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Support Under The Federal Immigration I-864 Affidavit of Support Versus California's Family Code and State Case Law: What Family Law Attorneys Should Know

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This article examines the Affidavit of Support mandated by the Department of Homeland Security (DHS) or State Department for family-based immigration cases when a U.S. citizen agrees to sponsor an intended immigrant, and the immigration laws that apply to the marriage between the sponsoring and intended immigrant spouses and the dissolution of that marriage. In many ways, those laws are different and directly contrary to California's Family Code and case law that otherwise would govern the dissolution. This article explores how those laws differ and offers some practice tips for California family law practitioners to consider when representing either party to the dissolution.

What is a Department of Homeland Security I-864 Affidavit of Support Filed on Behalf of an Immigrant?

All U.S. citizens, when sponsoring a foreign national[1], must comply with the U.S. Immigration and Nationality Act ("INA"). Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("Immigration Responsibility Act"),[2] and this Act made sweeping changes to immigration rules. One critical change is the requirement that the U.S. citizen sponsor execute Form I-864, "Affidavit of Support" (hereinafter, "Affidavit"), in which the sponsor promises to support the immigrant seeking admission to the United States at a level not less than 125% of the national poverty level (and not less than 100% for a sponsoring spouse on active duty in the Armed Forces or U.S. Coast Guard). The government itself has said in its guide for sponsors that the purpose of the I-864 Affidavit is to prevent the noncitizen from becoming a public charge.[3]

Specifically, section 531(a) of the Immigration Responsibility Act amended section 212(a)(4) of the INA, and provides that an immigrant is inadmissible if likely to become a "public charge," i.e., likely to seek public benefits: "an alien is inadmissible as an alien likely to become a public charge if the alien is seeking an immigrant visa, admission as an immigrant, or adjustment of status as: (a) An immediate relative, (b) a family-based immigrant, or (c) an employment-based immigrant, if a relative of the alien is the petitioning employer or has a significant ownership interest in the entity that is the petitioning employer." As a result of this change, to overcome the public charge inadmissibility ground, the sponsor has to show that he or she earns enough to support the immigrant at least to a level that is 125% of the national poverty level.[4] To prove this, the sponsor must sign and file an Affidavit under section 213A of the INA, 8 U.S.C. § 1183a, for the benefit of the non-citizen foreign national.[5] The spousal or domestic partner sponsor is the petitioner, who signs the affidavit for the immigrant spouse or domestic partner coming to live in the United States.

This article focuses on spousal and domestic partner sponsorship, i.e., when a U.S. citizen sponsors an intended immigrant spouse or domestic partner, and the Affidavit and its impact on California dissolution of marriage or domestic

partnerships. Any reference to "spouse" and "marriage" is also a reference to "domestic partner" and "domestic partnership'" the analysis and recommendations apply equally to both unions.[6]

First and foremost, it is important for family law practitioners to understand that the Affidavit is a legally binding and enforceable contract between the sponsoring spouse and the federal government, under which the sponsoring spouse agrees to support the intended immigrant spouse to a certain economic level. The federal government relies on this Affidavit and the sponsor spouse's income and all assets available to him or her as stated therein to determine whether the sponsor is able to meet the financial requirements of sponsorship, and to safeguard against the sponsored spouse applying for federal and state means-tested public benefits (i.e., becoming a "public charge").[7] What may surprise many family law practitioners is that the sponsored immigrant spouse can also enforce this contract against the sponsor and file an action to enforce the sponsor's support obligation separately from any support rights the sponsored immigrant spouse may have under the Family Code. The spouse's right to enforce the Affidavit and the seminal case of *Erler v Erler,* 824 F.3d 1173 (9th Cir. 2016), among others, is discussed below.

When Does the Sponsoring Spouse's Obligation Under the I-864 Affidavit Terminate, and Will Divorce Terminate the Support Obligation?

The sponsoring spouse's obligation under the Affidavit terminates by operation of law only upon the occurrence of one of five specific circumstances:

1. The intended immigrant becomes a U.S. citizen;
2. The intended immigrant is no longer permanent resident by either departing U.S. or relinquished his/her residency;
3. The intended immigrant is subject to removal or deportation proceedings but applies for and obtains, in the Immigration court hearing the matter, a new grant of adjustment of status, based on a new affidavit of support, if one is required except for limited purpose when the intended immigrant entered as a fiancé and later adjust status in US;
4. The intended immigrant or sponsor dies. That said, a sponsor's estate upon death of the sponsor may have obligation for any support that was accumulated before the sponsor's death; or
5. The intended immigrant worked for forty qualifying quarters as defined in Title II of the Social Security Act.[8]

Notice that divorce is not one of the enumerated circumstances that terminates sponsor obligations under the Affidavit. The newly revised Affidavit expressly states that the obligations of the sponsoring spouse to sponsor the immigrant spouse *do not terminate with divorce or dissolution of marriage*. By signing the Affidavit, the sponsoring spouse expressly acknowledges that until the sponsor spouse's obligations under the Affidavit terminate, he or she undertakes the full obligation and promise to provide the sponsored spouse with any support necessary to maintain the sponsored spouse at an income level that is at least 125% of federal poverty guidelines[9] for his or her household size (reduced to 100% if the sponsoring spouse is on active duty in the U.S. Armed Forces or U.S. Coast Guard, and the sponsored person is his spouse or unmarried child under twenty-one years of age).[10] The support obligation even survives bankruptcy as a non-dischargeable domestic support obligation that ends only on the occurrence of one of the five enumerated circumstances.[11]

The sponsoring spouse also agrees to submit to the personal jurisdiction of any federal or state court that has subject matter jurisdiction over the sponsor to enforce the obligations under the Affidavit.[12] The sponsoring spouse also authorizes the release of information contained in the signed Affidavit, in supporting documents and in the sponsoring spouse's DHS or Department of State records to "other entities and persons where necessary for the administration and enforcement of U.S. immigration laws."[13]

What happens if the sponsoring spouse cannot submit documentary proof that the immigrant spouse will not be a public charge, *i.e.*, that the sponsoring spouse has the ability to support the sponsored spouse at an income level that is at least 125% of federal poverty guidelines for his or her household size? Simply put, the government will not give the sponsored spouse the immigrant status.

Joint sponsorship is an option, but that comes with its own separate obligation for the joint sponsor. If the sponsoring spouse is unable to show that he or she can meet the poverty guidelines test, then the sponsoring spouse can ask one other person (two under certain circumstances)[14] to formally co-sponsor the intended immigrant spouse. The joint sponsor individually must be able to meet the minimum income threshold established by the poverty guidelines, taking into consideration his own household plus the

sponsored immigrant spouse.[15] The joint sponsor signs his or her own Affidavit for the sponsored spouse and is jointly and severally liable for the support of the sponsored immigrant spouse.[16]

This federal law extends an obligation to support an intended immigrant to the third-party joint sponsor, which could complicate matters for family law practitioners because under California law, spousal support is an obligation between the spouses. We do not join other third parties to the dissolution to argue that they are directly liable to the spouse for spousal support.[17] Payments of recurring gifts and assistance by family members can be considered to increase a spouse's income for purposes of calculating a support obligation in family law court, but do not create a direct obligation of third parties to the other spouse.[18] How the Affidavit fits within the rubric of our State's laws is addressed below.

The Interplay of the Immigration Affidavit and California's Spousal Support Laws

Rules concerning spousal support in California are set forth in statutes and a long line of cases that have created a mostly clear path for family law practitioners to navigate. The family court has broad discretion. For example, when the court is presented with a request for temporary spousal support to preserve the status quo during a dissolution proceeding, it may order either spouse to pay any amount that is necessary for the support of the other spouse, consistent with the requirements of Family Code sections 4320(i) and (m) and 4325.[19] The courts use a formula to calculate temporary spousal support essentially in every county in California.

Family Code sections 4320-4326 set out the factors for the court to consider for spousal support either for long term marriages for what is loosely termed as a permanent order and/or post judgment orders based on the duration of marriage.[20] The court has authority under Family Code section 4330(a) to award spousal support in an amount based on the standard of living established during marriage. Section 4320 lists factors (a) through (m) that the court "shall" take into considering in ordering such spousal support. The family court has jurisdiction to increase or decrease the support order if needed. When litigating support for spouses, family law practitioners use the Family Code and a long line of cases to argue whether a party is self-sufficient or needs to be self-sufficient after the passage of time. We rely on the *Gavron* warning whereby the Court warns a supported spouse that he or she is expected to become self-supporting.[21] In 2000, the *Gavron* warning and its principle was codified in Family Code section 4330, which now states, "When making an order for spousal support, the court may advise the recipient of support that he or she should make reasonable efforts to assist in providing for his or her support needs…"

It is customary in family law practice to deal with situations in which the parties entered into a binding contract to opt out of receiving or paying spousal support either before marriage (prenuptial or premarital agreement) or after marriage (postnuptial agreement). In a nutshell, in these agreements, the parties release each other from a support obligation and terminate their rights to receive any support from the higher earning spouse. It is, in essence, a way to opt out of the Family Code statutory provisions for spousal support. Though there is dispute over the actual modern divorce rate,[22] the perception is that the divorce rate is high[23] and requests for both prenuptial and postnuptial agreements are on the rise.[24]

So, what happens when the Affidavit obligations meet the Family Code and its consideration of the supported spouse's ability and willingness to work, and California's enforcement of premarital and postnuptial agreements concerning support, and the *Gavron* warning?

The Affidavit tosses much of the California authority on its head. It essentially nullifies Family Code section 4320 and its mandate that a judge shall consider a long list of factors in making a support order.[25] In fact, as explained below, the Affidavit can be used by a sponsored spouse to *nullify* a prenuptial or postnuptial support agreement to the contrary. This makes it critical for our family law legal community to explore from the outset whether our non-U.S. citizen clients who entered the country have been sponsored by their spouse. If a client was sponsored by their U.S. citizen spouse, or if a U.S. citizen client sponsored their immigrant spouse, it is advisable to consider the impact of the Affidavit on any spousal support obligation and know how to navigate the Affidavit's impact.

If a client is a sponsored immigrant spouse, the normal tenets of family law are not the only authority to consider. We also need to know and understand cases addressing the Affidavit specifically and see if there is any authority that is helpful to understanding the issues presented.[26] There is a lack of clarity within the regulation itself, which makes implementation of I-864 dependent upon the direction of the courts, and as described below, the cases provide no clear path for counsel.[27] We also need to understand that some issues

concerning the Affidavit are not settled, and courts do not always take the same approach when dealing with Affidavits.

For example, unlike California's *Gavron* warning and the relevant sections of the Family Code that address the supported spouse's obligation to become self-supporting, the sponsored immigrant spouse's failure to work or look for work may not be relevant at all for purposes of determining support under an Affidavit, and if it is, it may just be one factor considered by the courts to determine the amount of damages to be awarded to the sponsored immigrant if the sponsoring spouse fails to provide support sufficient to meet the 125% poverty level test. In one case, the court upheld liability under the Affidavit but the amount owed by the sponsor was offset by the amount of income and benefits the sponsored spouse earned after divorce.[28]

In another case, when the sponsored immigrant was earning 150% of the poverty guideline, the court affirmed that the sponsoring spouse must allege and show that his or her income is below 125% of the poverty level annual guidelines and "[o]nly then" would the supported spouse be entitled to the sponsor's support.[29] In another case, a court found that a sponsoring spouse has an obligation under the Affidavit to support the immigrant spouse, but the sponsor is required to pay only the difference between the sponsored non-citizen's income (actual and capacity) and the 125% of poverty threshold.[30] Yet another case held that excerpts from congressional reports provided by the sponsoring spouse to bolster his claim that Congress intended immigrants to become self-reliant does not preclude a sponsored spouse from enforcing an Affidavit if he or she did not obtain employment or otherwise try to support him or herself.[31] The *Stump* court explained: "Given the choice between the taxpayers and a sponsor, Congress prefers, indeed requires, that a sponsor support an alien who has not become self-reliant."[32]

The *Stump* case is worthy of a closer look. *Stump* is a dissolution action, affirms that the Affidavit is a contractual obligation enforceable by the sponsored immigrant, and discusses whether the sponsored immigrant's failure to look for work would terminate the sponsor's obligation under the Affidavit. In *Stump*, the intended immigrant entered the U.S. as a fiancé under an I-134 Affidavit.[33] The two married and filed a new I-864 Affidavit under the new regulation. They separated after one year and filed a dissolution action in state court. The immigrant spouse filed an action in federal court to enforce the support obligation agreed to in the Affidavit. The sponsored spouse moved for judgment in her favor on the issue of the sponsor's obligation to provide her financial support under the Affidavit, and sought trial on the issues of damages. The sponsor spouse opposed the motion on the ground that the immigrant spouse did not prove the following matters material to the question of liability: whether she received means-tested benefits and is a lawful permanent resident of the United States, and whether she satisfied her statutory duty to seek and obtain employment. The court did not determine whether these factors are prerequisites to enforcing an affidavit, but said that it was clear that she did not receive public benefits. The issues of her immigration status and whether she looked for employment were in dispute, but the court deemed that they were not material to the issue of the sponsor's liability under the Affidavit.[34]

The court looked at the four corners of the Affidavit and determined that under its plain language, the sponsor agreed to support the immigrant and that the immigrant could sue him for support. The court held that the sponsored spouse need not prove that she received public benefits.[35] Specifically, the court held that the language of the Affidavit "creates a contract between the sponsor and the U.S. Government for the benefit of the sponsored immigrant, and any Federal, State, or local governmental agency or private entity that administers any means-tested public benefit programs. The sponsored immigrant, or Federal, State, or local governmental agency or private entity that provides any means-tested public benefit to a sponsored immigrant after the sponsored immigrant acquires permanent resident status, may seek enforcement of the sponsor's obligations through an appropriate civil action.[36]

The *Stump* court rejected the argument that the sponsor's obligations do not start until the immigrant attains resident status. "Under contract law principles, the Affidavit is binding and enforceable as a contract, when there is a valid offer, acceptance, and consideration. … [The sponsor spouse] signed it "in consideration of the sponsored immigrant not being found inadmissible to the United States under section 212(a)(4)(C) . . . and to enable the sponsored immigrant to overcome this ground of inadmissibility." (Affidavit of Support at 4.) Once the sponsor establishes that he has the financial resources to support the alien at 125% of the poverty level and signs Form I-864, which is designated as a legally enforceable contract, the Affidavit—and the sponsor's obligation—comes into force. Neither the statute nor the Affidavit sets forth any further conditions or terms that must be satisfied."[37] "The Defendant's obligation to

support the Plaintiff began on May 28, 2002, when he signed Form I-864."[38]

The *Stump* court further rejected the argument that the failure to look for or obtain employment would negate the sponsor's obligation of support: "The Act provides the specific conditions or events upon which a sponsor's obligation ends. The sponsored immigrant's failure to seek or obtain gainful employment is not such a condition or event. In fact, under this scenario, the sponsor's support is more likely necessary to keep the immigrant from becoming reliant on public financial assistance."[39] The *Stump* court raised the issue of whether the sponsored spouse's ability or willingness to obtain employment would impact the sponsored spouse's status, "including whether she becomes a deportable alien," but noted that the issue was not before the court.[40]

In our jurisdiction, a recent case worthy of exploration is the June 8, 2016, Ninth Circuit case of *Erler v Erler,* 824 F.3d 1173 (9th Cir. 2016). *Erler* expanded the scope of liability faced by family-based immigration sponsors who sign an Affidavit. *Erler* is a California dissolution case that addresses the Affidavit, how to calculate the Affidavit's 125% threshold, the myriad of rules under the Family Code, consideration of the supported spouse's ability and willingness to work, and California's enforcement of pre-marital and post-marital agreements concerning support.

In *Erler,* Yashar Erler, a U.S. citizen, married Turkish citizen Ayla Erler in 2009. To obtain Ayla's[41] permanent resident status, Yashar filed the Form I-864 Affidavit, promising to support her. The couple also signed a prenuptial agreement wherein each party agreed that neither would owe alimony in the event of a divorce. The marriage collapsed, and Ayla lived with her adult son, who took care of her. She was unable to find employment and claimed that she earned no income since her separation from Yashar. Ayla's adult son earned an income of approximately $3,200 per month and used it to pay rent and other living expenses for both himself and Ayla. The son's income exceeded 125% of the Federal poverty guidelines for a household of two.

Yashar argued that the premarital agreement and divorce judgment terminated his obligations under the Affidavit and that because Ayla's adult son was supporting Ayla at a level not less than 125% of the Federal poverty guidelines for a household of two, Yashar had not breached any obligation of support that might have survived the divorce. The U.S. District Court for the Northern District held that the premarital agreement and dissolution judgment did not terminate Yashar's support obligation to Ayla, but Yashar had not breached his continuing obligation to support Ayla because Ayla's adult son had maintained Ayla at an annual income of at least 125% of the federal poverty guidelines for a two-person household, and had done so since the time of the separation. As a result, the court reasoned that Yashar's duty to support Ayla had not been triggered. Ayla appealed the district court's conclusion.

On review, the Ninth Circuit considered the applicable statutory law that provides that an Affidavit remains enforceable until one of five factors is satisfied.[42] The court moved on to examine the I-864 Form that Yashar signed, and noted that it reproduces this information in a section entitled "When Will These Obligations End?" and just after the bullet points describing the five circumstances, the form warns the sponsor: "Note that divorce *does not* terminate your obligations under this Form I-864." (Emphasis in original.) The court then determined that "under federal law, neither a divorce judgment nor a premarital agreement may terminate an obligation of support. Rather, as the Seventh Circuit has recognized, "[t]he right of support conferred by federal law exists apart from whatever rights [a sponsored immigrant] might or might not have under [state] divorce law."[43] The court then held that the district court correctly determined that Yashar has a continuing obligation to support Ayla. Since none of the five factors was satisfied, the obligation to provide support continued.

The *Erler* court then turned to the issue of whether Yashar breached his continuing obligation to support Ayla under the Affidavit. To do so, the court explained that it must decide what it means for a sponsor of an intending immigrant to provide the immigrant "with any support necessary to maintain him or her at an income that is at least 125 percent of the Federal Poverty Guidelines for his or her household size" when the sponsored immigrant no longer resides in the sponsor's household. Specifically, the court needed to decide how to measure the immigrant's post-separation household size and the immigrant's post-separation income.

The court noted that the INA and the implementing regulations touch upon the issue but do not provide answers. The court held that the obligation of support extends to only the number of persons sponsored, and to determine the 125 percent poverty level, the court determines the number of sponsored persons in the household. To hold otherwise would lead to "untenable" results, the court explained,

> "because in signing the affidavit of support, Yashar agreed to support only Ayla, not Ayla and anyone else with whom she might choose to live. The

affidavit of support is a contract, *see* 8 U.S.C. § 1183a(a)(1); 8 C.F.R. § 213a.2(d), and contracts are interpreted to give effect to the reasonable expectations of the parties, see, e.g., 11 Williston on Contracts § 31:11 (4th ed. 2012). At the time a sponsor signs an affidavit of support for a single intending immigrant, he or she would reasonably expect that, if the immigrant separates from the sponsor's household, the obligation of support would be based on a household size of one. Or, if the sponsor agreed to sponsor multiple immigrants, such as a parent and child, then the sponsor would reasonably expect that, in the event of a separation, the obligation of support would be based on a household size that includes the total number of sponsored immigrants living in the household. The sponsor would not reasonably expect the obligation of support to be based on a household that includes the sponsored immigrant or immigrants plus anyone else with whom the immigrant might choose to live. Thus, in the event of a separation, the sponsor's duty of support must be based on a household size that is equivalent to the number of sponsored immigrants living in the household, not on the total number of people living in the household."

Thus, *Erler* makes it clear that the sponsor's support obligations toward those he or she sponsors will survive divorce and a premarital agreement and is not dischargeable even if the sponsored spouse is supported by a third party. In addition, the support obligation is not impacted by the sponsored spouse's attempts to be self-sufficient.

Another recent California case to consider is the July 28, 2017, marital dissolution case *In Re Marriage of Kumar*.[44] In *Kumar*, the California Court of Appeal, First District, Division 2, continued the Ninth Circuit *Erler*'s expansion of the scope of liability faced by family-based immigration sponsors who sign an Affidavit. The court affirmed that the immigrant spouse has independent standing to enforce the obligations of an I-864 Affidavit against her sponsor, and could bring her enforcement claim in either state or federal court. The *Kumar* court also held that the immigrant spouse seeking to enforce the Affidavit's support obligation has *no duty to seek employment to mitigate his or her damages*. The court relied on 8 U.S.C. § 1183a(a) and the rationale included in *Liu v. Mund*,[45] to rule that "an alien's failing to seek work or otherwise failing to mitigate his or her damages" is not an "excusing condition" of the sponsor's obligations under the Affidavit.[46]

In *Kumar,* the sponsor allegedly abused the intended immigrant and after deciding that he no longer wished to be with her, took her to Fiji (where she had immigrated from), and left her there. The wife alleged that he also tore her evidence of residency from her passport so that she could not return to the U.S., but she obtained travel documents from the U.S. Embassy abroad. During the dissolution action, the husband's attorney asked for a *Gavron* warning and for the wife to seek employment as a part of a Stipulation for payment of spousal support. The wife's attorney sought enforcement of the Affidavit. Wife had no evidence of residency and she was receiving general assistance from the state and working a low-paying job. She requested support based on the household income test under the Federal Poverty Guideline. The court refused the request and made a finding that the wife did not work to her full potential. He told her to file for enforcement of the Affidavit in federal court.

On appeal, the wife's attorney argued that the court erred in determining that she had failed to mitigate her damages and that this released the husband from his financial and contractual obligations on the ground that the wife's filing for enforcement in the state court gave her no standing. The First District reversed and held that the intended immigrant does have standing to enforce the support obligation created by I-864 in state court and there is no requirement to seek enforcement only at the federal court level. It held that there is no reason a superior family court hearing a divorce case cannot exercise jurisdiction over an immigrant spouse's contract claim based on an I-864 Affidavit and that intended immigrant has *no duty* to mitigate damages. Additionally, the court noted that there is no authority that the Affidavit does not create a right of support.[47] The case was remanded to the trial court to consider the I-864 Affidavit for the spousal support claim.

At the end of the day, what all these cases tell us for certain is that there has been no strong defense against enforceability of the Affidavit. There have been many attempts to challenge the affidavits as unenforceable, but almost all of them have been rejected by federal courts. Cases do not suggest that fraudulent inducement is a viable defense, and even if it were, this author believes that it would only render the contract voidable, and would require a rescission by the Sponsor.[48]

The statute nowhere suggests that rescission as defense to an action to enforce the Affidavit. *Erler, supra*, supports

the idea that sponsors may not avoid their support obligations by raising the defense of fraudulent inducement. It held that premarital agreement does not terminate an obligation of support, explaining that "[t]he right of support conferred by federal law exists apart from whatever rights [a sponsored immigrant] might or might not have under [state] divorce law."[49]

The argument that the contract is unconscionable due to its indefinite timeline has failed as a defense.[50] Even a lack of consideration argument by the sponsor when the intended immigrant was not recipient of her permanent residency card has failed.[51] In response to one husband sponsor's argument that he received nothing in consideration for his promise to support his immigrant wife under the Affidavit, the court rejected that argument on the ground that the consideration he received was for his wife not to be found inadmissible to the U.S., to allow her to seek legal and permanent residence and not to be deported.[52]

So, what is a possible solution for a sponsor who is going to marry or has married the intended immigrant, and the sponsor would like to avoid the additional support obligation under the Affidavit should the marriage collapse? This author suggests as a possible solution a separate, carefully prepared and detailed premarital (or post-nuptial) agreement, wherein the intended immigrant releases the sponsor from maintenance under the Affidavit and agrees to indemnify the sponsor should the sponsored immigrant access or use any means-tested public benefits.

This possible solution is in line with the DHS's position when the rules were being proposed as to the sponsored immigrant's right to waive enforcement for his/her support as a third-party contract beneficiary.[53] Specifically, in Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35732, document number FR 23-06, dated June 21, 2006, the DHS adopted a final rule that clarified several issues raised under an interim rule, including issues of support under an Affidavit. In the section "Beginning and End of the Sponsor's Support Obligation" the DHS anticipated and acknowledged that in a dissolution action, as part of a settlement, the immigrant "probably can" offer to terminate the Affidavit's support obligation as against the sponsor, but cannot alter the sponsor's obligations to the government under the Affidavit.

The DHS said: "Section 213A of the Act specifies the two circumstances that end the support obligation: The sponsored immigrant's (1) naturalization or (2) having acquired 40 quarters of coverage under the Social Security Act. The interim rule added two more: (1) The death of the sponsor or sponsored immigrant or (2) the sponsored immigrant's abandonment of status and permanent departure from the United States. These two additional grounds for termination exist as a matter of logical necessity. Section 213A of the Act does not provide any basis to say that divorce does, or does not, affect a support obligation under an affidavit of support. *If the sponsored immigrant is an adult, he or she probably can, in a divorce settlement, surrender his or her right to sue the sponsor to enforce an affidavit of support.* The sponsored immigrant and the sponsor (or joint sponsor) may not, however, alter the sponsor's obligations to DHS and to benefit-granting agencies." (Emphasis added.)

That said, we should consider a case called *Shah* v. *Shah,* No. 1:2012cv04648 - Document 52, p. 5-7 (D.N.J. Jan 14, 2014); LEXIS 4596 (D.N.J. 14 January 2014), in which the court held that a preexisting prenuptial agreement providing for the waiver of an immigrant spouse's rights "to spousal alimony, maintenance, or other allowances incident to divorce or separation" could not invalidate the sponsor spouse's obligation to provide financial support as agreed to in an executed Form I-864[54]. This does not clarify whether a premarital agreement would be more likely to be upheld against an Affidavit if the waiver is drafted with more specificity and with clear consideration exchanged between the parties as it relates to rights to support payments, and an indemnity provision in favor of the sponsoring spouse.

It is unsettled whether the waiver would be upheld, because as summed up by the *Shah* case, a waiver seems contrary to the reason for having an Affidavit in the first place: "Therefore, this Court finds that it would undermine the purpose of the statute to allow sponsors to present an I-864 to immigration authorities that can never be enforced by the sponsored alien due to a prenuptial agreement that is not disclosed to immigration authorities. Congress determined that for an I- 864 to be valid at all, the sponsored alien must be able to enforce it at the time when it is submitted to the United States. For this reason, the Court rejects the suggestion by Defendant that Plaintiff never had the right to enforce the I-864 on the basis of a prior prenuptial agreement."[55] As for the additional layer of an indemnity provision, it may be that a court would find the provision illusory and of no help to a sponsor's claim that the separate agreement invalidates his or her obligation under the Affidavit, because if the sponsored spouse uses public benefits, this suggests he or she would be unable to indemnify the sponsor when the government seeks repayment.

This author further believes that the courts will not uphold an agreement between the citizen and immigrant spouse that purports to waive the government's right to pursue a sponsor under a duly executed Affidavit, and such language should not be included in any waiver agreement.

A best practice tip for family law practitioners is to ask your potential clients whether they are a U.S. citizen and if not, inquire about their residency status and whether the client was sponsored by a former or current spouse or partner. Investigate whether any of the grounds for termination of the Affidavit's support obligation are presented. Consider exploring your client's options under the Affidavit in family court if it maximizes your client's spousal support request.

Another practice tip is that since original forms are filed with DHS or the Department of State, the courts have held that a copy of the Affidavit can be used in all court proceedings. Under current federal law, no one can enter the U.S. as an immigrant or be petitioned as a family member without an Affidavit, as highlighted above, unless the sponsored immigrant can show he or she has worked for 40 qualifying quarters as defined in Title II of the Social Security Act.

A further word of caution for immigration counsel. It is this writer's view that since family-based immigration customarily involves dual representation of the sponsoring spouse and the intended immigrant, immigration attorneys could become the subject of discovery if an action is filed to enforce an Affidavit. The parties surely will explore whether the attorney properly advised the sponsoring spouse of the legal consequences of and financial obligations incurred by entering into a contract with the U.S. government for the benefit of the intended immigrant, and also properly advised the sponsored spouse's right to enforce the Affidavit against the sponsor. It may be advisable to advise your clients to seek independent legal advice prior to signing the Affidavit.

Endnotes

1 For purposes of this article, the terms "non-citizen," "alien," "foreign national" or "intended immigrant" are used interchangeably.

2 Interim regulations for the Affidavit (Form I-864) were first published in 1997 and were finalized July 21, 2006. *See* Affidavits of Support on Behalf of Immigrants, 62 Fed. Reg. 54346 (Oct. 20, 1997) (codified at 8 C.F.R. § 213.a1 *et seq*.) and Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35732 (June 21, 2006 Final Rules).

3 *See* USCIS.gov, General Information F3, "How do I financially sponsor someone who wants to immigrate?" M-606B (October 2013), at paragraph entitled "What is the purpose of the affidavit of support?." *See also Stump v. Stump*, No. 1:04-cv-00253-TLS-RBC, p. 16 (N.D. IND. October 25, 2005) ("the purpose of the Affidavit … is to overcome the public charge ground of inadmissibility based on the sponsor's willingness and ability to support the identified immigrant").

4 A sponsoring spouse and an intended immigrant spouse do not need to submit an Affidavit if they can show that the intendent immigrant spouse falls into one or more of the following categories: (1) The intended immigrant spouse already worked 40 qualifying quarters as defined in Title II of the Social Security Act, (2) The intended immigrant spouse can be credited with 40 qualifying quarters as defined in Title II of the Social Security Act, OR (3) The intended immigrant spouse is the child of a U.S. citizen and if admitted for permanent residence on or after February 27, 2001, would automatically acquire citizenship under Section 320 of the Immigration and Nationality Act, as amended by the Child Citizenship Act of 2000.

5 For a copy of the Affidavit/Form I-864, go to https://www.uscis.gov/i-864. The DHS Interoffice Memorandum of June 27, 2006 is a good place to start for an overview of the DHS's policies concerning Affidavits. *See* Clarification of Policy Regarding USCIS Form I-864, Affidavit of Support HQRPM 70/21.1, a copy of which can be found at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/affsuppafm062706.pdf.

6 In *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2695 (2013), the Supreme Court held that the Defense of Marriage Act's "principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." As a result, it would be unconstitutional for domestic partners in a lawful union to be treated any differently from spouses in a lawful marriage in terms of the Affidavit. Prior to the 2013 case, domestic partners were unable to petition for their partners.

7 As an aside, the history of noncitizen eligibility for food stamps and other public benefits is long and complex. Practitioners with sponsored non-citizen clients in need of public assistance should contact their local California Department of Social Services for guidance. *See* Department of Social Services, All County Information Notice 1-23-03, April 24, 2003.

8 Affidavits of Support on Behalf of Immigrants, 71 FR 35732, document number 23-06.

9 *See* form I-864P, HHS Poverty Guidelines for Affidavit of Support, a copy of which can be found at https://www.uscis.gov/i-864p.

10 *See* Affidavit, page 7, Part 8 Sponsor's Contract, Statement, Contact Information, Certification, and Signature; Section "Sponsor Contract," part A.

11 *Cook v. Hrachova*, case no. 6:11-bk-14734-KSJ Chapter 7, Adversary No. 6:11-ap-00311 (U.S. Bkr. Ct. Mid. Dist. Fla., Orlando Div.).

12 *See* I.N.A. § 213A(a)(1)(B) & I.N.A. § 213A(e); *See* also Affidavit, page 9, Part 8 Sponsor's Contract, Statement, Contact Information, Certification, and Signature; Section "Sponsor Certification," paragraph C.

13 *See* Affidavit, page 9, Part 8 Sponsor's Contract, Statement, Contact Information, Certification, and Signature; Section "Sponsor Certification," paragraph 2.

14 Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35732, FR 23-06, Document Number FR 23-06, June 21, 2006, paragraph

F. "Joint Sponsors" (an intending immigrant may not have more than one joint sponsor, in addition to the principal sponsor; a principal intending immigrant and his or her accompanying spouse and children, as a group, however, may have a principal sponsor and up to but no more than two joint sponsors).

15 When discussing a visa petition, it is helpful to know the players. The principal beneficiary of the marriage-based visa petition is the sponsored spouse. A derivative beneficiary of a family-based visa petition is an immigrant who cannot be directly petitioned for, but who can follow-to-join or accompany the immediate family member as qualifying relatives. *See* Filing for Permanent Residence Based on a Family Petition, page 4, https://www.uscis.gov under Permanent_Residents_Fam.pdf. In a joint sponsor situation, the DHS has clarified that all such derivative beneficiaries do not have to have the same joint sponsor as the principal beneficiary, but, nevertheless, each sponsor is responsible for those immigrants he or she sponsors: "For example, suppose the principal beneficiary has a wife and four children who will accompany the principal beneficiary to the United States. It may be the case that a willing joint sponsor would have sufficient income to file an affidavit of support for the husband and wife and only one of the children. The final rule would permit the joint sponsor to accept responsibility only for those three aliens, and would allow a second joint sponsor to file an affidavit of support for the other three children. Each joint sponsor would then be responsible only for those aliens named in that joint sponsor's own Form I-864. The principal intending immigrant and the accompanying spouse and children, as a group, however, may not have more than two joint sponsors." Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35732, FR 23-06, Document Number FR 23-06, Federal Register Cite 71 Fed. Reg. 35732. Please note that there are special rules that apply if a sponsor dies before or after the visa petition has been approved. *See* U.S.C.I.S. Policy Manual Vol. 7 Adjustment of Status, Part A Adjustment of Status Policies and Procedures, Chapter 8 Death of a Petitioner or Principal Beneficiary. A copy can be found at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartA-Chapter8.html.

16 Note that in a joint sponsorship situation for immigration purposes, joint sponsors who cannot individually meet the income threshold cannot pool their income together to try to meet the minimum income threshold. *Id*.; *see also* sections 213A(f)(2) and (5) of the Act (a joint sponsor is allowed only in one specified situation: when the sponsor's income is not sufficient, and that joint sponsor must meet the income threshold; accordingly, the sponsor and joint sponsor cannot "pool" their income).

17 This leaves open the question of whether, if the joint sponsor made the same promise to support the immigrant spouse, family law practitioners are required to join that co-sponsor as a third party in family court to seek spousal support. The sponsored spouse would join the joint sponsor to enforce the obligations under the Affidavit while litigating against the spouse regarding the spouse's support obligations under the Affidavit and State law. This is no doubt a very interesting subject to research for another article, and may eventually be addressed by the courts.

18 *See In re Marriage of Alter,* 171 Cal. App. 4th 718 (2009) (Gifts from former husband's mother disguised as loans were imputed to the former husband's income when the court considered his ability to pay child and spousal support).

19 Cal. Fam. Code § 3600.

20 *See* Cal. Fam. Code § 4336 which provides in pertinent part:

(a) Except on written agreement of the parties to the contrary or a court order terminating spousal support, the court retains jurisdiction indefinitely in a proceeding for dissolution of marriage or for legal separation of the parties where the marriage is of long duration.

(b) For the purpose of retaining jurisdiction, there is a presumption affecting the burden of producing evidence that a marriage of 10 years or more, from the date of marriage to the date of separation, is a marriage of long duration. However, the court may consider periods of separation during the marriage in determining whether the marriage is in fact of long duration. Nothing in this subdivision precludes a court from determining that a marriage of less than ten years is a marriage of long duration.

(c) Nothing in this section limits the court's discretion to terminate spousal support in later proceedings on a showing of changed circumstances.

21 *See In re Marriage of Gavron,* 203 Cal. App. 3d 705 (1988). The *Gavron* warning is applied equally to men and women, and to domestic partners and those in same sex-marriages.

22 For a summary and discussion, *see* Bella DePaulo, Ph.D, *What is the Divorce Rate, Really*?, Psychology Today, Feb. 2, 2017, https://www.psychologytoday.com/blog/living-single/201702/what-is-the-divorce-rate-really.

23 *See* Dan Hurley, *The Divorce Rate is Not As High As You Think*, N.Y. Times, Apr. 19, 2005, http://www.nytimes.com/2005/04/19/health/divorce-rate-its-not-as-high-as-you-think.html

24 *See* Cheryl L. Young, *Is a Prenup a Must for Most Couples?*, Wall St. Journal, https://www.wsj.com/articles/is-a-prenuptial-agreement-a-must-for-most-couples-1425271056, Mar. 1, 2015, and Ben Steverman, *Why More Couples Are Signing Prenuptial Agreements*, Bloomberg News, Apr. 28, 2017, https://www.bloomberg.com/news/articles/2017-04-28/why-more-couples-are-signing-postnuptial-agreements.

25 *See* Cal. Fam. Code § 4320 for a complete list, including the extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, the ability of the supporting party to pay spousal support, the duration of the marriage, the ability of the supported party to engage in gainful employment, and the goal that the supported party shall be self-supporting within a reasonable period of time.

26 This author was able to locate about over fifty cases addressing enforceability of the Affidavit.

27 For example, the Federal Poverty Guidelines refer to "family size" but it is not clear how to measure the "family size" when the sponsored immigrant no longer resides with the U.S. citizen spouse. There is no guideline to identify the household members. While the federal regulation refers to sponsored income and household size income, there are no provisions calculating the sponsored immigrant's income and household size for purposes of determining whether the sponsor has breached his or her duty to support the immigrant.

28 *See Cheshire v. Cheshire*, 2006 U.S. Dist. LEXIS 26602, p. 17 (M.D. Fla. May 4, 2006).

29 *In re Marriage of Sandhu*, 207 P.3d 1067, 1071 (Kan. Ct. App. 2009).

30 *See Barnett v. Barnett*, 238 P.3d 594 (Alaska 2010).

31 *Stump v. Stump*, No. 1:04-cv-00253-TLS-RBC, p. 16 (N.D. IND. October 25, 2005).

32 *Id.,* at 17. Although case law is unsettled, this author believes that whether the spouse is employed or attempting to support him or herself will likely only be a factor considered by the courts to calculate the amount of damages to be awarded to the sponsored immigrant if the sponsoring spouse fails to provide support sufficient to meet the 125% poverty level test. In general, federal courts are not moved by the defense that the sponsor's obligations are extinguished if the sponsored spouse has failed to mitigate his or her damages by seeking employment.

33 When an intended immigrant is the fiancé of the U.S. citizen sponsor, the sponsoring fiancé must also satisfy the 125% income level test, but uses Form I-134. The DHS regulations clarified that the regulations relating to the use of Forms I-864 do not apply to other situations where immigration or consular officers have permitted the use of Form I-134. (8 C.F.R. § 213a, Affidavits of Support on Behalf of Immigrants (Part 213a added effective 12/19/97; 62 Fed. Reg. 54346)). Although both I-864 and Form I-134 are affidavits of support, the difference is that Form I-134 pre-dates Form I-864 and was used in family-based cases prior to 1996. Currently I-134 is used in fiancée visa petition cases when a US citizen petition his/her fiancé. Unlike Form I-864, courts have determined that Form I-134 is *not* enforceable against an immigration sponsor. *See Rojas-Martinez v. Acevedo-Rivera,* 2010 U.S. Dist. LEXIS 56187 (D.P.R. June 8, 2010 (granting defendant's motion to dismiss, and holding that I-134 is not an enforceable contract); *San Diego County v. Viloria*, 276 Cal. App. 2d 350, 80 Cal. Rptr. 869 (Cal. Ct. App. 1969); *Michigan ex rel. Attorney General v. Binder*, 356 Mich. 73, 96 N.W. 2d 140 (Mich. 1959); *California Dept. Mental Hygiene v. Renel*, 10 Misc. 2d 402, 173 N.Y.S. 2d 231 (N.Y. App. Div. 1958). However, once the fiancé enters and marries the fiancé and the two become spouses, DHS requires filing of an Affidavit Form I-864 to grant lawful permanent residency.

34 *Stump*, at 5-6.

35 *Stump*, *supra,* at 5-6.

36 8 C.F.R. § 213a.2(d)." *Stump*, at 9-10.

37 *Stump*, at p. 11.

38 *Id.*

39 *Stump*, at 18.

40 *Stump*.

41 For clarity, we will refer to the parties by their first names.

42 Specifically, the sponsored immigrant (1) becomes a citizen of the United States; (2) has worked or can be credited with 40 qualifying quarters of work under title II of the Social Security Act; (3) ceases to be a lawful permanent resident and departs the United States; (4) obtains in a removal proceeding a grant of adjustment of status as relief from removal; or (5) dies. *See* 8 C.F.R. § 213a.2(e)(2)(i); *see also* 8 U.S.C. § 1183a(a)(2)-(3).

43 *Liu v. Mund*, 686 F.3d 418, 419–20 (7th Cir. 2012). Since it is clear that an Affidavit survives divorce, the next question is whether an Affidavit survives the supported spouse's remarriage. There answer is that there is no clear authority on this issue. Although a full examination of remarriage could fill another article, this author suggests that the best answer is that remarriage is not a ground to terminate the support obligation unless the supported spouse's income is above 125% of Federal Poverty Guideline or the sponsoring spouse's obligation to support the immigrant spouse terminates under the five specific circumstances discussed in this article, such as until the immigrant spouse can be credited with forty quarters of work. The courts have made it clear that "[t]he right of support conferred by federal law exists apart from whatever rights [a sponsored immigrant] might or might now have under [state] divorce law." If the right to support is not extinguished under federal law and the four corners of the Affidavit, and cannot be extinguished by divorce, logic follows that a supporting spouse's remarriage, in and of itself, does not terminate the Affidavit's support obligation.

44 *In Re Marriage of Kumar*, 13 Cal. App. 5th 1072 (2017).

45 *Liu v. Mund*, 686 F.3d 418 (7th Cir. 2012).

46 *Kumar*, 13 Cal. App. 5th at 1084.

47 *Kumar*, 13 Cal. App. 5th at 1084.

48 Restatement (Second) of Contracts §164.

49 *Erler*, 824 F.3d at 1177 (alteration in original), *quoting Liu v. Mund*, 686 F.3d 418, 419- 20 (7th Cir. 2012). *See also Shah v. Shah,* No. 1:2012cv04648 - Document 52 (D.N.J. Jan 14, 2014) (a preexisting prenuptial agreement providing for the waiver of an immigrant spouse's rights "to spousal alimony, maintenance, or other allowances incident to divorce or separation" could not invalidate the sponsor spouse's obligation to provide financial support as agreed to in an executed Form I-864, and it "would undermine the purpose of the statute to allow sponsors to present an I-864 to immigration authorities that can never be enforced by the sponsored alien due to a prenuptial agreement that is not disclosed to immigration authorities. Congress determined that for an I- 864 to be valid at all, the sponsored alien must be able to enforce it at the time when it is submitted to the United States. For this reason, the Court rejects the suggestion by Defendant that Plaintiff never had the right to enforce the I-864 on the basis of a prior prenuptial agreement.").

50 *See Al-Mansour v. Shraim*, No. CCB-10-1729, 2011 U.S. Dist. LEXIS 9864 (D. Md., Feb. 2, 2011).

51 *Stump*. There have been discussions by many immigration lawyers that this is contrary to the DHS's interpretation of sponsor's obligations. Specifically, the DHS takes the position that the sponsor's obligation under the Affidavit is triggered when the sponsored immigrant obtains legal status as a permanent resident. The DHS's position makes sense from a contract perspective, since the Affidavit is a promise by the sponsor to financially support the intended immigrant to a certain level so that they do not become indigent and public charge, and this promise is made in exchange for permanent residency. If the intended immigrant never receives residency, then there would be no consideration for the sponsor's support promise. Also, the DHS has taken the position in the past that the sponsor is entitled to retract the I-864 at any time before the adjustment status is granted, which supports the position that obtaining residency is a condition precedent to the sponsor's obligations.

52 *See Baines v. Baines*, No. E2009-00180-COA-R3-CV, 2009 WL 3806131, 5 (Tenn. Ct. App. Nov. 13, 2009).

53 Affidavits of Support on Behalf of Immigrants, 71 FR 35732, FR 23-06, Paragraph H, under heading "Beginning and End of the Sponsor's Support Obligation."

54 *Shah v. Shah*, Civil No. 12–4648 (RBK/KMW), 2014 U.S. Dist. LEXIS 4596 (D.N.J. Jan. 14, 2014). The waiver at issue states under the section entitled "Alimony" that the immigrant spouse "waives, releases and relinquishes any and all rights whatsoever, whether arising by common or statutory law (present or future) of any jurisdiction to spousal alimony, maintenance, or other allowances incident to divorce or separation." *Id.* at 5.

55 *Shah,* at 7.

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