

# ASPECTS ON THE PAYMENT OF CHILD SUPPORT GRANTED TO THE CHILD

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## **Abstract**

*The payment of the child support granted to the minor raises certain problems when the debtor is of bad faith and has a residence abroad. There are mechanisms at EU level that are able to determine the recovery of the amount of the maintenance pension when the debtor tries to hide the amount of his income.*

*At European level, the reference legislation is EC Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of judgments and cooperation on maintenance obligations. The need to adopt the Regulation was the result of the negotiations that took place in The Hague in 2007, negotiations that led to the adoption of the Hague Convention on obtaining the maintenance allowance for children and other family members abroad and the Protocol on the law applicable to maintenance obligations. European countries that have not acceded to the European Union have adopted, by convention, this Regulation, precisely in order to facilitate the access of the minor creditor to his debt, in the event that the debtor willfully hinders payment. the debtor's faith is also realized if the debtor does not reside in an EU member state, the situation in which the provisions of the New York Convention apply. In the country of residence of the debtor all the procedural guarantees are granted to him and the contact with the competent authorities is made in Romania through the Ministry of Justice, the International Cooperation Directorate.*

**Key Words:** *minor, debtor, the external residence, instance.*

**JEL Classification:** [K36]

## **1. Introduction. Issue**

The granting of the child support to the minor by the parent who does not have the same domicile as the minor, raises in practice numerous problems regarding the collection of the sums of money, established by a court decision, which has become mandatory.

Most of the collection of the child support by the minor does not know obstacles regarding its payment, the parent voluntarily paying the debt. However, there are situations in which, knowingly, the debtor parent tries to evade the payment obligation, either by declaring that he/she has no income, or by trying not to declare all his/her income.

It is true that most of the time the situation faced by the creditor is one in which the debtor's income is presented as low, but it should not be overlooked that a debtor parent with a financial situation well above average can have the same momentum to try to reduce the amount, but this time not by hiding the income, but

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by minimizing the needs of the minor, respectively interpreting the legal phrase "... the need of the applicant."

The problem can be approached on two levels.

The first situation is that in which both the parent debtor and the minor creditor are domiciled in Romania.

The second situation is that the creditor and the debtor do not live in the same country. If the debtor and the creditor live in different countries within the European Union, the Community legislation facilitates the fulfillment of the obligation, and in the situation where the debtor or creditor lives in non-EU countries, the provisions of Regulation (EC) no. 4/2009, The Hague Convention of 2007 or the New York Convention of 1956, through the Romanian Ministry of Justice if the debtor resides in one of the EU Member States, contracting to the Hague Convention of 2007 or to the Convention of New York of 1956.

## **2. Collection of the child support by the minor child from the parent with whom he / she does not live permanently in the situation in which both have their domicile in Romania**

The basis of the matter for the payment of child support can be found in the Civil Code, art. 499, art. 513<sup>1</sup>, art. 514<sup>2</sup>, art. 515<sup>3</sup>, art. 517<sup>4</sup>, art. 524<sup>5</sup>, art. 525<sup>6</sup>, art. 526<sup>7</sup>,

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<sup>1</sup> Art. 513 Civil Code - The maintenance obligation exists only between the persons provided by law. It is due only if the conditions required by law are met.

<sup>2</sup> Art. 514 Civil Code - The personal character of the maintenance obligation. (1) The maintenance obligation has a personal character. (2) It is extinguished by the death of the debtor or the creditor of the maintenance obligation, unless otherwise provided by law. (3) The right to maintenance may not be assigned and may be pursued only under the conditions provided by law.

<sup>3</sup> Art. 515: Inadmissibility of waiving maintenance. No one may waive his right to maintenance for the future

<sup>4</sup> Art. 517: Art. 517: Maintenance of the child by the spouse of his/her parent. (1) The spouse who contributed to the maintenance of the child of the other spouse is obliged to provide maintenance to the child while he/she is a minor, but only if his/her natural parents have died, disappeared or are (2) In turn, the child may be obliged to give maintenance to the one who maintained him/her in this way for 10 years.

<sup>5</sup> Art. 524: Maintenance creditor. Only those who are in need are entitled to maintenance and cannot be supported from their work or property.

<sup>6</sup> Art. 525: The minor's right to maintenance. (1) A minor who requires maintenance from his/her parents is in need if he/she cannot be supported from his/her work, even if he/she has property. (2) However, if the parents could not provide maintenance without -and endanger their own existence, the court of guardianship may approve the maintenance to be ensured by capitalizing the goods he/she has, except for those of strict necessity.

<sup>7</sup> Art. 526: Misconduct. (1) A person who has been guilty of serious misconduct, contrary to law or morals may not claim maintenance. (2) A person who is in a state of need through his/her fault may request only maintenance of strict necessity.

art. 527<sup>8</sup>, art. 529<sup>9</sup>, art. 530<sup>10</sup>, art. 531<sup>11</sup>, art. 532<sup>12</sup>, art. 533<sup>13</sup>, art. 524<sup>14</sup>, art. 729 Code of Civil Procedure<sup>15</sup>.

From the analysis of the legal texts we can see that the maintenance obligation granted by the parent is imposed by law, in order to satisfy the material, spiritual needs for the upbringing and education of minors. It has an imperative character, it is personal, it cannot be forcibly pursued and it cannot be the object of an assignment. Nor can this right be waived for the future.

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<sup>8</sup> Art. 527: The debtor of maintenance: (1) Only the person who has the means to pay it or has the possibility to acquire these means may be obliged to maintain it. (2) When establishing the means of the one who owes the maintenance, his incomes and goods are taken into account, as well as the possibilities of their realization; also, its other obligations will be taken into account (see appeal in the interest of the law, Decision no. 2 of December 21, 2015).

<sup>9</sup> Art. 529: Amount of maintenance (1) Maintenance is due according to the need of the person requesting it and the means of the person to pay it (see appeal in the interest of the law, Decision no. 2 of 21 December 2015). (2) Where maintenance is due by the parent, it shall be set at one-fourth of his net monthly income for one child, one-third for 2 children and one-half for 3 or more children (see appeal in the interest of the law, Decision No. 2 of December 21, 2015). (3) The amount of maintenance due to children, together with maintenance due to other persons, according to the law, may or exceed half of the net monthly income of the obligor.

<sup>10</sup> Art. 530: Methods of execution (1) The maintenance obligation is executed in kind, by ensuring the necessities of living and, as the case may be, of the expenses for education, learning and professional training. (2) If the maintenance obligation is not performed voluntarily, in kind, the guardianship court shall order its execution by paying a child support, established in money. (3) The child support may be established in the form of a fixed amount or in a percentage of the net monthly income of the debtor. The provisions of art. 529 paragraph (2) and (3) remain applicable.

<sup>11</sup> Art. 531: Modification and termination of the child support. (1) If there is a change in the means of the maintenance provider and the need of the recipient, the guardianship court may, depending on the circumstances, increase or decrease the child support or decide to terminate the payment. (2) The child support established in a fixed amount shall be indexed by right, quarterly, according to the inflation rate.

<sup>12</sup> Art. 532: The date from which the child support is due (1) The child support is due from the date of the request for summons. (2) However, the child support may also be granted for an earlier period, if the introduction of the application for the trial was delayed due to the debtor's fault.

<sup>13</sup> Art. 533: Payment of the child support (1) The child support shall be paid in periodic installments, within the time limits agreed by the parties or, in the absence of their agreement, within those established by court decision. (2) Even if the maintenance creditor died in the period corresponding to an installment, the maintenance is due in full for that period. (3) The parties may also agree or, if there are good reasons, the guardianship court may decide that the maintenance be carried out by the advance payment of a lump sum to cover the maintenance needs of the to the person entitled for a longer period or for the entire period in which the maintenance is due, to the extent that the maintenance debtor has the means necessary to cover this obligation.

<sup>14</sup> Art. 534: Reimbursement of undue maintenance. If, for any reason, it is proved that the maintenance provided, voluntarily or as a result of a court decision, was not due, the person who performed the obligation may request a refund from the person who received it or from the one who had, in reality, the obligation to perform it, in the latter case, on the basis of enrichment without just cause.

<sup>15</sup> Art. 729. - "(...)(3) Income from work or any other amounts that are periodically paid to the debtor and are intended to ensure his/her livelihood, if they are less than the amount of the minimum net wage in the economy, can be tracked only on the part that exceeds half of this amount. (...) (7) State allowances and child allowances, childcare allowances, maternity allowances, death grants, state scholarships, daily allowances, and any other such allowances intended for special destination, established by law, cannot be prosecuted for any debts."

The legislator thus provided a stable and strong normative framework for the minor holder of the right to maintenance, precisely so that the fundamental values underlying the minor's upbringing and education cannot be affected by the precariousness of the material means. This makes the applicability of the fundamental principle, that of honoring the best interests of the minor.

Decision 6/2019 of the HCCJ, in its considerations shows, among other things, that the maintenance obligation has a legal character and a complex, material and moral content. Thus, the maintenance obligation of the minor includes several components, reflected in the content of art. 487 and 499 of the Civil Code, respectively those necessary for living, but also those necessary for ensuring education, learning and professional training. Therefore, the need of the minor must be assessed according to all these aspects<sup>16</sup>.

Moreover, art. 525 para. (1) Civil Code provides that "a minor who requires maintenance from his/her parents is in need if he/she cannot support himself/herself from his/her work, even if he/she has property". It follows, therefore, that the minor's state of need is assessed in relation to the impossibility of obtaining income from work, and not in relation to the possibility of subsistence on his property.

With regard to the debtor's income, it should be noted that this includes income from work, as well as any other income that is permanent. (Nicolae, 2019)

However, there are situations in which the debtor provides unreal information about his/her income, which is the basis for analyzing the material situation according to which the "possibilities of the offerer" are assessed. (Al. Bacaci, C. Hageanu, Viorica Dumitrache, 2009, p. 289)

Regarding the notion of "income", all his/her income is considered, generically, regardless of the source, respectively from labor or from other parts (for example, rents, royalties, dividends, bank deposits, civil and industrial fruits of own goods etc.). Occasional income is not taken into account.

In the Decision 21/2015 of the HCCJ it was shown that in the Fiscal Code are included definitions for each category of incomes realized from an activity carried out by a person, in the sense of art. 7 para. (1), including any activity carried out on the basis of an individual employment contract or a special status provided by law. Thus, the following are defined: income from independent activities (including income from intellectual property rights - art. 46); income from salaries (art. 55); income from the transfer of the use of goods (art. 61); investment income (including dividend income, interest - art. 65); income from pensions (art. 68); income from agricultural activities, forestry and fish farming (art. 71); income from prizes and gambling (art. 75); income from the transfer of real estate (art. 77); revenues from

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<sup>16</sup> Decision no. 6/2019 on the examination of the appeal in the interest of the law declared by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice regarding the interpretation and application of the provisions of art. 1,616-1,618 letter c) reported to art. 499, art. (1) and (3), Articles 515, 525 (1), 529-531 of the Civil Code and Articles 729 (3) and (7) of the Code of Civil Procedure, concerning the possibility of judicial compensation for the maintenance obligations owed by the parents to the children, when the children have been separated, and each of the parents provides maintenance to the child (children) who does not live (live) with him "; Point 20.

other sources (including insurance premiums, fees from commercial arbitration - art. 78 and 79)<sup>17</sup>. The notion of net monthly income is specific to the tax matter, representing the basis for calculating the profit tax and being defined, as such, by the same Fiscal Code for different categories of income, including income from salaries and income assimilated to them.

Practice has proven time and time again that the debtor parent does not declare all the income obtained, especially when the income is high and comes from several sources: rents, dividends, etc. The concealment is made either by not declaring and not paying the tax on the incomes obtained from rents or by not raising the dividends, respectively their reinvestment, so that they can no longer be taken into account when calculating the child support.

In the situation where the court decision establishes that the child support granted to the minor represents a percentage of the realized income, it is up to the creditor's representative to identify all the debtor's income, an aspect not pleasant and often difficult to achieve.

However, not all amounts of money obtained by the debtor employee enter the cap on the basis of calculation for obtaining the child support by the minor creditor. (Florian, 2016, p. 321)

In the traditional approach to the problem of income categories that can be included in the basis for calculating the child support, on the line opened by the Guidance Decision no. 14 of 23 May 1963 of the Plenum of the former Supreme Court shows that the increase for special working conditions cannot be taken into account for this purpose, as it is granted to "give material opportunity to employees to prevent or remove the harmful effects those works in the special conditions taken into account when granting the bonuses have on the human body", so that "it is necessary that the bonus remains entirely destined for its affectation". It was also noted that ignoring the purpose pursued by the legislator in granting the bonus "would reduce the possibility of defending the employee's body working in these conditions, this being also against the interests of the maintenance creditor"<sup>18</sup>.

Another category of allowance that is not included in the calculation basis for determining the amount is the amount in which the amounts of money representing the equivalent of the food norm granted in cash or in kind do not fall into the category of salary income or income assimilated to them (for tax purposes), cannot

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<sup>17</sup> Decision no. 21/2015 on the examination of appeals in the interest of the law formulated by the Board of the Suceava Court of Appeal and the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice on "interpretation and application of the provisions of Article 527 paragraph (2) and Article 529 paragraphs (1) and (2) of the Civil Code related to the provisions of Article 2 paragraphs (4) and Article 4 paragraph (4) of Government Ordinance No. 26/1994 on food rights, in peacetime, of national defense, public order and national security personnel, republished, with subsequent amendments and completions, regarding the inclusion of the value equivalent of the food norm in the total net monthly income in relation to which the child support is establish due by the parent to the child".

<sup>18</sup> Decision no. 21/2015 on the examination of appeals in the interest of the law formulated by the Board of the Suceava Court of Appeal.

be taken into account when calculating the child support, because it does not enter the net monthly income from salaries in relation to which this obligation is quantified, since it does not even enter the gross monthly income, on the basis of which establishes the monthly net income, in this sense being relevant the provisions regarding the gross and net monthly income from salaries. Thus, in the case of income from salaries, art. 57 of the Fiscal Code stipulates that the monthly net income is calculated (for the purpose of determining the tax, the rate of 16% being applied to the net income) by deducting from the gross income the compulsory social contributions on a month. Point 106 of the Methodological Norms for the application of Law no. 571/2003 on the Fiscal Code, approved by Government Decision no. 44/2004, with the subsequent amendments and completions, stipulates that "The gross monthly income from salaries represents the total income realized in a month, according to article 55 paragraphs (1) - (3) of the Fiscal Code, by a natural person, on each place of performance, regardless of their name or the form in which they are granted". It is noted that the legislator explicitly excluded, even from the calculation base of the monthly net income, the amounts provided by art. 55 para. (4) of the Fiscal Code, relevant in the present analysis<sup>19</sup>.

The sums of money granted to the minor by the debtor parent must cover all his/her needs. A child not only needs clothes, shoes and food, but also needs decent and optimal living conditions - which means a home suitable for raising a minor, clean, furnished and equipped, bright and warm -, he/she needs a good school and educational training, toys, age-appropriate books and, most importantly, he/she needs permanent and constant affection and attention, someone to take care of his/her education and permanent and constant care, someone to play with him/her, spend time with him/her, explain and teach him/her everything he/she needs and everything the child wants to know, someone to read him/her a story at bedtime, someone to take the child to kindergarten / school and to bring the child from kindergarten / school, or to extracurricular activities, by someone to help him / her with homework and lessons, someone to be with and together with the child at all times.

Given that following the divorce of the parents and due to the fact that the ex-spouses do not reach an agreement on the maintenance of the minor, the father offering an infinitely smaller amount and strictly related to income in Romania, in the conditions in which he lives, works and earns at the highest level in another country, we consider that the court must grant the percentage of the pension without being influenced by the high level of income of the debtor parent, because otherwise it would impose a cap on the standard of living of the minor, referring to criteria that the minor did not have in the scale of values until then.

However, it is more than obvious that all these "duties" listed above remain the responsibility of the parent where the minor's residence was established. And it is equally obvious that these "duties" represent that parent's exclusive contribution to the upbringing and maintenance of the minor<sup>20</sup>.

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<sup>19</sup> *Ibidem*, recital 60.

<sup>20</sup> Cluj Court of Appeal, Civil Section I, Civil Decision no. 209 / R of April 8, 2015, [www.curteadeapelcluj.ro](http://www.curteadeapelcluj.ro).

Although art. 530 paragraph 1 of the Civil Code stipulates as a rule the execution in kind of the maintenance obligation, the provisions of art. 499 of the Civil Code, respectively the particularities of the case. In this sense, the legislator took into account that the maintenance obligation is performed as a rule in kind as long as the parent lives with the minor, being a complex obligation, which includes both material maintenance and the need for spiritual, psychological development of the child, his/her education. Or, by execution in kind, in this matter, the obligation to provide food, clothes cannot be restricted, but the major interest of the child must be pursued to become, through education, a person capable of facing the challenges of life. As such, in the case of the parent who does not live with the child, his/her obligation is necessary to turn into money<sup>21</sup>.

Given that the parents had the matrimonial regime under the regime of the legal community, the parent who has the residence established together with the minor, knows in principle what the sources of income of the debtor parent are. (Mihăilă, 18-19 May 2018)

All the actions of the parent representing the interests of the minor must be governed by the principle of protecting the best interests of the minor, and the debtor parent must understand that the child support is not a facility obtained by the other parent, but the minor's right to decent growth and development.

### **3. Collection of the child support by the minor child from the parent with whom he / she does not live permanently in the situation when they have domiciles in different states**

The practice was the one that proved that there are many situations in which the debtor of the child support does not have the domicile in the same state as the creditor. Usually, the minor has his/her domicile in Romania, and the debtor lives outside the country's borders, but there are also situations when the creditor lives outside our country and the debtor in the country.

In order to support the creditor, a series of normative acts have been adopted at the EU level to unify and facilitate the rapid obtaining of the child support for the minor creditor.

Subject matter: Regulation (EC) No 4/2009 of the Council of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of judgments and cooperation in matters relating to maintenance obligations; The Hague Convention on the maintenance of child support abroad for children and other family members and the Protocol on the law applicable to maintenance obligations - "The Hague Protocol of 2007"<sup>22</sup>; Commission Decision 2009/451 / EC;<sup>23</sup> in the event that a party

<sup>21</sup> Gorj Tribunal, Civil Decision no. 833/2014, portal.just.ro.

<sup>22</sup> Article 1 paragraph (1), the Hague Protocol of 2007 "determines the law applicable to maintenance obligations arising out of a family relationship, parentage, marriage or affinity, including any type of maintenance obligation towards a child, regardless of the marital status of the parents."

<sup>23</sup> Commission Decision 2009/451 / EC of 8 June 2009, OJ L 149, 12.06.2009, p. 73. Denmark also concluded an agreement - by letter dated 14 January 2009, Denmark notified the Commission of its decision to implement the content of the Maintenance Regulation, in so far as this Regulation

/ defendant has his habitual residence in a non-EU country does not generally exclude the application of the rules of jurisdiction of the regulations. In this respect is also recital 15 of the EU Regulation on maintenance obligations. The fact that a defendant has his/her habitual residence in a third country should no longer have the effect of excluding the application of Community rules on jurisdiction and, from now on, no reference to the national law should be considered<sup>24</sup>.

Based on *Law no. 36/2012 on some measures necessary for the application of regulations and decisions of the Council of the European Union, as well as instruments of private international law in the field of maintenance obligations*, after receiving maintenance requests or specific measures, the Ministry of Justice sends them, for competent resolution, to the authority or institution holding the personal data, the competent territorial bar, the Chamber of Bailiffs or, as the case may be, the competent court. It benefits from free, total legal assistance, for the requests formulated through the central authority, under the conditions provided in art. 46 of the Regulation: creditors of maintenance obligations who have not reached 18 years of age or are continuing their studies, but not more than 21 years of age; maintenance creditors who are vulnerable persons. The Ministry of Justice sends directly to the competent territorial bar, the requests received from abroad. The dean of the bar urgently appoints, by decision, obligatorily, ex officio, a lawyer. The appointed lawyer requests the granting of public legal aid, including in the form of payment of the bailiff's fee. Subsequently, after obtaining an enforceable title, the appointed lawyer requests the court to grant public legal aid in the form of payment of the bailiff's fee. The lawyer submits the request for forced execution, the executory title and the decision of the dean of the bar, to the competent territorial bailiff<sup>25</sup>.

Where the debtor and creditor of the obligation are in different EU countries, judgments given in an EU Member State that has obligations under the Hague Protocol of 2007, the Regulation eliminates the "exequatur procedure". The implementing provisions are set out in Chapter IV, Section 1 of the Regulation. In the case of EU Member States that have no obligations under the Hague Protocol of 2007, the provisions of the Regulation (in contrast to the previously applicable rules) aim to speed up and simplify the enforcement of judgments, while maintaining the "exequatur procedure". These issues are covered in Chapter IV, Section 2 of the Regulation<sup>26</sup>.

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amends the Brussels I Regulation (see OJ L 149, 12.6.2009, p. 80), on the basis of a parallel agreement concluded with the European Community on 19 October 2005, according to which Denmark must notify the European Commission of its decision whether or not to implement the content of the amendments to the Brussels I Regulation. This means that the content of the "Maintenance Regulation will apply to the relations between the European Community and Denmark, except for Chapters III and VII". In addition, "the provisions of Article 2 and Chapter IX of the Maintenance Regulation apply only in so far as they concern jurisdiction, recognition, enforceability and enforcement of judgments and access to justice".

<sup>24</sup> [http://www.era-comm.eu-Divortul\\_cross-border\\_and\\_maintenance](http://www.era-comm.eu-Divortul_cross-border_and_maintenance).

<sup>25</sup> <https://e-justice.europa.eu>.

<sup>26</sup> [http://www.era-comm.eu/Better\\_Applying\\_the\\_EU\\_Regulations](http://www.era-comm.eu/Better_Applying_the_EU_Regulations).

The recovery of the maintenance amount is made free of charge, based on art. 46 of Regulation 4/2009.

In practice, however, recovering the debt from the debtor in bad faith, who refuses to pay the obligation voluntarily, is often difficult. If the value of real incomes is not known, unfortunately the amount will be reported at the minimum income on the national economy<sup>27</sup>.

Another situation, less common, is that the debtor of the obligation has a very high income, much above average. In this situation, the tendency of his action is to minimize the needs of the child.

In such a case, the parties request a divorce by agreement of the parties. The marriage resulted in a minor child, and the father agrees that the minor should have a home with the mother. Both mother and father have the same profession, since the father works in a non-EU state, where he earns a very high income. In the first years of the child's life, the family lived together in the non-EU state. The mother moves with the child back to Romania, not adapting to the extra-community state. The very large physical distance between the two states makes the father have little contact with the child, the communication being done mainly by electronic means. After a few years, the mother requests the divorce, with the agreement of the parties, with which the father agrees, along with the other ancillary claims, except for setting the child support at the level of  $\frac{1}{4}$  of the monthly net income, offering a fixed amount that he "considers sufficient for the needs of the child", the amount that represents the 5th part of what is normally granted to the minor, the maximum or towards the maximum amount related to the income of the debtor father. The court considers as a term for solving the request a term, assuming that the mother accepts the counter-offer. The needs of a minor dependent on persons with high incomes will be different from the needs of a minor whose parents have low incomes, or are even temporarily deprived of income. Therefore, when quantifying the child's need, the real possibilities of the dependent parents / parents will be taken into account.

In this situation the father acts with a double standard, namely: as long as he managed together with the child, the material possibilities offered to him were at the highest level, there being practically no limitation starting with primary needs and ending with educational ones, but as long as the child is in Romania, the level of material support no longer relates to the standards with which the minor was accustomed, practically integrating him/her in a certain social category, without taking into account that this affects the best interests of the child by changing the quality of life of the minor on subjective criteria.

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<sup>27</sup> Galati Court of Appeal, Civil Decision no. 544 / 2011- "The debtor of the maintenance obligation cannot be obliged to child support calculated at random as long as there is no proof of certain incomes realized abroad based on an employment contract. In the absence of definite evidence on the basis of which it is possible to establish the real income which the applicant, in this case, holds, the amount of the child support is to be established according to the minimum income on the national economy".

## Conclusions

The child support is a primary right of the child. The full application of the notion of the best interests of the child requires the development of a rights-based approach that co-opts all actors, ensures the holistic, physical, psychological, moral and spiritual integrity of the child and promotes human dignity. The best interests of the child are considered to be paramount and are an ongoing process, which must be assessed before making an important administrative decision.

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