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Spousal & Child Maintenance and Child Support

CHAPTER CONTENTS

Introduction	2
Maintenance for a Spouse	2
Child Maintenance and Child Support	5
Procedure for Spousal and Child Maintenance and Child Support	14
Legal Notices	17

Introduction

Spousal maintenance is an amount of money that one party to a marriage or de facto relationship may be required to pay to the other party after separation. A person who receives spousal maintenance is generally called the payee. The person who pays spousal maintenance is the payer.

Child maintenance, or child support, is an amount of money payable by one parent to another parent for the support of their children. The parent who receives child maintenance is called the payee. The parent who pays child maintenance is usually called the liable parent or payer.

One of the main objectives of the law of spousal maintenance and child support is to ensure that a former spouse or parent makes a fair contribution to the reasonable needs of the other spouse and children.

Where a court, tribunal or Services Australia – Child Support are required to assess a person's or child's entitlement to maintenance, they must disregard any entitlement the person and child might have to an income-tested pension, allowance or benefit when assessing their needs.

A payer's entitlement to such a payment is not disregarded when assessing the payer's ability to pay. Although many payers regard this as unfair, the law also requires that decisions should be fair to the community (taxpayers) by minimising reliance on publicly funded pensions, allowances and benefits and enforcing parents or former spouses to pay maintenance or child support where possible.

Maintenance for a Spouse

The *Family Law Act 1975* (Cth) (Family Law Act) governs spousal maintenance. A spouse may have a right to obtain maintenance for themselves from the other party to a marriage (s 72 Family Law Act) or de facto relationship (s 90SF Family Law Act) after separation.

After separation, a party may be liable to maintain the other party, to the extent that they are reasonably able to do so, if the person seeking maintenance is unable to support themselves adequately when comparing their income to their reasonable weekly needs because of:

- their care of a child of the marriage under the age of 18 years
- their inability to be gainfully employed by reason of age, or physical or mental incapacity
- any other adequate reason.

Before a de facto spouse can claim maintenance, the applicant must satisfy one of the following criteria (s 90SB Family Law Act):

- the applicant and the de facto spouse have been in a recognised de facto relationship for at least two years
- there is a child of the relationship
- they have made a substantial contribution during the relationship and a failure to make such an order would result in a serious injustice
- the relationship was registered under state or territory law.

Application for spousal maintenance

Time limits apply to parties who wish to apply for spousal maintenance. The time limits are:

- former married spouse—must apply within one year of the date on which the divorce becomes final (s 44(3) Family Law Act). If they are separated but not divorced, the time limit does not apply
- former de facto spouse—must apply within two years of the end of the relationship (s 44(5) Family Law Act).

The court may extend this time if failure to extend time would cause hardship to the child or the person applying for the order (s 44(6) Family Law Act), or if the party's circumstances at the end of the period were such that they would have been unable to support themselves without an income-tested pension, allowance or benefit.

Claims

The factors taken into account when assessing whether spousal maintenance should be paid are the same whether the parties were married (s 75(2) Family Law Act) or in a de facto relationship (s 90SF(3) Family Law Act). Those factors include:

- the age and health of each of the parties
- the income, property and financial resources of each of the parties, and the physical and mental capacity of each party for appropriate paid employment
- which party has the care or control of a child under 18 years of age of the marriage or relationship
- the financial needs and obligations of each of the parties to support themselves and their legal dependants
- the responsibilities of either party to support any other person
- the eligibility of either party for a pension, allowance or benefit under any law of the Commonwealth, state or territory or under any superannuation fund or scheme and the rate of any such pension, allowance or benefit

- the standard of living that in all the circumstances is reasonable for the parties following separation
- the extent to which the payment of maintenance to the party would increase the earning capacity of that party by allowing them to undertake a course of education or training, or to establish themselves in a business or obtain an adequate income
- the extent to which the party who is seeking maintenance has contributed to the income, earning capacity, property and financial resources of the other party
- the duration of the marriage and the extent to which it has affected the earning capacity of the party seeking maintenance
- the need to protect a party who wishes to continue their role as a parent
- whether either party is living with another person and the financial circumstances relating to those living arrangements
- the terms of any court order made or proposed to be made in relation to the property of the parties
- any child support under the *Child Support (Assessment) Act 1989* (Cth) (CS(A) Act)
- the CS(A) Act that a party has provided or is to provide for a child of the marriage or relationship
- any fact or circumstance that the justice of the case requires to be taken into account
- the terms of any financial agreement that is binding on the parties.

The court has a responsibility to make orders that will, as far as practicable, finally end the financial relationship between the parties and not result in further legal disputes (ss 81, 90ST Family Law Act). To this, the court will sometimes order that an asset be sold or transferred to the party seeking maintenance so that maintenance is paid as a lump sum.

Variation of orders

The court has a general power to vary spousal maintenance orders at any time on the application of either party (ss 83, 90SI Family Law Act).

Before varying an existing spousal maintenance order, the court must be satisfied that since the order was made:

- the circumstances of one or both parties have changed
- the cost of living has changed sufficiently to justify a change in the payments
- the amount of maintenance ordered to be paid is not proper or adequate where the order was made by consent

- the material facts were withheld from the court when it made the original order.

Cessation (when maintenance orders cease)

Under ss 82 and 90SJ of the Family Law Act, spousal maintenance ceases on the:

- death of the spouse receiving maintenance
- death of a person liable to make the payment (subject to certain restrictions)
- remarriage of the spouse receiving maintenance (except in special circumstances).

Spousal maintenance will not necessarily end if the spouse receiving maintenance enters into a subsequent de facto relationship.

Powers of the court

The Federal Circuit and Family Court of Australia has extensive powers in hearing a spousal maintenance claim. The orders that it can make under ss 80 and 90SS of the Family Law Act include:

- payment of a lump sum amount
- payment of weekly, monthly or yearly amounts of spousal maintenance
- transferal of property or assets to one party as a spousal maintenance payment
- a permanent, a fixed-period order or order for the life of one of the parties.

In addition, the court can order that spousal maintenance be secured, so that if the payment is not made, the security (e.g. land) can be sold and the proceeds paid to the person entitled to receive spousal maintenance.

Child Maintenance and Child Support

The majority of child support cases in Australia are dealt with by Services Australia – Child Support under the *Child Support (Assessment) Act 1989* (Cth) (CS(A) Act). There are some cases where the CS(A) Act does not apply and, in those circumstances, a party seeking child support will need to apply for a child maintenance order under the Family Law Act.

Assessment by Services Australia – Child Support

Services Australia – Child Support will make an administrative assessment and determine the appropriate amount of child support payable for a child after receiving an application from either parent or the carer of a child. Normally, the payee would apply for a child support assessment upon separation. A recipient of Centrelink payments for children has an obligation to seek child support. Application forms are available on the Services Australia website.

In some special circumstances, Services Australia – Child Support will change the assessment on application from the payer or payee.

When Services Australia – Child Support cannot make an assessment

Section 24 of the (CS(A) Act) sets out the circumstances in which children will be covered by the Act. When Services Australia – Child Support cannot make an assessment for child support, it may still be possible to get a court order for child maintenance.

Services Australia – Child Support cannot assess child support in matters where:

- the liable parent lives outside Australia in a country that is not a reciprocating jurisdiction
- children are over 18 years and dependent on their parents (e.g. full-time students or those with disabilities) (but maintenance might be sought under s 66L of the Family Law Act))
- maintenance is sought by a stepparent (but maintenance might be sought under ss 66M-66N of the Family Law Act in limited circumstances).

Who is liable to pay child support or maintenance?

Parents have a primary duty to support their children, and this duty has priority over all other commitments except the commitment for the parent to support themselves and any other child they have a legal duty to maintain. All children rank equally.

A 'liable parent' is a parent who is liable to pay child support under the CS(A) Act (s 5).

A liable parent must be a parent of the child and a resident of Australia for the purposes of the *Income Tax Assessment Act 1997* (Cth), or a resident of a reciprocating jurisdiction (s 29A CS(A) Act) (see *Peters & Peters & Ors* [2012] FamCAFC 105). A list of reciprocating jurisdictions is found in sch 2 of the *Child Support (Registration and Collection) Regulations 2018* (Cth).

The meaning of 'parent' (s 5 CS(A) Act) includes biological and adoptive parents, and the parents of children conceived through assisted reproductive technology.

If there is a dispute as to whether a person is in fact a biological parent of the child, either party can make an application to the court to seek DNA testing to resolve the dispute (ss 69V–69ZD Family Law Act). Once parentage is determined, the court or Services Australia – Child Support will assess the amount of child support/maintenance the liable parent has to pay.

A stepparent does not have a duty to maintain a child of the marriage unless a court orders otherwise (ss 66D, 66M Family Law Act). The court will look at the length of the relationship that has existed between the stepparent and the child to see if it is proper to make the stepparent liable for financial support of the child. Unlike a biological parent's responsibility,

however, the stepparent's duty to support a child is secondary to the duty of the child's natural parents to maintain the child.

Parents can be required to pay child support to non-parent carers.

Same-sex couples who have separated are able to apply for child support for any children from their relationship.

How much needs to be paid?

Services Australia – Child Support assesses child support by using formulas that are set out in pt 5 div 2 of the CS(A) Act.

The formula used depends on the circumstances of the parents and living arrangements for the children. The general starting point is to work out the costs of maintaining children (see the *Child Support Guide* on the Australian Government website, which is based on independent research) and to ascertain if one or both parents' income is taken into account.

The following factors are relevant to ascertaining what is called the parent's 'adjusted taxable income' (s 43 CS(A) Act):

- the parent's taxable income for the last relevant year of income in relation to the child support period
- the parent's reportable fringe benefits total for that year of income
- the parent's target foreign income for that year of income
- the parent's total net investment loss (within the meaning of the *Income Tax Assessment Act 1997* (Cth)) for that year of income
- the total of the tax-free pensions or benefits received by that parent in that year of income
- the parent's reportable superannuation contributions (within the meaning of the *Income Tax Assessment Act 1997* (Cth)) for that year of income.

A 'child support period' is defined in s 7A of the CS(A) Act.

Income estimates can be lodged where the current income is at least 15% lower than the income used in the assessment, and estimates will be checked against actual income as soon as a tax return is lodged.

The formula recognises that the costs of maintaining teenage children are usually more than the costs of younger children. The parents share the costs of their children in proportion to the percentage of each parent's income that exceeds what is called the 'self-support amount' (the minimum amount the parent needs to support themselves). The self-support amount is calculated using the male total average weekly earnings published by the

Australian Bureau of Statistics. The amount is revised annually and is published in the *Child Support Guide* on the Australian Government website.

The formulas also recognise that caring for a child is a means of supporting the child, so the number of nights the child spends in each parent's household is linked to the amount of child support each parent is assessed to pay. In special circumstances, the child support registrar may decide the percentage of care when the issue is actual care rather than the amount of care expected by care arrangements in place at the time.

For details about the exact calculations of child support in any particular instance contact Services Australia – Child Support or look at the self-help calculators on their website.

Collection of child support

Child support payments can be collected automatically by Services Australia – Child Support. Child support assessments are recorded on the Child Support Register immediately, unless the payee elects for private collection. Once an assessment, or 'registrable maintenance liability' is recorded on the Child Support Register, the amounts due for child support payments become due to the Commonwealth. For instance, the Child Support Registrar can collect child support payments from the payer via automatic withholdings from their salary (s 43 CS(A) Act).

Services Australia – Child Support encourages parents to arrange payment privately unless the payee receives a means-tested Centrelink benefit, and the payer does not have a good payment record. Private collections means that the payee is responsible for enforcing the obligation on the paying parent.

If private collection proves unsuccessful, the payee can apply to the child support registrar to enforce the liability against the non-paying parent (s 39 CS(A) Act). Services Australia – Child Support will usually only collect up to three months of arrears (up to a maximum of nine months in special circumstances).

Children over 18 years of age

Under the CS(A) Act, a child must be under the age of 18 years in order for a parent to make an application for child support. The child support assessment automatically ceases when the child turns 18.

Child support or maintenance may be payable after the child turns 18 if the payee parent makes an application to Services Australia – Child Support under s 151B of the CS(A) Act for the assessment to continue until the last day of secondary schooling in the year that the child turns 18. This application must be made after the child's 17th birthday but before the child's 18th birthday, otherwise a court application for maintenance must be made.

For court-ordered maintenance, the maintenance must be necessary for the child to complete their schooling or because the child has special needs as a result of a physical or mental disability (s 66L Family Law Act).

A court application for adult child maintenance can also be made where the adult child had acquired their physical or mental disability after they had turned 18 (see *Re: AM (Adult Child Maintenance)* [2006] FamCA 351; here a court decision was made for an order in respect of a 28-year-old child who contracted a degenerative disease at the age of 21).

Changing an assessment

The child support registrar can amend assessments under s 75(4) of the CS(A) Act for various reasons such as correcting mistakes or false statements, or to amend the assessment to reflect alterations to the payable amount of child support.

Services Australia – Child Support automatically makes new child support assessments as soon as new information about the parents' incomes becomes available (s 75 CS(A) Act). This occurs when a parent lodges a tax return or advises Services Australia – Child Support with an estimate that their current income is more or at least 15% lower than the child support income previously used.

Services Australia – Child Support can also amend a child support assessment if the care percentage has changed by more than 7.1% (i.e. one night a fortnight) and it would affect the amount of child support payable.

An assessment can be varied to nil (s 66A CS(A) Act).

A payer or payee can also ask the court to change a child support assessment if there is an application for orders pending in the court (s 116(b) CS(A) Act). The application can be for any type of order. It is necessary to obtain the leave of a court before applying to change a child support assessment in a period more than 18 months, as long as the administrative assessment was not completed more than seven years prior.

Other means of changing the assessment are:

- making a private arrangement with the other parent that may not involve Services Australia – Child Support (but a payee receiving an income-tested pension or benefit from Centrelink cannot agree to accept less than the amount assessed by Services Australia – Child Support)
- making a registered child support agreement with the other parent
- applying for a change to the assessment to Services Australia – Child Support (but only for 18 months prior to the date of application) relying on the reasons based on s 117 of the CS(A) Act
- objecting to a decision of Services Australia – Child Support.

Objections, reviews and appeals

Parents who are unhappy with the amount of child support payable should try to resolve the problem by first contacting Services Australia – Child Support. Direct contact with the department sometimes allows parents to use simple administrative remedies. An objection form can be found on the Services Australia website.

If a payer and/or a payee dispute a decision made by Services Australia – Child Support, they can apply to the Administrative Appeals Tribunal (AAT) for an external review of most Services Australia – Child Support decisions regarding the:

- refusal of extension of time to lodge an objection
- acceptance or non-acceptance of an application for assessment
- particulars of assessment (income or level of care)
- particulars of registration
- change of assessment
- low-income non-enforcement period
- refusal to remit penalties
- failure to collect arrears
- acceptance or refusal of a child support agreement
- credit or refusal to credit non-agency payments
- acceptance or refusal of an estimate.

The decision of the AAT is final on matters of fact, but there is a right to appeal to a court on a matter of law. This means that AAT decisions regarding the facts of the matter are final, however, an appeal can be made on the final basis that the decision maker has made an error about the law. This cannot be a general claim of error but must specifically identify the alleged error. The distinction between fact and law generally requires legal advice.

Child support agreements

It is the policy of Services Australia – Child Support to encourage private arrangements between parents for the payment of maintenance and child support. These agreements can be either binding or limited agreements.

Binding agreements

Binding child support agreements can be entered into only with a high level of formality (s 80C CS(A) Act). They operate in a similar manner to financial agreements that separating parents might make in relation to property, superannuation and spousal maintenance.

Key points about binding child support agreements:

- Each party to a binding child support agreement must receive independent legal advice from an Australian practising legal practitioner before entering or terminating the agreement.
- A binding child support agreement cannot be varied. However, it can be terminated and replaced with a new binding or limited child support agreement.

Binding agreements can be for a nil payment and can be used for property transfers.

Limited agreements

Limited child support agreements are more flexible and less formal than binding agreements (s 80E CS(A) Act). Parties are not required to receive independent legal advice. In certain situations, either party can terminate a limited child support agreement.

Key points about limited child support agreements:

- A child support administrative assessment must be in place before Services Australia – Child Support can accept a limited child support agreement.
- The amount payable under the agreement must be at least as much as would otherwise have been payable under the administrative assessment.
- The agreement can be terminated (s 80G CS(A) Act) by:
 - either party if the notional assessment (that would have applied if there was no agreement) changes by at least 15% from the previous notional assessment
 - either party after three years. This provides the parties with the flexibility to elect to end their agreement if it no longer suits their circumstances.

Assessment by the court

A court having family law jurisdiction (the Federal Circuit and Family Court of Australia or a state Magistrates Court exercising family court jurisdiction) may make an assessment for child maintenance when the CS(A) Act does not apply.

Considerations regarding payment

In determining the amount of child maintenance to be paid, the court will consider the parents' capacity to pay and the child's needs (s 66H Family Law Act).

Matters taken into account in looking at the child's needs include (s 66J Family Law Act):

- the income, earning capacity, property and financial resources of the child
- the child's age and proper financial needs

- how the child is being educated and how the parties expect the child to be educated and trained (e.g. private or public school fees)
- the child's special needs (e.g. health expenses)
- published research about child costs, specifically the figures prepared by the Institute of Family Studies (published quarterly).

An estimate of what would be payable if the child was covered by the child support scheme may also be a relevant consideration in determining the amount of child support payable.

Matters taken into account in looking at a parent's capacity to pay include (s 66K Family Law Act):

- both parents' income, earning capacity, property and financial resources
- both parents' commitments for necessary personal support and the support of legal dependants (legal dependants will not usually include stepchildren unless the payer has formally adopted them)
- the direct and indirect costs of caring for the child
- any other special circumstances relevant in the interests of justice.

Collection of court-ordered payments

Court orders or court-registered agreements for maintenance can be registered with Services Australia – Child Support who will then collect the maintenance on behalf of the payee. Court-ordered maintenance can be collected privately where both parties agree on a private collection arrangement. Note, however, that carer parents in receipt of a Centrelink benefit may not be able to enter into private collection arrangements without affecting their Centrelink benefit.

Cessation of child maintenance

Under the Family Law Act, maintenance for a child ceases on:

- the death of the child receiving maintenance (s 66U(1))
- the death of the person liable to make the payment (subject to certain restrictions) (s 66U(2))
- the child marrying, being adopted or entering into a de facto relationship (s 66V(1))
- the child's 18th birthday, unless an order extends the maintenance period (s 66T).

Variation of maintenance orders

Either party to a court order for maintenance for a spouse or a child may apply to the court at any time for a variation of the order (s 66S Family Law Act). The court will vary the order if justified by:

- the change in the circumstances of the child
- the change of circumstances of either party
- a change to the cost of living
- material facts that were withheld from the court on a previous occasion or the previous consideration of false material evidence.

The court may increase or decrease payments or may suspend, discharge or revive the order. The court can discharge arrears of payments if it is satisfied that the payer had valid reasons for not paying and does not have any current capacity to pay the arrears.

Overseas child maintenance

Australia has international maintenance arrangements that apply when one parent lives in Australia and the other parent lives in a country that is a reciprocating jurisdiction.

Where one party does not live in a reciprocating jurisdiction, the only remedy available in Australia is to make an application for child maintenance to a court exercising family law jurisdiction. This is permitted even if a payment would be assessed by Services Australia – Child Support as if the payer and payee were in Australia. However, enforcement against an uncooperative payer will be difficult if the payer has no assets in Australia.

International maintenance treaties

Australia is a signatory to bilateral treaties with New Zealand, Canada, the United Kingdom and the United States. The details of arrangements vary from country to country, but there are practical effects of these treaties. Arrangements with New Zealand are very similar to arrangements within Australia. The assessment is made in the country where the payee lives.

Where the payee lives in Australia and the payer lives in a reciprocating jurisdiction, an application for collection is made through Services Australia – Child Support in Australia, who issues an assessment and asks the reciprocating jurisdiction to collect the child support.

Where the payee lives in a reciprocating jurisdiction and the payer lives in Australia, Services Australia – Child Support collects the amount assessed in the reciprocating jurisdiction.

Information about Australia's arrangements for international collection and assessment of child maintenance and support is found on the Services Australia website.

Procedure for Spousal and Child Maintenance and Child Support

Court documents

It is important to note that the court cannot make orders relating to child support/child maintenance where the CS(A) Act applies.

If parties cannot agree on the amount of maintenance to be paid, an application for maintenance must be made on an initiating application. An affidavit and a financial statement must accompany the application. This is filed in the Federal Circuit and Family Court of Australia (Division 2).

If parties can agree on the amount of maintenance to be paid, they can prepare and file an application for consent orders in the Federal Circuit and Family Court of Australia (Division 2).

The court order can be registered with Services Australia – Child Support for collection. Consent arrangements relating to child support can be formalised by a binding or limited child support agreement.

Wording of the order or agreement

A maintenance order or agreement (e.g. a binding financial agreement for spousal maintenance, or binding or limited child support agreement for child maintenance) should clearly state:

- who is to pay maintenance and who is to receive it
- the names of the relevant children (including their birth dates for clear identification)
- how much is to be paid per child and when these payments are to cease for each child (if more than one). The amount payable should be set out in both words and figures, and it should be clear when it is payable (e.g. weekly or fortnightly).

The need to return to court in future can be minimised by allowing for Consumer Price Index (inflation) increases and by providing for the reduction of payments to a nominal amount whenever the payer is unemployed.

If Services Australia – Child Support is asked to collect the money, only a sum of money that can be worked out by reading the orders or agreement can be collected. Services Australia – Child Support cannot collect a reimbursement for categories of expenses (e.g. medical expenses, school fees or uniforms) where the amount of the expense is not expressly stated

on the order or agreement. There is a form to complete to ask Services Australia – Child Support to register an agreement.

The court hearing

Once an application for maintenance has been filed with the court (and a copy of the application is served on the other party), the court will conduct a hearing to determine whether maintenance is payable and how much should be paid. Each party will have an opportunity to present their case to the court. Each party is required to bring relevant disclosure documents to the hearing (e.g. each party's most recent tax return and assessment, recent pay slips, bills and banking records for the previous 12 months). The court can only make a decision based on the information presented to it, and it may draw adverse inferences if a person refuses or fails to prove the details of their financial circumstances.

Once the court has heard all available evidence, a decision will be made about whether maintenance is payable and how much should be paid (s 66G Family Law Act). Generally, a court will not backdate the order to allow maintenance to start on an earlier date, so the order for maintenance will commence on the day it is made.

Enforcement of spousal maintenance and child maintenance

When maintenance payments or child support payments are in arrears, several methods may be used to enforce payment under the *Child Support (Registration and Collection) Act 1988* (Cth). Enforcement of arrears may involve the bringing of an application to have the payer orally examined before the court about all matters relating to the refusal or failure to pay. Although an oral examination before a court does not force the payment of arrears, it may make enforcement simpler because the payer has provided details of their income and assets.

If an order is registered with Services Australia – Child Support for collection, the department can only collect arrears accrued after registration with the department. Similarly, Services Australia – Child Support can only collect a sum of money specified in an order or agreement.

Methods most commonly used by Services Australia – Child Support to collect arrears include:

- garnishment of a payer's wage or bank account
- intercepting a taxation refund
- seizure of property and sequestration of the estate of the defaulter
- compelling a third party (e.g. the defaulter's bank or employer) to give financial information about the defaulter. To obtain information about a defaulter's ability to pay arrears, an application for an oral examination of the defaulter can be made to court. A

payee can help Services Australia – Child Support to speed up the enforcement process by supplying the department with as much information as possible concerning the liable parent’s financial situation

- suing a defaulter to recover arrears (although this is usually only done after other options have been exhausted).

People with court orders who have never registered with Services Australia – Child Support for collection will need to take their own enforcement proceedings. Payees can commence their own enforcement action in court, even if Services Australia – Child Support is responsible for collecting child support.

Garnishment

Garnishment is Services Australia – Child Support’s most commonly used procedure. An order for garnishment will usually be served on the payer’s employer. The employer must deduct a certain amount from the payer’s wages and pay it to Services Australia – Child Support. A payer’s bank account can also be garnished. Services Australia – Child Support can compel third parties holding money for a payer in arrears to pay funds held to the agency. This can apply to funds held in a solicitor’s trust account.

Interception of tax refund

If a child support payer is entitled to a taxation refund, the refund will usually be intercepted by Services Australia – Child Support. The money intercepted is paid to the parent entitled to child support in reduction of any arrears of child support owed by the liable parent.

Seizure of property

Seizure of property is not a common method of enforcement. However, orders may be obtained to seize and sell personal property, and the proceeds are applied to payment of arrears.

Sequestration

The use of sequestration is rare. When a person does not pay arrears, the court may order that the payer’s estate be sequestered. This means that the entire payer’s real and personal estate (excluding clothes, bedding, kitchen furniture, tools of trade worth up to \$3550 and some other personal things) vests in a receiver. The court can make further orders concerning the disposal of this property. It has been held, however, that a sequestration order does not give the receiver any power to sell the property.

Legal Notices

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