

**Community of Practice for Family Law
Attorneys Representing Immigrant Survivors**

**Leveraging Immigration Affidavits of Support
in Divorce Action**

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NIWAP Community of Practice Team



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The following slides are intended to be a guide to lead our discussion on this topic and to provide substantive material for your future reference.



Overview

- I. Domestic Violence and Economic Security
- II. Special Considerations for Immigrant Victims
- III. Affidavit of Support
- IV. Enforceability: Outcomes in Practice

What are the economic barriers to immigrant domestic violence victims leaving abusive relationships?





Financial Barriers to Leaving an Abusive Relationship

All Survivors

- Loss of income, shared car, and shared property
- Loss of health insurance through abuser's work
- Costs of new household, safety, & supporting children
- Time off for court & medical attention
- Economic abuse:
 - Coerced debt
 - No credit history
 - Workplace sabotage

Immigrant Survivors

- Lack of lawful work authorization
 - Work in informal economy
- Limited public benefits access
- Immigration-related abuse
- Language/cultural barriers
- Barriers to justice and lack of knowledge of legal rights
- Primary reason immigrant victims stay = lack of financial resources

Options Post-Separation Economic Relief: For Many Immigrant Survivors Spousal Support May Not Be A Likely Possibility

Michigan Example: When awarding spousal support, the court must consider the Sparks factors (*Sparks v Sparks*, 440 Mich 141 (1992)), which closes the door to spousal support for many immigrant survivors.

- Length of marriage;
- Contribution of parties to marital estate;
- Age of the parties;
- Life status of the parties;
- Necessities and circumstances;
- Earning abilities;
- Past relations and conduct (i.e., fault);
- General principles of equity

Impact on Family Support

Of particular importance is the fact that enforcement of the affidavit could have a significant impact in obtaining financial relief for a client who may be living in a precarious situation due to lack of access to economic resources.

Family Based Immigration Petition


- The vast majority of immigrants who are lawfully admitted to the United States are admitted based on relationships with family members.
 - A citizen of the United States is able to petition for
 - Spouse; children under 21, adult sons or daughters; parents; & brothers and sisters.
 - A lawful permanent resident may petition for:
 - Spouse, children under 21 and unmarried sons and daughters.
 - Processing delays but no current backlogs for immediate relatives of US citizens.

Affidavits of Support

- When a citizen or lawful permanent resident sponsors their immigrant family member for lawful permanent residence
 - The sponsor must prove that their immigrant family member will not become a public charge.
 - A public charge is a noncitizen who is “primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.”
- The sponsor meets this burden of proof by filing Form I-864 Affidavit of Support.

Legally Binding Contract

- Legally binding contract between the USC or LPR sponsor and the U.S. government
 - To ensure the sponsored immigrant does not fall below 125% of poverty
 - Enforceable by the sponsored immigrant spouse, any sponsored stepchild, state benefits granting agencies
- Separate and distinct from state family law child or spousal support obligations



Immigrant Survivors Exempt From Both the Affidavit of Support Requirement and Public Charge

- Who does not need an affidavit of support
 - Refugees and asylees
 - VAWA self-petitioners
 - VAWA cancellation of removal applicants
 - Battered spouse waiver applicants
 - U and T visa applicants
 - Special Immigrant Juvenile applicants
 - Someone who has 40 qualifying quarters of work

Victims With Affidavits of Support

- Victims with citizen spouses could have affidavits of support if their spouse ever filed an immigration case on the victim's behalf including:
 - Lawful permanent residents
 - Conditional permanent residents
 - Battered spouse waiver applicants
 - Will have affidavits of support

What Does the Sponsor Commit To In the Affidavit of Support?

- The Form I-864 provides:
 - “If you do not provide sufficient support to the person who becomes a lawful permanent resident based on a Form I-864 that you signed, that person may sue you for this support.”
 - “Divorce does not terminate your obligation under Form I-864”
- By signing, the sponsor affirms:
 - “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.”

State Family Courts Have

- Enforced Affidavits of Support as contracts
- Used Affidavits of Support to set
 - Spousal support obligations and levels
 - Child support levels



In What Types of Family Court Proceedings Have Courts Enforced Affidavits of Support

- Divorce
- Custody
- Child support
- Spousal support
- Legal Separation
 - Less likely because they share quarters
 - Would need to be a shorter marriage

In What Other Proceedings Have Affidavits of Support Been Enforced?

- Federal court
 - Civil contract
- State court
 - Civil contract
 - Small claims
 - State benefits granting agency sues sponsor in civil court for repayment of money owed under the affidavit of support

Enforceability of the Affidavit Support

- Courts have found the I-864 Affidavit of Support enforceable and have ordered support payments to a former spouse
- Fraud in inducement cannot be a defense
 - *Dorsaneo v. Dorsaneo*, 261 F.Supp.3d 1052, 1054 (N.D. Cal. 2017)
- Contract defenses do not apply
 - *Cyrousi v. Kashyap*, 386 F.Supp.3d 1278, 1284 (C.D. Cal. 2019); *Belevich v. Thomas*, No. 2:27-cv-1193, at *21 (N.D. Ala. June 20, 2019) (Memo. Op.); *Li Liu v. Kell*, 299 F. Supp. 3d 1128, 1133 (W.D. Wash. 2017); *Erler v. Erler*, 824 F.3d, 1177 (9th Cir. 2016).

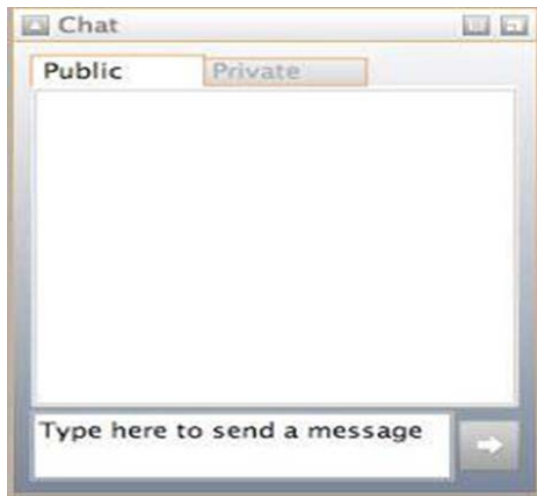
No Duty to Mitigate

- In *Liu v. Mund*, the court found that the Affidavit of Support exceptions do not include “the alien’s failing to seek work or otherwise failing to mitigate his or her damages.” 686 F.3d 418, 420 (7th Cir. 2012), as amended (July 27, 2012).
- *In re Marriage of Kumar*, 220 Cal. Rptr. 3d at 871-72 (Ct. App. 2017) (enforceable and no duty to mitigate)

Practice Tips

- The Affidavit of Support form requires the sponsor to provide sworn statement of income, employer, assets, etc.
- Use this to establish sponsor's income for purposes of:
 - Child support
 - Spousal support
- It is not uncommon for sponsors to overstate income for purpose of sponsoring an immigrant, but then try to understate income when calculating child and spousal support.

What types of evidence do you think a sponsor would have to submit with the affidavit of support?



Proof of: Income, Assets, Tax Filings

- 3 years tax returns
 - With supporting documents (e.g. W-2s, 1099s, Form 2555)
- Bank statements with
 - Current balance
 - Average balance over past 12 months
- Past 6 months pay stubs
- Employer letter
 - Nature of job/yearly salary
 - Dates of employment
 - Future employment/advancement prospects
- Proof of other income
 - Tax exempt interest, IRA distributions, pensions, annuities, qualified dividends, SSA-1099 and/or SSDI-1099
- Evidence of ownership, value, dates acquired
 - Stocks, bonds, certificates of deposit, personal property, real estate
 - Appraisal, tax assessment, mortgage, lien, release of debt

Self-Employed Sponsors

For self-employed sponsors to prove their income, they will have submitted documentation of income that often includes:

- 3 years of 1040 tax returns:
 - Schedule C – forms documenting self-employment;
 - Schedule A – itemized deductions;
- Copies of major invoices sent to clients;
- Cancelled checks for large amounts;
- The profit and loss statements for their business
- Proof of the value of assets the sponsor owns



How would you obtain the affidavit of support and the supporting evidence submitted to USCIS?



Affidavit of Support – When Does it End?

- Start: Obligations under the Form I-864 Affidavit of Support begins once the sponsored immigrant becomes a lawful permanent resident.
- Only Ends When: Sponsor's obligation remains in effect, no statute of limitations, and can only be terminated when:
 - Citizen or permanent resident sponsor dies
 - Sponsored immigrant dies;
 - Sponsored immigrant
 - Becomes a U.S. citizen
 - Permanently leaves the U.S.
 - Can be credited with 40 quarters – eligible for SSA retirement under the Social Security Act




How Sponsored Immigrants Are Credited With 40 Quarters

- Immigrant has 40 quarters (10 years) of work
- Citizen or permanent resident sponsor earned qualifying quarters during the marriage that can be credited to immigrant spouse
 - Even if legally separated
- Immigrant children/stepchildren can count qualifying quarters earned by a parent when child was under age 18
- Any combination of the above

Until Death Do Us Part...

- Sponsor's contractual commitment does not end if the sponsor and the sponsored immigrant were married and divorce, become estranged, or if the sponsor loses contact with the sponsored immigrant.
- This obligation of support remains unchanged, even when a premarital agreement or a divorce agreement attempt to eliminate the responsibility.
- *Erler v. Erler*, 824 F.3d, 1177 (9th Cir. 2016) (“[U]nder federal law, neither a divorce judgment nor a premarital agreement may terminate an obligation of support.”).

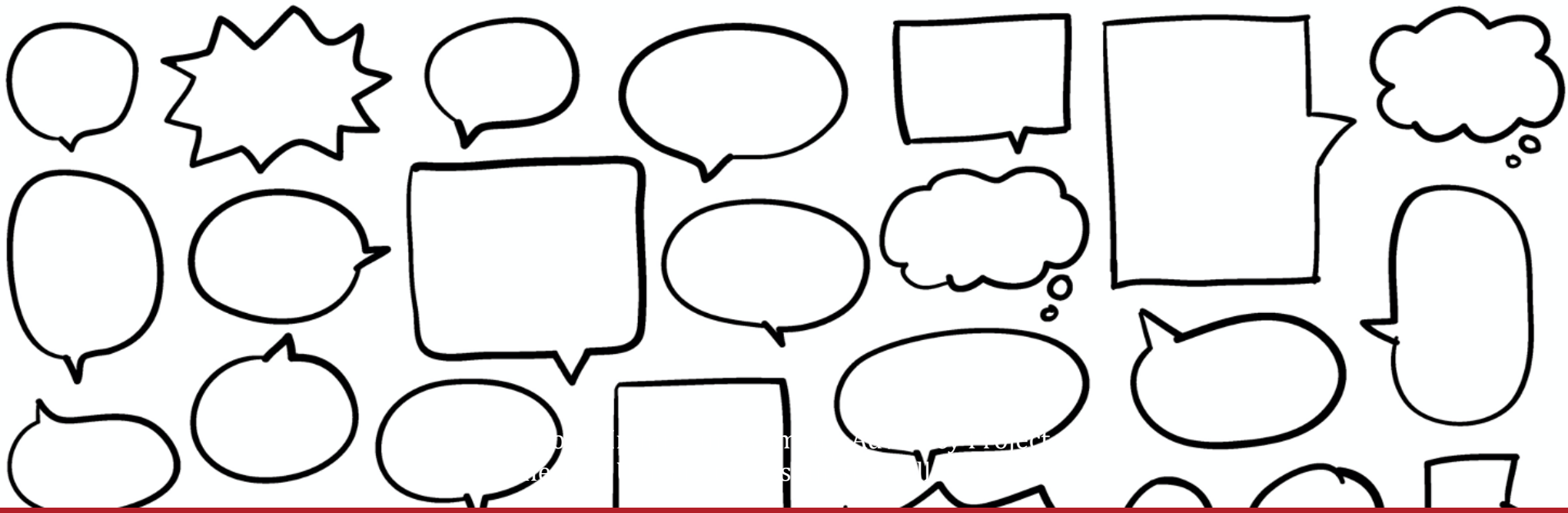


What are the options when a citizen victim sponsors their abuser?



Large Group Discussion

What is the difference and relationship between alimony and Affidavit of Support?



Affidavit of Support and Spousal Support

- The obligation under the Affidavit is separate and distinct from any obligation to pay spousal support
- *Motlagh v. Motlagh*, 100 N.E.3d 937, 942–43 (Ohio Ct. App. 2017)
- *Greenleaf v. Greenleaf*, Docket No. 299131, 2011 WL 4503303, at 3 (Mich. Ct. App. Sept. 29, 2011)
 - The trial court had erred in “conflating the two obligations and applying them in a manner it found equitable.”

Calculating What is Due Under the Affidavit of Support



How To Calculate the Number of Years Below 125% of Poverty?

- Sponsored immigrant spouses and children can enforce the affidavit of support for each year during which the sponsored immigrant's annual household income fell below 125% of the federal poverty line.
 - Most courts calculate this annually
 - Colorado and Indiana use an aggregation approach

Factors That Go Into the Calculation

- Date the sponsored immigrant (spouse/child) became a lawful permanent resident
 - The Federal Poverty Line (FGPL) Guideline for each year since that date
- Sponsored immigrant's household size for each year
- A list of the years since that date where the sponsored immigrant's household income fell below 125% FPL

Federal Poverty Guidelines Effective March 1, 2024

Sponsor's Household Size	100% of HHS Poverty Guidelines*	125% of HHS Poverty Guidelines*
	<i>For sponsors on active duty in the U.S. armed forces who are petitioning for their spouse or child</i>	<i>For all other sponsors</i>
1	\$15,060	\$18,825
2	\$20,440	\$25,550
3	\$25,820	\$32,275
4	\$31,200	\$39,000
5	\$36,580	\$45,725
6	\$41,960	\$52,450
7	\$47,340	\$59,175
	Add \$5,380 for each additional person	Add \$6,725 for each additional person

Can Be Awarded Past and Future Support Under the Affidavit

- Measured from date of lawful permanent residence
- Includes any year to the present when income was under 125% FPL
- And court order future support at 125% FPL in any year when immigrant spouse's income is under 125% FPL

Will Need Federal Poverty Level (FPL) Guidelines Historically for Each Year Since LPR - Example

- Poverty Guideline for 2 people for 2021
 - $17,420 \times 125\% = 21,775$
- Poverty Guideline for 2 people for 2020
 - $17,240 \times 125\% = 21,550$
- Poverty Guideline for 2 people for 2019
 - $16,910 \times 125\% = 21,138$
- Total due under affidavit of support = 64,463

Effect of a Pre 1997 I-134 Affidavit of Support

- Does not create a legal obligation
- Not legally binding contract
- Helpful evidence for spousal and child support - the affidavit of support may
 - Be considered with other evidence in deciding alimony after a long marriage
 - Impact the amount of alimony
 - Used to impute income regarding ability to pay spousal or child support
 - Provide helpful evidence of income and assets

Practice Pointers

- Enforcing affidavits of support must become a routine part of family law practice
 - Inform clients about Affidavits of Support
 - Learn whether your client has one
 - Use discovery, FOIA, protection orders to obtain
 - Copy of the Affidavit of Support
 - Supporting evidence submitted to USCIS as part of the family petition

Preclusion Issues

- Make strategic decisions about where to file enforcement actions
- Immigrant litigants should be aware that if an Affidavit of Support exists
 - They might need to seek enforcement during their divorce litigation to avoid claim preclusion issues.

In Practice: Case of JK (Washtenaw 2020)

- The parties had been married almost 4 years but lived together for less than a year. Client was young and educated but had language barriers and DV trauma. She moved in with her sister, received no support from husband.
- In response to pretrial motion to resolve enforceability of contract, opposing counsel stipulated that the I-864 was legally binding and enforceable in the context of the divorce action. At trial, the court heard arguments about the amount due under contract.

Court Enforced Affidavit

- **Without the I-864, this would not have been a spousal support case**
 - Client awarded liquidated damages for “support pursuant to the USCIS Form I-864 Affidavit of Support” retroactive to the date of separation: \$26,300.
 - Client awarded future monthly support (enforced via USSO) that “shall continue according to the terms of the Form I-864 Affidavit of Support” in “an amount equal to one-twelfth of 125% of that year's Federal Poverty Limit for a household of one.”
 - Defendant's monthly amount shall increase annually according to the Federal Poverty Limit.

In Practice: Case of AB (Washtenaw 2023)

- Parties married in 2018, but client didn't emigrate from Algeria until 2021.
- Parties lived together less than a year before client (pregnant) fled the DV to live with a relative in NY, where child was born.
- Evidentiary hearing held on Motion for Partial Summary Disposition, seeking enforcement of I-864.

Court Ruling – Part I

- Although the Court finds that the Affidavit of Support is an enforceable contract between the parties, the Court is not persuaded to join that cause of action with this divorce proceeding. As stated by the Greenleaf Court, ‘Plaintiffs obligation under the Affidavit of Support to provide defendant with any support necessary to maintain her at an income that is at least 125 percent of the Federal Poverty Guidelines for her household size is separate and distinct from any obligation to pay spousal support.’ Id At 9.

Court Ruling – Part II

- Accordingly, this Court will consider the Affidavit of Support as a factor in determining spousal support since it may be instructive as to several of the factors that are considered in determining whether spousal support is appropriate, but the Court will not join that cause of action with the parties' pending divorce matter.”
- Parties ultimately settled for de minimus short-term spousal support, which does not preclude enforcement of I-864.
- Client, who lives in New Jersey now and doesn't speak English, has to bring a new action to enforce the contract.

Questions and Answers

Resources

- Veronica's Articles
 - Affidavits are forever (2022)
 - 'Til Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses (October, 2012)
- Affidavits of Support and Enforceability Bench Card (September 30, 2021)
- Bench Card for State Court Judges on Common Issues that Arise From Parties' Immigration Status: Economic Remedies (March 10, 2022)
- Amicus Brief – No duty to mitigate

Technical Assistance and Materials

- NIWAP Technical Assistance:
 - Call (202) 274-4457
 - E-mail info@niwap.org
 - Web Library:
www.niwaplibrary.wcl.american.edu
 - Directory
 - <https://niwaplibrary.wcl.american.edu/home/directory-programs-serving-immigrant-victims/>
- Materials for this COP:
 - <https://niwaplibrary.wcl.american.edu/family-law-cop-materials-repository/>

Thank You!

