'TIL DEATH DO US PART: AFFIDAVITS OF SUPPORT AND OBLIGATIONS TO IMMIGRANT SPOUSES

Veronica Tobar Thronson[1]

This article analyzes the use of a federal affidavit of support, a required document that forms part of all family immigration petitions to overcome public charge grounds of inadmissibility. The federal statute mandating affidavits of support was altered in 1996 in an attempt to make them contractually binding, even after the dissolution of marriage. Further, affidavits of support implicate not only obligations between spouses, but also deeming analysis for public benefit eligibility. Case law interpreting these affidavits of support is scarce and varied, but trends, patterns, and contested issues are emerging. Yet courts have not settled on any theory and practice for incorporating these affidavits into their decisions related to family dissolution. This article provides an introduction to affidavits of support and an initial effort to frame the most critical issues related to them that arise in family litigation. This article also highlights some of the key strategic issues and caveats for litigants and parties.

Key Points for the Family Court Community:

- An introduction to affidavits of support and the immigration law context in which it exists
- A review of trends, patterns, and contested issues emerging in available judicial decisions in state and federal courts
- Key strategic issues and caveats for litigants and parties on the use of affidavits of support

Keywords: *Affidavit of Support*; *Divorce*; *Enforcement of Contract*; *Family Immigration*; *Immigrant Spouse*; *Sponsor and Petitioner*; *and Spousal Support*.

I. INTRODUCTION

Provisions introduced in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 mandate that each person who petitions for a family member to immigrate to the United States sign a legally enforceable affidavit of support.[2] While the affidavit of support is well known among immigration practitioners as a mandatory part of the immigration process, its existence and implications in resolving family law disputes are not always understood by family law attorneys and litigants. Moreover, after the immigration process is complete, immigration attorneys have little incentive to remain engaged with future family law consequences of a document that they have put into play, and thus many immigration attorneys remain woefully unprepared to discuss the lasting implications of the document with their clients.

Emerging case law from a wide variety of state and federal courts, however, highlights the increasing importance of the affidavit of support in resolving support issues in immigrant families, sometimes decades after the act of immigration is complete. Despite a few efforts at raising awareness for the family law bar[3] and the immigration bar,[4] the burgeoning case law regarding affidavits of support has largely escaped systemic review and consideration. Yet with millions of affidavits of support now in effect and litigation on the rise, awareness of the practical and strategic implications is overdue.

This article provides an introduction to the affidavit of support and an initial effort to frame the most critical issues related to it that are emerging in litigation across the country. While an article of this scope cannot provide exhaustive analysis, this work seeks to highlight some of the key strategic issues and caveats for litigants and parties that the developing case law identifies. Part II of this article introduces the affidavit of support and explains the immigration law context in which it exists. Part III then reviews available judicial decisions in state and federal courts to identify critical issues with serious pragmatic and strategic choices that family law attorneys must consider. These include

Correspondence: veronica.thronson@law.msu.edu

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enforceability, jurisdiction, calculating awards, preclusion, and understanding the potentially indefinite period of the obligation. As the decisional law rapidly expands on these issues, courts trend toward agreement on some issues but diverge sharply on others. The need for thoughtful engagement with this growing body of law is evident.

II. THE AFFIDAVIT OF SUPPORT AND ITS ROLE IN IMMIGRATION LAW

Given that most family practitioners have limited experience with immigration law practice, a relatively detailed introduction to the affidavit of support and the context in which it arises is warranted. Indeed, it is likely that not only family practitioners but also many people who sign affidavits of support themselves do not understand the full range of legal responsibilities that arise by signing the affidavit of support. In immigration practice, the affidavit of support is one of dozens of documents that are filed in the paper chase of a family based immigrant visa petition, and sponsors can easily overlook the many fine points to which they are committing.[5]

Immigration law permits U.S. citizens and lawful permanent residents to petition for family members meeting certain criteria to immigrate to the United States. The vast majority of immigrants who are lawfully admitted to the United States are admitted based on relationships with family members.[6] A citizen of the United States is able to petition for his spouse; children, married or unmarried; parents; and brothers and sisters.[7] A lawful permanent resident may petition for his spouse and his unmarried children who are under age twenty-one.[8]

After establishing eligibility for immigration based on a qualifying family relationship,[9] the intending immigrant then must show that she is not inadmissible. Various factors are considered in determining admissibility.[10] For purposes of this article, the critical ground of inadmissibility to note is that which makes a person seeking admission to the United States inadmissible if she is "likely at any time to become a public charge."[11] Forget about welcoming the tired and poor.[12]

To overcome the public charge ground of inadmissibility, provisions introduced in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 mandate that each person who petitions for a family member to immigrate to the United States sign a legally enforceable affidavit of support.[13] In other words, the signing of such affidavits is not an isolated event and every single time a spouse petitions for a spouse to immigrate to the United States an affidavit is involved to ensure that the intending immigrant will not fall into poverty. Millions of these affidavits have been executed since 1996.

Signers of these affidavits of support are referred to as "sponsors," and not anyone can be a sponsor. A sponsor must be a U.S. citizen, a national of the United States or a lawful permanent resident. The sponsor must be at least eighteen years of age, must be domiciled in the United States, and must demonstrate an annual income of at least 125 percent of the federal poverty line.[14] A sponsor must be current in tax reporting in order to be able to document the ability to maintain income through past federal income tax returns.[15] Sponsors who earn less than 125% of the poverty level are allowed to have another person who does meet that requirement submit an independent affidavit of support on behalf of the immigrant.[16] That additional sponsor independently commits to support the intending immigrant, not just as a supplement to the principal sponsor, should the immigrant fall into poverty.[17] Adding a joint sponsor does not relieve the primary sponsor from filing an affidavit that may have future effect if the sponsor's financial situation improves.

This required affidavit is not subject to negotiation and must be executed via a government created document, Form I-864, Affidavit of Support Under Section 213A of the [Immigration and Nationality] Act.[18] The form is daunting and is intended to be so. The document itself is eight pages long, with an additional eleven pages of instructions. It requires information ranging from basic data on the intending immigrant to disclosure of detailed financial documentation by the sponsor. Specifically, the sponsor indicates that he or she has "enough income and/or assets to maintain the intending immigrant(s) and the rest of [the] household at 125 percent of the Federal Poverty Guidelines."[19] To prove this ability, the sponsor must submit supporting documentation on assets, employment, and taxes for the past three years.

In addition to disclosing financial information, the affidavit of support includes contractual language setting forth significant commitments on the part of the sponsor that extend to both the intending immigrant and the government. As to the intending immigrant, the sponsor agrees to "[p]rovide the intending immigrant 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."[20] The affidavit warns that if "you do not provide sufficient support to the person who becomes a permanent resident based on the I-864 that you signed, that person may sue you for this support."[21]

The affidavit of support also warns the signer that it creates "a contract between you and the U.S. Government. The intending immigrant's becoming a permanent resident is the 'consideration' for the contract."[22] Therefore, it continues, "[i]f a Federal, State or local agency, or a private agency provides any covered means-tested public benefit to the person who becomes a permanent resident based on the I-864 that you signed, the agency may ask you to reimburse them for the amount of the benefits they provided."[23] If such reimbursement is not made, "the agency may sue you for the amount that the agency believes you owe."[24]

As discussed more fully below, the affidavit lays out a complex set of events that may end the otherwise unlimited duration of the agreed upon responsibility to provide support.[25] Lastly, the sponsor agrees "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."[26]

With this explanation of the content and scope of the affidavit of support in place, it is now time to review how this document and the various commitments it imposes have been received by the courts.

III. AFFIDAVITS OF SUPPORT IN PRACTICE

An initial question, of course, is whether affidavits of support are enforceable at all. Yet even a finding of enforceability offers very little guidance regarding where people can go to seek enforcement, when they can or must do so, and the types of actions in which the affidavit might have effect. In the affidavit of support itself, the sponsor agrees "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."[27] While addressing personal jurisdiction, it adds nothing of the substance of the many subject matter jurisdiction questions that arise. Are such enforcement actions federal cases, resolving obligations between the sponsor and the United States? Or are these cases federal because the affidavit of support exists pursuant to a federal statute? Perhaps these are simple contracts for resolution in the appropriate state courts? Or do these cases present family issues from which federal courts should abstain? When divorcing spouses are involved, does the presence of support issues that are normally contemplated in family courts mean that affidavit of support issues should be resolved in state court divorce proceedings? Or should state courts stay out of federal immigration matters? Does the failure to raise affidavit of support claims in a divorce proceeding preclude enforcement elsewhere?

Unfortunately, settled answers to most of these questions are still far away. In the emerging case law regarding affidavits of support, many issues are raised and few are settled as jurisdictions struggle with issues of first impression. Outcomes across jurisdictions have differed and assuredly jurisdictions will continue to diverge on many issues. While an article of this scope, at this point in time, cannot resolve the many strategic and jurisdictional issues that arise, a systemic review of the available decisions regarding affidavits of support is useful and important to highlight some of the key strategic decisions and caveats for litigants and parties in these cases.

A. ARE AFFIDAVITS OF SUPPORT LEGALLY ENFORCEABLE?

The idea of sponsor responsibility for intending immigrants is not entirely new, but it changed in character with the introduction of Form I-864. Prior to the changes in immigration and welfare law in

1996, intending immigrants were required to obtain an affidavit of support to show that they would not become public charges, and this generally was accomplished using an earlier created affidavit, Form I-134. However, this form did not purport to create a legal obligation to support the immigrant. While there is little case law on point, courts that addressed the enforceability of the affidavit found that executing Form I-134 did not create a legally binding contract.[28] In fact, the statutory revisions of 1996 and Form I-864 were in part intended in response to this unenforceability, and largely have succeeded in creating a binding contract.

In one of the few areas of agreement, courts in a variety of jurisdictions have confirmed that the affidavit of support is a legally binding and enforceable contract.[29] To date, efforts at enforcement have largely involved private actions by immigrants seeking to enforce the obligations set forth in the affidavit of support. For a brief time, public agencies in Connecticut initiated efforts to recover money spent on public benefits for persons on whose behalf an I-864 had been filed, but dropped these actions in response to public opposition.[30] More recently, in a hybrid of these types of actions, a court-appointed guardian and conservator successfully enforced the affidavit of support on behalf of her ward.[31] However, the development of law surrounding the affidavit of support is almost exclusively via private actions, and these will be the focus of this analysis.

Stump v. Stump,[32] among the first available written opinions addressing the enforceability of the affidavit, is representative of the reasoning commonly applied; the court there found that the affidavit of support constitutes a legally binding and enforceable contract between the sponsor and the sponsored immigrant. Applying contract law principles, the court found that "the Affidavit is binding and enforceable as a contract, when there is a valid offer, acceptance, and consideration."[33] While a government agency action is permitted to seek reimbursement of benefit funds expended by the agency, an action by the immigrant is permitted "with respect to financial support."[34] As such, any prior receipt of public benefits "is irrelevant to the sponsored alien's cause of action for financial support."[35] 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."[36]

Courts have regularly rejected challenges to the general enforceability of the affidavit of support. For example, courts turn away challenges to the contract formation language of the I-864 and find consideration for a valid contract in a defendant's promise to support the plaintiff in "the plaintiff being granted entry into the United States."[37] Given the alternative of couples living in separate countries, courts do not struggle to find ample the "consideration of his wife not being found inadmissible to the United States . . . obtaining legal permanent residence in the United States and in her not being deported. . . ."[38]

Courts likewise have not found affidavits of support unconscionable. For example, a Maryland court agreed with a husband that Form I-864 may be a contract of adhesion with characteristics of being "prepared in printed form," "drafted unilaterally by a dominant party," "presented on a 'take it or leave it' basis," and lacking any "real opportunity to bargain about its terms."[39] Yet the court found that "while the Form I-864 may be a contract of adhesion, under Maryland law, it is not unconscionable."[40] Although "this is a 'take-it-or-leave-it' offer, the sponsor receives a substantial benefit by signing the affidavit."[41]

Claims attacking enforceability of the affidavit of support due to misunderstanding, treachery or deceit generally fare no better. This is especially true where attorneys were involved in the immigration petitioning process. In a typical case, a husband sponsor who alleged that he was "deceived" into signing the affidavit found no traction with the court, which noted "the undisputed evidence shows that after conferring with an immigration attorney, [husband] decided to sign the affidavit of support and there was no evidence suggesting that [wife] did anything to encourage [husband] to sign it.[42] Courts also tend to be skeptical of easily made allegations of the sort that a spouse "never intended to enter into a lasting relationship, but was merely using the sponsor to gain immigration status."[43] While each case is factually unique, sponsors have a difficult task in meeting the "burden of proving that the immigrant committed such fraud."[44] Moreover, in assessing the balance of knowledge and power in such instances, the immigration system is set up so that it is always the sponsor who has grounding and connection in the United States and it is the intending immigrant who is, literally, in foreign territory.

Even though it is likely not obvious to litigants in the throes of contested divorce or support actions, these cases serve as a reminder that lawful permanent residence in the United States even for close family members is precious and difficult to obtain.[45] And in addition to revealing the immense importance of families being able to live together, these cases also reveal the high stakes involved in leaving a country and the fragility of life in a new country for immigrants who leave everything behind. While the commitments made by sponsors are substantial, the benefits to both sponsor and intending immigrant may be priceless.

B. MAKING A FEDERAL CASE OUT OF AFFIDAVITS OF SUPPORT?

Federal and state courts have both found jurisdiction over affidavit of support enforcement actions. State courts have found little difficulty in exercising such jurisdiction, though rationales have differed. For example, some courts rely on 8 U.S.C. § 1183a(e)(1), which provides, "An action to enforce an affidavit of support executed under subsection (a) may be brought against the sponsor in any appropriate court. . . by a sponsored alien, with respect to financial support."[46] More generally, courts simply fold consideration of I-864 issues into divorce and support actions, concluding that they have "jurisdiction to consider a claim for enforcement of an affidavit of support within the context of an underlying divorce action."[47]

Plaintiffs proceeding under contract approaches should be encouraged to think broadly about where contract enforcement actions might proceed. In one instance, a plaintiff successfully "filed suit in small claims court in California . . . seeking financial support from [his wife] pursuant to the Affidavit of Support."[48] A clear lesson here is that family practitioners seeking enforcement should think creatively about the variety of fora and procedural options available in their jurisdiction.

Federal courts are more mixed, but most federal courts have not hesitated to exercise jurisdiction over affidavits of support. Some federal courts exercise jurisdiction without comment in issuing decisions regarding I-864 enforcement.[49] Others tersely rely on the underlying federal statute creating affidavits of support and general federal question jurisdiction, finding "subject matter jurisdiction over this action, predicated upon 8 U.S.C. § 1183a and 28 U.S.C. § 1331."[50] Often, subject matter jurisdiction is not contested, such as a case in federal court in New Hampshire where the "parties do not question that this court has subject matter jurisdiction under 28 U.S.C. § 1331, because plaintiffs' claim arises under federal law—namely 8 U.S.C. § 1183a(e)(1)."[51]

Not all federal courts have been so ready to exercise subject matter jurisdiction to enforce affidavits of support. For example, one court found that the affidavit of support does create a cause of action, "the basis of the claim is the contract contained in the Form, not any provision of the federal statute itself."[52] The court further reasoned that the statute directs plaintiffs to "any appropriate court . . . [and this] is not an explicit grant of jurisdiction in the federal courts."[53] Finding that "a breach contract claim is a creature of state law," the court concluded "that it is without federal question jurisdiction to hear this action."[54]

Other federal courts have been wary of a variety of abstention doctrines, especially when there are parallel pending or decided legal actions between the parties in state courts. For example, one court rejected an appeal for abstention under the *Younger* abstention doctrine, which concerns potential federal court interference with pending state judicial proceedings. The court ultimately decided that because the current federal action sought "to enforce an obligation that exists independently of the [parties'] marriage," proceeding with a contract claim in federal court "will not interfere with the pending divorce proceedings so as to warrant *Younger* abstention."[55]

When other court proceedings are complete, some federal courts have expressed the need for analysis under the *Rooker–Feldman* doctrine which applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."[56] Finding a complaint barred under the *Rooker–Feldman* doctrine, the court noted that what a husband "in fact sought was

federal review of a state court's order enforcing the affidavit of support in his divorce case."[57] Such cases highlight the importance of strategic decisions in family litigation regarding the framing of the case and whether the affidavit of support will be integrated into the family litigation.

Finally, some federal courts faced with requests to enforce affidavits of support consider support issues to be family law matters and fall back on the increasingly questionable notion that "family law matters are strictly the province of state courts."[58] While true that traditionally federal courts refuse to entertain "divorce, alimony, and child custody orders,"[59] the refusal to contemplate affidavits of support evidences a very narrow view of the nature of the action and the powers of the federal court. As many have noted, the federal role in regulating family has never been as minimal as it is often described, and it is growing.[60]

C. CALCULATING AWARDS

As noted above, jurisdictional analysis can be implicated by whether a claim under the affidavit of support is characterized as a contractual claim or a claim for support in a divorce or other family law action. But no matter how the courts view the framing of the case for jurisdictional purposes, there is a clear trend that in calculating damages and awards courts look at affidavits of support as contractual matters.

The express terms of the Form I-864 state that "by signing the Form I-864, the sponsor is obligated to provide the sponsored immigrant with whatever support is necessary to maintain the sponsored immigrant at an annual income that is at least 125% of the federal poverty level annual guideline."[61] By signing a Form I-864 the "sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable."[62] Therefore, the "terms of the Form I-864 provide for the appropriate 'measure of damages that would put plaintiff in as good a position as she would have been had the contract been performed.'"[63] Courts generally, but not universally, agree that this requires a year by year analysis. In other words, to "be placed in as good a position as she would have been had Defendant performed his support obligation on an annual basis, this Court must compare Plaintiff's income against the 125% poverty threshold for each individual year in question."[64]

The poverty level is not high, and persons earning over the poverty level may not be able to recover any amount at all.[65] For example, the Alaska Supreme Court noted that "[e]xisting caselaw supports the conclusion that a sponsor is required to pay only the difference between the sponsored noncitizen's income and the 125% of poverty threshold."[66] This will vary based on "appropriate family unit size."[67] Some courts find "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."[68] Other courts have found that there is no duty to mitigate.[69] Notably, in a recent decision by Judge Posner, the Seventh Circuit Court of Appeals reversed a lower court decision imposing a duty to mitigate, finding no such mandate in the statute and questioning whether imposing such a mandate would be sound policy.[70] In short, "the list of excusing conditions does not mention the alien's failing to seek work or otherwise failing to mitigate his or her damages."[71]

Because the sponsor's responsibility is only to maintain the sponsored immigrant at an annual income that is no less than 125 percent of the Federal poverty line, the amount of money may not seem that large. However, this support may make a significant difference in the life of a sponsored immigrant living in poverty whose only means of support may come from enforcing the affidavit. Moreover, in accumulation the amount may grow substantially.[72]

For immigrants in poverty on whose behalf an affidavit of support has been filed, even small awards may be significant because they may be barred from receiving public benefits. First, even lawful permanent residents are barred from receiving federal, means-tested public benefits for their first five years in the United States.[73] But the affidavit of support also can make immigrants ineligible for assistance indefinitely via deeming provisions. Agencies may "deem" a sponsor's financial resources

to be available to the immigrant for purposes of determining the immigrant's need for public benefits.[74] This deeming barrier to benefits will remain in place for the full life of the support obligation under the affidavit of support.

The contractual focus notwithstanding, it still is common that cases where affidavits of support are raised in state court domestic matters, courts find that the cases "concern the interplay of the affidavit of support and any award of spousal support."[75] For example, one court found that the obligation under the affidavit is "separate and distinct from any obligation to pay spousal support," and that the trial court had erred in "conflating the two obligations and applying them in a manner it found equitable."[76] This court ordered that "the trial court shall first determine plaintiff's obligation under the Affidavit of Support and enforce that obligation."[77] The court stated that "after having determined plaintiff's obligation under the affidavit of support, the trial court shall make a separate determination whether defendant is entitled to spousal support."[78] Other courts have found the appropriate order of consideration to be reversed, awarding damages under the affidavit as contract years after spousal support or alimony obligations were determined or had ended.[79]

The order of consideration can be significant, as the award of contractual support amounts may impact the application of other spousal support factors. At the same time, it is important to note that many of these cases arise following very short marriages in which spousal support factors are unlikely to result in any award due to the short length of marriage.[80]

D. PRECLUSION PRECAUTIONS

When there are multiple actions involving support and the affidavit of support, a practitioner must be aware of preclusion issues. Given that litigation regarding these obligations is relatively new, some courts have adopted a lenient approach to preclusion. For example, one court permitted an action to enforce the affidavit ten years after a divorce was finalized. In that case, the former wife submitted evidence that "she did not know that she had a cause of action under the Affidavit of Support until she heard that a friend had been successfully sued under such an Affidavit."[81] The court found that because there was no evidence that the former wife "knew of or in the exercise of ordinary diligence could have discovered [husband's] breach before the divorce proceedings, her claim had not yet accrued and it was not a cause of action that 'could have been litigated' during the divorce proceedings for res judicata purposes."[82]

Other courts have been less forgiving in addressing res judicata issues, including not only instances where affidavit of support issues were actually litigated but also claim preclusion situations where general support obligations were litigated. As one court noted, it was "unclear whether the Appellant actually submitted the Affidavit of Support in the divorce proceedings, she clearly *could have* done so."[83] Because "the Appellant could have pursued her support claims under the affidavit of support in the divorce proceedings, she is barred from pursuing those claims in Appellee's bankruptcy case under the doctrine of res judicata."[84] Although there are numerous cases, discussed below, where affidavit obligations are enforced years after divorces are finalized, practitioners should not necessarily expect this to continue. As awareness of affidavit of support obligations rises, practitioners must take great care to explore the preclusive implications of strategic choices of raising the issue in divorce proceedings or seeking enforcement separately.

E. SURVIVING DIVORCE AND ENDLESS OBLIGATION

The enforcement period for affidavits of support varies slightly depending on whether the action is a private action or an action by a government agency. In either event, it can have a very long life, even exceeding the lifetime of the parties involved. With regards to an action by a government agency to recoup a sponsored immigrant receipt of means-tested benefits, an action may be brought "no later 10 years after the date on which the sponsored alien last received any means-tested public benefit to which the affidavit of support applies."[85] The critical baseline issue then is how long the affidavit is in effect.

The statute and affidavit of support set out various conditions that end the obligation. While these various triggers could occur quickly, it is possible that none happen until the death of the parties involved.[86] The affidavit of support itself specifically warns "that divorce **does not** terminate your obligations under this Form I-864."[87]

The first trigger ending the support obligation is the naturalization of the sponsored immigrant.[88] Provided they meet other requirements, persons who have been lawful permanent residents of the United States for at least five years can apply to become naturalized U.S. citizens.[89] A lawful permanent resident who is married to a U.S. citizen may apply to become a U.S. citizen after three years in such a marriage.[90] Yet there is no obligation to naturalize, and many lawful permanent residents choose not to seek U.S. citizenship.

Next, the responsibility of the sponsor to support the immigrant ends if the sponsored immigrant has worked or can be credited with forty qualifying quarters of coverage under Title II of the Social Security Act.[91] Because the sponsored immigrant can be credited with all of the "qualifying quarters worked by a spouse . . . during their marriage and the alien remains married to such spouse,"[92] in the event of a divorce, the sponsor would not be required to provide ongoing support if the marriage lasted ten years or more, even if the sponsored immigrant never works. This period, of course, would be shorter if the sponsored immigrant worked during the marriage and achieved her own quarters.

Although not statutorily based, the affidavit of support provides three additional conditions ending the support obligation when the sponsored immigrant "no longer has lawful permanent resident status, and has departed the United States; becomes subject to removal, but applies for and obtains in removal proceedings a new grant of adjustment of status, based on a new affidavit of support, if one is required; or dies."[93]

As is apparent from the discussion above, courts have not hesitated to recognize that support obligations survive divorce. For example, in *Hrachova v. Cook*, a Florida court ruled the defendant husband was liable to his former wife after they had been divorced for ten years.[94] Plainly, courts recognize that claims for support that initially are made after the termination of the marriage are as valid as those advanced during the marriage or in the context of divorce proceedings.

In adjudicating these cases, courts frequently struggle with the forty quarters concept and its implications. For example, in *Davis v. Davis*, the court awarded spousal support for ten years, presumably because the immigrant spouse *could* achieve forty quarters in ten years.[95] There is, however, no guarantee that someone will achieve forty quarters in her lifetime and the contractual obligation is not predicated on the work history that someone could achieve. The support obligation exists even if people are willfully underemployed or unemployed unless the court imposes a requirement to work through a duty to mitigate not expressly found in the affidavit.[96]

Litigants also should be aware of the provisions regarding shared counting of quarters. If the marriage is intact, even if not healthy, the sponsored immigrant may share the quarters earned by her spouse during the marriage, thus making the obligation period shorter or nonexistent. In one instance, the husband asked for an annulment and the wife sought a legal separation. The court granted the legal separation and the husband later successfully argued that he shared quarters with his wife even though they were separated, thus shortening the period of his obligation.[97] Had a divorce been granted, the former wife would not have been credited with her former husband's ongoing work quarters. Thus the length of a divorce proceeding and differences between separations and final divorces are among the strategic choices that practitioners must take into account.

IV. CONCLUSION

Even this brief initial review of the emerging case law related to affidavits of support makes clear that practitioners working with immigrant families must develop an understanding of the implications that the affidavit creates. The mere existence of an affidavit of support often will impact fundamental choices for family practitioners about framing cases, choices of forum, and discovery. For both family and immigration law practitioners, ethical considerations are prominent as they must reconsider the

advice given to immigrant families at the time of immigration as much as at subsequent enforcement stages. Affidavit of support enforcement considerations must become a routine part of family practice, from initial information gathering steps to ultimate strategic decisions about where and how to file cases.

And beyond the practicing bar, there is need for a deeper and more nuanced exploration of the theoretical and practical implications that arise from this intersection of immigration law and family law. Only with more engagement with this set of issues will a coherent and rational approach develop.

NOTES

1. I would like to thank David B. Thronson for his insights and commentary on early drafts of this article.

2. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1182(a)(4)(C)(ii); U.S. Citizenship and Immigration Services, I-864, Affidavit of Support Under Section 213A of the Act (Sept. 19, 2011), pt. 8, *available at* http://www.uscis.gov/files/form/i-864.pdf [hereinafter Form I-864].

3. *See, e.g.*, 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. B.J. 53 (Oct. 2009) ("This simple and seemingly innocuous form implicates a wide array of issues including, inter alia, federal court procedure, state court preemption, family law, immigration, public benefits, and Social Security law").

4. *See*, *e.g.*, Charles Wheeler, *Alien v. Sponsor: Legal Enforceability of the Affidavit of Support*, 10–23 BENDER's IMMIGR. BULL. 3 (2005).

5. While this article focuses on sponsors who file Affidavits of Support for their immigrant spouses, filings for any family-based sponsored immigrant raise comparable issues.

6. The U.S. Department of Homeland Security Office of Immigration Statistics reports that family-sponsored immigrants (immediate relatives of U.S. citizens and family preference classes of admission) represented sixty-six percent of the total legal permanent residents in 2010. Spouses of U.S. citizens represented fifty-seven percent of immediate relatives. RANDALL MONGER & JAMES YANKAY, U.S. LEGAL PERMANENT RESIDENTS: 2010 (U.S. Dep't of Homeland Security Off. Immigr. Statistics ed., Mar. 2011).

7. *See* 8 U.S.C. § 1151(b)(2)(A)(i) (2012).

8. *See id.* § 1153(a).

9. Although beyond the scope of this article, it is important to note that eligibility to immigrate stems not simply from the fact of the qualifying relationship, but also from the decision of the person in that relationship with lawful immigration status to *choose* to petition for the intending immigrant. In situations involving domestic violence, this aspect of immigration law can provide immense power and control to abusers. *See generally* Veronica T. Thronson, *Domestic Violence and Immigrants in Family Court*, 63 JUV. & FAM. CT. J. 63 (2012).

10. *See generally* 8 U.S.C. §1182 (2012) (establishing numerous grounds of inadmissibility based on issues ranging from criminal history to ideology to health).

11. *See id.* § 1182(a)(4)(A).

12. *Contra* EMMA LAZARUS, THE NEW COLOSSUS (1883).

13. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724, 8 U.S.C. §1182(a)(4)(C)(ii) (2012).

14. *See* Immigration and Nationality Act, 8 U.S.C. § 1183a(f) (2012). Note here that the domicile requirement can pose significant difficulties in situations where sponsors are living abroad.

15. *Id.* § 1183a(f)(6)(A)(i).

16. For 2012, 125% of the poverty guidelines for a family of two is $18,912.

17. Joint sponsors raise interesting issues beyond the scope of this article as the extensive and long lasting obligations created by an affidavit of support can extend to persons far outside intimate family circles involving traditional notions of obligations to support.

18. Form I-864, *supra* note 2, pt. 8.

19. *Id.* This commitment is responsive to the statutory requirement that the "sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable." 8 U.S.C. § 1183a(a)(1)(A) (2012).

20. Form I-864, *supra* note 2, pt. 8. Note that the required support level drops from 125% to 100% of poverty level for sponsors who are active duty military personnel.

21. *Id.*

22. *Id.*

23. *Id.* Federal means-tested public benefit and a state means-tested public benefits and is defined as any public benefit funded in whole or in part by funds provided by the Federal Government. The Department of State lists the following as means-tested public benefits: Food Stamps, Supplemental Security Income, Medicaid, Temporary Assistance for Needy

Families, and State Child Health Insurance Program. AFFIDAVIT OF SUPPORT FORMS (I-864 SERIES FORMS)—FREQUENTLY ASKED QUESTIONS, http://www.travel.state.gov/visa/immigrants/info/info_3183.html (last visited July 24, 2012).

24. Form I-864, *supra* note 2, pt. 8. *See also* 8 U.S.C. § 1183a(a)(1)(B) (2012) (requiring that the Affidavit of Support be "legally enforceable against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State) or by any other entity that provides any means-tested public benefit").

25. Form I-864, *supra* note 2, pt. 8.

26. *Id.*

27. *Id.*

28. For example, in *Tornheim v. Kohn*, an immigrant sued regarding the enforceability of a Form I-134 that his father-in-law, a U.S. citizen, had signed. No. 00 CV 5084(SJ), 2002 WL 482534, * 3–6 (E.D.N.Y. Mar. 26, 2002). The court reviewed existing case law on the issue and found that the I-134 affidavit was not enforceable. *Id.* (citing Dep't of Mental Hygiene of Cal. v. Renel, 10 Misc.2d 402 (N.Y. App. Term 1958)). For a history of the affidavit of support, see generally Hoffman, *supra* note 3. Note that this nonenforceable Form I-134 is still used in other contexts, such as petitions by U.S. citizens who file for their fiancés.

29. *See, e.g., In re* Schwartz, 409 B.R. 240, 246 (B.A.P. 1st Cir. 2008) (citing Shumye v. Felleke, 555 F. Supp. 2d 1020 (N.D.Cal.2008)); Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 WL 1208010 (M.D. Fla. May 4, 2006); Stump v. Stump, No. 1:04-CV-253-TS, 2005 WL 1290658 (N.D. Ind. May 27, 2005); Ainsworth v. Ainsworth, No. Civ.A. 02–1137–A, 2004 WL 5219037 (M.D. La. May 27, 2004).

30. *See* Ann Marie Coma, *State Suing Immigrants' Sponsors*, HARTFORD COURANT, Mar. 1, 2007.

31. Sloan v. Uwimana, No. 1:11–cv–502 (GBL/IDD), 2012 WL 1155206 (E.D. Va. Apr. 4, 2012) (holding sons liable to provide support to their mother on whose behalf they had filed Form I-864s and including award of attorney's fees).

32. 2005 WL 1290658. In this case, Mr. Stump filed Form I-864 on behalf of his wife. In a pattern typical of these cases, she filed for divorce less than one year into the marriage alleging physical abuse by husband. While the divorce was pending, she filed to enforce the affidavit in federal court.

33. *Id.* at 6.

34. *Id.* at 4 (citing 8 U.S.C. § 1183a(e)(1)).

35. *Id.* This is important because newer immigrants are ineligible for most public benefits, despite their lawful permanent resident status. *See* http://www.nilc.org/overview-immeligfedprograms.html (last visited Sept. 16, 2012).

36. *Stump*, 2005 WL 1290658 at 7.

37. Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 WL 1208010, 4 (M.D. Fla. May 4, 2006). *See also* Harsing v. Naseem, 2012 WL 140418, 2 (D. P. R., Jan. 18, 2012).

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

39. Al-Mansour v. Shraim, Civil No. CCB–10–1729, 2011 WL 345876, 2 (D.Md. Feb. 2, 2011).

40. *Id.* at 3. The court further stated that the form "unambiguously" stated that by signing the affidavit, the sponsor agreed to maintain the sponsored immigrant. *See also Baines*, 2009 WL 3806131 at 5–7 (arguing lack of consideration and unconscionability, but the court found that husband had been actively involved in his wife's immigration concerns and that he himself had met with the immigration attorney to sign the affidavit; the court further stated that he was not coerced and was not an involuntary or reluctant actor in the immigration application process).

41. *Al-Mansour*, 2011 WL 345876 at 3.

42. Hrachova v. Cook, No. 5:09–cv–95–Oc–GRJ, 2009 WL 3674851, 3 (M.D. Fla. Nov. 3, 2009).

43. Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 WL 1208010, 4 (M.D. Fla. May 4, 2006).

44. *See id.* (citing Wheeler, *supra* note 4, at 3).

45. This point is never lost on the millions of people unable to obtain lawful permanent resident status in the United States despite close family ties with U.S. citizens and permanent residents. *See generally* David B. Thronson, *You Can't Get Here From Here: Toward A More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58 (2006).

46. *See, e.g.*, Davis v. Davis, No. WD-04-020, 2004 WL 2924344 (Ohio Ct. App. Dec. 17, 2004) (reversing the trial court's order that, "any specific suit or enforcement of the § 213(A) of the Illegal Immigration Reform and Immigrant Responsibility Act, a federal provision, be pursued in an appropriate federal court").

47. Baines v. Baines, No. E2009-00180-COA-R3-CV, 2009 WL 3806131, 3 (Tenn. Ct. App. Nov. 13, 2009) (citing Naik v. Naik, 399 N.J. Super. 390, 397–98, 944 A.2d 713, 717 (N.J. Super. A.D. 2008); Davis v. Davis, No. WD-04-020, 2004 WL 2924344 at 4 (Ohio App. 6 Dist. Dec. 17, 2004); *In re* Marriage of Sandhu, 41 Kan. App. 2d 975, 978, 207 P.3d 1067, 1071 (Kan.App.2009) (citing Moody v. Sorokina, 40 A.D.3d 14, 18–19, 830 N.Y.S.2d 399 (2007)). *See also* Barnett v. Barnett, 238 P.3d 594 (Alaska 2010).

48. Mathieson v. Mathieson, Civil Action No. 10–1158 2011 WL 1565529 (Apr. 25, 2011 W.D. Penn.).

49. *See, e.g.,* Stump v. Stump, No. 1:04-CV-253-TS , 2005 WL 1290658 (N.D. Ind. May 27, 2005).

50. Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR , 2006 WL 1208010 (M.D. Fla. May 4, 2006).

51. Montgomery v. Montgomery, 764 F. Supp. 328, 330 (D.N.H. 2011).

52. Winters v. Winters, __ F. Supp. __ (M.D. Fla. May 30, 2012).

53. *Id.*

54. *Id.*

55. *Montgomery*, 764 F. Supp. at 330.

56. Davis v. Davis, 499 F.3d 590, 595 (6th Cir. 2007) (quoting Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005)).

57. *Id. See also In re* Schwartz, 409 B.R. 240, 246, 247 (B.A.P. 1st Cir. 2008) ("The *Rooker Feldman* doctrine prohibits lower federal courts, including bankruptcy courts, from reviewing final state court judgments").

58. Winters v. Winters, __ F. Supp. __,(M.D. Fla. May 30, 2012).

59. *Id.*

60. *See generally* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007); David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family in the Context of Child Custody*, 59 HASTINGS L.J. 453 (2008).

61. Shumye v. Felleke, 555 F. Supp. 2d 1020, 1024 (N.D.Cal. 2008).

62. *Id.* (quoting 8 U.S.C. § 1183a(1)(A)).

63. *Id.* at 1024 (citing Stump v. Stump, No. 1:04-CV-253-TS , 2005 WL 1290658 (N.D. Ind. May 27, 2005)).

64. *Id. But see* aggregate method adopted in Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 WL 1208010 (M.D. Fla. May 4, 2006).

65. The 2012 HHS Poverty Guidelines for a family of one is $11,170 making 125% of poverty level $13,962.

66. Barnett v. Barnett, 238 P.3d 594, 598 (Alaska 2010) (citing Younis v. Farooqi, 597 F. Supp. 2d 552, 556 (D.Md. 2009); *Shumye*, 555 F. Supp. 2d 1020; Naik v. Naik, 399 N.J. Super. 390, 944 A.2d 713, 717 (N.J. Super. A.D. 2008).

67. *Naik*, 399 N.J. Super. at 397–98, 944 A.2d at 717.

68. *Id.* at 397–98, 944 A.2d at 717. *See also Younis*, 597 F. Supp. 2d at 556 ("Assuming the plaintiff has an obligation to mitigate her damages by seeking employment, she need not apply for every available job in order to mitigate her losses; she needs only make reasonable efforts").

69. *See* Carlborg v. Tompkins, No. 10–cv–187–bbc, 2010 WL 4553558 (W.D. Wisconsin Nov. 3, 2010) ("Defendant points to no controlling authority supporting his assertion that plaintiff is obligated to seek work to reduce defendant's obligation under § 1183(a) [sic].").

70. *See generally* Liu v. Mund, 2012 WL 2861886 (7th Cir. July 12, 2012).

71. *Id.* at *2.

72. Hrachova v. Cook, No. 5:09–cv–95–Oc–GRJ, 2009 WL 3674851, *5 (M.D. Fla. Nov. 3, 2009) (finding husband was ordered to pay $103,197 to his ex-wife and her daughter, despite the fact that he testified that he did not have sufficient financial resources to pay). The court also found that his inability to pay the judgment was irrelevant to the issue of liability.

73. *See* TANYA BRODER & JONATHAN BLAZER, NATIONAL IMMIGRATION LAW CENTER, OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS, *available at* http://www.nilc.org/document.html?id=107 (last visited Sept. 16, 2012).

74. *See id. See also* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No.104-193, 110 Stat. 2105 (codified at 8 U.S.C. §§ 1601–45).

75. Greenleaf v. Greenleaf, Docket No. 299131, 2011 WL 4503303, at 2 (Mich. Ct. App. Sept. 29, 2011).

76. *Id.* at 3.

77. *Id.*

78. *Id.*

79. Hrachova v. Cook, No. 5:09–cv–95–Oc–GRJ, 2009 WL 3674851, at *2 (M.D. Fla. Nov. 3, 2009).

80. For example, many states have enumerated factors that are considered when awarding spousal support. In Michigan, a typical example, the factors include (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. Olson v. Olson, 256 Mich. App 619, 631, 671 NW2d 64 (Mich. Ct App. 2003).

81. Chang v. Crabill, No. 1:10 CV 78, 2011 WL 2471745, at *5 n.5 (N.D. Ind. June 21, 2011).

82. *Id.* at 4. It is also important to note that this case included a claim for a child, who the court noted "was not even a party to the divorce proceeding." *Id.*

83. *In re* Schwartz, 409 B.R. 240, 249 (B.A.P. 1st Cir. 2008).

84. *Id. See also* Mergia v. Adams, No. 2:08–cv–1159 JAM JFM PS, 2009 WL 1604706, at 7 (E.D. Cal June 5, 2009) (finding failure to list Affidavit as asset in bankruptcy proceeding bars claim under doctrine of judicial estoppels).

85. *See* Immigration and Nationality Act § 213A(b)(1)(B)(2)(C) (2012).

86. *See* Abrams, *supra* note 60 ("The affidavit of support creates a tangible and potentially permanent economic tie").

87. Form I-864, *supra* note 2, pt. 8.

88. 8 U.S.C.A. § 1183a(a)(2) (2012).

89. *See id.* § 1427(a)(1).

90. *See id.* § 1430(a).

91. *See id.* § 1183a(3)(A)(i).

92. *See id.* § 1183a(3)(B)(ii).

93. Form I-864, *supra* note 2, pt. 8.

94. Hrachova v. Cook, No. 5:09–cv–95–Oc–GRJ, 2009 WL 3674851, at *3 (M.D. Fla. Nov. 3, 2009). *See also* Chang v. Crabill, No. 1:10 CV 78, 2011 WL 2471745, at *5 n.5 (N.D. Ind. June 21, 2011).

95. 970 N.E.2d 1151 (Ohio Ct. App. 2012). *See also* Davis v. Davis, 2004 WL 2924344 (Dec. 17, 2004); Davis v. United States, 499 F.3d 590, 593 (6th Cir. 2007).

96. *See* Liu v. Mund, 686 F.3d 418 (7th Cir. 2012), *as amended* (July 27, 2012).

97. *Davis*, 970 N.E.2d 1151.

Veronica Tobar Thronson is an assistant clinical professor of law and director of the Immigration Law Clinic at Michigan State University College of Law. Previously, she was the directing attorney of the Domestic Violence Project at the Legal Aid Center of Southern Nevada where she practiced in the areas of family and immigration law from 2002 to 2010. She also served as the director of Training and Legal Services at the New York Immigration Coalition, a nonprofit umbrella advocacy organization for over 200 groups in New York that work with immigrants, refugees, and asylees.