

Family Law

The newsletter of the Illinois State Bar Association's Section on Family Law

Chair's Column

BY SUSAN W. ROGALINER

This is my first column addressing you as chair of the Family Law Section Council for the 2021-22 bar year. I look forward to this year with the excitement that only the work of the dedicated members of the Family Law Section Council can bring! This year the membership of appointees approaches 60 with many new attorneys and judges whom I look forward to getting to know better through participation on our diverse section council.

First, however, I wish to say a few words about Sally Kolb, our outgoing chair for the 2020-21 year. Sally has been an exemplary and excellent leader of us all during the most difficult year of the pandemic which relegated us to virtual meetings. This was no simple task for Sally, our members, and the ISBA staff. It was a challenging year, indeed, and Sally led us all through it with the calm and expertise only she could

Continued on next page

Chair's Column

1

Enforcing an I-864 Affidavit in an Illinois Divorce

1

Illinois Supreme Court Caselaw and Legislation Update

4

Enforcing an I-864 Affidavit in an Illinois Divorce

BY RUSSELL D. KNIGHT & STEPHANIE L. TANG

Marriage to an American citizen is the most common path to U.S. residency for foreign nationals, with more than 2.3 million foreign nationals gaining lawful permanent resident status via marriage between 1998 and 2007. As part of the process, the American citizen spouse often signs a Form I-864 Affidavit of Support, promising to support the immigrant spouse at an income level of at least 125 percent of the federal poverty level (for 2021, \$16,100 for a one-person household). Up until June 2021, the Illinois appellate court had not

issued any published opinions regarding enforceability of an I-864 Affidavit of Support in an Illinois divorce proceeding.

Terms of the I-864 Affidavit of Support

The promise of an American citizen sponsor spouse to maintain their immigrant spouse at 125 percent of the federal poverty level means that a government agency may sue the sponsor for an amount they believe the sponsor owes monies within "ten years after the date on which the sponsored alien last

receive[s] any means-tested public benefit to which the Affidavit of Support applies." The I-864 Affidavit further informs immigrant spouses that "if [the sponsor] does not provide sufficient support to the person who becomes a permanent resident based on the I-864 that [the sponsor] signed, that person may sue [the sponsor] for this support." This means both a government agency and an immigrant spouse may have a valid claim against a sponsor.

Continued on next page

Chair's Column

CONTINUED FROM PAGE 1

bring to her position as chair. She taught us all how to effectively communicate and participate not only at our monthly meetings, but subcommittee meetings, and our first ever 100 percent virtual continuing legal education programs. Thank you, Sally, and I only hope that I can carry on with the legacy you left us as the first "COVID chair" of the Family Law Section Council.

Under Sally's leadership last year, we were able to accomplish a lot under the restrictive COVID circumstances. Many of you attended our first all virtual continuing legal education program relative to practicing law during the pandemic which was very well received. Also, when the state legislature recommenced gathering in Springfield at the end of our year, the legislation started coming fast and furious. I am happy to report that seven out of our 15 bills have thus far passed and are sitting on the governor's desk awaiting his signature.

Although I am starting out this year as the second "COVID chair," I hope not to end my year that way and as such I am looking forward to our first in-person meeting which will be scheduled during

the ISBA's Midyear Meeting in December. I am also looking forward to our plans for expanded virtual continuing legal education with new formats. In the past, our New Orleans destination continuing legal education programs have been very popular and always sold out. The good news is we hope to reinstate traveling CLE in the future, so stay tuned! Additionally, we have a lot pending relative to legislation and changes in Supreme Court Rules particularly having to do with virtual court appearances, mediation, and the like. I will be devoting future columns to the specifics of new legislation impacting family law practitioners and other matters of interest and importance relative to the seemingly never-ending changes in the way we practice law.

I look forward to my year as chair and in particular working with the members of the Family Law Section Council including Stephanie Tang, vice-chair, and Wes Gozia, secretary. I want you to know that I very much appreciate your active participation and I thank you all for your leadership!■

Enforcing an I-864 Affidavit in an Illinois Divorce

CONTINUED FROM PAGE 1

The I-864 Affidavit then outlines a limited list of "termination events" that would terminate the sponsor's obligation: (1) death of a sponsor or the sponsored immigrant; (2) the sponsored immigrant becomes a naturalized citizen; (3) the sponsored immigrant permanently leaves the United States; or (4) the sponsored immigrant completes forty qualifying quarters of work (approximately ten years). Divorce, however, is not a termination event. The Affidavit also does not impose an affirmative obligation for the sponsored immigrant to notify a sponsor when one of the termination events is satisfied.

In re Marriage of Bychina: Enforcement of an I-864 Affidavit in an IL Divorce Proceeding

The Immigration and Nationality Act authorizes suit "in any appropriate court ... by a sponsored alien" "to enforce an affidavit of support executed under" 8 U.S.C. § 1183a(e). Furthermore, a sponsor may also be held liable for attorney fees, other costs of collection, and "corresponding remedies available under State law." See 8 U.S.C. § 1183a(c). However, there was no published case on whether an Illinois domestic relations court could properly enforce an I-864 Affidavit until June 2021.

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OFFICE

ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS

Matthew A. Kirsh
Robin R. Miller
William J. Scott, Jr.

PUBLICATIONS MANAGER

Sara Anderson
✉ sanderson@isba.org

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The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

In June 2021, the Illinois appellate court issued its first published opinion regarding enforcement of a Form I-864 Affidavit of Support in *In re Marriage of Bychina*. 2021 IL App (2d) 200303. (June 18, 2021). In *Bychina*, Wife filed Petition for Dissolution of Marriage, including a count alleging Husband breached a federal contract (I-864 Affidavit). At trial, the court *sua sponte* declined to rule on the merits of the breach of contract claim, citing three primary reasons: (1) Illinois divorce law conflicts with the Affidavit of Support obligations under federal law, (2) Wife's financial situation was "implausible" and she could earn more than the federal poverty guideline; and (3) It did not wish the doctrines of *res judicata* or collateral estoppel to preclude Wife from obtaining relief in federal court, where the trial court believed she was likely to obtain relief. The trial court specifically reserved ruling on maintenance so Wife could seek relief in federal court, and it "retain[ed] jurisdiction to redress any shortcoming."

The Second District Illinois Appellate Court reversed and remanded the trial court's decision to decline jurisdiction to enforce the I-864 Affidavit. The Second District first noted that the Husband's obligations under the I-864 are separate from any obligations he may have under IL Divorce law and "may be enforced in a state divorce action, through specific performance of the contract, by an order for spousal support under state law, or a combination of both." Citing to state courts outside of Illinois, the court asserted, "A state court is just as capable as a federal court of addressing the contract issue raised by a claim of breach of obligation under Form I-864." The court highlighted that Wife specifically requested that the state court adjudicate the breach of contract claim, that by declining jurisdiction, the state court effectively required Wife to undergo additional delays and incur more fees to clog the court system with a separate federal claim. Finally, the court noted that the trial court failed to identify any remedies that would be available at the federal court level that were not otherwise available at the state court level.

Potential Defenses to Enforcement of an I-864 Affidavit

The *Bychina* case still leaves open room for spouses trying to avoid paying support to their immigrant spouse under the I-864 Affidavit of Support.

Ask the Court to Decline Jurisdiction

The *Bychina* court explicitly noted that the immigrant spouse had included a separate count asking the court to litigate the breach of contract claim regarding Form I-864 and the trial court *sua sponte* chose to decline jurisdiction. However, it is unclear whether the outcome would be the same if Husband formally requested the trial court decline jurisdiction. The Illinois Supreme Court has provided the following guidance: "[A] court which has jurisdiction over the parties and the subject matter involved may nevertheless decline jurisdiction of a case when it is apparent that trial in another forum with jurisdiction over the parties would be more convenient and would better serve the ends of justice." *Vinson v. Allstate*, 579 NE 2d 857. It stands to reason a state court may potentially still choose to decline jurisdiction on these grounds if contested by the sponsor spouse.

The Claim is Barred Res Judicata

Courts are similarly split on whether a claim for support pursuant to an I-864 Affidavit can be barred *res judicata*. In *Chang v. Crabill*, the court determined an immigrant's claim for support was not barred where the immigrant was unaware she had a cause of action against her sponsor husband until her friend informed her she had successfully litigated such a claim. No. 1:10 CV 78, 2011 WL 2471745, at *5 n.5 (N.D. Ind. June 21, 2011). Conversely, the court in *Mergia v. Adams* found an immigrant's claim was barred from pursuing her support claim in her sponsor's bankruptcy case because the immigrant "could have pursued her support claims under the affidavit of support in the [prior] divorce proceedings." No. 2:08-cv-1159 JAM JFM PS, 2009 WL 1604706, at *7 (E.D. Cal June 5, 2009).

A Valid Pre-Nuptial Agreement Waives the Obligation

Courts are split on whether a spouse may waive their right to sue their sponsor under

the I-864 Affidavit by entering into a valid pre-nuptial agreement. Courts finding a pre-nuptial agreement cannot waive a sponsor's support obligation note that an outside agreement is not delineated as a termination event. *Shah v. Shah*, No. 12-4648 (RBK/KMW), 2014 U.S. Dist. LEXIS 4596 (D. N.J. Jan. 14, 2014). Additionally, these courts note that I-864 Affidavit rights cannot be waived because federal law imposes them. *Erler v. Erler*, No. CV-12-02793-CRB, 2013 U.S. Dist. LEXIS 165814, at *1 (N.D. Cal. Nov. 21, 2013), *aff'd* No. 3:12-cv-02793-CRB, at *8 (9th Cir. June 8, 2016). It should be noted that even if a court finds the immigrant waived their right to sue their sponsor under the affidavit pursuant to a pre-nuptial agreement, the government likely still has a claim against the sponsor if the immigrant starts receiving benefits.

Additional Resources:

Greg McLawsen, *The I-864 Affidavit of Support: An Intro to the Immigration Form You Must Learn to Love/Hate*, 48 Fam. L.Q. 581 (2015).

Stephanie L. Tang, *Arguing Affidavits of Support*, 105(8) Illinois B.J. 34 (2017). ■

Illinois Supreme Court Caselaw and Legislation Update

BY MATTHEW A. KIRSH

In May of 2021 the legislature passed a bill that will greatly affect how allocation of parental responsibilities evaluations are conducted. The Illinois Supreme Court also decided two cases with which all family law practitioners should be aware.

HB 2741

HB 2741 amends 750 ILCS 5/607.6. The bill deletes the controversial subsection(d) which had been interpreted by trial courts in Cook County and the second district appellate court in a Rule 23 opinion to prohibit experts from speaking with a child's therapist, even if the therapist was not appointed by the court. Obviously, the inability of an expert appointed under Section 604.10(b) or 604.10(c) to speak with the therapist of a minor child who is the subject of the custody dispute was a severe limitation on the ability of the expert to investigate and had the possibility of materially affecting the expert's recommendation. Section 607.6(d) was merely an example of the rule of unintended consequences. The intent was to protect the sanctity court-ordered counseling and to discourage parents from trying to gain an advantage through what the therapist would say to the expert. The courts interpreted the language broadly and the result was the disqualification of experts for speaking with one of the most vital sources of information regarding a child's best interests.

By deleting subsection(d), we are back to the way things were before its enactment. When the law is signed by Governor Pritzker, experts will be able to speak with a child's therapist if the proper authorizations are signed pursuant to the Illinois Mental Health and Developmental Disabilities Confidentiality Act and HIPAA.

HB 2741 passed both houses on May 27, 2021 and was sent to the governor on June 23, 2021. The governor has 60 days

to sign the bill or veto the bill. If he does nothing, it automatically becomes law after 60 days. There is no reason to believe that a veto is forthcoming. Once signed, the law is effective immediately.

In Re Marriage of Crecos, 2021 IL 126192

On May 20, 2021, the supreme court handed down its decision in the *Crecos* case. The case has relevance for two reasons. The first is that it held that a temporary fee order, as opposed to an interim fee order pursuant to 750 ILCS 5/501(c-1) may be a final and appealable order. Because the fees ordered were not subject to reallocation and adjustment, the fee orders in this case were appealable if the trial court made a finding pursuant to Illinois Supreme Court Rule 304(a), which it did.

The *Crecos* decision also cleared up some conflicting appellate court decisions regarding when a post-decree order is final and appealable. The court agreed with the line of cases that held a post decree petition is a single claim and not an independent cause of action. For example, the resolution of a post-decree custody modification petition is not a final and appealable order if a petition for modification of child support is still pending. In this situation, if a party wants to immediately appeal the custody decision, that party must seek a 304(a) finding from the trial court. Put another way, as long as there are any post-decree matters pending, no post-decree order is final and appealable unless there is a 304(a) finding.

Municipal Trust and Savings Bank v. Moriarty, 2021 IL 126290

In this case the supreme court interpreted the service of summons language found in 735 ILCS 5/2-202. In this case, a lawsuit was filed in Kankakee County, which has a population of less than 2,000,000. In counties of less than two million, a private process

server can be used without the need for a special appointment. The plaintiff employed a private process server who served the defendant at Rush Hospital in Cook County. A default was entered and the defendant moved to vacate the default by objecting to the service of process. The plaintiff prevailed at the trial and appellate levels. The supreme court reversed.

The supreme court stated that: "Section 2-202 is concerned with where process is served on a defendant; it says nothing about where the particular complaint is filed." The moral of the story is that if you file a petition for dissolution in Lake or DuPage County and the respondent is going to be served in Cook County, you need to get a special process server order entered in the county in which the case was filed. ■