OBLIGATIONS ALIMENTAIRES
MAINTENANCE OBLIGATIONS

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DESCRIPTIONS DE SYSTÈMES À FAIBLE COÛT POUR LE RECOUVREMENT DES ALIMENTS

(AUSTRALIE, AUTRICHE, BRÉSIL, COSTA RICA, NORVÈGE ET SLOVAQUIE)

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DESCRIPTIONS OF LOW-COST SYSTEMS FOR THE RECOVERY OF MAINTENANCE

(AUSTRALIA, AUSTRIA, BRAZIL, COSTA RICA, NORWAY AND SLOVAKIA)

Document d'information No 2 d'avril 2007
à l'intention de la Commission spéciale de mai 2007
sur le recouvrement international des aliments
envers les enfants et d'autres membres de la famille

Information Document No 2 of April 2007
for the attention of the Special Commission of May 2007
on the International Recovery of Child Support
and other Forms of Family Maintenance

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I. EXAMPLES OF LOW-COST ARRANGEMENTS FOR INTERNATIONAL MAINTENANCE MATTERS IN AUSTRALIA

1. Introduction

The administrative and legal costs of applications represent a potential barrier to the effectiveness of the new Convention. The purpose of this paper is to identify and explain the key ways that Australia has reduced the cost of processing international cases.

2. Background

From 1 July 2000 new arrangements commenced that improved Australia's ability to give effect to international maintenance obligations. The new arrangements facilitated a change from court-based processes to predominantly administrative arrangements and transferred responsibility for most international child support matters from the Attorney-General's Department to the Child Support Agency (CSA). CSA was already responsible for establishment, modification and enforcement of internal child support cases, and enforcement of international decisions registered in Australian courts.

The new arrangements were implemented by amendments to the law. The amended statutes provided for CSA to:

- Register overseas child support and spousal maintenance decisions for recognition and enforcement using an administrative process;
- Establish a new decision for child support by administrative assessment where one party resides in Australia and one party resides abroad; and
- Assume the role of Central Authority and sending/receiving agency.

3. Key features of low-cost arrangements in Australia

A. Administrative recognition and enforcement of foreign decisions

1. **Recognition by registration.** The law in Australia allows CSA to register a foreign maintenance decision. The registration process requires a caseworker employed by CSA to check that the decision meets the legal requirements and enter the details on a database. There is no need for legal representation for the applicant and the courts are not involved.

2. **Simple application requirements.** There are no forms or special documents that must accompany an application. This reduces translation costs. If translation is necessary, the cost is met by CSA. If the application does not contain sufficient information, the caseworker will contact the applicant by telephone or in writing to request further information.

3. **Effective debtor location tools.** Upon receipt of an application, CSA caseworkers undertake searches to determine if the debtor is in Australia. CSA has on-line access to national taxation and social security databases at no cost. The law permits taxation and social security agencies to share information with CSA for the purposes of international maintenance matters.

If the initial searches do not locate the debtor, CSA can undertake further searches by issuing information gathering notices. These notices legally oblige a person to provide information to CSA. A notice can be used to obtain information from sources including financial institutions, road authorities, correctional facilities, telecommunication service providers and local government. The law prevents a person from imposing a charge for providing this information to CSA.

4. **Limited service requirements.** At the time of registration the debtor receives notice that the decision has been registered and is enforceable. The law in Australia specifies that notice is effective if it is in writing and sent by ordinary mail to the last known address of the debtor. This reduces the costs associated with service of process.

5. **Administrative review and appeal.** The notice of registration explains that the debtor may seek an internal review of the registration. The internal review is conducted by senior caseworkers employed by CSA and there is no cost to the applicant. The debtor does not require legal assistance to make an application for review.

After the internal review process, the debtor can make a further appeal to an independent appeal tribunal. An appeal can be made in writing or by telephone and there are no fees or costs. The debtor does not require legal assistance to make an appeal to the tribunal. The same tribunal is also responsible for internal child support appeals and other social security appeals, therefore the tribunal operates at a low cost for international matters.

6. **Administrative enforcement.** Immediately the decision is enforceable, CSA will initiate action to collect the amounts payable in accordance with the decision. A CSA caseworker is responsible for ensuring collection of maintenance on an ongoing basis. Initially this involves contacting the debtor and negotiating voluntary payments. This early contact helps to build a working relationship with the debtor, establish a regular payment pattern and avoid accrual of arrears.

If voluntary payment is not successful, the caseworker will apply administrative enforcement measures, which can include automatic wage withholding, garnishment of funds in bank accounts, tax refund intercepts, deductions from social security payments and prohibition on overseas travel. The law in Australia provides for these enforcement measures to be applied without a court order. This significantly reduces the costs involved.

B. Administrative establishment and modification of decisions in international cases

1. **Simple application process.** An application for an administrative assessment of child support can be made to CSA by a creditor or a debtor, whether they are resident in Australia or resident in a reciprocating jurisdiction. There is no requirement that the application be made in writing and it may be made by telephone. If the applicant requires a translator to speak to CSA, the cost is met by CSA.

2. **Formula assessment.** A CSA caseworker determines whether the parties are eligible for an administrative assessment, in accordance with legal requirements and gathers information from the parties and income details from taxation and social security agencies. The caseworker uses this information to apply a legislative formula to determine how much child support is payable. There is no involvement of the courts or legal practitioners in this process.

3. **Administrative modification.** An administrative assessment can be easily changed to reflect changed circumstances. For example, if a debtor's income reduces, CSA can use an estimate of the income in the assessment and if the care arrangements for the children change, CSA can recalculate the assessment. These changes can be made administratively at no cost to the parties.

C. Other general factors

1. **Multi-function Central Authority.** In Australia CSA is a "one-stop shop" for international child support. CSA is the Central Authority and is predominantly responsible for establishment, modification, recognition and enforcement of international decisions. This has allowed CSA to develop skills and expertise and build effective working relationships with international partners.

CSA is also responsible for the administration of internal child support cases. CSA has over 3400 employees and approximately 160 are dedicated to international cases. This leads to significant savings and efficiency.

2. **Information technology.** CSA has adopted new technology to help reduce costs. The electronic case management system used for internal cases is also used to manage international cases. The functions of this system include recording case details, applying the assessment formula, sending letters and legal notices, and monitoring payments.

Other information technology used by CSA to reduce costs includes electronic information exchange, secure e-mail and on-line service delivery.

II. MAINTENANCE ESTABLISHMENT AND ENFORCEMENT IN AUSTRIA

1. National substantive law

1. This note provides a brief explanation of the Austrian State's substantive-law and procedural provisions on maintenance claims.

2. Under Austrian law, those entitled to maintenance are children, spouses, in certain cases also divorced spouses and parents (the terms "children" and "parents" are always taken to cover grandchildren and grandparents as well), but never stepchildren, foster children, brothers and sisters or cohabitants.

3. Maintenance is calculated on the basis of a need/ability-to-pay principle. The first thing to be decided is whether there is a need for maintenance. Irrespective of the age or mental condition of the creditor, this depends solely on whether the creditor can support himself (is not capable of supporting himself). This means that in principle no distinction is made between the maintenance claims of children who are minors and those who are of age as long as they are not capable of supporting themselves.

Insofar as a creditor is not able to support himself, he is entitled to maintenance.

4. Parents are required to contribute to the maintenance of their children in proportion to their means. The consequences are twofold: on the one hand, it is not necessarily a question of actual income, but a fictitious income that is achievable through additional effort may also come into play as a basis for calculation and, on the other hand, the parents are not jointly and severally liable.

For the usual type of case (child living with one of the parents claims maintenance from the other), the concept of percentage components has evolved in case law so that an equivalent account is taken of ability to pay in comparable cases. A percentage share of the income (more exactly of the monthly average net income less extra occupational and sickness costs) of the debtor is to be allocated to the creditor. This is graded according to the age of the children and is reduced by specific percentages where there are other maintenance claims vying for a share. In the case of very low incomes and numerous maintenance obligations, a further limit on the financial burden may have to be imposed so that the debtor still has sufficient resources to ensure that he retains his earning capacity.

5. Spouses must in principle contribute to joint maintenance in proportion to their means. Where one of the partners in a marriage is not working, the practice has always been that the spouse who is not earning is entitled to 33% of the average net income by way of maintenance claim, while when both partners are earning there is a supplementary entitlement bringing the claim up to 40% of the overall income (*i.e.* should the income difference be more than 3:2).

Apart from the minimum need limit in the usual type of case (exceptions are made for persons who are bringing up children or can no longer be gainfully employed and persons who were divorced through no fault of their own or against their will), alimony also depends on the debtor being solely or predominantly at fault in the failure of the marriage. It is mostly granted for the duration, without any time limit.

6. Parental maintenance is addressed on a specific-need basis. It is characterised by a view of what constitutes reasonable limits that is more favourable to the debtor and it is not very common in practice, mainly because there is a social network that generally functions well.

7. All maintenance claims are subject to the *rebus sic stantibus* clause, and are adapted accordingly if there is a significant (at least 10%) change in circumstances (*e.g.* income of the debtor, emergence or disappearance of additional care obligations, needs of the creditor).

8. It is not possible to waive the maintenance entitlement in advance. Any limitation (in particular also by settlement) of the maintenance entitlement of a child who is a minor can only take effect if authorised by the guardianship court.

2. Recovery of maintenance under Austrian law

9. Since 2005, a new non-contentious case law (voluntary jurisdiction) has been in force. In cases where that law is applicable, there is no civil procedure concerning the maintenance, but a non-contentious procedure. Both the maintenance of children (whether of age or minors) and parental maintenance are to be claimed through the non-contentious procedure. This results in two distinct approaches to claiming maintenance.

2.1. For children and parents: The non-contentious procedure

10. The procedure begins with an **application**, which may involve a specific statement of claim but need not do so. The application is served on the defendant for comment. If the court sets a deadline for comment on an application stating a figure and draws attention to the legal consequences, it is possible in the absence of comment to proceed on the basis of the factual information in the application. The application (unless a decision is not actually taken) is then granted and the possibility of a successful appeal by the debtor becomes very unlikely.

11. If the debtor contests the application (or the application is submitted without a specific statement of claim), the debtor is required to disclose his income and property situation to the extent necessary for calculation of the maintenance. If he fails to do so or does not do so in time or fully, his employer or the social security provider may also be questioned. In addition, the tax office may be obliged to provide information. Banks are not obliged to do so.

12. Oral proceedings are not mandatory. The decision is taken by a ruling, which is only immediately enforceable if the court so orders. Otherwise legal force is pending. It becomes effective if there is no appeal within 14 days (or the appeal is not in the end admitted). A third instance (further appeal to the Supreme Court) is really only available if authorised by the court of appeal.

13. In first instance proceedings, the parties do not have to be represented by a lawyer. The appeal, too, can be lodged by the party itself. Legal representation is only compulsory before the Supreme Court. Costs are only reimbursed in proceedings if the case concerns the maintenance claim of persons who have attained their majority (children or adults).

14. Protective measures are possible. Provisional maintenance (minimum needs allowance) may on application be granted by a decision in summary proceedings for children who are minors. Higher decisions in summary proceedings are also possible, but only if confirmation of entitlement and risk is provided.

2.2. Spouse and divorce maintenance

15. This is not to be pursued through the non-contentious procedure, but through the civil procedure. Here, too, there is no obligation to have a lawyer in first instance proceedings. But the parties must at least make a specific statement of claim. The information obligations described above do not apply. The evidentiary proceedings are more formal than in the non-contentious procedure and lawyers' costs must be reimbursed by the losing party.

16. The judge must decide following oral proceedings. The decision is issued in the form of a judgment and may be contested by appeal (within 4 weeks). Provisional enforceability cannot be ordered. The appeal court decides either through a documentary procedure or following oral appeal proceedings. For the appeal procedure it is compulsory to have a lawyer. Costs are reimbursed. A third judicial process is in certain circumstances available if authorised by the court of appeal.

17. Decisions in summary proceedings are also possible here, but only if confirmation of entitlement and risk is provided. Minimum maintenance is not granted.

2.3. Maintenance claims coming from abroad

18. Some specific rules apply in cross-border claims: If it lies within the scope of the New York Convention, the application is completed at and transmitted by the transmitting authority. It will then be transmitted from the receiving authority to the competent court. The national law in addition to the New York Convention states the designation of a legal representative for the applicant (mostly a Court's officer) to strive for an amicable solution (settlement) of the application. If no friendly settlement can be reached, a pro bono lawyer has to be appointed. If legal aid is granted, the lawyer has to work without receiving payment from the applicant. As it depends only on the means of the child, not the means of the custodial parent, the granting of legal aid can be said to be a question of formal routine.

19. Applications have to been made in German language. The transmitting authority has to arrange for translation. The work of the authorities is cost free. Applicants do not have to pay Court fees at all in maintenance cases. Specific costs such as as those for translations, interpreters or expert witnesses should be covered by the legal aid. The applicant may have to pay the costs of the defendant's lawyer, but only under certain circumstances; e.g. only if

- the application was withdrawn or rejected and
- it would not be unfair to let the applicant pay for them and
- the applicant is not a minor child.

3. Enforcement (execution)

20. Both the maintenance judgment in the contentious procedure and the ruling in the non-contentious procedure are execution orders. Amicable settlements can also be enforced. The execution procedure is divided into authorisation and enforcement, with smooth transition from one to the other, and both are implemented by the court at fairly low cost. The process begins with the application for authorisation of execution, which is issued through a written procedure and may be appealed against (within 14 days). This is followed by the enforcement procedure, which varies according to the object of the execution. The attachment, sale and distribution of proceeds of movable or immovable property is, of course, possible, but is not a particularly suitable means of execution for maintenance accruing. Maintenance accruing is therefore best recovered through execution relating to receivables, especially wages and salaries (orders for direct wage withholding to be transferred to the collecting creditor to whom the employer, as a third-party debtor, has to pay what is in fact due to the liable party).

21. Recognition of foreign maintenance orders depends on the legal basis of the enforcement. It may be ruled by the Brussels I Regulation, the 1958 Hague Convention (the 1973 Hague Convention has not been signed nor ratified by Austria) or (especially regarding orders from USA, Canada, Australia and New Zealand) by a Reciprocity Declaration. Thus the way in which recognition proceedings varies (no need for specific recognition regarding orders from USA, Canada, Australia and New Zealand).

22. The fact that a claim is for maintenance does not give it any precedence in the pledging of payments, and the order in which they are pledged is to be determined rather by the priority principle. Creditors are not given any preference with respect to their arrears, which constitute a claim like any other (indeed, public authority claims are also hardly ever given preference in Austria).

23. There is however special provision for maintenance accruing. Although this does not have absolute precedence, there are more extensive payment possibilities. While other claims can only be satisfied within the framework of the "general minimum living standard" (that minimum amount which the liable party must be allowed to retain even in the course of execution in order to avoid ruining him and to ensure that he can earn a modest living), there is, owing to the lower "maintenance minimum living standard", an additional payment fund available exclusively to the creditors. In the course of execution of maintenance accruing, the liable person consequently retains a lower minimum living standard than in relation to other creditors. As a textbook colourfully puts it, "parents must share their last crust with their children".

III. THE OBLIGATION TO PAY MAINTENANCE IN BRAZIL

In Brazil, the obligation to pay maintenance is based on the constitutional principle of human dignity, mentioned in Article 1, sub-section III of the Federal Constitution of 1988.

In addition, Article 227 provides that it is the duty of the family, the society and the State to ensure children and adolescents the right to life, health, nourishment and dignity.

It is relevant to point out the provision in Article 1.596 of the Civil Code, that prohibits any discriminatory designations in relation to children born out of wedlock or adopted children with regard to their rights and description.

Judicial Co-operation in Brazil

1. Letters rogatory to be executed in Brazil

In Brazil, letters rogatory in general, including cases related to recovery of child support and other forms of family maintenance, require *exequatur* from the Superior Court of Justice (STJ) in order to be executed.

In accordance with the future Hague Convention on international recovery of child support and other forms of family maintenance, letters rogatory must be sent by the foreign Central Authority to the Brazilian Central Authority, which will verify whether all the requirements of the Convention have been met.

If the Brazilian Central Authority concludes that the requirements are not fulfilled, a notice will be sent back to the foreign Central Authority, which must correct or complete the original request before sending it again to the Brazilian Central Authority.

When the Convention requirements are fulfilled, letters rogatory are sent to the STJ for verification.

In the case of a judicial request, this verification is done by the Superior Court of Justice, which grants *exequatur* and orders a Federal Court of First Instance to execute the request. If the Superior Court of Justice does not grant *exequatur* (only in cases where the order is contrary to Brazilian public order (o*rdre public*) or due process has not been respected), notice is sent back to the Brazilian Central Authority, which will send it to the foreign Central Authority.

In the case of an administrative request in substance, even if it is sent via letter rogatory, the Brazilian Central Authority either executes the request or forwards it to the competent administrative body to do so.

Costs related to Letters Rogatory in Brazil

Letter rogatory proceedings transmitted through the Brazilian Central Authority will be free of charge for applications under the future Hague Convention. There will be no charge for costs related to services of experts, sworn translation, oral testimony and genetic testing.

However, if the applicant prefers not to use the Central Authority channel, consular certification is needed, as well as the nomination of a person responsible for paying the costs that may arise from such an application.

2. Judicial assistance

The administrative proceedings related to requests for judicial assistance and letters rogatory are the same.

In the case of a request for judicial assistance, the foreign Central Authority sends it to the Brazilian Central Authority, which verifies whether the requirements of the Convention are met.

If the Brazilian Central Authority concludes that the requirements are not met, the request is returned to the foreign Central Authority, which must correct or complete the original request before sending it back to the Brazilian Central Authority.

When the Convention requirements are fulfilled, the request for assistance is sent to the Attorney General's Office, which will bring proceedings before a Brazilian Federal Court of First Instance.

Costs related to judicial assistance in Brazil

The Brazilian bodies will bear the burden of costs on the unsuccessful party in cases of judicial assistance requests under the future Hague Convention.

All judicial proceedings requested or executed by the Attorney General's Office, such as court fees, service of process and warranty or bound to appeal, are exempt of costs.

3. Recognition and enforcement of foreign judicial orders

In Brazil, all foreign orders, whether judicial or administrative, must be recognised by the Superior Court of Justice. Requests for recognition and enforcement of foreign judicial or administrative orders must be sent by the foreign Central Authority to the Brazilian Central Authority, which verifies whether all the requirements of the Convention are met.

If the Brazilian authority concludes that the requirements are not met, the request is returned to the foreign Central Authority, which must correct or complete the original request before sending it back to the Brazilian Central Authority.

When the Convention requirements are met, the request is presented to the Superior Court of Justice by the Attorney General's Office.

If the above-mentioned Court recognises the foreign judicial order, the request is sent to a Federal Court of First Instance, which must execute the order.

A foreign administrative order is only enforceable in Brazil if, in accordance with Brazilian law, it is of judicial nature.

If the Superior Court of Justice does not recognise the order, notice is sent back to the Brazilian Central Authority, which will send it to the foreign Central Authority.

4. Costs related to recognition and enforcement of foreign judicial orders in Brazil

All judicial proceedings requested or executed by the Attorney General's Office are exempt of costs.

IV. THE DEVELOPMENT OF LOW-COST PROCEDURES AS A MEANS OF PROVIDING EFFECTIVE ACCESS TO PROCEDURES

THE COSTA RICA EXPERIENCE

Jorce Aguilar

The Hague, May, 2007

In general, effective access to procedures has to do with the real ability of the potential applicant to initiate proceedings directed to obtain a decision regarding a child support order.

In Costa Rica, the constitutional basis for access to justice derives from Article 41, which states: "Everyone shall receive reparation for injuries or damages to himself or his property, or moral interests, through recourse to the laws. Justice must be prompt, enforced, not denied, and in strict accordance with the laws."

Also, there are certain constitutional principles pertaining to the obligation to provide for child support, as part of the parental obligations and State protection, according to Article 51, which establishes "[t]he family, as a natural element and foundation of society, is entitled to State protection. Mothers, children, the elderly and the destitute infirm are also entitled to such protection."

Furthermore, Article 53 of the Constitution, is clear in stating that "[p]arents have the same obligations toward children born out of wedlock that they have toward those born within it. Everyone is entitled to know who his parents are, in accordance with the law." This means that a child support order can be obtained regardless of the marital status of the parents.

As a matter of principle, Costa Rican law does not differentiate between obligations toward children born out of wedlock and those born within it, for Article 54 of the Constitution forbids any personal qualification based on the nature of filiation.

Now, the importance given to family and children is guaranteed by the Costa Rican legal system, with the creation of an autonomous institution named *Patronato Nacional de la Infancia* (The Children's Board), in charge of providing special protection of mothers and minors, with the collaboration of other State institutions (Article 55 of the Constitution).

Within the lines of Article 14 of the draft Hague Convention, Articles 12 and 13 of the Costa Rican *Ley de Pensiones Alimenticias*, N° 7654 (Child Support Act of 1996), provide the possibility for an applicant to file a verbal or written request, without the need for further authentication, including the possibility to obtain free legal assistance provided by the State without means testing; the mother's sole allegation is sufficient to accord her a public defender should she need legal representation to participate in certain proceedings in which the debtor is usually represented by his own attorney.

Within this context, it is important to bear in mind that *gratuity* (cost-free) is the rule according to the Costa Rican Family Code. Moreover, according to the principle established in the Constitution of Costa Rica, no differences can be made between foreign or national citizens, except where the law establishes a reasonable ground for different treatment. Also, all documents needed in these proceedings are free of legal fees.

Therefore, under a bilateral or multilateral agreement, all services provided by the Costa Rican Central Authority with respect to establishment, modification, recognition and enforcement of support would be provided at no cost to the foreign resident, on the basis of reciprocity, thus avoiding a long and cumbersome *exequatur* procedure.

In order to have a broad perspective on how effective access to procedures operates in Costa Rica, it is important to bear in mind what the applicable law is in this country, such as the Law on Child Support, the Law on Responsible Paternity, the Law on Domestic Violence, the Childhood and Adolescence Code, as well as the Family Code.

The Family Code (1973) gives family matters a special and autonomous regulation; the State has the duty to provide effective access to procedures and this is conceived as legal assistance. As mentioned earlier, child support cases are ruled by the principle of gratuity, which means no stamp, seal or legal paper is required for these proceedings. Since the best interest of the child has a more relevant bearing, the decision in most cases does not impose any fees or punitive damages on the debtor, thus the payer must firstly and primarily honour his obligation towards the child, for it is understood that the child as creditor is the one who needs child support.

In practice, there is no need to file a written suit, for most child support cases are solved through oral proceedings. Even if the matter has to be brought before the judicial authority, the custodial parent can appear before the judge and file the request orally without legal assistance or representation by a lawyer.

Normally, the proceedings continue thereafter with no need for parental intervention until effective collection of child support.

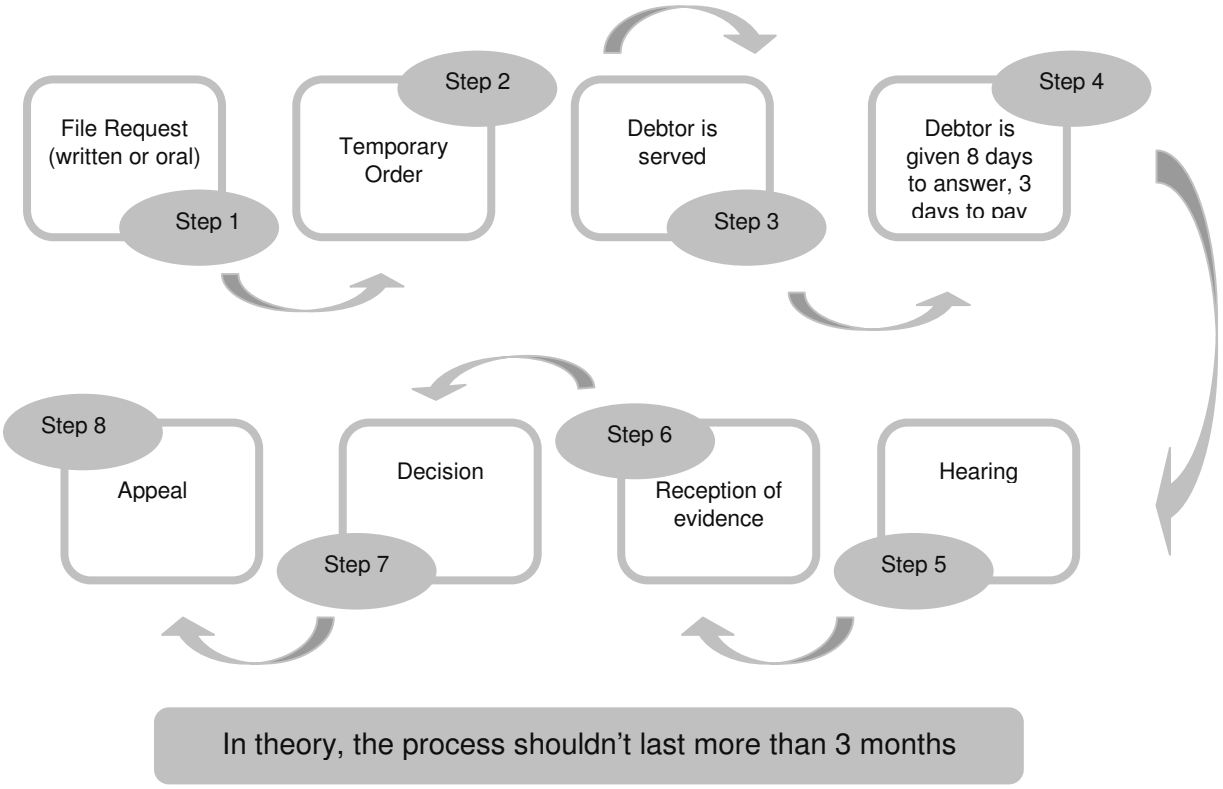
Even though representation by a lawyer is needed to file a divorce suit, child support cases do not require the custodial parent to be represented by an attorney. However, if legal representation is needed to participate in certain proceedings during the case, or the creditor requests legal aid, advice or counselling, then he or she can be represented by a State lawyer or public defender.

As mentioned before, there is an exemption of legal fees, although legalisation of certain documents might imply minor costs. If legalisation of foreign documents is requested, we encourage ratification of the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*.

Flow chart of a child support case

The custodial parent, or legal representative of the child, files an oral request before the court clerk. The judge then issues a temporary order and, once the debtor is served, he has eight days to respond. In the meantime, he is ordered to deposit the approximate amount within the next three days, the rationale behind this rule being that child support cases involve a basic and fundamental matter of human survival, such as food, health and housing needs.

If the debtor challenges the order, the judge brings the parties to a conciliation hearing. Relevant evidence can be submitted to the judge, who will then issue a final decision. Theoretically, the entire procedure can last for up to three months, and even if an appeal is pending on the decision, the debtor must continue to provide child support.



Establishing paternity

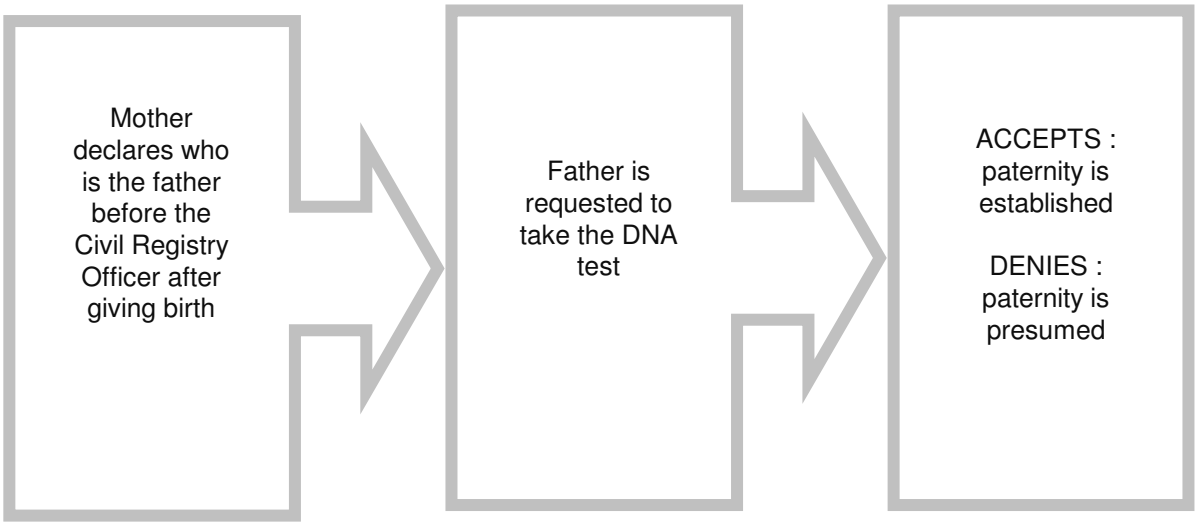
Enforcement of the Act on Responsible Paternity (1999) brought a dramatic decrease in the number of children with an unknown father. This law is considered as a model of advanced legislation in Latin America and in many other countries around the world, for it enacts a very simple and expeditious procedure for establishing paternity.

The Act basically enables the mother to declare the name of the father of her child before the Civil Registry Officer and directly after giving birth at the hospital..

The Civil Registry Officer then asks the potential father whether he accepts his paternity or not, or if he is willing to take the DNA test in one of the laboratories of the Social Security Systems, which is cost-free.

If the father accepts his paternity, without taking the DNA test, or if the test confirms it, paternity is then established and the child is inscribed as his son or daughter.

If the father refuses to take the DNA test, there is a legal presumption he is indeed the father and automatically the child is inscribed as his.


Mother declares who is the father before the Civil Registry Officer after giving birth
Father is requested to take the DNA test
ACCEPTS : paternity is established
DENIES : paternity is presumed

V. ADMINISTRATIVE ASSESSMENT OF CHILD SUPPORT IN NORWAY

Non-custodial parent living in Norway, child and custodial parent living in a Contracting State of the Hague Conventions of 15 April 1958 or 2 October 1973, or in the United States of America

The case is normally initiated by an application for assessment from the custodial parent or from a foreign authority on his or her behalf.

The first step is to give the non-custodial parent (NCP) notice about the application, and to give him or her the opportunity to give comments and to send us verified information about his or her income and expenses. The notice is sent to the NCP by ordinary mail. If the mail is not returned, we assume that the NCP has received it. If we do not receive the necessary documentation from the NCP, and the mail is not returned, we have provisions in our law to establish a child support order by discretion.

Pursuant to the Registry Act L16.01.1970 nr. 1, residents in Norway have the duty to register their residence address with the Registry Office. The body responsible for the child support case has access to the national population register. This is the reason why the notice is sent by mail and is not served upon the NCP.

We have access to public registers showing the last five years of taxable income and employer details. If the NCP has been in Norway for some time, we collect information from these registers, or we contact his or her employer for information about his or her monthly gross income. The information obtained provides the basis for a discretionary decision. If the NCP sends us the requested documentation, it is this documentation that is taken as the basis for the assessment of child support.

The decision is sent to the parties by ordinary mail, with information about the right to appeal against the decision. If the mail is not returned, and we do not receive an appeal within three weeks, the decision is enforceable in Norway, and we start collecting the support right away.

Both parties have the right to appeal within three weeks from the date they receive a copy of the decision. If one or both of them submits an appeal, the issuing authority considers whether there are reasons for changing the decision. If not, the case is forwarded to the National Insurance Administration, who either alters or confirms the decision. A decision made by the National Insurance Administration cannot be appealed through another administrative authority. The parties may bring the case to court if they are not satisfied with the decision made or confirmed by the National Insurance Administration.

Non-custodial parent living abroad in a Contracting State of the Hague Conventions of 15 April 1958 or 2 October 1973, or in the United States of America, child and custodial parent in Norway.

The case is normally initiated by an application for assessment from the custodial parent in Norway.

According to Article 83 of the Norwegian Children Act, Norway has jurisdiction to handle an application when one of the parents or the child live in Norway. And according to Article 5, paragraph 2, of the Lugano Convention, the custodial parent may choose jurisdiction. We consider that he or she has chosen Norwegian jurisdiction when he or she applies to a Norwegian authority.

The notice about the application is sent to the non-custodial parent (NCP) by ordinary mail, and is simultaneously sent for service upon him or her through the authorities in the country where he or she lives. If he or she sends us the necessary documentation before we receive the certificate of service, this will be taken as the basis for the decision and an order is issued. If he or she does not reply to the notice, we wait for the certificate of service and establish an order by discretion. Since we do not have the same possibility for collecting information from abroad as we have in Norway, statistics are used about average income in the country where he or she lives, or if we know his or her profession, the average income for that profession in that country is used, and the decision based on those statistics.

When a decision has been made, it is sent to the parties by ordinary mail, and simultaneously the order is sent for service upon the non-custodial parent through the authorities in the country where he or she lives. If the mail is not returned and we do not receive an appeal within a reasonable time, the decision is enforceable in Norway. In determining "a reasonable time", we take into consideration that the postal service may be slower than in Norway.

The right to appeal and the procedure for handling an appeal is similar to the procedure described for "non-custodial parent in Norway" above.

The advantage of administrative processing is that, on the whole, it is quicker than processing before a court of justice and is therefore both cheaper and more efficient. It is also considered to be beneficial or conflict-reducing for the parties to have their differences decided within a reasonable time.

Due process is ensured through the Norwegian Public Administration Act, which states that the parties shall be notified and given an opportunity to make a statement before a decision is made. It also contains rules concerning the parties' entitlement to acquaint themselves with the documents of the case, and whether or not grounds shall be given for the decision, as well as the parties' right to appeal. Furthermore, the parties are entitled to access information that emerges during the processing of the case if it is of significant importance. It is also easier for the administrative body to obtain more information during the actual processing of the case, if necessary, than it is for the courts of law – which may be reluctant to do this for fear that it may lead to postponement of the case. Administrative processing guarantees good <u>individual</u> processing of the case.

Applications for alteration of orders

Follow the same procedure as described above.

<u>Comments:</u>

The administrative process is free of charge for the parties in a case where one of them lives abroad. In cases where both live in Norway, the parties may have to pay a fee of approximately NOK 900 each for the assessment. They may apply for exemption from the fee.

According to Protocol 1, Article Va, of the Lugano Convention, the expression "court" includes administrative decisions issued by Danish, Icelandic and Norwegian administrative authorities in cases regarding maintenance obligations.

The assessment rules in Norway

The provisions of the Children Act have firm rules for calculation of child support. The basis for child support is the "maintenance cost", *i.e.*, consumption expenses, living expenses and child care expenses. The maintenance cost increases with the age of the child and is divided into three age groups: 0 – 5 years, 6 – 10 years and 11 – 18 years. The cost is calculated on the basis of the standard budget for consumption and living expenses for children living in Norway established by the National Institute for Consumer Research (SIFO). For children living abroad, the maintenance cost is regulated according to the cost of living in the country where the child lives. If the custodial parent receives child benefit, the amount will be deducted from the total expenses.

To calculate the child support, we take into consideration the income of both parents and the child's income, if any.

If a party fails to present required documentation, or if there are grounds for believing that the party is withholding information that may be significant to the decision, or has no income, or the income is significantly lower that he or she ought to be able to earn based on education and ability, the income is determined on a discretionary basis**.**

The child support is determined on the basis of the maintenance cost and the ratio between the income of the parents and the child's income, if any. The child support is fixed as 1/6, 2/6, 3/6, 4/6 or 5/6 of the maintenance cost.

When the child support has been calculated as described above, the support is tested against the NCP's ability to pay the support. The NCP has the right to retain means to cover his or her expenses for tax, his or her own maintenance, living expenses and maintenance of his or her own children in his or her own home. The means for own maintenance are set at a fixed rate for single persons and a fixed rate for cohabiting or married couples, based on the standard budget for consumer expenses established by the National Institute for Consumer Research (SIFO).

When a NCP with several children is not fully able to pay the child support, the deciding body may, on its own initiative, determine a decrease in the calculated child support.

Total maintenance payments, including maintenance payments for children over the age of 18, shall not exceed 25 per cent of the NCP's gross income.

If the parents have agreed in writing, or a court has ordered that the child shall spend a minimum of two days per month with the NCP, the NCP is granted a reduction in child support. The reduction will differ according to the length of time agreed upon or ordered.

Recognition and enforcement of child support orders issued in a Contracting State of the Hague Conventions of 1958 or 1973, or in the United States of America.

Recognition

A request for recognition of a foreign order under the Hague Convention, or under the bilateral agreement between Norway and the United States of America, is handled on an administrative basis. The receiving agency is the National Office for Social Insurance Abroad. This office checks that the application has been prepared in accordance with the Convention or the agreement, and that all relevant documents are enclosed.

A notice is then sent to the NCP in Norway. If he or she has no objections, or the objections are not relevant, an order for enforcement is issued. The NCP has the right to appeal against the order. If he or she submits an appeal, our office considers whether there are grounds for changing the decision. If no grounds are found, the case is forwarded to the National Insurance Administration, who either alters or confirms the decision**.**

Enforcement

When the case is ready for enforcement, our office advises the National Insurance Collection Center. They send an invoice to the NCP asking him to pay voluntarily. If he fails to do so, the Collection Center orders garnishment through his income or social benefits. In addition to garnishment, the Collection Center has the ability to put a lien on real estate, cars, bank accounts etc.

For the National Office for Social Insurance Abroad
(NAV Utland)
Oslo, Norway

Åse Kristensen
Senior Adviser

VI. MAINTENANCE ESTABLISHMENT AND ENFORCEMENT PROCEDURES IN SLOVAKIA

Establishment of a maintenance order (including modification) in Slovakia

Although the Slovak system of establishment of maintenance is a judicial one, and thus - by the very nature – not designed as an inherently "low cost" procedure, a number of features existing in Slovakia make it virtually "cost free" for a foreign applicant.

1. Non-adversarial character of the proceedings

Although the court proceedings require an application by the creditor, the actual character of the proceedings is not adversarial. The parties are not required to be represented by a lawyer and the court has an ex officio duty to inform them of their rights and establish the facts of the case, by gathering all the necessary evidence. In maintenance cases this primarily consists of the statements of the parties and written information collected from the debtor's employer, tax authority, bank or other relevant source. A foreign applicant claimant is not required to appear in person before the court and his/her written statement or communication is considered sufficient for the court (see also point 3 below). Only seldom the court requires evidence to be taken from the applicant abroad by means of a formal letter rogatory sent to the applicant's State of habitual residence. Such procedure, although it does prolong the proceedings, does not entail additional costs for the applicant, as the costs of the taking of evidence are borne by the court (in rare cases, when the debtor suggests the evidence to be taken, the court may order such costs to be borne by the debtor).

Any foreigner acting before a court in Slovakia has the right to act in their mother tongue. Consequently, even if a need arises to serve documents abroad on the applicant, the costs of translation are borne by the court.

Similar rules also apply for appellate proceedings.

A maintenance order can be arrived at also by way of and in the form of an agreement by the parties. Such private agreement can be a basis of voluntary maintenance payments, but is not an enforceable title in itself. The court may, after scrutiny, approve such private agreement (transfer it into its own decision) and thus give it the full value of an enforceable decision.

2. No court fees to be paid

Any proceedings in respect of maintenance obligations between parents and children, including appeals proceedings, are exempt from payment of court fees. In cases of other maintenance obligations, the exemption from court fees is personal (only for the applicant, irrespective of whether he is the creditor or debtor). The parties do, strictly speaking, have an obligation to bear the costs of the proceedings, but due to the overall character of the proceedings (see point 1 above and 3 below), there are seldom any costs incurred which would have to be borne (paid) by the applicant.

There is always the possibility for the applicant to ask for free legal aid (including an attorney). In child maintenance cases such application is granted almost "automatically", since the only means criterion is the income of the child, not the means of the custodial parent or family.

However, if the defendant is not successful in the proceedings, he is usually directed by the court to reimburse the creditor's expenses (such costs might arise for the foreign creditor who chooses to go to court outside the system of international co-operation and is represented by a lawyer whose expenses are not covered by the system of free legal aid).

3. Free-of-charge assistance and representation by the Centre for International Legal Protection of Children and Youth

An important element in maintenance cases for foreign creditors is the free assistance provided by the Centre of International Legal Protection of Children and Youth in Bratislava. The Centre provides free legal assistance to maintenance applicants from abroad on the basis of an international treaty[1] (or reciprocity arrangement). Such free legal assistance includes full handling of the interests of the applicant, including free legal representation before the Slovak court in maintenance proceedings (by the specialised lawyers working in the Centre) and in any enforcement proceedings necessary, and the receipt of payments from the debtor (and their transfer abroad under more favourable banking conditions than usual), depending to the extent of the power of attorney received from the creditor.

Recognition and enforcement of a maintenance order in Slovakia

No specific proceedings for *recognition* of a foreign order are required: recognition takes place within the enforcement proceedings. Consequently it entails no additional costs.

Either party can, however, ask for a specific *verdict* on recognition (or non-recognition). Such proceedings, as specific proceedings, would entail additional costs for the party asking for such proceedings (*i.e.*, application fee to the court), but not other costs, since these are not adversarial proceedings and the court assesses the condition for recognition / non-recognition ex officio (and the costs of evidence taken are borne by the court).

In cases, where the Centre is representing the foreign applicant, the proceedings for enforcement, including any specific recognition proceedings, are dealt with by the Centre, without additional costs for the applicant.

As for the ***enforcement*** proper, whether of a foreign maintenance order or a Slovak order, the proceedings are, again, exempt from court fees. The involvement of the court is only limited, however, as an "overseer" of enforcement, *e.g.*, it issues an authority for the enforcement officer (*huissier)*.

The enforcement officer, of course, charges for his services. The costs of enforcement are, however, borne by the debtor. The creditor cannot be required to pay any advances or securities up front and, should the result of the enforcement not be sufficient to cover the costs of enforcement, such costs are borne by the State.

Consequently, any enforcement proceeding is cost-free for a foreign maintenance creditor.

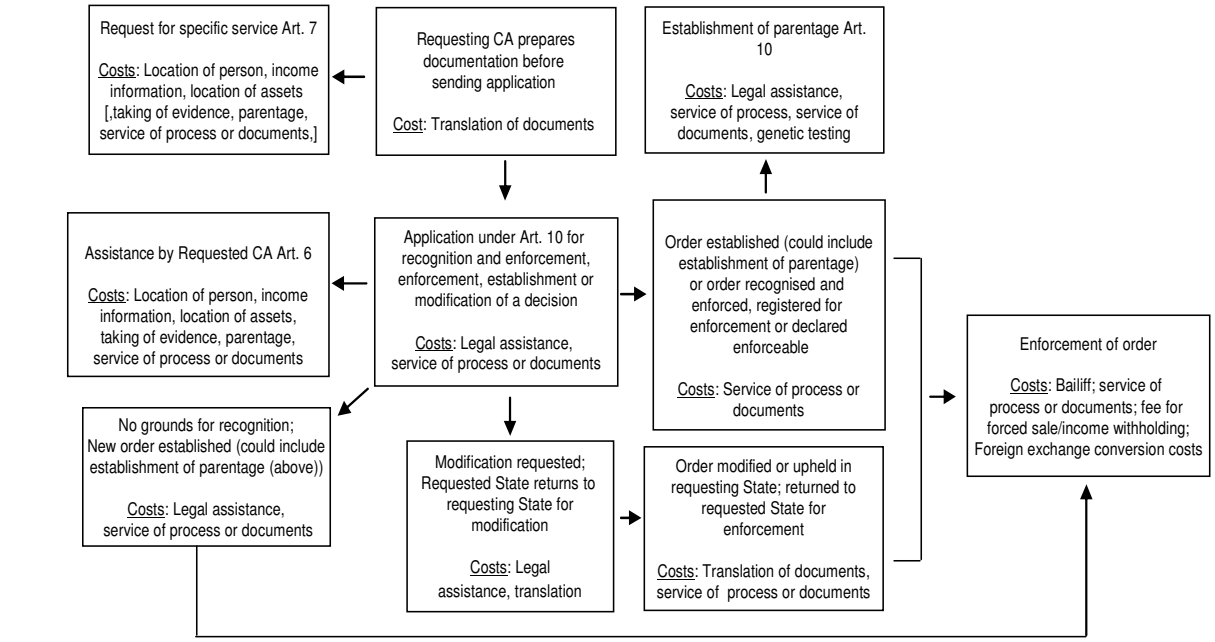
In cases, where the Centre is representing the foreign applicant, before the case is submitted to an enforcement officer, the Centre gives notice to the debtor about the consequences of default of his obligation toward the creditor. If the debtor does not/is not willing to proceed with voluntary payments, the Centre submits an enforcement application to an enforcement officer. Of course, even after this, the Centre continues to be involved in the matter for the duration of the maintenance obligation, or as long as the power of attorney given to it by the creditor is in force.

1) The Centre, is among its many other functions, also Slovakia's Central Authority under the 1956 New York Convention on the Recovery of Maintenance Abroad.

FLOW CHART

International Case Processing

Potential for Costs to Applicants* under the Convention



OPTIONS TO REDUCE COSTS:
Translation of documents: develop / use standardised forms and other documents under Art. 21 in several languages
Legal assistance: allow administrative or judicial standardised process that does not require presence of an attorney
Location: develop automated interfaces between various State databases and child support program
Service of process or documents: Allow service by mail or other alternatives to personal service
Genetic testing: enter contracts that can be used by multiple States to reduce the cost of testing.

*Costs may be recovered from debtor or unsuccessful party. Article 40