



MINISTRY OF JUSTICE

**QUESTIONNAIRE CONCERNING A NEW GLOBAL INSTRUMENT ON THE  
INTERNATIONAL RECOVERY OF CHILD SUPPORT  
AND OTHER FORMS OF FAMILY MAINTENANCE**

**I New York Convention of 20 June 1956 On recovery abroad of  
maintenance**

*A – Questions addressed to States Parties*

1. Yes but it is considered the main one.
2. Yes. Portuguese courts can only carry out already existing judicial decisions (sentences or provisory judgements).
3. Request, power-of-attorney, list of the sums paid and amounts due, judicial decision setting the maintenance, with indication that all parties have been notified and note that the judgement has the force of *res judicata*, birth certificates of the minors, marriage certificate in case it has not been dissolved. All documents must be originals or authenticated certificates of the respective originals.
4. Contact with the debtor, so he or she can pay the sum in arrears. Should the debtor fail to do so, the case is sent to the district Court of his or her residence, with a view to enforcing the maintenance obligation.
5. No
6. Yes (Attached)
7. Yes. The Portuguese Central Authority has already received requestes from foreign public institutions. In these situations, the procedure is the one foreseen in the said Convention. Despite Act 75/98, of November 19, we

are yet to receive any request by the Portuguese Social Security to recover maintenance payments abroad.

8. (See also answer 20 of Part II)

- a) Yes. If the creditor is a minor, the Public Prosecution will represent him. When the creditor of the obligation is of age, legal aid is to be granted under the conditions of the European Agreement on the Transmission of Applications for Legal Aid, as the Public Prosecution has not the right to represent the person concerned and so the decision must be reviewed and confirmed prior to being carried out.
- b) The creditor who is a minor can be represented, at the courts, by the Public Prosecution; the possibility of resorting to the various forms of legal aid provided for at the European Agreement on the Transmission of Applications for Legal Aid; and, in administrative matters (translation of documents) as regards the Directorate of Justice Administration.
- c) For the intervention by the Public Prosecution, it is necessary that the maintenance is due to minors. Whenever it is due to persons of age, the conditions of the Agreement mentioned above apply.
- d) Where they are due to a spouse, there is no representation by the Public Prosecution. If the creditor is of age, legal aid is to be granted under the Agreement mentioned above. The remaining order of procedure is the same.

9. The administrative support, namely the translation of the entire case.

10. Translation into Portuguese.

11. Portuguese.

12. The debtor or the Court are responsible for bank transfers. Both make the bank deposit in favour of the creditor or of the entity that was indicated.

13. The currency is converted by the banking institution according to the change rate at the time.

14. Bank transfer.

15. No.

16. Resort to the police entities.
17. The request is not carried out due to the inexistence of economical means.
18. No.
19. Resort to the police entities to find out whether there are seizable goods, although it is up to the Courts, in the scope of the case, to proceed to the said investigation.
20. Delay on the execution of the case.
21. Yes, although it is not possible to determine if one is the Sending or the Receiving Authority, as the Directorate plays both roles simultaneously. Portugal sends recovery requests to Spain, France, Italy, England, Luxembourg, Switzerland, Belgium, Germany, the Netherlands, Australia, Brazil, Angola, Cape Verde and Mozambique

<b>2000</b> – 83 <b>2001</b> – 76 <b>2002</b> (up until July 25) - 48
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22. Yes

## **Part II Questions concerning national systems of maintenance obligations in respect of children and other family members**

### *Form of maintenance decision*

- 1- Traditionally, maintenance assumes the form of periodic (mostly monthly) payments of money. Article 2005 of the Civil Code allows different forms of payment to be established by agreement, as well as, exceptional (not specified) measures if the circumstances of the case justify them.

### *Eligibility*

- 2- The persons who can by law benefit from a maintenance decision are, in the framework of family relationships:
  - a) The descendants or ascendants,  
In the case of "minor" adoptive affiliation, the adoptive parents, though not considered ascendants, may receive maintenance from the adopted if their spouses, ascendants or descendants are unable to provide it.  
Provisional maintenance can be awarded to a child in a process of recognition of parentage (Article 1821 of the civil Code), if the court, in a preliminary analysis, judges the recognition to be probable.
  - b) The spouse or ex- spouse,  
The nature of the maintenance obligation between spouses relies on the mutual duty of marital assistance, acquiring autonomy usually in cases of "*de facto*" separation.  
The maintenance obligation between ex-spouses, though based on the creditor's necessities and the debtor's ability to pay, is conditioned by the judicial assessment of "fault in the violation of marital duties". Thus, Article 2016 states that if one of the ex-spouses has been declared the main party responsible for the divorce as a result of the violation of marital duties, then that ex-spouse is, in principle, not entitled to receive maintenance from the other
  - c) Brothers or sisters,
  - d) Underage nephews,
  - e) Step children who are underage and are (or were, at the time of death of the parent) supported by the step parent's spouse,
  - f) The person who was living for two years in conditions similar to the spouses with another person who at the time of death was not married. In

this situation, maintenance can only be demanded from the estate of the deceased.

- 3- "Dependent child" means the child unable to meet the expenses related to his or her safety, health and education. Parents cannot be relieved from their maintenance obligations as long as the children are unable, through the product of their work or other forms of income, to pay for those expenses. Adult or emancipated descendants might still benefit from maintenance, as long as their studies are not completed, taking into consideration the normal duration of the education.
- 4- The Hague Convention of 1973 on the law applicable to maintenance obligations should apply.
- 5- Child support is determined through a judicial process.
- 6- No, the process is the same, although, obviously, Private International Law rules apply.
- 7- Yes, procedures are different. Application of maintenance for an adult follows the ordinary proceedings of the Civil Code and the Civil Procedure Code. If the application for maintenance concerns a child, a special simplified process is followed, as determined by Article 186 *et seq.*, Decree-Law 314/78 as amended by Decree-Law 185/93.

#### *Methods of calculating maintenance*

- 8- The assessment of child support is based on the evaluation, on a case by case approach, of the creditor's necessities and the debtor's ability to pay. Jurisprudence considers that correct and proportioned maintenance must take into account the debtor's income, assets and expenses. In the case of the creditor, the aspects to be observed respect, *inter alia*, to the needs of nourishment, safety, health (medical expenses), education, transportation. The child's entitlement to enjoy the same life style as the parent is another criteria used to determined the amount of the maintenance obligation. However, if the descendant becomes a young adult the impossibility to support oneself becomes relevant although the continuation of the studies in

full time allows the granting of maintenance, during the period normally needed to complete the specific degree that was chosen, as long as it does not impose a too severe burden on the parents. In the analysis of these cases, the young adult's behaviour and ability to work are sometimes taken into account.

- 9- If Portuguese law is applicable to the maintenance obligation, the general criteria are the same, but the different living costs between countries will be taken into consideration.
- 10- The main criteria are the same. However, the efforts demanded to child support debtors' are usually higher than in a regular maintenance obligation case where a thorough analysis of the other adult possibilities to find income takes place. As far as ex-spouses are concerned Article 2016, paragraph 3, of the Civil Code expressly states that in the assessment of maintenance the court must take into account the following factors: age, health, professional qualifications, possibilities of employment, time to be spent with their common children, all types of income and any other relevant circumstances.
- 11- The law applicable according to The Hague Convention of 1973 on the law applicable to maintenance obligations, although, in any case, the creditor's needs and the debtor's resources shall be taken into account in determining the amount of maintenance, pursuant to Article 11, paragraph 2 of the Convention.

*Reassessment / adjustment / modification of maintenance decisions or assessments*

- 12- The law does not determine the automatic reassessment of maintenance.
- 13- Presently, court decisions usually include automatic annual adjustments. The most frequent marker is the cost of living index, but minimum wage variation is also mentioned in jurisprudence.
- 14- Article 2012 of the Civil Code states that if circumstances change a maintenance assessment can be modified, either upwards or downwards, for future payments. The petitioner must present evidence to support his claim.

If the decision on maintenance includes no automatic adjustment, inflation or other markers' variations may justify a reassessment.

Proceedings on reassessment should be started in the same type of Court as the one that rendered the decision on maintenance.

- 15-Portuguese Courts have to be internationally competent and only subsequent changes in circumstances may justify a reassessment. There is no revision on the merits of the foreign decision in the recognition procedure.

### *Establishing paternity*

- 16-If the question arises not as an incidental one in relation to maintenance proceedings, Articles 56 and 61 of the Civil Code would apply. The general rule is the law of the State of the nationality of the parent on the date of establishment of the parentage.

As to the law applicable, in general, to incidental questions the doctrine and jurisprudence are not unanimous. However, in recent doctrine, incidental questions in relation to maintenance obligations included in the scope of The Hague Convention of 1973 on the law applicable to maintenance obligations, are described as an exception where the law applicable to the maintenance obligation should also apply to incidental questions.

- 17-The requirements concerning the establishment of paternity vary depending on the mother's marital state. In case the mother is married, the law presumes that the husband is the father. No further declaration is necessary. The presumed paternity has to be mentioned in the child's birth certificate.

Otherwise, if the mother is single or if her husband is not the father, the mother can state that fact in a declaration, thus setting the presumption aside. In these cases, the establishment of paternity depends on a voluntary or a judicial recognition. If the registration only mentions the identity of the mother, the Civil Registry's Office sends the court a copy of the process to promote *ex officio* an inquiry of the father's identity. Any legally admissible evidence can be used. A judicial process to establish paternity can be started if maternity has been established or, if this is not the case, if a judicial process to establish maternity starts simultaneously.

18- Paternity may be established by a number of different legal procedures. There is a legal presumption of paternity given to the husband of the mother. This presumption works and can be challenged in the terms mentioned in the previous paragraph. The recognition of paternity of a child born outside marriage is made through voluntary recognition or judicial decision. A representative with special powers can do the voluntary recognition. This act can be carried out through a declaration before the clerk of the Civil Registry's Office, in a will or a public document. Voluntary recognition is irrevocable. Whenever the birth of a child is registered without mentioning the father's identity, an inquiry to the paternity is launched *ex officio*. The process for an inquiry can be requested by the guardian and any legally admissible evidence can be used. The judge shall hear the mother to gather more information about the paternity. The man pointed out by the mother as the presumed father will also be questioned. After having gathered information, the judge decides to dismiss the case if no sufficient evidence is provided or to send the process to the District Attorney based in the competent court for that lawsuit. The instruction of the demand is secret and shall be carried out in a discrete way to prevent any harm to the dignity or reputation of the persons involved. Judicial representatives can only participate in the phase of appeal. As previously mentioned, paternity can also be established through judicial recognition. The petition for this lawsuit can be brought on by the child or by the mother, if the child is a minor.

The law presumes paternity if the relationship between the child and the defendant is perceived to the general public as a father-son relationship; if the father states, in any written document, including private letters, that he is the father; if the mother and the defendant lived as a couple during the legal period of conception; or if the presumed father had sexual relations with the mother during that same period. Raising serious doubts about the defendant's paternity can set these presumptions aside. As far as the biological issue is concerned, Article 1801 of the Civil Code determines that the methods to be used in these procedures are blood tests and other scientific methods, including DNA tests. The presumed father cannot refuse to provide a blood sample to the authorities and can be fined if he does so. The cost of lawsuit destined to establish paternity varies on several factors, including lawyer's fees, expert reports, such as a DNA report, and others. The legal procedures can be covered by legal aid in the terms stated in paragraph 20, as the details concerning distinctions between residents and



non-residents. Expenses resulting of scientific reports are also covered by the legal aid.

- 19- The mere use of a different method to determine paternity or the fact that the decision entails a determination of paternity don't constitute ground to refuse recognition. However, concerning the law applied to the case, Article 27, paragraph 4, of the Lugano Convention and Article 1100, paragraph 2, of the Civil Code may provide for additional grounds of non-recognition. Article 1100 list the grounds of opposition to recognition that are only taken into consideration if expressly alleged by the parties. Pursuant to paragraph 2 a party may oppose to recognition if the decision was render against a Portuguese national and according to Portuguese conflict of law rules Portuguese law should apply.

#### *Legal and administrative aid and assistance*

- 20- A resident claimant who proves that he or she lacks the necessary economic conditions to pay for lawyers' fees or the normal expenses of a judicial process can benefit from legal aid pursuant to the Law 30-E/2000. Legal advice is provided by the Bar Association and the State. Advice might also include extra judicial initiatives or informal dispute settlement. Legal aid includes the exemption from court costs and other expenses related to the proceedings, the postponement of the payment of the legal costs and the payment of lawyers' fees. This form of legal aid can be required at any stage of the proceedings, remaining in possible appeals and attached proceedings, with no regard to the merit of the initial process.

Every habitual resident and any citizen of a European Union Member State with residence outside Portugal can benefit from legal aid and advice in the same conditions as Portuguese nationals. Citizens from outside the European Union with residence outside Portugal have the same rights regarding legal aid as do Portuguese nationals in their respective countries.

In international cases the central authority provides information and assistance. The Central authority has concluded an agreement with the Public Prosecution according to which underage children can be represented by the Public Prosecution independently of any request for legal aid.

21-The main eligibility requirement for assistance is economic insufficiency. This status can be demonstrated with any appropriate document. Some people enjoy a presumption of economic insufficiency: the applicant for maintenance, the creditor of a maintenance obligation or a child in a process of paternity determination. This presumption can be set aside with the demonstration that the beneficiary has an income superior to triple the minimum wage. Legal aid can also be taken away if, in the context of the maintenance proceedings, the court awards the applicant a sum of money to pay for the legal expenses.

22-No. In both cases mentioned, the procedures follow the general rule. The request for legal aid is presented in any Social Security service in a standard application form, in which the applicant states the desired form of legal aid. A decision is reached within 30 days, and if during this period the applicant is not informed of any decision, the request is considered accepted.

#### *Legal costs and expenses*

23-The expenses with lawyers` fees depend on many factors such as: the lawyer (because there is no official regulation of the fees), the complexity of the lawsuit, its probability of success and expenses, among others. Court fees vary depending on the amount of the demand, but are reduced to half where parties` agreement is reached before the end of the proceedings. In appeals and reviews, the same rules apply although the amounts are reduced to half. In any case, the minimum amount to be paid is 39,91 euros.

Pursuant to Decree-Law 224-A/96, article 3, *alinea e*), minors are exempt from the payment of court fees.

Example 1:

Assessment of maintenance

(maintenance obligation: €300/month)

Case fees:	€99.76
Administrative expenses:	€39.91
Parties turnover fees:	€49.88
Total:	€189.55

Example 2:  
 Execution of a writ  
 (value €2.000)

Case fees:	€119.71
Administrative expenses:	€39.91
Parties turnover fees:	€59.86
Total:	€219.48

24-Yes, legal expenses can be paid for from maintenance payments. However, in a process of provisional maintenance, legal aid can be revoked if the judge awards a sum of money to meet the applicant's legal expenses.

*Collection and transfer arrangements and enforcement decisions*

25-Payment and collection follow the same procedure in the case of child support or family maintenance. Payment can be carried out by the delivery of money, adjudication of the attached assets, judicial consignment of income or by the product of the sale (Article 1118 of the Civil Code).

26-The same rule applies.

27-The procedure follows the same rules, regardless of the creditor being a child or a spouse or another family member. The applicant has the power to choose the assets to be attached and later sold. The product of the sale is then given to the applicant in the terms decided by the court. Opposition to the enforcement does not suspend the proceedings. The applicant can request the adjudication of part of the debtor's income or pensions, or consignment of income, independently of the attachment. If the applicant requests the adjudication of the established sum, the court notifies the entity responsible for the payment to deliver that sum directly to the applicant or representative.

28-Maintenance decisions can be enforced by the following methods: wage withholding, garnishment from bank accounts, forced sale of property, division of pension benefits and committal to prison.

29- There are no typical banking costs as the cost varies depending on a number of factors such as: the bank, the amount, the country of destination, the type of transfer, among others.

30- Not specifically relating to maintenance obligations transfers.

### **Part III Questions concerning the elements to be included in the new instrument**

31- At present, there is still no consensus among Central Authorities in what regards the documents that must be produced and their respective requirements. This situation commonly creates useless delays in the process. Thus, it would be advisable to include unambiguous and complete rules on documents to be produced at the future Convention.

The complexity of certain legislations concerning legal aid contributes to barriers preventing the efficient recovery of child support. A provision should be included in order to simplify the procedures.

32- The present lack of precise provisions on issues related to the functions and responsibilities of Central Authorities may create difficulties. That could be easily prevented by the inclusion of clearer rules on the subject.

33- Items a), b), e) and f) are crucial and need to be addressed.

Items k) and j) are considered necessary to implement an effective system of cooperation.

Item l) would be very useful to clarify some of the existing problems though the most important is that such claims remain included in the scope of the future Convention.

The inclusion of items c) and d) is desirable to create a comprehensive instrument.

Regarding item g), at least some provisions should be included to clarify present uncertainties.

Item h) although very important as far as the practical effectiveness of recovery of maintenance is concerned, is a problem to which solution will be difficult to find within the scope of a convention on private international law.

34- A) Elements a), b), e), f), j) and l).

B) As a principle, possibilities to opt out an entire subject matter of the Convention are not desirable and, consequently, could only be agreed upon if strictly necessary to achieve agreement on the global instrument, after a case-by-case analysis on the relevance of the issue in question.

C) Yes.

35 Bilateral agreements are different in nature. Although, Portugal has entered into some bilateral agreements we do not consider adequate to replicate any elements of such agreements in a universal convention.

36 Yes, Cape Verde.

37 We would favour a case-by-case contribution.

38 A governmental website providing general information to citizens explains the rules on child support and presents a list of the legislative instruments.

[WWW.infocid.pt](http://WWW.infocid.pt)



MINISTÉRIO DA JUSTIÇA

DIRECÇÃO GERAL DA ADMINISTRAÇÃO DA JUSTIÇA

**CONVENÇÃO DE NOVA IORQUE SOBRE COBRANÇA DE ALIMENTOS NO  
ESTRANGEIRO**

**(Decreto-Lei nº. 45 942, de 28.09.64)**

**Documentos necessários à instrução de processo de cobrança de alimentos:**

- Requerimento conforme minuta junta (anexo I)
- Procuração passada à Instituição Intermediária conforme minuta junta (anexo II)
- Certidão da sentença que fixa os alimentos constando também que a mesma foi notificada às partes e que transitou em julgado
- Relação dos montantes em dívida (anexo III)
- Certidão(ões) de nascimento do(s) minore(s)
- Certidão de casamento caso credor e devedor ainda sejam casados
- Certificado(s) de escolaridade do(s) filho(s) caso seja(m) maior(es)
- Fotografias do credor e do devedor

**Traduit du Romain**

**ROUMANIE  
MINISTERE DE LA JUSTICE  
DIRECTION DES RELATIONS INTERNATIONALES  
ET DES DROITS DE L'HOMME**

Tel: 314.15.14; Fax: 31.16.62 – Rue Apolodor no. 17, Arr. 5, Bucarest

Bucarest, le 26 mars 2003

**No. 5374/II/2003/23**

**BUREAU PERMANENT DE LA CONFERENCE DE DROIT  
INTERNATIONAL PRIVE  
HAGUE Scheveningseweg 6  
2517 KT Hague  
HOLLANDE**

**Concernant : Lettre circulaire**

L.C. ON no. 1 (03)

***(Commission spéciale sur les obligations alimentaire)***

Concernant le questionnaire envoyé au Ministère de la Justice de Roumanie, concernant le projet par lequel on souhaite la réalisation d'un instrument nouveau concernant les obligations de paiement de la pension alimentaire, on transmet nos réponses qui concernent la deuxième partie du questionnaire.

**a) La nature de la décision concernant la pension alimentaire**

1. La pension d'entretien s'établit par la décision du juge.

Dans le cas d'une pension alimentaire pour un enfant, celle-ci s'établit, par office, une fois que le mineur a été confié. L'accord des parents concernant la assignation de l'enfant et la contribution de chacun aux dépenses de la croissance. De l'éducation, de préparation professionnelle, produit des effets seulement si elle est approuvée par une instance judiciaire (article 42 du Code de la Famille).

L'obligation d'entretien a un caractère successif (s'exécute par des prestations successives). Cela parce que son but est de couvrir les dépenses d'entretien, au mesure que celles-ci apparaissent et imposées par les besoins courants, en principe, l'entretien ne peut être accordé sous la forme d'une prestation unique et globale. L'article 93 du Code de la Famille prévoit que l'obligation d'entretien s'exécute en nature ou par le paiement d'une pension en espèces. L'instance judiciaire établit le mode et les modalités d'exécution, en tenant compte des circonstances. En pratique, on a décidé que la pension d'entretien établit sous la forme de prestations

périodiques peut être remplacée par la déposition anticipée des sommes dues pour toute la période d'entretien. Les instances sont réticentes d'accorder des pensions d'entretien sous forme globale.

## **b) L'éligibilité**

2. Conformément à l'article 86 du Code de la Famille, obligation d'entretien existe en le mari et la femme, parents et enfants, celui qui adopte et l'adopté, grand-parents et neveux, arrière – grands parents et arrière neveux, frères et sœurs, mais aussi entre les autres personnes prévues par la loi.

Les autres personnes prévues par la loi sont :

- ?? ex- mariés qui ont divorcé
- ?? ex- mariés dont le mariage a été annulé, mais auquel au moins un des marié était de bonne croyance ;
- ?? en face d'un enfant qui a été pris en charge sans les formes d'adoption;
- ?? le mari qui a contribué à l'entretien de l'enfant de l'autre mari a l'obligation d'entretien de cet enfant ;
- ?? les héritiers de la personne qui a été obligée à l'entretien d'un mineur ou qui, sans obligation légale, a donné à celui-ci entretien.

La vocation d'entretien des personnes énumérées dans l'article 86 est réciproque.

3. L'obligation d'entretien des parents face à l'enfant est constitué de l'obligation d'assurance des moyens nécessaire à la vie : les aliments, une maison, des habits, des médicaments, des besoins spirituels – éléments qui entrent dans le contenu général de l'obligation d'entretien existante et autres catégories de personnes, qui dans ce cas contient l'obligation d'assurance des moyens nécessaires pour la croissance, l'éducation, l'apprentissage et la préparation professionnelle de l'enfant.

Dans ce sens restreint, l'enfant en entretien est l'enfant face duquel est établi l'obligation d'entretien.

4. Le Code de la Famille.

## **c) La procédure d'évaluation initiale de la pension d'entretien**

5. Dans le cadre de la procédure judiciaire.
6. Etablissement du quantum de l'obligation d'entretien se fait sur les mêmes critères.
7. La procédure judiciaire est identique, les critères sont les mêmes.

## **d) La méthode de calcul du quantum de la pension d'entretien**

8. Conformément à l'article 94 du Code de la Famille, l'entretien est du en conformité avec le besoin de celui qui le demande et avec les moyens de celui qui va le payer. Quand l'entretien est du d'un parent ou de celui qui adopte, il s'établit



jusqu'à un tiers de son gain du travail pour un enfant, un tiers pour deux enfants et la moitié pour trois ou plusieurs enfants.

(Il faut tenir compte de tous les enfants qui sont dans l'entretien de celui obligé, aussi d'autres mariages, en dehors du mariage ou des adoptés).

La base de calcul. Ce qui signifie gains du travail :

- ?? des gains habituels, ayant un caractère permanent, stables ;
- ?? non ceux sporadiques (heures supplémentaires, indemnités de déplacement, transfère, licenciement) ;
- ?? non ceux de gain pour des conditions difficiles spéciales.

Conformément à l'article 409 du Code de procédure civile, on peut suivre les salaire et d'autres gains réalisés du travail, les pensions accordés dans le cadres des assurances sociales, mais aussi d'autres sommes qui sont payées périodiquement au débiteur et sont destinées à l'assurance des moyens d'existence de celui-ci.

9. La loi ne prévoit pas d'autres critères d'évaluation.

10. Les critères sont les mêmes : le besoin de celui qui sollicite et les moyens de celui qui doit payer.

11. Le Code de la Famille.

#### **e) La réévaluation ou la modification des décisions concernant la pension d'entretien**

12. Le quantum de la pension ne se modifie pas automatiquement, une fois avec la modification des revenus du débiteur, mais seulement à la demande de la personne intéressée.

13. Seulement si la pension d'entretien est établie sous la forme d'une cote partie du revenus du débiteur, la majoration des ces revenus (ou l'index par exemple) conduit automatiquement à la modification automatique du quantum de la pension. Les instances judiciaires, par ailleurs, établissent rarement de cette manière la pension d'entretien.

14. La modification se fait par décision judiciaire, à la demande de la personne intéressée (crédeur/débiteur). L'instance compétente n'est pas obligatoirement celle qui a prononcé la décision initiale.

15. -

#### **f) l'établissement de la paternité**

16. Le Code de la Famille

17. L'établissement de la paternité ne suppose pas des procédures administratives, mais seulement judiciaires.

18. Dans le cadre de l'action pour l'établissement de la paternité de l'enfant de en dehors du mariage sont admissibles tous moyens de preuves : des inscrits, des témoins, interrogatoires, expertise (sérologique, anthropologique, dactyloscopique, etc.), présomptions. De même, la paternité de l'enfant de en dehors du mariage peut se faire par reconnaissance.

Les dépenses pour l'administration des preuves sont avancées, généralement par la partie qui demande cette preuve, mais l'instance peut obliger aussi l'autre partie de déposer les sommes nécessaires (article 170 du Code de procédure Civile).

La partie qui perd les prétentions avancées, va être obligée à demande de payer les dépenses judiciaires (article 274 du Code de procédure Civile).

19. Dans le système du Code de la Famille il n'est pas possible d'accorder la pension d'entretien sans que préalablement soit déterminer la paternité de l'enfant.

### **g) Le support juridique et l'assistance judiciaire et administrative**

20. -

21. L'assistance est réglementée par l'article 74-81 du Code de procédure Civile.

22. Les formes et les conditions de l'accord de l'assistance juridique ne diffère pas en fonction de la nature du litige ou de la qualité des parties.

### **h) Les dépenses judiciaires et d'autres dépenses**

23. Généralement, on parle seulement des honoraires des avocats et ceux pour l'administrations des preuves. Les actions pour l'établissement des obligations légales d'entretien sont dépensées du paiement de la taxe de timbre et du timbre judiciaire (article 15 lettre c de la Loi no. 146/1997 concernant les taxes de timbre judiciaire).

24. Non.

### **i) Les accords concernant le couverture, le transfère et l'exécution des décisions**

25 – 27. Conformément à l'article 409 du Code de procédure Civile on peut suivre les salaires et d'autres revenus procédure Civile on peut suivre les salaires et d'autres revenus périodiquement réalisés par le travail, les pensions accordées dans le cadre des assurances sociales, mais aussi d'autres sommes qui sont payées périodiquement au débiteur et son destinées à l'assurance des moyens d'existence de celui-ci.

Les revenus du travail ou toute autre somme qui sont payés au débiteur et sont destinées à l'assurance des moyens d'existence de celui-ci, au cas ou cela sont moindre que le quantum du salaire minimum net de l'économie, peut être suivi seulement sur la partie qui dépasse la moitié de ce quantum.

On ne peut suivre que les sommes dues avec titre d'obligation d'entretien et dédommagement pour la réparation des dommages causés par la mort, par la blessure corporelle pour l'incapacité de travail temporelle, la compensation accordée aux salariés en cas de annulation du contrat individuel de travail sur quelque base légale que ce soit, mais aussi les sommes qui reviennent aux chômeurs, conformément à la loi.

Les allocations d'état et les indemnisations pour les enfants, les aides pour les soins de l'enfant malade, les aides de maternité, ceux accordés en cas de décès, les bourses d'études accordés par l'état, les diurnes, et toute autre indemnisation avec une destination spéciale, établit conformément à la loi, ne peuvent être suivies pour aucune dette.

La preuve des moyens matériels se fait par tout moyen de preuve, comme étant un état des faits.

L'exécution. L'arrêt est constitué de la rétention de la somme due par le débiteur par celui qui à son tour lui doit des sommes d'argent. Se concrétisant, l'unité par laquelle est engagé le parent obligé à la pension d'entretien est obligée à retenir des droits salariales qui lui sont dus la somme qui représente le quantum de l'entretien, pour pouvoir être donnée à l'autre parent.

En vue de l'exécution, la loi oblige ceux qui doivent des sommes d'argent au débiteur suivi, qu'à la demande de l'instance d'exécution ou de l'exécuteur judiciaire de donner les informations nécessaires en vue de l'exécution, sous sanction d'amendes et mêmes de dédommagements si par le refus de communication on a apporté des préjudices (article 373 paragraphe 2 et 3 du Code de procédure Civile).

28. Le suivi forcé sur les biens mobile :

- ?? l'arrêt sur le salaire, pour les sommes qui se trouvent dans les comptes bancaires ou d'autres sources ;
- ?? par la vente des biens mobiles.

Le suivi forcé sur les biens immobiliers.

Les revenus et les biens du débiteur peuvent être soumis à l'exécution forcée si, conformément à la loi, on peut les suivre et seulement dans la mesure nécessaire pour la réalisation des droits des crédateurs.

On mentionne que à présent, les demandes concernant la pension alimentaire à l'étranger sont résolues en vue de la Convention de New York 1956, à laquelle la Roumanie a adhéré en 1991.

**NOTE AND QUESTIONNAIRE CONCERNING A NEW GLOBAL INSTRUMENT ON  
THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF  
FAMILY MAINTENANCE**

**PART 1 PRACTICE UNDER EXISTING INTERNATIONAL INSTRUMENTS**

**ANNEX 1**

PART 1 NEW YORK CONVENTION OF 20 JUNE 1956 ON THE RECOVERY ABROAD OF MAINTENANCE

*Section A Questions addressed to States Parties*

Question 1

***Do your authorities treat the New York Convention as complementary to (i.e. to be used in combination with) other international instruments such as the 1958 and 1973 Hague Conventions on the Enforcement of Decisions relating to Maintenance Obligations or the Brussels and Lugano Conventions?***

Answer

Scotland uses the conventions separately. We carry out Central Authority functions under both the Hague Convention (although there is no provision for this) and the New York Convention. We do not recognise and enforce orders under the New York Convention but we do arrange for maintenance to be obtained either voluntarily or with a fresh, Scottish order.

Question 2

***When acting as the requested State, do your authorities require a "decision" from the State of origin before taking steps for the recovery of maintenance?***

Answer

No previous decision is required unless the application is for spousal only maintenance.

Question 3

***What documentation do you require from a transmitting agency? Which documents are required in the original?***

Answer

The following documents are normally required if the application is on behalf of children:

- a. Acknowledgement or assumption of paternity (original or certified copy) including grounds on which the claim is sought;
- b. Marriage and/or birth certificates (original or certified copy);
- c. Statement of financial incomings and outgoings (original or certified copy);
- d. Statement that applicant is entitled to legal aid in requesting country (original);
- e. Power of attorney allowing Central Authority to take action on applicant's behalf (original);
- f. Statement of whereabouts of payer;
- g. Name and address of claimant.

If the application is for spousal only maintenance then the original or certified copy of the divorce is required along with the original or certified copy of maintenance order.

Question 4

***What are your standard procedures following receipt of documentation from a transmitting agency?***

Answer

When an application is received it is checked to ensure that it meets the appropriate criteria by the Scottish Executive Justice Department and will then be sent to the Law Society of Scotland. The Law Society will transfer the application to a private firm of solicitors near the location of the payer with expertise in this area of law. These solicitors will then take appropriate action on behalf of the applicant to obtain maintenance.

Question 5

***Are there any issues that have arisen concerning the categories of persons eligible to apply as "in need" and "dependent"?***

Answer

No.

Question

***Do you make use of standard forms, whether acting as a receiving or transmitting agency? (If so, could you please supply copies).***

Answer

A standard form is used when acting as a transmitting agency - copy attached.

Question 7

***Do your authorities permit public bodies/agencies to make use of the Convention procedures to recover maintenance payments on behalf of the maintenance creditor or to recover monies already paid by that public body/agency to the creditor, and if so, subject to what conditions (eg. power of attorney)?***

Answer

Unlikely that court would make an order in the name of a public authority. It can possibly make an order in the name of parent and then for money to be sent to public authority, providing that the claimant is still residing in requesting state and public authority has authority of maintenance creditor to collect on his/her behalf.

Question 8

***Legal assistance:***

***(a) Do you provide legal assistance to the claimant?***

Answer

(a) The claimant will receive cost-free legal advice and assistance from a private solicitor providing a certificate is produced to show that she is entitled to legal aid or exemption from expenses in requesting state.

Question

**(b) What form does this take?**

Answer

(b) See above.

Question

**(c) Is this subject to any conditions or limitations?**

Answer

(c) Claimant must be able to produce a certificate stating that she is entitled to legal aid or exemption from expenses in requesting country.

Question

**(d) Are applications for spousal and child support treated differently?**

Answer

(d) As regards legal assistance, such applications are not treated differently.

Question 9

**What costs incurred by your authorities, when acting as the receiving agency, are charged to the requesting State (or the claimant)?**

Answer

None.

Question 10

***What are your requirements with regard to the translation of documents submitted by the transmitting agency?***

Answer

Applications should be submitted with an English translation.

Question 11

***What languages do personnel in your authority (a) use, and (b) accept?***

Answer

- (a) English
- (b) We accept the languages of those countries with which we have reciprocal agreements, otherwise, translations of official documents into the English should be provided.

Question 12

***Does your authority accept any responsibility with regard to the transfer/receipt of maintenance payments on behalf of the creditor?***

Answer

No.

Question 13

***What rules/procedures apply with regard to the conversion of maintenance payments into the currency of the creditor's State?***

Answer

The exchange rate used is the rate on the day the order is registered in Scotland.



Question 14

***What methods of transferring funds are least costly for the maintenance creditor?***

Answer

Unsure because Scottish Executive Justice Department does not become involved with transfer of payments.

Question 15

***Are you aware of cases in which UN personnel, or personnel of other international organisations or Embassy staff, have claimed immunity under the Convention? If so, how were these cases resolved?***

Answer

No.

Question 16

***What powers or procedures are available to your authority to locate the whereabouts or place of work of a maintenance debtor/respondent.***

Answer

This subject is currently under review in the UK. Normally we can consult the Department of Welfare and Pensions about a possible address but this will only reveal the location of a person who is claiming benefits. Solicitors may be able to obtain legal aid to hire a private detective.

Question 17

***What is your policy in respect of a maintenance debtor/respondent whose entire income consists of public assistance payments?***

Answer

Not possible to arrest most state benefits. It is for the solicitor to decide the most appropriate action. It may be possible to reach voluntary agreement.

Question 18

***Does your authority have power to take or apply for any provisional or protective measures?***

Answer

There is an exception to the general rule against using diligence in respect of a future debt in actions for aliment or financial provision on divorce whereby the court, in terms of section 19 of the Family Law (Scotland) Act 1985, can grant a warrant for inhibition or arrestment on the dependence of the action and, if it thinks fit, to limit the inhibition to any particular property or to funds not exceeding a specified value.

Question 19

***What powers or procedures are available to your authority to determine the extent of assets of a maintenance debtor/respondent?***

Answer

None.

Question 20

***What are the principal problems, which you experience in dealing with cases (a) as a transmitting agency; and (b) as a receiving agency?***

Answer

(a) As a transmitting agency, the main problem is the lack of information about what documents are required and about the procedure in the respective country.

(b) As a receiving authority, the main problem is the lack of information about the payer's whereabouts.

Question 21

***Do you have any statistics indicating the number and outcome of cases brought under the New York Convention? If so, could you please supply them. If possible, please distinguish between incoming and outgoing cases, and indicate the other States involved?***

Answer

Statistical information such as this is not routinely collated, however such information could be produced if required.

Question 22

***Are there any States with whom you experience chronic difficulties in relation to the operation of the Convention?***

Answer

No chronic difficulties, just occasional delays in receiving progress reports generally.

**PART I - PRACTICE UNDER EXISTING INTERNATIONAL INSTRUMENTS**

PART II - HAGUE CONVENTIONS OF 1958 AND 1973 ON THE RECOGNITION AND ENFORCEMENT OF DECISIONS RELATING TO MAINTENANCE OBLIGATIONS

*Section A - Questions addressed to States Party to one or both Conventions*

Question 1

***Does a limitation period operate in respect of an action for the enforcement of a maintenance obligation? Which law governs any such limitation period?***

Answer

No limitation period.

Question 2

***Does a limitation period operate in respect of the execution of a writ for the recovery of maintenance? Which law governs any such limitation period?***

Answer

No limitation period.

Question 3

***Do your procedures for enforcement permit the debtor to claim inability to pay?***

Answer

An order will be enforced if the debtor has enough assets. The debtor may appeal against the registration of the order if he does not have enough assets.

Question 4

***Do your procedures allow for the possibility of modifying the content of a decision registered in application of the 1973 Convention?***

Answer

No.

Question 5

***Is the debtor entitled to bring modification proceedings in respect of the foreign decision? If so, what jurisdictional basis and on what grounds?***

Answer

No.

**PART I - PRACTICE UNDER EXISTING INTERNATIONAL INSTRUMENTS**

PART III - HAGUE CONVENTIONS OF 1956 AND 1973 ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS

*Section B - Questions addressed to non-Party States*

Question 1

***Are there any particular reasons why your State has not ratified the 1945 or 1973 Conventions?***

Question 2

***Are there any modifications/improvements to the 1956 or 1973 Conventions which would make their ratification/accession a more attractive proposition for your State?***

1-2 Lead policy is with the Lord Chancellor's Department.

Question 3

***Are spouses (or any other category of persons) free under your system to choose the law which will govern their maintenance obligations?***

Answer

It is thought that if a Scottish court has jurisdiction in an action for aliment between spouses it will simply apply Scottish law.

**PART I - PRACTICE UNDER EXISTING INTERNATIONAL INSTRUMENTS**

PART IV - GENERAL QUESTIONS

Question 1

***To what extent has the assessment and enforcement of maintenance obligations in your State become an administrative rather than a judicial activity?***

Answer

It is still mainly a judicial activity.

Question 2

***(If relevant). Has the movement towards an administrative approach had implications for international cases?***

Answer

Not relevant.

**PART II - QUESTIONS CONCERNING NATIONAL SYSTEMS OF MAINTENANCE  
OBLIGATIONS IN RESPECT OF CHILDREN AND OTHER FAMILY MEMBERS**

*Form of a maintenance decision*

Question 1

***What form may a maintenance decision take in respect of (a) a child and (b) a spouse or other family member? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?***

Answer

In Scotland, there are presently two systems for the determination of child support: the Child Support Act 1991 has taken priority over the Family Law (Scotland) Act 1985, and has effectively removed child support from the private law arena and the jurisdiction of the courts, to the public sphere and the stewardship of the Secretary of State for the Department for Work and Pensions.

Under the 1991 Act, decisions on maintenance are taken by the Child Support Agency, and are, therefore, administrative decisions. In those cases governed by the 1991 Act there would be an adjustment between the amount received by the parent with care on benefits and the amount of child support payable by the absent parent. This adjustment is done by means of set formulae. CSA awards are all periodical payments.

Although the Agency was meant to take over from the courts in this area, it has been unable to take on the full workload of all the mandatory and voluntary applications for assessment which it would potentially receive. Transitional provisions were therefore enacted to allow the courts to continue temporarily to make and vary aliment awards in cases where the parent with care was not in receipt of income support, family credit or disability working allowance, and where either (i) the parent with care had obtained a court order for aliment before April 5, 1993, or (ii) had made a written agreement relating to aliment with the absent parent before April 5, 1993.

Furthermore, it has now been provided that even if parents did not make an agreement before April 5, 1993 they can still ask the court to make a maintenance order which is in all material respects in the same terms as a written agreement entered into by the parties after that date.



Some residual jurisdiction, other than that arising due to transitional provisions, remains with the courts in respect of awards of aliment. This principally arises:

- (i) Where maintenance is sought for children who are aged over 16 (or over 19 if in full-time non-advanced education and the court has jurisdiction under the 1985 Act).
- (ii) Where an additional or "top up" aliment award is sought on top of the amount set by child support officers using the ordinary 1991 Act formula. This will be relevant only where the absent parent is a very high income earner;
- (iii) Where the absent parent lives abroad;
- (iv) Where support is sought from a non-parent who has accepted the child as a member of his family. This is possible under the 1985 Act but not the 1991 Act;
- (v) Where support is sought for a child with a disability.

For the aforementioned case and those others where maintenance is sought for a spouse, the 1985 Act is the relevant legislation. Under this Act it is not necessary to go to court to obtain aliment (note that under the 1991 Act parents can still enter into agreements, legally enforceable or not, provided caring parent does not claim benefit). Parties may reach their own agreements with respect to aliment which the courts will enforce. Otherwise, a judicial decision will be made on the matter. In granting decree in an action for aliment the court has power according to section 3(1) of the 1985 Act to:

"(a) Order the making of periodical payments, whether for a definitive or an indefinite period or until the happening of a specified event:

(b) Order the making of alimentary payments of an occasional or special nature ...

The Act says that this includes "payments in respect of inlying, funeral or educational expenses"; this power is not intended to give the court a power to substitute a lump sum for a periodical payment (section 3(2)). Aliment is conceived as being of an income nature although the regular payments may be supplemented by occasional or special payments under paragraph (b).

(c) to backdate an award of aliment

- (i) to the date of bringing of the action or to such later date as the court thinks fit; or
- (ii) on special cause shown, to a date prior to the bringing of the action;

(d) to award less than the amount claimed even if the claim is undisputed".

*Eligibility*

Question 2

***Who is eligible in your country to benefit from a maintenance decision? (e.g. child, spouse, other relative, etc).***

Answer

Under the 1991 Act only a "qualifying child" (one who has at least one absent parent) is eligible to benefit from a maintenance decision.

Under section 1(1) of the 1985 Act an obligation of aliment is owed by, and only by,

- (a) a husband to his wife
- (b) a wife to her husband
- (c) a father or mother to his or her child
- (d) a person to a child (other than a child who has been boarded out with him by a local or other public authority or voluntary organisation) who has been accepted by him as a child of his family.

Question 3

***What is your definition of a "dependent" child for child support purposes?***

Answer

For the purposes of the 1991 Act, a child is:

- (i) under the age of 16 or
- (ii) in full time education which is not advanced education, and under the age of 19 or
- (iii) under 18 and available for either work or youth training while the parent is still claiming child support in respect of the child.

For the purposes of the 1985 Act, a child is generally defined as a person under 18, but may also include a person over the age of 18 but under the age of 25 who is "reasonably and appropriately undergoing instruction at an educational establishment, or training for employment or for a trade, profession or vocation."

Question 4

***Which is the law applicable to the question of eligibility of (a) child and (b) spouse or other family member to obtain maintenance?***

Answer

The law applicable to the question of eligibility of a child and a spouse to obtain maintenance is the Family Law (Scotland) Act 1985, sections 1 to 7 and the Child Support Act 1991.

*Procedures for the initial assessment of maintenance*

Question 5

***Is child support determined through an administrative or a judicial process?***

Answer

It depends on whether the case falls within the 1991 Act or the 1985 Act (see above). If under the Child Support Act 1991, then, determination of child support is an administrative process; otherwise, it is still a judicial process.

Question 6

***Is the process different where either the applicant or the respondent live abroad? If so, please give details***

Answer

Proceedings arising out of an application under section 31(1) of the Maintenance Orders (Reciprocal Enforcement) Act 1972 are treated as an action for aliment within the meaning of the Family Law (Scotland) Act 1985 and, as said above, jurisdiction remains with courts in respect of awards of aliment if the absent parent lives abroad. In fact, the CSA has no jurisdiction to deal with claims where the absent parent lives abroad.

Question 7

***Is the process different where the application is for maintenance for a spouse or other family member rather than a child? If so, can the two processes be joined?***

Answer

The process is essentially the same; however different factors would be taken into consideration when determining the amount of aliment due. In cases of divorce, the court will make such award of aliment for children of the marriage as is justified in the circumstances, before turning to any question of financial support for the spouse.

*Methods of calculating Maintenance*Question 8

***Is the assessment of child support based on a formula, guidelines, or other criteria? Please outline the principal elements involved in making an assessment?***

Answer

Under the 1985 Act, aliment is such support as is reasonable in the circumstances having regard to the needs and resources of the parties, their earning capacities and, generally, all the circumstances of the case. Both present and foreseeable needs and resources are to be taken into account and a consideration of earning capacity clearly entitles the court to have regard not only to present earned income and opportunities in present employment but, more generally, to the potential income which it may be within a party's capacity to earn. The court is not to take account of any conduct of a party unless it would be manifestly inequitable to leave it out of account.

By contrast, under the 1991 Act, aliment is determined in accordance with set formulae, which are simplified by the Child Support, Pensions and Social Security Act 2000, in force since April 2002. Under the new formulae (section 1 and Schedule 1 of the 2000 Act) the only factors that matter are: net weekly income of the non residential parent (the absent parent in 1991 Act terminology) and the number of qualifying children living with the parent with care.

The weekly rate of child support maintenance is the basic rate unless a reduced rate, flat rate or the nil rate applies. The basic rate is the following percentage of the non-resident parent's weekly income:

15% where he has one qualifying child

20% where he has two qualifying children

25% where he has three or more qualifying children

Qualifying children includes step children as well as blood children by new partner.

Net weekly income is gross income less income tax, NI, and all payments into approved pension schemes.

#### Question 9

***Are there any differences in the assessment criteria employed when (a) the applicant or (b) the respondent live abroad?***

#### Answer

The CSA will not get involved at all if the respondent lives abroad.

#### Question 10

***Is the method different when the application is for maintenance in respect of a spouse or other family member rather than a child?***

#### Answer

Under the 1985 Act, the method of calculation of maintenance is not different in respect of a spouse rather than a child, although different factors would be taken into consideration when making the calculations, e.g., the court may, if it thinks fit, take account of any support, financial or otherwise, given by the defender to any person whom he or she maintains as a dependant in his or her household, whether or not the defender owes an obligation of aliment to that person.

#### Question 11

***Which is the law applicable to the assessment of maintenance for (a) child and (b) a spouse or other family member?***

Answer

The Child Support Act 1991 applies to children as specified above (see answer 1) and spouses seeking support not only for themselves but also for children of the marriage will come within the jurisdiction of the 1991 Act for the children unless they have a prior court order or agreement. For the remaining cases, the 1985 Act applies.

*Reassessment/adjustment/modification of maintenance decisions or assessments*

Question 12

***Are maintenance payments in respect of children or spouses or other family members subject to automatic reassessment, and if so, by whom and with what frequency?***

Question 13

***Are such payments subject to automatic adjustment in accordance with an external marker, such as the cost of living index, and if so, by what mechanisms and with what frequency?***

Question 14

***In what circumstances may a maintenance decision or assessment in respect of a child or a spouse or other family member be varied/modified upwards or downwards? Is this done by the same authority that made the original determination?***

Answers 12-14

Under the 1985 Act, maintenance payments in respect of children or spouses are not subject to any type of automatic reassessment.

A decree granted in an action for aliment may, on an application by or on behalf of either party to the action, be varied or recalled by an order of the court if, since the date of the decree, there has been a material change of circumstances. The provisions of the 1985 Act apply to applications and orders for variation or recall as they apply to actions for aliment and decrees in such actions. So the same factors have to be taken into account in quantifying aliment and the court has the same powers, including power to backdate a variation or recall to the date of the application or, on special cause shown,

to an earlier date. The expression "a material change of circumstances" can cover a change in foreseen circumstances on the basis of which the decree was granted. However, it will not cover the case where the court has simply made the original award on the basis of incomplete or incorrect information: in such a case there has not been a change of circumstances.

Under the 1991 Act, there is provision for reviews on a periodical basis. These are to be conducted as if fresh application for maintenance assessment had been made. The regulations provide that assessment must be reviewed after it has been in force for a period of 52 weeks (in the case of an assessment whose effective date is on or before April 18, 1994) or 104 weeks (where the effective date is after April 18, 1994).

Furthermore, there is also provision for review where there is a change of circumstances. This includes such matters as increases in wages or benefits; but for a reassessment to take place the change must normally satisfy one of several financial thresholds between £1 and £10. This is to avoid constant trivial revisions.

There may also be review at the instigation of the child support officer (CSO). This occurs where the CSO is satisfied that a maintenance assessment in force is defective because it has been made in ignorance of a material fact, is based on a mistake as to a material fact or is wrong in law: in these circumstances he or she may make a fresh assessment as if there had been an application by the affected party. In addition the CSO has power to make an assessment as if an application had been made on grounds of change of circumstances or against refusal to make or review an assessment where satisfied that application for such a review would be appropriate.

#### Question 15

***In what circumstances may a foreign decision or assessment be varied/modified on the application of a resident debtor?***

#### Answer

Under Part I of the 1972 Act, the registering court has like power to vary or revoke a registered order as if it had itself made and had jurisdiction to make the order. It may do so on the application of the payer or payee. The Act is silent on the law to be applied to an application for variation. The law applied by the reciprocating country would seem to be the appropriate law, but Scots law may be applied on the view that if it differs from that law, the necessary adjustment can, in the case of a provisional order, be made by the foreign court in deciding on confirmation.

Under Part 2, an order registered in a court other than that by which it was made may be varied or revoked by the registering court as if it had been made by it and as if that court had had jurisdiction to make it; and no other court shall have power to vary or revoke the order.

Under Part 3 of the Act, and with regard to the Republic of Ireland firstly, the powers of revocation and variation of an order remain exclusively with the courts of the country in which the order was made. Secondly, under the scheme of the Hague Convention Order, Scottish courts cannot vary or revoke an order made in a Hague Convention country (although the rate of payment may be altered in some cases). The provisions of the Reciprocal Enforcement (United States of America) Order 1995 allow Scottish Courts to vary or revoke an order made in the United States of America.

### *Establishing Paternity*

#### Question 16

***Which is the law applicable to the determination of paternity in the context of child support proceedings?***

#### Answer

The law applicable to the determination of paternity in the context of child support proceedings is section 5(I)(a) and (b) of the Law Reform (Parent and Child) (Scotland) Act 1986 and sections 28(2) and (3) of the Human Fertilisation and Embryology Act 1990.

#### Question 17

***Please summarise your administrative and legal requirements concerning the establishment of paternity in the context of child support proceedings.***

#### Answer

Paternity is primarily established through a parental genetic link between the child and the putative father. This link can be shown by leading extrinsic evidence, such as the results of scientific tests, though more commonly it is established by relying on one of a number of presumptions that the law provides. In cases involving artificially assisted



conception, paternity is deemed by the law from certain facts notwithstanding the acknowledged lack of any genetic connection.

*Section 5(1)(a) of the Law Reform (Parent and Child) (Scotland) Act 1986* provides that a man shall be presumed to be the father of a child if he was married to the mother of the child at any time in the period beginning with the conception and ending with the birth of the child. The presumption can be rebutted by proof on a balance of probabilities. The presumption is not rebutted by showing that either the husband or another man could be the father of the child. Scientific proof, such as DNA profiling, will in most cases be available and will give incontrovertible evidence of where the truth lies, but if it is not available extrinsic evidence on a number of factors may be led (e.g. proof that sexual intercourse took place at the relevant time).

*Section 5(1)(b) of the 1986 Act* provides that a man who is not married to the mother of the child at the relevant time shall be presumed to be the father of the child if both he and the mother of the child have acknowledged that he is the father of the child and he has been registered in the appropriate register as the father. As with section 5(1)(a), this is only a presumption that can be rebutted by proof on a balance of probabilities. Such proof will take the form of proof that the man registered as the father is not genetically related to the child as his or her father.

With regard to assisted reproduction, *section 28(2) of the Human Fertilisation and Embryology Act 1990* provides that where a woman has become pregnant as a result of the placing in her of an embryo or of sperm and eggs or of her artificial insemination, and at that time she was party to a marriage, then the other party to the marriage shall, so long as the embryo was created with sperm that was not his, be treated as the father of the child. This applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination. Section 28(2) does not create a presumption; it is, rather, the wholly artificial creation of a father-child relationship, deemed by the law from the husband's presumed consent to the relevant infertility treatment.

This section cannot be overcome by showing the absence of a genetic link, because its very application depends upon the absence of such a link. Likewise it is not open to another man to claim paternity by showing the existence of the relevant genetic link, for once that the provision applies no other person is to be treated as the father of the child for any purpose. Even in those cases where the mother's husband did not consent, section 28(2) will be effective until such time as the presumption of consent has been rebutted.

Finally, *section 28(3) of the 1990 Act* provides that where an embryo or sperm and eggs are placed in a woman, or she is artificially inseminated, and this is done "in the course of treatment services provided for her and a man together" by a person licensed to provide these treatment services under the 1990 Act, then the man shall be deemed, for all purposes, to be the father of the child. As with section 28(c), this provision applies only when there is no genetic link. When it applies, no other person is to be treated as the father of the child for any purpose and it is therefore irrelevant for anyone else to prove a genetic link between the child and any other person.

#### Question 18

***Please outline the legal procedures and the methods (including the scientific methods) by which paternity may be established in the context of proceedings for child support. Please indicate the costs that typically would be involved, who would bear these costs, whether the costs are capable of being covered by legal aid, and whether any distinction is made between residents and non-residents in these matters.***

If the presumptions above do not apply or if the facts of paternity are nonetheless disputed, then the matter must be resolved by evidence. The question of paternity must be resolved by raising an action for decree of parentage or non-parentage (under section 7 of the 1986 Act) or may arise as an incidental question within other proceedings such as an action for divorce, aliment or parental rights or responsibilities. The standard of proof in proceedings to establish or deny parentage is the normal standard of the balance of probabilities.

The most useful evidence in modern paternity proceedings is that gathered from scientific tests, such as blood tests or "DNA profiling".

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 70(1)(a) provides that in any civil proceedings, the court may request a party to provide a sample of blood, or other body fluid, or of body tissue, for the purpose of blood or DNA tests. The court has a discretion whether to choose to make such a request and will not do it in every paternity case. The court may make this request either on the application of one of the parties, or of its own volition. If a request is made, and the party it is addressed to does not comply, then they will not under the present law be physically compelled to undergo tests, nor be rendered in contempt of court. Instead, if a party to whom a request has been made does not comply, then the court may draw such adverse inference, if any, as seems appropriate, taking into account the subject matter of the proceedings.

If, for some reasons, DNA or blood test evidence is not available then it may still be necessary to use other types of more circumstantial evidence to try to establish paternity. In the past evidence was often led to try to establish that the pursuer could not have been the father because around the estimated date of conception he did not have sexual access to the mother of the child. Many other facts will be relevant evidence in a paternity dispute. In the past, evidence has been led as to the mother's opportunity to have sexual relations with other men, her actings around the time of conception, the opinions of friends and relatives, and so forth.

The claimant would not normally be required to pay any costs incurred during the testing procedures if they qualify for legal aid.

There is no distinction between residents and non-residents in these matters, therefore if a payer named as a defender in an action raised in Scotland for recovery of maintenance disputes paternity, then, the Scottish court would require to make a ruling on the issue after hearing evidence. If paternity is admitted at the hearing the court would normally make an order for maintenance at that time.

#### Question 19

***May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (b) if a law or a method is applied to that determination different from that applied in your country? If so, please explain the reasons.***

A foreign child support decision will not be refused if it entails a determination of paternity. The only grounds for refusal of the registration of an order are:

- registration manifestly contrary to public policy;
- order obtained by fraud;
- proceedings between same parties for same purpose pending before another UK court;
- order incompatible with another order in proceedings between same parties for same purpose

As said above, there is no distinction between residents and non-residents in these matters.

*Legal and administrative aid and assistance*

Question 20

**What forms of assistance (including administrative assistance, legal aid and advice) are available in your country to:**

- a. a resident claimant for child support**
- b. a claimant for child support who is resident abroad**

Answer

Forms of assistance available in Scotland to:

(a) a resident claimant for child support under 1985 Act: under 1991 Act just question of filling in forms: in this case, the claimant will need to apply for advice and assistance or legal aid giving particulars of his resources, i.e. claimant's disposable income and disposable capital.

(b) a claimant for child support who is resident abroad: in these cases section 43A of the Maintenance Orders (Reciprocal Enforcement) Act 1972 makes special provision for legal aid and for advice and assistance in reciprocal maintenance cases.

Section 43A(1) and (2) provide respectively that, where the responsible authority in the Reciprocating country, Hague Convention country, the Republic of Ireland, the Convention country or the USA has provided a certificate of entitlement stating that the maintenance claimant would qualify for complete or partial legal aid or exemption from costs in proceedings there, the maintenance claimant should receive legal aid or advice and assistance in Scotland without inquiry into his or her financial resources, and without the need to pay a contribution. A modified procedure for making application to the Board will therefore apply.

Question 21

**Please specify the principal eligibility requirements, including any means tests, for the different forms of assistance available.**

Answer

For the modified procedure to operate either in respect of advice and assistance or civil legal aid, as said above, a certificate of entitlement must have been issued in relation to

the application by the responsible authority in his or her own country; in these cases, the applicant is eligible for free legal aid without enquiry into his/her resources. Although the Board needs to be satisfied that the application has probabilis causa litigandi and that it is reasonable to make legal aid available.

In cases where the foreign authority is unable to give the certificate mentioned in section 43A(2), he will inform the nominated solicitor. The applicant will then need to apply for civil legal aid in the normal way giving particulars of his resources. Such an application must normally comply with the provisions of Regulation 5(2) of the Civil Legal Aid (Scotland) Regulations 1996, SI 1997 No. 727 (S67), namely:

1. The application must be in English or French
2. The application must be sworn:
  - (a) If the applicant resides within the Commonwealth or the Republic of Ireland, before any Justice of the Peace or Magistrate, or any person for the time-being authorised by law, in the place where he is, to administer an oath for any judicial or other legal purpose, or
  - (b) If the applicant resides elsewhere, before a Consular Officer in the service of Her Majesty's Government in the United Kingdom, or any other person for the time-being authorised to exercise the functions of such an officer or having authority to administer an oath in that place for any judicial or other legal purpose.
3. The application must be accompanied by a statement in writing, itemising the applicant's disposable income and disposable capital.

The Board has power to waive in whole or in part any of the requirements of Regulation 5(2) if it is satisfied that compliance with them would cause serious difficulty, inconvenience or delay and the application otherwise satisfies the Board's requirements.

The granting of a legal aid certificate will cover representation by a solicitor and where appropriate by counsel in the proceedings raised, and include all such assistance as is usually given by a solicitor or counsel in the steps preliminary to or incidental to the proceedings, or in arriving or giving effect to a settlement to prevent them or bring them to an end. In particular, legal aid will cover steps in the execution of diligence; this includes taking steps to locate a player who cannot be traced after a maintenance order has been registered. However, the routine collection of payments, and the transmission of these to the client will not be covered.

Question 22

***Are the rules and procedures concerning legal or administrative aid or assistance different for applications for maintenance for a spouse or other family member?***

Answer

No.

*Legal costs and expenses*

Question 23

***What are the typical legal costs and expenses (including lawyers' fees and court costs) involved in an application for child support or maintenance in respect of a spouse or other family member? Can you describe how these costs and expenses will vary from the initial application through any processes of appeal or review?***

The typical legal costs and expenses, involved in an application for child support or maintenance are:

- enforcement expenses
- expenses incurred tracing a payer who cannot be found after a maintenance order has been registered
- standard legal fees
- any unrecoverable court costs

As most of the maintenance cases are heard in the sheriff courts, if a maintenance order is appealed, then, an advocate needs to be appointed to present the case in the Court of Session which will entail additional expense.

Question 24

***Is it possible for payment of costs and expenses to be met from maintenance payments?***

Answer

Payments of costs and expenses cannot be met from maintenance payments.

*Collection and transfer arrangements and enforcement of decisions*

Question 25

***How is the payment and collection of (a) child support and (b) maintenance for a spouse or other family member organised in your country?***

Answer

Firstly, under the 1985 Act, the payment and collection of child support and maintenance for a spouse when the payer pays on a voluntary basis is usually organised through bank transfers and cheque payments.

Secondly, under the 1991 Act, rather than leave collection in the hands of parents with care, part of the remit of the Child Support Agency has been to provide a cheap collection and enforcement service. The 1991 Act introduce a flat fee for those who opt to use their collection services which also applies where parents with care have no ption as recipients of State benefits. This collection fee is payable by the absent parent.

Question 26

***What, if any, particular arrangements apply where payments are to be made or collected from abroad?***

Answer

The same arrangements as under the 1985 Act apply where payments are to be made or collected from abroad.

Question 27

***What are the procedures for enforcing (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member?***

Question 28

**Please list the methods available for the enforcement of (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member. In particular, please indicate whether any of the following enforcement/collection methods are available in your jurisdiction:**

- **wage withholding;**
- **tax refund intercepts;**
- **garnishments from bank accounts or other sources;**
- **deductions from social security payments;**
- **forced sale of property;**
- **division of pension benefits; and**
- **committal to prison**

Answer

If the payer fails to pay on a voluntary basis, under the 1985 Act the payee may use diligence procedures for enforcement of a maintenance order. Most of these diligences procedures (term used in Scotland to describe enforcement of a civil court order) are regulated by the Debtors (Scotland) Act 1987.

Section 19 of the Family Law (Scotland) Act 1985 (which freezes the power to enter into transactions over land or buildings) provides that in an action for aliment the court has power, on cause shown, to grant warrant for inhibition or warrant for arrestment on the dependence of the action and, if it thinks fit, to limit the inhibition to any particular property or to funds not exceeding a specified value. Thus, funds belonging to the payer which are held by a third party, e.g. a bank or a building society, may be attached by an arrestment and action of furthcoming. Furthermore, the payer's household goods may be attached by poinding and sale but some goods are exempt (e.g. clothing, tools of trade, basic domestic furniture, children's toys, etc .....).

Diligence is carried out by independent fee paid officers of the court called Messengers-at-Arms and Sheriff Officers. These officers must be paid for their work whether or not enforcement action is successful. If the claimant is eligible for legal aid then these fees will be paid by the Scottish Legal Aid Board. However, the claimant will be liable for these fees if they are not receiving legal aid.

So far as current aliment under a court decree is concerned enforcement is by means of a current maintenance arrestment under sections 51-56 of the Debtors (Scotland) Act 1987. This requires the employer of the debtor to deduct a sum, determined in accordance with a statutory formula, from the debtor's earnings on each pay-day and to



pay the sum so deducted to the creditor. If the payer changes jobs then a fresh arrestment would need to be served on the new employer. This can only be used if the debtor is in default to the extent of three instalments and only if at least four weeks have elapsed since the granting of the decree for aliment was intimated to the debtor. It is also possible for the arrestment of bank accounts, inhibitions and poiding.

Where the payer is unemployed and in receipt of social security or other welfare benefits, it is not possible to recover maintenance due from any part of those benefits.

As a last resort, where the payer refuses to pay maintenance due under a court order, the payee may raise an action for civil imprisonment of the payer. This would only apply if the payer has the ability to pay but continually refuses to do so. It is not an enforcement procedure and is not automatically granted, the sheriff has complete discretion.

The Child Support Agency (CSA), created by the 1991 Act, has a range of different alternatives to enforce decisions about the maintenance assessment. These include the possibility of a deduction from earnings order. In this case, the Secretary of State has a discretionary power to make such an order. This order may be made to secure the payment of arrears of child support maintenance, as well as future amounts, or a combination of both. A deduction from earnings order must be directed at the employer of the liable person and has effect from the date specified in the order.

Where a liable person fails to make one or more payments and it appears to the CSA that it is inappropriate to make a deduction from earnings order against him or, although such an order has been made, it has proved ineffective as a means of securing that payments are made in accordance with the maintenance assessment in question then the CSA may apply to the sheriff for a liability order against the liable person. This order, in turn, may be rendered operative by poiding and sale and an arrestment and action of furthcoming or sale.

Finally, where a liability order has been made the CSA is regarded as the creditor for the purposes of Section 4 of the Civil Imprisonment (Scotland) Act 1882, and this includes imprisonment for failure to obey decree for an alimentary debt.

To sum up, the methods available in Scotland for the enforcement of child support decisions and maintenance decisions in respect of a spouse are as follows:

- Wage withholding
- Garnishment from bank accounts or other sources

- Forced sale of property
- Committal to prison

Question 29

***What are the typical banking costs involved in the transfer of maintenance payments from/to your account?***

Answer

Standard banking costs would be charged.

Question 30

***Have any arrangements been developed in your country, either by the public or the private sector, to facilitate the easy and low-cost transfer of payment to/from abroad.***

***No, they have not***

**PART III QUESTIONS CONCERNING THE ELEMENTS TO BE INCLUDED IN THE NEW INSTRUMENT**Question 31

***Please list any shortcomings in the current processes for the obtaining or recovery abroad of child support or other forms of family maintenance by persons resident in your country which might be improved or remedied in the new instrument.***

Answer

The main problem we encounter is a lack of knowledge of administrative/judicial procedures in reciprocating countries. We cannot, therefore, always supply the applicant with much in the way of detailed information on what to expect, how long procedure will take, what supporting documents will be required and whether legal aid will be given. There is also a problem in the multiplicity of international instruments applicable and the complexity of the instruments.

Question 32

***Please list any shortcomings in the current process by which a foreign applicant seeks to obtain or recover child support or other forms of family maintenance from a person resident in your jurisdiction, which might be improved or remedied in the new instrument.***

Answer

The major problem facing an applicant from abroad seeking to obtain or recover child support in Scotland is the lack of power to locate a debtor and the lack of any effective procedure to compel the debtor to disclose his assets and employment. The creditor may then be at a disadvantage and enforcement will be difficult.

Finally, there is a problem where a foreign applicant holds an order which is not covered by an international agreement either because it is from a state not party to any agreement or the order is not one covered by any relevant agreement. In these circumstances the applicant will be able to start fresh proceedings but it is likely that sums due will not be backdated.

Question 33

***Bearing in mind that the new instrument is to be 'comprehensive in nature, building on the best features of the existing Conventions', and that the precise structure of the new instrument has still to be determined, please indicate any preliminary views you have on the key elements to be addressed in the new instrument. In doing so, you may find it helpful to use the following list and to indicate what degree of importance, if any, you attach to each of the items listed:***

- a. provisions concerning administrative co-operation;***
- b. provision for the recognition and enforcement of foreign decisions;***
- c. applicable law principles;***
- d. uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance;***
- e. provisions specifying the assistance to be provided to an applicant from another Contracting Party;***
- f. provisions concerning legal aid and assistance to be provided to an applicant from another Contracting Party;***
- g. provisions concerning co-operation in the establishment of paternity;***
- h. provisions concerning co-operation in the international transfer of funds at low cost;***
- i. provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis;***
- j. standard forms;***
- k. provisions aimed at securing compliance with obligations under the instrument;***
- l. provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor;***

**m. others. Please specify**

Answer

a. Essential but obligations should not be so wide that the cost of setting up Central Authority would deter states from signing the agreement. Time limits for dealing with cases would be useful.

b. Essential.

c. The question of applicable law raises all sorts of difficulties. We believe the main priorities should be proceeded with and only if it becomes clear that it is really necessary should anything be done.

d. See response to Q34.

e. Desirable but see (a) above.

f. Essential but again obligation should not be so great that it would deter states from signing. We suggest that legal aid should be available:

(1) Where an applicant has Legal Aid in his home state, he should qualify automatically for Legal Aid in the state in which the Maintenance Order is sought to be enforced.

(2) Where Legal Aid is available for enforcement action in the requested state the applicant should be entitled to such Legal Aid in accordance with local rules.

g. Desirable but there are a few complications. For example, if assistance is required from abroad to help make initial maintenance determination then Central Authorities may not be able to become involved because there is, as yet, no official application. Moreover consideration will have to be given to current rules of service and taking of evidence abroad.

h. Reluctant to become involved in transfer of funds.

i. Not desirable.

j. Essential.

k. Desirable but would have to make sure methods of enforcement are not too severe and concentrate on conciliation between states.

l. Possible advantages to this but real concern over legal aid being given to public bodies.

m. Others - desirable.

- Keep additional documentation to a minimum and minimise translation requirements;

- Include definition of a 'maintenance order' for example, should it cover lump sum payments? Must draw a line between maintenance obligations which do come within scope of Convention and rights in property arising out of a matrimonial relationship which do not come within the scope of the instrument.

- rules about appropriate jurisdiction for modifying orders.

#### Question 34

***With regard to the overall structure of the new instrument, and bearing in mind that the new instrument should 'combine the maximum efficiency with the flexibility necessary to achieve widespread ratification',***

***a. which of the elements that you have mentioned under 33 should be included as core elements in the sense that all Contracting Parties should without exception be bound to comply with them,***

***b. which of those elements should be optional, in the sense that Contracting Parties would have the freedom to opt in or opt out of them.***

***c. do you favour a general principle that, where recognition of an existing decision is not possible in the country where the debtor resides, the authorities of that country should be under an obligation to provide assistance to the creditor in obtaining a new decision?***

#### Answer

a. elements we regard as being core are:

1. administrative co-operation
  2. provision for the recognition and enforcement of foreign decisions
  3. uniform direct rules of jurisdiction
  4. some form of mutual provision for legal aid/assistance - we do not necessarily see this as core - see our response
  5. standard forms
- b. elements we regard as being optional are:
1. applicable law provisions
  2. Provision regarding co-operation in the establishment of paternity
  3. provision concerning co-operation in the transfer of funds
  4. provisions concerning public bodies claiming reimbursement of benefits paid to maintenance creditors.
- c. Yes, we do favour this. We already provide for this under the UN Convention.

Question 35

***In the case of States which have entered into bilateral or regional arrangements, please indicate which elements within those arrangements you would wish to see replicated or reflected in the new global instrument.***

- None especially

**PART IV NEGOTIATING PARTNERS AND MISCELLANEOUS**Question 36

***Apart from Member States of the Hague Conference and the States Parties to the New York Convention of 1956 (a full list is provided in Annex II) are there any other States that you would wish to be invited to take part in the negotiations of the new instrument?***

None especially

Question 37

***Would you be prepared to contribute to a fund (a) to enable poorer States to be able to take part in the negotiations or (b) to enable principal documents to be translated into Spanish and simultaneous interpretation in Spanish to be available at plenary sessions?***

We are consulting Lord Chancellor's Department about this.

Question 38

***Do you have a website or brochure which provides information about the system of support and other forms of family maintenance in your country? If so, please provide details or a copy of any publications.***

We have details about how to claim maintenance from abroad on the Scottish courts website - [www.scotcourts.gov.uk](http://www.scotcourts.gov.uk). We also produce a booklet about this. The booklet is available on the Scottish Executive Justice Department website - [www.scotland.gov.uk](http://www.scotland.gov.uk). If both parties are living in the UK the Child Support Agency has jurisdiction. Details about them can be found on [www.csa.gov.uk](http://www.csa.gov.uk)

*Note: Respondents are also invited to comment on any or other matters which they consider material to the development of the instrument.*



**Overall Conclusion**

We would advocate that a new global instrument is introduced to replace the Hague Convention of 1973 and the New York Convention of 1956.

The new instrument should provide a system for recognition and enforcement of a judicial decision relating to maintenance. We feel there should be rules of jurisdiction in the Convention and would favour using the habitual residence or domicile of the maintenance creditor. We do not think it appropriate that the creditor should have to raise an action outside her jurisdiction in order to obtain support for children. Having said that, it is appropriate that the rights of the debtor are protected and it must be shown that he has been served notice of the proceedings and a copy of any decision. It is likely that in most cases the debtor will have enough of a link with the creditor's residence to allow it to claim jurisdiction. This will satisfy states where such a link must be established. If there is no link between the debtor and the creditor's state of residence then there could be rules excluding the jurisdiction of the creditor's state and substituting the jurisdiction of the debtor. This should be seen as an exception and we would expect the creditor to be given assistance to raise the action. Moreover, there would have to be some consideration about the practicalities. It would be important to ensure that disagreements about jurisdiction did not lead to delays about arranging maintenance.

We would also be keen to see uniform rules regarding variation of orders. Here, we consider that the court or administrative body in the original country should have jurisdiction to vary the original order as long as the payee remains within that jurisdiction. If the requested state had jurisdiction to vary orders then a debtor could thwart any jurisdictional rules in favour of the creditor's residence by immediately seeking to vary the orders. The creditor would then have to organise legal assistance in the debtor's country to defend any moves for variation.

As regards variation, a possible compromise might be to allow the debtor to vary the order in his state but then to ensure that any variation is confirmed in the state where the order was made. This system is currently used by 'commonwealth countries'. We have little experience of this in practice but it does add an 'extra layer' into the procedures and there is increased potential for conflict between the two jurisdictions.

**EVIDENCE IN SUPPORT OF AN APPLICATION FOR RECOVERY OF MAINTENANCE UNDER THE UNITED NATIONS CONVENTION**

In the matter of

Court

against

, Claimant

, Respondent

\_\_\_\_\_, the claimant, being duly sworn, gives evidence as follows:

1. What is your full name, date of birth and nationality?
2. Where do you reside?
3. What is the full name and address of your legal representative in the United Kingdom, if you have one?
4. **ANSWER ONLY IF YOU HAVE AT ANY TIME BEEN MARRIED TO THE RESPONDENT**

When and where were you married to the respondent?

Are you still the wife of the respondent?

When did the respondent last live with you?

Were any children born of this marriage; adopted during the marriage; or accepted as members of the family during the marriage? If so, state the names, ages and dates of birth of the children and whether they were born of the marriage, adopted during the marriage or accepted as members of the family during the marriage.

Which of these child[ren] are financially dependent on you?

Are you claiming maintenance from the respondent for yourself, for one or more children or for yourself and child[ren]? List the persons for whom maintenance is claimed.

What briefly are the grounds for your claim?

When did the respondent last make a contribution towards the maintenance of the persons for whom maintenance is claimed?

Have you applied to any other court for a maintenance order for yourself and/or for any of the said children? If so, has any maintenance order been made? (Attach a copy of the order together with any certificate of arrears if the order was made by a court in the United Kingdom).

What is the amount of maintenance you are claiming from the respondent for yourself and/or any of the children?

5. **ANSWER ONLY IF YOU ARE SEEKING MAINTENANCE FOR CHILDREN BORN OUT OF WEDLOCK**

Is the respondent the putative father of any of your children born out of wedlock?

If so, what are their names, ages and dates of birth?

Has the paternity of these children been determined by any court? If so, when and by which court?  
(Attach copy of any order).

If paternity has not been determined by a court, have you evidence to support your allegation that the respondent is the putative father of these children?  
(Attach any such evidence).

Has the respondent made any contribution to you for the maintenance of these children? If so, when was the last time?

Have you applied to any other court for an order for maintenance of any of these children? If so, has any order been made? (Attach copy of order, together with any certificate of arrears if order was made by a court in the United Kingdom).

What is the amount of maintenance you are claiming from the respondent for these children?

6. Are you receiving assistance from the Supplementary Benefits Commission? If so, in what amount?
7. Are you employed and, if so, where? What is your occupation if you are not employed?
8. What is your present weekly "take home" pay (including overtime)?
9. Are you in business on your own account? If so, state nature of business and the last year's net profit.
10. Do you receive a weekly income from any of the following sources? If so, state the amount received.

Child Benefit  
Family Credit  
Social Security Benefit  
Disability Benefit/Pension  
Service pension  
Old age pension

11. Do you have any other source of income? If so, state source and amount?

12. What do you spend each week to support yourself and your children?

Rent (including council tax if payable by you)

Mortgage repayments

Household expenses (ie gas, electricity etc)

Food

Household supplies

Clothes

Hire purchase payments

School fees

School meals

Travelling expenses

Insurance premiums

Incidental expenses

Other

**TOTAL**

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13. So far as you know, what is the respondent's full name, date of birth and nationality?

14. Can you describe the respondent? (You should attach a photograph of him if you have one).

Height

Hair

Eyes

Other distinguishing marks (eg moustache, scars, etc).

15. **ANSWER TO THE BEST OF YOUR KNOWLEDGE AND BELIEF**

What is the respondent's present address?



**APPLICATION FOR THE RECOVERY OF MAINTENANCE FROM A PERSON SUBJECT TO THE JURISDICTION OF A STATE WHICH IS A CONTRACTING PARTY TO THE UNITED NATIONS CONVENTION ON THE RECOVERY ABROAD OF MAINTENANCE**

In the matter of

, Claimant

against

, Respondent

Court

1. The claim of [state name of claimant] who states that she is married to the said respondent and that she resides at
2. That the claimant is the mother and the said respondent is the father of the following dependent child[ren]:  
name born
3. That the claimant is entitled to and seeks the recovery of maintenance from the said respondent for [state whether maintenance is sought for yourself, your child[ren] or for both].

In the weekly amount of £

4. That upon information and belief the respondent is now residing at

and is subject to the jurisdiction of that State, which is a Contracting Party to the United Nations Convention on the Recovery Abroad of Maintenance done at New York on 20 June 1956.

**WHEREFORE**, the claimant applies for such an order of maintenance directed to the said respondent as shall be deemed fair and reasonable.

- 5. Evidence in support of this application is attached.
- 6. The following documents are also attached:
  - (1) an authority for the Receiving Agency in the said State to take on the claimant's behalf all appropriate steps for the recovery of maintenance.
  - (2) documents establishing the family relationship of the claimant and respondent and their relationship to any dependent child[ren]:  
namely
  - (3) a photograph of the claimant (and a photograph of the respondent) [delete if none available].
  - (4) other documents as follows:

(signed)  
[Claimant]

Taken before me this                                      day of                                      19

Justice of the Peace/Sheriff/Sheriff Clerk/Sheriff Clerk Depute



**FORM OF AUTHORITY**

I, the undersigned, .....  
(state full name)

of .....  
.....  
(state full address)

hereby empower .....  
(to be completed by Scottish Executive Justice Department)

to take, on my behalf, all appropriate steps for the recovery of maintenance  
from .....  
(state name of respondent)

including the settlement of the claim and, where necessary, the institution and  
prosecution of an action for maintenance and the execution of any order or other  
judicial act for the payment of maintenance.

Drawn up at ..... on .....  
.....  
(Signature)

As witnessed by .....  
.....



REGERINGSKANSLIET

Memorandum

Ju2002/6093/DOM

14 October 2002

**Ministry of Justice  
Stockholm, Sweden**

*Division for Procedural Law and Court  
Issues  
Legal Adviser  
Charlotta Arvidsson  
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Hague Conference on Private International  
Law  
Permanent Bureau of the Conference  
Att. Mr William Duncan  
Scheveningseweg 6  
2517 KT The Hague  
Netherlands

**Information note and questionnaire concerning a new  
global instrument on the international recovery of  
child support and other forms of family maintenance**

On behalf of the Ministry of Justice of Sweden I have the pleasure of providing you with the Swedish comments on the questionnaire.

**PART I  
PRACTICE UNDER EXISTING INTERNATIONAL INSTRUMENTS**

The Swedish answers on the questionnaire from 1999 are still accurate.

**PART II  
QUESTIONS CONCERNING NATIONAL SYSTEMS OF  
MAINTENANCE OBLIGATIONS IN RESPECT OF CHILDREN AND  
OTHER FAMILY MEMBERS**

**Form of maintenance decision**

**1. What form may a maintenance decision take in respect of (a) a child and (b) a spouse or other family member? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?**

a)

Maintenance payments shall be determined by a judgement or by agreement.

Payments shall be made in advance for each calendar month. However, the court may decide on another mode of payment if there are special reasons for doing so.

An agreement under which future maintenance is to be paid by means of a lump sum or for periods exceeding three months is valid only if it is in writing and is witnessed by two persons. If the child is under eighteen years

of age, the agreement must also be approved by the Social Welfare Committee.

Maintenance in the form of a lump sum shall be paid to the Social Welfare Committee if the child is under eighteen years of age. The sum paid to the committee shall be used to purchase from an insurance company an annuity for the child appropriate to the obligation to maintain the child, unless the agreement prevents this or the Committee finds that the sum can be used in some other appropriate manner for the maintenance of the child.

An application for maintenance payments to be determined may not be granted for a retroactive period of more than three years prior to the date of which proceedings were commenced, unless the person liable to pay maintenance agrees.

b)

If the spouses cannot agree on the issue of maintenance, a court can determine the dispute.

After a divorce, the maintenance allowance shall be periodic. However, payment of a lump sum can be ordered if there are special reasons, e.g. that the spouse needs to make a pension contribution.

An application for maintenance payments to be determined may not be granted for a retroactive period of more than three years prior to the date of which proceedings were commenced, unless the person liable to pay maintenance agrees.

### **Eligibility**

#### **2. Who is eligible in your country to benefit from a maintenance decision? (e.g. child, spouse, other relative, etc).**

Children, spouses and divorced spouses are eligible to benefit from maintenance decisions.

#### **3. What is your definition of a “dependent” child for child support purposes?**

- a) A child under eighteen years of age
- b) A child over eighteen, but under twenty-one years of age, if the child's basic education is not concluded

#### **4. Which is the law applicable to the question of eligibility of (a) child and (b) a spouse or other family member to obtain maintenance?**

The law of the State where the dependent has his or her habitual residence is applicable if the parties do not agree otherwise.

### **Procedures for the initial assessment of maintenance**

#### **5. Is child support determined through an administrative or a judicial process?**

Maintenance support for a child with parents who are separated is paid to the custodial parent by the local Social Insurance Office at a rate of SEK 1173/month. The parent liable for maintenance must repay the State, related to income and total number of children. If the allowance instead is paid directly to the custodial parent, the Social Insurance Office pays an equally reduced support. The obligation to repay is initially determined through an administrative process. There is no reason for a child or a parent to ask a court for a maintenance order unless the liable parent should pay more than SEK 1173/month and neglects this obligation.

#### **6. Is the process different where either the applicant or the respondent live abroad? If so, please give details.**

Children living abroad are not entitled to maintenance support from the Social Insurance Office. In those cases the maintenance allowances are decided through an agreement or a judicial process.

If the liable parent lives abroad, the Social Insurance Office can order the custodial parent to take steps to get the maintenance obligation determined through a judicial process. The Social Insurance Office takes over the child's right to maintenance allowance up to the sum paid out by the office as maintenance support.

#### **7. Is the process different where the application is for maintenance for a spouse or other family member rather than a child? If so, can the two processes be joined?**

There is no possibility for a spouse to get maintenance support from the Social Insurance Office. The maintenance allowance is decided through an agreement or a judicial process.

The two processes can be joined in a divorce case.

### **Methods of calculating maintenance**

#### **8. Is the assessment of child support based on a formula, guidelines, or other criteria? Please outline the principal elements involved in making an assessment.**

It is based on legal criteria. A parent is entitled to retain from his or her incomes net of tax an amount for his or her own maintenance. Housing expenses are generally calculated. In addition to this, there are other living

expenses, which are computed with the guidance of an index-linked standard amount. He or she can also reserve an amount for maintenance of a spouse at home if there are special reasons. Finally the liable parent can make a reservation for an amount for the support of children at home. How much of the excess that should be claimed for maintenance allowance depends, among other things, on the needs of the child and the other parent's capacity to bear the maintenance expenses. To some extent deductions can be made for expenses for contact.

**9. Are there any differences in the assessment criteria employed when (a) the applicant or (b) the respondent live abroad?**

No (if the same law still is applicable)

**10. Is the method different when the application is for maintenance in respect of a spouse or other family member rather than a child?**

Yes. There are no strict legal criteria. However, some of the assessment criteria mentioned above serve as guidelines.

**11. Which is the law applicable to the assessment of maintenance for (a) child and (b) a spouse or other family member?**

The law of the state where the dependent has his or her habitual residence is applicable if the parties not agree otherwise.

**Reassessment / adjustment / modification of maintenance decisions or assessments**

**12. Are maintenance payments in respect of children or spouses or other family members subject to automatic reassessment, and if so, by whom and with what frequency?**

No.

**13. Are such payments subject to automatic adjustment in accordance with an external marker, such as the cost of living index, and if so, by what mechanisms and with what frequency?**

Yes. They are adapted according to alterations in the price base amount. The National Social Insurance Board determines each year whether the maintenance allowance shall be altered and in that event by what percentage. The alteration, usually on 1 February, applies to maintenance allowance that has been decided before 1 November of the immediately preceding year.

**14. In what circumstances may a maintenance decision or assessment in respect of a child or a spouse or other family member be varied / modified upwards or downwards? Is this done by the same authority that made the original determination?**

The court may adjust a judgement or agreement concerning maintenance if this is prompted by a change in the circumstances. For the period prior to the commencement of proceedings, however, an adjustment contested by either party may only take the form of a reduction or cancellation of payments not yet made.

The court may also alter a maintenance agreement if the agreement is unreasonable in view of the circumstances. However, repayment of maintenance already received may only be ordered if there are special reasons for making such an order.

If the amount of a periodical maintenance payment has not been changed over a period of six years, other than through automatic adjustment, the court may, with respect to the period after the commencement of proceedings, review what was earlier decided about maintenance, without grounds for adjustments as set out above.

**15. In what circumstances may a foreign decision or assessment be varied / modified on the application of a resident debtor?**

In the same circumstances as a domestic decision may be adjusted.

**Establishing paternity**

**16. Which is the law applicable to the determination of paternity in the context of child support proceedings?**

Presumption of paternity: The law of the state where the child initially had habitual residence is applicable. If no one is considered to be the father according to that law, *lex patriae* is applicable.

When paternity is specially determined by an acknowledgement: *lex fori*.  
When paternity is specially determined by a judgement: the law of the State where the child has habitual residence at the time of the decision of the court of the first instance.

**17. Please summarise your administrative and legal requirements concerning the establishment of paternity in the context of child support proceedings.**

If the child's mother is married when the child is born, her husband is automatically considered to be the father of the child. If she is unmarried, paternity must be specially determined by an acknowledgement or by a judgement. The Social Welfare Committee shall endeavour to establish who is the father of the child and give him an opportunity to acknowledge the paternity. The mother of the child and the Social Welfare Committee shall approve an acknowledgement. The Social Welfare Committee may approve only if it can be assumed that the person who has acknowledged paternity is

the father of the child. If the investigation of the Social Welfare Committee does not clearly identify someone as the father or if the man who the committee considers is the father does not want to acknowledge paternity it is necessary to have the matter considered by a court.

**18. Please outline the legal procedures and the methods (including the scientific methods) by which paternity may be established in the context of proceedings for child support. Please indicate the costs that typically would be involved, who would bear these costs, whether the costs are capable of being covered by legal aid, and whether any distinction is made between residents and non-residents in these matters.**

The mother or the Social Welfare Committee normally conducts the child's action. The process is sometimes joined with an application for maintenance. Proceedings in the case may be brought against more than one man. On the application of a defendant, the court shall issue a summons to a man who has not already been summoned to appear in the case and consider whether that man is the father of the child. The records of the Social Welfare Committee's inquiries shall be submitted to the court and the committee may be ordered to make additional inquiries. The court shall ensure that the question of the paternity of the child is properly investigated. Blood tests shall be carried out with respect to the mother, the child and the man who may be the father of the child, if the latter requests it or there is reason to assume that the mother had sexual intercourse with more than one man during the period in which the child could have been conceived.

The court shall declare a man to be the father if it is established that he had sexual intercourse with the child's mother during the period in which the child could have been conceived and, having regard to all the circumstances, it is probable that he fathered the child.

Each party shall bear his or her own legal costs. However, a defendant may be required to reimburse another party fully or in part for that party's legal costs, if there are special reasons. The party's own legal costs can be covered by legal aid. With a few exceptions no distinction is made between residents and non-residents in these matters.

**19. May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (b) if a law or a method is applied to that determination different from that applied in your country? If so, please explain the reasons.**

- a) No, unless there is a special reason to refuse recognition of the paternity decision.
- b) No.

**Legal and administrative aid and assistance**

**20. What forms of assistance (including administrative assistance, legal aid and advice) are available in your country to:**

- a) a resident claimant for child support;**
- b) a claimant for child support who is resident abroad.**

Any person who is not a Swedish citizen and who is not resident in Sweden, neither at present nor at a previous stage, can receive legal aid for matters that will be tried in Sweden, if there are special reasons. If the matter will be examined abroad, legal aid can only be granted if the person is resident in Sweden. Nationals of all EU Member States have the same rights to legal aid as Swedish citizens. Nationals of other States will have the same rights if there is reciprocity.

Legal Advice and Legal Aid are governed by the Legal Aid Act (1996:1619). Legal Advice is available for up to two hours in all legal matters, for example concerning maintenance payments. Legal Aid can be obtained in matters concerning maintenance for children if there are special reasons for it. The justification for the requirement of special reasons stems from the fact that a child who is eligible for maintenance in most cases can obtain payment from the Social Insurance Office (see question 5). In such situations the child does not have to claim for maintenance and, accordingly, is not in need for Legal Aid.

Administrative assistance can be provided by the Social Insurance Office, Foreign Department (SIO).

**21. Please specify the principal eligibility requirements, including any means tests, for the different forms of assistance available.**

Legal Advice can be provided by a lawyer or junior barrister at a lawyer's office. Up to two hours' legal advice can be provided at a charge, currently SEK 1 162. If the person obtaining the legal advice has insufficient financial resources, the charge can be reduced by half. If the person obtaining the legal advice is a child, he or she usually does not need to pay anything.

To be eligible for Legal Aid one has to meet certain general conditions.

1. The applicant must have obtained Legal Advice for at least one hour.
2. The applicant must meet an income threshold. The current income limit is 260 000 SEK (approx. 27 375 EURO) a year. When the applicant's income shall be estimated attention is paid to his or her economic situation as a whole. For example, one shall consider child maintenance expenses, property and debts.
3. The applicant must be in need of a Legal Aid Counsel and it must be clear that such need can not be obtained by any other means, such as legal guidance from a specialised public authority.
4. It must be considered reasonable for public funding to contribute to the costs. The assessment of the reasonableness is made with regard to the character and significance of the matter in question, the value of the object of the civil case and other circumstances.
5. If the applicant has - or is considered ought to have had - a Legal Expenses Insurance, such insurance has to be used in the first place.



**22. Are the rules and procedures concerning legal or administrative aid or assistance different for applications for maintenance for a spouse or other family member?**

The requirement for special reasons to receive legal aid only applies to matters concerning maintenance for children. As mentioned under question 20, the justification for the requirement of special reasons stems from the fact that a child who is eligible for maintenance in most cases can obtain payment from the Social Insurance Office.

**Legal costs and expenses**

**23. What are the typical legal costs and expenses (including lawyers' fees and court costs) involved in an application for child support or maintenance in respect of a spouse or other family member? Can you indicate how these costs and expenses will vary from the initial application through any processes of appeal or review?**

The court proceedings themselves are free of charge in Sweden with the exception of an application fee, which is currently SEK 450. The most typical cost will therefore be lawyers' fees. There might also be costs for evidence and witnesses.

It is not possible to make any assessments of how these costs vary under the proceedings, since it vary from one case to another.

**24. Is it possible for payment of costs and expenses to be met from maintenance payments?**

No.

**Collection and transfer arrangements and enforcement of decisions**

**25. How is the payment and collection of (a) child support and (b) maintenance for a spouse or other family member organised in your country?**

Maintenance allowances shall be paid to the dependent. If the dependent is a child who has not attained the age of eighteen the allowance shall be paid to the custodial parent living together with the child. If the local Social Insurance Office pays maintenance support for a child to the custodial parent, the parent liable for maintenance may have to repay the State.

If a parent (a) or a spouse (b) neglects to pay maintenance or if a parent (a) neglects to pay back maintenance support, attachment may take place.

**26. What, if any, particular arrangements apply where payments are to be made or collected from abroad?**

In addition to what is required by the New York Convention, there are no special practical arrangements concerning payments. However, the SIO has, for example in Finland, opened a special bank account to make money transfers easier and cheaper.

**27. What are the procedures for enforcing (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member?**

Cases concerning enforcement (a and b) are dealt with by an officer at the Enforcement Service. An application is made orally or in writing. The enforcement title shall be submitted with the application. Undertakings in writing, witnessed by two persons, relating to maintenance allowance in accordance with the Marriage Code or the Parental Code are enforced as judgments that have entered into final force. A case concerning enforcement is processed for one year from the date of the application, but can be prolonged for an unlimited period.

**28. Please list the methods available for the enforcement of (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member. In particular, please indicate whether any of the following enforcement / collection methods are available in your jurisdiction:**

- wage withholding;**
- tax refund intercepts;**
- garnishment from bank accounts or other sources;**
- deductions from social security payments;**
- forced sale of property;**
- division of pension benefits; and**
- committal to prison.**

Possible methods:

- wage withholding; (attachment may only take place if the amount of the allowance remains unpaid or if the debtor on two or more occasions during the last two years prior to the attachment decision has failed to pay within the proper time and there is cause to assume that this may be repeated)
- tax refund intercepts;
- garnishment from bank accounts or other sources;
- deductions from social security payments;
- forced sale of property; and
- division of pension benefits.

**29. What are the typical banking costs involved in the transfer of maintenance payments from / to your country?**

Banking costs can be a problem for both payments to and from the country. There might be costs involved both when transmitting a payment and when withdrawing that same instalment in another country.

The SIO has an agreement with the Swedish bank *Nordea* with the effect that no banking fees are charged in Sweden. However, if payments are done through other banks, the fees can be quite considerable.

**30. Have any arrangements been developed in your country, either by the public or the private sector, to facilitate the easy and low-cost transfer of payments to / from abroad?**

The arrangements are the ones mentioned under questions 26 and 29, i.e. that the SIO has an agreement with the Swedish bank *Nordea* and that SIO has opened bank accounts in foreign countries to facilitate payments from both a practical and an economical point of view. The SIO plans to look into the possibility of opening bank accounts in more countries, since the arrangements have been successful.

**PART III**

***QUESTIONS CONCERNING THE ELEMENTS TO BE INCLUDED IN THE NEW INSTRUMENT***

**31. Please list any shortcomings in the current processes for the obtaining or recovery abroad of child support or other forms of family maintenance by persons resident in your country which might be improved or remedied in the new instrument.**

A few problems have been noticed in this respect.

1. When a child who is eligible for maintenance has obtained the payment in advance from an authority, the authority might succeed the child in the right to receive the payment from the debtor. In this situation not all parties to the New York Convention are of the opinion that the convention is applicable to the authority.

It could be valuable if a future global instrument stated that it would be sufficient for the applicability if the authority can present a power of attorney from the obligor.

2. There are different views whether the obligation stated in article 6 of the New York Convention also includes actions for establishing paternity. If a future instrument would ensure that this is the case, it would make the process more efficient and less costly.
3. There are no provisions dealing with the recovery of future increases of maintenance which are index-bound. It would be of interest to regulate also such recovery.
4. The New York Convention deals with the recovery of maintenance. Thus, it contains provisions regarding the right for the child or spouse to receive payments from the debtor. However, it does not contain any provisions concerning the rights of the debtor. For example, there

are no provisions dealing with modification of maintenance decisions in the interest of the debtor. To create balance, one might consider whether it would be appropriate for the new instrument to deal also with such questions.

5. When the receiving authority takes all appropriate actions to recover maintenance it might be necessary for it to examine, for example, whether the enforcement decision falls under any statute of limitation. In making such assessment the receiving authority shall apply the law of the state of the debtor, which sometimes can be a complicated task. Therefore, it could be of interest to find a less difficult solution to this problem.
6. It might be valuable to create provisions that in some detail describes how the receiving authority should act in carrying out its task of taking appropriate actions. From a practical perspective, a clearer framework on what elements that are included in the obligations of the receiving authority could be useful.

**32. Please list any shortcomings in the current processes by which a foreign applicant seeks to obtain or recover child support or other forms of family maintenance from a person resident in your jurisdiction which might be improved or remedied in the new instrument.**

No major shortcomings have been drawn to our attention.

**33. Bearing in mind that the new instrument is to be “comprehensive in nature, building on the best features of the existing Conventions”, and that the precise structure of the new instrument has yet to be determined, please indicate any preliminary views you have on the key elements to be addressed in the new instrument. In doing so, you may find it helpful to use the following list and to indicate what degree of importance, if any, you attach to each of the items listed:**

**a provisions concerning administrative co-operation;**

An important element.

**b provisions for the recognition and enforcement of foreign decisions;**

An important element.

**c applicable law principles;**

Would be valuable in dealing with provisions on statute of limitations.

**d uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance;**

To address this issue will be a complicated task and will take considerable time. In the context of maintenance decisions there is, at the moment, no urgent need for uniform direct rules of jurisdiction. The new instrument should therefore not focus on the issue.

**e provisions specifying the assistance to be provided to an applicant from another Contracting Party;**

An important element.

**f provisions concerning legal aid and assistance to be provided to an applicant from another Contracting Party;**

Important to have clear and predictable provisions, which already is the case in most situations.

**g provisions concerning co-operation in the establishment of paternity;**

To establish paternity and maintenance at the same time would be of great value to make the process more efficient.

**h provisions concerning co-operation in the international transfer of funds at low cost;**

Such provisions could be interesting.

**i provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis;**

Reciprocity should not be the key element. Instead one should focus on provisions which facilitate the recovery of maintenance despite the fact that there are no reciprocal arrangements.

**j standard forms;**

To develop standard forms suitable at a global level is a complicated task which takes time. The new instrument should not focus on this issue. Under all circumstances, the use of standard forms should not be mandatory.

**k provisions aimed at securing compliance with obligations under the instrument;**

An important element.

**l provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor;**

An important element. See under answer 31(1).

m others. Please specify.

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**34. With regard to the overall structure of the new instrument, and bearing in mind that the new instrument should “combine the maximum efficiency with the flexibility necessary to achieve widespread ratification”,**

**a which of the elements that you have mentioned under 33 should be included as core elements in the sense that all Contracting Parties should without exception be bound to comply with them,**

The elements mentioned under a), e), k) and l).

**b which of those elements should be optional, in the sense that Contracting Parties would have the freedom to opt in or opt out of them, and**

The elements mentioned under b), f), g) and h).

**c do you favour a general principle that, where recognition of an existing decision is not possible in the country where the debtor resides, the authorities of that country should be under an obligation to provide assistance to the creditor in obtaining a new decision?**

Yes.

**35. In the case of States which have entered into bilateral or regional arrangements, please indicate which elements within those arrangements you would wish to see replicated or reflected in the new global instrument.**

The new instrument should be built not only on the best features of existing Conventions, but also on important and valuable features of bilateral or regional arrangements. For example, when addressing provisions concerning administrative co-operation one should elaborate on the very good US-system for making research after debtors whose places of residence are unknown.

#### **PART IV**

#### ***NEGOTIATING PARTNERS AND MISCELLANEOUS***

**36. Apart from the Member States of the Hague Conference and States Parties to the New York Convention of 1956 (a full list is provided in Annex II) are there any other States that you would wish to be invited to take part in the negotiations on the new instrument?**

It would be of great value if European countries not parties to the Brussels and Lugano Conventions participate in the negotiations on a new instrument.

**37. Would you be prepared to contribute to a fund (a) to enable poorer States to be able to take part in the negotiations or (b) to enable principal documents to be translated into Spanish and simultaneous interpretation in Spanish to be available at plenary sessions?**

Sweden supports the idea of the fund and will explore ways to solve the financing of contributions to the fund. However, we cannot at this stage make any commitments to contribute to a fund.

**38. Do you have a website or brochure which provides information about the system of support and other forms of family maintenance in your country? If so, please provide details or a copy of any publications.**

Brochure and fact sheet are attached and are also available on websites

[www.justitie.regeringen.se](http://www.justitie.regeringen.se) and [www.social.regeringen.se](http://www.social.regeringen.se)

Specified e-mail address:

<http://www.justitie.regeringen.se/inenglish/pressinfo/pdf/famlaw.pdf>

<http://www.social.regeringen.se/pressinfo/pdf/familj/familjepolitiken.pdf>

<http://www.social.regeringen.se/pressinfo/pdf/familj/socialforsakringen.pdf>

## QUESTIONS CONCERNING NATIONAL SYSTEMS OF MAINTENANCE OBLIGATIONS IN RESPECT OF CHILDREN AND OTHER FAMILY MEMBERS

1. A maintenance decision (which includes also a court approved private agreement) has the form of a judgement which establishes the monthly sum of money to be paid. Only the arrears may be expressed in the form of a lump sum. There is not distinction in this respect between maintenance for a child or another person.
2. The beneficiaries are as follows:
  - the child has the right of maintenance against his parents and if they cannot fulfill their obligation, against the respective grandparents;
  - parents have the right of maintenance against their grown up children;
  - the spouses against each other (this obligation precedes the maintenance obligation of the children towards their parents);
  - ex spouses against each other (again this obligation precedes the maintenance obligation of the children towards their parents) as long as the needy ex spouse does not remarry;
  - unmarried mother of the child has the right of maintenance against the father of the child for a period of one year after the birth of the child.
3. A "dependent" child is a person unable to provide for himself. The jurisprudence have interpreted this notion as "the time during which the child is preparing for his future occupation through regular study". Possible interruption in the ongoing process (i.e. repeating a year of studies) has no influence over the existing obligation. However, if the child does not continue to the college after finishing secondary education (at the age of 17 or 18), starts working and then decides to take up college or university, the obligation is not automatically renewed. Though the court, upon a motion, may still award maintenance to the child. Depending on the circumstances of the case.
4. The law applicable to the whole maintenance obligation (including the eligibility) is the *lex patriae* of the beneficiary. However, the law does not specifically regulate the issue in respect of other (family) relations than the ones listed in point 2 above.
5. Child support is determined through judicial proceedings.
6. If the respondent lives abroad, the Slovak court does not have jurisdiction if maintenance of other person than a minor child is involved. If the beneficiary lives abroad, the jurisdiction of the Slovak court is not given, unless the respondent is a Slovak national. Otherwise the process itself is the same irrespective of the place of residence. Of course, if a foreign resident is involved, the procedure gets more complicated due to the need of service abroad and taking of evidence abroad (or application of foreign material law), etc.
7. The process is not necessarily different. The condition for the determination of maintenance are. The only difference is that while the maintenance of a minor child is adjudicated, the child has to have a special guardian in the proceedings (*guardian at litem*). No such person is involved in the proceedings for adult persons.

The law does not prohibit the joining of proceedings for maintenance of a child and another person, if it is effective. In practice this does not happen. On the other hand, the law prescribes that the establishment of maintenance for a child must be joined with the paternity proceedings and with a divorce proceedings. In fact, the proceeding is not solely for maintenance, but for the regulation of all parental rights and responsibilities (including placement and maintenance).



8. The assessment of child support is left for the court's discretion. The guiding criteria are the justifiable needs of the beneficiary as well as the abilities and possibilities of the obligor. Both parents fulfill their obligation on the basis of their abilities, possibilities and economic circumstances. The child has the right to share the standard of living of their parents. The court shall take into account the fact which parent personally cares for the child and to what extent and, if the parents live together, also their involvement in maintaining the common household. Recently a new aspect was added: if the financial circumstances of the obligor allow so, the accumulation of moneys for the purposes of future studies may also be considered as justifiable needs of the child.
9. No difference.
10. In addition to the common criteria (justifiable needs of the beneficiary as well as the abilities and possibilities of the obligor), there are some specific aspects. For the obligation of children towards their parents the criterion is that the children have an obligation to provide to their parents "decent living". Each child has this obligation to the extent that reflects the ratio of his abilities and possibilities to the abilities and possibilities of the other children. In maintenance obligation of spouses the criteria are that the material and cultural living conditions of both spouses must be equal in principle. The involvement in maintaining the common household must be taken into consideration, too. Ex spouse who is incapable of providing for himself/herself has the right to apply for "adequate" maintenance from the other ex spouse according to his abilities and possibilities. This right is limited by re-marriage or the death of the obligor.
11. Same as point 4.
12. There is no automatic reassessment provided for in the law.
13. N/A
14. The criterion for variation is "the change of circumstances" interpreted in the widest sense (in children usually the passage of time). The decision is done by courts. In cases of minor children there is even an obligation on the court to do so on its own motion if the circumstances of the case change.
15. The conditions are the same as under 14 above (if a Slovak court has a jurisdiction at all; it has jurisdiction solely in cases where the debtor is a Slovak national).
16. The law applicable to the determination of paternity is the *lex patriae* of the child (the nationality received through birth). If the child lives in Slovak, Slovak law can be applied if it is in the best interest of the child. *The question itself, however, is somewhat misleading: there is no "determination of paternity in the context of child support proceedings", there is only "determination of child support in the context of the paternity proceedings". Child support cannot be established if paternity had not been established first. Unless, of course, there question of paternity is not questioned. Then the "determination of paternity" is just a matter of evidence (birth certificate). If paternity IS questioned, the issue cannot be dealt with in the context of child support proceedings, but a proceedings on contestation of paternity, etc. have to be introduced separately.*
17. This question is answered in 16. Paternity has to be established as the first legal step, before the court can decide on child support. For the purposes of child support proceedings the paternity is evidenced through the birth certificate. The birth certificate is filled in by the administrative authority either on the basis of legal presumption (husband of mother), joint declaration of maternity made by the parents, on the basis of the court decision on the determination of paternity or on the basis of the decision of the Supreme Court of Slovak Republic recognizing a foreign

court decision relating to the paternity of a Slovak child. Consequently, in the context of the child support proceedings the issue of paternity is not dealt with. If the obligor should raise objections as to his paternity, the court would direct him to file an application to that matter and might (but is not under the obligation to) stay the proceedings in expectation of the outcome of any such proceedings.

18. As explained earlier paternity cannot be "established" in the context of support proceedings. The regular proceedings for the establishment of paternity is initiated upon the motion of the child or his mother. Since child is minor, the application, in the absence of application by the birth mother, is made in practice by *the guardian ad litem*. Such proceeding may result in joint declaration of both parents on the paternity or in the declaration of paternity by the court. The court shall name a man the father of the child, if it is proven to the court that the man had sexual intercourse with the birth mother at a period falling between 180 and 300 days before the child's birth, unless his paternity is excluded on serious grounds. Blood tests are used as the basic scientific tool. DNA testing is possible, but not yet standard practice. As regards costs of proceedings: under the present legal provisions, there are three aspects that make up this issue: the payment of court fees, payment of court costs and the costs of legal representation (attorney at law). The court fees are 500,-Sk at the moment, but if the child is the applicant, he is exempt from the fees. As regards the costs of proceedings, the rule is that each party bears their own costs. If a party needs an attorney (there is no legal requirement to be represented in the proceedings by an attorney), they have to ask the court first for the exemption from the payment of court fees. And if the court granted them the exemption, such decision would also extend to the fees for the attorney, if in the court's opinion the party needs an attorney to effectively protect his rights in the proceedings. There is no distinction between the residents and non-residents. There is a distinction between nationals and non-nationals. Equal treatment of foreigners is subject to reciprocity.
19. A decision containing the determination of paternity may be refused in the context of recognition and enforcement of foreign judgement on child support only in one instance: if the determination relates to a child who is a Slovak national and such decision was not previously recognized by the Supreme Court of Slovakia. In such case the court would close the case without prejudice, until the decision on paternity was recognized by the Supreme court. The recognition of a paternity determination is governed by rules of recognition contained either in domestic law or applicable international treaty. Under domestic law the application of a law (method) different from that applied in Slovakia is not legal ground for refusal or recognition.
20. Both foreign residents claiming maintenance in Slovakia and Slovak residents claiming maintenance abroad can be assisted by the Center for International Legal Protection of Children and Youth (also the Central Authority under the New York Convention) which provides its administrative assistance free of charge. If a Slovak resident claims maintenance abroad, apart from the assistance and advice by the Center, there is no other free legal aid and advice system in place. If a foreign claimant proceeds in Slovakia, the maintenance proceedings (including enforcement) before a Slovak court are exempt from court fees by operation of law. That does not apply automatically to costs of proceedings (see more explanation under 18). The Center does, however, represent such claimants before the Slovak courts free of charge on the basis of a power of attorney.
21. The maintenance proceedings (irrespective of who is the applicant) are exempt from the payment of court fees, if maintenance between parents and children are involved. In all other cases, the applicant is exempt from the payment of court fees. As regards

the costs of proceedings see under 18. The test of eligibility for the court's decision on the exemption from the payment of court fees contains two criteria: "the economic circumstances of the party so warrant" and it is no "arbitrary or obviously unsuccessful assertion or defence of a legal right".

22. The Centre does not provide administrative aid and legal advice to other applicants than children (outside of the New York Convention context). Otherwise the answer to 21 is applicable.
23. These are usually "low cost" proceedings, but we cannot provide you with overview of the typical costs and expenses, since such overview does not exist. The travel costs (for the parties to appear) and the lost earnings would be the typical costs involved, we presume.
24. The payments of costs and expenses cannot be met from the maintenance payments.
25. There is no specific system of payment and collection of maintenance (whether for children nor for other beneficiaries). If the maintenance is paid voluntarily, the obligor either direct his employer to withhold the sums and send them to the beneficiary or has a permanent order established with his bank or sends the money by postal money order. If maintenance is not paid voluntarily, the beneficiary has to apply for enforcement with the court or with the sheriff's officer (we have a parallel system of enforcement in Slovakia; sheriff's officers are more efficient, but also much more expensive).
26. There are no specific arrangements, with the sole exception of the existence of the Center which can provide free assistance.
27. The procedures do not differ. The applicant applies either to the court which subsequently orders enforcement in the form requested by the applicant (most often wage withholding) or to the sheriff's officer. The officer then requests the court to issue an authority for execution. The methods for enforcement available to the court and to the sheriff's officer are the same.
28. Again no distinction between the beneficiaries. The methods available are:
  - wage withholding;
  - assignment of a claim by the obligor (i.e. garnishment from bank accounts or other sources);
  - forced sale of movable or immovable property;
29. The banks charge from 0,5 to 3 % of the transferred sum abroad (depending on the destination – the fees for transfers to the Czech Republic are much lower – and on the fact whether the obligor is the client of the bank or not), with the minimum fee set at 200,- to 300,- Slovak Crowns. Transfers to Slovakia are without charges if the person is the client of the bank to which money was transferred. Otherwise charges are imposed depending on the transferred sum (the minimum charge being around 500,-Sk).
30. The Center has made arrangements for cases where the maintenance is being transferred via the Center (inside and outside of Slovakia). The Slovak banks do not charge any fees (in exchange for the Center not claiming interest). This, of course, has no influence on the fees charged by foreign banks upon receipt of the money transferred from Slovakia or upon transfer of the money to Slovakia.

## QUESTIONS CONCERNING THE ELEMENTS TO BE INCLUDED IN THE NEW INSTRUMENT

31. The problem of the current process sometimes is the variety of methods and legal bases of co-operation (enforcement), whereas the requested authorities tend to decline co-operation with reference to another available way, method, etc. The problem with the New York Convention lies exactly in the fact that it does not prescribe a certain way to proceed and thus does not provide any reliable method. The new instrument could be very helpful if it specified directly the obligations (alternative obligations) of the requesting authorities (States) i.e. recognize and enforce an existing maintenance order or, when recognition is not possible, initiate proceedings to obtain such an order. This should be the minimum standard of co-operation.

Another added value would be the system of co-operation of requesting and requested (central) authorities added on top of the system of the recognition and enforcement which is now absent in the relevant Hague Conventions.

Assistance in determining the whereabouts of the obligor and/or his employer (his income) would also help immensely.

Also, the instrument should be applicable in relations to States (like US and Canada) who cannot (for one reason or another) subscribe to a system of "unified" recognition and enforcement of foreign judgements (e.g. opt-out clauses).

A major practical help would be the introduction of a good rule on the statute of limitation (even though the acceptance of such a rule may prove difficult), either in the form of a "harmonizing" legal rule or in the form of conflict of law rules (in favor of the law of the beneficiary, if possible). The legal actions by the beneficiary are guided always by the knowledge or their own rules and their expectations may be thwarted by the application of rules of the requested State (e.g. the statute of limitation on maintenance in Slovakia is 3 years running for each individual installment; in Hungary it is only 6 months and the beneficiary has to prove to the court that the obligor willfully failed to pay maintenance to obtain arrears for a period beyond 6 months; it goes without saying that the beneficiary is almost never successful in proving the legal requirement; in the context of intercountry enforcement such requirement is unfair; if the law of the beneficiary applied or if a harmonized rule of a convention settled the matter, the beneficiary's legal position would be more transparent).

The difficulties some countries have with the transfer of maintenance abroad is also hampering the outcome of enforcement cases, the new instrument might be helpful also in this respect.

32. In view of the fact that Slovakia has created a highly specialized central authority to assist claimants from abroad whose obligations are well defined in the domestic legislation, the new instrument might not be so "vital" from this perspective for Slovakia. However, setting clear cut rules (see point 31) would help the Slovak central authority as well.

33. The key elements of the new instrument should be, in the order of importance we attach to them, as follows:

- I. provisions concerning administrative co-operation;
- II. provisions specifying the assistance to be provided to an applicant,
- III. provision for the recognition and enforcement of foreign decisions, with the alternate way of procedure if recognition is/was not possible,

- IV.** provisions on judicial assistance in cases of maintenance establishment and modification (also paternity, if included in the instrument);
- V.** provisions concerning legal aid and assistance
- VI.** provisions concerning transfer of funds
- VII.** opt out (pot in) clause (see point 31)
- VIII.** uniform direct rules of jurisdiction, etc
- IX.** applicable law (statute of limitation – see point 31)
- X.** standard forms
- XI.** co-operation in cases of establishment of paternity (though this may cause trouble)
- XII.** provisions concerning public bodies claiming reimbursement.

- 34. a)** core elements: I,II ,V and, if included, also VIII and IX  
**b)** opt out: III, IV, VI, XI and XII (also possibility of opt out for certain forms of maintenance, e.g. between unmarried couples, etc)  
**c)** as already follows from the previous responses, Slovakia is very much in favor of this general principle.
- 35.** The main element of these arrangements which we would like to have replicated in the new instrument is exactly the principle mentioned in point 34 lit. c/

#### **PART IV**

- 36.** Cuba, Vietnam and Ukraine come to mind since Slovakia has a lot of unsuccessful cases of maintenance enforcement in respect of these countries. Also the involvement of most Arabic countries would be interesting, but highly improbable that it would lead to a positive (workable) outcome due to their domestic legal systems.
- 37.** Unfortunately not. Under the present economic situation we would need such funding ourselves, to be able to participate at the negotiations.
- 38.** The central authority of Slovakia (The Center of International Legal Protection of Children and Youth) has a website [www.cipc.sk](http://www.cipc.sk) which includes basis information on intercountry enforcement of maintenance. The Ministry of Justice has elaborated an information document in English on the applicable provisions of the Slovak law in the field of maintenance establishment and enforcement which was used as the basis of negotiations on reciprocity with the Canadian provinces. The information document needs an update, but can be afterwards provided to the Hague Conference if that is the type of information sought.

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## ENGLAND & WALES ANSWERS TO QUESTIONNAIRE JUNE 2002 ON MAINTENANCE OBLIGATIONS

part ii questions concerning national systems of maintenance obligations in respect of children and other family members

### ***Form of maintenance decision***

1. **What form may a maintenance decision take in respect of (a) a child and (b) a spouse or other family member? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?**

The UK has two systems for dealing with maintenance obligations, the Child Support Agency and the courts in England and Wales.

#### **The Child Support Agency**

*Child Support Act 1991*

*amended by Child Support Act 1995, Social Security Act 1998 and Child Support, Pensions and Social Security Act 2000*

The Child Support Agency (CSA) is part of the Department for Work and Pensions. It covers the whole of the UK, but certain features differ slightly for Scotland and Northern Ireland. The CSA is responsible for assessing, collecting, paying and enforcing child support maintenance. The Agency operates out of six Child Support Agency Centres and across a network of local offices. The six Child Support Agency Centres are in Hastings, Falkirk, Dudley, Plymouth, Birkenhead and Belfast. The Centres carry out most of the maintenance assessment work and deal with the collection of maintenance payments. A Client Helpline Service is based in each Centre to allow the individual to phone the CSA about their particular case.

The main Centres are supported by a number of processing offices; these are responsible for a range of activities including tracing the parent who needs to pay maintenance, initiating contact with non-resident parents and arranging the payment of child support maintenance.

**(a)** Child support maintenance is awarded under the *Child Support Act 1991* and is administered in the UK by the Child Support Agency. The scheme only relates to child maintenance and does not cover spousal only maintenance.

The Act provides for the structure of the scheme, application for child support maintenance, calculation of the amounts to be paid appeals, variations, collection and enforcement. The detail of the scheme is left to regulations. Child support officers under delegated powers make certain decisions, such as the calculation of child maintenance and are subject to appeal under the Act

Child support maintenance decisions take the form of periodic payments of money, expressed as weekly amounts. Before 1993, lump sum payments and property transfers could be made as final settlements under a court order. Since the setting up of the CSA, these final settlements are not accepted, but are taken into consideration when making a maintenance assessment.

#### **The Courts**

(a) The Courts in England Wales provide for maintenance of the under the *Children Act 1989*.

*Children Act 1989 Schedule 1*

The Act provides for financial relief for a child in the High Court, or County Court or Magistrates' (Family Proceedings) Court.

Application can be made for a child under 18 years of age for the following:

periodical payments, secured periodical payments and lump sum payments, settlements of property or transfer of property. Where a child is over 18 and is undergoing education or training, or where there are special circumstances and there is not in force a periodical payments order immediately before the child reached the age of 16.

(a) & (b) The Courts also provide for maintenance for spouses and children, children, spouses only and other family members under various legislation.

*Matrimonial Causes Act 1973 sections 23,24A, 27 and 10(2)*

On granting a decree of divorce, nullity of marriage, or a judicial separation the court may make an order for periodical or lump sum payments for either party of the marriage and for periodical payments or lump sum payments to the applicant for the benefit of a child of the family or to the child of the family (sec23).

A spouse may apply to the High Court or a county court for periodical payments, secured periodical payments and a lump sum payment (but not a transfer of property) for him/herself and or for the children without a petition for divorce, judicial separation or nullity (sec 27)

Where the court makes a secured periodical payments order, lump sum payments order, or a property adjustments order, at anytime thereafter the court may make a further order for the sale of such property specified in the order. The order may contain supplementary provisions requiring the making of a payment out of the proceeds of sale, or it could be used to secure periodic payments (sec 24A).

An application can be made by a spouse where a court has granted a divorce (before the decree absolute) for a pension attachment and/ or sharing order where the petitioner has given an undertaking containing specific proposals to make suitable financial provision for the respondent (sec 10(2)).

*Domestic Proceedings and Magistrates' Courts Act 1978 sections 2, 6 and 7*

Financial provision may be made for either party of the marriage and for any child of the family. The magistrates' court may make an order for the following:

periodical payments or lump sum payments to the party to a marriage (spouse), periodical payments or lump sum payments to the applicant for the benefit of a child of the family to whom the application relates. A lump sum order is limited to £1000 (sec 2).

orders for payments that have been agreed by the parties can be made on the grounds that either party to a marriage has agreed to make such financial provision as may be specified in the application for the benefit of the applicant, the benefit of a child of the family or to a child of the family. There is no limit to the amount of a lump sum order here (sec 6).

These provisions are complementary to the orders for financial provision for children under the *Children Act 1989* above

*Inheritance (Provision for Family and Dependants) Act 1975 sec 2*

Certain members of the deceased's family and dependants may make a claim against the estate of a deceased person for financial provision. These are: the wife or husband of the deceased, a former wife or husband who has not remarried, a child of the deceased, any person who was treated as a child of the family and any person who was being maintained by the deceased before death.

The Court may make an order for periodic payments from the estate for a specified term, an order for the payment of a specified lump sum, an order for the transfer, and settlement or acquisition of specified property being part of the deceased's estate.

## **Eligibility**

- 2. Who is eligible in your country to benefit from a maintenance decision? (e.g. child, spouse, other relative, etc).**

### **The Child Support Agency**

Under the *Child Support Act 1991*, the people who are eligible to benefit from a maintenance decision are:

- ?? A parent who is the main provider (custodial parent) of day –to –day care of the child/children (qualifying child)
- ?? Someone other than the parent who lives with, and has care of the child/children (qualifying child). For example grandparents or other relations.
- ?? Other relations, or guardians who have care of a child whose parents live elsewhere in England, Scotland and Wales or Northern Ireland may be able to apply for child maintenance from the non-resident parent, provided there is no court order, or written maintenance agreement in force.
- ?? The non- custodial parent in certain defined circumstances may also be able to make a claim for maintenance. For example, where care of the child/children is shared, and the non-resident parent provides fewer nights of care than the other parent or person.

**The Courts**

?? Under the *Domestic Proceedings and Magistrates' Courts Act 1978*

Either party to a marriage may apply for financial provision in the Magistrates' Court for themselves or any child of the family.

?? Under the *Inheritance (Provision for Family and Dependants) Act 1975*

The following may apply for maintenance: the spouse of the deceased, the former spouse of the deceased who has not re-married, a cohabitant of the deceased, a child of the deceased, any person who was treated as a child of the family or any other person who before the death of the deceased was being maintained by him.

?? Under the *Matrimonial Causes Act 1973* either spouse to a marriage may apply to the High Court or County Court for maintenance.

- ?? Under the *Children Act 1989 Schedule 1* application for financial relief can be made to a High Court or County Court, or Magistrates' (Family Proceedings) Court for a child under 18 by a parent or guardian of a child, or the holder of a residence order. Additionally, a child can mean someone over the age of 18 in specified circumstances. Application can be made by a child over 18 who is, or will be undergoing education or training or where there are special circumstances, or whose parents are not living together, or where a periodical payments order was not in force immediately before he was 16.

(See

above)

**3 What is your definition of a "dependent" child for child support purposes?**

**The Child Support Agency**

*Child Support Act 1991 Section 55*

A person is a child if he is under the age of 16, or under the age of 19, if receiving full time education, which is not advanced education (still at school or an equivalent educational establishment), he is under the age of 18 and prescribed conditions are satisfied with respect to him.

**The courts**

*Domestic Proceedings and Magistrates' Courts Act 1978 Section 88*

A dependent child is defined in relation to one or both parties to a marriage and includes a child whose father and mother were not married to each other at the time of his birth.

A child of the family is defined as being a child of both parties to a marriage and any other child, not being a child who is placed with those parties as foster parents by a local authority or voluntary organisation and who has been treated as a child of the family by both those parents.

*Children Act 1989 Schedule 1*

Additionally, a child can mean someone over the age of 18 in specified circumstances. For example, a child who has reached the age of 18 and who is continuing in education, or to whom special circumstances apply can obtain from his parents periodical payments or lump sum payments where his parents are not living with each other in the same



household and there was no periodical payments order in force in respect of him before he reached the age of 16.

4. **Which is the law applicable to the question of eligibility of (a) child and (b) a spouse or other family member to obtain maintenance?**

**Lex fori**

?? Child Support Act 1991 as amended by Child Support Act 1995, Social Security Act 1998 and Child Support, Pensions and Social Security Act 2000

?? Children Act 1989 Schedule 1

?? Matrimonial Causes Act 1973 sections 23,24A, 27 and 10(2)

?? Domestic Proceedings and Magistrates' Courts Act 1978 sections 2, 6 &7

?? Inheritance (Provision for Family and Dependents) Act 1975 sec 2

**Procedures for the initial assessment of maintenance**

**5 Is child support determined through an administrative or a judicial process?**

Child support is determined through both an administrative process and a judicial process. The administrative process is conducted through the Child Support Agency, under the *Child Support Act 1991*. Child support is conducted through the courts in England and Wales when the following legislation is applied: *Children Act 1989 Schedule 1, Matrimonial Causes Act 1973, Domestic Proceedings and Magistrates' Courts Act 1978 and Inheritance (Provision for Family and Dependents) Act 1975*

6. **Is the process different where either the applicant or the respondent live abroad? If so, please give details.**

**Child Support Agency**

The UK Child Support Agency has no jurisdiction to deal with maintenance applications if the non-resident parent is not habitually resident in the UK, except if the non-resident parent works abroad for a company with a UK based payroll.

**The courts**

The process is not different in the courts in England and Wales. Once the process has been started, applications made under the *Maintenance Orders (Reciprocal Enforcement) Act 1972 s 27A* for a maintenance order in the case of a child or children alone is dealt with under the *Children Act 1989*. In any other case an application is dealt with under the *Domestic Proceedings and Magistrates' Courts Act 1978*.

**7 Is the process different where the application is for maintenance for a spouse or other family member rather than a child? If so, can the two processes be joined?**

See 1 above.

**Child Support Agency**

The Child Support Agency only applies to maintenance for children and does not apply to these circumstances at all.

**The courts**

In the courts in England and Wales spousal and child maintenance applications are often joined. However, applications for maintenance under the *Inheritance (Provision for Family and Dependents) Act 1975* cannot be joined and are always treated separately

**Methods of calculating maintenance**

8. **Is the assessment of child support based on a formula, guidelines, or other criteria? Please outline the principal elements involved in making an assessment.**

### **Child Support Agency**

For child support the Child Support Agency's assessment is currently based on a complex formula. It takes into account the number and ages of the children (qualifying child) and the ability of both parents to contribute towards the child maintenance. Ability to pay is calculated by looking at the income available after making allowances for basic day-to-day expenses. (This calculation is not carried out for a parent with care who is receiving public assistance payments.) The formula is based on Income Support (public assistance) rates. Rates of all child support maintenance are described as *basic rate, reduced rate, flat rate nil rate and shared care*. There are safeguards to ensure that non-resident parents do not pay maintenance of more than 30% of their net income. Maintenance is reduced if the parents share care of the child. A new, simpler, method of calculation is being introduced based on a percentage of the non-resident parent's net income after deductions have been made for the children in his current family - 15% for one child, 20% for two and 25% for three or more children.

### **The courts**

When making an assessment under *Schedule 1 of the Children Act 1989* the court will take the following into account:

- a. the income, earning capacity, property and other financial resources, which any parent of the child, the applicant for the order or any other person in whose favour the court proposes to make the order.
- b. the financial needs obligations and responsibilities which those mentioned at (a) above has or is likely to have in the foreseeable future.
- c. the financial needs of the child.
- d. the income, earning capacity (if any), property and other financial resources of the child.
- e. any physical or mental disability of the child.
- f. the manner in which the child was being, or was expected to be educated or trained.

Where a person is not the mother or father of the child the court would have regard to whether that person had assumed responsibility for the maintenance of that child and the length of time that responsibility was met. The court would also consider whether he did so knowing that the child was not his child and take into account the liability of any other person to maintain the child.

9. **Are there any differences in the assessment criteria employed when (a) the applicant or (b) the respondent live abroad?**

No. The same criterion is applied.

### **Child Support Agency**

See 6 above

For those cases where the non-resident parent lives abroad and the company has a UK based payroll, where the absent parent is in the armed forces, or employed by the Crown (including the Diplomatic Service), or is employed by certain UK based local authorities and health authorities no difference is applied to the assessment criteria by the Child Support Agency. In all other cases where a party resides abroad, the Child Support Agency does not apply.

### **The courts**

Assessment of maintenance by a UK Court is undertaken under the criteria set out in *Section 3 of the Domestic Proceedings and Magistrates' Courts Act 1978*, which mirror that of the *Matrimonial Causes Act 1973* and which are applied by the Divorce Courts. These are: -

- a. **The income, earning capacity, property and other financial resources that each party has or is likely or may reasonably be expected to have in the future.**
- b. **The financial needs, obligations and responsibilities which each of the parties has or is likely to have.**
- c. **The standard of living enjoyed by the parties prior to the breakdown of the relationship.**
- d. **The age of each party.**
- e. **Any disabilities.**

- f. Contributions, past and foreseeable, which the parties have made to the welfare of the family.
- g. The conduct of the parties if it is such that it would be inequitable to disregard it.

Applications for child maintenance from abroad are dealt with under the *Children Act 1989 Schedule 1*. The provision enables the High Court, County Courts to make periodical payments, make secured periodical payments, lump sum payments, settlement of property or transfer of property order (if the Convention or Agreement allows). The provision also enables the Magistrates' Family Proceedings Courts to make periodical payments or a lump sum order for a child irrespective of whether the child's parents are married.

### **10 Is the method different when the application is for maintenance in respect of a spouse or other family member rather than a child?**

NOTE: The UK Child Support Agency does not deal with applications for spousal or other maintenance.

#### **The courts**

The method of calculation is not different for a child, spouse, or other family member, however different factors are taken into consideration when the assessments are made. See 1 above.

### **11 Which is the law applicable to the assessment of maintenance for (a) child and (b) a spouse or other family member?**

Applicable law of the forum

#### **(a)**

?? Child Support Act 1991 as amended by Child Support Act 1995, Social Security Act 1998 and Child Support, Pensions and Social Security Act 2000

?? Children Act 1989 Schedule 1

#### **(a) and (b)**

?? Matrimonial Causes Act 1973 sections 23,24A, 27 and 10(2)

?? Domestic Proceedings and Magistrates' Courts Act 1978 sections 2, 6 &7

?? Inheritance (Provision for Family and Dependents) Act 1975 sec 2

### **Reassessment / adjustment / modification of maintenance decisions or assessments**

### **12 Are maintenance payments in respect of children or spouses or other family members subject to automatic reassessment, and if so, by whom and with what frequency?**

#### **Child Support Agency**

The Child Support Agency will look at assessments at intervals, based on the circumstances of the case, in order to bring them up to date - this is known as a periodic case check. If neither party to the assessment is in receipt of a prescribed benefit, such as Income Support or Jobseeker's Allowance, both parties will be invited to tell the Child Support Agency of any changes in their circumstances that might affect their assessment. If either party is in receipt of a prescribed benefit, a case check will be carried out automatically. The Agency does not, however, automatically re-assess liability.

#### **The Courts**

The courts, on the other hand in England and Wales do not automatically of their own motion re-assess maintenance payments. Assessment is done in response to an application

### **13 Are such payments subject to automatic adjustment in accordance with an external marker, such as the cost of living index, and if so, by what mechanisms and with what frequency?**

No

### **14 In what circumstances may a maintenance decision or assessment in respect of a child or a spouse or other family member be varied / modified**

**upwards or downwards? Is this done by the same authority that made the original determination?**

**Child Support Agency**

In relation to the Child Support Agency, either parent may apply to the deciding authority for the child support maintenance assessment to be varied/modified if there is a change of circumstances, or if the assessment was made on the basis of incorrect evidence.

The deciding authority may revise the decision without application to take account of a change or error.

Either parent may apply to the deciding authority for a departure from the formula assessment to take account of specific circumstances, for example, the cost of maintaining contact with the child (the non-resident parent); lifestyle inconsistent with declared income (the parent with care).

A Child Support Appeal Tribunal may also modify an assessment.

**The courts**

Under *Schedule 1 6A of the Children Act 1989* and the *Domestic Proceedings and Magistrates' Courts' Act 1978*, application can be made to the magistrates' court to vary a maintenance order for periodical payments and lump sum payments. The court may vary, revoke, revive, or alter by agreement between the parties, any order made under legislation. The grounds are usually based on a material change in circumstances and the Court will consider the case de-novo applying all the principles and criteria as outlined in legislation, unless the variation is agreed between the parties.

Under *Schedule 1 of the Children 1989* application can be made to the High Court or County Court to vary or discharge an order for periodical payments.

**15 In what circumstances may a foreign decision or assessment be varied / modified on the application of a resident debtor?**

**Child Support Agency**

The Child Support agency is not applicable in these circumstances.

**The courts**

In the courts a foreign assessment may be varied or modified where there has been a significant change in circumstances since the order was made, such as loss of regular employment.

Where countries are listed under Part 1 of the *Maintenance Orders (Reciprocal Enforcement) Act 1972*, and operating a common law judicial system (largely Commonwealth countries), the court may vary their registered order by a provisional order, if the reciprocating country has power to confirm that variation. The court that made the original determination makes the ultimate order.

Where there is an agreement with a reciprocating country under the New York Convention, the court in the UK can vary a registered order by a final order on an application that there has been a change of circumstances. The court in the reciprocating country therefore makes the order and not the court that made the original determination. A resident debtor in these circumstances is therefore able to apply for a final order to the court at which the order is registered.

The only variation the court can make in relation to an Order made under the 1973 Hague Convention is the method of payment and the place of payment.

**Establishing paternity**

**16 Which is the law applicable to the determination of paternity in the context of child support proceedings?**

The law applicable to paternity testing-

*Family Law Act 1986* – under section 55A individuals have a right to make a free-standing application to the Court for a declaration of Parentage. Companies accredited by the Lord Chancellor carry out scientific tests (this can be by way of mouth swab). Currently charges are £135 + VAT per sample tested.

*Child Support Act 1991*- under section 27, the Child Support Agency may make application for a Declaration of Paternity following a direction for blood tests or other form of DNA sampling.

*Children Act 1989* - section 89 also provides for the ordering of scientific tests to establish paternity.

*Common law* – a man shall be presumed to be the father of a child if he was married to the mother of the child at the time of the conception and birth of the child. The presumption can be rebutted, by DNA testing.

*Human fertilisation and Embryology Act 1990* - sections 27 & 28 (please see the response from the Scottish Executive).

**17 Please summarise your administrative and legal requirements concerning the establishment of paternity in the context of child support proceedings.**

For the court's purposes, practical arrangements are governed by the *Magistrates' Courts (Blood Tests) Rules 1971*.

For UK Child Support Agency purposes, parentage is only an issue where it is denied. The majority of non-resident parents named on a child maintenance application accept parentage.

Where parentage is denied before a maintenance assessment has been made, the UK Child Support Agency will consider whether a presumption of paternity can be made under *section 26 of the Child Support Act 1991*. If a presumption cannot be made, the parties will be offered scientific paternity tests in order to resolve the matter. Where scientific tests are not appropriate, e.g. the child was conceived via fertility treatment involving donor sperm or eggs, an application for a declaration of parentage via the courts will be considered.

Where parentage is denied following a maintenance assessment, the onus is on the alleged non-resident parent to provide evidence of non-parentage, but the UK Child Support Agency may offer scientific testing. Only conclusive evidence such as a DNA test result or a declaration of parentage/non-parentage will trigger a revision of the maintenance assessment. Either parent can apply at any time to a court for a declaration of parentage.

**18 Please outline the legal procedures and the methods (including the scientific methods) by which paternity may be established in the context of proceedings for child support. Please indicate the costs that typically would be involved, who would bear these costs, whether the costs are capable of being covered by legal aid, and whether any distinction is made between residents and non-residents in these matters.**

(See also 16 above)

In the courts application for maintenance is made by way of complaint. If paternity is challenged, the Complainant or Respondent may apply to the court for a Direction for Scientific Tests to establish paternity. If the results of these tests prove paternity, the court will make such a declaration. The court may draw inferences from refusal to comply with a direction for testing, but this refusal in itself would not be the sole evidence upon which a declaration would be made. Other evidence establishing the likelihood of the Respondent being the father of a child would be adduced, such as co-habitation, gestation charts etc.

Normally the person applying for the direction would be responsible for payment of the fees and associated expenses (such as travel), but in the case of an application by the Child Support Agency, they would indemnify such expenses. If an assisted party made the application for scientific tests to be carried out, legally funded services would indemnify the costs, which would be recoverable from the other party if the results of the tests were in favour of the party who applied for them.

For UK Child Support Agency purposes, where scientific testing is used as the means to resolve a parentage dispute, the costs are £224.58 at the discounted rate and £272.18 at the full rate. The discounted rate is applied where the non-resident parent pays in advance for the test. This is refunded to him where the test result is negative.

The full rate is applied where the UK Child Support Agency pays in advance for the test and the non-resident parent agrees to refund the monies in the event of a positive result. Or where the court directs scientific tests.

Residents and non-resident parents can apply to court for a declaration of parentage/non-parentage. A declaration of parentage is made in respect of each child. This is because the position in relation to each child must be considered, as they will not necessarily be the same. The cost of court proceedings depends on the level of court and time spent. The application fee to the court is £120 irrespective of whether it is made by an individual or the Secretary of State.

The time that it will take to deal with proceedings will depend on a number of factors, including the availability of court dates and the complexity of the case which may justify a number of hearings. It is, however, generally reasonable to expect that the proceedings would take a period of months to conclude and involve, as a minimum, an initial directions hearing and a final hearing. The length of

the final hearing will depend on the issues and the arguments to be put but it should be recognised that the availability of scientific evidence can lead to proceedings being unopposed.

Publicly funded legal services can be applied for. The most relevant level of service is Legal Representation. This is available subject to criteria including the application of a means test, prospects of success and cost benefit (that is the likely benefits for the client as against the likely costs of the proceedings).

Where proceedings are not dealt with under publicly funded legal services, then the client, whether applicant or respondent, must meet any costs of legal representation on a private client basis. The amount involved will depend on the charging rates of the solicitor and any barrister involved, as well as the time spent and complexity of the case.

**19. May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (b) if a law or a method is applied to that determination different from that applied in your country? If so, please explain the reasons.**

See 16 above

Generally speaking it would be accepted if the law of the reciprocating country had been applied. However, it is open to the person denying paternity to request scientific tests if the evidence obtained in that country is less reliable than DNA Testing.

## ***Legal and administrative aid and assistance***

**20 What forms of assistance (including administrative assistance, legal aid and advice) are available in your country to:**

**a a resident claimant for child support;**

**b a claimant for child support who is resident abroad.**

Public funding ("legal aid") is available to anyone who qualifies, provided the applicant is seeking advice on a matter of English law or using the courts of England and Wales and the case is within the scope of the scheme. There are different levels of service which have different detailed rules but the most common are Legal Help (usually used for advice outside proceedings) and Legal Representation (for representation in proceedings). Each application for funding is treated on an individual basis and is subject only to the statutory tests of the means of the applicant and the merits of their application. When the Legal Services Commission (LSC) considers applications for funding, the applicant's place of residence does not play any part in the decision-making process, although special administrative arrangements may apply.

Assistance and advice is provided by the Child Support Agency's National Enquiry Line, Client Help Line and on the Agency's website. Voluntary organisations such as the Citizen's Advice Bureau also provide advice and assistance. The UK child support scheme is administrative and non-adversarial. There is no requirement for legal representation. Therefore publicly funded legal services are only available or likely to be justified or granted in limited circumstances or when maintenance is fixed by the court (rather than the Child Support Agency).

**21 Please specify the principal eligibility requirements, including any means tests, for the different forms of assistance available.**

For Legal Representation, people receiving income support or income-based jobseeker's allowance automatically qualify financially for funding. Otherwise, people can get "free", or non-contributory, help, if they have a gross monthly income of less than £2,250, a monthly disposable income below £263 and disposable capital of £3,000 or less. If their monthly disposable income is between £263 and £695, or disposable capital between £3,000 and £8,000, they will be offered funding on the basis that they agree to pay contributions towards their legal costs. These figures have applied since 5 August 2002.

Since 5 August 2002, higher gross income thresholds have been set for families with five or more dependants. The list of state benefits, which were disregarded from disposable income, are now also disregarded from the assessment of gross income. The purpose of these changes was to ensure that

the gross income cap does not disadvantage those who have large families or rely heavily on disability benefits.

The LSC first calculates the gross income that an applicant will receive within the calendar month up to and including the date of the application. This means the total income from all sources, including the applicant's partner and any third parties such as friends or relatives. Certain state benefits, including Housing Benefit, Council Tax Benefit, disability living allowance and any payments out of the social fund, are disregarded from the total income. The gross income cap acts as a filter. If an applicant's gross income is less than the limit (currently £2250), the LSC will go on to assess disposable income and disposable capital.

To reach the disposable income figure, a number of other allowances are then offset against gross income. These include income tax; national insurance contributions; maintenance payments to an ex-spouse; child-care expenses incurred because of work; and rent or mortgage repayments. There are also fixed allowances for dependants.

For applications from 14 October 2002 the allowances have been as follows: -

Child age 15 or under £160.77 per month (£37.00 per week)

Child age 16 or over £164.25 per month (£37.80 per week)

Partner £133.40 per month (30.70 per week)

Although funding for full representation may not be available, an applicant may still be entitled to up to £500 worth of initial legal advice and assistance under the Legal Help scheme [(formerly known as advice and assistance or Green Form)]. This provides for basic advice from a solicitor on almost any point of English law. This help can include giving oral or written advice, writing letters, negotiating, and obtaining a barrister's opinion and the upper costs limit can be extended.

In order to qualify for Legal Help, an applicant must be receiving either income support, income-based jobseeker's allowance, or have no more than £2,250 of gross monthly income and £611 of disposable monthly income. An applicant must also have no more than £3,000 of disposable capital.

In addition to qualifying financially, an applicant must also show that the merits of the case justify the grant of public funding. The application is considered against criteria specific to the type of case; these criteria are set out in a document called the Funding Code. Broadly speaking, the test is designed to measure, taking all the circumstances into account, whether a privately paying client of moderate means would be prepared to spend his or her own money on taking the case.

For Legal Help a supplier contracted with the Legal Services Commission will apply both the means test and a merits test, which consists of two main elements – sufficient benefit to the client to justify work or further work being carried out and the reasonableness of funding from the Community Legal Service Fund, having regard to any other potential sources of funding.

The LSC must consider, for example, the prospects of success, any alternative sources of funding, and any other circumstances such as wider public interest or overwhelming importance to the applicant. It will also consider the possible benefits of litigation and, where possible, compare them to the likely costs.

## **22 Are the rules and procedures concerning legal or administrative aid or assistance different for applications for maintenance for a spouse or other family member?**

No. The same means testing arrangements apply and the same assessment against the Funding Code criteria would also apply.

### ***Legal costs and expenses***

## **23 What are the typical legal costs and expenses (including lawyers' fees and court costs) involved in an application for child support or maintenance in respect of a spouse or other family member? Can you indicate how these costs and expenses will vary from the initial application through any processes of appeal or review?**

### **Child Support Agency**

The Child Support Agency has no role in relation to the support of spouses or other family members.

In relation to the Child Support Agency, the making of a child support maintenance assessment and the collection, enforcement, onward transmission of maintenance within the UK are services provided free by the Agency. Processes of review and appeal are also free. Any court costs are borne by the Agency and there is no requirement for legal representation.

### **The courts**

The variables are such that legal costs and expenses involved in an application to the court for child support or other maintenance will depend on the level of court, which is used and the work, which has to be done in the circumstances of the particular case. Although court fees are fixed (by statutory order) relating to the type of application submitted to the court, the lawyer's fees and other expenses will depend on the work done. Where proceedings are publicly funded through legal aid, fees actually and reasonably incurred are allowed in accordance with hourly rates which are fixed by regulations. It is difficult to provide separate figures for legal costs and legal help, as individual statistics are not collated. These are all identified for legal aid purposes as family proceedings. Bills paid for family proceedings 2001-2002 show an estimated net cost of £2014 per application for financial provision cases brought under *Schedule 1 of the Children Act 1989*. For applications for financial provision where no children are involved the estimated net cost of £1,606 per application is given.

If a decision is appealed then the costs will be increased accordingly. Again, the amount involved will depend on the work done. In some cases, in particular where the residential/custodial parent is in receipt of benefits (income support), child support will be fixed by the Child Support Agency through an administrative process and the matter will not normally be considered by the court.

### **24 Is it possible for payment of costs and expenses to be met from maintenance payments?**

No. Costs are not met from maintenance payments

### **Collection and transfer arrangements and enforcement of decisions**

#### **25. How is the payment and collection of (a) child support and (b) maintenance for a spouse or other family member organised in your country?**

#### **Child Support Agency**

- a. The Child Support Agency will undertake on behalf of the parent any collection/enforcement for payment of maintenance; the individual cannot take private action on her own behalf. When a maintenance assessment has been made for child support the parents may choose to make payments directly between themselves or have the Agency collect the payments and pass them over. Where direct payment breaks down or the parent with care is receiving a welfare benefit (Income Support or income-based Jobseeker's Allowance) the non-resident parent will usually be required to make payments via the Agency.

### **The courts**

- b. The process in the courts is different from the Child Support Agency. With regard to the courts, payment for both (a) and (b) is usually made via the court for onward transmission and enforcement on default (with the consent of the receiving party). Payments may be made direct between the parties and the order registered with the court, but enforcement is not automatic and the recipient must invoke enforcement and prove non-payment in the latter circumstances. Most orders made at magistrates' court, or foreign orders registered in this country are registered for payment at the debtor's local magistrates' court.

#### **26. What, if any, particular arrangements apply where payments are to be made or collected from abroad?**

Payments from abroad are made directly to the payee (mainly county court orders) or to the collecting magistrates' court, where it passes through their accounts, before payment is made to the payee. Payments received from the USA are, in a small number of cases sent directly to the payee. In the majority of cases payments are sent to the Reciprocal Enforcement of Maintenance Orders Section (REMO) of the Lord Chancellor's Department, as a central authority to bank and convert the currency and subsequently pay the sums to the payee.



**27. What are the procedures for enforcing (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member?**

**Child Support Agency**

The UK Child Support Agency may require the non-resident parent's employer to deduct child support maintenance direct from the employee's wages. For other forms of enforcement the Agency has to make an application to the court.

**The courts**

In the courts in England and Wales enforcement is incremental – by reminder, by summons and finally by warrant to secure the attendance of the payer at court. An inquiry into his/her means and capacity to pay is then conducted. The

**28 Please list the methods available for the enforcement of (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member. In particular, please indicate whether any of the following enforcement / collection methods are available in your jurisdiction:**

- ?? **wage withholding;**
- ?? **tax refund intercepts;**
- ?? **garnishment from bank accounts or other sources;**
- ?? **deductions from social security payments;**
- ?? **forced sale of property;**
- ?? **division of pension benefits; and**
- ?? **committal to prison.**

The UK can apply all of the above methods for enforcement, except tax refund intercepts.

A person who is under an obligation to make payments in accordance with a registered order in the magistrates' court is required to give notice to the clerk of the registering court of any change of address. If the payer fails to give such notice, without reasonable excuse, he/she is liable to be convicted of a summary offence and fined up to a maximum of £500 or 14 days imprisonment in default.

The following enforcement/ collection methods are available in England and Wales: Legislation - *Magistrates' Court Act 1980* and *Maintenance Enforcement Act 1991*

- ?? wage withholding- as attachment of earnings order
- garnishment from bank accounts or other sources - not available in family proceedings/magistrates' courts, only available in County Courts and the High Court
- ?? deductions from social security payments - but only up to a maximum of £2.50 a week.
- ?? forced sale of property - not available in family proceedings /magistrates' courts, only available in County Courts as a last resort.
- ?? division of pension benefits - not available in family proceedings /magistrates' courts, only available in County Courts and before retirement at the time of divorce. However, pension is computed as income for the purpose of calculating maintenance where the payer has retired.
- ?? committal to prison – yes where the court, after conducting a means enquiry and having exhausted all other methods of enforcement, finds wilful refusal or culpable neglect to pay.
- ?? disqualification from driving – Child Support Agency only

**29 What are the typical banking costs involved in the transfer of maintenance payments from / to your country?**

Where money required to be paid under a registered order is expressed in a currency other than UK sterling, the order is treated as if it were an order for payment in Pounds Sterling at the rate of exchange prevailing at the date of registration of the order. Thereafter there is the rate of exchange costs and if payment is made through REMO an extra £5 charged by the clearing bank and subject to increase.

**30 Have any arrangements been developed in your country, either by the public or the private sector, to facilitate the easy and low-cost transfer of payments to / from abroad?**

No.

part iii questions concerning the elements to be included in the new instrument

**31 Please list any shortcomings in the current processes for the obtaining or recovery abroad of child support or other forms of family maintenance by persons resident in your country which might be improved or remedied in the new instrument.**

- ?? one of the main problems is tracing the liable person in their new place of residence. There is widespread ignorance of the law and who to approach.
- ?? a major failure is the delay experienced with most applications; it can lead to several years before even an answer to the application is given. The worst case experienced was a delay of 12 years before a final response was received.
- ?? there is no uniformity of approach when jurisdictions deal with the same types of applications. Lack of knowledge of different systems leads to confusion and adds to delay.
- ?? lack of clarity regarding documents required in individual jurisdictions and lack of knowledge about how to seek clarification can deter applicants.

**32 Please list any shortcomings in the current processes by which a foreign applicant seeks to obtain or recover child support or other forms of family maintenance from a person resident in your jurisdiction which might be improved or remedied in the new instrument.**

- ?? the court in England and Wales cannot check the truth of evidence obtained in the reciprocating country nor easily require prompt provision of collaborative or supplementary evidence.
- ?? information from the applicant is often incomplete and uninformative, especially in relation to financial circumstances.
- ?? there are not sufficient robust mechanisms available to enable a court to automatically react when a maintenance debtor defaults in his/her payments; reliance is placed on the payee to inform the court and ask for action to be taken when payments cease.
- ?? there is an inability of the courts to establish through an agency the whereabouts of the Respondent. There is limited access to information, which is often out of date.

**33 Bearing in mind that the new instrument is to be "comprehensive in nature, building on the best features of the existing Conventions", and that the precise structure of the new instrument has yet to be determined, please indicate any preliminary views you have on the key elements to be addressed in the new instrument. In doing so, you may find it helpful to use the following list and to indicate what degree of importance, if any, you attach to each of the items listed:**

**a provisions concerning administrative co-operation**

VERY IMPORTANT

- ?? these are considered to be very important. It is crucial to have good levels of administrative co-operation.
- ?? standardisation of forms and use of information technology for rapid communication/translation.
- ?? provision of a good practice guide
- ?? standardised agreement on how to deal with non-compliance, delays and completion of documents.
- ?? review approach to public authorities recouping payments.
- ?? the new global agreement could make provision for establishing a global system for electronic transfers of payments in a cost- effective way for the benefit of the payee.

?? we would welcome the opportunity to examine the benefits of comparing an administrative based system with a common law based scheme.

**b provisions for the recognition and enforcement of foreign decisions**

?? it is considered to be very important to maintain provision to enable variation of foreign decisions in the light of changed circumstances

?? there is no problem in recognising foreign decisions, however enforcement of them is difficult if they are not made on a sound basis of fact and the liable party's ability to pay.

?? it is considered to be very important that the convention makes provision for dealing with spousal maintenance.

**DESIRABLES**

?? consider the definition of maintenance in order to see if lump sum payments could be entertained.

?? advantages of provisional orders should be taken into account.

**c applicable law principles**

This would be difficult to achieve.

We would prefer the Conference to concentrate on the rules of Jurisdiction, and recognition and enforcement provisions rather than applicable law principles.

If it is considered necessary to consider applicable law, we would suggest that this should be carried out in such a way that it would not delay progress on the rest of dossier.

We would prefer to retain the principle of lex fori

**d uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance**

Yes – and where courts should have jurisdiction to hear other connecting factors.

**e provisions specifying the assistance to be provided to an applicant from another Contracting Party**

Yes -if they are drafted as clear and unambiguous.

**f provisions concerning legal aid and assistance to be provided to an applicant from another Contracting Party**

Yes- assistance should generally be state funded on a non-discriminatory basis, and subject to a means test or declaration, as the parties involved are most usually not in the high income bracket

**g provisions concerning co-operation in the establishment of paternity**

NOT IMPORTANT

**h provisions concerning co-operation in the international transfer of funds at low cost**

WORTH CONSIDERING AS AN IDEAL

See 33 (a) above. The conversion of currency is costly and causes delay, not least when the UK Court cannot agree with the reciprocating court upon the exchange rate to be applied

**i provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis**

No. This would be a retrograde step

**j standard forms**

Yes. See 33 (a) above. This is a priority

**K provisions aimed at securing compliance with obligations under the instrument**

Provision should be made for monitoring, education and support to ensure compliance.

**l provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor.**

Yes. Desirable and would be possible if powers centred on a central authority

**m others. Please specify.**

Fresh start – one single international Act, one single international treaty. This is challenging but not impossible.

**34 With regard to the overall structure of the new instrument, and bearing in mind that the new instrument should “combine the maximum efficiency with the flexibility necessary to achieve widespread ratification”**

**a which of the elements that you have mentioned under 33 should be included as core elements in the sense that all Contracting Parties should without exception be bound to comply with them.**

- ?? Standardisation of forms
- ?? Standardised agreement on how to deal with non-compliance, delays and completion of documents
- ?? Inclusion of a provision to enable variation of foreign decisions in the light of changed circumstances
- ?? Provision for dealing with spousal maintenance
- ?? Application of uniform direct rules of jurisdiction to the determination and modification of decisions in respect of maintenance and rules which give courts jurisdiction to hear other connecting factors
- ?? Provision specifying the assistance to be provided to an applicant from another contracting country

**b which of those elements should be optional, in the sense that Contracting Parties would have the freedom to opt in or opt out of them**

Provisions enabling public authorities to recoup payments from maintenance creditors

**c do you favour a general principle that, where recognition of an existing decision is not possible in the country where the debtor resides, the authorities of that country should be under an obligation to provide assistance to the creditor in obtaining a new decision?**

Yes

**35 In the case of States which have entered into bilateral or regional arrangements, please indicate which elements within those arrangements you would wish to see replicated or reflected in the new global instrument.**

part iv negotiating partners and miscellaneous

**36 Apart from the Member States of the Hague Conference and States Parties to the New York Convention of 1956 (a full list is provided in Annex II) are there any other States that you would wish to be invited to take part in the negotiations on the new instrument?**

Antigua  
Bahamas  
Guernsey  
Jamaica  
Jersey  
Malawi  
Nigeria  
Uganda  
Zambia

**37 Would you be prepared to contribute to a fund (a) to enable poorer States to be able to take part in the negotiations or (b) to enable principal documents to be translated into Spanish and simultaneous interpretation in Spanish to be available at plenary sessions?**

We are prepared to consider (a) and (b)

**38 Do you have a website or brochure which provides information about the system of support and other forms of family maintenance in your country? If so, please provide details or a copy of any publications.**

NO. However we are working on this under a communications strategy

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# 2002 SUPPLEMENTARY ANSWERS FOR ENGLAND AND WALES TO 1998 QUESTIONNAIRE ON MAINTENANCE OBLIGATIONS PART 1 -NEW YORK CONVENTION OF 20 JUNE 1956 ON THE RECOVERY ABROAD OF MAINTENANCE

## Section A

### 1. QUESTION

**What powers or procedures are available to your authority to locate the whereabouts or place of work of a maintenance debtor/respondent?**

#### ANSWER

When a respondent's address is not known to the applicant, the REMO section will contact other government departments i.e. the Department for Work and Pensions (Benefits Agency), the Passport Agency and the Immigration Department, for their assistance in ascertaining a current address for the respondent.

The police service used to fulfil this function but is now no longer available to do so other than to supply the court with any information from their records. There is a high proportion of cases, which are simply marked 'not served' because the court has been unable to determine that the application has been served upon the respondent. The court will consider proceeding in the absence of the respondent but without some positive information is unlikely to do so. The issue of a warrant against a respondent is not resorted to.

### 2. QUESTION

**What is your policy in respect of a maintenance debtor/respondent whose entire income consists of public assistance payments?**

#### ANSWER

Case law allows the court to determine that there shall be no order for maintenance. Previous practice of making nominal orders is not considered correct unless there is a likely change of financial circumstances in the near future.

### 4. QUESTION

**Does your authority have power to take or apply for any provisional or protective measure?**

#### ANSWER

The court has responsibility if the maintenance order is registered, to act to enforce the order.

### 6. QUESTION

**What powers or procedures are available to your authority to determine the extent of assets of a maintenance debtor/respondent?**

#### ANSWER

The court is able to summon the debtor and make a means enquiry and require that evidence be provided to the court of the extent of his/her assets.

### 21. QUESTION

Do you have any statistics indicating the number and outcome of cases brought under the New York Convention? If possible, please distinguish between incoming and outgoing cases, and indicate the other States involved.

**ANSWER**

We cannot provide statistics regarding the outcome of cases brought under the New York Convention. The table below shows incoming and outgoing cases brought in 2000, 2001 and to 7 October 2002

<b>COUNTRY</b>	<b>2000 2001 2002 (YEAR)</b>	<b>INCOMING total</b>	<b>OUTGOING total</b>
<b>Australia</b>	2 12 6	20	
<b>Austria</b>	1 1	2	
<b>Belgium</b>	3 0 0	3	
	1		1
<b>Brazil</b>	1	1	
	1		1
<b>Finland</b>	1 1	2	
<b>France</b>	3 3 1	7	
	1		1
<b>Germany</b>	2 1	3	
	1 4		
<b>Hungary</b>	1	1	
<b>Israel</b>	1	1	
	2		2
<b>COUNTRY</b>	<b>2000 2001 2002 (YEAR)</b>	<b>INCOMING total</b>	<b>OUTGOING total</b>
<b>Italy</b>	1	1	
	2		2
<b>Netherlands</b>	3 5 1	9	
	3		3
<b>Norway</b>	39 26 5	70	
<b>Philippines</b>			
	1		1
<b>Poland</b>	18 28 29	75	
<b>Portugal</b>	4	4	
	2		2
<b>Romania</b>	1	1	
<b>Spain</b>	6 4		10
<b>Sweden</b>	34 52 29	115	

	2		2
Switzerland			
	1		1
Yugoslavia	2	2	

**8. QUESTION**

**Are there any States with whom you experience chronic difficulties in relation to the operation of the Convention?**

**ANSWER**

See table above. Those countries that are part of the New York Convention and are not listed above use the convention very infrequently or not at all.





20 May 1999

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## Secretary-General's bulletin

### Family and child support obligations of staff members \*

The Secretary-General, for the purpose of implementing staff rule 101.2 (c) and pursuant to staff rule 103.18 (b) (iii), promulgates the following:

#### Section 1

##### Staff members' obligations

Staff rule 101.2 (c) provides, as one of the fundamental duties of all staff members, that they must comply with local laws and honour their private legal obligations, including the obligation to honour orders of competent courts. Such orders include orders against a staff member to make payments for the support of his or her spouse or former spouse and/or dependent children ("family support court orders").

#### Section 2

##### Procedures when staff members fail to comply with family support court orders

2.1 Under staff rule 103.18 (b) (iii), the Secretary-General may authorize deductions from staff members' salaries, wages and other emoluments for indebtedness to third parties. Family support court orders create indebtedness to third parties, such as the staff member's spouse, former spouse and/or dependent children.

2.2 To ensure effective relief when staff members fail to comply with family support court orders, the Organization will voluntarily take the following actions when it receives a family support court order against a staff member which is final and which is not being honoured by the staff member:

(a) The staff member will be requested to comply with the order immediately and to submit proof of compliance to the Organization within 30 calendar days from the date of receipt of the request from the Organization;

(b) If the staff member does not submit the proof of compliance within 30 days, the Organization will commence deductions from the staff member's United Nations emoluments in respect of the amounts ordered;

(c) The amounts deducted will then be paid to the spouse, former spouse or the dependent child(ren), in accordance with the order.

2.3 For the purpose of the present bulletin, a family support court order will be deemed final if the only action left in regard of that court order would be to have the order executed. If the staff member concerned contests the order, he or she must submit a new order of a competent court, setting aside or vacating the original order or staying the original order pending appeal, or proof that he or she has otherwise amicably resolved the matter with his or her spouse or former spouse. Until such evidence is submitted, the Organization will honour the original court order.

2.4 To facilitate the legal or judicial resolution of claims against staff members in spouse or child support cases, the Organization will continue to cooperate with the appropriate authorities and may provide, at their request, relevant information to persons or organizations outside the United Nations, when and in the manner it deems appropriate, even without the consent of the staff member. The staff member will be notified that the information has been provided and

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\* *Personnel Manual* index No. 1036.

of the nature of the information, and will receive a copy of this information.

### **Section 3**

#### **Implementation**

All requests for assistance in securing compliance with family support court orders and requests for information relating to family or child support are to be addressed to the Assistant Secretary-General for Human Resources Management for action. The Office of Legal Affairs will provide advice if the Organization is presented with conflicting family support court orders or if other legal issues arise.

### **Section 4**

#### **Final provisions**

4.1 The present bulletin shall enter into force on 24 May 1999.

4.2 The provisions in paragraphs 8 and 9 of ST/AI/399 are hereby abolished.

(Signed) Kofi A. **Annan**  
Secretary-General

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**Staff Rule 103.18**

Rule 103.18

Deductions and contributions

- (a) There shall be deducted, each pay period, from the total payments due to each staff member:
  - (i) Staff assessment, at the rates and subject to the conditions prescribed in staff regulation 3.3 and rule 103.17;
  - (ii) Contributions to the United Nations Joint Staff Pension Fund in accordance with article 25 of the Regulations of the United Nations Joint Staff Pension Fund and rule 103.16.
  
- (b) Deductions from salaries, wages and other emoluments may also be made for the following purposes:
  - (i) For contributions, other than to the United Nations Joint Staff Pension Fund, for which provision is made under these Rules;
  - (ii) For indebtedness to the United Nations;
  - (iii) For indebtedness to third parties when any deduction for this purpose is authorized by the Secretary-General;
  - (iv) For lodging provided by the United Nations, by a Government or by a related institution;
  - (v) For contributions to a staff representative body established pursuant to staff regulation 8.1, provided that each staff member has the opportunity to withhold his or her consent to, or at any time to discontinue, such deduction, by notice to the Secretary-General.

QUESTIONNAIRE FROM THE HAGUE CONFERENCE ON PRIVATE  
INTERNATIONAL LAW CONCERNING A NEW GLOBAL INSTRUMENT ON THE  
INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF  
FAMILY MAINTENANCE:

RESPONSE OF THE UNITED STATES OF AMERICA

PRELIMINARY NOTE: In addition to the information provided herein, the United States believes that three additional U.S. documents will be useful to persons wishing to understand the U.S. approach to international child support agreements. Those are 1) the provision of U.S. law that authorizes the negotiation and conclusion of bilateral child support agreements; 2) the Model Agreement that the U.S. has used in bilateral negotiations; and 3) a paper titled, "Toward an Accommodation of Divergent Jurisdictional Standards for the Determination of maintenance Obligations in Private International Law," which explains the U.S. fact-based, non-jurisdictional approach to the enforcement of child support obligations, and which was submitted at the 1999 Hague Conference Special Commission on Maintenance Obligations. Copies of these documents are attached hereto, and they should be considered integral parts of the U.S. response.

**PART I: PRACTICE UNDER EXISTING INTERNATIONAL INSTRUMENTS**

Because the United States is not a party to existing maintenance conventions, our previously submitted responses to the questionnaire sent out in advance of the April 1999 Special Commission only addressed questions to non-party states. We now submit supplemental information concerning the 1999 questions that were addressed to state parties. Although the questions ask for a state's practice "under the Convention," as we are not a party we simply provide information on our practice.

**1999 QUESTIONNAIRE ON MAINTENANCE OBLIGATIONS**

**PART I - NEW YORK CONVENTION OF 20 JUNE 1956 ON THE  
RECOVERY ABROAD OF MAINTENANCE**

**Section A - Questions addressed to State Parties**

1 Do your authorities treat the New York Convention as complementary to (i.e. to be used in combination with)

**other international instruments such as the 1958 and 1973 Hague Conventions on the Enforcement of Decisions relating to Maintenance Obligations or the Brussels and Lugano Conventions?**

The United States is not a party to any of the multilateral conventions; we currently rely on federal and state-level reciprocal arrangements for the establishment and enforcement of child support obligations.

**2 When acting as the requested State, do your authorities require a "decision" from the State of origin before taking steps for the recovery of maintenance?**

A decision is necessary for the enforcement of a foreign decision. However, if there is not a foreign decision, the U.S. jurisdiction may establish a legally enforceable order here.

**3 What documentation do you require from a transmitting agency? Which documents are required in the original?**

The Uniform Interstate Family Support Act (UIFSA), enacted as the local law of each U.S. state, requires that:

"the [petition] or accompanying documents must provide, so far as known, the name, residential address, and social security numbers of the obligor and the obligee, and the name, sex, residential address, social security number, and date of birth of each child for whom support is sought. The [petition] must be accompanied by a certified copy of any support order in effect. The [petition] may include any other information that may assist in locating or identifying the [respondent]."

**4 What are your standard procedures following receipt of documentation from a transmitting agency?**

The petition or pleading will be filed with the appropriate tribunal, and the petitioner will be notified where and when it was filed.

**5 Are there any issues that have arisen concerning the categories of persons eligible to apply as "in need" and "dependent"?**

There is no requirement that an applicant be "in need" to apply for services from a state child support enforcement agency.

**6 Do you make use of standard forms, whether acting as a receiving or transmitting agency? (If so, could you please supply copies).**

The federal government mandates the use by all U.S. state child support enforcement agencies of standard forms in interstate cases and is working with other nations on forms (bilingual, where appropriate) for use in international cases.

**7 Do your authorities permit public bodies/agencies to make use of the Convention procedures to recover maintenance payments on behalf of the maintenance creditor or to recover monies already paid by that public body/agency to the creditor, and if so, subject to what conditions (e.g. power of attorney)?**

As a non-party, the United States does not use Convention procedures. However, a state child support enforcement agency may only recover the amount of support payments owed by the obligor and not necessarily the cost of all public benefits provided to the obligee.

**8 Legal assistance:**

**(a) Do you provide legal assistance to the claimant?**

While there is not an attorney/client relationship between the child support agency and applicant, state child support enforcement agencies provide all any necessary and appropriate administrative and legal assistance to the families they serve.

**(b) What form does this take?**

Services are provided by state child support enforcement agencies and vary by state according to the procedures and practices of each state.

**(c) Is it subject to any conditions or limitations?**

The child support agency decides what services are necessary and appropriate.

**(d) Are applications for spousal and child support treated differently?**

Yes. State child support enforcement agencies will enforce support obligations with respect to a child and a custodial parent who lives with that child. In cases where there are no minor children, state agencies will not provide services for spousal support, unless an individual state elects to do so in the given circumstances.

**9 What costs incurred by your authorities, when acting as the receiving agency, are charged to the requesting State (or the claimant)?**

No costs are charged to foreign reciprocating states or foreign obligees.

**10 What are your requirements with regard to the translation of documents submitted by the transmitting agency?**

All documents to be presented to a child support tribunal must be translated into English.

**11 Which languages do personnel in your authority (a) use, and (b) accept?**

English is the only language accepted by most state child support agencies.

**12 Does your authority accept any responsibility with regard to the transfer/receipt of maintenance payments on behalf of the creditor?**

All state child support agencies have a state disbursement unit, which assists in the collection of payments and the transfer of those payments to the benefit of the obligee.

**13 What rules/procedures apply with regard to the conversion of maintenance payments into the currency of the creditor's State?**

Maintenance payments collected in the United States are typically transmitted in U.S. dollar denominations, regardless of residence of obligee.

**14 What methods of transferring funds are least costly for the maintenance creditor?**

Electronic transfers by automated clearinghouse gateways, currently under development by the global financial community, are the least costly transfer solution. Another low-cost option is for a foreign obligee to obtain a debit card account on a U.S. bank so that payments may be accessed through an automated teller machine.

**15 Are you aware of cases in which U.N. personnel, or personnel of other international organizations or Embassy staff, have claimed immunity under the Convention? If so, how were these cases resolved?**

In cases where personnel of international organizations or Embassies claim immunity, the state child support enforcement agency will contact the organization directly for assistance.

**16 What powers or procedures are available to your authority to locate the whereabouts or place of work of a maintenance debtor/respondent?**

The federal government operates the Federal Parent Locator Service (FPLS), a computer matching system that locates noncustodial parents who owe child support. The FPLS includes two databases: the National Directory of New Hires, which is a central repository of employment, unemployment insurance, and quarterly wage information for all newly-hired U.S. employees, and the Federal Case Registry - a national database that contains information on individuals in child support cases and child support orders. The FPLS also has access to location sources from other federal agencies.

**17 What is your policy in respect of a maintenance debtor/respondent whose entire income consists of public assistance payments?**

The limited income of the obligor will be factored into the child support order, in accordance with the laws of the particular U.S. state.



**18 Does your authority have power to take or apply for any provisional or protective measures?**

Temporary child support orders may be made pursuant to the law of a particular state.

**19 What powers or procedures are available to your authority to determine the extent of assets of a maintenance debtor/respondent?**

Federal and state governments have a wide variety of mechanisms to determine the assets of a debtor, including access to tax records and bank and financial account records.

**20 What are the principal problems which you experience in dealing with cases (a) as a transmitting agency, and (b) as a receiving agency?**

See comments on questions 31 and 32 of the 2002 questionnaire.

**21 Do you have any statistics indicating the number and outcome of cases brought under the New York Convention? If so, could you please supply them. If possible, please distinguish between incoming and outgoing cases, and indicate the other States involved.**

There are no statistics on this issue.

**22 Are there any States with whom you experience chronic difficulties in relation to the operation of the Convention?**

The United States is not a Convention member.

#### **Section B - Questions addressed to non-Party States**

**1 Are there particular reasons why your State has not ratified the New York Convention?**

Reasons the United States has not ratified the New York Convention:

- The Convention requirement for legal assistance depends on the legal aid system in effect in each country, with wide variation in how much assistance is given, and

the standard of income for qualification. Because of these different standards, many U.S. children and custodial parents would not qualify for assistance even though they could not in fact afford to pay. It is our experience in interstate cases within the United States that many custodial parents are not able to benefit from a support enforcement program without legal assistance.

- The Parties to the Convention do not all interpret the Convention to cover both existing orders and where an order has not been entered. Both are necessary for an adequate enforcement system.

- The Convention does not benefit from full implementation in all Party States.

**2 Are there any modifications/improvements to the New York Convention which would make ratification by your State a more attractive proposition?**

The United States is focussing its efforts on the negotiation of a new multilateral convention rather than on ratification of the New York Convention.

**3 In relation to the negotiation of any bilateral or other arrangements to which your State is, or is to become Party, which of the issues raised in Section A have been of significance? Are there other issues not raised in Section A which have been significant?**

Significant issues raised in Section A are those related to the issues described above.

**PART II - HAGUE CONVENTIONS OF 1958 AND 1973 ON THE RECOGNITION AND ENFORCEMENT OF DECISIONS RELATING TO MAINTENANCE OBLIGATIONS**

**Section A - Questions addressed to States Party to one or both Conventions**

**1 Does a limitation period operate in respect of an action for the enforcement of a maintenance obligation? Which law governs any such limitation period?**

Yes. U.S. jurisdictions generally apply the law of the forum. The laws of individual U.S. states govern such limitations. Information on each state may be found on the

U.S. Office of Child Support Enforcement's (OCSE) Online Interstate Roster and Referral Guide at "<http://ocse3.acf.dhhs.gov/ext/irg/sps/selectastate.cfm>."

**2 Does a limitation period operate in respect of the execution of a writ for the recovery of maintenance? Which law governs any such limitation period?**

Yes. U.S. jurisdictions generally apply the law of the forum. Laws of individual U.S. states govern such limitations. Information on each state may be found on the OCSE Online Interstate Roster and Referral Guide at "<http://ocse3.acf.dhhs.gov/ext/irg/sps/selectastate.cfm>;" see section E on Statute of Limitations.

**3 Do your procedures for enforcement permit the debtor to claim inability to pay?**

Yes, but until the order is modified, arrears on the obligation continue to increase.

**4 Do your procedures allow for the possibility of modifying the content of a decision registered in application of the 1973 Convention?**

Modification of decisions should be sought in the jurisdiction that entered the decision, as long as one or more of the parties continues to reside in that jurisdiction.

**5 Is the debtor entitled to bring modification proceedings in respect of the foreign decision? If so, on what jurisdictional basis and on what grounds?**

The debtor may request assistance from the state child support enforcement agency in obtaining a modification review where the order was originally established. Generally, a U.S. state will not modify a foreign order unless neither parent lives in the foreign country. If the custodial parent and no other party reside in the issuing jurisdiction, the debtor must go to the state of residence of the custodial parent to seek a modification review. In the United States, significant change of circumstances is the typical basis for granting of a modification. Details on modification procedures in each state may be found on the OCSE Online Interstate Roster and Referral Guide at

"<http://ocse3.acf.dhhs.gov/ext/irg/sps/selectastate.cfm>;"  
see section K on Modification and Review/Adjustment.

## **Section B - Questions addressed to non-Party States**

**1 Are there any particular reasons why your State has not ratified/acceded to either of the Hague Conventions?**

The United States has not ratified the 1958 and the 1973 Hague Enforcement Conventions in part because of Constitutional problems with some of the bases of jurisdiction established.

**2 Are there any modifications/improvements to the Hague Conventions which would make ratification/accession a more attractive proposition for your State?**

The United States is focussing on the negotiation of a new multilateral convention, rather than on ratification of these Hague Conventions. As noted above, the bases of jurisdiction need to be more flexible, designed to accommodate substantially different systems. Using a fact-based approach (rather than jurisdiction-based approach), which would not require fundamental changes in the Constitutional or other law of the Parties, would provide the most flexibility and cover the vast majority of cases.

## **PART III - HAGUE CONVENTIONS OF 1956 AND 1973 ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS**

### **Section A - Questions addressed to States Party to one or both Conventions**

**1 Which law is applied by your courts to incidental/preliminary questions (e.g., as to the paternity of a child) arising in the course of maintenance proceedings within the scope of the Hague Conventions?**

U.S. jurisdictions generally apply the law of the forum. All states have procedures for establishment of paternity. See response to questions 16 - 19 of the 2002 questionnaire.

**2 In a decision of 21 February 1997 (Nederlandse Jurisprudentie 1998, No 416), the Netherlands Supreme Court ruled that Article 8 of the Hague Convention of 1973, in the light of its history and that of the Convention as a**

whole, was not incompatible with the admission of a choice by divorced spouses of the governing law, the law chosen being that of the country of their common habitual residence for a long period and of the forum. (Dutch law, chosen by the parties, was applied rather than Iranian Law which governed the divorce.) Is this decision consistent with the manner in which Article 8 has been interpreted by your courts? If not, do you think that an amendment of Article 8 would be desirable to allow expressly for a choice of law by the spouses?

The United States does not think it would be desirable for the new convention to provide expressly for a choice of law by the spouses. The United States view is that the law of the forum, including its choice of law rules and including whether or not it would recognize the choice of the spouses, should be the applicable law.

**3 Do your courts interpret the Hague Convention of 1973 as applying to maintenance obligations of one spouse in respect of children of the other spouse to whom she/he is in loco parentis?**

U.S. courts generally require a legal custody relationship rather than merely an "in loco parentis" relationship.

**4 Have any particular difficulties arisen in applying/interpreting either the 1956 or the 1973 Conventions?**

The United States is not a party to these conventions.

#### **Section B - Questions addressed to non-Party States**

**1 Are there any particular reasons why your State has not ratified the 1956 or 1973 Conventions?**

The United States has not ratified the 1958 and 1973 Hague Applicable Law Conventions because of the difficulty of requiring local courts to apply foreign law. While there are few problems in recognizing and applying the law of the issuing State in interpreting and enforcing an order entered by that State, application of the law of the requesting State to procedures taking place in the United States would, as a practical matter, likely be impossible to implement.

**2 Are there any modifications/improvements to the 1956 or 1973 Conventions which would make their ratification/accession a more attractive proposition for your State?**

The United States is unlikely to ratify either Applicable Law Convention, preferring to apply local law in enforcement proceedings.

**3 Are spouses (or any other category of persons) free under your system to choose the law which will govern their maintenance obligations?**

Choice of law is not generally available, although, in some limited situations, the practical result of other choices made by the litigants would be the application of the law of a chosen state. For instance, if an order for child support is made by one state, and the parties leave the jurisdiction and establish residence in new jurisdictions, they could, by agreement have the case considered by this new forum using its own law on some of the issues involved.

#### **PART IV - GENERAL**

**1 To what extent has the assessment and enforcement of maintenance obligations in your State become an administrative rather than a judicial activity?**

There has been a substantial increase in the use of administrative procedures in both the assessment and enforcement of maintenance obligations in the United States. Hearing officers within the agencies may hear and determine the obligation rather than requiring a judicial proceeding. Hearings are not required for many enforcement activities, and the role of lawyers in many states is very limited. Mandatory guidelines are used for the establishment of support amounts. Federal legislation has established a number of mandatory procedures to be used by the states under the federal enforcement program. Many states have supplemented these required procedures.

**2 (If relevant) Has the movement towards an administrative approach had implications for international cases?**

The use of administrative procedures has not had special implications for international cases.

**3 Please list the methods for enforcing maintenance obligations in your State. Is any distinction drawn between the methods of enforcement available in domestic and international cases?**

Among the methods used for enforcement are wage withholding (including recognition of out-of-state withholding orders), garnishment of real and personal property, interception of tax refunds, denial of new and renewal licenses of various kinds such as drivers' licenses and professional licenses, denial of U.S. passports, and in certain cases, criminal prosecution. There is no distinction for domestic and international cases.

**4 Please comment on any other matters you consider relevant which are not covered by the Questionnaire.**

The comments above are based on the enforcement system established pursuant to federal law, enacted and amended over the last three decades (since the establishment of the U.S. Child Support Enforcement Program in 1975). Individual states may provide other remedies and procedures. Enforcement is also possible outside this program through privately-retained counsel. Some but not all of the program enforcement mechanisms are available in such cases.

**PART II: QUESTIONS CONCERNING NATIONAL SYSTEMS OF MAINTENANCE OBLIGATIONS IN RESPECT OF CHILDREN AND OTHER FAMILY MEMBERS**

***Preliminary Comments on Family Support Law under the U.S. Federal System***

Before responding to the specific questions posed by the questionnaire, the United States believes that it will be useful to provide some background on the relationship between the federal and state governments how this affects the establishment and enforcement of family maintenance obligations in the United States.

Under the U.S. Constitution, powers not specifically delegated to the federal government are reserved to the individual states. Family law, including child support

(i.e., maintenance), is one of those subjects that has traditionally been considered as being within the nearly exclusive jurisdiction of individual state legislatures and courts. However, over the past three decades, child support law has become much more standardized in the United States, as the federal role in child support enforcement has expanded significantly.

The U.S. Congress established the national Child Support Enforcement Program in 1975 under Title IV-D of the Social Security Act (title IV-D), 42 U.S.C. §§ 651-669a. The Child Support Enforcement Program is a joint federal, state and local partnership designed to ensure that parents provide support to their children. Pursuant to title IV-D and related federal regulations, 45 C.F.R. §§ 301.00-310.190, each state operates a child support program, either in the human services department, department of revenue, or district attorneys office, often with the help of prosecuting attorneys, other law enforcement agencies, and officials of family or domestic relations courts. The program involves 54 separate state and territory systems, each with its own unique laws and procedures. Under the auspices of the Federal Office of Child Support Enforcement (OCSE) within the U.S. Department of Health and Human Services, state child support programs provide four major services: locating non-custodial parents, establishing paternity, establishing child support obligations, and collecting child support for families.

Federal law requires states, as a condition for receiving certain federal funds, to adopt a variety of specified laws or procedures to accomplish the objectives of the Child Support Enforcement Program. One of the required laws, the Uniform Interstate Family Support Act (UIFSA) of 1996, was developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to provide for a uniform reciprocal process for the establishment and enforcement of child support obligations across state lines. (NCCUSL is composed of representatives of each state, and develops laws, which individual states can then choose to adopt, in areas where uniformity among the states would be beneficial). The nationwide adoption of UIFSA brings uniformity among states in the processing of interstate cases; it provides for the recognition and enforcement of sister state orders; it establishes rules so that there is only one outstanding child support order



between the parties; and it establishes rules among states for establishing and modifying support orders.

Thus, although it is true that child support is primarily a matter of state law in the United States, because of both federal and state actions much of that law is substantively the same from state to state. The areas where state laws are not uniform include, by way of example, guidelines (all states must have uniform guidelines that limit the decision maker's discretion in determining the amount of a child support order, but the substance of those guidelines differs from state to state); the duration of the child support obligation (i.e., when a child ceases to be a dependent); and the statute of limitations for enforcing payment of arrears.

Title IV-D and UIFSA have special provisions for international cases. In general, if a foreign country is determined under either federal or state law to be a "reciprocating" country, it is treated as if it were a state of the United States for purposes of child support enforcement, and all of the procedures and enforcement mechanisms available under title IV-D and UIFSA for interstate cases are available for cases from that foreign country.

The United States is not currently a party to any multilateral convention on maintenance (see answers to 1999 questionnaire, supra, for explanation). Therefore, the provisions of title IV-D and UIFSA are the only mechanisms for the enforcement of foreign child support obligations through a public agency.

***Form of maintenance decision***

**1 What form may a maintenance decision take in respect of (a) a child and (b) a spouse or other family member? In particular, are they confined to periodic payments of money? Are there any circumstances in which a lump sum, property transfer or similar order may be made to satisfy a maintenance obligation?**

(a) Maintenance decisions involving child support vary on a state-by-state basis within the United States. For a child, maintenance decisions may take many forms, including: (1) periodic payments of money (e.g., U.S. \$X/month); (2) the provision of medical insurance or

additional financial payments by the noncustodial parent for medical support; (3) payments for prior periods; and (4) money judgments for unpaid arrears. In some states, lump sum payments, property transfers, or other alternatives to periodic payments are available. The enactment of UIFSA in all U.S. states and territories has reduced the range of variation in state law, although it is still considerable.

(b) The form of maintenance decisions in respect of a spouse or other family member also varies among the states, but for the most part is not subject to significant regulation at the federal level or application of the UIFSA statutory scheme. UIFSA applies to interstate establishment and enforcement of spousal maintenance, but does not apply to modification of spousal maintenance or to any maintenance decisions respecting other family members. The same forms that are available for a child may also be available for other family members to whom support is owed.

### ***Eligibility***

#### **2 Who is eligible in your country to benefit from a maintenance decision? (e.g., child, spouse, other relative, etc).**

In every jurisdiction of the United States, a person with legal custody of a child can benefit from a child support maintenance decision. Similarly, with respect to a spouse, the availability of spousal maintenance is virtually universal, although the details vary significantly by state. Some states provide for a legal obligation to support relatives other than children and spouses, although such support appears to be rare.

Under title IV-D, a state child support enforcement agency will establish a maintenance decision only for a child.

#### **3 What is your definition of a "dependent" child for child support purposes?**

In answering this question, the use of "dependent" child for child support purposes will be confined to a child entitled to maintenance or, as is usually referred to in these answers, entitled to child support. For child support purposes, once again the definition of "dependent"

varies by state. Generally, a child is "dependent" (i.e., eligible to receive child support) if someone has legal custody or guardianship of a child who has not reached the age of majority for purposes of child support, as defined by that particular state. For example, in Texas, child support terminates when the child reaches 18 years of age or graduates from high school, whichever comes later. In New York, the age of majority for maintenance is 21. Hawaii extends the obligation to support a child past 21 if the child is enrolled in higher education.

A child may also be considered "dependent" beyond the state's age of majority in the case of mental or physical disability. Most commonly the disability must have been present or occurred before the child reached the age of majority.

**4 Which is the law applicable to the question of eligibility of a (a) child and (b) a spouse or other family member to obtain maintenance?**

As a general matter, U.S. jurisdictions apply the law of the forum, including applicable federal law, in making decisions regarding maintenance. (This is to be distinguished from cases where a U.S. tribunal is enforcing a foreign decision. The U.S. tribunal will generally not reopen determinations made by the foreign tribunal, so long as the foreign tribunal had personal jurisdiction over the obligor under U.S. law.)

(a) Eligibility for child support is determined primarily by state laws. Federal laws affecting the eligibility of a child for maintenance may be found in section 454 of title IV-D, 42 U.S.C. §§ 654(4), (6), (32), and related federal regulations, 45 C.F.R. §§ 302.31 & 302.33. Briefly, these federal provisions require that a state child support enforcement agency provide services with respect to each child receiving benefits under certain federal public assistance programs or to any other child upon application to the agency by an individual with respect to the child. A state child support enforcement agency may require an application fee not to exceed U.S.\$25 for furnishing such services. However, no fees or costs will be required from a foreign reciprocating country or foreign obligee.

(b) As its name implies, the federal Child Support Enforcement Program has focused on child maintenance, although U.S. state child support enforcement agencies may enforce spousal maintenance obligations if requested to do so by a foreign reciprocating country. Generally, maintenance for spouses and other family members is governed by state law without federal oversight and eligibility requirements.

***Procedures for the initial assessment of maintenance***

**5 Is child support determined through an administrative or a judicial process?**

In the United States, individual states determine whether to establish, enforce, and modify child support through administrative or judicial processes, or both. Recent legislative changes in many individual states have emphasized the use of administrative processes.

**6 Is the process different where either the applicant or the respondent live abroad? If so, please give details.**

Yes, where one parent lives abroad, the process will differ depending upon whether the foreign parent lies in a foreign reciprocating country and whether the U.S. State has personal jurisdiction over the foreign respondent, as explained below.

**a. Foreign Applicant/U.S. Respondent.**

If the applicant resides in a foreign country, a state child support enforcement agency will process the request as one from another U.S. state if the country is a foreign reciprocating country under either state or federal law. As of January 1, 2003, the United State of America will have federal-level arrangements in effect with Australia, the Czech Republic, Ireland, the Netherlands, Norway, Poland, Portugal, the Slovak Republic, and the Canadian Provinces of Alberta, British Columbia, Manitoba, Newfoundland/Labrador, Nova Scotia, and Ontario. Individual states of the United States have established reciprocal arrangements with up to 20 foreign countries and Canadian provinces. Lists of foreign reciprocating countries for the various U.S. states can be found at the OCSE website:

<http://ocse3.acf.hhs.gov/ext/irg/sps/selectastate.cfm>; see section C1 for each state].

If the applicant resides in a non-reciprocating country, it is within the state's discretion whether to process the request, and many U.S. states will not accept such requests due to resource constraints.

**b. U.S. Applicant/Foreign Respondent.**

With respect to a case where the respondent lives abroad, but the applicant resides in the United States, how the U.S. state processes the case will depend on whether it has personal jurisdiction over the respondent. A U.S. state with personal jurisdiction over the respondent will establish an order and ask for that order to be registered and enforced in the other nation. If the U.S. state does not have jurisdiction, then either the state agency or the applicant will need to ask the foreign country where the respondent resides to determine the child support obligation.

**7 Is the process different where the application is for maintenance for a spouse or other family member rather than a child? If so, can the two processes be joined?**

The process is the same where a request is being made for both a child and a custodial parent residing with that child. Otherwise, processes governing the application for maintenance for a spouse vary by state. Pursuant to federal law, requests from foreign reciprocating countries for enforcement of spousal support where no child is involved may be provided at the option of a particular state. However, while many of the substantive and procedural provisions of UIFSA apply equally to child support and spousal support, private attorneys rather than state child support enforcement agencies typically provide the necessary legal services for these cases on a fee-for-service basis.

Processes governing the application for maintenance for family members other than children and custodial parents also vary by state. Under title IV-D, state child support agencies do not provide services for maintenance of other family members. Nor do any of the substantive or procedural provisions of UIFSA apply to support of other family members.

***Methods of calculating maintenance***

**8 Is the assessment of child support based on a formula, guidelines, or other criteria? Please outline the principal elements involved in making an assessment.**

Federal law requires each state to establish child support guidelines to facilitate determinations of all support orders in the state. These guidelines must be applied when the child support obligation is established unless doing so is found to be unfair.

The guidelines may be established by statutory law or by judicial or administrative action and must be reviewed at least once every four years to ensure that their application results in the determination of an appropriate child support award. As part of the four-year review, states consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines.

Federal law requires that, in any judicial or administrative proceeding for the award of child support, there must be a rebuttable presumption that the amount of the award that would result from the application of the guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the state, is sufficient to rebut the presumption in an individual case. Such criteria must take into account consideration the best interests of the child.

At a minimum, federal law requires state guidelines to meet the following criteria:

? Take into consideration all earnings and income of the noncustodial parent;

? Be based on specific descriptive and numeric criteria and result in a computation of the support obligation;

? Provide for the child's health care needs, through health insurance coverage or other means.

State guidelines vary substantially. Depending on the state, the following factors may be considered in the guidelines:

- ? Both parents' income
- ? Use of gross or net income
- ? Educational expenses
- ? Child care expenses
- ? Extraordinary health care costs
- ? Age of children
- ? Custody and visitation arrangements
- ? Expenses of subsequent families
- ? Current spouse's earnings
- ? Any other household income

There are three principal types of guidelines currently in place throughout the United States: (1) income shares, (2) percentage of income, and (3) the Melson formula.

? An income shares guideline is based on the concept that the child should receive the same proportion of parental income that he would have received if the parents lived together. Thirty-four states use an income shares guideline.

? The basic principle of the percentage of income guideline is that the noncustodial parent should pay a flat percentage of gross or net income in child support. These guidelines often include an adjustment for pre-existing support orders, and take into account the number of dependents. Seventeen states use the percentage-of-income guideline.

? The Melson guideline is a comprehensive formula with three basic principles: (1) parents should keep sufficient income for their basic needs and to encourage continued employment; (2) parents should not retain any excess income until the basic needs of the dependents are met; and (3) when income is sufficient to provide the basic needs of the parents and all dependents, the dependents are entitled to share any additional income so that they can benefit from the noncustodial parent's higher standard of living. Three states use the Melson guideline.

To access information on each state's guidelines for child maintenance, go to OCSE's website:  
<http://www.acf.dhhs.gov/programs/cse/> - see especially "Online Interstate Referral Guide  
 [<http://ocse3.acf.dhhs.gov/ext/irg/sps/selectastate.cfm>] - Support Details" and "Links to States."

**9 Are there any differences in the assessment criteria employed when (a) the applicant or (b) the respondent live abroad?**

a) No.

b) No.

**10 Is the method different when the application is for maintenance in respect of a spouse or other family member rather than a child?**

The Title IV-D agencies establish, enforce and modify only child support or spousal maintenance when child support is involved in the same case. As a result, there are no federal requirements regarding the determination of maintenance in respect of a spouse or other family member. State law governs the method for providing maintenance to these individuals. See answer to question 4, *supra*.

**11 Which is the law applicable to the assessment of maintenance for (a) child and (b) a spouse or other family member?**

As explained in the answer to question 4, U.S. jurisdictions generally apply the law of the forum, including applicable federal law, in maintenance cases.

a) State law governs within the broad federal mandates as discussed above.

? Federal law - 42 U.S.C. § 667.

? Federal regulations - 45 C.F.R. § 302.56.

b) State law almost entirely controls establishment of spousal maintenance, and totally controls maintenance of other family members. See answer to question 7, *supra*.

***Reassessment/adjustment/modification of maintenance decisions or assessments***



**12 Are maintenance payments in respect of children or spouses or other family members subject to automatic reassessment, and if so, by whom and with what frequency?**

In most cases, child support orders are not subject to automatic reassessment (reviews). Federal law provides that either parent can ask a state to review the child support order every three years or if there is a significant change of circumstances (as defined by the state). However, some states review public assistance cases automatically every three years and a few states automatically adjust orders using cost-of-living measures (see #13, *infra*), usually on a two-year cycle. The same authority that established the original child support order conducts the review of the order.

There are no federal requirements regarding the automatic reassessment of maintenance payments for spouses or other family members.

**13 Are such payments subject to automatic adjustment in accordance with an external marker, such as the cost of living index, and if so, by what mechanisms and with what frequency?**

Federal law requires states to adjust child support orders using one or more of the following methods: (1) child support guidelines, (2) a cost-of-living adjustment, or (3) automated methods determined by the state. To access information on each state's procedures for reviewing and adjusting child support orders, go to OCSE's website: <http://www.acf.dhhs.gov/programs/cse/> - see especially "Online Interstate Referral Guide - Modification and Review/Adjustment"

State law determines whether a child support order is subject to automatic adjustment by an external marker, i.e. a cost-of-living index. Approximately seven states automatically adjust some or all of their child support orders using an external marker.

For example, almost all Minnesota orders are adjusted every two years with a cost-of-living adjustment (COLA). Minnesota uses the Minneapolis/St. Paul earnings index.

In New York, the Consumer Price Index for Urban Consumers (CPI-U) is used for administrative reviews. If

the CPI-U has risen by 10% and 24 months have passed since the order was established or modified, the order will be adjusted automatically in public assistance cases. All parties must receive notice. The parties have a right to appeal to the court, which can either find that no adjustment is warranted or apply the guidelines to the case.

The Alaska Child Support Enforcement Agency uses an administrative process to establish orders. The judicial process is often used when parents seek a child support order without the assistance of the child support enforcement agency. In Alaska, a cost-of-living adjustment is only applicable if contained in the court order; it is not applicable to administrative orders.

Other states use the following external markers to automatically adjust maintenance payments in some cases:

New Jersey - Consumer Price Index for metropolitan statistical areas that encompass New Jersey;  
Delaware - Standard of Living Adjustment; and,  
Iowa - Consumer Price Index for all urban consumers, U.S. city average.

**14 In what circumstances may a maintenance decision or assessment in respect of a child or a spouse or other family member be varied / modified upwards or downwards? Is this done by the same authority that made the original determination?**

Federal law provides that either parent can ask a state to review the order every three years or if there is a significant change of circumstances. State law defines what constitutes a change of circumstances for adjusting a maintenance decision or assessment.

For example, Alaska will review an existing order if at least 12 months have elapsed since an order was issued, modified or last reviewed, and the party requesting the review provides evidence that the child support amount would increase or decrease by at least 15%. If the requesting party has no such evidence, the agency will review the order at the party's request if at least 36 months have elapsed since the order was issued, modified or reviewed.

Texas reviews public assistance cases automatically every three years or upon request in public assistance and non-public assistance cases. To modify an order, Texas requires a change in the circumstances of the child or a person affected by the order that is material and substantial and has occurred since the date of the order. The monthly amount of child support must differ by either 20% or U.S. \$100 from the amount that would be awarded in accordance with the child support guidelines.

Massachusetts reviews public assistance cases automatically every three years or upon request in public assistance and non-public assistance cases. Massachusetts law provides that child support orders shall be modified if there is an inconsistency between the amount of the existing order and the amount that would result from application of the child support guidelines. An order will be modified if applying the child support guidelines results in an amount that differs from the current order by 20% or if medical support needs to be established.

The same authority that set the original amount makes the redetermination of the child support order.

There are no federal requirements regarding the circumstances by which a maintenance decision or assessment in respect of a spouse or other family member may be varied/modified upwards or downwards.

**15 In what circumstances may a foreign decision or assessment be varied/modified on the application of a resident debtor?**

Under UIFSA, a foreign child support order may be modified by a U.S. state if all parties have left the foreign jurisdiction that issued the decision, a petitioner who is a non-resident of the state in which the petition for modification is filed seeks modification in the state, and the respondent/obligor is subject to the personal jurisdiction of the state.

Alternatively, a U.S. state may modify the decision if the child is subject to the personal jurisdiction of the U.S. state and all of the parties have filed a written consent in the issuing foreign tribunal for a tribunal of the U.S. state to modify the foreign decision.

The NCCUSL has proposed amendments to the 1996 version of UIFSA that specifically address a number of international child support enforcement issues. The 2001 UIFSA amendments, which have not yet been uniformly adopted by U.S. states, include a provision that a U.S. state may modify a foreign child support order if the foreign country or political subdivision "will not or may not modify its order pursuant to its laws. . . ." Although as a general rule any requests for modification should be heard by the tribunal that issued the order, we recognize that in certain cases, modification would not be possible, absent action by the Requested Party. Such a stalemate may occur, for example, if a foreign country requires that parties be physically present to obtain a modification of a child support order, but it lacks the authority to compel a nonresident to appear. The U.S. state in such circumstances "may assume jurisdiction to modify the child-support order and bind all individuals subject to the personal jurisdiction [of the state] whether or not consent to modification of a child-support order otherwise required the individual . . . has been given or whether the individual seeking modification is a resident of [the U.S. state] or the foreign country or political subdivision." UIFSA 2001 § 615.

### ***Establishing paternity***

#### **16 Which is the law applicable to the determination of paternity in the context of child support proceedings?**

As explained in the answer to question 4, U.S. tribunals generally apply the law of the forum, including applicable federal law, in maintenance cases.

Federal law, 42 U.S.C. § 666(a)(5), specifies that individual U.S. states are required to have basic procedures available to establish paternity until a child attains 18 years of age, including the use of legally and medically acceptable genetic tests which tend to identify the father or exclude the alleged father. (See also response to question #17.)

An individual state may have additional features or may vary the basic requirements where the federal act is not prescriptive. For example, the percentage of probability for genetic testing that creates a rebuttable or conclusive presumption of paternity varies from state to state. All

states have rules regarding a presumption-of-paternity for married parents. Many states also have additional presumption of paternity provisions covering legitimisation (marriage after birth of the child), common law marriages, and birth of the child after the death of the husband which are not covered by specific provisions of federal law.

**17 Please summarise your administrative and legal requirements concerning the establishment of paternity in the context of child support proceedings.**

A father can acknowledge paternity by signing a written admission in response to a petition or a voluntary acknowledgement of paternity. All states have programs in which birthing hospitals provide unmarried parents of a newborn the opportunity to acknowledge the father's paternity of the child. States must also assist parents to acknowledge paternity up until the child's eighteenth birthday through vital records offices or other entities designated by the State. Before a mother and a putative father can sign an acknowledgement of paternity, the mother and the putative father must be given notice, orally or through the use of video or audio equipment, and in writing of the alternatives to, the legal consequences of, and the rights (including, if one parent is a minor, any rights afforded due to minority status) and responsibilities that arise from signing the acknowledgement. Parents are not required to apply for child support enforcement services when acknowledging paternity.

An acknowledgement of paternity becomes a finding of paternity unless the man who signed the acknowledgement subsequently denies that he is the father within 60 days or the date of a legal proceeding relating to the child, whichever occurs first. If it becomes necessary to seek child support, a finding of paternity creates the basis for a child support order. A final support order against the father cannot be established for a child who is born to unmarried parents until paternity has been established.

In a contested case, the state child support enforcement agency can order genetic testing on blood or tissue samples of the man, mother and child. Genetic tests will be ordered upon the request of a party, if the request is supported by a sworn statement by the party: (1) alleging paternity and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the

parties; or (2) denying paternity and setting forth facts establishing a reasonable possibility of the non-existence of sexual contact between the parties. Genetic test results indicate a probability of paternity and can establish a legal presumption of paternity. Under current standards of DNA testing, the accuracy of the testing generally exceeds 99 percent certainty of paternity in a case in which the alleged father is not excluded by the testing; a man who is excluded is 100% certain to be declared not to be the father (in the absence of fraud in the testing). Each party in a contested paternity case must submit to genetic tests at the request of either party or the state child support enforcement agency.

**18 Please outline the legal procedures and the methods (including the scientific methods) by which paternity may be established in the context of proceedings for child support. Please indicate the costs that typically would be involved, who would bear these costs, whether the costs are capable of being covered by legal aid, and whether any distinction is made between residents and non-residents in these matters.**

See the answer to question #17 for the legal procedures and methods by which paternity may be established.

No distinction is made between U.S. residents and non-residents regarding genetic testing. However, foreign reciprocating countries and their resident obligees are not charged fees for paternity or other requested services.

In any case in which the state child support enforcement agency orders genetic testing, the agency will pay costs of such tests, subject to recoupment (if the state so elects) from the alleged father if paternity is established. Payment of support owed to the obligee has priority over fees, costs and expenses. The state child support enforcement agency will also obtain additional testing in any case where an original test result is contested, upon request and advance payment by the contestant.

Genetic testing costs in 2000 ranged from about U.S. \$150 to U.S. \$500 for testing of the mother, father, and child. Costs for international cases may be higher because of the need to ensure the chain of custody of the evidence. Costs vary between states and may also depend on whether the

individuals are requesting the test in a private bar case or are tested at the request of a state child support enforcement agency that has negotiated a contract price with a specific laboratory.

**19 May the recognition or enforcement of a foreign child support decision be refused (a) if it entails a determination of paternity, or (b) if a law or a method is applied to that determination different from that applied in your country? If so, please explain the reasons.**

Procedures for contest are the same for domestic and international cases. Recognition of an out-of-state child support decision, including a determination of paternity, will not be automatically refused. However, the putative obligor is given an opportunity to contest the validity of registration and enforcement upon due process or other grounds. UIFSA, enacted by all U.S. states, specifies that a successful contest must be based upon one of the following:

- ? the issuing tribunal lacked personal jurisdiction over the contesting party;
- ? the order was obtained by fraud;
- ? the order has been vacated, suspended, or modified by a later order;
- ? the issuing tribunal has stayed the order pending appeal;
- ? there is a defense under state law to the remedy sought;
- ? full or partial payment has been made; or
- ? the statute of limitation precludes enforcement of some or all of the arrearages.

***Legal and administrative aid and assistance***

**20 What forms of assistance (including administrative assistance, legal aid and advice) are available in your country to:**

- a a resident claimant for child support;**
- b a claimant for child support who is resident abroad.**

State child support enforcement agencies provide comprehensive enforcement services to resident applicants and to applicants for child support who are resident abroad.

Services provided by all state child support enforcement agencies include locating parents, establishing paternity, obtaining child and spousal support, and providing legal and administrative assistance services that are part of the establishment and enforcement process.

Private legal aid (as distinct from any legal or other services offered by the state child support enforcement agency) may be available on an individual basis, depending on the residence, resource availability, or scope of services determined by the individual legal aid provider. Similarly, it would be at the option of the legal aid provider whether or not it would provide assistance to a claimant for child support who is resident abroad and does not apply through the U.S. child support system.

**21 Please specify the principal eligibility requirements, including any means tests, for the different forms of assistance available.**

Eligibility for child support services is not means-tested.

Assistance from the state child support enforcement agency is available at no cost to recipients of public assistance. Public assistance is means-tested and eligibility requirements vary among the individual states.

Assistance from the state child support enforcement agency is available to non-recipients of public assistance upon the completion of an application and the payment of a maximum U.S. \$25 fee.

With respect to requests from foreign reciprocating countries, no costs are assessed for assistance from the state child support enforcement agency from the foreign reciprocating country or its resident obligees. However, costs may be assessed by the state child support enforcement agency against the obligor.

**22 Are the rules and procedures concerning legal or administrative aid or assistance different for applications for maintenance for a spouse or other family member?**

With respect to requests from foreign reciprocating countries, a maintenance order will be enforced for the absent parent's spouse (or former spouse) with whom the



child is living if a support obligation has been established with respect to the spouse and the support obligation established with respect to the child is also being enforced by the state child support system. Such applications processed through the U.S. IV-D system will receive the benefit of the cost-free services provided by state child support enforcement agencies.

With respect to requests from foreign reciprocating countries, if a support obligation has been established only in regards to a former spouse who does not reside with a child for whom support is being enforced, individual U.S. states have the option whether to process the case through the state child support system.

Applications for establishment of maintenance obligations for spouses and other family members will not be processed by the state child support enforcement agency.

If a support application for a spouse or other family member is not processed through the state child support enforcement agency, private counsel or a legal aid attorney may need to be secured in order to present the case to the appropriate tribunal for action.

### ***Legal costs and expenses***

**23 What are the typical legal costs and expenses (including lawyers' fees and court costs) involved in an application for child support or maintenance in respect of a spouse or other family member? Can you indicate how these costs and expenses will vary from the initial application through any processes of appeal or review?**

Foreign reciprocating countries will not be charged throughout the enforcement process, from application to any appeals undertaken by the state child support enforcement agency.

Legal costs for cases that are not handled by the state child support enforcement agency vary widely depending upon the nature of the case and the state of the tribunal in which the proceedings will be carried out.

**24 Is it possible for payment of costs and expenses to be met from maintenance payments?**

Foreign reciprocating countries and their resident obligees will not be charged fees by state child support enforcement agencies. Fees may be collected from the obligor by the support enforcement agency in addition to the basic maintenance payments. However, the payment of child support owed to the obligee has priority over collection of fees, costs, and expenses from the obligor.

Legal costs for cases that are not handled by the state child support enforcement agency are paid by agreement between the parties and attorneys involved and may be collected from maintenance payments to obligee.

***Collection and transfer arrangements and enforcement of decisions***

**25 How is the payment and collection of (a) child support and (b) maintenance for a spouse or other family member organised in your country?**

(a) Collection and disbursement for child support cases handled by a state child support enforcement agency go through a single point of contact, the state disbursement unit (SDU). All collections, including wage withholdings and tax intercepts are sent to the SDU, which forwards the payments (after any appropriate deductions for recovery of public benefit payments) to the obligee. Collections and payments may be made by check or electronic transfer; cash is very rarely used.

(b) Payment and collection of spousal support in cases where child support is also being collected are made through the same SDU system.

Payment in child and spousal support cases not handled by the state child support enforcement agency, but which involve income withholding, go through the SDU system. Non-income withholding cases may go directly between parties.

**26 What, if any, particular arrangements apply where payments are to be made or collected from abroad?**

All child support payments through a state child support enforcement agency, including payments from abroad, are made to and dispersed by a "state disbursement unit," created by each state child support enforcement agency pursuant to federal legislation.

**27 What are the procedures for enforcing (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member?**

(a) A variety of mechanisms are available to each state child support enforcement agency for enforcing the order. Specific enforcement methods are listed in the response to question #28.

(b) For child support orders including provision for spousal support, the same enforcement tools may be used.

Some methods for enforcement are not available in certain states for enforcement of support orders that pertain only to spouses or other family members.

**28 Please list the methods available for the enforcement of (a) child support decisions and (b) maintenance decisions in respect of a spouse or other family member. In particular, please indicate whether any of the following enforcement / collection methods are available in your jurisdiction:**

**wage withholding;  
tax refund intercepts;  
garnishment from bank accounts or other sources;  
deductions from social security payments;  
forced sale of property;  
division of pension benefits; and  
committal to prison.**

Each of the above-listed methods may be used to enforce child support and support for a former spouse living with the child.

In addition, support obligations may be enforced using work requirements under which an individual who has overdue support may be required to participate in employment programs, credit bureau reporting, liens arising by operation of law (automatically) against real and personal property for amounts of overdue support, interest on late payments, intercept of federal payments, lottery intercepts, passport denial, and denial/revocation of professional and recreational licenses.

**29 What are the typical banking costs involved in the transfer of maintenance payments from/to your country?**

Costs for transfer of payments by state child support enforcement agencies from the United States are typically only the additional international postage because most payments are currently made by mail using a U.S. dollar denomination check.

Costs for incoming payments to U.S. state child support enforcement agencies vary depending upon the contract that state has with its servicing bank for processing international payments. Some states incur no costs other than the differential exchange rates; others experience additional fees ranging from U.S. \$25 to U.S. \$50 per check.

**30 Have any arrangements been developed in your country, either by the public or the private sector, to facilitate the easy and low-cost transfer of payments to/from abroad?**

The U.S. is exploring the potential for development and use of automated clearinghouse gateways for electronic transfer and currency conversion to and from other nations.

All U.S. state child support enforcement agencies are required to have state disbursement units, which must be able to send and receive U.S. funds electronically. Such capability in each state child support enforcement agency holds the potential for implementation of an international electronic funds transfer system.

For general commercial and potentially child support enforcement purposes, a public/private initiative is underway on a pilot basis with Canada, and discussions are being held with other nations, regarding an automated clearinghouse "gateway" project of the U.S. Federal Reserve. Estimated costs for currency transfer and conversion under this electronic transfer system are only a few cents per transaction.

In the future, it is hoped that countries reciprocating with the United States will use gateways, which will automatically convert outgoing U.S. funds to a foreign currency account in a partner bank in the other country. A similar arrangement would be used for incoming foreign funds going to each state's child support enforcement agency state disbursement unit.

**PART III: QUESTIONS CONCERNING THE ELEMENTS TO BE INCLUDED  
IN THE NEW INSTRUMENT**

**31. Please list any shortcomings in the current processes for the obtaining or recovery abroad of child support or other forms of family maintenance by persons resident in your country which might be improved or remedied in the new instrument.**

The following are issues (not necessarily in order of importance) that we hope the new instrument will address:

a. Multiple decisions: Difficulties arise when the Requested State varies a decision of the Requesting State at the request of the debtor (usually by reducing the payment amount or abolishing arrears) without requiring the debtor to first seek variation in the Requesting State. In such cases, the Requesting State's original decision continues to be the controlling decision in that State, which results in two conflicting decisions. The new instrument should develop clear rules on variance, for both prospective and retroactive payments.

b. Assistance for debtors in variance cases: In the United States, the state child support enforcement agencies provide assistance to debtors as well as creditors. Some countries do not provide administrative assistance to debtors who have encountered substantial changes in their financial circumstances and who seek variation of a child support decision. Therefore, debtors often seek variation *sua sponte*, or invest valuable resources to hire private counsel to get decisions of the Requesting State varied in the Requested State. If the Requested State assisted debtors in gathering information for a variation request and transmitting it to the Requesting State, this would go a long way toward resolving the variation problem discussed above.

c. The "black hole" syndrome: Requesting State requests simply disappear once they have been received by the Requested State, as if they have been swallowed up by a "black hole." Nothing happens, and months or years go by with no payments being made to the applicant in the Requesting State. There are many reasons for this: child support workers in the Requested State do not handle many international cases, and are unsure of what to do with them;

the incoming international request looks different - it is not in the same form as domestic cases; and needed information is missing and the process to get it from the Requesting State is confusing and time-consuming. An important way to address this problem is for the instrument to provide for a strong Central Authority, for effective cooperation among Central Authorities, and for monitoring how the new instrument is being implemented. Another important part of the solution to this particular problem is the development of comprehensive, uniform forms to be used in providing information in international cases. The instrument needs to recognize the importance of uniform forms, without establishing rigid requirements that will be difficult to adjust. The problems with getting necessary case information discussed in this paragraph exist with incoming cases as well. For further discussion, please see our responses to question 32.

d. Cost of Services: The U.S. state child support enforcement agencies provide legal, administrative, technical and other services (including paternity testing) at no cost to a resident of a foreign reciprocating country. In some countries, foreign applicants must pay for some of these services. The greater the cost to the resident of the Requesting Party of pursuing a child support action in a foreign country, the less effective the instrument will be.

e. Establishment of Paternity and Maintenance Decisions: The vast majority of requests from U.S. states to foreign countries are for the recognition and enforcement of a U.S. decision, i.e., paternity has been established and a decision entered in a U.S. tribunal. But occasionally a U.S. state will ask a foreign country to establish paternity and enter an initial child support decision. Some states are not able to do either of these things, leaving the U.S. applicant faced with having to go to the foreign country, hire private counsel, and initiate litigation there.

f. Limited Service Requests: In some cases, the Requesting State can exercise jurisdiction over a debtor residing in the Requested State, and, therefore, may enter its own child support decision. In those cases, it would be helpful if the Requested State would provide limited services, such as collection of DNA samples, location of persons or assets, or assistance with service of process, to the Requesting State, instead of establishing a foreign

decision. The instrument should provide for such limited service requests.

g. Translation expenses: The Requesting State is usually required to submit all documentation in the language of the Requested State. Court or administrative decisions dealing with maintenance often address many other subjects as well (e.g., custody, access or divorce). In addition, even the portion of the decision that deals with maintenance may contain a lengthy recitation of background facts, income, and expenses. All of this information results in expensive and often unnecessary translation costs. The negotiators of the new instrument should consider how to reduce these unnecessary costs. Perhaps the instrument could provide that, so long as a certified copy of the entire original decision in its original language is provided, only the maintenance portion of a decision needs to be translated, or that a translated abstract is sufficient.

**32. Please list any shortcomings in the current processes by which a foreign applicant seeks to obtain or recover child support or other forms of family maintenance from a person resident in your jurisdiction which might be improved or remedied in the new instrument.**

Many of the following problems affect outgoing as well as incoming cases.

a. Electronic Communication of Case Information: There are serious problems with getting and updating all needed case information in a low-cost, efficient, and timely manner. Case information correspondence by surface or air mail is time-consuming, expensive, and difficult to automate. We need to consider how the new instrument can take advantage of developments in electronic communication. Perhaps the instrument could provide that most information could be transmitted electronically, and only a few key documents must be transmitted by surface or air mail.

Informal case update information, for example, should certainly be acceptable when transmitted electronically. The negotiators should also consider which of the official documentation required to process a request (completed forms, petitions, testimony, decisions, orders and other official court or administrative documents; payment records; birth and marriage certificates; photographs;

etc.) might be transmitted electronically and used in official proceedings in the Requested State.

b. Electronic funds transfer: The problems related to sending case correspondence by surface or airmail of course also apply to collections and disbursements. Currency conversion costs diminish the collection amount because banks charge significant fees and convert at less-than-favorable exchange rates when dealing with relatively small, non-commercial amounts of foreign currency. The negotiators should consider how the instrument can facilitate the use of technology (electronic funds transfer/electronic data interchange or direct deposit to banking correspondents) so that payments can be processed at minimal cost and favorable exchange rates.

It would be useful for the negotiators or the Permanent Bureau to study how other instruments/transactions handle electronic communications and electronic funds transfer.

c. Updated point-of-contact information: Often much time is wasted simply finding out who is the person in the foreign country currently responsible for a particular case. There should be a provision in the instrument to encourage/require routine, timely updates of this information for every case.

d. Timely responses to requests for information: There should be some provision in the instrument to encourage/require responses to inquiries within a specified period of time.

**33 Bearing in mind that the new instrument is to be "comprehensive in nature, building on the best features of the existing Conventions", and that the precise structure of the new instrument has yet to be determined, please indicate any preliminary views you have on the key elements to be addressed in the new instrument. In doing so, you may find it helpful to use the following list and to indicate what degree of importance, if any, you attach to each of the items listed:**

Preliminarily, the United States notes that the above reference to existing Conventions must be read in conjunction with the additional recommendation that the new instrument "be structured to combine the maximum efficiency with the flexibility necessary to achieve widespread



ratification." While it may make sense for the new instrument to incorporate and build on the features of existing Conventions that have worked well in practice, features that have proved ineffective, inefficient or that have prevented widespread ratification should be discarded and replaced with new approaches.

**a. provisions concerning administrative co-operation;**

This is an essential feature. We have learned from our bilateral child support efforts and from our experience in other public and private international law efforts, that the adoption by a large number of countries of a treaty that sets forth a comprehensive set of standards and obligations for the establishment and enforcement of maintenance is only the first step. The treaty is only a success if it works in practice. As stated previously, the Conference should focus on the goal of getting child support payments to needy children in international cases.

This instrument must ensure that parties establish strong, effective Central Authorities and other related authorities at every step in the process. Parties should provide assistance to each other (including limited service requests and judicial assistance, where appropriate) and to debtors and creditors; they should provide points of contact in every case who can respond to inquiries in a timely manner. Negotiators should consider whether the instrument should provide mechanisms for training to help countries carry out their obligations, and for monitoring parties' implementation efforts.

**b. provisions for the recognition and enforcement of foreign decisions;**

This is a key element of the new instrument. The recognition and enforcement of foreign decisions eliminates the necessity of re-litigating the same issues between the same parties in a maintenance case and the creation of conflicting, multiple decisions. Therefore, the United States supports an instrument that will provide for the recognition and enforcement of decisions from the Requesting State to the greatest extent possible.

The United States is convinced that a flexible, practical approach to recognition and enforcement is the only one that will work in the new instrument. Rather than

imposing direct or indirect jurisdictional rules in the instrument, the instrument should provide that the Requested State must recognize and enforce the Requesting Party's decision if that decision was made under factual circumstances meeting the jurisdictional/due process standards of the Requested State. Adoption of this approach in the new instrument would avoid a prolonged and futile effort to develop uniform jurisdictional standards. Experience has shown that this is difficult if not impossible to achieve: a country will not join an instrument that is incompatible with its jurisdictional standards. Thankfully, it is not necessary to tackle the issue of jurisdiction in order to achieve our goal, which is an instrument that will get child support to needy children in a predictable, consistent, efficient, low-cost and timely manner.

Most child support decisions from a Requesting Party will meet the jurisdictional standards of the Requested Party. Even if the jurisdictional basis cited by the Requesting Party is not acceptable to the Requested Party, the facts of the case will probably provide another jurisdictional basis which would be acceptable to that Party. In the few cases where the Requested Party is unable to recognize the decision of the Requesting Party, the instrument should provide that the Requested Party will take steps to obtain a new decision under its own law.

Variation of orders is closely related to the issue of recognition and enforcement of orders. There are wide differences among the countries of the world in the determination and calculation of the level of maintenance payments. The new instrument will not succeed if it permits the Requested Party routinely to modify the Requesting Party's decisions, using the Requested Party's guidelines. On the other hand, maintenance decisions need to be modified from time to time, and the instrument must provide for this.

The instrument should do everything possible to facilitate and encourage variation by the Requesting State (i.e., the variation should be done by the party that entered the initial decision). For example, the instrument could require the Requested State to provide administrative assistance to debtors, so that it would be easier for the debtor to transmit a variation request to the Requesting State; it could require Requesting States to have procedures for the prompt review and adjustment of decisions on the

petition of either resident or non-resident creditors or debtors; and the instrument should provide that the physical presence of the creditor or the debtor is not required in maintenance proceedings, including variation proceedings.

The instrument should limit the circumstances under which the Requested State is permitted to vary an order (e.g., when no interested party any longer has a connection to the Requesting State, or when the creditor has consented to the jurisdiction of the Requested State).

The instrument should consider the treatment of arrearages in connection with variation of orders. A Requested State should not be permitted to reduce or eliminate arrears, even if it agrees to enforce the Requesting State's decision with respect to prospective amounts. Additionally, if the Requested State cannot recognize and enforce the Requesting State's order, and must establish a new order, the new order should include payments not only for periods after entry of the new order but also for accrued arrearages. The failure of a foreign state to recognize arrearages accrued in the United States creates problems with U.S. decisions because, under U.S. law, arrears that have accrued under a court order are considered "final judgments" and cannot be retroactively modified by a court.

Finally, when a decision is modified by the Requested State, as permitted under the instrument, the instrument should clarify the effect on the initial order. Ideally, there should be only one controlling order at any one time.

**c. applicable law principles;**

The law of the forum should apply, including its choice of law provisions. Any other option would be unworkable, given that this is intended to be a worldwide, and not just a regional, instrument. Insisting that lawyers and litigants analyze and argue foreign law, and that courts make decisions based on foreign law, would be an enormous burden, could be so costly as to effectively eliminate a litigant's rights, and would probably result in decisions based on incorrect application of the foreign law.

**d. uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance;**

The United States strongly believes that the new instrument should avoid addressing direct or indirect rules of jurisdiction for the reasons explained in our answer in paragraph 33b. It is not necessary to establish jurisdictional rules in order to achieve the practical, concrete goals of the convention; discussion of jurisdiction will use up enormous amounts of scarce time and will distract the negotiators from the core issues which the convention must address if it is to be of use, such as administrative cooperation and enforcement of decisions; and experience has shown that any attempt to establish direct or indirect rules of jurisdiction will almost certainly fail and will jeopardize the wide acceptance of the instrument, which is a key to the success of the entire project.

**e. provisions specifying the assistance to be provided to an applicant from another Contracting Party;**

It would be useful to list the types of assistance that are contemplated by the instrument, so as to avoid the problem that exists under current instruments where different countries have different understandings of what sort of assistance is required. The instrument should explicitly state which types of assistance must be provided by all parties, and which are permissive. Some of the types of assistance that should be addressed are:

- Recovery of maintenance, either by enforcement of the Requesting State's decision or by the establishment of a new decision
- Collection and distribution of payments
- Assistance to the debtor by the Requested State in gathering new information and transmitting it to the Requesting State for review and possible variation of the Requesting State's decision
- Timely review by the Requesting State of requests for variation from the debtor
- Location of persons and assets
- Assistance with service of process
- Help with obtaining DNA samples
- Establishment of parentage

**f. provisions concerning legal aid and assistance to be provided to an applicant from another Contracting Party;**

Through its bilateral efforts, the United States has learned that "legal aid," "administrative aid," and "technical assistance" can all mean different things in different countries. First and foremost, the new instrument must reflect a common and explicit understanding of the meaning of these terms. For example, one country may say that it cannot provide free legal assistance; however, it may be that petitioners in that country rarely need legal assistance, because the administrative assistance freely provided by the relevant agency is so extensive. Once the terminology is clarified, there will still be differences in the nature and extent of no-cost assistance that countries provide, but it may not be as great as one might suspect.

The United States strongly believes that the provision of no-cost services not only results in more money reaching more needy children but also saves the government and the taxpayer money, as fewer families need to rely on cash assistance from the government. Thus, the United States has made a policy decision that state child support enforcement agencies should provide all services related to the recovery of maintenance free of charge to foreign reciprocating countries and their residents. Therefore, we urge that the instrument require a Requested State to provide no-cost services to residents of a Requesting State.

**g. provisions concerning co-operation in the establishment of paternity where necessary for child support enforcement;**

Provisions concerning paternity establishment are definitely important. The United States is aware that a number of countries do not currently provide this service for foreign applicants. The new instrument should seek to avoid situations where no country will exercise jurisdiction to establish a child support decision, as illustrated in the following hypothetical. Suppose that a mother and child reside in Texas and the father resides in a foreign country. The father has never been in the United States, and has taken no action, such as encouraging the mother to go to the United States or sending support to the mother in the United States, that would give Texas personal jurisdiction over the father under U.S. law. (The fact that Texas is the residence of the mother and child is not, in and of itself, sufficient under U.S. law to confer jurisdiction over the father in a Texas court). Because Texas cannot establish paternity or enter a child support decision, the mother

petitions the foreign country where the father resides. In our experience, the foreign country may refuse the mother's request because it considers Texas the appropriate forum. This is because the laws of many foreign countries accept the residence of the mother and child in a country as a sufficient basis for its tribunals to exercise jurisdiction over the father. Thus, the mother is left with no remedy.

Further, in its bilateral discussions, the United States has learned that the methodology and costs of paternity establishment vary widely from country to country. It would be useful during the negotiation process to arrange for a workshop on this issue, with presentations by technical experts, among others.

**h. provisions concerning co-operation in the international transfer of funds at low cost;**

The negotiators must address the importance of utilizing the most expedient, cost-effective technologies available to recover maintenance and remit collections to the creditor. Currency transfer and conversion fees combine to constitute the second highest cost of recovering international maintenance. (Only translation costs are higher.) It would be useful during the negotiation process to have a workshop on this issue so that experts can explain the problems, as well as the solutions offered by technology. Once there is a greater understanding of the issue, it should be easier to determine how to treat it in the instrument.

**i. provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis;**

The instrument must contain certain core obligations that every party must undertake. It would be extremely useful, however, to expand the scope of the instrument beyond those core obligations to cover other services that some parties may not be in a position to provide at the present time. If the instrument does include such "optional" services, there should, of course, be no obligation for any Contracting Party to provide such services to a country that does not reciprocate. On the other hand, the instrument should permit any country that wishes to provide services on a non-reciprocal basis to do so. How best to accomplish these objectives in the

instrument needs to be carefully considered. Should each Contracting Party be required to indicate which services it will provide, with all Parties that state that they provide a particular service being automatically obligated to provide that service to each other? Or should each Contracting Party decide for itself (on a country-by-country basis or a case-by-case basis) whether it wishes to undertake an obligation to provide a particular service for a particular country?

**j. standard forms;**

Effective implementation of an international maintenance arrangement requires standardized forms and procedures. Bilingual forms save time and money by eliminating many of the translation requirements that would be needed to send an international request. Tribunals gain confidence in the reliability of the information provided on standard forms they have seen before. It is probably not feasible or desirable to include the precise forms in the binding international agreement, given that they will need to be in so many languages and will need to be modified from time to time.

The instrument should, however, provide for a mechanism for the development and periodic modification of forms. Even before the instrument is completed and a permanent mechanism for handling forms is established, the negotiators should consider establishing a Forms Working Group to decide which forms are most important and develop drafts of these. The Forms Group established at the 1999 Special Commission on Maintenance created a draft Transmittal that could be used as a starting point. That group also recommended the use of a separate "stand alone" Location of Persons & Assets Information Form. A Uniform International Petition or Application for filing in Tribunals may also be useful for many countries. At the program level, workers must be provided practical training in the use of these forms and a clear understanding of the procedures required to send cases to every member State.

**k. provisions aimed at securing compliance with obligations under the instrument;**

As noted elsewhere in the U.S. response, experience has proven that the adoption of an international instrument establishing standards and procedures that all countries

agree are wise is only the first step. The success of the convention depends on its full implementation by all Parties. Therefore, the instrument and the Hague Conference must do everything possible to facilitate compliance. The instrument's obligations should be very clear in order to avoid inconsistent interpretation.

Other possible ways to facilitate compliance include:

-- Each party could be encouraged/required to provide the Hague Conference/other Parties in writing with the procedures to be followed in sending requests to the Central Authority;

-- There could be a mechanism for coordinating the dissemination of forms and procedures among Parties;

-- The instrument could provide for a mechanism to monitor/evaluate implementation. This might involve asking/requiring Parties to periodically provide information, statistics, etc.;

-- The Hague Conference, member states and non-governmental organizations could organize training sessions and workshops, perhaps on a regional basis, where countries can exchange best practices.

**1. provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor;**

The instrument should clearly provide for public bodies that have provided benefits to maintenance creditors to petition under the instrument for the recovery of maintenance, including maintenance owed for a prior period. Public bodies are only entitled to recover *maintenance owed by the debtor* for the prior period. While the public body may have an assignment of maintenance for reimbursement purposes, the reimbursement sought should not exceed the maintenance amount that was owed by the debtor but not paid.

**m. others.**

-- Relationship with the 1980 Hague Convention on International Child Abduction: It will be essential to U.S. adherence to the new instrument that it not be used to facilitate recovery of maintenance from a U.S. non-custodial parent in circumstances where the child has been wrongfully removed or retained. The instrument should not disturb national law, whatever it may be, regarding enforcement of maintenance obligations in those



circumstances. Therefore, the instrument should not apply if the Requested State makes or recognizes a judicial finding that the person seeking the recovery of maintenance has wrongfully removed or retained the child for whom maintenance is sought in the territory of the Requesting State.

-- Use of cooperation and enforcement mechanisms by private attorneys: While the new instrument will be drafted so as to establish rights and obligations between governments, maintenance creditors in the United States sometimes retain private attorneys to pursue their maintenance claims, rather than going through the state child support enforcement agency. The new instrument should provide that its enforcement and cooperation mechanisms are, to the extent appropriate, available to private counsel.

**34. With regard to the overall structure of the new instrument, and bearing in mind that the new instrument should "combine the maximum efficiency with the flexibility necessary to achieve widespread ratification",**

**a. which of the elements that you have mentioned under 33 should be included as core elements in the sense that all Contracting Parties should without exception be bound to comply with them?**

The answer to this question involves balancing two competing considerations. The first is how important a particular element is to the goal of obtaining support for the greatest number of needy children. There are some elements that are so important that one would question the utility of an instrument that did not include them as mandatory for all parties. The second is whether most countries would be willing to include a particular element as mandatory. The United States's preliminary view is that the following elements should be included as mandatory obligations.

-- Recognition and enforcement of foreign decisions for the recovery of maintenance for minor children, including procedures for collection and distribution of maintenance payments;

-- Establishment of a maintenance decision (including the determination of paternity if necessary) by the Requested State if it is unable to recognize a decision of the Requesting State;

- Rules regarding variance based on the principle that, as a general rule, decisions should be varied by the tribunal that originally made them;
- Administrative cooperation;
- Cost-free administrative services provided to debtors and creditors without travel requirements;
- Any necessary legal services provided cost-free without travel requirements;
- Central Authorities;
- Limited services for location of persons/assets and collection of DNA samples;
- Requirement of timely response to requests/inquiries from other States;
- Provision that public bodies may recover maintenance;
- Provision for the recovery of maintenance for prior periods, especially where the arrearages are due pursuant to a support order enforceable in the Requesting State;
- Provisions to monitor/facilitate compliance with obligations under the instrument;
- An instrument that includes core elements and optional elements, and permits parties to agree to the optional elements only on a reciprocal basis.

**b. which of those elements should be optional, in the sense that Contracting Parties would have the freedom to opt in or opt out of them?**

- Maintenance for spouses and collateral relatives;
- Use of abstracts of tribunal orders or requiring translation of only the maintenance recital;
- assistance with service of process;
- standard forms (highly desirable, but implementation of the convention should not be delayed by difficulties in developing agreed forms);
- transfer-of-funds provisions (highly desirable, but implementation of the agreement should not be delayed by difficulties in streamlining the transfer of funds).

As noted elsewhere, the United States does not favor the inclusion of either jurisdiction or applicable law provisions.

**c. do you favour a general principle that, where recognition of an existing decision is not possible in the country where the debtor resides, the authorities of that**

country should be under an obligation to provide assistance to the creditor in obtaining a new decision?

Yes.

35. In the case of states which have entered into bilateral or regional arrangements, please indicate which elements within those arrangements you would wish to see replicated or reflected in the new global instrument.

As explained elsewhere in this answer in more detail, the United States believes that the following elements would make for the strongest global instrument: Each party should be able to establish/recognize and enforce child support decisions for residents of other parties, including the establishment of paternity and the collection and distribution of payments. If a party is unable to recognize a decision of another party, then it should take all necessary steps to establish a new decision. Each party should provide these services to residents of other parties at no cost. Each party should designate a Central Authority to facilitate implementation of the Convention.

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA  
AND THE GOVERNMENT OF \_\_\_\_\_  
FOR THE ENFORCEMENT OF MAINTENANCE (SUPPORT) OBLIGATIONS

The Government of the United States of America

and

the Government of \_\_\_\_\_ (hereinafter referred  
to as the Parties),

Resolved to establish a uniform and effective framework for the  
enforcement of maintenance obligations, the recognition of  
maintenance decisions, and the determination of parentage,

In accordance with section 459A of the Social Security Act, Title  
42, United States Code, section 659A, and as authorized by the  
laws of \_\_\_\_\_,

Have agreed as follows:

Article 1

Objective

1. Subject to the provisions of this Agreement, the Parties  
hereby seek to provide for:

a. the recovery of maintenance or the reimbursement of  
maintenance to which a maintenance creditor or a public body  
having provided benefits for a maintenance creditor subject to the  
jurisdiction of one Party (hereinafter referred to as the  
claimant) is entitled from a maintenance debtor who is subject to  
the jurisdiction of the other Party (hereinafter referred to as  
the respondent), and

b. the recognition and enforcement of maintenance orders,  
reimbursement orders and settlements (hereinafter referred to as  
maintenance decisions) made or recognized within the jurisdiction  
of either Party.

## Article 2

### Scope

1. This Agreement shall apply to maintenance obligations arising from a family relationship or parentage, including a maintenance obligation towards a child born out of wedlock. However, a maintenance obligation towards a spouse or former spouse where there are no minor children will be enforced under this Agreement on the basis of reciprocity between \_\_\_\_\_ and the individual states and other jurisdictions of the United States.
2. This Agreement applies to the collection of payment arrears on a maintenance obligation and to the modification in amounts due under an existing maintenance decision.
3. The remedies provided for in this Agreement are not exclusive and do not affect the availability of any other remedies for the enforcement of a valid maintenance obligation.
4. This Agreement shall not apply if the Requested Party makes or recognizes a judicial finding that the person seeking the recovery of maintenance has wrongfully removed or retained the child for whom maintenance is sought in the territory of the Requesting Party.

## Article 3

### Central Authorities

1. The Parties shall each designate a body as Central Authority which shall facilitate compliance with the provisions of this agreement.
2. The Central Authority for \_\_\_\_\_ shall be
3. The Central Authority for the United States of America shall be the Office of Child Support Enforcement in the Department of Health and Human Services, as authorized by Title IV-D of the Social Security Act.

4. The parties may designate other public bodies to carry out any of the provisions of this agreement in co-ordination with the Central Authority.

5. Any changes in the designation of the Central Authority or other public bodies by one Party shall be communicated promptly to the Central Authority of the other Party.

6. Communications shall be addressed by the Central Authority or other public body of one Party directly to the Central Authority or other responsible public body of the other Party as designated by that Party.

#### Article 4

##### Applications and Transmission of Documents and Judicial Assistance

1. An application for the recovery or reimbursement of maintenance from a respondent subject to the jurisdiction of the Requested Party shall be made by the Central Authority or other designated public body of the Requesting Party, in accordance with the applicable procedures of the Requesting Party.

2. The application shall be made on a standard form in English and \_\_\_\_\_ to be agreed upon by the Central Authorities of both Parties, and shall be accompanied by all relevant documents. All documents shall be translated into the language of the Requested Party.

3. The Central Authority or other designated public body of the Requesting Party shall transmit the documents referred to in paragraphs 2 and 5 of this Article to the Central Authority or other designated public body of the Requested Party.

4. Before transmitting the documents to the Central Authority or other designated public body of the Requested Party, the Central Authority or other designated public body of the Requesting Party shall satisfy itself that they comply with the law of the Requesting party and the requirements of this Agreement.

5. When the application is based on or the documents include a decision issued by a competent court or agency establishing parentage or for the payment of maintenance:

a. the Central Authority or other designated public body of the Requesting Party shall transmit a copy of the decision certified or verified in accordance with the requirements of the Requested Party;

b. the decision shall be accompanied by a statement of finality or, if not final, a statement of enforceability and by evidence that the respondent has appeared in the proceedings or has been given notice and an opportunity to appear;

c. the Central Authority or other designated body of the Requesting Party shall notify the Central Authority or other designated body of the Requested Party of any subsequent change by operation of law in the amount required to be enforced under the decision.

6. In carrying out their tasks under this Agreement, the Parties shall provide each other assistance and information within the limits of their respective laws, and consistent with any treaties related to judicial assistance in force between the Parties.

7. All documents transmitted under this Agreement shall be exempt from legalization.

## Article 5

### Functions of the Central Authority of the Requested Party

The Central Authority or other designated public body of the Requested Party shall take on behalf of the claimant all appropriate steps for the recovery or reimbursement of maintenance, including the institution and prosecution of proceedings for maintenance, the determination of parentage where necessary, the execution of any judicial or administrative decision and the collection and distribution of payments collected.

## Article 6

### Cost of services

All procedures described in this Agreement, including services of the Central Authority, and necessary legal and

administrative assistance, shall be provided by the Central Authority or other designated public body of the Requested Party without cost to the claimant. The costs of testing blood or tissue for parentage determinations shall be borne by the Central Authority or other designated public body of the Requested Party. The Central Authority or other designated public body of the Requested Party may assess costs in any proceeding against the respondent appearing in its jurisdiction.

## Article 7

### Recognition and enforcement of maintenance decisions

1. Maintenance decisions, including maintenance decisions arising from a determination of parentage, from one Party shall be recognized and enforced in the other Party to the extent that the facts in the case support recognition and enforcement under the applicable laws and procedures of the latter Party.
2. Maintenance decisions made after the failure of the respondent to appear shall be considered as decisions under paragraph 1 if it demonstrated that notice had been given and the opportunity to be heard had been satisfied in a way to satisfy the standards of the Requested Party.
3. The Requested Party shall take all appropriate steps to establish a maintenance decision if it is unable, under paragraph 1, to recognize a maintenance decision of the Requesting Party.



Article 8

Applicable Law

1. All actions and proceedings under this Agreement by either Party shall be carried out pursuant to the law including choice of law provisions and procedures of that Party.
2. The physical presence of the child or custodial parent shall not be required in proceedings under this Agreement in the Requested Party.

Article 9

Territorial Application

1. For \_\_\_\_\_, this Agreement shall apply to \_\_\_\_\_.
2. For the United States of America, this Agreement shall apply to the fifty states, the District of Columbia, Guam, Puerto Rico, the United States Virgin Islands, and any other jurisdiction of the United States participating in Title IV-D of the Social Security Act.

Article 10

Federal State Clause

With respect to the United States, any reference to the law or requirements or procedures or standards of a Party or of the Requesting or Requested Party shall be construed as a reference to the law, requirements, procedures or standards of the relevant state or other jurisdiction of the United States.

Entry into force

1. This Agreement shall enter into force on the later of the dates on which each Party has been notified in writing through the diplomatic channel that the legal requirements under domestic law for the entry into force have been fulfilled.

2. This Agreement shall apply to any outstanding maintenance decision, or payment accrued under such decision, regardless of the date of that decision.

#### Article 11

##### Termination

1. Either Party may terminate this Agreement by notification in writing addressed to the other Party through the diplomatic channel.

2. The termination shall take effect on the first day of the third month following the receipt of the notification.

3. In the event that either Party's domestic legal authority to carry out its obligations under this Agreement ceases, in whole or in part, either party may suspend application of this Agreement, or with the agreement of the other Party, any part of this Agreement. In that event, the Parties will seek, to the fullest extent practicable in accordance with domestic law, to minimize unfavorable effects on the continuing recognition and enforcement of maintenance obligations covered by this Agreement.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Agreement.

Done at \_\_\_\_\_ in duplicate, in English and languages both of which are equally authentic, on this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

**P.L. 104-193 (August 22, 1996), Section 371 added two sections to the Federal Social Security Act:**

### **INTERNATIONAL SUPPORT ENFORCEMENT**

**SEC. 459A. [42 U.S.C. 659a] (a) AUTHORITY FOR DECLARATIONS.-**

(1) **DECLARATION.**-The Secretary of State, with the concurrence of the Secretary of Health and Human Services, is authorized to declare any foreign country (or a political subdivision thereof) to be a foreign reciprocating country if the foreign country has established, or undertakes to establish, procedures for the establishment and enforcement of duties of support owed to obligees who are residents of the United States, and such procedures are substantially in conformity with the standards prescribed under subsection (b).

(2) **REVOCACTION.**-A declaration with respect to a foreign country made pursuant to paragraph (1) may be revoked if the Secretaries of State and Health and Human Services determine that-

(A) the procedures established by the foreign country regarding the establishment and enforcement of duties of support have been so changed, or the foreign country's implementation of such procedures is so unsatisfactory, that such procedures do not meet the criteria for such a declaration; or

(B) continued operation of the declaration is not consistent with the purposes of this part.

(3) **FORM OF DECLARATION.**-A declaration under paragraph (1) may be made in the form of an international agreement, in connection with an international agreement or corresponding foreign declaration, or on a unilateral basis.

**(b) STANDARDS FOR FOREIGN SUPPORT ENFORCEMENT PROCEDURES.-**

(1) **MANDATORY ELEMENTS.**-Support enforcement procedures of a foreign country which may be the subject of a declaration pursuant to subsection (a)(1) shall include the following elements:

(A) The foreign country (or political subdivision thereof) has in effect procedures, available to residents of the United States-

(i) for establishment of paternity, and for establishment of orders of support for children and custodial parents; and

(ii) for enforcement of orders to provide support to children and custodial parents, including procedures for collection and appropriate distribution of support payments under such orders.

(B) The procedures described in subparagraph (A), including legal and administrative assistance, are provided to residents of the United States at no cost.

(C) An agency of the foreign country is designated as a Central Authority responsible for-

(i) facilitating support enforcement in cases involving residents of the foreign country and residents of the United States; and

(ii) ensuring compliance with the standards established pursuant to this subsection.

(2) **ADDITIONAL ELEMENTS.**-The Secretary of Health and Human Services and the Secretary of State, in consultation with the States, may establish such additional standards as may be considered necessary to further the purposes of this section.

(c) DESIGNATION OF UNITED STATES CENTRAL AUTHORITY.-It shall be the responsibility of the Secretary of Health and Human Services to facilitate support enforcement in cases involving residents of the United States and residents of foreign countries that are the subject of a declaration under this section, by activities including-

(1) development of uniform forms and procedures for use in such cases;

(2) notification of foreign reciprocating countries of the State of residence of individuals sought for support enforcement purposes, on the basis of information provided by the Federal Parent Locator Service; and

(3) such other oversight, assistance, and coordination activities as the Secretary may find necessary and appropriate.

(d) EFFECT ON OTHER LAWS.-State may enter into reciprocal arrangements for the establishment and enforcement of support obligations with foreign countries that are not the subject of a declaration pursuant to subsection (a), to the extent consistent with Federal law.

**AND**

**42 U.S.C. 654 - STATE PLAN FOR CHILD AND SPOUSAL SUPPORT**

§654 (32)(A) provide that any request for services under this part by a foreign reciprocating country or a foreign country with which the State has an arrangement described in section 459A(d) shall be treated as a request by a State;

(B) provide, at State option, notwithstanding paragraph (4) or any other provision of this part, for services under the plan for enforcement of a spousal support order not described in paragraph (4)(B) entered by such a country (or subdivision); and

(C) provide that no applications will be required from, and no costs will be assessed for such services against, the foreign reciprocating country or foreign obligee (but costs may at State option be assessed against the obligor); and