

## by Catharine M. Venzon

The Immigration and Naturalization Service has always had a concern that aliens seeking permanent resident status in the United States will marry solely to gain that status, thereby circumventing the Immigration Laws. This concern was addressed by Congress in the Marriage Fraud Act of 1986, as amended by the Immigration Act of 1990.

An attempt to gain resident status without a bona fide marriage is marriage fraud. A finding of marriage fraud can lead to the denial of the issuance of an immigrant visa, refusal of admission as a conditional or permanent resident, the loss of resident status previously granted, and deportation from the United States. Lawyers must consider the special needs of aliens in divorce, separation or annulment matters. Accordingly, attorneys must know the applicable sections of the Immigration Law that deal with marriage fraud in order to understand the severe repercussions to any alien who is accused of it.

In order to assist the practitioner, this article will include a glossary of frequently used terms in U.S. Immigration Law:

**INS:** Immigration and Naturalization Service

**INA:** Immigration and Nationality Act

**Alien:** Anyone who is not a U.S. citizen is an alien

**Immigrant:** An alien who intends to reside permanently in the U.S.

**Non-Immigrant:** An alien who intends to visit, live or work temporarily in the U.S.

**Permanent Resident Alien:** An alien who is admitted by the Immigration Service to enter the U.S. in order to reside permanently.

**Conditional Resident Alien:** An alien who receives resident status based on a marriage of less than two years to a U.S. citizen. In order to become a permanent resident alien, the alien and their spouse must file a joint petition with the INS within 90 days of the second anniversary of the day the INS granted conditional resident status.

**Naturalization:** The process of acquiring citizenship for anyone who did not become a U.S. citizen by birth.

**Green Card:** A green card is actually an alien registration receipt card given to aliens after they have acquired resident status in the U.S. It covers both conditional and permanent resident aliens. The card used to be green but is now rose-colored.

**Immigrant Visa:** A document package issued by a U.S. consul abroad that an alien presents at the U.S. border to be admitted as a conditional or permanent resident.

**Illegal Alien:** This is a non-technical and usually inaccurate term with a negative inference. Usually, this refers to people who entered the U.S. without being inspected and admitted in legal status by the U.S. Immigration Service.

**Deportation:** An alien who never acquired or who loses legal status inside the U.S. is subject to deportation by the INS. Deportation is a civil procedure to remove aliens from the country.

**INA Section 204 (c):** This Section bars the approval of any permanent residence petition for any alien deemed to have acquired permanent status based upon a fraudulent marriage including an alien who never married but attempted to do so to gain permanent alien status.

**INA Section 216:** This Section sets out applicable definitions and rules regarding marriage

fraud.

Conditional resident status is conferred on an alien to a United States citizen or a lawful permanent resident in a marriage deemed bona fide although less than two years old. The status is conditional for another two years. If the marriage is more than two years old at the time of application for status, the alien can be approved for lawful permanent status without any condition.

The U.S. citizen or a permanent resident alien may petition for their alien spouse to receive an immigrant visa. An alien with an approved immigrant visa petition may be issued an immigrant visa by a U.S. consular post abroad and use the visa to be admitted to the U.S. as a permanent resident. Also, some aliens already in the U.S. may use an approved immigrant visa petition to gain permanent resident status through adjustment inside the U.S. The INS will interview the couple to determine the bona fides of the marriage. This status, however acquired, is a very important step for any alien seeking to remain in this country.

Conditional resident status becomes permanent after the second anniversary of conditional resident status if the alien and the petitioning spouse jointly file a I-751 petition signed by both parties. This is filed within ninety days of the second anniversary of the granting of conditional resident alien status. Thereafter, they are interviewed by an INS examiner to see if their marriage is legitimate.

If an I-751 joint petition cannot be filed, the conditional resident alien may request a waiver based on one or more of the following grounds: extreme hardship if deported, termination of a good faith marriage, or battered spouse or child ground.

The good faith waiver requires that the qualifying marriage was entered into in good faith by the alien spouse, the alien was not at fault in failing to meet the requirement of filing the joint petition, and the qualifying marriage was terminated other than through the death of the petitioning spouse. The battered spouse or child waiver must show that during the marriage the alien spouse or child was battered by or was the victim of extreme mental cruelty by the U.S. citizen or permanent resident spouse or parent. The waiver for a battered spouse does not require that the qualifying marriage be terminated.

It should be noted that the first and third elements are the same for both grounds. Attorneys representing an alien in a divorce must be concerned with the statutory jurisdictional requirements and the necessity for alleging grounds in a divorce action.

New York, unlike other states (such as California), does not grant divorces based on irreconcilable differences.

Domestic Relations Law (DRL) Section 170 sets forth the grounds for matrimonial actions:

1. Cruel and inhuman treatment--DRL Section 171, 170(1);
2. Abandonment--DRL Section 172;
3. Imprisonment--DRL Section 170(3);
4. Adultery--DRL Section 174;
5. No-Fault--Conversion of a prior written separation--DRL Section 170(5) and 170(6).

DRL Section 171--Cruel and inhuman treatment ground for a divorce has produced the most litigation on the standard of proof needed to establish a cause of action. The Trial Court has broad discretion to grant or deny a divorce on the ground of cruelty. *Brady v. Brady*, 64 N.Y.2d 339, 486 N.Y.S.2d 891 (1985). A lesser degree of proof is required for short-term marriages compared to long-term or "vintage marriages."

A high degree of proof is required with respect to the grounds of cruelty where there is a vintage marriage. *Hessen v. Hessen*, 33 N.Y.2d 406, 353 N.Y.S.2d 421 (1974); *Brady v. Brady*, 64 N.Y.2d 339, 486 N.Y.S.2d 891 (1985).

In a short-term marriage, lesser conduct will constitute cruel and inhuman treatment. See *Steiner v. Steiner*, N.Y.L.J., 4-4/8/85 at 14, COL.5 [Sup. Ct., Richmond County]; *Reiss v. Reiss*, N.Y.L.J. 2/26/91 at 29, col.1 [2nd Dept.]; *Rieger v. Rieger*, 161 A.D.2d 227, 554 N.Y.S.2d 613 (1st Dept. 1990).

For a vintage marriage, conduct must be viewed in the context of the entire marriage, including its duration and whether particular actions can properly be labeled "cruel and inhuman." See *Brady v. Brady*, 64 N.Y.2d at 345, 486 N.Y.S.2d at 894.

The bottom line evidentiary requirement to obtain a divorce on the grounds of cruel and inhuman treatment is, "... conduct by the defendant which is harmful to the physical or mental health of the plaintiff which makes cohabitation unsafe or improper ..." *Brady v. Brady*, 486 N.Y.S.2d, 891 (Ct. App. 1985).

What types of behavior satisfy this standard, and what nature of cruelty is required for grounds? Some examples are: (a) physical violence, verbal abuse, or the threat of violence; See *Pfeil v. Pfeil*, 100 A.D.2d 725, 473 Misc.2d 629 (4th Dept. 1989); (b) emotional abuse, which can include emotional abandonment; See *Siczewicz v. Siczewicz*, 92 A.D.2d 915, 460 N.Y.S.2d 130 (2nd Dept. 1983); (c) sexual infidelity and disclosure of adultery to spouse; See *Fritz v. Fritz*, 88 A.D.2d 778, 451 N.Y.S.2d 519 (4th Dept. 1982); false accusations of infidelity; See *Wilbourne v. Wilbourne*, 173 A.D.2d 289, 569 N.Y.S.2d 680 (1st Dept. 1991); alcohol abuse; See *Weilbert v. Weilbert*, 115 A.D.2d 473, 495 N.Y.S.2d 707 (2nd Dept. 1985), compulsive gambling--*Reiss v. Reiss*, N.Y.L.J., 2/26/91 at 29 col.1 (2nd Dept.). It is important to note of these examples that some may be insufficient standing alone but can be sufficient to satisfy the standard for cruel and inhuman treatment when coupled with incidents of any of the other above-mentioned behaviors.

When attempting to decide if one spouse has treated the other in a cruel and inhuman manner, courts will take into account whether the complaint involves a course of conduct or a pattern of actual behavior rather than isolated incidents of behavior. Other factors courts look at include the seriousness, manner, duration, extent, and effect of the behavior, as well as the length of the marriage.

Regarding situations which do not satisfy the evidentiary standard for a divorce based on cruel and inhuman treatment, there is the seminal case of *Hessen v. Hessen*, 353 N.Y.S.2d 421 (Ct. App. 1974) wherein the court set out that the cruel and inhuman treatment ground will not be applied to every "dead" marriage.

It is important to note in *Hessen* that the court noted that the length of a marriage is a factor that will be taken into consideration when a divorce is sought on the grounds of cruel and inhuman treatment. Also, certain behaviors that, in a course of conduct within a short-term marriage, could satisfy the standard for cruel and inhuman treatment will very possibly not be sufficient to satisfy the cruel and inhuman grounds standard to obtain a divorce in a vintage marriage. Other conduct which is insufficient to grant a divorce on the grounds of cruelty include (1) irreconcilable differences; See *Tsakis v. Tsakis*, 110 A.D.2d 763, 488 N.Y.S.2d 51 (2nd Dept.

1985); (2) lack of communication and/or sexual intimacy; See *Green v. Green*, 127 A.D.2d 983, 513 N.Y.S.2d 49 (4th Dept. 1987); (3) isolated incidences standing alone; See *Wenderlich v. Wenderlich*, 34 A.D.2d 726, 311 N.Y.S.2d 797 (4th Dept. 1970).

It is imperative that an effect on a victim's physical or mental well being be shown. See *Forcucci v. Forcucci*, 96 A.D.2d 751, 461 N.Y.S.2d 320 (4th Dept. 1983). The Court does consider whether a client has sought mental or psychological assistance, although collaboration by medical proof or testimony of other witnesses is not required. See *Green v. Green*, 127 A.D.2d 983, 513 N.Y.S.2d 49 (4th Dept. 1987).

It is also important for the matrimonial practitioner to ensure that the residence requirements of DRL Section 230 are met. An alien is not barred from acquiring a domicile in New York State for purposes of maintaining an action for divorce. The sole purpose of DRL Section 230 is to assure that New York has sufficient interest in the marriage to entertain an action to dissolve it and adjudicate the rights of the parties. See *Lacks v. Lacks*, 41 N.Y.2d 71, 390 N.Y.S.2d 875, *Rearg. denied*, 41 N.Y.2d 901, 393 N.Y.S.2d 1028 (1977).

The five bases for jurisdiction under DRL Section 230 are as follows:

1. the parties were married in the State and either party has been a resident when the action is commenced and has been a resident for a continuous period of one year immediately preceding the action--DRL Section 230(1);
2. the parties have resided in this State as husband and wife and either party is a resident when the action is commenced and has been a resident for a continuous period of one year immediately preceding the action--DRL Section 230(2);
3. the cause of action occurred in this State and either party has been a resident for a continuous period of at least one year immediately preceding the action--DRL Section 230(3);
4. the cause occurred in this State and both parties are residents at the time of the commencement--DRL Section 230(4); or
5. either party has been a resident of this State for at least two years immediately preceding the commencement of this action--DRL Section 230(5).

The threshold problem confronting aliens desiring to pursue a matrimonial action is the ability to satisfy the "term residence" as set forth in DRL Section 230 and 231 in order to enable the court to obtain jurisdiction. Many of these issues were directly addressed in the case of *Coran v. Coran*, 84 Misc.2d 335, 375 N.Y.S.2d 797 (Sup. Ct. Kings County 1975). The "concept of residence" satisfies "domicile" as required in DRL Section 231. Actually, "domicile," under 231 is

being construed as equivalent to "residence" under common law construction. The term "residence" has a broader meaning than it has had in the past, useful for aliens.

The former Immigration Act of 1990 conditioned the filing of a "marriage terminated" waiver on the conditional resident alien being the moving party in the matrimonial. This is no longer required if the marriage was entered into in good faith.

When representing an alien in a matrimonial action, if cruel and inhuman treatment is the ground sought, it is important to draft a complaint carefully and to include information and examples that will enable you to meet the evidentiary standard as previously set forth without raising a question of the bona fides of the marriage. This specificity standard set out in CPLR Section 3016(c), which states, "in a separation or divorce action, the nature and circumstances of a party's alleged misconduct, if any, and the time and place of each act complained of, if any, shall be specified in the complaint or counterclaim as the case may be." CPLR 3016(c) should be flexibly construed so as not to preclude a meritorious action. See *Pfeil v. Pfeil*, 100 A.D.2d 725, 473 N.Y.S.2d 629 (4th Dept. 1984).

Also, fraud in the inception of the marriage is grounds for an annulment. An allegation of marriage fraud may be made to obtain an annulment by the spouse of an alien who gained legal resident status through the marriage. It is especially important when representing a conditional resident alien, but also important for permanent resident aliens against whom an annulment on the basis of fraud is sought, to successfully defend as zealously as possible against such grounds. Conversely, in the case where representing a U.S. citizen who wishes to assert fraud as grounds for annulment, it would be wise to counsel such a client on the possible damage and repercussions, including criminal liability of a marriage fraud allegation. Try to discern the motivation for such allegation. In such a case, it would also be important to inform the U.S. citizen that if they had any knowledge of an alien's intention to marry in order to gain legal resident status and that citizen participated knowingly in the sham marriage, criminal provisions subject U.S. citizen co-conspirators to felony prosecution under 18 USC Section 1001.

Finally, some precedent holds that an alien who is found guilty of marriage fraud may also be liable for money damages to his spouse. See *Gubin v. Lodisev*, 494 N.W.2d 782 (Mich. App. 1992).

To conclude, it is imperative that practitioners are sensitive to the unique exposure aliens have in a divorce action. Their special needs should not be ignored, and it is hoped that this article

will assist practitioners in the representation of aliens and their spouses as well.