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WOMEN'S RIGHTS IN ISLAM REGARDING MARRIAGE AND DIVORCE

4 Wm. Mitchell J. L. & P. 3*

By: Imani Jaafar-Mohammad, Esq. and Charlie Lehmann⁺

I. INTRODUCTION

There are many misconceptions surrounding women's rights in Islam. The purpose of this article is to shed some light on the basic rights of women in Islam in the context of marriage and divorce. This article is only to be viewed as a basic outline of women's rights in Islam regarding marriage and divorce. Muslim clients' situations will vary greatly depending on what Islamic School of Thought (Hanafi, Hanbali, Maliki, and Shafi) they follow, whether they are Sunni or Shiite, their cultural traditions, and a variety of other factors.

It is also important to understand that the religion of Islam and people's cultural traditions are two very different factors. A major pitfall for practitioners is confusing cultural practices with religious beliefs. Many attorneys make the major mistake of assuming that all of a Muslim's manners and practices are related to Islam. In fact, many Muslims are heavily influenced by their individual cultural backgrounds. Islam is an extremely culturally diverse religion. American Muslims alone hail from countries all over Africa, the Middle East, Asia, Europe, and many are born in the United States with a variety of ethnic backgrounds.¹

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¹ See *Mapping the Global Muslim Population*, Pew Forum on Religion & Public Life, Oct. 7, 2009, available at <http://pewforum.org/docs/?DocID=450>. It is estimated in Pew's study of more than 200 countries there are 1.57 billion Muslims of all ages living in the world today, representing 23% of an estimated 2009 world population of 6.8 billion. See *id.* While Muslims are found on all five inhabited continents, more than 60% of the global Muslim population is in Asia and about 20% is in the Middle East and North Africa. *Id.*

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It is also important not to over generalize cultural practices. A client's conduct could simply be a family tradition or a common practice in a small region that is not representative of an entire country or people. Islam is by no means a homogeneous religion. The most effective advocates who routinely work with Muslims are practitioners who are open minded and take their clients as individuals.

The goal of this article is to give practitioners insight into the basic beliefs of Muslims regarding women's rights in two specific areas: marriage and divorce. Effective advocates learn to be culturally and religiously competent, which does not necessarily mean that attorneys agree with the client's practices. Not judging clients based on their cultural or religious practices, but merely understanding the client's religious and cultural background is essential to representing Muslims or any other minority group.

Definitions of some basic vocabulary related to Islam and Muslims are needed to fully understand the content in this article. Please take note of the following terms:

Islam- the actual religion; Arabic word that means peace through submission to God (Allah).

Muslim(s)- the followers of Islam; an Arabic word that means one who submits to God.

Allah- the Arabic word for God; Islam is a monotheistic religion that teaches that God has no partners, children, or associated entities.

Quran- the Holy Book of Muslims; Arabic word that literally means the recitation. This is the primary source for the teachings of the Islamic faith.

Muhammad- the last and most important Prophet in Islam, he was the first leader of the Islamic state and the prime example of how a Muslim should live his or her life.

Hadith – statements of the Prophet Muhammad that have been written down and compiled. Used as a supplement to the Quran as a secondary source. There is a science used to authenticate and verify authentic hadiths. Hadiths are referred to as “strong” or “weak” based on their chain of transmission and whether they can strongly be linked to the Prophet Muhammad. This article will cite Hadith as support for the principles described.

Sunna – Actions of the Prophet Muhammad also used to supplement the Quran as a secondary source.

II. MARRIAGE

Marriage in Islam is viewed as an important and sacred union between a man and woman that fulfills half of one's religious obligations.²

A well-known passage in the Quran discusses marriage as follows: “Among His signs is that He created for you spouses from yourselves so that you might find repose with them. And He has placed between you

² Sahih ul-Jaami Hadith: Anas bin Malik, a companion of the Prophet Muhammad, reported that the Prophet Mohammad said, “Any man whom Allah provides with a virtuous wife has been helped to half his Deen (religion), so he should fear Allah regarding the other half.”

affection and mercy. In that there are certainly signs for people who reflect."³

Marriage in Islam is often referred to in a poetic manner describing the love and mutual rights that exist between men and women.⁴ Islam puts a strong emphasis on mutual love and respect between a husband and wife.⁵ Men are also specifically commanded to treat their wives with kindness and respect. The Prophet Muhammad is reported to have said: "The most perfect in faith amongst believers is he who is best in manners and kindest to his wife."⁶

Marriage is also viewed as an act of worship to God (Allah).⁷ Islam views emotional and sexual expression between a husband and wife as a form of worship.⁸ Sexual relations are not solely for procreation but are viewed as a way for a couple to connect, strengthen their relationship, and help relieve everyday stresses.⁹ As a result, celibacy is forbidden for men or women even if either happens to be an Islamic scholar or religious leader (shaykh, imam, etc.).¹⁰ Fidelity is also highly stressed in Islam.¹¹ Spouses are expected to be loyal and faithful to one another and seek emotional and sexual pleasure within the bonds of marriage.¹²

A. MARRIAGE REQUIREMENTS

There are basic requirements for marriage in Islam. First, a couple must mutually consent to the marriage.¹³ This requires both a clear proposal and acceptance.¹⁴ A woman also must have a wali or legal guardian present during the process.¹⁵ If a wali is not present a woman must be past puberty and competent to make

³ *Quran 30:21.*

⁴ *See Quran 4:1; Quran 7:189.* The second cited passage refers specifically to mates dwelling with each other in love.

⁵ *See id.*

⁶ Hadith reported by Abu Dawoud, a companion of the Prophet Muhammad.

⁷ *See Hammudah Abd al Ati, Family Structure in Islam 54-56 (American Trust Publications 1977).*

⁸ *Id.* at 54-56.

⁹ *Id.* at 54-56.

¹⁰ *Id.* at 56.

¹¹ *See Quran 25:68; Quran 4:23-24.* Take note that *Quran 4:23-24* details which people in society can marry each other and imposes limits on family members marrying one another that did not exist pre-Islam.

¹² Abd al Ati, *supra* note 7, at 54-56.

¹³ *Id.* at 59.

¹⁴ *Id.* at 60.

¹⁵ *Id.* at 60-61, 70-76.

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the decision to marry.¹⁶ There are no requirements regarding who can propose marriage.¹⁷ One historical event in the Prophet Muhammad's life reflecting this principle is the proposal of Khadija bint Khuwaylid, the first wife of the Prophet Muhammad.¹⁸ Khadija was the Prophet Muhammad's employer, and through working with him she grew to respect his honesty and integrity and proposed marriage to him.¹⁹ Khadija was 25 years older than the Prophet Muhammad and in a much better financial position at the time of the proposal.²⁰ He accepted her proposal and their marriage is known for the love and compassion they had for one another.²¹

This proposal illustrates the ability of Muslim men and women to marry whomever they choose, and highlights the fact that marriages arranged without the consent or involvement of Muslim women is completely contrary to the Islamic tradition. There is a documented decision by the Prophet Muhammad where a girl approached him stating her father forced her into marriage.²² The Prophet Muhammad gave her the choice to either accept the marriage or invalidate it immediately due to the duress involved.²³ Although Islam provides many rights to women regarding marital issues, cultural traditions can greatly influence the proposal and acceptance process beyond the Islam requirements and, in some cases, directly contradict Islamic practices.

Once a couple decides they want to marry and an official proposal is accepted in writing or orally, the next required step is to agree on the terms of a marriage contract.²⁴ The marriage contract in its most basic form reflects the couple's consent to the union without duress and is signed in the presence of competent witnesses.²⁵ The couple is free to make their marriage agreement as detailed as they like. The contract allows couples to discuss major aspects of their marriage before they become husband and wife and make binding agreements. For example, contracts can include an agreed upon place to live or decisions regarding careers and children.²⁶ Islamic marriage contracts are very practical tools that allow couples to engage in negotiations to ensure their major goals and philosophies are in line.

¹⁶ *Id.* at 61.

¹⁷ *Id.* at 61.

¹⁸ *See* Bihar ul-Anwar, Vol. 16, 56-73.

¹⁹ *Id.* 56-73.

²⁰ *Id.* 56-73.

²¹ *Id.* 56-73.

²² *See* Jamal Badawi, *The Status of Women in Islam*, Al-Ittihad, Vol. 8, No. 2 (1971), citing Ibn Hanbal No. 2469; Ibn Maja, No. 1873.

²³ *Id.*

²⁴ *See* Abd al Ati, *supra* note 7, at 60. The importance of reducing all agreements to writing can be seen in the *Quran* (2:282). There is a strong tradition in Islam to make sure agreements are written down and signed to avoid future disputes.

²⁵ *Id.* at 60-61.

²⁶ *See generally id.* at 60-62.

Brides are also entitled to a dowry that is typically negotiated at the same time as the marriage contract.²⁷ The dowry is specifically a gift showing love and devotion to the bride.²⁸ There are two types of dowries a bride is entitled to: the mahr and the muakhr.²⁹ Each dowry will be discussed individually.

First, the mahr is the dowry given to the bride at the time of marriage before consummation takes place.³⁰ She is not required to share this dowry and is free to do what she wishes with the gift.³¹ Cultural traditions often shape the dowry gift because there are essentially no requirements other than the actual giving of the dowry.³² For example, some cultures encourage cash payments while others traditionally give one of the groom's family heirlooms to the bride.³³ The families involved will typically discuss the dowry and their individual expectations. The bride is often asked her opinion to make sure she receives a gift she enjoys. However, the actual mahr will take many different forms and practitioners who review Muslim marriage contracts will see a variety of items being given as the mahr.³⁴

Muakhr is the second type of dowry that is given upon the death of the husband or the couple's divorce.³⁵ This is also referred to as the "deferred" dowry.³⁶ Muakhr is meant for both financial support and as a large consequence that the couple should consider when contemplating divorce.³⁷ In situations of death, this amount is paid out before the estate is divided.³⁸ If the estate cannot cover the entire amount, the wife is entitled to collect the amount from the husband's surviving family members who are also heirs to the

²⁷ See *Quran* (4:4); Abd al Ati, *supra* note 7, at 165-166.

²⁸ See Jamal Badawi, *The Status of Women in Islam*, Al-ittihad, Sept. 1971, available at <http://www.islamfortoday.com/womensrightsbadawi.htm>.

²⁹ See generally *id.*

³⁰ *Id.*

³¹ Abd al Ati, *supra* note 7, at 64.

³² *Id.* at 62-70.

³³ *Id.*

³⁴ I have personally seen the following items used as dowry: cash, a down payment for the couple's new home, jewelry, jewelry boxes made of mother of pearl, large sets of clothing, coins minted during the Ottoman Empire, the fact that a husband has memorized the entire Quran that he brings to the marriage (he is a *Hafiz*), and family Qurans that are considered precious heirlooms.

³⁵ See Abd al Ati, *supra* note 7, at 165-166.

³⁶ *Id.*

³⁷ *Id.*

³⁸ It is basic principle in Islamic estate work that all debts be taken out of the estate before it is divided. Unpaid dowry is considered a debt on the husband's estate. See generally Abd al Ati, *supra* note 7, at 62-70.

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estate.³⁹ She can also waive the obligation for any reason, including hardship on her husband's family.⁴⁰

After the negotiations are concluded, a marriage ceremony takes place. There is no requirement that a religious authority conduct marriage ceremonies, but it is a common Islamic practice to adopt the laws of the land a Muslim lives in as long as the laws do not conflict with required Islamic practices.⁴¹ Many mainstream American Muslim scholars have come to the opinion that the person conducting a marriage ceremony must be licensed by the state in which the marriage is occurring.⁴² It is also imperative for the couple to register their marriage properly with the state in addition to executing an Islam marriage contract.⁴³ The actual marriage ceremony and reception will vary greatly depending on the cultural traditions. It was the example of the Prophet Muhammad for the reception to include providing a meal for members of one's community.⁴⁴

It is important to remember the Islamic framework for the marriage process described above is greatly influenced by an individual's cultural and family traditions. Distinguishing between culture and religion is essential for practitioners who work with Muslim clients, especially in such delicate matters as drafting marriage contracts.

B. POLYGAMY

Polygamy is often a misunderstood concept in Islam. The Quran allows polygamy in the following verse:

If ye fear that ye shall not be able to deal justly with the orphans, Marry women of your choice, Two or three or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice.⁴⁵

Historically, the practice of polygamy existed before Islam without restrictions.⁴⁶ Islam limited the number of wives to four and established clear rules and regulations for the practice to ensure fair treatment of each

³⁹ See generally Abd al Ati, *supra* note 7. This is a generally accepted practice and the *muakhr* is considered a divine debt that must be paid before an estate is divided.

⁴⁰ *Id.*

⁴¹ See Abd al Ati, *supra* note 7, at 59.

⁴² It is a common practice that those who conduct marriages in mainstream masjids are licensed by the state they live in and require couples seeking marriage to possess a state issued marriage license. The Islamic Jurisprudence Council of Minnesota is a prominent group of religious scholars and a prime example of this practice in action.

⁴³ This information is supported by the oral opinions of known scholars in Minnesota and many other states throughout the United States.

⁴⁴ Hadith reported by Ahmad and Abu Dawoud.

⁴⁵ *Quran* 4:3

⁴⁶ See Abd al Ati, *supra* note 7, at 98.

wife.⁴⁷ Aisha Bint Abu Bakr, a wife of the Prophet Muhammad, was reported as saying:

Allah's Prophet (peace and blessings of Allah be upon him) distributed everything justly amongst his wives; yet after all, he used to say: O Allah! This is the fair way of dividing what I possess amongst my wives. O Allah! Blame me not for what You alone possess while I do not, i.e., the heart, feelings and emotions of a man.⁴⁸

The passages above reflect a strict requirement that a man who has multiple wives must treat each wife equally. This equality is expected in regards to finances, emotions, and even sexual relationships.⁴⁹ The Quran unequivocally states that if a man is unable to do this and treat his wives justly he should not marry more than one wife.⁵⁰

Polygamy is an option and not a requirement in Islam.⁵¹ As was mentioned earlier, Muslims must follow the laws of the land that they live in as long as it does not contradict the requirements of the faith.⁵² In America, polygamy is illegal.⁵³ As a result, it is Islamically unacceptable for Muslims in America to practice polygamy. Muslims living in countries where polygamy is legal and practiced may choose to include in their marriage contract that the husband not take any other wives. If a husband violates an agreement not to engage in polygamous marriage, that constitutes grounds for divorce and the financial

⁴⁷ Abu Dawoud, a companion of the Prophet, reported the following: Omair al-Asdee was reported as saying: 'When I accepted Islam, I was married to eight wives. I discussed this with the Prophet Muhammad who said: "*Keep four only, and divorce the other four.*"

⁴⁸ This Hadith was reported by Abu Dawood, al-Nasaiee, Al-Tirmithee and Ibn Majah.

⁴⁹ The Prophet Muhammad's wives each had an assigned night and were entitled to his sexual and emotional companionship unless each wife decided to waive that obligation. For example, some of his older widowed wives chose to use their nights with the Prophet Muhammad to learn from him instead of engaging in sexual activity and they had more platonic relationships with him.

⁵⁰ See *Quran* 4:3.

⁵¹ Abd al Ati, *supra* note 7, at 98.

⁵² Imam Suhaib Webb has an excellent discussion of this concept in this article Muslim Americans Must Obey US Laws, available at <http://www.suhaibwebb.com/society/international/muslim-americans-must-obey-u-s-laws-nidal-hasan-disobeyed-islamic-doctrine-at-loonwatch-com/>. As stated in his article: "The Islamic religion commands believers to obey the laws of the land they live in, even if it be one ruled by nonbelievers. Muslim jurists consider citizenship . . . to be a covenant (*aqd*) held between the citizen . . . and the state, one which guarantees safe passage/security (*amaan*) in exchange for certain obligations (such as obeying the laws of the land); covenants are considered sacredly binding in Islam. The Quran commands: And fulfill every covenant. Verily, you will be held accountable with regard to the covenants. (Qur'an, 17:34). The Quran condemns those who break covenants as not being true believers:

It is not the case that every time they make a covenant, some party among them throws it aside. Nay! The truth is most of them believe not. (Qur'an, 2:100) The Islamic prophet Muhammad described the religious hypocrite as follows: When he enters into a covenant, he proves treacherous. (Sahih al-Bukhari)"

⁵³ See generally *Loughran v. Loughran*, 292 U.S. 216 (1934).

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penalties that are typically included in the marriage contract are fully enforceable⁵⁴

Polyandry, or marrying more than one husband, is not permitted to maintain the children's lineage for purposes of inheritance and protect children's rights as heirs.⁵⁵ Monogamy is the normal practice in the majority of Muslim communities due to the financial and emotional burden it carries.⁵⁶ It is far more common for American lawyers to see issues involving monogamous marriage and divorce rather than disputes involving polygamy.⁵⁷

III. DIVORCE

Divorce existed before Islam, but the advent of Islam made the divorce process much more favorable to women. Women's property is not divided during a divorce.⁵⁸ Whatever a woman earns or is given before and during the course of the marriage remains her property if the marriage ends.⁵⁹ This prevents men from taking advantage of women's property or wealth through marriage. On the other hand, the man's property is divided if a divorce occurs according to the couple's marriage contract.⁶⁰ A woman is entitled to support and maintenance from her former husband if she requires.⁶¹ There are also special instructions if divorce occurs before the marriage is consummated and before or after the dowry is set.⁶²

Islam also instituted a three-month waiting period for women called Iddah.⁶³ During this three-month period women are not permitted to re-marry.⁶⁴ The basic reason for this rule is to determine whether the

⁵⁴ See Abd al Ati, *supra* note 7, at 98. Discussion of the rights of a woman to request a divorce in the event a husband takes a co-wife without her consent.

⁵⁵ Children's rights are highly protected in Islam. Children's inheritance is determined through lineage and Islamic lineage is connected through a child's father. In order to determine without doubt the child's paternity, Islam outlawed polyandry. This was not meant to oppress women but to protect children. Abd al Ati, *supra* note 7, at 100.

⁵⁶ See Jamal Badawi, Polygamy in Islam, <http://www.al-islamforall.org/litre/englitre/Polygainis.htm>. This is a good resource for the historical scope of polygamy and its place in modern Islam.

⁵⁷ In my legal experience I have only seen polygamy practiced among recent immigrants who come to America already engaged in polygamy. This is a very small portion of the Muslim population and it is rare that American lawyers will encounter polygamous marriages in their practices.

⁵⁸ See *Quran* 2:229; *Quran* 4:20.

⁵⁹ *Id.*

⁶⁰ See generally *Quran* 2:231; *Quran* 2:241.

⁶¹ See *Quran* 2:231; *Quran* 2:241.

⁶² See *Quran* 2:236-7.

⁶³ See *Quran* 2:228; *Quran* 2:231.

⁶⁴ *Id.*

woman was pregnant before she remarried so the proper father could be ascertained.⁶⁵ This practice also ensures the child's identity and lineage can be accurately determined.⁶⁶ A husband and wife are also allowed to attempt reconciliation during the waiting period.⁶⁷ However, men are specifically instructed not to take back their wives to "injure or take undue advantage" of them.⁶⁸

Determining the proper procedure for divorce is highly dependent upon the timing of the divorce, the reasons for divorce, the client's Islamic School of Thought (Hanafi, Hanbali, Maliki, and Shafi), whether he or she is Sunni or Shiite, and the circumstances surrounding the divorce.⁶⁹ The scope of this article cannot cover all the conceivable scenarios or grounds for divorce but will seek to address the basic requirements for divorce.⁷⁰ It is important to keep in mind different schools of thought can cause some variances in the basic structure described below.

A. REQUIREMENTS FOR DIVORCE

As stated earlier, Muslims in America seeking a divorce still have to comply with the laws of the United States.⁷¹ However, most Muslims will seek to follow the laws regarding divorce in America but will also want documents reflecting their religious beliefs and their marriage contract.⁷² Either a man or woman can initiate a divorce.⁷³ Before a Muslim starts official legal action he or she must meet the following requirements:⁷⁴

He or she must have reached puberty and be capable of making a decision;⁷⁵

⁶⁵ See Abd al Ati, *supra* note 7, at 245-6.

⁶⁶ *Id.*

⁶⁷ See *Quran* 2:228.

⁶⁸ *Quran* 2:231.

⁶⁹ See generally Abd al Ati, *supra* note 7, at 218-222. Research into each school of thought and sect of Islam will reveal the differences between them in matters of divorce. The scope of this article is limited to general Islamic divorce issues.

⁷⁰ See Abd al Ati, *supra* note 7, at 226. Some grounds for divorce can include a wife who accepts Islam when her husband chooses to remain non-Muslim, apostasy from either party, established invalidity of a marriage contract, and violation of a clause in the marriage contract regarding polygamy.

⁷¹ See Imam Suhaib Webb, *supra* note 52.

⁷² See *id.*

⁷³ See Abd al Ati, *supra* note 7, at 243.

⁷⁴ See *id.* at 226-27. The final requirement is to ensure that the wife is not experiencing pain from her period, is not pregnant, and has a clear, uncompromised mind to make decisions regarding divorce.

⁷⁵ *Id.*

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He or she must be sane, conscious, alert, and free from intoxication or anger;⁷⁶

He or she must be free from external pressure;⁷⁷

His or her intention must be clear;⁷⁸

Divorce must take place after the wife's menstrual period and no sexual relations have occurred since her period ended.

If all the above factors are present, either the husband or wife can pursue a divorce or they can pursue a divorce jointly and amicably. This will involve going through the normal divorce proceedings according to American law but will also involve reviewing the terms in the marriage contract and drafting language that incorporates prior agreements and ends the contract.

There are also several levels of revocability of divorce in Islam.⁷⁹ If a client approaches a practitioner claiming the divorce is revocable the best course of action is to consult an Islamic scholar. This can be a complicated question that will likely require an Islamic scholar to listen to both sides and make a determination. Islam has a strong tradition of alternative dispute resolution that will help resolve complex matters surrounding divorce.⁸⁰

It is also important to keep in mind that although divorce is permitted in Islam, it is not encouraged. The Prophet Muhammad stated of all the permitted acts divorce is most displeasing to God (Allah).⁸¹ The Quran further states: "Live with them (your wives) on a footing of kindness and equity. If you dislike them it may be that you dislike something in which Allah has placed a great deal of good."⁸² Muslims truly view divorce as a last result and many Muslims seek counseling and extensive assistance to avoid divorce. If a client is coming to a practitioner to carry out a divorce it has likely been a very long and difficult religious and

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Abd al Ati, *supra* note 7, at 237. In sum, the levels of revocability are as follows: revocable Sunna divorce, revocable contra-Sunna divorce, irrevocable Sunna divorce, and irrevocable contra-Sunna divorce. Again, this can be a complicated determination that will likely need to be made by an Islamic scholar if it arises in a legal matter. *Id.* at 237.

⁸⁰ This can be seen in the traditional practice of Imams or Sheiks being trained as mediators for the purpose of resolving disputes within the Muslim community. This can be seen in Minnesota through the Islamic Jurisprudence Council that helps parties resolve their differences in an amicable way in accordance with Islamic teachings of peace and brotherhood.

⁸¹ Hadith reported by Abu Dawoud, a companion of the Prophet Muhammad. Hadith also reported by Ibn Umar.

⁸² *Quran* 4:19. Prophet Muhammad further stated: "A believing man must not hate a believing woman. If he dislikes one of her traits he will be pleased with another." Hadith reported by Muslim.

personal decision.

IV. CASE STUDY

This section includes a fictional case study designed to provide practice tips based on the information in this article. The client in this scenario, Mrs. X, is a composite of common issues that could arise in the Islamic divorce context. Discussion of this scenario below will be used to provide best practices and practice tips for attorneys working with Muslims. As practitioners' communities grow and diversify, it becomes necessary for attorneys to broaden knowledge on legal issues stemming from religious and cultural traditions.

Scenario: Client Mrs. X comes to your office for her first meeting. Mrs. X is 32 years old, does not have children, and is seeking a divorce from her husband, Mr. X. Mrs. and Mr. X are naturalized U.S. citizens who have lived in America for several years. They immigrated with their respective parents before age 10, but several family members remained in their home country of Y and they maintained strong cultural ties to Y. Mrs. and Mr. X met at a young age and pursued marriage after forming a deeper connection while attending University together. When they decided to marry, they felt it would be meaningful to travel back to country Y to perform the ceremony. Mrs. and Mr. X had an Islamic marriage ceremony and signed a marriage contract that had Islamic requirements and some cultural norms from country Y. The marriage contract itself was the result of a lengthy negotiation process. The contract is also in the native language of Y. Mrs. X also has a marriage certificate from Y that appears to have a seal and signature.

Mrs. X claims that, as stated in her marriage contract, she is entitled to \$20,000 as part of the second dowry, which is paid upon divorce. She also informs you that Mr. X believes the marriage contract is no longer valid because they are not living in Y, and wants the assets divided according to Minnesota law. Mrs. X claims they agreed to the dowry amounts and the contract should be enforced.

V. DISCUSSION

To an attorney unfamiliar with the cultural and legal aspects involved in this scenario, a foreign, religious antenuptial contract can be intimidating. Surprisingly, Minnesota courts have yet to directly answer whether religious agreements can constitute antenuptials.⁸³ However, Minnesota has upheld religiously inspired contracts before.⁸⁴ Other state courts have specifically upheld religious antenuptials.⁸⁵

⁸³ See Charles Goldstein, *The Enforceability of Religious Agreements as Antenuptials in Minnesota*, *The Hennepin Lawyer*, June 23, 2005, available at <http://hennepin.timberlakepublishing.com/article.asp?article=931&paper=1&cat=147>.

⁸⁴ See *Abd Alla v. Mourssi*, 680 N.W.2d 569 (Minn. Ct. App. 2004) (upholding a contract where parties agreed on arbitration based on Sharia law).

⁸⁵ See *Rahman v. Hossain*, A.2d, 2010 WL 4075316 (N.J. Super. A.D.) (upholding the validity of a "mahr" payment found in the parties' marriage contract, which was based on Islamic law).

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The validity of the marriage contract in the above scenario is a common issue that can arise in an Islamic divorce context. An attorney who is faced with this scenario should first turn to Minn. Stat. § 519.11, the Minnesota statute governing antenuptials. According to the statute, an antenuptial contract – an agreement prior to the solemnization of marriage – is valid if: (a) there is a full and fair disclosure of the earnings and property of each party, and (b) the parties have had an opportunity to consult with legal counsel of their own choice.⁸⁶ After determining whether there has been a fair and full disclosure of the earnings of each party, the attorney must also determine whether the parties had an opportunity to consult with legal counsel prior to signing the agreement.⁸⁷ Many couples may choose not to consult legal counsel and instead turn to trusted family figures, but it is important to evaluate the choices that were made during the negotiation process and how these choices impacted the outcome.

Depending on the individual culture, many Islamic marriage contracts are signed the day of the ceremony. This can sometimes bring into question whether both parties had the opportunity to consult with the legal counsel of their choice. However, despite the cultural traditions, many Islamic marriage contracts are the result of a lengthy, well thought out negotiation process during which both parties have the opportunity to consult legal counsel and family members.⁸⁸ Therefore, the signing of the marriage contract on the day of the ceremony is considered a formality. Since Mrs. X's marriage contract is the product of such negotiations, under Minn. Stat. § 519.11, the contract is most likely valid as an antenuptial agreement under Minnesota law.

However, a court's enforcement of any religiously inspired document immediately invokes First Amendment questions. On the other hand, if the contracts are set forth in terms that allow a court to enforce them using neutral principals, there should be no constitutional quandary. First Amendment scholar Eugene Volokh argues that "[i]f two parties enter into an agreement promising to perform a secular act (e.g., pay money) in the event of some secularly ascertainable event (e.g., a divorce)," then there is no constitutional barrier to enforcing the agreement.⁸⁹ This is exactly the case in Mrs. X's situation. Mrs. and Mr. X entered into a legally binding contract promising to perform a secular act – pay Mrs. X \$20,000 - in the event of a secularly ascertainable event – their divorce. The analysis of the contract's enforceability is not affected by the fact that their agreement had a religious motivation. Therefore, a court should not be precluded from enforcing Mrs. and Mr. X's religious antenuptial agreement on constitutional grounds.

Practitioners should not be distracted by marriage contracts that are drafted in a foreign language. The first step in approaching a contract of this nature is to find a reliable translator who can provide an accurate translation of the document. Translators may also be able to help explain what a specific seal or stamp is on a contract. If finding a translator is difficult, consider contacting the courts. Many courts have a bank

⁸⁶ Minn. Stat. § 519.11, subdiv. 1.

⁸⁷ *See id.*

⁸⁸ *See generally* Abd al Ati, *supra* note 7, at 50-98. There are several issues surrounding Islamic marriage contracts that require discussion and negotiations between the bride, groom, and their families. These discussions generally take some time to complete due to the complexity of the issues and differences of cultures and expectations involved.

⁸⁹ The Volokh Conspiracy, Islamic Agreements in Civil Courts, <<http://volokh.com/posts/1216332053.shtml> (last visited Oct. 13, 2010).

of court-certified interpreters who may also be available to interpret documents for these types of cases.

Second, attorneys should not be concerned by unusual dowry items or unfamiliar customs included in the marriage contract.⁹⁰ Attorneys should focus on the value of the dowry items and finding reasonable solutions to compensating the wife. Many attorneys allow unusual dowry items to steal their attention when the true issues lie in the actual enforceability questions raised earlier in this discussion.

VI. CONCLUSION

Working with Muslim clients poses challenges of both a religious and cultural nature. The information provided above is a basic framework regarding marriage and divorce in Islam. However, this framework can be dramatically changed by a client's cultural or family traditions. The best advice for practitioners is be open to learning about clients and do not be afraid to ask questions that will help distinguish between culture and religion. The information provided in this article should be used as a tool to educate practitioners about Islamic practices and give attorneys knowledge of important Islamic concepts regarding marriage and divorce.

⁹⁰ I have received questions on the validity of dowry items such as gold bars, which are common in the Middle East, or goats, which seem to appear in cultures with more rural roots. Focus on what the value of the dowry is and what specifically the wife can reasonably be expecting in an American context as opposed to the actual item stated in the contract.