Immigration Support Advocates

SUING ON THE I-864 AFFIDAVIT OF SUPPORT

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When a married couple separates, spousal maintenance (or "alimony") is generally not available automatically as a matter of right.[1] Whether one former spouse will be responsible for supporting the other depends on a multitude of factors which vary state-to-state. It may therefore come as a shock to family law practitioners to learn of a common immigration form that may require a divorce court to award substantial financial support, regardless.[2] The form may require payment of financial support for an unlimited period of time, even when a marriage was short lived.

As immigration practitioners are well aware, most family-sponsored visa beneficiaries and certain employment-based immigrants are required to file an I-864 Affidavit of Support.[3] The document is required for a noncitizen to overcome inadmissibility due to a likelihood of becoming a "public charge."[4] Unlike its unenforceable predecessor,[5] the I-864 purports to be a binding contract between a U.S. citizen "sponsor" and the U.S. government.[6] The sponsor promises to maintain

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[1] *See*, *e.g.*, Marriage of Irwin, 822 P.2d 797, 806 (Wash. App. 1992), *rev. denied*, 833 P.2d 387.

[2] Anecdotally, it appears the family law implications of the I-864 Affidavit of Support have received relatively little air time in media devoted to the domestic bar. *But see* Geoffrey A. Hoffman, *Immigration Form I-864 (Affidavit of Support) and Efforts to Collect Damages as Support Obligations Against Divorced Spouses — What Practitioners Need to Know*, 83 FLA. BAR. J. 9 (Oct. 2009) (articulately sounding the alarm bell).

[3] INA § 212(a)(4)(C), 8 U.S.C. § 1182(a)(4)(C) (family-sponsored immigrants); INA § 212(a)(4)(D), 8 U.S.C. § 1182(a)(4)(D) (employment-based immigrants). *See* Form I-864, Affidavit of Support (rev'd Sep. 19, 2011), *available at* http://www.uscis.gov/files/form/i-864.pdf (last visited Oct. 16, 2012).

[4] INA § 212(a)(4), 8 U.S.C. § 1182(a)(4).

[5] The Form I-134 *Affidavit of Support* was used prior to passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009. *Cf.* Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 Creighton L. Rev. 741 (1998) (discussing changes to the Affidavit of Support). The Form I-134 may still be used to overcome public charge inadmissibility for intending immigrants not required to file the I-864. *See* Instructions for Form I-134, Affidavit of Support (rev'd May 25, 2011), *available at* http://www.uscis.gov/files/form/i-134instr.pdf (last visited Nov. 12, 2012).

[6] Form I-864, *supra* note 3, at 6; INA § 213A(a)(1)(B), 8 U.S.C. § 1183a(a)(1)(B) (requirement of enforceability); 8 C.F.R. § 213a.2(d) (same). Interim regulations for the I-864 were first published in 1997 and were finalized July 21, 2006. Affidavits of

the intending immigrant at 125% of the Federal Poverty Guidelines ("Poverty Guidelines") and to reimburse government agencies for any means-tested benefits paid to the noncitizen beneficiary.[7] This is a substantial level of support: for it would require support of $13,963 annually ($1164 per month) for a single individual, adding $4,950 for each additional family member.[8] The I-864 provides that the sponsor will be held personally liable if he fails to maintain support, and may be sued by either the beneficiary or by a government agency that provided means-tested public benefits.[9] Where a single sponsor is unable to demonstrate adequate finances to provide the required support, additional "joint-sponsors" may be used to meet the required level, and thereby become jointly and severally liable.[10]

The mid-naughts witnessed the first round of state and federal cases in which I-864 beneficiaries successfully sued their sponsors for missing financial support. Sadly, this timing likely coincided with the unraveling of marriages on the basis of which the first I-864s had been executed.[11] In a thorough Bulletin published in 2005, Charles Wheeler reported on developments to date and highlighted a multitude of

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Support on Behalf of Immigrants, 62 Fed. Reg. 54346 (Oct. 20, 1997) (to be codified at 8 C.F.R. § 213.a1 *et seq*.) (hereinafter Preliminary Rules); Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35732 (June 21, 2006) (same) (hereinafter Final Rules).

[7] Form I-864, *supra* note 3, at 6. *See also* INA § 213A(a)(1)(A), 8 U.S.C. § 1183a(a)(1)(A) (same requirement by statute). The Poverty Guidelines are published each year in the Federal Register. *See* Annual Update of the HHS Poverty Guidelines, 77 Fed. Reg. 4034 (Jan. 26, 2012) (hereinafter Poverty Guidelines).

[8] Poverty Guidelines, *supra* note 7.

[9] Form I-864, supra note 3, at 7. In lieu of tiptoeing around gendered pronouns, beneficiaries and sponsors will be assigned the feminine and masculine herein, respectively, as this represents the vast majority of cases discussed herein.

[10] 8 C.F.R. § 213a.2(c)(2)(iii)(C). Joint sponsors are jointly and severally liable, but there is no known case in which joint sponsors have been sued by a beneficiary. INA § 213A(f), 8 U.S.C. § 1183a(f) (defining sponsor).

[11] All cases cited in this BULLETIN arise from Affidavits executed for spouses, though some employment-sponsored visas also require the I-864. *See supra* note 3. Likewise, though virtually no available cases discuss the right of a sponsored child to maintain an action on the I-864, there appears to be no reason such an action would be improper. *See* Chang v. Crabill, 2011 U.S. Dist. LEXIS 67501 (N.D. Ind. June 21, 2011) (denying motion to dismiss action by sponsored spouse and child).

potential pitfalls for beneficiaries seeking to sue on the I-864.[12] The present Bulletin provides an update on this evolving area of law.

It is established that noncitizen-beneficiaries may sue on the I-864 as a contract, but courts continue to struggle with a myriad of potential defenses. Likewise, beneficiaries have successfully relied on the I-864 to achieve substantial spousal maintenance awards, but this is not possible in all jurisdictions. This Bulletin offers updated advice to immigration and family law attorneys in this hybrid practice area, noting a thread of confusion over how the I-864 ought to be interpreted in light of its underlying statutory framework.

I. Contract Issues

It is now settled law that the I-864 provides the noncitizen-beneficiary a private cause of action against the sponsor, should he fail to maintain support.[13] Specifically, the intending noncitizen is a third-party beneficiary with respect to the promise of support made by the sponsor to the U.S. Government.[14] Under the terms of the I-864, only five specified events end the sponsor's support obligations: the beneficiary (1) becomes a U.S. citizen; (2) can be credited with 40 quarters of work; (3) is no longer a permanent resident *and* has departed the U.S.; (4) after being ordered removed seeks permanent residency based on a different I-864; or (5) dies.[15] It is settled that a

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[12] Charles Wheeler, *Alien vs. Sponsor: Legal Enforceability of the Affidavit of Support*, 1-23 BENDER'S IMMIGR. BULL. 3 (2005).

[13] *See*, *e.g.*, Moody v. Sorokina, 40 A.D.2d 14, 19 (N.Y.S. 2007) (holding that trial court erred in determining I-864 created no private cause of action). No known appellate case has held to the contrary. *But see* Rojas-Martinez v. Acevedo-Rivera, 2010 U.S. Dist. LEXIS 56187 (D. P.R. June 8, 2010) (granting defendant's motion to dismiss; holding that I-134, predecessor to I-864, was not an enforceable contract, even though executed after the effective date of IIRAIRA legislation).

[14] *See*, *e.g.*, Stump v. Stump, No. 1:04-CV-253-TS, 2005 U.S. Dist. LEXIS 45729, at *19 (D. Ind. May 27, 2005) (memo op.) (granting in part plaintiff's motion for summary judgment; rejecting argument that noncitizen could have failed to perform duties under the I-864, as there was no support for proposition that third-party beneficiary could breach a contract).

[15] Form I-864, *supra* note 3, p. 7. *See also* INA § 213A(a)(2), (3); 8 U.S.C. § 1183a(a)(2), (3) (describing period of enforceability).

couple's separation or divorce does not terminate the sponsor's duty.[16] While an I-864 beneficiary may sue a sponsor for support, courts have taken diverging approaches to a host of issues surrounding the particulars of the contract action.[17]

I.A. Duration of obligation

Conditions precedent. A condition precedent is an event that must occur before an obligor has a duty to perform on a contract.[18] Courts have grappled with several possible preconditions to a beneficiary's right to sue on the I-864.

In *Baines v. Baines* a Tennessee court rejected the argument that a beneficiary must have received means-tested public benefits in order to seek support from a sponsor.[19] The Court took recourse to the statute, "which provides that the sponsor agrees to provide support to the sponsored alien and that the agreement to support is legally enforceable against the sponsor by the sponsored alien."[20] In fact, the current I-864 appears to make this clear, proving in separate paragraphs: "[i]f you do not provide sufficient support [to the beneficiary]… that person may sue you for support;" and "[i]f a [government or private agency] provides any covered means-tested public benefits… the agency may ask you to reimburse them…"[21] Comparing the paragraphs, it is clear that receipt

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[16] Hrachova v. Cook, No. 5:09-cv-95-Oc-GRJ, 2009 U.S. Dist. LEXIS 102067, at *3 (M.D. Fla. Nov. 3, 2009) ("[t]he view that divorce does not terminate the obligation of a sponsor has been recognized by every federal court that has addressed the issue").

[17] Note that the Department of Homeland Security expressly defers to the courts on issues relating to the contract-based enforcement of the I-864. Final Rules, *supra* note 6, at 35742-43 ("It is for the proper court to adjudicate any suit that may be brought to enforce an affidavit of support").

[18] The second *Restatement* of contracts abandoned the characterization of conditions as precedent or subsequent, *compare* RESTATEMENT (SECOND) of Contracts § 224 (1981) (hereinafter RESTATEMENT (2nd)) *with* RESTATEMENT (FIRST) OF CONTRACTS § 250 (1932) (defining condition precedent), yet use of the term persists.

[19] No. E2009-00180-COA-R3-CV, 2009 Tenn. App. LEXIS 761 (Tenn. Ct. App. Nov. 13, 2009) (holding that such an argument was inconsistent with the "clear language" of the statute). *See also Stump*, 2005 U.S. Dist. LEXIS 45729, at *2 (noting prior order denying sponsor-defendant's Fed. R. Civ. Pro. 12(b)(6) motion to dismiss due, *inter alia*, to plaintiff-beneficiary's failure to allege she had received means-tested benefits).

[20] *Baines*, 2009 Tenn. App. LEXIS 761, at *12.

[21] Form I-864, *supra* note 3, p. 7.

of means-tested benefits is a pre-condition only to an agency seeking reimbursement, not to an action by the noncitizen-beneficiary for support.

By contrast, courts hold that a beneficiary's household income must fall beneath 125% of the Poverty Guidelines before an action may be maintained against the sponsor.[22] This result is not surprising. The duty owed by a sponsor to a beneficiary is to maintain the beneficiary at 125% of the Poverty Guidelines; if the beneficiary's income has not slipped beneath this point then the sponsor's duty of financial support has not been triggered.

An important condition precedent has been recognized under the latest iteration of the I-864 (revised September 19, 2011).[23] Under the new form, it appears that a beneficiary must have achieved lawful permanent resident (LPR) status in order to sue for support.[24] The I-864 previously provided that the sponsor's promise was made, "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."[25] Examining that language, the consideration offered by the government was the return promise that the intending immigrant would overcome public charge inadmissibility,[26] the elements of contract formation were

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[22] *See*, *e.g.*, In re Marriage of Sandhu, 207 P.3d 1067 (Kan. Ct. App. 2009) (holding that beneficiary had no cause of action due to earnings over 125% of the Poverty Guidelines). *See also* Iannuzzelli v. Lovett, 981 So.2d 557 (Fla. Dist. Ct. App. 2008) (noting that beneficiary-plaintiff was awarded no damages at trial because she had failed to demonstrate "that she ha[d] been unable to sustain herself at 125% of the poverty level since her separation from the marriage").

[23] *See supra* note 3.

[24] *See* 8 C.F.R. § 213a.2(e) (support obligations commence when intending immigrant is granted admission as immigrant or adjustment of status).

[25] Form I-864, Affidavit of Support p. 4 (rev'd Nov. 5, 2001), on file with the author (emphasis added); Form I-864, Affidavit of Support, p. 4 (rev'd Oct. 6, 1997), on file with the author (same).

[26] Worded this way, was the return promise illusory? Recall that the government has discretion to find a noncitizen inadmissible on public charge grounds regardless of a signed I-864. INA § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A).

met, rendering an enforceable agreement – so reasoned a federal court in *Stump v. Stump*.[27]

In the current version of Form I-864, the language just quoted has been struck. Instead, the Form recites that "[t]he intending immigrant's *becoming a permanent resident* is the 'consideration' for the contract."[28] This alone might not change the result reached in *Stump*, since the carrot of future permanent residency could constitute an immediate valuable exchange at the time the Form is signed.[29] If so, the elements of contract formation would be met and the reasoning of *Stump* would make the agreement immediately enforceable. The important difference occurs where the new Form clarifies in two different places that the sponsor's *obligations* commence, "[i]f an attending immigrant becomes a permanent resident in the United States based on a Form I-864 that you have signed."[30] Looking to this revised language, in *Chavez v. Chavez* a Virginia court easily concluded that "becoming a permanent resident is a condition precedent" to a beneficiary suing on an I-864.[31] This result is consistent with the understanding of the Department of Homeland Security, which expressly considered and endorsed the view that a sponsor's support duties arise only after the intending immigrant acquires status.[32]

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[27] No. 1:04-CV-253-TS, 2005 U.S. Dist. LEXIS 45729, at *18 (D. Ind. May 27, 2005) (granting in part plaintiff's motion for summary judgment).

[28] Form I-864, *supra* note 3, p. 4. The revised language appears clearly to be more consistent with the INA interpretation exposed in the federal regulations. *See* 8 C.F.R. § 213a.2(e) (support obligations commence "when the immigration officer or the immigration judge grants the intending immigrant's application for admission as an immigrant or for adjustment of status…").

[29] Like the "consideration" of permanent residency, the promise of overcoming public charge inadmissibility is something that can be realized only in the future. Yet the *Stump* Court found such a promise constituted consideration forming a binding contract at the time of signing. 2005 U.S. Dist. LEXIS 45729, at *18.

[30] Form I-864, *supra* note 3, p. 4.

[31] Civil No. CL10-6528, 2010 Va. Cir. LEXIS 319 (Va. Cir. Crt. Dec. 1, 2010) (denying beneficiary's motion for relief *pendente lite*).

[32] Final Rules, *supra* note 6, at 35740 ("[t]he final rule clarifies that, for the obligations to arise, the intending immigrant must actually acquire permanent resident status").

Terminating obligation - quarters of work. Of the five events that may terminate a sponsor's obligations under the I-864[33] only one has received attention in the context of actions by noncitizen-beneficiaries. In *Davis v. Davis*, the Ohio Court of Appeals addressed how to calculate 40 quarters of work for purposes of determining when a sponsor's support duty has terminated.[34] The Court concluded the total would be calculated by adding all qualifying quarters worked by the beneficiary to all those worked by the sponsor – apparently even if this results in counting a single quarter twice (once for the beneficiary, once for the sponsor). As argued by a dissenting opinion, this result seems starkly at odds with the purpose of the I-864.[35] Were a beneficiary and sponsor both gainfully employed, support duties could terminate in five rather than ten years.

I.B. Defenses

Litigants have tested the waters with a number of defenses to a noncitizen-beneficiary's recovery under the I-864.

Lack of consideration. If a party to a contract reserves the discretion to choose whether or not to perform his obligation, his promise is illusory and the agreement is unenforceable as lacking consideration.[36] Courts have rejected the argument that the I-864 lacks of consideration on the part of the Government. As discussed above, under the previous iteration of the Form, overcoming public charge inadmissibility was the value held forth by the Government as a carrot for the sponsor's promised support.[37] Relying on this language, courts readily held that

[33] See *supra* note 15.

[34] No. WD-11-006 (Ohio Ct. App. May 11, 2012), *available at* http://www.sconet.state.oh.us/rod/docs/pdf/6/2012/2012-ohio-2088.pdf (last visisted Nov. 12, 2012).

[35] *Id.* At *19 (Singer, J., dissenting).

[36] RESTATEMENT (2nd) § 77.

[37] See *supra*, text accompanying notes 24-32.

the promise of overcoming inadmissibility is a thing of value adequate for consideration.[38]

The present version of the I-864 sets forth "becoming a permanent resident" as the consideration carrot offered by the Government to the sponsor.[39] Courts have yet to address whether the revised Form is vulnerable to attack as lacking consideration. In fact, there is serious reason to question whether the revised language is more prone to challenge.

As Charles Wheeler pointed out with respect to a prior version of the Form, the Government's promise was in a sense illusory where it promises the intending immigrant would overcome public charge admissibility. Under the INA, the Government retained discretion to find a noncitizen inadmissible regardless of a properly executed I-864.[40] Yet the language of the previous I-864 was given an interpretive gloss to avoid the problem of the Government's reservation of discretion. It required only minor semantic contortion to say that the Government had promised that the intending immigrant *would be inadmissible unless the application was signed*. In other words, the Government promised the intending immigrant will overcome the *per se* basis for denial (i.e., lacking an I-864). Indeed, the federal court in *Stump v. Stump* seemed to believe this was precisely the consideration set forth in the I-864.[41]

It would be more difficult to apply this interpretive gloss to save the current I-864, under which the Government has even greater opportunity to fail its promised performance. Again, the Form now asserts that "[t]he intending immigrant's becoming a permanent

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[38] No. E2009-00180-COA-R3-CV, 2009 Tenn. App. LEXIS 761, at *13-14 (Tenn. Ct. App. Nov. 13, 2009); Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 U.S. Dist. LEXIS 26602, at *11-12 (M.D. Fla. May 4, 2006).

[39] *See supra*, text accompanying note 28.

[40] Wheeler, *supra* note 12.

[41] *See* No. 1:04-CV-253-TS, 2005 U.S. Dist. LEXIS 26022, at *6-7 (N.D. Ind. Oct. 25, 2005) ("The [sponsor] made this promise as consideration for the [beneficiary's] application not being denied on the grounds that she was an immigrant likely to become a public charge").

resident is the 'consideration' for the contract."[42] The Government's promise is now insulated by two layers of statutory discretion: it must favorably exercise discretion both for the immigrant to overcome public charge inadmissibility and to grant permanent residency.[43] But more importantly – regardless of a properly executed I-864 – the Government would be statutorily prevented from upholding its promise if the intending immigrant is statutorily ineligible to adjust, for instance because she entered the country without inspection.[44] Likewise, any other grounds of inadmissibility could statutorily prevent the Government from upholding its promise – can the Government promise a sponsor that his Nazi-persecutor wife may become a permanent resident if the sponsor signs the I-864?[45] All this serves to question whether the Government's promise is illusory, since it simply is not the case that the Government is prepared to grant permanent residency merely because a sponsor has signed the I-864.[46]

Unconscionability. A contract is rendered unenforceable if it was unconscionable at the time the agreement was entered into.[47] *Baines v. Baines* is the leading case discussing the alleged unconscionability of the Affidavit of Support.[48] There, the sponsor asserted that his wife's immigration benefit would have been denied had he refused to sign the I-864 and also that she would have divorced him.[49] Yet considering the exchange at the time it was made, the Court found it reasonable that

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[42] Form I-864, *supra* note 3 at 6.

[43] *See*, *e.g.*, INA § 245(a), 8 U.S.C. § 1255(a) (Attorney General may adjust status to lawful permanent residency "in his discretion").

[44] *Id.* (adjustment of status generally available only to noncitizen "who was inspected and admitted or paroled into the United States").

[45] *See* INA § 212(a)(3)(E), 8 U.S.C. § 1182(a)(3)(E) (participants in Nazi persecution are inadmissible).

[46] *But see* RESTATEMENT (2nd) § 78 ("[t]he fact that a rule of law renders a promise voidable or unenforceable does not prevent it from being consideration").

[47] *See* RESTATEMENT (2nd) § 208.

[48] No. E2009-00180-COA-R3-CV, 2009 Tenn. App. LEXIS 761 (Tenn. Ct. App. Nov. 13, 2009). *Cf.* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 12-20 BENDERS IMMIGR. BULL. 1 (2007), text accompanying notes 376-80 (arguing that sponsor may not understand responsibilities under Affidavit).

[49] *Baines*, 2009 Tenn. App. LEXIS 761 at *14-15.

the sponsor would want to support his wife in the immigration process, as well as financially (he was doing so already).[50] Indeed, in prenuptial contracts couples routinely commit to substantial financial obligations – even duties of personal performance… or non-performance[51] – yet these agreements are generally enforceable.[52] It is notable, however, that the *Baines* Court took a careful look at the factual record, suggesting there might be more severe fact patterns that could render the agreement unconscionable.[53] Note that any fact pattern severe enough to rise to the level of unconscionability would likely raise questions no only relating to the bonafides of the marriage, but of deportable fraud.[54]

Testing slightly different waters, in *Al-Mansour v Shraim*, the Court rejected an argument that the I-864 is unconscionable because it is a 'take it or leave it' contract of adhesion.[55] The Court found the various cautionary recitals in the Form adequate to overcome the charge of unconscionability, even given the extra scrutiny visited on contracts of adhesion.[56]

Fraud. Sponsors have alleged they were fraudulently induced to sign Affidavits of Support, but such defenses or counterclaims have tended to die quick deaths at summary judgment. In *Carlbog v. Tompkins* the plaintiff-beneficiary successfully defeated the defendant-sponsor's counterclaim of fraud, where the sponsor had produced inadmissible translations of emails purporting to show that the beneficiary had designed a scam marriage – but even if admitted the

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[50] *Id.*, at *16.

[51] *See*, *e.g.*, Favrot v. Barnes, 332 So.2d 873 (La.Ct. App. 1967), *rev'd on other grounds*, 339 So.2d 843 (La.1976), *cert. den.*, 429 U.S. 961 (prenuptial agreement limiting sexual intercourse to about once a week).

[52] *See*, *e.g.*, Susan Wolfson, *Premarital Waiver of Alimony*, 38 FAM. L.Q. 141, 146 (Spring 2004) (observing that prenuptial agreements impacting alimony may be enforceable).

[53] A situation in which a foreign national defrauded a citizen into signing the Form I-864 might be such a scenario. With the noncitizen as a third-party beneficiary, it might be difficult to raise a theory of fraud in the inducement.

[54] *See* INA § 237(a)(1)(G), 8 U.S.C. § 1227(a)(1)(G) (grounds of deportation for marriage fraud).

[55] No. CCB-10-1729, 2011 U.S. Dist. LEXIS 9864 (D. Md., Feb. 2, 2011).

[56] *Id.*, at *7-8.

emails lacked sufficient particulars to pass summary judgment on the question of fraud.[57] As mentioned with respect to unconscionability, a beneficiary who defrauded an I-864 sponsor could also face immigration consequences for that action.

Impossibility. Addressing an unlikely fact pattern, in *HajiZadeh v. HajiZadeh*, the Court upheld the trial court's finding that the beneficiary-sponsor had rendered performance of the I-864 impossible by returning to his home country (temporarily) and concealing his whereabouts.[58] This was a battle lost at trial – the appellate court refused to reweigh the evidence, ending the argument.

I.C. Damages

Where a sponsor fails his support duties under the I-864, the measure of damages is fundamentally straight-forward. To calculate damages, courts compare the plaintiff's actual annual income for each particular year at issue against the 125% of Poverty Guideline threshold for that year.[59] But the devil, naturally, is in the details.

Determining required level of support. A plaintiff-beneficiary is entitled to receive support "necessary to maintain him or her at an income that is at least 125 percent of the [Poverty Guidelines]."[60] Courts agree that if a beneficiary has an independent source of income, such as a job, the sponsor need pay only the difference required to bring the beneficiary to 125% of the Poverty Guidelines.[61] But what counts as income for this purpose? The term is not defined by the I-864, and mysteriously courts have generally ignored the fact that C.F.R.

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[57] 10-cv-187-bbc, 2010 U.S. Dist. LEXIS 117252, at *8 (W.D. Wi., Nov. 3, 2010). *See also* Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 U.S. Dist. LEXIS 26602 (M.D. Fl., May 4, 2006) (following trial, finding no evidence adequate to prove plaintiff-beneficiary had defrauded defendant-sponsor into signing Form I-864 with a false promise of marriage, despite early marital problems).

[58] 961 N.E.2d 541, (Ind. Ct. App. Jan. 18, 2012) (unpublished decision).

[59] *See*, *e.g.*, *Al-Mansour*, 2011 U.S. Dist. LEXIS 9864, at *11; Shumye v. Felleke, 555 F. Supp. 2d 1020, 1024 (N.D. Cal. Apr. 3, 2008); Carlborg v. Tompkins, 2010 U.S. Dist. LEXIS 117252, at *8 (W.D. Wi., Nov. 3, 2010); *Cheshire*, 2006 U.S. Dist. LEXIS 26602, at *17. *See* INA § 213A(h); 8 U.S.C. § 1183a(h) (Poverty Guidelines means official poverty line "as revised annually"); 8 C.F.R. § 213a.1 (same).

[60] Form I-864, *supra* note 3, p. 6.

[61] *Cheshire*, 2006 U.S. Dist. LEXIS 26602, at *17.

regulations define income by reference to federal income tax liability.[62] Indeed, in considering whether gifts would count towards a beneficiary's income, the court in *Younis v. Farooqi* appeared to indicate the question would not be answered by the fact that gifts are not income for tax purposes.[63]

Shumye v. Felleke considered whether a number of financial sources constitute "income" for purposes of the I-864: a divorce settlement is not income because it was a settlement of the married couple's preexisting community property rights; student loans are not income because they are a form of debt, but student grants are income because they need not be repaid; and affordable housing subsidies would also be counted as income.[64] In *Nasir v. Asfa Ahad Shah* the Court held that the plaintiff-beneficiary was not entitled to additional support to make up for personal debts.[65] And another court determined that child support payments do not count towards income, since they are intended for the benefit of the child rather than sponsored parent.[66]

As discussed throughout this Bulletin it is not clear what rule the INA and C.F.R. play in determining contract rights under the I-864. But the vague meaning of "income" in the I-864 could certainly be clarified by taking recourse to the C.F.R. definition, incorporating the detailed federal income tax guidelines.

Failure to mitigate. The weightiest case law development in the past year has been *Liu v. Mund*, the Seventh Circuit holding that an I-864 beneficiary has no duty to mitigate damages by seeking employment.[67] Though not actually a "duty" as such, a party generally "cannot recover damages for a loss that he could have avoided by

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[62] 8 C.F.R. § 213a.1. *See also* Love v. Love, 33 A. 3d 1268, 1277 (Pa. Super. Ct. 2011) (noting the "narrow" definition of income under state domestic code).

[63] Younis v. Farooqi, 597 F. Supp. 2d 552, 555, n. 3 (D. Md. Feb. 10, 2009). The court did not decide the issue since the gifts in question were minimal.

[64] 555 F. Supp. 2d 1020 (N.D. Cal. Apr. 3, 2008).

[65] No. 2:10-cv-01003, 2012 U.S. Dist. LEXIS 135207, at *10-11 (S.D. Ohio Sept. 21, 2012).

[66] *Younis*, 597 F. Supp. 2d at 555 ("child support is a financial obligation to one's non-custodial child, not a monetary benefit to the other parent").

[67] 686 F.3d 418 (7th Cir. 2012).

reasonable efforts."[68] While not the first case to consider the issue, *Liu* is the most thorough treatment to date.[69] In *Liu*, the plaintiff-beneficiary lost at summary judgment on the finding that she had not actively pursued work during the period for which support was sought.[70] The Seventh Circuit, per Judge Posner, found that the I-864 itself, the INA and federal regulations were all silent as to whether the beneficiary had a duty to seek employment.[71] Instead, the decisive analytical factor was the clear statutory purpose behind the I-864: to prevent the noncitizen from becoming a public charge.[72] Worth noting is that one magistrate judge deployed precisely the same policy consideration to reach the opposite conclusion: "[i]f the sponsored immigrant is earning, or is capable of earning, [125% of the Poverty Guidelines] or more, there obviously is no need for continued support."[73]

In *Liu* the government, as amicus, argued the Court should look to the common law duty to mitigate.[74] The Seventh Circuit rejected this both because it found no federal common law duty to mitigate and due to outright skepticism of the traditional cannon that abrogation of common law is disfavored.[75] Neither of those analytic moves are sure to

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[68] RESTATEMENT (2nd) § 350, cmt. b. *See id.* § 350(1) ("[Generally] damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation").

[69] For example, in *Younis v. Farooqi* the Court assumed for the sake of argument that such a duty existed, but concluded the defendant-sponsor failed to demonstrate the plaintiff-beneficiary had failed that duty. 597 F.Supp.2d at 556-57.

[70] *Liu*, 686 F.3d at 420.

[71] *Id.*

[72] *Id.*, at 422. *See also* Love v. Love, 33 A. 3d 1268, 1276 (Pa. Super. Ct. 2011) (holding that earning capacity could not be imputed to beneficiary, because "[i]t is abundantly clear that the purpose of the Affidavit is to prevent an immigrant spouse from becoming a public charge"); Carlborg v. Tompkins, No. 10–cv–187–bbc, 2010 U.S. Dist. LEXIS 1175252, at *11 (W.D. Wis. Nov. 3, 2010) ("If defendant could defeat a suit for damages by relying on plaintiff's failure to carry her part, government agencies would be stuck with the costs of the destitute spouse, with no recourse").

[73] Ainsworth v. Ainsworth, No. 02-1137-A, 2004 U.S. Dist. LEXIS 28962, at *4 (M.D. La. Apr. 29, 2004) ("the entire purpose of the affidavit is to ensure that immigrants do not become a 'public charge'"), *recommendation rejected*, 2004 U.S. Dist. LEXIS 28961 (May 27, 2004).

[74] *Liu*, 686 F.3d at 421.

[75] *Id.*, at 423, 421.

find traction elsewhere. States generally do have common law doctrines imposing a duty to mitigate damages, [76] and this duty includes using reasonable efforts to seek employment – in the case of wrongful discharge, for example.[77] Moreover, other federal courts have looked to the common law doctrine in the state where the federal action was brought.[78] And it is doubtful that all tribunals could be quite so bold with respect to the cannon of construction cast asunder by the Seventh Circuit – not everyone is a Judge Posner.[79]

When beneficiaries seek to enforce the I-864 in the context of a domestic relations support order, courts have addressed whether income may be "imputed" to the beneficiary based on earning capacity.[80] In *Love v. Love*, the Superior Court of Pennsylvania followed similar moves to the Seventh Circuit in *Liu*.[81] Noting the lack of definition for "income" under the INA, the *Love* Court noted the

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[76] *See* RESTATEMENT (2nd) § 350 (generally, damages cannot be recovered for avoidable loss); Naik v. Naik, 944 A. 2d 713, 717 (N.J. Super. Ct. A.D., Apr. 24, 2007) (asserting without discussion that "the sponsored immigrant is expected to engage in gainful employment, commensurate with his or her education, skills, training and ability to work in accordance with the common law duty to mitigate damages").

[77] *See*, *e.g.*, CAL. JURY INSTR.--CIV. 10.16 (rev'd fall 2012) ("An employee has sustained financial loss as a result of a breach of an employment contract by the employer, has a duty to take steps to minimize the loss by making a reasonable effort to find [and retain] comparable, or substantially similar, employment to that of which the employee has been deprived").

[78] *See*, *e.g.*, Younis v. Farooqi, 597 F. Supp. 2d 552, 556 (D. Md. Feb. 10, 2009) (citing Maryland law for the proposition that the plaintiff-beneficiary had a duty to make reasonable efforts to mitigate damages by obtaining employment). Whether a federal court applies state or federal common law is question governed by that bane of first year law students, the *Erie* doctrine. *See Cf.* 19 Charles A. Wright, *et al.*, Federal Practice & Procedure § 4501 (West, 2d ed. 2012).

[79] *See*, *e.g.*, Congressional Research Service, *Statutory Interpretation: General Principles and Recent Trends* (rev'd Aug. 31, 2008) *available at* http://www.fas.org/sgp/crs/misc/97-589.pdf (last visited Nov. 8, 2012), at 18 (explaining the canon as traditionally formulated and currently used).

[80] In *Mathieson v. Mathieson* a plaintiff-beneficiary brought a federal court action to seek support of I-864 support obligations. No. 10–1158, 2011 U.S. Dist. LEXIS 44054 (W.D. Penn., Apr. 25, 2011). The Court found the action barred by the Rooker-Feldman doctrine in light of a prior state court domestic support order, but noted that it would have agreed with the state court's holding that income could be imputed to the beneficiary based on earning capacity. *Id.*, at *10, n. 3.

[81] *Love v. Love*, 33 A.3d 1268 (Pa. Super. Ct. 2011).

"narrow" definition under state domestic code and the C.F.R..[82] As in *Liu*, the decisive factor was the policy purpose underlying the I-864: "[u]nlike actual income, earning capacity will never provide shelter, sustenance, or minimum comforts to a destitute immigrant."[83] Yet in *Barnett v. Barnett*, the Supreme Court of Alaska concluded summarily that "[e]xisting case law" supported the conclusion that earning capacity should be imputed to an I-864 beneficiary, thus holding that spousal support was not appropriate given the beneficiary's imputed earning capacity.[84]

Attorney fees. The I-864 warns the sponsor: "If you are sued, and the court enters a judgment against you… [y]ou may also be required to pay the costs of collection, including attorney fees."[85] Likewise, 8 U.S.C. § 1183a(c) provides that remedies available to enforce the Affidavit of Support include "payment of legal fees and other costs of collection." Indeed, courts have proved willing to award fees, subject to typical limitations of reasonableness.[86] Following the language of the Affidavit, the plaintiff-beneficiary is entitled to fees only if she prevails and a judgment is entered.[87] Where a noncitizen-beneficiary pursues her entitlement to support in the context of a maintenance order, her attorney would be wise to carefully track hours spent specifically on the I-864 claim. The beneficiary may or may not be entitled to an award of reasonable attorney fees with respect to the entire divorce proceeding. If a court is unable fairly to discern the time spent prosecuting the I-864 claim it could refuse to allow any fee recovery.

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[82] *Id*., at 1277-78. *See* 8 C.F.R. § 213a.1 ("income" means "an individual's total income… for purposes of the individual's U.S. Federal income tax liability").

[83] *Id.,* at 1278.

[84] 238 P.3d 594, 598 (Alaska 2010).

[85] Form I-864, *supra* note 3, p. 7.

[86] *See*, *e.g.*, Sloan v. Uwimana, No. 1:11-cv-502 (GBL/IDD), 2012 U.S. Dist. LEXIS 48723 (E.D. Va. Apr. 4, 2012) (awarding fees in reliance on 8 U.S.C. § 1183a(c), subject to scrutiny for reasonableness pursuant to the Lodestar method).

[87] *See*, *e.g.*, *Barnett*, 238 P.3d at 603 (holding that fees were appropriately denied in absence of judgment to enforce I-864); Iannuzzelli v. Lovett, 981 So.2d 557 (Fla. Dist. Ct. App. 2008) (holding that the fees were appropriately denied in absence of damages; note that action was based on a prior iteration of Form I-864).

II. Procedural Issues

Both the I-864 and the INA provide that the sponsor submits to the personal jurisdiction of any competent U.S. court by executing the Affidavit of Support.[88] While personal jurisdiction appears to have posed little trouble,[89] a number of procedural issues have arisen for noncitizen-beneficiaries seeking to litigate against sponsors.

II.A. Federal Court

Federal courts historically have had no difficulty finding subject matter jurisdiction over suits on the I-864. Yet to paraphrase Vice-President Dan Quayle, this is an irreversible trend that could change.[90] The I-864 statute, at 8 U.S.C. § 1183a(e)(I), provides that "[a]n action to enforce an affidavit of support… may be brought against the sponsor in *any appropriate court*… by a sponsored alien, with respect to financial support."[91] Most courts to consider the issue have held that this provision creates federal question jurisdiction with regards to a suit by a beneficiary against a sponsor.[92] Moreover, even in cases where the

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[88] I-864, *supra* note 3, p. 7 ("I agree to submit to the personal jurisdiction of any Federal or State court that has subject matter jurisdiction of a lawsuit against me to enforce my obligations under this Form I-864"); INA § 213A(a)(1)(C); 8 U.S.C. § 1183a(a)(1)(C).

[89] *But see* HajiZadeh v. HajiZadeh 961 N.E.2d 541, (Ind. Ct. App. 2012), discussed *supra* at *text accompanying* note 58 (in which the *beneficiary* had absconded to the foreign country, making performance of the sponsor's duties impossible).

[90] *See* Howard Rich, *The Stunning, Sudden Reversal of Economic Freedom in America* (Sep. 25, 2012), www.forbes.com (quoting the Vice President: "I believe we are on an irreversible trend toward more freedom and democracy, but that could change").

[91] INA § 213A(e); 8 U.S.C. § 1183a(e) (emphasis added). By signing the Form I-864, the sponsor also agrees to "submit to the personal jurisdiction of any Federal or State court that has subject matter jurisdiction of a lawsuit against [the sponsor] to enforce [his/her] obligations under this Form I-864." Form I-864, at 7. *Cf.* Younis v. Rarooqi, 597 F. Supp. 2d 552, 554 (D. Md. Feb. 10, 2009) (noting that sponsor submits himself to personal jurisdiction "of any federal or state court in which a civil lawsuit to enforce the affidavit has been brought"). This language may be broader than the actual requirements of the statute, which appear to require only that the sponsor waive personal jurisdiction with respect to actions brought to compel reimbursement to a government agency. *See* INA § 213A(a)(1)(C), 8 U.S.C. § 1183a(a)(1)(C) (sponsor agrees to submit to jurisdiction for purposes of actions under "subsection (b)(2)," concerning actions to compel reimbursement of government expenses).

[92] *See*, e.g., Liu v. Mund, 686 F.3d 418 (7th Cir. 2012); Montgomery v. Montgomery, 764 F. Supp. 2d 328, 330 (D. N.H. Feb. 9, 2011); Skorychenko v. Tompkins, 08-cv-626-

issue has not been addressed expressly, it is safe to presume that other federal courts have reached the same conclusion *sub silentio*, as there is an affirmative obligation for a tribunal to ensure it has subject matter jurisdiction.[93]

Departing from other decisions in the same district,[94] in *Winters v. Winters* a federal court in Florida recently concluded that it lacked subject matter jurisdiction over an I-864 contract action against a sponsor.[95] The Court's critical analytical move was to clarify that the suit sounded only on contract law and was not predicated on the underlying immigration statute.[96] The case was a suit on the contract, and did "not involve the validity, construction or effect of the federal law, but [only] construction of the contract.[97] 8 U.S.C. § 1183a(e)(I) speaks only of jurisdiction in an "appropriate court," without specifying expressly that federal tribunals would be "appropriate."[98]

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slc, 2009 U.S. Dist. LEXIS 4328 (W.D. Wis. Jan. 20, 2009); Stump v. Stump, No. 1:04-CV-253-TS, 2005 U.S. Dist. LEXIS 26022, *1 (N.D. Ind. Oct. 25, 2005); Ainsworth v. Ainsworth, No. 02-1137-A, 2004 U.S. Dist. LEXIS 28961, at *4 (M.D. La., May 27 2004); Tornheim v. Kohn, No. No. 00-CV-5084 (SJ), 2002 U.S. Dist. LEXIS 27914, (E.D. N.Y. Mar. 26, 2002) ("Plaintiff's suit arises under the laws of the United States . . ."). *See also* Cobb v. Cobb, 1:12-cv-00875-LJO-SKO, 2012 U.S. Dist. LEXIS 93131, at *6 (E.D. Cal. July 3, 2012) (noting that INA "expressly creates a private right of action allowing a sponsored immigrant to enforce an affidavit of support," but declining to reach issue); Al-Mansour v. Ali Shraim, No. CCB-10-1729, 2011 U.S. Dist. LEXIS 9864, at *9 (D. Md. Feb. 2, 2011) (holding that Court had jurisdiction over suit to enforce I-864, because the "claim involve[d] a federal statute"). *But see*, Davis v. U.S., 499 F.3d 590, 594-95 (6th Cir. 2007) (holding that court lacked subject matter jurisdiction over declaratory judgment action seeking to clarify sponsor's duties under I-864).

[93] *See*, *e.g.*, Rembert v. Apfel, 213 F.3d 1331, 1333 (11th Cir. 2000) ("As a federal court of limited jurisdiction, we must inquire into our subject matter jurisdiction *sua sponte* even if the parties have not challenged it.") *overruled on other grounds by* Roell v. Withrow, 538 U.S. 580 (2003).

[94] Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 U.S. Dist. LEXIS 26602 (M.D. Fla. May 4, 2006); Hrachova v. Cook, No. 5:09–cv–95–Oc–GRJ, 2009 U.S. Dist. LEXIS 102067 (M.D. Fla. Nov. 3, 2009).

[95] No. 6:12-cv-536-Orl-37DAB, 2012 U.S. Dist. LEXIS 75069 (M.D. Fla. Apr. 25, 2012).

[96] *Id.*, at *5 ("while the federal statute requires execution of the affidavit, it is the affidavit and not the statute that creates the support obligation").

[97] *Id.*, at *8.

[98] *Id.*, at *6.

It is too early to gauge the impact of *Winters*, but it is difficult to image a sudden change in the vast current of cases acknowledging jurisdiction (even if tacitly). Yet *Winters* illustrates a pervasive confusion over the nature of an noncitizen-beneficiary's suit against a sponsor. Time and again, courts have been less than clear about why and how the INA and C.F.R. govern the duties of a sponsor and rights of a beneficiary.[99] Whereas some courts have glibly referred to such suits as involving "federal statute,"[100] the *Winters* Court viewed the case before it as a simple contract action and rigorously scrutinized the statute for a federal cause of action, finding none.

In contrast to the prevailing view that federal courts possess subject matter jurisdiction over private suits on the I-864, and notwithstanding *Winters*, federal tribunals have been vigilant against collateral attacks on state court judgments.[101] Pursuant to the *Rooker-Feldman* doctrine, federal courts lack subject matter jurisdiction over attempts to take a second bite at a litigation apple in federal court that has already been munched in state court.[102] When it comes to the I-864, a federal court generally will lack jurisdiction to enter a judgment pertaining to the actionable of time for which support was sought in a state court

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[99] For further discussion see *infra*, section III.B.

[100] Al-Mansour v. Ali Shraim, No. CCB-10-1729, 2011 U.S. Dist. LEXIS 9864, at *9 (D. Md. Feb. 2, 2011) ("This court has subject matter jurisdiction over this case because [the beneficiary's] claim involves a federal statute").

[101] *See*, *e.g.*, Nguyen v. Dean. Civil No. 10-6138-AA, 2011 U.S. Dist. LEXIS 3903 (D. Or. Jan. 14, 2011) (holding that plaintiff was barred from relitigating spousal support in federal court, rebranding request as "financial support" rather than "spousal support"); Schwartz v. Shwartz, 409 B.R. 240, 249 (B.A.P. 1st Cir. Aug. 26, 2008) (noting that *Rooker-Feldman* doctrine would bar suit if I-864 had been considered by state divorce court); Davis v. U.S., 499 F.3d 590, 595 (6th Cir. 2007) (as alternate basis for dismissal, holding that *Rooker-Feldman* doctrine bared suit).

[102] Under the *Rooker-Feldman* doctrine, a federal court lacks jurisdiction where:

> (1) the federal plaintiff lost in state court; (2) the federal plaintiff complains of injuries caused by the state court's rulings; (3) those rulings were made before the federal suit was filed; and (4) the federal plaintiff is asking the district court to review and reject the state court rulings.

Mathieson v. Mathieson, No. 10–1158, 2011 U.S. Dist. LEXIS 44054, at *5 (W.D. Penn. Apr. 25, 2011) (citing Great W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 166 (3d Cir. 2010).

action.[103] Even if the state court action was based on a family law statute, incorporating the I-864 obligation into a spousal support order,[104] the federal court action may be barred based on the I-864, not a separate federal statute.[105] Yet a district court in New Hampshire reached a contrasting result deploying abstention doctrine.[106] There, a state court had entered a temporary support order that might or might not have relied upon the I-864, but regardless of whether it did a federal order mandating payment of support would not "interfere" with the state court order, as it would not require the federal tribunal to "countermand the temporary order."[107]

II.B State Court

State courts have unanimously found subject matter jurisdiction over a claims by I-864 beneficiaries against their citizen sponsors.[108] This is no surprise, as contract actions fall squarely within the competency of a court of general jurisdiction. Without known exception, these claims have arisen exclusively in family law proceedings.[109] Yet there seems to be no reason a beneficiary could not bring suit outside the context of family law proceedings in a State court of general jurisdiction.

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[103] Mathieson, 2011 U.S. Dist. LEXIS 44054, at *7.

[104] *See infra* section II.B.1.

[105] Mathieson, 2011 U.S. Dist. LEXIS 44054, at *9. Note the *Winters* court made a similar move before concluding it lacked federal question jurisdiction over a private suit on the I-864. If the federal action is based on no federal statute – for purposes of a *Rooker-Feldman* analysis – how is there federal question jurisdiction?

[106] Montgomery v. Montgomery, 764 F. Supp. 2d 328 (D. N.H. Feb. 9, 2011).

[107] *Id.*, at 333-34. *See also* Cobb v. Cobb, 1:12-cv-00875-LJO-SKO, 2012 U.S. Dist. LEXIS 93131, at *6 (E.D. Cal. July 3, 2012) (noting that Court would lack jurisdiction under domestic relations exception to hear alleged diversity jurisdiction suit seeking review of alimony order involving I-864).

[108] *See*, *e.g.*, Marriage of Sandhu, 207 P.3d 1067, 1071 (Kan. Ct. App. 2009) (holding that family court erred in dismissing for lack of subject matter jurisdiction the beneficiary's claim for maintenance based on the I-864).

[109] *See*, *e.g.*, Baines v. Baines, No. E2009-00180-COA-R3-CV, 2009 Tenn. App. LEXIS 761, at *8 (Tenn. Ct. App. Nov. 13, 2009) (holding that family law court had jurisdiction over contractual claim for specific performance of I-864).

II.B.1 Maintenance ("Alimony") Orders

Every known case in which an I-864 beneficiary has sued a sponsor in state court has arisen in family law proceedings. A source of confusion has been *how* precisely the I-864 comes into play procedurally. Specifically, it has been litigated both: as (1) a standalone contract cause of action, joined to a divorce/dissolution proceeding; and (2) a basis for awarding spousal maintenance. This is a distinction with a difference for the beneficiary. Unlike contract judgments, spousal maintenance orders have special enforcement mechanisms in many states, making enforcement cheaper and easier.[110] Furthermore, spousal maintenance – unlike payment on a contract judgment – is counted as income to the recipient for purposes of federal income tax, and is deductible for the payer.[111] Another difference might be the ability to discharge a contract judgment in bankruptcy proceedings. But Bankruptcy Courts have ruled that judgments predicated on the I-864 are non-dischargeable domestic support obligations.[112]

In *Love v. Love* a Pennsylvania trial court was reversed for refusing to "apply" the I-864 when setting a spousal support obligation.[113] The appeals court held that the Affidavit merited deviation from the standard support schedule, though it did not specify which statutory factor merited the deviation.[114] The trial court had relied on a state precedent opinion for the proposition that contractual agreements could not be incorporated into statutory support orders, but the appeals court disagreed there was such a rule and held that the I-864 beneficiary had

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[110] *See* 20 WASH. PRAC., FAM. AND COMMUNITY PROP. L. (West 2011) § 36.10 (maintenance order can be enforced by State agency through property lien, withholding of federal benefits, and intercepting income tax refunds *inter alia*).

[111] *See* IRS, Publication 17, *Tax Guide 2011 for Individuals*, Ch. 18 (Dec. 21, 2011), *available at* http://www.irs.gov/pub/irs-pdf/p17.pdf (last visited Nov. 20, 2012). I owe this observation to Prof. Kevin Ruser.

[112] Matter of Ortiz, No. 6:11-bk-07092-KSJ, 2012 Bankr. LEXIS 5324 (Bankr. M.D. Fla. Oct. 31, 2012) (granting summary judgment to beneficiary); Hrachova v. Cook, 473 B.R. 468 (Bankr. M.D. Fla. 2012).

[113] 33 A. 3d 1268 (Pa. Super. Ct. 2011).

[114] *Id.*, at 1273. *See* Pa. R. C. P. 1910.16-5 (grounds for deviating from support guidelines), *available at* http://www.pacode.com/secure/data/231/chapter1910/s1910.16-5.html (last visited Oct. 18, 2012).

the option to pursue either.[115] An energetic dissent in *Love* argued that incorporating a contractual agreement into a support order violates constitutional prohibitions on imprisonment for debts, since jail time is an enforcement mechanism available for support orders.[116] Note that some state courts have held that the proscription on debt imprisonment is inapplicable to enforcement of spousal maintenance.[117]

By contrast, in *Greenleaf v. Greenleaf* a Michigan court held that a lower court erred by incorporating the I-864 into a support order.[118] Under Michigan law, support awards are made in equity on consideration of 14 enumerated factors.[119] But the Court held that the lower court should first have determined the sponsor's "obligation" under the I-864, then proceeded to determine spousal support as a separate consideration.[120]

The appropriate duration of a support order based on the I-864 is impressive. One appellate court held that it is erroneous to order support for a period shorter than the terminating events specified in the I-864.[121] Because there is no date on which any of the five terminating events is sure to occur, a support order cannot set a date certain for termination of obligations. Indeed, it appears the best practice would be for the support order to simply echo the five terminating events articulated in the I-864.

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[115] Love, 33 A. 3d at 1274.

[116] *Id.*, at 1281 (Freedberg, J., dissenting).

[117] *See*, *e.g.*, Decker v. Decker, 326 P.2d 332, 337–38 (Wash. 1958).

[118] No. 299131 (Mich. Ct. App., Sep. 29, 2011), *available at* http://www.michbar.org/opinions/appeals/2011/092911/49856.pdf (last visited Oct. 18, 2012). *See also* Varnes v. Varnes, No. 13-08-00448-CV (Tex. App., Apr. 23, 2009) (noting it was undisputed that beneficiary was not entitled to spousal support based on I-864 under either of the two statutory grounds allowed by Texas law) *available at* http://statecasefiles.justia.com/documents/texas/thirteenth-court-of-appeals/13-08-00448-cv.pdf (last visited Oct. 18, 2012).

[119] Greenleaf, *supra* 118, at *3.

[120] *Id.*, at *5.

[121] In re Marriage of Kamali, 356 S.W.3d 544, 547 (Tex. App. Nov. 16 2011) (holding that trial court erred in limiting payments to an "arbitrary" 36-month period).

In jurisdictions lacking established law on this issue, family practitioners would be wise to raise the I-864 in the pleadings as a separate, alternate contractual cause of action.[122] Should the court determine that the Affidavit cannot be incorporated into a spousal support order, the practitioner will want this alternate basis on which to seek relief. Indeed, as discussed below, failure to do so could preclude the beneficiary from bringing a subsequent action on the Affidavit.[123]

II.B.2 Issue Preclusion, Claim Preclusion

Procedural doctrines prohibit the litigation both of matters that have already been *actually* litigated and that *could* have been litigated. The former is referred to as issue preclusion, the latter as claim preclusion.[124]

Where a family law court has considered the I-864 in calculating a spousal support order, issue preclusion prevents the beneficiary from bringing a subsequent contract action.[125] Such was the case in *Nguyen v. Dean*, where the plaintiff-beneficiary had expressly argued to the family law court that spousal support should be predicated on the Affidavit of Support. [126] By contrast, issue preclusion did not prevent the plaintiff-beneficiary's federal court action in *Chang v. Crabill*, where the family law court stated that "[n]o request was made by the respondent for spousal maintenance of any kind."[127]

Could a contract action be barred by claim preclusion (f.k.a. res judicata) because the plaintiff-beneficiary *could* have litigated the

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[122] *See*, *e.g.*, *Varnes*, *supra* note 118, at *9-10 (holding that trial court properly refused to address a contractual theory of recovery where beneficiary had pled only that spouse "'should support' her pursuant to the Affidavit of Support").

[123] See section II.B.2 *infra*.

[124] *Cf.* 18 WRIGHT § 4406.

[125] As discussed above, the federal court also may lack subject matter jurisdiction over such an action under the Rooker-Feldman doctrine. See section II.A *supra*.

[126] No. 10–6138–AA, 2011 U.S. Dist. LEXIS 3803 (D. Or. Jan. 14, 2011) (granting defendant's motion for summary judgment).

[127] No. 1:10 CV 78, 2011 U.S. Dist. LEXIS 67501 (N.D. Ind. June 21, 2011).

matter in a prior dissolution case?[128] In *Nasir v. Shah* the Court dismissed this possibility with a terse assertion that "[w]hether or not plaintiff sought or was entitled to spousal support is irrelevant to defendants' [sic.] obligation to maintain plaintiff at 125% [Poverty Guidelines]."[129] But the issue gave pause to the *Chang* Court. It ruled that the matter could not be resolved on the record presented at summary judgment, since it was unclear when the plaintiff-beneficiary should have discovered her right to sue on the I-864 (e.g., the sponsor may not have failed to meet support obligations prior to the dissolution order).[130] If the beneficiary could be charged with such notice at the time of her dissolution proceedings, it appears the *Chang* Court would have barred her subsequent federal action.

Because a sponsor's duty of support is ongoing, it appears a beneficiary could face claim preclusion only with respect to periods of time prior to the conclusion of a dissolution action. The beneficiary could not generally be charged with notice of a sponsor's future failure to provide support.[131] Recall that courts have been willing to enter spousal support orders mandating the terms of the I-864, which orders are of indefinite duration. A sponsor might argue that a beneficiary's failure to seek such a support order has a claim preclusive effect with respect to any future contract-based action, since any time period could have been covered by the spousal support order. But regardless of the statutory rules governing spousal support, claim preclusion does not attach if a cause of action has not yet accrued, so failure to obtain a prospective support order cannot have a preclusive effect with respect to future contract breaches.

III. Unresolved issues

III.A Prenuptial agreements

A major unresolved issue is whether a noncitizen-beneficiary and sponsor may enter into a prenuptial agreement that limits or eliminates

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[128] *Id.*, at *7-13.

[129] No. 2:10-cv-01003, 2012 U.S. Dist. LEXIS 135207, at*15 (S.D. Ohio Sept. 21, 2012).

[130] *Id.*, at *11.

[131] Except perhaps where the sponsor, for example, announces his intention to discontinue payment.

the sponsor's duties to the noncitizen-beneficiary under the I-864.[132] At least one federal court has touched on the issue, but in dicta only.[133] In *Blain v. Herrell* a couple signed a pre-marital contract, agreeing to be "solely responsible for his or her own future support after separation" and waiving rights to alimony and spousal support.[134] The agreement was signed approximately one year before the U.S. citizen spouse executed an I-864 for his then-wife.[135] In subsequent divorce proceedings, a Hawai'i state court determined the pre-marital agreement was enforceable, and apparently refused to award alimony based on the I-864 because of the valid pre-marital agreement.[136] The citizen-sponsor then filed *pro se* a separate action in U.S. district court. Though the action was dismissed on the sponsor's own motion, the Court opined on the merits of the case.[137] The Court easily concluded that the noncitizen-beneficiary was entitled to waive her rights under the I-864.[138] The noncitizen-beneficiary, "signed a contract directly with Defendant, the Pre-Marital Agreement, in which he voluntarily chose to waive his right to any support from Defendant."[139] Thus, the issue was settled.

Indeed, the Department of Homeland Security (DHS) has endorsed the view that, in a divorce proceeding, an noncitizen-beneficiary could settle her rights under the I-864. "If the sponsored immigrant is an adult, he or she probably can, in a divorce settlement, surrender his or

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[132] *Cf.* Shereen C. Chen, *The Affidavit of Support and its Impact on Nuptial Agreements*, 227 N.J. LAW. 35 (April 2004) (discussing I-864 in relation to Uniform Premarital Agreement Act).

[133] Blain v. Herrell, No. 10-00072 ACK-KSC, 2010 U.S. Dist. LEXIS 76257 (D. Haw. July 21, 2010).

[134] *Id.*, at *1-2.

[135] *Id.*, at *5.

[136] *Id.*, at *11.

[137] *Id.*, at *22-25.

[138] *Id.*, at *24-25 ("It is… a basic principle of contract law that a party may waive legal rights and this principle is applicable here").

[139] *Id.*, at *25.

her right to sue the sponsor to enforce an affidavit of support."[140] In *Blain* the parties had entered in the pre-marital agreement before executing the I-864 – though this timeline was mentioned in the Court's analysis its import is unclear.[141] Taken together, *Blain* and the DHS guidance suggest that a noncitizen-beneficiary may elect to waive her right to sue under the I-864 both before and after its execution. But these positions have yet to be seriously tested. For instance, courts routinely cite Congressional policy when construing the meaning of the I-864.[142] Where a prenuptial agreement waives a beneficiary's rights under the Affidavit, is it unenforceable as against public policy?[143] Courts routinely treat the I-864 not merely as a contract but as a hybrid creature of federal statutes. The INA expressly gives a noncitizen-beneficiary the right to sue a sponsor for violation of the I-864[144] – may parties privately agree to nullify this right?[145] While these issues remain unresolved, family law attorneys should remain extremely cautious when advising clients about their ability to contract around the I-864.

III.B Interpreting the I-864[146]

A persisting question is the extent to which the courts should rely on the INA and C.F.R. to determine the beneficiary and sponsor's rights

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[140] Final Rules, *supra* note 6 at 35740 (but clarifying that a sponsor's duties to reimburse government agencies would remain unchanged).

[141] *Blain*, 2010 U.S. Dist. LEXIS 76257 at *25.

[142] *See*, *e.g.*, *supra* at text accompanying notes 67-73.

[143] *See* RESTATEMENT (2nd) § 178(1) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms").

[144] INA § 213A(a)(1)(B), 8 U.S.C. § 1183a(a)(1)(B) (Affidavit of Support must be enforceable be beneficiary).

[145] If in fact it is the statute that creates the right. See Section III.B, *infra*.

[146] This BULLETIN does not distinguish between the 'construction' and 'interpretation' of contracts. *Cf.* Black's Law Dictionary (9th ed. 2009) (suggesting such distinction is antiquated).

and duties.[147] Courts have been analytically mushy as to how these statutes and regulations come into play. Here are three possibilities.

It could be that the relevant provisions of the INA and C.F.R. are incorporated by reference into the I-864. Indeed, all versions of the I-864 have purported to do this, at least to some extent. Each version has recited that "under section 213A of the [INA]" the Form creates a contract.[148] Previous versions went further, reciting that a sponsor could be sued by the beneficiary or an agency if he failed to meet his obligations "under this affidavit of support, *as defined by section 213A and INS regulations*."[149] The current version cautions: "[p]lease note that, by signing this Form I-864, you agree to assume certain specific obligations *under the Immigration and Nationality Act and other Federal laws*."[150] The Form then explains that "[t]he following paragraphs *explain* those obligations," but perhaps the provision could be read as an incorporation.[151] Nonetheless, if courts viewed this language as incorporation by reference, they have not said so.

Another option – it could be that courts look to the INA and C.F.R. to clarify the meaning of vague or missing terms in the I-864, rather than wholly incorporating the statute and regulations into the written agreement.[152] Consider the meaning of "income," which is not defined in the I-864. Courts have treated the term as an enigma,[153] despite the

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[147] Interpreting contracts in the context of a statutory scheme is not unique to the Affidavit of Support. For instance, there is a jurisdictional split on the issue of whether unemployment benefits received by a wrongfully discharged employee may be deducted from the employer's damages. 24 WILLISTON ON CONTRACTS § 66:6 (West 4th ed.), nn. 88 & 89. The author owes this analogy to Prof. Robert Denicola .

[148] Form I-864, *supra* note 3, p. 6; Form I-864(rev'd Nov. 5, 2011), *supra* note 25, p. 5; Form I-864 (rev'd Oct. 6, 1997),), *supra* note 25, p. 5.

[149] Form I-864 (rev'd Nov. 5, 2011), *supra* note 25, p. 5; Form I-864 (rev'd Oct. 6, 1997), *supra* note 25, p. 5.

[150] Form I-864, *supra* note 3, p. 6 (emphasis added).

[151] *Id.* (emphasis added).

[152] *See* RESTATEMENT (2nd) § 216(1) ("[e]vidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated").

[153] In *Shumye v. Felleke*, for example, the court made findings as to whether a litany of assets constituted "income," but it is unclear what standard governed those determinations. 555 F. Supp. 2d 1020, 1025-28 (N.D. Cal. Apr. 3, 2008).

fact it is defined by the C.F.R. by reference to the meaning used for federal income tax.[154] A Pennsylvania court located the C.F.R. definition, but seemed to place greater reliance on the definition of income in the state family code – clearly the Court did not believe the C.F.R. definition was conclusive.[155] Why not?

Finally, it could be that the I-864 itself is nothing more than window dressing for rights and duties that arise directly from statute. It could be that Congress has dictated the rights of a beneficiary against a sponsor, without regard to whether these duties could be created arise under traditional contract law principles, looking only at the Affidavit of Support. In some states, for instance, so-called private attorney general statutes empower individual citizens to enforce public laws in a manor usually reserved to public prosecutors.[156] These individuals are even entitled to receive penalty payments from those they successfully prosecute.[157] Likewise, the INA could conceivably give a noncitizen-beneficiary a cause of action to pursue her I-864 sponsor, completely aside from whether a contractual cause of action exists. Congress might simply have decreed that sponsors have specified liabilities that may be enforced by beneficiaries.

Recall that in *Winters v. Winters* one federal court searched carefully for a private cause of action in the I.N.A. provisions and was able to find none, therefore finding no federal question jurisdiction.[158] By contrast, most courts have appeared to find that suits on the I-864 are based on

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[154] 8 C.F.R. § 213a.1. The definition has made reference to federal income rules since the first interim rules were promulgated. Preliminary Rules, *supra* note 6, 54352.

[155] Love v. Love, 33 A. 3d 1268, 1277 (Pa. Super. Ct. 2011).

[156] *See*, *e.g.*, David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 MICH. ST. L. REV. 423, 428-34 (2010) (discussing evolution of such statutes); Steve Baughman, *Sleazy Notarios: How to Crush them and Get Paid for it*, 7 BENDER'S IMMIGR. BULL. 187 (Feb. 15, 2002) (discussing use of California private attorney general statute to combat unauthorized practice of immigration law).

[157] Baughman, *supra* note 156 at n. 3 (reporting on collecting $35,000 in fees against defendant).

[158] No. 6:12-cv-536-Orl-37DAB, 2012 U.S. Dist. LEXIS 75069, at *5 (M.D. Fla. Apr. 25, 2012) ("while the federal statute requires execution of the affidavit, it is the affidavit and not the statute that creates the support obligation").

"federal statute."[159] This may hint at some disagreement towards the nature of the beneficiary's cause of action. Yet certainly it would seem odd if Congress had simultaneously (1) given beneficiaries statutory rights against a sponsor, yet (2) went through the motions of requiring the Affidavit of Support to be a contract in its own right.[160]

IV. Conclusion

This hybrid area of law virtually demands collaboration across practice areas. Few in the domestic bar will care to tangle with an area of law routinely characterized by appellate judges – or their exasperated law clerks – as byzantine.[161] Likewise, few immigration practitioners will have the skills to venture beyond their home turf of "happy law" to successfully wage warfare in the trenches of family law.[162]

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[159] Al-Mansour v. Ali Shraim, No. CCB-10-1729, 2011 U.S. Dist. LEXIS 9864, at *9 (D. Md. Feb. 2, 2011). *See supra*, note 92 (collecting cases).

[160] *See* INA § 213A(a)(1)(B), 8 U.S.C. § 1183a(a)(1)(B) (mandating that Affidavit of Support be enforceable as a contract).

[161] *See*, *e.g.*, Japarkulova v. Holder, 615 F.3d 696, 706 (6th Cir. 2010) (Martin, J., concurring) ("…our Byzantine immigration laws…"). *See also* Singh v. Ashcroft, 362 F.3d 1164, 1168 (9th Cir. 2004) ("In this case, it is the INS that has been stymied by its own byzantine rules").

[162] According to Pete Roberts of the Washington State Bar Association there are two areas of happy law, adoption and immigration.