Alimony Or No Alimony

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The parties married in 2003 and divorced in 2006. The Wife was twenty-eight, the husband thirty, and no children were born of the marriage. Both parties are in good physical and emotional health. The Wife is a well educated person having a post-high school degree in mechanical engineering, fluent in two languages and also practically fluent in English. The marriage did not absent the Wife from the job market and she has no plans to go back to school or to rehabilitate herself in any way. There was no standard of living established. The time the parties actually lived together was limited to three days after the marriage ceremony and then, fifteen months later, they lived together for three months in the Husband's parents' home. In fact, the parties had never met before the wedding.

Alimony in New Jersey is determined on the weighing of a number of factors.[1] There are no hard and fast rules. Nonetheless, most matrimonial attorneys when presented with the facts outlined above, would say, as the Trial Court did, that this was not an alimony case, much less a potentially "permanent" alimony case.

Yet, after the Wife appealed, she was awarded annual support sufficient to maintain her at an income that is at least 125% of the poverty guidelines, reduced dollar for dollar by any income earned by her each year. If the Wife's income during any year exceeded the 125% level, the Husband would have no support obligation that year. The 125% poverty guidelines level for a one person family in 2013 is $14,363[2]. Moreover, the Husband's obligation could be long term or even permanent depending on

future events. Niak v. Niak, 399 N.J. Super. 390 (App.Div. 2008).

So what makes this case so different? The difference rests on the facts of this case and the parties themselves. In Niak, a case of first impression in New Jersey, the Court was asked to decide the "enforceability and amount of support that must be paid by the signer of an Immigration Affidavit of Support (Form I-864EZ)." Id. at 392. While this issue was raised for the first time by the self-represented Wife in a motion for reconsideration, it was considered by the Appellate Court Panel composed of Judges A.A. Rodriguez, C.S. Fisher, and C.L. Miniman because the "equities in the case" compelled it.

According to immigration rules, any alien who seeks U.S. permanent residency as an immediate relative or as a family sponsored immigrant is inadmissible if he or she is likely to become a public charge[3], unless the Visa petitioner (sponsor) submits an Affidavit of Support that meets the requirements of the Immigration and Naturalization Act (INA) Section 213A. One of the most common avenues for seeking permanent residency is through marriage, and Form I-864EZ is one of the documents required as part of the application process. Mr. Niak submitted such an application on behalf of his Wife.

The Appellate Court held that Form I-864EZ is enforceable against a resident of New Jersey based on the fact that the 1996 amendment of 8 U.S.C.A. §1183(a)(1)(B) created the clause that the Affidavit of Support is a legally enforceable contract "against the sponsor by the sponsored alien…". Further, the support must continue until a triggering termination event occurs, such as:

1. the sponsored immigrant becomes a U.S. citizen;
2. the sponsored immigrant can be credited with 40 qualifying quarters as defined under title II of the Social Security Act;
3. the sponsored immigrant departs the United States permanently;
4. the sponsored immigrant dies;
5. or the sponsored immigrant becomes able to sufficiently provide for him or herself.

As the Niak Court points out "[d]ivorce, however, is not a terminable event". Id. at 396.

The Niak Court also had to determine the standard for setting the I-864EZ support. As to this, the Court held that "[a] minimum standard or floor is set [at] 125 percent of the Federal Poverty Line for the appropriate family unit size." Id. at 398. In the Niak case, the family unit consisted of only one person, the Wife. However, the court clarified that:

the sponsor is not necessarily required to pay the sponsored immigrant 125 percent of the Federal Poverty Guidelines for the appropriate family unit size. Rather, considering the sponsored immigrant's own income, assets and other sources of support, the sponsor must pay any deficiency in order to meet this minimum level or floor. In short, 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. When the sponsor and sponsored immigrant are married, alimony, child support (if any) and equitable distribution of income-producing assets must be included in the sponsored immigrant's available support. Therefore, although Form I-864EZ support is an independent obligation, it is impacted by other monetary obligations set by the court in a matrimonial action.

Therefore, after setting spousal and child support and equitable distribution, the court should only consider Form I-864EZ support if the sponsored immigrant's sources of support fall below 125 percent of the Federal Poverty Guidelines for the family unit size. Ibid.

The Niak ruling raises many issues and potential pitfalls for practicing attorneys. For example, any attorney preparing a pre-nuptial or post-nuptial agreement must advise the client that Immigration Services will not accept the pre-nuptial support provisions in lieu of the Affidavit of Support. The Affidavit must be signed regardless so that the sponsored individual can file for permanent residency. Moreover, where an I-864EZ is being contemplated, the pre-nuptial or post-nuptial clients should be made aware that an alimony waiver may not be totally effective. Additionally, because the sponsor is also responsible to reimburse any government agency or private entity that provides the sponsored immigrants with federal, state or local means tested public benefits,[4] in the pre-nuptial or post-nuptial agreements setting alternatives like life insurance and trusts should be investigated.

Where an I-864EZ has been provided and now support is being sought by the sponsored spouse, an appropriate divorce pleading alleging a cause of action to enforce the I-864EZ contractual support should be included with the divorce cause of action. Because the I-864EZ support must be adjusted at the end of each year, appropriate language requiring production of financial documents must be included in any property settlement agreement.

Further, what if the sponsor signed an Affidavit of Support for the minor children of the sponsored spouse? Couldn't an argument be made that in New Jersey, where the parents of college aged students have an obligation to pay their proportionate share of a child's costs if financially able[5], that the sponsor may be obligated for the higher education costs of the children he or she sponsored? The final word, be aware and beware.