THE EFFECT OF ISLAMIC FAMILY LAW ON NORTH AMERICAN FAMILY LAW ISSUES*

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Introduction

In an age of multi-culturalism, family law attorneys must become familiar with the impact religious customs and laws may have on civil family law issues. The areas in which Islamic law & custom impact civil family law in Western countries can be categorized as follows:

1. Enforcement of a deferred *mahr* (dowry) amount contracted for in an Islamic marriage contract:
   a. where the Islamic marriage contract was signed in an Islamic country;
   b. where the Islamic marriage contract was signed in a Western country;
2. Civil enforcement of substitute property rights under a *nikah* (marriage) contract in lieu of property rights granted by Western laws;
3. Recognition in a Western country of a divorce decree obtained in an Islamic country under *Shari'a* law and of a marriage contracted under *Shari'a* law in a Western country;
4. Conflicts between custody laws in Islamic and Western countries;
5. Religious court arbitration of *nikah* agreements, support, and custody rights.

This article will focus on the manner in which various states in the United States, and in some respects Canadian provinces, have dealt with conflicts between civil law and Islamic family law. Because both the U.S. Constitution and Canadian Constitution mandate separation of church and state,[1] courts walk a very fine line between adjudicating religious issues (which is forbidden), and enforcing rights and obligations obtained through religious-based contracts and/or customs.

Before proceeding, a basic understanding of *Shari'a* —or Islamic—family law and customs, as well as its vocabulary, is necessary.

Basic Primer on Islamic Law as it Relates to Family Law Issues

Shari'a:

The term "*Shari'a* ," which is commonly used to refer to "Islamic law," has been defined as "the highway of good life."[2] Although *Shari'a*, according to believers, is the product of divine revelation,[3] it has also, undoubtedly, been shaped by hundreds of years of legal theory and interpretation.[4] As a result, *Shari'a* family law schools of thought and implementation vary among Islamic countries, and sometimes even within various parts of the same country.[5]

Koran (*Quran)*:

The *Koran* is believed by Muslims everywhere to be the written form of divine revelations made to the Prophet Mohammed.[6]

Sunna & Hadith:

The *sunna* are the practices of the Prophet Mohammed and provide the basis for the *hadith,* which are the traditions and sayings attributed to the Prophet.[7] The *Koran*, the *sunna* and the *hadith* were not committed to writing until well after the death of the Prophet.[8] Thereafter, over the centuries,

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scholars and jurists developed, through a process of analogical deduction, consensus of the jurists, and other juristic devices, based upon the *Koran* the *sunna* and the *hadith*, a body of laws that are now referred to as "*Shari'a,"* Islamic law.[9] Four schools of law developed among the Sunnis,[10] and two main schools developed among the Shi'as.[11] Varying support for these schools of law among the Muslim world has led to differences in the substance of *Shari'a* family law among Muslim countries.[12] (A comprehensive analysis of the differences in theology and practice among the schools is beyond the scope of this article.)

Marriage & Divorce Rights & Rites Under Islamic Laws

Shari'a family law, as compared to current modern Western family laws, is not egalitarian. For example, *Shari'a* allows a man to divorce a woman unilaterally and without cause, while a woman may only divorce a man if he is recalcitrant, or under other very limited circumstances. If a woman cannot show a valid legal right to divorce her husband, she may still be able to divorce him (subject to the decision of the *Shari'a* court), but she will most likely forfeit her contractual dower rights, which often constitute the sole means for her post-divorce survival.

As another example, *Shari'a* almost always grants physical custody of children to the mother until the boy reaches age 7 (in some countries even as young as 2), and until the girl reaches age 9 or 11 [or puberty]; thereafter, the father or the father's family, if the father is not available, in most jurisdictions, **not** the mother or the mother's family, is granted physical custody of the child — see discussion on *hadana* below). Furthermore, a mother may also lose physical custody of her children if she remarries, even if she does so legally after she obtained a valid religious divorce.

With certain limitations, *Shari'a* allows polygamy, but never polyandry.[13] However, many countries utilizing *Shari'a* family law allow a woman to offset some--but certainly not all in most circumstances--of these default inequalities by contractually setting out her rights in the marriage contract (*nikah)* signed by the parties before the marriage.

Marriage under Islamic law is a contractual relationship bolstered by certain rights and obligations inherent in *Shari'a*. A valid Islamic marriage is a contract (*nikah*), effected by an offer, usually from the woman or her guardian (often her father or brother), and an acceptance by the man.[14] No imam is necessary to conduct the marriage ceremony; usually two adult witnesses, and in some cases just "publicizing" the marriage is sufficient to render the marriage valid if all other provisions of Islamic law are effectuated.

Generally, the man accepts, agrees to, and pays a dower (called "*mahr*" or "*saddaq'*"). When a marriage contract is completed, the "woman comes under her husband's . . . authority, control and protection."[15] "[T]he *Shari'a* conception of marriage (is) dominated by two presuppositions: Women render their sexual favours; and in return they gain the right to maintenance."[16] Each party to the marriage has certain rights and obligations under *Shari'a*.[17] However, some of these rights and obligations are defined differently in various Islamic countries, and it is these rights and obligations that may be augmented or abrogated, to a certain degree in the marriage contract itself (depending on the provisions of the law in that particular country).[18] For example, in many of the Islamic countries, a Wife may insert into the marriage contract the reasons for which she may be entitled to divorce (even without the husband's consent). In contrast, and most importantly, however, the marriage contract may not alter Husband's unfettered right to divorce his Wife, without cause, as that right is deemed to be unalterably granted to Husband by *Shari'a*.

Under *Shari'a*, divorce is accomplished by the husband pronouncing, the word *talaq* (I repudiate you*)* three times. Authorities and countries differ on how and when this may be accomplished, and procedures differ from country to country or even from region to region within that country. Generally, however, under *Shari'a* a Husband must pronounce the word *talaq* at a time when his

Wife is not menstruating, and then successively do so twice more, during each of the periods following the cessation of the Wife's menstrual cycle. In the alternative, in some jurisdictions, Husband may pronounce *talaq* three times in succession on the same occasion, provided it is done at a time during which Wife is not menstruating. Thereafter, Wife is in an *'idda,* or waiting period, for three months, during which time she is forbidden to remarry. This *'idda* period is also significant for the Wife, because the Husband is required to continue to give maintenance to Wife during the *'idda* period, but not thereafter.[19]

(There is no such thing as long-term or lifetime maintenance, alimony or spousal support under *Shari'a.* That is one reason why the amount of *mahr* the wife receives upon divorce is such an important part of the marriage contract – the amount of *mahr,* in many cases, is all the wife may have to survive on if the husband divorces her).[20]

The important thing to remember about *talaq* is that Husband needs absolutely no reason to divorce his wife. He must simply accomplish the means by which that is done as is dictated by the specific Islamic jurisdiction or country in which he seeks to accomplish this.

In contrast, other means by which the parties may dissolve their marriage are usually initiated or requested by women. *Khul* (or *mubarat*), (divorce accomplished with the agreement of the husband) wherein the wife may initiate the divorce, but, the price for such ability to divorce is that the wife usually gives up her right to all or part of the *mahr* provided for in her marriage contract, or she gives some other compensation to the husband to allow her to be divorced from him.

Tatliq (or *tafriq*) is a means by which the courts may grant a divorce to a woman on specified grounds, even if the husband does not consent to the divorce. In most Islamic countries, the marriage contract itself may stipulate specific reasons whereby a woman is entitled to request and be granted an unconditional divorce without giving up her *mahr.* These grounds for allowing the wife to obtain an unconditional divorce are set forth in the *nikah* agreement, and may include a whole host of reasons, such as husband marrying a second wife, husband prohibiting her from working, or some other specified grounds. However, these grounds must also be proven in the *Shari'a* court, and the right to such a divorce is subject to the decision of the *Shari'a* judges).[21] The wife may specify in her *nikah* agreement that she can request and be granted a divorce without grounds, just as a man can, without forfeiting her *mahr.*[22] Under very limited circumstances, even where the *nikah* agreement doesn't set forth grounds for the wife to divorce her husband, wife may still use *tatliq* or *tafriq* where the husband is guilty of acts forbidden by *Shari'a*, as a means to obtain a judicial divorce from her husband without his consent and still be entitled to her *mahr* rights.

The marriage contract usually provides for a stipulated amount of dower (*mahr)* which is payable by the husband to the wife. Generally, (although this varies by custom) a small portion of the *mahr* is payable upon signing of the agreement, and a much larger, "deferred portion" is payable upon divorce or death of the husband. (Parties can also stipulate that the deferred portion is payable at any time upon Wife's demand, although it is rarely demanded in an intact marriage).

In many of the Islamic marriages taking place in the U.S., it has become customary to have only a "token" *mahr* inserted into the marriage contract. This is especially true in Islamic marriages where the parties and their families have become more "Americanized," or "Westernized." This "token" *mahr* may also have been influenced by American jurisprudence, which appears loathe to enforce *nikah* agreements that appear to be unjust. Thus, *nikah* agreements in North America are often looked upon more as a "religious" rather than a "contractual" agreement, with the *mahr* being characterized as a "token of affection" shown by the groom toward the bride. This is not necessarily universal even in the U.S., nevertheless, family law attorneys faced with *nikah* agreements in divorce situations should be willing to explore the customs of the married couple, their

family, and their community to determine whether the minimal amount of *mahr* was really intended by the parties to be the sole amount the wife would be entitled to receive upon divorce, or whether it was to be merely a religious symbol or other token of the marriage under Islamic law and custom.

In most Islamic countries, the wife's entitlement to marital property is limited to the *mahr* that is provided for her in the marriage contract. (She is also entitled to the assets that are in her name, and her own earnings during marriage that still remain upon divorce). All assets acquired in the husband's name and all earnings of the husband are generally deemed to belong solely to the Husband.[23] The *nikah* not only specifies the amount of money to be paid to wife in case of divorce, the agreement, if silent, also presupposes the application of *Shari'a* to prevent wife from claiming any property acquired during the marriage with husband's efforts, or property in his name. In many cases, the only asset to which the wife may lay claim upon divorce is the amount of the deferred *mahr*.

In many instances, the amount of the *mahr* is a source of pride and bragging rights. For example, many men will stipulate to a much larger amount of *mahr* than what they can possibly afford at the time of the marriage (or that they ever hope to acquire in the future). That is because they simply want to show off to the bride's family, to friends and to neighbors, how much they're willing to, and by implication, how much they are able to afford to pay; and they simply assume they will never have to pay it. In turn, the bride's family may also attempt to obtain a commitment of very high *mahr* amount so that they can brag to friends how much money their daughter was valued in the marriage. (It should be remembered that husbands do not receive any *mahr* or other dowry under an Islamic marriage contract).

Mut'a (Temporary Marriage)

Recognized only in the *Shi'a* sect of Islam, *Mut'a* (which in Arabic means "pleasure") is a "marriage contract with a defined duration which can be from some minutes to 99 years. It legitimates the sexual union as well as the children born into it."[24] The temporary marriage contract must have a definite period and a definite payment of *mahr.* This type of contract does not entitle the husband to have the type of control over the wife that he would be entitled to have under a regular marriage (ie. He does not have the right to prevent her from working, or prohibiting her from obtaining a specific type of employment), and by the same token, the temporary wife is not entitled to maintenance. There is no divorce of a temporary marriage — it simply expires by its terms, or the husband can "gift" to the temporary wife the balance of the time that he has, in effect purchased, but the wife has no such option. While the man can enter simultaneously into as many *mut'a* marriages as he wants, a woman can only do so one at a time, and cannot contract another one until the expiration of the *'idda* of two menstruation periods following the end of the *mut'a* period.[25] Children of a *mut'a* marriage are considered legitimate and are entitled to support. *Mut'a* marriages are not permitted in any other sect of Islam, other than Shi'a.

Custody Rights Under Islamic Law:

The Doctrine of *Hadana* governs "physical child custody" rights under Islamic law. The law of the particular Islamic country varies with respect to the age of the child where physical custody is automatically granted to the father. Under *Shari'a* generally: The child of a father is recognized only if the parties were married (whether a full legal marriage, or a *mut'a*, a temporary marriage).[26] A child born out of wedlock or of an incestuous relationship is not deemed to be the child of the father, and would thus have no obligation to support, and no legal or custodial rights to the child.

With respect to children from a legitimate marriage or from a temporary marriage, the doctrine of *Hadana* provides, essentially:

1. The mother is entitled to "physical" custody of her male child up to the age of seven (in some countries it is a lower age, even as low as post-nursing age, or the age of 2), and of her female

child up to the age of puberty (in some countries it is a specific age of 9 or 11).[27] If the father is unfit for physical custody once the child reaches the requisite age, the child's paternal male relatives, and not the mother, are given custody, although this, too, varies from country to country.

2. The mother's right to *hadana* is also subject to the control of the father who is the child's natural guardian – in other words, the father has sole "legal" custodial rights, known as *wilaya* and has the sole power to determine, for example, whether the child obtains a passport, the course and place of his education, etc. If the father is not available or is incompetent to exercise such legal custodial rights, it is often the father's family will have sole legal guardianship or sole legal custodianship of the child, although this, too, varies by country.

A mother can lose custody before the child reaches the requisite age if she is an "apostate," i.e. wicked or untrustworthy. A mother can also lose custody before the child reaches the requisite age if she cannot promote the child's religious or secular interests.[28] **Most significantly, a mother can also lose custody of the children if she remarries someone not from the father's family.**

Enforcement of a *Nikah* Agreement

In North American family law cases, the conflicts often arise regarding entitlement and interpretations of the deferred *mahr* in the *nikah* agreements. When *nikah* agreements have been enforced in American or Canadian courts, they were done by analyzing the *nikah* agreement as a contractual document rather than a "religious" document, and they may also be given validity as a "premarital agreement", subject to the same requirements and analyses as civil prenuptial (premarital) agreements.

In a case involving a lengthy marriage, it is the husband who is likely to seek enforcement of the *nikah* when the amount of the *mahr* is likely to cost him a lot less than giving the wife her share of assets acquired during the marriage, and to which she would be entitled under the civil law of that state. In such cases, the husband will seek to invoke the law of the Islamic country where the agreement was signed, or the *Shari'a* laws of the particular Islamic school under which they were married.

In contrast, in a case involving a short marriage, or where the deferred *mahr* amount is likely to be far greater than the assets acquired during marriage, it is the wife who will seek enforcement of the *nikah.* Often, the wife may even claim that her rights to the *mahr* are not exclusive, and that she may, in addition to the *mahr*, be also entitled to her share of marital assets under civil law.

In either case, the outcome may often involve huge sums of money. However, even a "token" *mahr* that is customarily part of a U.S. *nikah* agreement can present a problem. While such a token *mahr* may well be unenforceable in a U.S. court which may dismiss the agreement as merely "religious" and thus "unenforceable," that may not be the case if the parties migrate, or return, to an Islamic country where the divorce court in that country may well enforce the "token" *mahr* and leave the wife without resources or her fair share of other marital property.

Family law cases in the U.S. and in Canada appear to have ruled upon validity and enforceability of *nikah* agreements, and entitlement of the *mahr* using several legal analyses.[29]

In cases where the *nikah* agreement met the requirements of that particular state's Prenuptial Agreement laws, the *mahr* was enforced. For example, in *Odatalla v. Odatalla*,[30] a *mahr* of $10,000 in an Islamic Marital Agreement was sought to be enforced by the wife; the court upheld the agreement on **neutral principles of law**, not on religious policy or theories, and the *nikah* was held to be an enforceable agreement. Of course, the fact that the negotiations for the specific amount of *mahr* were videotaped and the agreement was shown to have been freely & voluntarily executed was a key factor in the court's decision, finding that there was no need to resort to religious interpretations of the contract.

Similarly, in *Akileh v. Elchahal* [31], a *sadaq* of $50,000 in an Islamic marriage contract was determined to be a valid prenuptial agreement based upon **neutral principles of law,** without having to resort to interpretations of *Shari'a* or other religious law.

And, in the Canadian province of British Columbia, in the case of *Nathoo v. Nathoo*[32], a *mahr* of $20,000 was held enforceable **on neutral principles of law**. The court found that the parties discussed the amount and negotiated with each other in reaching the terms. The court held: "Our law continues to evolve in a manner which acknowledges cultural diversity. Attempts are made to be respectful of traditions which define various groups who live in a multi-cultural community."[33] Additional factors, interestingly, included the court's finding that the *mahr* agreement did not oust the provisions of applicable civil family law with respect to the wife's entitlement to property.

The *Nathoo* case provides an insight into the types of *nikah* agreements and *mahr* provisions that are more likely to be enforced. Those *nikah* agreements that provide for the *mahr* amount to be the Wife's sole remedy upon divorce, coupled with the apparent inadequacy of the *mahr* amount (compared to the civil property and support rights to which she would ordinarily be entitled in the absence of such an agreement), have generally fared very poorly. These types of *nikah* agreements, which envision *mahr* to be the sole remedy upon divorce, will be interpreted under premarital laws in effect for that state or province.

For example, *Khan v. Khan*[34] involved a one-year marriage, with a *nikah* agreement signed in Pakistan, whereby Wife waived her right to support upon divorce. Husband claimed the arranged marriage was in order to effect a sponsorship of the wife to Canada. The Court held that the *nikah* was unconscionable, that Wife did not understand the terms and import of the contract, she had had no independent legal advice, husband took advantage of a significant disparity of bargaining power, and the consequences were unconscionable because the Wife was entirely dependent on husband while she was in Canada. The court found that the terms of the contract were too vague to be sure that support was in fact waived. (The court also held that the signing of the "sponsorship agreement" by the Husband had the effect of undoing any support waiver).[35]

Neutral principles of law have also been used to invalidate *nikah* agreements. For example, in *Habibi-Fahnrich v. Fahnrich*[36], an Islamic marriage agreement providing for "a ring advanced and half of husband's possessions postponed" was deemed unenforceable in New York for failure to adhere to Statute of Frauds because a) material terms were not agreed upon, ie. what is "one half," what is "one half interest," and what is the extent of "interest"; b) the contract was not specific, *ie.*, "possession" and definition of "one half of the possessions; c) the term "postponed" is left undefined, and further clarification is left up to the reader to determine; and d) the agreement was insufficient on its face.

Similarly, in *In re Marriage of Dajani* [37], the California court refused to enforce a *mahr* because it contravened public policy of promoting divorce by providing for a set amount to be awarded to the Wife in the event of a divorce.[38] In other words, the *Dajani* court interpreted the *nikah* agreement under neutral principles of prenuptial agreement law that was in existence in California at the time the case was decided.

In cases where the courts would have had to resort to interpretations of *Shari'a* to determine the meaning of the agreement, courts were much less likely to enforce the agreement. For example, in *Shaban v. Shaban*[39], the marital agreement was executed in Egypt, and it barred the wife from obtaining anything upon divorce other than *mahr*. The agreement provided that "The above legal marriage has been concluded in Accordance with his Almighty God's Holy Book and the Rules of his Prophet to whom all God's prayers and blessings be, by legal offer and acceptance from the two contracting parties." The California court held that even if the language might have indirectly

indicated a desire for the marriage to be governed by the rules of the Islamic religion, it simply bore too attenuated a relationship to any actual terms or conditions of a prenuptial agreement to satisfy the statute of frauds, and was held to be unenforceable as a premarital agreement.

It is important to note that in many states, if the *nikah* agreement is to be analogized and is sought to be enforced as a "premarital" or a "prenuptial" agreement, particular requirements of that state's premarital agreement laws must be adhered to in order to make it enforceable. Such requirements may include, by statute, full disclosure of all assets and liability, access to legal advice, a specific "waiting period" between the time the contract is presented and it is signed, etc.[40]

Although the reading of these cases make it difficult to generalize, it appears that where the conscience of the court is not offended by the terms of the agreement (or in contrast, where the conscience of the court is so shocked by the terms of the *mahr* as to make it difficult to enforce), courts have resorted to using "neutral principles of contract law" to interpret and validate (or invalidate, as the case may be) these religious marriage contracts. If the agreement met the requirements of Statute of Frauds, and if parol evidence may be used to interpret, but not to alter the agreement, it will generally be deemed irrelevant whether such agreement was entered into as a "religious contract." The cases reveal that courts have paid a lot of attention to the circumstances under which the agreement was negotiated and signed.

Conflicts Between Islamic And North American Marriage/Divorce Laws

Numerous other issues arise in family law cases where the Islamic parties contracted marriages in Islamic countries, or contracted marriages in Western countries but only in accordance with *Shari'a* without civil solemnization.

For example, where the parties enter into a religious marriage in a Western country but do not solemnize it in accordance with the laws of the Western country, such marriages will generally be deemed void. To understand the difference between Islamic marriages and Western countries' civil marriages: most Western countries deem marriage to be a creature of statute and thus permission must be obtained from the state and compliance with the solemnization laws must be strictly adhered to. In contrast, Islamic marriages are a product of contractual agreements between the parties (or their families), and even though certain *Shari'a* laws and procedure must be followed, the Islamic marriage is not a creature of statute, it is a creature of contract. This is true, even if, as is the case in some Islamic countries, registration of the marriage is mandatory. Even in those countries where registration of marriage is mandatory, failure to officially register does not render the relationship adulterous, nor does it de-legitimize the children, it may only deprive the parties of benefiting by some of the legal rights the country affords validly registered marriages.

Rights and obligations of marriage are accorded by Western countries only to those who abide by and conform to the specific marital ceremonies prescribed by the states or the countries in which they resided at the time of marriage.[41] Therefore, the results reached in a case such as *Farah v. Farah*[42], are not surprising. In *Farah* the Pakistani Muslim couple signed a proxy *nikah* agreement in London, England, that provided for a $20,000 *mahr*, but neither party was present during the proxy ceremony in England. In a divorce case filed a year later, the Virginia (U.S.) court held that the marriage was invalid because English law requires certain formalities for a marriage to be valid, and does not recognize the type of proxy marriage which these parties entered into. Therefore, if the marriage was deemed to be *void ab initio* under English law where the marriage was celebrated, it is not recognized as a valid marriage Virginia. This, despite the fact that under Islamic law in Pakistan, such a proxy *nikah* agreement is perfectly valid. (The Virginia court held, *in dicta,* that if the proxy marriage had occurred in Pakistan where proxy marriages are deemed valid, the Virginia

court would have enforced the *nikah* agreement absent any public policy against its enforcement).

In the case of *Moustafa v. Moustafa*[43], the tables were turned, and the wife was granted annulment in Maryland on the grounds of bigamy. The Maryland court was asked to apply Egyptian law by the husband who claimed that he divorced his first wife, married the second wife, remarried the first wife without obtaining a divorce from the second (without first wife's knowledge), and then renounced his marriage to the first wife in Egypt. Thus, husband asserted that Maryland had no jurisdiction to annul a marriage that no longer existed. Unfortunately for husband, the Maryland court held that the renunciation of the marriage in Egypt was to be given no effect in Maryland as wife had never been notified nor participated in the proceeding in Egypt, and since the Husband did not properly bring before the court any Egyptian law that he claimed allowed him to have more than one wife, Wife was granted the annulment.

One of the most recent cases illustrates the strict scrutiny to which courts subject a party who claims divorce or marriage rights pursuant to laws of other countries (at least where religious issues intersect with the secular laws of the state). In *Aleem v. Aleem*[44] wife filed for divorce in Maryland and while the case was pending, husband rushed to the Pakistani Embassy & performed *talaq*. Husband then claimed in the civil court of Maryland that since he had already divorced his wife under Pakistani law, Wife was entitled solely to her *mahr* of $2,500 that the Pakistani courts allow her, and not her half of the jointly acquired assets which amounted to approximately $2 million. The Maryland Court found that *talaq* lacks any significant "due process for the wife" and the lack and deprivation of due process is contrary to Maryland's public policy; thus *talaq* was denied any comity, and wife was entitled to proceed with her divorce in accordance with Maryland civil law.

Custody Issues in Islamic Marriage Cases

Custody cases involving Islamic parties prior to the enactment and the adoption by most of the states in the U.S. of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) were generally decided based upon a determination of whether the foreign Islamic court merely rubber-stamped the *Shari'a* law (*hadana)* and granted father custody of children over a specific age, or whether the Islamic court also engaged in a "balancing test" of what was in the best interest of the child.

For example, in *Ali v. Ali* [45], the *Shari'a* court in Gaza granted a divorce and custody of the child to father who had returned to Gaza with the child after having lived in New Jersey with the mother for two years (mother remained in New Jersey). The New Jersey court not only held that the child's "home state" was New Jersey, but also held that the *Shari'a* court's decision was arbitrary, capricious and not sanctioned by the court as being in the best interest of the child. The New Jersey court appeared to be offended by the fact that under *Shari'a* law, the father is automatically and irrebuttably entitled to custody when a boy is seven years old, without examining whether such custodial award is in the best interests of the child.

For a long time, the seminal case of *Hosain v. Malik*[46], was the leading case cited by many courts in ruling upon the issue of enforcing a custody order issued by an Islamic court. In *Hosain v. Malik*, both parties were citizens of Pakistan. After the marriage dissolved in Pakistan, father sued for custody of their daughter, and mother fled to the U.S. with the child (she had a student visa) where she moved in with a man and conceived another child — she hid from the father for 2 years. Mother was represented by counsel in the Pakistani custody proceeding but she refused to appear in person and refused to obey the Pakistani judge's order that the child be produced; the father was awarded custody by the Pakistani court. Thereafter, the father sought enforcement in Maryland of the Pakistani order granting him custody, while mother filed a complaint in Maryland requesting custody and a restraining order against the father. Islamic experts on both sides testified that the Pakistani court was required to consider the welfare of the child, but the experts

disagreed about whether the court applied the best interests test or if it based its decision solely on *hadana (*referred to as *hazanit* in the opinion, although it is more accurately called *hadana).* The appellate court agreed that the Pakistani custody decree, granting father custody, should be enforced, because it found that the Pakistani court considered the "child's best interest" as well as *hazanit* (*hadana*)[47] when it made the custody determination. More importantly, the appellate court also held that the trial court could properly determine the best interest of the child "by applying relevant Pakistani customs, culture & mores."[48] The court went on to acknowledge that *hadana* was similar to "the traditional maternal preference" once applicable in Maryland that "are based on very old notions and assumptions (which are widely considered outdated, discriminatory, and outright false in today's modern society)," but that "we are simply unprepared to hold that this longstanding doctrine of one of the world's oldest and largest religions practiced by hundreds of millions of people around the world and in this country, as applied as one factor in the best interest of the child test, is repugnant to Maryland public policy."[49]

It is important to note in this case that the Pakistani court's decision rested on several factors:

1. Mother forcibly removed the child from the father's access (under *hadana* father is always the legal guardian of the child, regardless of the child's age, and regardless of the mother's physical custodial preferences for children under a certain age)
2. Mother lived with another man in adultery and had a child with him (her right under *hadana* to physical custody of children under a certain age was no longer applicable to her)
3. Child was living in a non-Islamic society (this, too, is one of the factors in which *hadana* will be forfeited by the mother)
4. Father *was* living in an Islamic society (this coupled with the other three factors above, rendered father eligible to have custodial rights of the children even though they may be under the age under which *hadana* grants custody to the mother)

Although the Mother argued that the Pakistani court penalized her for not appearing at the custody hearing, and that if she had appeared, she would have been arrested and severely punished for adultery, the Maryland court held that there was nothing repugnant or even foreign for a court considering adultery or failure to appear in court as factors in determining the best interest of the child. The important factor in the court's decision was that the mother had an opportunity to be heard, and that she decided not to take it.

In *Amin v. Bakhaty*[50]**,** the parties married in Egypt. The father, was also a citizen of the United States, and spent the majority of his time in New Jersey tending to his anesthesiology practice. He would visit Egypt at most six times a year for a week to ten days at a time, but he did not stay with his wife or their child while he was in Egypt. When the mother traveled to United States with their son and searched for an apartment in Louisiana near her family where they (mother, son, and father) would reside, the father brought criminal charges against the mother in Egypt for removing the minor child from the country without his permission, and for fraud in her procurement of son's Egyptian passport which she obtained without his consent. (Note that, under the doctrine of *wilaya,* father has the right to sole legal guardianship of a child, and he has the sole right to determine where the child is educated, whether and when he obtains a passport, etc.) Mother was convicted in Egypt, *in absentia,* and sentenced to serve three years' imprisonment, while Father received sole custody of the son after a *talaq* divorce in Egypt. (Note that this case was determined under the UCCJA[51], before the UCCJEA[52] was enacted). The trial court in Louisiana found that it had jurisdiction to determine custody and support for the child, it declined to recognize Egypt as the child's "home state" under the UCCJA, and granted interim custody to mother and ordered father to pay $850/month in child support. The appellate court

affirmed, finding that the lower court's holding that Egypt was not a "state" under the UJJCA was a discretionary one and not erroneous. It also held that the Egyptian law that mandates both temporary guardianship and physical custody of the child to be exclusively with the father does not abide by the "best interest of the child" standard, and thus the Egyptian court's decision on custody was not binding on Louisiana. (It is quite possible that a reverse decision would have been made under the new UCCJEA—see discussion below).

With the adoption of the new UCCJEA in the latter part of the 1990's and early 2000's in almost every state[53] in the United States, the picture for enforcement of custody orders from foreign countries, especially Islamic countries, changed drastically. It should be noted, first and foremost, that **almost none** of the Islamic countries are signatories to The Hague Convention on the Civil Aspects of International Child Abduction. Thus, Islamic countries are not bound to enforce a U.S. custody order. Nevertheless, a UCCJEA provision adopted by most U.S. states provides:

> (a) A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying this chapter and Chapter 2 (commencing with Section 3421).
> (b) Except as otherwise provided in subdivision (c), a *child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this part must be recognized and enforced* under Chapter 3 (commencing with Section 3441).
> (c) A court of this state need not apply this part if the child custody law of a foreign country violates fundamental principles of human rights.[54]

(Emphasis added).

Thus, this provision of the UCCJEA now mandates that child custody determinations made in a foreign country (regardless of whether such foreign country is a signatory to the Hague Convention) are to be recognized much the same as those of a sister state, **unless** the child custody law of a foreign country violates fundamental principles of human rights. No case has yet made a determination whether application of *hadana* violates "fundamental principles of human rights."

Nevertheless, *Tostado v. Tostado*[55] illustrates the application of this section of the UCCJEA. The trial court in *Tostado* was asked to enforce a Mexican court's custody order. The court held that the Mexican custody order is presumed to be correct, and the party contesting the order has the burden of proving that it violates human rights principles. The court explained that with the 2001 amendment of the UCCJEA in Washington State, courts could no longer consider the substantive laws of a foreign country when deciding whether to enforce a foreign custody decree or assume jurisdiction to make its own initial determination. The court held that this recodification of the UCCJEA removed the "best interest of the child" language because it "tended to create confusion between the jurisdictional issue and the substantive custody determination."[56]

Religious Courts as Arbitrators in Divorce/Custody Cases

In many of the states in the U.S., arbitrators can make binding decisions on issues relating to property division and spousal support. Arbitrators, however, are generally prohibited from making binding decisions on custody and child support[57] issues, as these remain solely within the purview of the courts and their jurisdiction over these issues cannot be taken away from them. Arbitrators in most U.S. states do not have to be attorneys or retired judges — anyone, without any specific qualifications, can act as an arbitrator. Of course, religious courts have always been used by religious parties to arbitrate or rule upon religious divorce issues, to wit, determine whether, and under what circumstances a wife may religiously divorce her husband, the proper procedure to be used by the husband to divorce his wife, etc.

However, it has become customary in the U.S. and in several Canadian provinces[58] to also use

religious courts to resolve property disputes, spousal support/alimony, and even custody issues, by empowering these religious courts to act as "binding arbitrators."

The use of Islamic religious courts as arbitrators to resolve property, support and custody cases has become a virtual cottage industry. The difficulty with religious courts acting as binding arbitrators is that, first, with rare exceptions, religious court arbitrators are not attorneys, and are often unfamiliar with the state's or province's laws on divorce, property, support and custody issues; *Shari'a* courts tend to rule in accordance with Islamic law, which is likely to give deference to the *nikah* agreement and to *Shari'a* family law rather than to civil law; and with the exception of issues relating to custody and child support, binding arbitration by a *Shari'a* court (indeed from all arbitrations except on custody and child support issues) will preclude appeal from the *Shari'a* court's decision or a trial *de novo*. This will often mean that women are likely to lose much of their civil family law rights in an Islamic court, as *Shari'a* is disparate in its treatment of women relative to divorce issues. Islamic family courts are also likely to give great weight to a man's testimony and much less so to the woman's, because *Shari'a* gives a woman's testimony half the weight of a man's (or two women's testimony equals that of a man).[59]

Additionally, even in states in which no-fault divorce mandates equal division of marital property, the Islamic court will consider "fault" in determining property and support rights for the woman; this, of course, inures to the detriment of the woman, as a man has unfettered power, under Islamic law, to divorce his wife, even if she doesn't merit it, while a woman must prove serious fault in the man to enable her to divorce him and still be entitled to retain her *mahr*. Finally, if the marriage is of long duration and the *nikah* agreement provides for a much lesser *mahr* than one half the marital property, the wife is likely to receive nothing but her *mahr*; more importantly, she likely will not receive any support after her *'idda* of three months following the divorce.

In sum, submitting to an Islamic court for binding arbitration of property division and spousal support (alimony) is, in most cases, dangerous for the woman, and could subject her attorney to claims of malpractice. Interestingly, in the Canadian provinces of Ontario and Quebec, religious court arbitrations of family law matters have been either entirely forbidden or substantially curtailed so as to prohibit application of religious law to family law matters.[60] Precisely for the reasons set forth above, those Canadian provinces concluded, after much research and public comment, that Islamic women have been increasingly pressured by imams and their Islamic communities to submit to religious court arbitration of their family law issues. These women have been warned by their religious leaders that submission to the religion mandates that all conflicts, including divorce, property, support, and custody issues, remain within the purview of the Islamic court, not the civil court.

Nevertheless, it should be remembered that under Islamic law, a woman is not deemed to be divorced until either her husband properly pronounces *talaq* three times in the manner specifically set forth in the particular tradition of the Islamic court or jurisdiction which the parties follow, or the Islamic court issues a religious divorce to the woman, whether by *khula* or by *tafriq*.

Even if a civil divorce has been granted to the parties, unless there is a religious divorce accomplished as required under *Shari'a*, the parties are deemed not to be divorced in some Muslim jurisdictions.[61] In those jurisdictions requiring a Muslim divorce as well, if a woman remarries after having received only her civil divorce but she has not been religiously divorced, she may be deemed to an adulteress with grave consequences to her in her native Islamic country, or perhaps another Islamic country she may visit. (As has been widely publicized, in some Islamic countries an "adulteress" is still subject to lashes, stoning, loss of custody of her children, or other means of severe punishment. Adultery is not only considered an extremely serious crime under *Shari'a* but in many Islamic cultures, it is grounds

for honor-killing of the adulteress to reclaim the family's honor). This issue, therefore, should not be easily dismissed.

Warning to Practicing Family Law Attorneys

Because Islamic family law varies in interpretation and application of *Shari'a* family law from one Islamic country to another (or even from one region in a country to another), in any case involving Islamic marriages, divorces, *nikah* agreements, and/or custody issues, it is imperative that a legal expert **from the particular country** whence the parties hail, or to which either of them wish to return, be retained to explain to the civil Western courts precisely what family laws operate in that particular Islamic country, and how the rights of each party and the children are likely to be affected by those laws.

[1] First Amendment to the U.S. Constitution, which provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"; Canadian Charter of Rights and Freedoms states that certain freedom are guaranteed and are subject "only to such reasonable limits that prescribed by law as can be demonstrably justified in a free and democratic society (among which freedoms are "freedom of conscience and religion," but are subject to legislative amendments of the provinces.

[2] FAZLUR RAHMAN, ISLAM 117 (Anchor Books 1968).

[3] *See, e.g.*, Javaid Rehman, *The Sharia, Islamic Family Laws And International Human Rights Law: Examining The Theory And Practice Of Polygamy And Talaq*, 21 INT'L J.L. POL'Y & FAM. 108, 110 (2007) ("Islamic family laws derive from two fundamental sources of the Sharia: the Quran and the Sunna. . . . According to the Islamic faith, every word of the Holy Quran is divine and cannot be challenged.").

[4] *E.g., id.* at 109-112 ("[I]t is important to comprehend the metamorphosis, growth and contextualization of the Sharia. The labyrinth of religious, ethical and moral raw materials . . . were given shape and direction by Islamic scholars and jurists . . .").

[5] *E.g., id.* at 118-19 (discussing divergence of *Shari'a* family law in, *inter alia*, Iran, Pakistan, and Egypt); *see also* Kristen Cherry, *Marriage And Divorce Law In Pakistan And Iran: The Problem Of Recognition*, 9 TULSA J. COMP. & INT'L L. 319, 320 (Fall 2001) ("Essential to understanding the marital laws of Pakistan and Iran is to understand that while both are Islamic law countries, they each adhere to different sects of Islam; thus, explaining some key differences in their laws.").

[6] *E.g.,* RAHMAN, *supra* note 2, at 110.

[7] *E.g., id.* at 111.

[8] *E.g., id.* at 110 ("While meticulously noted down, and revealed in stages during the lifetime of the Prophet, the Quran was produced as an authentic text only during the currency of the third Caliph Hazrat Uthman [internal citations]."); *id.* at 111 ("The Sunna of Muhammad therefore is preserved and communicated to the succeeding generations through the means of hadiths. While the Quran was recorded within a relatively short time, the recording of the Sunna took a much longer period.") (internal citations omitted).

[9] *E.g., id.* at 111-12 ("In understanding Islamic family laws it is important to comprehend the metamorphosis, growth and contextualization of the Sharia. The labyrinth of religious, ethical and moral raw materials derived from the two principal sources, Quran and Sunna, were given shape and direction by Islamic scholars and jurists during the second and third centuries of the Muslim calendar.").

[10] *E.g., id.* at 112 ("The codification of the Sharia within Sunni Islam was principally the work of four jurists . . . ."); the main Sunni Schools are Hanafi, Maliki (these being the most widespread), Shafi'i and Hanbali (which is limited to Wahhabi interpretations in Arabia). *Islamic Famly law in a Changing World—A global Resource Book*, Edited by Abdullahi A An-Na'im, Zed Books Ltd Publishers, at pgs. 5-6.

[11] Imami or Ithna'Ahsari school in Iran Iraq & Lebanon, and the Zaydi in Yemen—*Marriage on Trial,* Ziba Mir-Hosseini, at pg. 6.

[12] See, e.g. Kristen Cherry, *Marriage And Divorce Law*

In Pakistan And Iran: The Problem Of Recognition, 9 TULSA J. COMP. & INT'L L. 319, 320 (Fall 2001)note 5, at 320 ("Essential to understanding the marital laws of Pakistan and Iran is to understand that while both are Islamic law countries, they each adhere to different sects of Islam; thus, explaining some key differences in their laws.").

[13] Even the cost of obtaining an Islamic divorce is disparate. For example, the Islamic Shari'a Council in London charges men £100 for a *talaq* dissolution, while it charges women £250 for a *khula* dissolution. (Of course, the ostensible large disparity may be explained by the differing procedures — men can automatically, without the wife's consent, pronounce *talaq, talaq, talaq,* and they are divorced, while the wife's seeking a *khula* dissolution involves several summonses, mediation requirements, etc. (See attached Exhibit "A" — Application forms for a *talaq* dissolution, and a *khula* dissolution).

[14] DAVID PEARL, A TEXTBOOK ON MUSLIM PERSONAL LAW, §3.1.1 (2d ed., Routledge 1987).

[15] Ziba Mir-Hosseini, *The Construction Of Gender In Islamic Legal Thought And Strategies For Reform*, Prepared for Sisters in Islam Regional Workshop, 'Islamic Family Law and Justice for Muslim Women,' Kuala Lumpur, Malaysia (June 8-10, 2001), at page 7.

[16] ZIBA MIR-HOSSEINI, MARRIAGE ON TRIAL: ISLAMIC FAMILY LAW IN IRAN AND MOROCCO 36 (I.B.Tauris, 2d ed. 2000).

[17] *See, e.g.,* MARRIAGE ON TRIAL, *supra* note 16, at 34-36.

[18] *Id.*

[19] *'idda* is a waiting period of three menstrual cycles following a divorce, during which time wife is not permitted to remarry — that was to assure that if she is pregnant, parentage of the child is known to be that of the man from whom she was divorced, rather than that of her new husband. *Marriage on Trial*, *id* at 37.

[20] In some Islamic countries, such as Jordan, Malaysia, Syria and Iran, courts may order alimony for a year or two as compensation to the innocent wife; and Iranian courts may order compensation to the wife for household work she performed during marriage because under *Shi'a*—and even some *Sunni*—schools, a wife has no obligation to perform household tasks during marriage, and thus, having done so voluntarily, she may be compensated for same by the court.

[21] MARRIAGE ON TRIAL, *supra* note 16.

[22] In reality, however, few Muslim women have the financial and emotional power to obtain such a concession in the *nikah* agreement, ad many Muslim women are unaware that they have the right to demand such a provision in their *nikah* agreement.

[23] Wife's right to work during the marriage is limited, in most Islamic countries, by *Shari'a* law that prevents her from doing so if Husband prohibits her, or limits the type of employment she may undertake, at the sole discretion of the husband.

[24] MARRIAGE ON TRIAL, *supra* note 16, at 164-165.

[25] MARRIAGE ON TRIAL, *supra* note 16, at 165.

[26] Certain exceptions may prevail but are of no significance in terms of this article, and will not be discussed.

[27] However, under the Shafi'i school, once the children reach puberty, the court may either ask the children to decide which parent should have physical custody, or the court may decide under a "best interest of the child" test. Egypt, for example, codified this Shafi'i opinion in its 2005 family statutes relating to child custody.

[28] Source: *Hosain v. Malik*, 108 Md. App. 284 (1996).

[29] Readers outside the U.S. should note that there are no federal marriage/divorce/custody laws in the U.S. Each of the 50 states has its own marital laws and family law jurisprudence. While certain laws may have been commonly adopted by most states, such as the UCCJEA (Uniform Child Custody Jurisdiction & Enforcement Act), even the interpretation of such laws may differ from state to state. The Uniform Premarital Agreement Act, for example, has been adopted by some but not all states. And even some states that have adopted it, have amended or deleted some of its provisions. Thus, when looking to one state's courts to determine validity and enforceability of a *nikah* agreement, only analogies, not hard and fast rules, may be drawn from another state's court's interpretation; an identical *nikah* agreement may be enforced in one state and given no civil validity in another. The same may be said for Canada. Each province has its own family laws, and interpretations of identical *nikah* agreements may vastly differ between them.

[30] *Odatalla v. Odatalla* 355 N.J. Super. 305 (NJ 2002).

[31] *Akileh v. Elchahal* 666 So.2d 246 (Fl. 1996).

[32] *Nathoo v. Nathoo*, 1996 CanLII 2705 (Can. B.C. S.C.).

[33] *Id.*

[34] *Khan v. Khan*, [2005] O.J. No. 1923 (Can. Ont. Ct. Just.) (QL).

[35] These cases should be read with caution, as they are not only fact specific, but also province- or state-specific. Certain states and provinces take a more jaundiced view of religious contracts that deprive a party of rights deemed important under civil law. For example, many states and provinces tightly regulate the right to waive alimony/spousal support, because such waivers could drain public coffers. Because a *nikah* agreement presupposes imposition of *Shari'a* family law wherein the wife is not entitled to support beyond the *'idda* period (three months) after divorce, this may run afoul of support rights under civil law. Additionally, some states allow waiver of support in premarital agreements, while other states prohibit them. Thus, interpretation of a *nikah* agreement as waiving support, as well as the sole entitlement to property division, will also have an impact on whether the particular state or province will enforce it. For example, *Avitzur v. Avitzur*, 446 N.E.2d 136 (NY 1983) enforced a *ketubah* (Jewish marriage agreement) mandating that the husband give the wife a *get* (Jewish divorce).

[36] *Habibi-Fahnrich v. Fahnrich*, 1995 WL 507388 (N.Y.Supp., 1995) (New York).

[37] *In re Marriage of Dajani*, 251 Cal.Rptr. 871 (1988).

[38] Query whether the *Dajani* case would meet a different result today, as the California prenuptial agreement law has since been changed.

[39] *Shaban v. Shaban*, 88 Cal. App. 4th 398 (2001).

[40] *See, e.g.*, Cal. Fam. Code §1600-1620.

[41] Even states such as Texas, that recognize "common law marriage" (wherein parties living together for a prescribed time period are deemed married, even without undergoing a marriage ceremony) have prescribed requirements for meeting the standards of "marital status." *See* Tex. Fam. Code Ann. §2.401.

[42] *Farah v. Farah*, 16 Va. App. 329 (1993).

[43] *Moustafa v. Moustafa* 888 A.2d 1230 (Md. 2005).

[44] *Aleem v. Aleem*, 947 A.2d 489 (Md. 2008).

[45] *Ali v. Ali* 279 N.J. Super.154 (NJ 1994).

[46] *Hosain v. Malik* 108 Md. App. 284 (Md. 1996).

[47] *See supra* for definition of *hadana*.

[48] *Hosain v. Malik*, *supra,* at 288.

[49] *Hosain v. Malik*, *supra,* at 318-319.

[50] *Amin v. Bakhaty*, 798 So. 2d 75 (La. 2001).

[51] Uniform Child Custody Jurisdiction Act.

[52] Uniform Child Custody Jurisdiction and Enforcement Act.

[53] Massachusetts and Puerto Rico are the only U.S. States/Territories that have not adopted the new Act.

[54] This is the California statutory adoption of the UCCJEA — *see* Cal. Fam. Code §3405. Most other states which have adopted the UCCJEA have very similar or identical language. Only the New Jersey version of the UCCJEA has a specific exception providing that a foreign country's laws or judgments regarding custody will not be enforced if does not base custody decisions on evaluation of the *best interests of the child*. N.J.S.A. 2A:34-57.

[55] *Tostado v. Tostado*, 137 Wash. App. 136 (2007).

[56] UCCJEA §201 cmt., 9 U.L.A. 672 (1999).

[57] *In re Marriage of Goodarzirad*, 185 Cal.App.3d 1020 (1986); *Armstrong v. Armstrong*, 15 Cal.3d 942 (1976); *In re Marriage of Bereznak & Heminger*, 110 Cal.App.4th 1062 (2003).

[58] See exceptions detailed in the discussion in succeeding paragraphs.

[59] Islamic Shari'a Council, London, England: Surah Al-Baqara 2:282.

[60] Ontario Statute: Family Law Statute Amendment Act 2006 S.O. 2006 (Ontario forbids all arbitrations by religious courts); Quebec Statute: Article 394 of Code of Civil Procedure (Arbitration by Advocates). No arbitrations permitted in family law cases.

[61] The Islamic Shari'a Council in London notes that a civil divorce may be sufficient to deem the parties divorced under Islamic law; and in contrast, the Islamic Shari'a Council advises parties on their application for religious divorce that their religious divorce does not absolve them of their obligation to obtain a civil divorce. In contrast, the published Fatwas from Leader's Office in Qom (Iran), maintain that secular divorce "does not obviate the need for an Islamic divorce."

Leichter Leichter-Maroko LLP is a Beverly Hills family law firm with more than 60 years of combined experience in family law. We primarily handle complex asset divorces, high-conflict custody matters, inter-jurisdictional cases, high-income child support and spousal support matters, and appeals. We also provide mediation services, consultation with other attorneys and litigants, evaluation of cases, arbitration and private judging.

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