

Avalent>Perekonnaasjad ja pärimine>Elatis

Family maintenance

Saksamaa

1 What do the concepts “maintenance” and “maintenance obligation” mean in practical terms? Which persons have to pay a maintenance allowance to another person?

People obliged to pay maintenance:

children may have to pay maintenance to their parents

parents may have to pay maintenance to their children

one spouse may have to pay maintenance to the other spouse

(great-)grandchildren may have to pay maintenance to their (great-)grandparents

(great-)grandparents may have to pay maintenance to their (great-)grandchildren

an unmarried parent may have to pay maintenance to the other parent, if a child is in their care

a registered partner may have to pay maintenance to the other registered partner.

2 Up to what age can a child benefit from a maintenance allowance? Are there different rules for maintenance concerning minors and adults?

There is no age limit for child maintenance: it must be paid as long as the child is dependent on it, unless the child is at fault. However, as soon as children have finished their education and training, they are usually expected to provide for themselves. German maintenance legislation generally privileges children who are minors over adult children who have completed their general education. The requirements imposed on the person liable for maintenance are stricter, and minors take priority over children who have reached full age.

3 Should I apply to a competent authority or a court to obtain maintenance? What are the main elements of this procedure?

For a maintenance obligation to be recognised, the entitled party must normally apply to a court, the Youth Welfare Office (*Jugendamt*) or a notary, in order to obtain an enforceable title (*vollstreckungsfähiger Titel*) that allows a sum of money to be compulsorily collected.

If the claim is contested, it must be tried in court. However, the obligation to satisfy a claim can be recognised before a notary or the Youth Welfare Office

The scope of the authority of the Youth Welfare Office is more restricted than that of the notary: the Youth Welfare Office can record an obligation to maintain a child up to the age of 21, or a claim by a mother or a father arising from the birth of a child.

Disputes over maintenance claims are family law cases and are dealt with by the family court (*Familiengericht*). The proceedings are regulated by the Act on Procedure in Family Matters and Matters of Non-contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* – FamFG) and the Code of Civil Procedure (*Zivilprozessordnung* – ZPO).

4 Can a request be made on behalf of a relative (if yes, what grade), or a child?

According to Section 1629(1) of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) the parents represent the child jointly; one parent may represent the child alone if he or she exercises parental custody alone or if he or she is authorised to take a decision alone under Section 1628 of the Civil Code. The general rule, therefore, is that parents may assert a claim on behalf of the child as the legal representatives of that child. However, according to the first sentence of Section 1629(2) of the Civil Code, the father and the mother are not permitted to represent the child whenever Section 1795 of the Code would prevent a guardian from representing the child owing to a conflict of interest. Among other things, this covers legal disputes between the child and a parent's spouse. In this case, a person referred to as an ‘additional carer’ (*Ergänzungspfleger*) must be appointed to act as the child's representative and assert the claim on his or her behalf. Maintenance claims are an exception to the general rule. According to the second sentence of Section 1629(2) of the Civil Code, if the parents share joint parental responsibility for a child, then the parent who has care of the child may bring a maintenance claim relating to the child against the other parent. Section 1629(3) of the Civil Code modifies this provision in cases where the parents of the child are still married to each other or are registered partners but are living apart, or there are divorce/separation proceedings pending between them. In this case, a parent is permitted to assert the child's maintenance claims against the other parent only in his or her own name. This is to avoid making the child a party to divorce/separation proceedings between the parents.

5 If I plan to bring the case to court, how do I know which court has jurisdiction?

The courts with jurisdiction in maintenance cases are the family courts (*Familiengerichte*), which are divisions of the local courts (*Amtsgerichte*). Which court has jurisdiction in the particular place is determined by Section 232 of the Act on Procedure in Family Matters and Matters of Non-contentious Jurisdiction.

As long as there are matrimonial proceedings pending, the court with geographical jurisdiction is, as a rule, the court that is or was the court of first instance for the divorce proceedings. Otherwise, geographical jurisdiction is often determined according to the usual place of residence of the defendant. A different situation applies in proceedings that concern maintenance obligations towards a minor or towards a child treated as a minor. Here the court with jurisdiction is the court of the usual place of residence of the child, or of a parent who is authorised to act on behalf of the child. However, this does not apply if the child or a parent is usually resident outside Germany.

A child who wishes to bring an application for maintenance against both parents may do so before the court that would be competent to deal with an application against one of the parents only.

6 As an applicant, do I have to go through an intermediary to bring the case to court (e.g. a lawyer, central or local authority, etc.)? If not, which procedures apply?

In principle, parties to maintenance cases have to be represented before the court by a lawyer. However, representation by a lawyer is not necessary when applying for an interim order (*einstweilige Anordnung*). Nor does a child have to have a lawyer if the Youth Welfare Office is providing assistance and represents him or her for the purpose of asserting a maintenance claim.

7 Do I have to pay fees to bring a case to court? If so, how much are they likely to be? If my financial means are insufficient, can I obtain legal aid to cover the costs of the procedure?

Legal costs charged in respect of court maintenance proceedings take the form of fees or expenses. The amount of these costs is based on the value of the claim, the course of proceedings and the specific circumstances of the case.

The costs are payable in the first place by the party ordered to pay them by the court in its judgment. In principle that will be the unsuccessful party.

Applicants who owing to their personal and economic circumstances are unable to meet court costs in full, or who can pay only in instalments, are entitled to claim legal aid (*Verfahrenskostenhilfe*) to help cover the costs of the court maintenance proceedings. However, the intended legal action or defence must afford a reasonable chance of success and must not appear frivolous. Depending on the income and assets of the applicant, legal aid is provided to cover the court costs and the costs of the party's own lawyer in full or in part, but not the costs of the opposing lawyer in case of failure.

8 What kind of maintenance is likely to be granted by the court? How is the amount of maintenance calculated? Can the court's decision be revised, if living costs or family circumstances change? If yes, how (e.g. by means of an automatic indexation system)?

Maintenance must be paid regularly. The level of the payment is determined by the requirements and needs of the party entitled to maintenance and the ability to pay of the party liable for maintenance. The higher regional courts (*Oberlandesgerichte*) have developed tables and guidelines in this respect which assist in determining a flat rate for the items to be taken into account. The Düsseldorf table is regularly used as a basis for calculating the level of child maintenance.

If there is a change in the actual circumstances on which court orders are based, these orders can be modified at the request of the party entitled to maintenance or the party liable for maintenance. In the case of a minor, child maintenance can also be index-linked in accordance with the first sentence of Section 1612a(1) of the Civil Code, in which case it is stated as a percentage of the minimum level of maintenance in force at any given time. The minimum level of maintenance is regulated by 1612a(1), sentences 2 and 3, of the Civil Code, and increases on a three-bracket scale as the child gets older. If a court order contains an index-linked maintenance payment, the order does not have to be modified whenever the child reaches a new age bracket.

9 How and to whom will the maintenance be paid?

In principle, maintenance must be paid monthly in advance to the party entitled to maintenance or, in the case of minors, to the parent looking after them or to the party otherwise entitled to receive payment.

10 If the person concerned (debtor) doesn't pay voluntarily, what action can be taken in order to force him/her to pay?

Established maintenance claims can be enforced by way of compulsory enforcement (*Zwangsvollstreckung*). Compulsory enforcement is applied in accordance with the ordinary rules.

However, the obligation imposed on the party liable for maintenance is reinforced by the fact that a breach is punishable under criminal law.

A person who is in breach of a maintenance obligation can be sentenced to up to three years' imprisonment or ordered to pay a fine. If a custodial sentence is unavoidable, the court can suspend the sentence and order the convicted party to fulfil his or her maintenance obligations. The court will then revoke the suspension of the sentence if the convicted party commits a gross or persistent breach of the order, and thus gives grounds to fear that he or she may commit further criminal offences and in particular a breach of maintenance obligations. In the case of first-time offenders, by contrast, the public prosecutor's office may provisionally refrain from bringing a charge, or the court may provisionally halt the criminal proceedings, provided that the accused is at the same time instructed to comply with maintenance obligations of a stated amount.

11 Please describe briefly any limitations on enforcement, in particular debtor protection rules and limitation or prescription periods in your enforcement system

Movable property can be attached (*Pfändung*) by the bailiff (*Gerichtsvollzieher*) (Section 808(1) of the Code of Civil Procedure). The cases in which this form of attachment is allowed are restricted by Sections 811–812 of the Code of Civil Procedure. The items listed in Section 811 of the Code are exempt. This does not apply to goods that have been purchased subject to reservation of ownership pending payment (*Eigentumsvorbehalt*) as provided in Section 811(2) of the Code. Sections 811a and 811b of the Code allow items of value that are classed as exempt under Section 811 to be replaced by items of lower value that perform the same function.

The debtor's residence may be searched without his or her consent only on the basis of a search warrant issued by a judge (Section 758a of the Code of Civil Procedure). The attachment of claims is handled by the court in charge of enforcement proceedings.

The attachment of earned income is subject to the exemptions set out in Sections 850 *et seq.* of the Code of Civil Procedure. How much of the debtor's earned income is exempt is determined not just by the debtor's income level, but also by how many people are legally entitled to receive maintenance from the debtor. As an aid to calculation, a table of exemption limits has been drawn up and included as an annex to Section 850c of the Code, which is used for determining the exemption limits. This table is reviewed at regular intervals and, where necessary, the level is adjusted.

If enforcement is carried out on the basis of a maintenance claim or a claim arising from a wrongful act (*unerlaubte Handlung*) intentionally committed, Sections 850d and 850f of the Code of Civil Procedure allow the court in charge of enforcement proceedings, on application by the creditor, to set a different level of exemption from attachment. The debtor may likewise apply to have a different level set if he or she has special personal needs in accordance with Section 850f(1) of the Code of Civil Procedure.

An account held by the debtor can be exempted from attachment in accordance with Section 850k of the Code of Civil Procedure. Such an account is known as an attachment-exempt account, or 'P account' (*Pfändungsschutzkonto*, or *P-Konto*). It is intended to ensure a reasonable standard of living for the debtor and his or her dependants. In the first instance, the P account automatically protects balances up to the level of the basic exemption, which currently stands at EUR 1 178.95 per calendar month. This basic exemption can be increased under certain circumstances, e.g. if the debtor has further maintenance obligations. See the details on amounts exempted from attachment here:

<http://www.bmjd.de/DE/Themen/FinanzenUndAnlegerschutz/Zwangsvollstreckung/Pfaendungsschutz/Pfaendungsschutzkonto.html>. Child benefit and certain social security payments enjoy additional protection. To obtain this kind of protection, all the debtor generally has to do is provide the bank with evidence. In specific cases, when the debtor has special needs owing to illness, the amount of the account balance that is to be exempted from attachment can be adjusted individually by the court in charge of enforcement proceedings.

The regular limitation period of three years applies to maintenance claims (Section 195 of the Civil Code), with the period beginning at the end of the year in which the claim arose and the entitled party was made aware of it (Section 199(1) of the Civil Code). A separate limitation period of 30 years applies only to arrears in established maintenance (Section 197(1) point 3 of the Civil Code): the period begins to run as of the date of the binding decision of the court or the establishment of the enforceable title, or as stated for the records (Section 201(1) of the Civil Code).

The limitation of maintenance claims can be suspended. Suspension means that the period when the limitation is suspended is not included in the limitation period (Section 209 of the Civil Code). This is the case for child maintenance until the child reaches the age of 21 (Section 207(1), sentence 2, point 2(a) of the Civil Code).

If a judicial act of execution is undertaken or applied for, the regular three-year limitation period recommences (Section 212(1), point 2 of the Civil Code). This prevents the limitation of established future maintenance claims.

12 Is there an organisation or an authority which can help me to recover maintenance?

The maintenance order is an ordinary enforceable title (*Vollstreckungstitel*) for a monetary claim, which means that, in principle, the party entitled to maintenance must abide by the ordinary rules of enforcement and enforce the claim themselves.

However, the Youth Welfare Office can help with collection if it is assisting the child as per Section 1712 of the Civil Code. It can assist a child on application by a parent who has sole responsibility for the child or, if the parents have joint responsibility, on application by a parent who has care of the child.

A distinction must be drawn between this scenario and another kind of case: a party entitled to maintenance may receive certain social security payments that meet a need that would otherwise be covered by the maintenance payment. If the recipient of such social security payments has an outstanding maintenance claim against a party who is liable for maintenance, the claim for maintenance is as a rule transferred to the responsible public authority, which can then assert the maintenance claim in its own name.

In particular cases, where a child is brought up by a single parent and the other parent does not pay any cash maintenance, entitlement for payments arises under the Maintenance Advances Act (*Unterhaltsvorschussgesetz* – UVG). The Maintenance Advances Office (*Unterhaltsvorschusskasse*) then collects the maintenance claim that has been passed on to it.

Additionally, if no maintenance is paid by the party liable for maintenance, and social assistance (*Sozialhilfe*) has to be paid (assuming that the other requirements for social assistance are met), maintenance claims are passed on to the social assistance provider (in the same way as the advance payments mentioned above), and the social assistance provider can then enforce them. In the case of the basic job-seekers' benefit (*Grundsicherung für Arbeitssuchende*), the transfer takes place only upon written notice from the payment provider to the party liable for maintenance.

13 Can organisations (government or private) advance the payment of maintenance wholly or partly in the debtor's place?

Payments under the Maintenance Advances Act and the payments of social assistance and basic job-seekers' benefit referred to in Question 12 are independent social security payments with a defined scope, and are not maintenance payments in the strict sense. They are paid directly to the claimant by the competent public authorities. They do not depend on whether the maintenance claim can or cannot be collected. The public authorities to which the maintenance claim has been passed on can enforce the claim in their own name.

Unlike payments under the Maintenance Advances Act and payments of social assistance and basic job-seekers' benefit, the assistance with claims given by the Youth Welfare Office does not create a separate entitlement to payment by the responsible public authority. In this case, the role of the public authority is restricted to helping the entitled party to assert and enforce the claim for maintenance.

14 If I am in this Member State and the debtor has his/her residence in another country:

14.1 Can I obtain the assistance of an authority or private organisation in this Member State?

If a party entitled to maintenance wishes to enforce a maintenance claim against a liable party who is resident abroad, he or she can seek assistance from the Federal Office of Justice (*Bundesamt für Justiz*) in Bonn. The Federal Republic of Germany has appointed the Federal Office of Justice to serve as the Central Authority for cross-border maintenance proceedings.

14.2 If so, how can that authority or private organisation be contacted?

Applications that are made under Article 55 of the EU Maintenance Regulation, Article 9 of the 2007 Hague Convention on Maintenance or Article 2(1) and 2(2) of the 1956 UN Convention by an entitled party who is resident in Germany must be submitted to the requested Central Authority by sending them to the Federal Office of Justice in Bonn. For more information, see: https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/AU/AU_node.html

The contact details of the Central Authority are:

Bundesamt für Justiz

Referat II 4

53094 Bonn

Germany

E-mail: auslandsunterhalt@bfj.bund.de

Tel.: +49(0)228 99410 6434

Fax: +49(0)228 99410 5202

15 If I am in another country and the debtor is in this Member State:

15.1 Can I address a request directly to such an authority or private organisation in this Member State?

Entitled parties who have residence abroad may apply to the Central Authority of their State of residence under Article 55 of the EU Maintenance Regulation, Article 9 of the 2007 Hague Convention on Maintenance or Article 2(1) and 2(2) of the 1956 UN Convention.

15.2 If so, how can that authority or private organisation be contacted and what kind of assistance can I receive?

These applications must be submitted via the Central Authority in the country of residence. From there, they are forwarded to the Central Authority of the Federal Republic of Germany (see 14.2).

16 Is this Member State bound by the 2007 Hague Protocol?

Yes.

17 If this Member State is not bound by the 2007 Hague Protocol, which law will be applicable to the maintenance claim according to its private international law rules? What are the corresponding private international law rules?

Not applicable.

18 What are the rules on access to justice in cross-border cases within the EU following the structure of Chapter V of the Maintenance Regulation?

The fees for maintenance proceedings are as a rule payable in advance. Within the area covered by the Maintenance Regulation, legal aid is granted in accordance with Articles 44 to 47 of the Regulation. The obligation to pay in advance does not apply under certain circumstances, particularly if legal aid is granted.

19 What are the measures adopted by this Member State in order to ensure the functioning of the activities described in Article 51 of the Maintenance Regulation?

Germany has provided its Central Authority – the Federal Office of Justice (*Bundesamt für Justiz*) – with the necessary powers to ensure the effectiveness of the measures described in Article 51.

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