The Crossroads of Immigration and Family Law

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Long viewed as the land of opportunity, the United States of America attracts hundreds of thousands of immigrants each year. In the last few decades, immigration has exploded. From 1980 to 2010, the foreign born population surged from 14.1 million to 40 million.[1]

A foreign national may obtain lawful permanent resident status in the United States in a variety of ways, such as through employment or a visa lottery. Historically, the most popular method of obtaining permanent residency is through a family-based sponsorship, particularly through marriage to a U.S. citizen.[2]

One out of every five married couple households consists of at least one spouse born in a foreign country.[3] At the same time, divorce continues to be on the rise.[4] It is estimated that between 40 and 50 percent of all marriages end in divorce.[5]

This article will address various considerations that arise when immigration and matrimonial law are at a crossroads.

Before You Say 'I Do'

When a U.S. citizen is involved in a relationship with a noncitizen, the couple may marry sooner than they would have otherwise if their relationship naturally progressed. For example, the noncitizen's visa may be about to expire, and he/she would need to leave the country unless he/she marries. In another case, the foreign national may be out of status (he/she may have remained here for a longer time than permitted), and marriage may be the only option to remain in the United States. Under these circumstances, among others, a prenuptial agreement can be a powerful protective document.

It must be noted, though, that a prenuptial agreement cannot be used as a mechanism to obtain protections in a marriage that is not bona fide and is a "sham." If it is determined that a marriage was entered into for the sole purpose of obtaining a green card, a prenuptial agreement may be invalidated. For example, in *Heilbut v. Heilbut*,[6] the appellate division determined that the parties' prenuptial agreement violated public policy. The court upheld the invalidation of the prenuptial agreement because it was based upon a "scheme to circumvent immigration laws in the United States."[7]

When used in a bona fide marriage, a prenuptial agreement can be an important tool that allows a couple to tailor the law to meet their specific needs. It also can help limit losses in case there was more opportunism involved in the relationship than the U.S. citizen realized before getting married.

No Prenup? Try a Postnup.

If a couple rushed to the altar, such as to avoid a spouse's departure from the country, there may have been insufficient time to execute a prenuptial agreement. In lieu of a prenuptial agreement, the couple could enter into a postnuptial agreement.

A postnuptial agreement also may be useful in situations when marital strife arises and one spouse does not have unconditional permanent residency.[8] During the immigration process, the parties may resolve the issues ancillary to a divorce in a postnuptial agreement without having to initiate a formal divorce proceeding.

Happily Ever … For Less Than Two Years

According to applicable law, marriages entered into by a U.S. citizen and a foreign national that end in divorce in less than two years are presumed to have been entered into based on fraud.[9] Such marriages are subject to challenge by the Immigration Service. In an effort to deter people from entering into "sham" marriages, the noncitizen's permanent resident status is conditional during the first two years of marriage.[10]

In the immigration context, a sham marriage is a marriage entered into for the sole purpose of obtaining immigration benefits. Some red flags for a sham marriage are that the parties have a significant age difference, have different ethnic backgrounds, speak different languages, live in separate households, or failed to notify friends and family about the marriage.[11]

A conditional permanent resident can obtain a green card that is valid for two years.[12] In the event that the conditions are not removed, the foreign national stands to lose permanent resident status unless a waiver is granted. Waivers may be based on "good faith," "exceptional hardship" to the noncitizen spouse, or abuse of the noncitizen spouse.[13]

For the restrictions on the permanent residency to be removed, the conditional permanent resident typically needs to file a petition jointly with his/her spouse.[14] In the petition, the couple is required to represent that they are married and that they did not enter into the marriage for immigration benefits. Additional information must be provided, such as details regarding their place of residence, employment background and the bona fide nature of the marital relationship over the course of the preceding two years.

In a short-term bona fide marriage, a divorce agreement may include provisions that encourage cooperation of the U.S. citizen in the immigration process. For example, the divorce agreement may state that the parties married in good faith for love and affection and lived together as husband and wife. As a protection for a conditional permanent resident, the U.S. citizen may promise in the divorce agreement that he/she will cooperate in filing a joint petition to remove the condition and will furnish whatever evidence is available to substantiate the bona fide nature of the parties' marriage. The divorce agreement also may provide that the U.S. citizen will accompany the noncitizen to a hearing or interview before immigration personnel, if required, regardless of the parties' marital status at the time of the hearing or interview.

If a Joint Petition Is Not Feasible

If the foreign national is unable to file the petition jointly, he/she can file the petition unilaterally under a prescribed set of circumstances. As indicated above, a waiver of requirement to file a joint petition can be obtained on the basis of showing: (i) the marriage was entered into in good faith; (ii) extreme hardship; or (iii) domestic violence.[15]

A waiver based upon the couple's marrying in good faith requires more than just a showing that the parties had a valid wedding ceremony. The noncitizen must demonstrate that it was a bona fide marriage. The noncitizen may produce corroboration that the marriage was genuine, such as by proffering evidence of the parties' relationship prior to marriage, cohabitation after the marriage, commingling of their assets, filing joint income tax returns, and photographs of the couple in happier times.

Another basis for the waiver is a demonstration by the noncitizen that he/she would suffer extreme hardship if required to return to his/her country of origin. For example, if a couple had children, a noncitizen may claim extreme hardship on the basis that returning to his/her native country would preclude active participation in the children's lives. To prevail in obtaining a waiver on this basis, it is helpful for the noncitizen to have sole custody or at least joint custody.

The Violence Against Women Act, a federal law, also provides a basis to obtain a waiver in the event of domestic violence. If making an application on this basis, to the extent possible, corroborating evidence of the domestic violence should be produced, such as police reports, orders of protection, medical records, and perhaps alleging cruel and inhuman treatment as the divorce grounds.

Green Card as a Bargaining Chip?

As a practical matter, in a contested divorce case between a U.S. citizen and noncitizen, the citizen spouse may endeavor to use a green card as a bargaining chip to gain leverage. For example, a foreign national couple and their children may be in the United States based on one spouse having a visa through his or her employment. Thus, the status of the other spouse and children is contingent upon the status of the spouse with a visa through his/her employment. If there is marital strife, and one spouse pursues a strategy to have the other spouse deported from the United States, the spouse who has the employment visa may endeavor to change his/her status, if an opportunity arises for him/her to obtain a green card. If the spouse does so clandestinely, the other spouse and their children may be stripped of their status and unable to remain in the country.

The effort to use a green card as leverage in a divorce proceeding may be poorly received by a court. For example, in *Rocano v. Rocano*,[16] a husband obtained a green card for himself and his wife's daughter, but deliberately failed to obtain a green card for his wife. This fact influenced the court awarding the wife non-durational spousal support and in excess of 50 percent of some of the marital assets.[17]

Sponsorship and Spousal Support Obligations

When immigration is obtained through marriage, the sponsoring spouse must file an "Affidavit of Support" form on behalf of the noncitizen spouse. In an effort to prevent the noncitizen from becoming a public charge, in the Affidavit of Support, the sponsor is required to affirm that he/she is aware of his/her obligations under the Social Security Act and Food Stamps Act.[18] If a noncitizen spouse receives welfare or other public assistance, the U.S. citizen spouse is obligated to repay the government for the benefits received for a period of up to 10 years or until the noncitizen spouse becomes a U.S. citizen, whichever time period is shorter.

State law already imposes an obligation to support a current or former spouse to prevent him/her from becoming a public charge.[19] However, the execution of the Affidavit of Support during the immigration process potentially triggers a greater obligation since it could be used as evidence in court in a matrimonial proceeding.

There's a Tax for That?!

Gifts between spouses who are both U.S. citizens and gifts from a foreign national to a U.S. citizen are exempt from federal gift taxation. If the gift is from a U.S. citizen to a spouse who is a foreign national, however, the U.S. citizen can gift only up to $145,000 per year tax free in 2014.[20]

Pursuant to federal gift and estate tax laws, for deaths in 2014, there is an individual exemption up to $5.34 million from federal estate taxation.[21] For a surviving spouse, however, there is an unlimited marital deduction, provided, however, the surviving spouse is a U.S. citizen.

A noncitizen surviving spouse, even a permanent resident, is ineligible for the unlimited marital deduction.[22] On the other hand, if the foreign national predeceases a U.S. citizen spouse, assets left to the U.S. citizen surviving spouse will be eligible for the unlimited marital deduction.[23]

The rationale behind the distinction in the treatment of U.S. citizen and noncitizen surviving spouses is that the federal government does not want a noncitizen to inherit a substantial amount of money, avoid estate tax, and then return to his/her native country.

Got a QDOT?

In order to ameliorate the estate tax consequences to a noncitizen surviving spouse, a qualified domestic trust (QDOT) may be established for his/her benefit. The trustee of a QDOT must be a U.S. citizen or corporation, such as a bank.[24]

The inherited assets would be distributed to the QDOT, and the noncitizen can receive the income generated from the QDOT free of estate taxes.[25] He/she may have to pay estate taxes upon distribution of principal of the trust property.[26]

If a party is entering into a prenuptial or postnuptial agreement and the U.S. citizen has substantial assets, it may be prudent to include a provision that the U.S. citizen will set up a QDOT trust for the benefit of the foreign national.

Conclusion

As a general matter, divorces are complicated and rife with emotion. In cases involving immigration issues, they can become even more intricate and nuanced.

Endnotes:

1. Luke J. Larsen & Nathan P. Walters, "Married-Couple Households by Nativity Status: 2011," American Community Survey Briefs, U.S. Department of Commerce, U.S. Census Bureau (September 2013), http://www.census.gov/prod/2013pubs/acsbr11-16.pdf.

2. Randall Monger & James Yankay, "U.S. Lawful Permanent Residents: 2013," Annual Flow Report, Office of Immigration Statistics (May 2014), http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2013.pdf.

3. Larsen & Walters, supra note 1, at 5.

4. Taryn Hillin, "New Study Says Divorce Rates Will Increase As Economy Recovers," The Huffington Post (Jan. 28, 2014; http://www.huffingtonpost.com/2014/01/28/divorce-rates_n_4682692.html; and Steve Matthews, "Worsening U.S. Divorce Rate Points to Improving Economy," Bloomberg News (Feb. 18, 2014), http://www.bloomberg.com/news/2014-02-18/worsening-u-s-divorce-rate-points-to-improving-economy.html.

5. Marriage and Divorce, American Psychological Association, http://www.apa.org/topics/divorce/.

6. *Heilbut v. Heilbut*, 297 A.D.2d 233, 746 N.Y.S. 2d 294 (1st Dept. 2002).

7. Id. at 234, 296.

8. Conditional permanent resident status results when the marriage conferring the immigration benefit is less than two years old when the foreign national obtains residency.

9. INA §237(a)(1)(G)(i), 8 U.S.C.A. §1227(a)(1)(G)(i).

10. "Remove Conditions on Permanent Residence Based on Marriage," U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, http://www.uscis.gov/green-card/after-green-card-granted/conditional-permanent-residence/remove-conditions-permanent-residence-based-marriage#.

11. "Do You Take This Immigrant?", Nina Bernstein, New York Times (June 11, 2010), http://www.nytimes.com/2010/06/13/nyregion/13fraud.html?pagewanted=all&_r=0.

12. "Conditional Permanent Residence," U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, http://www.uscis.gov/green-card/after-green-card-granted/conditional-permanent-residence.

13. Id.

14. Id.

15. Immigration and Nationality Act §216(c)(4), 8 U.S.C. 1186a (2006).

16. *Rocano v. Rocano*, 12 Misc.3d 1169(A), 820 N.Y.S.2d 845 (N.Y. Sup. Ct. Kings County, April 12, 2006).

17. Id. at 16-17, 23-24.

18. Form I-134, "Affidavit of Support", Department of Homeland Security, U.S. Citizenship & Immigration Services, http://www.uscis.gov/sites/default/files/files/form/i-134.pdf.

19. N.Y. Gen. Oblig. Law §5-311 (McKinney 2012).

20. 26 U.S.C.A. §2523(a) and 26 U.S.C.A. §2503 (2011).

21. 26 U.S.C.A. 2010(c)(3) (2011).

22. 26 U.S.C.A. 2056(d) (2011).

23. 26 U.S.C.A. 2056 (2011).

24. 26 U.S.C.A. 2056(A)(a)(1)(A) (2011).

25. 26 U.S.C.A. 2056(A)(b)(3)(A) (2011).

26. 26 U.S.C.A. 2056(A)(b) (2011).

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