

51046B

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

MAY 31 2001

PATRICIA PRESLEY, COURT CLERK
By _____
Deputy

JACK G. BURNS)
)
Plaintiff,)
)
-VS-)
)
WEI WEI BURNS,)
)
Defendant.)

Case No. FD-2000-5203

TRIAL BRIEF

Comes now Defendant, WEI WEI BURNS, for her TRIAL BRIEF and provides:

ISSUES: SUPPORT OF DEFENDANT

FACTS: Plaintiff and Defendant met via the internet in 1996 when Plaintiff contacted the Defendant. . The Plaintiff pursued Defendant and made many specific promises of support and benefits. The parties became engaged and pursued the admission of the Defendant to this Country as a fiance of Plaintiff. This was unsuccessful. The parties married on January 14, 1998, in Beijing China after a courtship of over a year. The parties then sought admission of the Defendant to the U.S. as an immediate family member of the Plaintiff. Defendant provided financial information to establish his ability to support the Defendant at least a 125% of poverty. Plaintiff executed on January 18, 1998 an I-864 as required by 8 U.S.C. §1183a so as to prevent the Defendant from becoming a charge on the public. Defendant was admitted to this Country in January 1999. In August of 2000, Plaintiff filed for Divorce.

Support Alimony

Defendant asserts that she is entitled to Spousal Support Alimony under 43 O.S. § 121. She was brought to this Country by the Plaintiff, a country in which she is isolated by virtue of her language and culture. The evidence will demonstrate that Defendant has been working diligently to overcome this barrier but, a recent evaluation by "Edmond Language Institute" (a copy of the report will be submitted to the Court by agreement) indicates that the Defendant is still functioning in English at a very low level, such as to be unemployable.

The Defendant was a medical doctor in Beijing China. She can not be expected to perform menial and degrading work as may be suggested by the Plaintiff, i.e. working in Chinese Restaurants. She is entitled to consideration of the station in life that she formerly had, the conduct of the parties, the resources of the husband and the physical condition of the wife.

Stansberry v. Stansberry, 1978 OK 77, 580 P.2d 147. *Durland v. Durland* 552 P.2d 1148. Defendant argues that the term “physical condition” would include present linguistic skills that impair the ability to earn a living. The evidence will establish the ability of **Plaintiff** to pay support alimony and the need of the Defendant for support to place her in condition to support herself.

Plaintiff may assert that it was Defendant’s choice to subject herself to the possibility of “cultural isolation” and that he can not be held responsible for her present need. Defendant asserts that **Plaintiff was** involved in the decision for Defendant to come to this Country and understood the risks of divorce far better than Defendant and must be held just as responsible for Defendant’s present inability to support herself.

Support Required Pursuant to I-864 “Affidavit of Support”

Defendant asserts that 8 U.S.C.A. § 1183a imposes an obligation of support that is legally enforceable by the Defendant against the **Plaintiff**. The act requires a sponsoring party to provide an “affidavit of support” that has certain requirements. The purpose of the “affidavit of support” is to prevent the immigrant from being a charge on the public as an immigrant is not eligible for many ‘means tested’ or other public benefits. The level of support to which the immigrant is entitled is 125% of poverty.

Plaintiff signed, pursuant to §1183a, an “Affidavit of Support” and petitioned for Defendant’s entry into the United States as his spouse. Thus under 8 U.S.C. §1183a (f) **Plaintiff is** Defendant’s sponsor.’

¹ In the Deposition of **Plaintiff**, he claimed that this statute is not applicable because the Defendant is not a “sponsored immigrant” under the act. 8 U.S.C. 1101 is attached in its lengthy entirety as Exhibit 2. to establish that “sponsored immigrant” is not per se defined, but “sponsor” is defined in this subsection with reference made to other sections. Those sections are:
8 U.S.C. § 1183a (f) “Sponsor” **defined**

- (1) In general
For purposes of this section the term “sponsor” in relation to a sponsored alien means an individual who executes an **affidavit** of support with respect to the sponsored alien and who -
- (A) is a citizen or national of the United States or an alien who is lawfully admitted to the United States for permanent residence;
 - (B) is at least 18 years of age;
 - (C) is domiciled in any of the several States of the United States, the District of **Columbia**, or any territory or possession of the United States;
 - (D) is petitioning for the admission of the alien under section 1154 of this title; and
 - (E) demonstrates (as provided in paragraph (6)) the means to maintain an annual income equal to at least 125 percent of the Federal poverty line.

8 U.S.C. § 1154. Procedure for granting immigrant status

(a) Petitioning procedure

- (1) (A) (I) Any citizen of the United States claiming that an alien is entitled to classification by reason of a **relationship** described in paragraph (1), (3), or (4) of section 1153(a) of this title or to an immediate relative **status** under section 115 l(b)(Z)(A)(i) of this title may file a petition with

Defendant claims that when the sponsor executed an INS Form I- 864, the “Affidavit of Support”, a contract was formed between the Plaintiff and the United States Government with the Defendant as a third party beneficiary. In this document*, the Defendant acknowledged (1) “that this **affidavit** of support constitutes a contract between me and the U.S. Government “; (2) “that the sponsored immigrants, . . . are entitled to sue me if I fail to meet my obligations under this **affidavit** of support”; and (3) that the Plaintiff agreed “to submit to the personal jurisdiction of any court of the United States or of any state, territory, or possession of the United States **if the** court has subject matter jurisdiction of a civil lawsuit to enforce this **affidavit** of support and that no lawsuit to enforce this affidavit of support shall be barred by any statute of limitations that might otherwise apply, so long as the plaintiff initiates the civil lawsuit no later than ten (10) years after the date on which a sponsored immigrant last received any means-tested benefits.”

Defendant asserts that this statute imposes on the Plaintiff an obligation “to provide the sponsored immigrant(s) whatever support is necessary to maintain the sponsored immigrant(s) at an income that is at least 125 percent of the Federal poverty guidelines”. The Statute further provides that the support obligation endures until the sponsored immigrant either becomes a citizen, or has worked (or can be credited with) 40 quarters of work; the sponsor or the sponsored immigrant dies, or if the sponsored immigrant ceases to hold the status of an alien lawfully admitted for permanent residence and leaves the United States.

Availability of Federal Remedv in this Court

The Statute in question, clearly states that the action can be brought in “Federal or State court” to enforce the provisions of the act. Further, in subsection 0), the act provides:

Remedies available to enforce an affidavit of support under this section include any or all of the remedies described in section 3201, 3203, 3204, or 3205 of Title 28,

the Attorney General for such classification.

(ii) An alien spouse described in the second sentence of section 1151(a)(2)(A)(i) of this title also may file a petition with the Attorney General under this subparagraph for classification of the alien (and the alien’s children) under such section.

8 U.S.C. § Sec. 1151. Worldwide level of immigration

(b) Aliens not subject to direct numerical limitations Aliens described in this subsection, who are not subject to the worldwide levels or numerical limitations of subsection (a) of this section, are as follows:

(2) (A) **(I)** Immediate relatives. - For purposes of this subsection, the term “immediate relatives” means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age. In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of **the** citizen’s death and was not legally separated from the citizen at the time of the citizen’s death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen’s death but only if the spouse **files** a petition under section 1154(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries.

as well as an order for specific performance and payment of legal fees and other costs of collection, and include corresponding remedies available under State law. .

..

Clearly under the “equitable clean up doctrine” this court can and should proceed under all related causes of action between the parties. Defendant asserts that a claim for support alimony and a claim for mandatory support under the Immigration Act, although with **differing** criteria and goals are similar enough to be properly considered in this action.

Defendant would argue that the “**affidavit** of support” can be likened to an anti-nuptial contract calling for certain support levels in the event of a divorce and the corresponding loss of support for the immigrant. Defendant asserts that this Court can enter orders for the **Plaintiff** to provide for the support of the Defendant at 125% of poverty and can fashion an order that would require Plaintiff to contribute to Defendant’s income in any month in which **Plaintiff’s** income fails to reach the target level. Orders can be entered regarding submission of proof of income and yearly tax records of Defendant to Plaintiff to verify income.

Creating harmonious orders under Support Alimony and the I.N.S. act.

Defendant asserts that this Court can enter orders regarding support alimony under 43 O. S. 12 1 in compliance with state law and can enter orders providing for the continued support of the Defendant pursuant to the requirements of the “**Affidavit** of Support” after the termination of the support alimony. The Support Alimony terminates on the statutory grounds, the continued support under the **Affidavit** of Support terminates on the grounds contained in 8 U.S.C. 1183a.

CONCLUSION:.

Defendant asserts that the two theories of relief are not mutually exclusive and should be determined in this action. Support Alimony is appropriate to provide for the Defendant according to her station in life and to which she was accustomed in the marriage and to provide establish (as opposed to restore) an ability to support herself by providing English education for the Defendant. The “**Affidavit** of Support” orders should be triggered upon Defendant’s unemployment or underemployment.

Clearly it is in the Plaintiffs best interest to enable the Defendant’s obtaining skills to support herself Providing Defendant with the ability to support herself will limit the Plaintiffs exposure to long term support obligations under the requirements of 8 U.S.C. §1183a.

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CERTIFICATE OF MAILING

I, THOMAS NEIL LYNN III, attorney, do **certify** that on the above day and date of **filing**, I placed a true and correct copy of the above and foregoing in the United States Mail, Post Paid, to:

Tom **Wakely**
Attorney at Law
1436 S.W. 44th
Oklahoma City, OK 73 119

Thomas Neil Lynn III