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IN GOD WE TRUST: Islamic Divorce vs. Civil Divorce Justice

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QUESTION PRESENTED

Under Maryland Law, are the terms and conditions entered into as part of an Islamic Marriage Ceremony, namely, the portion known as “Mahr,” enforceable in a Maryland Family Law Case?

TABLE OF CONTENTS:

I. INTRODUCTION

II. Maryland Law

A. Maryland Case Law

B. Maryland Statutory Law

III. PUBLIC POLICY CONSIDERATIONS and MULTI-JURISDICTIONAL DISTINCTIONS

A. Consequences of Treating a Mahr Agreement as an American Nuptial Agreement:

1. The Two Achieve Different Ends
2. Public Policy may be Offended
3. Determining the Intent of the Parties is Virtually Impossible
4. Agreements Contracted out of Duress and Undue Influence are Prohibited

V. Procedural Divorce Difficulties for Muslim Couples

VI. CONCLUSION
I. INTRODUCTION

This question has yet to be expressly addressed in Maryland; however, in general, a civil divorce has no validity in most religious doctrine, nor is a religious divorce civilly recognized.¹ This rule is true for most major religions and has been explicitly discussed in Jewish and Catholic divorce proceedings. Thus, it may be helpful to juxtapose those traditions in order to evaluate the likely outcome in an Islamic divorce.

Both Islamic and Jewish practices have contractual elements in marriage including provisions for payments to the wife in the event of divorce.² Jewish religious traditions impose strict requirements on the ability to divorce because in addition to obtaining a civil divorce, the couple must conduct a religious divorce ceremony in accordance with Jewish law.³ If one of the parties does not participate in the religious divorce ceremony, the other party cannot remarry within the faith regardless of the outcome of the civil trial.⁴

Whereas almost all states recognize that a religious ceremony performed by an authorized minister of faith is valid for secular purposes, the same is not true for divorce. For civil divorces the power of dissolution remains almost exclusively within the secular judiciary rather than within the faith. Likewise a civil divorce often has no bearing on a religious divorce.⁵

For Jewish divorces, American courts are divided on whether or not to enforce the get. Under Jewish tradition, the get is a contract that the husband must hand over to his wife to

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² Embracing Tradition, supra note 1 at 569.
⁴ Agunah, supra note 3 at 315.
⁵ Agunah, supra note 3 at 315.
effectively dissolve the marriage and make the wife eligible to remarry.⁶ Even where a civil divorce is granted, if the get is not handed over to the wife in a religious divorce proceeding, the wife under Jewish tradition is considered an adulterer if she remarries.

Courts in Florida, Ohio, and Pennsylvania refuse to enforce gets claiming that a religious divorce offends the Establishment Clause, Free Exercise Clause or is simply beyond the jurisdiction of the court.⁷ Other jurisdictions however, have enforced contractual provisions to give a get.⁸ These courts have reasoned that they are not enforcing a religious belief; rather they are enforcing a condition precedent which happens to be of religious significance.⁹

Just as courts are split in deciding whether or not to enforce the get, so too are courts split on whether or not to enforce the mahr in Islamic civil divorce cases. The mahr is “the property given by the husband to indicate his willingness to contract marriage, to establish a family, and to lay the foundations for affection and companionship.”¹⁰ It is a set amount of money that is promised to the wife in the event of a divorce. The parties do not contemplate the assets of each other since the only significance of one’s assets after divorce are those that are expressly agreed upon in the mahr.¹¹

⁶ Agunah, supra note 3 at 319.
⁷ See Turner v. Turner, 192 So. 2d 787 (Fla. Dist. Ct. App. 1966) (holding by a divided court that a provision in a final decree of divorce ordering the husband to cooperate with his wife in obtaining a Jewish divorce was unenforceable), cert. denied, 201 So. 2d 233 (Fla. 1967); Steinberg v. Steinberg, No. 44125, 1982 WL 2446, at *4 (Ohio Ct. App. June 24, 1982) (holding that a provision in a separation agreement and divorce decree obligating the wife to obtain a Jewish divorce was unenforceable); Price v. Price, 16 Pa. D. & C. 290, 291 (1932) (holding that court had "no right to order anyone to consent to any kind of divorce -- whether it be civil or religious").
⁸ See, e.g., Feuerman v. Feuerman, Civil No. 83-267188 (Mich. 6th Jud. Cir. Aug. 1, 1984) (ordering specific performance of an agreement to obtain a Jewish divorce where such agreement was embodied in settlement papers).
¹⁰ Lindsey E. Blenkhorn, Note: Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and their Effect on Muslim Women, 76 S. Cal. L. Rev. 189, 202 (2002) [Hereinafter “Blenkhorn”].
¹¹ Blenkhorn, supra note 10 at 204.
II. Maryland Law

A. Maryland Case Law

Maryland case law does not expressly address the *mahr*; however, it does address Muslim couples going through civil divorce proceedings. *Hosain v. Malik*, an appeal arising from *Malik v. Malik*, touched briefly on Islamic divorce but focused primarily on the custody battle of a child between Pakistani parents.\(^\text{12}\) Prior to filing in Maryland court, a Pakistani court had previously decided that the child would be better suited with the father. The mother, after fleeing to the U.S. with the child, brought suit in Maryland arguing that the Pakistani order should not be upheld.\(^\text{13}\) The question decided on appeal was “whether the Pakistani Court applied the best interest of the child standard.”\(^\text{14}\) The court wavered between applying the culture, customs, and mores of Pakistan and the religion of the parties, or alternatively to apply Maryland law and American culture and mores in determining the child’s best interest.\(^\text{15}\) Because the Pakistani best interest standard was so tightly linked to Maryland public policy, the court upheld the Pakistani court order giving sole custody to the father.\(^\text{16}\) The Maryland appellate court articulated that this case was not about whether a Pakistani judge or a Maryland judge reached the “right” decision, nor was this a case about whether Pakistani religion, culture or legal system are personally offensive; rather this case was about whether the Pakistani courts applied a “rule of law,

\(^{13}\) Id. at 285.
\(^{14}\) Id. at 288.
\(^{15}\) Id.
\(^{16}\) Id. at 290.
evidence, or procedure so contradictory to Maryland public policy as to undermine the confidence in the trial.”17

The Md. Code Ann., Cts. & Jud. Proc. §10-505 (1974, 1991 Repl. Vol.) required the appellant to prove that (1) the Pakistani court did not apply the “best interest of the child” standard, or that (2) in making its decision, the Pakistani court applied a rule of law or evidence or procedure so contrary to Maryland public policy as to undermine confidence in the outcome of the trial.18 Appellant was not able to do this because Pakistani courts give “paramount consideration to the welfare of the child” as do courts in Maryland.19

Another Maryland case addressing a Muslim divorce and applying public policy to its decision was Moustafa v. Moustafa.20 Both parties were originally married in Cairo, Egypt in 1976.21 In September 1985 a divorce decree was issued to the parties in a Muslim proceeding by the Arab Republic of Egypt at the consulate in Washington, D.C. This foreign decree was then adopted and enrolled by the Montgomery County Circuit Court in 1987.22 Meanwhile in America in November 1985 the appellant husband lawfully married a new woman, Zawawi, but in June 1986 appellee and appellant lawfully remarried in Egypt. It is undisputed that appellant did not obtain a divorce from Zawawi until 1989. In an Egyptian proceeding in 2002, after appellee filed divorce in Maryland, appellant renounced the validity of the remarriage with appellee in Egypt.23 The lower court in Maryland held for the appellee, ordering the appellant to pay child support and alimony. Appellant brought this appeal.

17 Id. at 302.
18 Id. at 302-03.
19 Id. at 325.
21 Id. at 393.
22 Id.
23 Id. at 394.
Appellee was neither notified nor participated in the 2002 divorce proceeding in Egypt and thus the divorce decree was not recognized by the Maryland court. The appellant contended that the Maryland court should have speculated that under Egyptian law a man can be married to more than one woman at the same time. Appellant was required by Md. Code Ann., Cts. & Jud. Proc. § 10-505 (2004) to (1) provide notice of his intent to rely upon that law, and (2) prove what that law is. Appellant did not do so. Even if appellant did assert this law the court would have still denied the foreign judgment as inconsistent with public policy of the forum state since bigamy is unacceptable in Maryland. This case illustrates that a divorce decree issued by a foreign court may not be upheld in an American jurisdiction. Likewise, although the law in one land forms a valid union, it will not be validated where public policy in America is violated.

B. Maryland Statutory Law

In addition to the Md. Code Ann., Cts. & Jud. Proc. § 10-505 (2004) cited above, Md. Code Ann., Family Law §8-203 (2006) is relevant to divorce proceedings and the allocation of “marital property.” For example, this section states that where there is a dispute over marital property in a divorce proceeding the court shall be the determining factor of the assets. The section lists time restrictions for claiming the property; however, foreign decrees are not bound

24 Id. at 398.
26 Malik v. Malik, 99 Md.App. 521, 534 (1994) (“where [a foreign] judgment is ... against public policy ... it will not be given any effect by our courts”).
by those restrictions. Furthermore the statute articulates that gifts are generally inapplicable in determining marital property. Although Maryland case law does not specifically address *mahr* agreements in divorce proceedings, applying this statutory law in conjunction with holdings from other jurisdictions may help determine whether a Maryland court is likely to enforce a religious compact or dissolution.

III. PUBLIC POLICY CONSIDERATIONS and MULTI-JURIDSIONAL DISTINCTIONS

Jurisdictions outside of Maryland have specifically addressed Islamic divorces with respect to *mahr* agreements; but where recognized, they have used American notions of family and contract law to equate the *mahr* to a nuptial agreement. However, legal and Islamic scholars such as Azizah Y. al-Hibri and Lindsey E. Blenkhorn, worry that this equation will have detrimental effects on women.27 Thus they encourage courts to learn more about the religion and treat the *mahr* as a separate entity from American nuptial agreements.

A. Consequences of Treating a *Mahr* Agreement as an American Nuptial Agreement

1. The Two Achieve Different Ends

*Mahr* agreements treated as prenuptial agreements ignore the original intent of the contracting parties and preclude Muslim women from receiving rights under American property law.28 Where a *mahr* seeks to protect the Muslim wife by ensuring a designated sum in the event of a divorce, the prenuptial agreement separates property before the marriage, protecting the

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27 Azizah Y. al-Hibri is a law professor at the T.C. Williams School of Law at the University of Richmond who gave a speech on “Muslim Marriage Contract in American Courts” in May 2000.

assets of the wealthier spouse, and usually lacking protection for the women. The \textit{mahr} represents the entire financial settlement between the parties. Even where the \textit{mahr} is large and the settlement may benefit the spouse, judges often will not enforce them because it allows “profiteering by divorce.” Thus, if courts are only to enforce small agreements, women will suffer hardship when a small \textit{mahr} is enforced in place of assigning a large property estate.

The New Jersey court in \textit{Chaudry v. Chaudry}, held that the \textit{mahr} was an “antenuptial agreement.” The effect of this holding gave the wife her entitled $1,500 \textit{mahr} but precluded her from receiving alimony amounting to half of her doctor-husband’s estate. Another example of the court’s failure to distinguish a \textit{mahr} from a prenuptial was exemplified in the Florida case \textit{Akileh v. Elchahal}. There the court enforced the \textit{mahr} as an antenuptial agreement without looking into its significance. This too prevented the wife from attaining marital property.

2. Public Policy may be Offended

Courts hesitate to classify \textit{mahr} agreements as prenuptial agreements because they allow the wife to “profiteer by divorce” which is inconsistent with public policy. The California Court of Appeal in \textit{In re Marriage of Noghrey} struck down a religious contract that involved two Iranian immigrants who previously agreed to a \textit{kethuba}, the Jewish equivalent of the \textit{mahr}. The wife, who had filed for divorce after seven short months of marriage was entitled to receive $500,000 as a result of her Jewish marriage; however, the court refused to uphold this contract

\begin{footnotesize}
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  \item[29] Blenkhorn, \textit{supra} note 10 at 203.
  \item[32] Id. at 1006.
  \item[33] Id.
  \item[34] \textit{Al-Hibri, supra} note 28.
  \item[35] Blenkhorn, \textit{supra} note 10 at 204.
\end{itemize}
\end{footnotesize}
reasoning that a no-fault divorce would “menace the marriage of the best intentioned spouse.”\textsuperscript{37} The same court had previously struck down a mahr agreement in \textit{In re Marriage of Dajani} that was worth only $1,700 concluding similarly that public policy would be offended.\textsuperscript{38}

3. Determining the Intent of the Parties is Virtually Impossible

Another problem with enforcing a religious agreement in a civil divorce proceeding is that the courts are required to interpret the religious agreements in violation of the Establishment Clause.\textsuperscript{39} Some courts have worked around this constitutional provision by applying a “neutral principles of law” approach. Courts attempt to avoid religion and interpret agreements based on theories of contract law. The New Jersey decision in \textit{Odatella v. Odatella} held that “agreements, though arrived at as part of a religious ceremony of any particular faith,” are enforceable if they are “capable of specific performance under ‘neutral principles of law’” and if “the agreement in question meets the state’s standards for those ‘neutral principles of law.’”\textsuperscript{40} In \textit{Aziz v. Aziz}, the court held that a contract for a mahr was enforceable despite the fact that agreement was entered into as part of a religious ceremony because the parties understood and agreed to the essential terms of the contract.\textsuperscript{41}

Although the neutral principles of law approach has been used to decide some religious divorce cases, it is prohibited from deducing the couple’s intent. The dissent in \textit{Avitzur v. Avitzur} argued that enforcing a religious contract requires knowledge of religious law and

\textsuperscript{37} \textit{Id.} at 157.
\textsuperscript{38} \textit{In re Marriage of Dajani}, 251 Cal. Rptr. 871 (Ct. App. 1988).
\textsuperscript{39} Blenkhorn, \textit{supra} note 10 at 215.
\textsuperscript{40} \textit{Odatella} at 310.
\textsuperscript{41} \textit{Aziz v. Aziz}, 488 N.Y.S.2d 123 (Sup. Ct. 1985).
tradition and is not suited for a judge’s determination. In *In re Marriage of Shaban*, a California Court held that a prenuptial agreement made in Egypt governed by the rules of Islam were too attenuated to satisfy the statute of frauds in the United States and therefore struck down the religious agreement as a violation of contract law.

4. Agreements Contracted out of Duress and Undue Influence are Prohibited

Courts that insist on enforcing a *mahr* as a prenuptial agreement may still face opposition from the Uniform Premarital Agreement Act (“UPAA”) which prohibits any marital agreement entered into involuntarily. This act has been adopted by about half of the states; however Maryland is not one of them. Instead Maryland follows basic contract law for prenuptial agreements requiring the signature of both parties. It is a common law principle however, that agreements made out of duress or undue influence are voidable. Because Muslim women typically marry at a young age, lack formal education, and are ignorant of legal consequences of their actions, it is quite possible that duress and cultural pressures are involved in the formation of marriage contracts. Enforcing these contracts offend western notions of offer, acceptance, consideration, and equal bargaining power.

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42 Bleckhorn, *supra* note 10 at 218.
45 http://www.medlawplus.com/legalforms/instruct/statelaw.tpl
46 Bleckhorn, *supra* note 10 at 226.
47 Id.
48 Id.
V. **Procedural Divorce Difficulties for Muslim Couples**

Divorces accomplished by verbal *talaq* or through approval by a local Muslim *imam* do not fare well in American courts; rather courts look for evidence of judicial proceedings.49 In *Amin v. Bakhaty*, the husband’s declaration of “I divorce thee” three times to his wife was not sufficient procedure by U.S. standards to constitute a divorce even though the words would have binding effect under Islamic law.50 The requirement of a judicial proceeding represents the western idea that a divorce has to be “officially recognized” in order for it to be legitimate.51 This poses problems for Muslims because Islamic laws of divorce give legal validity to Islamic *fiqh*. Requiring judicial proceedings reflect the presumption that secular values are better than religious ones.

VI. **CONCLUSION**

Applying religious divorce contracts to civil divorce proceedings is a sect of family law that is recently evolving; however, in general, the two have no binding effect on one another. Only sixteen cases in the U.S. have dealt with Islamic divorce and Maryland has but a few, none of which expressly address the *mahr*. U.S. public policy is a determining factor in most of these cases. Muslim couples looking for judgment in America should beware that courts will apply their own law and policy regardless of the validity of an agreement in Islam.

Professor Azizah Y. al-Hibri is currently working on a book that will address and answer many issues surrounding Muslim marriage contracts in American courts. In the meantime, she

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49 *See eg. Shikoh v. Shikoh*, (Ct. App. 2d) (holding that a religious divorce granted by a local *shaikh* failed to constitute a judicial proceeding which was required for all legitimate divorces under New York law, and therefore the divorce invalid).
51 Id. at 78.
recommends that if a Muslim couple is going to have both a religious and a civil marriage ceremony, they should have the religious one first or simultaneously with the civil one in order to avoid future legal complications in American divorce proceedings.\textsuperscript{52}