The Intersection of Islamic Family Law and California Family Law*

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Introduction

The areas in which Islamic law & custom impact civil family law in California 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 California family law;
3. Recognition in California of a divorce decree obtained in an Islamic country under *Shari'a* law and of a marriage contracted under Shari'a law in California;
4. Conflicts between custody laws in Islamic and California family laws;
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 have dealt with the family law conflicts between civil law and Islamic family laws, as there is a dearth of these cases in California. Although California law on prenuptial agreements appears to be quite a bit more restrictive than most other states, the manner in which other states have handled these cases is instructive by analogy. Thus applicability of the California version of the UPAA must be reviewed whenever issues of Islamic marriage contracts are being scrutinized.

Because both the U.S. Constitution and the California Constitution mandate separation of church and state,[1] courts walk a very fine line between adjudicating religious issues (which are forbidden), and enforcing rights and obligations obtained through religiously based contracts and/or customs (which may be permissible under neutral principles of law). In order to understand the issues faced by the California practitioner when handling Islamic marriage cases, there must be an understanding of what Islamic family law entails.

Marriage & Divorce Rights & Rites Under Islamic Laws

Shari'a (Islamic law) family law, as compared to current modern California family law, is not egalitarian. For example, while *Shari'a* allows a man to divorce a woman unilaterally and without cause, a woman may only divorce a man if he is recalcitrant, if her marriage contract so provides, 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* law almost always grants physical custody of children to the mother until the boy reaches age seven (in some countries even as young as two), and until the girl reaches age nine or eleven [or puberty]; thereafter, in most cases, the father or the father's family, if the father is not available, 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. 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 (a *nikah*),

effected by an offer, usually from the woman or her guardian (often her father or brother), and an acceptance by the man.[2] 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. (This is in direct contrast with California marriage laws, in which marriage is a product of statute).

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."[3] "[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."[4] Each party to the marriage has certain rights and obligations under *Shari'a*.[5] Keep in mind that 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).[6] 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).

Under *Shari'a*, divorce is accomplished by the husband pronouncing the word *talaq* (I repudiate you) three times. However, under *Shari'a* there is no such thing as long-term or lifetime maintenance, alimony or spousal support. 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.

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.[7] 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*.[8] 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 (*nikah*) 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 civil 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.[9] The *nikah* not only specifies the amount of money to be paid to wife in case of divorce, but the agree-

ment, 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 worth in the marriage. (It should be remembered that Husbands do not receive any *mahr* or other dowry under an Islamic marriage contract).

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).[10] A child born out of wedlock or of an incestuous relationship is not deemed to be the child of the father, and the father would thus have no obligation to support and no legal or custodial rights to the child.

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

   i) 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 two), and of her female child up to the age of puberty (in some countries it is a specific age of nine or eleven).[11] 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.

   ii) 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.

The mother can lose custody before the child reaches the requisite age if she is an "apostate", i.e., wicked or untrustworthy. The mother can also lose custody before the child reaches the requisite age if she cannot promote the religious or secular interests of the child..[12] **Most significantly, mother can lose custody of the children if she remarries someone other than from 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 courts, they were done by analyzing the *nikah* agreement as a contractual document rather than a religious document, and they may also have been given validity as a premarital agreement, subject to the same requirements and analyses as civil prenuptial (premarital) agreements.

Family law cases in the U.S. appeared to have ruled upon validity and enforceability of *nikah* agreements, and entitlement of the *mahr* using several legal analyses. [13]

In cases where the *nikah* agreement met the requirements of that particular state's Prenuptial Agreement laws, the *mahr* was enforced. See *Odatalla v. Odatalla* (2002) 355 N.J.Super. 305 where a *Mahr* of $10,000 in an Islamic Marital Agreement was deemed valid based on **neutral principles of law**, not on religious policy or theories, and the *nikah* was held to be an enforceable agreement. See also *Akileh v. Elchahal* (Fla. 1996) 666 So.2d 246 where a *sadaq* of $50,000 in an Islamic marriage contract was determined to be a valid prenuptial agreement based upon **neutral principles of law.**

Neutral principles of law have also been used to invalidate *nikah* agreements. In *Habibi-Fahnrich v. Fahnrich* (N.Y.Supp., 1995) No. 46186/93 1995 WL 507388 (New York) 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 it's face.

Similarly, in *In re Marriage of Dajani* (1988) 251 Cal. Rptr. 871, the California court refused to enforce a *mahr* because it contravened public policy against promoting divorce by providing for a set amount to be awarded to the Wife in the event of a divorce.[14] 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* (2001) 88 Cal.App.4th 398, 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, and so forth.[15] Indeed, unless a *nikah* agreement meets all of the very detailed requirements of the California Premarital Agreement Act, it is highly unlikely that it will be enforced as a "prenuptial agreement." That does not end the inquiry, however. In the event the requirements of the California UPAA were fully met in the preparation and signing of the *nikah*, the query becomes whether the California courts would enforce the *nikah* agreement as barring all rights to equal division of community property, and whether the *mahr* set forth in the nikah was an appropriate substitute and a waiver of spousal support. In other words, the California divorce lawyer must strictly scrutinize the provisions of the *nikah* to determine the rights and obligations of the parties under the agreement and other California law.

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 there must be strick compliance with the solemnization laws. In contrast, Islamic marriages are a product of contractual agreements between the parties (or their families), even though certain *shari'a* laws and procedure must be followed. Even in those Islamic 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.[16] Therefore, the results in *Farah v. Farah* (1993) 16 Va.App. 329 are not surprising. In *Farah* the Virginia (U.S.) court held that the marriage ceremony conducted in England was invalid because the parties failed to comply with the requirements of English law formalities for a marriage to be valid, even though it may have been valid under Islamic law in Pakistan. See also *Moustafa v. Moustafa* (Md. 2005) 888 A.2d 1230.

One of the most recent cases illustrates the strict scru-

tiny 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,* 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* (whereby husband divorces his wife by pronouncing talaq three times), 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 adoption 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 automatically 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. See, for example, *Ali v. Ali* (1994) 279 N.J.Super. 154 where 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* (1996) 108 Md.App. 284 was the leading case cited by many courts in ruling upon the issue of enforcing a custody order issued by an Islamic court. There the appellate court held 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)*[17] 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."[18] 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 "...[w]e 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."[19]

In *Amin v. Bakhaty* (La. 2001) 798 So.2d 75 the appellate court affirmed the lower court's holding that Egypt was not a "state" under the UCCJA 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[20] in the United States, the picture for enforcement of custody orders from foreign countries, especially those from Islamic countries changes drastically. First, note that almost none of the Islamic countries are signatories to the **Child Abduction provision of the Hague Convention.** Thus, Islamic countries are not bound to enforce a U.S. custody order. Notwithstanding that fact, the UCCJEA has a provision adopted by most of the states in the U.S. which 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.[22] [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, the case of *Tostado v. Tostado* (2007) 137 Wash.App. 136 is illustrative of the application of this section of the UCCJEA. In *Tostado* the court was requested to enforce a Mexican court order for custody. The court held that the foreign court's judgment for custody is "presumed to be correct," and the presumption "shifts to the party contesting the order, who has the burden of proving by a preponderance of the evidence that ***the foreign court judgment violates principles of human rights***" (emphasis added). The court further stated that, with the amendment of the UCCJEA in 2001 in Washington State, the court could no longer consider the substantive laws of a foreign country when deciding whether to enforce a foreign custody decree or whether to assume jurisdiction to make its own initial determination. The court held that this re-codification of the UCCJEA in 2001 removed the "best interest of the child" language because it "tended to create confusion between the jurisdictional issue and the substantive custody determination."[22]

Religious Courts as Arbitrators in Divorce/Custody Cases

In California, 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[23] 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 California 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, and so forth.

However, it has become customary in the U.S.[24] 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 court as the arbitrator in resolution of property, support & custody cases has become a virtual cottage industry in the U.S. The difficulty with religious courts acting as arbitrators with binding authority is that, first, with rare exceptions, religious court arbitrators are not attorneys; they are often unfamiliar with the state's laws on divorce, property, support or 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 & child support, binding arbitration by the *shari'a* court (indeed from all arbitrations except on custody and child support issues) will mean there is no appeal nor a *trial de novo* from the *shari'a* court's decision. This will often mean that women are likely to lose much of their California 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).[25]

Additionally, even tough California is a no-fault divorce state mandating equal division of community property, the Islamic court may well give greater weight to "fault" in determining property and support rights for the woman; this, of course, usually 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 community property, the wife is likely to receive nothing but her *mahr*; even more importantly, she will not likely receive any support after her *'idda* of three months following the divorce.

In sum, submitting to an Islamic court for a binding arbitration award of property division and spousal support (alimony) is, in most cases, very dangerous for the woman, and is likely to subject her attorney to claims of malpractice.

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 tradi-

tion 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 may be deemed not validly divorced in some Muslim jurisdictions.[26] 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. ■

* *This article was adapted from a law review article written by Alexandra Leichter and published in the International Academy of Matrimonial Law Journal.*

Endnotes

1 U.S. Const., 1st Amend.; Cal. Const., art.I, § 1.

2 Pearl, A Textbook On Muslim Personal Law (2d ed. 1987) §3.1.1.

3 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.

4 Ziba Mir-Hosseini, Marriage on Trial: Islamic Family Law in Iran and Morocco (2d ed. 2000) at 36.

5 *See, e.g., Marriage on Trial*, *supra*, note 5, at 34-36.

6 *id.*

7 *Marriage on Trial id.*

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

9 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.

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

11 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.

12 Source: *Hosain v. Malik* (1996) 108 Md.App. 284

13 The Uniform Premarital Agreement Act, for example, has been adopted by some states, but by no means universally. However, even those states that have adopted it, have amended or deleted certain of its provisions. Thus, in looking to the courts to determine validity and enforceability of *nikah* agreements, only analogies, not hard and fast rules, may be drawn from one state's interpretation when using it for another state; thus the identical *nikah* agreement may be enforced in one state while it is given no civil validity in another.

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

15 See, e.g., Fam. Code, §§ 1600-1620.

16 Even states such as Texas that recognize "common law marriage" [wherein parties living together for a minimum of a prescribed time period are deemed to have been married even without undergoing a marriage ceremony] have prescribed requirements for meeting the standards of "marital status." (See Tex. Fam. Code Ann. § 2.40.1

17 See *supra* for definition of *hadana.*

18 *Hosain v. Malik, supra,* 108 Md.App. at p. 288.

19 *Hosain v. Malik, supra,* 108 Md.App. at pp. 318-319.

20 Missouri, Massachusetts, New Hampshire and Vermont are the only states in the U.S., and Puerto Rico, a U.S. Territory, have not adopted the new Act.

21 This is the California statutory adoption of the **UCCJEA** — see **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.

22 Uniform Child Custody Jurisdiction and Enforcement Act, §201 cmt., 9 U.L.A. 672 (1999).

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

24 See exceptions detailed in the discussion in succeeding paragraphs.

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

26 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."