CENTER FOR SECURITY POLICY
THE OCCASIONAL PAPER SERIES

Shariah Law and American State Courts

AN ASSESSMENT OF STATE APPELLATE COURT CASES

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May 20, 2011

Version 1.3
May 20, 2011

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INTRODUCTION

PURVIEW

This study evaluates published appellate legal cases that involved "conflict of law" issues between Shariah (Islamic law) and American state law. For every case in this sample drawn from published appellate legal cases, there are innumerable cases at the trial level that remain unnoticed except by the participants. Thus, this report is a only a sample of possible cases—a "tip of the iceberg"—of legal cases involving Shariah in local, state and federal courts.

Our findings suggest that Shariah law *has* entered into state court decisions, in conflict with the Constitution and state public policy. Some commentators have said there are no more than one or two cases of Shariah law in U.S. state court cases; yet we found 50 significant cases just from the small sample of appellate published cases. Others state with certainty that state court judges will always reject any foreign law, including Shariah law, when it conflicts with the Constitution or state public policy; yet we found 15 Trial Court cases, and 12 Appellate Court cases, where Shariah was found to be applicable in the case at bar. The facts are the facts: some judges are making decisions deferring to Shariah law even when those decisions conflict with Constitutional protections. This is a serious issue and should be a subject of public debate and engagement by policymakers.

PURPOSE

With the publication of this study and subsequent studies now in preparation, our objective is to encourage an informed, serious and civil public debate and policymakers' engagement with the issue of Shariah law in the United States of America. This public debate is more urgent than ever before, as organizations such as the Muslim Brotherhood and their salafist coalition partners state openly their intent to impose the Shariah State and Shariah law as dominant across all Muslim majority countries. Institutionalized, authoritative Shariah doctrine is comprehensive and by definition without limit in its ambitions and scope. It includes legally mandated, recommended, permitted, discouraged and prohibited practices that are explicitly biased against women, homosexuals, non-Muslims, former Muslims and those designated as blasphemers.

United States universities and colleges are increasingly offering courses and specializations In Shariah law, including business schools, law schools and general courses. The academic study of all kinds of comparative law including Shariah is worthwhile; but in many cases, these courses may not provide full information on the conflicts between Shariah and Western legal traditions and values.

In addition, there are organizations and individuals within the United States actively and openly advocating for the establishment of Shariah law in America, especially for personal status and family law. A prominent one is the Assembly of Muslim Jurists of America[1] (AMJA) with more than 100 members including local Imams and Shariah authorities across America, as well as Shariah authorities from other countries. AMJA promotes the adherence to Shariah law when possible in all legal and civic activities by Muslim Americans, and in some cases, by non-Muslims.

Given these stated goals of AMJA and similar organizations, this study was conducted to discover the extent to which Shariah law had in fact entered U.S. state courts. News reports have identified individual cases of plaintiffs, defendants or judges citing Shariah or Islamic law. Many groups and individuals have raised concerns about state courts citing foreign and transnationalist laws and precedents, including Shariah law. The American Public Policy Alliance, a non-partisan organization that advocates for the Constitutionality of U.S. and state laws and public policies, has drafted the American Laws for American Courts Act (ALAC) to prevent enforcement of foreign legal decisions that violate Constitutional protections and liberties. That ALAC Act, which has passed in Tennessee, Louisiana and Arizona and to date has not been legally challenged on any grounds, was used as a methodological tool to define which Shariah-related cases in state courts were in conflict with the Constitution or state public policies.

METHODOLOGY

This study is based on research and analysis conducted in 2010 and 2011 by the Center for Security Policy and the offices of the Center's general counsel, attorney David Yerushalmi. Initial identification of potential cases was done by counsel, CSP staff and interns, and citizen

[1] Andrew Bostom and Al-Mutarjim, "Chairman King: Subpoena the Assembly of Muslim Jurists of America," Pajamas Media, March 1, 2011 http://pajamasmedia.com/blog/congressman-king-subpoena-the-assembly-of-muslim-jurists-of-america-amja/

volunteers from the non-profit organization ACT for America. Information regarding state cases reported upon here was retrieved through Google Scholar using search terms including "Islam," "Islamic" "Muslim," "Sharia" and "Shariah." Additional search terms were country-specific: "Iran," "Pakistan," "Egypt" and "Saudi Arabia," all countries with Shariah-centric legal systems.

The sample we reviewed was only "the tip of the iceberg," because Google Scholar is not a complete database of state cases involving Shariah. As a search tool it only allows retrieval of those reported appellate and trial court level cases that are available through open sources (See "Future Directions," below). We found an initial sample of approximately 150 cases involving Shariah doctrine, which were narrowed to a set of 50 cases designated Relevant or Highly Relevant.

RATINGS

Of the 50 cases considered, 29 were rated "Highly Relevant," meaning that upon legal review they were found to involve Shariah in a conflict of law with the Constitutional principles or state public policy at the trial court or appellate court level. The remaining 21 cases were rated "Relevant," meaning that a significant element of Shariah law was involved at the trial court or appellate court level.

In addition, we evaluated whether the Trial Court (TC) and Appellate Court (AC) decisions were Shariah-compliant (SY), not Shariah-compliant (SN), indeterminate (SI) or not applicable (SNA). For example, a decision deemed to be Shariah-compliant at the trial court level was labeled "TCSY," while a decision deemed non-Shariah-compliant at the appellate level was labeled "ACSN."

FINDINGS

This study analyzes and discusses a total of 50 cases from 23 different states: 6 cases were found in New Jersey; 5 in California; 4 each in Florida, Massachusetts and Washington; 3 each in Maryland, Texas and Virginia; 2 each in Iowa, Louisiana and Nebraska; and 1 each in

Arizona, Arkansas, Delaware, Illinois, Indiana, Maine, Michigan, Minnesota, Missouri, New Hampshire, Ohio and South Carolina.

The 50 cases were classified into seven distinct "Categories" of dispute: 21 cases deal with "Shariah Marriage Law"; 17 cases involve "Child Custody"; 5 deal with "Shariah Contract Law"; 3 deal with general "Shariah Doctrine"; 2 are concerned with "Shariah Property Law"; 1 deals with "Due Process/Equal Protection" and 1 deals with the combined "Shariah Marriage Law/Child Custody."

In addition, the cases were also assessed as to whether or not the ultimate decision of the court was in accordance with Shariah law at both the Trial Court and Appellate Court levels:

At the Trial Court level: 22 decisions found that the application of Shariah was at odds with the state's public policy; 15 found Shariah to be applicable in the case at bar; 9 were indeterminate; and in 4 cases Shariah was not applicable to the decision at this level, but *was* applicable at the appellate level.

At the Appellate Court level: 23 decisions found that the application of Shariah was at odds with the state's public policy; 12 found Shariah to be applicable in the case at bar; 8 were indeterminate; and in 7 cases Shariah was not applicable to the decision, but *had been* applicable at the trial court level.

Across the 50 cases there were 16 foreign countries from which Shariah-based legal conventions or decisions were brought to bear upon the case. Some cases made reference to more than one country while others involved Shariah law without reference to a specific foreign country. Among the cases that referenced Shariah law in a foreign country: 6 each were from Saudi Arabia, Iran and Lebanon; 4 were from Egypt; 3 each were from Pakistan, Jordan and Morocco; 2 each were from India and Iraq; and 1 each was from Afghanistan, Algeria, Gaza [sic], Israel, the Philippines, Syria, and the United Arab Emirates (UAE).

One Arizona case, number 7 in the Top 20 summarized below (*Nationwide Resources Corp. v. Massabni, Massabni, and Zouheil*, 143 Ariz. 460, 694 P.2d 290 (Ct. App. 1984)), was unique in having multiple conflicts of law. At the Trial Court level, the judge arbitrarily ap-

plied the foreign Islamic law of Morocco, even though the parties were neither Moroccan nor Muslims; at the Appellate Court level, the judge applied the foreign law of Syrian Christians (the parties' actual background), which still created a conflict with the public policies of Arizona.

FUTURE DIRECTIONS

Google Scholar, the open source database used to identify published cases, is not a complete data base of state cases involving Shariah because as a search tool it allows retrieval only of those reported appellate and trial court level cases that are available through open sources. Google Scholar explicitly does not include within its knowledge bases those judicial opinions not published, decisions rendered by order and not by opinion, and those cases settled or terminated prior to a judicial opinion. Google Scholar will also not retrieve jury verdicts that are not otherwise challenged and ruled upon by the court. Consequently, the reported cases represent only a small sampling of the total cases that likely involve Shariah in the courts. Therefore, one area for future research should assess a more comprehensive sample, possibly resulting in a larger and more varied set of findings of types of conflict of law presented by Shariah in U.S. state courts.

Second, a similar assessment should be done using U.S. federal legal cases (this study looks only at cases from courts in the the 50 states) as the study sample, using either the Google Scholar small sample of Appellate Court cases, or a larger one including a broader set of Trial Court cases that did not reach Appellate Courts.

Third, in the course of conducting this study, we identified another set of cases which we excluded from this paper, but which we plan to assess in a second paper: Shariah-motivated crimes and disputes, up to and including murder, in which a party in the case cites some precept from Shariah doctrine as his or her rationale for a crime or dispute. These cases were then litigated or prosecuted entirely without reference to Shariah law, just as regular crimes or disputes. We suggest that these cases should be assessed from a public policy, sociological or criminological perspective. They include, for example, Shariah-motivated honor killings that are subsequently prosecuted simply as murder; assault or murder against an alleged "blas-

phemer against Islam" which is subsequently prosecuted as a regular crime; and jihadist violence against institutions or persons, which is subsequently prosecuted as a regular crime without reference to the doctrinal motivation. In all the cases we have found in this category, the parties themselves identified their motivation as driven by Shariah or Islamic law.

A fourth area of research, one that is already being addressed by other researchers, is the imposition of Shariah laws on non-Muslims and Muslims alike in the U.S., particularly in the area of Shariah blasphemy laws applied through political pressure and "lawfare" to censor free speech that is factually descriptive of, or critical of, Shariah doctrine and its applications. This is also a conflict of law issue though not covered in this paper, because it involves the conflict between Shariah blasphemy (aka "Islamophobia") doctrines and the Constitutional protection of free speech.

Finally, a fifth area for further research is the body of labor law cases and EEOC cases, to gain a deeper understanding of both cases of reasonable accommodation to Shariah practices which are comparable to other workplace accommodations, and those cases which are "unreasonable" accommodations where another religious or employee group may be disadvantaged because of a preference for – indeed, an establishment of – Shariah doctrine as superior to others.

We suggest that this study, and any future studies on the conflict between Shariah and public policy including Constitutional liberties and protections, are urgently needed to inform the ongoing public debate, and to assist legislators and civil society leaders in clarifying public policy relative to Shariah law.

COMPONENTS OF THIS PUBLICATION

To help readers of this study, we provide the findings in a variety of formats including statistical summaries and full-text published decisions for all 50 cases, including:

1. Background
2. Top 20 Cases
3. Statistical Presentation of Data
4. State Cases, in alphabetical order by State
5. Appendices

BACKGROUND

From its founding, America has debated the conflict between domestic and foreign laws. Much of America's identity, as a sovereign democratic republic with strong Constitutional protections from government intrusion, was forged through the rejection of foreign laws. Now American courts are confronting increasing numbers of cases of a new foreign legal doctrine—the Islamic law known as Shariah. Authoritative, institutionalized Shariah legal doctrine is the only law in Saudi Arabia, Sudan and Iran, and it is a dominant legal institution in most other Muslim-majority countries. In many countries with increasing populations of Muslim immigrants, some Muslim groups are demanding the right to observe—and to impose on their fellow Muslims – Shariah doctrine, even when that doctrine conflicts with the federal and state constitutions and public policy. Other Muslims come to the U.S. to escape Shariah law, and seek the protections of the secular courts and law enforcement to protect them from Shariah law.

The Center for Security Policy provides assessments of this ongoing introduction of foreign laws into our legal system, that are opposed to our constitutional liberties, public policies and values, including institutionalized, authoritative Shariah law. In this paper we provide a small sample of cases involving Shariah law, published from appellate state court decisions. Some of these cases involve clear conflicts of law between Shariah doctrine and the U.S. Constitution or state public policies; some more simply provide examples of Shariah's entry into the American legal system and civil society.

Shariah is distinctly different from other religious laws, like Jewish law and Catholic Canon, and distinctly different from other secular foreign laws. This distinction rests in the fundamental Shariah doctrine that Islamic law must rule supreme in any jurisdiction where Muslims reside. In the case where Muslims are few, they are permitted to comply as minimally necessary with the secular "law of the land," but according to authoritative and still quite extant Shariah law, Muslim adherents to this legal doctrine may not accept secular or local laws as superior to or even equal to Shariah's dictates. This creates an explicit doctrine to introduce Shariah law and replace U.S. legal systems with Shariah for the local Muslim population.

As described in the Introduction, this study evaluated a sample of published appellate court cases which involved Shariah law in U.S. state courts. For every published appellate case, there are innumerable cases at the trial level that are unnoticed except by the participants. Thus, this report is truly just the "tip of the iceberg" of legal cases involving Shariah in local, state and federal courts.

WHAT IS SHARIAH LAW?[2]

A rudimentary understanding of Shariah is required to grasp the implications of the Shariah relative to U.S. law, and a concise description is provided by Yerushalmi in his 2008 article on Shariah-compliant finance:

> To begin, Shariah, or the "proper way," is considered the divine will of Allah as articulated in two canonical sources. The first is the Qur'an, which is considered the perfect expression of Allah's will for man. Every word is perfect and unalterable except and unless altered by some subsequent word of Allah. While most of the Qur'an's 6,236 verses are not considered legal text, there are 80 to 500 verses considered instructional or sources for normative law.
>
> However, the Qur'an is only one source of Allah's instruction for Shariah. The Hadith—stories of Mohammed's life and behavior—are also considered a legal and binding authority for how a Muslim must live. The Hadith were collected by various authors in the early period after Mohammed's death. Over time, Islamic legal scholars vetted the authors for trustworthiness and their Hadith for authenticity, and there is now a general consensus across all Sunni schools that there are six canonical Hadith. The legal or instructional portions of the Hadith together make up the Sunna. While the Shariah authorities from the Shi'a Muslim world also accept the Hadith as authoritative, they do not accept certain authors' authority—a belief based mostly upon theological grounds. For all Shariah authorities, however, the Qur'an is considered the primary and direct revelation of Allah's will, while the Sunna is the indirect expression of that will and secondary. Both sources are generally considered absolutely infallible and authoritative.
>
> In order to divine the detailed laws, norms, and customs for a Muslim in all matters of life, the Shariah authorities over time developed schools of jurisprudence to guide their interpretations of the Qur'an and Sunna. While there is broad agreement among the schools about the juris-

[2] Yerushalmi, Esq., D.. *Shariah's "Black Box": Civil Liability And Criminal Exposure Surrounding Shariah-Compliant Finance*. Utah Law Review, North America, 200829 01 2009, pages 1027 – 1030, accessed May 2, 2011, http://epubs.utah.edu/index.php/ulr/article/view/76/68

prudential rules, important distinctions between the schools result in different legal interpretations and rulings, albeit typically differences of degree, not of principle.

The rules of interpretation and their application to finite factual settings in the form of legal rulings are collectively termed al fiqh (literally "understanding"). Usul al fiqh, or the "sources of the law," is what is normally referred to as jurisprudence. Technically, Shariah is the overarching divine law and fiqh is the way Shariah authorities have interpreted that divine law in finite ways. It is important to note, however, that the word Shariah appears only once in the Qur'an in this context, yet it has gained currency in the Islamic world by virtue of Shariah authorities, over a period of more than a millennium, creating a corpus juris (i.e., al fiqh) based upon their interpretative understandings of the Qur'an and Sunna. As such, this article uses the word Shariah to mean all of Islamic jurisprudence, doctrine, and legal rulings.

WHY ARE CONFLICTS BETWEEN SHARIAH LAW AND U.S. FEDERAL, STATE OR LOCAL LAW A PROBLEM?

Shariah doctrine includes personal, pietistic religious observances that are not in conflict with U.S. laws. But institutionalized, authoritative Shariah is comprehensive and by definition without limit in its ambitions and scope, and it also includes legally mandated, recommended, permitted, discouraged and prohibited practices that are strongly biased and discriminatory against women, homosexuals and non-Muslims. Shariah law provides a legal framework for violence up to and including legalized murder against apostates (people who have left Islam), homosexuals, blasphemers and especially women accused of various crimes. Just this year in 2011, in Pakistan's Shariah legal system, both apostates and blasphemers have been imprisoned and faced execution. Shariah criminal punishments are extreme, including amputations and lashings for numerous crimes.

Shariah is a highly institutionalized legal tradition in Muslim-majority countries, and as detailed below, also in the U.S. particularly through institutions like the Assembly of Muslim Jurists of America (AMJA). Although there are several schools of Shariah legal traditions, consensus among those schools on all major points of law – institutionalized, documented for centuries, and authoritative – is recognized throughout Shariah courts. A brief excerpt from the

national security study of Shariah, "Shariah: the Threat to America," shows the extent of Shariah's scope and consensus among the various schools of Shariah:[3]

> Shariah contains categories and subjects of Islamic law called the branches of fiqh (literally, understanding"). They include Islamic worship, family relations, inheritance, commerce, property law, civil (tort) law, criminal law, administration, taxation, constitution, international relations, war and ethics, and other categories. Four Sunni and two Shiite schools (madhhab) of jurisprudence address these legal issues. The Islamic scholars of the Sunni schools – Hanafi, Hanbali, Maliki, and Shafi'i – as well as the Ja'fari and Ismaili Fatimid Shiite schools, completed codification of Islamic law by the tenth century.
>
> From that time until the present, Islamic fiqh has remained reasonably fixed. Despite a measure of variation on minor details, and a more flexible attitude about ijtihad by traditional Shiite scholars, all of the major schools of Shariah are in agreement on more than 70 percent of substantive matters. In 1959, al-Azhar University (today the seat of Sunni jurisprudence although it was founded by the Shiite Fatimids) issued a fatwa that recognized Shia Islam as legitimate. Despite its own adherence to fiqh of the Ja'fari Twelver school, the Iranian constitution of 1989 likewise made a point of explicitly recognizing the validity of the four Sunni madhhabs. According to Shariah, all of Islam – its doctrines, practices, theology and adherents – are subordinate to that comprehensive code.

PRIOR RESEARCH

The English-language literature on Shariah law (also spelled in the literature as Sharia or Shariah or Sharyah), also known as "Islamic Law," is extensive both in the breadth of topics, the sheer amount of publication in academic and law journals, and the venerable history of American interest in Islamic law's conflicts with American and Western laws, values and policies. As early as 1908, for example, one could read about the "Wakf as Family Settlement among the Mohammedans " by Syed A. Majid, in the Journal of the Society of Comparative Legislation; or in 1915, "The Adhesion of Non-Christian Countries to the Hague Conventions of Private International Law," by Norman Bentwich in the same journal.

[3] See www.shariathethreat.org for a downloadable pdf of the entire book, background information on all authors, and extensive links to key Shariah doctrinal resources used as references.

The topic is not new to academics or lawyers; but, with an increased presence of Shariah-adherent Muslims in the United States, and the rapid rise of political and militant Islam globally, the conflict between Shariah law and the Constitution requires a new level of debate among policymakers, media, the legal community, and most importantly, the American public.

To assist in that debate, and for further reading, we have provided an Appendix with citations to a small sample of articles on Shariah and conflict of laws issues dating back to the early 1900's, identified using search terms "United States" and "Sharia OR Shariah." To make this a useful sample, we eliminated the hundreds of articles that focused primarily on Shariah in other countries, as well as most articles on Shariah finance (a minor publishing industry in itself). For additional reading, we refer you to the extensive articles and books cited and analyzed in Yerushalmi's article on Shariah finance (*Shariah's Black Box*, Utah Law Review 2008)[4] and in the recent widely distributed and quoted national security assessment of *Shariah, Shariah: The Threat to America—Report of Team B II*.[5] The suggested articles in the Appendix are only a miniscule sample of the many hundreds of articles on Shariah law published annually; they include articles both critical of, and supportive of, Shariah's introduction into Western legal systems and civil society. We would urge the ordinary citizen interested in the topic to read in the field including some of these older articles: using the search terms cited above, we found numerous articles on Shariah, from pre-World War I journals to the present,[6] (showing here with the numbers of publications per year containing the search terms in parentheses to the right of the year):

* 2006 to May, 2011 (969)
    - 2011 (14)
    - 2010 (173)
    - 2009 (235)
    - 2008 (255)
    - 2007 (275)

[4] Ibid

[5] See www.shariathethreat.org for a downloadable pdf of the entire book, background information on all authors, and extensive links to key Shariah doctrinal resources used as references.

[6] Search conducted at Heinonline.org May 2, 2011. See www.heinonline.org .

- 2006 (264)
* 2000 to 2005 (640)
* 1990 to 1999 (487)
* 1980 to 1989 (199)
* 1970 to 1979 (69)
* 1960 to 1969 (64)
* 1950 to 1959 (15)
* 1900 to 1949 (34)

In addition to the legal and academic literature on Shariah law in the U.S., a study of Islamic law in the U.S. was conducted by Emory Law School in 1999, which resulted in numerous country reports focusing particularly on issues of reform and personal status of women under the Shariah. This study, "No Altars: A Survey of Islamic Family Law in the United States," includes a section on conflicts between Shariah and U.S. laws, including conflicts in the areas of polygamy, marriage to non-Muslims, forced marriages, and spousal abuse. The authors' observations from twelve years ago apply even more today: "Some Muslims are proactively interested in ways to legitimately opt out of United States legal norms that potentially conflict with their Islamic preferences."[7] The purpose of the Emory Law School project on Islamic Family Law (IFL) is described at the website: "The first objective of this Project is to verify and document the scope and manner of the application of IFL [Islamic Family Law] around the world, including Muslim communities living within predominantly non-Muslim countries."[8]

Also of note, in a non-academic but still influential article published in 1993 originally in the print edition of The American Muslim[9] by the American Muslim Council Deputy Director Issa Smith, "Native American Courts: Precedent for an Islamic arbitral system," the author argued for a number of milestones that have since been achieved. These milestone include the creation of Muslim Bar Associations, and National Muslim Law Students Association, and the

[7] Asifa Quraishi and Najeeba Syeed-Mille, "No Altars: A Survey of Islamic Family Law in the United States," Emory Law School, http://www.law.emory.edu/ifl/index2.html , accessed May 2, 2011.

[8] Islamic Family Law: Possibilities of Reform Through Internal Initiatives, Emory Law School, http://www.law.emory.edu/ifl/index2.html, accessed May 2, 2011.

[9] http://theamericanmuslim.org/tam.php/features/articles/native_american_courts_precedent_for_an_islamic_arbitral_system/0013143

various organizations dedicated to the study of, promotion of, or enforcement of Shariah law in the U.S., which are listed in part later in this study:

> Although the Muslim community in North America is vastly different from the Indian community, I feel that in developing a plan for the implementation of Muslim family law, we can in some ways imitate the paradigm of the tribal court system and its supporting network. In particular, I recommend that as a first step, supporting organizations dealing with Islamic family law be established immediately. A professional association of Muslims in the law field (of whatever specialty) is a must. A law school students' support group should be formed, and Muslim youth should be encouraged to enter this field.
>
> A second step would be to establish institutes in the U.S. which can supplement legal education with courses in Islamic family law. At the same time, pressure should be put on law schools to include courses in Shariah taught by Muslims. An idea suggested in several quarters and being developed by the American Muslim Council, is the **moot court** where students and legal experts can act out Muslim family court scenarios....
>
> The process of implementing Muslim family law will not be accomplished overnight. Changes of their type take place very slowly in American society, and our community is far from being prepared for this tak [sic]. I commend the continental council of Masajid for organizing this conference, and bringing together so many workers and thinkers. I pray to Allah the real decisions are made here that can be implemented by those ready to work. **However, I strongly urge that consideration be given to political realities and the sensitivities of the American public. Such a radical change in American law—allowing Muslims to take control over their family law issues—must be initiated from the indigenous Muslim community here in the United States. To have it seem that this initiative is originating from overseas or from organizations financed overseas, would create a very negative impression that would likely destroy this effort.** [emphasis added]

UNITED STATES-BASED MUSLIM AND NON-MUSLIM INSTITUTIONS SUPPORTING SHARIAH LAW

United States universities and colleges are increasingly offering courses and specializations In Shariah law, including business schools, law schools and general courses. The academic study of all kinds of comparative law including Shariah is worthwhile; but in many cases, these courses may not provide full information on the conflicts between Shariah and Western legal traditions and values. In many cases, particularly for courses in Islamic Finance, they fo-

cus on the technical and operational aspects of the topic, without ever discussing the actual nature of authoritative Shariah law as understood and documented both here and abroad. This list does not include Muslim Bar Associations in many cities and states, the Muslim Lawyers Association, or the National Muslim Law Students Association. These groups are identified here to show the intent and extent of institutionalized study of Shariah law, as well as promotion and enforcement of Shariah law, in the U.S.

Shariah Scholars Association of North America (SSANA)[10]
International Society for Islamic Legal Studies[11]
Islamic Law Students Association[12]
Islamic Law Section, The Association of American Law Schools[13]
Karamah – Muslim Women Lawyers for Human Rights[14]
Islamic Legal Studies Program, Harvard Law School[15]
Cordoba University[16]
North American Fiqh Council[17]
North American Imams Federation[18]
Assembly of Muslim Jurists of America[19]

[10] http://greatnonprofits.org/reviews/profile2/sharia-scholars-association-of-north-america

[11] http://www.isils.net/about/executive+board , accessed May 2, 2011

[12] http://www.ilsaku.justicediwan.org/home/showonepage/57.html

[13] https://memberaccess.aals.org/eWeb/dynamicpage.aspx?webcode=ChpDetail&chp_cst_key=43088344-2cef-40c9-b3ca-4e9f4307ecc4 , access May 2, 2011, and audio from founding meeting here: http://www3.cali.org/aals07/mp3/AALS%202007%20Islamic%20Law%20in%20the%20Constitutions%20of%20Muslim%20States%20200701 05.mp3

[14] http://www.karamah.org/

[15] http://www.law.harvard.edu/programs/ilsp/

[16] http://www.siss.edu/

[17] http://www.fiqhcouncil.org/

[18] http://www.imamsofamerica.org/

[19] http://www.amjaonline.com/index.php

THE ASSEMBLY OF MUSLIM JURISTS OF AMERICA

The Assembly of Muslim Jurists of America (AMJA) is a U.S.-based organization committed to the establishment of Shariah law, especially for personal status and family law. Their extensive boards (123 members combined) include local Imams and Shariah authorities across America, as well as Shariah authorities from other countries. The entire AMJA membership, as listed at their website, is provided with titles when given as Appendix C.

AMJA is highly rooted in local American communities, and associated with international and U.S. Shariah authorities and Shariah institutions, as well as a prolific center at the website for fatwas on many topics. AMJA also holds conferences and publishes proceedings. They appear to be an active organization with significant reach and influence.

If such an organization promotes Shariah law in the United States, and they have representatives in influential positions across the country, their statements of intent are important in understanding the possible threat of Shariah law intruding into the U.S. legal system. For example, the Assembly of Muslim Jurists of America posted at their website an October 2010 article by M. Ali Sadiqi, "Islamic Dispute Resolution in the Shade of the American Court House."[20] This article's conclusions on the conflict between public policy and Shariah suggest that a law such as the American Laws for American Courts Act (ALAC) is needed to preserve the intent of stated public policy in enforcement decisions. Sadiqi addresses the Constitutional barrier that Shariah-adherent Muslims must hurdle, in obtaining enforcement of at least some Islamic arbitration decisions in America:

> Private citizens, Muslims and non-Muslims alike, can enforce agreements they have made between and amongst each other by filing a case in the appropriate court seeking various remedies. The challenge for Muslims seeking resolution under binding Islamic Arbitration is to demonstrate to the court that it has the legal authority to enforce the Arbitration Award, **given the fact that it is based on another system of law outside the U.S. Constitutional framework**. [emphasis added]

[20] http://amjaonline.com/conference-papers/7th-imam-conference/Islamic%20Dispute%20Resolution%20in%20the%20Shade%20of%20the%20American%20Court%20House%20Dr%20Sadiqi.pdf

Sadiqi states that one of the purposes of his article is to "look at some concrete methods for ensuring enforceability of Islamic Arbitration Awards in American courts....What this means is that the state, including any court, has the duty to enforce any contract made between consenting parties, unless there is some compelling state interest in not doing so." He goes on to give an example of when an Islamic arbitration could not be enforced by the state courts:

> However, there is at least one roadblock facing Islamic Arbitration – determinations of inarbitrability based on public policy. For example, under Islamic inheritance law, the Fara'id, a wife is entitle to a specified share of one quarter of the tarik or estate if there are no children; if there are children, then she is entitled to one eighth. Under American law, most states protect the rights of a spouse to a portion of his or her spouse's estate through "elective share" laws. Such laws allow a spouse to elect whether to take the share given them in a will or to take the statutorial share, usually 1/3 of the estate. Thus, it is quite possible that an arbitral award of 1/8 of the tarik could be overturned if the wife does not specifically agree to this amount and waive her statutory elective share.
>
> Issues of child custody and visitation also invoke the public policy scrutiny of the courts. American courts use a "best interest of the child" standard" in custody and visitation determinations." They will be unlikely to allow agreements to stand without some form of judicial review.[21]

AMJA supports compliance with existing laws of the host country only when Muslims have no choice, a doctrinal Shariah position. However, in Muslim-majority countries – or where Shariah adherents can dominate secular legal systems – they advocate the supremacy of Shariah law over secular law. A number of statements below make clear these distinctions, drawn by AMJA authorities, between Shariah doctrine and secular, democratic principles. Emphasis has been added to the original articles:

[21] Sadiqi, p. 37

AMJA: From "About Political Plurality in Islamic country" by Dr.Salah Al-Sawy[22]

Ninth: As for the extent of legality of political plurality before establishing the Islamic State, we see it is permissible to have plurality that is capable of co-ordination, completeness, common work and co-operation with others to set up Islam, and at the same time, we see it is impermissible to have plurality that rejects co-operation, the closed plurality that is built upon ideologies and concepts, because they are a hindrance to the way of enabling for fixation....

Tenth: There is no problem in making alliances with moderate secular trends in the stage of pursuance of establishing the Islamic State, on condition that the subject of alliance is legal, and that it must not comprise any bindings that would harm the message of the religion, or that would tie the hands of the people who are involved in the Da`wa works and prevent them from spreading the truth and from marching towards the objective of establishing the Islamic State...

As for making alliances with the secular trends for eliminating the prevailing falsehoods, and then taking the matter afterwards to the test of the will of the majority, we see it is permissible to have what we mostly think it comprises the ability of power to establishing the Islamic State, or at least, reducing the degree of prevailing oppression and paving the convenient way for the Da`wa activities to prosper and flourish, and we prevent alliances in which we mostly think would not achieve any of these objectives for the Islamic State....

AMJA: A recent fatwa from AMJA on democracy[23]

But democracy gives free reign to the authority of the Ummah, and puts no ceiling on it. The law is the expression of its will, and if the law says it, the conscience must be silent! A constitutionalist even said: "We have departed from the divine right to rule for kings, and replaced it with the divine right to rule for parliaments!" The shari'a, on the other hand, differentiates between the source of the legal system and the source of the political authority. The source of the legal system is the shari'a, while the source of the political authority is the Ummah. Meanwhile democracy makes the Ummah the source of both.

[22] http://www.amjaonline.com/en_d_details.php?id=21

[23] http://translating-jihad.blogspot.com/2011/03/american-muslim-leader-issues-fatwa.html

AMJA: Judiciary work outside the land of Islam[24]

AMJA members discussed the permissibility of resorting to the judiciary system outside of the land of Islam. In this connection, AMJA asserts that in principle, **it is incumbent upon all Muslims to resort to Islamic law for arbitration inside and outside the land of Islam.** Indeed, resorting to Islamic law for arbitration whenever it is within one's ability to do so is what distinguishes a believer from a hypocrite.

However, it is permissible to resort to a man-made judiciary system in a land that is not ruled by Islamic law if it becomes the only way for someone to retrieve one's legitimate right or alleviate a grievance- provided one does not exceed what rightfully belongs to him under the Islamic law. Therefore, one should consult with the scholars first to know precisely what is due for him in that specific dispute under Islamic law.

Furthermore, since attorneys are representative of their clients, it is permissible to practice law within the scope of permissible, just, and legitimate cases that are filed to demand a right or alleviate a grievance. Similarly, it is permissible to study, teach, and understand man-made laws **for the purpose of realizing the superiority of the Islamic laws**, or practicing law in an environment that does not recognize the sovereignty of the Islamic law, intending to defend the oppressed people and retrieve their rights. This is, however, contingent upon the possession of enough Islamic knowledge, in order to avoid becoming an unwitting participant in sinful actions and transgressions.

AMJA members agreed that, in principle, it is prohibited for someone to assume a judiciary position under an authority that does not rule by Islamic law unless it becomes the only way to alleviate a great harm that is threatening the main body of Muslims. This is, again, conditional upon possessing knowledge about Islamic law, knowing rules and regulations of the Islamic judiciary system in Islam, and choosing a branch of practice as close in specialty as possible to the rules and regulations of Islamic law. In addition, one should judge between people according to Islamic law as much as one can. Furthermore, while in this position, one should maintain displeasure in his heart to the man-made laws. Needless to say, this ruling is an exception that is governed by the aforementioned provisions and restricted to necessity only.

[24] The Assembly of Muslim Jurists in America in cooperation with The Islamic League of Denmark: The Second Annual Session: Copenhagen, Denmark: 22-25 June, 2004, http://www.amjaonline.com/en_d_details.php?id=94

AMJA further clarified that it is permissible for Muslims to serve as members in a jury proceeding, with the stipulation that their opinions be in compliance with Islamic law and with the intention to establish justice for all.

AMJA: On Marriage to gain permanent residency[25]

d) The case of the nominal marriage for the purpose of getting permanent residency

The nominal marriage is the marriage contract in which the parties involved do not intend the reality of marriage and have no regard for its requirements and prerequisites. Rather, it is only used as a means to gain certain benefits. This type of contract is prohibited for lack of intention to consummate it, for the violation of the objectives for which marriage was legislated, and for the devising of prerequisites that are contrary to the objective of marriage.

However, the outward legality of this contract is dependent on how verifiable the nominal nature of this contract is before the court. If it is incontestable, then the contract is invalid, but if it is not, then the contract is considered valid, provided that all the prerequisites of marriage are fulfilled and no preventive reason existed.

AMJA: Working with the media:[26]

E. It is not permissible to publish any information—even if it is true or permission has been granted—**if doing so would result in harm as defined by Shari'ah.**

F. Information must be broadcast via lawful means (in accordance with Shari'ah) and prohibited means must be avoided.

G. Any work with **institutions known to be enemies of Islam** must absolutely be avoided if such work would involve supporting their injustice and aggression.

H. Any work with institutions whose main focus is on anything prohibited in Shari'ah must be absolutely avoided, such as magazines or channels specialized in spreading sin and vice.

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[25] Ibid

[26] Decisions and recommendations of the Fifth Conference of the Assembly of Muslim Jurists in America (AMJA)

Manama, Bahrain 14 – 17 Dhul-Qa`dah 1428 (November 24 – 27, 2007) http://www.amjaonline.com/en_d_details.php?id=108

AMJA: Working in Courts of Law[27]

VIII: Working in courts of law and the various affiliated branches outside the lands of Islam

A. Allah sent His Messengers and revealed His Books for people to stand forth with justice. The way to do this is to judge by His Laws, to stand up for pure justice and to renounce all the vain desires and human arrangements that go against it. Therefore, **it is not lawful to seek judgment from man-made courts of law, unless there is a complete lack of Islamic alternatives** which would have the power to restore people's rights and eliminate injustice, and as long as one's demands before the court are lawful and **one does not make anything lawful unless it agrees with Shari'ah.** If judgment is pronounced in a person's favor, without due right, he/she must not take it, because a judge's verdict does not make the prohibited lawful, nor the lawful prohibited; the judge's role is merely to reveal, not to create.

B. It is incumbent upon Muslim communities to try to solve their disputes by compromising within the limits of Shari'ah judgment and by seeking out ways that are legal in their countries of residence which would enable them to judge by Islamic Law, **especially in terms of personal status laws.**

C. Working in the field of legal representation is lawful **if the attorney is convinced of the justice and Islamic legitimacy** of what he is being asked to represent.

AMJA: On conflicts between national allegiance, and allegiance to Shariah[28]

Decisions Regarding Contemporary Aqeedah Challenges The Debated Relationship between Religious Loyalty and Nationalistic Affiliation

• There is no harm in citizenship if it is taken as means of organizing the affairs of the residents outside the lands of Islam and establishing da'wah and founding their institutions. This is so long as its **(the citizenship's) possessor keeps his loyalty to his creed and nation (i.e. Islam and the Muslims),** fulfills his covenant with Allaah and His messenger, and he and his family are secure of tribulation in their religion.

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[27] ibid

[28] The 6th Annual AMJA Conference Held in Montreal – Canada During Dhul Qi'dah 9 – 13, 1430 (Hijri) / October 28 – 31, 2009 http://www.amjaonline.com/en_d_details.php?id=322

> • The legal framework that governs the relationship with the hosting nations outside of the lands of Islam is the contract of security. This is what is stipulated in the official residency documents. Of its implications is the abidance by the laws and local regulations as long as it doesn't drive one to commit a sin or abandon an obligation. Fulfilling this contract is a necessity by sharee'ah and for the sake of da'wah. **Upon conflict (of one's legal vs. Islamic obligation), reservation (from participating in the Islamically impermissible) is to be made in the item that conflicts**, and all else remains on the default of abidance.

We recommend, to understand AMJA's doctrinal imperative to impose Shariah in the U.S., further reading of additional fatwa, conference proceedings and articles at the AMJA website, [29] and also at the websites of the other organizations listed above.

We reaffirm our goal from this paper's introduction: with the publication of this study and subsequent studies now in preparation, our objective is to encourage an informed, serious and civil public debate and engagement with the issue of Shariah law in the United States of America. This public debate is more urgent than ever before, as organizations such as the Muslim Brotherhood and their salafist coalition partners state openly their intent to impose the Shariah State and Shariah law as dominant across all Muslim majority countries.

[29] www.amjaonline.com

TOP 20 CASES

1. *S.D. v. M.J.R.*, 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010).

Shariah: Highly Relevant TCSY; ACSN

S.D. (wife) and M.J.R. (husband) were both Muslims and citizens of Morocco and both resided in New Jersey. After only three months of marriage, husband began physically abusing wife. The physical abuse administered by husband injured wife's entire body including her breasts and pubic area. Additionally, husband forced himself on wife and had non-consensual sex with her on multiple occasions. Husband stated to wife that Islam allowed him to have sex with her at any time he wished.

Wife asked the trial court to grant a restraining order against husband shortly after he verbally divorced her in front of their imam. The trial court refused to issue a final restraining order against husband finding that, although husband had harassed and assaulted wife, husband believed it was his religious right to have non-consensual sex with his wife and that belief precluded any criminal intent on the part of husband. The New Jersey appellate court reversed the trial court and ordered that the trial court enter a final restraining order against husband. The New Jersey appellate court stated that the trial court erroneously allowed the husband's religious beliefs to excuse him from New Jersey's criminal code and that husband knowingly engaged in non-consensual sex with wife.

2. *Hosain v. Malik*, 671 A. 2d 988 (Md. Ct. Spec. App. 1996).

Shariah: Highly Relevant TCSY; ACSY

Hosain (wife) and Malik (husband) lived in Pakistan as a married couple for approximately eight years before Hosain fled to the United States with the couple's daughter. Malik filed for custody of their daughter in a Pakistani court. Hosain did not appear before the Pakistani court because she would have been arrested in Pakistan for adultery because she lived with a man after she fled to the United States. The Pakistani court granted custody to Malik. Malik requested that American courts recognize and enforce the Pakistani custody order via a

mechanism known as *comity*. A Maryland trial court granted comity to the Pakistani custody order. On appeal, the Maryland appellate court affirmed the trial court and granted comity to the Pakistani custody order holding that the Pakistani court considered the best interests of the child in granting custody to Malik. However, the minority opinion disagreed that the Pakistani court considered the child's best interest and instead focused on factors outside of the "best interests of the child" analysis. These other factors included that the child would live in an "un-Islamic" society if it were allowed to remain with Hosain in the United States.

3. *In re Marriage of Obaidi*, 227 P. 3d 787 (Wash. Ct. App. 2010).

Shariah: Highly Relevant TCSY; ACSN

Qayoum (husband) and Obaidi (wife) signed a pre-marital agreement known as a "*mahr*" which was written in Farsi. Husband was a U.S. citizen; had little understanding of any culture outside of America; and did not speak, read, or write Farsi. The contents of the *mahr* required that husband pay wife $20,000 at some future date, but husband was not advised about the *mahr's* contents until after he had signed it. A few months after the couple signed the *mahr*, they were married in an Islamic wedding; and later they were wed in a civil ceremony. Several months after the civil ceremony, wife was kicked out of the couple's residence and filed for divorce in Washington state court.

The trial court found the *mahr* enforceable and awarded wife $20,000 per the terms of the *mahr*. The trial court noted that husband initiated the divorce without good cause; and therefore, was liable, per Islamic law, to pay the amount due under the *mahr*. The Washington appellate court held that the trial court erred by looking to Islamic law; and instead should have applied neutral principles of law to determine whether the *mahr* was enforceable. The appellate court stated that under neutral principles of law (Washington contract law) the parties must agree on the essential terms of a contract in order for the contract to be enforceable. Applying this neutral principle of law, the appellate court held the *mahr* was unenforceable because the parties never agreed why or when the $20,000 would be due.

4. *Chaudry v. Chaudry*, 388 A. 2d 1000 (N.J. Super. Ct. App. Div. 1978).

Shariah: Highly Relevant TCSN; ACSY

Husband and wife were both Pakistani citizens. Wife filed for divorce in a New Jersey court alleging that her husband had abandoned her. Husband answered the divorce suit by stating that he had already been granted a divorce under Pakistani law; and thus, the trial court was without jurisdiction to divide the marital estate. The trial court ruled that Pakistani law violated New Jersey public policy because of its gross bias against the wife. The trial judge invalidated the Pakistani divorce and ordered husband to pay spousal maintenance to wife.

The New Jersey appellate court did not show much concern regarding whether the Pakistani divorce court offended New Jersey public policy. Instead, the appellate court held that the trial court should have recognized the Pakistani divorce and should not have ordered husband to pay spousal maintenance to wife because the couple's Islamic pre-marital agreement did not provide for spousal maintenance and did not allow wife to take an interest in husband's property. The appellate court stated that the pre-marital agreement was freely negotiated, but apparently ignored the fact that the couple's parents negotiated the agreement and the wife had no role in negotiating the pre-marital agreement that would cause her to be without spousal maintenance and without an interest in marital assets acquired by husband.

5. *Tarikonda v. Pinjari*, No. 287403 (Mich. Ct. App. 2009).

Shariah: Highly Relevant TCSY; ACSN

Tarikonda (wife) and Pinjari (husband) were married in India in 2001. In April 2008, Pinjari obtained an Islamic summary divorce known as *talaq* against Tarikonda. In May 2008, Tarikonda, possibly without knowing about the *talaq*, filed for divorce in Michigan. Pinjari filed a motion requesting that the Michigan trial court recognize the *talaq* divorce and dismiss Tarikonda's divorce complaint. The trial court granted comity to the *talaq* Pinjari pronounced in India and dismissed Tarikonda's complaint. The Michigan appellate court reversed the trial court holding that *talaq* violated Tarikonda's right to due process because: (a) she had no prior notice of the *talaq* pronouncement; (b) she had no right to be present at the pronouncement

and did not have an attorney; and (c) the *talaq* provided no opportunity for a hearing. The Michigan appellate court also held that *talaq* violates equal protection because women do not also enjoy the right to pronounce *talaq*. Additionally, the Michigan appellate court held that *talaq* violates Michigan public policy because, upon divorce, Islamic law allows women to recover only the property that is in their names while Michigan law provides for an equitable division of the marital estate.

6. *Karson v. Soleimani*, Nos. B216360, B219698 (Cal. Ct. App. 2010).

Shariah: Highly Relevant TCSY; ACSN

Kioumars Ardakani, a life-long resident of Iran, was estranged from his second wife, Soleimani, when he died in Iran without leaving a will. Karson was Ardakani's daughter from a previous marriage and was Soleimani's stepdaughter. Karson was a Muslim and both Ardakani and Soleimani were of the Bahai faith. Ardakani's estate included three parcels of real property in Iran. Karson filed suit in a California court alleging that Soleimani, Soleimani's attorney in Iran, and other family members who lived in Iran defrauded Karson out of her interest in her father's estate. Soleimani filed a motion to dismiss Karson's suit on the basis that Iran was a more convenient forum to try the case than was California. The trial court found that Iran was a more suitable forum to hear Karson's suit and granted Soleimani's motion to dismiss. The California appellate court reversed the trial court and ordered Karson's suit be heard in California. The appellate court held that Iran was not an appropriate forum because Iranian law did not protect the parties' due process rights and discriminated against women and religious minorities such as the Bahai.

7. *Nationwide Resources Corp. v. Massabni, Massabni, and Zouheil*, 143 Ariz. 460, 694 P.2d 290 (Ct. App. 1984).

Shariah: Highly Relevant TCSY; ACSN

After obtaining a judgment against Defendants Bertha and Fadlo Massabni and Pierre Zouheil, Plaintiff Nationwide brought an action to garnish a promissory note for monies owed

to Defendant Zouheil. Mr. Zouheil claimed that the promissory note was community property belonging to him and his wife (both Syrian Christians); and therefore not subject to garnishment by Nationwide. Nationwide contended that the promissory note was the separate property of only Mr. Zouheil and subject to garnishment. The trial court, following Nationwide's suggestion, applied Moroccan Islamic law to determine the nature of the promissory note as separate or community property despite the fact that the Zouheils were neither Muslims nor Moroccan citizens. In reviewing the trial court's decision, the Arizona appellate court applied Syrian Christian law and determined that the promissory note was Defendant Zouheil's separate property. The application of Syrian Christian law, which does not allow couples to acquire community property simply by virtue of the existence of their marriage, directly conflicted with Arizona law which starts with the presumption that all property acquired by either spouse during marriage is community property.

8. *In re Custody of R., minor child*, No. 21565-9-II (Wash. Ct. App. 1997).

Shariah: Highly Relevant TCSY; ACSN

Mr. Noordin and Ms. Abdulla had a child, R., out of wedlock, but were later married in Malaysia. Neither Mr. Noordin nor Ms. Abdulla were citizens of the United States. While the couple was residing in the Philippines, Ms. Abdulla filed for an annulment in Philippine civil court; and Mr. Noordin was granted *talaq*, or Islamic divorce, and given custody of R. by a Sharia court in the Philippines. Subsequently, the Philippine civil court ruled that the Sharia court lacked jurisdiction, granted custody of R. to Ms. Abdulla, and allowed her to take R. out of the country. Ms. Abdulla took R. to the United States without notifying Mr. Noordin.

Mr. Noordin later moved to the United States, filed an action in Washington state court, requested that the Sharia court's ruling be enforced, and asked the court to give him custody of R. The trial court showed little patience in working through the issue of whether the Sharia court had jurisdiction to decide who should be R.'s custodian, enforced the Sharia court's ruling, and gave Mr. Noordin custody of R. The Washington appellate court reversed the trial court and ordered the trial court to determine whether the Sharia court had jurisdic-

tion to determine R.'s custodian. The Washington appellate court also stated that if the Sharia court had jurisdiction to determine R.'s custodian, Ms. Abdulla could challenge the Sharia court's order by proving that the Sharia court's proceedings violated Washington public policy or that the foreign court did not consider the best interests of the child when it awarded custody.

9. *Tazziz v. Tazziz*, No. 88-P-941 (Mass. App. Ct. 1988).

Shariah: Highly Relevant TCSY; ACSNI

Ismail Tazziz (father) and Pamela Tazziz (mother) lived together as husband and wife in East Jerusalem for 22 years. The father was a Jordanian citizen with an Israeli ID card; and the mother was a dual citizen of Jordan and the United States and had an Israeli ID card. The couple had several minor children. All of the couple's minor children were United States citizens by virtue of being born abroad to an American mother. The mother took three of the couple's minor children to Massachusetts without the father's consent and filed suit in Massachusetts for custody of the minor children. Two months after the mother filed for custody in Massachusetts, the father filed for custody in an Israeli Sharia court.

The Massachusetts trial court dismissed the mother's complaint without considering the best interests of the children. The trial court appeared to not realize that it had discretion to hear the mother's suit for custody. The appellate court sent the mother's case back to the trial court and instructed the trial court to consider a variety of factors in order to protect the children's interests and to evaluate whether the Sharia court would consider the best interests of the children when awarding custody.

10. *Rhodes v. ITT Sheraton Corp.*, 9 Mass. L. Rptr. 355 (Mass. 1999).

Shariah: Highly Relevant TCSN; ACSNA

Plaintiff Rhodes, a non-Muslim woman, was on vacation at a Sheraton resort in Jeddah, Saudia Arabia, and suffered severe spinal injuries after she dove into the resort's lagoon and hit

her head on a coral structure. Plaintiff filed her suit in a Maryland court for her injuries. Defendant ITT Sheraton requested that the Maryland court dismiss Plaintiff's suit, under a mechanism called *forum non conveniens*, because Saudi Arabia represented a more convenient forum in which to try the suit. The Massachusetts court refused to dismiss Plaintiff's suit and deemed Saudi Arabia an inadequate forum because, among other deficiencies, Saudi law, which is the application of Sharia as the law of the land, exhibits a systemic bias against women and non-Muslims.

11. *Abd Alla v. Mourssi*, 680 N.W.2d 569 (Minn. Ct. App. 2004).

Shariah: Highly Relevant TCSY; ACSY

Abd Alla and Mourssi entered into a partnership agreement. Included in the terms of the partnership agreement was a clause whereby both parties agreed to submit any disputes arising out of the partnership agreement to Islamic arbitration. A dispute arose between the two parties and the disagreement was submitted to an Islamic arbitration committee. Following the arbitration committee's ruling on the dispute, Abd Alla asked a district court to confirm the arbitration decision. Abd Allah also argued that Mourssi had not timely contested the arbitration committee's decision. Mourssi alleged that the arbitration decision should be vacated because, Mourssi alleged, the committee exceeded its authority and the arbitration award was obtained by corruption, fraud, and undue means. The trial court confirmed the Islamic arbitration committee's decision. The Minnesota appellate court held that district court properly confirmed the arbitration committee's ruling. The Minnesota appellate court said that Mourssi did not contest the arbitration committee's ruling in the timeframe required by Minnesota law. Moreover, the appellate court stated that Mourssi did not establish that the arbitration ruling was obtained as a result of fraud or other undue means which would have allowed Mourssi, under Minnesota law, to vacate the arbitration committee's decision.

12. *El-Farra v. Sayyed, et al.*, 226 S.W.3d 792 (Ark. 2006).

Shariah: Highly Relevant TCSN; ACSN

The Islamic Center of Little Rock (Center) hired El-Farra to serve as the Center's imam in January 2001. On May 15, 2003 and May 30, 2003, person responsible for the Center's governance sent El-Farra disciplinary letters advising El-Farra that his sermons were inaccurate and inappropriate. Additionally, the disciplinary letters accused El-Farra of creating disunity and other misconduct that was contrary to Islamic law. In July 2003, El-Farra was fired and paid sixty days salary as required by the terms of his contract with the Center. El-Farra sued for breach of contract, defamation, and tortious interference with a contract. The trial court ruled the First Amendment prohibited the courts from hearing El-Farra's claims and dismissed the suit. The Arkansas Supreme Court held that the trial court's dismissal of El-Farra's suit was proper on First Amendment grounds because the claims made by El-Farra could not have been decided by neutral principles of law, but instead would have required the court to determine the propriety of El-Farra's termination by inquiring into Islamic law.

13. *In re Marriage of Malak*, 182 Cal. App. 3d 1018 (Cal. Ct. App. 1986).

Shariah: Highly Relevant TCSN; ACSY

Laila (wife) and Abdul (husband) Malak, both Lebanese nationals, were married in 1970. Laila and Abdul moved to the UAE in 1976 to escape Lebanon's civil war. In July 1982, Laila moved to California and took the couple's two children with her without Abdul's consent. Laila filed for divorce and custody of the couple's two children in California court in September 1982. Abdul obtained a preliminary order from a Lebanese Sharia court awarding him custody of the couple's two children on February 8, 1983. Laila was personally served with the order on May 26, 1983. Laila was required to respond to the Sharia court within 15 days of being personally served if she wanted to oppose the Sharia court's preliminary order. She failed to file an opposition within 15 days; and the Sharia court's preliminary custody order became final on June 30, 1983. Abdul filed the Sharia court's final order and requested that the California courts enforce the order. The trial court refused to enforce the Sharia court's order, in part,

because the trial court did not believe that the children's best interests were considered by the Lebanese Sharia court. The California appellate court ordered that the Sharia court's custody orders be enforced and that Abdul be given custody of the two children. The California appellate court appeared to defer to the Sharia court's analysis of what was in the children's best interests rather than make an independent assessment of the best interests of the children. For example, the California appellate court did not comment on or challenge the Sharia court's finding that the couple's children had many friends in Lebanon despite the fact that the children had spent all or almost all of their lives outside of Lebanon in the UAE or America. The Sharia court's analysis emphasized that Abdul, the children's father, was a Muslim and that Lebanon, Abdul's then place of residence, would allow them to receive an Islamic education.

14. *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863 (Cal. Ct. App. 2001).

Shariah: Highly Relevant TCSN; ACSN

Ahmad (husband) and Sherifa (wife) were married in Egypt in 1974; moved to the United States in the early 1980s; and filed for divorce in 1998. Ahmad argued that a document signed by him and Sharifa's father, as her proxy, constituted the parties' pre-marital agreement to have Islamic law govern any property settlement following a divorce. The document recited that the marriage had been concluded in accordance with Islamic law and that the two parties were aware of the legal implications of the marriage. The trial court found the document was not a prenuptial agreement, but instead was a marriage certificate. The trial court applied California law to the division of property. The appellate court recognized that the document was vague about the material terms to which the husband and wife were allegedly agreeing, that there are multiple schools of Islamic legal thought that could govern the agreement, and that no particular school of Islamic legal thought was selected by the parties. The appellate court held that the pre-marital document did not provide sufficient information about the parties' agreement to constitute a valid pre-marital agreement. As a result of the appellate court's holding, California law was applied to the property division and the wife took an interest in the marital property. The wife would have accumulated no interest in these assets under Islamic

law since property acquired by a spouse during marriage remains that spouse's separate property.

15. *Saudi Basic Indus. Corp. v. Mobil Yanu Petrochem. Co., Inc. and Exxon Chem. Arabia, Inc.*, 866 A. 2d (Del. 2005).

Shariah: Highly Relevant TCSY; ACSY

Saudi Basic Industries Corporation (SABIC) entered into two joint venture agreements—one with Mobil and the other with Exxon. Both joint venture contracts provided that the parties' only source of profits would be from the operations of the joint ventures. The contracts further provided that the parties would pass-through costs to the joint venture entities—without mark-up—for any technologies that were purchased from a third party and then sublicensed to the joint ventures. However, in the year 2000, ExxonMobile discovered that SABIC had procured technology from Union Carbide, sublicensed the technology to both joint venture entities, and overcharged both joint ventures for the technology that SABIC had sub-licensed to the joint ventures. Exxon and Mobile sued SABIC alleging that the overcharges were a breach of the joint venture agreements and a violation of the Saudi law against usurpation (*ghasb*). After consulting with five experts on Saudi Arabian law to determine how the law of usurpation (*ghasb*) would be applied in Saudi Arabia, the trial court applied Saudi law and found SABIC liable for usurpation and breach of the joint venture agreements. The trial court awarded $416 million to Exxon and Mobile on their usurpation claim, $324 million of which were "enhanced" damages. On appeal, SABIC argued that the trial court failed to properly study and understand Saudi law; and thus, erroneously instructed the jury on the Saudi law of usurpation (*ghasb*). The appellate court noted that the trial court engaged in a meticulous effort to understand Islamic law as it would have been applied in Saudi Arabia and that the trial court properly considered expert testimony regarding the law of usurpation (*ghasb*) as it would have been applied in Saudi Arabia. The appellate court affirmed the trial court's judgment against SABIC.

16. *Akileh v. Elchahal*, 660 So. 2d 246 (Fla. Dist. Ct. App. 1996).

Shariah: Highly Relevant TCSN; ACSY

Akileh (wife), her father, and Elchahal (husband) agreed that, in return for Akileh's hand in marriage, Elchahal would enter into an antenuptial agreement called a "sadaq." Under the terms of the sadaq, Elchahal was to pay Akileh $50,001—$1 was paid immediately and the remaining $50,000 was deferred to an uncertain, later date. After the sadaq was signed, Akileh and Elchahal were married in December 1991. In 1993, Akileh filed for divorce after she contracted a venereal condition from Elchahal. The issue of whether Elchahal was liable to pay the remaining $50,000 to Akileh under the terms of the sadaq was to be decided at the couple's divorce trial. Akileh testified it was her understanding that the wife forfeits her sadaq only if she cheats on her husband. Elchahal testified that he believed the sadaq is forfeited if the wife initiates the divorce. The trial court ruled that the sadaq was unenforceable because the parties had failed to agree on the sadaq's essential terms. The trial court further stated that if the parties had agreed on the essential terms of the sadaq, then the court would essentially agree with Elchahal's version of when the sadaq is forfeited and not order Elchahal to pay the deferred amount because the court would find that the purpose of the sadaq was to "protect the wife from an **unwanted** divorce." Under the trial court's ruling, Akileh would forfeit the deferred $50,000 because she initiated the divorce. The appellate court held that the sadaq was enforceable and the terms of the sadaq required Elchahal to pay the deferred portion to Akileh upon divorce. The appellate court ordered the trial court to enter judgment in Akileh's favor.

17. *Aleem v. Aleem*, 404 Md. 404, 947 A.2d 489 (Md. 2008).

Shariah: Highly Relevant TCSN; ACSN

Husband and wife, both originally from Pakistan, were married in Pakistan in 1980. Shortly thereafter, the couple moved to Maryland where they resided 20 years prior to their divorce. The husband was in the United States on a diplomatic visa. The wife had obtained green card status. The wife initiated a divorce action in a Maryland court; and while the action

was pending, the husband went to the Pakistani embassy and obtained an instantaneous divorce under Islamic law known as *talaq*. *Talaq*, under the law of Pakistan, would have resulted in the wife not acquiring any rights in the property accumulated by her husband during their marriage. Under Maryland law, she would have acquired marital property rights to assets titled in the husband's name. The lower courts refused to recognize the *talaq*. The lower appellate court refused to recognize *talaq* as being contrary to Maryland public policy because of the extreme differences between Maryland and Pakistani law regarding marital property rights. The Maryland Supreme Court also refused to grant comity to the husband's *talaq* because *talaq* violated Maryland's public policy. *Talaq* violated gender equality promoted by Maryland's constitution because *talaq* was available only the husband and not the wife. Moreover, *talaq* violated a wife's due process rights because a wife could file for divorce in a Maryland court and the husband could obtain the instantaneous *talaq* before the wife had an opportunity to fully litigate the divorce filed by her in Maryland court. *Talaq* also would deprive the wife of the marital property rights that she held under Maryland law.

18. *In re Marriage of Vryonis*, 202 Cal. App. 3d 712 (Cal. Ct. App. 1988).

Shariah: Highly Relevant TCSY; ACSN

Fereshteh, a Shiite woman, performed what she believed to be a valid *muta* (or temporary Shiite marriage) ceremony between herself and Speros Vryonis, a member of the Greek Orthodox faith. For two and one-half years following the *muta* ceremony, the two never told friends that they were married, they lived at separate locations, they spent only a few nights together during any given month, Speros continued to date other women, and Fereshteh was aware that he was dating other women. After Speros told Fereshteh that he was going to marry another woman, she told others—for the first time—that she and Speros were married. After Speros married the other woman, Fereshteh filed for divorce. Fereshteh claimed that she had a good faith belief that she and Speros were married; and that her good faith belief in their alleged marriage entitled her to spousal support and property rights as a putative spouse under California law. The California Court of Appeals held that a person could not success-

fully claim that he or she is a putative spouse by virtue of having performed a *muta* ceremony because *muta* is insufficient to allow a person to form a good faith belief that he or she had entered into a legal California marriage.

19. *In re Marriage of Donboli*, No. 53861-6-I (Wash. Ct. App. 2005).

Shariah: Highly Relevant TCSN; ACSN

Husband and wife held dual American-Iranian citizenship and lived in America when they gave birth to a child in 2000. In late 2001 while the couple and their child were in Iran, the husband beat his wife so severely that she required a two-week stay in the hospital. Shortly after the altercation, husband served wife with divorce papers while both of them and their child were still in Iran. Husband also took the passports that belonged to his wife and child. With some degree of effort and assistance from a foreign embassy, wife obtained replacement passports for herself and the child in early 2002 and was able to return to the United States.

In late March 2002, wife filed a petition for divorce and child custody in the state of Washington. Husband filed for custody in Iranian court; and in October 2002, the Iranian court awarded custody of the child to husband. In June 2003, a Washington family court declined to enforce the Iranian custody order. The appellate court also refused to enforce the Iranian custody order. The appellate court held that enforcing the Iranian custody order would violate Washington public policy because (a) the wife had no notice or opportunity to be heard at the Iranian custody hearing and (b) Iranian child custody law did not consider the best interests of the child when awarding custody as required by Washington law.

20. *Farah v. Farah*, 429 S.E.2d 626 (Va. Ct. App. 1993).

Shariah: Highly Relevant TCSY; ACSN

Ahmed Farah was a citizen of Algeria; Naima Mansur was a citizen of Pakistan; both were Muslims. Proxies of Ahmed and Naima met in London to conduct a ceremony that bound Ahmed and Naima as husband and wife according to Islamic law. The ceremony did

not conform to the formalities required of marriages by English law. Following the ceremony in London, the couple went to Pakistan where Naima's father held a "Rukhsati" reception for the couple. Following the reception, the couple returned to Virginia where they resided. They never had a civil marriage performed for them in the United States although they intended to do so. Less than one year after the proxy ceremony in London, the couple separated. Ahmed filed an action to have the marriage declared void; Naima filed a divorce action. Ahmed contended that he and Naima were not legally married because the London ceremony did not adhere to the formalities required by English law; and therefore, their marriage was void. Naima argued that the marriage was legal in Pakistan because the proxy ceremony in London was valid under Islamic law, the marriage was completed in Pakistan, and Pakistan recognizes valid Islamic marriages.

The trial court found that a valid marriage existed because the London proxy ceremony was valid under Islamic law and the law of Pakistan. The trial court reasoned that Virginia should grant comity and recognize the marriage because it was valid under the laws of a state—Pakistan. The appellate court reversed the trial court and held that the marriage was invalid. The validity of a marriage in Virginia, said the appellate court, is dependent on whether the marriage was valid in the place where the ceremony occurred; not whether the marriage was religiously valid under Islamic law.

INTRODUCTION: STATISTICAL PRESENTATION OF DATA

Table 1 – Cases by States

Number of Cases	State
6	New Jersey
5	California
4	Florida
4	Massachusetts
4	Washington
3	Maryland
3	Texas
3	Virginia
2	Iowa
2	Louisiana
2	Nebraska
1	Arizona
1	Arkansas
1	Delaware
1	Illinois
1	Indiana
1	Maine
1	Michigan
1	Minnesota
1	Missouri
1	New Hampshire
1	Ohio
1	South Carolina

Table 2 - States by Cases

State	Number of Cases
Arizona	1
Arkansas	1
California	5
Delaware	1
Florida	4
Illinois	1
Indiana	1
Iowa	2
Louisiana	2
Maine	1
Maryland	3
Massachusetts	4
Michigan	1
Minnesota	1
Missouri	1
Nebraska	2
New Hampshire	1
New Jersey	6
Ohio	1
South Carolina	1
Texas	3
Virginia	3
Washington	4

Table 3 - Cases by Category

Category	**Number of Cases**
Shariah Marriage Law	21
Child Custody	17
Shariah Contract Law	5
Shariah Doctrine	3
Shariah Property Law	2
Due Process/Equal Protection	1
Shariah Marriage Law/Child Custody	1

Table 4 - Trial Court Shariah Compliant Decision

Shariah Compliant?	Number of Cases
No	22
Yes	15
Indeterminate	9
Not Applicable	4

Table 5 - Appellate Court Shariah Compliant Decision

Shariah Compliant?	Number of Cases
No	23
Yes	12
Indeterminate	8
Not Applicable	7

*Table 6 - Cases by Country Originating Conflict of Foreign Laws**

Country	Number of Cases
Saudi Arabia	6
Iran	6
Lebanon	6
Egypt	4
Pakistan	3
Jordan	3
Morocco	3
India	2
Iraq	2
Afghanistan	1
Algeria	1
Gaza [sic]	1
Israel	1
Philippines	1
United Arab Emirates	1
Syria	1

* Total is less than total number of cases
because some cases did not specify a specific country

Table 7 - Category by State

New Jersey by Category	Number of Cases
Shariah Marriage Law	3
Child Custody	3

California by Category	Number of Cases
Shariah Marriage Law	2
Child Custody	1
Shariah Property Law	1
Shariah Doctrine	1

Florida by Category	Number of Cases
Shariah Marriage Law	3
Shariah Doctrine	1

Massachusetts by Category	Number of Cases
Child Custody	3
Due Process/ Equal Protection	1

Washington by Category	Number of Cases
Shariah Marriage Law	2
Child Custody	1
Shariah Marriage Law/ Child Custody	1

Table 7 - Category by State (continued)

Maryland by Category	Number of Cases
Shariah Marriage Law	2
Child Custody	1

Texas by Category	Number of Cases
Shariah Contract Law	2
Shariah Marriage Law	1

Iowa by Category	Number of Cases
Child Custody	2

Louisiana by Category	Number of Cases
Shariah Marriage Law	1
Child Custody	1

Nebraska by Category	Number of Cases
Shariah Marriage Law	1
Child Custody	1

Virginia by Category	Number of Cases
Shariah Marriage Law	2
Child Custody	1

Table 7 - Category by State (Continued)

Arizona by Category	Number of Cases
Shariah Property Law	1

Arkansas by Category	Number of Cases
Shariah Contract Law	1

Delaware by Category	Number of Cases
Shariah Contract Law	1

Illinois by Category	Number of Cases
Shariah Marriage Law	1

Indiana by Category	Number of Cases
Shariah Marriage Law	1

Maine by Category	Number of Cases
Shariah Doctrine	1

Table 7 - Category by State (Continued)

Michigan by Category	Number of Cases
Shariah Marriage Law	1

Minnesota by Category	Number of Cases
Shariah Contract Law	1

Missouri by Category	Number of Cases
Child Custody	1

New Hampshire by Category	Number of Cases
Shariah Marriage Law	1

Ohio by Category	Number of Cases
Child Custody	1

South Carolina by Category	Number of Cases
Child Custody	1

SHARIAH COMPLIANCE KEY

RATING: Shariah Involvement Score:

Highly Relevant: Shariah represents a clear conflict of law with Constitutional principles or state public policy

Relevant: Significant elements of Shariah are involved

TRIAL: Trial Court Shariah Compliance Outcome Review:

Yes: TCSY

No: TCSN

Indeterminate: TCSI

Not Applicable: TCSNA

APPEAL: Appeals Court Shariah Compliance Outcome Review:

Yes: ACSY

No: ACSN

Indeterminate: ACSI

Not Applicable: ACSNA

50 CASES INVOLVING SHARIAH LAW BY STATE

The following cases are presented as they are published, including formatting, typography and highlights in order to provide the utmost accuracy. We have included the highlighted search terms as a useful points of reference for the reader.

ARIZONA

CATEGORY: Shariah Property Law

RATING: Highly Relevant

TRIAL: TCSI

APPEAL: ACSI

COUNTRY: Syria/Morocco

URL:
http://scholar.google.com/scholar_case?case=6131404002427558453&q=Islam+OR+Islamic+OR+Muslim+OR+Shariah+OR+Sharia&hl=en&as_sdt=4,3

143 Ariz. 460 (1984)

694 P.2d 290

NATIONWIDE RESOURCES CORPORATION, PLAINTIFF/APPELLEE, V. BERTHA S. MASSABNI AND FADLO MASSABNI, WIFE AND HUSBAND; AND PIERRE M. ZOUHEIL, DEFENDANTS/APPELLANTS.

No. 2 CA-CIV 5038.

Court of Appeals of Arizona, Division 2.

September 28, 1984.

Review Denied January 8, 1985.

462*462 Miller & Pitt, P.C. by W. John Thomas, Tucson, for plaintiff/appellee.

Croswell & Cornelio by Carmine Cornelio, Tucson for defendants/appellants.

OPINION

HOWARD, Judge.

This is a garnishment action arising out of a case which we previously decided, *Nationwide Resources Corporation v. Massabni et al.,* 134 Ariz. 557, 658 P.2d 210 (1982) in which we, inter alia, awarded Nationwide court costs of $1,312.30 and attorney's fees of $33,349.29. The trial court, in accordance with the mandate, entered a judgment against the Massabnis and Pierre Zouheil, who was the other defendant in the case, in favor of Nationwide for the foregoing sums. Nationwide then served a writ of garnishment on Jerry Janke and Grace Janke, who answered that they were indebted to Pierre Zouheil and his wife, Linda, in the principal amount of $107,400.57, evidenced by a promissory note payable to the Zouheils as husband and wife. It was the Zouheils' position in the trial court that the debt owed to them by the Jankes was community property and not subject to garnishment because Nationwide's judgment was against Pierre Zouheil only. Nationwide contended that the money owed by the Jankes was not a community asset, but the sole and separate property of Pierre Zouheil and therefore subject to Nationwide's judgment. The trial court, after a trial on the issue, found that the debt was the separate property of Pierre Zouheil and awarded judgment to Nationwide in the sum of $34,661.59. No judgment was entered against Linda Zouheil.

The Zouheils contend the trial court erred because Nationwide failed to prove that the debt was the separate property of Pierre Zouheil and not community property. We disagree and affirm.

The record shows that Pierre Zouheil was a Syrian citizen. He married Linda Zouheil in Beirut, Lebanon, in 1972. They are both Christians. They moved to Syria and lived there before moving to Morocco. In 1978 they were living in Morocco but were citizens of Syria. In 1978 they both were to come to the United States but Mrs. Zouheil had a medical problem which prevented her from traveling. Zouheil came by himself to Sierra Vista, Arizona, meeting with his friends, the Massabnis, whom he had met previously in Germany. The Massabnis and Pierre Zouheil bought a restaurant business from Nationwide Resources, which purchase became the subject of the main action involved in *Nationwide Resources Corporation v. Massabni,* supra. A few days after making the offer for the restaurant, Zouheil invested $120,000 in a day care center in Sierra Vista owned by the Jankes. The parties signed a document stating that Pierre Zouheil invested the money to purchase a one-half interest in the business, including the land involved with the business. The document speaks of the parties as partners. A warranty deed was also made out to Pierre Zouheil, granting him a one-half interest in the realty on which the day care center was operated, as his sole and separate property. The money which Zouheil used to purchase the property and partnership interest in the day care center came from a bank account in Dresden, Germany. Zouheil deposited his Moroccan earnings in this bank account which he claimed was in both his and his wife's names.

When Mr. and Mrs. Zouheil did immigrate to Arizona in January 1980, the investments Zouheil made were in shambles. Bertha Massabni, who was supposed to buy 463*463 the restaurant from Nationwide, had decided, without consulting Pierre Zouheil, not to do so and a lawsuit had been commenced on December 1, 1978. The Jankes who were supposed to be sending monthly status

reports and profits to the Zouheils in Morocco had not been doing so. Sometime after immigrating to the United States, Zouheil sued the Jankes in Cochise County Superior Court. The original complaint named Zouheil as the plaintiff but it was subsequently amended to add Mrs. Zouheil. The case was settled by the payment of $25,000 cash and the execution, on April 15, 1981, of the promissory note in issue in this case. Zouheil testified that before the case was settled he told his attorney to make his wife a co-owner of the property.

The trial court, in coming to its conclusion that the note was the separate property of Zouheil, found:

"1. At the time said defendant [Pierre Zouheil] entered in a partnership with Jerry Janke and Grace Janke, husband and wife, and acquired real property in said partnership business, he was not a resident of the state of Ariozna [sic], and

2. Said real property was acquired as his sole and separate property.

3. The partnership was dissolved as a result of an action in this court "Zouheil v. Janke", number 39179 [sic], and a stipulation therein resulting in a promissory note from defendants therein to defendant herein, Zouheil, payable to him and his wife.

4. That said note nevertheless is a separate property asset beglonging [sic] to Zouheil."

* * * * * *

We start with the presumption that all property acquired by either spouse during marriage is community property. *Bourne v. Lord,* 19 Ariz. App. 228, 506 P.2d 268 (1973). The promissory note was acquired by the Zouheils while they were domiciled in Arizona and it is presumptively community property. Nationwide had the burden of proving by clear and satisfactory evidence that the note was not a community asset but, instead, the separate property of Zouheil. *Cooper v. Cooper,* 130 Ariz. 257, 653 P.2d 850 (1981). If the note was community property, it could not be garnished because Nationwide's judgment was against Zouheil only. See *Eng v. Stein,* 123 Ariz. 343, 599 P.2d 796 (1979).

To prevail Nationwide, had to show that the initial investment with the Jankes in 1978 was the sole and separate property of Zouheil and that there was no transmutation of this property from separate to community. As far as transmutation is concerned, the trial court apparently disbelieved Zouheil's testimony. Beginning with this initial investment, we first note that the partnership interest was purchased with money from a bank account in Germany, in the names of both Mr. and Mrs. Zouheil, Syrian citizens and Christians living in Morocco. What did Zouheil get for his $120,000? First, he got a deed to an undivided one-half interest in real estate in Cochise County. He also got a one-half

interest in a partnership. His interest in the partnership, which was to be his share of the profits and surplus, was personal property. A.R.S. § 29-226. Therefore, in exchange for the $120,000 he got both real property and personal property.

The property right of the Zouheils in the partnership is personal property and is governed by the law of their matrimonial domicile at the time of its acquisition — in this case, Morocco. See *Jizmejian v. Jizmejian,* 16 Ariz. App. 270, 492 P.2d 1208 (1972), Smith, Summary of Arizona Community Property Law, Sec. 11 at pp. 18-19 (1977). The real estate, if purchased with the separate funds of Zouheil, and granted to him as his sole and separate property, would still be his separate property. See *Stephen v. Stephen,* 36 Ariz. 235, 284 Pac. 158 (1930).

As can be seen, whether one considers the investment as real or personal property, the issue is resolved by determining whether the funds used to purchase the interest were the sole and separate funds of Zouheil.

464*464 In the trial court Nationwide contended that the Islamic law of Morocco applied and that under that law the funds used by Zouheil were his sole and separate property. The trial judge apparently agreed with this contention in awarding judgment in Nationwide's favor. On appeal we became concerned with the applicability of Islamic law to the Zouheils who were neither citizens of Morocco, nor Moslems. Since the trial court's determination of the applicable foreign law is a ruling on a question of law, Rule 44.1, Arizona Rules of Civil Procedure, we asked the parties to furnish us with materials on the issue so that we could make our own determination of the law. See *Kadota v. Hosgai,* 125 Ariz. 131, 608 P.2d 68 (1980). From the material furnished we conclude that the personal status of a Syrian couple residing in Morocco does not fall under the jurisdiction of Moroccan law. Article 13 of the Royal Decree [Dahir] of September 27, 1957, which is still in effect, states: *"Article 13* Aliens who are not Muslims are subject to their national law regarding their personal status." Michel Bourely, *Droit Public Marocain* [Moroccan Public Law] 44 (rabat, 1965) [in French].

Consequently, Article 10 of Decree 60/L.R. of March 13, 1936, as amended by Decree 146/L.R. of 1938, which is still in effect, stipulates that Syrian and Lebanese members of recognized religious communities shall be subject to the legal system of their own personal status laws in matters of personal status and to the provisions of the Civil Code in matters that do not fall under the jurisdiction of that system. Muhammad Fahr Shaqfah, *Sharh Ahkam al-Ahwal al-Shakhsiyah lil-Muslimin wa al-Nasara wa al-Yahud* [Treatise on Personal Status Provisions for Muslims, Christians and Jews] 65 (Damascus, 1973) [in Arabic].

According to Article 39 of the Law of Personal Status for the Catholic communities (Syrians and Lebanese), spouses may each keep ownership of movable and immovable properties. The Article,

Majmu'at al-Qawanin al-Lubnaniyah [Compilation of Lebanese Laws] Section: Personal Status System of Religious Communities 1-6 (Beirut, 1973) [in Arabic], reads as follows:

"Article 39 A married couple may each keep ownership of movable and immovable properties and the right to manage them, to benefit from them, and keep the proceeds of such worth unless they have agreed in writing to the contrary."

Immovable property must be registered in the Real Estate Register, including property of a married woman. Article 22 of Decree 188 of March 15, 1926 and its amendments, David Takriti, *ed., al-Nusus al-Agariyah* [Real Estate Texts] 151 (Damascus, 1959) [in Arabic], provides the following:

"Article 22 The transaction for registering the rights of a married woman, whose personal status forbids her personally to dispose of them, shall take place upon the request of her representative according to the provisions of her personal status."

The law also requires that any document which may establish any right to a property must be recorded in accordance with Article 34 of the above-cited law. This article reads as follows:

"Article 34 The documents that establish real property rights, usufruct or servitude rights, their assignment, and amendment, their termination and their filing with the aim of recording them in the real property registers, must contain, in addition to the related charters and basic contracts, the following information:

1) The first and last names of the two contracting parties, their personal status, and professions

2) When necessary, the name of the husband, date of the marriage, the agreement according to which the marriage took place, date of the marriage contract, and residence of the public servant who attended it

3) The domicile of the contracting parties and the residence they have selected within the region of the Real Estate 465*465 Office if they were not resident in that region." *Id.* at 194-195.

Hence, it is obvious that the concept of community property as a result of marriage does not exist in Morocco or in Syria. Any community property must be designated as such by either one of the spouses at the time of purchasing any real property and registering the other party as co-owner. Without such registration neither the wife nor the husband has a claim against the other.

In conclusion, the wife in a Syrian Catholic marriage does not share her husband's properties, nor does she have an ownership interest in her husband's earnings unless he has specially registered part of his property to her in the public records.

There was no evidence that Zouheil did so here. Therefore, the note was Zouheil's separate property unless it was transmuted to community property.

This brings us to the question of transmutation. Separate property can be transmuted into community property by agreement, gift or commingling. *Myrland v. Myrland,* 19 Ariz. App. 498, 508 P.2d 757 (1973). The fact that the promissory note was made out to the Zouheils as husband and wife does not preclude the trial court from determining the true status of the note. Cf., *Bourne v. Lord,* supra; *Grant v. Grant,* 119 Ariz. 470, 581 P.2d 704 (App. 1978) (separate property put into joint tenancy). The alleged transmutation here was apparently by means of gift. In making proof of a transmutation of the character of property by gift the usual rules of evidence as to sufficiency apply. See *Katson v. Katson,* 43 N.M. 214, 89 P.2d 524 (1939). One of the first requirements of a valid gift is donative intent. See *Neely v. Neely,* 115 Ariz. 47, 563 P.2d 302 (App. 1977). There was evidence in this case which tended to show that Zouheil never intended to give his wife any interest in the note. The deed in the day care center transaction was made out to Zouheil as his sole and separate property. Not until after the lawsuit had been filed by Nationwide did Zouheil take steps to see that his wife had an interest in the Janke transaction, the inference being that the promissory note was made out to husband and wife only to avoid any judgment in the Nationwide case and not with the intention of making the note community property. While Zouheil testified that the German bank account was in his and his wife's names, and that the deed was put in his name alone because he was told that his wife's name could not be on the deed until she came to the United States, he failed to produce any documents or witnesses to corroborate this testimony. The trial court is not bound to accept as true the uncontradicted testimony of an interested party. *Carrasco v. Carrasco,* 4 Ariz. App. 580, 422 P.2d 411 (1967). It did not do so here and we cannot say that it erred in failing to do so.

Affirmed.

BIRDSALL, C.J., and HATHAWAY, J., concur.

ARKANSAS

CATEGORY: Shariah Contract Law

RATING: Highly Relevant

TRIAL: TCSY

APPEAL: ACSY

COUNTRY: N/A

URL: http://scholar.google.com/scholar_case?case=8485220082054480479&q=Sharia+OR+Islam+OR+Islamic+OR+Muslim&hl=en&as_sdt=4,4

226 S.W.3d 792 (2006)

MONIR Y. EL-FARRA, APPELLANT, V. KHALEEM SAYYED, MOSTAFA MOSTAFA, HAMID PATEL, NADEEM SIDDIQUI, MOHAMMED SHAHER, ALI JARALLAH, NEAL AL-MAYHANI, OMAR ROBINSON, MASSOD TASNEEM, FAWZI BARAKAT, ASHRAF KHAN, SALIF SIDDIQUI, SHAGUFTA SIDDIQUI, SAID KHAN, ISLAMIC CENTER OF LITTLE ROCK, INC., JOHN DOE NO. 1, AND JOHN DOE NO. 2, APPELLEES.

No. 05-419.

Supreme Court of Arkansas.

February 2, 2006.

Laser Law Firm, by: Brian A. Brown; McHenry, McHenry & Taylor, by: Robert McHenry, Little Rock, for appellant.

793*793 Cross, Gunter, Witherspoon & Galchus, P.A., by: Carolyn B. Witherspoon and Brian A. Vandiver, Little Rock, for appellees.

JIM GUNTER, Justice.

In this appeal, we consider whether the circuit court had subject-matter jurisdiction to entertain the claims of appellant, Monir El-Farra, a former **Islamic** minister, against the **Islamic** Center of Little Rock and the members of its executive committee, the appellees. The circuit court granted the appellees' motion for summary judgment, dismissing the minister's complaint with prejudice for lack of subject-matter jurisdiction. We affirm.

Appellant is an Imam, which is a minister in the religion of **Islam**. In January of 2001, the **Islamic** Center of Little Rock ("ICLR") hired appellant pursuant to a written employment contract, which provided that the ICLR could terminate the contract through a unanimous vote of its Executive Committee and Board of Directors "on valid grounds according to **Islamic** Jurisdiction (Shari'a)" upon sixty-days notice to appellant.

In November of 2002, an in-house arbitration was conducted between the ICLR and the appellant over certain ICLR members' concerns regarding appellant's confrontational, controversial, and offensive behavior in his khutbas (sermons) and his interference in the ICLR administration. On May 15, 2003, the President of the ICLR sent a warning letter to appellant, copying the members of the Executive Committee and the Board of Directors, stating that appellant's actions have created "disunity and `fitna' among the community," that members have commented upon the "inappropriateness and inaccuracy" of particular khutbas, that his khutbas have "inappropriately targeted some community members with whom you have had personal disagreements," and that his behavior was "un-**Islamic**." The letter then stated that the appellant must meet certain listed requirements to improve the situation or he would be subject to immediate termination. On May 30, 2003, the Executive Committee sent another letter to appellant, and copied the Board members. The letter cited additional grievances, stating that the appellant's misconduct "contradicts the **Islamic** law" in terms of relations with his supervisors, and placed him on probation. Finally, on July 17, 2003, the ICLR voted to terminate appellant, sent a letter telling him he was being terminated, effective immediately, and enclosed a check in payment of his salary for sixty days.

Appellant filed a complaint against the ICLR and members of its Executive Committee, alleging defamation, tortious interference with a contract, and breach of contract. The appellees filed a motion for summary judgment, arguing that the First Amendment to the United States Constitution prohibits the circuit court from exercising jurisdiction in this case. The circuit court agreed and granted the appellees' motion for summary judgment. Appellant filed this appeal.

We review a circuit court's interpretation of a constitutional provision *de novo. Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.,* 353 Ark. 701, 720, 120 S.W.3d 525, 537 (2003). The First Amendment to the United States Constitution[1] provides in pertinent part as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. amend. I. The United States Supreme Court, applying the First Amendment, has

794*794 held that civil courts are not a constitutionally permissible forum for a review of ecclesiastical disputes. *See* *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 710, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969); *Watson v. Jones,* 80 U.S. (13 Wall.) 679, 727, 20 L.Ed. 666 (1871). The federal courts have repeatedly concluded that any attempt by civil courts to limit a religious institution's choice of its religious representatives would constitute an impermissible burden upon that institution's First Amendment rights. *Alicea-Hernandez v. Catholic Bishop of Chicago,* 320 F.3d 698 (7th Cir.2003)(affirming dismissal of discrimination claims); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals,* 929 F.2d 360 (8th Cir.1991)(affirming summary judgment in favor of church on age and sex-discrimination claims following priest's discharge); *Minker v. Baltimore Annual Conference of United Methodist Church,* 894 F.2d 1354, 1359 (D.C.Cir.1990)(affirming dismissal of minister's age-discrimination and breach-of-contract claims for church's denial of pastorship); *Hutchison v. Thomas,* 789 F.2d 392 (6th Cir.1986)(affirming dismissal of complaint, including claims of breach of contract and defamation, for church's forced retirement of minister); *Rayburn v. General Conference of Seventh-Day Adventists,* 772 F.2d 1164 (4th Cir.1985)(affirming summary judgment for church on discriminatory denial-of-pastorship claim), *cert. denied* 478 U.S. 1020, 106 S.Ct. 3333, 92 L.Ed.2d 739 (1986); *Simpson v. Wells Lamont Corp.,* 494 F.2d 490 (5th Cir.1974).

The Eighth Circuit explained its reasons for refusing to involve itself in internal church discipline involving a priest's attempts to obtain employment in his chosen profession by stating as follows:

In the instant case, however, Kaufmann's claims relate to his status and employment as a priest, and possibly to other matters of concern with the church and its hierarchy, and go to the heart of internal church discipline, faith, and church organization, all involved with ecclesiastical rule, custom and law. While there may be some secular aspects to employment and conceivably even to the priesthood or clergy, it is apparent that the priest or other member of the clergy occupies a particularly sensitive role in any church organization. Significant responsibility in matters of the faith and direct contact with members of the church body with respect to matters of the faith and exercise of religion characterize such positions. In spite of Kaufmann's argument, the proposed amendments to the complaint deal only with matters of religion and there is no allegation that we can construe in any other light.

Kaufmann v. Sheehan, 707 F.2d 355, 358 (8th Cir.1983).

In *Scharon, supra,* the Eighth Circuit again addressed this issue, stating:

Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts, for to review such decisions would require the courts to deter-

mine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made. This is precisely the kind of judicial second-guessing of decision-making by religious organizations that the Free Exercise Clause forbids.

Id. at 363.

Appellant argues that his breach-of-contract claim does not involve ecclesiastical 795*795 matters related to **Islamic** doctrine, but only interpersonal matters concerning his relationship with the Executive Committee. Moreover, he claims that he is not challenging the discharge itself—in other words, he is not seeking reinstatement— but is merely seeking damages in accordance with the terms of the contract. Therefore, he argues, his claim is purely secular, does not involve the court in selection of a minister, and falls within the "neutral-principles doctrine" announced by the United States Supreme Court in *Jones v. Wolf,* 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979). We reject his arguments.

In *Jones,* the Court created a narrow exception to the prohibition of court involvement in ecclesiastical matters where the controversy involves a church's property rights. The Court stated that "there are neutral principles of law, developed for use in all property disputes, which can be applied without `establishing' churches to which property is awarded." *Id.* at 599, 99 S.Ct. 3020. Arkansas has acknowledged this exception only with regard to real-property disputes. In *Kinder v. Webb,* 239 Ark. 1101, 1102, 396 S.W.2d 823, 824 (1965), we stated that "civil courts will not assume jurisdiction of a dispute involving church doctrine or discipline unless property rights are involved." *See also Holiman v. Dovers,* 236 Ark. 211, 236 Ark. 460, 366 S.W.2d 197 (1963). While appellant argues that he is contractually entitled to be paid money by ICLR, this is not a case involving a property dispute, but a contract dispute. The neutral-principles exception does not apply.

Appellant relies on *Jenkins v. Trinity Evangelical Lutheran Church,* 356 Ill. App.3d 504, 292 Ill.Dec. 195, 825 N.E.2d 1206 (Ill.App.Ct.2005), in which the Illinois Appellate Court extended the neutral-principles exception to a minister's discharge where the minister resigned with the agreement that he would be paid a certain guaranteed benefit for his resignation. The parties were not arguing about whether the minister should or should not have been discharged. He resigned in exchange for the church's agreement to pay him a certain benefit. The only dispute before the court was the amount of that benefit. In holding that the First Amendment did not prohibit the court's exercise of jurisdiction, the court noted that the church bylaws in that case adopted the "neutral principles" doctrine, giving civil courts jurisdiction over contract disputes as long as they did not involve ecclesiastical issues. *Id.* at 1211. The court held that, because the minister's resignation was not the issue, the dispute was not intimately related to the church's right to discharge him. *Id.* at 1213. Therefore, the court determined that the case fell within the neutral-principles exception.

First, appellant's claim is distinguishable from the pastor's dispute in *Jenkins.* In *Jenkins* the court specifically noted that the minister's resignation and the reasons therefor were not in issue. *Id.* at 1212. In this case, that is exactly what is in issue. The only way appellant can recover for breach of contract in this case is if the ICLR did not terminate him "on valid grounds according to **Islamic** Jurisdiction (Shair'a)." Second, appellant's claims that there are no ecclesiastical issues involved and that he is not seeking reinstatement but only damages do not persuade us that the circuit court erred in finding it had no subject-matter jurisdiction. Appellant is suing for breach of contract. Regardless of the remedy he is requesting—and in this case he is seeking the traditional remedy of damages as opposed to specific performance—the court must review whether the grounds for termination were "valid grounds according to 796*796 **Islamic** Jurisdiction." It is our opinion that any determination of this claim would involve ecclesiastical issues.

Finally, the courts have held that the First Amendment protects the act of decision rather than the motivation behind it; therefore, whether the termination of appellant was based on secular reasons or **Islamic** doctrine, this court will not involve itself in ICLR's right to choose ministers without government interference. *See, e.g., Cha v. Korean Presbyterian Church of Washington,* 262 Va. 604, 553 S.E.2d 511 (Va.2001) (church's decisions about appointment and removal of minister is beyond subject-matter jurisdiction of civil courts); *EEOC v. Catholic Univ. Of America,* 83 F.3d 455 (D.C.Cir.1996)(Free Exercise Clause exempts selection of clergy from employment-discrimination suits; question is not whether reasons are ecclesiastical in nature, but whether they are related to a pastoral-appointment determination); *Rayburn, supra; Scharon, supra.* "Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts. . . . ." *Scharon,* 929 F.2d at 363; *see also Belin v. West,* 315 Ark. 61, 864 S.W.2d 838 (1993) (trial court has no jurisdiction to resolve legal disputes involving a church or minister if it involves an inquiry into church doctrine or ecclesiastical matters); *Gipson v. Brown,* 295 Ark. 371, 749 S.W.2d 297 (1988) (we stated that we do not interfere in purely ecclesiastical matters). Based upon this well-established precedent, we hold that the circuit court correctly concluded that it lacked subject-matter jurisdiction to review appellant's breach-of-contract claim against the appellees.

Appellant next argues that the circuit court erred in dismissing his tort allegations. The tort allegations include appellant's claim that the publication of the letters of May 15 and May 30, 2003, constituted defamation, and his claim that the appellees committed tortious interference with the employment contract between ICLR and appellant. The allegations of interference rely upon the defamation claim.

Appellant claims that the letters included the following allegedly defamatory statements: (1) the May 15 letter accused appellant of "insubordination, disrespect, and lack of cooperation," of being "disruptive to the community," of delivering khutbas (sermons) which showed "maleficence and

deliberate interference in the operations of the EC," and of "creating disunity and `fitna' among the community," which appellant claims is a major breach of **Islamic** law; and (2) the May 30 letter accused appellant of conduct which "contradicts the **Islamic** law," and of conduct which has "increasingly been unbecoming, insubordinate and disrespectful to the entire community." Appellant argues that these false accusations against him do not assert ecclesiastical disputes or conflicts in religious doctrines, but allege merely secular conflicts with the Executive Committee. We disagree.

In order to prove his claim of defamation, appellant must show that these allegedly defamatory statements were in fact false. *Northport Health Services, Inc. v. Owens,* 356 Ark. 630, 641, 158 S.W.3d 164, 171 (2004). To determine the truth or falsity of statements such as whether appellant's conduct "contradicts the **Islamic** law" or whether he was "creating disunity and `fitna' among the community," the circuit court would be required to inquire into religious doctrine and governance. Moreover, these statements were made in the context of a dispute over appellant's suitability to remain as Imam. It is difficult to see how an inquiry can be made into these statements without an examination of religious 797*797 doctrines, laws, procedures, and customs regarding who is and is not fit to be the Imam for ICLR, and the First Amendment prohibits the circuit court from delving into these matters.

Finally, the tortious-interference claim relies in part upon the defamation claim. Therefore, for the reasons discussed herein, we hold that the circuit court does not have subject-matter jurisdiction to review it.

Affirmed.

GLAZE and IMBER, JJ., not participating.

[1] The First Amendment is applicable to the states through the Fourteenth Amendment. *See Murdock v. Pennsylvania,* 319 U.S. 105, 108, 63 S.Ct. 870, 87 L.Ed. 1292 (1943).

CALIFORNIA

CATEGORY: Shariah Doctrine

RATING: Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: N/A

URL: http://scholar.google.com/scholar_case?case=17705984737212824683&q=sharia+OR+Muslim+OR+Islamic+OR+islam&hl=en&as_sdt=4,5

55 Cal.2d 663 (1961)

IN RE JESSE L. FERGUSON ET AL. ON HABEAS CORPUS.

Crim. No. 6799.

Supreme Court of California. In Bank.

Apr. 24, 1961.

Joseph A. DeChristoforo, under appointment by the Supreme Court, for Petitioners.

Stanley Mosk, Attorney General, Doris H. Maier and Richard D. Lee, Deputy Attorneys General, for Respondent. 667*667

WHITE, J.

This is a petition in propria persona for a writ of habeas corpus by Jesse L. Ferguson and nine other inmates confined in Folsom State Prison pursuant to judgments, the validity of which is not herein questioned. The petition principally seeks the removal of restrictions placed upon petitioners' claimed religious activities in prison, and the right to communicate with an attorney concerning alleged illegal restraints by the prison officials, unrelated to the judgments of incarceration. Our order to show cause issued, and counsel was appointed to represent petitioners before this court.

According to their allegations, petitioners are members of the **Muslim** Religious Group. They believe in the solidarity and supremacy of the dark-skinned races, and that integration of white and dark races is impossible since contrary to the laws of God and nature. They appear to be strongly convinced of the truth of their form of what they characterize as a religious belief and in its superiority over other religions. Concerning their relationship to the prison officials, petitioners state that "It is a maxim Dogma and order of our God that we kneel to no one except him. Because we as a religious group do not kneel before some one [who] does not believe in our God."

The general policy of the Department of Corrections is to encourage religious activities by inmates. Some time prior to February 1958, the Director of Corrections considered the question of whether the Muslims should be classified as a religious group. It was determined that they were not entitled to be accorded the privileges of a religious group or sect at that time. Such is the present policy of the Department of Corrections toward Muslims, and this policy was approved by the State Advisory Committee on Institutional Religion in January 1961. Other religious groups are allowed to pursue religious activities, but the Muslims are not allowed to engage in their claimed religious practices.

There appears to be considerable friction between the prison officials and the **Muslim** inmates as individuals and as a group. On August 16, 1960, two prison officials found it necessary to search two **Muslim** inmates for contraband. The officials were soon surrounded by approximately 20 of the **Muslim** group, who manifested much hostility and a desire to protect their two "Brothers" from interference by the prison officials. A number of the Muslims who had gathered were ordered to report to the captain's office where they were questioned. According to the report of a prison official, "All 668*668 of those questioned looked down their noses at those present as if we were a very small piece of refuse." At the close of the interview, petitioner Mitchell refused to leave and as an officer attempted to remove him, Mitchell told him "to get his 'stinking hands' off him as no white devil was allowed to put his hands on a **Muslim**." Mitchell was forced to the floor so he could be handcuffed and removed from the office.petitioner Johnson thereafter lunged at one of the officers, and he was also forcibly subdued and removed from the captain's office.

On August 21, 1960, petitioner Ferguson attempted to contact a Los Angeles attorney concerning alleged violations of the rights of the **Muslim** inmates while in Folsom Prison, but it appears that the letter was not allowed to be transmitted to the attorney. Ferguson again sought help on August 28, 1960, by writing to his mother, with directions to take the letter to a specified address. The letter to his mother was also confiscated, and Ferguson was punished for abuse of the mail privilege. In the opinion of the prison officials the letter to his mother contained derogatory remarks about the prison officials. Ferguson stated in the letter to his mother that the prison officials had advised him that his letter to the attorney "Is being returned in your central file, and he is [not] an approved correspondent of yours and you will not be permitted to write to him. The charges you state in your letter are also untrue and we will not permit you to make such statements, criticizing officials of this

institution." Ferguson continued: "Now mother what this man forgot, was that this letter I wrote to Mr. Berry. It was legal and he is a lawyer. And I have the right by law to write to a lawyer when it is about law."

It is alleged that in October 1960 and on three subsequent occasions, petitioner Haynes attempted to purchase the "**Muslim** Bible," the "Holy Qur'an." He was advised that the book had been disapproved by the associate warden, and he was told to refrain from persisting in his efforts to obtain a book that could not be approved. It also appears that a major portion of the **Muslim** religious literature has been confiscated by the prison authorities. Specifically, it appears that on October 10, 1960, petitioner Ferguson's **Muslim** religious scrapbook was confiscated by the prison officials when it was found in the possession of inmate Jones. Jones, who is not a petitioner, would not disclose the ownership of the scrapbook, and it was subsequently destroyed as contraband. In his report of the incident the correctional officer stated that "This book consisted of the usual '**Muslim**' trash, advocating hatred of the white race, superiority of the black man, ..." 669*669

On November 1, 1960, petitioner Ferguson refused to obey an order given by a prison official. He then grabbed the official by the wrist and necktie, and subsequently he became abusive and belligerent toward other officers in refusing to submit to a routine search of his person. It was necessary to physically subdue him in order to accomplish the search.

Penal Code, section 1473, provides that "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint."penal Code, section 1484, provides that "The party brought before the court or judge, on the return of the writ, may ... allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge." And section 1485 of the Penal Code provides that "If no legal cause is shown for such imprisonment or restraint, or for the continuation thereof, such court or judge must discharge such party from the custody or restraint under which he is held." Concerning Penal Code, section 1473, the court stated in In re Rider, 50 Cal.App. 797, 801 [195 P. 965], that "We think that a person may be said to be unlawfully 'restrained of his liberty,' so as to be entitled to the writ of habeas corpus, when, though [lawfully] in custody, he is deprived of some right to which, even in his confinement, he is lawfully entitled under the constitution or laws of this state or the United States, the deprivation whereof serves to make his imprisonment more onerous than the law allows, or curtails, to a greater extent than the law permits even in his confinement, his freedom to go when and where he likes." We stated in In re Chessman, 44 Cal.2d 1, 9 [279 P.2d 24], that "The writ of habeas corpus has been allowed to one lawfully in custody as a means of enforcing rights to which, in his confinement, he is entitled." [1] It thus appears that a writ of habeas corpus may be sought to inquire into alleged illegal restraints upon a prisoner's activities which are not related to the validity of the judgment or judgments of in-

carceration, but which relate "solely to a matter of prison administration." (In re Chessman, supra, 44 Cal.2d 1, 3-4, 5-6, 9.)

Petitioners contend that their rights to religious freedom under the Fourteenth Amendment of the United States Constitution, and that their rights to "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, ..." under article I, section 4, of the California Constitution, have been denied by the 670*670 prison officials. They allege that they are not allowed a place to worship, that their religious meetings are broken up, often by force, that they are not allowed to discuss their religious doctrines, that they are not allowed to possess an adequate amount of their religious literature, and that their religious leaders are not allowed to visit them in prison. They allege that Protestant, Catholic, Jewish and Christian Scientist groups are allowed the above-enumerated privileges.petitioners seek to be permitted religious privileges equal to those allowed to the other prison religious groups, or that religious privileges be denied to all prison religious groups of whatever faith, or, that they be discharged from prison so they may pursue the beliefs and practices of their **Muslim** faith.

Respondent admits that the above restrictions have been enforced only against the petitioners and other **Muslim** inmates, but claims that the discriminatory treatment is justified because: "In the petitioners' case, the Director determined that the principles petitioners allegedly espoused were in direct conflict with the health, safety, welfare and morals of the prison. ...petitioners, by their acts in rejecting the authority of members of the white race, displaying verbally and physically their hostility to the prison staff, interfering in the disciplinary proceedings of other inmates and the alleged doctrines advocated, present a problem in prison discipline and management."

[2] Freedom of religion is protected as a fundamental right by provisions in the California and United States Constitutions. (U.S. Const., amends. XIV, I; Cal. Const., art. I, 4.) But whatever may be the guarantees of general religious freedom afforded by article I, section 4, of the California Constitution, it is expressly provided in article X, section 7, of that document that "Notwithstanding anything contained elsewhere in this Constitution, the Legislature may provide for the establishment, government, charge and superintendence of all institutions for all persons convicted of felonies. For this purpose, the Legislature may delegate the government, charge and superintendence of such institutions to any public governmental agency or ... officers, ... Any of such ... officers ... shall have such powers, perform such duties and exercise such functions in respect to other reformatory or penal matters, as the Legislature may prescribe." (Emphasis added.) [3] It is manifest that petitioners are not protected by the guarantees of religious freedom set forth in article I, section 4, of the California Constitution, since they 671*671 are incarcerated in an institution for "persons convicted of felonies," and subject to the above exception of article X, section 7. [4] Nor does it appear that petitioners may rely on federal constitutional guarantees since, of necessity, inmates of state prisons may not be allowed to assert the usual federal constitutional rights guaranteed to nonincarcerated

citizens. (United States ex rel. Morris v. Radio Station WENR, 209 F.2d 105, 107; see Siegel v. Ragen, 180 F.2d 785, 788; Nichols v. McGee, 169 F.Supp. 721, 724-725; Curtis v. Jacques, 130 F.Supp. 920, 921-923.) [5] Rather, the United States Supreme Court has recognized that: "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." (Price v. Johnston, 334 U.S. 266, 285 [68 S.Ct. 1049, 92 L.Ed. 1356]; see also Tabor v. Hardwick, 224 F.2d 526, 529.) It has been indicated that in cases of extreme mistreatment by prison officials, an inmate of a state prison may obtain relief on federal constitutional grounds. (United States ex rel. Morris v. Radio Station WENR, supra, 209 F.2d 105, 107; Adams v. Ellis, 197 F.2d 483, 485.) [6] But in the instant circumstances, the refusal to allow these petitioners to pursue their requested religious activities does not appear to amount to such extreme mistreatment, so as to warrant the application of whatever federal constitutional guarantees which may exist for the protection of inmates in state prisons. (Cf. United States ex rel. Wagner v. Ragen, 213 F.2d 294, 295; Nichols v. McGee, supra, 169 F.Supp. 721, 724-725.) We are, accordingly, reluctant to apply federal constitutional doctrines to state prison rules reasonably necessary to the orderly conduct of the state institution. (United States ex rel. Morris v. Radio Station WENR, supra, 209 F.2d 105, 107; United States ex rel. Vraniak v. Randolph, 161 F.Supp. 553, 559-560.)

The California Legislature has implemented the constitutional prison control provisions of article X, section 7, by providing that the "management and control of the State prisons" is vested in the Office of the Director of Corrections. (Pen. Code, 5054.) Further, Penal Code, section 5058, provides that "The director may prescribe rules and regulations for the administration of the prisons and may change them at his pleasure." It appears that the alleged discrimination against petitioners and the **Muslim** group respecting their religious activities has occurred pursuant to an order by the Director of Corrections. [7] Notwithstanding the foregoing 672*672 grant of authority, the orders, rules, or regulations prescribed by the Director of Corrections must be reasonable and not an abuse of his discretion. (See In re Chessman, supra, 44 Cal.2d 1, 9; Davis v. Superior Court, 175 Cal.App.2d 8, 20 [345 P.2d 513].) [8a] However, it is apparent that the **Muslim** beliefs in black supremacy, and their reluctance to yield to any authority exercised by "some one [who] does not believe in [their] God," present a serious threat to the maintenance of order in a crowded prison environment. Even conceding the Muslims to be a religious group it cannot be said under the circumstances here presented that the Director of Corrections has made an unreasonable determination in refusing to allow petitioners the opportunity to pursue their claimed religious activities while in prison. (See Akamine v. Murphy, 108 Cal.App.2d 294, 296 [238 P.2d 606].)

[9] Petitioners' counsel contends that the instant determination by this court is "of necessity, a forerunner to determination of the broader question of whether the preachments of the 'Black Muslims' are such that their activities could be suppressed outside of prison." It is further contended that if the

Muslim beliefs are such as to justify prohibition of mere assembly within prison of the holders of those beliefs, then a corresponding assembly outside of prison could be suppressed. But it is apparent, in view of the provisions of article X, section 7, of our Constitution that the instant determination relates only to the **Muslim** religious group in prison.

[10] It was contended at oral argument herein that petitioners are only seeking freedom of religious belief, and not the freedom to effectuate their beliefs by action. Even as prisoners, petitioners have the absolute right to possess their **Muslim** beliefs. (Cf. Gospel Army v. City of Los Angeles, 27 Cal.2d 232, 242 [163 P.2d 704]; Ex parte Jentzsch, 112 Cal. 468, 471 [44 P. 803, 32 L.R.A. 664].) Nor may petitioners be punished for holding their **Muslim** beliefs. (Cf. Everson v. Board of Education, 330 U.S. 1, 15-16 [67 S.Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392].) [11] But assembling and discussing the inflammatory **Muslim** doctrines in a prison situation must be considered to be such action, even though "religious," which may be reasonably regulated by the Director of Corrections. (Cal. Const., art. X, 7; Pen. Code, 5054, 5058; cf. Cal. Const., art. I, 4, which reads in part, ["but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State"].) 673*673

[8b] It has also been contended on petitioners' behalf that the numerous incidents wherein petitioners and other Muslims have been involved in violation of prison rules have been directly caused by the prison officials' refusal to accord the Muslims the status of a religious group, and that if the Muslims were accorded the same privileges as other religious groups in prison, the cause of the friction would be removed. While there may be merit in this contention, nevertheless, in light of the potentially serious dangers to the established prison society presented by the **Muslim** beliefs and actions, it cannot be said that the present, suppressive approach by the Director of Corrections is an abuse of his discretionary power to manage our prison system. What adjustments should be made to alleviate the present situation would appear to be, at this time, a matter within his discretion. (See Pen. Code, 5058; Akamine v. Murphy, supra, 108 Cal.App.2d 294, 296.)

Petitioners contend that they have been subjected to physical force by prison officials solely because of their affiliation with the **Muslim** movement. They allege that force has been used (1) August 16, 1960, upon the person of petitioner Mitchell, "without just cause," (2) August 16, 1960, upon petitioner Johnson, "without just and proper cause," and (3) November 1, 1960, an assault upon petitioner Ferguson "without any just cause whatsoever."petitioners also allege that they have been segregated by the prison officials into an old and filthy part of Folsom prison. It is admitted in the return that physical force was used on each of the above occasions, but the respondent warden alleges that the physical force used on each occasion was only that necessary to subdue one or another of the petitioners when he refused to obey proper orders and became violent. It is also admitted that the petitioners were segregated, but only in the normal course of institutional punishment for their violations of prison regulations.

[12] Prisoners may not be subjected to corporal punishment (Pen. Code, 673) nor, as indicated, may petitioners be punished solely because of their **Muslim** beliefs. But physical force may be used by prison officials where necessary to prevent a prisoner from doing bodily harm to a prison official. (O'Brien v. Olson, 42 Cal.App.2d 449, 460 [109 P.2d 8].) [13] It appears that in each of the enumerated instances where physical force was used, one of the petitioners, because of a conflict involving his **Muslim** beliefs, became physically belligerent and aggressive toward a supervisory official. Since by their aggressiveness petitioners appear to 674*674 have created a serious risk of physical harm to the prison officials who had charge of them, the use of physical force by the officials in each of the above-enumerated instances was within the rule of O'Brien, supra, so that petitioners have not been subjected to physical force solely because of their **Muslim** beliefs. It also appears that the segregation of the **Muslim** petitioners was in the ordinary course of institutional discipline. (See People v. Garmon, 177 Cal.App.2d 301, 303 [2 Cal.Rptr. 60].) [14] Furthermore, this court must assume that the prison officials will treat the **Muslim** inmates as humanely as is possible, considering the difficult administrative problems presented by the **Muslim** actions and practices. (Code Civ. Proc., 1963, subds. 1, 15, 33.)

[15a] Petitioner Ferguson requests specially that the prison officials be compelled to return his religious scrapbook, which he loaned to inmate Jones from whom it was confiscated on October 10, 1960. Since we have determined that the **Muslim** Religious Group is not entitled as of right to be allowed to practice their religious beliefs in prison, the "religious" scrapbook must be considered as any ordinary writing advocating or encouraging prohibited conduct. [16] Reasonable censorship of the printed matter which may be possessed by an inmate is necessary in prison administration (see Pen. Code, 4570), and is not a denial of fundamental rights. (People v. Ray, 181 Cal.App.2d 64, 69 [5 Cal.Rptr. 113]; Morris v. Igoe, 209 F.2d 108, 109; Adams v. Ellis, supra, 197 F.2d 483, 485.) [15b] In view of the inflammatory nature of the material which petitioner Ferguson's scrapbook appears to have contained, it cannot be said that the confiscation of the scrapbook by the prison authorities was unreasonable. (See Davis v. Superior Court, supra, 175 Cal.App.2d 8, 20.)

Petitioners particularly urge that the prison authorities be specifically ordered and directed to allow the former to purchase their bible, the Holy Koran. But, as we shall see, it does not appear that they seek the standard Mohammedan scriptures.

As heretofore pointed out, reasonable censorship of the printed matter which may be in the possession of an inmate is necessary in prison regulation and does not impinge upon fundamental rights. Also, we have heretofore set forth the broad delegation of power by our Constitution and statutes which provide that the "management and control of the State prisons" is committed to the office of the Director of Corrections 675*675 (Pen. Code, 5054), and the director may not only formulate rules and regulations for the administration of prisons, but, at his pleasure, he may change them (Pen. Code, 5058). [17] Certainly it cannot be said that the prison officials would be acting arbitrar-

ily or unreasonably in withholding a version of any bible or other literature adapted by the **Muslim** Religious Group to support their doctrines of the supremacy of the black race and segregation from the white race. To so hold would be to compel the prison officials to permit inmates to purchase and disseminate in the prison literature advocating and encouraging the very conduct which the prison authorities may lawfully suppress.

In the case now engaging our attention, the record does not establish that petitioners seek to be permitted to purchase the orthodox Holy Koran, recognized as the scriptures of the Mohammedans and containing the professed revelations to Mohammed, and which is the basis for the religious, social, civil, commercial, military and legal regulations of the Mohammedan world. Nor does it appear that in the requests to the prison officials for permission to purchase their bible, petitioners made it clear to those officials that they were seeking to purchase the orthodox Holy Koran, rather than some version adapted to their "Black **Muslim**" doctrines. Manifestly then, respondent prison authorities cannot be herein directed to comply with petitioners' request to purchase their sacred book when it has not been established that a proper application has been made to the prison authorities thereby enabling them to exercise their discretionary power to manage the prison system. (Pen. Code, 5054, 5058.)

Petitioner Ferguson contends that he has an absolute right to contact a member of the Bar on proper legal business, and that by withholding his communication to the attorney of August 21, 1960, the prison officials in effect held him incommunicado as to any effective vindication of his legal rights. Apparently Ferguson was then attempting to secure counsel to represent him and his fellow Muslims in the prosecution of the instant matter. Respondent does not deny that the foregoing letter to the attorney was not allowed to be delivered, but it is contended that "the sending and receiving of correspondence within the prison is a privilege and not a right; ... that inmates may write to ... attorneys, provided each letter is of proper character and length; that a violation of the rules regarding mail privilege may cause curtailment or suspension of this privilege; ..." It was further urged by 676*676 respondent at the oral argument that as a prisoner, petitioner Ferguson is generally permitted to contact or procure an attorney by use of the mails, but that no prisoner is allowed to set forth in such a letter to an attorney anything derogatory or critical of the prison authorities. It appears that at this time petitioners, including Ferguson, have communicated with, and had the benefit of appointed counsel through action of this court. Respondent now asserts the right to refuse to permit any of the petitioners, as prisoners, to procure by mail counsel of his own choosing if the letter to the attorney contains matter which is derogatory of the prison authorities.

[18] Even though incarceration in a state prison brings about the loss of numerous legal rights (Pen. Code, 2600, 2601), and the necessary curtailment of freedoms because of incarceration (Davis v. Superior Court, supra, 175 Cal.App.2d 8, 20), a prisoner remains "under the protection of the law" (Pen. Code, 2650). [19] He may not be subjected to "cruel, corporal or unusual punishment" (Pen.

Code, 673; O'Brien v. Olson, supra, 42 Cal.App.2d 449, 460), "and any injury to his person, not authorized by law, is punishable in the same manner as if he were not convicted or sentenced" (Pen. Code, 2650). Also, the money and valuables which a prisoner brings into prison must be accounted for upon his discharge. (Pen. Code, 2085.) Furthermore, a prisoner has a right not to be treated unreasonably considering the circumstances. (Akamine v. Murphy, supra, 108 Cal.App.2d 294, 296; see People v. Garmon, supra, 177 Cal.App.2d 301, 303; Davis v. Superior Court, supra, 175 Cal.App.2d 8, 19-20.)

[20] We stated in In re Chessman, supra, 44 Cal.2d 1, 10, that "prisoners have the right to prompt and timely access to the mails for the purpose of transmitting to the courts statements of facts which attempt to show any ground for relief, ..." and it has been held, as hereinbefore indicated, that a person who is lawfully incarcerated may prosecute a writ of habeas corpus to inquire into a matter which "relates solely to a matter of prison administration." (In re Chessman, supra, 44 Cal.2d 1, 3-4, 5-6, 9.) It would thus appear only right and just that a prisoner has a right to prompt and timely access by mail to the courts (In re Chessman, supra, 44 Cal.2d 1, 10; Warfield v. Raymond, 195 Md. 711, 713 [71 A.2d 870, 871]; see Ex parte Hull, 312 U.S. 546, 548-549 [61 S.Ct. 640, 85 L.Ed. 1034]; Spires v. Dowd, 271 F.2d 659, 661; Haines v. Castle, 226 F.2d 591, 593) though as stated in In re Chessman, supra, 44 Cal.2d 1, 10, "it would be manifestly impossible to 677*677 allow prisoners 'immediate access by mail to the courts ... at all times.' "

[21] It has been held that the right of prison officials to inspect communications between prisoners and their attorneys "should not be used unnecessarily to delay communications to attorneys or the courts since such delay could amount to an effective denial of a prisoner's right to access to the courts." (Bailleaux v. Holmes, 177 F.Supp. 361, 364.) [22] It has also been recently stated that "Of course an absolute isolation of those incarcerated in a penal institution by a ban on communication by them with the outside population would constitute an unreasonable exercise of that power [censorship]." (Davis v. Superior Court, supra, 175 Cal.App.2d 8, 20.) [23] Further, it is manifest that the right of a prisoner to petition a court for redress of alleged illegal restraints on his liberty is unreasonably eroded if the prison authorities may be allowed to deny a prisoner the opportunity of procuring counsel, so that his petition for writ of habeas corpus or other mode of redress always must be presented in propria persona. [24] It must also be conceded that when a prisoner is writing to an attorney in an attempt to secure legal representation, he must be allowed to set forth factual matters even though derogatory or critical of the prison authorities, since he must persuade the attorney receiving the letter that the writer's rights as a prisoner truly have been violated, so as to interest that attorney in the prisoner's alleged case against the prison authorities. [25] Therefore, it is an abuse of discretion for prison regulations to be utilized so as to deny an inmate the opportunity to procure with reasonable promptness, or to communicate with in a reasonably prompt manner, a member of the Bar on matters pertaining to alleged violations of the prisoner's legal rights allegedly

suffered as a direct result of incarceration, even though the letter to the attorney may be critical of the prison authorities. [fn. 1] (Cf. In re Chessman, supra, 44 Cal.2d 1, 3-4, 678*678 9-10; People v. Howard, 166 Cal.App.2d 638, 642- 643 [334 P.2d 105] [Prison rules cannot be used to impair an inmate's right to appeal]; In re Robinson, 112 Cal.App.2d 626, 629-630 [246 P.2d 982] [Absolute right of inmate to file document with a court relating to judgment of conviction]; In re Rider, supra, 50 Cal.App. 797, 801-802 [Superintendent of institution of incarceration may not deny inmate right to privately consult with counsel].)

While the question of the right to engage counsel for the purpose of this proceeding now appears to be moot in that counsel has been appointed and presumably communication to him has not been unduly restrained, this is not to say that these petitioners may henceforth be restrained from communicating, by letter or otherwise, to prospective counsel written in good faith concerning claimed infringements on their legal rights, such as they are.

In view of the foregoing, the petitioners are not now entitled to relief in any respect complained of in the petition. Accordingly, the order to show cause is discharged, and the petition for the writ is denied.

Gibson, C. J., Traynor, J., Schauer, J., McComb, J., Peters, J., and Dooling, J., concurred.

[fn. 1] 1. The instant holding is not contrary to In re Chessman, supra, 44 Cal.2d 1, 9, where it was held that a prisoner has no right to be visited by an attorney who is not his attorney of record. The object of petitioner Ferguson's communication was to secure the services of an attorney. Nor is the instant holding contrary to Chessman, supra, at p. 10, where it was held that a prisoner has no enforceable right to engage in legal research. The latter holding in Chessman was supported by a reference to Penal Code, sections 2600, 2601, and 2602, which sections deprive persons sentenced to a state prison of their civil rights. It is manifest that Penal Code, sections 673, 2650, 2085, and 1473, all of which sections provide legal rights to a prisoner, are exceptions to the general rules of sections 2600, 2601, and 2602, supra.

CATEGORY: Shariah Marriage Law

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: Egypt

URL:
http://scholar.google.com/scholar_case?case=11883136301773989345&q=sharia+OR+Muslim+OR+Islamic+OR+islam&hl=en&as_sdt=4,5

105 Cal.Rptr.2d 863 (2001)

88 Cal.App.4th 398

IN RE MARRIAGE OF AHMAD AND SHERIFA SHABAN. AHMAD SHABAN, APPELLANT, V. SHERIFA SHABAN, RESPONDENT.

Nos. G024572, G025498.

Court of Appeal, Fourth District, Division Three.

April 11, 2001.

As Modified on Denial of Rehearing May 9, 2001.

Review Denied July 11, 2001.

864*864 Schwamb & Stabile, Mark A. Hewitt, Orange; Hart, King & Coldren, Robert S. Coldren, Richard P. Gerber, Santa Ana; and James R. Goff, Laguna Hills, for Appellant.

Law Offices of Marjorie G. Fuller, Marjorie G. Fuller, Fullerton; and Mark S. Millard, Los Angeles, for Respondent.

OPINION

SILLS, P.J.

This appeal presents a situation that not only reaches the outer limits of the ability of a prospective married couple to incorporate by reference terms into a prenuptial agreement, but so far exceeds those limits as to fall off the edge. It is one thing for a couple to agree to basic terms, and choose 865*865 the system of law that they want to govern the construction or interpretation of their premarital agreement. (See Fam.Code, § 1612, subd. (a)(6) ["Parties to a premarital agreement may contract with respect to ... [¶] ... [¶] The choice of law governing the construction of the agreement"].) It is quite another to say, *without any agreement as to basic terms,* that a marriage will simply be governed by a given system of law and then hope that parol evidence will supply those basic terms.

Here, a couple who married in Egypt in 1974 had their marriage dissolved after living in the United States for about 17 years. In the course of the proceedings, the husband asserted that the couple had a written prenuptial agreement. The document that he claimed was the prenuptial agreement was a one-page piece of paper written in Arabic and signed by him and his future father-in-law at the time of the wedding. (The bride did not sign it; her father signed it as her "representative.") The record contains three English translations of the document, and, with the exception of the recitation of a dowry arrangement, none of the translations sets forth any substantive matter. At trial, the husband attempted to introduce parol evidence in the form of an expert witness who was prepared to testify that certain language in the document signified an intention on the part of the husband and wife to have their marriage, including property relations at the time of any divorce, governed by "**Islamic** law." The trial judge refused to allow the expert to testify, held there was no prenuptial agreement (he found the document was really a marriage "certificate"), and proceeded to apply California community property law to the earnings and acquisitions of the parties.

We affirm the property division set forth in the judgment. It is not that a document in a foreign language is not a fit subject for parol evidence. It obviously is. (See *Reamer v. Nesmith* (1868) 34 Cal. 624, 628.) We affirm because the requirement that prenuptial agreements be in writing under California law is a statute of frauds provision, and to satisfy the statute of frauds, a writing must state with reasonable certainty what the terms and conditions of the contract are. An agreement whose only substantive term in any language is that the marriage has been made in accordance with "**Islamic** law" is hopelessly uncertain as to its terms and conditions. Had the trial judge allowed the expert to testify, the expert in effect would have written a contract for the parties.

The husband also mounts a challenge to an attorney fee order for fees on this appeal. The argument is based in part on the novel idea that the fee award was excessive because appellate practice consists, in the words of one of the husband's briefs, of "simply changing] the trial points and authorities into an appellate format." We reject that contention in the strongest possible terms.

FACTS

Ahmad and Sherifa Shaban were married in the Arab Republic of Egypt in February 1974. They came to the United States in the early 1980's, and dissolved their marriage in 1998 in the Superior Court of Orange County. At trial, Ahmad contended that a one-page document written in Arabic on what appears to be a form (there is Arabic writing in the blanks of the form) constituted a prenuptial agreement governing the disposition of any property acquired by either of them during the marriage. We set out in the margin the complete text of the translation of the document that, to the degree there is any difference among the three, best favors Ahmad's position.[1]

The document designates the bridegroom and the bride, and then refers to a dowry (often called a "mahr") of 500 Egyptian pounds and 25 piasters due from the husband to wife's "proxy," i.e., her father. It states that a token portion of the dowry 866*866 (the 25 piasters) had already been paid, with the balance due "at nearer maturity (divorce or death)." (At oral argument, Ahmad's counsel acknowledged that the amount of balance due on the dowry was now equivalent to about $30.) The document then describes two witnesses, one of whom was an ambassador, and the other an engineer.

Then comes certain language, which forms the basis of Ahmad's appeal. One translation goes: "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." Another translation reads: "Legal marriage concluded in Accordance with God's Book and the precepts of His Prophet and with the mutual agreement of the husband and the wife's representative."[2] After that there is an oblique reference to the "two parties [having] taken cognizance of the legal implications." The document was signed by the husband and the "wife's representative" or "agent."

At trial, Ahmad made an offer of proof that the phrase signified a written intention by the parties to have the property 867*867 relations governed by "**Islamic** law," which provides that the earnings and accumulations of each party during a marriage remain that party's separate property. (In practical effect, that would mean that there would be no community interest in Ahmad's medical practice or retirement accounts; his trial brief indicated that the real property of the parties, put in joint names, would be divided between them.) The trial judge, however, concluded that the document was a marriage "certificate" and not a written prenuptial agreement, and therefore did not allow Ahmad's expert to testify.[3] Concluding that there was no prenuptial agreement, the court entered a judgment applying California community property law to the acquisitions during the marriage and dividing what it then held was the community estate. Ahmad has appealed from the property division portion of the judgment, arguing, among other things, that the trial judge erred in excluding the expert testimony. At oral argument he conceded that if California law were to govern, the court's division of property was correct.

DISCUSSION

The Parol Evidence Was Properly Excluded

Because It Was Offered to Establish the Substance of the Alleged Agreement

At the outset, it is important to distinguish between the parol evidence rule and the statute of frauds. (See generally *Ellis v. Klaff (1950)* 96 Cal.App.2d 471, 475-76, 216 P.2d 15 [comparing and contrasting the two rules: parol evidence is a principle of substantive law; the statute of frauds is designed to prevent perjury and fraud].) Parol evidence, of course, may be received to interpret a term of art used within a contract. (See *Pacific Gas & E. Co. v. G.W. Thomas Dray age etc. Co.* (1968) 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641; cf. *ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773, 1793, 22 Cal.Rptr.2d 206 [*Pacific Gas,* properly understood, is directed to situations where parties give words special meanings or use a "code"].)

But independent of the parol evidence rule, the statute of frauds requires that the contract itself not be the *product* of parol evidence. As our Supreme Court explained in an early case turning on the statute of frauds: "The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence." (*Craig v. Zelian* (1902) 137 Cal. 105, 106, 69 P. 853.)

Regardless of whether we are dealing with California law before or after our Legislature adopted the Uniform Premarital Agreement Act in 1985, California has had in place, since 1872, a statute of frauds provision for prenuptial agreements. (See 868*868 *Hall v. Hall* (1990) 222 Cal.App.3d 578, 585, 271 Cal.Rptr. 773.) (The current incarnation of that statute is Family Code section 1611 ["A premarital agreement shall be in writing and signed by both parties"]. At the time of Ahmad's and Sherifa's marriage, it was former Civil Code section 5134 ["All contracts for marriage settlements must be in writing and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved"].)

Often, prenuptial agreement cases have turned on whether a given *oral* agreement had been sufficiently performed to take it out of the writing requirement. (See *Hall v. Hall, supra,* 222 Cal.App.3d at p. 586, 271 Cal.Rptr. 773 and authorities collected therein.) But in any event, there never has been any question that the writing requirement is a "statute of frauds law." (*Id.* at p. 585, 271 Cal.Rptr. 773; see also *Barton v. Barton* (1938) 10 Cal.2d 578, 580-581, 75 P.2d 1057 [no enforceable prenuptial agreement because letters of a "social and sentimental nature" were insufficient to satisfy statute of frauds]; *Hughes v. Hughes* (1920) 49 Cal.App. 206, 208-210, 193 P. 144 [statute of frauds barred enforcement of oral promise by prospective husband to give wife diamond ring, diamond stickpin, ermine coat and automobile if she would marry him, even though parties were, indeed, married afterwards].)

In the context of the requirement of a writing for real estate transactions (see Civ.Code, § 1624), California courts have, since *Ellis v. Klaff, supra,* 96 Cal.App.2d at pp. 476-477, 216 P.2d 15, adopted the principles set forth in section 207 of the Restatement of Contracts, which provides that to be sufficient, the required writing must state "with reasonable certainty ... [¶] ... [¶] the terms and conditions of all the promises constituting the contract...." (See also *Ontario Downs, Inc. v. Lauppe* (1961) 192 Cal.App.2d 697, 702, 13 Cal.Rptr. 782; *Rivers v. Beadle* (1960) 183 Cal.App.2d 691, 696, 7 Cal.Rptr. 170; *Burge v. Krug* (1958) 160 Cal.App.2d 201, 207, 325 P.2d 119; *Ferrara v. Silver* (1956) 138 Cal.App.2d 616, 618, 292 P.2d 251; *Potter v. Bland* (1955) 136 Cal.App.2d 125, 129, 288 P.2d 569.) As Justice Lillie noted in *Burge,* the writing "considered alone," must express "the essential terms with sufficient certainty to constitute an enforceable contract," hence "recovery may not be predicated upon *parol proof of material terms omitted from the written memorandum." (Burge v. Krug, supra,* 160 Cal.App.2d at p. 207, 325 P.2d 119, emphasis added.)

There is no reason the same requirement that the writing evidence with reasonable certainty the terms of the contract should not also apply to prenuptial agreements. The policy considerations behind the statute of frauds apply, if anything, with even more force to prenuptial agreements. Such agreements will often be litigated in the highly emotional aftermath of the breakup of an intimate relationship, and will involve subject matter far more personal and more likely to "strike home" than an impersonal real estate transaction. The temptation for selective memory is usually greater in domestic relations cases than it is in real estate deals.

Given the need for reasonable certainty of terms and conditions,[4] it is evident that the phrases "in Accordance with his Almighty God's Holy Book and the Rules of his Prophet" and "two parties [having] taken cognizance of the legal implications," 869*869 no matter how much they might indirectly indicate a desire to be governed by the rules of the **Islamic** religion, simply bear too attenuated a relationship to any actual terms or conditions of a prenuptial agreement to satisfy the statute of frauds. (The reference to "legal implications" is particularly meaningless, because all marriages bear "legal implications" the world over.[5]) The only thing that bears any resemblance to a material term is the lonely dowry provision.[6] Indeed, all three translations of the document provide far more information about the two witnesses to the wedding than they provide about any agreement of the parties.

Because the trial court did not err in excluding the parol evidence in this case, there is no need to address the question of whether any such agreement was against public policy. It is enough to remark that the need for parol evidence to supply the material terms of the alleged agreement renders it impossible to discuss any public policy issues. After all, how can one say that an agreement offends public policy when it is not possible even to state its terms?

The Attorney Fee Orders Were Proper

In a related appeal (G025498) which we now consolidate with Ahmad's original appeal 870*870 (G024572), Ahmad attacks two post judgment attorney fee orders, one for $55,000 and one for $2,500. The $55,000 award was to provide Sherifa with attorney fees for *this* appeal, after Ahmad had filed a notice of appeal and bonded around the attorney fee award in the judgment, which was for fees incurred at trial. (That particular fee award, for $56,000, has not been challenged in this appeal.) The $2,500 fee award was for the fees incurred in opposing a petition for modification of the judgment.

Ahmad's main argument against these awards is that, given the division of an estate worth some $3 million, Sherifa had so many assets that she didn't *need* any money for attorney fees. The argument fails for three reasons:

First, the nature of Ahmad's position in this appeal was that the property division in the judgment was incorrect. Had Ahmad prevailed on that point-indeed, if he yet prevails assuming that the Supreme Court were to reverse today's judgment the assets that he now claims are his wife's to use to pay attorney fees could end up being his.

Second, just because Ahmad had a legal right to bond around a judgment doesn't mean that the court could not compensate Sherifa for her effective lack of liquidity to finance the defense of the judgment on appeal. (See *Hunter v. Hunter* (1962) 202 Cal.App.2d 84, 92-93, 20 Cal.Rptr. 730 [upholding attorney fees for appeal in case where wife was without funds to pay appellate counsel].) Unless there was an award of fees prospectively, Sherifa would have been without means to present her case in this court.

Third, the record contains some evidence of Ahmad's recalcitrance in transferring various assets to Sherifa. The trial court thus had evidence, in addition to the bond staying execution of the judgment, that Ahmad was determined to wage the litigation in such a way as to deprive Sherifa of liquid assets pending the appeal.

The *amount* of the fee award for defending this appeal is, in our judgment, reasonable as well, but this issue requires a little more explication. Ahmad doesn't really argue that the amount is excessive in terms of the combination of traditional factors such as time spent, difficulty of subject matter, or experience and expertise of counsel. (See generally *In re Marriage of Cueva* (1978) 86 Cal.App.3d 290, 296, 149 Cal.Rptr. 918.) Instead, he makes this, rather remarkable argument: It was excessive because "most of the work that would have to be done by appellate counsel on appeal had already been done in connection with the trial."

It is a contention the members of this panel, or any appellate or reviewing court, are particularly situated to reject out of hand. So let us do so.

Appellate work is most assuredly not the recycling of trial level points and authorities. Of course, the orientation of trial work and appellate work is obviously different (see generally Eisenberg, et al, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2000) If 1:12, pp. 1-2 to 1-3 [noting difference between determination of case on merits and examination for error]), but that is only the beginning of the differences that come immediately to mind.

For better or worse, appellate briefs receive greater judicial scrutiny than trial level points and authorities, because three judges (or maybe seven) will read them, not just one judge. The judges will also work under comparatively less time pressure, and will therefore be able to study the attorney's "work product" more closely. They will also have more staff (there are fewer research attorneys per judge at the trial level) to help them identify errors in counsel's reasoning, misstatements of law and miscitations of authority, and to do original research to uncover ideas and authorities that counsel may have missed, or decided not to bring to the court's attention.

Additionally, because there is no "horizontal stare decisis" within the Court of Appeal, intermediate appellate court precedent that might otherwise be binding on a trial court (see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937) is not absolutely binding on a different panel of 871*871 the appellate court. So, in appropriate and rare cases, appellate court precedent is open for reexamination and critical analysis. Along the same lines, appellate counsel must necessarily be more acutely aware of how a given case fits within the overall framework of a given area of law, so as to be able to anticipate whether any resulting opinion will be published, and what effect counsel's position will have on the common law as it is continuously developed.

Then there is the simple matter of page limitations. Appellate courts are more liberal than trial courts as to the number of pages counsel are allowed. (Cf. Cal. Rules of Court, rule 313(d) [limit of 15 or 20 pages for trial level points and authorities without necessity of obtaining permission to exceed limit] with rule 15(e) [limit of 50 pages for appellate briefs without necessity of obtaining permission to exceed limit].) Granted, the extra length of the "briefs" in appellate and reviewing courts is not always a good thing (cf. 9 Witkin, Cal. Procedure (4th ed.1997), Appeal, § 600, p. 634, quoting *King v. Gilder sleeve* (1889) 79 Cal. 504, 507, 21 P. 961 ["`the learned counsel may not have had *time* to prepare a *short* brief"]), but the difference does mean that appellate counsel will have much more freedom to explore the contours and implications of the respective legal positions of the parties. Part of that exploration may mean additional research that trial counsel simply will not have had the time to do.

Finally, because the orientation in appellate courts is on whether the trial court committed a prejudicial error of law, the appellate practitioner is on occasion likely to stumble into areas implicating some of the great ideas of jurisprudence, with the concomitant need for additional research and

analysis that takes a broader view of the relevant legal authorities. The instant case is a perfect example, involving as it does the complex interrelationship between the parol evidence rule and the statute of frauds, and the limits placed by the statute of frauds on the concept of incorporation by reference.

The upshot of these considerations is that appellate practice entails rigorous original work in its own right. The appellate practitioner who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them in to an appellate brief, is producing a substandard product.[7] Rather than being a rehash of trial level points and authorities, the appellate brief offers counsel probably their best opportunity to craft work of original, professional, and, on occasion, literary value. Ahmad's appellate counsel's notion that opposing appellate counsel's task was merely to "simply change the trial points and authorities into an appellate format" is not well taken.

In re Marriage of Hall (2000) 81 Cal.App.4th 313, 96 Cal.Rptr.2d 772, relied on by Ahmad for the proposition that the trial court was sua sponte obligated to state the reasons for a given attorney fee award on the record in open court, is in apposite, though Ahmad's general point—that family court rulings should be explained to the parties in such a way that they can understand why the judge ruled the way he or she did—is well taken. *Hall,* however, involved a child support order where the relevant statutory language left the trial court with no choice but to explain the order on the record. While the members of this panel might, if we were in the Legislature, favor amending the attorney fee award statutes to require an explanation in open court, there is no such statutory requirement now. The closest thing is the requirement that the trial court provide a statement of decision in certain circumstances.[8]

Ahmad further claims that $22,000 of the $55,000 award represents what were, in effect, sanctions given without 872*872 proper notice under Family Code section 271. He bases this contention on the trial judge's having stated on the record that $22,000 of the fee award was for "extraordinary" work prompted by "the issue of the marital contract and the nullity." (The reference to "nullity" was to Ahmad's having initially taken the position that the marriage should be annulled.) By no stretch of the imagination, however, can the figure be construed in the context of this case as a "sanction" under section 271. As this opinion has, we hoped, demonstrated, the "marital contract" issue was indeed an "extraordinary" one, justifying additional work by Sherifa's counsel. And while we have not had to deal with the merits of the "nullity" issue in this appeal, suffice to say that it was not ipso facto so fatuous that we are *compelled* to ascribe any extra fees that it might have caused Sherifa to incur to the category of "sanctions" either.

The other and smaller $2,500 attorney fee award was also within the bounds of the trial court's discretion. The award was made to reimburse Sherifa for her attorney fees in opposing a motion brought by Ahmad to modify the judgment regarding a particular asset. Again, it wasn't a "sanction

order" under section 271 of the Family Code as Ahmad claims. It was, like the fee award for this appeal, a garden-variety order under sections 2030 and 2032 of the Family Code to allow the cash poor party the means to litigate.

DISPOSITION

The judgment and the two orders challenged in this appeal are affirmed. Sherifa will recover her costs on appeal.

RYLAARSDAM and MOORE, JJ., concur.

[1] The translation below looks the most like it might be a premarital contract. The other two translations are laid out like a form document, with material filled in the blanks:

ARAB REPUBLIC OF EGYPT IN THE NAME OF GOD THE COMPASSIONATE AND MERCIFUL MARRIAGE CONTRACT

NO.673013

On Saturday 1, Safer 1394 (Hijra), corresponding to February 23, 1974, in my presence and by my ministration Abdel-Hameid Mohamed El-Basstawy, Notary of El-Zamalek, depending to the Abdein Court for personal status for Guardienship *[sic*] over persons at home no. 31, located at Ahmed Hesmat St. El-Zamalek.

The following marriage deed was concluded:

The Bridegroom:

Mr. Ahmed Mostafa Shaban, apt to age, physician, Egyptian, born on July 13,1949, at the United States of America, domiciled at 58, El-Esraa St. El-Mohandessin-El-Dokki, holder of Identity Card No.21357, issued on 10.12.1972, at Embaba, (his mother's name is Hayat El-Nowfos Mohamed El-Said).

The Bride:

Miss Sherifa Abdel Aziz Saeed, virgin, apt of age, she given proxy to her father Mr. Abdel Aziz Mohamed Saeed and to receive the advanced part of the dowry and the deed, holder of Identity Card No. 2235, issued from Kasr El-Nil, on 14.8.1972; She is employee, Egyptian, born on 23.2.1950, in Cairo, domiciled at 31, Ahmed Heshmat St. El-Zamalek, holder of Identify Card No. 16648, issued on 27.2.1972 at Kasr El-Nil (her mother's name is Saadia Emam Shaban).

The Dowry:

The dowry is L.E.500 and 250 piasters (five hundred pounds and twenty five piasters) the advanced part amounting to P.T. 250 (twenty five piasters) has been paid to the wife's proxy in the sitting, and the deferred amounting to L.E. 500 (five hundred pounds) is in the faith of the husband payable at nearer maturity (divorce or death).

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 foregoing was concluded after the two parties had taken cognizance of the legal implications and after ascertaining that there are no legal or formal impediments preventing their marriage, and that the bride does not receive any salary from the Government and does not possess any funds exceeding L.E. 200, and that the bride and bridegroom are of age.

This contract has been witnessed by

First witness:

Mr. Mohamed Hamedy Abu Zeid, Ambassador, Egyptian, born on 20.3.1919, at El-Sudan, domiciled at 31 Mohamed Mazhar St, El Zamalek, holder of Identity Card No. 16160, issued on 31.7.1973, at Kasr El-Nil

Second witness:

Mr. Mostafa Kamal Emam Shaban, Professor Engineer at Ein Shams, Egyptian, born on 18.12.1922, at El-Gharbia, domiciled at 58 El-Esraa, El-Mohandessin El-Dokki holder of Identity Card No 7818, issued on 1.8.1962, at Embaba district.

The present contract has been drawn up in copies:

— the 1st to the Husband

— the 2nd to the Wife's proxy

— the 3rd to the civil register office. Due fees has been settled

The witnesses:(signed)

The Husband:(signed)

The Wife's proxy:(signed)

The Notary: (signed)

Seal: Ministry of Justice.

[2] The third translation is: "This being a lawful wedding under the Holy Book of Good *[sic]* and the Tradition of His Messenger God's Peace and Blessing be on him and following the legal offer and acceptance duly issued by the husband and the agent for the wife, it being asserted that the parties had not previously married. ..."

[3] In this appeal, Ahmad complains of the considerable expense of retaining the expert (about $25,000, as the expert was flown in from London), only to have the trial court refuse to hear the testimony. The question thus arises as to whether the expense might have been saved. It is tempting to suggest that the issue of whether the expert would be allowed to testify in the first place, being strictly one of law, was perfectly suited for a motion in limine made well prior to trial (contrary to common perception, there is no rule against making a motion in limine except on the day of trial), so Ahmad could have spared himself the expense of flying the expert out for trial by filing such a motion. But that ignores the expense of making the motion itself, which would decrease any savings it might accomplish. The trial judge might also have allowed the expert to testify, subject to having the testimony struck later. That, at least, would have saved one of the parties the expense of bringing the expert back in the event of reversal, though it would have prolonged the trial and forced Sherifa to call her own expert, so, again, there might not have been any net savings. It would also have indirectly affected the trial court's ability to hear other cases and matters. While there appears no easy solution to the question, the issue once again illustrates the need for family courts to be sensitive to the circumstances and means of the litigants. (See *In re Marriage of Brantner* (1977) 67 Cal.App.3d 416, 422, 136 Cal.Rptr. 635.)

[4] Indeed, even the term "**Islamic** law" is relatively uncertain. There are at least four schools of interpretation of **Islamic** law: the Shafi'i, Hanafi, Maliki, and Hanbali. (See Venkatraman, ***Islamic*** *States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?* (1995) 44 Am. U.L.Rev.1949, 1965-1970 (hereinafter Venkatraman, ***Islamic*** *States and the United Nations*).) The legal system in various **Islamic** countries will often be influenced by one school or the other. (*Ibid.)* Egypt, for example, has been influenced by both the Hanafi and Maliki schools. (*Id.* at p. 1985 ["Maliki interpretations, particularly, prevailed over the predominant Hanafi ideology in influencing divorce reform."].) Indeed, one commentator has observed that England has rejected any attempt to give effect to **Islamic** "personal law" because of the varieties of competing schools within **Islam**. (See Snethen, *The Crescent and the Union:* ***Islam*** *Returns to Western Europe* (2000) 8 Ind. J. Global Legal Stud. 251, 264 [England rejected recognition of **Muslim** "personal law" because "there were so many variants of **Muslim** personal law that choosing from among them was untenable"].)

Here, not only would the expert have had to opine, based primarily on one phrase in the document and his own knowledge of Egyptian society and law in the early 1970's, whether the parties agreed to have their marriage governed by a school of doctrine disembodied from any system of national law (general "**Islamic** law" as distinct from codified Egyptian law or the law of some other nation state), but if he concluded that it was the former, he would have had to opine what particular school of **Islamic** law was to govern the contract.

[5] As Professor Wardle notes, Aristotle pointed out that setting the legal age of marriage was the "`first care'" of the prudent legislator, and thus it is not surprising that marriage regulation is the subject of law making "[n]o matter how sophisticated or primitive the national legal system." (See Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey* (1995) 29 Fam. L.Q. 497, 500.)

[6] And even the dowry provision illustrates how much parol evidence was offered to *write* the contract, of the parties, as distinct from merely interpreting a phrase within it. Dowries are often a means by which certain systems of religious law accommodate inequalities between husband and wife in the right to divorce. (Compare *In re Marriage of Noghrey* (1985) 169 Cal.App.3d 326, 329, fn. 2, 215 Cal.Rptr. 153 [dowry compensates wife for husband's right to divorce at will under Jewish law] with Venkatraman, ***Islamic*** *States and the United Nations, supra,* 44 Am. U.L.Rev. at p.2001 [same idea under **Islamic** law].) The idea seems to be that although the husband has the right to divorce at will while the wife is confined to certain grounds, the exercise of that right will cost him. (See also Coulson, A History of Islamic Law (Edinburgh University Press 1964) at pp. 207-208 ["A further device formulated by the law to safeguard the wife's position was that of deferred dower. Payment of a portion of the dower could be postponed by agreement of the parties until the termination of the marriage, and if the amount so stipulated was high enough it would obviously provide an effective brake upon the capricious exercise of the right of repudiation by the husband."]) Systems of marital law lend to be based on internally consistent sets of ideas, so grafting one part of another system may create anomalies. In California courts, for example, dowry provisions have not fared well by themselves. (See *In re Marriage of Dajani* (1988) 204 Cal.App.3d 1387, 251 Cal.Rptr. 871 [dowry provision unenforceable where beneficiary of provision sought divorce]; *In re Marriage of Noghrey, supra,* 169 Cal.App.3d at p. 326, 215 Cal.Rptr. 153 [same].) If Sherifa had known that she wouldn't be entitled to a dowry in the event of a divorce, would she have made the deal anyway? To ask such a question demonstrates how much the whole enterprise of creating the contract out of parol evidence is an exercise in speculation.

[7] "Substandard," however, does not necessarily mean "below the applicable standard of care." No doubt many appeals have been financed on a well-worn shoestring, where counsel would gladly have done additional work, but the client simply couldn't afford it. But low level work should hardly be treated as the norm.

[8] Ahmad's motion for this court to take judicial notice of certain documents in the trial court's file concerning a request he made for a statement of decision is granted. Even so, it makes no difference because in none of his opening briefs does he argue that he was denied a statement of decision that he was otherwise *entitled* to.

CATEGORY: Child Custody

RATING: Highly Relevant

TRIAL: TCSNA

APPEAL: ACSY

COUNTRY: Lebanon/United Arab Emirates (UAE)

URL:
http://scholar.google.com/scholar_case?case=6723671088046631007&q=sharia+OR+Muslim+OR+Islamic+OR+islam&hl=en&as_sdt=4,5

182 Cal.App.3d 1018 (1986)

227 Cal. Rptr. 841

IN RE THE MARRIAGE OF LAILA ADEEB SAWAYA AND ABDUL LATIF MALAK.LAILA ADEEB SAWAYA MALAK, APPELLANT, V. ABDUL LATIF MALAK, APPELLANT.

Docket No. A024984.

Court of Appeals of California, Sixth District.

March 24, 1986.

1020*1020 COUNSEL

William M. Hilton for Appellant Husband.

C. Rick Chamberlin, Lawrence H. Stotter and Stotter & Samuels for Appellant Wife.

OPINION

AGLIANO, Acting P.J.

Abdul Latif Malak (husband) has appealed from orders of the trial court entered on September 21, 1983, (1) denying his motion to enforce a child custody decree issued by the Sherei Sunnit Court, Beirut, Lebanon; (2) finding that whether California had subject matter jurisdiction of the issue of

child custody was to be investigated and determined at a subsequent hearing; and (3) awarding wife attorney's fees in the sum of $2,500 and costs of $27.25.

While this appeal was pending, the trial court on August 14, 1985, determined California did not have subject matter jurisdiction over the issue 1021*1021 of child custody. That order became final and husband, who now has the children with him in the United Arab Emirates, has withdrawn his appeal on the issue of subject matter jurisdiction.

Laila Sawaya Malak (wife) cross-appeals from the trial court's order of the same date quashing service on husband of summons issued on wife's petition for dissolution of marriage, the trial court determining it lacked personal jurisdiction over husband.

We conclude the court correctly determined it did not have in personam jurisdiction over husband. We further decide that the court erred in declining to recognize and enforce the Lebanese decrees.

Factual Background

Husband and wife, both citizens of Lebanon, were married in Lebanon in January 1970. They have two children, Fadi, born September 20, 1972, and Ruba, born January 25, 1977. Due to the civil war in Lebanon the parties moved to the United Arab Emirates (UAE) in 1976, where they lived together until July 1982, when wife, without husband's consent, took the children and came to California to reside with her brother in San Jose.

Wife filed a petition for legal separation on September 8, 1982, in Santa Clara County Superior Court. Her petition also prayed for custody of the children, child and spousal support, and attorney's fees and costs. Husband was personally served with summons while in San Jose, apparently to find and visit the children. Husband made an appearance in the action which he labeled "special." On October 7, 1982, following a hearing confined to the issue of the court's jurisdiction as to child custody, the trial court determined it did *not* have jurisdiction over the issue of custody, presumably because of the children's very brief presence in California. The court did not rule on defendant's special appearance claim. Husband then commenced separate custody proceedings in the UAE and in Lebanon, and obtained judgments in each jurisdiction which purported to award him custody of the children.

On December 27, 1982, husband returned to California and filed in the pending legal separation proceeding in Santa Clara County a motion to enforce the judgment of the Abu Dhabi **Sharia** Court, United Arab Emirates, dated November 1, 1982, which in effect granted him custody of the children. Husband also filed the judgment with the court clerk pursuant to Civil Code sections 5164 and 5172 of the Uniform Child Custody Jurisdiction Act (UCCJA), which authorize the filing of child

custody decrees of other states 1022*1022 and foreign countries and provide that such decrees are to be given effect and enforced in like manner as decrees of this state.

On January 21, 1983, the trial court determined that wife had received neither adequate notice of the proceedings nor opportunity to be heard prior to the UAE judgment and therefore denied husband's motion to enforce the UAE decree. Husband did not appeal from this order.

On March 14, 1983, husband filed another motion to enforce the same UAE decree. This time he added the allegation that the UAE law had provided wife with the opportunity to appeal the custody decree and thereby to have a trial de novo; and that despite having been served with the decree on December 27, 1982, she failed to appeal and allowed the decree to become final. Wife moved to strike this motion on grounds of res judicata and the previously argued lack of notice, and requested attorney's fees and costs. After a hearing on May 24, 1983, the court filed its order granting wife's motion to strike and awarded wife attorney's fees and costs, the amounts to be fixed at a later time. No appeal was taken from this order.

Meanwhile, on May 16, 1983, wife had filed a first amended petition for dissolution of marriage, custody of the children, spousal and child support, division of property, attorney's fees and costs. The petition, summons, and a motion for orders pendente lite were duly served on husband. On June 9, 1983, husband made a "special" appearance for the purpose of objecting to the jurisdiction of the court over his person and moved to quash summons. Husband filed a declaration stating he was a Lebanese national currently residing in the UAE; that except for the instant litigation and occasional visits to California in the past, he had had no contact with California.

On July 12, 1983, husband filed yet another motion to enforce custody decrees — not the previously described UAE decree — but decrees of the Sherei Sunnit court in Beirut, Lebanon granted in proceedings commenced by husband in Beirut on October 20, 1982. The Lebanese court initially had issued two interim orders on February 8, 1983, which removed custody of the children from the mother and granted same to the father. Copies of these orders were served on wife's brother in San Jose on March 13, 1983, mailed to her attorney on April 21, 1983, and personally served on wife on May 26, 1983. Under rules of the Lebanese court, however, these orders remained unenforceable pending the exercise or waiver of wife's right to oppose husband's petition. Under these rules, wife had 15 days following personal service on her to file opposition, whereupon the interim orders would be nullified and the issues set at large. She defaulted however, and on June 30, 1983, the Beirut court entered a final decree. Husband filed 1023*1023 these decrees with the Santa Clara County Superior Court Clerk on July 11, 1983. There is no issue relating to their authenticity.

Wife responded to husband's California motion, alleging: she had not been a resident of Lebanon for six years, having resided in Abu Dhabi in the UAE for five years and the United States for one

year; that husband was at all times aware of her address and despite that knowledge applied for the interim custody decree from the Beirut court without notice except by publication in Lebanon, which she claimed was inadequate; and husband's prior motions to enforce the child custody decree obtained in the UAE under similar circumstances had been denied.

A hearing was held on July 20, 1983, on all pending issues. On July 22, 1983, the court filed a memorandum decision, and on September 21, 1983, the formal order, described above, which is the subject of these appeals.

The Order Quashing Service of Summons

(1) Wife contends the trial court erred in deciding it lacked in personam jurisdiction of husband. We disagree.

The wife's petition as amended, sought dissolution of the marriage, division of property, custody of the children, child support, spousal support, attorney's fees and costs. Husband appeared "specially" as to the original and amended petitions on the basis of his lack of minimum contacts with California. His participation in the case involved exclusively the issue of child custody through his efforts to gain recognition and enforcement of his foreign custody decrees as authorized by the UCCJA. The trial court agreed and quashed summons except as to the issue of custody.

This case is virtually indistinguishable from our Supreme Court's decision in *Kumar* v. *Superior Court* (1982) 32 Cal.3d 689 [186 Cal. Rptr. 772, 652 P.2d 1003] on this issue. In *Kumar,* a mother took her child to California without the consent or knowledge of the child's father who had visitation rights under a divorce decree of the State of New York in which he resided. The father came to California for the sole purpose of exercising his visitation rights and toward that end sought the California court's assistance by recording the New York decree and filing a petition for writ of habeas corpus. When Mrs. Kumar commenced and served a California proceeding to modify and enforce spousal support, child support and to obtain attorney's fees, Mr. Kumar moved to quash service in the child support and fee proceedings for lack of in personam jurisdiction. The trial court denied the father's motion to quash on the ground he had sought and received the California court's assistance in enforcing his visitation rights under the New York 1024*1024 order, and he had thereby made a general appearance submitting himself to the court's jurisdiction. (*Id.,* at p. 693.) The Supreme Court reversed, stating: "Yvonne argues that Jitendra had sufficient contact with California through his use of this state's courts in securing the habeas corpus order, which constituted a general appearance on his part. This court has held that neither execution of a guaranty agreement nor a special appearance in California to move for an order to quash service of a summons for lack of personal jurisdiction was sufficient to establish jurisdiction over a nonresident. (*Sibley* v. *Superior Court* (1976) 16 Cal.3d 442 [128 Cal. Rptr. 34, 546 P.2d 322].) Although *Sibley* distinguishes

cases where nonresidents seek significant benefits from the activity in California, it holds that the imposition of jurisdiction should be both constitutionally justified and `fair.' [¶] Principles of fairness preclude the exercise of personal jurisdiction where connection with the state resulted from an effort to encourage visitation with the noncustodial parent. (*Titus* v. *Superior Court, supra,* 23 Cal. App.3d 792 [100 Cal. Rptr. 477].) [Fn. omitted.] This is especially true in the instant case, where Jitendra was virtually forced into the California court because Yvonne denied him his visitation rights. It would be grossly unfair to allow her now to claim that he thereby established `minimum contact' sufficient to establish personal jurisdiction." (*Id.,* 32 Cal.3d at pp. 703-704.)

Husband in the instant case likewise appeared "specially" and moved to quash service of summons. The fact that husband also moved thrice to enforce the UAE and the Lebanese decrees, and even subsequently for an order allowing him to visit his children did not subject him to the court's jurisdiction in the dissolution action for in personam awards of support, attorney's fees and costs and division of marital property.

Husband's Appeal

(2) On June 20, 1985, while this appeal was pending, wife filed a motion to dismiss husband's appeal on the ground husband had wilfully violated and remained in violation of an order of the trial court. The declaration of wife's attorney in support of the motion discloses that on December 5, 1984, over wife's opposition the trial court granted husband's motion to take and visit with the children in the UAE until January 15, 1985, when he was to return them to San Jose. Husband, however, has refused to return the children as ordered. On May 1, 1985, the trial court, on wife's application, held husband in contempt. However, as stated above the trial court has since declined to exercise subject matter jurisdiction over the issue of child custody and husband has the children with him. The parties now advise us that husband was allowed to purge himself of contempt by the payment of a fine 1025*1025 of $1,000, the full penalty imposed by the court. We must thus deny wife's motion to dismiss husband's appeal and proceed to its merits.

Enforcement of the Lebanese Decree

(3) The trial court declined enforcement of the child custody orders of the Sherei Sunnit Court of Beirut, Lebanon on the ground due process had been denied wife, with the added finding the **Islamic** court did not appear to hold the "best interests of the child" a central consideration in the determination of custody. The record, in our view, supports neither conclusion.

The enforcement of foreign custody decrees is governed by the Uniform Child Custody Jurisdiction Act, sections 5150-5174 of the Civil Code. (See also Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A.) The act deals with a state court's determination of subject matter jurisdiction over

the custody of children as the issue might arise vis-a-vis another state and with the recognition and enforcement of the decrees of other states.

Civil Code section 5162 provides: "The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this title or which was made under factual circumstances meeting the jurisdictional standards of the title, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this title."

The act, pertinent to the instant case, also has international application. Section 5172 provides: "The general policies of this title extend to the international area. The provisions of this title relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons."

A certified copy of a custody decree of another state which meets the jurisdictional standards of the act may be filed with the clerk of any superior court in California and when so filed must be enforced in like manner as a custody decree of a court of this state. (Civ. Code, § 5164.) It follows that a custody decree of another nation, if it meets the requirements of sections 5162 and 5172, must be given effect in the same manner as a California decree.

The requirements of section 5172 were met. Wife was given reasonable notice of the Lebanese proceedings and a reasonable opportunity to be heard 1026*1026 prior to entry of the June 30, 1983, decree which husband sought to enforce. The record discloses the following procedural chronology: After the California trial court on October 7, 1982, declined to exercise jurisdiction over child custody, husband on October 20, 1982, commenced a divorce and custody proceeding in the Beirut Sherei court on the premise that wife and children were nationals of Lebanon. On February 8, 1983, the Beirut court issued ex parte orders purporting to remove custody of the children from wife. No arguably adequate notice to wife preceded these orders. It is important to note, however, that these orders were interim only. A patently reliable and authentic summary of the Beirut court's procedural rules describes this order as follows: "This order in default shall be interim and will not be enforceable except after its notification to the defendant who may oppose it within a period of 15 days, the court will then nullify the ex parte interim order and will hear both parties and pronounce a final judgment in the case." Thus, while the ex parte order was obtained without due process, the same cannot be said of the final decree. Wife was personally served with a copy of the interim order on May 17, 1983, following personal service on her brother on March 13, 1983, and mailing to her attorney on April 21, 1983. She was also served with notice of her right to file opposition. Yet, she failed to present opposition and the final decrees were entered on June 30, 1983.

The notice and opportunity to be heard in this case were substantially more than provided the party in *Miller* v. *Superior Court* (1978) 22 Cal.3d 923 [151 Cal. Rptr. 6, 587 P.2d 723], wherein our Supreme Court held that due process had been served. In that case, following wife's departure with the children from Australia to the United States, husband obtained an interim ex parte order of custody with a noticed hearing to be held six days later. Notice of the hearing was served on wife's solicitors in Australia who reportedly had no knowledge of her whereabouts. Wife did not appear at the hearing whereupon the Australian court made its order granting custody of the children to husband. Wife was personally notified of this order approximately one week later but took no step to set it aside. Responding to wife's contention that she was not given reasonable notice and opportunity to respond within the meaning of Civil Code section 5172, the court first observed that notice to counsel of record alone was not unreasonable, and then stated: "More importantly, Patricia's contentions are based on a mischaracterization of the Australian orders of 28 July and warrants of 3 August. It is obvious that the order was not intended to effect a permanent change in custody. Rather, it provided a change of custody with a return date. The order contemplated that Harry would have custody pending a hearing and determination whether he or Patricia should have custody. The period contemplated for Harry's custody was short, at most six days if Harry was successful in immediately locating the children. The interim order far from 1027*1027 denying Patricia a right to be heard, is designed to permit Patricia full right to be heard on the custody issue — a right still available to her before the Australian court." (*Id.,* at pp. 928-929.) Similarly wife in the instant case was provided with notice that she had 15 days (cf. 10-day notice requirement in Civ. Code, § 5154, subd. (2)) to appear and answer the petition whereupon the case, from all that appears, would have been set for a fair and objective hearing without regard to the interim ex parte orders. The procedure in that sense is not unlike that prescribed in our own state for temporary ex parte custody orders. (Civ. Code, § 4600.1.) Wife has not shown she was in any way precluded from opposing husband's petition in Lebanon or that she made any effort to respond.

The requirements of section 5162 were also met since it appears the factual circumstances under which the Lebanese decrees were made satisfied the jurisdictional standards of the UCCJA. Section 5152 sets forth several bases for a court's exercise of jurisdiction including the ground that "[i]t is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships."

The record discloses, and the Sherei court found, that husband and wife are both Lebanese nationals, that they have a home in Beirut, they both have relatives and friends there and Lebanon is still considered their homeland. It thus appears despite the parties' absence from Lebanon for a number of years due to civil war, the absence was not intended to be permanent, husband, at least, still has a

significant connection with Lebanon, and there is available in Lebanon substantial evidence concerning the children's present or future care, protection, training and personal relationships.

The record also shows that the Lebanese court did take the best interests of the children into consideration in determining their custody. The settled statement filed herein by stipulation contains a summary of the proceedings which, under the heading "Custody of the children," sets forth the factors considered in this case.[1]

1028*1028 Wife contends that custody of the minor children would, in Lebanon, invariably be given to the father. There is no substantial evidence to that effect. Reliance is apparently placed on an opinion[2] communicated from the American Embassy in Abu Dhabi, United Arab Emirates, relative to the custody decree issued in that jurisdiction. Whatever the merits of this somewhat cryptic and unqualified opinion, this appeal is not concerned with 1029*1029 the child custody laws of the **Sharia** court in the UAE but with those of the Sherei court in Beirut, Lebanon. The laws may be entirely similar but no evidence before us says as much. The evidence described above, on the other hand, demonstrates that the best interests of the children were important considerations in the award of custody by the Lebanese court and the criteria were not substantially different from those prescribed in this state. (Cf. Civ. Code, § 4608.) The trial court, under such circumstances, could properly give effect to the Lebanese decree. (Cf. *Hovav* v. *Hovav* (1983) 312 Pa. Super. 305 [458 A.2d 972, 974].)

(4) Husband's further contention the trial court lacked authority to award wife attorney's fees and costs is without merit. The trial court's award of fees and costs was made on May 26, 1983, following dismissal of husband's motion to enforce the *UAE* decree. Husband did not appeal from that order. Further, Civil Code section 5157, subdivisions (4) and (5) of the Act provides for an award of attorney's fees and costs upon dismissal of a petition for lack of notice and opportunity to be heard (Civ. Code, § 5153) which was a basis for dismissal of that petition.

Disposition

1. The trial court's order quashing service of summons on husband is affirmed.

2. The trial court's order awarding wife attorney's fees and costs is affirmed.

3. The trial court's order denying recognition and enforcement of the child custody decrees of the Sherei Sunnit Court, Beirut, Lebanon, is reversed with directions that an order be entered declaring that said decrees are entitled to recognition and enforcement in the courts of this state in accordance with the provisions of section 5162 of the Civil Code.

4. The parties shall bear their own costs and attorney's fees incurred in this appeal.

Brauer, J., and O'Farrell, J.,[*] concurred.

[1] "The Sherei Court has taken into consideration while pronouncing the two orders relating to the custody of the children Fadi and Ruba, several human, educational, social, psychologie [*sic*], material and moral factors for the purpose of insuring the best interest of the two children and their present future and on the long run. Some of these factors are:

"1 — Both parents hold the [L]ebanese nationality and they lived in [L]ebanon with their two children the greatest part of the children life [*sic*], except for some intervals of time during which the parents were obliged to leave to Abu-Dhabi for work due to the civil war in Lebanon and were continually with their children in constant contact with their relatives in Lebanon whether to the father's or the mother's side and they still have their home in Beirut up to this date.

"2 — As well as the parents and the two minor children have many friends, neighbours and relatives in Lebanon and they are tied up to their country, their permanent residence, and home state with lots of enviramental [*sic*], traditional, social habits, heritage, moral and cultural links.

"3 — In addition, their native tongue is the [A]rabic language, and the two minor children were brought up according to [I]slamic morals and teaching and trained to practice [I]slamic religion along with their studies in school. It is being understood also that the faith of the children is the same faith of the [M]uslim father and they are [M]uslim in accordance with the law.

"4 — The court has considered the best interest of the two minor children at a long-range in respect of avoiding their exposal to shredding, loss, spiritual and physical deficiency resulting from the radical change which will take place in case the children are transferred to a world strange to them in all respect without having their friends or relatives with them, and where the customs and traditions are completely and radically different from the customs and traditions to which they have been used to and practicing during their life.

"The court viewed the welfare of the two children with regard to the educational system which differs substantially from which they have been accustomed to with the impossibility of continuing the learning of their [A]rabic language and the impossibility of obtaining the [I]slamic education and exercise of its rituals.

"The court has also considered the interest of the two children with regard to the material side, because the father has properties and work opportunities in Lebanon for the future and plans for the future of the two children to carry on the business activities of the father in the fields of engineering, real estate managements, that will provide for them a progressive future in their country which cannot be provided to them in case they stay in the U.S.A. and in particular that their divorced mother might not be able to provide them proper life with any means of subsistence because she is unem-

ployed and it is quite possible that her stay in the U.S.A. is illegal, shakey [*sic*] and uncontinuous. She is homeless and constantly moving from one place to another and she will not be able to bring them up properly in a strange country where the children have no relatives and are away from the protection, affection and tenderness of their father."

[2] "1. Paras 2 through 4 below respond to Arp's request for our comments on general UAE practice in legal cases involving child custody disputes.

"2. If marriage was conducted under the **Sharia** law, husband can — on his own declaration — divorce his wife through UAE **Sharia** court whether she currently us [*sic*] in UAE or in any other country. Divorce certificate, once issued, may simply be mailed to respondent *[sic]*. Even should couple be reunited, husband would be entitled to two more divorces under similar terms.

"3. If **Sharia** divorce is carried out in UAE, custody of minor children would virtually always be given to their **Muslim** father. We consider such an award to be an absolute certainty in cases where children have UAE citizen father, and are in possession of UAE passports. On the other hand, children would be permitted to join mother and leave country with prior approval of father.

"4. If the marriage was one contracted between two non-Muslims, it is possible that UAE civil authorities — not **Sharia** court which would not accept jurisdiction — would recognize custody by mother if recognized religious authority granting divorce so stipulated. This would be likely also in cases of foreign divorces where mother is in possession of court order giving her custody of the children."

[*] Assigned by the Chairperson of the Judicial Council.

CATEGORY: Shariah Marriage Law

RATING: Highly Relevant

TRIAL: TCSY

APPEAL: ACSN

COUNTRY: N/A

URL:
http://scholar.google.com/scholar_case?case=17609243807178042148&q=sharia+OR+Muslim+OR+Islamic+OR+islam&hl=en&as_sdt=4,5

202 Cal.App.3d 712 (1988)

248 Cal. Rptr. 807

IN RE THE MARRIAGE OF FERESHTEH R. AND SPEROS VRYONIS, JR. FERESHTEH R. VRYONIS, RESPONDENT, V. SPEROS VRYONIS, JR., APPELLANT.

Docket No. B016594.

Court of Appeals of California, Second District, Division Three.

June 30, 1988.

714*714 COUNSEL

Richard A. Love, Reish & Luftman and Duane A. Dauphine for Appellant.

Pamela C. Sellers and Lorraine Loder for Respondent.

OPINION

KLEIN, P.J.

Appellant Speros Vryonis, Jr. (Speros) purports to appeal a judgment on bifurcated issues[1] wherein the trial court held respondent Fereshteh R. Vryonis (Fereshteh) had the status of a putative spouse.

Because Fereshteh reasonably could not believe she was validly married under California law, we order the issuance of a peremptory writ.

715*715 FACTUAL & PROCEDURAL BACKGROUND[2]

Speros was the director of and a teacher at the Center for Near Eastern Studies at UCLA. Fereshteh was a visiting professor at the center, and the parties met there in the fall of 1979. She was an Iranian citizen, a member of the Shiah Moslem Twelve Imams religious sect, and involved in the local **Islamic** community. Speros was a nonpracticing member of the Greek Orthodox Church.

Prior to arriving in the United States in 1979, Fereshteh spent six years in England, where she earned a Ph.D. at Cambridge University. She had been married before and was the mother of two children.

The parties saw each other occasionally during 1980 and 1981 in connection with center activities. They dated in February and March of 1982, but Fereshteh repeatedly stated she could not date Speros without marriage or a commitment because of her strict religious upbringing. Speros responded he could not marry as he did not know her and that he was a "free man."

Nonetheless, on March 17, 1982, at her Los Angeles apartment, Fereshteh performed a private marriage ceremony. According to Fereshteh, the marriage conformed to the requirements of a time-specified "Muta" marriage, authorized by the Moslem sect of which she was an adherent. Fereshteh was unfamiliar with the requirements of American or California marriage law. However, she believed the ceremony created a valid and binding marriage, and Speros so assured her.

The parties kept the marriage secret and did not hold themselves out as husband and wife. All indicia of marriage were lacking. The parties did not cohabit, but rather, maintained separate residences. They did not inform relatives or friends of the marriage. Speros did not have a key to Fereshteh's apartment, and Fereshteh only had a key to Speros's house for three months. Speros continued to date other women. Fereshteh did not use Speros's surname. The parties did not commingle their finances, nor did they assume any support obligations for one another. They did not take title to any property jointly. During the period of time in question, Speros and Fereshteh filed separate tax returns, each claiming single status. They spent 22 nights together in 1982, only a few in 1983, and none in 1984.

On frequent occasions, Fereshteh requested Speros to solemnize their marriage in a mosque or other religious setting, which Speros refused.

In July 1984 Speros informed Fereshteh he was going to marry another woman, after which time Fereshteh began informing people of the purported 716*716 marriage. In September 1984, about

two and one-half years after the date of the private marriage ceremony, Speros married the other woman.

Fereshteh thereafter petitioned for dissolution on October 15, 1984, seeking attorney's fees, spousal support and a determination of property rights. Speros moved to quash the summons based on lack of jurisdiction in that a marriage did not exist. The motion was denied. The trial court held a bifurcated hearing in March 1985 to determine first the validity of the marriage and putative spouse status.

In the statement of decision and judgment on bifurcated issues, the trial court held Fereshteh had a good faith belief a valid marriage existed between her and Speros, and specifically found: "3. On March 14, 1982, in Los Angeles, California, the Petitioner performed a private religious marriage ceremony between herself and the Respondent which conformed to the requirements of a **Muslim** Mota [*sic*] marriage. [¶] 4. No marriage license was obtained. And only the Petitioner and Respondent were present during the ceremony. No written documents were made to declare or record or otherwise authenticate the existence of a marriage between the parties, either at the time of the ceremony or thereafter. [¶] 5. The Respondent required the Petitioner to keep the marriage secret and to live in a separate residence. [¶] 6. The Petitioner believed in good faith that a valid marriage existed as a result of the ceremony, the consent expressed by Respondent, Respondent's subsequent actions, and statements of the Respondent. [¶] 7. The Petitioner had no knowledge of the marriage laws of California and was ignorant as to any impediment to the validity of the marriage and justifiably relied on Respondent's assertions that the Petitioner and Respondent were husband and wife. [¶] 8. On March 14, 1982, when the marriage ceremony was performed, the Respondent stated his consent to the marriage but did not intend such statements and participation in the ceremony to constitute a valid California marriage. [¶] 9. The ceremony performed between the parties on March 14, 1982, did not constitute a valid California marriage due to the Respondent's lack of intention that such ceremony constituted a valid marriage and due to the subsequent lack of recordation or authentication of such marriage ceremony. [¶] 10. The Petitioner has the status of a putative spouse...."

The finding of putative marriage would allow Fereshteh in subsequent proceedings to assert claims for spousal support and property division. The trial court ordered Speros to pay $10,000 as a partial contributory share of Fereshteh's attorney's fees.

Speros filed the purported appeal.

CONTENTIONS

Speros contends: (1) the trial court erred as a matter of law in finding putative spouse status because (a) there was no evidence of a void or voidable 717*717 marriage in that neither party made any attempt to comply with the statutory requirements of solemnization and recordation, and (b) there

was no objective evidence to sustain the finding of Fereshteh's good faith belief in the existence of a valid marriage without the existence of the usual indicia of a marriage; (2) the ruling in effect resurrects common law marriage, contravening public policy; and (3) it was error to allow Fereshteh to testify as an expert regarding **Islamic** custom and practice and the Muta marriage.

DISCUSSION

1. *General principles of putative marriage doctrine.*

Civil Code section 4100[3] defines the marriage relationship as "a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by the issuance of a license and solemnization as authorized by this Code, ..."

Section 4200 sets forth the procedural requirements for a valid California marriage as one which "must be licensed, solemnized,[4] authenticated, and the certificate of registry of marriage filed as provided in this article; but noncompliance with its provisions by others than a party to a marriage does not invalidate it."

(1) Where the marriage is invalid due to some legal infirmity, an innocent party nevertheless may be entitled to relief under the long recognized protections of the putative marriage doctrine. Said doctrine was codified in section 4452, enacted in 1969.

Section 4452 sets forth the rights of a putative spouse as follows: "Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare the party or parties to have the status of a putative spouse, and, if the division of property is in issue, shall divide, in accordance with Section 4800, that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. The property shall be termed `quasi-marital property'."

In addition to enjoying property rights in the nature of those afforded marital partners (§§ 4452, 4800), a putative spouse may also obtain spousal support. (§ 4455.)

718*718 2. *Requirement of a void/voidable marriage construed to mean invalid marriage.*

As set forth *ante,* section 4452 requires a threshold determination of a void or voidable marriage.

A void marriage is an incestuous (§ 4400), bigamous or polygamous one. (§ 4401.) A voidable marriage is defined as one where there was (a) no capacity by one party to consent due to youth or unsoundness of mind, (b) fraudulently or forcibly obtained consent, (c) physical incapacity of entering

into a marriage, or (d) a living spouse of either party who has been absent five years or more and believed dead. (§ 4425.)

The circumstances here do not give rise to either a void or a voidable marriage. However, that in and of itself does not preclude relief under the putative marriage doctrine. A fact situation may involve neither a void nor a voidable marriage, and yet relief is afforded, based upon the reasonable expectations of the parties to an alleged marriage entered into in good faith.

The void or voidable requirement of section 4452 was interpreted by *In re Marriage of Monti* (1982) 135 Cal. App.3d 50 [185 Cal. Rptr. 72]. In that case, Shirley and Clifford were married in Ohio in 1957, and a final divorce decree was entered in that state two years later. However, shortly before entry of the final decree, Shirley and Clifford reconciled. Thereafter, they moved to California where they lived and worked together and raised a son. In 1981, the parties separated and Shirley filed a petition for dissolution of marriage. (*Id.,* at pp. 52-53.)

In a supporting declaration Shirley asserted putative spouse status, stating: upon their reconciliation in 1959, she asked Clifford whether they had to do anything about the divorce proceedings; Clifford replied nothing would happen unless he made an appearance in court; as a result, she continued to believe they were still married; it was only in 1981 that she learned there had been a final decree entered in Ohio. (135 Cal. App.3d at p. 53.)

The trial court ruled the Montis' marriage was terminated in 1959, and the parties thereafter did not enter, or purport to enter, into any other ceremony of marriage; therefore, there was no void or voidable marriage between the Montis and, consequently, Shirley was not a putative spouse. (*Id.,* at p. 54.)

The *Monti* court held section 4452 merely codified the substantive case law existing before 1969 defining a putative spouse. (*Id.,* at p. 55.) Before that time, it was well settled the essential basis of a putative marriage was a belief in the existence of a valid marriage. (*Vallera* v. *Vallera* (1943) 21 719*719 Cal.2d 681, 684 [134 P.2d 761]; *In re Marriage of Monti, supra,* 135 Cal. App.3d at p. 55.) Section 4452 was merely declaratory of existing law and not intended to work significant substantive changes. (*In re Marriage of Monti, supra,* at pp. 54-55.)

With due consideration to the intent of the Legislature in adding section 4452, the *Monti* court held Shirley had alleged sufficient facts to form the essential basis of a putative marriage. (*Id.,* at p. 56.) The trial court's dismissal of Shirley's petition on the ground she was not a putative spouse due to the lack of a void or voidable marriage was held erroneous. (*Ibid.*)

Monti thereby implicitly recognized the codification of the putative marriage doctrine in section 4452 was not intended to narrow the application of the doctrine only to parties to a void or voidable

marriage. Instead, the Legislature contemplated the continued protection of innocent parties who believe they were validly married.

Were section 4452 limited to situations where a marriage is void or voidable as those terms are defined by statute (§§ 4400, 4401, 4425), the putative marriage doctrine would cease to apply to many invalid marriages.

Because in enacting section 4452 the Legislature intended merely to declare existing law, we construe the void/voidable aspect as simply requiring a threshold determination that a legal infirmity in the formation renders a marriage invalid.

In the instant case, the purported marriage was plainly defective.

3. *Inquiry into good faith belief in a valid marriage.*

Fereshteh seeks affirmation of the trial court's finding she had a good faith belief she was validly married to Speros, urging the only necessary finding to establish putative marriage is that one spouse believed in good faith a valid marriage existed.

Speros urges more than a "good faith belief, however wild" is required. He posits the requisite state of mind must be a good faith belief in a valid California marriage, and that there must also be some objective indicia of a valid marriage by which to measure such belief.

It is unclear from the statement of decision whether the trial court found Fereshteh believed she had celebrated a valid Muta marriage and held thereby a belief sufficient to confer putative spouse status, or whether the trial court determined Fereshteh had a good faith belief she was validly married under California law.

(2a) If the trial court based its putative marriage finding on Fereshteh's belief she had celebrated a valid Muta marriage, the ruling was error because 720*720 the required good faith belief is in the existence of a lawful California marriage. If the trial court found Fereshteh had a good faith belief she was validly married under California law, the ruling was error because the requisite good faith belief must have a reasonable basis.

a. *Good faith belief must be objectively reasonable.*

While a trial court may be tempted to base a finding of putative spousal status merely on the subjective good faith in a valid marriage held by a credible and sympathetic party, more is required. (3) "Good faith belief" is a legal term of art, and in both the civil and criminal law a determination of good faith is tested by an objective standard.

In *Russ Bldg. Partnership* v. *City and County of San Francisco* (1988) 44 Cal.3d 839, 853 [244 Cal. Rptr. 682, 750 P.2d 324], the following language is pertinent: "A vested right requires more than a good faith subjective belief that one has it." In *Perdue* v. *Crocker National Bank* (1985) 38 Cal.3d 913, 924 [216 Cal. Rptr. 345, 702 P.2d 503], the court observed: "The recent decision in *Lazar* v. *Hertz Corp.* (1983) 143 Cal. App.3d 128 [191 Cal. Rptr. 849], offers an analogy to the present litigation. Hertz's car rental agreement permitted it to determine unilaterally the price charged for gas used to fill the tanks of returned rental cars. Plaintiff's suit alleged that Hertz fixed unreasonably high prices, in breach of its duty of good faith and fair dealing. Discussing this cause of action, the court said that `[*t*]*he essence of the good faith covenant is objectively reasonable conduct.* Under California law, an open term in a contract must be filled in by the party having discretion within the standard of good faith and fair dealing.' (P. 141.)" (Italics added.)

Strong language is used in *Theodor* v. *Superior Court* (1972) 8 Cal.3d 77, 98, footnote 13 [104 Cal. Rptr. 226, 501 P.2d 234], dealing with a search warrant issue, to make the point: "`If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.' (*Beck* v. *Ohio* (1964) 379 U.S. 89, 97 [13 L.Ed.2d 142, 148, 85 S.Ct. 223].) `Good faith ... is immaterial, and cannot serve to rehabilitate an otherwise defective warrant.' (*Lockridge* v. *Superior Court, supra,* 275 Cal. App.2d 612, 622.)"

In discussing the question of probable cause, *People* v. *Ruggles* (1985) 39 Cal.3d 1, 9 [216 Cal. Rptr. 88, 702 P.2d 170], stated: "The probable cause determination that will validate a warrantless search of defendant's vehicle must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely the subjective good faith of the police officers."

721*721 Without question, the hallmark of the law is reasonableness, and "`[r]easonableness,' of course, is an objective standard, requiring more than good faith." (*In re Arias* (1986) 42 Cal.3d 667, 696 [230 Cal. Rptr. 505, 725 P.2d 664].)

(4) A proper assertion of putative spouse status must rest on facts that would cause a reasonable person to harbor a good faith belief in the existence of a valid marriage. Where there has been no attempted compliance with the procedural requirements of a valid marriage, and where the usual indicia of marriage and conduct consistent with a valid marriage are absent, a belief in the existence of a valid marriage, although sincerely held, would be unreasonable and therefore lacking in good faith.

While solemnization is not an absolute prerequisite to establishing a putative marriage (*Wagner* v. *County of Imperial* (1983) 145 Cal. App.3d 980, 983 [193 Cal. Rptr. 820]; *Santos* v. *Santos* (1939) 32 Cal. App.2d 62 [89 P.2d 164]), it is a major factor to be considered in the calculus of good faith.

Without some diligent attempt to meet the requisites of a valid marriage (*Miller* v. *Johnson* (1963) 214 Cal. App.2d 123, 126 [29 Cal. Rptr. 251]), a claim of good faith belief in a valid marriage would lack any reasonable basis.

Consideration of such factors provides a framework for determining whether a petitioner had reason to believe a valid marriage existed. Lacking a reasonable basis for an alleged good faith belief, even an honestly held belief in the existence of a valid marriage will not be in good faith and therefore insufficient to come within section 4452.

(i). *Application here.*

(2b) Fereshteh testified her belief in the validity of the purported marriage rested on her having performed the Muta ceremony, combined with Speros's assurances the marriage was valid.

As indicated, Fereshteh performed a private marriage ceremony at her apartment, with only the two of them present. The ceremony was not solemnized by a third party. No license was obtained and there was no authentication or recordation. In short, there was no attempt to meet the statutory requirements of section 4200 with respect to the formation of a valid California marriage.

Because the parties made no colorable attempt at compliance, Fereshteh could not believe reasonably a valid California marriage came into being. Fereshteh's ignorance of the law does not compel a contrary conclusion. Further, her reliance on Speros's assurances is unavailing. Unlike *Monti,* wherein Shirley relied on Clifford's statement that the divorce dissolving 722*722 their undisputably valid marriage was never finalized (*In re Marriage of Monti, supra,* 135 Cal. App.3d at p. 53), there was no endeavor here to comply with legal formalities.[5]

Subsequent events are not germane to whether there was a proper effort to create a valid marriage in the first instance. However, later conduct sheds further light on whether Fereshteh had reason to believe she was married to Speros. We observe the parties did not reside together, but continued to maintain separate households. They did not assume any support obligations for one another. They spent no more than five or six nights together in any given month during the marriage. Speros continued to date other women, of which fact Fereshteh was aware. Fereshteh did not use Speros's name. There was no merging of finances, nor was there any joint accumulation of real or personal property. Fereshteh and Speros filed separate tax returns, each claiming single status. For the two and one-half year period following the purported marriage, the parties did not hold themselves out as husband and wife. It was only when Speros told Fereshteh he was to be married that Fereshteh published the fact of their purported marriage.

In sum, the alleged private marriage went unsolemnized, unlicensed and unrecorded. Thereafter, the parties did not cohabit, or hold themselves out as husband and wife, and in no way approximated

the conduct of a married couple. Because the facts were at odds with the formation and existence of a valid marriage pursuant to California law, Fereshteh could not rely on Speros's statements reasonably to believe she was married. Notwithstanding Fereshteh's sincerity, her belief was unreasonable and therefore not in good faith.

b. *Required belief in valid marriage construed to mean lawful marriage.*

As noted, the trial court may have based its finding of putative spouse status on Fereshteh's belief she had conducted a valid *Muta* marriage. 723*723 However, case law reflects the requisite belief is in a *lawful* marriage, that is to say, a marriage which complies with statutory requirements.

Schneider v. *Schneider* (1920) 183 Cal. 335, 339 [191 P. 533, 11 A.L.R. 1386], recognized the putative marriage doctrine serves to protect persons domiciled in a community property state who "believ[ed] themselves to be *lawfully* married to each other, ..." (Italics added.) Along similar lines, *Feig* v. *Bank of Italy etc. Assn.* (1933) 218 Cal. 54, 58 [21 P.2d 421], held a plaintiff who "innocently and in good faith believed himself at all times to be the *lawful* husband of the decedent" was entitled to an equitable apportionment of their gains. (Italics added.)

Two years before *Feig,* in *Flanagan* v. *Capital Nat. Bank* (1931) 213 Cal. 664, 666 [3 P.2d 307], the essential basis of recovery under the doctrine was stated as a bona fide belief "in the existence of a *valid* marriage." (Italics added.) "Lawful" and "valid" are nearly synonymous,[6] and subsequent cases tended to use the latter term in enunciating the doctrine, as does section 4452. (See e.g. *Vallera* v. *Vallera, supra,* 21 Cal.2d at p. 684; *Estate of Krone* (1948) 83 Cal. App.2d 766, 768 [189 P.2d 741]; *Estate of Long* (1961) 198 Cal. App.2d 732, 738 [18 Cal. Rptr. 105]; *In re Marriage of Monti, supra,* 135 Cal. App.3d at pp. 55-56.)

Although in many situations, there is little practical difference between lawful and valid, the use of the latter term in this context may engender confusion. (5) The putative marriage doctrine protects the expectations of innocent parties who believe they are *lawfully* married. (*Schneider* v. *Schneider, supra,* 183 Cal. at pp. 339-340.) When the basis of the doctrine is stated as a good faith belief in a valid marriage, Fereshteh's belief she had celebrated a valid Muta marriage initially might seem sufficient to come within the doctrine. However, our overview discloses the doctrine requires a belief a marriage is lawful within the meaning of the Civil Code.

(2c) Assuming the trial court based its finding of putative marriage on Fereshteh's belief she had conducted a valid Muta marriage, the ruling was error.[7]

4. *Remaining contentions not reached.*

Speros also contends the trial court's ruling resurrects common law marriage, contravening public policy, and invites our comment. He further 724*724 complains it was error for the trial court to qualify Fereshteh as an expert in **Islamic** custom and practice and the Muta marriage.

However, in view of our extensive treatment of the main issue here, it is unnecessary specifically to address these contentions.

CONCLUSION

The fact that the purported marriage was neither void nor voidable is without import, as section 4452 merely requires a threshold determination a marriage is legally infirm.

Under the putative marriage doctrine, the requisite good faith belief must have a reasonable basis, as a sincere but objectively unreasonable belief is not in good faith. Further, the belief must be in a lawful marriage. A belief one's marriage conforms to the precepts of one's faith is insufficient to come within the doctrine.

Fereshteh's belief she conducted a valid Muta marriage ceremony is not what is contemplated by section 4452. Even assuming Fereshteh believed she was validly married under California law, because her belief is objectively unreasonable, the requisite good faith is lacking.

DISPOSITION

Let a peremptory writ of mandate issue, directing the trial court to vacate its judgment on bifurcated issues and to make a different order consistent with this opinion. Speros to recover costs on appeal.

Croskey, J., concurred.

Danielson, J., concurred in the result only.

[1] Regardless of the formal appearance of the instant "Judgment on Bifurcated Issues," it was non-appealable. The judgment is interlocutory in its effect, as the property division issues remained to be tried. (Code Civ. Proc., § 904.1; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 67, p. 91.) Although judgments on *collateral* matters in bifurcated trials are separately appealable (*In re Marriage of Van Sickle* (1977) 68 Cal. App.3d 728, 735 [137 Cal. Rptr. 568]; *In re Marriage of Fink* (1976) 54 Cal. App.3d 357, 362 [126 Cal. Rptr. 626]), the trial court's ruling herein pertained to the central issues of the litigation. However, this is not a situation where the time for appealing from a final judgment has expired. (See *In re Marriage of Patscheck* (1986) 180 Cal. App.3d 800, 804 [225 Cal. Rptr. 787].) Further, the matter has been fully briefed, issues of continuing interest are presented, and the entire litigation is resolved by our review. Therefore, a dismissal would be unneces-

sarily dilatory and circuitous. (*Olson* v. *Cory* (1983) 35 Cal.3d 390, 400-401 [197 Cal. Rptr. 843, 673 P.2d 720].) Accordingly, we treat the matter as a petition for writ of mandate. (*Ibid.*)

[2] The evidence is set forth in the light most favorable to the judgment. (*Gyerman* v. *United States Lines Co.* (1972) 7 Cal.3d 488, 492, fn. 1 [102 Cal. Rptr. 795, 498 P.2d 1043].)

[3] All statutory references are to the Civil Code, unless otherwise indicated.

[4] Solemnization denotes a ceremony wherein the parties declare, in the presence of the person solemnizing the marriage, that they take each other as husband and wife. (§ 4206.)

[5] We are aware of *In re Marriage of Recknor* (1982) 138 Cal. App.3d 539, 544-547 [187 Cal. Rptr. 887, 34 A.L.R.4th 805], which held a woman did not qualify as a putative spouse because she *knew* at the time she entered into the second marriage her first marriage had not yet been dissolved, but she was entitled to recover support and attorney's fees because the man was estopped from denying the validity of their 15-year marriage. It appears *Recknor* failed to give due consideration to an essential element of estoppel, namely, the party asserting it must have been ignorant of the true state of facts. (*LaRue* v. *Swoap* (1975) 51 Cal. App.3d 543, 551 [124 Cal. Rptr. 329].)

In order to prove this element, "`it is necessary that the evidence show not only that the party claiming the estoppel did not have actual knowledge of the true facts but that he did not have notice of facts sufficient to put a reasonably prudent [person] upon inquiry, the pursuit of which would have led to actual knowledge; the convenient or ready means of acquiring knowledge being the equivalent of knowledge [citations].'" (*Ibid.*)

Notwithstanding Speros's assurances, because Fereshteh was on notice the purported marriage was defective, estoppel does not lie.

[6] Black's Law Dictionary (5th ed. 1979) at page 1390 defines "valid" inter alia as: "Having legal strength or force, executed with proper formalities, ... Of binding force; legally sufficient or efficacious; ..."

[7] Moreover, the putative marriage doctrine operates to protect expectations in property acquired through joint efforts. (*Schneider* v. *Schneider, supra,* 183 Cal. at pp. 339-340.) Where, as here, there is neither cohabitation, pooling of earnings, acquisition of jointly owned property, nor any economic interdependence, the rationale of section 4452 would not be served.

CATEGORY: Shariah Property Law

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: ACSY

COUNTRY: Iran

URL:
http://scholar.google.com/scholar_case?case=13655740802413205633&q=sharia+OR+Muslim+OR+Islamic+OR+islam&hl=en&as_sdt=4,5

MARYAM SOLEIMANI KARSON, PLAINTIFF AND APPELLANT, V. MEHRZAD MARY SOLEIMANI, DEFENDANT AND RESPONDENT.

Nos. B216360, B219698

Court of Appeals of California, Second District, Division One.

Filed August 2, 2010.

Maryam Soleimani Karson, in pro. per., for Plaintiff and Appellant.

Law Offices of Cyrus Meshki and Cyrus Meshki for Defendant and Respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

Appellant Maryam Soleimani Karson (Karson) sued her stepmother, respondent Mehrzad Mary Soleimani (Soleimani), for damages arising out of the probate in Iran of the estate of Karson's father and Soleimani's husband. Karson claims Soleimani absconded with Karson's share of the estate, as a result of fraud and in breach of an agreement between the parties.

Soleimani moved to dismiss this action on the ground of forum non conveniens, arguing that Iran was a more appropriate forum in which to try Karson's claims. The trial court agreed. It stayed, and later dismissed, the action. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Our factual recitation is drawn primarily from Karson's verified complaint which alleges: Kioumars Soleymani Ardakani (Ardakani), died intestate in September 2007. He had lived his entire life in Iran, where he owned several parcels of real property. Those properties included a seafront property, located in Sorkhrood, Iran (Sorkhrood property), a condominium in Navab, Tehran (Navab property), and a house in Mokhtariyeh, Tehran (Mokhtariyeh property).

Ardakani was Karson's father and the estranged husband of his second wife, Soleimani.[1] Ardakani was a member of the Baha'i faith, as is Soleimani, and the two were married in 1980 in Iran in accordance with the tenets of that faith. The Baha'i faith is condemned by the Iranian government. Karson is "technically" a **Muslim**. Karson, who was granted asylum in 1997, is a naturalized United States (U.S.) citizen, and a citizen of the **Islamic** Republic of Iran. Soleimani has resided in the U.S. for over 15 years; she lives in Arcadia California.

Soleimani and Karson each traveled to Iran to attend Ardakani's funeral. While in Iran, Soleimani retained the services of an attorney, Ahmad Doroodian (Doroodian). Soleimani and Susan (see fn. 1) vested Doroodian with an unlimited power of attorney to act on their behalf with respect to matters related to the probate in Iran of Ardakani's estate. While she was still in Iran, Karson transferred an unlimited power of attorney to her uncle, to act on her behalf with respect to matters related to her father's estate. Karson's uncle subsequently transferred that power of attorney to Kamal Hosseinkhani, who had been Ardakani's close friend for over 30 years.

Doroodian filed a probate petition with respect to Ardakani's estate. Thereafter, he refused repeated requests by Karson and her uncle for information or documentation regarding the probate of Ardakani's estate. As a result, Karson made arrangements to retain an attorney in Iran to file an independent probate petition to represent her interests in her father's estate. When Doroodian was informed of this fact, he asked Karson to refrain from pursuing an independent action, claiming a second petition would lead to extensive procedural delays. Karson also claims Doroodian falsely told her that if she filed an independent probate action and disclosed her father as a Baha'i to the Iranian court, it would jeopardize her ability to recover from Ardakani's estate. Doroodian promised Karson that if she agreed to refrain from filing a separate probate petition, Soleimani would take all necessary steps to secure the Sorkhrood property for Karson, and promptly provide Karson with an unlimited power of attorney with respect to any legal rights she and Susan had or might acquire in the Sorkhrood property.[2] Karson accepted this offer, and refrained from filing an independent probate petition. Over the course of the next few months, Soleimani and Doroodian repeatedly promised—but never delivered—the promised power of attorney to Karson.

In March or April 2008, Soleimani demanded that Karson pay Doroodian's legal fees of approxi-

mately $230,000 for services rendered in connection with the probate of Ardakani's estate. Karson balked, as she had not retained Doroodian and he had not performed any services on her behalf. In addition, Karson believed Doroodian's fee was exorbitant, in light of the fact that she had previously agreed to pay another attorney about $13,000 for the provision of legal services equivalent to those Doroodian had supposedly performed. Karson subsequently learned Soleimani agreed to pay Doroodian such an exorbitant rate because he paid bribes to civil servants in order to facilitate the probate of Ardakani's estate. In addition, although Ardakani's original death certificate contained a stamp indicating he was a member of a "Religious Minority," Doroodian submitted a falsified death certificate to the probate court stating Ardakani was a **Muslim**, in order to avoid disclosing to the Iranian judiciary that Ardakani and Soleimani were members of the Baha'i faith.[3]

Karson claims that at or around this time, Soleimani and Doroodian contacted Hosseinkhani, to whom Karson's uncle had by then transferred Karson's power of attorney. Soleimani and Doroodian conspired with Hosseinkhani to transfer Karson's interests in the Mokhtariyeh and Navab properties to Doroodian as payment for his legal fees, in exchange for a payment by Soleimani and Susan to Hosseinkhani of approximately $6,500, and payment of an unspecified sum by Doroodian to Hosseinkhani. In mid-May 2008, Doroodian contacted Karson and informed her the probate of her father's estate was complete, and she no longer owned any interest in the Mokhtariyeh or Navab properties. Karson alleges the value of her share in the Mokhtariyeh and Navab properties, at the time the Iranian probate was completed, was at least $230,000.

In March 2009 Karson filed this action for damages against Soleimani and several Doe defendants. The verified complaint alleges causes of action for: (1) breach of contract; (2) fraud; (3) negligent misrepresentation; (4) promissory estoppel; (5) intentional infliction of emotional distress; (6) constructive trust/unjust enrichment; and (7) conversion.

Soleimani filed a motion seeking to have the action dismissed, on the ground of forum non conveniens. (Code Civ. Proc., § 410.30, subd. (a)[4].)

Karson filed an opposition to the motion, supported by her declaration and a request for judicial notice.

Soleimani filed a reply, supported by a declaration from Cyrus Meshki, her attorney in this action. Soleimani argued the action should be dismissed or, at a minimum, stayed.

Following a hearing, the trial court deemed Soleimani's motion to dismiss a motion to stay based on forum non conveniens and, on that basis, granted the motion. The trial court found Iran provided Karson a suitable alternative forum in which to adjudicate her claims against Soleimani, and that both private and public interests weighed in favor of trying those claims in Iran.

Karson filed an appeal from the order staying the action. While that appeal was pending, the trial court entered an order dismissing the action based on forum non conveniens. Karson filed a second appeal from the order dismissing the action.[5]

DISCUSSION

1. Legal framework and standard of review

Forum non conveniens is an equitable doctrine under which a court may decline to exercise its jurisdiction to hear a case when it finds the case may be more appropriately and justly tried elsewhere. (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751 (*Stangvik*).) The doctrine is codified in section 410.30, which states: "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any condition that may be just." (§ 410.30, subd. (a).) If a court grants a stay on grounds of forum non conveniens, it retains jurisdiction over the case and may resume the proceedings if the action in the alternative forum is unreasonably delayed or fails to reach a resolution on the merits. (*Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853, 857 (*Archibald*).) A dismissal, on the other hand, completely deprives the court of jurisdiction over the case. (*Id.* at pp. 857-858.) As the moving party, the defendant bears the burden to prove California is an inconvenient forum. (*Stangvik, supra,* at p. 751.) To satisfy this burden, the movant must produce evidence; bald assertions will not suffice. (*Ford Motor Co. v. Insurance Co. of North America* (1995) 35 Cal.App.4th 604, 610 (*Ford Motor Co.*).)

A court ruling on a motion to stay or dismiss an action based on forum non conveniens engages in a two-step analysis. First, as a threshold matter, it must determine the suitability of the proposed alternative forum. (*Stangvik, supra,* 54 Cal.3d at p. 752, fn. 3.) A forum other than California is suitable if and only if the defendant is subject to jurisdiction in that forum, the statute of limitations in that forum would not bar the action, and the action would be adjudicated by an independent judiciary respecting due process of law. (*Guimei v. General Electric Co.* (2009) 172 Cal.App.4th 689, 696 (*Guimei*); *Boaz v. Boyle & Co.* (1995) 40 Cal.App.4th 700, 711 (*Boaz*); *Stangvik, supra,* at pp. 753-754, fn. 5, 764.) The trial court's determination of the suitability of an alternative forum is a "nondiscretionary determination." (*Chong v. Superior Court* (1997) 58 Cal.App.4th 1032, 1036 (*Chong*); *Shiley Inc. v. Superior Court* (1992) 4 Cal.App.4th 126, 131 (*Shiley Inc.*).) "There is no balancing of interests in this decision, nor any discretion to be exercised." (*Shiley Inc., supra,* at p. 132.) It is a legal question subject to de novo review. (*American Cemwood Corp. v. American Home Assurance Co.* (2001) 87 Cal.App.4th 431, 436 (*American Cemwood*).)

If the court finds the alternative forum a suitable place for trial, the second step of the analysis is to

consider the private interests of the parties and the public interests in litigating the case in California. (*Stangvik, supra,* 54 Cal.3d at p. 751.) "The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. [Citations.]" (*Ibid.*)

In ruling on a forum non conveniens motion, the court must carefully balance all relevant factors; no one factor should determine the outcome of the motion. (*Rinauro v. Honda Motor Co.* (1995) 31 Cal.App.4th 506, 510.) Instead, the "private and public interest factors must be applied flexibly, without giving undue emphasis to any one element." (*Stangvik, supra,* 54 Cal.3d at p. 753.) "[T]he appropriate question for the court is not whether a suit can be brought in California, but whether California has sufficient private and public interests in the action to entertain it in this state." (*Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 Cal.App.4th 753, 759.) The trial court's determination at this second step of the analysis as to balancing private and public interests is a task squarely within its discretion, and its ruling is entitled to "substantial deference" on appeal. (*Chong, supra,* 58 Cal.App.4th at p. 1037.) As such, it is subject to review only for abuse of discretion. (*Ibid.*)

The plaintiff's choice of a California forum is entitled to great weight, particularly if the plaintiff is a California resident. (*Stangvik, supra,* 54 Cal.3d at pp. 754-755.) Because "dismissal of an action results in California's loss of jurisdiction over the matter, it has long been the rule . . . that an action brought by a California resident may not be dismissed on grounds of forum non conveniens except in extraordinary circumstances." (*Century Indemnity Co. v. Bank of America* (1997) 58 Cal.App.4th 408, 411, fn. omitted.) As to a dismissal, the plaintiff's choice of forum is entitled to a "strong presumption" of appropriateness; the defendant must demonstrate not merely that the proposed alternative is a better forum, but that California is a "*seriously inconvenient* forum." (*Ford Motor Co., supra,* 35 Cal.App.4th at p. 611; see also *Northrop Corp. v. American Motorists Ins. Co.* (1990) 220 Cal.App.3d 1553, 1561.) If the defendant fails to meet this burden, a grant of a motion to dismiss will necessarily be error. (*Ford Motor Co., supra,* at p. 611.)

The court may dismiss, rather than stay, an action by a California resident based on forum non conveniens only in extraordinary circumstances. (*Archibald, supra,* 15 Cal.3d at p. 858.) *Archibald* rejected the argument that a trial court may dismiss an action by a California resident based on forum non conveniens in any "case in which the foreign forum is very much more convenient."

(*Ibid.*) On the contrary, an action by a California resident may be dismissed based on the ground of forum non conveniens only if "California cannot provide an adequate forum or has no interest in doing so." (*Id.* at p. 859, fn. omitted.) The trial "has considerably wider discretion to grant stays precisely because under a stay California retains jurisdiction. [Citation.] Even an action brought by a California resident is subject to a stay." (*Century Indemnity Co. v. Bank of America, supra,* 58 Cal.App.4th at p. 411.) "In considering whether to stay an action, in contrast to dismissing it, the plaintiff's residence is but one of many factors which the court may consider." (*Archibald, supra,* at p. 860.)

2. Iran is not a suitable alternative forum

We begin with the first step in the forum non conveniens analysis, whether the proposed alternative forum is a suitable place for trial. (*Stangvik, supra,* 54 Cal.3d at p. 751.) In a typical case, an alternative forum is suitable "if there is jurisdiction and no statute of limitations bar to hearing the case on the merits." (*Chong, supra,* 58 Cal.App.4th at p. 1037.) "The availability of a suitable alternative forum for the action is critical." (*American Cemwood, supra,* 87 Cal.App.4th at p. 435.) Because of this factor, the suit will be entertained, no matter how inappropriate a plaintiff's choice of forum may be, if the defendant cannot be subjected to jurisdiction in the alternative forum. The same is true if plaintiff's cause of action is elsewhere barred by the statute of limitations, unless the court is willing to accept the defendant's agreement not to assert this defense. (*Stangvik, supra,* at p. 752.) And, in extraordinary circumstances, a proposed alternative forum will be deemed unsuitable even if a defendant is amenable to process and even if there is no procedural bar to resolving the issues on the merits. This exception applies in cases in which, effectively, "`no remedy at all'" is available, viz., the proposed alternative forum lacks an independent judiciary, or fails to adhere to the tenets of due process, as that term has been defined by American courts. (*Chong, supra,* at p. 1037; *Shiley Inc., supra,* 4 Cal.App.4th at pp. 133-134; *Boaz, supra,* 40 Cal.App.4th at p. 711.) The motion to dismiss based on forum non conveniens must be denied if no suitable alternative forum is available to the plaintiff. (*Stangvik, supra,* at p. 752.)

a. Jurisdiction in the alternative forum

The pivotal issue on appeal is whether the courts of Iran provide a suitable alternative forum for Karson's claims. The burden is Soleimani to make this showing by demonstrating she is subject to jurisdiction in the alternative forum. (*American Cemwood, supra,* 87 Cal.App.4th at p. 440.) To satisfy this burden, the defendant moving to dismiss on grounds of forum non conveniens must produce evidence; "merely bald assertions" will not suffice. (See *Ford Motor Co., supra,* 35 Cal.App.4th at p. 610.)

Here, Soleimani merely asserted, without any evidentiary support, that Karson could "properly

bring her causes of action in Iranian courts, Iran still maintains jurisdiction over [Soleimani], and the action is not barred by the statute of limitation." In addition, Soleimani asserted that both she and Karson "have sufficient contacts with Iran to make it an appropriate forum." At best, Soleimani understated the governing standard—by asserting she need "merely show that [Karson had] chosen an inconvenient forum for adjudication of the matter;" at worst, she misrepresented that standard by averring that she lacked a duty "to establish what forum would be convenient."

Soleimani's motion founders on the first prong of the threshold step of the forum non conveniens test: Soleimani has presented no evidence to establish she is subject to jurisdiction in Iran. Indeed the only evidence before the trial court on this point, is in Karson's verified complaint and her declaration in opposition to the motion to dismiss, is that Soleimani is a long-term California resident. Soleimani had not been to Iran for at least 15 years before she went there to attend Ardakani's funeral. The fact of Soleimani's status as a long-term U.S., resident is borne out by a letter she submitted to the Immigration and Naturalization Service in 2001 in support of an I-130 "`petition for alien relative,'" as part of her effort to obtain permanent U.S. resident alien status for her husband, Ardakani.[6] In addition, although Soleimani apparently voluntarily subjected herself to the jurisdiction of Iranian courts (albeit under false pretenses) by participating in the probate proceeding of Ardakani's estate that was wrapped-up in 2008, there is no evidence she remains amenable to service of process there. Absent a showing the defendant is subject to jurisdiction in Iran, the trial court's stay or dismissal of the action constitutes reversible error. (See *American Cenwood, supra,* 87 Cal.App.4th at p. 440 [each defendant seeking stay on grounds of forum non conveniens must show he or she can be sued in alternative forum].)

b. Statutes of limitation

The availability of a suitable alternative forum depends not only on whether the defendant is subject to the jurisdiction of the alternative forum, but also on whether the statute of limitations has run in that forum. (*Stangvik, supra,* 54 Cal.3d at p. 751.) A defendant may not "`request dismissal of an action on the ground that it should be heard in another forum when the action will likely never be heard in the other forum because it is barred by the statute of limitations there.' [Citation.]" (*Delfosse v. C.A.C.I., Inc.-Federal* (1990) 218 Cal.App.3d 683, 690.) If the statute of limitations has expired in the alternative forum, the defendant must be willing to waive the statute of limitations as a condition of the court granting a motion based on forum non conveniens. (*Stangvik, supra,* at p. 752; *Delfosse v. C.A.C.I., Inc.-Federal, supra,* at pp. 690-691.)

Soleimani's motion, supporting memorandum and her reply papers were prepared by Meshki, a California legal practitioner who also purports to be an expert in Iranian and **Islamic** laws, and who has taught and practiced law in Iran. Notwithstanding his purported expertise, Meshki failed to establish that Karson's contract, tort and equitable claims are not barred by Iranian statutes of

limitation. The record contains no evidence Soleimani agreed not to raise the statute of limitations as a defense in Iran, or to toll the statute in California if a stay was granted. Thus, Soleimani failed also to make this portion of the requisite threshold showing that a suitable alternative forum was available for adjudication of Karson's claims.

c. "No remedy at all"

Even if Soleimani were amenable to process in Iran, and that forum did not present a procedural bar to disposition of Karson's claims on the merits, Iran would still be an unsuitable alternative forum. A rarely invoked, but well-established exception obtains in forum non conveniens cases in which there is "`no remedy at all.'" This exception is reserved for those rare instances in which the foreign forum lacks an independent judiciary, or fails to apply principles of due process as that term has been interpreted and applied by American courts. In such cases, the foreign forum is unsuitable as a matter of law. (*Guimei, supra,* 172 Cal.App.4th at p. 697; *Boaz, supra,* 40 Cal.App.4th at p. 711; *Chong, supra,* 58 Cal.App.4th at p. 1037.) This is such a case.

Soleimani insists Iran is a more appropriate forum than California in which to resolve this matter. She asserts "Iran is a foreign independent sovereignty. Its Constitution not only supports the notion of `due process of law' through its modern legal principals [sic], but also specifically recognizes separation of the three branches of government: Judiciary, Legislative and Administrative. (Iran's Constitutional Law enacted 1979 . . .; Article 57)." Soleimani, however, has offered no evidence to support this contention, or to illustrate how Iran's purportedly independent Constitutional law is implemented on a practical level.

Karson, on the other hand, cites several sources which indicate Iran may well lack an independent judiciary that adheres to principles of due process. For example, Karson points to the Department of State's (DOS), 2008 Report on Human Rights Practices in Iran, submitted to Congress on February 25, 2009 (Report). According to the Report, although the Iranian judiciary is purportedly independent from the government's executive and legislative branches, in practice the judiciary remains under the influence of executive and religious authorities. Indeed, even Soleimani points to an inextricably intertwined relationship between the religious and judicial institutions, as a basis for why Iran provides a more suitable forum in which to resolve Karson's claims. (See Motion to Dismiss, Memorandum of Points and Authorities, at pp. 2, 10 (noting that "disposition of this matter would inherently and inseparably involve[] the laws of Iran and **Islam**," both procedurally and on the merits), and 12 (asserting that, litigating in California will require court to become "familiar with the Iranian and **Islamic** laws that led to the matter").) Karson also notes the Report opines that there is a "glaring" absence of due process in Iranian courts where, for example, it requires "[t]he testimony of two women [to] equal . . . that of one man." Karson also argues that, because inheritance laws in Iran favor Muslims over non-Muslims, to maximize her ability to prevail

against Soleimani in Iran, she would likely need to reveal that Soleimani is Baha'i, as was her father, that Soleimani purposefully misled the Iranian judiciary to believe she and her late husband were **Muslim**, and that Soleimani and Doroodian bribed civil servants to shepherd Ardakani's estate through probate. Karson observes that, if her revelations are deemed credible, Soleimani is likely to suffer severe penalties,[7] because members of the Baha'i faith have few rights in Iran and inheritance of property is not among them. Further, Karson argues that even if she obtained an Iranian judgment against Soleimani which she sought to enforce in the U.S., she would, in all likelihood be unable to do so in light of the Iranian government's treatment of Baha'is. That judgment would have been obtained in violation of Soleimani's right of due process, as our courts understand that term, and no American court would enforce it. (See e.g., *Chong, supra,* 58 Cal.App.4th at p. 1037; *Stangvik, supra,* 54 Cal.3d at p. 752, fn. 3; *Bank Melli Iran v. Pahlavi* (9th Cir. 1995) 58 F.3d 1406, 1410-1414 [observing that evidence contained in several DOS Reports on Human Rights Practices in Iran (1982-1986), demonstrated that any judgment plaintiff might obtain against defendant (the sister of former Shah) in Iran would have been obtained in violation of defendant's due process rights, and be unenforceable in U.S. because defendant could not have received a fair trial under Iranian system of jurisprudence].)

In sum, as the moving party, Soleimani bore the burden to show that California is an inconvenient forum. (*Stangvik, supra,* 54 Cal.3d at p. 751.) To satisfy this burden, she was required to produce evidence; bald assertions will not suffice. (*Ford Motor Co., supra,* 35 Cal.App.4th at p. 610.) We find Soleimani failed to meet her burden on the threshold issue as to the suitability of the proposed alternative forum. Accordingly, her motion to dismiss based on forum non conveniens should have been denied, and the trial court erred by failing to do so.[8]

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to vacate its order dismissing the action, to vacate the order granting the motion to stay the action based on forum non conveniens, and to enter a new and different order denying the motion to dismiss. Karson shall recover her costs on appeal.

We concur:

MALLANO, P. J.

CHANEY, J.

[1] Ardakani is also survived by a daughter from his marriage to Soleimani, Susan Soleimani (Susan), who is not a party to this litigation.

[2] Karson alleges that Ardakani wished to ensure the Sorkhrood property be kept in trust for his first grandchild, her son Cougar, but that Sorkhrood property had, at some unspecified time, been fraudulently acquired from Ardakani. However, before he died, Ardakani assured Karson the legal challenges had been resolved, and "title would be issued in [Karson's] name." Karson does not specify the value or disposition of the Sorkhrood property in the complaint. However, she contends this dispute relates only to the distribution of monetary assets, not real property.

[3] Karson claims Soleimani engaged in this deception because the Iranian government does not recognize Baha'i marriages, confiscates property belonging to Baha'is, and because Baha'is have no right of restitution or compensation for such loss. She also claims Baha'is may not inherit property.

[4] Undesignated statutory references are to the Code of Civil Procedure.

[5] Karson moved to consolidate the two appeals. We granted that motion, and consolidated the appeals for purposes of briefing, oral argument and decision.

At the outset, we note the trial court lacked jurisdiction to dismiss the action. Once the appeal from the order granting the stay—an appealable order (see § 904.1, subd. (a)(3))— was perfected, the trial court was divested of power to act on any matter "embraced in" or "affected by" the order appealed from. (§ 916, subd. (a); *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196-198.) By that point, jurisdiction over matters appealed from had shifted to the court of appeal, and any act by the trial court in contravention of the section 916 stay was void as an act in excess of that court's jurisdiction. (35 Cal.4th at pp. 198-199.)

Clearly, an order by the trial court dismissing an action on the ground of forum non conveniens, thereby depriving itself forever of jurisdiction of an action previously merely stayed on the same ground, is a matter affecting the status quo which, if effective, would render the pending appeal futile. Accordingly, we reverse the order and will remand the matter with directions to the trial court to vacate its dismissal. The remainder of our opinion is addressed to the merits of the trial court's order staying the action on the ground that California is an inconvenient forum.

[6] As relevant here, Federal law permits non U.S. citizens to immigrate only if a U.S. citizen or lawful permanent resident alien relative (spouse, child, parent or sibling) agrees to sponsor the non-citizen. (See 8 U.S.C. §§ 1154(a)(1)(A)(i), (1154(b); 8 CFR § 204.1(a) (2010).)

[7] At the extreme, Karson notes that, according to the Report, "Baha'i blood is considered `mobah,' meaning Baha'is may be killed with impunity."

[8] Our conclusion that the trial court committed reversible error by finding Iran to be a suitable

alternative forum, makes it unnecessary for us to address the merits if the court's ruling on the discretionary second step of the forum non conveniens analysis, the consideration of the litigants' private interests, and the public's interest in retaining the action for trial in California.

DELAWARE

CATEGORY: Shariah Contract Law

RATING: Highly Relevant

TRIAL: TCSY

APPEAL: ACSY

COUNTRY: Saudi Arabia

URL:
http://scholar.google.com/scholar_case?case=5554654220013038 51&q=Sharia+OR+Islam+OR+Islamic+OR+Muslim&hl=en&as_sdt=4,8

866 A.2d 1 (2005)

SAUDI BASIC INDUSTRIES CORPORATION, PLAINTIFF BELOW, APPELLANT, V. MOBIL YANBU PETROCHEMICAL COMPANY, INC. AND EXXON CHEMICAL ARABIA, INC., DEFENDANTS BELOW, APPELLEES.

No. 493,2003.

Supreme Court of Delaware.

Submitted: June 1, 2004.

Decided: January 14, 2005.

A. Gilchrist Sparks (argued), Donald E. Reid and Jason A. Cincilla, Esquires, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; Of Counsel: Kenneth R. Adamo, Joseph L. McEntee, Jr. and Margaret I. Lyle, Esquires, of Jones Day, Dallas, Texas; Gregory A. Castanias, Lawrence D. Rosenberg, Elizabeth Rees and William K. Shirey II, Esquires, of Jones Day, Washington, D.C.; for Appellant.

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Loeser & Parks LLP, Cleveland, Ohio; Elizabeth J. Sher, Esquire, of Pitney Hardin LLP, Florham Park, New Jersey; Kenneth C. Johnson, Esquire of Exxon Mobil Corporation, Houston, Texas; for Appellees.

Before STEELE, Chief Justice, HOLLAND, BERGER and JACOBS, Justices, and STRINE, Vice Chancellor,[1] constituting the Court en Banc.

6*6 JACOBS, Justice.

Saudi Basic Industries Corporation ("SABIC"), the counterclaim defendant below, appeals from a $416.8 million Superior Court judgment entered against SABIC and in favor of SABIC's joint venture partners, Mobil Yanbu Petroleum Company ("Mobil") and Exxon Chemical Arabia, Inc. ("Exxon").[2] SABIC brought this action in the Superior Court of Delaware, seeking a declaratory judgment that any payments made to SABIC by the joint venture partnerships were not overcharges that violated any applicable contract. In response, Mobil and Exxon asserted counterclaims in 7*7 tort[3] and for breach of contract, alleging that for over two decades, SABIC had secretly overcharged the partnerships for technology that SABIC had licensed from Union Carbide Corporation. After a two-week trial, the jury found that SABIC had breached the joint venture agreements and had also committed the Saudi tort of usurpation against both Mobil and Exxon. Based on those findings, the jury awarded compensatory damages of $220,238,108 to Mobil and $196,642,656 to Exxon.

On this appeal, SABIC contends that the judgment should be reversed and/or that the case should be remanded for a new trial, because the trial judge made numerous rulings, both substantive and evidentiary, that were erroneous as a matter of law. Having considered in depth the parties' briefs and the extensive record, we conclude that none of SABIC's multitudinous claims of error has merit and that the judgment of the Superior Court should be affirmed.

FACTS

The facts that are pertinent to this appeal are either undisputed or, where disputed, are based upon reasonable inferences from the record evidence that, viewed in the light most favorable to the prevailing parties, raise issues of material fact that the jury could justifiably have resolved in Exxon-Mobil's favor.[4]

1. Formation of the Joint Venture Partnerships

SABIC is a Saudi Arabian corporation that originally was 100% owned (and now is 70% owned) by the Saudi government. SABIC was formed in the late 1970s to work jointly with several firms to use petroleum-based feedstocks in manufacturing polyethelene, which is a type of plastic. During

the mid-to-late 1970s, in order to diversify Saudi Arabia's industrial base, SABIC began exploring the possibility of forming joint ventures to manufacture polyethylene. The result was the formation of two separate 50-50 joint ventures, one between SABIC and Mobil (the "Yanpet joint venture"), and the other between SABIC and Exxon (the "Kemya joint venture"). The Yanpet joint venture was formed by an agreement SABIC and Mobil entered into on April 19, 1980; the agreement for the Kemya joint venture was entered into between SABIC and Exxon on April 26, 1980. Both joint ventures had the same ultimate purpose: to manufacture polyethelene in Saudi Arabia.

A critical, carefully negotiated premise of both joint ventures was that the profits enjoyed by each joint venture partner would be limited to the profits earned by the joint venture. As a result, no partner would profit at the joint venture's expense. Consistent with that principle, the joint venture agreements forbade any partner 8*8 from charging a "mark-up" on technology procured from a third party and sublicensed to the joint venture. Thus, Article 6.3 of the Yanpet joint venture agreement provided:

To the extent either Partner or any Affiliate thereof procures patents, processes and other licensing rights of third parties, and sublicenses such rights to the partnership, it shall not receive any remuneration other than actual cost incurred in acquiring and sublicensing such right.

And, Article 6.3 of the Kemya joint venture agreement, which was to the same effect, provided that:

Patents, processes, and other licensing rights of third parties which require the payment of royalties, rentals and other remuneration to such third parties shall be paid by the Partnership against appropriate invoices. To the extent either Partner or any Affiliate thereof procure such rights and sublicenses for the Partnership, it shall not receive any remuneration other than actual cost disbursed in acquiring such license.

2. SABIC Secretly Overcharges The Yanpet And Kemya Joint Ventures

In order to manufacture polyethylene, Yanpet (the SABIC/Mobil joint venture partnership) needed technology that it did not own. Initially, the parties intended that Yanpet would license Unipol(R) PE technology directly from Union Carbide Corporation ("UCC"). After a Spring 1980 meeting in Riyadh, Saudi Arabia, however, SABIC informed its partner, Mobil, that SABIC itself would license the technology directly from UCC and then sublicense it to Yanpet. Consistent with Article 6.3, SABIC assured Mobil that SABIC would pass through to Yanpet at its cost, "dollar for dollar," the amounts SABIC paid to UCC for Yanpet's use of the Unipol(R) PE technology. In fact, however, SABIC intended to furnish the technology to Yanpet at a mark-up above SABIC's cost.

In September 1980, SABIC and UCC executed an agreement granting SABIC an exclusive license to the Unipol(R) PE technology within the Kingdom of Saudi Arabia (the "SABIC/UCC License

Agreement"). Neither Mobil nor Yanpet was permitted to attend any of the meetings between SABIC and UCC at which the financial terms of the SABIC/UCC License Agreement were discussed. That did not concern Mobil, because having been assured that SABIC would be providing Yanpet the same terms that SABIC itself had procured from UCC, Mobil and Yanpet did not negotiate, or even comment upon, the financial terms of the sublicense. Ultimately, SABIC and Yanpet executed the SABIC-Yanpet Unipol(R) PE Technology License Agreement, which was dated effective October 15, 1980.

Over the following two decades, SABIC charged Yanpet sublicense fees and royalties that were substantially higher than what SABIC was paying to UCC under the SABIC/UCC License Agreement.[5] Because SABIC never told Mobil that it had marked up the sublicense fees and royalties, Mobil believed, during that entire time, that SABIC's license royalties were being passed through to Yanpet at cost.

The negotiation of and performance under the sublicense agreement between SABIC and Kemya (the SABIC-Exxon joint venture partnership) mirrored the Mobil/Yanpet 9*9 fact pattern. Originally, SABIC and Exxon planned for Kemya to use Exxon's own proprietary technology to manufacture polyethylene. Later, they understood that instead, Exxon would acquire the right to use UCC's Unipol(R) PE technology, and would then grant a Unipol(R) PE license to Kemya, as sublicensee. Ultimately, however, as with Yanpet, SABIC informed Exxon, in a March 1980 meeting in Riyadh, that it (SABIC) would license that technology directly from UCC, and then sublicense the technology to Kemya. Like Mobil, Exxon was excluded from the negotiations over the financial terms of the SABIC/UCC license. That did not concern Exxon because Mr. Ibrahim Bin Salamah, SABIC's chief negotiator for the Kemya and Yanpet Joint Venture Agreements and also for the Kemya and Yanpet Unipol(R) PE/UCC technology sublicenses, assured Exxon's representative that SABIC was "not interested in profiting on the technology passed on to its [joint ventures]."

In fact, however, SABIC never intended to limit its royalty charges to Kemya to the amount(s) that SABIC would be paying to UCC. As with Yanpet, SABIC had determined to charge a marked-up royalty to Kemya. Following the same pattern that it employed with Yanpet, SABIC overcharged Kemya for its use of the Unipol(R) PE technology, to create a "cushion" in case the ventures failed. SABIC accounted for the overcharges as a "profit" in its internal financial records.

In June 1987, because of poor market conditions in the polyethylene business, UCC agreed to reduce the royalties due from its licensees, including SABIC. Correspondingly, the joint venture partners amended the Yanpet and Kemya sublicenses to reduce the royalties payable by the joint venture partnerships to SABIC. Unbeknownst to ExxonMobil, however, SABIC had negotiated for itself a royalty rate reduction that was significantly larger than the reduction SABIC had granted to the joint ventures. Exxon and Mobil representatives testified that SABIC never told Mobil, Yanpet,

Exxon or Kemya that it had extracted a reduction in the cost of Unipol(R) PE technology that was much larger than the reduction SABIC had extended to Yanpet and Kemya. SABIC's concealment of the discrepancy between those royalty reductions — which had the effect of increasing SABIC's reserves — was intentional.

Not until the year 2000 did ExxonMobil discover the overcharge. That occurred as a result of a dispute between SABIC and the Saudi taxing authority relating to the royalties paid by SABIC to UCC under the SABIC/UCC Agreement. The Saudi taxing authority determined that those payments were taxable. That decision prompted SABIC to send letters to Kemya and Yanpet informing them of the tax dispute and demanding that the partnerships pay a share of the tax to SABIC. While attempting to determine the accuracy of SABIC's indemnification demand, ExxonMobil discovered, for the first time,[6] 10*10 that SABIC had overcharged the partnerships for furnishing the UCC's Unipol(R) PE technology.

3. The Procedural History Of The Litigation

To aid an understanding of the issues presented by SABIC's arguments, it is helpful first to summarize the procedural history of the litigation, including the trial court rulings that are challenged on this appeal.

a. *The New Jersey Federal Action*

The claims at issue first surfaced in litigation brought by SABIC against ExxonMobil in the United States District Court for the District of New Jersey. In that court, SABIC sought a declaratory judgment that ExxonMobil had used technology, previously developed for Kemya, to obtain proprietary information (including patent and trade secrets) in violation of ExxonMobil's service agreement with Kemya. SABIC sought a declaratory judgment that Kemya owned the patents, and also sought an injunction directing ExxonMobil to transfer legal title to those patents to Kemya.[7]

ExxonMobil raised the defense of unclean hands against SABIC's claim, contending that SABIC had wrongfully overcharged Kemya for the royalty payments at issue here.[8] During the discovery stage, SABIC agreed to a consent order that would have required SABIC to respond to discovery regarding the overcharge claims. But SABIC did not comply with that order. Instead, it filed the Delaware Superior Court action that is the subject of this appeal.[9]

b. *The Delaware Superior Court Action*

In its Superior Court action, SABIC sought a declaratory judgment that Kemya's and Yanpet's royalty payments to SABIC were not overcharges that violated any applicable contract. In response, ExxonMobil interposed counterclaims for damages, based upon SABIC's alleged breaches of the

joint venture agreements, breaches of fiduciary duty and upon the implied duty of good faith, and the doctrines of unjust enrichment and promissory estoppel. ExxonMobil also demanded a jury trial, to which SABIC made no objection until only weeks before the trial, when SABIC moved (unsuccessfully) to strike the jury trial demand.

11*11 On March 21, 2003, at the conclusion of a two week trial, the jury returned a verdict awarding compensatory damages of $220,238,108 to Mobil and $196,642,656 to Exxon. The jury found that SABIC had breached Article 6.3 of both the Yanpet and Kemya joint venture agreements, and also that SABIC had committed the Saudi tort of usurpation ("*ghasb*") against both Mobil and Exxon.

SABIC claims on this appeal that that jury verdict must be set aside because it was the product of multitudinous rulings, all erroneous as a matter of law, made by the trial judge during the course of the Superior Court action. The rulings that are contested on this appeal fall into five separate groupings. To better understand SABIC's claims on appeal, and our analysis of those claims, the contested rulings are briefly summarized at this point.

(1) *The Statute of Limitations Rulings*

Before trial, SABIC moved for summary judgment on the ground that ExxonMobil's claims were barred by Delaware's three-year statute of limitations. The trial court denied that motion, holding as a matter of law that (1) under substantive principles of Saudi law (which both sides agree is applicable), ExxonMobil's claims were property rights that could not be barred by the passage of time; and (2) Delaware's borrowing statute (which would have subjected ExxonMobil's claims to the three year limitations period) was inapplicable.[10] The trial court later denied SABIC's post-trial motion for judgment as a matter of law or, alternatively, for a new trial, holding that the court had previously determined, as a matter of law, that the Delaware three year statute of limitations did not bar ExxonMobil's claims.[11]

(2) *The Evidentiary Rulings*

Both before and during the trial, the Superior Court made evidentiary rulings. Four of those rulings are contested on this appeal and are next described.

(a) the exclusion of certain testimony by Ibrahim Bin Salamah — proffered by SABIC long after the discovery cutoff date and shortly before trial — that contradicted the prior testimony of Bin Salamah and of another SABIC witness, as well as SABIC's formal admissions that SABIC intended to charge a marked-up royalty to Yanpet and Kemya but never disclosed that intent to its partners;

(b) the admission of an internal memorandum authored by Exxon employee, John Webb, reflecting representations by Mr. Bin Salamah in 1986, that the royalty rates paid by SABIC to UCC for its Unipol(R) PE license were the same as the royalty rates being paid by ExxonMobil as sublicensees of SABIC;

(c) the admission of testimony of Exxon employee George Fitzpatrick, and of Mobil employee Robert Murphy, that SABIC had promised ExxonMobil a "pass through" license, and later represented that it (SABIC) had "passed through" its billings to Kemya and Yanpet at SABIC's cost; and

(d) the limitation of the scope of evidence (proffered by SABIC) of Exxon's subjective intent relating to drafts of agreements that predated the joint venture, and that were never executed, in connection with ExxonMobil's possibly providing polyethene technology to the 12*12 joint ventures.[12]

(3) *The Rulings On SABIC's Defense of Release*

One of SABIC's defenses to ExxonMobil's counterclaims was that the 1987 Letter Agreements, wherein ExxonMobil and SABIC renegotiated the joint ventures license fees, operated to release all payment-related claims that ExxonMobil could have brought against SABIC. The trial court granted judgment as a matter of law to ExxonMobil on that release defense on three separate grounds: (i) neither Exxon nor Mobil had signed the 1987 Letter Agreements; (ii) the unambiguous language of those Agreements limited the scope of any release to technology-related claims and did not include payment-related claims; and (iii) the only evidence as to the relevant Saudi law was the unrebutted testimony of Professor Wael B. Hallaq, who opined that the 1987 Letter Agreements would not affect ExxonMobil's claims as a matter of law. After the jury verdict, SABIC renewed its motion for judgment as a matter of law, based on the same release defense that the trial judge had previously rejected. The Superior Court denied that motion by order dated August 27, 2003.[13]

(4) The Rulings on ExxonMobil's *Claims For Breach of Contract*

At the conclusion of the trial, the jury found that SABIC was liable to ExxonMobil for having breached Article 6.3 of the joint venture agreements, which (the jury found) was controlling and required SABIC to limit its royalty charges for providing Unipol(R) PE technology to the partnerships to a "pass through" of SABIC's own cost of licensing that same technology from UCC. After the close of the evidence, SABIC moved for judgment as a matter of law on those contract claims. The trial court denied that motion.

After the jury verdict, SABIC renewed its motion for judgment as a matter of law or, alternatively, a new trial.[14] The basis of the renewed motion for judgment was that as a matter of law no reasonable jury could have found for ExxonMobil on their contract claims. The thrust of SABIC's alterna-

tive motion for a new trial was that the great weight of the evidence established that the 1980 Unipol(R) PE licenses had superseded and/or modified the joint venture agreements.[15]

The trial court denied both motions, holding that: (a) a reasonable jury could have found that Article 6.3 (which required a cost pass through) governed the terms under which SABIC could sublicense the Unipol(R) PE technology to the joint ventures; and (b) the record dispositively negated SABIC's contention that specific joint venture polyethylene licenses entered into in October and November 1980 had superseded or "trumped" Article 6.3 of the joint venture agreements, because Exxon and Mobil did not sign the sublicenses, and did not understand or intend that the sublicenses would operate to supersede Article 6.3.[16]

13*13 (5) The Rulings on ExxonMobil's *Tort Claims for "Usurpation"*

The jury also found SABIC liable to ExxonMobil for committing the tort known under Saudi law as usurpation (*ghasb*). The amount of the jury award for usurpation was $416 million, of which $92 million represented Exxon's and Mobil's *pro rata* share of the amounts that (the jury found) SABIC had overcharged for the Unipol(R) PE technology, and $324 million represented those parties' *pro rata* share of the profits that SABIC had earned through its use of the overcharges in its business operations.

Following the jury verdict, SABIC filed two separate motions for judgment as a matter of law or, alternatively, a new trial or remittitur on ExxonMobil's *ghasb* claims. In its first motion, SABIC sought judgment as a matter of law, claiming that there was no legally sufficient evidentiary basis for a reasonable jury to find for ExxonMobil, and that the evidence overwhelmingly supported a verdict in SABIC's favor.[17] Specifically, SABIC argued that the *ghasb* verdict was deficient as a matter of law because (1) the trial court declined to instruct the jury that under Saudi law, for SABIC to commit *ghasb* it must have acted "forcefully and with the victim's knowledge" (as distinguished from usurpation by secrecy or stealth), and (2) here, SABIC had acted secretively and without the victims' knowledge.[18]

The Superior Court denied that motion, ruling that (a) the court's determination of the Saudi law elements of *ghasb* on which it based the jury instruction was the culmination of many months of study, research, discussion and extensive expert testimony on Saudi law, including a separate live hearing on the subject;[19] (b) the court's rejection of the elements of "knowledge" and "force" advocated by SABIC was "consistent with the classical Hanbali authorities that would be followed by a Saudi judge;"[20] and (c) the jury verdict was not against the great weight of the evidence and indeed, was amply supported by the evidence.[21]

In its second (renewed) motion for judgment as a matter of law or, alternatively, a new trial or remittitur, SABIC contended that the damages award of $324 million (which SABIC characterizes as

"enhanced damages"),[22] was unprecedented under Saudi 14*14 law and, therefore, the jury should not have been allowed to award damages above the actual $92 million overcharge. Alternatively, SABIC argued, it was entitled to a new trial wherein the jury would be given adequate instructions on enhanced damages, rather than being led to believe that an enhanced damage award follows automatically once the elements of *ghasb* are established. Those instructions (SABIC urged) should include a list of six factors that a Saudi judge would consider, plus the admonition that "enhanced damages" are permitted only under the most "unusual or egregious of circumstances."[23]

The Superior Court denied SABIC's motion, finding that its jury instruction relating to *ghasb* damages was correct and that the *ghasb* damages award was not against the great weight of the evidence. Specifically, the trial judge ruled that: (a) SABIC's argument that damages for *ghasb* are virtually unprecedented and rarely awarded in the Saudi legal system, was unsubstantiated, unverifiable and irrelevant;[24] (b) the jury instruction properly left any award of usurpation damages to the jury's discretion; (c) the six factors on which SABIC argued that the Court should have instructed the jury had no foundation in Saudi law as determined after a studied analysis based upon the authoritative texts; and (d) instructing the jury on the factors advocated by SABIC would be misleading and, in some cases, would invite inappropriate speculation.[25]

c. *Proceedings After The Filing of This Appeal*

After it commenced this appeal, SABIC filed a motion in this Court to supplement the record to include what SABIC characterized as an "official statement of Saudi Arabian law issued by the Ministry of Justice of Saudi Arabia." That "official statement" had never been presented to, or considered by, the trial court whose determinations of Saudi law had become final, subject only to review by this Court. SABIC's motion was also filed without leave of this Court. ExxonMobil vigorously opposed the motion. Weeks later, SABIC filed a motion to remand the case to the trial court to reconsider certain of SABIC's post trial motions for judgment as a matter of law, or alternatively for a new trial, in light of its newly-filed "official statement of Saudi law." This Court denied both motions as procedurally improper on January 29, 2004.

ANALYSIS OF SABIC'S CLAIMS OF ERROR

(1) THE STATUTE OF LIMITATIONS RULINGS

(a) *The Issues Presented*

Before the trial, SABIC moved for summary judgment as a matter of law on the ground that the application of Delaware's borrowing statute[26] resulted in ExxonMobil's twenty-plus year old claims being barred by Delaware's three year statute of limitations, 10 *Del. C.* § 8106. SABIC claimed that Exxon and Mobil had inquiry notice of their overcharge claims no later than 1994, and that there

was no legal basis to toll the running of the statute. More specifically, SABIC argued that: (i) because ExxonMobil's claim arose "outside of Delaware" (*i.e.,* in Saudi Arabia), the limitations periods prescribed by both Delaware and Saudi Arabian law were potentially 15*15 applicable; (ii) Delaware's borrowing statute required the Superior Court to apply the shorter of those two potentially applicable limitations periods; (iii) in this case, the shorter period of limitations was the three year period prescribed by Section 8106, and as result, ExxonMobil's claims were time-barred.

In a pretrial bench ruling, the trial judge denied the motion, holding as a matter of law that the borrowing statute did not apply and that ExxonMobil's claims were not time-barred under substantive Saudi law principles. Under Saudi law (which, all parties agree, governs ExxonMobil's contract and tort claims), property rights (including ExxonMobil's claims) are eternal and cannot be extinguished by the passage of time. As the trial judge explained:

The Delaware borrowing statute, the purpose of it, is (a) to prevent forum shopping; and[](b) [] to protect the residents of Delaware.

To apply the borrowing statute and [conclude] that Delaware's statute of limitation[s] would apply would basically turn the borrowing statute on its head for the purpose for which it was enacted.

SABIC purposefully chose this forum. And all indications strongly suggest that they chose this forum to obtain a shorter statute of limitations. So it [is] somewhat of a twist; in that, usually these cases involve a plaintiff who chooses this forum, hoping to get a longer statute of limitations.... So here, it's a twist on the normal set of facts. But the bottom line is: Our legislature intended to prevent people out of state, foreign plaintiffs, from coming into this forum and getting the benefit of a statute of limitations that really ought not to apply given the fact that the substantive law is interwoven with the procedural right.

And here because Saudi law makes it clear and the parties don't dispute that Saudi law makes it clear, that a property right is eternal. And there is no concept in Saudi law that the usurper of the property can rely on the passage of time to extinguish claims.

On that basis, the trial court ruled that ExxonMobil's claims were not time-barred as a matter of law. That ruling, SABIC contends, is erroneous because: (1) the Delaware borrowing statute does apply and as a result, makes applicable the shorter (three year) Delaware statute of limitations, which bars ExxonMobil's claims; (2) the three-year statute was not tolled or, alternatively, any tolling had ceased by 1994; and (3) even payments made by ExxonMobil within the three-year limitations period (*i.e.,* after 1997) are not recoverable because they represented continuing damages, as opposed to continuing wrongs.

SABIC's contentions frame the limitations-related issues, which are *first,* whether Delaware's borrowing statute applies; *second,* if so, whether the Delaware three year statute of limitations was tolled and if so, for how long; and *third,* whether post-1997 royalty payments made within the three year limitations period are also time-barred. We review these claims *de novo* for errors of law.[27] For the reasons next discussed, we uphold the trial judge's determination that the Delaware borrowing statute (and, as a consequence the Delaware three year statute of limitations) does not apply. We further conclude that, independent of the borrowing statute, the Delaware tolling statute tolled any limitations 16*16 period until SABIC commenced this action in July 2000, because before that time SABIC was not amenable to suit in Delaware and, therefore, was "out of the State" for tolling statute purposes.

(a) *Applicability of The Borrowing Statute*

It is undisputed that if Saudi law governs the limitations issue, then ExxonMobil's claims are not subject to any bar of limitations; but if Delaware law governs the limitations question, then the three-year statute applies and (absent tolling) bars ExxonMobil's claims.[28] The issue of which law applies turns upon whether the Delaware borrowing statute is applicable. That statute provides:

Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply.[29]

This statute, if literally read and applied, would cause the three-year Delaware limitations statute to govern ExxonMobil's overcharge claim. SABIC urges us to adopt such a literal reading. SABIC argues that under the first sentence of Section 8121, ExxonMobil's cause of action arose "outside of this State," *i.e.,* in Saudi Arabia. Therefore, the applicable limitations period must be prescribed by Delaware law, which is the "shorter" of the "time limited by the law of this State" (Delaware: three years) and "the time limited by the law of the ... country where the cause of action arose" (Saudi Arabia: no limitations period). Moreover, SABIC argues, the application of Delaware's three year statute is similarly mandated by its second sentence, because the two joint venture partnerships were "resident[s] of this State" at the time the "cause of action originally accrued."

The infirmity in SABIC's argument is that its literal construction of the borrowing statute, if adopted, would subvert the statute's underlying purpose. Our case law precedent eschews such a construction. As both this Court and the trial court have recognized, borrowing statutes "are designed to prevent shopping for the most favorable forum...."[30] To accomplish that purpose, those

statutes are normally designed to "shorten the time limit — not to extend it."[31] Borrowing statutes such as Section 8121 are typically designed to address a specific kind of forum shopping scenario — cases where a plaintiff brings a claim in a Delaware court that (i) arises under the law of a jurisdiction other than Delaware and (ii) is barred by that jurisdiction's statute of limitations but would not be time-barred in Delaware, which has a longer statute of limitations. Under that "standard scenario," the borrowing 17*17 statute operates to prevent the plaintiff from circumventing the shorter limitations period mandated by the jurisdiction where the cause of action arose.

Our decision in *Pack v. Beech Aircraft Corporation* illuminates that purpose. In *Pack,* the plaintiff brought a wrongful death action in a Delaware court under the New Jersey Wrongful Death Statute, which had a "built in" two-year statute of limitations. Had the lawsuit been brought in New Jersey it would have been time-barred, because the suit was not filed until after the two-year limitations period had expired. The plaintiff argued that the action was not time-barred, because the applicable statute was not the New Jersey statute but the Delaware three-year statute of limitations. Rejecting that argument, this Court held that Delaware's borrowing statute would be applied in order to enforce New Jersey's "built in" two-year limitations period:

If a non-resident chooses to bring a foreign cause of action into Delaware for enforcement, he must bring the foreign statute of limitations along with him if the foreign statute prescribes a shorter time than the domestic statute. Our statute does not apply to a resident of this State suing on a foreign cause of action provided he was a resident when the cause of action arose. As to such a resident the common law rule that the *lex fori* governs the matter of limitations of actions is left in full force.[32]

Although the plaintiff in *Pack* was a resident of Delaware, this Court recognized that a literal application of the second sentence of Delaware's borrowing statute to that particular plaintiff would *extend,* rather than shorten, the applicable limitations period. This Court declined to apply the borrowing statute in such a literal way, because to do so would undercut the overriding purpose of borrowing statutes, which is "to prevent shopping for the most favorable forum." Because the two-year limitations period was "built in" to New Jersey's statutory cause of action for wrongful death, this Court applied Delaware's borrowing statute so as to "enforce the New Jersey law as we find it."[33]

The sane reasoning that led this Court to eschew a literal application of the borrowing statute in *Pack,* requires us to uphold the reasoning of, and the result reached by, the trial court in this case. Here, ExxonMobil's claims arose under Saudi law, which imposes no time bar upon those claims. If ExxonMobil had prosecuted their overcharge claims in Saudi Arabia, their claims would not be time-barred. But ExxonMobil did not assert these claims in Saudi Arabia, or bring suit in Delaware as plaintiff to enforce those claims against SABIC. Rather, it was SABIC who came to Delaware to obtain an adjudication that (*inter alia*) Delaware's three year statute of limitations barred ExxonMobil's claims. Given the nature of SABIC's affirmative claim for declaratory relief, ExxonMobil was

entitled to assert its overcharge causes of action as counterclaims for damages. In these circumstances, as the trial judge found, the party that was "shopping for the most favorable forum" was SABIC, not ExxonMobil.

The trial judge recognized that to apply the borrowing statute to ExxonMobil would subvert the statute's fundamental purpose,[34] by enabling SABIC to prevail 18*18 on a limitations defense that would never have been available to it had the overcharge claims been brought in the jurisdiction where the cause of action arose, *i.e.,* Saudi Arabia. Because the Superior Court properly ruled that the borrowing statute did not apply, it follows that that court also correctly held that ExxonMobil's counterclaims to recover the royalty overcharges were not time-barred.

(b) *The Application of The Tolling Statute*

The conclusion that ExxonMobil's counterclaims were not time-barred was correct for a second, independent reason. Even if the borrowing statute did apply and thereby triggered Delaware's three-year statute of limitations, Delaware's tolling statute stopped the running of the three-year statute until SABIC filed this action in Delaware and as a result, became amenable to service of process. Our tolling statute provides:

If at the time when a cause of action accrues against any person, such person is out of the State, the action may be commenced, within the time limited therefor in this chapter, after such person comes into the State in such manner that by reasonable diligence, such person may be served with process. If, after a cause of action shall have accrued against any person, such person departs from and resides or remains out of the State, the time of such person's absence until such person shall have returned into the State in the manner provided in this section, shall not be taken as any part of the time limited for the commencement of the action.[35]

It is settled law that the purpose and effect of Section 8117 is to toll the statute of limitations as to defendants who, at the time the cause of action accrues, are outside the state and are not otherwise subject to service of process in the state.[36] In those circumstances, the statute of limitations is tolled until the defendant becomes amenable to service of process.[37]

Here, SABIC was "out of the state" and service of process upon SABIC could not have been accomplished in Delaware. Because SABIC lacked significant contacts with Delaware before it filed this lawsuit, the Delaware courts would have lacked personal jurisdiction over SABIC. Therefore, ExxonMobil could not have obtained personal jurisdiction over SABIC in Delaware. Only by voluntarily initiating this action in Delaware as plaintiff did SABIC "come [] into the State" and thereby become amenable to service of process.[38] 19*19 Thus, even if the three-year Delaware statute of limitations were found applicable to ExxonMobil's claims, the running of that statute was tolled until the date that SABIC filed its Superior Court action.[39]

We conclude, for these reasons, that the Superior Court did not err by rejecting SABIC's defense (and claim-in-chief) that ExxonMobil's counterclaims are barred by the statute of limitations.

(2) THE EVIDENTIARY RULINGS

We turn next to SABIC's claim that the trial judge made four erroneous evidentiary rulings. We review rulings on the admission of evidence for abuse of discretion.[40] Where a court "has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused."[41] We conclude that none of the contested evidentiary rulings constituted an abuse of discretion.

(a) The first contested trial court ruling,[42] is the exclusion of SABIC's proffered testimony of Ibrahim Bin Salamah, the SABIC official who negotiated the joint venture agreements. The proffered testimony was that Mr. Bin Salamah had personally told his counterparts at Exxon and Mobil that SABIC would receive a margin or "mark-up" on the Unipol(R) PE technology. That testimony, if allowed, would have contradicted the testimony of SABIC's Rule 30(b)(6) representative, Dr. Richard Pai, whom ExxonMobil had deposed three times. On each of those occasions Dr. Pai testified that SABIC always intended to charge the joint ventures a margin on the Unipol(R) PE technology, but had never informed Exxon, Mobil, Kemya or Yanpet of its intent. The proposed new testimony would also have directly contradicted Ben Salamah's previous deposition testimony — given only days before trial — that SABIC "never talk[ed] about the margin;" as well as SABIC's October 4, 2002 interrogatory responses, filed shortly before the trial, that expressly adopted Dr. Pai's testimony. Lastly, the proffered new testimony would have contradicted SABIC's responses to ExxonMobil's requests for admissions, in which SABIC represented that it had "no information that shows, one way or the other" whether SABIC had disclosed the royalty mark-ups to the joint ventures or to ExxonMobil.

Granting ExxonMobil's motion *in limine,* the trial court prohibited Mr. Bin Salamah from giving his proffered new testimony, on two grounds. First, that testimony would reverse all of SABIC's prior positions on this issue; and second, 20*20 the reversal of position would be highly prejudicial. The proffered testimony was never disclosed to ExxonMobil until SABIC filed its reply brief in support of its motion for summary judgment — long after the discovery cut-off date and at a time that ExxonMobil was effectively foreclosed from countering the new testimony. The persons to whom Mr. Bin Salamah had supposedly revealed this information were not available either to be re-deposed or to be called as rebuttal witnesses at trial. By that point in time, one of those witnesses had died and the other (who was never questioned about this subject at his deposition) was unavailable to testify at trial. Not surprisingly, the trial judge ruled that:

[I]t was SABIC's conduct during discovery that resulted in exclusion of this testimony. Simply stated, had SABIC complied in good faith with the letter and spirit of our discovery rules before trial, the Court would probably not have been forced to exclude this portion of Mr. Bin Salamah's testimony.[43]

The trial court reasoned that Mr. Bin Salamah's new testimony was reasonably available to SABIC at all times during the discovery period; that Rule 30(b)(6) required SABIC's counsel to review that testimony with Mr. Bin Salamah before submitting the (contrary) Rule 30(b)(6) deposition testimony of Dr. Pai (as the spokesperson for the SABIC organization); and that the consequences of counsel's failure to do that should fall upon SABIC, not ExxonMobil.[44] On the basis of "fundamental fairness,"[45] the trial court concluded that to have "allowed Mr. Bin Salamah to testify on this subject ... would have rewarded SABIC for discovery techniques that do not pass muster in this Court and would have resulted in a thorough sandbagging of ExxonMobil."[46]

We agree. Given these facts, the trial court's evidentiary ruling could not possibly constitute an abuse of discretion. Mindful of that, SABIC attacks the ruling's factual and legal predicates. SABIC argues (contrary to the trial judge's finding) that Mr. Bin Salamah's new testimony would not have contradicted that of Dr. Pai, and that SABIC's counsel was not procedurally obligated to consult with Bin Salamah before Dr. Pai's Rule 30(b)(6) deposition. That argument amounts to little more than assertion without support in the record. Nowhere does SABIC come to grips with the case law that supports the trial judge's analysis and result. Having reviewed the record and applicable law, we conclude that the trial court's ruling is solidly grounded in both law and fact, and that SABIC's contrary arguments lack merit.

(b) The second contested evidentiary ruling was the admission into evidence of an internal memorandum by Exxon employee, John Webb, reflecting representations made by Mr. Bin Salamah in 1986, that the royalty rate called for by the SABIC/UCC license agreement for the Unipol(R) PE technology was identical to the royalty rate required by the SABIC-Kemya license agreement. SABIC claims that the Webb memorandum was admitted erroneously, because it was hearsay. The trial court, however, admitted the document as past recollection recorded, which is a recognized exception to the 21*21 hearsay rule.[47] We find no abuse of discretion in the admission of that document. Nor was SABIC prejudiced by its admission into evidence. The trial court gave SABIC the opportunity to cross-examine Webb about the memorandum and also to call Mr. Bin Salamah and elicit his denial that he made any statement to Webb. SABIC availed itself of both opportunities.

(c) The third contested evidentiary ruling is the admission of the testimony of two ExxonMobil employees, George Fitzpatrick and Robert Murphy, to the effect that SABIC had promised ExxonMobil a "pass through" license, and had represented (to Messrs. Fitzpatrick and Murphy) that SABIC had "passed through" its billings to Kemya and Yanpet at SABIC's cost. SABIC claims that this tes-

timony was "multiple hearsay." That contention is misguided. A statement is not hearsay if offered only to prove that the statement was made, rather than for the truth of the matter asserted.[48] Here, Fitzpatrick's testimony about SABIC's statements was offered to rebut SABIC's defense that Exxon had waived its breach of contract claim, by showing that Exxon did not know about the overcharge and therefore could not have intentionally relinquished a known right. Nor could the out-of-court statement attributed to SABIC (that there was no overcharge) have been offered for its truth, because the truth was the precise opposite.

Mr. Murphy's disputed testimony was also to the effect that SABIC had promised a "pass through" license and that it had passed through its billings to Kemya and Yanpet at SABIC's cost. Murphy's testimony also was not hearsay because it was not offered for its truth. The statement was offered to correct a misimpression, created during Murphy's cross-examination, that Murphy had been told that SABIC intended to make a profit from furnishing the Unipol(R) PE technology, yet despite being so informed, ExxonMobil made no effort to follow up on that disclosure. Nor was the Murphy testimony prejudicial, because Murphy had previously testified that he received assurances from SABIC that the UCC royalties would be passed through directly to Yanpet.

(d) The fourth contested evidentiary ruling concerns the limitation by the trial court of the scope of SABIC's proffered evidence of Exxon's subjective intent in connection with ExxonMobil's possibly providing polyethene technology to the joint ventures. SABIC attempted to prove Exxon's intent by offering into evidence drafts of never-executed agreements that predated the joint venture agreements. The trial judge excluded only the evidence and testimony that pertained to Exxon's internal state of mind, as distinguished from specific objective communications to and by SABIC on this subject (which were admitted). The trial court reasoned that Exxon's intent regarding never-executed agreements that predated the joint venture were not probative of Exxon's state of mind as of the later time when the parties did execute the joint venture agreements. This ruling was a rational exercise in determining the bounds of relevancy. Even more important, the ruling did not prejudice SABIC, which was permitted to introduce evidence of the earlier negotiations as of the time that (it appeared) Exxon and Mobil might provide the polyethylene technology to the joint ventures. Moreover, in closing argument SABIC's counsel was permitted to (and did) argue that SABIC believed that a 22*22 royalty mark-up was acceptable, based upon the parties' early negotiations relating to the possible provision of the technology by Exxon and Mobil. The jury chose not to credit that argument, however.

For these reasons, none of the contested evidentiary rulings constituted an abuse of discretion.

(3) THE RULINGS ON SABIC'S RELEASE DEFENSE

SABIC's third claim of error is that the trial court improperly struck SABIC's release defense. SABIC argues that the 1987 Letter Agreements, wherein ExxonMobil and SABIC renegotiated the joint ventures' license fees, operated to release all of ExxonMobil's payment-related claims against SABIC.[49] Because the court dismissed that defense as a matter of law, we review its ruling *de novo* for legal error.[50]

The trial judge ruled the release defense out of the case for three independent reasons. The first was that neither Exxon nor Mobil had signed the 1987 Letter Agreements; the second was that the plain language of those Agreements limited the scope of any release to technology-related claims and did not include payment-related claims; and the third was that the only evidence on this issue from a Saudi law expert was the unrebutted testimony of Professor Hallaq, who opined that the 1987 Letter Agreements would not affect ExxonMobil's claims as a matter of law. We conclude that the trial court ruled correctly in all respects.

Articles 18.2 and 19.2 of the joint venture agreements expressly require that any "amendment, modification, or waiver of any provision" must be "in writing and signed by the Partners." The term "Partners" is defined to mean SABIC and Exxon (in the Kemya Agreement) and SABIC and Mobil (in the Yanpet Agreement). Because Exxon and Mobil did not sign, and were not parties to, the 1987 Letter Agreements, they cannot be found to have waived claims under the joint venture agreements. The express requirement of a signature by the "Partners" in the joint venture agreement provisions, and the absence of any actual signatures by Mobil or Exxon, disposes of SABIC's contention that "the Exxon and Mobil partners [Kemya and Yanpet] *are deemed* to have signed the agreements ... because [they] were the joint venturers, and because they accepted the lucrative benefits of those agreements."[51]

In addition, the scope of the release provisions in the 1987 Letter Agreements is clearly limited to "UCC LDPE Technology" and "UCC HDPE Technology." Both terms are limited in the sublicenses to "technical information and data." There is no evidence that the parties (SABIC, Kemya and Yanpet) intended a meaning different from that connoted by the agreement's plain language.[52] Furthermore, 23*23 Professor Hallaq testified that under Saudi law, a release regarding the "object of the contract" (here, technology) cannot be construed as a release of claims relating to payment. That testimony is unrebutted.

Finally, as the trial court pointed out, Professor Hallaq, who was the only Saudi law expert who offered an opinion on the purported release, testified that even if the release language could be construed to cover claims for payment, under Saudi law the representations of Kemya and Yanpet in the 1987 Letter Agreements "are not binding and do not in any way preclude ExxonMobil's payment claims in this case." The reason (Hallaq testified) was that SABIC never disclosed that its royalty payments to UCC were less than Kemya's and Yanpet's royalty payments to SABIC. As a re-

sult, SABIC's representations in the 1987 Letter Agreements were "not accurate or complete." That testimony also stands unrebutted.

We conclude, for these reasons, that the trial court committed no error in dismissing SABIC's release defense as a matter of law.

(4) THE RULINGS ON EXXONMOBIL'S BREACH OF CONTRACT CLAIMS

By its verdict the jury found SABIC liable to ExxonMobil for having breached Article 6.3 of the joint venture agreements.[53] Those provisions (the jury determined) were controlling and limited SABIC's royalty charges for providing Unipol(R) PE technology to the partnerships, to a "pass through" of SABIC's own cost of obtaining a license for that same technology from UCC. During the trial, SABIC moved for judgment as a matter of law on ExxonMobil's contract claim, and after the adverse jury verdict, SABIC moved (again) for judgment as a matter of law or, alternatively, for a new trial. The trial judge denied both motions and judgment was ultimately entered against SABIC on the contract claims.

On appeal, SABIC contends that the trial judge erred in denying its pre (and post) verdict motions for judgment because: (1) as a matter of law Article 6.3 does not apply to SABIC's provision of the Unipol(R) PE technology to the joint venture partnerships; rather, the parties intended that Article 6.1 — which does not require a cost "pass through" — would control; and (2) in any event, the joint venture agreements do not govern what royalties SABIC could charge for providing the Unipol(R) PE technology to the joint venture partnerships. The reason (SABIC argues) is that the parties intended that the later-executed Unipol(R) PE/UCC technology sublicense agreements between SABIC and the joint venture partnerships — which have no "pass through" provision — would supersede and repeal any application of Article 6.3 of the joint venture agreements.[54]

24*24 To the extent SABIC claims that the trial court determined the applicable law incorrectly, or instructed the jury erroneously, or failed to grant judgment as a matter of law because of legally insufficient evidence, we review those claims *de novo* for legal error.[55] We will not disturb a jury's findings of fact on the basis of legally insufficient evidence, however, if there is "any competent evidence upon which the verdict could reasonably be based."[56] Having applied the appropriate review standards to the facts and evidence of record, we discern no error of law in the trial court's rulings, or any legal insufficiency of evidence to support the jury verdict, with respect to ExxonMobil's breach of contract claims.

(a) *SABIC's Argument That Article 6.3 Does Not Apply To ExxonMobil's Claims For Breach of Contract*

Our analysis of SABIC's first challenge to the judgment for breach of contract starts with the uncontested fact that when SABIC furnished the Unipol(R) PE technology to the joint venture partnerships, SABIC did not limit its royalty charges to the partnerships to a "pass through" of its own cost to procure that technology from UCC. It is undisputed that SABIC charged the partnerships a "mark up" over and above its actual cost. The record discloses substantial evidence (based upon which the jury found as fact) that SABIC had concealed those markups from ExxonMobil for almost two decades.

SABIC virtually concedes that those facts would constitute a violation of Article 6.3 of the joint venture agreements, *if* (as the jury found) Article 6.3 governs the overcharge breach of contract claims. SABIC can hardly contend otherwise, as Article 6.3 of the Yanpet agreement directs that "to the extent either Partner or any Affiliate thereof procures patents, processes, and other licensing rights of third parties, and sublicenses such rights to the Partnership, *it shall not receive any remuneration other than actual cost incurred in acquiring and sublicensing such right.*"[57] Article 6.3 of the Kemya joint venture agreement is substantially identical. SABIC's position must therefore be (and indeed is) that Article 6.3 does not govern the overcharge claims. That position contains two prongs.

SABIC first argues, as it did in the Superior Court, that Article 6.3 does not apply to the Unipol(R) PE technology that SABIC licensed to the joint ventures. According to SABIC, Article 6.3, by its plain terms, applies only to partner-*licensed* polyethylene technology that is then sublicensed to the joint ventures, as distinguished from partner-*owned* polyethylene technology that is then licensed to the joint venture. SABIC argues that the parties intended that Article 6.1(a) — which does not require a cost pass-through but instead allows the parties to negotiate transaction-specific financial terms — would apply to partner-owned polyethylene technology. Article 6.1, SABIC asserts, "plainly reflects the parties' intent that separate, later-executed technology [l]icenses, not the 25*25 [joint venture] agreements, would exclusively govern the provision by a partner of the technology `required' to `manufacture' polyethylene." Because SABIC owned the Unipol(R) PE technology, Article 6.3 does not apply and therefore (SABIC concludes), no breach of Article 6.3 could legally have occurred.

The Superior Court rejected this argument on the ground that it ignores the plain language of Articles 6.3 and 6.1, as well as the substantial persuasive evidence that undermines SABIC's position. We conclude that the trial court ruled correctly. SABIC's entire position rests upon a distinction between partner-licensed and partner-owned polyethylene technology. Article 6.3, however, makes no such distinction. Article 6.3 does not exclude partner-*owned* polyethylene technology from its coverage. Indeed, that provision covers technology that a partner "procures," and as the trial judge held, "[a] reasonable jury could conclude that `procures' includes a `purchase.' In fact ... a number of wit-

nesses at trial ... testified that `procures, as it appears in Articles 6.3, would include a purchase of technology.'"[58]

SABIC's distinction does not aid its position for a second reason: a reasonable jury could have found that SABIC was a licensee, not the owner, of the Unipol(R) PE polyethylene technology. That technology SABIC then sublicensed to the partnerships — the very scenario that is contemplated and covered by Article 6.3. The trial court so held:

SABIC's argument that it purchased the Unipol(R) PE technology and then licensed it to the Joint Ventures rings hollow in light of the great weight of evidence in the form of documents that refer to *sub* licenses.... The record is replete with documents referencing the UCC-SABIC transaction as a license and the SABIC Joint Venture transactions as sublicenses. SABIC's witnesses attempted to explain to the jury that while the term "sublicense" may have been used, SABIC "attached no legal meaning" to that term. The overwhelming documentary evidence supports the jury's finding that the true character of the UCC-SABIC agreement was a license, that the agreements with KEMYA and YANPET were sublicenses, and that Articles 6.3 applied.[59]

SABIC next argues that the evidence conclusively establishes that the parties intended for Article 6.1 of the joint venture agreements (which contains no pass-through requirement) — not Article 6.3 (which does) — to govern the terms under which SABIC could sublicense the Unipol(R) PE technology to the joint venture partnerships. Only if the plain language of Article 6.1 is ignored can this argument attain plausibility, because in fact Article 6.1 fatally undercuts SABIC's claim.

Article 6.1(a) of the Kemya joint venture agreement provides that:

To the extent patents and licensing rights and related technical proprietary information are in the opinion of the Partners required to design and construct the Petrochemical Plant and produce Manufactured Products, *ECAI* [Exxon Chemical Arabia Inc.] *and its affiliates* to the extent they are permitted (without having to account to a third party) shall offer to provide to the Partnership, all such patents, licensing rights, technical and proprietary information necessary to perform its obligations 26*26 hereunder consistent with Annex XI hereto.[60]

Article 6.1 explicitly and specifically refers to Exxon and Mobil, but that provision does not in any way mention, refer or even allude to SABIC. For that reason alone the jury had a reasonable basis to find that Article 6.1 does not apply to SABIC and, therefore, confers no rights upon SABIC.

On appeal SABIC argues — as it did before the trial court and the jury — that the references to "*ECAI and its affiliates*" in Article 6.1 of the Kemya joint venture agreement, and to "*MOBIL and/or MOBIL Affiliates*" in Article 6.1 of the Yanpet joint venture agreement,[61] must be construed

to mean "*a partner*." Under that construction, SABIC would be an "affiliate" of Mobil or Exxon because those entities are partners in the two joint ventures.

That argument labors under multiple infirmities. Nothing in the joint venture agreements or in any case law cited by SABIC persuasively supports, let alone compels, that interpretation. To read "affiliates" as including all entities with which Mobil and Exxon have formal relationships as partners — a construction that SABIC insists the jury was required to accept as a matter of law — would be odd, to say the least. SABIC was not an "affiliate" of Mobil or Exxon as that term is commonly and ordinarily understood.[62] To the contrary, SABIC was ExxonMobil's bargaining adversary, the party on the other side of the arm's-length negotiations that resulted in the joint venture agreements. Reuel Agarrado, SABIC's own witness, testified that Article 6.1 "does not apply to SABIC." There is no evidence that SABIC ever informed Exxon or Mobil that it was relying upon Article 6.1 when SABIC violated the pass-through terms of Article 6.3. Nor did SABIC ever allege in its original or amended complaint that it had relied upon Article 6.1.

Despite these infirmities, the trial court allowed SABIC to present its Article 6.1 argument to the jury, which ultimately rejected it. The jury's rejection of SABIC's argument has an ample and sufficient basis in the evidentiary record, as did the trial judge's post-trial ruling that the jury was justified in reaching that result:

The Court notes that at trial ExxonMobil introduced a copy of [SABIC's] Second Amended Complaint ... and Article 6.1 of the Joint Venture Agreements is nowhere mentioned in that complaint. The Court also notes that SABIC witnesses admitted that they never advised anyone at Exxon or Mobil that SABIC believed Article 6.1(a) applied to the provision of Unipol(R) PE technology to the Joint Ventures. Given all of this, there is more than a sufficient basis from which a reasonable jury could conclude 27*27 that SABIC's Article 6.1(a) argument was an afterthought, and an unavailing one at that. This Court seriously considered precluding SABIC from presenting [that] argument ... because of the lack of evidentiary basis supporting such an argument, and because the argument was not asserted until very late in [the] litigation.... After... characterizing SABIC's claim ... as "hanging on by a thread," the Court nonetheless permitted SABIC to argue this to the jury over ExxonMobil's objection. Thus, SABIC had a full and fair opportunity to present this argument to the jury for its consideration. The jury rejected it.... [T]here is no basis to overturn the jury's rejection of that argument.[63]

We find that ruling to be free from error and correct.

(b) *SABIC's Argument That The Sublicenses Supersede And Repeal Any Application of Article 6.3*

Alternatively, SABIC contends that even if Article 6.3 does govern (thereby limiting SABIC's royalty charges to a pass through of its actual cost of obtaining the Unipol(R) PE technology), in this

case Article 6.3 had no force or effect, because the SABIC/Kemya and SABIC/Yanpet sublicense agreements superseded and repealed any application of Article 6.3.

The trial court rejected this argument, holding that:

SABIC next argues that, under Saudi rules of contract interpretation, the Joint Venture polyethylene licenses which were entered into in November and October 1980 "trump" the general provisions of the Joint Venture Agreements, including Article 6.3. In support of this argument, SABIC states that under Saudi law, partnership agreements like the Joint Venture Agreements are *ja'iz* contracts, which are not prospectively binding on the partners but rather serve as a starting point for later, transaction-specific agreements. The later transaction-specific contracts are *lazim* agreements which are prospectively binding on the partners and "trump" inconsistent terms of *ja'iz* contracts. According to this argument, the detailed transaction-specific nature of the Unipol (R) PE technology licenses makes them *lazim* contracts that supercede [sic] Article 6.3 of the Joint Venture Agreements. The infirmity of this argument is that there is no evidence in the record to suggest that Exxon or Mobil knew that SABIC was deriving a profit from its provision of the Unipol(R) PE technology to the Joint Ventures or that Exxon or Mobil knew the financial terms in the UCC-SABIC license. Thus, as a matter of law, the sublicenses cannot possibly modify Article 6.3 of the Joint Venture Agreements. In fact [on ExxonMobil's motion for judgment as a matter of law the Court pointed out that] on SABIC's contract modification argument, the parties' Saudi law experts agreed that ... for there to be a modification of an agreement, the [parties] to the agreement must have conferred on the proposed modification and understood what they were agreeing to....

While the Saudi law experts who testified disagreed on many aspects of Saudi law, they did agree that it was not possible under Saudi law to modify an agreement unless the parties understood that they were modifying an agreement and understood the terms of the modification. There is no evidence in the record that Exxon or Mobil knew that the financial terms of the sublicenses were different than the UCC-SABIC license.... 28*28 SABIC can point to no set of factual circumstances that suggest Exxon or Mobil understood, much less intended, that the sublicenses modified Article 6.3. The Court also notes that Article 18.2 of the KEMYA Joint Venture Agreement and Article 19.2 of the YANPET Joint Venture Agreement specifically require that any amendment, modification or waiver of any provision of the Joint Venture Agreement be in writing and signed by the partners. Dr. Hallaq testified that these provisions would be honored under **Islamic** principles of contract law. Because Exxon and Mobil, the partners, never signed the sublicenses ... the sublicenses cannot possibly supercede [sic] or modify the Joint Venture Agreements as a matter of Saudi law.[64]

The above-quoted analysis effectively disposes of SABIC's argument that the sublicense agreements modified and superseded Article 6.3 of the joint venture agreements. Nothing advanced by SABIC

on this appeal straightforwardly addresses the trial court's reasoning. SABIC asserts that the trial judge misunderstood the significance of the *ja'iz* nature of the joint venture agreements, but that assertion ignores the testimony of SABIC's own Saudi law expert, Professor Frank E. Vogel, that even *ja'iz* partnership contracts remain binding on the partners unless and until the partners reach agreement on the changed terms. That event never occurred here. As Professor Hallaq explained, under Saudi law, the sublicense agreements cannot be deemed to supersede the obligations upon which the parties agreed in Article 6.3 of the joint venture agreements, because no language in the sublicense agreements purports to waive SABIC's obligations to ExxonMobil under those that provision. "This absence of waiver," Professor Hallaq explained, "is dictated by the **Islamic** legal principle that unspecific, general or implied language cannot supersede specific and clear language which Articles 6.3...represent."[65]

SABIC's remaining challenges to the trial court's breach of contract rulings are equally unavailing.[66] The evidence amply suffices to sustain the jury's finding that the joint venture agreements, and specifically Article 6.3, controlled ExxonMobil's 29*29 contract claims and was not superseded by the sublicense agreements. No authority that SABIC presented either to the trial court or to us required the trial judge or the jury to accept SABIC's contrary position as a matter of law. Because the jury verdict finding SABIC liable for breaching Article 6.3 of the joint venture agreements was properly grounded both legally and factually, it must stand.

(5) THE RULINGS ON EXXONMOBIL'S CLAIMS OF USURPATION *(GHASB)*

SABIC reserves its final and most extensive set of challenges for the portion of the judgment holding SABIC liable to ExxonMobil for committing the tort known under Saudi law as "usurpation" or "*ghasb.*" The amount of the jury award and judgment for usurpation was $416.8 million, which includes both the amount of overcharged royalties ($92.8 million) and the profits SABIC obtained from using those overcharges in its business ($324 million).

SABIC divides its challenges to the usurpation award into two separate categories of claimed error: (1) errors that resulted in SABIC being held liable for usurpation, and (2) errors that resulted in an award of what SABIC describes as "enhanced damages."[67] For both categories, SABIC argues that it is entitled to judgment as a matter of law on ExxonMobil's *ghasb* claims of liability and enhanced damages; or alternatively, to a new trial on both the liability and enhanced damages issues.

In support of its challenges SABIC advances five separate claims of error. First, SABIC contends that the trial court as a matter of law erred in denying its motion for judgment, because to be found liable for *ghasb* under Saudi law, ExxonMobil was required to — but did not — establish "an open and obvious taking that is intentional and without any color of right." SABIC argues that all ExxonMobil alleged and proved was that SABIC had engaged in "secret conduct... based upon color of

right." Those contentions also form the basis for SABIC's second argument, which is that SABIC is entitled to a new trial on the issue of liability for *ghasb,* because the trial court erroneously declined to instruct the jury that the wrongdoer's actions must be "open, obvious, intentional and without color of right." Third, SABIC claims that it is entitled to judgment as a matter of law on the claim for enhanced damages, because no Saudi court would award enhanced damages in a contract case such as this one. Fourth, and alternatively, SABIC contends that it is entitled to a new trial in which the jury would be given adequate guidance in considering whether to award enhanced damages. Fifth, and finally, SABIC argues that the trial court, although purporting to employ the methodology that a Saudi judge would follow to determine the applicable Saudi law ("*ijtihad*"), in fact invoked *ijtihad* merely as a "*post hoc* rationalization" for foreign law rulings that were essentially arbitrary and unprincipled.[68]

30*30 To the extent SABIC contends that the Superior Court made incorrect determinations of Saudi law or instructed the jury incorrectly on issues governed by Saudi law, such determinations and jury instructions are treated as rulings on a question of law and are subject to *de novo* review.[69] But where, as here, the trial court's determination of foreign law rests on the credibility of foreign law experts, the trial court's predicate credibility findings will be accorded appropriate deference.[70]

(a) *The Trial Court's Use of The Ijtihad Methodology To Determine Saudi Law*

We first address SABIC's fifth argument, because it challenges the methodology that the trial court employed to determine Saudi law, and, thus by its very nature, assails the procedural foundation of all of the challenged substantive Saudi law rulings. In essence, SABIC claims that the *ijtihad* process that the trial judge employed to determine Saudi law was "free wheeling," "standardless," and a "bare `guess' as to the correct content of Saudi law."[71] We reject these contentions, because the record clearly establishes that the trial judge went to extraordinary lengths to understand the applicable Saudi law and to make rulings that were consistent with the numerous Saudi law sources presented to her. To understand how and why that is so, a prefatory discussion of the Saudi system of jurisprudence, and of the Saudi *ijtihad* analytical approach, is helpful.

In Saudi Arabia, **Islamic** law (*shari'a*), which is a fundamentally religious law based on both the *Q'uran* and the model behavior of the Prophet Muhammed, is the law of the land. Although early **Islamic** law scholars eventually coalesced into various guilds or schools, only four of those guilds have survived in modern times: the Hanbali, the Hanafi, the Shafi'i and the Maliki. In Saudi Arabia, the judges are instructed to rule exclusively in accordance with the teachings of the Hanbali guild.[72]

The Saudi law system differs in critically important respects from the system of legal thought employed by the common law countries, including the United States. Perhaps most significant is that

Islamic law does not embrace the common-law system of binding precedent and *stare decisis.* Indeed, in Saudi Arabia, judicial decisions are not in themselves a source of law, and 31*31 with minor exceptions, court decisions in Saudi Arabia are not published or even open to public inspection.

The trial judge was keenly mindful of this distinctive characteristic of Saudi law and of the problems that it created for defining the elements of, and remedies for, *ghasb* and for how to instruct the jury on those issues. The court observed:

SABIC's arguments ignore the simple truth that the circumstances under which *ghasb* (usurpation) damages are available under Saudi law are not well known, much less defined, because Saudi law is not based on precedent or *stare decisis.* Contrary to the implication of SABIC's briefing on this issue, the reality is that one cannot simply consult a statute book or a case reporter to find the elements of, or damages available for, the Saudi law tort of *ghasb.* Nor can one point to one definition of, or a given set of circumstances giving rise to, *ghasb.* To illustrate the extreme difficulty of discerning and interpreting Saudi law, the Court notes that none of the Saudi law experts who testified agreed on the proper elements of *ghasb*.... Finally, because Saudi law decisions are not published, even *if* the decisions had precedential value (which all the experts agree they do not) the Court could not look to decisions of Saudi judges to determine the proper elements or define the recoverable damages.[73]

Instead of relying upon statutes or decisional precedent to discern the law applicable to a particular case, judges in Saudi Arabia must "first and last ... navigate within the boundaries" of the Hanbali school's authoritative works, which are the scholarly treatises primarily consulted by Saudi judges.[74] Using these scholarly writings as guides, Saudi judges identify a "spectrum of possibilities on any given question, rather than a single `correct' answer."

Thus, in this highly different legal environment, the predominate factor in determining the Saudi law on a given issue is the study and analysis, or *ijtihad,* that a judge brings to bear in each particular case. To state it in different terms, the critical inquiry is whether "the proper analytical procedures are followed in reaching the results." The trial judge so recognized, observing that "[w]hen faced with the daunting task of determining the elements of *ghasb* and the damages available for this tort, the Court, weighing the credibility of each Saudi law expert, exercised, as best it could under the circumstances, *ijtihad,* to reach the `right' result."[75]

Mindful of how "daunting" would be the task of determining the Saudi law principles applicable to this case, the trial judge made exceptional efforts to ensure that she was fully informed of the Hanbali teachings upon which to ground her legal rulings. Before trial, the parties presented the trial judge with seven reports from four Saudi law experts (two expert witnesses for each side), as well as each expert's lengthy deposition. Perceiving a conflict in the experts' opinions, the trial judge re-

tained an independent expert, 32*32 Mr. Herbert S. Wolfson, and obtained his advice on critical issues, including the elements of, and the damage remedies available for, usurpation. Mr. Wolfson prepared an initial report and the trial court permitted him to conduct additional research in Saudi Arabia, after which Wolfson prepared a supplemental report and was deposed for a full day. After reviewing a total of nine reports and over one thousand pages of deposition testimony, the trial judge then held a day-long pretrial hearing, to permit the parties to present live testimony from Professor Hallaq, Dr. Vogel and Mr. Wolfson. Only after this extensive process did the trial court undertake to determine the disputed elements of *ghasb.* Even after that comprehensive inquiry, the court considered (over ExxonMobil's objection) two additional reports of Dr. Vogel submitted *post-trial.*

It is notable that only after SABIC received the adverse jury verdict did it attack the trial court's *ijtihad* process, even going so far as to contend, in a post-trial affidavit of Dr. Vogel, that the trial judge "was simply not qualified to practice *ijtihad.*" SABIC advances that same position on appeal. Confronting that contention, the trial judge made the following observations which, in our view, afford a complete answer to SABIC's position:

What troubles the Court even more is that Dr. Vogel opines that this Court cannot credibly engage in the *ijtihad* process. According to Dr. Vogel, "*ijtihad* requires for its credibility qualifications which on the very face of things, neither Prof. Hallaq, myself or, with respect, any U.S. Court possesses." If Dr. Vogel is correct, then why did SABIC choose to file this dispute in a United States Court? If Dr. Vogel is correct in that neither he nor Dr. Hallaq possess the qualifications to engage in the *ijtihad* process, then *what* Saudi law "expert" would be able to assist this United States Court in determining the applicable Saudi law?

* * * * * *

It is remarkable that SABIC, having [purposefully] selected this forum instead of a Saudi Court, knowing the United States legal system is dramatically different than the Saudi legal system, comes forward after a verdict against it to claim that *no* American judge is qualified to interpret and apply Saudi law. This is particularly incredible in light of SABIC's vehement argument that this case should be tried by a U.S. judge.[76]

As we view it, the careful, painstaking inquiry that the trial judge conducted puts to rest SABIC's contention that she engaged in a standardless, "seat of the pants" determination of the disputed Saudi law issues. It is one thing for SABIC to argue that one or more specific decisions resulting from the trial judge's inquiry are legally erroneous. On this record, however, it is not fair for SABIC to contend that the trial court's analytical process itself was arbitrary, unprincipled or lawless.

We turn next to the specific legal errors that SABIC claims the trial judge made in her *ghasb* liability and damages determinations and jury instructions.

(b) *The Claim That The Trial Court Determined The Legal Elements of Ghasb Erroneously*

After considering the extensive documentary and testimonial evidence of **Islamic** 33*33 law pertaining to *ghasb,* the trial court determined that:

In order to establish a claim for usurpation, Mobil or Exxon must show, by a preponderance of the evidence, that SABIC wrongfully exercised ownership or possessory rights over the property of another without consent, which means with blatant or reckless disregard for those property rights. The conduct need not be intentional.[77]

SABIC does not dispute that ExxonMobil factually established each of those elements. Rather, SABIC argues on appeal, as it did in the Superior Court, that the trial court's formulation of the tort of usurpation is erroneous because *ghasb* includes two additional elements that the trial court ignored: (1) SABIC's taking of the joint ventures' property must be "open and obvious," and (2) the taking must be "intentional and without any color of right." Thus, SABIC argues that it cannot be adjudicated as a usurper so long as its seizure of its partners' property was surreptitious, as distinguished from being open and obvious.

The trial judge rejected this argument on the ground that SABIC's two additional proffered elements find no support in the Hanbali works, as explicated by the Saudi law experts whose testimony she found to be credible. Having reviewed the extensive record developed on this issue, we conclude that the trial judge's legal rulings, and the intermediate evidentiary and factual rulings upon which they are grounded, are correct.

Bearing importantly on this issue, as the trial judge found, is that "[as] Mr. Wolfson opined ... there is no single binding definition of *ghasb,* `but rather a range of possibilities.'" Dr. Vogel testified that ... there is "no single `binding definition of usurpation [or *ghasb*].'"[78] Not surprisingly, all three experts "differed on the proper elements of a *ghasb* claim."[79] That being the case, the trial judge had no alternative but to decide which expert's testimony to accept or reject. The trial court determined to accept the opinion testimony of Professor Hallaq and Mr. Wolfson, and to reject that of Dr. Vogel. The court found:

ExxonMobil points out that Dr. Vogel's "varying and inconsistent" definitions of *ghasb* only confirm that there is no one correct definition. The Court is inclined to agree. Each time he opined on the subject, Dr. Vogel's definition [of] *ghasb* seemed to change....

The Court does not find Dr. Vogel's latest definition of *ghasb* persuasive. Having had the opportunity to watch Dr. Vogel testify, observe his demeanor on the witness stand when his interpretation of Saudi law was challenged, and review his latest affidavit as well as his prior affidavits and deposition testimony, the Court finds he has become (or been exposed as) more of an advocate than an objective scholar of **Islamic** law. His relentless attacks on Dr. Hallaq's qualifications and expertise further undermine his credibility in the Court's eye. The Court is concerned about Dr. Vogel's objectivity.[80]

That finding is entitled to deference on appeal. Based upon the testimony of Mr. Wolfson (and even, to some extent, of Dr. Vogel), the trial court determined that SABIC's first disputed element — an "open and obvious" taking — cannot be located in 34*34 the works of the Hanbali school. As Mr. Wolfson noted, "the most influential Hanbali scholars, whose works enjoy tremendous respect in Saudi Arabia," do not "include openness or notoriety as elements in the definition of *ghasb*." Dr. Vogel also agreed that the Hanbali scholars do not include open and notorious in their definition of usurpation, and he conceded that even if the victim is completely unaware that a taking has occurred, the taking qualifies as usurpation:

Q. Now suppose, just suppose, I have a bunch of horses, okay?.... And you come into my corral and take one of my horses, but I'm in Brazil.... So I have no idea that you have in fact taken my horses.... And, indeed, when I come back, I don't know that the horse is gone?.... That would be usurpation, too, wouldn't it?

A. Yes.[81]

In short, the record supports the trial judge's foreign law determination that the Hanbali sources do not require that the wrongful exercise of ownership or possessory rights over the property of another must be "open and obvious." Nor do the Hanbali texts support SABIC's second argued-for element, that the taking must be "intentional." SABIC bases that argument upon the (rejected) testimony of Dr. Vogel, who never identified any Hanbali source that supports a definition of usurpation which includes an element of intentional transgression. Mr. Wolfson, whose testimony the trial judge did accept in some important respects, opined that "the intent to infringe cannot possibly be a necessary element" of a civil claim for usurpation, based on numerous examples of usurpation in the authoritative texts that demonstrate that even an innocent purchaser of wrongfully taken property can be held liable. Although the usurper must "inten[d] to exercise ownership, he need not inten[d] to infringe the rights of the true owner." The trial judge's determination of Saudi law, based entirely on expert testimony, is entitled to deference, as no basis has been shown to overturn it.

Accordingly, we find that the trial court committed no error in submitting the usurpation claim to the jury or in denying SABIC's motion for judgment as a matter of law.

(c) *The Claim That The Trial Court Instructed The Jury Erroneously On The Elements of Ghasb*

SABIC next argues that even if the trial court was correct in denying its motion for judgment as a matter of law, the court erred by not granting SABIC's alternative motion for a new trial. The basis for this argument is that the jury was not, but should have been, told that to find that SABIC committed usurpation, it must find that SABIC's conduct was "open, obvious, intentional, and without color of right." We have rejected that argument as the basis for SABIC's claim of entitlement to judgment as a matter of law. The argument fares no better when it is recast as a claim of entitlement to a new trial. Because we have upheld the trial court's determination that to constitute usurpation a wrongdoer's conduct need not be open, obvious, or intentional, it follows that the trial court committed no error in refusing to instruct the jury on definitional components that were not elements of that tort under Saudi law.[82]

35*35 (d) *The Claim That The Trial Court Erroneously Permitted The Jury To Decide Whether To Award "Enhanced Damages" To ExxonMobil*

SABIC next contends that the trial court erred by denying its motion for judgment as a matter of law as to the portion of the jury verdict that awarded "enhanced damages" to ExxonMobil.[83] The ground for this claim is that "no Saudi court would award enhanced damages in a contract case such as this one," because "enhanced damages are unprecedented in contract cases, even where the elements of *ghasb* are otherwise present."

SABIC presented that same argument to the trial judge, who concluded that "SABIC's argument that damages for *ghasb* are rarely awarded in the Saudi legal system and are virtually unprecedented[,] is unsubstantiated, unverifiable and irrelevant...."[84] As the trial court explained:

[S]imply because SABIC's expert is unable to name a case in which a Saudi judge awarded damages for usurpation is of little import to this Court considering that Saudi law does not recognize *stare decisis* and Saudi law opinions are not published. To say that usurpation damages are "highly unusual" presumes that there are Saudi law cases where judges refuse to award damages for usurpation even when the elements have been clearly established. No such case law was provided to the Court, nor could it be, given the nuances of the Saudi law system. Moreover, whether a form of damages is "unprecedented" is also irrelevant if such damages are available according to the authoritative Hanbali texts which are the primary works consulted by Saudi judges to determine the law applicable to the type of dispute raised in this case.[85]

SABIC makes no effort to confront the trial judge's reasoning in its briefs. Instead SABIC strives to create the impression that all the Saudi law experts, including Mr. Wolfson, agreed that a Saudi judge would be unlikely to award so-called "enhanced damages" in a contract action. That argument, besides being legally irrelevant, is factually wrong. A claim for *ghasb* lies in tort, not in con-

tract. Mr. Wolfson testified that compensatory damages for the tort of *ghasb,* which includes repayment of both the actual overcharged amounts and the actual past profits obtained by SABIC's use of those amounts in its business operations, finds solid support in the Hanbali treatises. Even Dr. Vogel acknowledged that "the Hanbalis have made a point of ... trying to pursue that usurper for all conceivable profits."[86] Accordingly, no basis has been shown for SABIC's claim that the trial court committed legal error by submitting the "enhanced damages" issue to the jury.

(e) *The Claim That The Trial Court Instructed The Jury Erroneously On The Question of Enhanced Damages*

SABIC's final argument is that it is entitled to a new trial on enhanced damages, 36*36 because the trial judge instructed the jury that it "may" award enhanced damages for *ghasb,* yet provided no guidance to cabin the jury's discretion in awarding such damages. That "total lack of guidance," SABIC urges, was not only "prejudicial and reversible error," but also a denial of due process of law, because the instruction granted "unfettered ... discretion ... without any consideration by the jury of the factors that would be taken into account by a Saudi Court."

Implicit in SABIC's position, but never straightforwardly argued to us or to the trial court, is the premise that this case should never have been tried to, or decided by, a jury. We address that implicit premise first. Had SABIC taken this position frontally and from the outset of the case, that argument might have considerable force. The reason is that in an American jury trial, the division of labor between judges and juries does not readily lend itself to the *ijtihad* methodology that Saudi Arabian jurists are required to employ. A jurist deciding a case under Saudi law would have wide discretion that, as the Superior Court found, differs significantly from that which is normally vested in an American jury. A Saudi jurist is empowered — although not legally required — to consider all equities that might bear on what, if any, damages the Saudi jurist, unconstrained by American rules of evidence,[87] might choose to award.[88]

To put it in different terms, had SABIC brought this case in Saudi Arabia, the litigation would have been not unlike a proceeding in equity before a jurist having capacious authority to make factual and legal determinations, including shaping a remedy in accordance with the jurist's sense of equity, circumscribed and influenced by the traditions of **Islamic** law that he would bring to bear on the dispute. In such a proceeding, the Saudi jurist would have had complete discretion to conclude that an award requiring SABIC to disgorge the profits it earned from the wrongfully retained overcharges was equitable. Unlike the division of labor inherent in an American jury trial, the Saudi jurist's application of *ijtihad,* and his resulting remedial decision, would not neatly divide between determinations of law and fact.

But, this case was not brought in Saudi Arabia. Instead, SABIC voluntarily brought this case in an American court of law, where SABIC knew there is a division of labor between the judge (whose duty is to determine the applicable law) and the jury (whose duty is to determine the facts). Nor did SABIC ever seek to avoid a jury trial at the outset of the case, which it could have done. Instead, SABIC waited until only a few weeks before the trial to file a motion to strike ExxonMobil's jury trial demand. Even then, the basis for SABIC's motion was not that a jury was inherently incapable of deciding Saudi law claims, but rather that the war in Iraq and the other events unfolding in the Middle East would prejudice the jury against SABIC. The trial judge denied that motion and SABIC's post-verdict motion for a new 37*37 trial (arguing the same ground). The trial court ruled that ExxonMobil was constitutionally entitled to have a jury decide its counterclaims. Moreover, the court had taken extraordinary precautions to identify, and to afford SABIC an opportunity to strike, any potentially prejudiced jurors.[89] SABIC has not challenged that ruling on appeal.

Having chosen an American forum whose adjudicatory processes SABIC knew were different from those of Saudi Arabia, SABIC cannot fault the trial court for having followed those procedures. That is especially true where, as here, SABIC presented the trial judge very little by way of helpful proposed instructions, and where the instructions it did propose were reasonably found to be not well grounded in Saudi law. Having rationally taken into account the unusual (from a Saudi law standpoint) procedural posture in which she was functioning, and having grounded her instructions to the jury upon a well-reasoned distillation of the Saudi principles articulated by the foreign law expert whose testimony she was entitled to credit, the trial judge did all that could have fairly been expected.

Turning to the specifics of SABIC's claim, our review of a challenged jury instruction focuses "`not on whether any special words were used, but whether the instruction correctly stated the law and enabled the jury to perform its duty.'" Jury instructions "need not be perfect," but they "must give a correct statement of the substance of the law and must be `reasonably informative and not misleading.'"[90] We conclude that the instruction given to the jury as to awardable *ghasb* damages satisfies those standards. The jury was instructed as follows:

I will now explain to you an additional element of damages that you may award only if you find that SABIC is liable for usurpation, a claim I defined for you earlier.

If you find in favor of Exxon or Mobil on the claims for usurpation, then you may award damages above the amount, if any, you awarded for breach of contract based upon any profits you may determine SABIC derived by using in its operation the money, if any, that was usurped from YANPET or KEMYA. Damages for usurpation may not include any interest.[91]

Any appellate determination of whether a jury was afforded sufficient guidance in exercising its fact-finding discretion on a given issue, must necessarily depend upon the law that governs that issue and the instruction that the trial court gave (or refused to give) on that subject. In this case, the only specific request SABIC made to the trial court to furnish such guidance, was that the court instruct the jury on six factors that Mr. Wolfson suggested might possibly enter into a Saudi judge's perception of the equities in this case.[92] The trial judge declined 38*38 to give the requested instruction, for two reasons. The first was that the requested instruction did not represent established Saudi law; the second was that to give the requested instruction would likely confuse and mislead the jury. The trial court's analysis of these concerns, as reflected in her post-trial denial of SABIC's motion for judgment as a matter of law or, alternatively, a new trial on the damages issue, is thoroughly textured, well-reasoned, and, in our view, dispositive of SABIC's claim of error.

The trial judge's first reason for not instructing the jury on the six "Wolfson factors" was that they did not represent established Saudi law:

It is important to place the six factors articulated by Mr. Wolfson in the proper context. It is clear from the context in which Mr. Wolfson offered this testimony that he was not stating that these factors were Saudi law, that the factors were exclusive, or that consideration of these factors was required. To the contrary, these factors, according to Mr. Wolfson[,] are non-exclusive considerations that "*might possibly* enter into a Saudi judge's perception of the equities" in this case. Mr. Wolfson clearly opined that "[a] Saudi Arabian judge enjoys considerable discretion to rule in a manner leading to what he perceives as a fair and just result." .... The Court did not find during the Saudi law hearing, nor does it find now, that Mr. Wolfson's list of factors reflects established Saudi law ... based upon the authoritative texts.... The Court noted during the Saudi law hearing that Professor Hallaq and Dr. Vogel did not identify any such list of factors and there was no evidence to suggest that such a list of factors had ever been embraced by the Hanbali school. Nowhere in Dr. Vogel's pretrial affidavits or in his post-trial affidavits does he provide the Court with authority in the Hanbali texts or otherwise to support a jury instruction on these ... factors.... [A]nd while the Court certainly considered Mr. Wolfson's list of factors in the context [in which] they were presented ... the Court believed then, as it does now, that it would be error to instruct the jury on these factors. The Court did not want to supply to the jury an incomplete list of factors or suggest factors that, under Saudi law, are not "factors" embraced by the Hanbali school.[93]

The trial judge's second reason was that to instruct on those factors would confuse and mislead the jury:

Moreover, the Court did not believe that the jury would be able to meaningfully engage in an analysis of each of the factors without creating tremendous confusion and uncertainty. This situation is a good example of the difficulty in applying Saudi law in a *jury* trial. A Saudi judge exercises tre-

mendous discretion and is not bound by precedent. A Saudi judge is free to consider whatever evidence he feels is worth considering and disposing of any evidence he does not consider worthwhile. In other words, under the Saudi legal system, *Delaware Rule of Evidence 403* has no place. Here, the Court exercised its discretion in determining not only what the Saudi law is, but how it should be 39*39 explained to the jury. Obviously, many of the concepts of Saudi Arabian law are not easily understandable to a U.S. judge, much less a lay person in the United States. The Court in this case attempted to set forth the elements of the tort and convey to the jury in a clear, understandable manner the circumstances under which *ghasb* damages would be awardable. The Court could not present to the jury every conceivable circumstance under which *ghasb* damages could be awarded, nor could it tell the jury ... that it is "rare" for juries to award damages for *ghasb*.... The factors Mr. Wolfson suggested are factors that a judge *could* analyze. The factors invite considerations that an American jury would not be permitted to consider, such as "a desire to find the middle ground between competing litigants," in other words, a compromise verdict or a consideration of the consequences of the jury verdict. Factor 5 may have prompted the jury to balance ExxonMobil's right to recover any wrongfully taken principal amounts against the *possibility* of undue hardship to SABIC. Such an instruction would invite inappropriate considerations by the jury having no place in deliberations and encourage the jury to engage in endless speculation about the "possible" undue hardship that SABIC might experience if ordered to pay damages. In addition, the Court was concerned that Factor 2 impermissibly injected into the case the issue of statute of limitations which the Court had ruled pretrial was contrary to Saudi law. To suggest to the jury that ExxonMobil's delay could be considered ... when deciding whether or not to award damages for usurpation flies in the face of the Saudi substantive law which provides that property rights are eternal and cannot be extinguished by the passage of time.[94]

On appeal, SABIC argues that even if the trial court correctly refused to grant judgment to SABIC as a matter of law, the court should nonetheless have granted SABIC a new trial, because the jury was given no guidance on how to properly exercise its otherwise unfettered discretion. Given the difficult circumstances that confronted the trial judge, we cannot conclude that her jury instructions relating to *ghasb,* however succinct, subjected SABIC to any injustice that warrants reversal.

The jury was not given unbridled authority to do whatever it wished. The trial judge plainly instructed the jurors that they could not find for ExxonMobil unless "SABIC wrongfully exercised ownership or possessory rights over [their] property ... without consent, which means with blatant or reckless disregard for those property rights." That is, the jury was told that SABIC's state of mind and conduct must have been far more culpable than an inadvertent breach of contract.[95] The jury was also instructed that they could, *but need not,* award additional damages beyond damages for breach of contract if they concluded that SABIC had committed *ghasb.* And, if, in that event, the jury made a discretionary decision to award additional damages, the trial judge cabined that discre-

tion by limiting any additional award to "any profits you may determine SABIC derived by using in its operations the money, if any, that was usurped..." These instructions flowed from the trial judge's legal determination, based upon Saudi law principles well 40*40 grounded in the expert testimony that she accepted, that if the jury found that SABIC committed *ghasb* as she defined it, an award of damages so limited would do justice.

If the trial judge, based upon the identical record, had reached the same result in a bench trial as the jury did in this trial, SABIC would have had no ground to attack that result as contrary to law or equity. By parity of reasoning, the verdict reached by the jury here — a product of the combined effort of the jurors and of the trial judge who circumscribed the jury's discretion in accordance with her application of *ijtihad* — affords SABIC no independent basis for reversal.[96] To the extent SABIC suggests that the result would have been different had the case been litigated in Saudi Arabia, that argument, even if true, has no greater merit than would the argument that a jury verdict should be set aside because another jury would have decided the case differently, or that an equitable decree should be set aside because another chancellor might have crafted a different remedy. Arguments of that kind have never, for good and obvious reason, found favor under our law, and they find no favor here.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court awarding damages to ExxonMobil, and against SABIC, is affirmed. The mandate shall issue forthwith.

[1] Sitting by designation pursuant to Art. IV, § 12 of the Delaware Constitution and Supreme Court Rules 2 and 4.

[2] Except where the context otherwise requires, Mobil and Exxon, the two counterclaim plaintiffs below, are referred to collectively as "ExxonMobil." Although Exxon's and Mobil's respective parents merged in 1999 to form ExxonMobil, they were separate companies and competitors at the time that most of the critical events in this lawsuit took place.

[3] As discussed more fully herein, ExxonMobil's tort claim was based upon the Saudi Arabian tort of *ghasb* (usurpation).

[4] The facts recited in this Opinion are shaped by the applicable standard of review. SABIC claims on appeal, among other things, that the trial court erroneously denied SABIC's motion for judgment as a matter of law. This Court reviews the denial of such a motion to determine "`whether the evidence and all reasonable inferences that can be drawn therefrom, taken in a light most favorable to the non-moving party, raise an issue of material fact for consideration by the jury.' In other words, we will not disturb a Superior Court ruling denying a motion for judgment as a matter of law where

`under any reasonable view of the evidence the jury could have justifiably found for [the non-moving party].'" *Mazda Motor Corp. v. Lindahl,* 706 A.2d 526, 530 (Del.1998) (internal citations omitted); *accord, Chrysler Corp. (Del.) v. Chaplake Holdings, Ltd.,* 822 A.2d 1024, 1036 (Del.2003).

[5] There is evidence that SABIC's motive for the surreptitious overcharges was to create a "cushion" for itself in case the joint ventures failed. SABIC accounted for the mark-up in its own internal accounting documents as its "profit" or "net gain."

[6] In support of its argument that ExxonMobil had waived their overcharge claims and that, in any event, the claims were barred by the statute of limitations, SABIC points to testimony of Richard Todd, a Kemya secondee, speculating about a possible difference between the amounts paid by Kemya and amounts paid by SABIC. Todd conceded, however, that he had no actual evidence of any differential, that he did not know whether there was, in fact, any difference, and that he was unaware of any assurances by SABIC to Exxon and Kemya that there would be no mark-up.

In an effort to establish its defense of waiver or, alternatively, that ExxonMobil had been on inquiry notice of its claims for statute of limitations purposes, SABIC also cites two June 1994 form letters, sent separately by SABIC to Yanpet and Kemya, that inadvertently attached a June 10, 1994 statement from UCC to SABIC. There is no evidence that anyone at Mobil ever saw that document or that anyone at Yanpet ever told Mobil about it. Nor did Kemya know what the document meant, because the UCC document addressed several joint ventures and the numbers relating to each were different. When Kemya asked SABIC about the document, SABIC reassured Kemya that the sublicense was a pass-through and that there were no overcharges. As a result of, and in reliance upon, that representation, Exxon and Kemya made no further inquiry about this issue.

[7] *Saudi Basic Indus. Corp. v. ExxonMobil Corp.,* 194 F.Supp.2d 378, 384 (D.N.J.2002), *vacated in part and remanded in part,* 364 F.3d 102 (3rd Cir.2004), *cert. granted,* ___ U.S. ___, 125 S.Ct. 310, 160 L.Ed.2d 221 (2004).

[8] *Id.* Shortly after SABIC filed the Superior Court action, ExxonMobil filed a separate action against SABIC in the New Jersey federal court to recover the royalty overcharges. SABIC moved to dismiss that second action, claiming that, as a "foreign state," it was immunized from being sued in the United States under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et. seq. ("FSIA"). The New Jersey District Court held that by filing suit in New Jersey, SABIC had waived any FSIA immunity as to the overcharge claims. *See* 194 F.Supp.2d at 401, 403.

[9] *Id.,* 194 F.Supp.2d at 413-414, n. 15.

[10] Bench Ruling, C.A. No. 000-07-161, Feb. 10, 2003 (Appellant's Opening Br. at R4-8).

[11] *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. et al.,* C.A. No. 000-07-161, 2003 WL 22016813 (Del.Super.Aug.26, 2003).

[12] *Saudi Basic Indus. Corp.,* 2003 WL 22048238 at *2-*5, *8-*9 (Del.Super.Sept.2, 2003).

[13] *Saudi Basic Indus. Corp.,* 2003 WL 22048236 at *5 (Del.Super.Aug.27, 2003).

[14] *Saudi Basic Indus. Corp.,* 2003 WL 22048236 (Del.Super.Aug.27, 2003)

[15] *Id.* at *1.

[16] SABIC's defense that Article 6.3 was superseded by the sublicenses was stricken by the Superior Court. On appeal, SABIC contends that it is entitled, at the very least, to a new trial at which that defense could be presented to the jury.

The Superior Court also rejected SABIC's contention that ExxonMobil had abandoned their contract claims, concluding that "this particular argument borders on frivolous and [that]...the record establishes, unequivocally, that ExxonMobil asserted, and continued to vigorously assert, its breach of contract claim and never stopped litigating this claim." 2003 WL 22048236 at *1. SABIC has not appealed that ruling.

[17] *Saudi Basic Indus. Corp.,* 2003 WL 22016864 (Del.Super.Aug.26, 2003).

[18] *Id.* at *2.

[19] *Id.* at *1, *2.

[20] The court found that the expert whose testimony was offered to support SABIC's view of the law, was "more of an advocate than an objective scholar of **Islamic** law." *Id.* at *4.

[21] *Id.* at *5.

[22] SABIC characterizes the $324 million component of the $416 million award as "enhanced damages," but at trial the Saudi law experts agreed that under Saudi law the injured plaintiff is entitled to recover compensatory damages for usurpation, which may include a return of the actual overcharged amounts *plus* the actual past profits obtained from the wrongful use of the overcharged amounts. Although SABIC's use of the term "enhanced damages" is vaguely suggestive of punitive damages, SABIC's expert, Dr. Frank E. Vogel, conceded that damages awarded for the tort of usurpation are not akin to punitive or exemplary damages.

[23] *Saudi Basic Indus. Corp.,* 2003 WL 22016843 at *1, *2 (Del.Super.Aug.26, 2003).

[24] *Id.* at *3.

[25] *Id.* at *2.

[26] 10 *Del. C.* § 8121.

[27] *City Investing Co. Liquidating Trust v. Cont'l. Cas. Co.,* 624 A.2d 1191 (Del.1993); *Chrysler Corp. (Del.),* 822 A.2d at 1031, 1035.

[28] Given our disposition of this issue, we do not reach SABIC's contention that the post-1997 royalty payments would not be recoverable.

[29] 10 *Del. C.* § 8121.

[30] *Pack v. Beech Aircraft Corp.,* 132 A.2d 54, 58 (Del.1957).

[31] *Id., citing* 63 Harv. L.Rev. 1177, 1263 *Developments in the Law: Statutes of Limitation,* (1950) ("Borrowing statutes provide only a shorter time limit than the local period, which is still applicable to bar an action not barred by the borrowed foreign limitation.").

[32] *Pack,* 132 A.2d at 57.

[33] *Id.* at 60.

[34] The correctness of the trial court's construction of the borrowing statute is also supported by other Delaware precedent. In *Air Prod. & Chem., Inc. v. Lummus Co.,* 252 A.2d 543 (Del.1969), the plaintiff (like SABIC here) filed a preemptive action in Superior Court seeking a declaratory judgment that the defendant's threatened contract claim was barred by Delaware's three-year statute of limitations. There, as here, the contract claim had no relationship with the forum state (Delaware), and arose under the law of Puerto Rico, whose period of limitations was fifteen years. This Court required the declaratory judgment plaintiff, as a condition to requiring the litigation to proceed in Delaware, to stipulate that the Delaware borrowing statute would not be asserted as a defense. *Id.* at 545.

[35] 10 *Del. C.* § 8117.

[36] *Hurwitch v. Adams,* 155 A.2d 591, 594 (Del.1959).

[37] *Brossman v. FDIC,* 510 A.2d 471, 472-73 (Del.1986) (statute of limitations tolled until the effective date of the Delaware long-arm statute because prior to that time the nonresident defendant was not amenable to service of process).

[38] Shortly after SABIC filed this action, ExxonMobil commenced an action in the New Jersey federal court, raising claims similar to its counterclaims here. SABIC immediately sought to dismiss

that action, claiming that it was immune from suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 et. seq. ("FSIA") and could not be sued anywhere in the United States. The United States District Court for the District of New Jersey held that SABIC's filing suit in New Jersey waived any FSIA immunity as to the overcharge claims in New Jersey and the Delaware courts. *Saudi Basic Indus. Corp.,* 194 F.Supp.2d at 401-03, *vacated in part and remanded on other grounds,* 364 F.3d 102 (3rd Cir.2004) (holding that the *Rooker-Feldman* doctrine deprived the federal court of subject matter jurisdiction over suit by ExxonMobil once final judgment on the identical issue was granted by the Delaware Superior Court.), *cert. granted,* ___ U.S. ___, 125 S.Ct. 310, 160 L.Ed.2d 221 (2004).

[39] It is undisputed that ExxonMobil asserted their overcharge counterclaims well within the three-year period from the filing of SABIC's complaint.

[40] *Bell Sports, Inc. v. Yarusso,* 759 A.2d 582, 590 (Del.2000); *Lilly v. State,* 649 A.2d 1055, 1059 (Del.1994).

[41] *Firestone Tire and Rubber Co. v. Adams,* 541 A.2d 567, 570 (Del.1988).

[42] That ruling was one of several bases of SABIC's post-verdict motion for a new trial.

[43] *Saudi Basic Indus. Corp.,* 2003 WL 22048238 at *3 (Del.Super.Sept.2, 2003).

[44] *Id.* at *4-*5.

[45] *Id.* at *3.

[46] *Id. at *5.*

[47] D.R.E. 803(5).

[48] D.R.E. 801(c); *Fawcett v. State,* 697 A.2d 385, 387 (Del.1997).

[49] SABIC argues that the trial court erred by granting ExxonMobil judgment as a matter of law on the release defense, and by denying SABIC's post-verdict motion for judgment as a matter of law on the basis of that same (previously stricken) defense of release.

[50] *Chrysler Corp. (Del.),* 822 A.2d at 1031, 1035.

[51] That argument lacks even facial coherence in the case of the 1987 Letter Agreement between Yanpet and SABIC, because that agreement was signed on behalf of Yanpet by SABIC's Bin Salamah, who knew — but concealed from Mobil — that SABIC had received from UCC a larger discount than it was passing on to the joint ventures.

[52] Freddie Merrell, who was president of Yanpet at the time, testified that he did not believe that Yanpet was releasing any payment-related claims in the 1987 Letter Agreement. Similarly, Gregory McPike, who was a member of the Kemya board at the time, testified that he did not believe the 1987 Letter Agreement had anything to do with releasing payment-related claims, and that he did not have authority to release a "$180 million claim" on behalf of Exxon.

[53] Except where the context shows otherwise, the references (in the singular) to Article 6.3 and to Article 6.1, are to Articles 6.3 and 6.1 of both the Yanpet and the Kemya joint venture agreements.

[54] Alternatively, SABIC contends that it is entitled to a new trial to allow SABIC to present to the jury the same contract defenses that were the subject of its motions for judgment as a matter of law. That contention lacks merit because SABIC was allowed to present those defenses to the jury, which chose not to accept them. 2003 WL 22048236 at *3. Because we conclude that the trial court correctly rejected the contentions that underlie SABIC's motions for judgment, and that the jury's verdict (which was adverse to SABIC) is based upon competent and legally sufficient evidence, we do not further address SABIC's new trial argument.

[55] *Chrysler Corp. (Del.),* 822 A.2d at 1034, 1036; *City Co. Liquidating Trust v. Cont'l. Cas. Co.,* 624 A.2d 1191, 1194 (Del.1993).

[56] *Mercedes-Benz of N. Am. Inc. v. Norman Gershman's Things to Wear,* 596 A.2d at 1358, 1362 (Del.1991) (quoting *Turner v. Vineyard,* 80 A.2d 177, 179 (Del.1951)).

[57] Yanpet Joint Venture Agreement, Art. 6.3 (italics added).

[58] *Saudi Basic Indus. Corp.,* 2003 WL 22048236 at *3.

[59] *Id.* (internal footnotes omitted).

[60] Kemya Joint Venture Agreement, Art. 6.1 (italics added). Article 6.1 of the Yanpet joint venture agreement is substantially identical. It provides:

To the extent patents and licensing rights and other technical and proprietary information which are owned or controlled by *Mobil and/or Mobil Affiliates* are required to design and construct the Petrochemical Complex and manufacture the Manufactured Products, *Mobil and its Affiliates* shall provide all such patents and licensing rights and other technical and proprietary information to the Partnership, necessary to perform its obligations hereunder on mutually agreeable terms and conditions.

Yanpet Joint Venture Agreement, Art. 6.1 (italics added).

[61] See note 60 *supra.*

[62] For example, SABIC was not a parent, or a subsidiary, or a sister corporation, of Exxon or Mobil, or of any person or group that controlled Exxon or Mobil.

[63] 2003 WL 22048236 at *3.

[64] 2003 WL 22048236 at *4 (internal footnotes omitted).

[65] The expert testimony establishing the applicable principles of Saudi contract law vitiates SABIC's claim on appeal that the integration clauses of the sublicenses (which nowhere specifically purport to modify or supersede Article 6.3 of the joint venture agreements) must be regarded as "*conclusive evidence*" that the parties intended to supersede the prior joint venture agreements.

[66] SABIC also assails the trial judge's determination that the sublicenses could not possibly modify or supersede the joint venture agreements because Mobil and Exxon did not sign the sublicense agreements. Exxon's and Mobil's actual signatures were not needed, SABIC argues, because the signature of SABIC — Exxon's and Mobil's partner in these joint ventures — was legally sufficient to bind Exxon and Mobil. This argument, like others advanced by SABIC, ignores the plain language of the governing contract. The joint venture agreements explicitly require that any amendment, modification or waiver of any provision of the joint venture agreements be "in writing and signed by the partners." The term "Partners" is defined in the Kemya agreement to mean SABIC and Exxon; and in the Yanpet agreement, is defined to mean SABIC and Mobil. SABIC's argument ignores the definition of "Partners," as well as the evidence provided by its own witness, Mr. Bin Salamah, who testified that when the partners intended to modify the joint venture agreement, they "sat down in a room and agreed in writing and signed it at the bottom of the page." It is undisputed that no authorized representative of Exxon and Mobil ever sat down in a room with SABIC and signed the sublicense agreements.

[67] SABIC characterizes the latter component of the usurpation award (the profits earned from the overcharges) as "enhanced damages," to accentuate its argument that a disgorgement of profits is "unprecedented" and should not have been allowed in this case. ExxonMobil, on the other hand, characterizes the entire amount of the award as "compensatory damages," to underscore its position that past profits obtained by the tortfeasor's wrongful use of the overcharged amounts is an element of allowable damages for usurpation with "solid support" in the treatises of the Hanbali guild or school of **Islamic** law, the school that Saudi judges are instructed to follow.

[68] Appellant's Op. Br. at 40-41.

[69] SUPER. CT. CIV. R. 44.1; *see* *Corbitt v. Tatagari,* 804 A.2d 1057, 1062 (Del.2002) (trial court's jury instructions reviewed *de novo*); *J.S. Alberici Constr. Co. v. Mid-West Conveyor Co.,*

750 A.2d 518, 520 n. 2 (Del.2000) (foreign law determinations treated as rulings of law and reviewed *de novo*).

[70] *See, BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.,* 229 F.3d 254, 268 (3rd Cir.2000) ("[T]he District Court is in the best position to determine what at this point is essentially a credibility issue — i.e, which [foreign law] expert to believe."); *Servicios Comerciales Andinos, S.A. v. Gen. Elec. Del Caribe, Inc.,* 145 F.3d 463, 476, n. 7 (1st Cir.1998) ("[T]he finder of fact is entitled to make its own assessment of the credibility of [foreign law] experts.").

[71] SABIC also asserts that *ijtihad* was "raised for the first time in post-trial briefing" and that "the court never indicated prior to its post-trial orders that it was engaging in *ijtihad* to determine either the elements of *ghasb* or the availability of enhanced damages." *Id.* at 40. That assertion is contradicted by the record, which discloses that the trial judge questioned one of the expert witnesses about the *ijtihad* methodology during the Saudi law hearing, and that the judge indicated that she had relied upon that methodology in ruling upon a pre-trial motion for summary judgment.

[72] Dr. Vogel, SABIC's Saudi law expert, agreed that Saudi judges hew conservatively to the Hanbali school.

[73] *Saudi Basic Indus. Corp.,* 2003 WL 22016843 (Del.Super.Aug.26, 2003) at *1 (italics in original, internal footnotes omitted).

[74] Particularly important are two works by Mansur al-Bahuti, a 17th century scholar, as well as the works of Ibn Qudama and Al Maqdisi.

[75] *Saudi Basic Indus. Corp.,* 2003 WL 22016843 at *2, n. 8 (Del.Super.Aug.26, 2003) (citing the testimony of Professor Hallaq that every time a **Muslim** judge exercises *ijtihad,* "it is basically his best ... effort to find what is the right thing to do..." and the testimony of Herbert S. Wolfson, that a Saudi judge performing *ijtihad* tries to do the "right thing.").

[76] *Saudi Basic Indus. Corp.,* 2003 WL 22016864 at *4 (Del.Super.Aug.26, 2003) (italics in original, internal footnotes omitted).

[77] *Id. at* *1.

[78] *Saudi Basic Indus. Corp.,* 2003 WL 22016864 at *4 (Del.Super.Aug.26, 2003) (internal footnotes omitted).

[79] *Id.* at *3.

[80] *Id.* at *4 (footnotes omitted).

[81] Professor Hallaq explained that "[t]he victim doesn't have to know that he was violated in order to be considered a victim of usurpation."

[82] The trial court instructed the jury "that the tort of *ghasb* is comprised of the following elements: (a) the exercise of ownership or possessory rights, (b) over the property of another, (c) without consent, (d) wrongfully." *Saudi Basic Indus. Corp.,* 2003 WL 22016864 at *1 (Del.Super.Aug.26, 2003).

[83] As previously noted, "enhanced damages" refers to $324 million of the total $416.8 damages award, which represents the profits realized by SABIC for using the overcharged amounts in its business.

[84] *Saudi Basic Indus. Corp.,* 2003 WL 22016843 at *3 (Del.Super.Aug.26, 2003).

[85] *Id.* at *2. The trial judge further observed "[b]y way of analogy [that] under U.S. law, punitive damages are rarely awarded, yet we do not instruct the jury about the frequency or lack of frequency of such awards." *Id.*

[86] *Id.* at 0066.

[87] For example, the Saudi jurist would not be constrained by D.R.E. 403, under which the trial judge in this case excluded evidence because its probative value was outweighed by its potential for prejudice.

[88] By way of example, as Mr. Wolfson testified, a Saudi adjudicator could (but would not be required to) take into account factors such as: (i) whether SABIC's conduct was intentionally harmful; (ii) whether, even if tortious, SABIC's conduct was not intended to deprive Yanpet or Kemya of their property; and (iii) whether any obligation SABIC had to restore any wrongful overcharges should be mitigated by the length of time ExxonMobil took to assert their claims.

[89] *Saudi Basic Indus. Corp.,* 2003 WL 22048238 (Del.Super.) at *1-*2.

[90] *Corbitt v. Tatagari,* 804 A.2d 1057, 1062 (Del.2002) (quoting *Cabrera v. State,* 747 A.2d 543, 545 (Del.2000)).

[91] *Saudi Basic Indus. Corp.,* 2003 WL 22016843 at *2 (Del.Super.Aug.26, 2003).

[92] Those factors include: "(1) the court's perceptions as to the relative culpability of each party; (2) the lapse of time between the start of the alleged wrongful conduct and ExxonMobil's decision to file suit; (3) a desire to find the middle ground between competing litigants; (4) the sheer size of ExxonMobil's claim in terms of the absolute number of dollars at stake (and the attendant perception that awarding compensation above the principal amount might be `too much'); (5) a desire to

balance ExxonMobil's right to recover any wrongfully taken principal amounts with the possibility of undue hardship to SABIC and/or (6) a concern that ExxonMobil's decision to invoke the **Islamic** law tort of *ghasb* may have been motivated by a desire to sidestep the unavailability of interest or lost profits in Saudi Arabia and, thus, should not be rewarded." *Saudi Basic Indus. Corp.,* 2003 WL 22016843 at *2 (Del.Super.Aug.26, 2003).

[93] *Id.* at *2 (italics in original, internal footnotes omitted).

[94] *Id.* (italics in original, internal footnotes omitted).

[95] The jury was told that, at a bare minimum, it must find that SABIC acted with "reckless disregard" for ExxonMobil's rights.

[96] Even if the trial judge's instructions were regarded as giving the jury an implicitly binary choice regarding damages — *i.e.,* to award damages as she formulated them or to award no additional damages beyond damages for breach of contract — that binary choice worked no fundamental unfairness upon SABIC. For a jury to find that a party that recklessly disregarded the property rights of another should be required to disgorge all profits it wrongly obtained, is hardly alien to our tradition. Nor would be an order requiring full disgorgement by a party committing tortious conduct inconsistent with Saudi law. In large measure, SABIC's argument reduces to a contention that the trial judge erred by not instructing the jury that it could, based on some generalized sense of equity, award partial, rather than full, disgorgement, once it found that additional damages for *ghasb* were warranted.

FLORIDA

CATEGORY: Shariah Doctrine

RATING: Relevant

TRIAL: TCSY

APPEAL: ACSI

COUNTRY: N/A

URL:
http://www.fljud13.org/LinkClick.aspx?fileticket=Gou70XZCgII%3D&tabid=667&mid=1031

GHASSAN MANSOUR, ABBAS HASHEMI AND HAMID FARAJI, COLLECTIVELY AS THE TRUSTEES OF THE ISLAMIC EDUCATION CENTER OF TAMPA, INC., AND ISLAMIC EDUCATION CENTER OF TAMPA, INC., A NON PROFIT CORPORATION, PLAINTIFFS, VS. ISLAMIC EDUCATION CENTER OF TAMPA,INC., A NONPROFIT CORPORATION,

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF

THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY,

CIVIL DIVISION

GHASSAN MANSOUR, ABBAS HASHEMI

AND HAMID FARAJI, collectively as the

Trustees of the Islamic Education Center

of Tampa, Inc., and ISLAMIC EDUCATION

CENTER OF TAMPA, INC., a non profit

corporation,

PLAINTIFFS, CASE NUMBER: 08-CA-3497

DIVISION "L"

vs.

ISLAMIC EDUCATION CENTER OF TAMPA,

INC., a nonprofit corporation,

DEFENDANT.

_____/

OPINION

The purpose of this opinion is to discuss the facts, procedural history and analysis relating to the court's Order in Connection with Plaintiffs' Emergency Motion to Enforce Arbitrator's Award dated March 3, 2011.

FACTS AND PROCEDURAL HISTORY

This action was filed in 2008 to resolve issues relating to the corporate governance of the Islamic Education Center of Tampa, Inc. ("IEC"). The IEC is a learning center and community center for Muslims in the Tampa Bay area. The dispute began in the early 2000s, but was exacerbated by disagreement concerning control of the cash proceeds from an eminent domain settlement.

The court conducted a pre-trial conference on November 23, 2010. The non-jury trial in this case was then set for the January 2011 trial term.

Shortly before the scheduled trial the plaintiff filed Plaintiffs' Emergency Motion to Enforce Arbitrator's Award claiming that the litigation should be concluded in line with the decision of an arbitrator. The Plaintiff sought an emergency hearing on the motion in view of the impending trial. Prior to the motion the court was not aware of any arbitration pending between the parties.

The hearing on Plaintiff's motion began on January 10, 2011. Testimony was taken and the attorneys presented legal argument on the motion. The primary goal of the hearing was to determine whether an arbitration had taken place, the nature of the arbitration (whether civil or religious) and the outcome of the purported arbitration.

The IEC is governed by a "constitution" drafted by an Islamic A'lim. Part of the evidence considered by the court was a document entitled "Organizational Structure of the Islamic Education Center of Tampa as described in its constitution which was adopted on September 25, 1993" (Plaintiffs' Exhibit #4). This document guides the operation of the IEC.

Plaintiffs' Exhibit #4 contains several provisions that are relevant to the issue of corporate governance of the IEC. Article 5 is entitled "Organizational Framework." Subsection 5.2 describes the Resident A'lim and his role. The IEC constitution provides that a Resident A'lim has veto power over the board of trustees. The IEC constitution also provides in paragraph 5.2.2 that the Resident A'lim is to guide the IEC "to insure adherence to Islamic laws."

The A'lim is also to provide judgment on matters of conflict referred to him by the board. The decision by the A'lim on such matters is to be implemented. According to one witness, in the Muslim religion, an A'lim is a person who is specially educated and trained in Islam. The A'lim teaches, guides and leads the people.

The initial inquiry of the court was to determine whether the purported arbitration was part of an established dispute resolution process recognized by ecclesiastical law. The testimony taken at the initial hearing established that in Islam the Quran provides that two or more brothers who have a dispute are first required to try to resolve the dispute among themselves. If that does not occur they can agree to present the dispute to the greater community of brothers within the mosque or the Muslim community. If that is not done or the dispute is not resolved then it is presented to an Islamic judge, an A'lim.

The testimony further was to the effect that the individual litigants were all Muslim and participated in the work of the IEC. In an effort to resolve the dispute some of the individual litigants invited an A'lim from Texas by the name of Ghulam Hurr Shabbiri (also referred to as Sheikh G. Shabbari) to speak to the members of the IEC. After he spoke to the IEC he met with a group of the individual litigants and discussed whether he could serve as an arbitrator of the dispute.

One side claims that when Mr. Shabbiri met with everyone they signed a document whereby they agreed to have him arbitrate their dispute. The other side contends that there were two conditions to Mr. Shabiri serving as arbitrator. First, Dr. Bahraini had to agree to Mr. Shabiri serving as the arbitrator and second, the other side in the dispute had to dismiss their lawsuit.

A handwritten agreement dated January 17, 2009 was introduced (Plaintiffs' Exhibit #2). It was signed by most, if not all, of the individual litigants. Later, Mr. Shabbiri met separately with both sides involved in the dispute. No immediate decision was rendered by Mr. Shabbiri. It was not until December 28, 2010 that Mr. Shabbiri provided a written decision in the arbitration (Plaintiffs' Exhibit #3). Mr. Shabbiri's decision addresses alleged ambiguity in the IEC

constitution, appointment of Trustees for the IEC, and allegedly improper amendments to the IEC constitution.

The hearing on January 10, 2011 was bifurcated and has not yet been concluded.

ANALYSIS

From the outset of learning of the purported arbitration award, the court's concern has been whether there were ecclesiastical principles for dispute resolution involved that would compel the court to adopt the arbitration decision without considering state law. Decisional case law both in Florida and the United States Supreme Court tells us that ecclesiastical law controls certain relations between members of a religious organization, whether a church, synagogue, temple or mosque.

For example, in Franzen v. Poulos, 604 So. 2d 1260 (Fla. 3rd DCA 1992), the court found that the trial court could not intervene in an internal church governance dispute. The Franzen court said that the U.S. Constitution (the First and Fourteenth Amendments) "permit(s) hierarchical religious organizations to establish their own rules and regulations for internal discipline and governance, and to create tribunals for adjudicating disputes over these matters." Once such matters are decided by an ecclesiastical tribunal, the civil courts are to accept the decision as binding on them. See also, Southeastern Conference Association of Seventh-Day Adventists, Inc. v. Dennis, 862 So. 2d 842 (Fla. 4th DCA 2003).

The court has concluded that as to the question of enforceability of the arbitrator's award the case should proceed under ecclesiastical Islamic law. Based upon the testimony before the court at this time, under ecclesiastical law, pursuant to the Qur'an, Islamic brothers should attempt to resolve a dispute among themselves. If Islamic brothers are unable to do so, they can agree to present the dispute to the greater community of Islamic brothers within the mosque or

the Muslim community for resolution. If that is not done or does not result in a resolution of the dispute, the dispute is to be presented to an Islamic judge for determination, and that is or can be an A'lim.

The court will require further testimony to determine whether the Islamic dispute resolution procedures have been followed in this matter. When the hearing was recessed to reconvene at a later date the defense was presenting its case. Counsel advised that he anticipated calling between five and seven witnesses.

ORDERED in Chambers in Tampa, Florida this ____ day of March, 2011.

ORIGINAL SIGNED MARCH 22ND, 2011

_____

The Honorable Richard A. Nielsen

CIRCUIT COURT JUDGE

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CATEGORY: Shariah Marriage Law

RATING: Highly Relevant

TRIAL: TCSNA

APPEAL: ACSY

COUNTRY: N/A

URL:
http://scholar.google.com/scholar_case?case=14755993999812557676&q=Muslim+OR+Islamic+OR+Sharia+OR+Islam&hl=en&as_sdt=4,10

ASMA AKILEH, APPELLANT,V. SAFWAN ELCHAHAL, APPELLEE.

No. 94-04100.

District Court of Appeal of Florida, Second District.

January 12, 1996.

247*247 Nancy Hutcheson Harris and Lee S. Damsker of Maney, Damsker, Harris & Jones, P.A., Tampa, for Appellant.

Jay P. Dinan of Purcell & Dinan, P.A., Tampa, for Appellee.

PATTERSON, Judge.

The wife, Asma Akileh, appeals from the final judgment of dissolution of marriage. She challenges the trial court's ruling that the parties' **Islamic** antenuptial agreement, known as a sadaq, is unenforceable for lack of consideration and because the parties did not have a "meeting of the minds." We reverse and remand for entry of a judgment in the wife's favor.

The wife grew up and was educated in Syria. She came to the United States in February 1990. She is of **Islamic**, or Moslem, faith. The husband, Safwan Elchahal, was born in Tripoli, Lebanon, and lived in Lebanon until 1979, when at the age of twenty, he came to the United States. The husband was also raised in the Moslem faith and culture.

Until her marriage, the wife had never socialized with a man outside the presence of her family. In the **Islamic** culture, a man's introduction of himself to the woman's family is considered a statement that he is willing to marry the woman and only then does the family allow a meeting between the two. When the husband proposed marriage to the wife, he recognized that she had the right to a sadaq. A sadaq is a postponed dowry which protects the woman in the event of divorce.

Approximately two months before the marriage, the husband met with the wife's father, Rahi Akileh, and raised the issue of the sadaq. Akileh expressed to his future son-in-law his desire that the sadaq for his daughter be paid in two parts, with an immediate payment of $1 and a deferred payment of $50,000. Upon completion of their negotiations, the husband and Akileh agreed to a sadaq of $50,001. The wife also agreed to the sadaq.

The sadaq was signed on December 26, 1991, and the parties were married in Tampa the following day. The certification of marriage incorporated the sadaq, which provided, "The sadaq being fifty thousand and one dollars of which one U.S. dollar advanced and fifty thousand dollars postponed." The certificate of marriage was executed by the bride, the bridegroom, two witnesses, and the Iman of the **Islamic** Center of Tampa Bay…

At the wife's request, the parties tried counselling in June, July, and August 1993. On August 4, 1993, the husband advised his apartment complex that he was terminating the lease at the end of the month because he had decided to move back to Atlanta. When the wife found out that her husband was leaving the state, she filed for divorce on August 24, 1993. The husband served his answer and counterclaim for dissolution of marriage on October 28, 1993.

The case was tried on August 15, 1994. At trial, four witnesses testified as to the meaning of the **Islamic** word "sadaq." The wife's **Islamic** expert, Mazi Najjar, testified that generally a sadaq is similar to the concept of a dowry. He stated that only the wife could waive her right to receive the postponed portion of the sadaq. Najjar said that the wife's right to receive the sadaq was not negated if the wife filed for divorce.

248*248 The wife testified that a wife's right to receive the postponed portion of the sadaq was absolute and not affected by the cause of a divorce. The wife stated that the exception was that a wife would forfeit the dowry if she cheated on her husband. The wife was unaware of any other instances in which the sadaq would be forfeited. Raji Akileh, the wife's father, also testified that the postponed portion of the sadaq is an absolute right of a wife to request from the husband whenever she wished and especially in the event of divorce.

The husband testified that he believed that the postponed portion of the sadaq was forfeited if a wife chose to divorce her husband. The husband's understanding of a sadaq stemmed from his sister's experience. His sister had previously sought a divorce and then pursued the postponed sadaq. An

Islamic court ruled that she was not entitled to receive the sadaq since she had wanted the divorce. However, the husband testified that a woman seeking a divorce is entitled to her sadaq if she is abused. The husband admitted that he had never discussed the meaning of a sadaq with the wife or her father.

The trial court held that the sadaq was unenforceable for lack of consideration and because there was no meeting of the minds. The court stated that even if the parties attached sufficiently similar meanings to the sadaq to show that there was a meeting of the minds, the court would find that the sadaq was meant to protect the wife from an unwanted divorce. As such, the trial court would not order the husband to pay the wife the postponed sadaq since the wife was "the one that chose to pursue the divorce."

The issue of whether a sadaq is an enforceable antenuptial agreement is a matter of first impression in Florida; however, other jurisdictions have held that a religious antenuptial agreement may be enforceable in a court of law, if it complies with contract law. For instance, in *Aziz v. Aziz,* 127 Misc.2d 1013, 488 N.Y.S.2d 123 (Sup.Ct. 1985), the court specifically acknowledged its authority to require a party to fulfill the secular obligations of a religious antenuptial agreement. In *Aziz,* the parties entered into a *mahr,* a type of antenuptial agreement which required a payment of $5,032, with $32 advanced, and $5,000 deferred until divorce. The court held that the *mahr* conformed to New York contract requirements and "its secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony." *Aziz,* 488 N.Y.S.2d at 124. *See also Schwartz v. Schwartz,* 153 Misc.2d 789, 583 N.Y.S.2d 716, 718 (Sup.Ct. 1992) ("courts may use `neutral principles of law' to resolve disputes touching on religious concerns"). Thus, we hold that Florida contract law applies to the secular terms of the sadaq.

Further, the court's determination that the contract was unenforceable is a legal issue which can be reviewed *de novo* by this court. *Royal Oak Landing Homeowner's Ass'n v. Pelletier,* 620 So.2d 786 (Fla. 4th DCA), *review denied,* 630 So.2d 1101 (Fla. 1993).

The trial court erred in finding that the wife gave no consideration in this contract. Under Florida law, marriage is sufficient consideration to uphold an antenuptial agreement. *O'Shea v. O'Shea,* 221 So.2d 223 (Fla. 4th DCA), *cert. denied,* 225 So.2d 919 (Fla. 1969). In addition, the parties agreed on the essential terms of the contract. The agreement was an antenuptial contract, executed in contemplation of a forthcoming marriage. The parties understood that a sadaq was to protect the wife in the event of a divorce. The parties agreed $1 was to be paid at the time of the execution of the agreement and $50,000 was postponed, to be paid if the parties divorced. The wife performed under the agreement by entering into the marriage.

The husband contends that the different interpretations placed upon the sadaq by the parties meant that there was no contract, i.e., no meeting of the minds. However, as the supreme court held in *Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.,* 302 So.2d 404, 408 (Fla. 1974):

A subsequent difference as to the construction of the contract does not affect the validity of the contract or indicate the minds of the parties did not meet with respect thereto. 17 C.J.S. Contracts § 31.

249*249 Courts should be hesitant to hold a contract void for indefiniteness, particularly when one party has performed under the contract. *Blackhawk Heating & Plumbing Co.,* 302 So.2d at 408.

The husband's subjective intent at the time he entered into the agreement is not material in construing the contract. *Jackson v. Investment Corp. of Palm Beach,* 585 So.2d 949 (Fla. 4th DCA 1991). At no time did the husband make known his unique understanding of a sadaq either during his negotiations with the wife's father or prior to signing the certificate of marriage.

Accordingly, we hold that the sadaq was valid and enforceable and we reverse and remand for the entry of a judgment in the wife's favor.

Reversed and remanded.

RYDER, A.C.J., and CAMPBELL, J., concur.

CATEGORY: Shariah Marriage Law

RATING: Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: N/A

URL: http://scholar.google.com/scholar_case?case=10818633525355204919&q=Islamic+Law&hl=en&as_sdt=4,10

BLENE A. BETEMARIAM, APPELLANT, V. BINOR B. SAID, APPELLEE.

No. 4D09-1312.

District Court of Appeal of Florida, Fourth District.

November 17, 2010.

Curtis L. Witters of Glickman Witters & Marell, P.A., West Palm Beach, and Marjorie Gadarian Graham of Marjorie Gadarian Graham, P.A., Palm Beach Gardens, for appellant.

Susan G. Chopin of Chopin & Chopin, LP, West Palm Beach, for appellee.

WARNER, J.

Appellant, Blene Betemariam, timely appeals a final judgment of paternity and for partition, which determined, among other things, that she was not legally married to the appellee, Dr. Binor Said. The parties participated in a religious ceremony, but never obtained a marriage license. The court held that the marriage was not valid, and that the court thus had no authority to award alimony or order equitable distribution of assets. We affirm, as we conclude that Virginia, where the religious ceremony was performed, would hold that their unlicensed marriage was void ab initio. We reverse, however, the trial court's refusal to require Said to pay the parties' children's educational expenses because Said had the ability to pay such expenses, which were in accordance with the parties' standard of living.

Betemariam and Said met each other in 2000 when both were married but separated from their respective spouses. They began living together, and Betemariam gave birth to twins the next year. In the fall of 2002, both Betemariam and Said had finalized their divorces to their prior spouses, and they began discussing marriage. Said's father wished his son to be married in the **Islamic** faith. Although Betemariam was not a Muslim, she agreed to marry Said in an **Islamic** ceremony, which occurred on January 1, 2004, in Alexandria, Virginia. The service was conducted by an Imam in accordance with **Islamic law**. The couple received a marriage certificate, written in Arabic and signed by Said's father and uncle as witnesses. Said and Betemariam did not obtain a marriage license before their religious ceremony, nor did they file their marriage certificate with any clerk of court.

Betemariam testified that her understanding was that the Imam —c as an official with the authority to marry people — would take care of everything necessary for her and Said to be recognized as a married couple. Said never told her that they needed a civil license in advance of their wedding. However, she admitted that she had obtained a marriage license for one of her previous two marriages. Said testified that he did not believe they needed to get a marriage license in advance of the wedding. Said testified that the couple's intent in going through with the wedding ceremony was to sanctify their union and to make a religious commitment. Said never thought that he would be in court "discussing whether I have a religious or legal marriage."

The parties moved to Florida and eventually settled in West Palm Beach where Said joined a radiology practice. Following the move to West Palm Beach where they purchased a home, Betemariam was the primary care-giver for the children and did not work outside the home. The parties eventually enrolled their children at the Rosarian Academy, a private school that costs $13,000 per child each year. At the time of trial, the children had attended Rosarian for about five years. The parties opened joint bank accounts and purchased other property, taking title jointly as husband and wife.

When Betemariam filed for divorce in 2007, Said moved to dismiss the proceedings, claiming that the parties were never legally married. Betemariam amended her petition to include a count for equitable relief in the event the court determined that the parties were not legally married to each other. Said counter-petitioned for paternity, visitation, and child support.

The case proceeded to trial. After hearing the foregoing evidence, the court entered a final judgment of paternity and for partition, ruling that the parties were never legally married and that the court was without jurisdiction to consider equitable distribution or alimony. The court reasoned that although the parties entered into a religious ceremony, they had not obtained a marriage license in any of the states in which they had resided. Because both parties had been married previously, the court discounted any claim of lack of knowledge of the licensing requirement.

The court did, however, resolve the paternity and child issues. It designated Betemariam as the primary residential custodian, awarded child support, and required Said to maintain an insurance policy for the benefit of the children. The court also ordered partition and sale of both parcels of property owned by the parties. Betemariam moved for rehearing and, among other things, requested that the final judgment be amended to require Said to pay the costs of private school education for the children. The trial court denied the motion, prompting this appeal.

The issue of whether the parties' religious wedding ceremony amounted to a valid marriage is determined in accordance with the **law** of the place where the putative marriage occurred. *See Preure v. Benhadj-Djillali,* 15 So. 3d 877, 877 (Fla. 5th DCA 2009); *see also Goldman v. Dithrich,* 179 So. 715, 716 (Fla. 1938). Here, because the wedding ceremony occurred in Virginia, we look to Virginia **law** to determine whether the parties in this case were validly married. Betemariam argues that the Virginia statute requiring the parties to obtain a marriage license to constitute a valid marriage is directory, not mandatory. Therefore, the trial court could determine that the marriage was valid based upon the parties' belief in the validity of their marriage.

Virginia statutory and case **law** is contrary to Betemariam's position. Section 20-13 of the Code of Virginia, entitled "License and solemnization required," provides as follows: "Every marriage in this Commonwealth *shall* be under a license and solemnized in the manner herein provided." (emphasis supplied). Additionally, Virginia's statutory scheme provides that the validity of a marriage is not affected by certain defects:

§ 20-31. Belief of parties in lawful marriage validates certain defects

No marriage solemnized *under a license* issued in this Commonwealth by any person professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of authority in such person, or any defect, omission or imperfection in such license, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

Va. Code § 20-31 (emphasis supplied).

In *Offield v. Davis,* 100 Va. 250, 40 S.E. 910 (1902), the Supreme Court of Virginia interpreted a former version of the Virginia Code, which contained language similar to the current statutory language, prescribing that "every marriage in this state shall be under a license and solemnized in the manner herein provided." 40 S.E. at 914. The court held that the statute "wholly abrogated" common **law** marriage, and "no marriage or attempted marriage, if it took place in this state, can be held valid here unless it has been shown to have been under a license, and solemnized according to our statutes." *Id.*

We view *Offeld* as making the marriage license mandatory, not directory, and other Virginia courts do likewise. In a case on "all fours," a Virginia circuit court has held that the parties' marriage was void ab initio when they were married in a religious ceremony but failed to obtain a marriage license. *See In re Ejigu,* 79 Va. Cir. 349, 2009 Va. Cir. LEXIS 127, 2009 WL 4704510 (Sept. 30, 2009) (Klein, J.). In that case, the petitioners, a putative husband and wife, sought to have their marriage affirmed under section 20-31 and 20-91, Code of Virginia. The latter statute provides a vehicle for a court to issue a decree affirming a marriage where it is "denied or doubted by either of the parties," and the court is presented with "due proof of the validity thereof." The parties had been married in a religious ceremony but did not obtain a marriage license. They had conducted themselves as husband and wife since their marriage. Nevertheless, the court determined that it could not affirm their marriage, which was void ab initio for failure to obtain the license.

The court found that section 20-31 could not be used to validate the marriage, as that section allowed correction of defects with respect to the officiant's authority or defects in the marriage license. It did not cure a marriage void ab initio. Quoting from *Offeld,* the court held that in order to be valid under Virginia **law**, the marriage must be under a license and properly solemnized. One without the other is not enough. The court looked to a similar case of *In re Kulmiye & Ismail,* 77 Va. Cir. 67, 2008 Va. Cir. LEXIS 121 (2008) (Roush, J.), involving nearly identical facts to those in this case. In that case, as well, the court held that the marriage was invalid and could not be affirmed when no marriage license was ever issued. In *Ejigu,* Judge Klein concluded:

[T]he defect presented was not an issue of the officiant's authority or the contents of the marriage license. The defect was the complete non-existence of the license itself. Under the plain meaning of the three above referenced statutes, this Court has no authority to affirm a marriage that was entered into without a license. While the parties may remain married according to their religion, their marriage ceremony conferred no legal rights between them under the laws of the Commonwealth of Virginia.

(footnote omitted). As Virginia has interpreted its requirement of a marriage license as mandatory, and the parties in this case did not obtain a marriage license, they were not validly married under Virginia **law**. The trial court had no choice but to determine that no legal marriage had occurred. This result is also consistent with the Fifth District's reasoning under a similar circumstance involving Oregon **law**. *See Preure,* 15 So. 3d at 878.

Because the trial court also found, as appears undisputed in the record, that neither party could claim lack of knowledge of the marriage license requirement, both parties were equally responsible for the invalidity of their marriage. Thus, we also agree with the trial court that Betemariam could not claim equitable alimony. *See Burger v. Burger,* 166 So. 2d 433 (Fla. 1964) (where putative wife

is equally responsible with putative husband for invalidity of marriage, wife is not entitled to permanent alimony).

The trial court did, however, have the authority to determine the issues involving the children pursuant to both parties' requests in their pleadings and its authority pursuant to Chapter 742, Determination of Parentage. Betemariam contends on appeal that the trial court abused its discretion in failing to require Said to pay for the children's private schooling when it was the standard of living of the children and Said could well afford to pay it. The trial court failed to mention it in the final judgment and simply denied the motion for rehearing requesting it.

On appeal, Said does not contest his ability to pay, nor does he contest that the children have always been educated in private institutions. Rather, he maintains that Betemariam did not request such relief. We disagree.

It is well established that a court may order a parent to pay for private educational expenses if it finds that the "parent has the ability to pay for private school" and the "expenses are in accordance with the family's customary standard of living and are in the child's best interest." *Wilson v. Wilson,* 559 So. 2d 698, 700 (Fla. 1st DCA 1990); *see also Kaiser v. Harrison,* 985 So. 2d 1226 (Fla. 5th DCA 2008). An award of a child's private school expenses is reviewed for abuse of discretion. *See Thomas v. Thomas,* 776 So. 2d 1092, 1094 (Fla. 5th DCA 2001).

Betemariam's petition sufficiently pleaded her request for an award of private school tuition, even if she did not specifically mention that request within the section of her petition styled "prayer for relief." *See Raskin v. Raskin,* 625 So. 2d 1314, 1315 (Fla. 4th DCA 1993) ("Ordinarily, it is the facts alleged, the issues, and the proof, *not the form of the prayer for relief,* which determine the nature of the relief to be granted.") (emphasis added). In the body of the wife's amended petition for dissolution, Betemariam specifically stated that she "requests that the Husband be ordered to continue to provide a private school education for the minor children at Rosarian Academy or another private school of comparable quality."

In any event, this issue was tried by the parties' consent. *See, e.g., Smith v. Smith,* 971 So. 2d 191, 194-95 (Fla. 1st DCA 2007); *Hemraj v. Hemraj,* 620 So. 2d 1300, 1301 (Fla. 4th DCA 1993). Although the joint pretrial statement did not specifically include a request for such relief, the parties both presented evidence on the issue of the children's private schooling. Betemariam testified to her desire for the children to remain at the Rosarian Academy through the eighth grade. Betemariam's forensic accountant also testified to the substantial amount of income Said would have left over even if he paid for the children's private school. By contrast, Said testified that he did not want the court to order him to continue to pay for private schooling at Rosarian Academy, explaining that he thought Rosarian was "too structured" and that there were other schools available, including a good

public school. In closing argument, Said's attorney specifically requested that the court not order payment of the private schooling. It is disingenuous to suggest that the issue was not tried, when counsel asked the court to address the issue.

We conclude on this record that the court abused its discretion in failing to order Said to pay for private tuition for his children. His income clearly could support such payments, and the parties had sent their children to Rosarian Academy for five years. They had never attended another school. Everyone testified to how well the children were doing in life generally.

It appears that the court may have been swayed by Said's argument that Betemariam had not properly requested that relief, but, as noted above, she requested it in her pleadings, and in any event we find that the issue was tried by consent. Thus she was entitled to make that claim and have the court adjudicate the issue. We therefore reverse with instructions that the court order Said to pay for the private school tuition of the children.

As to all other issues raised, we find no error. We therefore affirm the final judgment except as to the failure to order Said to pay private school tuition on which we reverse and remand for the trial court to amend its final judgment consistent with this opinion.

POLEN and LEVINE, JJ., concur.

Not final until disposition of timely filed motion for rehearing.

CATEGORY: Shariah Marriage Law

RATING: Relevant

TRIAL: TCSNA

APPEAL: ACSI

COUNTRY: Iran

URL: http://scholar.google.com/scholar_case?case=16464270707637572234&q=Iran&hl=en&as_sdt=4,10

358 So.2d 610 (1978)

MAHMOOD MOHAMMAD, APPELLANT, V. SHALA MOHAMMAD, APPELLEE.

No. EE-235.

District Court of Appeal of Florida, First District.

May 17, 1978.

Opinion Revised on Rehearing June 26, 1978.

611*611 Jean Laramore, Tallahassee, for appellant.

J. Klein Wigginton, of McClure, Wigginton, Campbell & Owen, Tallahassee, for appellee.

BOYER, Judge.

By this appeal, the husband (appellant here) seeks review of several portions of a final judgment of dissolution of marriage.

The parties were married in **Iran** in 1965 after the husband had completed medical school and the wife had graduated from high school. At the time of their marriage, the parties entered into an antenuptial agreement fixing the property rights of both parties in the event of divorce. The parties moved to the United States and eventually in 1973 moved to Tallahassee where the husband com-

menced the practice of obstetrics and gynecology. The wife did not work during the marriage: However, she is currently attending college and is studying to become an x-ray technician.

The parties have two children, a daughter, age 4, and a son, age 11, the custody of whom the parties are litigating. The trial court ordered both parties to submit to a mental examination by a court appointed psychiatrist, who reported his findings and conclusions to the court. The husband moved to compel discovery of psychiatric reports relating to the mental condition of the wife. The trial judge granted the motion but refused the husband access to the records of the wife's psychiatrist, Dr. Wray.

The husband's income for 1974 was $74,053.00 and $120,636.00 for 1975. His projected income for 1976 was $153,666.96. He has a $10,000.00 interest in a joint land venture, joint interest with his wife in the marital home, a joint checking account with the wife for $5,000.00 a personal account of $2,500.00, and a corporate savings account of $30,000.00.

During the final hearing, several friends, neighbors, doctors and clinical psychologists testified on the issue of custody and both parties' fitness to have custody. Later, the court entered a final judgment awarding the wife custody of the children, child support, lump sum alimony, periodic alimony, a car, one-half of the parties' $5,000.00 savings account and attorneys fees.

The record on appeal reveals an amended petition for dissolution of marriage to which is attached as an exhibit an antenuptial agreement entitled "Marriage Contract Deed" entered into by the parties in **Iran**. In her answer appellee admitted the signing of the antenuptial agreement and admitted that a copy thereof was attached to the amended petition. Appellant's first assignment of error urges that the trial court erred in denying appellant the opportunity to present any evidence pertaining to said antenuptial agreement and in refusing to enforce same. The transcript of the testimony reveals the following:

"Direct Examination by Mrs. Laramore:

"Q. Dr. Mohammad, you entered into a marriage contract with your wife in another country, did you not?

"A. That's right.

"Q. And what were the terms of this marriage contract?

"The Court: That is wholly without my consideration, this antenuptial agreement that was entered into under the laws of another country. That is not going to have one bit of bearing whatever on what I intend to do.

"Mrs. Laramore: I'm sorry, Your Honor has not said that before. I did not know.

612*612 "The Court: Well, I thought I made that plain earlier, that I wasn't going to be bound in this proceeding by any antenuptial agreement entered into under the laws of another country which was the tradition and culture of that country. I'm sorry if I didn't make that plain. I'll make it plain now.

"Mrs. Laramore: I'm sorry, I would not have asked.

"The Court: No, I thought I made myself plain on that. I read the antenuptial agreement. It's in the file I suspect somewhere."

Although the better practice would have been to have made a proffer of the antenuptial agreement or at least have it marked for identification, the allegations of the amended petition and answer established it as a fact and it is clear from the testimony that the attitude of the trial judge was such as to place a chilling effect upon any further attempts by appellant's counsel to have it considered.

The real issue presented by appellant's first point is whether or not a change in circumstances after a marriage vitiates an otherwise valid antenuptial agreement. However, because of the refusal of the trial judge to permit evidence relative to the circumstances of the parties at the time the antenuptial agreement was entered into or, indeed, any evidence at all relative to the antenuptial agreement, we are unable to reach that issue on appeal. It is obvious, though, that by virtue of the refusal of the trial court to admit the evidence appellant has been deprived of an opportunity to have the issue resolved. We, accordingly, reverse and direct that the appellant be afforded an opportunity to adduce evidence relative to the antenuptial agreement, the circumstances of the parties at the time the agreement was entered into, the circumstances of the parties at the time of the dissolution, and any other evidence relative to the antenuptial agreement, its validity and enforceability.

Another point which requires our consideration relates to the testimony (or sought testimony) of Dr. Wray. The record reveals that prior to the commencement of the dissolution action Mrs. Mohammad sought the services of Dr. Robert Wray, a psychiatrist. During the progress of the case, over the objection of Dr. Mohammad's attorney, the trial judge obtained copies of various reports made by Dr. Wray relative to Mrs. Mohammad but refused to admit them into evidence and refused to permit their inspection by the attorneys for the parties. Dr. Wray was not called as a witness at the final hearing because Mrs. Mohammad invoked her psychiatrist-patient privilege of confidentiality, which was sustained by the trial judge.

We are acquainted with no law nor rule of evidence which permits a trial judge in a dissolution proceeding, in the absence of agreement of the parties, to consider matters not in evidence and not available to the attorneys for the respective parties. As to the privilege, our sister court of the Third District in *Critchlow v. Critchlow,* 347 So.2d 453 (Fla. 3rd DCA 1977), considering a case factually similar to that sub judice, said:

"In addition, this case falls within the exception to the privileged communication between a psychiatrist and his (or her) patient as set out in Section 90.242(3)(b), Florida Statutes (1975):

"90.242 Psychiatrists as witnesses; nondisclosure of communications with patient

"(3) There shall be no privilege for any relevant communications under this section:

* * * * * *

"`(b) In a criminal or civil proceeding in which the patient introduces his mental condition as an element of his claim or defense, or, after the patient's death, when said condition is introduced by any party claiming or defending through or as a beneficiary of the patient. Laws 1965, c. 65-404, § 1, eff. June 25, 1965.'

"In her petition for dissolution of marriage, Cynthia alleges that she is a fit and proper person to have custody of Kelli. After her voluntary commitment to the hospital for mental treatment, John filed a motion for leave to amend his counterpetition 613*613 to reflect that Cynthia is not a fit and proper person to have custody because of her current emotional instability. At a hearing on this motion to amend, the issue of Cynthia's mental condition was injected into the proceedings and Cynthia's counsel (upon ore tenus motion) agreed to the appointment of a psychiatrist to examine her and John, and to render a professional opinion as to which party is best suited to have custody thereby introducing Cynthia's mental condition as an element of her claim for Kelli's custody.

"We also find that *Roper v. Roper,* 336 So.2d 654 (Fla. 4th DCA 1976) relied upon by Cynthia is not controlling because in the instant case, in contrast to Roper, Cynthia's mental health is a highly relevant issue.

"Further, in a dissolution of marriage proceeding where the issue of child custody is presented it is incumbent upon the chancellor to evaluate, among other crucial factors, the mental health of each of the parents in making a final custody determination which is in accord with the best interest of the minor child or children. See Section 61.13(3)(g), Florida Statutes (1975). In light of Cynthia's voluntary commitment for treatment of her mental condition, Cynthia's mental health is vital to a proper determination of permanent custody and, therefore, Section 90.242, Florida Statutes (1975) creating the patient-psychiatrist privilege cannot be invoked under the facts in this child custody case.

"Accordingly, the protective order appealed is reversed and the cause remanded to the trial court to enter an order authorizing John to take the depositions of Cynthia's treating physicians; but limiting the scope of those examinations to communications, diagnosis and treatments insofar as Cynthia's mental and emotional state relates to her fitness as a mother." (347 So.2d at pages 454-455)

While we agree with our sister court, under the facts of that case, that opinion is not dispositive of the case sub judice. F.S. 90.242(3)(b), excepts from the privilege communications between a psychiatrist and his patient in a criminal or civil proceeding in which the patient introduces his mental condition as an element of his claim or defense. Unlike the *Critchlow* case, appellee in the case sub judice did not introduce her mental condition as an element of her claim or defense. In *Critchlow* the wife alleged that she was a fit and proper person to have custody of the child. She thereafter was committed to a mental hospital for treatment. Thus, her mental condition became a highly relevant

issue. In the case sub judice, appellee's mental condition was introduced by appellant as an element of his claim, and appellee's mere denial of appellant's allegations did not waive the statutory privilege. If such were the case, the privilege would be meaningless because a party could always inject such element into the case and thereby destroy the opposing party's statutory privilege.

Until such time as the issues relative to the enforceability of the antenuptial agreement have been resolved there is no occasion for us to address the other issues presented on this appeal relative to alimony.

Neither is there any occasion for our consideration of the issues relative to the requirement of child support beyond the age of 18 years, nor those issues relative to attorney's fees in the trial court, until such time as the issue of child custody is properly determined upon appropriate evidence. The record reveals that more than a year and a half has elapsed since the final hearing which gave rise to the final judgment here appealed. We recognize that circumstances may well have changed in that period of time. Further, on the state of the record before us it would be virtually impossible for the learned trial judge, wise and experienced though he be, to correct, nunc pro tune, the deficiencies noted by us in the proceedings without conducting a de novo hearing on the issue of child custody. The best interest of the children, not procedural niceties, is, of course, the pole star of custody proceedings. We accordingly reverse for a de novo hearing on the issue of 614*614 custody, at which hearing the parties may, if they so desire, introduce specific portions of the record of the prior hearing or "fresh" evidence, or both, subject, of course, to the application of the appropriate rules of evidence.

Appellee's motion for attorney's fees incident to this appeal is provisionally granted, to be fixed by the trial court in accordance with this court's opinion in *Dresser v. Dresser,* 350 So.2d 1152 (Fla. 1st DCA 1977).

AFFIRMED IN PART AND REVERSED IN PART and remanded for further proceedings consistent herewith.

McCORD, C.J., and MELVIN, J., concur.

ILLINOIS

CATEGORY: Shariah Marriage Law

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: N/A

URL: http://law.justia.com/cases/illinois/court-of-appeals-fifth-appellate-district/1998/5940813.html

NO. 5-94-0813

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE, V. EDWIN A. JONES, DEFENDANT-APPELLANT.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 94-CF-156
	)	
EDWIN A. JONES,	)	Honorable
	)	David W. Watt, Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE KUEHN delivered the opinion of the court.

Defendant took three wives. They wed into the Islamic faith. Defendant believed that the teachings of the Holy Koran empowered him to beat his wives. So he beat all three of them. Only two survived.

Defendant stands convicted by the circuit court of Jackson County sitting without a jury of first-degree murder, unlawful use

of weapons by a felon, and two counts of aggravated battery. He was sentenced to natural-life imprisonment for the murder, 5 years' imprisonment each for the unlawful use of weapons and one count of aggravated battery, and 10 years' imprisonment for the other aggravated battery count. The 5- and 10-year prison sentences were ordered to be served concurrently with one another and to be served consecutively to the natural-life prison sentence. Defendant appeals his convictions and sentences.

Defendant challenges the evidence in support of his first-degree murder conviction. He claims that no rational trier of fact could have found more than involuntary manslaughter on the facts presented. He asks us to reduce the first-degree murder conviction to involuntary manslaughter.

We do not retry cases on review. We simply determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. People v. Collins, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985). We will not reverse a guilty verdict unless the evidence, viewed in a light most favorable to the State, is palpably contrary to the result reached. Collins, 106 Ill. 2d at 261, 478 N.E.2d at 277.

Jeannie Boyd-Jones succumbed to massive injuries sustained as a result of a prolonged beating administered by defendant. Portions of her deep body fat liquified, and the tissue died as a result of the force applied. Over one-third of her blood supply permeated the internal body cavity lost to circulation as a result of the force applied. Her lower torso and shanks were one massive contusion, with no portion of her frame free of visible welts and bruises. Jeannie Boyd-Jones was beaten to death. Of that there can be no dispute.

The question is whether the evidence establishes that defendant acted with knowledge that the beatings he inflicted created a strong probability of great bodily harm.

With this element of the State's case at issue, we look first to the instrument used to inflict the beatings. People's exhibit number three was identified by defendant. He admitted that the State's exhibit was the "stick" employed to "discipline" his three wives. There is no question about the weapon used to inflict the wounds that caused death.

The "stick" was 36 inches in length and 2« inches in diameter. It was only slightly larger in length and slightly smaller in its barrel than the Louisville Slugger employed by Mark McGwire. The trial court characterized it as a cudgel. Over the course of 8« hours it was applied with full force to various portions of Jeannie's body. At times, defendant would hold it with both hands like a baseball bat and swing for the fences with all the force he could muster. The defendant is six feet two inches in height and weighs 250 pounds.

Of course, defendant did not swing at Jeannie continuously during the 8«-hour "disciplinary period." Jeannie fell in and out of consciousness, a circumstance that on occasion brought a respite. Defendant had two other wives to address. There was also evidence of certain smoke breaks during the ordeal. On occasion, however, when defendant was not beating his other wives or smoking

crack cocaine, he was reviving Jeannie in order to inflict further punishment. At one point, as Jeannie was about to collapse and pass out, defendant told her to "go ahead and die bitch."

Finally, Jeannie stopped breathing. Defendant rushed to her side and attempted CPR. He prayed for her to live. His prayers were to no avail.

The trial court noted, in observing the size of the defendant, the instrument he employed in the beatings, and the injuries this deadly combination produced, that "this was nothing less than torture." The trial court aptly found that the 8«-hour process literally reduced Jeannie's body tissue to a "bloody pulp."

Defendant insisted that Jeannie's clothing obscured her horrific bruising from his view. He disavowed knowledge of the harm he was producing. On appeal, defendant points to the efforts he made to save Jeannie and to the pleas for divine intervention and argues that he did not possess the requisite state of mind for murder.

Defendant may not have actually intended to kill Jeannie. Despite his comment to her, he may not have actually known that his acts would produce death. Notwithstanding, based on his actions and words, it was decidedly reasonable for the trial court to conclude that defendant knew that his acts created a strong probability of great bodily harm. Indeed, it is unimaginable that a man of size and strength could take an instrument that resembled a baseball bat, employ it with full force to the body of a young woman, persist in the activity until it produced unconsciousness, and not expect to produce great bodily harm. We are at a loss to understand what defendant was thinking during the sound and fury of his attacks with such a weapon, particularly when he saw his wife succumb and lapse into unconsciousness.

The evidence, when viewed in a light most favorable to the prosecution, supports the reasonableness of the trial court's finding that the defendant committed first-degree murder.

Next, defendant challenges his court-appointed lawyer's performance. He inveighs against counsel for the failure to procure an amir or sheik to opine about his religious faith and its sanction of wife-beating. The record reflects that counsel unsuccessfully searched for such an expert. It also reflects a grave misapplication of any Islamic license for his conduct.

We seriously doubt that anyone knowledgeable on Islamic teachings would have proved helpful to this defense. Had such an expert been found, had he explained the righteousness of defendant's conduct or merely explained how defendant may have believed that his actions conformed to religious teachings, the expert would not have changed the outcome. The sovereign State of Illinois has a longstanding rule of law that prohibits the engaged-in conduct. This society will not abide defendant's actions regardless of the religious beliefs that may have motivated them. If a religion sanctions conduct that can form the basis for murder, and a practitioner engages in such conduct and kills someone, that practitioner need be prepared to speak to God from prison.

Since defendant suffered no prejudice by virtue of an Islamic expert's absence, he was not deprived of the effective assistance

of counsel under the sixth amendment. See Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); People v. Albanese, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984).

Next, defendant raises the excessiveness of a natural-life prison term. Defendant contends that the natural-life prison sentence is an abuse of discretion, and he points to his lack of a substantial criminal record, his remorse soon after the beating ended, his employment record, and his attendance of a university in an effort to show that he is not beyond rehabilitation.

A trial court may impose a natural-life prison sentence for first-degree murder where the "court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." 730 ILCS 5/5-8-1(a)(1)(b) (West 1992). Various courts have defined brutal and heinous. See People v. La Pointe, 88 Ill. 2d 482, 501, 431 N.E.2d 344, 353 (1981). We think the statutory terminology is rather self-evident and easily applicable here.

In evaluating the brutality and heinousness of a crime, the entire spectrum of facts surrounding the given incident must be analyzed and evaluated. People v. Hartzol, 222 Ill. App. 3d 631, 651, 584 N.E.2d 291, 306 (1991). The brutal and heinous behavior is found not in the defendant's state of mind, but rather from the nature of the offense. Hartzol, 222 Ill. App. 3d at 651, 584 N.E.2d at 306. The imposition of a natural-life prison sentence rests within the trial court's discretion and will not be disturbed on review absent an abuse of that discretion. Hartzol, 222 Ill. App. 3d at 651, 584 N.E.2d at 306.

We cannot find an abuse of discretion in the imposition of a natural-life prison sentence for this crime. This crime takes domestic violence and domestic murder to a new height. Hour upon hour, for over eight, defendant, a man of great size and strength, pummeled three defenseless women.

Defendant might have achieved his goal to inflict pain upon these women by adopting the manner employed by most wife-beaters. Apparently, slapping them, striking them with his fists, or simply throwing them about would not do. He needed a cudgel the size of a baseball bat. The injuries inflicted with it evidence that he did not tread lightly with its use.

Defendant was not content to allow nature to save Jeannie's life. He callously revived Jeannie from unconsciousness to heap injury upon injury, hour after hour, until her body could stand no more and she stopped breathing. Defendant reduced his wife's body tissue to a "bloody pulp." We cannot quarrel with the trial court's view that this murder was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty.

Although a sentencing judge must consider rehabilitative potential, he need not give greater weight to rehabilitation than to the seriousness of the offense. People v. Reid, 160 Ill. App. 3d 491, 493, 513 N.E.2d 517, 518 (1987). Rehabilitation does not outweigh other considerations that are persuasive factors warranting a severe sentence. Reid, 160 Ill. App. 3d at 493, 513 N.E.2d at 518. Natural-life imprisonment is reserved for a class of murderer who demonstrates by his conduct a capacity for

particularly brutal and heinous behavior indicative of wanton cruelty. It is a sentence reasonably designed to remedy the evil of such conduct. Society deserves protection from it. La Pointe, 88 Ill. 2d at 501, 431 N.E.2d at 352-53.

Defendant really did not show rehabilitative potential. In allocution, his regret rang hollow as he explained that his reading of the Koran permitted the administration of 180 lashes. Defendant blamed his wife Lisa and her failure as a Muslim as the reason for the beatings. He castigated Jeannie's parents for disowning her after she married a black man. He viewed the trial and his wife's death as a racial issue. A fair reading of his comments demonstrates a total lack of remorse over the death he caused and a total lack of empathy for the feelings of the survivors.

Defendant had prior felony convictions. He kept handguns and used cocaine. This does not speak to a potential for restoration to useful citizenship but rather speaks to a mind-set that society's laws are simply there to be broken.

Finally, defendant challenges the extended-term 10-year prison sentence because it is not the most serious class of offense for which he stands convicted. See 730 ILCS 5/5-8-2(a) (West 1992); People v. Jordan, 103 Ill. 2d 192, 206, 469 N.E.2d 569, 575 (1984). A sentence of natural-life imprisonment cannot be "extended" pursuant to section 5-8-2 of the Unified Code of Corrections. People v. Young, 124 Ill. 2d 147, 162-63, 529 N.E.2d 497, 504 (1988). Therefore, because extended-term provisions cannot apply to defendant's natural-life sentence for murder, the extended-term provisions can properly be applied to the next most serious offense of which defendant was convicted--aggravated battery. Young, 124 Ill. 2d at 165-66, 529 N.E.2d at 505-06. Our supreme court recently reaffirmed Young. People v. Terry, No. 84156 (Ill. June 18, 1998).

Accordingly, the judgment of the circuit court is affirmed.

Affirmed.

HOPKINS and GOLDENHERSH, JJ., concur.

INDIANA

CATEGORY: Shariah Marriage Law

RATING: Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: Egypt

URL: http://scholar.google.com/scholar_case?case=9438377630007162545&q=Islamic+OR+Shariah+OR+Muslim+OR+Islam&hl=en&as_sdt=4,15

858 N.E.2d 128 (2006)

SAMER M. SHADY, APPELLANT-RESPONDENT, V. SHEANIN SHADY, APPELLEE-PETITIONER.

No. 53A01-0605-CV-222.

Court of Appeals of Indiana.

December 11, 2006.

130*130 Karen A. Wyle, Bloomington, IN, Attorney for Appellant.

Karl L. Mulvaney, Nana Quay-Smith, Kelly R. Eskew, Bingham McHale, LLP, Indianapolis, IN, Attorneys for Appellee.

OPINION

FRIEDLANDER, Judge.

On April 4, 2006, the trial court dissolved the marriage of Samer M. Shady (Samer) and Sheanin F. Shady (Sheanin),[1] awarded Sheanin physical and legal custody of A.S., awarded Samer supervised parenting time of A.S., and ordered Samer to pay $47 per week for child support. Samer now appeals, and presents the following restated issues for review:

(1) Did the trial court abuse its discretion by admitting certain evidence, qualifying Sheanin's witness as an expert, or relying upon Sheanin's expert's conclusions?

(2) Did the trial court abuse its discretion by failing to consider certain statutory factors?

(3) Were the trial court's findings and conclusions clearly erroneous?

(4) Did the trial court manifestly abuse its discretion in its parenting time order?

We affirm.

The issues presented are fact sensitive and, therefore, we will provide a detailed recitation of the facts viewed in a light most favorable to the ruling. Samer was born in Egypt on January 3, 1970, as an Egyptian citizen.[2] Sheanin is an American citizen. In 1994, Sheanin traveled to Egypt in order to study at The American University in Cairo. While in Egypt, Sheanin met Samer. Samer's father died in Egypt in July 1994. Shortly thereafter, 131*131 Sheanin and Samer married in a civil ceremony in Cairo, Egypt on October 9, 1994, and married in an Islamic ceremony a short time later. Following their marriage, Sheanin and Samer remained in Egypt until sometime in 1995, at which point they moved to Bloomington, Indiana. Sheanin and Samer lived with Sheanin's parents in Bloomington for the duration of their marriage.

Samer became a naturalized U.S. citizen on July 27, 2000. On January 28, 2001, A.S., Sheanin and Samer's only child, was born. On October 31, 2003, Sheanin filed a petition for dissolution of the marriage. Also in October 2003, Samer's brother moved from Egypt to Quincy, Massachusetts. On June 18, 2004, Sheanin filed a motion for an emergency order prohibiting Samer from adding A.S. to his Egyptian passport and removing A.S. from Monroe County, Indiana. Sheanin filed the motion because "[a]fter [Samer] was [n]aturalized he mentioned a number of times bringing [A.S.] overseas. . . ." *Transcript* at 99. Further, Sheanin enrolled A.S. in the U.S. Department of State's passport watch program. Sheanin took these measures because she was concerned that if Samer took A.S. to Egypt, he would not allow A.S. to return to the U.S. On June 29, the trial court issued an order that prohibited Samer from both adding A.S. to his Egyptian passport and removing A.S. from Monroe County.

On September 27, 2004, the trial court issued an order directing Richard Lawlor, Ph.D., to conduct a custody evaluation. Dr. Lawlor submitted his evaluation on November 19, 2004, which revealed the following: Dr. Lawlor met with Sheanin, Samer, A.S., Sheanin's parents, Larry and Hilda McConnaughy, and Sheanin's brother, Sheahan McConnaughy, on October 4, 2004. Dr. Lawlor interviewed Sheanin and Samer individually, Sheanin and A.S. together and Samer and A.S. together, and Larry, Hilda, and Sheahan. Dr. Lawlor administered the Minnesota Multiphasic Personality In-

ventory-2 (the MMPI-2) test to both Sheanin and Samer.[3] The MMPI-2 test results indicated, in relevant part, that:

Sheanin ha[d] two scales, Scales 1 and 2, out of normal range. [Dr. Lawlor did] not think this reflect[ed] any psychiatric diagnosis, but rather significant personality traits.

A 12/21 code type (two highest scales) is a pattern on the [MMPI-2] typically found in individuals who are anxious, tense and nervous. They tend to be high strung and to worry about many things. . . . They are . . . also suspicious and untrusting. They . . . harbor hostility toward people who are perceived as not offering enough attention or support. Sheanin [ ] present[ed] as below average in ability to deal with stress and frustration. . . . She also ha[d] a high average sense of social responsibility.

The psychological testing on *Sam[er]* . . . present[ed] [that] . . . he [ ] seem[ed] to be a person with a low sense of self-esteem or self-concept. He ha[d] all scales within normal range but one scale, Scale 6, approaching significance. His highest scale[s] [were] Scale 6 and Scales 4. . . .

People with profiles where Scales 4 and 6 are the two highest scales tend to be 132*132 immature, narcissistic, and self[-]indulgent individuals. . . . They resent demands made of them. . . . Repressed hostility and anger are characteristics of people with this code type and they are often irritable, argumentative, and are described as "generally obnoxious." They resent authority. People with this pattern deny serious psychological problems and they rationalize and transfer blame for problems onto others. They do not accept responsibility for their own behaviors. They also tend to be somewhat unrealistic and grandiose in their self-appraisals. If a psychiatric diagnosis is warranted it is usually that of passive-aggressive personality disorder. . . . [W]ithin the context of custody or visitation disputes[,] . . . when the elevations are highest on these two scales there are typically problems of pride, willfulness, unreleased resentments and jealousy. Because of that there is potential for problems in the area of temper control as well as [] attempting to control others with threats of losing one[']s temper. Individuals with this pattern have an inability to forgive and forget and because of that are described often as trapped in the past. Insults to the person's public role, and hurts that have been inflicted, must be atoned for and compensated for. Even fairly normal range elevations on Scale 6 are problematic. They tend to denote rigidity or fixity of one's judgments. This often entails developing over-identifying alliances with a child or children but being severe when high parental standards and expectations are not met.

Sam[er] present[ed] as far below average in his ability to deal with stress and frustration and he tend[ed] to over[-]control hostility to an extreme degree. This pattern is consistent with the likelihood of passive-aggressive behaviors. . . .

SUMMARY AND CONCLUSIONS: . . . Sam[er] made the interesting observation . . . of him not being [the kind of person] who [would] abduct[] children and go[] back to [another] country after a divorce. . . . However, . . . [Dr. Lawlor thought] that [Samer] ha[d][the] potential for being th[at] type of person. . . .

[A.S.] has an excellent relationship with both parents and . . . it is important that she have as much contact as is possible with Sam[er]. However, . . . whatever safeguards are recommended by the State Department, as well as by experts in this particular area of International Law, need to be put in place before [A.S.] is allowed to visit with her father outside of Monroe County. . . . [T]hese restrictions should stay in place at least until [A.S.] is old enough to understand what might be going on and would be able to resist on her own should there ever be an attempt to take her outside of the United States without the awareness of [Sheanin].

Appellant's Appendix at 49-51 (emphases in original). Dr. Lawlor also noted there were no allegations of serious domestic violence.

On December 13, 2004, Sheanin filed a "Motion for Order of Supervised Visitation and Notice of Engagement of Expert Witness in Risk Assessments in International Custody-Visitation Cases." *Id.* at 52. In this motion, citing Dr. Lawlor's evaluation, Sheanin renewed her request that the trial court limit Samer's access to A.S. to supervised visitations because of her ongoing fear that Samer would abduct A.S. and abscond to Egypt. Sheanin also notified the trial court that she retained Maureen Dabbagh, a purported expert in the field of international parental child abduction. The trial court, over Samer's objection, granted Sheanin's motion and ordered 133*133 Samer's visitations with A.S. to be supervised pending a final dissolution decree and parenting-time order.

On August 18, 2005, the trial court conducted a hearing in order to determine whether Dabbagh was an expert. Dabbagh's formal, post-secondary education consists of "two (2) years of [c]ommunity [c]ollege in the nursing field." *Transcript* at 24. Dabbagh has worked in international child abduction since 1994. During that time, she has worked with Interpol, the U.S.F.B.I., the U.S. Department of State's Office of Children's Issues, the U.S. Department of State's Diplomatic Security, various U.S. embassies and agencies, and the U.S. Department of Justice. Dabbagh has "also given presentations in the United Nations and Geneva upon invitation. [She has been] [p]art of panels and [C]ongressional testimony in Washington. [She was also] [a]sked to participate in ABA funded research on this topic." *Id.* at 25. Further, Dabbagh

yearly . . . attend[s] continuing education both [in the U.S.] and abroad on a wide variety of issues from changes in international law to psychiatr[y] or . . . alienation issues. [She] just finished up one [continuing education course in] DNA forensics. . . . It's like ten (10) years of this and it's the only

way you can get a formal education that's documented in th[e] field [of international child abduction].

Id. at 24. The training Dabbagh has received, however, "has solely been in regard to international child abduction recovery." *Id.* at 39

Dabbagh has been involved in over 400 cases of international child abduction. She is the founder and president of "P.A.R.E.N.T.," an "international parent advocacy group. . . . [It is] the first and largest international coalition of agencies that lends support resources and information to parents and professionals as well as law enforcement issues regarding international child abduction." *Id.* at 30, 31. Although Dabbagh's training has been solely in recovery of abducted children, she also provides risk assessments in custody disputes. At the conclusion of the hearing, the trial court certified Dabbagh as an expert on international child abduction.

The trial court conducted hearings on November 17, 2005 and February 3, 2006. Sheanin and Samer agreed on property division and that Sheanin would have primary physical custody of A.S. The relevant remaining issues decided at the hearing were legal custody of A.S. and parenting time. In this regard, Sheanin's, Samer's, and Dabbagh's testimonies primarily addressed whether Samer was still a dual American-Egyptian citizen, the requirements of renouncing one's Egyptian citizenship, A.S.'s citizenship status, the effect of Samer's citizenship status upon A.S.'s citizenship status, ABA risk profiles used to assess whether one poses a potential risk of abducting his child, and whether Samer posed a risk to abduct A.S. The following is a summation of the testimony and documentary evidence adduced at the hearing.

Samer was a reservist in the Egyptian Army, but never served on active duty. Samer is no longer subject to prescriptive military service in Egypt by virtue of his age. Samer attempted to renounce his Egyptian citizenship by submitting his Egyptian birth certificate and passport to the Egyptian consulate. Samer's understanding of Egyptian law was that the Egyptian Minister of the Interior possessed the authority to validly abolish his Egyptian citizenship. In support of his contention that he validly renounced his Egyptian citizenship, Samer submitted a photocopied letter addressed to "The General/Assistant Minister of Interior Department 134*134 of Passport, Immigration, and Nationality," translated from Arabic into English, which bore an indiscernible seal, that stated Samer submitted a request to renounce his Egyptian citizenship. *The Exhibits* at Exhibit B.[4] Samer also submitted a second photocopied letter to "The Consulate General of Arab Republic of Egypt in New York," also translated from Arabic to English, which did not possess a seal of the Egyptian government or any of its agencies, that stated the Egyptian Ministry of the Interior recognized him as a citizen of the U.S. and no longer recognized him as a citizen of the Arab Republic of Egypt. *Id.*

Dabbagh testified that A.S. automatically received Egyptian citizenship because she is the biological child of a male Egyptian national, despite being born in the U.S. Dabbagh testified that A.S. does not need a passport to travel with Samer to Egypt because she can "piggy-back[]" onto his passport. *Transcript* at 326. Dabbagh further stated, "[A.S.] continues to be an Egyptian Citizen and entitled to an Egyptian passport regardless of [Samer's] nationality. In other words, [A.S.] still has access to an Egyptian passport. [A.S.] will still enjoy the privileges . . . of being an Egyptian [c]itizen because she [wa]s not the one renouncing her citizenship." *Id.* at 336. Dabbagh testified that even if an Egyptian national renounces his citizenship and his renunciation is authorized by a presidential decree, the Egyptian national may renew his citizenship. "You just go ask for it. . . . [A]ctually it's very easy to get back." *Id.* at 338.

Dabbagh then addressed her assessment of the risk that Samer would abduct A.S. and abscond to Egypt. Dabbagh testified that "because of Doctor Lawlor's report [Dabbagh] was able to take [Dr. Lawlor's] observations and his diagnosis and compare them with findings from the ABA research on psychological components. And that's where the [] ABA research has shown that parental abduction is motivated by revenge and control." *Id.* at 353. Dabbagh testified that Exhibit B was an official request by Samer to renounce his citizenship, but that there was no demarcation on the papers, *i.e.,* a presidential seal, that indicated it constituted an officially recognized renunciation. Dabbagh further stated that "research shows that if a child is young and vulnerable sometimes their [sic] even older and vulnerable, that they don't rebel against that authority or don't have the skill[s] to say [`]no I don't want to go['] and . . . stop the process [of abduction]." *Id.* at 356.

Dabbagh identified the following risks based upon the ABA risk factors for international child abduction: (1) "if the child was taken, the more difficult it is to get a child back the greater the risk[,]" *id.* at 357; (2) "[t]he minor child in this case is young and vulnerable [to] influence[] . . . [,]" *id.;* (3) Samer "does have a support system in place in Egypt [that] would allow him to abduct[,]" *id.;* (4) Samer has significant family connections in Egypt; (5) this is a "bi-cultural marriage that has dissolved. That in and of itself is not a risk[.][H]owever, if that element exists and then underneath that you have a number of specific risk factors then you have that particular profile in play for abduction[,]" *id.* at 358; (6) marital instability; (7) lack of parental cooperation; and (8)

[d]isenfranchisement. [Samer] is disenfranchised from a legal system here in the United States that offers him what the legal system offers him in Egypt. 135*135 In the United States we do not have a legal system that has a set of laws different for a male then [sic] . . . for a female. . . . [I]n our judicial system we apply the law equally regardless of . . . gender . . . or religion. Whereas in Egypt . . . there [are] different laws for Christians, there is a different law for Shiites, . . . there is a different law for females and there is a different law for males. In [Samer]'s situation he would have the advantage in an Islamic Court [in Egypt] by virtue of . . . his gender.

Id. at 358-59. With regard to Samer's "significant connections," Dabbagh stated:

[w]hen we're looking at significant connections often times we will look in cases where a dual national or an individual has lived in one place and grown up and then transferred to another place[.][ ][W]e look . . . to determine where [one's] significant connections are. So we look at the demographics and we look at the history of both places. So if [Samer] hasn't invested here, in other words, . . . he didn't go to school here, he doesn't own real estate here, he doesn't have a business here, and we're looking at the things that make a person a permanent part of the community. We then look at the other place, you know, well what w[ere] the significant connections there also? So we . . . look at job history. . . . [H]ave they been at the same job for twenty-five (25) years? Are they vested? . . . [I]s it an existence where they can just pick up and leave[?] . . . [S]o we look at all these different things and in this particular case I was able to identify the fact that there was no regular job status or property owned or no business owned or . . . enroll[ment] in school[.] . . . [T]here doesn't seem to be any permanency.

Id. at 364.

Dabbagh also testified about The Hague Convention On The Civil Aspects of International Child Abduction. The U.S. is a signatory to this convention, but Egypt is not. Pursuant to this convention, signatory countries agree to extradite abducted children back to the country from which they were abducted when certain conditions are met. Dabbagh testified that

[i]n situations where a child is a dual national and the risk [of abduction] is to a Non-Hague country[,] the specific problem[] . . . is that there really aren't any real effective safeguards except supervised visitation. Things like passport controls or putting up civil bonds . . . can work in other types of risk cases[,] but unfortunately . . . they literally are not effective in these types [of cases] and the ABA has recommended supervised visitation and that was my recommendation.

Id. at 366.

Based upon her understanding of international law, Egyptian law, her experience in abduction cases, and her analysis pursuant to the ABA risk profiles of the risk that Samer would abduct A.S., "Dabbagh identified risks [and] added those up and there were a few [] that fell into the grave risk and when [Dabbagh] added them up on the ABA recommendations it said, you know, this is grave risk category." *Id.* at 366. Dabbagh concluded, "[t]he majority of the kids that [she] go[es] after or the cases that [she] get[s] of abduction, the children were taken during visitation[,]" *id.* at 367, and "children abducted or retained in Egypt usually never see their other parent again." *Id.* at 363.

On April 4, 2006, the trial court issued its findings of fact and conclusions of law in which it stated, in relevant part:

7. Sheanin fears that Samer will abduct [A.S.] Samer has threatened, on multiple occasions, to take [A.S.] to Egypt and not to return the child to 136*136 [Sheanin]. Sheanin is asking that parenting time between Samer and [A.S.] be supervised until [A.S.] is old enough to actively resist any attempt to remove her from the [U.S.]

8. In analyzing [Sheanin's] request, the [trial] [c]ourt must consider: (1) the risk of abduction; (2) the obstacles to locating and recovering [A.S.] if an abduction were to occur; and (3) the potential harm [A.S.] would likely suffer if abducted.

9. In *Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA, and the Hague Child Abduction Convention,* the American Bar Association notes six "risk profiles" for child abduction. While these profiles must be used with caution as a predictive device, two clearly have application to the case at bar:

a. Profile 1. When there has been a prior threat of or actual abduction. As set forth above, Samer has threatened to remove [A.S.] to Egypt.

b. Profile 5. When one or both parents are foreigners ending a mixed-culture marriage. "Parents who are citizens of another country (or who have dual citizenship with the U.S.) and also have strong ties to their extended family in their country of origin have long been recognized as abduction risks. . . ." Often in reaction to being rendered helpless, or to the insult of feeling rejected and discarded by the ex-spouse, a parent may try to take unilateral action by returning with the child to [his] family of origin. This is a way of insisting that [his] cultural identity b[e] given preeminent status in the child's upbringing.

Although Samer's mother and father are deceased, he has substantial ties to his brother, who is an Egyptian national living in the United States. He also has extended family in Egypt.

* * *

10. The Hague Convention on the Civil Aspects of International Child Abduction is an international treaty that governs the return of children from member nations. Significantly, Egypt is not a signatory to the Hague Convention. Consequently, there is no standard legal or diplomatic mechanism for securing [A.S.]'s return should Samer remove her to Egypt. Once [A.S.] is in Egypt, her relationship with her mother would be governed by Islamic law. Islamic law does not recognize a civil divorce granted to a female. After the issuance of this Decree of Dissolution, Sheanin will remain, in the eyes of the Egyptian authorities, the wife of Samer. In Egypt, he will maintain absolute control over her ability to see her child, or even to leave the country once she enters. [A.S.] could not leave the country without his permission until she is 21. Effectively, if Samer follows through on his threats to remove the child to Egypt, all future contact between [A.S.] and her mother will cease.

11. The government of Egypt considers all children born to Egyptian fathers to be citizens of Egypt. Thus, [A.S.] is a dual citizen of the United States and Egypt. [A.S.] may travel on her father's passport, as long as he provides proof that he is her father. She may also travel on the passport of a male relative. (Samer's brother is an Egyptian citizen.) During an unsupervised visit, it would not be difficult to remove [A.S.] to Egypt.

137*137 12. Samer has attempted to renounce his Egyptian citizenship. He state[d] that his passport has been destroyed. However, Egypt does not recognize this renunciation. Absent a specific order by the Egyptian President, [Samer] remains free to obtain a new Egyptian passport.

13. [A.S.] is only 5 years of age. She could not be expected to take action to prevent her forced removal to Egypt.

14. Removal to Egypt would be devastating for [A.S.] As has been stated, she would be separated, perhaps permanently, from her mother and her mother's family. Her mother has been her primary caregiver for the first five years of [A.S.]'s life. Additionally, [A.S.] would be placed in a culture that is substantially different from that which she has known. The legal rights and cultural expectations for women in the United States differ markedly from those of women in Egyptian society. It is clear that [A.S.] would face a tremendous adjustment that she would be forced to endure without [Sheanin]'s aid. Samer [] has not visited regularly with [A.S.], and could not be expected to fill the void left by the absence of [Sheanin].

15. Having considered: (1) the risk of abduction; (2) the potential harm [A.S.] would likely suffer if abducted; and (3) the obstacles to locating and recovering [A.S.] if an abduction were to occur, the [trial] [c]ourt finds that deviation from the Indiana Parenting Time Guidelines is warranted, and strict prevent[a]tive measures are needed to insure the wellbeing of [A.S.] Visits between Samer and [A.S.] must be supervised.

Appellant's Appendix at 12-14. Samer now appeals. Additional facts will be included as necessary.

1.

Samer contends the trial court abused its discretion by allowing the ABA risk profiles to be used as evidence.[5] We understand Samer's argument to be that the trial court abused its discretion by admitting Sheanin's Exhibit 13, the ABA's *Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA,* 138*138 *PKPA, and the Hague Child Abduction Convention,* because Sheanin "offered almost no evidence, from her expert witness or otherwise, as to the methodology used by the ABA in the research that produced the `risk profiles'." *Appellant's Brief* at 15. After Sheanin offered Petitioner's Exhibit 13, the following exchange occurred:

The Court: . . . Do you object to "13", exhibit number "13"? . . .

* * *

Thomas McDonald: No. . . .

The Court: Okay. Then I will show "13" . . . admitted without objection.

Transcript at 323. In order to preserve for review a claim that the trial court erroneously admitted evidence, a specific and timely objection must be made. *Tate v. State*, 835 N.E.2d 499 (Ind.Ct.App.2005), *trans. denied.* In the absence of a specific and timely objection, a claim regarding the admission of evidence is not available on appeal unless it constituted fundamental error. *Troxell v. State*, 778 N.E.2d 811 (Ind.2002). Nowhere in his brief does Samer claim the admission of this evidence constituted fundamental error. His claim, therefore, is waived. *Cf. Willey v. State*, 712 N.E.2d 434 (defendant's claim not waived on appeal even though no objection was made at trial because he asserted the admission of evidence constituted fundamental error).

Samer further contends "[t]o the extent the trial court relied on [Dabbagh's] assessment of [Samer] as a potential abductor, that reliance was [] erroneous. . . ." *Appellant's Brief* at 16. Within the context of Samer's argument, we take this to mean that the trial court abused its discretion when it relied upon Dabbagh as an expert witness. Under Ind. Evidence Rule 702(a), a witness may be qualified as an expert by virtue of her "knowledge, skill, experience, training, or education. . . ." Only one of the enumerated characteristics is necessary to qualify an individual as an expert. *Hobson v. State*, 795 N.E.2d 1118 (Ind.Ct.App.2003), *trans. denied.* A witness may qualify as an expert, therefore, on the basis of her practical experience alone. *Id.* It is within the trial court's sound discretion to determine whether a person qualifies as an expert witness. *Id.*

Sheanin attempted to, and the trial court did, certify Dabbagh as an expert on the subject of international child abduction, to which Samer objected. Samer's primary objection to the trial court's decision to allow Dabbagh to testify as an expert witness was her lack of formal education. Dabbagh attended only two years of post-secondary school, in which she studied nursing. Ending the inquiry into Dabbagh's qualifications as an expert in international child abduction there would grossly understate her involvement in the field.

Dabbagh is the proprietor of Dabbagh & Associates, a consulting firm that provides services for clients interested in the recovery of abducted children and the assessment of the risk of future abduction. By her estimates, Dabbagh has worked on in excess of four-hundred such cases. Dabbagh has testified before the U.S. Congress, Committee on Government Reform, and is the founder and president of P.A.R.E.N.T. International, a non-profit organization involved in international parental child abduction. Dabbagh has testified as an expert on international child abduction in cases in Ar-

kansas, California, Idaho, Illinois, Kansas, Maryland, Michigan, New Hampshire, New Jersey, Ohio, Tennessee, and Texas. Dabbagh is a board member with the Missing Children's Investigation Center, was a faculty member at the 13th annual Children's Rights Council International Conference in Washington, 139*139 D.C., and is a board member with SOS France, a French Justice Department-funded non-governmental organization that works in the field of international child abduction. Additionally, Dabbagh has authored, contributed to, and presented papers on international child abduction.

Dabbagh clearly qualifies as an expert on international child abduction because of her knowledge, training, and practical experience. The trial court, therefore, did not abuse its discretion by qualifying her as an expert witness. *See* *Hobson v. State,* 795 N.E.2d at 1123 ("[the expert's] testimony shows that he had practical experience in shooting firearms, and that factor alone is sufficient to qualify him as an expert under [Evidence] Rule 702").[6]

Samer also contends the trial court abused its discretion by relying upon Dabbagh's conclusions because "those conclusions . . . were . . . based on crucially incomplete information." *Appellant's Brief* at 20. We first observe that Samer has failed to cite any legal authority in support of his argument. Further, as Samer notes, "[t]he trial court's findings did not explicitly refer to Dabbagh. . . ." *Id.* Samer's argument is essentially a challenge to the weight to be given, not the admissibility of, Dabbagh's testimony regarding the risk that Samer would abduct A.S. Upon appeal, however, we do not reweigh the evidence. *Cf.* *Green v. Green,* 843 N.E.2d 23, 26 (Ind.Ct.App.2006) ("[w]hen reviewing a trial court's determination to modify custody, we may not reweigh the evidence or judge the credibility of the witnesses"). Thus, we decline Samer's invitation to reevaluate the weight to be given Dabbagh's conclusions.

2.

Samer contends the trial court abused its discretion in its parenting time determination by failing to consider certain statutory factors in Ind.Code Ann. § 31-17-2-8 (West, PREMISE through 2006 2nd Regular Sess.). Samer states "I.C. XX-XX-X-X sets forth those factors the trial court must consider before entering an order determining custody *and visitation*12." *Appellant's Brief* at 21 (emphasis supplied, footnote in original). Samer's argument fails in several respects.

Initially, we observe that I.C. § 31-17-2-8 is entitled "Custody order." Contrary to Samer's characterization of I.C. § 31-17-2-8, that statute sets forth only the factors that a trial court must consider in making a *custody* determination, and states, in relevant part, "[t]he [trial] court shall determine custody and enter a custody order in accordance with the best interests of the child." Samer asserts that "[f]ailure to consider any of these factors constitutes an abuse of discretion." *Appellant's Brief* at 21 (citing *Green v. Green,* 843 N.E.2d 23). *Green,* however, does not involve a parenting-time or

visitation order, but merely a review of a petition to modify a custody order. In further support of his argument that a trial court is required to consider the factors set forth in the custody statute in making a parenting-time determination, Samer states:

I.C. XX-XX-X-X refers specifically to "custody orders". However, custody and visitation are interrelated, particularly at the time of the initial dissolution decree determining both. See, e.g., *Taylor v. Buehler,* 694 N.E.2d 1156, 140*140 1160 (Ind.Ct.App.1998)[, *trans. denied],* describing the predecessor statute's list of factors as "the factors [that] must have been considered with regard to the initial custody-visitation determination." See also *In re Banning,* 541 N.E.2d 283, 284[] fn. 2 (Ind.Ct.App.1989); *Pence v. Pence,* 667 N.E.2d 798, 801 (Ind.Ct.App. 1996).

Appellant's Brief at 21 n. 12. Samer's reliance upon *Taylor, Banning,* and *Pence,* however, is misplaced.

Taylor involved a review of a trial court's order modifying parental visitation. In that case, we discussed the differing standards for modifying a visitation order under I.C. §§ 31-1-11.5-24(b) (*repealed by* Public Law 1-1997, Sec. 157) and 31-6-6.1-12(b) (*repealed by* Public Law 1-1997, Sec. 157). As the citations indicate, those statutes no longer govern a trial court's parenting-time determination. *Taylor,* therefore, is inapposite, as is *Banning.* Samer relies upon our discussion in *In re Banning,* in which we stated:

the Indiana Supreme Court, in *State ex rel. Jemiolo v. LaPorte Circuit Court,* [442 N.E.2d 1060, 1062 (Ind.1982)], stated that:

Although visitation rights and custody rights are not synonymous I.C. 31-1-11.5-24, they are sufficiently interrelated, [sic] *In re Marriage of Ginsberg,* [425 N.E.2d 656, 659 (Ind.Ct. App.1981)], that a petition to determine visitation rights filed after a determination of custody is in the nature of proceedings supplemental. See *State ex rel Greebel v. Endsley,* [269 Ind. 174, 379 N.E.2d 440, 441 (Ind. 978)].

Thus, *Res judicata* would not appear to be applicable.

In re Banning, 541 N.E.2d at 284 n. 2. *Banning,* like *Taylor,* is of no help to Samer. *Pence* is equally inapposite. *See Pence v. Pence,* 667 N.E.2d 798 (trial court's order temporarily terminating parent's visitation rights was reversed because the parent's due process rights were violated).

I.C. § 31-17-4-1 (West, PREMISE through 2006 2nd Regular Sess.), the statute that currently governs a trial court's decision to award or deny parenting time, does not require the trial court to consider prescribed factors. Rather, it states, in relevant part, that "[a] parent not granted custody of the child is entitled to reasonable parenting time rights unless the [trial] court finds, after a hearing, that

parenting time by the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development." Whatever the value of a trial court considering the factors listed in I.C. § 31-17-2-8, if any, in making a parenting time determination, it is clear that such is not required, and, therefore, the trial court did not abuse its discretion by failing to consider those factors.

3.

Samer contends several of the trial court's findings and conclusions were clearly erroneous. When, as here, the trial court enters findings of fact and conclusions of law, its findings and conclusions shall not be set aside unless clearly erroneous. *Nowels v. Nowels,* 836 N.E.2d 481 (Ind.Ct.App.2005). "A finding or conclusion is clearly erroneous when a review of the evidence leaves us with the firm conviction that a mistake has been made." *In re Z.T.H.,* 839 N.E.2d 246, 249 (Ind.Ct. App.2005). We review the judgment by determining whether the evidence supports the findings and whether the findings support the judgment. *Nowels v. Nowels,* 836 N.E.2d 481. We consider only the evidence favorable to the judgment and all reasonable inferences to be drawn from that evidence. *Id.* We neither 141*141 reweigh the evidence nor assess witness credibility. *Id.*

Samer argues the trial court's Finding 12 is clearly erroneous because the evidence does not support the finding that he remains an Egyptian citizen or a dual citizen of the U.S. and Egypt. Finding 12 states, "Samer has attempted to renounce his Egyptian citizenship. He states that his passport has been destroyed. However, Egypt does not recognize this renunciation. Absent a specific order by the Egyptian President, [Samer] remains free to obtain a new Egyptian passport." *Id.* at 13.

Dabbagh testified that she is familiar with Egyptian law. Dabbagh stated that, according to her understanding of Egyptian law, in order to render the renunciation of one's citizenship effective and authentic, one is required to procure "[Egyptian] President Mubarric's [sic] seal and personal signature." *Transcript* at 337. Dabbagh further stated that if one renounces his Egyptian citizenship, he may regain it later. "You just go ask for it. You just like say well, you know, I only did it because, you know, I was trying to get this job or, you know, what ever, a moment of insanity or what ever. It's much, actually it's very easy to get back. It's very difficult to renounce." *Id.* at 338. The trial court acted within its discretion when it adopted Dabbagh's and rejected Samer's contrary understanding of Egyptian law. There was evidence to support the finding that Samer is either an Egyptian citizen or a dual citizen of the U.S. and Egypt. The trial court's finding, therefore, was not clearly erroneous.[7]

Samer next argues the trial court's Finding 9(b) is clearly erroneous because the evidence does not support the finding that he has strong family ties in Egypt. Finding 9(b) states, in relevant part, that:

[Risk] Profile 5. When one or both parents are foreigners ending a mixed-culture marriage. "Parents who are citizens of another country (or who have dual citizenship with the U.S.) and also have strong ties to their extended family in their country of origin have long been recognized as abduction risks. . . . Often in reaction to being rendered helpless, or to the insult of feeling rejected and discarded by the ex-spouse, a parent may try to take unilateral action by returning with the child to [his] family of origin. This is a way of insisting that [his] cultural identity b[e] given preeminent status in the child's upbringing."

142*142 Although Samer's mother and father are deceased, he has substantial ties to his brother, who is an Egyptian national living in the United States. He also has extended family in Egypt.

Appellant's Appendix at 12.

Regarding Samer's family ties in Egypt, Dabbagh stated:

he was born [in Egypt], he was raised there, that's his home country, that's where [h]is family is from, that's where he continues to have family and friends, so where you have significant connections you have a support system and the support system also includes individuals that share the same like ideology, the same like belief system, they would . . . be supportive of [his] action or decisions that [he] had made in regarding abduction.

Transcript at 356-57.

Samer testified that his mother and father are deceased, and his brother, sister-in-law, niece, and nephew live in Massachusetts. Samer has relatives that live in Egypt, including three uncles, one aunt, several half-brothers and half-sisters, and cousins, although Samer stated he does not "have any affiliation with them actually." *Id.* at 409. Samer also has a "Godmother" in Egypt with whom he was close, *id.* at 417, but stated, "[s]he's feebly old" and he does not "know if she is still living or not." *Id.* at 418. Based upon this evidence, the trial court found that Samer met the description of a potential abductor characterized in "Profile 5[,]" *i.e.,* he is a citizen of a foreign country or has dual citizenship and has "strong ties to [his] extended family in [his] country of origin. . . ." *Appellant's Appendix* at 12. There was evidence to support the trial court's finding, and, therefore, its finding was not clearly erroneous.

Samer further argues the trial court's Finding 11 is clearly erroneous because the evidence does not support the finding that A.S. remains an Egyptian national regardless of Samer's Egyptian citizenship status. Finding 11 states, in relevant part, "[t]he government of Egypt considers all children born to Egyptian fathers to be citizens of Egypt. Thus, [A.S.] is a dual citizen of the United States and Egypt." *Id.* at 13. Dabbagh testified that, under Egyptian law, "[i]ndividuals of Egyptian decent

[sic] automatically . . . inherit their [f]ather's Egyptian nationality where ever they're born geographically." *Transcript* at 325. Dabbagh further stated:

[A.S.] continues to be an Egyptian [c]itizen and entitled to an Egyptian passport regardless of her [f]ather's nationality. In other words, the child still has access to an Egyptian passport. [A.S.] will still enjoy the privileges and pleasures of being an Egyptian [c]itizen because she is not the one renouncing her citizenship.

Id. at 336. Dabbagh testified that in order for A.S. to renounce her Egyptian citizenship, she, like Samer, was required to secure Egyptian President Mubarak's seal and personal signature. Based upon Dabbagh's testimony, the trial court found, contrary to Samer's conflicting assertions, that A.S. remained a dual citizen of the U.S. and Egypt. The trial court's finding was not clearly erroneous because there was evidence to support it.[8]

143*143 4.

Samer contends the trial court manifestly abused its discretion in its parenting time order because it permitted Sheanin or someone of her designation to supervise Samer's parenting time with A.S. Upon review of a trial court's determination of a parenting time issue, we reverse only when the trial court manifestly abused its discretion. *J.M. v. N.M.*, 844 N.E.2d 590 (Ind.Ct.App.2006), *trans. denied.* The trial court does not abuse its discretion if there is a rational basis in the record supporting its determination. *Id.* Upon appeal, we neither reweigh the evidence nor judge the witnesses' credibility. *Id.* In all parenting time controversies, courts are required to give foremost consideration to the best interests of the child. *Id.*

Samer argues that allowing Sheanin or her appointee to supervise his visits with A.S. will have a detrimental impact upon his relationship with A.S. because "[Sheanin's] distrust of and hostility toward [Samer] is apparent[, and Sheanin's] . . . parents' and brother's attitude[s] toward[] [Samer] [are][] negative." *Appellant's Brief* at 23. Samer concludes, therefore, that "[i]t is hardly likely that [Samer's] and [A.S.'s] relationship can continue to flourish under such hostile conditions[,]" *id.* at 23-24, which, he asserts, violates the Indiana Parenting Time Guideline's "premise that it is usually in a child's best interest to have frequent, meaningful and continuing contact with each parent." Ind. Code Ann. Title 34, *Preamble For Indiana Parenting Time Guidelines* (West, PREMISE through Amendments received through June 1, 2006).

We first note that Sheanin's or her appointee's supervision of Samer's parenting time with A.S. has no impact upon the frequency or continuation of A.S.'s contact with Samer. We further note that Samer was not denied parenting time. Rather, his parenting time was ordered to be supervised within certain parameters designed to protect A.S.'s best interests based upon the trial court's finding that "deviation from the Indiana Parenting Time Guidelines is warranted, and strict preventive

measure[]s are needed to insure the wellbeing of [A.S.]" *Appellant's Appendix* at 14. In light of the facts as set forth above, the trial court did not manifestly abuse its discretion when it concluded deviation from the Indiana Parenting Time Guidelines was warranted. Samer's argument, therefore, fails. *See J.M. v. N.M.,* 844 N.E.2d 590 (trial court did not manifestly abuse its discretion when it ordered supervised parenting time because the father's behavior continued to scare the child and was detrimental to the child's well being).

Judgment affirmed.

CRONE, J., and DARDEN, J., concur.

[1] Sheanin is also referred to as "Sheanin McConnaughy," which is her pre-marital and post-dissolution name. *Appellant's Appendix* at 14.

[2] We use the terms "national" and "citizen" interchangeably.

[3] Dr. Lawlor's evaluation stated the MMPI-2 "is a comprehensive personality test [that] [ ] is useful in [child custody] cases on two levels. First, it is a good psychometric supplement to interviewing [subjects because one can] [] look[] at the mental health of the parties. On a second level this test [] sometimes give[s] useful information regarding personality states or traits that could have an effect on parenting." *Appellant's Appendix* at 41.

[4] Samer did not paginate *The Exhibits.* Thus, we refer to exhibits by their trial-marked label.

[5] In his appellate brief, Samer seems to argue the trial court abused its discretion by admitting Petitioner's Exhibit 13, the ABA's *Jurisdiction in Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA, and the Hague Child Abduction Convention,* which contained the ABA Risk Profiles. In his reply brief, however, Samer states that "[Sheanin's] brief asserts that [Samer] is appealing [the] admission of the ABA Judge's Guide (Mother's Exhibit 13). . . . In fact, [Samer] is appealing the admission of the ABA Risk Profiles as part of Dabbagh's report and testimony, and any reliance thereon by the trial court." *Appellant's Reply Brief* at 7. We note that Dabbagh's report, Petitioner's Exhibit 17, was admitted without objection. Samer's claim that the trial court abused its discretion by admitting Petitioner's Exhibit 17, therefore, is waived. *Cf. Willey v. State,* 712 N.E.2d 434 (Ind.1999) (defendant's claim not waived on appeal even though no objection was made at trial because he asserted the admission of evidence constituted fundamental error). Further, the "ABA Risk Profiles" appear in the appellate record only as part of the "ABA Judge's Guide" and as referenced in Dabbagh's report regarding her assessment of the risk that Samer would abduct A.S. Samer separately included in the appellate record neither the "ABA Risk Profiles" nor the document in which it was first published, Linda K. Girdner & Janet R. Johnston, *Early Identification of Parents At Risk For Custody Violations and Prevention of Child Abductions,* 36 Family

Ct. Rev. 392 (1998). Samer, therefore, has provided an insufficient basis upon which to review his claimed error. *Davidson v. State,* 825 N.E.2d 414, 417 (Ind.Ct.App. 2005), *trans. granted,* 849 N.E.2d 591 (Ind. 2006), *rev'd on other grounds.* In light of this omission, we are unable to discern how Samer would have us conduct a review of the "ABA Risk Profiles" apart from their inclusion in Petitioner's Exhibit 13, *i.e.,* the "ABA Judge's Guide."

[6] Samer asserts Dabbagh did not qualify as an expert under Evidence R. 702(b), which states, "[e]xpert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable." Contrary to Samer's assertion, Dabbagh was not a "scientific expert," nor was the subject matter of her testimony "scientific."

[7] We grant Sheanin's "Motion To Strike Addendum to Appellant's Brief." In her motion to strike, Sheanin states, "[t]he Addendum contains a single document, namely what purports to be `Egyptian Gazette of 26 May 1975, Edition No. 22, Law No. 26 of 1975 issue[d] on 29 May 1975, Concerning Egyptian Nationality,' apparently in Arabic as well as in an uncertified English translation that Samer allegedly obtained." Among the other concerns about what Samer purports to be Egyptian law, our primary concern, and the basis upon which we grant Sheanin's motion to strike, is that "[t]his document . . . was not before the trial court in this matter . . . and, therefore, could not have been used by the trial court in rendering the decision that Samer is appealing." *Appellee's Motion to Strike* at 2. We do note, however, that if the document Samer submitted upon appeal accurately reflects prevailing Egyptian law, it casts serious doubt upon Dabbagh's testimony regarding the requirements for renouncing one's Egyptian citizenship and, consequently, her assessment, and the trial court's findings to the extent they are based upon that assessment, of the risk Samer poses to abduct A.S. We further note that a trial court's parenting time determination may be modified. *See* I.C. § 31-17-4-2 ("[t]he court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child").

[8] We note that if the document Samer submitted upon appeal accurately reflects prevailing Egyptian law, the trial court's finding that A.S. remains a dual citizen of the U.S. and Egypt also is cast into serious doubt. We reiterate, however, that such evidence was not before the trial court.

IOWA

CATEGORY: Child Custody

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: Jordan/Morocco

URL: http://scholar.google.com/scholar_case?case=8866177460201014539&q="Islamic+law"&hl=en&as_sdt=

429 N.W.2d 135 (1988)

AHMED S. AMRO, PLAINTIFF, V. IOWA DISTRICT COURT FOR STORY COUNTY, DEFENDANT.

No. 87-1637.

Supreme Court of Iowa.

September 21, 1988.

As Corrected October 20, 1988.

136 Timothy McCarthy II, Des Moines, for plaintiff.

Ann Beneke, Nevada, for defendant.

Considered by McGIVERIN, C.J., and HARRIS, LARSON, CARTER, and ANDREASEN, JJ.

ANDREASEN, Justice.

The district court found Ahmed S. Amro to be in contempt of the court's order requiring him to return his infant son to his ex-wife, Souad Mejdouli. The court ordered that Ahmed be incarcerated

until he complied with the order. We granted certiorari in this case to determine the legality of the court's contempt order. We find the court orders to be lawful and annul the writ.

I. *Background.*

Ahmed S. Amro came to the United States from Jordan in 1978 and began studies at Iowa State University. Souad Mejdouli came to the United States in 1980 from Morocco. She stayed with an aunt in Des Moines for approximately two years and then returned to Morocco. During that two-year period, Souad and Ahmed did not have any significant personal contact with each other.

Approximately one week after Souad returned to Morocco, Ahmed contacted Souad's aunt and requested permission to marry Souad. Souad returned to the United States on February 24, 1983. Ahmed and Souad were married in a Muslim ceremony on that same day. This was an arranged marriage and did not involve a courtship.

Shortly after the religious ceremony, Souad learned that Ahmed was still married to another woman. The divorce proceedings between Ahmed and his first wife were still pending. Ahmed and Souad continued to live together and on December 10, 1983, their son, Mujahid, was born. Shortly after the birth of Mujahid, Ahmed's first marriage was dissolved. On January 9, 1984, Ahmed and Souad were married in a civil ceremony.

Their marriage went smoothly through 1985. At that time, Ahmed learned of his mother's death and returned to Jordan for approximately four months. After Ahmed returned, his marriage with Souad deteriorated.

On November 11, 1986, Ahmed physically assaulted Souad until she was compelled to flee and contact the police. She was taken to the hospital for treatment. The police suggested that Souad find a safe place to stay and she went to a shelter for battered women in Ames. On that same night, Ahmed was arrested and charged with assault. He was released on bail a short time later. The police told Ahmed where Mujahid was located. At that time, Ahmed found Mujahid and took custody of him. Souad has not seen Mujahid since the night of the assault. Ahmed was later convicted of assault in a jury trial.

Within seven days of the assault, on November 18, 1986, Souad filed a petition for dissolution of marriage. A hearing for temporary custody of Mujahid was set for November 21, 1986. On November 20, Ahmed moved to continue the temporary custody hearing until November 26. He asked for this extra time so that his attorney could better prepare for the hearing. Ahmed also claimed to need additional time 137*137 because he was unable to attend school and provide care for Mujahid. The motion stated that the continuance would not significantly prejudice Souad's interests. Ahmed made airline reservations for Mujahid to fly to Jordan on the same day that he moved to continue the tem-

porary custody hearing. On November 22, within two weeks of the assault on Souad, Ahmed put three-year-old Mujahid on a plane bound for Jordan.

Mujahid remains in Jordan and is being cared for by Ahmed's sister. Ahmed remained in Ames and attended Iowa State University. He anticipated graduation from the College of Engineering in May of 1988.

Following a hearing, the court entered a temporary custody order on February 10, 1987, which provided that Mujahid be placed in Souad's care during the pendency of the dissolution action. Ahmed was granted reasonable rights of visitation. The court also ordered Ahmed to return Mujahid to Iowa by February 23, 1987. On March 16, Ahmed was found to be in contempt and was given until April 6, 1987, to purge himself. A consent order was entered on May 20, 1987, which allowed Ahmed to travel to Jordan to bring Mujahid back to Souad's custody by June 22, 1987. Both parties signed the consent order. Ahmed returned to Iowa on July 27, 1987, without Mujahid. Ahmed stayed with his father and Mujahid for three weeks. According to Ahmed, his father had control of Mujahid's passport and would not allow the child to be returned to the United States. Ahmed did not attempt to obtain a duplicate passport from the United States Embassy nor did he seek assistance from the Jordanian government.

A contempt hearing was held on August 13, 1987. The purpose of this hearing was to determine whether Ahmed was in contempt for failing to comply with the temporary custody order of February 10, 1987, and the consent order of May 20, 1987. The court held on September 23, 1987, that Ahmed was not in contempt and stated:

While the failure to return Mujahid may have been accomplished by design on Ahmed's part, this court cannot draw this conclusion beyond a reasonable doubt.

The application for rule to show cause was denied.

The marriage of Ahmed and Souad was dissolved on November 4, 1987. Souad was awarded sole custody of Mujahid and Ahmed was granted reasonable rights of visitation. Ahmed was to pay alimony and child support totaling $300 per month. The dissolution decree also ordered Ahmed to arrange for the return of Mujahid by December 1, 1987, and provided that Ahmed would be subject to arrest if Mujahid was not returned.

On November 19, Ahmed contacted Souad's counsel and asked for her cooperation in turning this matter over to a committee of Islamic scholars. Ahmed stated that his father would have no regard for an order from a court within the United States, but would be bound by the opinion of Islamic religious leaders. Souad's counsel declined to participate in this strategy.

On November 30 Ahmed filed a petition for writ of certiorari and obtained a stay order. We remanded this matter to the district court for a hearing to provide Ahmed with the opportunity "to advance any excuses he might have for his failure to obey the court's order for the return of his infant son."

A contempt hearing was held on January 14 and 15, 1988. Ahmed testified he had talked with his father after receiving the dissolution decree. His request that Mujahid be returned to Souad was denied. He believed his father would accept a custody decision by a panel of Islamic scholars. Mr. Jamal Said, an Islamic scholar, testified he had previously talked with Ahmed about custody of Mujahid. He believed if he wrote a letter to Ahmed's father advising him the three-year-old son should be in the custody of his mother under **Islamic law**, then Ahmed's father would comply. The court then continued the contempt hearing two weeks so that the letter could be sent to Ahmed's father.

Ahmed made arrangements for Mr. Said to render a written opinion to Ahmed's father. Mr. Said's letter stated in part:

138*138 So I promised them [the court] to write you a letter kindly requesting from you to send the son of Ahmad [sic] Amro to America. And I assure you that the child will not be turned into his mother till she accepts to abide by the Islamic Laws regarding this matter. And the first of these laws is to withdraw this case totally from the American Judicial System, because as it is known according to the **Islamic Law**, it is not allowed for a Muslim to seek judgment from any Non-**Islamic law** in cases like this case. And after she withdraws the case, her child will be turned into her, if God wills, through her acceptance to abide by the Islamic Laws before Scholars in the Islmic [sic] Jurisprudence.

At no time was the court ever informed of Mr. Said's intentions of removing this case from the Iowa Judicial System and obtaining Souad's consent to submit to **Islamic law**. When Ahmed's father received this letter, he became enraged and stated he would only consider opinions of Islamic scholars from Jordan.

Following the hearing on January 29, the district court entered its February 4 remand ruling which found Ahmed to be in contempt for willful failure to comply with or to make reasonable efforts to comply with the terms of the dissolution decree. Ahmed was ordered to be incarcerated until Mujahid was returned to Story County. On February 5, Ahmed filed a petition for writ of certiorari and request for emergency stay order. We granted the emergency stay order and set the date for consideration of the petition of writ of certiorari for February 15. On March 2, a writ of certiorari was issued and the temporary stay order was nullified. Ahmed was incarcerated on March 9, 1988.

II. *Issues.*

Ahmed raises three issues in the petition for writ of certiorari. First, he claims that the district court erred in applying Iowa Code section 665.5 (1987) rather than Iowa Code section 598.23(1) (1987). Ahmed further challenges the findings of contempt as precluded by the doctrines of res judicata, issue preclusion, and double jeopardy. Finally, Ahmed asserts that there was insufficient evidence to establish that he was in contempt of court beyond a reasonable doubt.

These issues are properly considered in a certiorari proceeding. A writ of certiorari shall be granted when a court exceeds its proper jurisdiction or otherwise acts illegally. Iowa R.Civ.P. 306. Illegality exists when the findings of the court do not have substantial evidentiary support, *see Fetters v. Degnan,* 250 N.W.2d 25, 27 (Iowa 1977), or when the tribunal does not apply the proper law, *see Hightower v. Peterson,* 235 N.W.2d 313, 317 (Iowa 1975).

III. *Religious Involvement.*

There has been a great deal of evidence presented throughout this dispute concerning the Muslim religion. This evidence was introduced in an attempt to establish a role for Islamic religious leaders (Islamic scholars) in the return of Mujahid to this jurisdiction. Before we examine the legal issues presented in this case, it will be necessary to determine the proper role in our decision making process for evidence concerning the Muslim religion.

This court may not prescribe what shall be orthodox in any religion or religious culture. *See West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 637, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628, 1637 (1943); *Lynch v. Uhlenhopp,* 248 Iowa 68, 82-83, 78 N.W.2d 491, 500 (1956). It would be contrary to this legal standard to place this matter in the hands of Islamic scholars. While Ahmed has the ability to use his contacts in the religious community, we will not allow jurisdiction of this matter to be removed from this judicial system and given to a committee of Islamic scholars.

IV. *Use of Iowa Code Section 665.5.*

The district court ordered the incarceration of Ahmed under Iowa Code section 665.5 (1987). That section provides:

If the contempt consists in an omission to perform an act which is yet in the 139*139 power of the person to perform, the person may be imprisoned until the person performs it. In that case the act to be performed must be specified in the warrant of commitment.

Ahmed contends that Iowa Code section 598.23(1) (1987) was the applicable Code provision and it was error for the court to use section 665.5. Iowa Code section 598.23(1) provides:

If a person against whom a temporary order or final decree has been entered willfully disobeys the order or decree, the person may be cited and punished by the court for contempt and be committed to the county jail for a period of time not to exceed thirty days for each offense.

Ahmed offers *Skinner v. Ruigh,* 351 N.W. 2d 182, 184 (Iowa 1984), as support for his position. *Skinner* held that section 598.23(1) provided the penalty for contempt in dissolution cases. *See id.* Because this is a dissolution case, Ahmed contends that his penalty is limited to thirty days of incarceration for his act of contempt, which was removing Mujahid from this jurisdiction. In order to merits of this claim, it will be necessary to review the court's authority to incarcerate an individual found to be in contempt.

A review of Iowa Code chapter 665 reveals two distinct situations in which a court is authorized to incarcerate a contemner. *Compare* Iowa Code § 665.4 (1987) *with* Iowa Code § 665.5 (1987). Section 665.4 authorizes specific periods of incarceration as punishment for past acts of contempt. Section 665.5, on the other hand, authorizes incarceration to forcefully coerce compliance with a court order. *See State v. Longstreet,* 407 N.W.2d 591, 593 (Iowa 1987); *Phillips v. Iowa Dist. Court,* 380 N.W.2d 706, 709 (Iowa 1986); *Wilson v. Fenton,* 312 N.W.2d 524, 528-29 (Iowa 1981); *cf. Hicks ex rel. Feiock v. Feiock,* ___ U.S. ___, 108 S.Ct. 1423, 1429-30, 99 L.Ed.2d 721, 731-33 (1988); *Shillitani v. United States,* 384 U.S. 364, 370, 86 S.Ct. 1531, 1535-36, 16 L.Ed.2d 622, 627-28 (1966). Incarceration for a past act of contempt is punitive when there is no action available to the contemner which can effect release.

Skinner v. Ruigh, 351 N.W.2d 182, 184 (Iowa 1984), stated that chapter 665 provides the procedural framework in a dissolution case. When the provisions of chapter 665 are compared with chapter 598, it becomes apparent that the specific penalty provisions of section 665.4 have a counterpart in section 598.23. Section 665.5, which authorizes incarceration in order to compel performance, does not have a counterpart in chapter 598. *Skinner* involved a past act of contempt and did not limit the ability of the court in dissolution cases to use incarceration as a method to compel an unwilling individual to comply with a court order. To adopt Ahmed's interpretation of *Skinner* would relegate the court to the position of a helpless bystander in many extreme instances of contempt. Unless the court is allowed to enforce a custody award through the use of its contempt powers, a custody award could be meaningless and the child's best interest would be unprotected.

Our interpretation is supported by previous Iowa cases. *McNabb v. Osmundson,* 315 N.W.2d 9, 14-15 (Iowa 1982), stated that Iowa Code section 598.23 is intended to be primarily punitive in nature, and is only indirectly coercive. *See also* Iowa Code § 598.22 (1987) ("the court may act pursuant to section 598.23 regardless of whether the amounts in default are paid prior to the contempt hearing."); *Ogden v. Iowa Dist. Court,* 309 N.W.2d 401 (Iowa 1981) (per curiam). Because the court's contempt order expressly provided for Ahmed's release upon compliance, and did not impose a fine

or fixed period of incarceration, it was coercive, not punitive in nature. The provisions of section 598.23 were not applicable.

V. *Issue Preclusion, Res Judicata, and Double Jeopardy.*

Ahmed contends that the contempt order of February 1988 is barred by the doctrines of issue preclusion and res judicata. He also asserts that this hearing constitutes double jeopardy. The basis of each of 140*140 these challenges is a claim that the contempt hearing in August of 1987 addressed the identical issues as the hearing conducted in February 1988.

For issue preclusion or res judicata to apply, the issue that is litigated must be identical to the issue raised in the previous action. *See Hunter v. City of Des Moines,* 300 N.W.2d 121, 123 (Iowa 1981); *In re Marriage of Kurtz,* 199 N.W.2d 312, 315 (Iowa 1972). Even assuming former jeopardy principles apply, they were not violated in this case. *See State v. Stewart,* 223 N.W.2d 250, 251 (Iowa 1974), *cert. denied,* 423 U.S. 902, 96 S.Ct. 205, 46 L.Ed.2d 134 (1975); *see also United States v. Halbrook,* 36 F.Supp. 345, 347 (E.D.Mo.1941) ("Before a defendant may successfully interpose a plea of double jeopardy, it is necessary that there be an identity of offenses.").

The issue addressed in January 1988 was not identical to the issue addressed in August of 1987. In August, the issue was whether Ahmed was in contempt for failing to comply with the temporary custody order of February 10, 1987, and the consent order of May 20, 1987. The January 1988 contempt hearing addressed Ahmed's failure to comply with or to make reasonable efforts to comply with the dissolution decree of November 4, 1987. The finding of contempt in February 1988 dealt with a court order and many facts that were not in existence in August 1987. Because the hearings involved facts and issues that were not identical, issue preclusion, res judicata, and double jeopardy do not prevent the enforcement of the February 1988 order.

This holding does not conflict with *Clark v. Glanton,* 370 N.W.2d 606, 608 (Iowa App.1985). In *Clark,* the court of appeals applied issue preclusion to a finding of contempt. The court of appeals stated that "time was not an issue in either contempt action." *Id.* Here, the passage of time and the events that occurred after the final decree was entered are at the center of the controversy.

VI. *Sufficiency of Evidence to Establish Contempt.*

An action for contempt of court is treated in the nature of a criminal proceeding. *See Phillips v. Iowa Dist. Court,* 380 N.W.2d 706, 708-09 (Iowa 1986). No person may be punished for contempt unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt. *See id.* Contempt is sufficiently shown if some of the default was willful. *See Skinner v. Ruigh,* 351 N.W.2d 182, 186 (Iowa 1984). In this context, a finding of willful disobedience

requires evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not.

Lutz v. Darbyshire, 297 N.W.2d 349, 353 (Iowa 1980). Furthermore, because certiorari is an action at law, our review is at law and not de novo. *See Johnson v. Iowa Dist. Court,* 385 N.W.2d 562, 564 (Iowa 1986).

A review of the record demonstrates that the trial court's finding of willful contempt is supported by substantial evidence. Since Ahmed's assault on Souad and his initial manipulation of the courts in order to remove Mujahid to Jordan, Ahmed's attempts to return Mujahid have been half-hearted. This attitude is demonstrated by his failure to contact the Jordanian government or attempt to obtain a duplicate passport.

The credibility of Ahmed's testimony is further weakened by a consistent failure to be forthright. For example, Ahmed denied assaulting Souad, even though he had been convicted of the assault. Ahmed has also offered several conflicting versions of his reasons for sending Mujahid to Jordan. He was also less than truthful when he explained the proposed letter of Mr. Jamal Said. Ahmed did not mention that a condition of Mujahid's return would be the withdrawal of this case from the American judicial system or Souad's acceptance of **Islamic law** in settling this matter.

141*141 On several occasions the district court made very clear reference to its belief that Ahmed was lying. In the order dated February 4, 1987, the district court stated:

Mr. Amro was able to take Mujahid to Jordan because he lied to the Court as to what his true intentions were when he falsely promised that he would take no action which was prejudicial to the rights [of] Souad. Subsequently he has given three differing versions of his intent, none of which included an admission that he lied. He has an arrangement in Jordan where he can be with his son any time he chooses to be. His son is in the care of his sister and his wife to be. He would suggest that his 89-year old father is so powerful and sophisticated that he requires opinions from committees of religious scholars before he takes action. The court does not believe that aspect of his testimony. This is a situation that Mr. Amro has engineered to try to justify the situation that he intentionally created and which has continued up to this date. He fails to even make an effort to enlist the aid of the Jordanian authorities who could effect a change if his version of the facts were correct. Instead Mr. Amro attempts to get the Court and the petitioner to agree that the custody issue should be redetermined by Islamic scholars and then be enforced if his aged father agrees to comply. This is a sham and subterfuge which Mr. Amro engages in for the purpose of trying to get the Court to overlook his contemptuous, willful non-compliance with its order.

We agree with the district court. The contumacious action by Ahmed has been established beyond a reasonable doubt.

VII. *Period of Incarceration and Disposition.*

After establishing that Ahmed is in contempt, we must consider whether it is appropriate for Ahmed to be incarcerated. As discussed earlier, Ahmed's sentence is designed to coerce him into effecting the return of Mujahid. Ahmed will be released once he has purged himself of contempt. This was not an unconditional sentence for a definite period of time. When incarceration is used to coerce, we do not look to the statutory limits of Iowa Code sections 598.23 or 665.4. Instead, we consider whether the contemner carries "the keys of their prison in their own pockets." *Shillitani v. United States,* 384 U.S. 364, 368, 86 S.Ct. 1531, 1534, 16 L.Ed.2d 622, 626 (1966); *see also McNabb v. Osmundson,* 315 N.W.2d 9, 15 (1982). If Ahmed is without any opportunity to take reasonable actions to obtain his release, then his incarceration until he has complied, is inappropriate. When the incarceration is used to coerce, the contemner has the burden of showing the inability to comply with the court order. *See Lamb v. Eads,* 346 N.W.2d 830, 832 (Iowa 1984) ("The contemner then has the burden of showing he could not perform the duty, if he relies on that ground."); *see also Wilson v. Fenton,* 312 N.W.2d 524, 527 (Iowa 1981) ("the alleged contemnor has the burden of proof on a defense of inability to comply"); *Foust v. Denato,* 175 N.W.2d 403, 405 (Iowa 1970) ("when the evidence clearly shows the order of court has been disobeyed, a party who seeks to purge himself of contempt by showing his inability to comply with the order of court has the burden to prove it").

The evidence reflects several courses of action that Ahmed has not fully attempted, such as obtaining a duplicate passport and attempting to work with the Jordanian government. At this point, Ahmed has not made every reasonable effort at his disposal to return Mujahid. We recognize the possibility that Ahmed may eventually exhaust his courses of action and remain unsuccessful in returning Mujahid to the United States. At this time, however, we are not faced with that question. That question will not arise until Ahmed has exhausted all reasonable courses of action in his effort to return Mujahid to his mother. We are satisfied that there are reasonable courses of action available to Ahmed to comply with the court's order. The district court did not exceed its proper jurisdiction or otherwise act illegally.

WRIT ANNULLED.

CATEGORY: Child Custody

RATING: Relevant

TRIAL: TCSY

APPEAL: ACSNA

COUNTRY: Jordan

URL:
http://scholar.google.com/scholar_case?case=12163430433237070782&q=sharia&hl=en&as_sdt=217b00004

UPON THE PETITION OF MANAL HUSEIN MAKHLOUF, PETITIONER-APPELLANT, AND CONCERNING AHMAD MOHAMMED AL-ZOUBI, RESPONDENT-APPELLEE.

No. 4-701/04-0906

Court of Appeals of Iowa.

Filed January 26, 2005

Enrene Van Tonder, Cedar Rapids, for appellant.

Philip Burian of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, for appellee.

Heard by Huitink, P.J., and Mahan, Miller and Vaitheswaran, JJ., and Snell, S.J.[*]

SNELL, S.J.

This case arrives to us from a plethora of litigation too long to mention. The parties have sought support from the judicial system of two nations and spent years to vindicate their claims. We trust following our opinion they will move to end their stalemates.

I. Background Facts and Proceedings.

The litigation controls the custody of the parties' child, Samantha, a citizen of the United States, being born in El Paso, Texas on December 1, 1996 and a citizen of Jordan, through her parents. Her father Ahmad Mohammad Al-Zoubi is a citizen of Jordan. Her mother, Manal Husein Makhlouf, is

also a citizen of Jordan. The parents divorced in Jordan on March 26, 1998 without addressing the issue of custody. Rightly or wrongly for most of her life, Samantha has been in the physical custody of her mother, Manal.

Now we are reviewing the order of the Linn County, Iowa District Court dated May 27, 2004. That ruling examined several issues of fact and law coming from the sites of Jordan and Iowa, and held that the Iowa court would decline to exercise jurisdiction and deferred to the nation of Jordan for further resolution. Upon review by our court, we affirm.

Jordan has not been somnolent in this matter. The Jordanian Court exercised jurisdiction of the parties in 1998, granting a divorce. Between 1997 and March 2000, Manal sought and obtained an order for child support and spousal support from the court of Western Amman, Jordan. Later, she sought and got an order from the court of Bani Kenanah, Jordan, adjusting the support amounts.

In March 2000 Manal moved to Cedar Rapids, Iowa where she met and married Thamer Al-Tall, her current husband. Their families had arranged the marriage which took place in Jordan. Manal did not inform Ahmad of her move to the United States. Manal took Samantha with her to Cedar Rapids. Samantha has resided with her mother and, since Manal's new marriage, with Thamer, throughout her life. Manal did not tell Samantha that her father was Ahmad and encouraged Samantha to believe that Thamer was her father.

In August of 2000 Ahmad commenced litigation in the Bani Kenanah Court for custody of Samantha. He had previously sought visitation in the Jordanian courts. Manal continued to receive support from Ahmad under the Jordanian Court order. Manal received notice of Ahmad's custody action, appeared by counsel and contested the custody litigation. The Jordanian Court awarded Samantha's custody to Manal on April 9, 2001. However, that order was reversed by the **Sharia** Court of Appeals. On July 17, 2001, that court held that the lower court had not been told that Manal had remarried and thereby lost the right to Samantha's custody. Manal received notice of the appeal but did not participate in the appeal. She does complain that Ahmad did not inform the appeals court that Manal's mother was willing to assume custody. The **Sharia** Court of Appeals entered an order granting Ahmad custody of Samantha.

While the Jordanian custody action commenced by Ahmad in August 2000 was pending, Manal commenced her own action on February 2001, in Iowa District Court. She sought child custody, visitation and support. She represented, under oath, that "from February 1997 until January 2000, the minor child lived at various addresses in El Paso, Texas . . . . " This misrepresentation covered the fact that during this period they lived in Jordan excepting at most ten months cumulative in El Paso. Manal also represented in her verified petition that there were no other court proceedings relating to the custody and support of Samantha, that she had never been a party or witness to previ-

ous proceedings relating to Samantha, that she was eligible for U.S. citizenship, and that Samantha had spent most of her life in the United States. She apparently misled her attorneys on all of these matters which were false. Manal makes no claim that her attorneys were at fault.

Manal also represented that she did not know the whereabouts of Ahmad when filing the Iowa action. She stated again under oath, that Ahmad was an American citizen living in one of four states (Texas, Georgia, Alabama or Oklahoma). The file history of the case shows that Manal knew Ahmad's address, that he was not a citizen of the United States and that he did not live in the United States when she filed her petition on February 19, 2001. Based on Manal's representations, which were false, the court authorized service by publication. Ahmad did not know of the Iowa custody proceeding.

The Iowa District Court found Ahmad in default for failing to appear, and granted custody of Samantha to Manal on June 12, 2001. During this period, Ahmad was searching for Samantha. When he finally found out that Samantha was in Cedar Rapids, Iowa, he challenged the validity of the custody order. On October 21, 2002, after a court hearing through which the foregoing came to light, the Iowa District Court vacated the June 12, 2001 custody order.

While these proceedings were going on in Iowa, a third party entered the picture. Manal's mother, Fawzieh Ibrahim, started a separate case in Jordan, seeking to obtain custody of Samantha. She got an order dated February 27, 2002 from the Northern Irbid Court in Jordan giving her custody of Samantha. Manal did not participate in that litigation.

After a contested hearing, on August 28, 2003, the Iowa District Court registered the Jordanian **Sharia** Court of Appeals ruling of July 17, 2001, pursuant to Iowa Code section 598B.305 (2003). The court also dismissed Manal's petition for child custody, visitation and child support with prejudice.

Since the August 28, 2003 ruling Ahmad has sought to enforce the Jordanian decree. Manal has resisted his efforts. In a ruling filed December 31, 2003, the Iowa District Court exercised temporary emergency jurisdiction under Iowa Code section 598B.204 and directed the parties to adopt a transition plan to transfer Samantha's custody to Ahmad. The transfer was to have been accomplished on or before June 15, 2004. Following up on this, on February 2, 2004, the court entered an order stipulated by the parties that Ahmad should take full custody of Samantha no later than 9:00 a.m., June 14, 2004.

On March 17, 2004 Manal filed her application to modify custody. She asked the Iowa court to readdress the matter of custody, modify the registered Jordanian decree and award her Samantha's custody. Ahmad moved to dismiss Manal's application; the court granted the motion.

II. Standard of Review.

Our standard of review of this matter is de novo. *In re Marriage of Cervetti,* 497 N.W.2d 897, 899 (Iowa 1993).

III. Other Facts.

Adding to the difficulties in resolving this case, Manal obstructed all attempts to have an orderly transfer of custody to Ahmad. The court appointed Susan Schmitz, a child counselor, to prepare Samantha to meet her father. Over a period of nine months Manal refused to take Samantha for regular visits with Susan Schmitz. She engaged in negative coaching against Ahmad which exacerbated the trauma experienced by Samantha. Manal's conduct got so bad the district court found her in contempt and sentenced her to five days in jail. She was allowed to purge herself.

Other reprehensible conduct occurred when an attorney for Manal's mother (Fawzieh) appeared in Amman to obtain an order enforcing Fawzieh's order granting her custody. That order had been vacated two months earlier, on April 28, 2003 when the Irbid Court ordered that Ahmad's Jordanian decree be enforced immediately. The Jordanian Minister of Justice requested the Minister of the Interior to assist in its enforcement. As a direct result of Fawzieh's deceit and meddling, Ahmad was arrested but released quickly when the Amman Court learned the truth. The Iowa District Court entered "clarified Findings of Fact" so that Fawzieh could not cause more problems for Ahmad.

IV. The Controlling Law.

A. Jurisdiction.

We are applying the law as found in the "Uniform Child-Custody Jurisdiction Enforcement" statutes of Iowa Code chapter 598B. Article I applies to all states of the United States. Iowa Code § 598B.102(15). International application is supplied as follows: "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 article and Article II." Iowa Code § 598B.105(1). Article II concerns jurisdiction. Thus, the country of Jordan is treated by this law the same as a state of the United States.

The Iowa District Court applied section 598B.204 to obtain emergency jurisdiction. Section 598B.204(1) states:

A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

The child, Samantha, through the conduct of her mother, Manal, whether from malicious or misguided intentions, has for years been deprived of parenting by her father. Manal has prevented visitation and custody with her father authorized by a duly constituted court of law both in Jordan and Iowa. These acts of Manal subjected both Samantha and her father, Ahmad, to mistreatment and abuse within the meaning of the statute. We affirm the district court's invoking of emergency jurisdiction.

B. Statutory Law.

Counsel for the parties have thoroughly briefed and argued many legal issues involving procedure, jurisdiction, authority of the court, finality of rulings, timeliness of appeals, collateral attacks, law of the case, estoppel and related matters. Though not countless, these law questions are expansive. We have carefully examined all of them. Our decision focuses on one issue, however, and we find it determinative. Section 598B.208 provides the law controlling this case. Paragraph 1 of that section states:

Except as otherwise provided in section 598B.204 or by any other law of this state, if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless any of the following applies:

Iowa Code § 598.208(1).

Three exceptions are listed none of which is relevant. Case authorities supporting this principle of law may be found in *O'Neal v. O'Neal,* 329 N.W.2d 666, 669 (Iowa 1983); *Hosain v. Malik,* 671 A.2d 988, 991 (Md. Ct. Spec. App. 1996); *In re S.L.P.,* 123 S.W.3d 685, 689-90 (Tex. App. 2003).

Manal has blatantly engaged in unjustifiable conduct throughout the proceedings in Jordan and Iowa. In addition to those matters listed above, Manal refused to tell Samantha that Ahmad is her father and continued the ruse that her current husband is the father. The truth was finally revealed to Samantha by her counselor Susan Schmitz.

In her verified petition for custody filed on February 19, 2001, in the Iowa District Court, Manal claimed she was eligible for United States citizenship. When she applied on March 11, 2002 for naturalization, she was found to be ineligible because she was gone from the United States for more than thirty months within the prior five year period.

Manal's conduct shows a pattern of lies and deception consistently pervasive. She has exhibited contempt for the rule of law, be it in Jordan or Iowa. Based on the authority of Iowa Code section 598B.208, we affirm the decision of the district court declining to exercise its jurisdiction and grant-

ing respondent Ahmad's motion to dismiss the petitioner Manal's application to modify the custody decision placing Samantha's custody with Ahmad.

The district court also ordered the transfer of custody to progress in accordance with the court's order of February 2, 2004. We affirm this order. Even when jurisdiction is declined, the court is empowered to fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct. Iowa Code § 598B.208(2). This has been done by the district court which shall now continue to issue appropriate orders until its orders are carried out to completion.

V. Cross-Appeal.

Ahmad has cross-appealed asking that attorney fees and costs incurred by Ahmad be assessed against Manal. The district court denied this request.

Assessment of these fees and costs is reviewed for an abuse of discretion standard. *In re Marriage of Romanelli,* 570 N.W.2d 761, 765 (Iowa 1997). In general, the assessment of attorney fees and costs rests with the sound discretion of the trial court. *Id.* However, the legislative enactment of section 598B.208(3) has removed much of the court's discretion in these types of cases. Section 598B.208(3) states that:

If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection 1, it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses, and child care expenses during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate.

The trial court did not address this section in its decision.

The fees and expenses incurred by Ahmad that are requested are only those occurring after February 2, 2004, the date of the district court's order, that was stipulated to by the parties, and which granted full custody of Samantha to Ahmad. Fees and expenses incurred by Ahmad before that date are not requested.

For background, however, expenses incurred prior to February 2, 2004 are shown by Ahmad's affidavit signed on January 13, 2004. It states, in summary, that since finding Samantha in Cedar Rapids on December 19, 2001, he has incurred the following expenses:

A. Because of Manal's refusal to comply with discovery rules, court orders, consent to visitation, refusal to mediate or even talk to Ahmad, legal research was required for which Ahmad paid Iowa attorneys $33,500 and $5,000 more is owed.

B. He has flown to Iowa eight times, costing $21,120 in airplane expense and car rental expense.

C. He has paid $2,000 in counseling bills for Samantha ordered by the court because Manal lied to her about her father all her life.

D. Unlisted expenses include those incurred searching for Samantha prior to finding her December 19, 2001, and phone call and fax costs, food and lodging while in Iowa.

E. He has paid $5,000 in attorney fees for Jordan attorneys in cases heard there.

F. Ahmad is a math teacher at King Fahd University of Petroleum and Minerals. He has spent his life savings on this case and became heavily indebted.

Ahmad's counsel has submitted a detailed report of legal work done on this case from February 4, 2004 through October 12, 2004. Legal work done on each day charged is itemized by the hours worked or parts thereof, the rate charged and an explanation of the legal work accomplished. Much of it was in addition to normal appellate work, necessitated by more filings and hearings caused by Manal. These included transfer of custody, a stay of transfer, new jurisdictional issues, an emergency stay application to the supreme court, a claim of human rights violations in Jordan that impacted the case (later withdrawn) and an effort to delay the appeal by asking for an extension to ask the district court to prepare a summary of facts rather than submit the evidence to the supreme court.

We have carefully examined the submission listing attorney work by Ahmad's counsel as to time spent, rate charged, and nature of the work. The time spent over an eight month period is 321.70 hours, at the rate of $120 per hour amounting to $29,254.50 for attorney fees. An additional expense of $1,283.58 was incurred in the direct cost of computer research, transcript of evidence costs for hearings and other exhibits and transcript costs.

This was an unusual case that resulted in an extraordinary amount of legal work, given the international aspect of the parties' backgrounds and the intricate use of the world's legal system by Manal. We find the above listing of fees and expenses to be reasonable and necessary. They are all assessed against Manal to be paid to Ahmad in the amount of $29,254.50.

Manal has submitted an affidavit in forma pauperis which we have duly considered. This claim does not alter our decision, however, since we are ruling on the present state of the record and applicable law. Collectability depends on future circumstances which we do not attempt to foresee.

The district court shall enter such further orders as are necessary to conform with this opinion.

Court costs are assessed against petitioner Manal.

AFFIRMED ON APPEAL; REVERSED AND REMANDED ON CROSS-APPEAL.

[*] Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2003).

LOUISIANA

CATEGORY: Child Custody

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: Egypt/Lebanon

URL: http://scholar.google.com/scholar_case?case=4590415366527786188&q=Muslim+OR+Islam+OR+Islamic+OR+Sharia&hl=en&as_sdt=4,19

798 So.2d 75 (2001)

MAGDA SOBHY AHMED AMIN V. ABDELRAHMAN SAYED BAKHATY.

No. 2001-C-1967.

Supreme Court of Louisiana.

October 16, 2001.

77*77 Randy J. Fuerst, Lake Charles, Stephen M. Irving, Baton Rouge, Counsel for Applicant.

Jack M. Dampf, Gregory P. Aycock, Baton Rouge, Counsel for Respondent.

TRAYLOR, J.[*]

We granted a writ of certiorari to determine whether a Louisiana court may exercise jurisdiction to determine custody and support for an Egyptian child, when the Egyptian father is a naturalized United States citizen, with his primary residence in New Jersey, and the Egyptian mother presently resides in Baton Rouge, Louisiana. We conclude that the lower courts properly determined jurisdiction under both the Uniform Child Custody Jurisdiction Act (UCCJA), La.Rev.Stat. § 13:1700 *et seq.,* and traditional notions of personal jurisdiction in the circumstances surrounding this case. Ac-

cordingly, we affirm the judgment of the court of appeal and remand to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Magda Amin, and defendant, Abdelrahman Bakhaty, were married on November 21, 1991 in Egypt. Ms. Amin is an Egyptian national, currently residing in 78*78 Baton Rouge, Louisiana. Dr. Bakhaty holds dual citizenship[2] in the United States and Egypt, with homes in New Jersey and Egypt. One child, Ahmed, was born of the marriage between Dr. Bakhaty and Ms. Amin on August 23, 1992 in Egypt. Ahmed has resided with his mother since his birth.

During the marriage, Ms. Amin lived with her father in Egypt, while Dr. Bakhaty spent the majority of his time in New Jersey, where he maintains a medical practice in anesthesiology. Dr. Bakhaty would visit Egypt at most six times a year, for a week to ten days at a time. When he would visit Egypt, he stayed in a hotel or at his mother's home.[3]

In early December 1998, prior to any litigation being instituted by either party, Ms. Amin traveled from Egypt to the United States with her son, Ahmed. She went first to New York and then came to Baton Rouge, Louisiana, where her sisters live. When Ms. Amin arrived in the United States, she repeatedly contacted Dr. Bakhaty by telephone. Based on their telephone conversations, Ms. Amin believed that Dr. Bakhaty was going to come meet her in Baton Rouge, so, thereafter, she searched for an apartment in Baton Rouge for them to reside. However, Dr. Bakhaty never came to meet his wife in Baton Rouge; instead he flew to Egypt to investigate how Ms. Amin accomplished her departure from Egypt. Several days later, Ms. Amin's father contacted her to inform her that Dr. Bakhaty brought criminal charges against her in Egypt for removing the minor child from Egypt without his permission, and for fraud in her procurement of Ahmed's Egyptian passport.[4] She has since been convicted in Egypt for these alleged crimes.[5]

On January 7, 1999, Ms. Amin filed suit against Dr. Bakhaty in East Baton Rouge Parish Family Court, seeking a divorce, sole custody of Ahmed, and child support. The petition stated that Dr. Bakhaty was a United States citizen domiciled in New Jersey, he had abandoned the marriage and refused to support her and the child, and the parties had been physically separated since June 1998. On January 8, 1999, Dr. Bakhaty obtained a Certificate of Divorce in Egypt. Two days later, he filed for a declaratory judgment of permanent custody of the minor child in Egypt.

Subsequently, on May 28, 1999, Dr. Bakhaty filed a Petition for Civil Warrant in East Baton Rouge Parish Family Court seeking to obtain physical custody of Ahmed.[6] In his petition, he claimed that he was a citizen of Egypt; that he had not given approval for his spouse and minor 79*79 child to validly obtain travel documents,[7] which is required by Egyptian law; and that he had no advance notice of her plans. In support of his claim for custody of Ahmed, he stated that under Egyptian law,

both the temporary guardianship and physical custody of Ahmed were exclusively with him, and that an order to confirm his custody was pending before the Egyptian court. Alternatively, Dr. Bakhaty requested that the trial court place the child in the care of the Department of Health and Human Resources, pending a hearing on a Writ of Habeas Corpus. In fact, there was no award of custody to Dr. Bakhaty by any court when the Petition for Civil Warrant was filed.

On June 1, 1999, all matters pertaining to the Petition for Civil Warrant were stayed, and both parties were prohibited from removing the minor child from the trial court's jurisdiction. The parties surrendered their passports, and those of the child, to the court.

On June 15, 1999, Dr. Bakhaty filed exceptions to Ms. Amin's petition alleging lack of subject matter jurisdiction, lack of personal jurisdiction, insufficiency of service of process, lis pendens, and res judicata based on the Egyptian proceedings. On November 23, 1999, Ms. Amin filed a second petition, requesting sole custody of Ahmed and admitting that she and Dr. Bakhaty had been divorced on January 8, 1999, in Cairo, Egypt. She also requested child support, retroactive to the date of her initial petition, and periodic support for herself until she could find employment.

The trial court held a hearing on Dr. Bakhaty's exceptions on March 9, 2000. At that hearing, the parties testified along with two experts offered by Dr. Bakhaty. Ms. Patricia Aby testified as an expert on **Islamic** law relating to international child custody disputes and the application of the UCCJA. Mark Lazarre testified as an expert on procedures for immigration and naturalization. In addition, the parties submitted numerous documents to the court, including Egyptian documents in Arabic with translations. At that hearing, the court orally granted Dr. Bakhaty's exception of res judicata based on the parties' stipulation that the Egyptian divorce was final.

Without ruling on the remaining exceptions, the trial court held a subsequent hearing on May 30, 2000, to determine provisional custody and support. In a judgment dated June 20, 2000, the trial judge denied Dr. Bakhaty's exceptions, and granted interim custody to Ms. Amin, fixed child support in the amount of $850 per month, ordered Dr. Bakhaty to provide medical coverage for Ahmed, and ordered that Ahmed's residence remain in East Baton Rouge Parish pending further custody and support proceedings.[8]

In written reasons for judgment, the trial court declined to treat Egypt as a "state" under the UCCJA, finding that determination to be a discretionary one. Rather, the trial court asserted subject matter jurisdiction on the fourth delineated ground of residual jurisdiction, i.e., that no other state could maintain jurisdiction, and it would be in Ahmed's best interest for the Louisiana court to assume jurisdiction. 80*80 *See* La.Rev.Stat. § 13:1702(A)(4). While acknowledging that Ms. Amin's departure from Egypt occurred under "questionable" circumstances, the trial court rejected Dr. Bakhaty's

argument that the behavior rose to the level of reprehensible conduct sufficient to decline jurisdiction under the UCCJA.

On personal jurisdiction, the trial court reasoned that Dr. Bakhaty's Petition for Civil Warrant was an act by which he purposefully availed himself of the privilege of conducting activities within Louisiana. Regarding service of process, the trial court concluded that Dr. Bakhaty had adequate notice of the pending custody proceeding as evidenced by his actions, and notice of the support issues through service under the Long-Arm Statute.

Dr. Bakhaty appealed. On appeal, the First Circuit affirmed the trial court's judgment, reasoning that the factual findings of the trial court were fully supported by the evidence in the record, and thus, not subject to reversal based on manifest error. *Amin v. Bakhaty,* 00-2710 (La. App. 1 Cir. 5/11/01), ___ So.2d ___, 2001 WL 499007. Further, the court of appeal found no error of law in the trial court's application of the UCCJA, and adopted the trial court's written reasons in their entirety. *Id.* Judge Fitzsimmons dissented, arguing that the UCCJA should have no application whatsoever; rather, the prerequisites for jurisdiction were lacking because the facts of the case failed to establish a sufficient nexus between the parties and Louisiana for purposes of subject matter jurisdiction. We granted a writ of certiorari to review the lower courts' holdings. *Amin v. Bakhaty,* 01-1967 (La.7/18/01), 794 So.2d 832.

ANALYSIS

This case concerns the application of the Uniform Child Custody Jurisdiction Act (UCCJA), La.Rev.Stat. § 13:1700, *et seq.* to an international custody dispute involving Louisiana and Egypt. For the reasons that follow, we agree with the lower courts' conclusion that Ahmed's interests are best served by the trial court's exercise of jurisdiction over this matter.

I. Trial Court's Jurisdiction Over Child Custody

Jurisdiction Under the UCCJA

Jurisdiction over the subject matter of a controversy is "the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based upon the object of the demand, the amount in dispute, or the value of the right asserted." La.Code Civ. Proc. art. 2. Subject matter jurisdiction is created by the constitution or legislative enactment, *see, e.g.,* La. Const. Art. 5, and cannot be waived or conferred by the consent of the parties, *see* La.Code Civ. Proc. arts. 3 & 925. In East Baton Rouge Parish, the family court has legislatively been given exclusive jurisdiction to hear "all actions for divorce, ... spousal and child support, and custody and visitation of children, as well as of all matters incidental to any of the foregoing proceedings...." La.Rev. Stat. § 13:1401(A)(1).

The UCCJA grafts a second tier of inquiry onto the question of subject matter jurisdiction for Louisiana courts considering child custody issues. Thus, a Louisiana court may have general subject matter jurisdiction, but must decline that jurisdiction based on jurisdictional limitations imposed by the UCCJA. *See* La.Rev.Stat. 13:1702(A) (preamble); *State ex rel. Rashid v. Drumm,* 824 S.W.2d 497, 501 (Mo. App.1992) (describing the UCCJA as a procedural statute that grants no new substantive rights to the parties, but merely determines the appropriate forum). Although likened to subject matter jurisdiction, 81*81 the choice of the optimum jurisdiction to resolve custody battles under the UCCJA actually focuses on the strength of connections between the minor child and the state, more akin to a personal jurisdiction analysis. However, our lower courts have generally approached the limitations imposed by the UCCJA as equivalent to declarations of subject matter jurisdiction which mandate that the jurisdictional requirements of the UCCJA be met when the custody request is filed. *See Miller v. Harper,* 99-316 (La.App. 3 Cir. 10/13/99), 747 So.2d 642, 644; *Renno v. Evans,* 580 So.2d 945, 948 (La.App. 2 Cir.1991).

The UCCJA provides four alternatives as a basis for a state to assert jurisdiction: (1) "home state" jurisdiction; (2) "significant connection" jurisdiction; (3) "emergency" jurisdiction; and (4) "residual" jurisdiction. *See* La.Rev.Stat. § 13:1702(A).[9] Applying the UCCJA to the facts in this case, the trial court correctly determined that Louisiana cannot be considered Ahmed's "home state"[10] because Ms. Amin filed her first request for custody only a month after arriving in Louisiana. Similarly, the trial court found that Ahmed had not been in Louisiana long enough, and had no prior contact with Louisiana, to provide evidence concerning the child's care, training, well being, and personal relationships for "significant connection" jurisdiction. The parties do not dispute that the trial court lacked a basis to assert "emergency jurisdiction," which is available only under extraordinary circumstances of abandonment, mistreatment, abuse, or neglect. *See Dillon v. Medellin,* 409 So.2d 570, 575 (La.1982); *Renno,* 580 So.2d at 950.

However, the trial court asserted a basis for subject matter jurisdiction under "residual jurisdiction," La.Rev.Stat. § 13:1702(A)(4), by concluding that no other "state," as defined under the UCCJA,[11] had jurisdiction under any of the above 82*82 provisions and Louisiana's exercise of jurisdiction would be in the best interest of the child. In assuming jurisdiction under the residual jurisdiction clause, the trial court reasoned:

When making an award of custody, this Court is compelled to consider Ahmed's best interest. See La. C.C. arts. 131 and 132. The only other forum that could possibly determine custody would be Egypt. However, the Egyptian Court is not compelled to consider the minor child's best interest. Dr. Bakhaty would have the absolute right to guardianship, as well as the right to physical custody. This Court believes that a parent's interest in a relationship with his or her child is a basic human right. *State in Interest of AC.,* 93-1125 (La.10/17/94), 643 So.2d 743. However, it is most likely that Ms. Amin will be deprived of a relationship with Ahmed if she is forced to return to Egypt to pursue

custody or visitation rights, particularly in light of the fact that she has been convicted of removing the minor child from the territory of Egypt without Dr. Bakhaty's permission. Since the minor child has always lived with his mother, it would not be in his best interests to deprive him of a relationship with her at his age. Therefore, this Court believes that it is in Ahmed's best interest that this Court assume jurisdiction under the provisions set forth in La. R.S. 13:1702(A)(4).

An analysis of the provisions of the UCCJA, the statute's stated purpose, and review of other jurisdictions applying the UCCJA leads this Court to the same conclusion.

Purpose of the UCCJA

The purpose of the UCCJA serves to limit the potential for multiple custody decrees in various states. As stated by this Court in *Revere v. Revere,* 389 So.2d 1277 (La.1980):

The Uniform Child Custody Jurisdiction Law was proposed in an effort to have states impose uniform legislative rules on themselves regarding jurisdiction in child custody cases. A custody decree in one state is subject to modification not only by the courts of that state, but also by the courts of another state, since the Full Faith and Credit clause has limited application in custody cases. *New York ex rel. Halvey v. Halvey,* 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947). In an age of fluid population trends many cases are presented in which jurisdiction may be concurrent in several states. In order to provide some stability to reasoned custody decrees by discouraging relitigation, to deter custody determinations by physical abduction, to avoid jurisdictional competition and conflicting custody decrees in several states, and primarily to attain the security of home environment necessary for a child's well being, the National Conference of Commissioners proposed the uniform law adopted in Louisiana by Act 513 of 1978.

Id. at 1278-79.

In adhering to the purpose of the UCCJA, some of our lower courts have reasoned that the jurisdictional rules of § 13:1702(A) are listed in the statute in descending preferential order. *Renno,* 580 So.2d at 948; *Snider v. Snider,* 474 So.2d 1374 (La.App. 2d Cir.1985). While this Court stated that deference should be given to the "home state" in general as the state "in the best position for evidence gathering and for exercising continuity of control," we have recognized that concurrent jurisdiction under two or more statutory standards for jurisdiction can exist in different states without requiring deference 83*83 between them. *Revere,* 389 So.2d at 1279-80.

Equally clear, however, is that § 13:1702(A) serves to limit jurisdiction rather than proliferate it. *See* La.Rev. Stat. 13:1700(A); *Broadway v. Broadway,* 623 So.2d 185 (La.App. 2 Cir.1993). When two states can legitimately claim a basis to assert jurisdiction under § 13:1702(A), the law requires a comparative determination regarding which jurisdiction will serve the best interests of the child.

See, e.g., La Rev. Stat. § 13:1700(A)(2) (listing purpose to decide custody by "state which can best decide the case in the interest of the child"); La.Rev.Stat. § 13:1706(C) (providing that determination of inconvenient forum requires consideration whether "it is in the interest of the child that another state assume jurisdiction"); La.Rev.Stat. § 13:1707(B) (allowing a court to decline jurisdiction based on improper conduct if "just and proper under the circumstances").

Application of the UCCJA in the International Context

Dr. Bakhaty argues that the trial court erred when it found that no other "state" would have jurisdiction in accordance with La.Rev.Stat. § 13:1702(A)(1), (2), or (3). Dr. Bakhaty asserts that the court lacked subject matter jurisdiction to adjudicate the custody of Ahmed under the UCCJA because Egypt is both the "home state" and the state with "significant connections" to Ahmed, and the UCCJA requires recognition of foreign states like those of sister states in the U.S.

Dr. Bakhaty bases this argument on La. Rev.Stat. § 13:1722, which provides:

The general policies of this Part extend to the international area. The provisions of this Part relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

We agree with Dr. Bakhaty's argument that the above statutory language allows the trial court to consider a foreign nation to be a "state." However, it does not follow that the statutory language mandates recognition of a foreign jurisdiction as a "state" for purposes of determining jurisdiction without regard to the best interest of the child.

In this case, the trial court recognized its authority to treat Egypt as a "state," but concluded that recognition was not mandated under the UCCJA, and refused to decline jurisdiction on that basis. We find no error in that legal conclusion. A court in its discretion may find that a foreign country is a "state" under the UCCJA, and whether or not it will depends on the facts and circumstances of each particular case.

Our review of prior cases in Louisiana supports this conclusion. In *McFaull v. McFaull,* 560 So.2d 1013 (La.App. 4th Cir. 1990), the Fourth Circuit recognized that the UCCJA applied to the "international area" in a case involving the Soviet Union, but ultimately found jurisdiction in Orleans Parish under the UCCJA. In *Gay v. Morrison,* 511 So.2d 1173 (La.App. 4th Cir. 1987), the Fourth Circuit concluded that Brazil could be considered a "state" under the UCCJA because the mother willingly consented to jurisdiction there in the original custody decree. *Id.* at 1176.

A review of other jurisdictions shows that, in most instances, a court's decision whether to consider a foreign nation as a "state" was a discretionary one. *See Ivaldi v. Ivaldi,* 147 N.J. 190, 685 A.2d 1319, 84*84 1325 (1996) (listing cases from various states that applied "home state" jurisdiction to a foreign nation).[12] In exercising that discretion, the courts' recognition of foreign courts generally turned on the following issues: (1) whether the child custody laws of the foreign jurisdiction and those of the United States were similar, particularly in light of considering the best interests of the child;[13] (2) whether foreign custody decrees existed prior to initiating any proceedings in the reviewing court;[14] (3) whether any of the parties were U.S. citizens;[15] and (4) whether the parties received adequate notice and a chance to be heard in the foreign forum.[16]

Cases from other jurisdictions that involve **Islamic** family law in applying the UCCJA fell on both sides of the equation. *See Hosain v. Malik,* 108 Md.App. 284, 671 A.2d 988 (Md.1996) (recognizing a Pakistani custody decree); *Malak v. Malak,* 182 Cal.App.3d 1018, 227 Cal.Rptr. 841 (1986) (recognizing a Lebanese decree); *but see Noordin v. Abdulla,* 88 Wash.App. 746, 947 P.2d 745 (1997) (refusing to recognize a decree in the Philippines); *Ali v. Ali,* 279 N.J.Super. 154, 652 A.2d 253 (Sup.Ct.1994) (refusing to recognize a Palestinian decree). While the factual circumstances differed in each case, a general principle pervaded: the court would recognize a foreign **Islamic** state if it found that the foreign jurisdiction applied the best interests of the child in its application of their child custody laws. *See Hosain,* 671 A.2d at 1000-06; *Ali,* 279 N.J.Super. at 167-69, 652 A.2d 253; *see also* Monica E. Henderson, Note, *U.S. State Court Review of **Islamic** Law Custody Decrees—When Are **Islamic** Custody Decrees In The Child's Best Interest,* 36 J. Fam. L. 423 (1997) (arguing that the international provision of the UCCJA involves ensuring not only that the foreign court provides adequate procedural due process but also applies 85*85 substantive standards that consider the best interest of the child).

In this case, the trial court declined to recognize Egypt as a "state" for purposes of determining jurisdiction based on the fundamental differences between Egypt's child custody laws and Louisiana's child custody laws. In Louisiana, custody in all cases will be determined by a court in the best interest of the child. *See* La. Civ. Code art. 131; *Evans v. Lungrin,* 97-0541 (La.2/6/98), 708 So.2d 731. The trial court found that custody laws in Egypt follow strict guidelines, irrespective of the best interest of the child.[17]

According to Dr. Bakhaty's expert, Ms. Aby, Egypt follows **Islamic** family law, which structures some of the rights between family members based solely on gender. Under the Egyptian concept of "guardianship," the father has the absolute right to the guardianship and the physical custody of the minor child. While physical custody of a young child would generally be with the mother, guardianship or right of control always stays with the father. After a divorce, the mother's physical custody of the child will generally only be allowed if the father with guardianship lives nearby and could continue to exercise control, including the right to choose the habitual residence of the child.

Dr. Bakhaty's affidavit when he petitioned for a civil warrant confirmed this structure in **Islamic** law, stating that by operation of Egyptian law, both the temporary guardianship and physical custody of Ahmed rested exclusively with him. An attached translation of an Egyptian Civil Code provision attached to the petition stated that the right to custody goes to the father, then to the grandfather in case a guardian was not appointed by the father.

Further, Ms. Aby confirmed Ms. Amin's deposition testimony that under **Islamic** law, the husband could pronounce a divorce merely by verbal proclamation.[18] Civil effect would be given to the declaration simply by having it notarized and served on the wife or her representative. Once served, the wife may raise certain limited issues with the court, but only if she had reserved her right to do so in her original marriage contract. Based on Ms. Aby's review of the marriage contract between Dr. Bakhaty and Ms. Amin, no such rights were reserved.

In addition to finding the Egyptian laws different from those in Louisiana, the trial court further found that no prior custody decree was pending when Ms. Amin filed her first petition for divorce, custody, and support in Louisiana. The UCCJA provides a discretionary basis for declining jurisdiction when another jurisdiction has commenced simultaneous proceedings. *See* La.Rev.Stat. § 13:1705(A); *see Ivaldi,* 685 A.2d at 1326 (finding New Jersey to be the child's "home state" but remanding to 86*86 determine whether Morocco was more convenient forum). Dr. Bakhaty only initiated custody proceedings in Egypt after determining that Ms. Amin and Ahmed left Egypt without his permission, which is apparently a crime in that jurisdiction.

Moreover, the trial court made clear that the unique circumstances of this case required more consideration for the best interest of this child than for the extension of comity toward the Egyptian/**Islamic** legal system. Ahmed had never spent one night of his life away from his mother. In contrast, Dr. Bakhaty spent at most twelve weeks a year in Egypt, with the majority of that time spent in a hotel, his mother's home, or seeing patients. In addition, Dr. Bakhaty refused to visit for almost two years of his son's life during a period of marital discord.

If Dr. Bakhaty were to gain custody of Ahmed, he intends to send or take him back to Egypt immediately. However, Dr. Bakhaty has lived in the United States virtually all of his adult life; he became a citizen in 1989, and his medical practice is in New York. As the trial court noted, because of the criminal convictions against Ms. Amin, she either could never return to Egypt or would be imprisoned upon her return. It appears likely that Ahmed would be deprived of his relationship with the parent who raised him, and possibly both parents, if Dr. Bakhaty continues to spend the majority of his time in New Jersey as he has in the past. On the other hand, if Ms. Amin has custody, she intends to stay in the United States. Given Dr. Bakhaty's United States citizenship and longtime residence in this country, he would not be deprived of the opportunity to visit with Ahmed.

Despite these factual findings by the trial court, Dr. Bakhaty argues that the trial court should decline jurisdiction because custody proceedings are ongoing in Egypt, where Ms. Amin is represented by counsel, and thus, has adequate opportunity to be heard as required by La.Rev.Stat. § 13:1722. We find this argument disingenuous considering that she is faced with a potential three year prison term upon her return to Egypt, based on Dr. Bakhaty's initiation of misdemeanor charges. This fact alone distinguishes this case from those in which the spouse merely refused to return to the foreign jurisdiction, with the resultant negative consequence of losing custody. *See, e.g., Malak,* 227 Cal. Rptr. at 846; *Hosain,* 671 A.2d at 1000.

Although Egypt is arguably Ahmed's home state by the six month statutory clock, it was within the trial court's discretion whether to defer the matter to the Egyptian legal system. Considering the circumstances, we cannot say the trial court abused its discretion in not deferring this matter to Egyptian courts, because those courts are not mandated to consider Ahmed's best interest as paramount.

Reprehensible Conduct As a Basis for Declining Jurisdiction

Dr. Bakhaty further contends that the trial court should have declined jurisdiction under the UCCJA based on the negative inference drawn when Ms. Amin's wrongfully removed the minor child from Egypt without his permission. La.Rev. Stat. § 13:1707(A) provides that "[i]f the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances." Dr. Bakhaty argues that the lower courts' decision effectively condones the unilateral conduct of this mother, and encourages the continued potential exercise of "self-help" in contravention of the UCCJA's purpose to deter abductions or other unilateral removals of 87*87 children undertaken to obtain custody awards. *See* La.Rev.Stat. § 13:1700(5).

Dr. Bakhaty's argument ignores the trial court's factual finding that Ms. Amin did not wrongfully remove the child from Egypt or engage in any other "reprehensible conduct."[19] The trial court found that Ms. Amin intended to visit Dr. Bakhaty and her family when she left Egypt. At the time she left Egypt, there were no custody proceedings pending anywhere. When Ms. Amin finally talked with Dr. Bakhaty in mid-December, he agreed to come to Baton Rouge to see her and Ahmed, but in fact, he actually had no intention of coming under the circumstances. Instead, while she and Ahmed waited for him in Baton Rouge, he flew to Egypt to confirm his suspicions about her removing Ahmed without his permission and without proper travel documents. It was only after Ms. Amin discovered from her father sometime in early January that Dr. Bakhaty was in Egypt investigating her actions for the purpose of bringing charges against her that she initiated court proceedings for divorce, custody, and support in Louisiana.

We find no manifest error in the trial court's credibility conclusion that Ms. Amin's intent when she came to the United States with Ahmed was not to abscond with the child, stay in this country, divorce her husband, and get custody of their child, as Dr. Bakhaty maintains. The fluid nature of her intentions on remaining in the U.S. were further evidenced by her willingness to return to Egypt during the proceedings. At the hearing on March 9, 2000, both parties were willing to stipulate that Ms. Amin would return to Egypt with Ahmed and continue to care for him there, if the criminal sentence against her could be dismissed and if certain support arrangements could be made. As the court of appeal recognized, these "on-the-record discussions ... apparently never reached fruition, but they belie Dr. Bakhaty's assertion that Ms. Amin's intentions were dishonorable or her conduct reprehensible." Thus, the court of appeal correctly found the trial court's factual conclusion concerning her initial intent and motivation to be supported by the record and not clearly wrong.

The court of appeal summarized the unique circumstances presented in this case as follows:

It does not involve a parent taking a child from the country in which the other parent resides. Rather, it involves a parent bringing a child to the country where the other parent resides. This is an important difference. As a result of the court's judgment in this case, Ahmed lives with his mother in the 88*88 United States, the country where both of his parents now live, rather than living with one parent in Egypt, while the other lives in the United States.

Based on these circumstances, we agree with lower courts' decision to exercise "residual" jurisdiction in the best interest of this child under the UCCJA, rather than deferring to the Egyptian legal system.

Personal Jurisdiction over Child Custody

Dr. Bakhaty contends that the trial court never obtained personal jurisdiction over him because he was never served personally with any documents and personal jurisdiction had never been waived. Dr. Bakhaty further argues that the trial court erred in finding his filing of a civil warrant creates minimum contact sufficient for personal jurisdiction.

A Louisiana court may adjudicate custody under the UCCJA without acquiring personal jurisdiction over an absent party. Once the subject matter jurisdiction of the Louisiana Court has been established, the resulting custody decree is binding if the absent party has been given notice and an opportunity to be heard. *See* La.Rev.Stat. § 13:1704.[20]

Based on the actions that Dr. Bakhaty performed to initiate and defend this custody suit, the Court is satisfied that Dr. Bakhaty received adequate notice of the pending custody proceedings. Further, notice is not required in a custody dispute when a party submits to the jurisdiction of the court. See La.Rev.Stat. § 13:1704(D). For the reasons discussed in Section II, *infra,* involving personal juris-

diction to determine child support, we find that Dr. Bakhaty submitted to the court when he filed his Petition for Civil Warrant, and thus, notice was not required. For the same reasons, we find Dr. Bakhaty's argument regarding insufficient service of process to be without merit.

II. Trial Court's Jurisdiction Over Child and Spousal Support

Subject Matter Jurisdiction

Dr. Bakhaty argues that the trial court lacked subject matter jurisdiction to enter an order of child support because the jurisdiction to enter a child support order is exclusively found under the provisions of the Uniform Interstate Family Support Act (UIFSA), La. Ch.Code § 1301 *et seq.* Dr. Bakhaty apparently contends that the trial court lacked subject matter jurisdiction because Ms. Amin cannot be considered a resident of Louisiana due to the status of her expired visitor's visa. *See* La. Child. Code art. 1302.5(A)(1) (discussing residency requirements for continuing exclusive jurisdiction).

However, the jurisdictional bases found in the UIFSA pertain to personal jurisdiction, not subject matter jurisdiction. *See* La. Child. Code art. 1302.1; *State, Through Dept. of Social Services v. Matthews,* 96-711 (La.App. 5th 89*89 Cir.1/28/97), 688 So.2d 137. The trial court had subject matter jurisdiction over the issues of child support and spousal support pursuant to La. R.S. 13:1401(A)(1). Thus, we find Dr. Bakhaty's argument to be without merit.

Personal Jurisdiction over Support Issues

Dr. Bakhaty additionally argued that the trial court lacked personal jurisdiction over him to render any order of support because he lacks the requisite minimum contacts with Louisiana and because he was never personally served with any pleadings. The trial court correctly determined that the UCCJA provisions relating to jurisdictional limitations in interstate custody disputes cannot be extended to child support matters. *See* La.Rev.Stat. § 13:1701(2). Thus, the trial court would only have the legal authority to render a personal judgment for child support if it had jurisdiction over Dr. Bakhaty. *Imperial v. Hardy,* 302 So.2d 5 (La.1974).

The trial court conducted a jurisdictional analysis under the due process rules of *International Shoe Company v. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), to conclude that Dr. Bakhaty established sufficient minimum contacts with Louisiana through his filing a Petition for Civil Warrant. Based on Dr. Bakhaty's actions, the trial court found that Dr. Bakhaty has purposefully availed himself the privilege of conducting activities within Louisiana, and he has invoked the benefits and protections of Louisiana's laws. *Burger King v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Based on these actions, Dr. Bakhaty should have reasonably anticipated being haled into court in Louisiana. *World-Wide Volkswagen Corp. v. Woodson,* 444

U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). A review of the Louisiana Code of Civil Procedure leads to the same conclusion.

Personal jurisdiction may attach through compliance with Louisiana Code of Civil Procedure article 6 or through one of several statutory bases, including the UIFSA in Children's Code article 1302.1,[21] and the Long-Arm Statute, La.Rev.Stat. § 13:3201.[22] Personal jurisdiction over a party is established when that party commences a civil action to enforce a legal right "by the filing of a pleading presenting the demand to a court of competent jurisdiction." La.Code Civ. Proc. art. 421; *see* La.Code Civ. Proc. art. 6.[23]

90*90 Dr. Bakhaty commenced a civil action titled Petition for Civil Warrant before the East Baton Rouge Parish Family Court. A Petition for a Civil Warrant in custody matters is generally governed by La.Rev. Stat. 9:343 which allows a custodial parent to obtain the court's assistance in the return of a child.[24] A properly filed Petition for Civil Warrant may limit a party's submission to the Court's jurisdiction for the sole purpose of obtaining the civil warrant. However, as both the lower courts found, Dr Bakhaty did not already have a basis for custody by order of any court, and thus, did not meet the statutory requisites for such a warrant to invoke that statute's limitations on jurisdiction. *See* La.Rev. Stat. 9:343(A); La.Rev.Stat. 13:3201(B); La. Ch.C. art. 1302.1(8). Under Louisiana's rule regarding fact based pleadings, Dr. Bakhaty's request for the return of the child essentially became a petition for custody.

When Dr. Bakhaty sought recognition of his custody rights regarding Ahmed, he subjected himself to the personal jurisdiction of our courts with respect to matters pertaining to Ahmed. La.Code Civ. Proc. art. 6(A)(3). Dr. Bakhaty's use of our courts differs from a nonresident who lacks the minimum contacts necessary to establish nonresident jurisdiction on a totally unrelated matter. Custody and support are always interrelated issues to a divorce, making any distinction of minimal consequence. *See Norvell v. Norvell,* 94-0001 (La.App. 4 Cir. 1/19/95), 649 So.2d 95, 97 (finding ex-wife's petition to enforce a Tennessee judgment for arrearages subjected her to personal jurisdiction in Louisiana "with respect to all matters ancillary to the alimony decree, including modification proceedings, when she sought enforcement in Louisiana's courts.")

The trial court concluded that service must be made in accordance with the Long-Arm Statute, La.Rev.Stat. 13:3204. While we agree that service under the Long-Arm Statute would suffice, we conclude that service was unnecessary, as Dr. Bakhaty had submitted to the jurisdiction of the court as discussed above by filing his Petition for Civil Warrant. In any event, the record contains an affidavit of Long-Arm Service, via certified mail, return receipt requested for both petitions filed by Ms. Amin. The original green card, which shows that the certified mail was signed for, is also in the record. Thus, Dr. Bakhaty was validly served with Ms. Amin's Petition for Divorce under the Louisiana Long-Arm Statute.

III. Other Issues Raised On Appeal

Dr. Bakhaty claims the trial court erred in refusing to order Ms. Amin to answer 91*91 certain questions about how she obtained Ahmed's Egyptian passport and her application for asylum in the United States. Because of the criminal matters lodged against her in Egypt and possible ramifications with the Immigration and Naturalization Services in the United States, she pled the Fifth Amendment in response to those questions. Dr. Bakhaty argues the trial court should have insisted on answers to those questions, and its failure to do so prejudiced his case.

Although the exact communications resulting in Ahmed's Egyptian passport were not elicited from her, documents submitted by Dr. Bakhaty were accepted into evidence. These indicated that in November 1998, Ms. Amin's brother-in-law, Hany Zohdy, an attorney who lives in Baton Rouge, obtained affidavits from two of his Egyptian friends, stating Ahmed needed medical treatment from his father and needed to visit him in the United States. Thus, the circumstances under which Ahmed's Egyptian passport were obtained were generally known to the trial court without additional testimony from Ms. Amin or Mr. Zhody.[25]

Similarly, Ms. Amin's testimony indicated that, although her original intent was merely to visit the United States, the circumstances occurring after her arrival caused her to change her mind and she now intended to stay in Louisiana, if possible. Mark Lazarre, an expert on immigration requirements, informed the court that the declarations needed for a visitor's visa and an asylum application were internally inconsistent; either Ms. Amin intended to stay in the United States or she did not. The trial court was made aware of this inconsistency and had sufficient information to consider it in evaluating Ms. Amin's credibility on this and other issues. Therefore, Dr. Bakhaty was not prejudiced by the trial court's refusal to order Ms. Amin to answer questions about her asylum application. We find this argument to be without merit.

CONCLUSION

For the foregoing reasons, we find that the trial court did not err considering the circumstances when it declined to recognize Egypt as the child's "home state," and assumed jurisdiction under the residual jurisdiction clause under the Uniform Child Custody Jurisdiction Act, La.Rev. Stat. 13:1700 *et seq.* Further, the trial court and court of appeal correctly found that personal jurisdiction was established by the Petition for Civil Warrant filed by the defendant.

DECREE

Accordingly, we affirm the First Circuit Court of Appeal judgment denying Dr. Bakhaty's exceptions to subject matter and personal jurisdiction. The case is remanded to the trial court for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED.

CALOGERO, C.J., and VICTORY, J., concur and assign reasons.

92*92 CALOGERO, Chief Justice, concurring.

I subscribe to the majority's result in this case. As to child custody, under these circumstances, I would likewise decline to treat a foreign nation as a state pursuant to the UCCJA. I am particularly persuaded by the fact that Dr. Bakhaty voluntarily went to East Baton Rouge Parish and filed a petition for civil warrant.[1] This pleading was not a valid petition for civil warrant, but a prima facie request for a Louisiana court to award custody in his favor. Of equal significance, in my opinion, are the facts that Dr. Bakhaty has been a United States citizen since 1989, has lived in the United States virtually all his adult life, has a residence in New Jersey, and practices medicine in New York. Furthermore, Ms. Amin wishes to remain in Louisiana. Given Dr. Bakhaty's significant connection with the United States, his voluntary entry into Louisiana to request custody of the minor child, and the wishes of Ms. Amin to remain in this state, jurisdiction over the minor child is appropriate in Louisiana.

VICTORY, J., concurring.[*]

I concur in the result reached by the majority. The trial court made a finding of fact that the child at issue in this case was relocated to Baton Rouge, Louisiana from Egypt by his mother in good faith with the intent of forming a family unit with the child's father, who has a residence in this country and is a United States citizen. The child was born in Egypt and had always resided there with his mother. Both mother and father are Egyptian nationals. However, mother and child have an extended family in Baton Rouge. Upon learning of the relocation, father commenced legal proceedings in Egypt and thereafter sought the assistance of our courts to require transfer of the child to him, relying on Egyptian principles of custody and guardianship. By that time, however, mother had already filed a proceeding in this state asking for a determination of custody that pre-dated custody proceedings instituted by the father in Egypt. The father claims that a final Egyptian custody decree has now been issued in this matter, although it does not appear that such had been rendered at the time of the Louisiana trial of this case, which is not yet final.

Ordinarily, I would be inclined under principles of comity to recognize a foreign custody judgment, particularly where, as here, the child was a habitual resident of another nation before his mother traveled with him to this country. Nevertheless, a body of law has developed in the area of international child custody disputes that impacts my views on the handing of this case. The United States is signatory to the Hague Convention which addresses such issues. Under that Convention, remedies are available in a case such as this when a parent removes a child from his nation of habitual residence. However, that Convention, which might have provided the father a remedy in this case, was

not signed by Egypt. Courts in this country have frequently examined the Hague Convention and the United States regulations issued pursuant thereto. It appears to be settled that the Convention applies 93*93 only when *both* countries involved are signatory nations. Where a parent from a non-signatory nation removes a child to a signatory country, there is no remedy available under the Hague Convention to the parent from the nation of origin. Had Egypt signed the Convention, our Department of State regulations suggest that this country would have cooperated in a request made by the Egyptian government for the return of the child. But Egypt chose not to sign the convention, declining to agree to a set of rules governing international custody disputes. *See Mezo v. Elmergawi,* 855 F.Supp. 59 (E.D.N.Y.1994) and the materials on international law cited therein. That being the case, I am not persuaded that any judgment of the Egyptian court regarding custody of this child, assuming that one was rendered, is entitled to the same comity that I might otherwise be inclined to extend. Comity is a principle of judicial courtesy that implies mutuality. It does not appear that Egypt would consider itself constrained to extend comity to a custody determination by a court in the United States of America.

Since I do not believe we are bound to decline jurisdiction under principles of comity, Louisiana courts have subject matter jurisdiction over the minor child now living in this state unless there is a superior claim to jurisdiction by some other state. Even though Louisiana is not the "home state" as that term is defined in the Act, our state has jurisdiction over children present within our borders where no other state has jurisdiction. La. RS. 13:1702(4)(i). Egypt is not a State within the meaning of the UCCJA. Thus under the terms of La. R.S. 13:1702(4)(i), Louisiana can assert subject matter jurisdiction over the child in question.

I recognize that Louisiana has adopted Section 1722 of the Uniform Act which provides:

The general policies of this Part extend to the international area. The provisions of the part relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

Notwithstanding this general provision, I am satisfied that Louisiana is justified in exercising its jurisdiction in this case. I reach this conclusion because our state was the first jurisdiction in which a custody proceeding was commenced and because the evidence in the record reasonably supports the conclusion of the trial court that the legal precepts under which a custody determination would be made in Egypt differ substantially and materially from our own. Moreover, since Egypt has declined to sign the Hague Convention, I do not feel compelled to exercise our discretion in favor of a nation that has rejected the principles that underlie both the Hague Convention agreements in this area and the UCCJA.

Accordingly, I concur.

[*] Retired Judge Robert L. Lobrano, assigned as Justice *Pro Tempore,* participating in the decision.

[2] While Egypt apparently recognizes Dr. Bakhaty as an Egyptian national with dual citizenship, we note that naturalization in the United States requires a renunication of all foreign citizenship. *See* 8 U.S.C. § 1448.

[3] Dr. Bakhaty also owns a house in Egypt, but Dr. Bakhaty's mother resides in it, and all the contents of this home belong to her.

[4] Ahmed also has a United States passport issued in April 1995, indicating that he is a United States citizen.

[5] Dr. Bakhaty submitted a judgment in the Egyptian court sentencing Ms. Amin in absentia to one week in prison, payment of damages, and court costs. He also submitted documents showing that Ms. Amin was convicted in absentia and sentenced to pay a fine of 501 Egyptian pounds and serve three years imprisonment "with labour."

[6] The civil warrant petition was allotted to a different judge from the one in whose court Ms. Amin's divorce and custody matters were pending; the second judge signed an order authorizing a warrant to be issued for law enforcement personnel to assist Dr. Bakhaty in locating Ahmed and taking him back to Egypt.

[7] In the petition, Dr. Bakhaty also alleged that his wife had obtained travel documents for herself and their son under false pretenses. An attachment to the petition shows that on February 12, 1999, Dr. Bakhaty brought a "civil misdemeanor" action in the Egyptian court, charging Ms. Amin with forgery of Ahmed's travel documents.

[8] As of the date of the trial court's ruling awarding interim custody and support, no final custody award had ever been rendered by any court in any country.

[9] La.Rev.Stat. § 13:1702(A) provides:

A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or

(2) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) The child is physically present in this state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with Paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

[10] "Home state" is defined as "the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned." La.Rev.Stat. § 13:1701(5).

[11] "State" is defined as "any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia." La.Rev.Stat. § 13:1701(10).

[12] Those states that refused to recognize a foreign nation as a "state" under the UCCJA lacked the statutory equivalent of La.Rev.Stat. § 13:1722 that extends the general policies of the UCCJA to the international area. *See Schroeder v. Vigil-Escalera Perez,* 76 Ohio Misc.2d 25, 664 N.E.2d 627, 636-37 (Com.Pl. 1995); *Rashid,* 824 S.W.2d at 503; *but see Klien v. Klien,* 141 Misc.2d 174, 533 N.Y.S.2d 211 (N.Y.1988) (holding that Israel is not a "state" under the UCCJA's definition of "state").

[13] *See Horlander v. Horlander,* 579 N.E.2d 91 (Ind.App.1991) (finding France to be the more convenient forum with a legal institution similar in nature to Indiana); *Middleton v. Middleton,* 227 Va. 82, 314 S.E.2d 362, 368 (1984) (finding England the "equivalent of statutory `home state'" because "English procedural and substantive law of child custody was `reasonably comparable' to the law of Virginia").

[14] *See Hosain v. Malik,* 108 Md.App. 284, 671 A.2d 988 (Md.1996) (finding that mother fled to this country after Pakistan awarded custody to the father); *Rashid,* 824 S.W.2d at 499 (finding that no proceedings had been instituted in any country prior to the initial filing in Missouri).

[15] At trial, Dr. Bakhaty's expert explained that citizenship should not be a determinative factor, and we agree in principle. In practice, a pattern has emerged that parties with U.S. citizenship enjoy greater success in keeping the case on American soil for custody determinations under the UCCJA. *See* June Starr, *The Global Battlefield: Culture and International Child Custody Disputes At Century's End,* 15 Ariz. J. Int'L & Comp. Law 791 (1998). While it may seem that the pattern is reinforced by the result in this case, we find that the parents' residency, i.e., where the parents spend the majority of their time, more relevant than citizenship per se.

[16] *See Malak v. Malak,* 182 Cal.App.3d 1018, 227 Cal.Rptr. 841, 846 (1986) (finding that wife had notice but refused to return to Lebanon); *Hosain,* 671 A.2d at 1000 (finding that wife was represented by counsel in Pakistan but refused to return); *Ivaldi,* 685 A.2d at 1327 (noting that father was participating in Moroccon proceedings).

[17] Dr. Bakhaty also claims the court demonstrated bias against the Egyptian legal system by selecting only portions of Patricia Aby's testimony in support of its ruling. However, we find that the trial court's overview of Egyptian law to be an accurate reflection of the evidence in the record presented by both parties. Thus, we find this argument to be without merit.

[18] Men in Egypt can divorce their wives anytime and without court approval. The procedure for a man involves the husband proclaiming "Talik" under oath three times, which roughly translates to "I divorce thee." During the three months after the proclamation, the husband has the option to revoke his proclamation, and the parties will remain married. On the other hand, in order for the wife to obtain a divorce, she must have court approval, and she must prove that she was physically or psychologically harmed. After the parties divorced in this case, the law in Egypt was changed to make divorce somewhat easier to obtain for women.

[19] Moreover, even if Ms. Amin engaged in "reprehensible conduct," the trial court reasoned that any alleged abduction or other violations of custody orders subsumed to the paramount concern of considering the best interest of the child. *See Bergeron v. Bergeron,* 492 So.2d 1193, 1203 (La.1986); *see also Rashid,* 824 S.W.2d at 502 (discussing the discretionary ground provided by the "reprehensible conduct" provision requires considering "the welfare of the child rather than the tactics of the parents"). This Court stated in *Bergeron,* 492 So.2d at 1203:

If the best interests of all children are to be served, the improper removal of a child from physical custody and improper retention of a child after a visit or other temporary relinquishment must be deterred .... [t]he imperative to discourage abduction and other violations of custody orders may, in extraordinary circumstances, be submerged to the paramount concern in all custody matters for the welfare of the child. *See Nehra v. Uhlar,* 43 N.Y.2d 242, 401 N.Y.S.2d 168, 372 N.E.2d 4 (1977).

The trial court apparently concluded that any alleged reprehensible conduct by the mother was outweighed by the best interest of the child in maintaining contact with both parents.

[20] La.Rev.Stat. § 13:1704 provides:

A. Notice required for the exercise of jurisdiction over a person outside this state shall be given in a manner reasonably calculated to give actual notice, and may be:

(1) By personal delivery outside of this state in the manner prescribed for service of process within this state; or

(2) By registered or certified mail; or

(3)(a) If the party is a nonresident or absentee who cannot be served by the methods provided in Paragraphs (1) and (2) of this Subsection, either personally or through an agent for service of process, and who has not waived objection to jurisdiction, the court shall appoint an attorney at law to represent him.

. . .

D. Notice is not required if a person submits to the jurisdiction of the court.

[21] We note that the UIFSA is a reciprocal statute that requires a foreign jurisdiction to have enacted the UIFSA or a substantially similar law. *See* La. Child. Code art. 1301.3(22)(b).

[22] La. Children's Code article 1302.1 provides, in part:

In a proceeding to establish, enforce, or modify a support order or to determine parentage, a tribunal of this state may exercise personal jurisdiction over a nonresident individual, or his tutor, in any of the following situations:

. . .

(8) There is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

Additionally, La.Rev.Stat. 13:3201(B) provides: "In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States."

[23] La.Code Civ. Proc. art. 6 provides that:

A. Jurisdiction over the person is the legal power and authority of a court to render a personal judgment against a party to an action or proceeding. The exercise of this jurisdiction requires:

. . .

(3) The submission of the party to the jurisdiction of the court by commencing an action or by the waiver of objection to jurisdiction by failure to timely file the declinatory exception.

B. In addition to the provisions of Paragraph A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and with the Constitution of the United States.

[24] La.Rev.Stat. 9:343 provides:

A. Upon presentation of a certified copy of a custody and visitation rights order rendered by a court of this state, together with the sworn affidavit of the custodial parent, the judge, who shall have jurisdiction for the limited purpose of effectuating the remedy provided by this Section by virtue of either the presence of the child or litigation pending before the court, may issue a civil warrant directed to law enforcement authorities to return the child to the custodial parent pending further order of the court having jurisdiction over the matter.

B. The sworn affidavit of the custodial parent shall include all of the following:

(1) A statement that the custody and visitation rights order is true and correct.

(2) A summary of the status of any pending custody proceeding.

(3) The fact of the removal of or failure to return the child in violation of the custody and visitation rights order.

(4) A declaration that the custodial parent desires the child returned.

[25] Dr. Bakhaty also claims the court erred in refusing to allow discovery through the deposition of Mr. Zhody concerning his actions on behalf of Ms. Amin. However, the trial court found Dr. Bakhaty had failed to present sufficient evidence of all four factors required by Article 508 of the Louisiana Code of Evidence to justify the deposition of a party's attorney. The court also concluded that extraordinary circumstances were not shown. La.Rev.Stat. C.C.P. art. 1452(B). We find no legal error in the court's refusal to order Mr. Zohdy to submit to a deposition, nor do we find any prejudice to Dr. Bakhaty's case due to the court's decision.

[1] As indicated in the majority opinion, a petition for civil warrant is governed by La.Rev. Stat. 9:343. The statute allows a parent with a valid custody order to apply for a civil warrant directing

law enforcement authorities to return the child to the custodial parent pending further order of the court having jurisdiction over the matter. If filed properly, the court's jurisdiction will be limited to obtaining the civil warrant.

[*] Retired Judge Robert L. Lobrano, assigned as Justice *Pro Tempore,* participating in the decision.

CATEGORY: Shariah Marriage Law

RATING: Relevant

TRIAL: TCSN

APPEAL: ACSI

COUNTRY: Iran

URL: http://scholar.google.com/scholar_case?case=9514806415377948363&q=Iran&hl=en&as_sdt=4,19

998 So.2d 731 (2008)

MRS. TAHEREH GHASSEMI V. HAMID GHASSEMI.

No. 2007 CA 1927.

Court of Appeal of Louisiana, First Circuit.

October 15, 2008.

733*733 Phil Breaux, St. Gabriel, LA, for Plaintiff/Appellant, Tahereh Ghassemi.

Mark D. Plaisance, Baker, LA, and Harry W. Ezim, Jr., Brian Prendergast, Wendy Edwards, Baton Rouge, LA, for Defendant/Appellee, Hamid Ghassemi.

Before PARRO, KUHN, and DOWNING, JJ.

KUHN, J.

Plaintiff appeals a judgment declining to recognize any Iranian marriage of the parties. For the detailed reasons that follow, we reverse the judgment and remand the matter for further proceedings consistent with the opinions expressed herein. Plaintiff also appeals three interlocutory judgments in this case. For reasons that follow, we affirm the interlocutory judgments.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff, Tahereh Ghassemi, filed suit in the East Baton Rouge Parish Family Court (family court) seeking a divorce, spousal support, and a partition of community property. In her petition, she alleged that she and the defendant, Hamid Ghassemi, were married in Bam, **Iran** in 1976, at which time both parties were citizens of **Iran**. She further alleged that a son, Hamed, was born of their union in 1977. Ms. Ghassemi contends that in that same year, Mr. Ghassemi entered the United States (U.S.) on a student visa.[1] Ms. Ghassemi avers that when Mr. Ghassemi left **Iran** in 1977, it was with the understanding that he would return to **Iran** after he completed his studies or that he would arrange for her and Hamed to join him and establish a residence in the U.S. Unbeknownst to Ms. Ghassemi, after entering the U.S., Mr. Ghassemi contracted a "marriage" with an American woman, allegedly to enhance his legal status in this country. However, this purported "marriage" ultimately ended in "divorce."[2]

The petition further states that, in 1995, Mr. Ghassemi made the necessary applications that allowed Hamed to enter the U.S. as his "son."[3] However, no efforts were made on behalf of Ms. Ghassemi for her to 734*734 enter the U.S. Subsequently, in 2002, Mr. Ghassemi "married" yet another woman in Baton Rouge, Louisiana, where he had become domiciled.[4] In 2005, through the efforts of her son, Hamed, Ms. Ghassemi finally entered the U.S. as a permanent resident and also settled in Baton Rouge. On May 22, 2006, she filed the present suit.

Mr. Ghassemi responded by filing a peremptory exception pleading the objection of no cause of action. He argued that the purported marriage to Ms. Ghassemi was invalid for various reasons. Specifically, Mr. Ghassemi contended that the marriage was invalid pursuant to section (3) of Article 1045 of the Civil Code of the Islamic Republic of **Iran**,[5] which provides, in pertinent part, as follows:[6]

> Marriage with the following relations by blood is forbidden, even if the relationship is based on mistake or adultery:
>
> * * *
>
> 3 — Marriage with the brother and sister and their children, or their descendants to whatever generation.
>
> * * *

In his pleadings, Mr. Ghassemi posited several arguments in support of his contention that the marriage was invalid, the principal one being that he and Ms. Ghassemi are first cousins. Following a hearing, Mr. Ghassemi's exception was overruled, and the issue of the validity of the marriage was set for a trial on the merits on December 6, 2006, along with Ms. Ghassemi's petition for divorce.[7]

In the interim, Ms. Ghassemi sought to obtain, through discovery, financial information and a detailed descriptive list of the community property relative to her claims for spousal support and a partition of the community property. In response to Ms. Ghassemi's discovery request, Mr. Ghassemi 735*735 filed a motion to quash, and then filed a motion for a protective order and a motion to stay

discovery regarding his personal and business financial information, until the family court made a determination as to whether the parties had been married and whether the marriage was valid in Louisiana. Shortly thereafter, Ms. Ghassemi filed a motion to compel regarding this same information. The opposing motions were entertained by the family court on August 29, 2006. Following the hearing, the family court granted Mr. Ghassemi's various motions and denied Ms. Ghassemi's motion to compel. Based upon the denial of Ms. Ghassemi's motion to compel, Mr. Ghassemi sought attorney fees and costs incurred in opposing the motion pursuant to LSA-C.C.P. art. 1469(4) and was subsequently awarded $1,500 in attorney fees.

During the course of the litigation, Mr. Ghassemi denied being Hamed's father. Consequently, Ms. Ghassemi filed a motion and order requesting a paternity test, which was met with Mr. Ghassemi's motion to quash. Mr. Ghassemi contended that the paternity of Hamed, now 29 years old, was irrelevant to Ms. Ghassemi's petition for divorce, spousal support, and partition of the community property. The family court ruled that it would hold this motion in abeyance until after the scheduled December trial.

On November 2, 2006, Mr. Ghassemi filed a pleading captioned, *"Rule to Show Cause Why a Louisiana Court Should Have any Obligation, Under the Doctrine of Comity or Conflicts of Law, to Give Legal Effect to a Purported Incestuous Marriage of **Iran**, A Foreign Country With Which the United States Has No Diplomatic Relations and Motion for Declaratory Judgment with Incorporated Memorandum and Motion to Dismiss."* Therein, he argued that Louisiana had no legal obligation to "give full legal effect" to a purported incestuous Iranian marriage. The matter was scheduled to be entertained on December 6, 2006, the date of the trial on the merits.

Ms. Ghassemi then filed a *"Dilatory Exception of Unauthorized Use of Summary Proceedings and Objection to Request for Dismissal by Declaratory Judgment."* Therein, she argued that pursuant to LSA-C.C.P. art. 926(A)(3), Mr. Ghassemi's rule and motion for a declaratory judgment constituted an unauthorized use of summary proceedings and that his request for the dismissal of her action via a declaratory judgment was impermissible. The matter was set for a hearing on December 5, 2006, the day before the scheduled trial.[8]

In his written opposition to the motion, Mr. Ghassemi argued that he intended to file a petition for a declaratory judgment but that it was inadvertently styled as a "motion." He further maintained that, out of an abundance of caution, a letter had been forwarded to Ms. Ghassemi's counsel advising of this mistake in captioning and stressing that the pleading was actually a "Petition for Declaratory Judgment." In addition, Mr. Ghassemi argued that because a declaratory judgment simply establishes the rights of the parties or expresses the opinion of the court on a question of law without ordering anything to be done, he also had included a "Rule to Show Cause and a Motion to Dismiss." According to Mr. Ghassemi, based on the content of the pleading, it was clearly "a 736*736 Petition for Declaratory Judgment" and "a Rule to Show Cause."

We note that the record lacks a transcription of the hearing and ruling on Ms. Ghassemi's exception and objection. Moreover, no judgment appears in the record, nor do the court minutes reflect any

ruling by the family court; however, it is undisputed by the parties that the family court overruled and/or denied Ms. Ghassemi's exception and objection. Ms. Ghassemi also filed a motion seeking a continuance of the trial of Mr. Ghassemi's request for declaratory relief. This motion was likewise denied.

On December 6, 2006, when counsel for Mr. Ghassemi prepared to argue what was summarized as his "petition for declaratory judgment and motion to dismiss," Ms. Ghassemi re-urged her "exception or objection;" however, she failed to argue the matter any further. The family court then held a "trial" on Mr. Ghassemi's request for declaratory relief.[9] Therein, Mr. Ghassemi argued that a marriage between first cousins was a violation of a strong public policy of Louisiana and, further, that Louisiana had no obligation, under the doctrine of comity, to recognize Iranian law or to give legal effect to a marriage certificate issued by **Iran**.

At the conclusion of the trial, the family court stated:

> This court exercising its powers vested from the state, this court will not recognize any document, decree, judgments[,] statutes or contracts, and will not give comity ... and no validity whatsoever from the country of **Iran** [s]ince that country has been declared by itself, and by its leader, to be an enemy of the United States. The United States has had no diplomatic relations with that country for 28 years, and they are not a signatory to the Hague Convention with respect to marriages. And even if the court recognizes the marriage, it will violate public policy of this state; and therefore the declaratory judgment is granted.

However, despite rendering this "initial" ruling from the bench, the family court later ordered the parties to submit post-trial memoranda.

Finally, on June 13, 2007, the family court issued written reasons and separately signed a final judgment, which contained the following decretal language:

> IT IS ORDERED, ADJUDGED AND DECREED that this Court declines to recognize, will not recognize, and hereby declines to give full faith and credit to the laws, judgment, decrees, treaties' [sic] or pronouncements of the country of **IRAN**.[10]
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court declines give [sic] comity and declines to recognize any laws, judgments, decrees, treaties' [sic] or legal pronouncement of the country of **IRAN**.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court declines to recognize any IRANIAN purported incestuous marriage of the parties and hereby dismisses [Ms. Ghassemi's] petition with prejudice.

737*737 Significantly, the judgment did not expressly state that the marriage was a violation of a strong public policy of this state.

From this judgment, Ms. Ghassemi now appeals. In so doing, she also challenges the interlocutory rulings made by the family court. We address first those assignments of error associated with the final judgment rendered in this case.

DISCUSSION

I. FINAL JUDGMENT

Initially, Ms. Ghassemi asserts several assignments of error as to the family court's procedural rulings relative to Mr. Ghassemi's request for declaratory relief and her exception and objection thereto. While at least some of these arguments appear to be potentially valid, we find we are hindered in our effort to address them due to an unclear and incomplete record.[11] However, we may pretermit any discussion of the procedural errors asserted by Ms. Ghassemi, as we find a substantive basis to reverse the family court's judgment.

At the trial of Mr. Ghassemi's request for declaratory relief, the parties stipulated as to the facts and presented only a question of law to the family court. Accordingly, we review the instant matter *de novo.* The sole issue before us is the same as that presented to the family court: whether an Iranian marriage between first cousins will be recognized in Louisiana.

A. Applicable Law

It is axiomatic that our analysis begins with an examination of the pertinent provisions governing the conflict of laws. Marriage and, specifically, the validity of marriages are topics that, traditionally, have been subsumed under the rubric of status. LSA-C.C. art. 3519, comment (a). Louisiana Civil Code article 3519, which addresses the status of persons, provides as follows:

> The status of a natural person and the incidents and effects of that status are governed by the law of the state whose policies would be most seriously impaired if its law were not applied to the particular issue.
>
> That state is determined by evaluating the strength and pertinence of the 738*738 relevant policies of the involved states in the light of: (1) the relationship of each state, at any pertinent time, to the dispute, the parties, and the person whose status is at issue; (2) the policies referred to in Article 3515; and (3) the policies of sustaining the validity of obligations voluntarily undertaken, of protecting children, minors, and others in need of protection, and of preserving family values and stability.

However, Article 3519 only applies to the validity of marriages that do not fall within the ambit of LSA-C.C. art. 3520. LSA-C.C. art. 3519, comment (a). Article 3520, which is more specific, addresses the validity of marriages that are valid in the state where they were contracted or in the state where the parties were first domiciled. Article 3520 purposefully does not encompass marriages that are not valid in either of these states, the validity or invalidity of which must be analyzed under LSA-C.C. art. 3519.[12] *See* LSA-C.C. art. 3520, comment (a). Specifically, Article 3520 provides:

A. A marriage that is valid in the state where contracted, or in the state where the parties were first domiciled as husband and wife, shall be treated as a valid marriage unless to do so would violate a strong public policy of the state whose law is applicable to the particular issue under Article 3519.

B. A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.

Comment (b) to Article 3520 explains our state's longstanding policy of "favor matrimonii." Specifically, it provides, in part, as follows:

Based on the universally espoused policy of favoring the validity of marriages if there is any reasonable basis for doing so (favor matrimonii), this Article authorizes the validation of marriages that are valid either in the state where contracted or in the state where the spouses were first domiciled as husband and wife.... This ancient policy of favor matrimonii and favor validatis is well entrenched in the substantive law of every state of the United States. This policy is equally important at the multistate level, where it is reenforced by the policy of avoiding "limping marriages". This Article enunciates this policy of validation and defines its limits. These limits are co-extensive with the "strong public policy of the state whose law is applicable to the particular issue under Article 3519." In order to rebut the presumptive rule of validation established by Article 3520, the party who asserts the invalidity of the marriage must prove that: (1) under Article 3519, the law of a state other than the one where the marriage was contracted or where the parties were first domiciled as husband and wife would be applicable to the particular issue; and (2) that law would invalidate the marriage for reasons of "a strong public policy".

Thus, it is the public policy of Louisiana that every effort be made to uphold the validity of marriages. *See Wilkinson v. Wilkinson,* 323 So.2d 120, 124 (La.1975). 739*739 Moreover, if a foreign marriage[13] is valid in the state where it was contracted, the marriage is accorded a presumption of validity.

In seeking declaratory relief, Mr. Ghassemi did not argue that a marriage between first cousins is invalid in **Iran**, where the marriage herein was purportedly contracted. Moreover, we conclude that such a marriage is not prohibited by the Iranian Civil Code article previously cited by Mr. Ghassemi in his peremptory exception pleading the objection of no cause of action. Accordingly, LSA-C.C. art. 3520 is controlling herein, and such a marriage is presumed to be valid. To defeat this presumption, Mr. Ghassemi must prove that the law of another state is applicable and that state's law would invalidate the marriage for reasons of "a strong public policy."

Because both he and Ms. Ghassemi are now domiciled in Louisiana, presumably with no intention of returning to **Iran**, and because Ms. Ghassemi has sought a divorce in the courts of this state, Mr. Ghassemi essentially argued that Louisiana law would be applicable under LSA-C.C. art. 3519 and asserted, to a considerable extent, that the marriage violates a strong public policy of Louisiana.

However, the majority of Mr. Ghassemi's argument in the underlying proceedings was premised on his assertion that the family court had no obligation under the doctrine of comity[14] either to recognize (1) a marriage certificate issued by **Iran** or (2) the laws of **Iran** where the purported marriage was contracted. In so doing, Mr. Ghassemi argued, in essence, that the family court could not or should not consider whether the marriage was valid under Iranian law. Based upon its judgment, the family court clearly credited this argument and, relying on the doctrine of comity, essentially based its decision not to recognize the purported marriage in light of the state of diplomatic relations between **Iran** and the U.S.[15]

However, as the parties now agree, the family court's discussion of comity and the U.S.'s diplomatic relations with **Iran**, or lack thereof, is irrelevant to the matter at hand.[16] Clearly, the positive law set forth in LSA-C.C. art. 3520 is controlling herein and provides the correct standard for a court to utilize in determining the validity of this foreign marriage. Thus, we find that the family court failed to enunciate the appropriate legal standard and further failed to analyze the precise 740*740 issue before it within the parameters of that standard.[17] The proper legal standard simply requires a two-part inquiry:

(1) Was the marriage valid in the state (**Iran**) where it was purportedly contracted?

(2) If so, would recognition of the validity of the marriage violate "a strong public policy" of the state whose law would be applicable under LSA-C.C. art. 3519 (Louisiana)?[18]

B. Valid in the state where contracted?

In his brief to this court, Mr. Ghassemi concedes, for the sake of argument, that a marriage between first cousins is valid under Iranian law. Nevertheless, the family court, relying on the doctrine of comity, refused to consider whether such a marriage was valid in **Iran**. Or, to be more precise, the family court essentially refused to acknowledge the existence of any marriage contracted in **Iran**.

Specifically, the family court ruled that it would not give effect to the laws of **Iran** and/or a marriage document issued by **Iran** under the doctrine of comity.[19] However, this is not a matter of enforcing Iranian law in Louisiana or giving automatic legal effect to an Iranian marriage certificate. To the contrary, this matter is squarely controlled by Louisiana law. Our legislature has expressly provided that a marriage valid where contracted will be recognized as valid in Louisiana absent a violation of strong public policy. Given its judgment, it is clear that the family court failed to recognize that determining whether a foreign marriage is valid where contracted — as required by Louisiana law— does not equate to enforcing a foreign law here. The family court likewise failed to appreciate the distinction between acknowledging that a foreign document is what it purports to be and blindly enforcing or giving legal effect to that document.

Furthermore, insofar as the family court indicated that Ms. Ghassemi would be unable to prove the existence of the marriage because, under the doctrine of comity, it would not allow the admission of, or allot any validity to, the marriage certificate issued in **Iran**, it was in error.[20] While such a

document is not entitled to be given legal effect, it is certainly relevant in determining whether a marriage occurred, where it occurred, and whether it was valid where it was confected.

741*741 Moreover, the Louisiana Code of Evidence, not the doctrine of comity, governs the admission of the document. *See generally* LSA-C.E. art. 901 *et seq.* Articles 902-905 of the Code of Evidence provide broad authority for the admission of public records of foreign countries, and specify how such documents may be authenticated. *See* LSA-C.E. art. 901, comment (f) to paragraph B. In particular, LSA-C.E. art. 902, which addresses self-authentication, provides, in part, as follows:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(3) Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (a) of the executing or attesting person, or (b) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

To the extent that Mr. Ghassemi argued that the fact that **Iran** is not a signatory to the "Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents" precludes the family court from admitting the marriage certificate into evidence, we find his argument to be wholly misguided. That Convention merely simplifies the legalization process for signatories by abolishing the cumbersome requirement of diplomatic or consular legalization of foreign public documents. Thus, under the Convention, a contracting state where a foreign document is to be used may not demand that the document be certified by its diplomatic or consular agent stationed in the contracting state where the document was generated. It therefore follows that those countries that are not parties to the Convention must still have such documents properly authenticated via the diplomatic or consular legalization process, the very procedure called for under LSA-C.E. art. 902(3).[21]

At the trial of his request for declaratory relief, Mr. Ghassemi argued that because the U.S. has no diplomatic relations with **Iran**, the document cannot be certified in accordance with Article 902(3). However, this is incorrect. Article 902(3) expressly states that a foreign document may be certified by "a diplomatic or consular official of the foreign country assigned or accredited to the United

States." After 742*742 the U.S. severed relations with **Iran** in 1980, the U.S. requested that the Swiss Government assume diplomatic and consular representation of the U.S. in **Iran**.[22] Consequently, the Swiss Embassy in Tehran, which houses the U.S. Interests Section, now performs specific consular and administrative functions on behalf of the U.S. Government, including the certification of Iranian public documents for their use in this country, a situation clearly contemplated by Article 902(3).[23] Even so, the last clause of Article 902(3) establishes that the courts are afforded considerable discretion in the authentication of foreign public documents and consequently may consider such documents presumptively authentic even without this final certification.

Based on all of the foregoing precepts, we find that the family court erred in declaring that it would not recognize any Iranian laws and/or Iranian documents, and, consequently, would not recognize any marriage contracted in **Iran**.[24] Moreover, there was absolutely no evidence, much less an assertion, that Iranian law prohibits marriage between first cousins; as we have concluded, such a marriage is not prohibited under the pertinent Iranian code article. Because a marriage between first cousins is valid in **Iran**, it is accorded the presumption of validity. Accordingly, it was error for the family court not to recognize the validity of first-cousin marriages under Iranian law when rendering its judgment.

C. Violation of a strong public policy?

If a marriage is valid where contracted, it is presumed to be valid in this state. To rebut that presumption in the case *sub judice,* Mr. Ghassemi must prove that the recognition of a foreign marriage between first cousins would violate "a strong public policy" of this state.

Clearly, in determining whether Louisiana has "a strong public policy" against recognizing the validity of a foreign marriage between first cousins, it is appropriate to examine our laws governing marriages that are contracted in this state. Louisiana Civil Code article 90, which addresses the impediments of relationships, provides as follows:

A. The following persons may not contract marriage with each other:

(1) Ascendants and descendants.

(2) Collaterals within the fourth degree, whether of the whole or of the half blood.

B. The impediment exists whether the persons are related by consanguinity or by adoption. Nevertheless, persons related by adoption, though not by blood, in the collateral line within the fourth degree may marry each other if they obtain judicial authorization in writing to do so.

The phrase "collaterals within the fourth degree" includes aunt and nephew, uncle and niece, siblings, and first cousins. LSA-C.C. art. 90, comment (b); *see also* LSA-C.C. art. 901. Pursuant to LSA-C.C. art. 94, a marriage is absolutely null 743*743 when contracted in this state (1) without a marriage ceremony, (2) by procuration, or (3) in violation of an impediment.

However, the mere fact that a marriage is absolutely null when contracted in Louisiana does not mean that such a marriage validly performed elsewhere is automatically invalid as violative of a strong public policy. For example, comment (b) to LSA-C.C. art. 3520 expressly states, in part: "The word `contracted' as opposed to the word `celebrated' is used [in this article] so as not to exclude common-law marriage from the scope of this Article." A common-law marriage is one that is performed without a ceremony. *See Succession of Marinoni,* 177 La. 592, 613, 148 So. 888, 895 (1933); *Chivers v. Couch Motor Lines, Inc.,* 159 So.2d 544, 549 (La. App. 3 Cir.1964); *see also* BLACK'S LAW DICTIONARY 277 (6thed.1990) (defining a common-law marriage as "non-ceremonial"). Based on the language in comment (b), LSA-C.C. art. 3520 was clearly intended to encompass foreign common-law marriages, *i.e.,* marriages contracted without a ceremony, even though such a marriage contracted in Louisiana is absolutely null.

Indeed, the jurisprudence is replete with decisions recognizing that if a common-law marriage is contracted in a state whose law sanctions such a marriage, the marriage will be recognized as a valid marriage in Louisiana, even though a common-law marriage cannot be contracted in this state. *See, e.g., Brinson v. Brinson,* 233 La. 417, 425, 96 So.2d 653, 656 (1957); *Bloom v. Willis,* 221 La. 803, 807, 60 So.2d 415, 417 (1952), *cert. denied,* 345 U.S. 916, 73 S.Ct. 726, 97 L.Ed. 1349 (1953); *Succession of Marinoni,* 177 La. at 610, 148 So. at 894; *Gibbs v. Illinois Cent. R. Co.,* 169 La. 450, 453-54, 125 So. 445, 446 (1929); *Lewis v. Taylor,* 554 So.2d 158, 159 n. 1 (La.App. 2 Cir.1989), *writ denied,* 554 So.2d 1237 (La.1990); *Succession of Rodgers,* 499 So.2d 492, 495 (La.App. 2 Cir. 1986); *Fritsche v. Vermilion Parish Hosp. Service Dist. No. 2,* XXXX-XXXX, p. 3 (La. App. 3 Cir. 2/2/05), 893 So.2d 935, 937-38, *writs denied,* XXXX-XXXX and XXXX-XXXX (La.4/22/05), 899 So.2d 574 and 576; *State v. Williams,* 96-652, p. 6 (La.App. 3 Cir. 2/5/97), 688 So.2d 1277, 1281; *Parish v. Minvielle,* 217 So.2d 684, 688 (La.App. 3 Cir.1969); *Chivers,* 159 So.2d at 549. *See also* LSA-C.C. art. 87, comment (d).

Similarly, this state has recognized a foreign marriage contracted by procuration, even though such a marriage would be absolutely null if contracted here.[25] In *U.S. ex rel. Modianos v. Tuttle,* 12 F.2d 927 (E.D.La.1925), the court held that the statute prohibiting marriage by procuration only applied to marriages contracted within Louisiana and that the marriage of a citizen celebrated by proxy in Turkey was valid where it was valid under the laws of that country.

There is no Louisiana jurisprudence addressing the recognition of a foreign marriage between first cousins; however, based on the law of this state, presently and historically, we find that such a marriage, if valid where contracted, is valid in Louisiana and is not a violation of a strong public policy.[26] In finding no violation, we make a clear distinction 744*744 between the marriage of first cousins and marriages contracted by more closely-related collaterals, *i.e.,* uncle and niece, aunt and nephew, and siblings.

Contrary to assertions made by defense counsel to the family court, marriage between first cousins has not always been prohibited in Louisiana. It was permitted under the Civil Codes of 1804, 1808, and 1825. It was also permitted under the Civil Code of 1870 until its amendment in 1902.[27]

Prior to its amendment in 1902, Article 95 of the Civil Code of 1870 (the source of present LSA-C.C. art. 90) provided, as follows:

Among collateral relations, marriage is prohibited between brother and sister, whether of the whole or of the half blood, whether legitimate or illegitimate, and also between the uncle and the niece, the aunt and the nephew.

It was then amended by 1902 La. Acts, No. 9, to provide, in part, as follows:

Among collateral relations, marriage is prohibited between brother and sister, whether of the whole or the half blood, whether legitimate or illegitimate, between uncle and niece, between aunt and nephew, and also between first cousins.

That no marriage contracted in contravention of the above provisions in another State by citizens of this State, without first having acquired a domicile out of this State, shall have any legal effect in this State.[28]

Thus, prior to 1902, there was absolutely no bar to marriages between first cousins in this state.

Even so, notwithstanding the prohibitions set forth in former Article 95 (as amended in 1902), the Louisiana Legislature thereafter repeatedly ratified marriages between collaterals in the fourth degree that had been contracted in violation of the prohibition. *See* 1972 La. Acts, No. 230, and 1981 La. Acts, No. 647. Effective September 11, 1981, former Article 95 was amended by 1981 La. Acts, No. 647, to provide as follows:

Among collateral relations, marriage is prohibited between brother and sister, whether of the whole or the half blood, whether legitimate or illegitimate, between uncle and niece, between aunt and nephew, and also between first cousins.

No marriage contracted in contravention of the above provisions in another state by citizens of this state, without first having acquired a domicile out of this state, shall have any legal effect in this State.

AH such marriages heretofore made in contravention of the above provisions shall be considered as legal. (Emphasis added.)

Hence, the Louisiana Legislature legalized all marriages between collaterals within the fourth degree that were contracted by citizens of this state before September 11, 1981.

In a similar vein, Article 113 of the Civil Code of 1870 was amended by 1904 La. Acts, No. 129:

745*745 Every marriage contracted under the other incapacities or nullities enumerated in the second chapter of this title, may be impeached either by the married persons themselves, or any person interested, or by the Attorney General; however, first, that marriages heretofore contracted between persons, related

within the prohibited degrees either or both of whom were then and afterward domiciled in this State and were prohibited from intermarrying here, shall nevertheless be deemed valid in this State, where such marriages were celebrated in other States or countries under the laws of which they were not prohibited; second, that marriages hereinafter contracted between persons, either or both of whom are domiciled in this State and are forbidden to intermarry, shall not be deemed valid in this State, because contracted in another State or country where such marriages are not prohibited, if the parties, after such marriage, return to reside permanently in this State.

Obviously, the amendment was intended to ratify prior "fugitive marriages"[29] but to henceforth prevent Louisiana domiciliaries from thwarting the law of this state by contracting such marriages. However, despite the express intention to prevent future fugitive marriages, the Louisiana Legislature thereafter periodically amended and reenacted former Article 113, employing essentially the same language utilized in 1904 La. Acts, No. 129. *See* 1912 La. Acts, No. 54; 1938 La. Acts, No. 426; and 1950 La. Acts, No. 242. Thus, fugitive marriages contracted by collaterals were periodically ratified.

In continually ratifying marriages between collaterals within the fourth degree, notwithstanding our law's express prohibition of such marriages, the legislature voluntarily chose to legalize marriages by Louisiana domiciliaries who had chosen either to ignore Louisiana law or flout it. *See* Katherine Shaw Spaht, *Revision of the Law of Marriage: One Baby Step Forward,* 48 La.L.Rev. 1131, 1139-40 (1988).

The general practice of retroactively validating prohibited marriages between collaterals only ended when 1987 La. Acts, No. 886, was enacted to revise the Civil Code articles relative to marriage. In addition to redesignating former Articles 95 and 113 as present Articles 90 and 94 respectively, that Act expressly protects those collaterals whose marriages previously had been declared legal pursuant to 1981 La. Acts, No. 647, but further evidences an intention not to continue the practice of retroactively validating such marriages. *See* Spaht, 48 La.L.Rev. at 1148. Specifically, Section 5 of 1987 La. Acts, No. 886, provides:

Notwithstanding the provisions of Civil Code Articles 90 and 94, or of any other provision of this Act, marriages between collateral relations contracted prior to September 11, 1981, shall continue 746*746 to be legal and of full effect on or after the effective date of this Act.

The foregoing is noted in comment (b) to present LSA-C.C. art. 90, which likewise states:

Marriages contracted by these collaterals before September 11, 1981, were legal under former Civil Code Article 95 as retroactively amended by Acts 1981, No. 647. Though not continued as part of the Civil Code, that validating provision has been carried forward in Section 5 of the act embodying this revision (Acts 1987, No. 886).

Furthermore, as a result of the amendments and reenactments set forth in 1987 La. Acts, No. 886, LSA-C.C. art. 94, comment (d) now reads as follows:

The retrospective provision of Article 113 of the Civil Code of 1870 concerning "fugitive marriages" has been suppressed in this revision. However, in order to protect the interests of persons who have relied on the most recent such exception, a section of the act embodying this revision (Acts 1987, No. 886, § 5) retroactively validates all marriages between collateral relations contracted prior to September 11, 1981, the effective date of Acts 1981, No. 647 (which similarly amended Article 95 of the Civil Code of 1870).

The prospective fugitive marriage provision of Civil Code Article 113 (1870) has also been suppressed because it is unnecessary. The only situation it addressed is that in which Louisiana domiciliaries who lack capacity to marry in this state contract marriage in another state or country and then return here to live, intending to remain here. In that case the second paragraph of Civil Code Article 10 (1870) (redesignated as Art. 15 in 1987 [subsequently revised; see, now, C.C. art. 3520]) applies, and is dispositive.

There is no reason to apply a different rule to a fugitive marriage performed in another state, rather than a foreign country.[30] (Emphasis added; footnote added.)

Thus, a marriage contracted in another country or state now must be analyzed without making any distinction as to the parties' domiciliary status at the time the marriage is contracted. Accordingly, a marriage contracted in another state or country where such a marriage is valid is to be analyzed pursuant to LSA-C.C. art. 3520 regardless of whether a person is a domiciliary of Louisiana or of another state or country.

Although no "general" ratifications have occurred since 1981, in 1993, the legislature enacted LSA-R.S. 9:211, which currently provides:

Notwithstanding the provisions of Civil Code Article 90, marriages between collaterals within the fourth degree, fifty-five years of age or older, which were entered into on or before December 31, 1992, shall be considered legal and the enactment hereof shall in no way impair vested property rights.

747*747 In light of all of the foregoing, and for reasons more fully explained below, we are compelled to conclude that Louisiana does not have a strong public policy against recognizing a marriage between first cousins performed in a state or country where such marriages are valid.[31]

Clearly, if Louisiana law were applied to the marriage at issue herein, it would be valid, since all marriages contracted by collaterals within the fourth degree before September 11, 1981, are legal. Thus, assuming the purported marriage herein was not valid under Iranian law, and that LSA-C.C. art. 3519 mandated the application of Louisiana law, the 1976 marriage would be valid. There is no reason a different result should obtain under LSA-C.C. art. 3520 simply because the marriage was valid in **Iran**.

Nevertheless, in an effort to discount the history of legislative ratifications and argue that a strong public policy in Louisiana absolutely prohibits a marriage between first cousins, Mr. Ghassemi argues that the ratification of all marriages between collaterals contracted prior to September 11, 1981, was merely intended to benefit those collaterals who were Louisiana domiciliaries when the marriage occurred and was not meant to benefit those who married before making Louisiana their domicile. We find this argument to be contrary to logic and justice. If the Louisiana legislature recognized marriages between collaterals within the fourth degree who were Louisiana domiciliaries and who had intentionally ignored or thwarted Louisiana law in order to contract their marriages, then, *a fortiori,* it would certainly recognize marriages legally contracted by collaterals who, before becoming domiciled here, were domiciled and married in a state or country that permitted such marriages. Moreover, all marriages contracted outside of Louisiana now are analyzed pursuant to either LSA-C.C. art. 3519 or 3520, regardless of whether the parties were domiciliaries of Louisiana or another jurisdiction at the time the marriage occurred. Hence, his attempt to urge the application of a distinction based on domiciliary status fails on this basis as well. Accordingly, we find Mr. Ghassemi's argument to be without merit.

However, we emphasize that the instant case involves the marriage of first cousins. Although the previously noted laws, both past and present, applied generally to all collaterals within the fourth degree, we reiterate that in finding no violation of a strong public policy, we make a clear 748*748 distinction between the marriage of first cousins and marriages contracted between more closely-related collaterals. While the former is commonly accepted, the latter is greatly condemned.

"The marriage of first cousins has historically been regarded as in a different category from that of persons more closely related." 52 Am.Jur.2d, *Marriage* § 51. A marriage between first cousins neither violates natural law[32] nor is it included in the wider list of prohibited relationships set forth in Chapter 18 of the Bible's Book of Leviticus, the font of Western incest laws. P.H. Vartanian, Annotation, *Recognition of Foreign Marriage as Affected by Policy in Respect of Incestuous Marriages,* 117 A.L.R. 186, 190 (1938).

Thus, while "incestuous" marriages have traditionally constituted an exception to the general rule that a marriage valid where contracted is valid everywhere, that historical exception excludes marriages contracted between first cousins. *See Id.;* Mark Strasser, *Unity, Sovereignty, and the Interstate Recognition of Marriage,* 102 W.Va.L.Rev. 393, 405 (1999). *See also* *Succession of Gabisso,* 119 La. 704, 713, 44 So. 438, 441 (1907) (recognizing the incest exception).

Our recognition of this distinction is further buttressed by the fact that relations between first cousins are not encompassed by our criminal incest statute, LSA-R.S. 14:78, which provides, in pertinent part:

A. Incest is the marriage to, or sexual intercourse with, any ascendant or descendant, brother or sister, uncle or niece, aunt or nephew, with knowledge of their relationship.

Some U.S. states that prohibit first-cousin marriages, including states that consider such marriages void if contracted within the state, have nonetheless recognized such marriages when validly celebrated elsewhere by relying largely on the fact that their respective legislatures had not seen fit to criminalize relations between first cousins, despite prohibiting them from marrying within the state. *See Matter of Loughmiller Estate,* 229 Kan. 584, 590, 629 P.2d 156, 161 (1981) (discussing how the prohibition against first cousin marriages has become less compelling as evidenced by the legislature's omission of sexual intercourse between first cousins in the definition of criminal incest); *Mazzolini v. Mazzolini,* 168 Ohio St. 357, 359-60, 155 N.E.2d 206, 208 (1958) (wherein the court relied on the fact that sexual relations between first cousins was not deemed incestuous under criminal statute); *see also, Matter of Hirabayashi,* 10 I. & N. Dec. 722, 724 (1964) (noting that a strong public policy did not exist against marriages between first cousins since cohabitation between first cousins was no longer considered a crime under Illinois statutes). Based upon the law of Louisiana, first cousins may legally cohabitate, have intimate relations, and even produce children; however, they are merely prohibited from regularizing their union by marriage. This disparity would tend to negate any contention that Louisiana has a strong public policy against marriages between first cousins, since it is in conflict with this state's policy to legally solidify such unions for the good of society at large and for the benefit of any potential posterity.

Furthermore, we note that marriages between first cousins are widely permitted 749*749 within the western world. "Such marriages were not forbidden at common law." 52 Am.Jur.2d, Marriage § 51. Additionally, no European country prohibits marriages between first cousins. *See* Martin Oppenheimer, FORBIDDEN RELATIVES: THE AMERICAN MYTH OF COUSIN MARRIAGE, 90 (1996); Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law,* 63 Md. L.Rev. 540, 564 (2004). Marriages between first cousins are also legal in Mexico and Canada, in addition to many other countries. *See* Código Civil Federal [C.C.F.] [Federal Civil Code], as amended, Articulo 156, Diario Oficial de la Federación [D.O.], 12 de Diciembre de 2004 (Mex.); The Marriage (Prohibited Degrees) Act, 1990 S.C., ch.46 (Can.); § 155 of the Canadian Criminal Code.

Actually, the U.S. is unique among western countries in restricting first cousin marriages. Even so, such marriages may be legally contracted in Alabama, Alaska, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Maryland, Massachusetts, New Jersey, New Mexico, New York, North Carolina,[33] Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and the District of Columbia.[34] An additional six states, Arizona, Illinois, Indiana, Maine, Utah, and Wisconsin, also allow first cousin marriages subject to certain restrictions.[35]

Accordingly, Louisiana is one of only 25 U.S. states that flatly prohibits such marriages. However, even other states that prohibit marriages between first cousins, have nonetheless found that such marriages do not violate public policy and thus recognize such marriages as valid, if they are valid in the state or country where they were contracted. *See Etheridge v. Shaddock,* 288 Ark. 481, 482-83, 706 S.W.2d 395, 396 (1986) (where Arkansas court cited Robert A. Leflar, AMERICAN CONFLICTS LAW, § 221 (3d ed.1977), for the proposition that the marriage of first cousins "does not create `much social alarm'" and found that such a marriage will be recognized, if valid where

contracted, despite Arkansas' prohibition against such marriages); *Matter of Loughmiller Estate,* 229 Kan. at 590, 629 P.2d at 161 (1981) (where Kansas court found that the marriage of first cousins contracted in Colorado was not "odious to the public policy" of Kansas and would be recognized as valid, notwithstanding Kansas' prohibition of first cousin marriages); *Toth v. Toth,* 50 Mich.App. 150, 151-52, 212 N.W.2d 812, 813 (1973) (per curiam) (where Michigan court found marriage between first-degree cousins married in Hungary was valid); *Raja v. Raja,* 54 Pa. D. & C.2d 72, 73-74 (Pa.Com.Pl.), *aff'd,* 220 Pa.Super. 730, 283 A.2d 86 (1971) (per curiam) (where Pennsylvania court found marriage between first cousins contracted in India, where such marriages were permitted, would be recognized as valid in Pennsylvania). Like the foregoing courts, we too find that although Louisiana law expressly prohibits the marriages of first cousins, such marriages are not so "odious" 750*750 as to violate a strong public policy of this state. Accordingly, a marriage between first cousins, if valid in the state or country where it was contracted, will be recognized as valid pursuant to LSA-C.C. art. 3520.

II. INTERLOCUTORY JUDGMENTS

Having resolved the substantive issues raised in this appeal, we turn now to address Ms. Ghassemi's assignments of error pertaining to the family court's interlocutory judgments.[36] In particular, Ms. Ghassemi complains that the family court erred in granting Mr. Ghassemi's motion to quash, motion for a protective order, and motion to stay discovery regarding personal and business financial information. She further argues that the family court erred in ordering her to pay $1,500 in attorney fees, pursuant to LSA-C.C.P. art. 1469(4), and in deferring a ruling on her motion for a paternity test.

Generally, a court has broad discretion in ruling on pre-trial discovery, and an appellate court should not upset such rulings absent an abuse of that discretion. *See Bell v. Treasure Chest Casino, L.L.C.,* XXXX-XXXX, pp. 3-4 (La.2/22/07), 950 So.2d 654, 656; *Lawrence v. City of Shreveport,* 41,825, p. 11 (La.App. 2 Cir. 1/31/07), 948 So.2d 1179, 1187, *writ denied,* XXXX-XXXX (La.4/20/07), 954 So.2d 166. That discretion encompasses the award of attorney fees in accordance with LSA-C.C.P. art. 1469(4).

In light of the procedural posture of the case at the time of the family court's rulings, we find no abuse of discretion. The family court's judgments pertaining to the discovery of financial information were simply based upon the pending trial to discover if a marriage had even occurred, an essential prerequisite to Ms. Ghassemi's alleged causes of action. Ms. Ghassemi was well aware that Mr. Ghassemi was challenging the existence of the purported marriage. The family court's judgments were not intended to deny Ms. Ghassemi the right to obtain discovery. Rather, they were merely intended to delay discovery of highly personal information pending a scheduled trial to determine whether the parties had indeed been married. Furthermore, we find that the award of attorney fees was permissible pursuant to LSA-C.C.P. art. 1469(4).

Finally, we find no error in the family court's deferral of Ms. Ghassemi's motion for a paternity test in light of LSA-R.S. 9:396 and LSA-C.C.P. art. 1464. The paternity of Hamed, now 29 years old, is

not a "relevant fact" in this action for a divorce, spousal support, and a partition of the community property, nor is the mental or physical condition of a party, or of a person in the custody or under the legal control of a party, in controversy herein.[37] Accordingly, we find Ms. Ghassemi's assignments of error pertaining to the interlocutory judgments of the family court to be without merit.

CONCLUSION

For all of the above and foregoing reasons, the interlocutory judgments rendered 751*751 on August 29, 2006, October 24, 2006, and December 5, 2006, are affirmed. The final judgment signed on June 13, 2007, is hereby reversed, and this matter is remanded to the family court for further proceedings consistent with the opinions expressed herein. All costs of this appeal are assessed to Hamid Ghassemi.

INTERLOCUTORY JUDGMENTS RENDERED ON AUGUST 29, 2006, OCTOBER 24, 2006, AND DECEMBER 5, 2006, AFFIRMED. JUDGMENT OF JUNE 13, 2007, REVERSED AND REMANDED WITH INSTRUCTIONS.

PARRO, J., concurs.

[1] After entering the U.S., Mr. Ghassemi resided in Indiana, where he attended a university.

[2] This "marriage" was contracted in Indiana in 1978 or 1979 and was terminated in 1983. Mr. Ghassemi became a U.S. citizen in 1989.

[3] Hamed became a naturalized citizen in 2003.

[4] Mr. Ghassemi and the woman he "married" in 2002 executed a separation of property agreement.

[5] We may take judicial notice of Iranian law pursuant to LSA-C.E. art. 202, which provides, in pertinent part, as follows:

B. Other legal matters. (1) A court shall take judicial notice of the following if a party requests it and provides the court with the information needed by it to comply with the request, and may take judicial notice without request of a party of:

* * *

(f) Law of foreign countries, international law, and maritime law.

* * *

C. Information by court. The court may inform itself of any of the foregoing legal matters in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

[6] The entirety of Iranian Civil Code article 1045, found in Chapter 3 titled "ON IMPEDIMENTS TO MARRIAGE," provides as follows:

Article 1045 — Marriage with the following relations by blood is forbidden, even if the relationship is based on mistake or adultery:

1 — Marriage with father or grandfather, mother or grandmothers, or to their ancestors to whatever generation.

2 — Marriage with children, or descendants to whatever generation.

3 — Marriage with the brother and sister and their children, or their descendants to whatever generation.

4 — Marriage with one's own paternal aunts and maternal aunts and those one's [sic] father, mother, grandfathers and grandmothers.

[7] No transcription of this hearing appears in the record; however, transcripts of later proceedings indicate that the family court intended to conduct a trial on December 6, 2006, to determine, first, if a marriage had taken place, and if so, to determine whether such a marriage was valid in Louisiana. If it determined the foregoing issues in the affirmative, the family court would then address Ms. Ghassemi's petition for divorce.

[8] The court minutes erroneously record that the hearing was held on December 6, 2006. However, it is clear from the transcription of the proceedings on December 6, 2006, as well as other subsequently filed pleadings, that the hearing on the dilatory exception was conducted on December 5, 2006.

[9] Although there is some confusion on Ms. Ghassemi's part as to whether the family court treated the matter as a summary proceeding or as an ordinary proceeding, the family court expressly referred to the proceeding as a "trial." In addition, Ms. Ghassemi has conceded that the matter was not scheduled on a "rule day."

[10] Because the instant matter does not involve the recognition of a legislative act, public record, or judicial decision of another U.S. state, the full faith and credit clause found in Art. IV, § 1 of the U.S. Constitution is not implicated in this case.

[11] On appeal, Ms. Ghassemi challenges the type of proceeding utilized to entertain Mr. Ghassemi's request for declaratory relief. As previously noted, the record before us contains no transcript of the hearing on Ms. Ghassemi's exception and objection or of the family court's reasons and ruling. In addition, the record lacks a written judgment or a complete minute entry from which we might discern exactly what transpired. Despite her personal knowledge of the matter, Ms. Ghassemi's own assignments of error reflect her uncertainty as to whether the family court ultimately treated Mr. Ghassemi's request for declaratory relief as a rule, and thus as a summary proceeding, or as a trial by ordinary proceeding, or even as a cumulation of the two, *i.e.,* a petition for declaratory judgment and rule to show cause, as argued by Mr. Ghassemi. If the last, we have no way of determining whether Ms. Ghassemi objected based on the improper cumulation of actions, or whether the family court intended to treat the matter as a proceeding granting supplemental relief in accordance with LSA-C.C.P. art. 1878.

Assuming that the family court construed Mr. Ghassemi's pleading as a petition for declaratory relief, Ms. Ghassemi complains that she received no citation. Notwithstanding the fact that the record before us contains no evidence, one way or another, on the matter, we note that a reconventional demand does not require citation. LSA-C.C.P. art. 1063. Although not raised by Ms. Ghassemi, we further note that the record does not contain any written leave of court permitting Mr. Ghassemi to file his reconventional demand. *See* LSA-C.C.P. art. 1033. However, given the incomplete nature of the record, we cannot say that such leave was not granted orally. *See Gotro v. State ex rel. Dept. of Transp. and Development,* 98-748, pp. 3-4 (La.App. 3 Cir. 12/9/98), 722 So.2d 100, 101.

[12] Louisiana Civil Code article 3516 clarifies that the word "state," as it appears in LSA-C.C. arts. 3519 and 3520, "denotes ... the United States or any state, territory, or possession thereof ... and any foreign country or territorial subdivision thereof that has its own system of law." (Emphasis added.)

[13] For the purposes of this opinion, a foreign marriage is one that is contracted in another state or another country.

[14] "Comity" is defined in BLACK'S LAW DICTIONARY 267 (6th ed.1990) as "courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will.... In general, [the] principle of `comity' is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect."

[15] Prior to the enactment of LSA-C.C. art. 3520, the validity of a foreign marriage was determined under the doctrine of comity. *See, e.g., Succession of Caballero,* 24 La.Ann. 573 (1872). However, the analysis employed under the doctrine of comity required the court to determine if the marriage was valid where it was contracted and whether recognizing it would violate the public policy of this state. Thus, LSA-C.C. art. 3520 essentially codified the previous comity analysis. Consequently, if the family court had properly analyzed the issue under the doctrine of comity, as it purported to do, the analysis should have been in accordance with LSA-C.C. art. 3520.

[16] It would be a questionable policy indeed to base the status of private individuals on the fluctuation of international relations.

[17] The family court's "initial" oral ruling and its written reasons for judgment did indicate that the marriage violated public policy. However the final judgment makes no mention of public policy, and it is well-settled that appeals are taken from judgments, not reasons for judgments. *Greater New Orleans Expressway Com'n v. Olivier,* 2002-2795, p. 3 (La. 11/18/03), 860 So.2d 22, 24.

[18] As noted above, Mr. Ghassemi contends that Louisiana law is implicated under LSA-C.C. art. 3519. Given her argument, Ms. Ghassemi apparently agrees with this contention.

[19] In making its determination, the family court placed considerable emphasis on the fact that **Iran** is not a signatory to the "Hague Convention of 14 March 1978 on [the] Celebration and Recognition of the Validity of Marriages." However, it failed to recognize that the U.S. is not a signatory either. Thus, we agree with Ms. Ghassmei's argument that this Convention was completely irrelevant and that the family court erred in admitting it and in relying upon it in making its decision.

[20] Despite the family court's comments to the contrary, documentary evidence is not required to prove the existence of a marriage. *See Succession of Cusimano,* 173 La. 539, 541, 138 So. 95, 95 (1931); *Bridges v. Osborne,* 525 So.2d 337, 341 (La.App. 1 Cir.), *writ denied,* 530 So.2d 567 (La. 1988); *Heirs of Hutton v. Self,* 449 So.2d 553, 554 (La.App. 1 Cir.), *writ not considered,* 457 So.2d 8 (La. 1984).

[21] Comment (c) to LSA-C.E. art. 902 recognizes that the procedure for the authentication of foreign documents pursuant to paragraph (3) of that article will, in many instances, be superseded by the simpler method of certifying documents that is provided for in the Convention.

[22] A court may take judicial notice, whether requested or not, of any fact, not subject to reasonable dispute because it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. LSA-C.E. art. 201(B)(2) and (C).

[23] As pointed out by Ms. Ghassemi, **Iran** has an Iranian Interests Section in the Pakistani Embassy in Washington, DC, which certifies U.S. documents for their use in **Iran**.

[24] In the event that Mr. Ghassemi challenges the marriage's validity under Iranian law (on any other basis) at the trial on the merits, the family court must make a determination as to whether the marriage was valid in **Iran**, and in so doing, must consider Iranian law.

[25] A marriage by procuration occurs when one party is not present but, instead, is represented by another person. *See* LSA-C.C. art. 92, comment (b).

[26] Obviously, given its prohibition, Louisiana does have a policy against such marriages. However, the prerequisites to a valid marriage in Louisiana vary in their significance. Some are more serious, while others are less so. *See, e.g.,* Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law From the Regulation of Marriage,* 63 La. L.Rev. 243, 251-252 (2003).

[27] A previous attempt to revise former Article 95 by 1900 La. Acts, No. 120 to prohibit marriage between first cousins was unsuccessful due to a procedural flaw. *See State ex rel. Caillouet v. Laiche,* 105 La. 84, 29 So., 700 (1901).

[28] The text of the article suggested that such marriages would be valid as long as citizens moved for a sufficient period of time so as to acquire domicile in another state that allowed such marriages. From this, it is implicit that Louisiana would recognize marriages contracted between collaterals in a state or country that sanctioned such marriages, so long as the parties were not domiciliaries of Louisiana at the time the marriage was confected.

[29] A "fugitive marriage" occurs when a domiciliary of Louisiana intentionally seeks to evade the laws of this state by temporarily repairing to another state or country solely for the purpose of contracting a marriage that he is prohibited from contracting at home. *See* LSA-C.C. art. 94, comment (d); *see also Succession of Gabisso,* 119 La. 704, 713-14, 44 So. 438, 441 (1907). It was reasoned that Louisiana could not give effect to these acts without sanctioning an evasion of its laws. Therefore, as explained by the redactors of the Civil Code of 1825, it was deemed necessary that: "[A] marriage made in a foreign country [or state] between two inhabitants of this state, who have not lost their domicile here, and who afterwards return here to reside, ought to be governed by our laws and not by those of the country [or state] where the marriage was celebrated." Projet of the Civil Code of 1925 at 2 (La. State Law Inst. Transl.1937).

[30] According to LSA-C.C. art. 94, comment (d), prospective fugitive marriages contracted by Louisiana domiciliaries were originally intended to be governed by former LSA-C.C. art. 15. However, former LSA-C.C. arts. 14 and 15 were amended and reenacted by 1991 La. Acts, No. 923, § 1, effective January 1, 1992, to consist of LSA-C.C. arts. 14 to 49. Pursuant to the statutory revision authority of the Louisiana State Law Institute, LSA-C.C. arts. 15 to 49, as set forth in 1991 La. Acts, No. 923, were redesignated as LSA-C.C. arts. 3515 to 3549. Accordingly, LSA-C.C. art. 94, comment (d) recognizes that, pursuant to the foregoing amendments and reenactments, LSA-C.C. art. 3520 is controlling in the case of a valid fugitive marriage (or LSA-C.C. art. 3519, if the marriage is invalid in the state where it was contracted).

[31] In so concluding, we note that the Louisiana Legislature has not expressly outlawed marriages between first cousins regardless of where they are contracted, as it has emphatically done in the case of purported same-sex marriages. *See* La. Const. Art. XII § 15; LSA-C.C. art. 3520(B); *Tuttle,* 12 F.2d at 928 (where the court, noting that Louisiana law did not expressly forbid recognition of a foreign marriage by procuration, stated that "if it was the intention of the Louisiana lawmaker, as a matter of general policy, to provide that no marriage by procuration, whether contracted within or without the state, should be valid within the state ... it undoubtably had the power to do so"). *See also Mason v. Mason,* 775 N.E.2d 706, 709 (Ind.App.2002), *trans. denied,* 792 N.E.2d 34 (Ind.2003) (where Indiana court recognized marriage of first cousins contracted in Tennessee, noting that although Indiana prohibited such marriages, it had no statute stating that such marriages violated Indiana's public policy as it did regarding same-sex marriages); *Schofield v. Schofield,* 20 Pa. D. 805, 807 (Com.Pl. 1910) (where court noted that Pennsylvania's prohibition against marriages between first cous-

ins only applied to marriages contracted within Pennsylvania and that the Pennsylvania Legislature could have prohibited first-cousin marriages no matter where contracted, but had not done so). Our conclusion is further buttressed by the uncertainty that exists regarding the actual basis for the prohibition against marriages between relatives. *See* LSA-C.C. art. 90, comment (c).

[32] Only marriages between those in the direct lineal line of consanguinity or those contracted between brothers and sisters are thought to violate natural law. *See* P.H. Vartanian, Annotation, *Recognition of Foreign Marriage as Affected by Policy in Respect of Incestuous Marriages,* 117 A.L.R. 186, 190(1938).

[33] As noted, first cousins may marry in North Carolina; however state law prohibits the marriage of double first cousins (i.e., those that share all lineal and collateral relatives). N.C. Gen.Stat. § 51-3 (2003).

[34] *See* National Conference of State Legislatures, State Laws Regarding Marriages Between First Cousins, available at http://www. ncsl.org/programs/cyf/cousins.htm. As of September 1, 2005, Texas no longer allows first-cousin marriages. Tex. Fam.Code Ann. § 2.004(6).

[35] *See* Ariz.Rev.Stat. Ann. § 13-3608; 720 Ill. Comp. Stat. 5/11-11(2); Ind.Code Ann. § 35-46-1-3; Me.Rev.Stat. Ann. tit. 19-A, § 701(2)(B); Utah Code Ann. § 30-1-1; and Wis. Stat. Ann. § 765.03.

[36] When an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory rulings prejudicial to him or her, in addition to review of the final judgment. *Rao v. Rao,* XXXX-XXXX, p. 6 (La.App. 1 Cir. 11/4/05), 927 So.2d 356, 360, *writ denied,* 2005-2453 (La.3/24/06), 925 So.2d 1232.

[37] According to Ms. Ghassemi, the sole purpose of her request for a paternity test was to use the results to attack the credibility of Mr. Ghassemi, who had denied paternity. In other words, she only wanted the test to cast doubt on the truthfulness of Mr. Ghassemi's testimony about the issues in this case, which are completely unrelated to paternity.

MAINE

CATEGORY: Shariah Doctrine

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: India

URL: http://scholar.google.com/scholar_case?case=15730901915678050417&q=Islam+OR+Islamic+OR+Muslim+OR+Shariah+OR+Sharia&hl=en&as_sdt=4,20

726 A.2d 205 (1999)

1999 ME 30

STATE OF MAINE V. NADIM HAQUE.

Supreme Judicial Court of Maine.

Argued November 3, 1998.

Decided February 16, 1999.

206*206 Andrew Ketterer, Attorney General, Nancy Torresen, Asst. Atty. Gen. (orally), Lisa P. Marchese, Asst. Atty. Gen., Augusta, for State.

William Maselli (orally), Sheila A. Cook, Auburn, for defendant.

Before WATHEN, C.J., and CLIFFORD, RUDMAN, DANA, SAUFLEY, and CALKINS, JJ.

DANA, J.

[¶ 1] Nadim Haque appeals from the judgment entered in the Superior Court (Androscoggin County, *Delahanty, J.*) convicting him of murder, 17-A M.R.S.A. § 201(1)(A) (1983), and assault with a dangerous weapon, 17-A M.R.S.A. § 208(1)(B) (1983). Haque contends that the trial court

erred by excluding the testimony of a psychiatrist that Haque was in a "blind rage" at the time of the killing; excluding all testimony by a cultural anthropologist; and permitting a state witness to testify to out of court statements by the victim and the defendant. We affirm.

[¶ 2] In January 1991, Haque left his home in Raniganj, India, to attend college in Lewiston. Soon after his arrival, Haque was befriended by Lori Taylor, a fellow student. Taylor was married and living with her husband and daughter. By the summer of 1992, Haque's relationship with Taylor had developed into a love affair. In 1993, Taylor separated from her husband. The relationship between Haque and Taylor appears to have reached a peak in the summer of 1995 when Taylor expressed her desire to marry Haque. Haque said that he was not ready, and after the summer they began seeing each other less frequently.

[¶ 3] In the fall of 1995, Taylor became friends with Ray Hall, a neighbor in her apartment building. Their relationship became intimate in March 1996. Around the same time, Haque presented Taylor with an engagement ring and asked her to marry him. She accepted the ring but only wore it for one day.

[¶ 4] On April 23, 1996, Haque and Taylor attended their first counseling session with Linda Barter, a Licensed Clinical Social Worker. On May 7, Haque bought another engagement ring, a rose, and a negligee for Taylor. The next day, the two attended their second counseling session. After the session, Haque presented the gifts to Taylor and spent the night at her apartment.

[¶ 5] On May 10, Haque tried to reach Taylor by telephone but she would not accept his call. That same day he bought a kitchen knife. On May 11, Taylor called Haque and told him their relationship was over. The 207*207 next day, Haque rented a car and bought a can of pepper mace spray and a baseball cap. On May 13, Haque drove to Lewiston, parked two blocks from Taylor's home and let himself into her apartment. He entered her apartment wearing the cap and carrying a roll of tape, the mace, and the knife.

[¶ 6] Approximately two hours later, Taylor arrived home from work. Haque confronted Taylor, asking her why she wanted to end the relationship. Taylor responded, "we [are] just too different." Soon after this statement, Haque slashed her throat. Hall heard sounds of a struggle coming from Taylor's apartment and he entered the apartment to investigate. When Haque saw Hall he told him to "get the hell out" and then stabbed him.

[¶ 7] At trial, the defense attempted to convince the jury that Haque did not form the requisite mens rea to be guilty of murder. 17-A M.R.S.A. § 201(1)(A) (1983). The defense theory appears to have been twofold: (1) Haque was not guilty of murder because he suffered from an abnormal condition of the mind, 17-A M.R.S.A. § 38 (1983); and (2) Haque was guilty of manslaughter, rather than murder, because he acted "while under the influence of extreme anger ... brought about by adequate

provocation," 17-A M.R.S.A. § 203(1)(B) (1983 & Supp.1998). The theory behind these defenses was that Haque's traditional Muslim Indian upbringing, immigrant experience and psychological condition strongly influenced his perception of his relationship with Taylor and, eventually, the way he reacted to Taylor's termination of the relationship.

[¶ 8] Dr. Bloom, the defense's medical expert, testified, inter alia, that Haque suffered from major depression and attention deficit disorder. During voir dire, Bloom discussed Haque's response to Taylor's statement, "we [are] just too different." According to Bloom, Haque interpreted her response "as [if] it was like you were telling a black person they were a nigger. To him he heard this as meaning that she saw him as being racially inferior to her." Bloom testified that as a result of the statement, Haque was in "a state of blind rage and it was in that state of mind" that he acted. At the end of the voir dire, the court excluded any testimony that Haque "went into a rage." During the trial the court rebuffed three attempts by Haque to place this testimony into evidence.[1]

[¶ 9] The court also excluded all testimony by the defense expert, Dr. Caughey, a cultural anthropologist with an interest in psychological anthropology. He had conducted research into the experience of immigrants to the United States and how people manage multiple cultural traditions. During voir dire, Caughey discussed the various factors that affect an individual's transition between two different cultures and how those factors were relevant to Haque's experience in the United States. Caughey also discussed gender relationships in traditional Muslim India and how an understanding of that topic would help explain Haque's relationship with Taylor. According to Caughey, in traditional Muslim India there is no dating and relationships are expected to last for life. Caughey testified that given Haque's traditional Muslim upbringing, the "on again off again quality" of his relationship with Taylor "must have been ... extremely difficult to manage."

[¶ 10] On direct examination, defense counsel asked Haque what his expectation was when Taylor accepted the gifts he had presented to her after the second counseling session. Haque responded, "I ... thought she was going to marry me and since we made up, it was more solid ... I had reasons to believe that this relationship would go on and she would marry me." Haque then testified that during the counseling session "it was agreed that we would go to [Taylor's] sister's boyfriend's birthday party." According to Haque, "it was agreed I would be introduced slowly but effectively to her family and this was a great chance, a golden opportunity because ... the family members would be there."

[¶ 11] The State called Linda Barter as a rebuttal witness. The court allowed Barter 208*208 to testify to what was said at the May 8 counseling session. Barter testified that the purpose of the May 8 session "was a discussion surrounding [Taylor's] wanting to end the relationship." According to Barter, "[Taylor] said she didn't want to be engaged. She did not want [Haque's] ring, and his response to that was, my parents can come over in July for the wedding."

DR. BLOOM'S TESTIMONY

[¶ 12] Haque contends that the trial court erred in excluding Bloom's testimony that Haque was in a "blind rage" at the time of the killing. Because the excluded testimony embraces an ultimate issue, we disagree.

[¶ 13] Pursuant to M.R. Evid. 701 and 702, the trial court "may exclude opinions which state legal conclusions, beyond the specialized knowledge of the expert." *State v. Flick,* 425 A.2d 167, 171 (Me.1981). In addition, the trial court may "exclude opinions which are arguably within the expert's specialized knowledge, but which are so conclusory, or so framed in terms of the legal conclusions to be drawn, that they will not `assist the trier of fact.'" *Id.* (citing M.R. Evid. 702). Therefore, when a medical expert in a criminal case proposes to testify as to an ultimate issue in the case—the defendant's state of mind—the trial court acts well within its discretion when it precludes the testimony. *See id.* (holding that the trial court did not abuse its discretion in excluding testimony by medical professionals that defendant "acted intentionally or knowingly ... or acted in extreme anger or fear.").

[¶ 14] One of Haque's defenses was that he was guilty of manslaughter, rather than murder, because he killed Taylor "while under the influence of extreme anger ... brought about by adequate provocation." 17-A M.R.S.A. § 203(1)(B) (1983 & Supp. 1998). Therefore, whether Haque was under the influence of extreme anger was one of the ultimate issues in this case. Testimony that Haque "went into a blind rage" at the time of the killing is not meaningfully distinguishable from an opinion that a defendant acted under the influence of "extreme anger." We, therefore, conclude that the court acted well within its exercise of discretion when it excluded testimony by Bloom that Haque went into a "blind rage." *See State v. Michaud,* 513 A.2d 842, 849 (Me.1986) (holding that the trial court did not err in excluding testimony that the defendant was "operating under extreme anger.").

DR. CAUGHEY'S TESTIMONY

[¶ 15] Haque contends that the trial court erred in excluding Caughey's testimony on cultural transitions because the testimony would have assisted the jury in determining whether Haque had the requisite state of mind to be guilty of murder.

[¶ 16] A qualified expert may testify if his or her "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." M.R. Evid. 702. A cultural anthropologist or other expert in cultural norms may possess "specialized knowledge" that can "assist the trier of fact." *See Dang Vang v. Vang Xiong X. Toyed,* 944 F.2d 476, 481 (9th Cir.1991) (upholding decision in civil trial to allow epidemiologist to testify about women in the Hmong culture); *see also People v. Aphaylath,* 68 N.Y.2d 945, 510 N.Y.S.2d 83, 502 N.E.2d 998, 999 (1986) (reversing order excluding expert testimony on the stress encountered by Laotian refugees). As with all expert testi-

mony, however, the expert's opinion must be relevant. M.R. Evid. 402. Testimony is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R. Evid. 401.

[¶ 17] The trial court concluded that the testimony was not relevant to any issue that was before the court. Dr. Caughey qualified as an expert in cultural anthropology, but was not qualified to, and did not, offer testimony as to Haque's state of mind. Although cultural differences may be relevant to a defendant's state of mind, Caughey's testimony was not relied on by Haque's psychiatric expert, Dr. Bloom. Moreover, Haque expressly disavowed any reliance on a cultural defense. Accordingly, 209*209 the testimony of Dr. Caughey was irrelevant to any state of mind defense. *See State v. Girmay,* 139 N.H. 292, 652 A.2d 150, 152 (1994) (testimony of expert in Ethiopian culture not relied on by defendant's psychiatric expert in murder case involving Ethiopian defendant was irrelevant and properly excluded); *see also People v. Poddar,* 26 Cal.App.3d 438, 103 Cal.Rptr. 84, 88 (1972), *rev'd on other grounds,* 10 Cal.3d 750, 111 Cal.Rptr. 910, 518 P.2d 342 (1974) (testimony relating to defendant's culture properly excluded as to issue of diminished capacity).

[¶ 18] The one issue to which Caughey's testimony would be relevant would be the defense of adequate provocation. Adequate provocation is an affirmative defense. 17-A M.R.S.A. § 201(3), which reduces murder to manslaughter, *id.* § 203(1)(B). The defendant must demonstrate (1) that he "caus[ed] the death while under the influence of extreme anger or extreme fear," which (2) was "brought about by adequate provocation." *Id.* § 201(3) & 203(1)(B). Provocation is adequate only if "[i]t is not induced by the actor," and

[i]t is reasonable for the actor to react to the provocation with extreme anger or extreme fear, provided that evidence demonstrating only that the actor has a tendency towards extreme anger or extreme fear shall not be sufficient, in and of itself, to establish the reasonableness of his reaction. *Id.* § 201(4).

[¶ 19] "There are limits on the type of conduct that we will recognize as sufficient to engender extreme anger or fear and mitigate the conduct of the defendant." *State v. Cumming,* 634 A.2d 953, 957 (Me. 1993). For example, "mere words alone, however inflammatory or opprobrious, do not" suffice. *State v. Hilliker,* 327 A.2d 860, 865 (Me.1974). Neither will finding a note that suggests that a former wife has formed a new relationship, *Cumming,* 634 A.2d at 957, or discovering a former wife in a lounge slow dancing with a man, *Tribou v. State,* 552 A.2d 1262, 1263-65 (Me.1989).

[¶ 20] Although the determination as to "the adequacy of the provocation under sections 201 and 203 is a conclusion to be drawn by the trier of fact, ... whether the evidence is legally sufficient to generate the defense ... is a question of law for the determination of the court." *State v. Michaud, Jr.,* 611 A.2d 61, 63 (Me.1992). The concurrent events which Haque contends provoked his ex-

treme anger were Taylor's refusal to marry Haque, her desire to terminate their relationship, and her statement that "we [are] just too different." As mere words that ended a romantic relationship, these events do not constitute a legally adequate provocation as a matter of law. Therefore, it was not "reasonable for [Haque] to react to the provocation with extreme anger or extreme fear." *See* 17-A M.R.S.A. § 201(4)(B). Given that the evidence was not legally sufficient to generate a defense of adequate provocation, Caughey's testimony was ultimately not relevant to any determination properly before the jury.

LINDA BARTER'S TESTIMONY

[¶ 21] Finally, Haque contends that the trial court erred in permitting Barter to testify as to the out of court statements of Taylor and Haque because the statements were hearsay. We disagree.

[¶ 22] Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M.R. Evid. 801(c). By definition, therefore, a statement that is not offered to prove the truth of the matter asserted is not hearsay. *State v. Tapley,* 598 A.2d 1190, 1192 (Me.1991). Because the statements of Taylor were not offered for the truth of the matter asserted but to impeach Haque's testimony, the statements were admissible. In addition, Haque's statements offered against him by the state were admissible as an admission by a party-opponent. *See* M.R. Evid. 801(d)(2).

The entry is:

Judgment affirmed.

[1] Dr. Bloom was permitted to, and did, testify extensively regarding Haque's state of mind at the time of his attack on Taylor, as well as the role that his cultural background would play in his response to the events at issue.

MARYLAND

CATEGORY: Child Custody

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: ACSY

COUNTRY: Pakistan

URL: http://scholar.google.com/scholar_case?case=13345154354945640474&q=hosain+malik&hl=en&as_sdt=2,4

947 A.2d 489 (2008)

404 Md. 404

671 A.2d 988 (1996)

108 Md. App. 284

JOOHI Q. HOSAIN (FKA MALIK) V. ANWAR MALIK.

No. 228, Sept. Term, 1995.

Court of Special Appeals of Maryland.

February 21, 1996.

Natalie H. Rees, Towson, for appellant.

Linda Haspel (Leslie B. Fried and Haspel & Meiselman, Chartered, on the brief) Rockville (Angela R. White of Baltimore, on the brief) for appellee, minor child.

Argued before WILNER, C.J., MOYLAN, BLOOM, FISCHER, DAVIS, MURPHY, HOLLANDER, JJ., and PAUL E. ALPERT, Judge (Retired), specially assigned.

DAVIS, Judge.

Joohi Q. **Hosain** (formerly Joohi **Malik**) appeals from an order of the Circuit Court for Baltimore County (Kahl, J.) entered in a custody dispute in which appellant, the mother, and appellee, Anwar **Malik**, the father, have been battling for sole custody of their minor child. By this order, the circuit court declined to assume jurisdiction in the matter and granted comity to various Pakistani court orders that granted sole unrestricted custody of the child to appellee. Four questions were presented originally on this appeal. Appellee presented the first question, a threshold matter, and appellant presented the next three issues. We restate these issues as follows:

I. Should this Court dismiss appellant's appeal because appellant allegedly included and relied on matters in the appendix of her brief that were extraneous to this appeal?

II. Did the circuit court abuse its discretion by proceeding with a remand hearing in the absence of the child's attorney?

III. Did the circuit court err in determining that appellant failed to prove that Pakistani law was not in substantial conformity with Maryland law?

990*990 IV. Did the circuit court err in not assuming jurisdiction under the Uniform Child Custody Jurisdiction Act?

Subsequent to oral argument before a three-judge panel of this Court on October 6, 1995, we issued an Order to counsel to appear before this Court, *en banc,* on January 10, 1996 to specifically address the query, "In deciding whether the Pakistani Court applied the best interest of the child standard, should the trial court's determination focus on the particular culture, customs and mores of Pakistan and the religion of the parties or, alternatively, is the best interest standard to be determined based on Maryland law, i.e., American cultures and mores?". We answer the four original questions in the negative and we hold that the lower court properly determined the best interest standard by applying relevant Pakistani customs, culture and mores. We, therefore, affirm the order of the circuit court.

FACTS

This is a long and bitter child custody dispute involving orders of courts in both Maryland and Pakistan. Not too long ago, these parties and their dispute were before this Court in ***Malik*** *v.* ***Malik***, 99 Md.App. 521, 638 A.2d 1184 (1994), which we decided on March 30, 1994. Needless to say, with the battle still raging, the parties have returned once again to this Court. Subsequent to oral argument before a three-judge panel of this Court, it was determined that an *en banc* hearing would be necessary. The Court set the matter in for an *en banc* hearing. The facts of this appeal arise directly out of the proceedings following ***Malik***.

As a matter of background, we recite the facts of this case as stated in ***Malik***:

The parties to this appeal are battling for custody of their daughter (the child), who was born in Karachi, Pakistan on September 11, 1983.... [T]he child's father... is a citizen of Pakistan. [T]he child's mother, also a citizen of Pakistan, has obtained a student visa that permits her to remain in this country on a temporary basis. The parties were married on June 20, 1982 and lived together until September of 1990, at which time the child was attending St. Joseph's Convent School in Karachi.

On September 15, 1990, [the mother] left the marital home and moved in with her parents. She took the child with her. [The father] sued for custody. When [the mother] learned of [the father's] lawsuit, she fled the country, taking the child with her. Soon thereafter, [the mother] moved into the home of a man with whom she has continued to live and by whom she conceived a son who was born in 1991. [The mother] was represented by counsel in the Pakistani custody proceeding. She refused, however, to appear in person. She also refused to obey the judge's order that the child be produced. It appears that the judge did consider a written statement submitted by [the mother], but awarded custody to [the father].

Having obtained legal custody of his daughter, [the father] set out to find her. [The mother] hid the child from [the father] for over two years. In 1992, [the father's] private detectives were finally able to locate the child and [the mother] in Baltimore County. Once she realized that she had been discovered and that [the father] was about to seek enforcement of the order granting him custody of his daughter, [the mother] filed a complaint in the Circuit Court for Baltimore County, requesting custody of the child and a restraining order against [the father]. At the conclusion of an emergency hearing, the trial judge decided that the Circuit Court for Baltimore County had jurisdiction to determine custody, that the Pakistani custody order was not entitled to comity, that temporary custody should be granted to [the mother], and that [the father] should be enjoined from going within three hundred feet of the child, [the mother] or their residence.

Id. at 523-24, 638 A.2d 1184. The parties point out to this Court that appellant fled to the U.S. from Pakistan with the child shortly *before*—not after—appellee filed a petition for custody in Pakistan. In this regard, we stand corrected. Additionally, appellant has since married the man by whom she had a son.

991*991 In ***Malik***, the father presented the following question for our review: "Did the chancellor err in exercising jurisdiction when custody proceedings were pending in a foreign country?" *Id.* at 525, 638 A.2d 1184. Although we held that the circuit court did have "home state" jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA) (codified in MD.CODE ANN., FAM.LAW § 9-201 to 9-224 (1991)), we did not affirm the circuit court's refusal to grant comity to the Pakistani custody order. *Id.*

Rather, we held that "the circuit court should decline to exercise jurisdiction unless persuaded that the Pakistani court either (1) did not apply the best interest of the child standard when it awarded custody to [the father], or (2) arrived at its decision by applying a law (whether substantive, evidentiary, or procedural) so contrary to Maryland public policy as to undermine confidence in the outcome of the trial." *Id.* at 533-34, 638 A.2d 1184. Accordingly, we remanded the case to the circuit

court for an evidentiary hearing on these issues. *Id.* at 536, 638 A.2d 1184. In so doing, we set forth the law for the circuit court to apply in determining whether the evidence that would be introduced demonstrated that the Pakistani court did not apply law in "substantial conformity with Maryland law." *Id.* at 534-36, 638 A.2d 1184. In addition, we held that the burden was on the mother to prove these matters by a preponderance of the evidence. *Id.* at 536, 638 A.2d 1184.

Accordingly, on November 14, 1994, the parties returned to circuit court for the remand hearing. Consistent with our holding in ***Malik***, counsel for both appellant and appellee were present and prepared to introduce evidence and examine witnesses regarding child custody law and its application in Pakistan. Court-appointed counsel for the minor child, however, failed to appear for the hearing. As counsel explained in her brief to this Court, "[c]ounsel for the minor child was aware of the hearing date, but failed to note it in her calendar and was out of the state at the time of the hearing." The hearing continued in the absence of the child's lawyer.

Each party came to the hearing armed with an expert witness to testify concerning the law of Pakistan. Appellant's expert witness was Dr. Hafeez **Malik** (no relation to the parties). Dr. **Malik** is a professor of political science at Villanova University. Dr. **Malik's** specialty involves Pakistani foreign policy as it relates to other nations. Dr. **Malik** testified that he has conducted research on Pakistani political, social, legal, and constitutional issues. The record reveals that Dr. **Malik** has a great deal of expert knowledge about Pakistan and its policies, through his research, membership in various associations, and publications. Dr. **Malik**, however, is not a lawyer. Although he did read the Pakistani court orders in this case, Dr. **Malik's** testimony indicated only a limited knowledge of Pakistani child custody law. Dr. **Malik** conceded that his area of specialty was not custody matters.

Dr. **Malik** acknowledged that the Guardians and Wards Act of 1890 (the Act), a British enactment governing child custody matters, is an accepted part of Pakistani law that governs child custody matters and specifically requires a Pakistani court to consider the "welfare of the minor." Dr. **Malik** recognized that, in application of the welfare of the minor test, the Act directs the court to consider such factors as the child's age, sex, religion, character and capacity of the guardian, nearness of the guardian's kin to the minor, parental wishes, the child's preference, and any existing or previous relationship of the proposed guardian with the minor or his or her property.

Dr. **Malik** testified that, although "lip service" was paid to the welfare of the child test, the Pakistani court did not really apply it to his satisfaction in the instant dispute, but rather focused on only one or two factors— fitness of the parent and religion. Throughout his testimony, Dr. **Malik** characterized the proceedings in Pakistan as "one-sided," because the Pakistani court never considered appellant's side of the dispute due to her absence from the proceedings. Dr. **Malik**, however, conceded that appellant at all times had the right to appear before the Pakistani court and to produce witnesses on her behalf and cross-examine appellee, but elected not to do so.

992*992 Appellee's expert witness was retired Pakistani Justice Sardar Muhammad Dogar. Justice Dogar practiced law for twenty-five years in Pakistan and was a Pakistani appellate court judge for twelve and one-half years. Although Justice Dogar had not handled many child custody cases, he

did say that as an appellate judge he was required to be well versed with all areas of law. He read the Pakistani court orders.

Justice Dogar testified that child custody disputes are governed by the "welfare of the minor" standard as enacted in the Act. He explained that Pakistani courts look to various factors in determining the welfare of the child, including character and fitness of the parents, desire of the child's parents, the child's preference, opportunities affecting the future life of the child, the child's age, sex, parental abandonment, abuse, religion, and the child's relationship with the proposed custodian.

Justice Dogar recognized that attention to "personal law," which he described as religious law based on Hinduism and Islam, is another factor to be considered in the Act. According to Justice Dogar, the "personal law," among other things, dictates whether the mother or father should get custody of the child, depending on the age and sex of the child. The testimony of both experts indicated that this is a set of parental preference rules based on religious and societal doctrine.[1]

In addition, Justice Dogar explained that the child's religion is a very important factor. Specifically, he stated that custody of a Moslem child will not be granted to an individual intending to raise the child as a non-Moslem. Similarly, Justice Dogar testified that custody of a non-Moslem child will not be granted to an individual intending to raise the child as a Moslem.

From his review of the Pakistani orders, Justice Dogar believed that the welfare of the child standard was applied in Pakistan. He also opined that the Pakistani court did not consider appellant's allegations. This was because a natural presumption was drawn that she did not have a good case from her failure to show up at the hearing in Pakistan, having received proper notice thereof. Had appellant elected to appear, Justice Dogar stated, she could have presented witnesses and cross-examined witnesses.

Subsequent to the hearing day, at the conclusion of counsels' arguments, the circuit court issued a bench ruling, followed by a formal written order several days later. After commenting that appellee's expert was more qualified on issues of Pakistani child custody law than appellant's expert, the circuit court concluded that appellant "failed to prove by a preponderance of the evidence that which the Court of Special Appeals indicated [in ***Malik***] she must prove, and this court must decline to exercise its jurisdiction in this case." The circuit court, therefore, granted comity to the Pakistani custody order.

The circuit court also issued a written order dated December 12, 1994, which stated that appellant "failed to prove, by a preponderance of the evidence, either of the tests set out by the Court of Special Appeals ..." As a result, the order concluded that the circuit court declined to assume jurisdiction in this matter and granted comity to the Pakistani child custody orders. It is from this order that appellant appeals.

LEGAL ANALYSIS

I

We first address appellee's contention that we should dismiss this appeal because appellant allegedly included and relied on extraneous materials in the appendix of her brief. Appellee specifically objects to the fact that appellant included in the appendix to her brief the reports and affidavits of Dr. Leon A. Rosenberg, Ph.D., Associate Professor of Pediatrics and Medical Psychology at Johns Hopkins University School of Medicine. These materials reflect his custody recommendation. According to appellee, these documents had no bearing on, nor were they 993*993 even offered as evidence in the November 14, 1994 remand hearing. As a result, appellee charges that these materials are irrelevant and prejudicial to this appeal.

Consequently, appellee urges this Court to exercise its power to dismiss this appeal pursuant to MD.RULES 8-501(m) & 8-602(a)(8) (1995) because the contents of the appendix to appellant's brief do not comply with MD.RULE 8-501, which requires the record extract and brief appendices to contain only those parts of the record "reasonably necessary" and "material" to the appeal. While we agree with appellee that Dr. Rosenberg's reports and affidavits are irrelevant to this appeal and should not have been included in the appendix of appellant's brief, we decline to exercise our power to dismiss this appeal. Instead, we simply shall not consider those extraneous materials, as appellee alternatively requests of this Court. *See* *Frosburg v. State Dept. of Personnel,* 37 Md.App. 18, 32, 375 A.2d 582 (1977).

II

Appellant's first argument is that the circuit court abused its discretion by proceeding with the remand hearing in the absence of the child's court-appointed attorney. Appellee, on the other hand, contends that appellant failed to preserve this issue for appeal under MD.RULE 8-131(a), because appellant never objected to proceeding with the hearing in the absence of the child's counsel. Additionally, appellee asserts that, even if the matter was properly preserved, the circuit court did not abuse its discretion. We agree with appellee that this issue was not properly preserved for appeal, and we may therefore, decline to review the issue. Nonetheless, for the benefit of appellant and the circuit court, we observe that conducting the remand hearing without the child's attorney was not an abuse of discretion.

Although appellant states in her brief that the circuit court proceeded "over the objection of counsel," our review of the record reveals that counsel never made any such objection at the time the matter of the child's attorney's presence initially arose during the remand hearing. At the very beginning of the remand hearing, after greeting those present in the courtroom and calling the case, the circuit court stated the following:

And my understanding is that [the child's attorney], who was appointed to represent the child in the case, is not available. She apparently, although she agreed to this date, she is not here and she is not able to be

contacted. My understanding is she may be on her way in from South Carolina or North Carolina at this time.

I think, in view of the difficulty we have had in setting the case in, at this time, we ought to proceed, even though she is not here. So I am going to make that decision and proceed, even though counsel for the child is not present.

Is there anything by way of opening statement from counsel?

After this point, when it would seem most natural to object, neither appellant's counsel nor appellee's counsel objected to proceeding without the child's attorney. The hearing then went forward. The matter arose again *after* the remand hearing had fully concluded, and the circuit court and parties were discussing reconvening on another day for closing arguments. At this point, in response to appellant's counsel's request that the child's attorney be present to make a statement at closing argument on behalf of the child, the circuit court stated:

[T]he child's position really at this point is not relevant. We are not at a point where the child's position is to be taken into consideration.

We are looking here at the mandate of the Court of Special Appeals, which requires me to determine whether [appellant has] met [her] burden of proof, that the Pakistani court did not apply the best interests of the child standard or that, in making its decision, that 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. Unless either of those are proven, the Circuit Court must decline to exercise jurisdiction and shall grant custody.

The attorney for the child has no function in making that determination. That's 994*994 why I elected to proceed today, even though [the child's attorney] is not present....

Without objecting to the hearing proceeding in the absence of counsel, appellant failed to alert the circuit court or appellee of her position that the hearing should be continued until such time as the child's counsel could be present. Under MD.RULE 8-131(a), we will not ordinarily decide a non-jurisdictional issue "unless it plainly appears by the record to have been raised in or decided by the trial court ..." The primary purpose of this rule is to ensure fairness to all parties in the case and to promote the orderly administration of law. *State v. Bell,* 334 Md. 178, 189, 638 A.2d 107 (1994). This concern for fairness is furthered by requiring counsel to bring her client's position on the matter at issue to the attention of the circuit court so that the circuit court may pass upon and perhaps correct any potential errors in the proceedings. *Id.* "Even errors of Constitutional dimension may be waived by failure to interpose a timely objection at trial, and so may alleged violations of sub-constitutional procedural rules." *Medley v. State,* 52 Md.App. 225, 231, 448 A.2d 363 (1982) (citations omitted). *See, e.g., Tichnell v. State,* 287 Md. 695, 713-14, 415 A.2d 830 (1980) (defendant's argument of prejudicial removal was not preserved because defendant failed to object to the removal to Wicomico County and failed to seek a further removal to another county); *Dresbach v.*

State, 228 Md. 451, 453, 180 A.2d 299 (1962) (per curiam) ("If the accused desired to complain of an alleged impropriety of a remark made by the court at his trial he should have either moved to strike it out, or moved to withdraw a juror and declare a mistrial.").

In certain circumstances, counsel's objection is not needed to preserve the issue for appeal. For example, in *Suggs v. State,* 87 Md.App. 250, 252-56, 589 A.2d 551 (1991), during cross-examination of a witness in a criminal trial, defense counsel asked an improper question related to prior criminal misconduct. The prosecutor objected, and the trial judge called a bench conference, during which the trial judge strongly admonished counsel not to *"ever do that again in this courtroom." Id.* at 254, 589 A.2d 551. Counsel agreed not to do so, and cross-examination resumed. *Id.* Counsel then asked the witness a proper question inquiring into possible bias on the part of the witness. *Id.* at 254, 256-57, 589 A.2d 551. The prosecutor immediately entered a strong objection under the mistaken belief that this question was the same as the previous "forbidden" question. *Id.* The trial court, also under the same mistaken belief, ordered the sheriff to *"take a hold* " of defense counsel, whereupon, in the jury's presence, "[t]he sheriff moved immediately behind [counsel] in a position to exercise control over him...." *Id.* at 254, 257, 589 A.2d 551. After this episode, the jury was removed, and the trial court instructed counsel that if he asked the question again he would be put in jail. *Id.* at 254-56, 589 A.2d 551. The jury returned, and the trial continued and the defendant was ultimately convicted. *Id.* at 251, 589 A.2d 551. At no point did defense counsel object to the trial court's action. *Id.* at 258, 589 A.2d 551.

On appeal to this Court, we held that the trial judge's comments "painted such a prejudicial portrait of the defense counsel as to deny [the defendant] his right to a fair trial." *Id.* at 257, 589 A.2d 551. Furthermore, we held that defense counsel did not waive appellate review by failing to object "because he reasonably feared that he would personally incur the greater wrath of the already outraged trial judge." *Id.* at 258, 589 A.2d 551. In the instant case, in contrast to *Suggs,* appellant's counsel was not precluded by the wrath of an outraged judge from objecting to proceeding without the child's attorney.

Rather, the instant case is much like *John O. v. Jane O.,* 90 Md.App. 406, 435, 601 A.2d 149 (1992), wherein we held that a parent, challenging the circuit court's child custody determination, could not raise for the first time on appeal the absence of the child's attorney during the taking of testimony. In *John O.,* the child's counsel requested, and both parties agreed, that he be excused prior to the taking of testimony. *Id.* In addition, the child indicated that he did not object to his attorney's absence. *Id.* Although these facts are not precisely the same as in the 995*995 case at hand, we believe that *John O.*'s rule is fully applicable. First, appellant's counsel's silence and her failure to object at the time it would have been natural to do so, is naturally and reasonably construed as counsel's waiver of any objection to the absence of the child's attorney. *See Fireman's Fund Ins. Co. v. Bragg,* 76 Md.App. 709, 719, 548 A.2d 151 (1988) ("When a party has the option of objecting, his failure to do so is regarded as a waiver estopping him from obtaining review of that point on appeal."). Second, the child's attorney, in her brief to this Court, states that, since the remand hearing did not involve the substantive issue of the child's best interest, she could not have assisted the circuit court in the factual determination required under ***Malik***. Thus, the child, through her attorney,

takes the position that counsel's presence was unnecessary in light of the discrete nature of the remand hearing. *John O.,* therefore, is similar to the instant case, and its rule fully applies hereto.

Accordingly, after remaining silent and failing to object to the circuit court's procedure, appellant's counsel cannot now complain that the remand hearing improperly proceeded without the child's attorney. As a consequence of appellant's counsel remaining silent in this regard, neither the circuit court nor appellee had any way of knowing of appellant's disagreement to going forward with the remand hearing. Indeed, the only way to construe appellant's counsel's failure to speak up is as an agreement to the manner in which the hearing proceeded. To review this issue now, would be patently unfair to the circuit court and to appellee.[2]

In any event, even if appellant had properly preserved the issue for our review, we would agree with appellee that the circuit court did not abuse its discretion by proceeding in the child's attorney's absence. There can be no doubt that in a contested child custody case the role of the child's attorney is critical. Court-appointed counsel provides the circuit court with an opportunity to hear from an individual who will speak for the child. *John O.,* 90 Md.App. at 435, 601 A.2d 149 (quoting *Levitt v. Levitt,* 79 Md.App. 394, 404, 556 A.2d 1162 (1989)). Furthermore, the child's attorney "provides independent analysis of the child's best interest, not advocating either parent's position." *Id.* at 436, 556 A.2d 1162.

Nonetheless, as the circuit court correctly observed, the interests of the parties' child were not the focus of the remand hearing. Our mandate in ***Malik*** was very specific. It required the circuit court upon remand to decide two very specific factual issues as stated above. The remand hearing was not for the purpose of determining the ultimate issue of the child's best interests, but rather to address only the limited threshold issues. ***Malik***, 99 Md.App. at 533-34, 536, 638 A.2d 1184.

We agree with appellee that there was no need for experts to testify at the remand hearing concerning whether the child's interests would be best served by awarding custody to appellant or appellee. Thus, the presence of the child's counsel was not essential for that purpose. In addition, as we noted, counsel for the child states in her brief that she "was aware that the minor child did not wish to have any contact with Appellee **Malik**," but that "[t]his type of information would not have assisted the trial court in making the required determinations as established in ***Malik*** *v.* ***Malik***, 99 Md.App. 521, 638 A.2d 1184." In short, the matters for 996*996 which the presence of the child's counsel would be necessary were not yet at issue at this early stage in the proceedings.

Also from our review of the record, it is clear that the circuit court had ample evidence from which to render a decision in accordance with the mandate in ***Malik***. The child's attorney could not have offered anything meaningful in addition to what appellant's counsel already presented. Indeed, appellant has failed to demonstrate or suggest, and we fail to see, how appellant or the child was in any way prejudiced by counsel's absence. *See, e.g., Velez v. State,* 106 Md. App. 194, 213-17, 664 A.2d 387 (1995) (where criminal defense counsel's absence from proceeding is not prejudicial to defendant's rights, it is harmless error to proceed in counsel's absence). *See also* 66 C.J.S.*New Trial* § 85(a)(2) (prejudice that counsel's absence causes to a party is an element to be considered before

granting a new trial). Indeed, it is not generally an abuse of discretion to refuse to continue a trial on the ground that a party's counsel is absent where the party is represented adequately by other counsel present. *Martin v. Rossignol,* 226 Md. 363, 366, 174 A.2d 149 (1961). *See also Cruis Along Boats, Inc. v. Langley,* 255 Md. 139, 143, 257 A.2d 184 (1969). Thus, while we recognize that the child's attorney's function is to represent the interests of the child, despite whatever the wishes of the litigating parents might be, the child's attorney in the instant case has made it clear that the child's position in this custody dispute is the same as appellant's position. As a result, because of the thoroughness of the presentation of her client's position by appellant's attorney at the remand hearing, we are unable to discern any prejudice to the child.[3]

Even if the matter were properly preserved for appeal, therefore, proceeding in the absence of counsel was not an abuse of discretion. *Langley,* 255 Md. at 143, 257 A.2d 184 (continuance because of counsel's absence is discretionary). *See, e.g., Markey v. Wolf,* 92 Md.App. 137, 177-78, 607 A.2d 82 (1992) (denial of continuance not reversed unless abuse of discretion) (citing a wealth of cases stating same); *Reaser v. Reaser,* 62 Md.App. 643, 648, 490 A.2d 1315 (1985) (denial of continuance not reversed on appeal absent abuse of discretion).

In sum, our holding on this issue is best captured by the language of the Court of Appeals sixty years ago:

> We confess our inability to understand in what manner plaintiff's case was injured by this incident, yet, if we felt otherwise, we would be powerless to help him, since he then made no objection to continuing the trial. For a party to remain silent under such circumstances until after losing his case before a jury and then for the first time make objection to such procedure and be sustained therein would be alike unfair to courts, litigants, and the public.

Lynch v. Mayor & City Council of Baltimore, 169 Md. 623, 633, 182 A. 582 (1936).

III

Turning to the heart of this appeal, appellant argues that the circuit court erred in determining that appellant failed to prove that Pakistani law was not in substantial conformity with Maryland law. In this regard, appellant's argument is two-pronged: first, appellant maintains that the Pakistani court did not apply the "best interest of the child" standard to the case at hand, although the standard exists in Pakistan; and second, even if the Pakistani court did apply the best interest of the child standard, the rules of law and procedure that the Pakistani courts followed were contrary to Maryland's public policy. Before addressing these arguments, we feel constrained to make certain critical observations.

Devotees of our national sports pastime agree that what is most important for a 997*997 batter is to keep his or her eye on the ball. So too must we be guided in our review herein. Lest there be any confusion about our assigned task on this appeal from the limited remand hearing below, we must

bear in mind what this case is *not* about. This case is not a review of legal determinations of the circuit court. Neither is this case about whether a Pakistani trial judge or a Maryland trial judge reached the "right" decision, for both judges are entitled to deference as to their factual findings; in other words, they have the right to "call them as they see them." Significantly, this case is not about this Court undertaking the task of acting as a fact finder in place of the circuit court or substituting its judgment for that of the Pakistani court. And, this case is not about whether Pakistani religion, culture, or legal system is personally offensive to us or whether we share all of the same values, mores and customs, but rather whether the Pakistani courts applied a rule of law, evidence, or procedure so contradictory to Maryland public policy as to undermine the confidence in the trial.

More specifically, the resolution of this case is about our limited and focused task as derived from the very narrow and specific function of the circuit court on remand from ***Malik***. As we explained in ***Malik***, 99 Md. App. at 536, 638 A.2d 1184:

> On remand, the circuit court must first determine whether the Pakistani court applied law that is in substantial conformity with Maryland law. That determination requires the presentation of evidence. *See* Md.Code (1974, 1991 Repl.Vol.), § 10-505 of the Courts and Judicial Proceedings Article. The Pakistani court's custody order is presumed to be correct, and this presumption shifts to [appellant] the burden of proving by a preponderance of evidence 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. If either (1) or (2) is proven, the circuit court must conclude that the law of Pakistan is so lacking in conformity with the law of Maryland that comity cannot be granted to the Pakistani custody order. Unless either is proven, however, the Circuit Court shall decline to exercise its jurisdiction and shall grant comity to the Pakistani custody decree.

Having issued that very limited mandate, it is crystal clear that the task of the circuit court on remand was straightforward and simple. Thus, the circuit court was obliged to hold an evidentiary hearing to determine (1) whether the Pakistani courts applied the "best interest of the child" standard or its equivalent, and (2) whether the procedural and substantive rights applied to the litigants before the Pakistani courts were such that confidence in the outcome there was undermined. Accordingly, faithfully adhering to our mandate and following ***Malik*'s** simple road map, the circuit court conducted an evidentiary hearing wherein two experts testified—Dr. **Malik** for appellant and Justice Dogar for appellee. Based on their testimony, the circuit court concluded that the testimony presented by Justice Dogar supported a finding that appellant failed to meet her burden of proof on the two matters that she was required to prove under ***Malik***.

The circuit court having made that determination—a factual determination—we cannot now reverse the judgment of the circuit court unless we find the circuit court's determination to be "clearly erroneous." *See* MD.RULE 8-131(c) (1995) ("[w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity

of the trial court to judge the credibility of the witnesses."). *See also* *Van Wyk, Inc. v. Fruitrade Int'l, Inc.,* 98 Md.App. 662, 668-69, 635 A.2d 14 (1994) (the "clearly erroneous" standard applies to findings of fact under MD.RULE 8-131(c)). Accordingly, we must view the evidence produced during the remand hearing in the light most favorable to the prevailing party, appellee. *Mayor of Rockville v. Walker,* 100 Md. App. 240, 256, 640 A.2d 751 (1994) (quoting *Maryland Metals, Inc. v. Metzner,* 282 Md. 31, 41, 382 A.2d 564 (1978)). Viewed in this 998*998 light, if there is evidence to support the circuit court's determination, we will not disturb it on appeal. *Id.* In other words, the circuit court's findings will not be deemed clearly erroneous if supported by competent material evidence. *Nixon v. State,* 96 Md. App. 485, 491-92, 625 A.2d 404 (1993).

With these principles in mind, we shall now determine whether appellant has directed our attention to issues appropriate for this appeal and, if appropriate, whether they have any merit.

A

The evidence was overwhelming that, as a general principle, Pakistan follows the best interest of the child test in making child custody decisions. Both experts testified that the Guardians & Wards Act of 1890 applies to child custody disputes. Section 7 of the Act authorizes a court to appoint a guardian for a child where "the Court is satisfied that it is for the welfare of a minor...." GUARDIANS AND WARDS ACT § 7 (1992). Section 17 of the Act, in pertinent part, states:

(1) In appointing or declaring the guardian of the minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

GUARDIANS AND WARDS ACT § 17 (1992).

As noted above, the experts made it clear during the remand hearing that Section 17 of the Act encompasses many different types of factors considered by courts in determining the "welfare of the minor." The expert testimony was clear that, depending on the specifics of a given case, Pakistani courts examine a number of different facts to determine the welfare of the child.

In their seminal handbook on Maryland family law, Judge Fader and Master Gilbert, citing an exhaustive collection of Maryland case law, outlined the various factors that courts may consider in determining the best interest of the child, including: fitness of parents, character and reputation of

the parties, the child's preference, the age, health, and sex of the child, adultery of parents, and material opportunities affecting the future life of the child. JOHN F. FADER, II & RICHARD J. GILBERT, MARYLAND FAMILY LAW, § 7.3 (1990 & Supp.1993). *See also* Best v. Best, 93 Md.App. 644, 655-56, 613 A.2d 1043 (1992). In addition, determining the best interest of the child involves a multitude of often ambiguous and intangible factors. *Best,* 93 Md.App. at 655, 613 A.2d 1043. Necessarily, therefore, this analysis is conducted on a case-specific basis, as the child's best interest "varies from each individual case." *Id.* In view of the expert testimony and the language of the Guardians and Ward Act itself, there was substantial evidence supporting the circuit court's determination that Pakistan follows the best interest of the child standard in child custody disputes.

Appellant, however, argues that, under this Court's mandate in ***Malik***, it is not enough that Pakistani law merely recognizes that the best interest of the child standard controls matters of child custody. Rather, appellant maintains that ***Malik*** required the circuit court to determine whether the Pakistani courts in this case *actually* applied that standard, and that the circuit court "erred in finding that the Pakistani court applied the best interest of the child standard" because the decisions of the Pakistani courts were "based solely on the mother's failure to appear in the Pakistani proceedings."

We agree with appellant that the first part of our mandate in ***Malik*** required the circuit court to deny comity to the Pakistani order if appellant could prove that the Pakistani court did not apply the best interest standard to this case. ***Malik***, 99 Md.App. at 533-34, 536, 638 A.2d 1184. In other words, appellant 999*999 is correct that it was not enough under our mandate for the circuit court to merely find that the best interest of the child standard is the law in Pakistan in child custody disputes. We are persuaded, however, that substantial evidence before the circuit court indicated that the Pakistani courts in fact applied the best interest of the child standard.

Preliminarily, we shall address appellant's argument that the Pakistani courts' sole reliance on appellee's evidence because of appellant's absence from the Pakistani proceedings rendered it impossible for the Pakistani courts to have actually applied the best interest of the child standard. A fair reading of the record reveals that the courts in Pakistan considered appellee's evidence, including appellee's denial of appellant's allegations, and concomitantly refused to accord weight to those allegations. Appellee's expert testified that, as a matter of practice, the only way the Pakistani court would have considered appellant's allegations is if she had appeared in person to substantiate them. Since she did not, according to appellee's expert, the Pakistani court did not consider those allegations.

This, however, does not mean that the first prong of our mandate in ***Malik*** was not satisfied. That the Pakistani court may have considered only appellee's evidence and refused to give credence to appellant's allegations in making the best interest of the child determination does not render that determination defective for purposes of granting comity to the Pakistani order under our mandate in ***Malik***.

It seems elementary that the Pakistani court could rely only on evidence that was presented during the proceedings in Pakistan. In Maryland, before making a custody determination under the Maryland UCCJA, the court must provide reasonable notice and opportunity to be heard to any person

claiming a right to custody of a child. MD.CODE ANN., FAM.LAW § 9-205 (1991). If a party to the custody proceeding whose presence is desired by the court is outside the state, "with or without the child," the court may order that the notice of the proceeding direct that party to appear personally and declare "that a failure to appear may result in a decision adverse to that party." *Id.* at § 9-211(b). Simply put, a custody decree of a Maryland court

> binds all parties who *have been served* in this State or *notified* in accordance with the Maryland Rules of Procedure, or who have submitted to the jurisdiction of the court, and who have been *given an opportunity to be heard.* As to these parties, the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this subtitle.

Id. at § 9-212 (emphasis added). Thus, in Maryland a court will proceed with a child custody determination in the absence of one of the parents. Moreover, appellee denied appellant's allegations during the Pakistani proceeding.

We do not find, therefore, that the best interest of the child test was not applied in Pakistan because of appellant's failure to put on a case. Justice Dogar testified that a natural presumption is drawn from one's failure to present evidence. This is not unique to the courts of Pakistan. In *Hayes v. State,* 57 Md.App. 489, 495, 470 A.2d 1301 (1984) (citations omitted), we observed:

> The Court of Appeals of Maryland has consistently applied this rule in civil cases and held that where a party fails to take the stand to testify as to the facts peculiarly within his knowledge, or fails to produce evidence (e.g., testimony by certain witnesses) the fact finder may infer that the testimony not produced would have been unfavorable to that party. In civil cases, the unfavorable inference applies where it would be most natural under the circumstances for a party to speak, or present evidence.

Indeed, had this case originated in Maryland, and had appellee been the one who failed to appear to testify or present evidence through other persons, after having received proper notice, our circuit court would be obliged to proceed on the evidence before it. This would not mean, however, as appellant suggests, that the circuit court would not have applied the best interest test. Quite to 1000*1000 the contrary, this simply would mean that the circuit court applied the test using the evidence before it.

In this regard, the Pakistani court proceeded in virtually the same manner in which a Maryland court would have proceeded had a parent failed to appear. Under these circumstances, therefore, we shall not condemn the Pakistani court for doing substantially that which a Maryland circuit court would have done.

Our view is bolstered by the uncontroverted fact that appellant had notice and an opportunity to present her side in Pakistan, but decided against doing so. The evidence is uncontradicted that appellant had notice of the child custody proceedings in Pakistan; she had the right to representation of coun-

sel; and she had the right to present evidence, call witnesses, and cross-examine witnesses. She in fact participated in the Pakistani proceedings through counsel and through her father as attorney-in-fact. Appellant failed to demonstrate to the circuit court that she did not have a meaningful opportunity to be present in Pakistan for the hearing. A reasonable examination of the record demonstrates sufficient evidence from which the circuit court could have concluded that appellant had the opportunity to go to Pakistan, elected not to do so, and that, had she done so or had she produced evidence through any witness, the Pakistani court would have considered fully any evidence she could have produced. In light of all of this, she cannot now cry foul for the Pakistani courts' exclusive reliance on appellee's evidence.[4] Furthermore, for the reasons expressed in Part III.B.v., we are not persuaded by appellant's argument that the effect of her admission to adultery prevented her from returning to Pakistan.

In sum, therefore, the fact that the Pakistani courts relied exclusively on appellee's evidence, without consideration of appellant's evidence in support of allegations, did not, of itself, make it legally impossible for the Pakistani courts to have applied the best interest of the child test.

B

We now address whether substantial competent evidence existed from which the circuit court could have determined that the best interest of the child standard was in fact applied in Pakistan. Preliminarily, we believe it beyond cavil that a Pakistani court could only determine the best interest of a Pakistani child by an analysis utilizing the customs, culture, religion, and mores of the community and country of which the child and—in this case—her parents were a part, i.e., Pakistan. Furthermore, the Pakistani court could only apply the best interest standard as of the point in time when the evidence is being presented, not *in futuro,* the Court having no way of predicting that the child would be spirited away to a foreign culture.[5] In other words, how could a Pakistani trial court apply any other standard pre-supposing—as it was constrained to— that the minor child would continue to be raised in Pakistan under the Islamic culture and religion? Thus, faced with the facts of a Pakistani child of two Pakistani parents who had been raised in the culture of her parents all of her life, not only did the Pakistani court properly utilize the only mores and customs by which the family had been inculcated, but it used the only principles and teachings available to it at the time. The circuit court 1001*1001 was required to determine whether the best interest of the child standard was applied as a Pakistani court would have applied it utilizing the customs and mores indigenous to that society. In this regard, the circuit court, relying on the testimony of Justice Dogar, properly based its findings of fact on how a Pakistani court would have applied the best interest of the child standard. Hence, bearing in mind that in the Pakistani culture, the well being of the child and the child's proper development is thought to be facilitated by adherence to Islamic teachings, one would expect that a Pakistani court would weigh heavily the removal of the child from that influence as detrimental. It certainly is not our task on this appeal to attempt to reorder the priorities of the Pakistani court in its analysis of undeniably legitimate factors bearing on whether the best interest of the child is served by granting custody to appellee.

Based on a plain reading of the Pakistani court orders, we hold that the trial judge was not clearly erroneous in finding that the Pakistani courts applied the best interest of the child standard to this case. On their face, the Pakistani court orders— especially the August 1, 1993 order granting permanent custody to appellee—unambiguously indicate that the welfare of the child standard was in fact applied. Before analyzing each Pakistani order, we are guided by the widely-recognized principle that judgments must be construed in the same manner as other written documents, and accordingly, where its meaning is clear and unambiguous, we do not look beyond the order, as there is no room for construction. *See, e.g., Reavis v. Reavis,* 82 N.C.App. 77, 345 S.E.2d 460, 462 (1986); *Lashgari v. Lashgari,* 197 Conn. 189, 496 A.2d 491, 495 (1985); *Blanchard v. Blanchard,* 484 A.2d 904, 906 (R.I.1984). The circuit court recognized this principle when it stated that "the judgment speaks for itself." Because appellant appealed appellee's Pakistani custody order, several Pakistani courts issued orders upon review thereof.[6]

We first examine the October 23, 1991 order originally granting temporary custody to appellee. The Court of Vth Senior Judge/ ASJ at Karachi East issued this order. In the first several paragraphs of the order, the court stated that appellee had applied for custody and set forth the facts on both sides of the case. The court then presented both parties' arguments for why the welfare of the child demands that custody be awarded to that particular party. Next, the court examined prior Pakistani case law dealing with the welfare of the child where one parent has taken the child away from the other parent. The court also noted that there was binding precedent for the proposition that, in passing an "order for the temporary custody of the minor, the welfare of the minor is to be considered as a paramount consideration." From these cases, the court concluded that appellant lost her right of "Hazanit"[7] over the minor by removing the child from the father.

The court focused heavily, which from the perspective of the Pakistani court is understandable, on the fact that appellant took the child out of the country.[8] The court stated that "in the present case the minor has been removed from Karachi to U.S.A. and the father is even not being given the proper address of the minor to see her and there is nothing in the pleadings of the [mother] as to where the minor is studying ..." In light of the Pakistani case law, the court stated that, by removing the child to the U.S.A., appellant 1002*1002 has deprived the child of "an opportunity to meet her father." This, according to the court, was injurious to the mental health and emotional well being of the child. As a result, the court held that appellant lost her right to Hazanit and awarded temporary custody to appellee.

Appellant successfully had the custody order suspended during the pendency of her appeal of that order. Upon that appeal, the Court of III Addl. District Judge Karachi East issued a judgment on April 19, 1992 affirming the October 23, 1991 order. After reciting the facts on both sides, this judgment concluded that the court correctly applied the case law holding that the mother loses her right of Hazanit where she removes the child from the father's access. As a result, the reviewing court found no reason to interfere with the October 23, 1991 order.

After this appeal, the Court of Vth Senior Civil Judge/ASJ & R.C. issued a judgment dated August 1, 1993, disposing of appellee's application under section 25 of the Act for the return of the child to

appellee's custody and granting permanent custody to appellee. Section 25 states that, where a child is removed from the custody of her guardian, the court may order that the child be delivered into the custody of the guardian, if the court finds that "it will be for the welfare of the ward."

After reciting the facts of both sides of the dispute, the court set out to determine specifically "[w]ith whom the welfare of the minor [l]ies." In so doing, the court set forth the testimony of appellee. Appellee testified that appellant is living a "sin life" with her lover in the U.S., and that his daughter is not being properly cared for by appellant. In addition, appellee testified that when his child lived in Pakistan he paid for her to attend the St. Joseph School where she received an Islamic education, but that the child is not now receiving an Islamic education in the U.S. Moreover, appellee testified that appellant is controlling the child through fear, and that appellant lacks moral character. Appellee also informed the court of appellant's failure to comply with a Pakistani court order. Appellee further stated that the man with whom appellant was living was a stranger to the child. In sum, appellee's testimony before the Pakistani court was that the welfare of the child will suffer in the hands of appellant and her lover.

The Pakistani court then noted that appellant did not challenge or rebut appellee's testimony, "though she was given full chance for the same purpose." In addition, the court observed that appellant's counsel "also failed to argue the matter." Based on this uncontradicted *evidence* on the record, i.e., appellee's testimony, the Pakistani court reasoned that custody should be awarded to appellee in the interest of "the welfare and well being" of the child. In so doing, the court relied upon and considered several factors to which appellee testified, e.g., that appellant forcibly removed the child from appellee's access, that appellant lived with another man in adultery, that appellant had a child with her paramour, that the child was living in a non-Islamic society, that appellee is a businessman living in an Islamic society, and that appellee is of good moral character.

We believe it is pellucid that these orders unambiguously indicate that the Pakistani courts did in fact apply the welfare of the child test in awarding custody to appellee. Moreover, these orders clearly contravene the minority's assertion that the Pakistani courts considered only that appellant was purportedly living a life of sin in the United States and that appellant kidnapped the child from Pakistan to the United States, and ignored other relevant best interest factors. Indeed, in its August 1, 1993 final custody order, the Pakistani court plainly based its conclusion on appellee's testimony. We see nothing improper with the Pakistani court's reliance on appellee's testimony. A Maryland trial judge, likewise, sitting without a jury is entitled to weigh and judge the credibility of the testimony of the witnesses. *See* MD.RULE 8-131(c) (1995). Thus, the minority's suggestion that the Pakistani court failed to consider the evidence and draw a reasoned conclusion therefrom is without merit. As we stated, we are not concerned with whether the Pakistani court applied the test properly or correctly, because we are not reviewing the merits of that decision. We are, however, only concerned with whether, as a 1003*1003 matter of fact, the test was applied. To be sure, were we standing in the shoes of the Pakistani judge, we might have given greater or lesser weight to the various factors at issue, thereby reaching a different conclusion. Moreover, we would certainly give great weight, as a Pakistani judge, to the impact tearing a child away from his/her cultural and religious moorings would have on the child's best interest. On this appeal, however, it is not our function

to consider how we would have applied the best interest of the child standard, nor is it that of a Pakistani appellate court reviewing the merits of the Pakistani lower court's determination.

Based exclusively on the plain reading of the Pakistani court orders themselves, we hold that there was substantial competent evidence from which the circuit court could have concluded that the Pakistani courts applied the best interest standard. We are satisfied that the unambiguous and clear terms of these orders do indeed speak for themselves. Even if we were inclined to go beyond the plain reading of the orders, it is readily apparent that there is other sufficient evidence to support the circuit court's determination.

Appellee's counsel asked appellee's expert, Justice Dogar, for his opinion regarding whether the Pakistani court applied the welfare of the child test. Justice Dogar replied that he had no reason to believe that the Pakistani court did not apply the test since that is what was written in the orders. While one might not agree with the Pakistani courts' reasoning, Justice Dogar testified that the test was applied to the extent of the evidence presented and the circuit court had the right to credit that testimony.

In any event, in light of the orders themselves, which indicate the consideration of several factors, and in light of Justice Dogar's extensive testimony, we conclude that the record contains substantial competent evidence from which the circuit court could conclude that the Pakistani courts in fact applied the best interest of the child standard. We affirm, therefore, the grant of comity on this basis.

C

Next, appellant argues that, even if the Pakistani court did in fact apply the best interest of the child standard, the circuit court erred in failing to conclude under the second part of our mandate in ***Malik*** that the child custody law and procedure that the Pakistani courts followed was contrary to Maryland's public policy. We disagree. Appellant sets forth several arguments in support of her contention that Pakistani law is contrary to Maryland law. We shall address each argument in turn.

i

We reject appellant's argument that the Pakistani court applied a rule of law so "contrary to Maryland's public policy as to undermine confidence in the outcome of the trial," when it allegedly based its child custody order only on evidence that appellee presented. Initially, we observe that we are not called upon here to pass judgment on a trial by fire, trial by ordeal, or a system rooted in superstition, or witchcraft. In fact, the Pakistani child custody system is rooted in the Guardian and Wards Act of 1890—an enactment based on British common law. As we noted in part A, the great weight of evidence shows: (1) the Pakistani court proceeded in a manner quite similar to the manner in which a Maryland court would have proceeded had a parent failed to appear; (2) appellant had notice and an opportunity to present her side of the case in Pakistan; and (3) appellant was represented by counsel and by her father in Pakistan. As a result, the circuit court did not err by failing to

conclude that basing the child custody decision only on evidence that was before the Pakistani court was "repugnant to Maryland public policy." ***Malik***, 99 Md.App. at 534, 638 A.2d 1184.

ii

Appellant also claims that the law as applied in Pakistan is repugnant to Maryland public policy because the Pakistani order was based on the right of Hazanit. In ***Malik***, we stated the following:

On the record before us, we cannot determine whether Pakistani law lacks conformity 1004*1004 with Maryland law. We can, however, resolve the narrow issue of whether the Pakistani order should be denied comity because there is a paternal preference in Pakistani law. If the only difference between the custody laws of Maryland and Pakistan is that Pakistani courts apply a paternal preference the way Maryland courts once applied the maternal preference, the Pakistani order is entitled to comity. A custody decree of a sister state whose custody law contains a preference for one parent over another would be entitled to comity, provided, of course, the sister state's custody law applies the best interest of the child standard.... A Maryland court should not, therefore, refuse to enforce a Pakistani custody order merely because a paternal preference is found in that country's law.

Id. at 535, 638 A.2d 1184.

As we previously noted, the doctrine of Hazanit embodies complex Islamic rules of maternal and paternal preference, depending on the age and sex of the child. Appellant describes the doctrine as follows:

Under the Islamic law, the Doctrine of Hazanit governs child custody. Under the Doctrine of Hazanit, the mother is entitled to custody of her male child up to the age of seven (7) and of her female child up to the age of puberty. However, the mother's right to Hazanit is subject to the control of the father who is the child's natural guardian. Moreover, if the father is unfit for custody once the child reaches the requisite age, the child's paternal male relatives, and not the mother, are given custody. Further, the mother can lose custody before the child reaches the requisite age if she is an "apostate" (wicked or untrustworthy). The mother can also lose custody before the child reaches the requisite age if she can not [sic] promote the religious or secular interests of the child.

Appellant states that in this case, the Pakistani court ruled that she lost Hazanit because she removed the child to the U.S. where appellee was unable to exercise his right to control as the child's natural guardian. Appellant further notes that she was considered "apostate" for living in an adulterous household.

Certainly, the doctrine of Hazanit is not a preference rule applied in Pakistan the same "way Maryland courts once applied the maternal preference." This, however, does not mean that it is therefore "repugnant to Maryland public policy." Our review of the record indicates that there was substantial

competent evidence upon which the circuit court could base its conclusion that "the law there in Pakistan is not so repugnant to the law of Maryland that we should fail to grant comity in the case." Given this evidence, we are also satisfied that the circuit court was legally correct in this regard.

The circuit court had before it the expert testimony of Justice Dogar that, under the Act, Hazanit is but one of the factors to be considered in the welfare of the child test. He stressed that a Pakistani court does not blindly apply the doctrine of Hazanit in making child custody determinations. According to Justice Dogar, "If the personal law [as expressed in the doctrine of Hazanit] was to be the only thing on the basis on which [the welfare of the child] was decided, there would have been no Guardians and Wards Act ..." Given the circuit court's opinion of the credibility of this expert, from this testimony, we hold that the circuit court could reasonably have found that Hazanit was merely one factor. In addition, consideration of this factor does not make Pakistani law repugnant to Maryland public policy.

We recognize that Hazanit is different in many respects from the traditional maternal preference once followed in this State. We recognize, however, that Hazanit is nonetheless similar to the traditional maternal preference in that they both are based on very old notions and assumptions (which are widely considered outdated, discriminatory, and outright false in today's modern society) concerning which parent is best able to care for a young child and with which parent that child best belongs.[9] Viewed in this regard, 1005*1005 standing as a factor to be weighed in the best interest of the child examination, Hazanit is no more objectionable than any other type of preference. As we noted in ***Malik***, the courts of this State will not refuse to enforce child custody awards of those states still recognizing the maternal preference as a factor. ***Malik***, 99 Md.App. at 535, 638 A.2d 1184.

Given that Hazanit is only more doctrinaire in degree from the maternal preference and because the circuit court could have reasonably found it to be only a factor, we hold that the circuit court did not err in concluding that the principles of Pakistani law which were applied were not repugnant to Maryland law. In fact, the Pakistani court arrived at the same rule of maternal preference now recognized in Maryland by virtue of its decision that appellant had forfeited her right of Hazanit, i.e., the preference no longer was applied in the custody determination. Thus, had the right of Hazanit been considered as a factor, we would be obliged to note 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. Since the Pakistani court decided the right to Hazanit was forfeited, it was not factored in and thus the effect of the preference was the same as that now recognized under Maryland law.

iii

Next, appellant asserts that the Pakistani custody orders were founded on principles of law repugnant to Maryland public policy because the orders were allegedly based on the Pakistani presumption that an adulterous parent is unfit for custody. We disagree. The record, including the Pakistani

orders and the testimony of the experts, contains substantial evidence that adultery was only one factor considered.

There is nothing "repugnant," or even foreign, in a court considering adultery as a factor in determining the best interest of the child. In *Davis v. Davis,* 280 Md. 119, 127, 372 A.2d 231 (1977), the Court of Appeals stated that it is proper in certain cases to consider adultery. In *Swain v. Swain,* 43 Md.App. 622, 629, 406 A.2d 680, *cert. denied,* 286 Md. 754 (1979), we stated the following:

[T]here are now no presumptions whatsoever with respect to the fitness of a parent who has committed, or is committing, adultery. Rather, adultery is relevant *only* insofar as it *actually* affects a child's welfare. We will not presume a harmful effect, and the *mere* fact of adultery cannot "tip the balance" against a parent in the fitness determination. Thus, a chancellor should weigh, not the adultery itself, but only any actual harmful effect that is supported by the evidence.

While appellant argues in terms of "presumption of unfitness," the testimony at the remand hearing was sufficient to support a conclusion that adultery was only a factor. Accordingly, the circuit court did not err by failing to conclude that this aspect of the Pakistani welfare of the child test was repugnant to Maryland public policy.

iv

Quoting ***Malik***, 99 Md.App. at 536-37, 638 A.2d 1184, appellant further argues that the circuit court "erred in not heeding the warning of the Court of Special Appeals to avoid placing `... too much emphasis ... on the removal of the child and too little emphasis... on the circumstances that preceded the removal ...'". Appellant misunderstands this aspect of ***Malik***. Our statement of caution in this regard only would be applicable "if the circuit court must resolve this dispute in accordance with Maryland law...." *Id.* at 536, 638 A.2d 1184. Since the circuit court never reached the resolution of the custody dispute in accordance with Maryland law, the circuit court did not err.

To the extent that appellant argues that the Pakistani courts placed too much weight 1006*1006 on appellant's removal of the child, we simply state that we have already determined that the Pakistani courts cannot be faulted for proceeding based on only the evidence that was before it. A Maryland court could only consider events preceding the removal of the child if evidence of those events are presented during the proceedings. As stated, appellant did not go to Pakistan to substantiate her claims and her representatives at the proceedings in Pakistan presented no evidence to support her allegations; therefore, the Pakistani courts simply chose to believe appellee's testimony and evidence over appellant's unsubstantiated allegations. The circuit court did not err by failing to conclude that it was repugnant to Maryland law for the Pakistani courts to proceed in this fashion.

v

Additionally, appellant asserts that the Pakistani custody orders were founded on principles of law repugnant to Maryland public policy because the Pakistani courts allegedly "penalized the mother for not appearing without considering the affect of her admission to adultery on her ability to return to Pakistan." In this regard, appellant points out that if convicted under Pakistani criminal law, her penalty could be public whipping or death by stoning.

Although Dr. **Malik** opined that appellant would be arrested for adultery if she returned to Pakistan for the custody proceedings, he also conceded that punishment for adultery[10] was extremely unlikely and that proving the crime[11] was extremely difficult. Given this testimony, the circuit court was not clearly erroneous in not considering the effect of whether appellant's admission to adultery was "repugnant" to Maryland public policy in its failure to find that the Pakistani courts punished her for not appearing.

vi

Appellant also asserts that the circuit court erred in not assuming jurisdiction under the UCCJA. This argument evidences a total misunderstanding of our mandate in ***Malik***. As we have stated throughout this opinion, in ***Malik***, we remanded this case to the circuit court for a very discrete purpose. The circuit court, following our mandate *which required appellant to bear the burden of proof,* found that she failed to prove both: (1) that the Pakistani court did not apply the best interest of the child test; and (2) that the Pakistani law applied was contrary to Maryland public policy. In the event that neither one of these two determinations was proved, our remand instructions were crystal clear: "the circuit court should decline to exercise jurisdiction." *Id.* at 533, 638 A.2d 1184.

In other words, as we stated, "Unless either is proven, however, the Circuit Court shall decline to exercise its jurisdiction and shall grant comity to the Pakistani custody decree." *Id.* at 536, 638 A.2d 1184. Neither having been proven, the circuit court did just as we instructed—declined to assume jurisdiction and granted comity. We find no merit in appellant's jurisdictional argument. Our opinion in ***Malik*** speaks for itself, and it has already adequately addressed appellant's argument in this regard.

vii

Peppered throughout the minority opinion are sundry references to matters introduced at the initial proceeding before the Circuit Court for Baltimore County, unsupported allegations of wrongdoing by appellee, and the report of Dr. Rosenberg, not only objectionable because they are beyond the pale of ***Malik***, but because they are not a part of the record on this appeal. The minority nevertheless makes reference to these 1007*1007 extraneous materials and utterly ignores the procedural posture of this case. Consideration of matters that go to the merits of a cause before a determination of the question of jurisdiction—when there is such a question—runs counter to accepted rules of procedure. *See* *Zouck v. Zouck,* 204 Md. 285, 302, 104 A.2d 573 (1954), and *Stewart v. State,* 21 Md.App. 346, 348, 319 A.2d 621 (1974), *aff'd,* 275 Md. 258, 340 A.2d 290 (1975).

In other words, the legal effect of our decision in ***Malik*** was to suspend and remove from consideration all of the events that transpired in the Circuit Court for Baltimore County—including all proceedings and evidentiary matters—prior to our decision in ***Malik***. In legal contemplation, it is as though they never happened and are not subject to our review until such time as there were factual findings supporting a grant of comity, *vel non,* and hence a resolution of the question of the exercise of the court's jurisdiction. Thus, consistent with our ruling on appellee's motion to dismiss, none of the matters referred to or materials introduced at the initial proceeding before the circuit court are properly before us.

Likewise, when appellant's counsel asked that the child's lawyer be allowed to be present to make a statement on behalf of the minor child, it was pointed out that counsel for the child had not heard the testimony of the two experts and would not be in a position to comment on what the appropriate standards should be with regard to jurisdiction.

The trial court, in response to whether a comment should be presented on the child's position, stated, "we are not at a point where the child's position is to be taken into consideration." The court then specifically noted that it was to be guided by the mandate of the Court of Special Appeals, "which requires me to determine whether you have met your burden of proof, that the Pakistani court did not apply the best interests of the child standard or that, in making its decision, that 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. Unless either of those is proven, the circuit court must decline to exercise jurisdiction and shall grant custody." The court went on to observe that the "attorney for the child has no function in making that determination."

Thus, it is only after the circuit court, pursuant to our mandate in ***Malik,*** determined that it would, in fact, exercise its jurisdiction that it would be empowered to consider the merits, including Dr. Rosenberg's report and other extraneous matters referred to by the dissent. Stated otherwise, a factual determination of whether the proceeding in Pakistan comported with Maryland law was antecedent to any consideration of the child's present position because the circuit court was without power to address the merits until it determined that it should exercise its jurisdiction. Appellant's counsel could have offered the report of Dr. Rosenberg or any other evidence on the merits had the trial court determined that comity should not be granted; however, since the court granted comity and thereby declined to exercise jurisdiction, the proceedings never ripened to a point where the child's present position was relevant.

As we have indicated herein, the trial court throughout made reference to our mandate in ***Malik*** as it endeavored to carry out our mandate. Significantly, the court, as we instructed it, imposed upon appellant the burden of proving that the Pakistani court did not apply the best interests of the child standard or applied a rule of law or evidence or procedure so contrary to Maryland public policy as to undermine confidence in the outcome of the Pakistani trial. Having faithfully adhered to our mandate, as evidenced by repeated references to that mandate throughout, the circuit court unquestionably made a definitive factual finding when it ruled:

[t]he expert opinion so-indicates, that indeed the welfare of the child, which is certainly akin, if not exactly the same, as the best interest of the child standard would be given appropriate consideration, as paramount to the concerns that the court would have in awarding custody.

The circuit court specifically found that "[t]he Courts there [Pakistan] would not consider 1008*1008 allegations offered on paper in any way at all but would insist on testimony being offered in person by the contending party, that certain things were true or not true." To the extent that the best interest standard was not applied, the court opined that "it is only because the mother and the child— [whom the court had ordered to be produced by appellant][12]—were not present in person to substantiate the mother's allegations." Notably the Pakistani court would not consider the allegations because, as the court observed, the Pakistani court "would insist on *testimony offered, in person,* in other words, *not allegations offered on paper."* Hence it is not simply a question of appellant's failure to appear; *it was her failure to produce evidence.* The court concluded that "the law of Pakistan requires their courts to give paramount consideration to the welfare of the child" where the parties are present and available to testify. Were we to remand this case for further proceedings, as the minority urges, the circuit court would be obliged to simply reiterate that the Pakistani court was prevented from considering allegations offered to show that the best interest of the child was not served by granting custody to appellee because the bald allegations were not supported by evidence.

Most notably, the court specifically concluded that the mother "has failed to prove by a preponderance of the evidence that which the Court of Special Appeals indicated she must prove, and this court must decline to exercise its jurisdiction in this case." Judge Kahl's conduct of the proceedings on remand and his understanding of ***Malik*** were commendable, notwithstanding the minority's reference to a single comment regarding the lack of evidence before the Pakistani court from which it could apply the best interests standard. The lack of evidence was occasioned exclusively by appellant's failure and/or refusal to participate personally in the proceedings in Pakistan. A review of the record reveals that, throughout, Judge Kahl accurately articulated and faithfully carried out our mandate pursuant to ***Malik***.

Simply put, what the minority would have us do in this appeal is abandon our appellate role, assume the function of the trial judge, and re-try the hearing on remand because of dissatisfaction with the result. While it would seem evident that Judge Kahl reached the right result, even if we were to conclude that we might reach a different result— which we do not—it is not even a close call that his findings were not clearly erroneous.

In addition, the minority would have us disregard both our holding in ***Malik*** regarding the appropriate issues to be addressed and the lower court's factual determination in response to our mandate in ***Malik,*** and now have our decision turn, in part, on the "length of separation from natural parents," the "potentiality of maintaining natural family relations," the "material opportunities effecting the future of the child," and the fact that "Mahak, through no fault of her own, has now lived in this country for approximately half of her life and has undoubtedly become increasingly `Americanized'.... [and] has lived continuously with her mother and her half-sibling."

1009*1009 While this is indeed an unfortunate circumstance, the minor child would not have undergone the cultural adjustment, nor would she have developed those relationships here had it not been for appellant's improper conduct of removing the child from her homeland and absconding to Maryland. We are not paving new roads herein in regard to the malingering of one seeking custody. Indeed, in the context of adoption proceedings, other courts have echoed this sentiment. *See, e.g., In re Petition of John Doe,* 159 Ill.2d 347, 202 Ill.Dec. 535, 536, 638 N.E.2d 181, 182 (1994) ("When the father entered his appearance in the adoption proceedings 57 days after his baby's birth and demanded his rights as a father, the petitioners [adoptive parents] should have relinquished the baby at that time. It was their decision to prolong this litigation through a lengthy, and ultimately fruitless, appeal."); *In re Clausen,* 442 Mich. 648, 502 N.W.2d 649, 664-67, 665 n. 43 (1993) ("[P]rompt action by the father to assert rights, combined with the father's being prevented from developing a relationship with the child by actions of courts or the custodians, are factors that excuse or mitigate the failure to establish such a relationship.").

While we empathize with the minor child and fully appreciate the hardship attendant to her readjustment, we must be mindful of the precedent that our dissenting colleagues would have us set. Were we to adopt the minority's reasoning, our holding would promote the uprooting of children from their home surroundings away from the non-custodial parent, family, and friends and the absconding to this State, where a judge would be obliged to grant custody to the errant parent because personal bonding and a readjustment to the new surroundings will have occurred during the pendency of judicial proceedings.

This is not simply a case where one parent having custody legally or pursuant to a lawful court order awaits the court's determination of which parent ultimately should have custody. Nor is this a case about an American citizen married to someone from a foreign country or a custodial parent from a foreign country who has come to this country and forthwith sought relief from an American court. Under such circumstances, arrangements may be made for visitation by the non-custodial parent in order to facilitate continuity in the relationship between the minor and the non-custodial parent. In other words, the court, acting as a referee, is in a position to issue *pendente lite* orders until such time as a judicial determination can be made concerning who is most fit to have custody.

Here, the natural father was, for a period of over two years, not only deprived of the companionship of his child, but he was ostensibly subject to the emotional trauma occasioned by not knowing where his child was for that period of time. Appellee also was constrained to incur expenditures just to ascertain his daughter's whereabouts and, pending this protracted litigation, he continues to be denied the opportunity to observe his daughter undergoing the emotional, psychological, and physical changes all parents are entitled to witness as their children develop; once denied this opportunity, a parent is never able to recreate that phase of the child's development.

More to the point, the child has been robbed of the guidance, love, and association with her natural father. Unquestionably, appellant's actions in secreting the child for over two years constituted extra legal efforts by appellant essentially to usurp the decision-making function of both the Pakistani and the American courts as to who should have custody of the minor child. Should appellant now be

heard to interpose events that transpired over the two-year period she avoided detection and then, only after she was tracked down by appellee's investigators, seek to secure legal sanction for her extra legal acts?

Citing Hadick v. Hadick, 90 Md.App. 740, 603 A.2d 915 (1992), the minority suggests that we should consider the policy in Maryland regarding separation of siblings. Again, the circumstance of the uniting of the step-siblings in the first place is a consequence of her adulterous relationship and her subsequent flight to this country wherein she secreted the minor child from the natural father for two years. The minority posits that appellant "should not be chastised for contesting 1010*1010 Pakistani decrees ... merely because she and her child are Pakistani by birth." We have acknowledged, in ***Malik***, 99 Md. App. at 528, 638 A.2d 1184, that the Circuit Court for Baltimore County had jurisdiction because "Maryland is the child's `home state.'" The nationality of appellant and the minor child is not an issue except insofar as the minority seeks to rely on the alleged disruption resultant from uprooting the child after five years. All parties were before the Pakistani court and subject to its jurisdiction precisely in the same manner that three citizens of Maryland would and should be under the jurisdiction of a Maryland court. A determination of personal jurisdiction always begins with the geographical location of the parties and one's residence is initially a by-product of the accident of one's birth.

There was absolutely no nexus between the parties to this case and the Baltimore County Circuit Court until appellant fled from Pakistan and defied a court order to produce the minor child. Appellant was, and continued for two years to be, a fugitive from the Pakistani legal system. Upon being found, appellant sought to enlist the aid of the Circuit Court for Baltimore County in what appears to be a conscious and apparently calculated plan to circumvent the laws of both jurisdictions since, during the two-year period appellant secreted the minor child, she, in essence, unilaterally appropriated custody to herself and thereby denied custody or visitation to appellee without authorization from any judicial authority. In other words, she took the law into her own hands.[13]

Returning to the true issues in the case at hand, as we have previously observed, none of the events subsequent to appellant's arrival in this country are relevant to the court's inquiry pursuant to ***Malik*** as to whether the circuit court had jurisdiction. That inquiry involved only what happened in Pakistan, not what has happened here.

While we are mindful that our decision today requires that the minor child readjust to her former culture and way of life, it would be manifestly unjust for us to reward appellant for her brazen disdain for the rule of law which has, pursuant to ***Malik***, made a determination that the proper forum for determining the best interest of the minor child is Pakistan.[14] To decide otherwise would be 1011*1011 to encourage all who are so inclined to circumvent the laws of their home state and remain outside the reach of any court for a period of time sufficiently long to permit the fugitive parent to argue that he or she should be awarded custody notwithstanding the fact that his or her actions occasioned the hardship upon which he or she bases his or her claim for relief. We decline to countenance such a result.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

HOLLANDER, J., dissents in which PAUL E. ALPERT, Judge (Retired) concurs.

HOLLANDER, Judge, dissenting.

I respectfully dissent, and I do so for several reasons. In my view, the issue regarding counsel has been preserved. Additionally, I believe that the trial court and the majority have erred in characterizing as "not relevant" the child's views with respect to the critical issues that the judge had to resolve. Therefore, I conclude that the circuit court erred in proceeding when the child's court-appointed counsel failed to appear. Furthermore, 1012*1012 my reading of the Pakistani court orders convinces me that the Pakistani courts did not apply the "best interests of the child" standard. As a result, the orders are not entitled to comity. Accordingly, I would reverse.

I.

The circuit court properly appointed an attorney to represent and protect the interests of twelve year old Mahak **Malik**, who is at the center of the controversy. Consistent with this Court's directive in ***Malik,*** evidence was presented on remand regarding Pakistani child custody law and its application in this case.

Inexplicably, Mahak's attorney failed to note on her calendar the date of the hearing and did not appear either at the trial or at the closing arguments that were held on another day. Nonetheless, the trial judge elected to proceed without the child's attorney. The majority holds that the issue of whether the trial judge erred in doing so is not preserved for our review, because appellant did not make a timely objection. Even if the issue were preserved, the majority concludes that the trial judge did not err, because "the interests of the parties' child were not the focus of the remand hearing." I disagree.

A.

In concluding that the counsel issue is not preserved, the majority has misconstrued Md.Rule 8-131(a). It provides that, ordinarily, we will not review a non-jurisdictional issue "unless it plainly appears by the record to have been raised in or decided by the trial court...." (Boldface added). The use of the word "or" plainly indicates that the rule's requirement is disjunctive, not conjunctive. Therefore, an issue *is* preserved for our review if it was *either* raised by a party *or* decided by the court.[1]

This interpretation of the rule is consistent with its purpose. The rule is intended "`to ensure fairness for all parties in a case and to promote the orderly administration of the law.'" *Brice v. State,* 254 Md. 655, 661, 255 A.2d 28 (1969), quoting *Banks v. State,* 203 Md. 488, 495, 102 A.2d 267 (1954).

By requiring counsel to object, *see State v. Bell,* 334 Md. 178, 189, 638 A.2d 107 (1994), the judge is on notice of an alleged error, and then has an opportunity to correct it. *See Clayman v. Prince George's County,* 266 Md. 409, 416, 292 A.2d 689 (1972); *Robinson v. State,* 66 Md.App. 246, 254-55, 503 A.2d 725 (1986). What is critical, then, is the judge's opportunity to consider an issue.

> Lawyers do not commit error. Witnesses do not commit error. Jurors do not commit error. The Fates do not commit error. Only the judge can commit error, either by failing to rule or by ruling erroneously when called upon, by counsel *or occasionally by circumstances,* to make a ruling.

DeLuca v. State, 78 Md.App. 395, 397-98, 553 A.2d 730 (1989) (emphasis supplied).

In this case, the court was called upon to rule by the circumstances presented. Clearly, the counsel issue was *decided* by the circuit court. The record reflects that, at the beginning of the hearing, the judge noted that Mahak's counsel was not present. Nevertheless, he expressly decided to proceed. Thus, under the plain language of Rule 8-131(a), the issue is preserved for our review.

The case of *John O. v. Jane O.,* 90 Md. App. 406, 601 A.2d 149 (1992), on which the majority relies to support its position of non-preservation, is inapposite. There, counsel for the child appeared at the hearing and *asked* to be excused. All of the parties then affirmatively consented to the absence. 1013*1013 Moreover, although the Court said that the father had not "raise[d]" the issue in the circuit court, the Court did not discuss whether the issue had been "decided."

Permeating much of the majority's analysis is the claim that appellant did not *timely* object. While there are provisions of the Maryland rules requiring a party to object as soon as the grounds become apparent, these rules, by their terms, apply to objections to the *admission of evidence.*[2] In contrast, Rule 2-517(c), which governs "objections to other rulings or orders," states:

> For purposes of review by the trial court or on appeal of any other ruling or order, it is *sufficient* that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court.

(Emphasis supplied).

The plain language of Rule 2-517(c) suggests that a timely objection is "sufficient." But a "sufficient" condition is different from a "necessary" condition. The difference in phraseology between Rule 2-517(c) and Rule 2-517(a) indicates that the choice of words was no accident. If the drafters wished to require timely objections to rulings other than ones concerning the admission of evidence, they obviously knew how to do so.

I am also troubled by the majority's apparent view that a minor child's rights in a custody case may be readily forfeited through the inaction of a parent. In this child custody maelstrom, the child's rights should not depend on whether a parent made a timely objection. Even in the context of child

support cases, parents cannot bargain away their children's rights. *Stambaugh v. Child Support Enforcement Administration,* 323 Md. 106, 111, 591 A.2d 501 (1991); *Shrivastava v. Mates,* 93 Md.App. 320, 327, 612 A.2d 313 (1992); *Lieberman v. Lieberman,* 81 Md.App. 575, 588, 568 A.2d 1157 (1990). By analogy, Mahak's right to an attorney at the very hearing that would determine her future should not be washed away merely because her mother did not timely complain. That result ignores the principle that, notwithstanding any failure to object, the *"parens patriae* power of the equity courts is plenary to afford minors whatever relief may be necessary to protect their best interests." *Wagner v. Wagner,* ___ Md.App.___,___, ___, A.2d ___ [1996 WL 44172] (No. 608, Sept. Term 1995, filed Feb. 6, 1996).

The reasoning of the Court of Appeals in *In re Adoption/Guardianship No. A91-71A,* 334 Md. 538, 557, 640 A.2d 1085 (1994), and *Washington County Dept. of Social Services v. Clark,* 296 Md. 190, 199-200, 461 A.2d 1077 (1983), is persuasive. The Court determined that no objection was necessary to preserve the issue of a court's failure to appoint independent counsel for the child, because the appointment of counsel was statutorily mandated. The Court also noted that the minor child was unable to object. Certainly, these cases are distinguishable, because they involved an adoption and a guardianship, and the trial courts failed altogether to appoint counsel. But to one in Mahak's position, this is a distinction without a difference. The effect of the circuit court's decision is that Mahak's voice was silenced.

B.

I also disagree with the majority's conclusion that, even if the issue were preserved, the circuit court did not abuse its discretion in proceeding without her attorney. At the conclusion of the evidentiary hearing, the trial judge stated, *inter alia,* that the child's position was "not relevant," because the hearing concerned only the two issues specified in our mandate in ***Malik***. Consequently, the trial court concluded that it was "not at a point where the child's position is to be taken into consideration." In adopting this view, the majority states that the "interests of the parties' child were not the focus of the remand hearing," that "the remand hearing was not for the purpose of determining the 1014*1014 ultimate issue of the child's best interests," that "the matters for which the presence of the child's counsel would be necessary were not yet at issue ...," and that the remand hearing was only an "early stage" of the proceedings.

The majority misconstrues the vital role of Mahak's counsel at the evidentiary hearing and overlooks the child's fundamental right to participate, as a party; that right, in Mahak's case, could only be exercised through counsel. Moreover, the issues set forth in our mandate in ***Malik*** were *the* dispositive issues in the case. Indeed, the outcome would determine Mahak's fate—whether she would remain in the United States with her mother, with whom she has resided here since 1990, or whether she would be returned, against her wishes, to Pakistan and to a father she apparently feared. Consequently, the hearing was not merely an "early stage" of the proceedings; the trial court's ultimate resolution of the comity issue would necessarily turn on what occurred at that hearing and, if its ruling is upheld, it will be the *only* hearing of significance. In this light, Mahak's position was *exactly* what was relevant, and it is a travesty to conclude otherwise.

The relevance of the child's position and the fundamental importance of counsel's role are underscored by the function of the child's counsel in an acrimonious custody dispute. Md.Code Ann., Fam.Law ("F.L.") § 1-202 (1991), authorizes the circuit court to appoint counsel for a child to provide the court with an "independent analysis" of the child's position. *John O. v. Jane O., supra,* 90 Md.App. at 436, 601 A.2d 149. Indeed, "[t]he purpose of § 1-202 is to afford the court an opportunity to hear from someone who will speak on behalf of the child." *Id.,* 90 Md.App. at 435-36, 601 A.2d 149 (citation and internal quotation marks omitted). The statute thus recognizes that the interests and positions of the parents in these cases are not necessarily congruent with those of the children, and that the child is entitled to an advocate who will champion the child's position.

The case of *Levitt v. Levitt,* 79 Md.App. 394, 556 A.2d 1162, *cert. denied,* 316 Md. 549, 560 A.2d 1118 (1989), is noteworthy. There, we held that a trial court was *required* to appoint counsel for a child in a custody modification proceeding, although no party had apparently ever moved for the appointment of counsel. *Id.,* 79 Md.App. at 403-04, 556 A.2d 1162. In much the same way, without the presence of her counsel, Mahak was not heard. While Mahak and her counsel wanted the court to deny comity, Mahak's counsel was unable to attempt to elicit any evidence to demonstrate that the Pakistani courts had not *applied* the best interests test. Through the questioning of witnesses, the introduction of evidence, and argument, her counsel might have been able to persuade the court to adopt the child's position that the Pakistani court decisions were not entitled to comity.

Numerous cases in other jurisdictions have recognized the importance of actual *participation* by the child's counsel in custody battles. The Montana Supreme Court's decision in *In re Marriage of Kramer,* 177 Mont. 61, 580 P.2d 439 (1978), for example, is instructive. That court held that the judge erred in deciding a custody issue in a divorce proceeding when appointed counsel for the children did not participate in any of the hearings. What the court said, 580 P.2d at 445, is pertinent here:

> The purpose of the statute [authorizing trial courts to appoint independent counsel for children] is to provide the children with an advocate who will represent their interests and not the parents' interest. This means that the attorney is not to take a passive role in the hearing on custody. He should represent the children actively and present to the court all the evidence he can marshal concerning the best interests of the children.

See also, J.A.R. v. Superior Court, 179 Ariz. 267, 877 P.2d 1323, 1331 (Ct.App.1994); *G.S. v. T.S.,* 23 Conn.App. 509, 582 A.2d 467 (1990) (court commits plain error if it fails to appoint independent counsel for children involved in custody dispute that involved allegations of sexual abuse); *In re Marriage of Barnthouse,* 765 P.2d 610 (Colo.Ct.App.1988), *cert. denied sub nom. Barnthouse v. Barnthouse,* 490 U.S. 1021, 109 S.Ct. 1747, 104 L.Ed.2d 184 (1989) (child's attorney should take an active role in presenting evidence); 1015*1015 *Veazey v. Veazey,* 560 P.2d 382, 390-91 (Alaska 1977).

Without question, Mahak's attorney did not fulfill her responsibility when she failed to participate at the hearing or at closing arguments. While the dereliction was undoubtedly accidental and unintentional, Mahak should not be forced to bear the burden of the error. We should be mindful of what the District of Columbia Court of Appeals said in *Jones v. Roundtree,* 225 A.2d 877, 878 (D.C.1967), albeit in a different context: "We are hesitant ... to visit the sins of an attorney on his client, especially when that client is a minor."

C.

In determining that the circuit court did not err in proceeding without Mahak's counsel, the majority states that "[t]he child's attorney could not have offered anything meaningful in addition to what appellant's counsel already presented." In support of its conclusion, the majority relies on the assertion of child's counsel that she would not have presented anything helpful even if she had been at the evidentiary hearing. My concern is obvious; however innocent counsel's mistake was in failing to appear, the child's attorney has a substantial self-interest in minimizing the resulting harm to her client. Indeed, in spite of her client's position and her own position opposing comity, she appeared at the appellate argument as an appellee and submitted an appellee's brief. An acknowledgement by her that her presence would have made a difference in the outcome would be tantamount to an admission of malpractice.

In my view, Mahak was tangibly prejudiced by her counsel's failure to participate.[3] Included in appellant's appendix were reports from Dr. Leon Rosenberg, who examined Mahak during the pendency of the circuit court proceedings. His reports purport to show that Mahak was extremely fearful of her father. The majority says that the reports are irrelevant and "extraneous," because the circuit court was not conducting a best interests hearing; it agrees with appellee that, since the reports were not admitted below, they cannot be considered here. That is precisely the point. Because child's counsel was not present, she could not attempt to introduce the reports. Had the reports been introduced, Mahak's counsel could have relied on them to show important deficiencies in the Pakistani proceedings and to highlight what was *not* done or considered there. Thus, the reports would have advanced the child's claim that, by failing to consider or address Mahak's fear of her father, the Pakistani courts did not *apply* the best interests standard.

The only way to show prejudice is to demonstrate what Mahak's counsel could have done had she participated at the hearing. The majority's reasoning is thus circular—it declares that there is no evidence of prejudice from counsel's failure to appear, and simultaneously it strips appellant of the ability to establish such prejudice. This circuitous approach means that a court's decision to proceed without counsel may never be reversible error, because practically the only way to establish prejudice is to go beyond the record and show what counsel could have introduced if he or she had participated in the hearing. In this regard, I find compelling the Court's comment in *Town of Somerset v. Montgomery County Board of Appeals,* 245 Md. 52, 225 A.2d 294 (1966). In considering whether actual prejudice must be shown to establish a denial of procedural due process, the Court said, "It would be a mockery 1016*1016 of justice to hold that a person cannot complain of the denial of the right to cross-examine unless he can show what the result of the cross-examination would have

been; that result is often as unexpected as it is revealing." *Id.,* 245 Md. at 66, 225 A.2d 294. *Cf. Wagner v. Wagner, supra,* slip op. at 19, ___ Md.App. at___,___ A.2d___ [1996 WL 44172] ("there is no requirement that actual prejudice be shown before denial of due process can be established").

In a footnote, the majority also asserts that a remand would accomplish nothing except "to allow appellant a second bite at the apple." Mahak is not a casual bystander in these proceedings. "We are not here dealing with chattels." *Krebs v. Krebs,* 255 Md. 264, 266, 257 A.2d 428 (1969). She is a young girl who will be profoundly affected by the outcome of these proceedings. Whether a remand gives the mother a second bite at the apple is not the point; a remand would give Mahak her only real bite. Fundamental fairness requires no less.

In sum, I cannot accept the majority's view that the child's position was not compromised. Without counsel, Mahak's position was neither articulated nor considered with respect to the critical and complex issues that were determinative of her future. The fact that Mahak was unable to have her interests represented in a proceeding, the outcome of which will have a colossal impact on her life, is, in my view, "prejudice" enough.

II.

I disagree with the majority's conclusion that the Pakistani court orders show that the courts there applied the best interests standard. The majority admonishes that, in analyzing the issue, it is important "to keep [our] eye on the ball." I respectfully submit, however, that, in its ultimate analysis of the Pakistani court orders, the majority strikes out.

A.

As a threshold matter, I note that there is some confusion in the record as to whether the circuit court actually found that the Pakistani courts had applied the best interests of the child standard. In his oral ruling at the conclusion of the hearing, the trial judge stated: "The court is persuaded that, *while the courts of Pakistan did not apparently apply the best interest of the child standard* to their decision, it is only because the mother and the child were not present in person to substantiate the mother's allegations." (Emphasis supplied). He later stated: "I am persuaded that, *if the child and the mother had been present,* the law of Pakistan requires their courts to give paramount consideration to the best interests of the child." (Emphasis supplied). These statements indicate that the circuit court actually found that the Pakistani courts had *not* applied the best interests of the child standard. This view is supported by the fact that, when counsel asked the court whether the proposed order to be submitted by counsel should contain the court's findings, the judge replied: "I don't think the findings need to be expressed in the order. The findings are on the record."

Nevertheless, in its subsequent written order, the court stated that appellant had "failed to prove [that] the Pakistani court did not apply the `best interest of the child' standard." Thus, there are flatly contradictory findings on the record. It is not dispositive that the finding favorable to appellee is in a

written order executed subsequent to the court's oral rulings. As the Court of Appeals stated in *Davis v. Davis,* 335 Md. 699, 713, 646 A.2d 365 (1994), "the subsequent issuance of a formal written order does not preclude a finding that judgment was actually orally rendered on an earlier date."

The problem of the contradictory findings is not merely of academic concern; it is crucial with respect to the appropriate standard of review. We must determine whether the circuit court's factual conclusions are clearly erroneous. Our decision hinges on which decision is subjected to that test. To say that the circuit court's finding that the Pakistani courts *applied* the best interests of the child test is *not* clearly erroneous is completely different from saying that its finding that the Pakistani courts *did not* 1017*1017 *apply* the best interests of the child test *is* clearly erroneous.

It is also significant that the trial court orally suggested that the Pakistani courts did not apply the best interests of the child standard, albeit because appellant and Mahak did not appear in Pakistan. While the trial court may have meant to blame appellant for the Pakistani court's action, it is the underlying finding that is critical. We expressly said in ***Malik*** that the Pakistani decisions are not entitled to comity if the Pakistani courts did not apply the best interests of the child standard. ***Malik***, 99 Md.App. at 533-534, 638 A.2d 1184. We did not say that, if the Pakistani courts failed to apply the proper standard because the mother did not appear, comity is warranted.

The majority minimizes this concern when it calls the court's initial finding "a single comment regarding the lack of evidence before the Pakistani court from which it could apply the best interests standard." But the circuit court did not simply refer to a "lack of evidence." To the contrary, it initially found that the Pakistani courts had not applied the best interests standard. Further, that "single comment" happens to be a finding on the paramount issue of this case.

As it is unclear what the circuit court found, we should not be forced to speculate, particularly when the future of a child is at stake. If we cannot clearly determine what the trial judge meant, at a minimum, a remand for clarification is required.

B.

Malik makes clear that a cardinal question is whether the Pakistani courts *applied* the best interests of the child standard. The Pakistani opinions certainly contain phraseology that *sounds* like a best interests standard. But careful review of the Pakistani orders makes clear that the Pakistani courts did not *apply* the best interests standard within the meaning of Maryland law.

In *Queen v. Queen,* 308 Md. 574, 521 A.2d 320 (1987), the Court defined the best interests standard:

"For the purpose of ascertaining what is likely to be in the best interests and welfare of a child a court may properly consider, among other things, the fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-

being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rational choice, the preference of the child. 2 Nelson, *Divorce and Annulment,* § 15.01 (2nd ed., 1945). It stands to reason that the fitness of a person to have custody is of vital importance. The paramount consideration, however, is the general overall well-being of the child."

Id., 308 Md. at 587-88, 521 A.2d 320, quoting *Hild v. Hild,* 221 Md. 349, 357, 157 A.2d 442 (1960).

In addition to the factors enumerated in *Queen,* we added in *Best v. Best,* 93 Md.App. 644, 655, 613 A.2d 1043 (1992), that the trial court should also consider "length of separation from the natural parents," "potentiality of maintaining natural family relations," "material opportunities affecting the future of the child," and "prior voluntary abandonment or surrender." *Best,* 93 Md.App. at 656-657, 613 A.2d 1043. *See also Montgomery County Department of Social Services v. Sanders,* 38 Md.App. 406, 419-21, 381 A.2d 1154 (1978). I am unable to find any contemporary authority suggesting that the best interest standard compels a custody award adverse to a parent who, without violating a court order, nevertheless leaves or flees the home jurisdiction with the child who is the focus of the custody battle.

Numerous cases in Maryland emphasize the overriding importance of the best interest standard. Indeed, we recently reiterated that the best interest standard is *"the* dispositive factor on which to base custody awards." *Wagner v. Wagner, supra,* slip op. at 37, ___ Md.App. at___, ___ A.2d___ (emphasis in original). Moreover, in *Taylor v. Taylor,* 306 Md. 290, 303, 508 A.2d 964 (1986), the Court said that the best interest of the child is "the objective to which virtually all other factors speak." *See also Robinson v. Robinson,* 328 Md. 507, 519, 615 A.2d 1018*1018 1190 (1992) (the best interest standard is the "primary concern"); *McCready v. McCready,* 323 Md. 476, 481, 593 A.2d 1128 (1991) (best interest test is the "appropriate standard" to determine custody); *Ross v. Hoffman,* 280 Md. 172, 175, 178, 372 A.2d 582 (1977) ("the best interest standard controls" custody dispute and is "always determinative"); *Fanning v. Warfield,* 252 Md. 18, 24, 248 A.2d 890 (1969) (best interest standard is the "ultimate test"); *Dietrich v. Anderson,* 185 Md. 103, 116, 43 A.2d 186 (1945) (the best interest standard is "of transcendent importance"); *Shunk v. Walker,* 87 Md.App. 389, 396, 589 A.2d 1303 (1991) ("The guiding principle of any child custody decision, whether it be an original award of custody or a modification thereof, is the protection of the welfare and best interests of the child"); *Kramer v. Kramer,* 26 Md.App. 620, 623, 339 A.2d 328 (1975). Bearing in mind the undisputed importance of the best interest standard, I turn to a review of the Pakistani orders in issue.

In the opinion of the Court of Vth Senior Civil Judge at Karachi East, issued October 23, 1991, the judge awarded custody to Mr. **Malik** because appellant removed the child from the "constructive custody" of her father and "the father cannot exercise his control" over the child. The court then cited a previous case for the proposition that "by removing the minor to U.S.A. the defendant has deprived the minor child of an opportunity to meet her father, which means that she has done some-

thing [injurious] to the mental and [e]motional well-being of the minor, and thereby has lost the right of Hizanat." Those were the only reasons that the court gave in support of its conclusion.

Noticeably absent is any discussion or findings as to the fitness of either parent. Nor is there any consideration of the well-being of the child or the standard of living or surroundings in which Mahak would be reared. Further, the court did not attempt to ascertain the desires of Mahak, who was then eight years old, either through appointment of an attorney for her or through counsel for the parties. This is in spite of the fact that § 17(3) of the Pakistani Guardians and Wards Act ("the Act") allows the court to consider the preference of the minor "if the minor is old enough to form an intelligent preference."

It is also significant that there was no effort by the Pakistani court to appoint an attorney for Mahak. Considering the importance of independent counsel for children in contested custody disputes, *supra* at 991-992, this failure offends the procedure of Maryland courts.

In its recitation of facts, the Pakistani court noted appellant's allegations that her former husband "is ad[d]icted of Alcohol and tranquilizers and the said habits made him unable to deal with daily life and discharge his obligation to look after the welfare of [appellant] and the minor" and that Mr. **Malik**

used to extend threats of dire consequences to the [appellant] and also used to threat[en] to snatch away the minor from the [appellant]. Due to said threats the minor started awakening at night time and used to utter words `Bachao Bachao.' In order to save the minor from unpleasant atmosphere and in the welfare of the minor the [appellant] left Karachi for U.S.A. along with the minor....

Yet the court failed to investigate, consider, or resolve the mother's serious allegations of appellee's substance and domestic abuse. As the majority concedes, Justice Dogar, appellee's expert witness, "opined that the Pakistani court did not consider appellant's allegations," because she failed to appear.

Although appellant did not personally appear in Pakistan to present the allegations of abuse,[4] it is extremely unlikely that a Maryland judge would simply award custody of a 1019*1019 child to a parent accused of abuse or misconduct, merely because the other parent fails to appear. Rather, the judge would attempt to ascertain the validity of the claims, in order to safeguard the well-being of the child. *See* John F. Fader II & Richard J. Gilbert, MARYLAND FAMILY LAW § 5-8 (2nd ed. 1995).

To be sure, an investigation is not statutorily required. *See Powers v. Hadden,* 30 Md.App. 577, 587, 353 A.2d 641 (1976). There are, however, circumstances when our courts have recognized that an investigation is warranted, to enable the court to fulfill the mission of doing what is best for the child. *See Ouellette v. Ouellette,* 246 Md. 604, 608, 229 A.2d 129 (1967) ("we think that the determination of the [custody issue], due to the ages of the children, should have been deferred until after

a qualified agency had made an investigation for the chancellor...."); *Jester v. Jester,* 246 Md. 162, 171, 228 A.2d 829 (1967). *See also Shanbarker v. Dalton,* 251 Md. 252, 259, 247 A.2d 278 (1968). In the face of appellant's allegations, which were known to the courts, the Pakistani court should have sought to assure the child's safety. *See Ross v. Hoffman, supra,* 280 Md. at 176, 372 A.2d 582, citing *Dietrich v. Anderson, supra,* 185 Md. at 118, 43 A.2d 186 ("a court of chancery stands as a guardian of all children and may interfere ... in any way to protect and advance their welfare and interests"). Appellee's denial of the accusations is not a substitute for an independent investigation.

In my view, the Pakistani court order fits squarely within the analysis of *Al-Fassi v. Al-Fassi,* 433 So.2d 664 (Fla.Dist.Ct.App. 1983), which we discussed favorably in our opinion in ***Malik***, 99 Md.App. at 534, 638 A.2d 1184. There, Florida's intermediate appellate court declined to grant comity to a Bahamian court order that awarded custody to a father to avoid the risk of the children's becoming "little Americans," of "losing the cultural heritage of Saudi Arabia," and of losing their royal inheritance. 433 So.2d at 665-66, 668. The court reasoned that the Bahamian decree was not entitled to comity because it did not conform to Florida's public policy of basing custody decisions on the best interests of the children. *Id.* at 668. The Florida court particularly noted that the Bahamian court had not considered all the factors in Florida's best interests of the child test:

> Section 61.13(3), Florida Statutes (1981) states that the court shall consider and evaluate all factors affecting the best interests of the child, and enumerates some of the significant factors. There are conspicuously missing, among the factors considered by the Bahamian court, the following considerations of Section 61.13(3): (1) length of time the children lived in a stable environment and the desirability of maintaining continuity; (2) education of the children; (3) psychological stability of the parents based on competent evidence; and (4) physical health of the parents. *Although the decree purports to have considered the best interests of the children, little evidence based on those interests, as set out by statute, was presented to the court.* The factor focused on by the Bahamian court was the "risk" of losing the inheritance of royalty if the children were raised as "little Americans." Comity must give way to the interests of the state in exercising *parens patriae* jurisdiction over the child with the objective of protecting the recognized best interests of the child.

Id., 433 So.2d at 668 (emphasis supplied).

Like the Bahamian court order at issue in *Al-Fassi,* the Pakistani court order, which professes concern for the "welfare" of the child, nonetheless gives no indication that it considered all of the best interest factors. Rather, the court merely said that custody belonged with the father because appellant had interfered with the father's right to "control" the child. The court appeared to indulge a conclusive presumption that appellant's interference with Mr. **Malik's** ability to see his daughter meant that custody belonged with Mr. **Malik**. That is not the application of the best interests of the child test, as we have defined it. As the Court stated in *In re Adoption/Guardianship No. A91-71A, supra,* 334 Md. at 561, 640 A.2d 1085, "the controlling factor ... in adoption and custody cases is not the natural parent's interest in raising the child, but rather what serves the best interests of the child."

1020*1020 The judgment of the Court of III Additional District Judge at Karachi East, to which Ms. **Hosain** appealed the previous court's ruling, is equally flawed. The mother's denial of the father's access to the child, and the near total emphasis on the father's "right" to "control" the child, were apparently the primary grounds on which the court based its decision. Like the lower court, the appellate court focused almost exclusively on Ms. **Hosain's** interference with Mr. **Malik's** rights of "constructive custody" or "control."

In affirming the award of custody to Mr. **Malik**, the court said: "The fact that the minor has been removed from the access of the father. The mother has lost her right of hizanat of the minor who is under law deemed to be in constructive custody of [the] father therefore the mother has lost right of hizanat...." The court also made statements that the "father should be deemed to be in constructive custody of the minor" and

> the right of a Mohammadan mother of the custody of a minor is subject to the control of the mother [sic; from the context it appears that the court or translator meant to say "father"] and if she takes away the minor against the wishes of the father to a place where [the] father cannot exercise supervision and control she acts without authority and her taking away the minor amounts to removal of the minor from the custody of the father.

The legal authority on which the court based its decision further establishes the apparent conclusive presumption that the mother's interference with the father's control of the child was the basis of the custody decree. The court quoted from the case of PLD 1967 Lahore 382 Mst. Churagh Bibi v. Khadim Hussain:

> "If a woman who has the hizanat of a ch[i]ld denies the father of the child, who is under Muslim law his or her natural guardian, access to the child, she must be considered not only to have removed the child from the constructive custody of the father, but also to have done something which is against the welfare of the minor...."

Appellant's allegations of abuse are included in the court's opinion:

> It is also contended that during the time they lived separately since both of the houses happened to be nearer to each other the [appellee] in a drunk position used to visit the appellant and extended threats of dire consequences for life of the appellant and used force to snatch away the minor daughter to coerce the appellant to accept the [appellee] and to go according to his wishes. This also badly affected the mind of the minor who used to get up during night hours and cried `BACHAO' `BACHAO' due to the aggressive behav[ior] and maltreatment at the hands of the appellee.

But, again, there is no indication that the court considered these serious allegations or took the lower court to task for failing to do so. From the foregoing, it is clear that the appellate court did not truly apply the best interests of the child test any more than the lower court had.

The analysis of the Court of Vth Senior District Judge/ASJ & R.C. at Karachi East, dated August 10, 1993, is concededly closer to the best interests of the child standard. Nonetheless, while the court paid lip service to something that sounds like a best interests of the child standard, it still did not *apply* that standard.

In awarding custody to appellee, the court reasoned that Ms. **Hosain** had "forcibly removed the custody of the minor M[a]hak **Malik** from the custody of" the father, that Ms. **Hosain** was "living a sin life accompanied by her lover," and that Mr. **Malik** was the "natural guardian" of the child. It added that the mother lived in "an unislamic society [which] will not be in the welfare and well being of the minor daughter," while Mr. **Malik** was "a business man living in an Islamic society with a moral character." Although the court mentioned that Ms. **Hosain** had a child with her paramour, who is now her husband, it did not consider or address Mahak's interest in remaining with her half-sibling. This is inconsistent with the policy in Maryland that courts should avoid the separation of siblings. *See Hadick v. Hadick,* 90 Md.App. 740, 748-49, 603 A.2d 915, 1021*1021 *cert. denied,* 327 Md. 626, 612 A.2d 256 (1992).

Overall, the Pakistani court's discussion amounts to conclusory statements. As with the Bahamian court order at issue in *Al-Fassi, supra,* there is no indication of a weighing of the various factors embodied in our best interests test, or a consideration of the child's need for stability. *See McCready v. McCready, supra,* 323 Md. at 481, 593 A.2d 1128 ("The desirability of maintaining stability in the life of a child is well recognized...."); *Cf. Krebs v. Krebs,* supra, 255 Md. at 266-67, 257 A.2d 428 ("Frequent change of custody does not contribute to that feeling of security essential to the mental well being of growing children"); *Jordan v. Jordan,* 50 Md.App. 437, 443, 439 A.2d 26, (1982) *cert. denied,* 293 Md. 332 (1986) ("`[T]he stability provided by the continuation of a successful relationship with a parent who has been in day to day contact with a child generally far outweighs any alleged advantage which might accrue to the child as a result of a custodial change.'" [Citation omitted]). Rather, the court said only that (1) Ms. **Hosain** denied Mr. **Malik** access to Mahak; (2) Ms. **Hosain** was living a sinful life by cohabiting with a paramour; and (3) Mahak would be living in an "unislamic society." Those reasons do not constitute application of the best interests of the child test.

As for the first reason, Ms. **Hosain's** denial of Mr. **Malik's** access to Mahak sounds like the father's-right-to-control rule on which the other courts relied. As for the second reason, the court was certainly entitled to consider that Ms. **Hosain** lived with another man, and had a child with him, out of wedlock. But the court never established the correlation between that conduct and Mahak's best interests. It is settled policy in Maryland that the fact of adultery should be considered "only insofar as it affects the child's welfare." *Davis v. Davis,* 280 Md. 119, 127, 372 A.2d 231 (1977). *Accord Swain v. Swain,* 43 Md.App. 622, 628, 406 A.2d 680, *cert. denied,* 286 Md. 754 (1979); *Draper v. Draper,* 39 Md.App. 73, 79, 382 A.2d 1095 (1978). Finally, the Pakistani court's reference to Mahak's living in an "unislamic society" is reminiscent of the facts of *Al-Fassi,* in which the Bahamian court had awarded custody to the father on the grounds of the risk of the children's becoming "little Americans," of "losing the cultural heritage of Saudi Arabia," and of losing their royal inheritance. 433 So.2d at 665-68.

Moreover, like the previous courts, the allegations of substance and domestic abuse were not considered, although the court stated in its opinion:

> It is further stated by [appellant, in her written statement] that [appellee] is addict of smoking joints, in the habit [of] consuming alcoh[o]l and also addict of using tranquilizers, which fact was transpired upon her after the marriage. And due to above addiction, the health of [appellee] is totally wrecked and his mind is unable to deal with his daily life, therefore, he cannot look after the welfare of the minor.

Consideration of these serious charges, regardless of whether the accuser appears, is essential to a meaningful application of the best interests test.

Certainly, I do not intend in any way to criticize Pakistani laws, mores, culture, or customs. Moreover, like the majority, I, too, recognize that Islam is "one of the world's oldest and largest religions." But we were clear in ***Malik*** that, unless the Pakistani courts *applied* the best interests standard, comity was not appropriate. The Pakistani courts' use of phrases such as the "welfare of the minor" does not constitute the *application* of the best interests of the child standard. These words are, after all, only labels.

III.

The majority accuses Ms. **Hosain** of bringing this unfortunate situation upon herself and her child through her "improper conduct" in leaving Pakistan and "absconding" to Maryland.[5] It terms her actions a "brazen disdain for the rule of law," and mentions her 1022*1022 "adulterous" relationship with her current husband.

Ms. **Hosain** did *not* unlawfully abscond from Pakistan with Mahak. Early in the opinion, the majority acknowledged that appellant left Pakistan *before,* and not after, appellee was awarded custody. Thus, when Ms. **Hosain** came to this country, she was not under any legal compulsion to remain in Pakistan or to relinquish custody of Mahak. In essence, she came as an immigrant to our nation of immigrants. The majority's assertion that appellant attempted to use the Maryland court in "a conscious and apparently calculated plan to circumvent the laws" of Pakistan is also unfounded. She, like many others, has resorted to our courts to defend her current living arrangement with her child, and to contest custody orders from another country that, in her view, are inconsistent with this State's policy. She should not be chastised for contesting the Pakistani decrees in the courts of the land where she now lives, merely because she and her child are Pakistani by birth.

The majority also suggests that the adoption of my views would sanction wholesale "uprooting" of children and would lead to the influx to Maryland of parents seeking custody of children who have been snatched, or trying to re-litigate issues that have been determined by custody decrees of other courts. I certainly do not want to be understood as encouraging such conduct. It is worth noting that the Maryland General Assembly and the United States Congress have enacted legislation to address

these concerns.[6] *See, e.g.,* the UCCJA and the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. But we should not lose sight of the fact that this case concerns only one child.

I respectfully dissent.

[1] This aspect of the "personal law" was referred to as the right of "Hazanit," which we shall discuss more fully below.

[2] In a footnote in her brief, citing *In re Adoption/Guardianship No. A91-71A,* 334 Md. 538, 557, 640 A.2d 1085 (1994), and *Washington County Dept. of Social Servs. v. Clark,* 296 Md. 190, 199-200, 461 A.2d 1077 (1983), appellant incorrectly asserts that her objection was not required. In both cases, the Court of Appeals held that a party's failure to preserve the issue of the propriety of the circuit court's failure, in the first place, to appoint counsel for the child under the statute mandating such appointment is reviewable because where "the person for whose protection the statute was enacted is too young to have raised the issue in the absence of counsel, [an appellate court] may, in [its] discretion, address the issue." *In re Adoption,* at 557, 640 A.2d 1085. *See also Clark,* at 200, 461 A.2d 1077. Both cases are inapposite to the instant case because we are not dealing with whether the circuit court should have appointed counsel for the child under a statute requiring it to do so. In our case, court-appointed counsel is already in place. Rather, *John O.* is the applicable authority in the instant case. In any event, even if both cases applied, it would make no difference in light of our discussion to follow.

[3] As an aside, we note that it would be a monumental waste of judicial resources, in light of the child's attorney's position, for this Court to remand the case to the circuit court on the ground that the child's attorney was absent from the remand hearing. If we were to remand the case, appellant's counsel would re-prosecute the matter with the child's attorney present, but not adding anything of value to the proceedings because, as counsel has made clear, she could not assist the trial judge in making the relevant determination under ***Malik***. The only result, therefore, would be to allow appellant a second bite at the apple.

[4] We note that, holding otherwise would lead to undesirable behavior on the part of the absent party having physical custody of the child. The absent party could effectively "hide out" until the proceedings in the other party's jurisdiction have been concluded. Thereafter, the absent party could run to his jurisdiction's court and successfully have comity denied to the order of the other party's jurisdiction's court on the ground that the best interest of the child test was not applied there because the absent party's evidence was not considered. To frustrate another country's or state's adjudicatory process in this manner is contrary to the orderly disposition of litigation and avoidance of multiplicity of lawsuits.

[5] The imperative that the Pakistani court apply the best interest standard as of the time the father sued for child custody in Pakistan and the case was presented in that court is unaffected by our correction, *supra,* noting that the mother fled the country before—rather than after—appellee filed his petition for custody. The Pakistani court was not obliged to, nor could it, apply the best interest standard to a Pakistani child using American values.

[6] At the remand hearing, these orders were introduced into evidence. Our review of these orders indicates that they were from the Pakistani judges' oral rulings from the bench. The orders contain grammatical and word usage errors.

[7] As the experts explained, "Hazanit" is a religious or personal right to have custody of one's child depending on, among other things, the age and sex of the child. We set forth appellant's explanation of this doctrine below. As an aside, there seems to be some discrepancy regarding the proper spelling of the term. The Pakistani orders state "Hizanat," but the parties state "Hazanit." In the interest of convenience, we shall employ the parties' spelling.

[8] We are mindful that the court in Pakistan may not have considered the circumstances preceding appellant's departure from Pakistan. As we explained above, however, the court could not do so because appellant never appeared to substantiate her claims.

[9] In *McAndrew v. McAndrew,* 39 Md.App. 1, 382 A.2d 1081 (1978), wherein we concluded that Maryland abolished the maternal preference by statute, we presented the reasoning underlying the maternal preference. We noted that it was once described as a "universal verity" and was recognized "by the commonality of man." *Id.* at 6, 382 A.2d 1081. We concluded, despite these views, that "[a] parent is no longer presumed to be clothed with or to lack a particular attribute merely because that parent is male or female." *Id.* at 9, 382 A.2d 1081.

[10] Q: "How many women, in the last 50 years, have been stoned under the Hudood Laws [criminal law] for adultery?"

Dr. **Malik**: "No one."

Q: "No one?"

A: "No one."

Q: "Not a single one?"

A: "No."

[11] Q: "And isn't that because the proof under Hudood is practically impossible?"

Dr. **Malik**: "It's not impossible, but it is very difficult."

Q: "Well, it requires four eyewitnesses—

A: "That's right."

Q: "—of the penetration, of the actual act of sexual intercourse; does it not?"

A: "Very true."

[12] Ironically, the minority posits that "the court did not attempt to ascertain the desires of Mahak, who was then eight years old...." The Pakistani court ordered the production of the minor child who would have indeed been able to express a preference as to custody; it was appellant who chose to defy the court's order and not produce the child. Justice Dogar testified, with respect to the weight to be given the minor child's preference:

If the court is satisfied the girl is intelligent and understands the implications of leaving the mother or leaving the father or leaving the whole family, then the court will give weight to the statement, but if the court considers that she is not capable of understanding what I am doing by leaving my mother or by leaving my father or by leaving my family, then they will not give it weight.

Appellant, as a consequence of defying the court order, thereby thwarted an opportunity to allow the Pakistani court to take into consideration what may have been the most persuasive evidence available as to the best interest of the child. Unfortunately, we will never know what the child's preference would have been when the Pakistani court ordered her production because, as a result of appellant's refusal to participate personally in the Pakistani proceedings, appellant has now created a five-year hiatus during which the child's preference and feelings have been influenced by the isolation from her father and dependency on appellant.

[13] The laws of Maryland, and virtually every jurisdiction in the United States, provide for the issuance of an ex parte order to a parent who is constrained to remove his or her child from the custody of the other parent where the circumstances warrant. MARYLAND CODE ANNOTATED FAMILY LAW § 9-305, is authority for the proposition that it is unlawful for a relative who knows that another person is the lawful custodian of a child under the age of sixteen years to "abduct, take, or carry away the child from the lawful custodian to a place outside of this State." Section 9-306(a) and (b) provide:

(a) *Petition.*—If an individual violates the provisions of § 9-304 or § 9-305 of this subtitle, the individual may file in an equity court a petition that:

(1) states that, at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child; and

(2) seeks to revise, amend, or clarify the custody order.

(b) *Defense.*—If a petition is filed as provided in subsection (a) of this section within 96 hours of the act, a finding by the court that, at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child is a complete defense to any action brought for a violation of § 9-304 or § 9-305 of this subtitle.

This is consistent with one of the stated purposes of the Maryland Uniform Child Custody Jurisdiction Act—to "deter abductions and other unilateral removals of children undertaken to obtain custody awards." MD.CODE ANN.FAM.LAW, § 9-202(a)(5).

Section 9-306(b) plainly provides the mechanism whereby one who has taken a child without legal sanction may file a petition within 96 hours of taking the child alleging that failure to act would have resulted in a clear and present danger to the health, safety, or welfare of the child. Appellant never filed any such petition, nor made any attempt of any kind to seek a legal determination until her whereabouts were discovered.

[14] Appellant, notwithstanding our decision herein, may petition the Pakistani court to modify the Pakistani custody decree.

Section 9-214(a) provides in pertinent part that a custody decree of another state shall not be modified unless:

(1) it appears to the court of this State that the court that rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this subtitle or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.

The evidence in the record strongly reveals that the Pakistani court retains jurisdiction. In this respect, Justice Dogar testified:

If she goes back and files a petition before the court and says, this case was decided ex parte, and my absence from the court was not intentional, it was due to some compulsion, which she can give one, two, whatever compulsion, and she says, no, I am here now. I am here. I want the ex parte proceedings to be set aside.

The court will grant this one issue only, and the court will call the other party and then upset, if it agreed, upset that order and then will give a full opportunity to both parties to again give evidence.

Mr. **Malik** will again have to make a statement in her presence. She will engage counsel. He will be asked to bring his witnesses. She will be asked to produce witnesses and make statements, and then the whole evidence of both parties, when it comes, according to the case, will be decided, and maybe she presents good evidence and gets custody.

Now, for the sake of an example, she has said that he is an alcoholic. That is a mere allegation on paper. It's not in court. If she comes with some evidence, well, maybe then the court will think he is not a good person.

In addition to the above, Justice Dogar stated numerous times during his testimony that the Pakistani courts would entertain appellant's petition to modify.

Significantly, the Order of the Vth Senior Civil Judge/ASJ at Karachi East provides:

I, may point-out [sic] here that in case any subsequent events are created, the defendent [sic] can apply for review of the order, but it is subject to the production of the minor in Court, as laid down in P.L.D.1985 Karachi page 645.

Similarly, the Commentary to § 17 of the GUARDIAN AND WARDS ACT (1992 Ed.) provides under the heading "Orders always temporary"

Orders under the Act must not necessarily be, in the nature of the things, final and unalterable; they can be altered from time to time, as circumstances require.

Furthermore, *Harris v. Melnick,* 314 Md. 539, 555, 552 A.2d 38 (1989), cited by appellant, refers to the Commissioners' Note to § 14 [Maryland's § 9-214] of the Uniform Act, and delineates the circumstances causing a "decree-rendering state to lose modification jurisdiction":

For example, if custody was awarded to the father in state 1 where he continued to live with the children for two years and thereafter his wife kept the children in state 2 for 6½ months (3½ months beyond her visitation privileges) with or without permission of the husband, state 1 has preferred jurisdiction to modify the decree despite the fact that state 2 has in the meantime become the "home state" of the child. If, however, the father also moved away from state 1, that state loses modification jurisdiction interstate, whether or not its jurisdiction continues under local law. See Clark, Domestic Relations 322-23 (1968). Also, if the father in the same case continued to live in state 1, but let his wife keep the children for several years without asserting his custody rights and without visits of the children in state 1, modification jurisdiction of state 1 would cease.

From the above, appellant clearly may not seek modification of the Pakistani court order by the circuit court, because the Pakistani courts have retained jurisdiction under the principle akin to Maryland's change in circumstances modification standard, i.e., "in case any subsequent events are created." Thus, since appellant may petition the Pakistani court for a modification of the Pakistani decree, under § 9-214, a court of this State "shall not modify that decree." Consequently, appellant may not seek a modification of the Pakistani decree in the circuit court until she has first petitioned the Pakistani court to modify its decree, and the Pakistani court thereafter declines to assume jurisdiction for this purpose. The excerpts cited from the record also indicate appellant may, even now, move to set aside the original Pakistani decree based on her representation that her absence "was due to some compulsion" and "not intentional."

[1] The present language of the rule contrasts with earlier versions that required an issue to have been both raised *and* decided by the lower court, with certain exceptions not pertinent here, in order to be preserved. *See* Rules 885, 1085 (repealed). For example, Rule 1085, which governed appeals to this Court, stated in pertinent part: "This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court." But a 1989 rule change substituted the word "or" for the word "and." Thus, three of the cases that the majority cites to support its position, *Medley v. State,* 52 Md.App. 225, 231, 448 A.2d 363 (1982); *Tichnell v. State,* 287

Md. 695, 713-14, 415 A.2d 830 (1980); *Dresbach v. State,* 228 Md. 451, 453, 180 A.2d 299 (1962), are inapposite, because they were decided before this critical rule change.

[2] For example, Rule 2-517(a) provides such a requirement for objections to the admission of evidence in a civil case, and Rule 4-323(a) provides a similar requirement for criminal cases. Rule 2-517(a) states, in pertinent part: *"An objection to the admission of evidence* shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." (Emphasis added).

[3] The majority cites *Velez v. State,* 106 Md.App. 194, 664 A.2d 387 (1995), to support its conclusion on the prejudice issue. *Velez* is not on point. *Velez* concerned the trial court's election to proceed at pretrial suppression hearing in the absence of counsel. The hearing here, by contrast, was tantamount to a trial on the merits. Moreover, our decision in *Velez* depended not only on the fact that the decision did not affect the outcome, but also on the fact that several safeguards existed to protect the defendant. *See id.* at 216-17, 664 A.2d 387. First, the defendant's counsel missed the testimony of only one collateral witness. *Id.* at 211, 664 A.2d 387. Also, counsel for another defendant took "copious" notes for absent counsel. *Id.* Moreover, and most important, the court gave counsel the opportunity to review the testimony and decide whether he wished to recall the witness for cross-examination. *Id.* at 212, 664 A.2d 387. Our decision in *Velez* was thus highly fact-sensitive.

[4] Appellant explained that she failed to return to Pakistan because, given her status as an adulterer, she could be severely punished. In view of Pakistani and Islamic laws and traditions, which the majority thoroughly reviewed, the mother also apparently recognized that the proceedings in Pakistan would likely result in an award of custody to the father, notwithstanding her claims of abuse. *Cf. Hanke v. Hanke,* 94 Md.App. 65, 72, 615 A.2d 1205 (1992) ("Where the evidence is such that a parent is justified in believing that the other parent is sexually abusing the child, it is inconceivable that the parent will surrender the child to the abusing parent without stringent safeguards....").

[5] I am not, as the majority seems to suggest, condoning parents who flagrantly disobey court orders or unlawfully bring their children to Maryland, "secrete" them, and then apply for custody on the ground that the child has bonded with the absconding parent.

[6] According to appellant, the Hague Convention on the Civil Aspects of International Child Abduction is the international version of the UCCJA. The parties agree that Pakistan is not a signatory to the Hague Convention. Moreover, appellant claims that appellee's expert conceded that Pakistan does not recognize child custody awards issued by other nations.

CATEGORY: Shariah Marriage Law

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: AC1SN;AC2SN

COUNTRY: N/A

URL: http://scholar.google.com/scholar_case?case=6938065992703518310&q=Muslim+OR+Islam+OR+Islamic+OR+Sharia&hl=en&as_sdt=4,21

947 A.2d 489 (2008)

404 Md. 404

IRFAN ALEEM V. FARAH ALEEM.

No. 108, September Term, 2007.

Court of Appeals of Maryland.

May 6, 2008.

490*490 Priya R. Aiyar (Michael K. Kellogg, Steven F. Benz, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC), on brief, for petitioner.

Susan M. Friedman (Daniel F. Cardine, Kuder, Smollar & Friedman, P.C., Washington, DC), on brief, for respondent.

Argued before BELL, C.J.,[*] RAKER, HARRELL, BATTAGLIA, GREENE, JOHN C. ELDRIDGE, (retired, specially assigned), and DALE R. CATHELL, (retired, specially assigned), JJ.

CATHELL, J.

Farah Aleem filed suit for a limited divorce from her husband, Irfan Aleem in the Circuit Court for Montgomery County. The husband thereafter filed an Answer and Counterclaim. He raised no ju-

risdictional objections. Without, however, any advance notification to the wife, and while the Montgomery County action was pending (between the filing of the action for a limited divorce and the filing of the amended complaint for an absolute divorce), the husband, a **Muslim** and a national of Pakistan, went to the Pakistan Embassy in Washington, D.C., and performed *talaq*[1] by executing a written document that stated:

"Now this deed witnesses that I the said Irfan Aleem, do hereby divorce Farah Aleem, daughter of Mahmood Mirza, by pronouncing upon her Divorce/Talaq three times irrevocably and by severing all connections of husband and wife with her forever and for good.

"1. I Divorce thee Farah Aleem

"2. I Divorce thee Farah Aleem

"3. I Divorce thee Farah Aleem. . . . "

Petitioner posits that the performance by him of *talaq* under **Islamic** religious and secular Pakistan law, and the existence of a "marriage contract," deprived the Circuit Court for Montgomery County of jurisdiction to litigate the division of the parties' marital property situate in this country.[2] 491*491 The trial court found that the marriage contract entered into on the day of the parties' marriage in Pakistan specifically did not provide for the division of marital property and thus, for that reason alone, the agreement did not prohibit the Circuit Court for Montgomery County from dividing the parties' marital property under Maryland law. The Court of Special Appeals agreed and stated "[t]hus, the Pakistani marriage contract in the instant matter is not to be equated with a premarital or post-marital agreement that validly relinquished, under Maryland law, rights in marital property." *Aleem v. Aleem,* 175 Md.App. 663, 681, 931 A.2d 1123, 1134 (2007). The Court of Special Appeals further stated:

"If the Pakistani marriage contract is silent, Pakistani law does not recognize marital property. If a premarital or post-marital agreement in Maryland is silent with respect to marital property, those rights are recognized by Maryland law. . . . In other words, the 'default' under Pakistani law is that Wife has no rights to property titled in Husband's name, while the 'default' under Maryland law is that the wife has marital property rights in property titled in the husband's name. We hold that this conflict is so substantial that applying Pakistani law in the instant matter would be contrary to Maryland public policy."

Id. at 681, 931 A.2d at 1134.

Petitioner presents two questions[3] for our review:

"1. [Did] the Court of Special Appeals disregard[ ] fundamental principles of international comity and conflicts of laws in refusing to recognize a Pakistani divorce because Pakistan and Maryland employ different 'default rules' for the division of property between spouses[?]"

"2. [Did] the Court of Special Appeals disregard[ ] fundamental principles of international comity and conflicts of laws in concluding that Pakistan lacked jurisdiction to dissolve the parties' marriage because the parties resided in Maryland on diplomatic visas[?]"

The Relevant Facts

The parties, both citizens of Pakistan, were married in Pakistan in 1980. The marriage was arranged by the families of the parties. In accordance with Pakistani custom there was a written agreement presented to the wife on the day of the wedding for her to sign. At that time she was 18 years old and her husband was 29 years old. She had just graduated from high school and he was a doctoral candidate at Oxford University in England. The agreement provided as follows:

492*492 "TRUE TRANSLATION[4]

493*493

That agreement provided for a "dower" of 51,000 rupees[5] the payment of which 494*494 was "deferred." There was no other express or implied waiver of any property rights of either party. During the presentation of the agreement, the wife was advised by her uncle who was acting as a "vakil." There is no evidence in this case, however, that the wife's uncle was a lawyer.[6] Under Pakistani law, unless the agreement provides otherwise, upon divorce all property owned by the husband on the date of the divorce remains his property and "the wife has [no] claim thereto." The opposite is also applicable. The husband has no claim on the property of the wife. In other words, upon the dissolution of the marriage, the property follows the possessor of its title.

Shortly after their marriage, the husband moved to England. The wife joined him later and they resided there for four years while he completed his studies. They then moved to the United States and began to reside in Maryland while the husband worked at the World Bank. They maintained a residence in this State for 20 years and resided here at the time the wife filed for divorce and the husband went to the Pakistan Embassy and performed *talaq*. The parties have two children, both of whom were born in this country, are United States citizens, and reside in this country. The wife is now a resident of Maryland, and holds a green card status.

The central issue in the present case concerns the wife's attempt to have the husband's pension from the World Bank, which relates primarily to his work performed while he was a resident of this

country, declared to be "marital property" and to have other property declared marital property and thus be entitled to half of that pension and property under Maryland law.[7]

Discussion

More than a hundred years ago, the Supreme Court of the United States, in an extensive discussion relating to the judgments of foreign countries, discussed the comity due judgments of foreign countries and full faith and credit issues. We include a comprehensive discussion from that opinion, in order to place the issue in historical context. In *Hilton v. Guyot,* 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895), the Supreme Court of the United States opined, as follows:

"International law, in its widest and most comprehensive sense, — including not only questions of right between nations, governed by what has been appropriately called the 'law of nations,' but also questions arising under what is usually called 'private international law,' or the 'conflict of laws,' and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation, — is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.

"The most certain guide, no doubt, for the decision of such questions is a treaty or statute of this country. But when, as 495*495 is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations.

"No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call `the comity of nations.' Although the phrase has been often criticized, no satisfactory substitute has been suggested.

"`Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, *or of other persons who are under the protection of its laws.*

. . .

"A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, *unless contrary to the policy of its own law.*

. . .

"The law upon this subject as understood in the United States at the time of their separation from the mother country was clearly set forth by Chief Justice Parsons, speaking for the supreme judicial court of Massachusetts, in 1813, and by Mr. Justice Story in his Commentaries on the Constitution of the United States, published in 1833. Both those eminent jurists declared by the law of England the general rule was that foreign judgments were only prima facie evidence of the matter which they purported to decide; and that by the common law, before the American Revolution, all the courts of the several colonies and states were deemed foreign to each other, and consequently judgments rendered by any one of them were considered as foreign judgments, and their merits re-examinable in another colony, not only as to the jurisdiction of the court which pronounced them, but also as to the merits of the controversy, to the extent to which they were understood to be re-examinable in England. . . .

"It was because of that condition of the law, as between the American colonies and states, that the United States, at the very beginning of their existence as a nation, ordained that full faith and credit should be given to the judgments of one of the states of the Union in the courts of another of those states.

"By the articles of confederation of 1777 (article 4, § 3), `full faith and credit shall be given, in each of these states, to the records, acts and judicial proceedings of the courts and magistrates of every other state.' By the constitution of the United States (article 4, § 1), full faith and credit shall be given in each state to the public acts, records and 496*496 judicial proceedings of every other state.
. . .

. . .

"The decisions of this court have clearly recognized that judgments of a foreign [country] are prima facie evidence *only,* and that, but for these constitutional and legislative provisions, judgments of a state of the Union, when sued upon in another state, would have no greater effect.

. . .

"Chancellor Kent . . . [said]: `No sovereign is obliged to execute, within his dominion . . . he is at liberty, in his courts of justice, to examine into the merits of such [foreign] judgment [for the effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty]. . . . '

. . .

"The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiffs' claim." (Brackets in original.) (Citations omitted.) (Some emphasis added.)

Hilton, 159 U.S. at 123-28, 16 S.Ct. at 143-68.

In *Andes v. Versant Corp.,* 878 F.2d 147, 149 (4th Cir.1989), that court reiterated the lack of applicability of the Full Faith and Credit Clause of the Federal constitution to judgments from foreign countries, saying "The Full Faith and Credit Clause of Article IV § 1 of the Constitution of the United States does not apply to foreign judgments." The same federal court of appeals in *Jaffe v. Accredited Surety and Casualty Co., Inc.,* 294 F.3d 584 (4th Cir.2002), opined as follows:

"Ruth Jaffe's reliance on this argument seems to arise from her confusion as to what is at issue in her case. With respect to her claim, we must determine the enforceability of the prior Florida judgment refusing to enforce her Canadian default judgment, not the enforceability of the Canadian default judgment itself. Neither the full faith and credit statute, nor the Full Faith and Credit Clause of the Constitution, applies to judgments issued from foreign countries. Accordingly, while both federal and state courts in the United States must give 'full faith and credit' to any judgment of a state court empowered to enter the judgment, they need only recognize the judgment of a foreign court to the extent that this recognition comports with the principles of judicial comity.

"For this reason, a state can refuse as Florida did, to recognize a *foreign* judgment on the ground that it conflicts with the public policy of that state." (Citations omitted.) (Emphasis in original.)

Jaffe, 294 F.3d at 591-92.

And *see, Taveras v. Taveraz,*[8] 477 F.3d 767, 781-83, (6th Cir.2007) ("However, it is well-settled that, unlike the recognition and enforcement of judgments due to sister states, a foreign country's judgments are not subject to the Full Faith and Credit Clause." (citations omitted).)

497*497 Much earlier, Maryland had formulated the same concepts in the cases of *Owings v. Nicholson,* 4 H. & J. 66 (1815),[9] which involved a judgment in the courts of Martinique, and in *Gardner v. Lewis,* 7 Gill 377 (1848), a case involving comity between states, but in which we relied on the law of comity between nations. In *Gardner* we stated as follows:

"The comity of nations, we are told, (see *Story on Conflict of Laws, p.* 38,) 'is derived altogether from the voluntary consent of the latter,' (the State, within whose territory it is attempted to make

the law of another State obligatory,) `and it is inadmissible, when it is contrary to its known policy, or injurious to its interests;' and it is `only in the silence of any positive rule, affirming, or denying, or restraining the operation of any foreign laws, the Courts of justice presume the tacit adoption of them, by their own government; unless they are repugnant to its policy or prejudicial to its interests.' This also, he assures us: `A nation will not suffer its own subjects to evade the operation of its fundamental policy, or laws; or to commit fraud in violation of them, by any acts or contracts made with that design, in a foreign country; and it will judge for itself, how far it will adopt, and how far it will reject, any such acts or contracts.'"

Gardner, 7 Gill at 392.

In a case somewhat similar to the case at bar, the situs of property of a wife was in Maryland. Maryland had enacted a law (pursuant to a constitutional mandate) that provided that the property of a wife in Maryland was not liable for the debts of the husband. The wife and the husband moved to, and became domiciled in, Illinois. That state had no comparable law. An action was brought to attach the wife's property in Maryland for the debts of the husband on the ground that the law of the parties' domicile should control. We rejected that contention in *Smith v. McAtee,* 27 Md. 420 (1867), stating as follows:

"And although we find this right of the wife to her property, protected in this State, by public policy, by statute and by decree of a Court of Equity, yet it was earnestly contended by the learned counsel for the appellee, that a creditor of the husband had a right to attach this fund in our courts of justice for the debt of the husband, as by the laws of Illinois, where the husband and a wife resided, the husband was entitled to all the personal property of the wife, and that by virtue of this law of the domicil the fund was vested in the husband. And he claimed this right to divest the wife of her property by the law of the domicil, on the ground of comity. In this case we cannot sanction such a right, for it has been decided that comity is overruled by positive law, and that it is only in the silence of any particular rule, affirming, denying or restraining the operation of foreign laws, that courts of justice presume a tacit adoption of them by their own government. It is certainly competent for any State to adopt laws to protect its own property as well as to regulate it, and `no State will suffer the laws of another to interfere with her own, and in the conflict of laws, when it must often be a matter of doubt, which shall prevail, the court which decides, will prefer the laws of its own country to that of the stranger.' . . . If therefore our legislative enactment in regard to the property of the wife and the laws of Illinois conflict, it cannot be made a 498*498 question in our own courts which shall prevail. `Where there is no constitutional barrier, we are bound to observe and enforce the statutory provisions of our own State.'" (Citations omitted.)

Smith, 27 Md. 420, 437-38.

Shortly after the decision in *Hilton v. Guyot, supra,* we conformed to its principles in a case where the issue was whether the laws of Delaware or Maryland would control in respect to certain personal property. Albeit in reference to comity between states, we discussed it in *Lowndes v. Cooch,* 87 Md. 478, 39 A. 1045 (1898), as follows:

"The leading inquiry, therefore, which this appeal presents is, does the law of Delaware or the law of Maryland control the disposition of the bank stock in controversy here? . . . `It [personal property] follows the law of the person. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession.' . . .

"This doctrine, however firmly established, is nevertheless subject to proper limitation to the effect that if a foreign law directly violates some recognized principle of public policy, or some established standard of morality prevailing in the forum exercising jurisdiction, the rules of comity will not compel such forum to enforce the foreign law rather than its own, if to do so would be hurtful or detrimental to the interest and welfare of its own citizens." (Emphasis added.)

Lowndes, 87 Md. at 485-87, 39 A. at 1046. We continued to recognize that emphasized doctrine in our cases (albeit sometimes in respect to comity issues between the various states of the United States instead of between Maryland and foreign countries. The doctrine, however, is the same in both instances). *See Castleman v. Templeman,* 87 Md. 546, 552, 40 A. 275, 277 (1898) ("[W]e can see no reason why the receiver should not be permitted to sue here . . . but through comity . . . when such suit does not injuriously affect the interests of the citizens of the latter, or violate its policy or laws."); *Northern Aluminum Co. v. Law,* 157 Md. 641, 646, 147 A. 715, 717 (1929) ("As to judgments of courts of foreign countries, there is no constitutional requirement of recognition. It is a matter of comity.").

Telnikoff v. Matusevitch, 347 Md. 561, 702 A.2d 230 (1997) (a "certified question" case), is perhaps the most modern and seminal of our cases on comity between Maryland and foreign countries. It did not involve issues of marital property or other domestic law issues, but involved primarily the law of defamation and the constitutional guarantees of freedom of speech.[10] *Telnikoff,* however, did restate with clarity the issues that relate to comity and their application generally. As stated above, the case involved the difference between the laws of libel of England and of Maryland. An English citizen had obtained a judgment in the courts of England based upon a libel occurring in England. He sought to have the judgment enforced in this country and Matusevitch brought an action to preclude the enforcement. We stated as follows:

"Telnikoff argues that the English libel judgment is entitled to recognition under principles of `comity.' Matusevitch, on the other hand, asserts that the English judgment is repugnant to the public policy of the United States and Maryland and, therefore, should be denied recognition.

499*499 "The recognition of foreign judgments is governed by principles of comity.

. . .

"(. . . `Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to the international duty and convenience and to the rights of persons protected by its own laws'). . . .

"Although foreign judgments are entitled to a degree of deference and respect under the doctrine of comity, courts will nonetheless deny recognition and enforcement to those foreign judgments which are inconsistent with the public policies of the forum state. . . .

"The justification for the public policy exception to the recognition of foreign judgments as articulated by the United States Court of Appeals for the District of Columbia Circuit in *Laker Airways v. Sabena, Belgian World Airlines,* 731 F.2d 909, 937 (D.C.Cir.1984), as follows:

`There are limitations to the application of comity. When the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.'

. . .

"In determining non-constitutional principles of law, courts often rely upon the policies and requirements reflected in constitutional provisions. . . . (`Although [Article 46 of the Maryland Declaration of Rights] may not directly apply to private employers, it nonetheless establishes a public policy in Maryland that an individual should not be subjected to sex-based discrimination).'"

Telnikoff, 347 Md. at 573-80, 702 A.2d at 236-39.

The Court of Special Appeals, in *Wolff v. Wolff,* 40 Md.App. 168, 389 A.2d 413 (1978), noted as follows:

"`The full faith and credit clause . . . does not apply to a divorce obtained in a foreign country. Courts of the United States are not required by federal law to give full force and effect to a judgment granted in a foreign nation. On the other hand, judgments of courts of foreign countries are recognized in the United States because of comity. . . . This principle is frequently applied in di-

vorce cases. . . . The principle of comity, however, has several important exceptions and qualifications. A decree of divorce will not be recognized by comity where it was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy of the state in which recognition is sought. . . .'" (Citations omitted.)

Wolff, 40 Md.App. at 177-78, 389 A.2d at 418.[11]

The Maryland Legislature declared Maryland's public policy in regard to property 500*500 acquired during a marriage, stating in the preamble to Chapter 794 of the Acts of 1978, that "the property interests of the spouses should be adjusted fairly and equitably." And furthermore, from the record in the present case, it appears that under **Islamic** law, which, albeit with certain modifications, has been adopted as the law in Pakistan, only the husband has an independent right to *talaq, i.e.,* to use *talaq* to divorce his wife.[12] The wife may only utilize *talaq* if the husband has given her that right in the contract of marriage. In the case at bar, the wife was not granted the right of *talaq* by her husband. It appears, also from the record, that the husband may utilize *talaq* with no prior notice to the wife. It is clear as well, as we point out above, that, under Pakistani law, upon a divorce there is no equitable division of marital property, i.e., property acquired by the parties during the marriage, unless the marriage "contract" so provides.

On November 7, 1972, the people of Maryland ratified the Equal Rights Amendment, now found as Article 46 of the Maryland Declaration of Rights. It provides "Equality of rights under the law shall not be abridged or denied because of sex." Md. Const. Declaration of Rights, art. 46. Accordingly, in the first instance, the enforceability of a foreign *talaq* divorce provision, such as that presented here, in 501*501 the courts of Maryland, where only the male, i.e., husband, has an independent right to utilize *talaq* and the wife may utilize it only with the husband's permission, is contrary to Maryland's constitutional provisions[13] and thus is contrary to the "public policy" of Maryland. Moreover, if we were to recognize the use of *talaq,* controlled as it is by the husband, a wife, a resident of this State, would never be able to consummate a divorce action filed by her in which she seeks a division of marital property, because a husband who is a citizen of any country in which **Islamic** law, *adopted as the civil law,* prevails could go to the embassy of that country and perform *talaq,* and divorce her (without prior notice to her) long before she would have any opportunity to fully litigate, under Maryland law, the circumstances of the parties' dissolution of their marriage.[14]

Talaq lacks any significant "due process" for the wife, and its use moreover, directly deprives the wife of the "due process" she is entitled to when she initiates divorce litigation in this State. The lack and deprivation of due process is itself contrary to this State's public policy.

Petitioner directs the Court's attention to the practice in Pakistan of having a Council of Arbitration[15] available to the wife. That practice, however, only applies if the parties want to reconcile and it addresses only that possibility. In a situation where both parties seek divorce, as here, it has virtually no application. Its function was explained at the trial level by a letter from Muhammad Najeeb, Chairman of the Arbitration Council in the Clifton Cantonment, Karachi, Pakistan, to the attorney for the wife, as follows:

"Please refer to your letter dated 15th Dec., 2003, on behalf of your client[ ] M st. Farah Aleem, I may inform you that the marriage was solemnized in Pakistan within the jurisdiction of this Union Council and that both your client and Mr. Aleem are Pakistani citizens and therefore this Union Council has jurisdiction in the matter. We had sent notices to your client as provided under Section 7 of the **Muslim** Family Laws Ordinance 1961. The purpose of notices is to ascertain whether both parties want to reconcile in which case the divorce shal[l] not become final. In case both parties or any one of them does not want reconciliation, the divorce shall become final after 90 days of such notice. . . . Mr. Aleem had responded in writing that he does not want to reconcile but there is no intimation from your client [in][ ]spite of the fact that your client has received the notice which will be presumed that she does not want any reconciliation. *It may also be mentioned that function of the Arbitration Council is only to see whether both husband and wife want to reconcile and live again as husband and wife."* (Bolding added.) (Emphasis added.)

Additionally, as indicated above, Maryland has enacted a comprehensive statutory 502*502 scheme designed to effectuate a fair division of property acquired by the parties during the time of their marriage, just as the pension at issue in this case was acquired.[16] To accept *talaq* and to accept the silence of the "contract" signed by the wife on the day of her marriage in Pakistan, as a waiver of her rights to marital property acquired during the marriage, is, in direct conflict with our public policy. Additionally, the Pakistani statutes proffered by petitioner as establishing that all of the property titled in his name, however and whenever acquired, is his property free of any claim by the wife arising out of the marriage, are also in direct conflict with the Maryland statutes[17] governing those same issues.

Judge Rodowsky, for the Court of Special Appeals, stated, as indicated earlier:

"If the Pakistani marriage contract is silent,[[18]] Pakistani law does not recognize marital property. If a premarital or post-marital agreement in Maryland is silent with respect to marital property, those rights are recognized by Maryland law. . . . In other words, the 'default' under Pakistani law is that Wife has no rights to property titled in Husband's name, while the 'default' under Maryland law is that the wife has marital property rights in property titled in the husband's name. We hold that this conflict is so substantial that applying Pakistani law in the instant matter would be contrary to Maryland public policy."

Aleem, 175 Md.App. at 681, 931 A.2d at 1134. We agree.

The *talaq* divorce of countries applying **Islamic** law, unless substantially modified, is contrary to the public policy of this state and we decline to give *talaq,* as it is presented in this case, any comity. The Pakistani statutes providing that property owned by the parties to a marriage, follows title upon the dissolution of the marriage unless there are agreements otherwise, conflicts with the laws of this State where, in the absence of valid agreements otherwise or in the absence of waiver, marital property is subject to fair and equitable division. Thus the Pakistani statutes are wholly in conflict with the public policy of this State as expressed in our statutes and we shall afford no comity to those Pakistani statutes.

Additionally, a procedure that permits a man (and him only unless he agrees otherwise) to evade a divorce action begun in this State by rushing to the embassy of a country recognizing *talaq* and, without prior notice to the wife, perform "I divorce thee . . ." three times and thus summarily terminate the marriage and deprive his wife of marital property, confers insufficient due process to his wife. Accordingly, for this additional reason the courts of Maryland shall not recognize the *talaq* divorce performed here.

We answer no to each of petitioner's questions.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY PETITIONER.

[*] Raker, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, she also participated in the decision and adoption of this opinion.

[1] Apparently, under **Islamic** law, where that **Islamic** law has been adopted as the secular law of a jurisdiction, such as Pakistan, a husband has a virtual automatic right to *talaq,* (i.e., to divorce his wife by acknowledging "I divorce thee" three times) but the wife only has a right to *talaq* if it is in the written marriage agreement or if he otherwise delegates that right to her. In the present case the husband did not grant the wife the right to *talaq.* While the nature of *talaq* is relevant to the issues here presented, the wife does not claim that the husband "granted" her that right and accordingly that is not a factual issue in this case.

Our holding in this case only relates to instances where **Islamic** law, or parts thereof such as *talaq,* is also the secular (civil) law of a country whose judgments we are urged to accept under the doctrine of comity. In other words, we address **Islamic** law only to the extent it is also the civil law of a country. The viability of **Islamic** law as a religious canon is not intended to be affected.

[2] The "marital property" as it would be defined under Maryland law included the husband's pension from World Bank valued at approximately one million dollars, real property valued at $850,000, personal property valued at approximately $80,000, and two or more vehicles.

[3] These questions raise broader issues than questions limited to the Pakistani marriage contract.

[4] The spelling in this quote is exactly as it appears in the document.

[5] While the dower was deferred at the time of the contract, it appears that when Irfan Aleem attempted to divorce Farah Aleem, that a sum of $2,500 was mentioned as a "full and final" settlement. Under **Islamic** law as it is in the civil law of Pakistan, a man, upon marriage, can defer the payment of the "dower" (*mahr* in Urdu) but he cannot divorce the wife by *talaq* unless he then pays the *mahr* to the wife. In a pleading filed in the Circuit Court for Montgomery County by the husband, *mahr,* is explained as follows:

"Professor Esposito explains the function of dower *(mahr)* in a **Muslim** marriage. Dower can be used as a means of controlling the husband's power of divorce, since upon dissolution of the marriage he is requi[r]ed to pay the total amount of the dower at once. He goes on to state that the wife's claim for any unpaid portion of her dower is an unsecured debt which is due from her husband. . . . Dower is a major part of the husband's financial commitment to his wife."

In the present case, the sum of $2,500 represents payment of the *mahr* to the wife. It is the husband's position that payment of *mahr* of $2,500 is all that is due the wife, as opposed to the one half of almost two million dollars that she might be entitled to under Maryland law (It is unclear how the *mahr* would affect the position of the Pakistani courts in respect to properties titled in both names. The primary property focus in the present case is the petitioner's pension — which is titled only in the husband's name.). This stark discrepancy highlights the difference in the public policies of this State and the public policies of **Islamic** law, in the form adopted as the civil, secular law of countries such as Pakistan.

[6] Apparently, under Pakistani law a "vakil" performs the function of a legal advisor and often is a lawyer.

[7] Due to the requirements of the World Bank's pension program, claims for a division of pension benefits based upon "marital property" status, are to be couched in terms of "alimony." The requirements of the World Bank in that regard are not crucial to our decision.

[8] The reported opinion contains the different spellings of the husband's name and wife's name throughout — without explanation.

[9] The majority opinion in this case was never delivered to the reporters and is not included in the bound volume.

[10] U.S. Const. amend. I.

[11] We affirmed and adopted the opinion of the Court of Special Appeals in *Wolff, supra,* at *Wolff v. Wolff,* 285 Md. 185, 401 A.2d 479 (1979).

[12] As stated by the Court of Special Appeals:

"The Pakistani law of divorce was succinctly described by the House of Lords in *In re Fatima,* [1986] 2 W.L.R. 693, [1986] 2 All E.R. 32, [1986] A.C. 527, 1996 WL 406815(HL). There, the entire court joined in the opinion (`speech') of Lord Ackner, who said:

In Pakistan the law relating to divorce is the **Islamic** law as modified by the **Muslim** Family Laws Ordinance 1961. In traditional **Islamic** law the husband has the right unilaterally to repudiate his wife, without showing cause and without recourse to a court of law. Such divorce is effected by the announcement of the formula of repudiation, a talaq, and in traditional law a divorce by talaq would take the simple form of the husband announcing talaq three times. The divorce then becomes immediately effective and irrevocable. Such a form of talaq has been called "a bare talaq." Although it is still effective in some countries, for example, Dubai, section 7 of the Ordinance provides:

"`(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman notice in writing of his having done so, and shall supply a copy thereof to the wife. (2) Whoever contravenes the provisions of subsection (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to 5,000 rupees or with both. (3) Save as provided in subsection (5), a talaq unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of 90 days from the day on which notice under subsection (1) is delivered to the chairman. (4) Within 30 days of the receipt of notice under subsection (1), the chairman shall constitute an arbitration council for the purpose of bringing about a reconciliation between the parties, and the arbitration council shall take all steps necessary to bring about such reconciliation. (5) If the wife be pregnant at the time talaq is pronounced talaq shall not be effective until the period mentioned in subsection (3) or the pregnancy, whichever be later, ends. (6) Nothing shall debar a wife whose marriage has been terminated by talaq effective under this section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.'

"`The chairman' refers to the chairman of the relevant local union council in Pakistan. Although he is required to convene an arbitration council to attempt the reconciliation of the parties, their atten-

dance is not obligatory and the divorce will become effective, unless the wife is pregnant, once 90 days have elapsed from the date on which the chairman received notice of the talaq."

[1986] A.C. at 531-32."

Aleem v. Aleem, 175 Md.App. 663, 665-66, 931 A.2d 1123, 1124-25 (2007).

[13] Article 46 of the Maryland Declaration of Rights, *supra.*

[14] In a letter from respondent's counsel to the Arbitration Council, respondent points out that the husband's performance of *talaq* was designed to circumvent Maryland law. She stated in relevant part as follows:

"Mr. Aleem is obligated to provide Ms. Aleem with both child support and alimony pursuant to Order of Court. Mr. Aleem, by seeking a divorce in Pakistan, is attempting to circumvent the laws of the state of Maryland, and the Order of our Court, notwithstanding that he has submitted to the Court's jurisdiction, to this day has counsel here in Maryland, and has regularly sought our Court's relief."

[15] It is referred to by different names in the record before this Court. We shall refer to it as the "Council of Arbitration."

[16] The *mahr,* deferred in the marriage certificate, would not normally be classified under Maryland law as marital property in any event, as it may not have been "acquired" during the marriage.

[17] Md.Code (1984, 2006 Repl. Vol., 2007 Cum.Supp.) §§ 8-201, 8-202, 8-203, 8-204, 2-205 of the Family Law Article; Md.Code (1984, 2006 Repl.Vol.) § 8-206 et seq. of the Family Law Article (describing property disposition in annulment and divorce).

[18] The places in the "contract" where a division of property would normally appear were simply left blank in the case at bar.

CATEGORY: Shariah Marriage Law

RATING: Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: Egypt

URL: http://scholar.google.com/scholar_case?case=14235257400427544 22&q=Egypt&hl=en&as_sdt=4,21

888 A.2d 1230 (2005)

166 Md. App. 391

MOUSTAFA M. MOUSTAFA V. MARIAM M. MOUSTAFA.

No. 2517 September Term, 2004.

Court of Special Appeals of Maryland.

December 23, 2005.

1231*1231 Charles M. Tobin, Silver Spring, for Appellant.

Jon W. Sargent, Greenberg Felsen & Sargent, LLC, Rockville, for Appellee.

Argued before MURPHY, C.J., SALMON and SHARER, JJ.

MURPHY, Chief Judge.

The parties to this appeal from the Circuit Court for Montgomery County, Moustafa M. Moustafa (Mr. Moustafa), appellant, and Mariam M. Moustafa (Mrs. Moustafa), appellee, are before this Court for the second time. In an unreported opinion filed on June 7, 2004, this Court held "that the circuit court erred in failing to make separate awards of child support and alimony *pendente lite* and, therefore, we shall reverse and remand this case to the circuit court for further proceedings consistent with this opinion." *Moustafa v. Moustafa,* No. 2848, September Term, 2002, 157

Md.App. 714 (*Moustafa* I). The Background section of that opinion includes the following information:

The parties were originally married in Cairo, **Egypt** on June 10, 1976. They came to the United States in 1978. They have two children, Sharon, born May 5, 1981, and Karim, born July 18, 1989. Both children reside with appellee in the family home on Shady Grove Lane in Montgomery County. Appellant has ownership interests in a number of businesses in the United States and in **Egypt** including, but not limited to, Eagle Manufacturing and Trading, Inc., M & M Construction Company, and United Technology Group.

On September 16, 1985, a divorce decree was issued to the parties by the Arab Republic of **Egypt** at that nation's consulate in Washington, D.C. The foreign decree was adopted and enrolled by the Circuit Court for Montgomery County on March 6, 1987.

On November 18, 1985, appellant married Faten Zawawi. According to appellee, appellant told her that his marriage to Zawawi was solely to allow him to become a United States citizen, and that he would later divorce her and return to appellee.

Appellee asserts that she and appellant were remarried in **Egypt** on June 14, 1986. Appellant denies that the parties were remarried. Appellee maintains that prior to their second marriage, appellant showed her a document that he represented to be a divorce decree reflecting his divorce from Zawawi. It is undisputed, however, that appellant did not actually obtain a divorce from Zawawi until February 28, 1989.

The further proceedings ordered by this Court concluded with a judgment entered by the Honorable DeLawrence Beard that, among other things, "annulled" the parties' June 14, 1986 marriage, and required that appellant pay to appellee (1) a monetary award, (2) "indefinite and permanent" alimony, (3) child support, and (4) counsel fees. The judgment also provided that appellant's alimony and support obligations were "accounting from June 17, 2002," the date on which appellee filed her complaint for divorce and/or annulment. In an OPINION that accompanied the 1232*1232 judgment, Judge Beard stated the following findings and conclusions:

The parties divorced on September 16, 1985, in a Muslim proceeding that was enrolled in Montgomery County in 1987 (Civil Case No. 21304). Subsequent to the parties' divorce in 1985, [Mrs. Moustafa] returned to **Egypt** to live. On November 19, 1985, [Mr. Moustafa] married Ms. Faten Zawawi. In 1986, while on a visit to **Egypt**, the parties were lawfully married a second time on June 14, 1986. [Mr. Moustafa] did not obtain a divorce from Ms. Zawawi until April 28, 1989. At the time that the parties were married on June 14, 1986, [Mr. Moustafa] was still married to Faten Zawawi. In an Egyptian proceeding in November 2002, [Mr. Moustafa], after [Mrs. Moustafa] filed for divorce in this Court, renounced the validity of the 1986 marriage contract with [Mrs. Moustafa].

* * *

There is no dispute that [Mr. Moustafa] was married to Faten Zawawi at the time the parties were married on June 14, 1986. As a result of [Mr. Moustafa]'s bigamy, this Court must grant an annulment to [Mrs. Moustafa].

* * *

The Defendant claims that he obtained a divorce from [Mrs. Moustafa] in **Egypt** on November 4, 2002. Such a divorce is not entitled to comity by this Court which will not proceed to the adjudication of a matter involving conflicting rights and interests until all persons directly concerned in the event have been actually or constructively notified of the pendency of the proceeding and given reasonable opportunity to appear and be heard.

In the present case, [Mrs. Moustafa] was neither notified nor participated in the Egyptian divorce proceeding. Absent any knowledge or opportunity to participate in the proceeding, [Mrs. Moustafa] was not afforded due process and the Decree shall not be recognized.

This Court's authority to grant an annulment to [Mrs. Moustafa] does not affect the Court's authority to award [Mrs. Moustafa] relief to include, but not be limited to custody, child support, alimony, monetary award or attorneys' fees. In *Ledvinka* [*v. Ledvinka,* 154 Md.App. 420, 840 A.2d 173 (2003)], the Court recognized this Court's authority to resolve custody, child support, and attorneys' fees when granting an annulment. The monetary award statute, Family Law Article, Section 8-203, also confirms that in a proceeding for an "annulment", the Court shall determine which property is marital property. Similarly, under Section 11-101, the Court may award alimony under (a)(2)(i) when there is an annulment.

* * *

The Defendant is currently employed with M & M Construction Company, earning approximately $16,000 per month. For approximately ten (10) years prior to 1991, [Mrs. Moustafa] worked at a print shop where she operated a press and did photography. Since 1991, [Mrs. Moustafa] has not worked outside the home, and thus generates no income.

* * *

The parties' most recent marriage has lasted eighteen (18) years. Overall, the parties have been married since 1976, or twenty-eight (28) years, but for brief separation and divorce of approximately one (1) year.

* * *

[Mrs. Moustafa] has had breast cancer and currently has an abdominal condition for which she is presently undergoing treatment. [Mrs. Moustafa] has also been diagnosed as clinically depressed. 1233*1233 [Mr. Moustafa] suffers from hypertension and a left hand palsy.

* * *

The Court finds that [Mr. Moustafa] dissipated marital assets in the amount of sixty-eight thousand five hundred ($68,500.00) dollars by writing checks to his brother, Saleh Moustafa, and his business, M & M Construction. [Mr. Moustafa] dissipated marital assets in the amount of one hundred sixty thousand seven hundred fifty-six ($160,756.00) dollars when he executed a Note to his brother, Saleh Moustafa, and recorded it as a Deed of Trust on the former marital home. [Mr. Moustafa] dissipated marital assets in the amount of seventy-four thousand five hundred ($74,500.00) dollars by transferring money by wire to his current ... wife, Rania Kamal.

Further, the Court finds that [Mr. Moustafa]'s withdrawing all of the monies in his IRA account in direct violation of Judge Dugan's Order dated June 21, 2002 constitutes dissipation of property. The IRA account is valued at approximately thirty-six thousand ($36,000.00) dollars.

Here, [Mr. Moustafa]'s wiring monies to Ms. Karnal, his new wife, writing checks to his brother, Saleh, and withdrawing all of his IRA monies all constitute an intentional dissipation of assets. Such dissipation is included in calculating the monetary award.

* * *

In this case, [Mrs. Moustafa] had substantial justification for prosecuting the annulment and for expending the sum of attorneys' fees and costs. In considering the respective financial positions of the parties, the Court recognizes that [Mrs. Moustafa] does not have any ability to make the payment toward these fees. By contrast, [Mr. Moustafa] had a substantial ability to pay the fees when considering [Mr. Moustafa]'s most recent bank statements which reflect over one hundred thousand ($100,000.00) dollars per month being received by [Mr. Moustafa] in the several months prior to trial.

Appellant now argues to us that (in the words of his brief) he is entitled to:

(1) a reversal of the annulment[;]

(2) a remand for a determination of whether the parties were married in 1986[;]

(3) a reversal of the order to pay the arrearage based upon the vacated order[;]

(4) a reversal of the award of permanent alimony and the amount of alimony based on an erroneous calculation of Appellant's current salary and ability to pay, the inclusion of expenses in the Appellee's financial statement for a daughter that [appellant] had no obligation to support[;] and

(5) a reversal of the order including Appellant's promissory note to his brother as a dissipated sum.

In support of these arguments, appellant presents four questions for our review:

I. IF IT FINDS THAT A MARRIAGE OCCURRED, DOES A MARYLAND COURT, HAVING PERSONAL JURISDICTION OVER THE PARTIES, HAVE AUTHORITY TO VOID A BIGAMOUS MARRIAGE WITHOUT ANY SHOWING THAT IT WAS INVALID IN THE ISLAMIC NATION WHERE IT WAS ENTERED?

II. MAY A TRIAL COURT ASSESS AN ARREARAGE IN "SUPPORT" PAYMENTS BASED UPON AN ORDER PREVIOUSLY 1234*1234 VACATED IN AN INTERLOCUTORY APPEAL?

III. IS THE BROAD DISCRETION OF THE TRIAL COURT, ANTICIPATING THE FUTURE, SUFFICIENT FOR IT TO DECLARE, IN THE ABSENCE OF ANY EXPERT TESTIMONY, THAT A PERMANENT ALIMONY AWARD IS WARRANTED?

IV. MAY A COURT FIND A DISSIPATION OF MARITAL PROPERTY WITHOUT EVIDENCE OF INTENT?

For the reasons that follow, we shall affirm the judgment of the circuit court.

I.

We reject the proposition that Judge Beard should have speculated that, under Egyptian law, a man can be married to more than one woman at the same point in time. In *Maple v. Maple,* 566 P.2d 1229 (Utah 1977), while rejecting Mr. Maple's "contention that since the marriage was annulled he should have no further obligation to the [appellee]," the Supreme Court of Utah stated:

> [Appellant's] counsel represents that he has gone to a great deal of trouble to determine and show that under the law of Thailand, a marriage with one already married is a nullity. Rule 9, Utah Rules of Evidence provides that this can be done by obtaining a copy of the law and presenting it to the court. But we do not see any difficulty here from failing to do so. The rule is that unless the law of a foreign jurisdiction is proved to be otherwise, it will be presumed to be the same as the law of the forum state.

Id. at 1230 (footnotes omitted). We agree with that analysis, which is entirely consistent with Maryland law. *See Hosain v. Malik,* 108 Md.App. 284, 302-03, 671 A.2d 988 (1996).

If appellant wanted Judge Beard to apply Egyptian law to the "annulment" issue, 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. Moreover, even if appellant had complied with these foundational requirements, the Court of Appeals has stated:

> Although foreign judgments are entitled to a degree of deference and respect under the doctrine of comity, courts will nonetheless deny recognition and enforcement to those foreign judgments which are inconsistent with the public policies of the forum state. *Malik v. Malik,* 99 Md.App. 521, 534, 638 A.2d 1184, 1190 (1994) ("where [a foreign] judgment is ... against public policy... it will not be given any effect by our courts").

Telnikoff v. Matusevitch, 347 Md. 561, 574, 702 A.2d 230 (1997). For these reasons, Judge Beard did not err or abuse his discretion in applying "the law of the forum."

II.

It is clear from the record of the case at bar that appellant's second question is both hypothetical and moot because (1) as noted by Judge Beard, Md.Code Ann., Fam. Law § 12-101(a) (2004) provides that appellant's support obligations can be "back dated" to June 17, 2002, the date on which appellee filed her complaint, and (2) in *Moustafa* I, this Court expressly rejected "appellant's claim that the parties' second marriage was void *ab initio* because of his intentional bigamy and, therefore appellee is disqualified from receiving alimony *pendente lite.*"

1235*1235 III.

Emphasizing that appellee presented "no expert testimony," appellant argues that Judge Beard was "clearly erroneous" in finding that appellee suffered from "clinical" depression. This erroneous finding, according to appellant, requires that we vacate the alimony award and remand for further proceedings on the issues of (1) whether appellee is entitled to "indefinite" alimony, and (2) the amount of whatever type of alimony is awarded. There is no merit in this argument. The record shows that, in applying Md.Code Ann., Fam. Law § 11-106(c)(1)-(2) (2004), Judge Beard was not clearly erroneous in finding that there would be an "unconscionable disparity" in the parties' standards of living unless appellee were awarded indefinite alimony.

Appellant also argues that the evidence was insufficient to support Judge Beard's finding that appellant had a monthly income of $16,000.00. It is well settled that disbelief of a party's testimony does not constitute affirmative evidence to the contrary, and that a court "may not find a specific amount of imputed or undisclosed actual income without supporting evidence." *Long v. Long,* 141 Md.App. 341, 349, 785 A.2d 818 (2001). As we pointed out during oral argument, however, Judge Beard was entitled to (1) accept all, part, or none of the testimony of any witness, and (2) draw reasonable inferences from the evidence accepted as true. The case at bar is simply not one in which the court's income calculation is based solely upon disbelief of a party's testimony as to his or her actual income. From our review of the documentary evidence presented to Judge Beard, we are persuaded that his calculation of appellant's income was not erroneous — "clearly" or otherwise.

IV.

The answer to appellant's fourth question is obviously, "no." As the above quoted portion of Judge Beard's OPINION makes clear, however, the record contains overwhelming evidence of appellant's "intent" to transfer funds "for the principal purpose of reducing the funds available for equitable distribution." *Jeffcoat v. Jeffcoat,* 102 Md.App. 301, 311, 649 A.2d 1137 (1994).

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.

MASSACHUSETTS

CATEGORY: Due Process and Equal Protection

RATING: Highly Relevant

TRIAL: TCSY

APPEAL: ACSY

COUNTRY: Saudi Arabia

URL: Available on Lexis Nexis

LEXSEE 9 MASS. L. RPTR. 355

EMMA LOUISE RHODES V. ITT SHERATON CORPORATION ET AL. [1]

1 Sheraton International, Inc., Sheraton Overseas Management Corporation, Sheraton Middle East Management Corporation and John Veelenturf.

97-4530-B

SUPERIOR COURT OF MASSACHUSETTS, AT SUFFOLK

9 Mass. L. Rep. 355*; *1999 Mass. Super. LEXIS 2

January 15, 1999, Filed

DISPOSITION: [*1] Defendants' motion to dismiss for forum non conveniens DENIED.

JUDGES: Margaret R. Hinkle, Justice of the Superior Court.

OPINION BY: MARGARET R. HINKLE

OPINION

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS FOR *FORUM NON CONVENIENS*

Plaintiff Emma Louise Rhodes seeks monetary damages for personal injuries she sustained in a diving accident which occurred in Saudi Arabia on August 23, 1994, allegedly as a result of defendants' negligence and breach of implied warranty. Defendants, ITT Sheraton Corporation (ITT Sheraton), Sheraton International, Inc. (Sheraton International), Sheraton Overseas Management Corporation (Sheraton Overseas), Sheraton Middle East Management Corporation (Sheraton Middle East), and John Veelenturf, now move to dismiss plaintiff's complaint for *forum non conveniens*. They argue that Saudi Arabia is an adequate alternative forum and that private and public interests weigh in favor of dismissal. After hearing and for the reasons set forth below, defendants' motion to dismiss is DENIED.

BACKGROUND

Plaintiff is a British citizen and resident of Great Britain. While on summer break from her university in 1994, she visited her parents at their [*2] home in Jeddah, Saudi Arabia. On August 23, 1994, she and her sister met two of their friends at the Red Sea Beach Resort, which is part of the Sheraton Jeddah Hotel and Villas (Jeddah Sheraton). [2] The resort complex on that date encompassed a beach, a large concrete wharf, a wooden platform or jetty and a lagoon. Coral stretched out from under the jetty and around the edge of the lagoon. Plaintiff struck her head on this coral when she dove into the lagoon from the jetty. She lay in the water, face down and unable to move, until she was pulled out and taken to a nearby hospital.

2 Neither the Jeddah Sheraton nor its Saudi owner, Saudi Brothers Commercial Company, is a defendant. Under the Sheraton International Management Agreement between Sheraton Middle East and the Saudi Brothers Commercial Company, Sheraton Middle East manages and operates the Jeddah Sheraton. Sheraton Middle East is a wholly owned subsidiary of ITT Sheraton. At all times relevant to this action, ITT Sheraton employed John Veelenturf as a Vice President and Director of Fire, Life Safety and Environmental Health. Veelenturf now is retired and living in Maine. ITT Sheraton also owns Sheraton International, which granted Saudi Brothers Commercial Company a license to use certain Sheraton trademarks. The final defendant, Sheraton Overseas, is a wholly owned subsidiary of Sheraton International. Each of the corporate defendants is a Massachusetts citizen with its principal place of business in Boston.

[*3] Plaintiff sustained a high level spinal injury as a result of her dive. She spent approximately three months in a Saudi hospital, where she underwent surgery to fuse her spine, before transferring to a hospital in England. She remained in the English hospital for 18 months. Today, plaintiff is tetraplegic. She cannot move her left arm or either of her legs and is limited to minimal movement of her right arm. Unable to care

for herself, plaintiff requires assistance for daily activities such as eating, bathing, dressing, changing her catheter and emptying her bowels. She attempted to finish her degree in accounting and financing but could not take certain required courses due to her disabilities. Plaintiff's expert estimates that her medical expenses resulting from the accident will exceed ten million dollars.

DISCUSSION

Under G.L.c. 223A, 5, I may dismiss or stay an action upon finding "that in the interest of substantial justice the action should be heard in another forum." Massachusetts courts have incorporated into the state *forum non conveniens* analysis standards and principles enunciated in federal cases discussing the federal common law doctrine. See *New Amsterdam* [*4] *Casualty Co. v. Estes, 353 Mass. 90, 95, 228 N.E.2d 440 (1967)*; *Green v. Manhattanville College, 40 Mass. App. Ct. 76, 78, 661 N.E.2d 123*, *cert. denied*, *422 Mass. 1107, 664 N.E.2d 1197 (1996)* (same analysis under G.L.c. 223A, 5, as under common law doctrine of *forum non conveniens*). The *forum non conveniens* inquiry involves two steps. See *Mercier v. Sheraton Int'l, Inc., 935 F.2d 419, 423-24 (1st Cir. 1991)*, *cert. denied*, *508 U.S. 912, 124 L. Ed. 2d 255, 113 S. Ct. 2346 (1993)*. First, I must consider whether an adequate alternative forum is available. If an adequate alternative forum does exist, I then must determine whether private and public interests strongly favor litigating the claim in that forum. *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09, 91 L. Ed. 1055, 67 S. Ct. 839 (1946)*.

1. Adequate alternative forum

Defendants cite federal cases granting motions to dismiss on *forum non conveniens* grounds when the alternative forum was Saudi Arabia. Implicit in these decisions is an acceptance of Saudi Arabia as an adequate alternative forum. None of the cases, however, addressed concerns similar to those raised by plaintiff. See, *e.g.* [*5] *Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285, 290 (5th Cir. 1989)* (parties previously agreed to bring all disputes before Saudi tribunal and nothing indicated that Saudi forum would treat plaintiff unfairly); *Kamel v. Hill-Rom Co., Inc., 108 F.3d 799, 801 (7th Cir. 1997)* (male plaintiff was citizen of Saudi Arabia); *Shields v. Mi Ryung Constr. Co., 508 F. Supp. 891, 896 (S.D.N.Y. 1981)* (plaintiff attempted to "cast aspersions" upon Saudi legal system without any supporting evidence); *Tisdale v. Shell Oil Co., 723 F. Supp. 653, 654-55, 659 (M.D. Ala. 1987)* (in absence of undue influence, unequal bargaining or evidence that Saudi law is inadequate, choice of forum clause requiring that all disputes be referred to Saudi Labor Commission is enforceable); *Jeha v. Arabian Am. Oil Co., 751 F. Supp. 122, 125-26 (S.D. Tex. 1990)*, aff'd, *936 F.2d 569 (5th Cir. 1991)* (plaintiffs offered no evidence that Saudi forum was inadequate). Although my finding regarding the private and public interests in this case renders a final determination as to the adequacy of a Saudi forum unnecessary, I note that plaintiff would face significant procedural disadvantages in Saudi Arabia. [*6] [3] See *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981)* (forum is inadequate when there is danger that plaintiff will be treated unfairly).

3 Plaintiff also would be disadvantaged if Saudi substantive law were to govern this case, as discussed in footnote 9.

The first significant drawback to trial of this case in Saudi Arabia is that plaintiff would not be permitted to testify. See Supplemental Affidavit of Frank E. Vogel, at 3. All parties are presumed to be prejudiced in favor of themselves and therefore are not considered to be reliable witnesses. *Id.*; Supplemental Affidavit of Hassan Mahassni, at 3. Plaintiff could submit written assertions that would be made part of the record. *Id.* If a defendant were to deny any assertion made by plaintiff, however, she would be forced to prove that assertion by other means. *Id.*

Plaintiff's ability to prove her allegations would also be limited by the fact that Saudi courts give more weight [*7] to oral testimony than written testimony. See Peter D. Sloane, *The Status of Islamic Law in the Modern Commercial World*, 22 Int'l L. 743, 751 (1988). Thus, defendants' oral testimony that they took certain safety precautions would carry more weight than any documents plaintiff could submit to rebut their testimony. [4] Prevailing in Saudi Arabia would be even more difficult for plaintiff in light of the requirement that, "[i]n financial matters, a party must produce two male witnesses or one male and two female witnesses in order to prove a point." *Id.*

> 4 The lack of pretrial discovery procedures in Saudi Arabia would stymie plaintiff's ability to offer such documents. David J. Karl, Note, Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know, 25 Geo. Wash. J. Int'l L. & Econ. 131, 150 (1992). Although according to defense expert Frank E. Vogel parties may request that the court demand any necessary documents from another party, the court need not exercise its wide discretion in her favor.

Another disadvantage to a Saudi forum is that Saudi courts do not follow any uniform rules of procedure. Joseph L. Brand, *Aspects of Saudi Arabian Law and Practice*, 9 B.C. Int'l & Comp. L.R. 1, 11 (1986). Every party to a case, "sitting and facing the *qadi* (the judge), conversationally presents its evidence which the *qadi* hears and weighs." *Id.* Cross-examination is limited, if allowed at all. *Id.* at 12 n.62 ("The *qadi* usually denies cross examination and when he allows it, only he directs the questions suggested by the examining party.") The *qadi* decides when enough evidence has been heard and at that point announces a decision in open court. *Id.* at 12. Saudi Arabia does not offer parties the opportunity to be heard by a jury. *Id.* at 30.

In addition to no rules of civil procedure, no system of binding judicial precedent or case law exists in Saudi Arabia. Nancy B. Turck, *Dispute Resolution in Saudi Arabia*, 22 Int'l Law, 415, 443 (1988); Brand, *supra* at 11. Plaintiff would not be able to predict or expect any particular rulings on issues of law that are established in Massachusetts. That this and the other procedural differences would apply equally to the defendants does not minimize that fact that a Saudi forum would deprive plaintiff of basic procedures which she expects to enjoy in a Massachusetts forum.

Finally, the existence of biases against women and non-Muslims in Saudi Arabia would impose additional disadvantages on plaintiff. Defendants' expert attributes the differential treatment based on gender and religion to "long-standing, well-known provisions in the law." Supplemental Affidavit of Frank E. Vogel at 2. Although defendants promise to ensure that any recovery by plaintiff in a Saudi court would not be diminished because of her gender and religion, their guarantee cannot insulate plaintiff entirely from the systemic prejudices.

2. Private and public interest

Even if the cumulative effect of the factors discussed above were not enough to deem Saudi Arabia an inadequate alternative forum, dismissal still would be improper if private and public interests weigh in favor of trial in Massachusetts. *Mercier v. Sheraton Int'l Inc., 935 F.2d at 427*. The "guiding principle" of the *forum non conveniens* analysis is that a plaintiff's "choice of forum should rarely be disturbed unless the balance of both private and public concerns strongly favors the [defendants'] motion." *Green v. Manhattanville College, 40 Mass. App. Ct. at 79*. Defendants bear the burden of "showing circumstances so strongly in [their] favor that plaintiff[ ] should be denied [her] right to bring suit in Massachusetts." See *Minnis v. Peebles, 24 Mass. App. Ct. 467, 473, 510 N.E.2d 289 (1987)*; *Walton v. Harris, 38 Mass. App. Ct. 252, 258, 647 N.E.2d 65*, *cert. denied*, *420 Mass. 1102, 648 N.E.2d 1285 (1995)*. Having balanced the factors set forth below, I conclude that defendants have not satisfied their burden.

[*8] Private interests considered in the *forum non conveniens* analysis include the relative ease of access to sources of proof; the availability of compulsory process to obtain testimony of unwilling witnesses; the cost of obtaining attendance of willing witnesses; and any practical factors that would make the trial easy, expeditious, and inexpensive. [5] .*W R. Grace & Co. v. Hartford Accident & Indem. Co., 407 Mass. 572, 578, 555 N.E.2d 214 (1990)*; *Green v. Manhattanville College, 40 Mass. App. Ct. at 80*; *Mercier v. Sheraton Int'l, Inc., 935 F.2d at 424*.

> 5 Another factor courts consider is the possibility of a view. Defendants argue that photographs of the accident site would be insufficient, especially because the scene has been altered by third-parties. If the scene has been altered, however, there is no purpose in viewing it, and therefore this factor is inapplicable.

Overall ease of access to sources of proof does not point strongly to either forum. On the issue of liability, defendants [*9] have access to their own corporate documents which, according to ITT Sheraton's senior vice president, are located in Boston, Egypt, and Saudi Arabia. On the issue of damages, plaintiff has accepted the burden of producing all relevant medical documents whether located in England or Saudi Arabia.

Access and cost considerations related to witnesses favor trial in Massachusetts. Defendants' argument that they cannot compel attendance at trial in Massachusetts of "all of the eyewitnesses to the incident" is unavailing for several reasons. First, eyewitnesses to the accident include plaintiff, her sister, and her friends. Defendants do not argue that these witnesses would be unwilling to appear in Massachusetts; presumably they would be present at their own or plaintiff's expense. Only one of the two resort employees who were in the beach area at the time of the accident actually witnessed plaintiff's dive. Both of these witnesses continue to work for the Jeddah Sheraton. Defendants have presented no evidence that either of them would be unwilling to appear at trial in Massachusetts. Moreover, plaintiff alleges that her accident was caused by defendants' negligence. Defendants do [*10] not claim any inability to compel attendance of witnesses related to the alleged negligence, many of whom are defendants' employees and live in New England.

Regarding the two languages involved in this case, the private interest in making the trial "easy, expeditious, and inexpensive" also is furthered by a Massachusetts forum. See *W.R. Grace & Co. v. Hartford Accident &*

Indem. Co., 407 Mass. at 578. All court proceedings in Saudi Arabia are in Arabic. Turck, *supra* at 441. A trial conducted in Arabic would have at least two adverse consequences. First, whereas all the parties and most if not all the witnesses speak English, some--including plaintiff--do not speak Arabic. The parties would be forced to rely on translators, significantly increasing the costs of litigation. [6] Second, all documents submitted to a Saudi court must be translated into Arabic. *Id.* If the Sheraton International Management Agreement is any indication, many if not all of the corporate documents are in English. [7] As for medical documents, only records for the three months that plaintiff spent in a Saudi hospital might already be in Arabic; records for more than 35 months of treatment would need [*11] to be translated from English.

6 Defendants have not identified which, if any, witnesses do not speak English; it is clear that if there is a need for translation in a Massachusetts trial, it would be less than that in a Saudi trial.

7 The agreement provides that English shall be the language used in arbitration.

Factors of public interest include administrative burdens; trying a diversity case in a forum that is at home with the applicable law; avoidance of unnecessary problems in conflict of laws; and unfairness of burdening citizens in an unrelated forum with jury duty. *W.R. Grace & Co. v. Hartford Accident & Indem. Co., 407 Mass. at 578*; *Mercier v. Sheraton Int'l, Inc., 935 F.2d at 424*.

At this stage, when the parties have not had an opportunity to submit briefs on choice of law, it is unclear what substantive law governs. Defendants assume that Saudi Arabian tort law is applicable based on Massachusetts choice of law principles. These principles do not clearly point to Saudi law; [*12] [8] several factors appear to favor Massachusetts law. [9] Even if Saudi law were to apply, application of a foreign law, while not ideal, need not be a determinative factor in the *forum non conveniens* analysis. See *Kearsarge Metallurgical Corp. v. Peerless Ins. Co., 383 Mass. 162, 169, 418 N.E.2d 580 (1981)* (court declined to dismiss action governed by other than Massachusetts substantive law).

8 Sources of Massachusetts choice of law principles include the Restatement (*Second) of Conflict of Laws and Professor R.A. Leflar's American Conflicts Law. Bushkin Assocs., Inc. v. Raytheon, Inc., 393 Mass. 622, 632-34, 473 N.E.2d 662 (1985)*. Under the Restatement, factors relevant to the choice of law are the needs of interstate and international systems; relevant policies of the forum; relevant policies and interests of other interested states; protection of justified expectations; basic policies underlying particular field of law; certainty, predictability and uniformity of result; and ease in the determination and application of the law to be applied. *Restatement (Second) of Conflict of Laws at 6(2)* (1971). Considerations proposed by Professor Leflar are predictability of results; maintenance of interstate and international order; simplification of judicial task; advancement of forum's governmental interests; application of the better rule of law. R.A. Leflar, American Conflicts Law 95, at 279 (4th ed. 1986). [*13]

9 For example, the better rule of law in a tort case probably would be that of Massachusetts. Saudi tort law is "subsumed under private actions and does not exist as a distinct and highly developed field of law." Brand, supra at 28. Given the theory of liability in this case, it also is significant that Saudi law does not recognize agency within the concept of torts. Id. (general Islamic philosophy is that one

is always responsible for one's own acts). Moreover, consequential, indirect, and speculative damages generally are viewed as nonrecoverable through a Saudi court. Turck, supra at 441. If she establishes defendants' liability, plaintiff could only expect to recover actual medical expenses and a fraction of her "diyah," which is a fixed amount of compensation for personal injury.

Public interest considerations weighing in favor of trial in Massachusetts include the fact that this is the corporate defendants' home forum, see *Reid-Walen v. Hansen, 933 F.2d 1390, 1400 (8th Cir. 1991)* ("The defendant's home forum always has a strong interest in providing a forum for redress of injuries

[*14] caused by its citizens."), and that defendants' alleged negligence occurred at least in part in Massachusetts. Trial in Massachusetts therefore would not burden local jurors with an entirely foreign controversy. See *Howe v. Goldcorp Invs., Ltd., 946 F.2d 944, 947 (1st Cir. 1991)*, *cert. denied*, *502 U.S. 1095, 117 L. Ed. 2d 418, 112 S. Ct. 1172 (1992)* (relation between chosen forum and lawsuit must not be so attenuated that case is an "imposition" on chosen court). Cf. *Jeha v. Arabian Am. Oil Co., 751 F. Supp. at 126* (dismissal for *forum non conveniens* appropriate when only connection to chosen court was location of principal office of defendant's subsidiary, a nonparty); *Shields v. Mi Ryung Constr. Co., 508 F. Supp. at 894* (dismissal for *forum non conveniens* appropriate when defendants' operation in chosen forum had "absolutely nothing to do" with lawsuit).

No public interest factor at this point clearly weighs in favor of a Saudi forum. Plaintiff's choice of forum should not be disturbed solely because she is a British citizen and resident of Great Britain. See *Lony v. E.I. Du Pont de Nemours & Co., 886 F.2d 628, 634 (3d Cir. 1989)* (foreign plaintiff) [*15] choice of forum should not automatically be denied full deference); *Nieminen v. Breeze-Eastern, 736 F. Supp. 580, 583-584 (D.N.J. 1990)* (reluctance to grant foreign plaintiff full deference may be overcome by evidence that choice of forum is based on convenience). Cf. *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 n. 23, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981)* (court may give less weight to foreign plaintiff's choice of forum). Moreover, defendants have failed to establish that the Saudi court system is sufficiently less conjested than the Massachusetts court system to justify dismissal of plaintiff's complaint.

ORDER

For the foregoing reasons, this Court orders that defendants' motion to dismiss for *forum non conveniens* is DENIED.

Margaret R. Hinkle

Justice of the Superior Court

DATED: January 15, 19

CATEGORY: Child Custody

RATING: Highly Relevant

TRIAL: TCSY

APPEAL: ACSI

COUNTRY: Israel

URL:
http://scholar.google.com/scholar_case?case=7757468307539909410&q=Sharia+OR+Islam+OR+Islamic+OR+Muslim&hl=en&as_sdt=4,22

26 Mass. App. Ct. 809 (1988)

533 N.E.2d 202

PAMELA TAZZIZ VS. ISMAIL TAZZIZ.[*]

No. 88-P-941.

Appeals Court of Massachusetts, Barnstable.

September 14, 1988.

September 22, 1988.

Present: KASS, CUTTER, & SMITH, JJ.

Paul V. Kenneally for the mother.

Scott P. Curtis for the father.

CUTTER, J.

This is an appeal, from a decision on or as of August 5, 1988, of a probate judge dismissing with prejudice a complaint of the mother of four minor children (describing 810*810 herself as "of East Falmouth, Barnstable County") for custody of those children. The unusual situation dealt with by the judge[1] is fully stated later in this opinion. The judge stayed the order of dismissal pending review of the situation by this court. For reasons stated below, we order that the judgment of dismissal be vacated and remand the case to the Probate and Family Court for further

consideration (on the issues both [a] whether that court has jurisdiction of this case, and [b] whether to exercise jurisdiction) in the light of this opinion.

Background Facts

The following facts do not appear now to be in dispute.[2]

(a) The father and mother of the minors were married in Massachusetts in 1966 in accordance with **Islamic** law. She is a citizen of the United States and also of Jordan. She has lived for twenty-two years since her marriage with the father in East Jerusalem. She holds an Israeli identification card. The father 811*811 is a citizen of Jordan with a Jordanian passport and holds an Israeli identification card.

(b) The following children of the marriage are living: Hanadi, a married adult daughter living in Jordan; Mohammed, an adult son now living and studying in Massachusetts; Hytham, a son sixteen years old; Amanda and Melinda, daughters, respectively fifteen and twelve years old; and Amar, a ten year old son. Both parents and all the minors are physically now within Massachusetts. It was represented at the arguments that all the minors are now attending school in Falmouth and that they are completely bilingual in English and Arabic. They were born and raised in Jerusalem "in an **Islamic**-Arab community in accordance with **Islamic** tradition and [have] attended [an] Arab private school." They are citizens of Jordan and have been residents of Israel. Because their mother is a citizen of the United States, they are considered also citizens of the United States born abroad of a mother who is a United States citizen. They have United States passports.

(c) About May 28, 1988, the mother came to Massachusetts with the three younger minor children. She and the minor children now are living at the home of the mother's father in East Falmouth. The mother had taken the three younger children to visit her married daughter in Jordan. There, without either the knowledge or consent of the children's father, she took them by air to Massachusetts. She then initiated these proceedings to obtain custody of the minor children then in Massachusetts and obtained from the probate judge on June 9, 1988, an order for temporary custody of these three children, stating by affidavit that she knew of no other pending custody proceedings anywhere.

(d) The father (at least by late July or early August) came to Massachusetts with the older minor son, Hytham, at some date not stated in the judge's findings and rulings, but apparently after the mother had initiated these proceedings. The custody of Hytham (not awarded in the original temporary order of June 9) was placed, by stipulation of the parties, with 812*812 the mother.[3] Before he left Israel the father filed proceedings in the **Sharia** Court (as to the nature of which there are no sufficient findings) in Israel. In those proceedings in Israel an order of notice has been issued for a hearing in Israel on Wednesday, September 28, 1988.

(e) At various proceedings before the judge, it became apparent that all four minor children wish to remain with the mother, but the judge, regarding this proceeding as a purely jurisdictional matter, made no detailed findings as to these wishes of the four minor children or as to charges (tardily made by the mother) against the father of physical abuse of the daughter Amanda[4] or about the reasons and circumstances which may have led the mother to remove the minor children to Massachusetts.

Positions of the Parties

The judge in her findings states the *general* positions of each of the parties. The "[m]other seeks custody from the Massachusetts [c]ourt. Her position is that conditions in East Jerusalem have become such that the children are unable to attend school regularly and that their safety and well being are in jeopardy." The father "asserts that the Jerusalem [c]ourt is the proper locus for the determination of the custody issues between the parties." He "admits that ... probably the Jerusalem [c]ourt will award custody of the minor children of the parties to the [m]other, that she would be allowed to have separate domicile in Israel with the children, but that the [Israeli c]ourt would not allow her to leave Israel, thus depriving the [f]ather of access to his children."

Discussion (see also the appendix to this opinion, *infra*)

No expert testimony or evidence (other than the father's admissions) appears to have been presented to the judge about what principles of family law would be applied in the **Sharia** 813*813 Court to Moslems living in Israel, to what extent those principles would be governed by Moslem religious law applied by Moslem or Israeli judges, and to what extent those principles (whatever may be the composition of the **Sharia** Court personnel) would be substantially consistent with the governing principles of Massachusetts law regarding child custody (in addition to due process requirements concerning such procedural matters as notices, representation by counsel, and opportunity to be heard). One case, *Custody of a Minor (No. 3),* 392 Mass. 728, 735-736 (1984, hereinafter referred to as "the 1984 custody case") suggests that such consistency with substantive Massachusetts law should be determined after inquiry whether the applicable law includes a basic concern for the best interests of the children, as contrasted, for example, with an undue consideration for purely parental interests.

As already stated, the probate judge (on or as of August 5) dismissed the mother's complaint with prejudice, but stayed the order until a decision of this court. A single justice of this court ruled, on August 18, 1988, that the order of dismissal constituted a final order of the Probate and Family Court subject to review by a panel of this court.

There is no clear indication by the judge in her findings and rulings that she recognized that she had discretion whether to take jurisdiction of the controversy. We think that, before acting (beyond this opinion) upon the appeal before us, there should be (for the guidance of the trial judge

and this court) substantial further exploration and findings by the judge with respect to various aspects of the present case.

Affirmance of the order below, as a practical matter, would force the mother, a citizen of the United States, and four minor citizens of the United States (albeit with dual citizenship in Jordan) to return to Israel for trial of this controversy. Such a return, the mother asserts, will expose the minor children to significant physical and educational hazards. The situation is one where there may be a substantial desire on the part of the mother permanently to remove the minor children to New England (and of the children thus to be removed) from a community which at present appears to be beset by serious international 814*814 tensions. Here, at least, such tensions are more remote, and the opportunities for members of minorities, such as these children, may be regarded by the mother and by them as more promising and varied than in the Near East. The findings below do not demonstrate to us that these considerations have been sufficiently taken into account by the judge with recognition that the present complex circumstances may give her some of the usual broad discretionary powers of a probate judge and a duty to exercise discretion, at least under G.L.c. 209B, § 7.[5]

This case obviously involves a situation to which the provisions of G.L.c. 209B have substantial application. The chapter appears to be based in some degree upon the Uniform Child Custody Jurisdiction Act, 9 U.L.A. 111 (Master ed. 1979), but varies from that draft statute in material respects. General Laws c. 209B, § 14, inserted by St. 1983, c. 680, § 1, provides that "[t]o the extent that the legal institutions of other nations *have rendered* custody determinations in substantial conformity with the provisions of this chapter, the courts of the commonwealth shall grant due recognition to such determinations" (emphasis supplied).

This provision was applied in the 1984 custody case, 392 Mass. at 730-731, 737, to enforce in Massachusetts a *preexisting* custody order of an Australian court. In that decision the parties conceded (a) that c. 209B was applicable to the situation then before the court, (b) that the Australian court had jurisdiction of the minor there involved when its custody order was entered, and (c) that "the procedural and substantive custody law of Australia appears reasonably comparable to that of" Massachusetts. *Id.* at 731. As to this, the opinion in the 1984 custody case reads (at 735), after citing *Schiereck* v. *Schiereck,* 14 Mass. App. Ct. 378, 380 (1982), "The procedural and substantive law applied by the foreign court must be reasonably 815*815 comparable to the law of the Commonwealth. For the purposes of this case, we assume that that standard survives the enactment of G.L.c. 209B. The wife concedes that the Australian law is reasonably comparable to our law."[6]

Other cases involving international issues of custody under c. 209B include *Bak* v. *Bak,* 24 Mass. App. Ct. 608, 613-616 (1987), which, in different circumstances, recognized the existence of a range of discretion in a probate judge whether to defer to custody proceedings in a foreign coun-

try. See the language of c. 209B, § 7. That section, on its face, deals with situations in which a trial judge not only is permitted, but may be required, to exercise discretion.

Conclusion

We remand the case to the Probate Court (for further consideration, if possible, by the same probate judge, after such additional evidentiary inquiry as she shall determine to be appropriate) on at least the following matters: (a) the date when proceedings were commenced in Israel and the nature and content of any pleadings there filed; (b) the nature and the composition of the **Sharia** Court and of the substantive law and principles which would be applied in Israel in that court 816*816 to family custody disputes between Moslems having the nationalities of each of the parties to this case and of their minor children; (c) whether and to what extent the law which the **Sharia** Court should apply is consistent with Massachusetts law in respects already discussed; (d) the wishes, intentions, and purposes of each of the parties and of each of their minor children with respect to their continued residence in Massachusetts and in the United States (see *Murphy* v. *Murphy,* 380 Mass. 454, 458 [1980], with recognition that the case deals with a situation prior to the enactment of c. 209B); (e) the economic circumstances of each of the parties, at least so far as these circumstances may affect the financial ability of the mother and each minor child to remain in the United States, including consideration of the opportunities of the mother for employment and support of herself and family both in Israel and in the United States (including the possibility of assistance from the mother's father); (f) the probable physical safety of each of the minor children and the opportunities for education, if they are ordered to return to Israel now; (g) whether any obstacles will or may exist to continuing in the future the privileges of the minor children to enter and live in the United States as citizens if they and their mother are obliged now to return to Israel and live there until the minor children, respectively, become of full age; and (h) whether the preference of the minors (already indicated to the judge) to live with the mother (rather than the father) because of alleged conduct of the father (or for other reasons) has any bearing on the exercise of the judge's discretion or justifies or explains the method adopted by the mother in bringing three of the minors to Massachusetts.

We intend no suggestion concerning the particular way in which the judge shall determine whether the Probate Court has jurisdiction and whether she should exercise her discretion. We only indicate matters about which inquiry should be made in order to ensure (a) an adequate basis for the exercise of her discretion and (b) appropriate findings of fact and rulings indicating 817*817 the basis of her decision.[7] See and compare *Redding* v. *Redding,* 398 Mass. 102, 105-106 (1986).

The judgment of dismissal entered by the Probate and Family Court is vacated and the case is remanded to that court for further proceedings in all respects consistent herewith. The rescript is to issue immediately. Costs of this appeal are to be in the discretion of the Probate Court.

So ordered.

APPENDIX.

Discussion of Whether the Probate Court has Jurisdiction.

(Not included in memorandum and order issued on September 22, 1988)

In the situation discussed in footnote 1 to this opinion, *supra,* it should be noted that c. 209B, by virtue of the definition of "State" in § 1, makes *most* (viz., §§ 2-13) of the provisions of c. 209B, applicable only to "any state, territory, or a possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia." Chapter 209B, § 14, provides, in very general terms, to "[i]nternational custody determinations" and "recognition" of them; as follows: "To the extent that the legal institutions of other nations have rendered custody determinations *in substantial conformity with the provisions of this chapter,* the courts of the commonwealth shall grant due recognition to such determinations" (emphasis supplied). This provision appears to refer to *all* the provisions of c. 209B, and not merely to § 2 relating specifically to jurisdiction.

Chapter 209B grants jurisdiction to a court (competent to deal with child custody) of this Commonwealth under § 2(*a*)(3)(ii) "where the child is physically present in the commonwealth and ... (ii) it is necessary in an emergency to protect the child from ... neglect or *for other good cause shown*" (emphasis supplied), subject to a proviso which appears to apply 818*818 only with respect to another "State" as defined in § 1. The phrase "other good cause shown" reasonably could be viewed as including the physical risks to the minors if it were to be ordered that they be returned to East Jerusalem. It may be significant that § 2(*b*) of c. 209B reads: "(*b*) Except under subparagraphs (3) and (4) of paragraph (2) physical presence in the commonwealth ... of the child *and one of the contestants* is not alone sufficient to confer jurisdiction on a court of the commonwealth to make a custody determination" (emphasis supplied). In the present case, *both* of the contestants (and not merely one of them) actually were present before the Probate Court, although the husband was there to dispute the court's jurisdiction.

Apart from c. 209B, there would be no doubt that the Probate Court would have had jurisdiction of this custody contest solely by virtue of the presence of the minor children within the commonwealth. See *Murphy* v. *Murphy,* 380 Mass. 454, 458 (1980, a pre-c. 209B decision); Restatement (Second) of Conflict of Laws, §§ 79, 92, 98 (1971). See also, generally, discussions in Annual Survey of Massachusetts Law, §§ 1.5 and 9.1 (1984) and authorities cited in each of the foregoing.

[*] This case was originally decided by memorandum and order on September 22, 1988, under Rule 1:28 of the Appeals Court. See *post* 1112 (1988). It later was represented (in behalf of the Chief Justice of the Probate and Family Court) to the panel which had decided this matter, that the decision would be helpful if published as an opinion. It was decided that the suggestion was

proper. This opinion in general follows the original rule 1:28 memorandum and order with an appendix added and with minor revisions. — REPORTER.

[1] The father of the minors in his brief prior to the arguments in September, 1988, contended that the Probate and Family Court clearly had no jurisdiction at all under G.L.c. 209B in this situation. For reasons more fully discussed in the appendix to this opinion, this panel rejects that view. Chapter 209B, for the most part, applies only to matters of child custody as between "states," narrowly defined in c. 209B, § 1, as confined to States and subdivisions of *this* nation. The question of *jurisdiction* with respect to issues of child custody possibly involving the courts of *another nation* appears to require further inquiry about particular matters of fact also pertinent to the issue whether (in a particular case) to *exercise* jurisdiction. The issue of jurisdiction accordingly was not discussed in detail in the memorandum and order issued under rule 1:28 on September 22, 1988. That memorandum and order was regarded essentially as requesting in this case a further inquiry and findings by the trial judge on stated matters of fact, pertinent both to the *existence* and *exercise* of jurisdiction, necessary for the guidance of the Probate Court and for consideration on review by any appellate court.

[2] It is not clear from the judge's findings about prior proceedings to what extent she conducted evidentiary hearings on this matter. The father at all times appeared pro se in the Probate Court, although at the arguments before us he was represented by counsel. The wife's counsel, at the arguments, stated that certain background facts had been developed by him in discussion with the father personally and then had been presented to the trial judge. In making her findings the judge presumably took into account whatever testimony or statements of the parties, of the minor children, and of the mother's counsel were made before her or were available to her.

[3] The father has been directed to submit his passport to the Probate Court and is restrained from removing the children from Massachusetts until the further order of the court. Temporary visitation rights have been stipulated.

[4] Amanda was stated by the judge to have become "very emotional about going on ... [a] visit with the [f]ather and could not even express ... her concerns about going. She was paralyzed to speak out."

[5] Failure of a judge to recognize that there is a range of discretion for judicial action may constitute a reviewable error of law. *Long* v. *George,* 296 Mass. 574, 578 (1937). *Peterson* v. *Cadogan,* 313 Mass. 133, 134-135 (1943). *Fletcher* v. *Cape Cod Gas Co.,* 394 Mass. 595, 601 (1985). *Commonwealth* v. *Ramos,* 402 Mass. 209, 216 (1988). See also *Commonwealth* v. *Ruiz,* 400 Mass. 214, 215 (1987), and cases there cited.

[6] The 1984 custody case then continued (392 Mass. at 735-736), "We would grant that we might not enforce a foreign custody determination made in an arbitrary or capricious manner, even if the applicable foreign law were comparable. Here, however, we see no indication of arbi-

trary or capricious action.... Finally, as the Appeals Court said, the foreign order *must be based on a determination of the best interests of the child.* This is a corollary to the requirement that the foreign substantive law must be reasonably comparable to ours. Here the Australian judge expressly recognized that standard (`welfare of the child as the paramount consideration' ...)...." (Emphasis supplied.) The 1984 custody case (at 733) referred to c. 209B, § 2(*d*), as not applicable to the case then before the court, but gave the caution that the 1984 court "read § 2(*d*) as telling Massachusetts judges not to act when custody proceedings are *pending in another State* and the circumstances described in... [§ 2(*d*)] exist." We recognize that there is probably doubt about (1) how far this admonition is to be applied, (2) whether it has application where broader problems and considerations exist, and (3) whether the Massachusetts proceeding in the present case preceded in time the foreign (and as yet undecided) Israeli proceeding. Although the 1984 custody case involved a preexisting order of a foreign court, it is relevant to an inquiry whether a Massachusetts court would or should recognize any order which might be entered by the **Sharia** Court.

[7] Obtaining appropriate evidence of the applicable principles of Israeli law in the present circumstances may be assisted by the use of statutory and decisional material available in one or more of the law schools in Massachusetts or elsewhere in New England. Staff members of such a law school may be qualified to give expert testimony on such legal principles. The attention of the probate judge is invited to the provisions of G.L.c. 209, § 7(*c*), use of which may facilitate arrangement of any necessary postponement of the proceeding now proposed in Israel for September 28, 1988. See, also, by way of analogy, Mass.R.A.P. 29(c), 365 Mass. 877 (1974).

CATEGORY: Child Custody

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: Lebanon

URL:
http://scholar.google.com/scholar_case?case=13281912114574107148&q=Sharia+OR+Islam+OR+Islamic+OR+Muslim&hl=en&as_sdt=4,22

HIBA CHARARA, VS. SAID YATIM.

No. 09-P-1189.

Appeals Court of Massachusetts.

November 23, 2010.

April 8, 2010.

Thomas K. Birch for the defendant.

Paul C. Foley for the plaintiff.

Present: Duffly, Dreben, & Kafker, JJ.

DUFFLY, J.

This is an appeal by the father, Said Yatim, from a divorce judgment entered in the Probate and Family Court that awarded custody of the couple's two minor children to the mother, Hiba Charara; divided their property; and ordered the father to pay child support. The parties, as well as their children, are United States citizens who were living in Massachusetts when the marriage suffered an irretrievable breakdown in 2004. On May 30, 2004, the couple (with their children) returned to Lebanon for the purposes of there obtaining a religious divorce. Once in Lebanon, the father did not institute divorce proceedings as he had agreed, but instead sought and obtained custody of the two children. The mother returned to the Commonwealth and instituted the underlying divorce action, in which she also sought custody and child support. Following a trial, a judge of the Probate and Family Court concluded that no deference was due the custody order

issued by a Jaafarite religious tribunal (Jaafarite Court) in Lebanon. The probate judge based his decision on evidence, including the testimony of experts, that the Jaafarite Court's custody order was not made in "substantial conformity" with Massachusetts law regarding the best interests of the children. With a modification to the judgment, discussed *infra,* we affirm the award of custody to the mother and child support in the amount of $184 per week.

I. *Background.*

A. *Facts.*

"We draw our factual summary from the findings of the judge, ... and the uncontested facts of record, all of which are supported by the trial record. We reserve some details for later discussion where pertinent to our analysis." *Millennium Equity Holdings, LLC v. Mahlowitz,* 456 Mass. 627, 630 (2010) (footnote omitted).

The mother and the father, who were born in Lebanon, are Shia Muslims. The father emigrated from Lebanon to the United States where he then entered college in Massachusetts, earning an undergraduate degree in electrical engineering in 1990, and thereafter a graduate degree in software engineering. The father became a United States citizen in 1992. The parties were married on June 29, 1995, in an **Islamic** religious ceremony performed in Lebanon.[1] At the time, the father was employed in Boston as a software engineer, and he returned to Massachusetts soon after the wedding. The mother joined him in May, 1996, becoming a naturalized citizen of the United States in 2001. Two sons were born of the marriage, the first in November of 1998 and the second in September of 2002. Both sons were born in the Commonwealth and therefore are United States citizens.

During the years the parties resided in Massachusetts, the mother was primarily responsible for the home and, after the birth of the children, was their primary caretaker. As the father worked increasingly less (and eventually not at all) due to health issues, the mother also was employed outside the home, first as a salesperson and later as a financial administrator. In 2002, the father began receiving private long term disability payments; in 2004, he began receiving Social Security Disability Insurance benefits after the Social Security Administration determined him to be disabled from employment.[2]

In 2003, the father traveled to Lebanon for medical treatments, and the mother alone cared for the two children until his return three months later, in 2004.

The parties began to experience marital difficulties, and after the father's return to Massachusetts, they discussed divorce. The judge found that the marriage suffered an irretrievable breakdown in the Commonwealth in 2004. He further found that the parties "agreed to return to Lebanon for the purposes of obtaining a religious divorce," and that "the [mother] would receive custody of the children."[3] The parties sold the marital residence and equally divided the sale proceeds. On

May 30, 2004, the parties traveled with their young sons to Beirut, Lebanon, where the mother and the children stayed at the home of her parents and the father stayed at the home of his parents.

Once in Lebanon, the father did not agree to a divorce or to giving the mother custody of the children.

B. *Proceedings.*

On June 23, 2004, the father initiated an action for reconciliation and custody in the Jaafarite Court in Lebanon.[4] That court has jurisdiction over family matters arising between persons of the Shia sect of the **Islamic** religion.[5] At about the same time, he sought the imposition of a travel ban against the mother. On July 5, 2004, the father brought a guardianship action seeking custody of the two children. By a temporary order dated July 29, 2004, the father was given custody of the children and a travel ban issued that prohibited the mother and the children from traveling outside Lebanon. Additional proceedings not relevant here also were instituted.

The mother was advised by her attorneys that, absent the father's agreement, she would have no chance of obtaining custody of the two sons in the Jaafarite Court in Lebanon after they reached the age of two years. The probate judge found that she entered into an agreement that the father have custody of the minor children and that she have visitation two days per week "only because she knew that under the substantive law of [the Jaafarite Court], she could not obtain custody and was merely attempting to secure visitation."

On November 14, 2005, the Jaafarite Court entered a permanent decree in the guardianship action, which confirmed the parties' agreement that the father would have guardianship (legal and physical custody) of the children, then seven and three years old. No divorce proceeding was initiated in the Jaafarite Court.[6]

The travel ban imposed on the mother was lifted sometime in late 2005; she eventually left Lebanon without the children, returning to Massachusetts in March of 2006. On April 5, 2007, she filed the underlying complaint for divorce in which she also sought custody of the children.[7] An attorney appeared on behalf of the father and filed an answer to the complaint.

Following a two-day trial, a judgment of divorce nisi issued on October 1, 2008, which became absolute on December 31, 2008. The judgment granted a divorce for the cause of irretrievable breakdown of the marriage; awarded legal and physical custody of the children to the mother, with reasonable visitation to the father; divided their property; and ordered the father to pay $184 dollars in weekly child support.[8]

On appeal, the father does not specifically challenge the probate judge's findings that it was in the best interests of the minor children that the mother be awarded legal and physical custody of

them. Rather, he claims that the Jaafarite Court decree awarding him custody is entitled to deference. As to the child support order, the father asserts that the probate judge erred in calculating the award.

II. *Discussion.*

In deciding the question whether the Jaafarite Court's decree should be given deference, the probate judge engaged in a two-step determination. He first determined that the Probate and Family Court "has jurisdiction to make a custody determination in this case pursuant to G.L. c. 209B, § 2(*a*)(2), because no other state is the home state of the [children], the [mother] resides here, and because the children and the parties resided here until 2004, there exists substantial evidence here regarding the children and their care." Second, he "decline[d] to give deference to the Lebanese Judgment because it was not in `substantial conformity' with the laws of Massachusetts. G.L. c. 209B, § 14." The father's various challenges to these conclusions are discussed *infra.*

A. *Jurisdiction under MCCJA.*

The father claims that the probate judge erred in concluding that, because "no other state is the home state" of the children, the judge properly could exercise jurisdiction pursuant to G.L. c. 209B, also known as the Massachusetts Child Custody Jurisdiction Act (MCCJA).[9]

Under *Khan v. Saminni,* 446 Mass. 88, 91 (2006), whether to extend deference to the judgment of another nation begins with our consideration of whether § 2 of the MCCJA bars or permits the exercise of jurisdiction. "The Probate Court judge's decision to exercise jurisdiction under the MCCJA is a discretionary one." *Orchard v. Orchard,* 43 Mass.App.Ct. 775, 779 (1997), citing *Tazziz v. Tazziz,* 26 Mass.App.Ct. 809, 815 (1988). See *Adoption of Yvette (No. 1),* 71 Mass.App.Ct. 327, 335 (2008), citing *E.N.* v. *E.S.,* 67 Mass.App.Ct. 182, 191-192 & n. 20 (2006).

That portion of the MCCJA on which the probate judge relied in exercising jurisdiction is G.L. c. 209B, § 2(*a*)(2), inserted by St.1983, c. 680, § 1, which permits the exercise of jurisdiction if "it appears that no other state would have jurisdiction under paragraph (1)."[10] Lebanon does not have jurisdiction unless it "is the home state of the child on the commencement of the custody proceeding," G.L. c. 209B, § 2(*a*)(1), that is, unless the children had resided with a parent in Lebanon for at least six consecutive months "immediately preceding the date of commencement of the custody proceeding" in Lebanon. G.L. c. 209B, § 1, inserted by St.1983, c. 680, § 1.

Here, the parties and their two children traveled from Massachusetts to Lebanon on May 30, 2004; slightly more than one month later, on July 5, 2004, the father filed the guardianship action that produced a temporary custody order and ultimately a decree awarding him legal and physical custody of the children. Lebanon was thus not the home State of the children at the commencement of the father's custody proceeding. The probate judge permissibly could exercise ju-

risdiction because the children had been living with a parent in Lebanon for less than six months when the father filed the guardianship action in the Jaafarite Court in Lebanon, and thus "no other state" had jurisdiction.[11] G.L. c. 209B, § 2(*a*)(2).

B. *Substantial conformity.*

To support his argument that the probate judge erred in concluding that the Jaafarite Court decree was not decided under law in substantial conformity with Massachusetts law governing child custody cases, the father claims (1) that the testimony of his expert supports the conclusion that "the relevant standard for custody matters under the Jaafarite School of **Islamic** Law in Lebanon is the best interests of the children"; and (2) the mother was under no duress when she entered into the agreement in Lebanon that gave custody to the father.

1. *Best interests standard.*

The probate judge's findings and conclusions regarding the substantive law of best interests applied in the Lebanese Jaafarite Court, as compared to that applied in the Commonwealth, are set forth below:

"Based on the evidence, it is clear that male children in Lebanon go to the Father at the age of two. The parents are not evaluated equally when determining the best interest of the children and which parent should have physical custody. Although the Mother can obtain custody, it is only if the father is a criminal or cannot or will not care for the children. Unlike Massachusetts which requires that the court determine the best interest of the child and which parent should have custody based upon the `happiness and welfare of the children,' it is clear that the Lebanese law does not take that into consideration unless the father is unfit. G.L. c. 208, § 31." (Footnote omitted.)

We have said that the "`substantial conformity' test requires the satisfaction of three procedural components: whether the foreign court (1) had jurisdiction over the parties and the subject matter; (2) applied procedural and substantive law reasonably comparable to ours; and (3) based its order on the `best interests of the child.'" *Qiuyue Shao v. Yue Ma,* 68 Mass.App.Ct. 308, 314 (2007), citing *Khan,* 446 Mass. at 95. This "analysis tracks standards reflecting the traditional doctrine of comity." *Khan, supra* at 94, citing *Schiereck v. Schiereck,* 14 Mass.App.Ct. 378, 380 (1982) ("Because the decree was issued by a foreign court, the doctrine of comity is invoked. See *Hilton v. Guyot,* 159 U.S. 113, 163-164 [1895]"). See *Custody of a Minor (No. 3),* 392 Mass. 728, 735 (1984).[12] These and other traditional principles of international comity all find their source in the seminal decision of the United States Supreme Court, *Hilton v. Guyot, supra* at 163-167, 190-191, 202-203, 228.[13]

The issue before us, whether the substantive laws of the Jaafarite Court in Lebanon are in substantial conformity with those of Massachusetts, turns largely on the question whether the Leba-

nese Jaafarite Court considers the best interests of the children, as that standard is understood under the laws of the Commonwealth.[14]

Here, the probate judge credited evidence, including certain testimony of the parties' experts, that, as between separating or divorcing parents, the Jaafarite Court in Lebanon will give the father custody of a son over the age of two absent circumstances, not present here, that would render him unfit. Compare *Tazziz,* 26 Mass.App.Ct. at 812-813, 816, citing *Custody of a Minor (No. 3),* 392 Mass. at 735-736 (where no expert testimony or evidence presented regarding governing principles of family law in **Sharia** Court in Israel, and "to what extent those principles ... would be substantially consistent with the governing principles of Massachusetts law regarding child custody," case remanded for determination, among other things, whether law applicable in foreign court includes "basic concern for the best interests of the children, as contrasted, for example, with an undue consideration for purely parental interests").

As the judge's findings reflect, not only the mother's experts but those of the father support the rulings as to the law that governed the parties' custody proceedings in the Jaafarite Court in Lebanon. The father's expert "testified that custody in Lebanon is determined according to the `best interest of the child' but that there is a presumption that it is in the best interest of male children [to] be in the custody of the mother until the age of two and after that, [that] they be in the custody of the father." A second expert testifying for the father stated, in response to a question regarding the mother's right to petition for custody in Lebanon, that "once a male child reaches the age of two, the father is more entitled to custody." The mother's expert testified that "in Lebanese Jaafarite Court, best interest for the child is being with the father after the age of two." The presumption may be rebutted only upon evidence of unfitness, such as that he "is a criminal, taking drugs, or incapable of caring for the child."[15]

The father argues that the presumption could have been rebutted by the mother, had she sought custody in the Lebanese Jaafarite Court on the basis that the father was disabled. He claims this would have "triggered an investigation into the fitness of the parents" and a custody determination that would have applied a best interests standard. It was within the probate judge's discretion to credit some, but not all, of the testimony of the father's experts and to reject an expert's opinion, in whole or in part. See *Guardianship of Brandon,* 424 Mass. 482, 499 (1997); *Dewan v. Dewan,* 30 Mass.App.Ct. 133, 135 (1991). The evidence presented in this case amply supports the judge's finding that it is not the relative fitness of the parents that is considered by the Jaafarite Court in Lebanon, but only the father's fitness, and if both parents are fit, then the father will be awarded custody. On this basis, the judge's conclusion was correct that no deference was due the Jaafarite Court custody decree.

The best interests of a child is the overarching principle that governs custody disputes in the Commonwealth. See *Custody of Kali,* 439 Mass. 834, 840 (2003), and cases and authorities collected therein. "[T]he touchstone inquiry of what is `best for the child' is firmly rooted in Ameri-

can history, dating back to the Nineteenth Century." *Ibid.* What is in a child's best interest depends upon the particular needs of the child, and is left largely to the discretion of the judge, who "may consider any factor pertinent to those interests." *Houston v. Houston,* 64 Mass.App.Ct. 529, 535 (2005). Thus, no case has set forth a definitive list of criteria that must be considered in determining what is in a child's best interest. However, some constants are revealed in our decisional law.[16] See, e.g., *Custody of Kali, supra* at 842 (it is in best interests of child to preserve "current placement with a parent, if it is a satisfactory one"; "stability and continuity with the child's primary caregiver is itself an important factor in a child's successful upbringing"; it is a gender-neutral inquiry). Other factors that have been considered all focus on what is in the child's best interest. See, e.g., *Hersey v. Hersey,* 271 Mass. 545, 555 (1930) (parental fault does not override child's best interest; child happy and healthy in present home with half-brother and in care of her mother); *Allen v. Allen,* 326 Mass. 214, 217 (1950) (in deciding custody, judge could credit testimony "as to the home in which the girl seemed to be happier"); *Vilakazi v. Maxie,* 371 Mass. 406, 409 (1976) ("In providing for the custody of a minor child, while the feelings and the wishes of the parents should not be disregarded, the happiness and the welfare of the child should be the controlling consideration"), quoting from *Jenkins v. Jenkins,* 304 Mass. 248, 250 (1939); *Felton v. Felton,* 383 Mass. 232, 233 (1981) (discussing diverse religious practices of parents; overriding goal is to serve best interests of children even where "attainment of that purpose may involve some limitation of the liberties" of a parent); *Williams v. Massa,* 431 Mass. 619, 636 (2000) (consideration given to which parent "would more likely be able to make appropriate decisions to address the children's special needs"); *Haas v. Puchalski,* 9 Mass.App.Ct. 555, 557 (1980) (judge could consider that father's home not "a settled home" as child would be cared for by many different relatives); *Rolde v. Rolde,* 12 Mass.App.Ct. 398, 405 (1981) (that mother was "primary nurturing parent" and "primary caretaker," and that children have "strongest bond" with mother, were factors "highly significant for the welfare of the children"); *Bouchard v. Bouchard,* 12 Mass.App.Ct. 899, 899-900 (1981) (findings should examine "relative advantages of the respective parental environments" and "in what respects that environment has been helpful or detrimental to the child's well being").

This is by no means an exhaustive list of all the factors that have been considered by our courts as relevant to a child's best interests, nor do we suggest which of these factors are appropriate to consider in any given case. We list them only to underscore our determination that, in the Commonwealth, as in most jurisdictions in the United States, the best interests analysis is a child-centered one that focuses on the specific needs and interests of a child and how these might best be met. The standard does not focus on "purely parental interests," *Tazziz,* 26 Mass.App.Ct. at 813, and significantly, it requires a gender-neutral analysis. See *Silvia v. Silvia,* 9 Mass.App.Ct. 339, 340-341 (1980) (Massachusetts comprehensive statutory scheme and common law regarding care and maintenance of minor children treats mother and father alike). See also *Custody of Kali,* 439 Mass. at 842; Kindregan & Inker, Family Law and Practice §§ 47.1 & 47.6 (3d ed.2002).

The best interests analysis our courts employ is thus unlike the presumptive entitlement to custody that governed the custody proceeding in the Jaafarite Court in Lebanon. The custody judgment of that court is therefore not in substantial conformity with the laws of the Commonwealth.

2. *Custody agreement as bar.*

Our conclusion that the Lebanese Jaafarite Court would not have considered the children's best interests, as that standard is understood in the Commonwealth, also resolves the father's claim that the parties' agreement as to custody that was entered into in Lebanon bars the mother from seeking custody in the Probate and Family Court. Cf. *Vorontsova v. Waronzov,* 75 Mass.App.Ct. 20, 25 n. 11 (2009) (concluding there was no error in judge's refusal to recognize foreign nation's divorce certificate under doctrine of comity; noting support for proposition that court could consider whether circumstances warrant collateral attack on ground of fraud, even where it would not have been permitted in foreign nation).

The father claims on appeal that the probate judge erred in concluding that the mother was under duress when she entered into the agreement. He argues that the mother was not under duress because she had other alternatives available to her in that she could have challenged the father's claim to custody and, at a hearing, the children's best interests would have been considered, which might have resulted in an award of custody to the mother. See note 15, *supra.* The father relies on *Khan* to support his claim that the custody agreement is a bar to seeking custody in the Probate and Family Court.[17]

In *Khan,* unlike the case before us, the law of Trinidad was determined to be in substantial conformity with our own in that "Trinidad judges are bound by statute and case law to treat the welfare of the minor child as the paramount consideration in determining custody issues." 446 Mass. at 97.[18] That case did not, on appeal, raise any question of duress.

Here, the probate judge credited the mother's testimony that the parties had agreed to return to Lebanon for the purposes of obtaining a religious divorce there, and had agreed that the mother would receive custody of the children.[19]

The judge also found, "Although the Wife was represented in Lebanon and entered into an agreement regarding custody and visitation, I credit her testimony that she did so only because she knew under the substantive law of that court, she could not obtain custody and was merely attempting to secure visitation." Finally, the judge concluded that under governing law in the Lebanese Jaafarite Court, the mother would not have been awarded custody of the sons after the age of two had she sought custody in that court. See discussion, *supra.* These subsidiary and ultimate findings and rulings support a determination that the mother's agreement to give guardianship of the children to the father was obtained under duress and was thus unenforceable. See *Cabot Corp.* v. *AVX Corp.,* 448 Mass. 629, 637 (2007) ("It is well established that a contract entered into under duress is voidable"). To avoid enforcement of a contract, a contracting party

may prevail on a theory of duress if she demonstrates "(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party." *Id.* at 637-638, quoting from *International Underwater Contractors, Inc.* v. *New England Tel. & Tel. Co.,* 8 Mass.App.Ct. 340, 342 (1979). Cf. *Segal v. Segal,* 278 N.J.Super. 218, 222 (1994) (one-sided settlement agreement obtained in exchange for granting wife Jewish divorce was unenforceable as a product of duress); *Golding v. Golding,* 176 A.D.2d 20, 21-24 (N.Y.1992) (wife compelled to enter into agreement by husband's invocation of his power to refuse to give her a Jewish divorce).

C. *Child support.*

The father's assertion that the child support order is erroneous assumes (1) that the judgment that orders him to pay $1,840 per week is a scrivener's error, and that $184 is intended; and (2) that the judge's finding that the mother earns approximately $60,000 a year is not an error and requires a recalculation of the child support award.

It is apparent from the judge's findings that he intended to order $184 in weekly child support. The findings state that the father should pay child support to the mother "in the amount of $184.00 per week which is consistent with the child support guidelines." Thus, it is clear that the judgment contains a scrivener's error.

Regarding the mother's salary, the Child Support Guidelines worksheet that was before the probate judge is based on an annual income of the mother in the amount of $45,290. Furthermore, even though the finding states that the mother "earns approximately $60,000 per year," the findings also refer to the mother's financial statement, which reflects that the mother's current annual income is $45,284.20 per year—an amount consistent with the mother's paycheck. The $60,000 figure thus seems to be an error, but a harmless one. Apart from these two minor errors, the findings are sufficient and the judgment is presumptively correct under the Child Support Guidelines.

So much of the judgment as orders the father to pay $1,840 in weekly child support payments is to be modified to order the father to pay $184 in weekly child support payments. As so modified, the judgment is affirmed.

So ordered.

[1] This was the mother's first marriage. The father testified that he previously was married, and that he was divorced in Dedham in about 1993.

[2] The parties' testimony reflects agreement that the father's disability did not disable him from caring for the children.

[3] The mother testified that she made the decision to seek a divorce in Massachusetts and to remain here with the children, but later, as a result of a conversation with the father, she under-

stood she would have to obtain a religious divorce in the court of the father's religious sect in Lebanon if she ever wished to remarry.

[4] In his petition, the father alleged that the mother was not obeying him, refused to cohabit with him, and was no longer under his submission. A judgment in favor of the father was thereafter entered on the petition that "oblige[d] the [mother] to obey ... and cohabit[]" with the father, "otherwise she will be considered as disobedient."

[5] As reflected in the testimony of experts and other documents of record, there are different **Islamic** religious tribunals in Lebanon for each of the main religions. The Shia are governed by the Jaafarite school. By an enactment issued in 1962, "[t]he Sunni and Jaafari Doctrine Judiciary courts are considered as a part of the state's Judicial organization."

[6] The mother testified that she was unable to divorce the father in Lebanon absent his agreement, and that he refused to agree to a divorce once they arrived there. The judge noted that the mother's expert testified that "for a woman to obtain a divorce in the court which had jurisdiction over the parties in this case, she would have to prove that the husband committed a crime, abused her, or abandoned her but that a man can obtain a divorce whenever he wants." The mother's expert further testified that the mother only could obtain a divorce in a Jaafarite Court if the father agreed.

[7] An earlier complaint for divorce was dismissed for lack of subject matter jurisdiction. In the instant action, the judge found that the marriage suffered an irretrievable breakdown within the Commonwealth during 2004. Thus, the jurisdictional requirements of G.L. c. 208, § 5, would be met "if the plaintiff is domiciled within the commonwealth at the time of the commencement of the action." G.L. c. 208, § 5, as appearing in St.1975, c. 400, § 10. See *Caffyn v. Caffyn,* 441 Mass. 487, 491-493 (2004). The probate judge made no findings regarding whether the mother ever changed her domicile from Massachusetts to Lebanon. It is uncontested, and the evidence supports a conclusion, that the mother was domiciled in the Commonwealth at least as of the date of commencement of the underlying divorce action.

[8] The father does not appeal from the judgment insofar as it divides the marital estate between the parties in a manner the judge determined to be "relatively equal."

[9] Section 2 of G.L. c. 209B, inserted by St.1983, c. 680, § 1, provides, in relevant part:

"(*a*) Any court which is competent to decide child custody matters has jurisdiction to make a custody determination by initial or modification judgment if:

"(1) the commonwealth (i) is the home state of the child on the commencement of the custody proceeding, or (ii) had been the child's home state within six months before the date of the commencement of the proceeding and the child is absent from the commonwealth because of his or

her removal or retention by a person claiming his or her custody or for other reasons, and a parent or person acting as parent continues to reside in the commonwealth; or

"(2) it appears that no other state would have jurisdiction under paragraph (1) and it is in the best interest of the child that a court of the commonwealth assume jurisdiction because (i) the child and his or her parents, or the child and at least one contestant, have a significant connection with the commonwealth, and (ii) there is available in the commonwealth substantial evidence concerning the child's present or future care, protection, training, and personal relationships."

[10] The father does not challenge the judge's findings that support the additional requirements under G.L. c. 209B, § 2(*a*)(2). See note 9, *supra.*

[11] We do not address additional claims by the father that are not supported by citation to relevant authority. See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

[12] In *Qiuyue Shao, supra* at 314-315, we considered citizenship and reciprocity as matters bearing on the question of deference to a foreign nation's custody order. See *Hilton v. Guyot,* 159 U.S. at 228; *Universal Adjustment Corp.* v. *Midland Bank, Ltd., of London,* 281 Mass. 303, 317 (1933); *Pacific Wool Growers v. Commissioner of Corps. & Taxn.,* 305 Mass. 197, 209 (1940). See also Restatement (Second) of Conflict of Laws § 98 (Approved Official Draft 1971), cited approvingly in *Custody of a Minor (No. 3),* 392 Mass. at 735 (citing *Schiereck v. Schiereck, supra*), and *Khan,* 446 Mass. at 94, in the context of cases considering foreign custody laws. On these factors the scale tips in favor of the mother. The parties and their children are United States citizens, and at the time the father filed reconciliation and guardianship actions in the Jaafarite Court, the only residence of the parties as an intact married couple, and the only home the children ever had known, was in the Commonwealth. The record discloses no treaty or other agreement to which the United States is also a party that compels Lebanon's recognition of a foreign court's custody judgment.

[13] Although the record does not reflect the basis for the jurisdiction of the Jaafarite Court, we have assumed that it had jurisdiction to determine the custody of the children. See *Jones v. Jones,* 349 Mass. 259, 261 (1965), and cases cited.

[14] No issue has been raised regarding substantial conformity of the Jaafarite Court's laws governing notice and procedure.

[15] Although the father argues that the mother could have made allegations regarding the father's unfitness, the factors cited by his experts, such as incapacity to care for the children due to incarceration or disability, were not present here. See note 2, *supra.* As the father's expert testified, even if the father had an illness but still was capable of caring for his children, the Jaafarite Court would "give him custody."

[16] In some circumstances, not relevant here, our statutes also set forth factors that are to be considered in deciding who has the right to custody of a child. See, e.g., G.L. c. 208, § 31A, inserted by St.1998, c. 179, § 3 (court to "consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interest of the child" when issuing custody order); G.L. c. 209C, § 10, inserted by St.1986, c. 310, § 16 (standards for awarding custody between unmarried parents; among listed factors, "court shall, to the extent possible, preserve the relationship between the child and the primary caretaker parent"); G.L. c. 210, § 3(*c*), as appearing in St.1999, c. 3, § 17 (dispensing with parental consent to adoption if in best interests of child; "court shall consider the ability, capacity, fitness and readiness of the child's parents ... and ... the petitioners.... In making the determination, the health and safety of the child shall be of paramount, but not exclusive, concern").

[17] On appeal, the father also argues that the mother is estopped from collaterally attacking the Lebanese Jaafarite Court judgment. So far as appears from the trial court record, that claim was advanced only in the father's proposed conclusions of law and is there undeveloped by argument or citation to relevant authority. He relies in his brief on *Bassett v. Blanchard,* 406 Mass. 88, 90-91 (1989), and *Moran v. Gala,* 66 Mass.App.Ct. 135, 139-142 (2006), but nothing in those cases provides support for his claims.

[18] In *Khan, supra* at 91-92, a consent judgment addressing custody previously had entered in the Trinidad Family Court and the Probate and Family Court judge declined to exercise jurisdiction under section 14 of the MCCJA. The mother in *Khan* filed motions for reconsideration and a stay of the order requiring the son's return to Trinidad, claiming she had agreed to the Trinidad consent judgment under duress, but duress was not an issue that was specifically addressed on appeal. *Id.* at 92. The court rejected the mother's claim that the consent decree was reached without evaluation of the son's best interest, "because the terms of the decree to which she now objects were reached on the basis of her agreement." *Id.* at 97. We think the decision assumes that the consent decree had not been entered into under duress.

[19] The mother claimed below: "My husband refused to grant a divorce in Massachusetts, and enticed me into returning to Lebanon on the premise that a divorce from the religious courts in Lebanon could not be granted in Massachusetts, and that he would grant me custody of the children in Lebanon if I returned to Lebanon with him in order to get the divorce."

CATEGORY: Child Custody

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: Lebanon

URL:
http://scholar.google.com/scholar_case?case=11543139391494968975&q=Sharia+OR+Islam+OR+Islamic+OR+Muslim&hl=en&as_sdt=4,22

NAZIH MOHAMAD EL CHAAR, VS. CLAUDE MOHAMAD CHEHAB.

No. 09-P-860.

Appeals Court of Massachusetts.

April 8, 2010.

December 31, 2010.

Nicholas M. O'Donnell for the plaintiff.

John G. DiPiano for the defendant.

Present: Duffly, Dreben, & Kafker, JJ.

DREBEN, J.

To be enforced, a foreign determination of child custody must be in "substantial conformity" with Massachusetts law. G.L. c. 209B, § 14, inserted by St.1983, c. 680, § 1. See *Custody of a Minor (No. 3),* 392 Mass. 728, 735 (1984); *Khan v. Saminni,* 446 Mass. 88, 94 (2006); *Schiereck v. Schiereck,* 14 Mass.App.Ct. 378, 380 (1982); *Charara v. Yatim, ante* 325, 329-330, 332 (2010).

Nazih Mohamad El Chaar, the father of a minor daughter, appeals from a judgment of the Probate Court dismissing his complaint to enforce a judgment of a Lebanese Sunnite court suspending the mother's custody of their daughter. The judge reasoned that the father failed to produce

evidence that the procedural and substantive law applicable to the Lebanese court was in substantial conformity with the laws of the Commonwealth. We affirm.

1. *Background.*

The parties, Lebanese citizens, married in Lebanon in 2001, and were living there when their daughter was born on September 16, 2002. When they were divorced in Lebanon in January, 2004, the mother was granted custody of the child with visitation to the father.[1] Thereafter, the mother, seeking to reduce visitation, filed an action in Lebanon that resulted in an order limiting the father's visitation to one day a week.

In May, 2006, the mother left Lebanon with the child without the permission of the father or the Lebanese court. After a brief sojourn in Canada, she settled in Massachusetts. When he could not find the child, the father filed a petition in the Sunnite **Muslim** Court of Beirut (the Lebanese court) to modify the custody orders.[2] The mother was represented by counsel at these proceedings.

In ruling against the mother's claim for custody, the Lebanese court judge referred to the order allowing the father to visit the child and the mother's removal of the child from Lebanon, circumstances that deprived the father of his visitation rights. Because it appears that under applicable Lebanese law the mother could not legally travel with the child outside Lebanon without the father's authorization, the Lebanese court judge concluded that the mother breached the father's "right" by her travel with the child. A judgment dated September 26, 2006, suspended the mother's right of custody as long as she remained outside Lebanon[3] and ordered her to deliver the child to the father.[4]

The mother appealed. In affirming the judgment, the Lebanese appellate court pointed out that since the mother traveled with her daughter outside the Lebanese territories after the father obtained a judgment giving him the right to see his daughter once a week, the father "has been deprived of the right and the girl was deprived of her right to see her father, and this matter is against her interest[,] which should be taken into consideration ... before the mother's interest."

On February 12, 2007, the father sought to enforce the Lebanese judgment and filed a complaint for a writ of habeas corpus and to enforce the foreign custody order in the Probate Court. The matter went to trial, and during the proceedings the mother filed a motion to dismiss under Mass.R.Dom.P. 41(b)(2) (1974).[5] The judge granted the mother's motion.[6]

In declining to defer to the Lebanese custody order, she stated:

"Without evidence as to whether or not the Lebanese proceedings comply with the requirements of G.L. c. 209B, § 14, this court cannot make a finding that the Lebanese proceedings considered the best interests of the child. There was no evidence that `the procedural and substantive law

applied by the foreign court [was] reasonably comparable to the law of the Commonwealth.' *Custody of a Minor [No. 3],* 392 Mass. 728, 735 (198[4]), quoting *Schiereck v. Schiereck,* 14 Mass.App.Ct. [378,] 380 [1982].

"...

"Upon review of the documents filed in support of these proceedings, this Court can find no indication of what standards were applied by the Lebanese court in reaching its decision to change custody. It appears that the Lebanese decision to modify custody was made based on the sole consideration that Mother left the jurisdiction with the minor child. Such a consideration, standing alone, does not satisfy the requirements of G.L. c. 209B, § 14. There is not even evidence before the Court that the relevant law of Lebanon, such as it has been presented, is reasonably comparable to the relevant law of Massachusetts...."

This appeal followed.

2. *The Lebanese court documents.*

It is not clear from the record whether the Lebanese court documents were admitted substantively, as the father contends, or whether they were admitted, as the mother argues, only for a limited purpose. The judge's comments can be read to support both arguments. Postjudgment, the mother filed a motion requesting the court to "settle a specific dispute over contents of the instant appellate appendix." The father wanted to include them; the mother objected. The judge endorsed the motion as follows: "all disputed exhibits shall be attached to the appendix for appeal and identified as disputed exhibits on the characterization of the Court as having been admitted `de bene.'"[7]

We need not interpret the judge's various rulings, as her findings indicate that she considered the documents in attempting to determine the standards employed by the Lebanese courts.[8] Indeed, the judge's "review of the documents filed in support of [the] proceedings," including her analysis of the Lebanese judgment, formed the basis for her decision.

3. *Conformity with Massachusetts law.*

"[T]he Massachusetts Child Custody Jurisdiction Act [MCCJA], G.L. c. 209B, governs any proceeding in which a custody dispute is presented for resolution." *Khan v. Saminni,* 446 Mass. at 91. As the parties do not challenge the Probate Court's jurisdiction under the statute, they properly direct their arguments to G.L. c. 209B, § 14, which provides:

"To the extent that the legal institutions of other nations have rendered custody determinations in substantial conformity with the provisions of this chapter, the courts of the commonwealth shall grant due recognition to such determinations."

Our cases have set forth three requirements to satisfy the "substantial conformity" test: whether the foreign court (1) had jurisdiction over the parties and the subject matter; (2) applied procedural and substantive law reasonably comparable to our laws[9]; and (3) based its order on a determination of the "best interests of the child." See *Custody of a Minor (No. 3),* 392 Mass. at 735; *Khan v. Saminni,* 446 Mass. at 95; *Schiereck v. Schiereck,* 14 Mass.App.Ct. at 380 (decided prior to the enactment of G.L. c. 209B); *Akinci-Unal v. Unal,* 64 Mass.App.Ct. 212, 220-221 (2005); *Qiuyue Shao v. Yue Ma,* 68 Mass.App.Ct. at 314; *Charara v. Yatim, ante* at 332. The first requirement is not in issue as the parties do not challenge the jurisdictional authority of the Lebanese family court over the Lebanese proceedings.

In determining the question of "substantial conformity" with Massachusetts law, we look to whether, under the applicable law of Lebanon, the court must consider "the best interests of the child[ ], as that standard is understood under the laws of the Commonwealth." *Charara v. Yatim, ante* at 333.[10], [11] This is true whether considering an original judgment awarding custody or a modification judgment showing changed circumstances; the guiding principle is always the best interests of the child. See *Ardizoni v. Raymond,* 40 Mass.App.Ct. 734, 738 (1996); G.L. c. 208, § 28; *J.F.* v. *J.F.,* 72 Mass.App.Ct. 782, 790 (2008).

Our decisional law has not required a "definitive list of criteria that must be considered in determining what is in a child's best interest[, but certain] constants are revealed in our [cases]." *Charara v. Yatim, ante* at 334. Such constants, or factors, include, for example, consideration of which parent has been the primary caretaker of, and formed the strongest bonds with, the child, the need for stability and continuity in the child's life, the decision-making capabilities of each parent to address the child's needs, and the living arrangements and lifestyles of each parent and how such circumstances may affect the child. See *id.* at 334-336. Although the relevance of particular factors may vary from case to case, the above listed factors underscore that in the Commonwealth "the best interests analysis is a child-centered one that focuses on the specific needs and interests of a child and how these might best be met." *Id.* at 336. All relevant factors must be considered. See *Rosenberg v. Merida,* 428 Mass. 182, 191 (1998). Even where the foreign law requires a custody determination to make reference to the best interests of the child, it does not necessarily follow that the substantive law applied by the foreign court is reasonably comparable to our own law. See, e.g., *Charara v. Yatim, ante* at 333-334, 336.

The father argues that the judge erred in allowing the motion to dismiss because he had established the elements of his case. In the father's view, the Lebanese decisions, which focus on the unauthorized removal of the child from Lebanon, and the judicial submissions made by the mother in Lebanon, demonstrate that the best interests of the child were considered by the Lebanese courts.[12]

Under Massachusetts law, while removal of a child without court authorization or parental consent is a relevant consideration, the child is "not chargeable with the misconduct of her mother ...

and ought not to be compelled to suffer for it. Her welfare is the paramount consideration." *Murphy v. Murphy,* 380 Mass. 454, 462 (1980), quoting from *Aufiero v. Aufiero,* 332 Mass. 149, 153 (1955). See *Custody of a Minor (No. 3),* 392 Mass. at 736; *Tolos v. Tolos,* 11 Mass.App.Ct. 708, 710 (1981). Thus, such removal by a custodial parent (with the inevitable impairment of the father's visitation rights, see G.L. c. 208, § 30) is alone insufficient to warrant modification of the custody order. See *Hernandez v. Branciforte,* 55 Mass.App.Ct. 212, 220 (2002). See also *Haas v. Puchalski,* 9 Mass.App.Ct. 555, 557 (1980); *Delmolino v. Nance,* 14 Mass.App.Ct. 209, 214 (1982). Contrary to the father's contention, there is no indication in the documents put before the probate judge that the Lebanese law governing custody disputes takes into consideration all the relevant factors bearing on the child's best interests as that standard is understood under the laws of the Commonwealth.[13]

5. *Additional issues.*

We comment briefly on the father's remaining arguments. The father asserts that Mass.R.Dom.Rel.P. 41(b)(2) may be invoked only after a plaintiff has completed the presentation of evidence, see note 5, *supra,* and that he intended to introduce the testimony of an additional witness, Dr. John Baker. Because, however, the judge dismissed the father's petition due to his failure to show the Lebanese proceedings complied with G.L. c. 209B, § 14, she was correct in ruling that Dr. Baker's testimony would not be relevant. Doctor Baker had prepared a report which had been marked as an exhibit. Counsel for the father told the judge that his examination of Dr. Baker would not challenge the report, but rather would be directed towards Dr. Baker's observations. As the report did not address the issue of Lebanese law and there is no claim that Dr. Baker was an expert in such law, his testimony had no relevance to the judge's determination of the only issue before her, namely, whether the Lebanese judgment was in "substantial conformity" with Massachusetts law.[14] There was thus no error in deciding the motion prior to Dr. Baker's testimony.

We also reject the father's argument that the judge abused her discretion in not qualifying his proffered expert, an Imam at a mosque in the Boston area, as an expert in Lebanese law. The judge considered carefully the education, training, and experience of the Imam but noted, inter alia, that his credentials and experience were primarily in the field of "counseling couples both in his clerical position and as a mediator or conciliator." Moreover, she pointed out that the Imam had left Lebanon in the early 1980's, although he occasionally traveled back to that country.

The decision to qualify an expert lies within the sound discretion of the judge. See *Commonwealth v. Richardson,* 423 Mass. 180, 183 (1996); Brodin & Avery, Massachusetts Evidence § 7.5.2 (8th ed.2007). While the judge in her discretion could have allowed the proferred expert to testify as to Lebanese law, she was not required to do so.

The father also claims that the judge misapplied hearsay rules by failing to permit him to testify at trial about what was said at the hearings in Lebanon. We need not reach the hearsay question, as the father made no offer of proof, and the record is not clear as to what evidence he intended to offer or whether such evidence was relevant to Lebanese substantive law.

A final comment is in order. Cases involving custody disputes present sensitive and often heart-wrenching issues, the resolution of which can seldom satisfy both parties. The judge stated that hers was a difficult decision to make and she also commented on the father's loving relationship with the child. She correctly noted that the only issue before her was the narrow one of enforcing the Lebanese order and the father was free to seek further visitation rights.

Judgment of dismissal affirmed.

KAFKER, J. (concurring).

I write separately to emphasize that a party seeking to enforce a foreign custody decree of an unfamiliar court system must do a far better job of fulfilling his or her burden of establishing (1) that the party's expert is qualified to opine on the foreign law at issue and (2) that the procedural and substantive law applied to the custody dispute was in substantial conformity with the laws of the Commonwealth. The father's presentation here was inadequate on both grounds. I therefore concur in the result for the following reasons.

Based on the limited presentation of the father in this case, the Probate Court judge did not abuse her discretion in not qualifying the father's expert regarding the family law enforced by the Lebanese Sunnite court. See *Commonwealth v. Richardson,* 423 Mass. 180, 183 (1996). Contrast *McLaughlin v. Board of Selectmen of Amherst,* 422 Mass. 359, 362 (1996). The proposed expert's experience with legal proceedings in the Lebanese court, as opposed to mediation proceedings associated with the court, was not well developed. The same was true of his knowledge of the substance of the family law applied by the Sunnite court. See Reporter's Notes, Mass.R.Civ.P. 44.1, Mass. Ann. Laws Court Rules, Rules of Civil Procedure, at 567 (LexisNexis 2009-2010) ("The trial judge's attention may be directed to the law of another jurisdiction by oral testimony of a *qualified* witness") (emphasis added). Given the difficulty and importance of a correct understanding of an unfamiliar legal system, I discern no error in the judge's decision to require a clearer demonstration of expertise.

In my view, the father's limited submissions also failed to satisfy his burden of proving that the Lebanese Sunnite court decree he sought to enforce was based on procedural and substantive law in substantial conformity with Massachusetts law. See *Akinci-Unal v. Unal,* 64 Mass.App.Ct. 212, 221 (2005) (party seeking to enforce foreign divorce judgments did not "demonstrate that either foreign tribunal applied law reasonably comparable to our own"); *Baker v. Booz Allen Hamilton, Inc.,* 358 Fed.Appx. 476, 481 (4th Cir.2009) ("Rule 44.1 provides courts with broad authority to conduct their own independent research to determine foreign law but imposes no

duty ... to do so.... Thus, the party claiming foreign law applies carries both the burden of raising the issue that foreign law may apply in an action and the burden of proving foreign law to enable the ... court to apply it in a particular case"); *Bigio v. Coca-Cola Co.,* No. 97 Civ. 2858, 2010 U.S. Dist. LEXIS 86890, at *10-11 (S.D.N.Y Aug. 23, 2010) (same). See also *Globe Newspaper Co.* v. *Commissioner of Educ.,* 439 Mass. 124, 131 (2003) ("burden of proof ordinarily falls on the party seeking relief"). As the Probate Court judge properly determined upon review of the very limited documentation submitted, "It appears that the Lebanese decision to modify custody was made based on the sole consideration that Mother left the jurisdiction with the minor child. Such a consideration, standing alone, does not satisfy the requirements of G.L. c. 209B, § 14." See *Hernandez v. Branciforte,* 55 Mass.App.Ct. 212, 220 (2002) ("a custodial parent's removal of the child from Massachusetts, without the other parent's consent, is alone insufficient to warrant modification of the custody order").

[1] The father testified that the divorce decree itself did not address the issue of custody because the parties had reached agreement on the issue. He stated that there were no specific rules and regulations with respect to seeing the child, and that in the period immediately following the divorce he saw his daughter three to four times a week.

[2] The probate judge found that "the family court system in Lebanon is a series of ecclesiastical courts recognized by the civil government of Lebanon."

[3] There is also an outstanding arrest warrant in Lebanon for the mother's abduction of the child.

[4] The parties have stipulated that Lebanon is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. See 42 U.S.C. §§ 11601-11611 (2006).

[5] In relevant part, rule 41(b)(2) provides:

"After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving h [er] right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them ... or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff the court shall make findings as provided in Rule 52(a)."

[6] The mother had previously filed a motion to dismiss the action or stay proceedings "predicated upon a theory of preemption by Federal Immigration and Nationality Law." The mother had filed an application for asylum for herself and the child. The judge denied the motion to dismiss but allowed the motion to stay pending resolution of the mother's immigration status. In her findings, the judge stated that the mother and child had obtained a grant of political asylum from the United States. The reasons for the asylum are not in the record before us, and the parties have

not briefed any issue concerning the effect, if any, of the grant of asylum on the present proceedings.

[7] The word "on" is not clear and could be "or" and the word "characterization" is also not clear.

[8] Examination of the judgment and documents concerning the procedural and substantive laws of Lebanon regarding custody matters was entirely proper in ascertaining whether the standards governing custody were in "substantial conformity" with our laws. See *Khan v. Saminni,* 446 Mass. at 96; *Qiuyue Shao v. Yue Ma,* 68 Mass.App.Ct. 308, 314-315, & nn. 12 & 13 (2007).

[9] A court's determination of foreign law is treated as a ruling on a question of law. See Mass.R.Dom.Rel.P. 44.1 & Reporter's Notes, Mass.R.Civ.P. 44.1, Mass. Ann. Laws Court Rules, Rules of Civil Procedure, at 566-567 (LexisNexis 2009-2010); *Berman v. Alexander,* 57 Mass.App.Ct. 181, 189-190 (2003).

[10] The parties proceed, as did the judge, on the assumption that the father had the burden of demonstrating at trial that the substantial conformity test of G.L. c. 209B, § 14, had been satisfied. Compare *Akinci-Unal v. Unal,* 64 Mass.App.Ct. at 220-221. For this reason, we need not address the issue. See *Larson v. Larson,* 28 Mass.App.Ct. 338, 341 (1990).

[11] In view of the decision we reach with respect to the comparability of "substantive law," it is not necessary to consider whether the procedural laws applicable to the Lebanese family court are reasonably comparable to our laws, although we note that the mother was represented by counsel and presented written argument in the Lebanese proceedings.

[12] Contrary to the father's assertion that the applicable standard is that of a motion for a directed verdict, "in passing upon a motion under the second sentence of rule 41(b)(2) a trial judge is not limited to that standard of proof required for a directed verdict ... rather, the judge is free to weigh the evidence and resolve all questions of credibility, ambiguity, and contradiction in reaching a decision." *Mattoon v. Pittsfield,* 56 Mass.App.Ct. 124, 139 (2002), quoting from *Ryan, Elliott & Co.* v. *Leggat, McCall & Werner, Inc.,* 8 Mass.App.Ct. 686, 689 (1979). See Smith & Zobel, Rules Practice § 41.11, at 44 (2d ed.2007).

[13] The father is not assisted by his reference to the mother's Lebanese appellate papers, which appear to cite to general custody considerations of Lebanese law such as "[s]he must be mature"; "[s]he must be wise"; she must "guard the little child['s] ethics."

The father also claims that the probate judge erred by failing to rule on his request that the court take judicial notice of the United Nations Convention on the Rights of the Child (to which, he asserts, Lebanon is a signatory), which provides, in Part I, art. 3(1), that "[i]n all actions concerning children ... the best interests of the child shall be a primary consideration." Assuming that

this provision is a proper subject of judicial notice, there is nothing therein that would cause a different result in this case.

[14] Even assuming that the judge should not have acted on the motion to dismiss until after Dr. Baker had given his testimony, it is difficult to perceive how the father was prejudiced.

MICHIGAN

CATEGORY: Shariah Marriage Law

RATING: Highly Relevant

TRIAL: TCSY

APPEAL: ACSN

COUNTRY: India

URL: http://scholar.google.com/scholar_case?case=4294001533062003586&q=Islamic+OR+Sharia+OR+Muslim+OR+Islam&hl=en&as_sdt=4,23

SAIDA BANU TARIKONDA, PLAINTIFF-APPELLANT, V. BADE SAHEB PINJARI, DEFENDANT-APPELLEE.

No. 287403.

Court of Appeals of Michigan

April 7, 2009.

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

UNPUBLISHED

PER CURIAM.

Plaintiff appeals as of right the trial court's order recognizing the parties' earlier divorce in India and granting defendant's motion to dismiss the divorce complaint pursuant to MCR 2.116(C)(7). We reverse.

Plaintiff and defendant are **Muslim** citizens of India who were married in Hyderabad, Andhra Pradesh, India in 2001. They have one child, Maahira, born December 22, 2005, in Anaheim, California. Although Maahira was sent to live in India, the couple resided in Michigan from February 2006 to January 2008, when they separated. Plaintiff remained in Michigan and defendant moved to New Jersey.[1]

India has a two-tiered legal system with a universal civil code that applies to all citizens and individual personal laws that apply to each of the Christian, Hindu, and **Muslim** communities. Jain, *Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women's Rights in India*, 23 Berkeley J Int'l L 201, 204 (2005). India recognizes the **Muslim** personal law with respect to issues of marriage and divorce. **Muslim** Personal Law (Shariat) Application Act of 1937, Act no. 26 of 1937, section 2.[2] One method of divorce under the **Muslim** personal law is the triple talaq. Pursuant to the triple talaq, a husband may summarily divorce his wife by pronouncing language such as, "I divorce thee," three times. Western, ***Islamic*** *"Purse Strings": The key to amelioration of women's legal rights in the Middle East,* 61 AF L Rev 79, 121-123 (2008).

In April 2008, defendant traveled to India and pronounced the following written triple talaq:

Now this deed witnesses that I the said Bade Pinjari, do hereby divorce Saida Tarikonda, daughter of T. Babu Khan, by pronouncing upon her Divorce/Talaq three times irrevocably and by severing all connections of husband and wife with her forever and for good.

1. I Divorce thee Saida Tarikonda

2. I Divorce thee Saida Tarikonda

3. I Divorce thee Saida Tarikonda . . . .

The parties disagree regarding whether plaintiff was notified of this triple talaq. However, in May 2008, plaintiff filed a complaint for divorce in Michigan. Defendant filed a motion to dismiss the complaint pursuant to MCR 2.116(C)(7) because of the existing Indian divorce. To prove the divorce occurred, he offered a divorce certificate from a Wakf Board in Andhra Pradesh, India. The trial court granted his motion. It instructed plaintiff to register the Indian divorce in Michigan and file a separate complaint for custody and child support.

On appeal, plaintiff argues that the trial court erred when it recognized the Indian divorce, because the triple talaq is violative of due process and contrary to public policy.[3] We agree.

This Court reviews a lower court's determination regarding a motion for summary disposition de novo. *Hinkle v Wayne County Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002). Under MCR 2.116(C)(7), a party may move for dismissal of a claim on the ground that the claim is barred because of a "`prior judgment... or other disposition of the claim before commencement of the action.'" *Maiden v Rozwood*, 461 Mich 109, 118 n 3; 597 NW2d 817 (1999), quoting MCR 2.116(C)(7). A movant need not file supportive material. *Id.* at 119. However, if the movant submits affidavits, depositions, admissions or other documentary evidence, the evidence must be admissible and the trial court must consider it. *Id.* "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.*

"Unlike the judgments of sister states, foreign country judgments are not subject to the command of the Full Faith and Credit clause of the United States Constitution, Art. IV, Sec. 1." *Electrolines, Inc v Prudential Assurance Co*, 260 Mich App 144, 152; 677 NW2d 874 (2003). Nevertheless, comity is one nation's recognition of the "legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." *Dart v Dart,* 460 Mich 573, 580; 597 NW2d 82 (1999) (*Dart I*). Our Supreme Court has adopted the following criteria, set forth in *Hilton v Guyot,* 159 US 113; 16 S Ct 139; 40 L Ed 95 (1895), with respect to comity:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. [*Id.* at 581, quoting *Hilton, supra* at 202-203.]

Likewise, this Court has stated that a judgment should be accorded comity if: 1) "`the basic rudiments of due process were followed,'" 2) "the parties were present in court," and 3) "`a hearing on the merits was held.'" *Dart v Dart,* 224 Mich App 146, 155; 568 NW2d 353 (1997) (*Dart II)*, aff'd *Dart I, supra*, quoting *Growe v Growe*, 2 Mich App 25, 33; 138 NW2d 537 (1965).

Plaintiff did not enjoy the basic rudiments of due process in the instant Indian divorce. *Dart II, supra* at 155. She had no right to prior notice of defendant's pronouncement of the triple talaq. *Ara v Ahmad,* 2002 AIR 3551, Judgment of the Supreme Court of India, entered October 1, 2002 (Appeal No. 465 of 1996)[4]; *Pathan v Pathan,* Judgment of the Bombay High Court, entered May 2, 2002 (Criminal Writ Petition No. 94 of 2000), part 7, sections 24-25.[5] Further, she was not represented by an attorney and had no right to be present at the pronouncement. *Id.* The divorce provided no opportunity for a hearing on the merits and it was not overseen by a court of law. *Ara, supra; Pathan, supra.* Because plaintiff was denied due process in the Indian divorce arising from defendant's pronouncement of the triple talaq, the trial court erred by recognizing the divorce and dismissing the complaint pursuant to MCR 2.116(C)(7). *Dart I, supra* at 582.

Notably, the Equal Protection Clauses of the United States and Michigan Constitutions provide that no person shall be denied the equal protection of the law. US Const, Am XIV; Const 1963, art 1, § 2. "The essence of the Equal Protection Clauses is that the government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate

treatment." *Crego v Coleman,* 463 Mich 248, 258; 615 NW2d 218 (2000). If the state distinguishes between persons, the distinctions must not be "`arbitrary or invidious.'" *Id.* at 259, quoting *Avery v Midland Co, Texas,* 390 US 474, 484; 88 S Ct 1114; 20 L Ed 2d 45 (1968). Wives have no right to pronounce the talaq. *Pathan, supra,* part 2, section 13; ***Islamic*** *"Purse Strings," supra* at 123. This distinction is arbitrary and invidious. To accord comity to a system that denies equal protection would ignore the rights of citizens and persons under the protection of Michigan's laws. *Dart I, supra* at 580.

Plaintiff also claims that it was contrary to public policy for the trial court to recognize the Indian divorce because the **Muslim** personal law and Michigan law differ substantially with respect to property division. Under **Muslim** personal law, wives may be entitled to a dower if it is afforded in their marriage contracts. **Muslim** Women (Protection of Rights on Divorce) Act, 1986, (Act no. 25 of 1986; 5/19/086), section 3(1)(c).[6] Absent a marriage contract, wives are limited to properties titled in their names. *Id.* at section 3(1)(d). Under Michigan law, trial courts recognize prenuptial agreements governing the division of property in the event of a divorce. *Reed v Reed*, 265 Mich App 131, 141-142; 693 NW2d 825 (2005). However, absent prenuptial agreements, trial courts equitably distribute marital property in light of all the circumstances. *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008). Given this difference between the **Muslim** personal law in India and Michigan law, affording comity to the Indian divorce would again ignore the rights of citizens and persons under the protection of Michigan's laws. *Dart I, supra* at 580.

In light of our conclusion above, this Court need not address plaintiff's remaining claims that: 1) it would be contrary to public policy to recognize the Indian divorce because it failed to resolve issues of custody, child support, medical expenses, parenting time, and spousal support, and 2) the triple talaq and divorce certificate were invalid in India.

On appeal, defendant maintains that the lower court file is devoid of evidence of personal service. This claim fails. The lower court file includes an affidavit of service, certifying that plaintiff served a copy of the summons and complaint by registered mail. MCR 2.104. Plaintiff also attached a document from the United States Postal Service detailing the delivery information.

Next, defendant argues that, even if the trial court erred by dismissing plaintiff's complaint pursuant to MCR 2.116(C)(7), "additional issues as to jurisdiction remain." Defendant fails to support his claim with citations to the record or authority to sustain this position. *Flint City Council v Michigan,* 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002) ("this Court will not search for authority to support a party's position, and the failure to cite authority in support of an issue results in its being deemed abandoned on appeal."). This claim is abandoned on appeal. *Id.*

Finally, given the Indian divorce, defendant maintains that plaintiff should have filed a separate complaint for custody and child support. He objects to such a complaint on several grounds.

However, because plaintiff has not yet filed a separate complaint for custody and child support in Michigan, defendant's objections are not ripe for review.

We reverse.

[1] At the time plaintiff filed the divorce complaint, Maahira lived with her in Michigan. It is unclear from the record when she moved from India to Michigan.

[2] This act may be accessed, according to act year, at (accessed March 17, 2009).

[3] Throughout her brief, plaintiff relies upon a recent Maryland case, in which the court refused to afford comity to a divorce arising from a pronouncement of the talaq in Pakistan. *Aleem v Aleem,* 404 Md 404; 947 A2d 489 (2008). A decision from a court in another state is not binding, but may serve as persuasive authority. *K & K Constr, Inc v Dep't of Environmental Quality,* 267 Mich App 523, 559 n 38; 705 NW2d 365 (2005).

[4] This judgment may be found at Supreme Court of India, *Judgment Information System* (accessed March 17, 2009).

[5] This judgment may be found at Asian Legal Resource Center, *Criminal Writ Petition No.: 94 of* 2000, (accessed March 17, 2009).

[6] The full text of this act can be found at the Commonwealth Legal Information Institutes, *Indian Legislation*, (accessed March 17, 2009). The full act may also be accessed, according to act year, at Government of India, *India Code Text Base,* , while Section 3 of the act may be found at (accessed March 17, 2009).

MINNESOTA

CATEGORY: Shariah Contract Law

RATING: Highly Relevant

TRIAL: TCSY

APPEAL: ACSY

COUNTRY: N/A

URL: http://scholar.google.com/scholar_case?case=8449493111914467247&q=Islamic+OR+Sharia+OR+Muslim+OR+Islam&hl=en&as_sdt=4,24

680 N.W.2d 569 (2004)

MOHAMED D. ABD ALLA, A/K/A MOHAMED D. ABD-ALLA, A/K/A MOHAMED D. ABDUL-ALLAH, RESPONDENT, V. MOHAMED MOURSSI, A/K/A MOHAMED MORSY, APPELLANT.

No. A03-1736.

Court of Appeals of Minnesota.

June 1, 2004.

570*570 Michael W. Bertelsen, Bell, Bertelsen Bright, Shoreview, MN, for respondent.

Stephen H. Berndt, Fridley, MN, for appellant.

Considered and decided by SCHUMACHER, Presiding Judge; KLAPHAKE, Judge; and STONEBURNER, Judge.

OPINION

ROBERT H. SCHUMACHER, Judge.

Mohamed Mourssi, a/k/a Mohamed Morsy, appeals from the district court's order confirming the decision of the **Islamic** Arbitration Committee and dismissing his motion to vacate the arbitration award. He argues he was denied his right to "appeal" to the committee and the committee exceeded

its authority.[1] We affirm.

FACTS

In August 2001, Mourssi and respondent Mohamed D. Abd Alla, a/k/a Mohamed D. Abd-Alla, a/k/a Mohamed D. Abdul-Allah, entered into a partnership to manage and acquire restaurants. The partnership was subject to a partnership agreement. The partnership agreement included an arbitration clause, which provides:

Any dispute, controversy or claim arising out of or in connection with or relating to this Agreement or any breach or alleged breach hereof shall, upon the request of any party involved, be submitted to and settled by arbitration before the Arbitration Court of an **Islamic** Mosque located in the State of Minnesota pursuant to the laws of **Islam** (or at any other place or under any other form of arbitration mutually acceptable to the parties so involved). Any award rendered shall be final and conclusive upon the parties and a judgment thereon may be entered in the highest court of the forum, state or Federal, having jurisdiction. The expenses of the arbitration shall be borne equally by the parties to the arbitration, provided that each party shall pay for and bear the costs of its own experts, evidence, and counsel.

At some point, the partnership acquired the Al-Bustan Restaurant. After purchasing the restaurant, numerous disputes arose between the partners. The parties agreed to arbitrate their difference before 571*571 an **Islamic** arbitration committee. In September 2002, the committee issued its decision, stating:

After many long meetings and review of all issues that occurred between [Mourssi and Abd Alla], the committee has decided in its last meeting the following:

1. [T]here shall be no link between the problem related to Al-Bustan Restaurant and any other previous problem that occurred between the two parties, may it be financial problems or any other problem[.]

2. [S]teps toward the sale of Al-Bustan Restaurant shall start on September 20, 2002, with the first priority to purchase it granted to [Mourssi] at a price of $210,000, which was agreed upon by the parties. He shall pay the full amount in a period of no more than two months from the date specified above. In case where [Mourssi] is not interested in purchasing the Al-Bustan Restaurant, the priority shall go to his associate [Abd Alla]. In case both parties do not want to purchase Al-Bustan Restaurant, the process of selling the restaurant shall be granted to the Arbitration Committee with no interference from either of the two parties. The Arbitration Committee then shall sell the restaurant and resolve all financial rights between the two parties.

The decision also states:

1. The Arbitration Committee decides that Al-Bustan Restaurant has been acquired by [Mourssi], and he assumes full responsibility over the restaurant since May 1st, 2002. Beginning at this date, all profits from sales shall go to [Mourssi]. Similarly, all losses, if any, shall be assumed by [Mourssi] alone. And any problem that arise with Al-Bustan Restaurant after this date shall be the sole responsibility of [Mourssi].

2. Any disagreement or issues, may it be financial or other, between the two parties, the Arbitration Committee shall have the sole right to study them, to determine the harm inherent in them, and to decree what it sees suitable.

3. All decisions of the Arbitration Committee shall be binding to all parties in the dispute as is accepted by them in a written statement, and in accordance to a condition in the sale contract specifying that all disputes regarding Al-Bustan Restaurant are to be resolved according to **Islamic** Jurisprudence.

In a letter dated November 10, 2002, Mourssi expressed his concerns to the committee regarding its decision and argued that the decision "could be considered as a frame for a possible solution but not a solution itself since there was not any issue or numbers determined or specified." Mourssi concluded the letter stating:

Based on all the facts I specified above, I cannot accept the decision made by the arbitration committee, and I would urge them to reconsider looking into the issue deeper, and to allow both parties to bring in documents to be the bases for resolving all problems, or to move to the next choice in the partnership agreement by taking the whole issue to the American judicial system according to the laws of the state of Minnesota.

The committee did not receive the letter until April 7, 2003.

In April 2003, Abd Alla moved the district court to confirm the arbitration award. On May 14, 2003, Mourssi responded that the court should deny Abd Alla's motion and vacate the arbitration award "on the grounds that it was procured by corruption, fraud or other undue means and that the Committee exceeded its authority." During the hearing Abd 572*572 Alla argued Mourssi had not timely contested the arbitration award and therefore could not now contest the award. Mourssi argued that under **Islamic** law there is no set time for appeal.

The district court remanded the matter to the committee to determine whether Mourssi had requested the committee to reconsider its decision in a timely manner, and if he did, was the decision "procured by corruption, fraud or other undue means and/or did the Committee exceed its authority." The committee responded that no right to reconsideration existed, the committee did not exceed its authority, and the decision was not procured by corruption, fraud, or other undue means. After receiving the committee's response, the district court confirmed the arbitration award.

ISSUE

Can the district court consider Mourssi's motion to vacate the committee's arbitration award?

ANALYSIS

On appeal, neither party contests whether the district court had jurisdiction to consider Mourssi's motion to vacate the arbitration award. Therefore, we must independently determine the extent of the district court's jurisdiction in this case. *See Herubin v. Finn,* 603 N.W.2d 133, 137 (Minn.App.1999) ("Subject matter jurisdiction cannot be conferred upon the court by consent of the parties.").

Although the arbitration in this case was conducted pursuant to **Islamic** law, judicial review of any arbitration award is limited to those matters where jurisdiction is statutorily granted. *Univ. of Minn. v. Woolley,* 659 N.W.2d 300, 308 (Minn.App.2003) (stating aggrieved school employee who choose to submit matter to arbitration is only entitled to limited judicial review under chapter 572), *review denied* (Minn. Jun. 17, 2003); *see also Park Const. v. Indep. Sch. Dist. No. 32,* 216 Minn. 27, 33, 11 N.W.2d 649, 653 (1943) ("In the absence of statute ... the decisions of common-law arbitrators are not subject to judicial review and supervision.").

Abd Alla sought judicial confirmation of the arbitration award. Chapter 572 provides: "Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 572.19 and 572.20." Minn.Stat. § 572.18 (2002). Section 572.18 unambiguously requires the district court to confirm the arbitration award unless grounds to vacate or modify the award are properly brought before the court. *See Mut. Serv. Cas. Ins. Co. v. League of Minn. Cities Ins. Trust,* 659 N.W.2d 755, 760 (Minn. 2003) ("[W]here the intention of the legislature is clearly manifested by plain and unambiguous language, [courts] have neither the need nor the permission to engage in statutory interpretation."); Minn. Stat. § 645.44, subd. 16 (2002) (stating "`shall' is mandatory").

Mourssi moved to vacate the award on the grounds that the award was procured by fraud, corruption, or undue influence and that the arbitration committee exceeded its authority. Even though Mourssi's motion to vacate was filed in response to Abd Alla's application to confirm the award, the motion is still subject to the time requirements of chapter 572. *See Component Sys., Inc. v. Murray Enters.,* 300 Minn. 21, 24-25, 217 N.W.2d 514, 516 (Minn.1974) (rejecting appellants assertion that 90-day time limit does not prevent hearing on motion to vacate when 573*573 it is asserted in answer in proceeding to confirm arbitration award).

Chapter 572 provides a court may consider vacating an arbitration award upon the application of a party where

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 572.12, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 572.09 and the party did not participate in the arbitration hearing without raising the objection;

But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

Minn.Stat. § 572.19, subd. 1 (2002).

Section 572.19 also provides that an application to vacate an arbitration award "shall be made within 90 days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known." Minn.Stat. § 572.19, subd. 2 (2002). Failure to file an application to vacate an arbitration award within 90 days when the application is not predicated on fraud, corruption, or other undue means prevents judicial review of the award. *Wacker v. Allstate Ins. Co.,* 312 Minn. 242, 249, 251 N.W.2d 346, 349-50 (1977).

Here, the committee's decision was issued on September 23, 2002. It is clear from the record that Mourssi had received a copy of the arbitration award by November 10, 2002. Mourssi moved the district court to vacate the arbitration award on May 14, 2003, considerably more than 90 days after he received a copy of the award. Thus, Mourssi is not entitled to judicial consideration unless his application to vacate was predicated on fraud, corruption, or other undue means.

Mourssi claims that the award was procured by corruption, fraud, or other undue means because "one of the arbitrators... was meeting with a potential buyer prior to the issuance of the September 23, 2002 award." Arbitration awards are strongly favored and a reviewing court must exercise "[e]very reasonable presumption" in favor of the arbitration award's finality and validity. *State, Office of State Auditor v. Minn. Ass'n of Prof'l Employees,* 504 N.W.2d 751, 754 (Minn. 1993).

In light of the presumptions favoring an arbitration award, an application to vacate an arbitration award on the grounds that it was procured by fraud, corruption, or other undue means, must present an allegation that, if true, would clearly demonstrate the award was the result of these impermissible

means. *See Beebout v. St. Paul Fire & Marine Ins. Co.,* 365 N.W.2d 271, 273 (Minn.App.1985) (stating before district court may consider vacating arbitration award on grounds of fraud, "[f]raud must be established by `clear allegations and proof'" (citation 574*574 omitted)), *review denied* (Minn. May, 31, 1985).

Mourssi's allegation that the arbitrator spoke to a "potential buyer" does not clearly demonstrate the award was result of fraud, corruption, or other undue means when the arbitration award provided Mourssi with the first opportunity to purchase the restaurant at a price that the parties agreed was appropriate. Because we conclude that the district court was not presented with an application to vacate an arbitration award that was filed within the time limits prescribed by chapter 572, section 572.18 only granted the district court jurisdiction to confirm the arbitration award.

DECISION

The district court properly confirmed the arbitration award under Minn.Stat., ch. 572.

Affirmed.

[1] Mourssi's claim is more appropriately characterized as a request for the committee to reconsider its decision and not an appeal to the committee.

MISSOURI

CATEGORY: Child Custody

RATING: TBD

TRIAL: TBD

APPEAL: TBD

COUNTRY: Saudi Arabia

URL:
http://scholar.google.com/scholar_case?case=17828722657749240596&q=Saudi&hl=en&num=100&as_sdt=fffffffffffe04

824 S.W.2d 497 (1992)

STATE OF MISSOURI, EX REL., AHALAAM SMITH RASHID, RELATOR, V. THE HONORABLE BERNHARDT C. DRUMM, JR., JUDGE, DIVISION 4, ST. LOUIS COUNTY CIRCUIT COURT, RESPONDENT.

No. 61142.

Missouri Court of Appeals, Eastern District, Writ Division Two.

February 11, 1992.

Motion for Rehearing and/or Transfer Denied March 9, 1992.

499*499 Margo L. Green, Daniel P. Card, II, Love, Lacks & Paule, St. Louis, for relator.

Charles Willis, St. Louis, for respondent.

Motion for Rehearing and/or Transfer to Supreme Court Denied March 9, 1992.

CRANE, Presiding Judge.

Ahalaam Smith Rashid, mother, a United States citizen and resident of St. Louis County, brought a dissolution of marriage action against Adel Mohammed Zaghdi, father, a citizen and resident of **Saudi** Arabia, in the Circuit Court of St. Louis County. In the action mother sought custody of the parties' six year old daughter, Amirah Adel Zaghdi, a dual citizen whose home was in **Saudi**

Arabia but was physically present in St. Louis County at the commencement of the proceedings. Mother was given temporary custody of the child *ex parte.* Father filed a motion to set aside the temporary custody order on the grounds of fraud. The trial court treated the motion as a challenge to the jurisdiction of the court to determine child custody. After a two day hearing, the trial court, applying the provisions of the Uniform Child Custody Jurisdiction Act (UCCJA) as enacted in Missouri, § 452.440 *et seq.,* ruled that it did not have jurisdiction to exercise custody jurisdiction and that **Saudi** Arabia did have jurisdiction, and ordered the child returned to the custody of the father. Mother filed this writ of prohibition to prevent dismissal of the custody proceeding. We granted a provisional writ which we now make absolute on the grounds that the trial court abused its discretion by finding it had no jurisdiction without considering the best interests of the child with respect to a forum under § 452.450.1(4) RSMo 1986.

FACTUAL BACKGROUND

The facts relevant to the issues presented by this writ are undisputed. Mother and father were married on July 28, 1984, in St. Louis County, Missouri, and lived for a short time after the marriage in Belleville, Illinois. Father, a **Saudi** Arabian citizen, was in this country as a student. In August, 1984, they moved to Lansing, Michigan for two years while father continued his studies. Their daughter Amirah was born in Michigan on September 15, 1985. The family continued to reside in Lansing, Michigan until August, 1986, when father graduated from Lansing Community College and returned to **Saudi** Arabia. Mother and Amirah returned to St. Louis, Missouri in August, 1986. They remained in St. Louis, Missouri, until December 5, 1986, when they left to join father in **Saudi** Arabia. The family lived together in **Saudi** Arabia until March 25, 1987, when mother returned to the United States alone for a seven month visit with her family. Mother returned to **Saudi** Arabia in October, 1987, and lived with father and Amirah until the beginning of 1988.

Mother left **Saudi** Arabia through the assistance of the American Embassy on February 13, 1988, and returned to the St. Louis area. Amirah remained in **Saudi** Arabia with father. Subsequently, father took another wife in **Saudi** Arabia. On September 19, 1991, father and Amirah came to the United States to visit mother. Upon their arrival in St. Louis, father and Amirah went with mother to the hotel where father was registered. While father was getting his room key, mother left the hotel with Amirah without father's knowledge or consent and kept Amirah with her until she was ordered to produce Amirah in court on November 4, 1991.

PROCEDURAL HISTORY

According to the pleadings there have been no custody or dissolution proceedings relating to this child or to this marriage except those that have been filed in St. Louis County. No proceedings have been instituted in **Saudi** Arabia nor has any prior decree relating to the custody of the child been entered by any court of any state or foreign country.

On October 31, 1990, mother filed a Petition for Dissolution of Marriage in the Circuit Court of St. Louis County in Cause Number 616940, seeking a dissolution of the marriage and the award of custody of Amirah to father. Mother filed an Amended Petition on August 26, 1991, seeking

custody of Amirah for herself. Mother moved to dismiss Cause Number 616940 on 500*500 September 20, 1991, on the grounds that father had never been served. She filed a new Petition for Dissolution of Marriage on September 20, 1991, in Cause Number 629059 and obtained personal service on father. Mother alleged that she had custody of Amirah in St. Louis County and sought permanent custody. She also sought and obtained an order *ex parte* granting her temporary child custody. Father filed his Answer, Cross Petition for Dissolution of Marriage, and Motion for Custody Pendente Lite in this Cause on October 28, 1991.

On November 1, 1991, father moved to set aside the temporary custody order on the grounds that it had been obtained by fraud. The trial court treated this as a motion to dismiss the custody determination for lack of jurisdiction. It heard evidence on this issue on November 13 and November 18, 1991, and entered its order sustaining the motion to dismiss. It delayed the effective date of its order to give the parties time to file an application for a writ.

In its order the trial court made the following conclusions:

1. This state is not the home state of the child and was not the home state of the child when this proceeding commenced on September 20, 1991.

2. This state had not been the child's home state within six months prior to the commencement of this proceeding.

3. The child does not have a significant connection with this state.

4. There is not available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

5. The child has not been abandoned.

6. The child has not been mistreated or abused.

7. The child has not been threatened with mistreatment or abuse.

8. The child is not being neglected and has not been neglected.

9. Although no other state has child custody jurisdiction and no other state has declined to exercise child custody jurisdiction, the Courts in **Saudi** Arabia have jurisdiction. Although not enacted in this State, Section 23 of the Uniform Child Custody Jurisdiction Act provides that "the general policies of (the) Act extend to the international area."

10. It is just and proper under the circumstances for the Courts of this state to decline to exercise jurisdiction.

The court further concluded, "[p]ursuant to §§ 452.450 and 452.475, RSMo, this Court does not have jurisdiction to make a child custody determination by initial decree."

AVAILABILITY OF UCCJA IN MISSOURI TO DETERMINE JURISDICTION IN AN INTERNATIONAL CUSTODY CASE

Mother first claims the trial court exceeded its jurisdiction in deciding this matter under the UCCJA because the UCCJA, as adopted in Missouri, does not include Section 23 of the uniform act. This section extends the general policies of the act to the international area and provides for recognition and enforcement of custody decrees of other nations under certain circumstances.[1] The Comment to that section provides that the first sentence makes the general policies of the Act applicable to international cases. "This means that the substance of section 1 (not adopted in Missouri) and the principles underlying provisions like sections 6, 7, 8 and 14(a) are to be 501*501 followed when some of the persons involved are in a foreign country or a foreign custody proceeding is pending." UNIF. CHILD CUSTODY JURISDICTION ACT § 23 comment, 9 U.L.A. 326-27 (1968).

The failure of a state legislature to adopt § 23 has been held to express an intent not to require the enforcement of foreign custody decrees. *Minton v. McManus,* 9 Ohio App.3d 165, 458 N.E.2d 1292, 1294 (1983). However, we have not been referred to, nor have we found, any case which addresses what a state legislature, by omitting § 23, intends with respect to the application of the other provisions of the UCCJA to an original custody dispute involving a resident of a foreign country.

The trial court used the jurisdictional provisions of the UCCJA (§ 452.450 RSMo 1986 and UCCJA § 3) and the "clean hands" provision (§ 452.475 RSMo 1986 and UCCJA § 8) to determine whether it had jurisdiction. The trial court specifically held in its order "[p]ursuant to §§ 452.450 and 452.475 this court does not have jurisdiction to make a child custody determination by initial decree."

1. Availability of § 452.450 to determine jurisdiction

We will first consider whether the trial court could use § 452.450 to determine if it had jurisdiction. As enacted in Missouri, this section provides that a Missouri court which is competent to decide child custody matters has jurisdiction to make a child custody determination if one of four possible jurisdictional bases exists. This section is a procedural statute which does not create any new substantive rights for any of the parties but merely dictates the forum where custody actions will be heard. *Elliott v. Elliott,* 612 S.W.2d 889, 892 (Mo. App.1981). The statute supersedes prior Missouri practice under which the courts used the test set out in § 79 of the Restatement Second, Conflict of Laws, to determine child custody jurisdiction. *Id.* at 893. The statute provides four possible bases for jurisdiction, commonly referred to as the (1) home state (2) significant connection (3) emergency and (4) default or vacuum bases. It recognizes *parens patriae* jurisdiction under restricted conditions and incorporates the longstanding Missouri public policy supporting jurisdiction where the best interests of the child are served. *See Kennedy v. Carman,* 471 S.W.2d 275, 281-87 (Mo.App.1971).[2] This jurisdictional provision is sufficiently comprehensive that it may be used to determine jurisdiction irrespective of whether a resident of a foreign country is involved. Moreover, custody decrees made pursuant to the UCCJA are recognized and enforced in other states which have adopted the UCCJA. § 452.500 RSMo 1986;

UCCJA § 13. The trial court acted within its authority in using § 452.450 to determine if it had jurisdiction in this international child custody matter.

2. Availability of § 452.475 to determine jurisdiction

We next consider the trial court's use of the "clean hands" provision of § 452.475 to determine whether it had jurisdiction. This section provides, with respect to an initial decree:

If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct, the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

Section 452.475.1 RSMo 1986. We do not need to reach the question whether this section is applicable to an international child custody dispute, because the doctrine of unclean hands does not affect a court's jurisdiction but only the court's decision whether it should or should not exercise jurisdiction. 1 McCAHEY, KAUFMAN, KRAUT & ZETT, CHILD CUSTODY AND VISITATION LAW PRACTICE § 4.08[1][2] (1991). This section provides a basis to *decline* otherwise existing 502*502 jurisdiction, not to determine jurisdiction, thus the court improperly relied on this section in finding that it had no jurisdiction.

3. Declination of Jurisdiction under § 452.475

Father argues that the trial court declined jurisdiction under § 452.475 and that it was within its discretion to do so. We do not read the trial court's order as a declination of jurisdiction. The court explicitly concluded that "this court does not have jurisdiction to make a child custody determination by initial decree." In its finding number 10, the court ruled it was just and proper under the circumstances for the courts of this state to decline jurisdiction. However, the trial court did not go on to decline jurisdiction. Moreover, once the court found it had no jurisdiction, it could not "decline" jurisdiction it did not otherwise have.

In any event, even if the trial court was inartfully attempting to decline jurisdiction under the clean hands provision, its attempt failed. In order for the court to decline under this section, it would have to have found that petitioner had wrongfully taken the child from another state or have engaged in similar reprehensible conduct. Although there was evidence in the record that mother had secreted the child from the father, the court made no finding in its otherwise detailed order that this or any other conduct constituted "reprehensible conduct" or even if this was the basis for the court's finding that it would be proper to decline jurisdiction.

More importantly, however, the court did not consider whether declination would be in the best interests of the child. The "clean hands" provision is a discretionary ground for denying jurisdiction and does not supersede the best interests of the child. *Snow v. Snow,* 369 N.W.2d 581, 583 (Minn.Ct.App.1985); *O'Neal v. O'Neal,* 329 N.W.2d 666, 669 (Iowa 1983). The paramount issue is the welfare of the child rather than the tactics of the parents. It is error to decline jurisdiction on the basis of a parent's conduct without considering the best interests of the child. *Nehra v. Uh-*

lar, 168 N.J.Super. 187, 402 A.2d 264, 268-69 (N.J.Super.Ct.App.Div.1979). *See also Van Houten v. Van Houten,* 156 A.D.2d 694, 549 N.Y.S.2d 452, 454 (1989).

If § 452.475 applies to an international custody dispute in Missouri, and if the trial court had found it otherwise had jurisdiction, the trial court would have had discretion to decline jurisdiction under that provision, only if it found reprehensible conduct and that declination would be in the best interests of the child. However it did not make these findings in support of declining jurisdiction. There was no valid declination of jurisdiction by the trial court.

APPLICATION OF § 452.450 OF THE UCCJA TO THIS ACTION

Alternatively, mother argues that if § 452.450 is used to determine subject matter jurisdiction in this custody proceeding, the trial court had jurisdiction under § 452.450.1(4) because no other state had jurisdiction and it is in the best interests of the child that the Missouri court assume jurisdiction.[3] We find the trial court misapplied the law in determining it had no jurisdiction. The trial court could not, as a matter of law, treat **Saudi** Arabia as a "state" under this section. In addition, it abused its discretion in determining it had no jurisdiction without considering the best interests of the child with respect to a forum.

Subsection (4) of § 452.450.1, is the "default" or "vacuum" basis of jurisdiction, which provides:

> It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

503*503 The comment to this section in the UCCJA provides: "Paragraph (4) of subsection (a) provides a final basis for jurisdiction which is subsidiary in nature. It is to be resorted to only if no other state could, or would, assume jurisdiction under the other criteria of this section." UNIF. CHILD CUSTODY JURISDICTION ACT § 3 comment, 9 U.L.A. 145 (1968).

In its finding number 9, the trial court found that although no other state has child custody jurisdiction, "the Courts in **Saudi** Arabia do have jurisdiction" and "the policies of (the) act extend to the international area" under § 23 of the UCCJA. The term "state" as used in the UCCJA has been held not to include foreign nations where the legislature has not adopted § 23 of the UCCJA. *Minton,* 458 N.E.2d at 1294.[4] Since Missouri has not adopted § 23 of the UCCJA, it is clear that the legislature did not intend the word "state" as used in § 452.450 to include a foreign country. Because "state" does not include a foreign country under § 452.450.1(4) and because Missouri has not adopted § 23 of the UCCJA, **Saudi** Arabia as a matter of law cannot have jurisdiction either as a "state" or under the policy provisions of § 23 of the UCCJA.

Two elements of jurisdiction under § 452.450.1(4) were met. No other state had jurisdiction and the child was physically present in the state at the commencement of the proceedings.[5] In order to determine if it had jurisdiction under § 452.450.1(4), the trial court was then required to ad-

dress the best interests of the child. *Creavin v. Moloney,* 773 S.W.2d 698, 704-705 (Tex.Ct.App.1989); *In re Marriage of Arnold,* 222 Cal.App.3d 499, 271 Cal.Rptr. 624 (1990).

The determination of the best interests of the child under § 452.450.1(4) refers to a choice of a forum, not to the fitness of the parents. *See, State ex rel. Laws v. Higgins,* 734 S.W.2d 274, 278 (Mo.App. 1987) (interpreting phrase as used in § 452.450.1(2)). As an initial matter it must be determined if there is any other forum which can and will adjudicate the custody proceedings. This is significant because, if there is no other forum which can and will adjudicate custody, then the best interests of the child are served by a custody determination in the forum where the child is physically present. *Dobyns v. Dobyns,* 650 S.W.2d 701, 707 (Mo.App. 1983). *See also, Massey v. Massey,* 89 A.D.2d 566, 452 N.Y.S.2d 101, 103 (1982); *McFaull v. McFaull,* 560 So.2d 1013, 1014 (La.Ct.App.1990); *Schmidt v. Schmidt,* 227 N.J.Super. 528, 548 A.2d 195, 198-99 (N.J.Super.Ct.App.Div.1988); *Creavin,* 773 S.W.2d at 704.[6]

504*504 The fact that no other state has jurisdiction is not dispositive of the question of the availability of another forum. Although Missouri has not extended the UCCJA to the international area, the paramount concern of Missouri in a custody proceeding is the best interests of the child. These interests may require that custody be determined by the courts of a foreign country. Accordingly, a Missouri court may find that a court of a foreign country is an available forum to adjudicate custody. The trial court did conclude that the courts of **Saudi** Arabia had jurisdiction. However, this conclusion was based on a misinterpretation of law and not on a determination of which forum was in the best interests of the child after considering relevant factors.

Although relevant factors will vary on a case by case basis, in this case the primary inquiry is whether there is an available foreign forum which would have jurisdiction substantially in accord with the principles in the UCCJA. *Suarez Ortega,* 465 So.2d at 609; *Klont,* 342 N.W.2d at 550-51. In determining whether a foreign forum is available, consideration must be given to whether the foreign forum could and would adjudicate the controversy. *See, e.g.* § 452.470.3 (UNIF. CHILD CUSTODY JURISDICTION ACT § 7(d), 9 U.L.A. 233 (1968)) (applying these factors in the *forum non conveniens* situation). *See also, Creavin,* 773 S.W.2d at 704 (Ireland was not an available forum where, because absolute divorce cannot be obtained in Ireland, the courts in Ireland do not have any power over the children of a marriage). Another factor is whether minimum due process, including notice and the opportunity to be heard, will be accorded in the foreign proceeding. *See Schmidt,* 548 A.2d at 198; *Klont,* 342 N.W.2d at 550-51; *Al-Fassi v. Al-Fassi,* 433 So.2d 664, 666 (Fla.Dist.Ct.App.1983).[7] A further factor is whether the foreign forum will be guided by the best interests of the child in awarding custody. *See, Al-Fassi,* 433 So.2d at 668. If there is an available foreign forum meeting this criteria, then the court should consider which forum has the strongest basis for jurisdiction under § 452.450.1.

The trial court did hear evidence relating to the child's ties to and home in **Saudi** Arabia, but there was no evidence relating to child custody laws in **Saudi** Arabia, whether courts there could and would adjudicate the controversy, if minimum due process would be accorded all parties to the proceedings, or if the best interests of the child would guide the custody determination. It did not make any findings on the best interests of the child with respect to a forum. Without considering these factors and making a determination of the best interests of the child, the court ex-

ceeded its authority in finding that it had no jurisdiction under § 452.450 and that the courts of **Saudi** Arabia had jurisdiction over this child custody proceeding. Likewise, without evidence on these factors the record is insufficient for us to reach the question of whether the trial court does or does not have jurisdiction under this section.

Although the trial court exceeded its authority in determining it had no jurisdiction on the record before it, the trial court is not prohibited from reexamining the question of jurisdiction on a proper record. Such a record would include evidence on whether there is another available forum. Such an inquiry would encompass consideration of the following factors:

1. Whether that forum would have jurisdiction substantially in accord with the principles of the UCCJA.

2. If that forum could and will adjudicate the custody matter.

505*505 3. Whether that forum would accord minimum due process including notice and the opportunity to be heard.

4. Whether that forum would decide custody on the best interests of the child.

If there is another available forum then the court should consider which of the available forums has the strongest basis for jurisdiction in accordance with the principles in § 452.450.1.

It is mother's burden, as the proponent of jurisdiction, to establish a *prima facie* basis of jurisdiction. *State ex rel. Laws v. Higgins,* 734 S.W.2d 274, 277 (Mo. App.1987). Although mother did not make that record at the first hearing below, she is not precluded from doing so in a future proceeding. *Kilgore v. Kilgore,* 666 S.W.2d 923, 932-34 (Mo.App.1984). The prior hearing in the trial court proceeded under a misunderstanding of law on the part of all participants due to the lack of judicial precedent governing jurisdiction of international custody disputes in a state which had not adopted the international provisions of the UCCJA.[8] The best interests of the child require that the trial court determine where jurisdiction properly lies and that a court with jurisdiction will adjudicate custody.

In determining the best interests of the child with respect to forum, evidence relating to the best interests of the child with respect to custody is irrelevant. Such evidence is only appropriate in a hearing to determine custody. Furthermore the jurisdictional issue is limited to determining whether another forum is available with jurisdiction which will determine the child custody issue in accord with minimum due process and award custody on the basis of the best interests of the child. Collateral matters relating to the culture, mores, customs, religion, or social practices in that other forum are not only irrelevant to the question of jurisdiction but also such cultural comparisons have no place in the ultimate custody award. *See e.g. Waites v. Waites,* 567 S.W.2d 326, 333 (Mo. banc 1978).

The provisional writ of prohibition is made absolute.

SATZ, J., concurs.

SMITH, J., dissents in separate attached opinion.

SMITH, Judge, dissenting.

I respectfully dissent.

Some additional exposition of the facts which were either not disputed or which were supported by evidence and supportive of the trial court's order is warranted.

While the parties were married in St. Louis County they never resided in Missouri during the marriage. The return of mother and daughter to St. Louis for three or four months in 1986 was to enable father to obtain the necessary visas and other documentation for the movement of mother and daughter to **Saudi** Arabia. St. Louis was not intended to be the domicile for either. During the marriage mother converted to the Islamic faith. In preparation for that conversion she studied the religious documents and tenets of that faith including its doctrines concerning the status and treatment of women. During the time the daughter lived in **Saudi** Arabia, nearly five years, mother lived with her for approximately six months, and did not reside with the child after the child was 2 and ½ years old. The circumstances under which the mother left **Saudi** Arabia were sharply contested. Her testimony placed the cause upon physical and/or mental abuse by the father. His testimony indicated marital problems and her dissatisfaction with social conditions involving women in that country. The court was free to credit the father's testimony. The daughter speaks only Arabic and is Islamic by religion. She attends school in **Saudi** 506*506 Arabia. She is, in addition to her American citizenship by virtue of her birth here, a **Saudi** citizen by virtue of her father's citizenship.

After mother's final return to this country, father visited her on several occasions while she was hospitalized for mental problems. He did not bring the daughter with him on those visits. There is evidence in the record that these hospitalizations followed suicide attempts. There is also evidence that husband attempted to reconcile on several occasions. These attempts were unsuccessful. Father's marriage to a second wife is permissible under the laws of his country and that was known to mother prior to her marriage to father.

Father came to St. Louis with the daughter in order to allow a visitation with the mother and for the family to return to **Saudi** Arabia. Mother arranged for this flight after representing her intention to reconcile. At the time of the return a petition for dissolution of marriage, filed by the mother, was pending in St. Louis county. The original petition sought custody to be placed with father with reasonable visitation for the mother. Father had received a copy of that petition. The record does not reflect that father received a copy of the amended petition requesting custody be placed in mother. Mother met father and daughter at the airport. They proceeded to a hotel arranged for by mother. A mix-up occurred with the keys to father's room and he returned to the lobby to obtain the correct keys. During his absence mother took the daughter and left in a taxicab leaving no indication of her destination. Father went to the home of mother's mother where he was promptly served with the present petition for dissolution seeking custody in the mother,

the prior petition having been dismissed by mother shortly prior thereto. Mother then obtained, *ex parte,* an order of temporary custody and an adult abuse order preventing father from contacting mother or daughter. Mother subsequently refused to produce the child until a body attachment was issued.

Father is employed full-time by **Saudi** Arabia Air Lines. He is, pending resolution of this matter, on "open vacation" from that company. Mother is unemployed. She has in the past been a student at several different educational institutions. Her support comes from Social Security disability benefits arising from her mental problems and includes benefits she obtained for her daughter after she took custody at the hotel. The record does not indicate whether she is entitled to and is receiving the benefits during the pendency of this matter while the child is in foster care. Mother professes that the mental disability no longer exists but that she remains entitled to the benefits so long as she maintains her status as a student. Mother receives continuing medical treatment as a manic depressive.

Initially, I am unable to concur in the conclusion that the trial court did not decline jurisdiction under the provisions of § 452.475, RSMo 1986. The court specifically stated in paragraph 10 of its order that it was declining jurisdiction. The language utilized was "It is *just and proper under the circumstances* for the Courts of this state to decline to exercise jurisdiction." (Emphasis supplied). The statute involved provides that the "court may decline to exercise jurisdiction if this is *just and proper under the circumstances.*" (Emphasis supplied).[1] I find it more than coincidental that the court utilized the exact statutory language found in § 452.475 in expressing its declination of jurisdiction. It is hypertechnical to hold that the failure to expressly cite the statute in paragraph 10 establishes non-reliance on that statute in declining jurisdiction when the language utilized to decline jurisdiction is taken verbatim from the statute. Furthermore the court specifically referred to § 452.475 in the following paragraph where it stated it did not have jurisdiction. Section 452.475 deals exclusively with *declination* of jurisdiction not absence of jurisdiction. I cannot accept that the trial court did not recognize 507*507 that. The court's finding that "pursuant to §§ 452.450 and 452.475, RSMo, this Court does not have jurisdiction to make a child custody determination by initial decree" was, in my opinion, simply a shorthand means of invoking both statutes thereby expressing its finding that it lacked jurisdiction *and* was declining jurisdiction. This is reinforced by the fact that the matter, as it came before the court, was on the motion of the father to dismiss the request for custody on the basis of fraud and reprehensible conduct, the latter of which is the ground for declination of jurisdiction set forth in the statute. The trial court regarded this motion as a request to dismiss for lack of jurisdiction and much of the evidence adduced at the hearing dealt with that subject matter. The issue was before the court and the court's order was, in my opinion, based at least in part, on its finding of "reprehensible conduct" under § 452.475.

Such a finding is fully supported by the evidence. Father was lured into the jurisdiction under a misrepresentation that mother wanted to reconcile and return to **Saudi** Arabia. The child was brought so mother and child could visit. The only document concerning custody of which the father was apparently aware was mother's initial petition for dissolution requesting custody in the father. Within an hour after arrival in St. Louis mother spirited the child away without advice as to the child's location. Within a matter of hours the new petition for dissolution seeking custody

in the mother was served on the father when he sought to locate the child through mother's mother. The trial court could well conclude that the actions of the mother were the product of a predetermined scheme to fraudulently entice the father into the country, abduct the child in his custody, and obtain personal service of her theretofore undisclosed petition seeking custody. The six year old child was removed surreptitiously from the custody of the only person she knew in this country, deprived of the only person with whom she could effectively communicate (mother's knowledge of Arabic was, by her own admission, rudimentary), and kept in this incommunicado state from September 20 until November 4 when she was surrendered to the juvenile court pursuant to the body attachment. Such conduct can well be classified as "reprehensible".

Nor am I troubled by the failure of the court to make specific findings of reprehensible conduct. The statute does not require such findings and our usual rules of review of a trial court's decision is to determine if the evidence supports the holding the court has made. Here it does. If the absence of findings constitutes a problem, however, the proper recourse is to return the matter to the trial court for the entry of the requisite findings, in this case whether the mother's conduct meets the requirements of declination of jurisdiction under § 452.475 and whether that is the basis of the court's order.

Further, I am unable to conclude that the court was in error in determining that it lacked jurisdiction. The court made a very specific set of findings in support of its conclusion that it lacked jurisdiction.[2] These holdings closely track the provisions 508*508 of § 452.450 which establish the circumstances under which the court should exercise jurisdiction. No challenge is made to any of these findings. The only attacks made are (1) that the procedures in **Saudi** Arabia will not give the mother a fair chance to obtain custody and (2) that the social climate, mores, and religious atmosphere in **Saudi** Arabia makes custody in the mother in this country "in the best interest of the child." The majority in upholding attack (1) concludes that the mother must be given an opportunity to establish that the "best interests of the child" require that the determination of custody be made in this state. She has, of course, had that opportunity and did not make the showing. I do not find the authorities relied upon by the majority to support this conclusion persuasive. Most involve situations where the child had been within the state for some period of time and had some connection with the state. The forum state had available the information of the child's previous care and treatment necessary to address the custody issue. That is not true here. None of the cases encompassed a situation such as this where the child had no recent connection at all with the state, was present therein on a transitory basis because of the misrepresentations of the parent seeking custody where the parent seeking custody had not functioned as a parent for over three years, and the parent seeking custody abducted the child from the only custodial parent.

Nowhere in any of the documents filed in the trial court or in this court has the mother asserted any basis for her conclusion that the best interests of the child warrant custody in her or that the courts of this state are in a position to make a determination of the best interests of the child. Nor does the record establish that it is in the "best interest of the child" that this state assume jurisdiction. As stated by the guardian ad litem to this court: "The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maxi-

mum rather than minimum contact with the State. *State of Missouri ex rel. June Lloyd Laws v. Higgins,* 734 S.W.2d 274 (Mo.App.1987)." As the court specifically found "there is not available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships." There is nothing in the record to indicate any error in the court's findings 1 through 9, and mother makes no challenge to those findings. I am unable to conclude that any basis exists for a determination that it is in the best interest of the child that a court in this state assume jurisdiction nor can I perceive any evidence not heretofore provided which would support such a determination.

As to attack (2) I do not believe it provides any basis for exercise of jurisdiction in this state. In the first place the mother offered only hearsay evidence of the social circumstances in **Saudi** Arabia, which was rejected by the trial court. But more importantly it is not the concern of the courts of this country to evaluate the socio-economic status of persons having dual citizenship living in foreign countries. The child here knows no culture other than that of **Saudi** Arabia and knows no family other than that of her father. She was taken to **Saudi** Arabia at a young age by her mother who knew or should have known of that nation's culture. In this court the guardian ad litem, an experienced and respected member of the bar, has stated that the child herself is very bright for her age, is well behaved and shows every evidence of good parenting, home training and care. He, further, expresses his support for the court's order. Nothing in the mother's history indicates that she would provide any better parenting than that provided by the father. To punish the father because of the social environment of his country simply because we disapprove of that environment, and to uproot the child from the only environment and family she has ever known because of that same disapproval, is totally beyond the function of the courts of this state.

I find nothing in this record to warrant a finding that the court abused its discretion or erred in its application of the law in the 509*509 order which it has entered. I would quash the preliminary writ.

[1] This section reads:

§ 23. [International Application]

The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

UNIF. CHILD CUSTODY JURISDICTION ACT § 23, 9 U.L.A. 326 (1968).

[2] "The UCCJA deliberately provided for jurisdictional flexibility to insure procurement of its dominant concern, the best interests of children. Some stability and certainty as to child custody jurisdiction was sacrificed where the best interests of the child presumably call for an assumption of jurisdiction by a state other than the home state." Foster, *Child Custody Jurisdiction: UCCJA and PKPA,* 27 N.Y.L.SCH.L.REV. 297, 302 (1981).

[3] Mother does not attack the trial court's findings 1-8 which would support a finding that the trial court did not have jurisdiction under § 452.450.1(1)-(3).

[4] Jurisdictions which have adopted § 23 take different approaches to the question of whether or not the word "state" includes a foreign country. *See e.g. Klein v. Klein,* 141 Misc.2d. 174, 533 N.Y.S.2d 211 (N.Y.Sup.Ct.1988) (Israel not a "state" within the definition of the statute); *Massey v. Massey,* 89 A.D.2d 566, 452 N.Y.S.2d 101 (1982) (Quebec, Canada not a state); *In re Marriage of Arnold,* 222 Cal.App.3d 499, 271 Cal.Rptr. 624 (1990) (Canada a "state" because UCCJA has international application). In those jurisdictions which have adopted § 23, but do not include a foreign country in the definition of "state," deference to the laws of other nations under the UCCJA is decided on the basis of whether child custody law in the foreign country is similar to the UCCJA, *see, Lotte U. v. Leo U.,* 128 Misc.2d 896, 491 N.Y.S.2d 581 (N.Y.Fam. Ct.1985) (Jurisdiction of Switzerland not recognized because based solely on domicile of father); *Suarez Ortega v. Pujals de Suarez,* 465 So.2d 607, 609 (Fla.Dist.Ct.App.1985) (Mexico would exercise jurisdiction in accord with principles embodied in UCCJA); *Klont v. Klont,* 130 Mich.App. 138, 342 N.W.2d 549, 550-51 (1983) (West Germany exercised jurisdiction in accord with principles of UCCJA), and whether basic due process is observed. *Garza v. Harney,* 726 S.W.2d 198, 200 (Tex.Ct.App.1987).

[5] *See* § 452.450.2 (UNIF. CHILD CUSTODY JURISDICTION ACT § 3(b), 9 U.L.A. 144 (1968)). "Physical presence of the child may also be sufficient for a residual jurisdiction provided by section 3(a)(4) of the Act to assure the parties of a forum when no other court has or is prepared to exercise jurisdiction under the two main criteria of the Act." Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws,* 22 VAND. L.REV. 1207, 1230 (1969). *See also,* Blakesley, *Child Custody Jurisdiction and Procedure,* 35 EMORY L.J. 291, 300 (1986).

[6] Contrary to the assertion in the dissent, some of these cases involve situations in which the child had been in this country on a transitory basis for a very short time. In *Schmidt* the child had been living in West Germany, and was taken to New Jersey without notice to his father by his mother, who filed a custody petition the day they arrived in New Jersey. In *Massey* the child had been living in Canada with her mother. She came to New York to visit her father and he refused to return her. The New York custody proceeding was commenced 10 days after her arrival in New York.

[7] These cases and the previous cases cited in this paragraph are all cases arising in jurisdictions in which the UCCJA has international application. Although Missouri has not adopted UCCJA § 23, if a Missouri court is going to recognize foreign country jurisdiction under a best interests of the child analysis, the minimum standards used in these other jurisdictions should apply.

[8] Mother apparently proceeded under the premise that the UCCJA did not apply because § 23 had not been adopted in Missouri and that therefore § 79 Restatement Second, Conflict of Laws would apply under which child's mere physical presence in the state and/or presence of the parents in the state was sufficient grounds for jurisdiction. Although we have rejected it, her position that prior law would govern was not without some logical support.

[1] Nothing in the statute conditions that declination on a determination that the best interests of the child require adjudication in this forum.

[2] "1. This state is not the home state of the child and was not the home state of the child when this proceeding commenced on September 20, 1991.

"2. This state had not been the child's home state within six months prior to the commencement of this proceeding.

"3. The child does not have a significant connection with this state.

"4. There is not available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

"5. The child has not been abandoned.

"6. The child has not been mistreated or abused.

"7. The child has not been threatened with mistreatment or abuse.

"8. The child is not being neglected and has not been neglected.

"9. Although no other state has child custody jurisdiction and no other state has declined to exercise child custody jurisdiction, the Courts in **Saudi** Arabia have jurisdiction. Although not enacted in this State, Section 23 of the Uniform Child Custody Jurisdiction Act provides that `the general policies of (the) Act extend to the international area.'

"10. It is just and proper under the circumstances for the Courts of this state to decline to exercise jurisdiction."

NEBRASKA

CATEGORY: Shariah Marriage Law

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: Iraq

URL:
http://scholar.google.com/scholar_case?case=10117899093099505305&q=%22islamic+law%22&hl=en&as_sdt=1000000004

579 N.W.2d 561 (1998)

6 Neb. App. 978

STATE OF NEBRASKA, APPELLEE, V. LATIF AL-HUSSAINI, APPELLANT.

No. A-97-1129.

Court of Appeals of Nebraska.

May 5, 1998.

562*562 Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., Lincoln, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown, Lincoln, for appellee.

HANNON, SIEVERS, and MUES, JJ.

MUES, Judge.

Latif Al-Hussaini was convicted of first degree sexual assault on a child, in violation of Neb.Rev.Stat. § 28-319 (Reissue 1995). He was sentenced to an indeterminate sentence of 4 to 6 years' imprisonment, with credit for 13 days spent in custody. The sole issue on appeal is whether or not the sentence imposed is excessive.

BACKGROUND

Al-Hussaini is a native of Iraq who escaped from his country during the Gulf War and has lived in the United States since 1995. He speaks virtually no English. On November 9, 1996, Al-Hussaini, age 34, participated in an Islamic ceremony in which he was "married" to a 13-year-old girl. There is no dispute that the victim was given away in marriage by her father. After the ceremony, the victim was taken to her new home with Al-Hussaini where intercourse immediately took place. The victim stated she did not consent to intercourse with Al-Hussaini. The victim's sister, age 14, was also "married" on the same day to another Iraqi man.

According to Al-Hussaini, he had been engaged to the girl for a month, there was a large party and celebration on the marriage day, and the girl was happy and continued to be happy. He took her to school each day until November 15, 1996, when she did not return home, and Al-Hussaini was arrested. Al-Hussaini stated that he is not angry at the girl and feels that he did not do anything wrong, as arranged marriages with young girls are customary in his religion and native country. He plans to divorce her in accordance with the Islamic religion.

Al-Hussaini has consistently claimed that his actions are legal and proper under **Islamic law** and that he had no idea that his actions violated the law in this country. He stated that he now understands that the marriage was not legal in the United States.

Al-Hussaini was charged with first degree sexual assault on a child, a Class II felony. § 28-319(2). He was charged with sexually penetrating a female less than 16 years of age between November 9 and November 15, 1996. On July 25, 1997, he pled guilty to the charge.

On September 23, 1997, Al-Hussaini was sentenced to an indeterminate sentence of 4 to 6 years' imprisonment, with credit for 13 days served. He timely appealed his sentence to this court.

ASSIGNMENT OF ERROR

Al-Hussaini alleges as his sole assigned error that his sentence is excessive.

563*563 STANDARD OF REVIEW

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Thomas,* 6 Neb.App. 510, 574 N.W.2d 542 (1998). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

ANALYSIS

Neb.Rev.Stat. § 28-105(1) (Reissue 1995) provides that the maximum penalty for a violation of a Class II felony is 50 years' imprisonment. Because Al-Hussaini's sentence is within the statutory limits, he must show an abuse of discretion, i.e., that the sentencing court's reasons or rulings are clearly untenable and deprive him of a substantial right and a just result.

Al-Hussaini argues that the sentencing court abused its discretion in denying him probation because probation is preferred to a sentence of incarceration. We note that Al-Hussaini's prior record is of little consequence.

The State points out that while Al-Hussaini attempts to lessen his culpability by claiming that the acts were sanctioned by his religion, there is evidence in the presentence investigation report that such a marriage would not be universally accepted in Iraq and, in fact, was highly unusual and would be considered wrong in the majority of Iraqi communities.

We recognize that this is an unusual situation. To some degree, Al-Hussaini is a victim of laws with which he has little, if any, familiarity and which are, according to him, vastly different from the customs and laws of his native country. But, as the district court observed when it imposed sentence, there is really only one victim of this crime and that is the 13-year-old child with whom Al-Hussaini had sexual intercourse without her consent. The district court observed that putting Al-Hussaini on probation would depreciate the seriousness of the offense, promote disrespect for the law, and minimize the substantial harm the victim has suffered.

CONCLUSION

The sentence imposed on Al-Hussaini is well within statutory limits. In view of the seriousness of the offense, we conclude that the district court did not abuse its discretion in sentencing Al-Hussaini, and its judgment is therefore affirmed.

AFFIRMED.

CATEGORY: Child Custody

RATING: Relevant

TRIAL: TCSI

APPEAL: ASCNA

COUNTRY: Nebraska

URL: http://scholar.google.com/scholar_case?case=9625446362878384893&q=%22islamic+law%22&hl=en&as_sdt=1000000004

MEHRUZ KAMAL, APPELLEE, V. SOHEL MOHAMMED IMROZ, APPELLANT.

No. S-08-491.

Supreme Court of Nebraska.

January 30, 2009.

915*915 Adam E. Astley and Virginia A. Albers, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., Omaha, for appellant.

Kathleen M. Schmidt, Omaha, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Sohel Mohammed Imroz appeals the decision of the Douglas County District Court, which entered a decree of dissolution ending Imroz' marriage to Mehruz Kamal. The court granted sole legal and physical custody of the couple's minor son to Kamal, with liberal rights of visitation to Imroz. The district court also divided the couple's assets and debt, ordered Imroz to pay child support, and prohibited either party from taking their son out of the United States without written consent of the other. Imroz appeals. We affirm the decision of the district court.

BACKGROUND

Imroz and Kamal were married on May 25, 2003, in Jamaica, New York. The marriage was arranged by the parents of Imroz and Kamal, and the couple was married pursuant to **Islamic law**. Kamal then moved to Omaha, Nebraska, to live with Imroz. The couple's son was born on July 28, 2004. Kamal moved out of her husband's apartment in December 2004. She subsequently moved in with her parents, who had immigrated to the United States. The parties continued to live separately until July 26, 2006, when Kamal filed for divorce.

At that time, Kamal also filed a motion for an ex parte restraining order and for custody of the child. Kamal made a number of allegations in her request for a restraining order, including an allegation that the child was in physical and emotional danger from Imroz. Kamal further alleged that Imroz frequently became angry and aggressive, that Imroz had withheld information about his baldness and general health prior to the marriage, and that Imroz had not provided for her sufficiently during the course of the marriage.

Kamal further alleged that Imroz locked her in the apartment during the day while he was at work. Kamal alleged that Imroz shook her and that his "arrogant and aggressive" attitude made it impossible for her to deal with him in person. Kamal alleged that Imroz was an Islamic fundamentalist and that he desired to raise their son as such. Kamal testified at the hearing that she was concerned Imroz would take their son to Bangladesh and 916*916 keep him there and that Imroz had previously taken their son out of the state without telling Kamal or getting her permission.

Imroz denied the allegations. He testified that he gave Kamal a spare set of keys immediately after she moved in to the apartment and that it would be impossible to lock someone inside. Imroz testified that he willingly drove Kamal wherever she wanted to go during the time they had only one vehicle. Imroz also testified that he drove Kamal's parents while they were visiting, and later when they needed to apply for welfare. Imroz also testified that Kamal had made communication regarding their son very difficult because she insisted on communicating only through e-mail.

Imroz testified that he is a practicing Muslim, but that he is respectful of other religions and participates in an interfaith group. Imroz also asked that he be allowed to take his son to Bangladesh to visit the child's great-grandmother. A clinical psychologist, who testified on Imroz' behalf, stated that it was his belief Imroz is a strongly attached father who has a good bond with his son.

The undisputed facts were that Kamal currently worked from home most days and that she had been the primary care-giver for her son since his birth. Kamal is an international student who is currently being sponsored by her mother for the purpose of retaining her student visa. Imroz works full time and is a U.S. citizen. Kamal requested sole custody of their son; Imroz requested that they be given joint custody or, in the alternative, that he be awarded sole custody. The parties both admitted that there had been a great deal of tension over visitation and that as a result, their attorneys had been required to get involved on more than one occasion.

In its decree, the trial court found that both Kamal and Imroz were fit persons to have custody, but that because of the conflict between the parents, joint custody was not in their son's best interests. The court further found that because Kamal had a flexible work schedule and could spend most of her time with their son, she should be awarded sole legal and physical custody with liberal rights of visitation to Imroz. The district court ordered Imroz to pay $815 per month in child support, required Imroz to maintain insurance for the child, and made equitable division of the marital estate. Finally, the district court ordered that Kamal apply to the district court before moving out of the state and required both parties to get the written consent of the other before taking their son out of the country.

ASSIGNMENTS OF ERROR

Imroz contends the district court erred by (1) failing to grant joint custody to the parties, (2) failing to allocate adequate parenting time to Imroz, (3) failing to calculate Imroz' child custody obligation based on a joint custody calculation, and (4) prohibiting Imroz from traveling to Bangladesh with his son.

ANALYSIS

PARENTING ACT DOES NOT REQUIRE JOINT CUSTODY

We first address Imroz' argument that the district court erred when it failed to grant joint custody. Neb.Rev.Stat. § 42-364(3) (Reissue 2008) states that

[c]ustody of a minor child may be placed with both parents on a joint legal custody or joint physical custody basis, or both, (a) when both parents agree to such an arrangement in the parenting plan and the court determines that such an arrangement is in the best interests of the child or (b) if the court specifically 917*917 finds, after a hearing in open court, that joint physical custody or joint legal custody, or both, is in the best interests of the minor child regardless of any parental agreement or consent.

A parenting plan developed by the court is required to "[a]ssist in developing a restructured family that serves the best interests of the child by accomplishing the parenting functions...."[1] Section 43-2929 lists the determinations the trial court is to make when developing the parenting plan, including legal and physical custody of each child; apportionment of parenting time, visitation, and holidays; location of each child during the week, weekend, and given days during the year; and procedures for making decisions regarding the day-to-day care and control of the child.

Imroz contends that § 43-2929 requires the district court to devise and apply a plan that involves both parents to the maximum amount possible. Imroz' interpretation of § 43-2929 would require the district court to enforce a joint custody agreement or, in the alternative, to grant custody to

the parent most likely to foster a relationship with the noncustodial parent. In the present case, Imroz contends that under those guidelines he should be granted primary custody of the child.

The current Parenting Act states:

The best interests of the child require:

(1) A parenting arrangement and parenting plan or other court-ordered arrangement which provides for a child's safety, emotional growth, health, stability, and physical care ...;

....

(3) That the child's families and those serving in parenting roles remain appropriately active and involved in parenting with safe, appropriate, continuing quality contact between children and their families when they have shown the ability to act in the best interests of the child and have shared in the responsibilities of raising the child;

(4) That even when parents have voluntarily negotiated or mutually mediated and agreed upon a parenting plan, *the court shall determine whether it is in the best interests of the child for parents to maintain continued communications with each other and to make joint decisions in performing parenting functions as are necessary for the care and healthy development of the child.*[2]

(Emphasis supplied.)

In contrast, § 42-364(2) (Reissue 2004), in defining best interests of the child, stated in relevant part that the court

shall consider the best interests of the minor child which shall include, but not be limited to:

(a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;

(b) The desires and wishes of the minor child if of an age of comprehension, regardless of chronological age, when such desires and wishes are based on sound reasoning;

(c) The general health, welfare, and social behavior of the minor child; and

(d) Credible evidence of abuse inflicted on any family or household member.

[1] A commonsense reading of the revised version of § 42-364,[3] as well as § 43-2923, indicates that the district court still has discretion in determining what the best interests of the child are. The current 918*918 § 43-2929 mandates that a "parenting plan *shall* serve the best interests of the child," and the current § 43-2923 mandates that court *"shall* determine whether it is in the best interests of the child for parents to maintain continued communications with each other." (Emphasis supplied.) In essence, the current §§ 42-364(3) and 43-2923 require the district court

to devise a parenting plan and to consider joint legal and physical custody. The statutes do not *require* the district court to grant equal parenting time or joint custody to the parents if such is not in the child's best interests.

[2] In the present case, the trial judge made a specific finding that Kamal had been the child's primary caregiver and that her flexible work schedule made it possible for her to be with her son nearly full time. The district court also found that because the parents were unable to communicate face-to-face and because there is a level of distrust between the parents, joint decisionmaking by the parents was not in the child's best interests. This decision is consistent with the mandatory statutory language requiring the court to determine whether it is in the best interests of the child for the parents to maintain continued communication.[4] The district court did not fail to apply the standards of the current Parenting Act correctly, nor did it abuse its discretion in its grant of parenting time to Imroz. Imroz' first assigned error is without merit.

DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN GRANTING CUSTODY TO KAMAL

[3-5] Imroz next argues that Kamal has been uncooperative in allowing visitation and therefore he should be granted sole custody because he is more likely to foster a meaningful relationship with the noncustodial parent. While we review child custody determinations de novo on the record, the trial court's decision will normally be upheld absent an abuse of discretion.[5] As we have recognized above, the current Parenting Act differs very little from the previous statutory scheme, and therefore case law addressing a change in custody is still generally applicable. The fact that one parent might interfere with the other's relationship with the child is a factor the trial court may consider in granting custody, but it is not a determinative factor.[6] And while interference with the other parent's visitation rights can arise to a material change in circumstances sufficient to alter a parenting plan, there is no indication at present that Kamal will ignore the trial court's order.[7] We find the district court did not abuse its discretion in granting custody to Kamal.

The same principles apply to Imroz' contention that the district court did not award him adequate parenting time. The parenting plan grants Imroz visitation every other weekend, every Wednesday from 6 p.m. to Thursday at 6 p.m., and 10 consecutive days in the summer. The district court also outlined the visitation schedule for holidays. The district court made it clear that the division of parenting time between the parties was devised in the best interests of the child.

Because we find that the district court did not commit an abuse of discretion in its 919*919 division of parenting time, we affirm the order of the district court. Imroz' assignment of error as to parenting time is without merit. We are therefore not required to address the issue of child support, as Imroz admitted that the district court's findings as to child support were correct if custody remained with Kamal.

DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT RESTRICTED PARTIES' ABILITY TO REMOVE CHILD FROM COUNTRY

[6] Imroz finally argues that the district court erred when it restricted his ability to travel with his child outside of the country. In its order, the district court forbade both parties from taking the child out of the country without written permission from the other parent. Imroz stated that he wishes to take his child to Bangladesh to visit family, specifically the child's great-grandmother.

The only finding the district court made with respect to its order that Imroz not take his child out of the country without Kamal's written permission was that Kamal feared Imroz would take the child to Bangladesh and not return. Kamal's fear was supported by the fact that Imroz once took the child out of the state without informing her.

The prohibition is not absolute, however, and Kamal expressed her willingness to allow the child to travel outside the country when he is a little older. We cannot say the trial court abused its discretion in this matter. Imroz' final assignment of error is also without merit.

CONCLUSION

We find that the district court correctly interpreted the standards of the current Parenting Act. We also find that the district court did not abuse its discretion when devising the parenting plan and by granting custody of the parties' child to Kamal. Nor did the court abuse its discretion by restricting either party from taking the child out of the country without the written consent from the other parent. We therefore affirm the district court's order.

AFFIRMED.

[1] Neb.Rev.Stat. § 43-2929(1)(a) (Reissue 2008).

[2] Neb.Rev.Stat. § 43-2923 (Reissue 2008).

[3] § 42-364 (Reissue 2008).

[4] See, also, *Coffey v. Coffey,* 11 Neb.App. 788, 661 N.W.2d 327 (2003).

[5] *Maska v. Maska,* 274 Neb. 629, 742 N.W.2d 492 (2007).

[6] *Id.*

[7] See, *Hibbard v. Hibbard,* 230 Neb. 364, 431 N.W.2d 637 (1988); *Coffey, supra* note 4.

NEW HAMPSHIRE

CATEGORY: Shariah Marriage Law

RATING: Relevant

TRIAL: TCSI

APPEAL: ACSNA

COUNTRY: Lebanon

URL: http://scholar.google.com/scholar_case?case=14080058251523713476&q=%22islamic+law%22&hl=en&as_sdt=4000000004

153 N.H. 226 (2006)

IN THE MATTER OF SONIA RAMADAN AND SAMER RAMADAN

No. 2004-727

Supreme Court of New Hampshire

Argued January 11, 2006

Opinion Issued February 14, 2006

227*227 *Tober Law Offices, P.A.,* of Portsmouth (*Stephen L. Tober* and *Tara C. Schoff* on the brief, and *Ms. Schoff* orally), for the petitioner.

Coughlin, Rainboth, Murphy & Lown, P.A., of Portsmouth (*Timothy C. Coughlin* on the brief and orally), for the respondent.

DALIANIS, J.

The respondent, Samer Ramadan, appeals an order of the Brentwood Family Division (*Taube,* J.) adopting the proposed divorce decree and uniform support order of the petitioner, Sonia Ramadan. We affirm.

The record supports the following facts. The parties were married in Tripoli, Lebanon on December 5, 1986. They have three children. Prior to their marriage, on November 27, 1986, the respondent and the petitioner, as represented by her father, entered into a "marriage contract"

promising a deferred "dower" payment of 250,000 Lebanese liras. The respondent was, at the time, a resident of the United States, and the couple settled in Massachusetts shortly after they were married.

The parties remained in Massachusetts from 1986 to 1990, and thereafter lived in Texas from 1991 to 1992. In 1992, they moved to Lebanon and resided there until 1997. They moved to Egypt in 1998, and returned to the United States in 1999, settling in New Hampshire. The petitioner filed for divorce on October 14, 2003, asserting that irreconcilable differences had led to the irremediable breakdown of the marriage.

The respondent claims that on October 13, 2003 — the day before the petitioner filed for divorce in New Hampshire — he initiated a divorce under **Islamic law** by declaring "I divorce you" three times in succession in the presence of the petitioner. The respondent also claims that he telephoned an attorney in Lebanon on the same day and declared, with two witnesses listening, that he had divorced his wife. On October 18, 2003, the respondent traveled to Lebanon to see his attorney and "sign the necessary papers."

The trial court issued an Order of Notice on October 30, 2003. The respondent returned to New Hampshire on December 12, 2003, and was 228*228 served in hand on the same day. On December 18, 2003, a religious magistrate in Lebanon issued a decree that the parties were divorced on October 13, 2003, pursuant to the respondent's repudiation of his wife. The respondent moved to dismiss the petition for divorce in New Hampshire, asserting that the trial court lacked jurisdiction over the divorce in light of the Lebanese decree.

On January 30, 2004, the trial court held a hearing on the respondent's motion to dismiss. The trial court, finding that "no valid judicial process was instituted by [the] Respondent in Lebanon prior to the date the Petitioner filed her Petition for Divorce," denied the respondent's motion on February 4, 2004, and entered a temporary decree awarding the petitioner sole legal custody and primary physical custody of the parties' children, monthly child support and alimony, and certain personal and real property. The temporary decree also prohibited the respondent from speaking negatively about the petitioner or referring to her "as a Muslim/Muslim woman" within the hearing of the children. The respondent thereafter filed motions to reconsider, to stay the temporary order, and to supplement the record. The trial court denied the motions.

The respondent returned to Lebanon in 2004 and, through his attorney, informed the trial court of his intent to ignore its orders because he claimed lack of subject matter jurisdiction. On August 20, 2004, a notice of conditional default was entered against the respondent for failure to answer interrogatories. After he failed to appear for a pre-trial conference on September 2, 2004, the trial court noted that the respondent had refused to participate in discovery and scheduled a final hearing for September 16, 2004. The respondent did not appear for the final hearing, and the trial

court entered a divorce decree approving and incorporating the petitioner's proposed decree and uniform support order without amendment.

On appeal, the respondent raises the following issues: (1) that the trial court's refusal to dismiss the divorce petition for lack of subject matter jurisdiction was error; (2) that principles of comity required dismissal of the divorce petition; (3) that the trial court's refusal to consider additional documentary evidence of the Lebanese divorce decree was error; (4) that the trial court erred by adopting the petitioner's proposed divorce decree; (5) that the trial court decreed an inequitable property division without stating its reasoning; and (6) that the trial court's temporary order prohibiting the respondent from referring to his wife as a Muslim woman in the presence of their children was an unconstitutional abridgment of his rights. The petitioner claims that the respondent continues to refuse to abide by the trial court's temporary order and urges this court to dismiss his appeal.

229*229 We first address the petitioner's request that we dismiss the respondent's appeal because he refused to comply with the trial court's orders and was accordingly found to be in contempt. We have held:

[I]n limited circumstances, an appeal in a civil case may be dismissed if the appellant has failed to comply with an order of the trial court that relates directly to the issues raised by the appellant on appeal, and the issue of contempt is not being appealed. When a party has consciously and deliberately disregarded a trial court order that has direct bearing upon an issue for which that party seeks relief, we may exercise our discretion to dismiss.

DeMauro v. DeMauro, 147 N.H. 478, 482 (2002). In the instant case, the respondent has appealed the trial court's adoption of the petitioner's proposed divorce decree, an issue to which the orders of the trial court, which he ignored, is directly related. However, the respondent also appeals the issue of subject matter jurisdiction, which he has contested throughout the underlying litigation, as well as the trial court's refusal to consider evidence of the Lebanese divorce decree's validity. Because these latter issues are not directly related to the ignored orders of the trial court, we decline to dismiss the respondent's entire appeal.

The respondent first argues that the trial court lacked jurisdiction over the divorce because the parties entered into a marriage contract in Lebanon in 1986 and, moreover, a Lebanese court decreed the parties divorced as of October 13, 2003, the day before the petitioner filed for divorce in New Hampshire. We find the respondent's arguments unconvincing.

Jurisdiction over parties to a divorce action in New Hampshire "exists ... where both parties were domiciled in the state when the action was commenced." RSA 458:5, I (2004). Jurisdiction over the cause of a divorce action "exists when it wholly arose or accrued while the plaintiff was domiciled in the state." RSA 458:6 (2004); *see Woodruff v. Woodruff,* 114 N.H. 365, 366-67 (1974). A review of the record confirms that the parties were domiciled in New Hampshire when

the divorce action was commenced on October 14, 2003, and had been so for at least three years. As such, the trial court properly exercised personal jurisdiction over the parties and subject matter jurisdiction over the cause for divorce. *Cf. Vazifdar v. Vazifdar,* 130 N.H. 694, 696 (1988) (where cause of action arose in New Hampshire, parties' children were in New Hampshire, and only assets which plaintiff sought to retain were located in New Hampshire, trial court had compelling interest in retaining jurisdiction).

230*230 Though we conclude that the trial court properly exercised jurisdiction over the parties' divorce, this alone would not preclude another forum from doing the same. *See Stankunas v. Stankunas,* 133 N.H. 643, 646 (1990). RSA chapter 459 (2004), however, establishes the principle that "a divorce obtained in another jurisdiction shall be of no force or effect in this state. . . if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced." RSA 459:1 (2004).

In matters of statutory interpretation, we are the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole. *In the Matter of Donovan & Donovan,* 152 N.H. 55, 58 (2005). When examining the language of a statute, we ascribe the plain and ordinary meanings to the words used. *Soraghan v. Mt. Cranmore Ski Resort,* 152 N.H. 399, 401 (2005); *see* RSA 21:2 (2000). The term "jurisdiction," as it is used in the context of RSA 459:1, is ordinarily defined as "the limits or territory within which any particular power may be exercised." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1227 (unabridged ed. 2002). We believe, therefore, that RSA 459:1 is to be construed broadly, encompassing not only jurisdictions within the United States, but also those of sovereign states existing outside of our national borders, including Lebanon.

Since the parties had been domiciled in New Hampshire for at least three years when the divorce action was commenced, the Lebanese divorce decree proffered by the respondent can have no force or effect in New Hampshire under RSA 459:1, regardless of its validity in Lebanon. As such, we conclude that the trial court did not err when it refused to dismiss the divorce petition for lack of subject matter jurisdiction.

Though we believe that RSA 459:1 precludes the Lebanese decree from having force or effect in New Hampshire, we take note of the respondent's argument that principles of comity mandated the dismissal of the divorce petition by the trial court. We have recognized foreign divorce decrees as a matter of comity. *Stankunas,* 133 N.H. at 646-47. Comity, however, is a discretionary doctrine that will not be applied if it violates a strong public policy of the forum state, or if it leaves the court in a position where it is unable to render complete justice. *Vazifdar,* 130 N.H. at 697.

In *Vazifdar,* the defendant in a New Hampshire divorce action claimed that, as a matter of comity, the trial court should have deferred to the jurisdiction of a Parsi court in India for the deter-

mination of the parties' marital status because it was under Parsi law that they had been married. *Id.* at 696-97. The defendant was residing in India, having returned and remained there after his family settled in New Hampshire. *Id.* at 695. We 231*231 considered the hardship that would befall the plaintiff, who had resided in New Hampshire with the parties' children for approximately ten years, noting that she would have to seek partial relief in India, even though New Hampshire could determine all the issues presented, and "bear the burdensome costs of traveling to India, solely for the defendant's convenience, since all evidence and witnesses [were] here in New Hampshire." *Id.* at 697. In light of the discretionary nature of the comity doctrine, we found no unsustainable exercise of discretion in the trial court's decision to retain jurisdiction over the divorce. *Id.*

In the instant case, the trial court properly exercised jurisdiction over the parties and the subject matter of the divorce pursuant to RSA 458:5 and RSA 458:6. Much like the plaintiff in *Vazifdar,* the petitioner, who had resided in New Hampshire with the respondent and their children for at least three years at the time the divorce actions were commenced, would be subject to considerable hardship in seeking relief in Lebanon, when all of the issues presented could be determined in New Hampshire. The petitioner would be forced to bear the burdensome cost of traveling to Lebanon, and the record suggests that she and her children were left with minimal financial resources after the respondent moved there.

Furthermore, we believe that public policy considerations support the trial court's decision to retain subject matter jurisdiction. "[C]ourts of a foreign country have no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of the proceedings for divorce," and recognizing an *ex parte* divorce obtained in a foreign nation where neither party is domiciled "would frustrate and make vain all State laws regulating and limiting divorce." *Slessinger v. Secretary of Health & Human Services,* 835 F.2d 937, 942-43 (1st Cir. 1987) (quotation omitted). We believe that, in *Slessinger,* the First Circuit articulated a sound public policy that applies in New Hampshire.

Therefore, even if RSA 459:1 did not settle this issue, we would hold, as we did in *Vazifdar,* that the trial court did not engage in an unsustainable exercise of discretion by declining to defer to the jurisdiction of a Lebanese court as a matter of comity.

The respondent next argues that the trial court erred by refusing to consider additional documentary evidence of the validity of the Lebanese divorce decree. Because the validity of the Lebanese divorce decree proffered by the respondent is irrelevant in light of RSA 459:1, we conclude that the trial court did not err by refusing to consider additional evidence on that issue.

The respondent further contends that the trial court divided the parties' marital assets and custodial rights in an inequitable fashion, and erred by 232*232 failing to articulate specific reasons for doing so. The trial court has broad discretion in determining matters of property distribution

and alimony when fashioning a divorce decree. *See In the Matter of Gronvaldt & Gronvaldt,* 150 N.H. 551, 554 (2004). Absent an unsustainable exercise of discretion, we will not overturn its ruling or set aside its factual findings. *Id.*

The petitioner submitted a proposed permanent decree at the final hearing on September 16, 2004, which heavily favored her in terms of distribution of marital assets, custody, support, and other matters pertaining to the divorce. When the respondent failed to appear for the final hearing or, as he concedes, to submit a proposed decree of his own, the trial court adopted the petitioner's proposed decree as the permanent decree of divorce. The respondent now asserts that the trial court, knowing that the respondent refused to recognize its jurisdiction or participate in the litigation, "should have . . . devised a way to discern some salient facts regarding the parties' marriage" or allowed an interlocutory appeal to this court before entering a "patently inequitable" decree. The respondent cites no authority, however, placing such a burden upon a court faced with a litigant who refuses either to participate in its proceedings or to comply with its orders.

A defendant in a divorce proceeding cannot argue that the disposition of marital property is unequal when the defendant has effectively prevented the trial court from being able to determine whether the disposition was in fact equal or not. *DeMauro,* 147 N.H. at 483. The respondent deliberately ignored the trial court's orders, failed to answer interrogatories, refused to participate in discovery, declined to submit a proposed permanent divorce decree to the trial court, and did not appear for the final hearing. He was afforded ample opportunity to provide the trial court with information that could have resulted in a final divorce decree striking a more even balance between the interests of the parties. The respondent cannot now, on appeal, challenge the precise outcome that he could have prevented. *See id.*; *cf. Bursey v. Bursey,* 145 N.H. 283, 285-86 (2000) (trial court did not unsustainably exercise its discretion when it entered divorce decree providing for unequal distribution of property without hearing evidence of husband's financial condition, where husband previously failed to answer interrogatories about that very subject). Accordingly, we conclude that the defendant has forfeited the right to appellate review of this issue. *See DeMauro,* 147 N.H. at 483.

Though we need not reach the issue in light of our conclusion above, we note the respondent's claim that the trial court was required by RSA 458:16-a (2004) to specify written reasons for the ordered division of 233*233 property. The respondent concedes, however, that his refusal to participate in the judicial proceedings left the trial court without evidence favoring his interests. With nothing to weigh the petitioner's proposed final decree against, the trial court had little choice but to adopt it without modification. Thus, were we to review this issue on the merits, we would conclude that the trial court's final decree was not an unsustainable exercise of discretion.

The respondent next challenges the provision in the trial court's February 2004 temporary order stating, in part, that he "shall not speak about the Petitioner as a Muslim/Muslim woman to the children or within hearing of the children." The respondent asserts that this portion of the order

comprises an "unconstitutional abridgment of his rights," specifically his "constitutionally protected right to parent" and his "free speech rights."

Assuming without deciding that the portion of the trial court's temporary order prohibiting the respondent from referring to his wife as a "Muslim" or "Muslim woman" in the presence of their children was an impermissible prior restraint on his freedom of speech, the offending language was not repeated in the permanent divorce decree. As we now affirm that decree, this issue is moot.

The petitioner requests that she be awarded attorney's fees and costs pursuant to New Hampshire Supreme Court Rule 23, which permits this court, "[i]n the interest of justice in extraordinary cases, but not as a matter of right," to "award attorney's fees related to an appeal to a prevailing party if the appeal is deemed . . . to have been frivolous or in bad faith." The respondent has contested subject matter jurisdiction from a point early in the divorce litigation. On June 24, 2004, he, through counsel, informed the trial court of his intention to file a motion seeking permission to pursue an interlocutory appeal with this court regarding the issue of subject matter jurisdiction, though there is no evidence in the record that such a motion was ever submitted. We find nothing in the record suggesting that the respondent acted frivolously or in bad faith, and the interests of justice do not merit an award of attorney's fees. As such, we decline the petitioner's request for attorney's fees and costs pursuant to New Hampshire Supreme Court Rule 23.

Affirmed.

DUGGAN and GALWAY, JJ., concurred.

NEW JERSEY

CATEGORY: Child Custody

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: Gaza

URL:
http://scholar.google.com/scholar_case?case=6518652102774090943&q=Islamic+OR+Sharia+OR+Muslim+OR+Islam&hl=en&as_sdt=4,31

279 N.J. Super. 154 (1994)

652 A.2d 253

FAIZA ALI, PLAINTIFF, V. QASSEM IZZAT ALI, DEFENDANT.

Superior Court of New Jersey, Chancery Division Union County, Family Part.

Decided May 2, 1994.

157*157 *Marion Solomon* for plaintiff (*Monaghan Rem & Zeller,* attorneys).

Wendy Parmet for defendant (*Parmet & Zeif,* attorneys).

WHITKEN, J.S.C.

PROCEDURAL HISTORY

This matter originated by the filing of a complaint by the plaintiff on September 16, 1993 seeking a divorce from the defendant, sole legal custody of the child of the marriage, permission to resume her maiden name and counsel fees. Thereafter, a motion was filed by the plaintiff to direct the defendant to return the infant child of the marriage, Nader, to her care, custody and control, to direct that the defendant appear before this court to provide information as to the whereabouts of Nader, for pendente lite custody, to restrain the defendant from any unsupervised con-

tact with the infant child and for counsel fees. The plaintiff in her supporting certification contended that the defendant failed to return Nader from Gaza to New Jersey.

This court entered an order on October 25, 1993 providing that within five days of the service of said order, the defendant was to return Nader to the care and custody of the plaintiff, that the 158*158 plaintiff was to have pendente lite custody of Nader, for service of the order on the defendant and requiring the defendant to appear before this court on November 18, 1993 to show cause why custody of Nader should not be continued with the plaintiff. This court further found that based upon the residence of Nader, New Jersey properly had jurisdiction over this matter as to the issues regarding the care, custody and welfare of Nader.

A subsequent order was entered by this court on January 10, 1994 providing that the defendant be arrested, committed and confined to the Union County Jail by the Sheriff of Union County and that a warrant be issued for the defendant's arrest, commitment and confinement indicating that the defendant was to be released upon his return of Nader to the plaintiff's custody and that failing to do so, he was to be brought before this court. A subsequent order on January 20, 1994 granted pendente lite custody of Nader to the plaintiff. On March 9, 1994 this court executed a consent order permitting the defendant additional time to answer or otherwise move with respect to the summons and complaint through and until March 17, 1994.

A motion, which is the subject matter of this opinion, was thereafter filed wherein the defendant husband alleged that the *ex parte* order of this court entered on October 25, 1993 should be vacated for the following reasons:

1. Lack of *in personam* jurisdiction over defendant;

2. Under the doctrine of comity, the order obtained by the defendant from the **Sharia** Court in Gaza granting him a divorce and custody of Nader controls and is entitled to recognition and enforcement by this court;

3. Gaza, and not New Jersey, is the "home state" of the child born of the marriage.

4. The doctrine of forum non conveniens mandates that the custody issue be litigated in Gaza, and not New Jersey where the burden on the defendant would be great.

The various contentions of the defendant will be treated individually and in succession.

159*159 *LAW*

(1) LACK OF *IN PERSONAM* JURISDICTION

The seminal case involving the exercise of *in personam* jurisdiction is *International Shoe Co. v. Washington,* 326 *U.S.* 310, 316, 66 *S.Ct.* 154, 158, 90 *L.Ed.* 95, 102 (1945),[1] wherein the Court

set forth the test to determine whether exercising this jurisdiction would "offend `traditional notions of fair play and substantial justice.'" *quoted in World-Wide Volkswagen Corp. v. Woodson,* 444 *U.S.* 286, 292, 100 *S.Ct.* 559, 564, 62 *L.Ed.*2d 490, 498 (1980). The Fourteenth Amendment's Due Process Clause, which is applicable to the states, "limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen, supra,* 444 U.S. at 291, 100 *S.Ct.* at 564, 62 *L.Ed.*2d at 497 (citing *Kulko v. California Superior Court,* 436 *U.S.* 84, 91, 98 *S.Ct.* 1690, 1696, 56 *L.Ed.*2d 132, 140-41 (1978)). When a judgment fails to comport with the due process requirements, it "is void in the rendering State and is not entitled to full faith and credit elsewhere." *Id.* (citing *Pennoyer v. Neff,* 95 *U.S.* 714, 732-33, 24 *L.Ed.* 565, 572 (1878)). Due process requires sufficient notice of the action, *Mullane v. Central Hanover Trust Co.,* 339 *U.S.* 306, 313-14, 70 *S.Ct.* 652, 657, 94 *L.Ed.* 865, 873 (1950), and that the court have personal jurisdiction over the defendant. *International Shoe, supra,* 326 *U.S.* at 316, 66 *S.Ct.* at 161, 90 *L.Ed.* at 102. In the present case, the defendant was personally served in Gaza on December 23, 1993 with the *ex parte* order entered on October 25, 1993, the summons and complaint for divorce, and motion papers. The defendant does not raise the issue of "notice" in his moving papers. Rather, the defendant asserts that this court lacks *in personam* jurisdiction[2] and thus is not empowered to enter any orders or judgments against him.

160*160 For a state to exercise *in personam* jurisdiction over a defendant, sufficient "minimum contacts" between the defendant and the forum state must exist. *International Shoe, supra,* 326 *U.S.* at 316, 66 *S.Ct.* at 161, 90 *L.Ed.* at 102. The purpose of the "minimum contacts" requirement is twofold; namely it:

[1] protects the defendant against the burdens of litigating in a distant or inconvenient forum. [2] And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

[*World-Wide Volkswagen Corp. v. Woodson, supra,* 444 *U.S.* at 292, 100 *S.Ct.* at 564, 62 *L.Ed.*2d at 498.]

A "minimum contacts" determination requires that the defendant must have purposefully availed himself of a state's benefits. *Burger King Corp. v. Rudzewicz,* 471 *U.S.* 462, 475-76, 105 *S.Ct.* 2174, 2183, 85 *L.Ed.*2d 528, 542-43 (1985). Although foreseeability is not one of the foremost criteria in a due process evaluation, it plays a role in the inquiry as to whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen, supra,* 444 *U.S.* at 297, 100 *S.Ct.* at 567, 62 *L.Ed.*2d at 501. If "minimum contacts" are found to exist through the purposeful activities of the defendant, the court's inquiry turns to whether "fair play and substantial justice" permit the exercise of *in personam* jurisdiction. *Burger King, supra,* 471 *U.S.* at 476, 105 *S.Ct.* at 2184, 85 *L.Ed.*2d at 543.

In the present case, the plaintiff/wife was born in Elizabeth, New Jersey and is an American citizen[3] and the defendant/husband is a Palestinian national. After graduating from Elizabeth High School in New Jersey in 1982, the plaintiff traveled 161*161 to Jerusalem to visit cousins and pursue her college studies. As a student at Bir-Zeit University on the West Bank, the plaintiff met the defendant, a resident of Gaza. On July 23, 1983, the plaintiff and defendant were married in a **Muslim** ceremony in Beit Hanoun, Gaza. As husband and wife, the parties resided in Gaza. In 1985, the plaintiff became pregnant. A few months prior to giving birth to Nader on February 1, 1986, the plaintiff returned to Elizabeth, New Jersey. As to why the plaintiff returned to New Jersey, the parties' explanations diverge. The defendant asserts that the plaintiff returned to American soil so that their child would have all of the privileges afforded to an American citizen. The plaintiff asserts that she returned home to attend beauty school, which she completed in August or September of 1986.

From approximately September 1986 until January 1991, which amounts to a period of about 4 years and 4 months, the plaintiff, defendant, and Nader lived as a family unit in Gaza. At the outbreak of the Gulf War in January of 1991, the plaintiff and Nader returned to Elizabeth, New Jersey. The defendant claims the plaintiff and Nader came back to Gaza in the Spring of 1991 whereas the plaintiff alleges it was in July 1991. In July 1991, the plaintiff again left Gaza for Elizabeth, New Jersey for a "trial separation" according to the defendant. What the plaintiff's certification fails to say is significant in that the plaintiff apparently left Nader in Gaza in the defendant's care when she left Gaza in July 1991. The defendant eventually obtained the appropriate travel documents from the Israeli authorities and left Gaza for the United States and was accompanied by Nader. According to the plaintiff, Nader "was back in Elizabeth, N.J. with me in time to start" school in September of 1991 and was enrolled in the Robert Morris School Number Eighteen in Elizabeth, where he completed both kindergarten and the first grade.

The plaintiff intimates that the defendant lived in New Jersey but eventually moved to New York City, although no dates are provided. The defendant states that he lived in New York and 162*162 that Nader lived with the plaintiff in Elizabeth on weekdays during the 1991-1992 academic year; furthermore, on weekends Nader would either reside with the defendant in New York or the defendant would come and spend the weekend in Elizabeth. During the 1992-1993 academic year, the defendant claims he never came to Elizabeth, where the plaintiff and Nader resided, except to pick up and drop off his son for visitation purposes.

The plaintiff offers additional proof to substantiate her claim that the defendant had sufficient contacts with New Jersey stating that the defendant's address on his green card application was that of Elizabeth, New Jersey. The defendant refutes the contention that he resided in New Jersey at this time; rather, he argues that the New Jersey address was used "for purposes of convenience only." The plaintiff also attached copies of the defendant's W-2 form for 1992 from WorldWide Television; however, it should be noted that the defendant's address is listed as "339 East 88th

Street, New York, NY." The defendant apparently used Elizabeth, New Jersey as his residence for purposes of filing his joint tax returns.

In May or June of 1993, the defendant left the United States and went to Paris for a visit en route to Gaza. The plaintiff brought Nader to Paris in July of 1993 and met the defendant. The plaintiff continued on to Jerusalem whereas the defendant and Nader remained in Paris for a few weeks. On or about July 10, 1993, the family was reunited in Gaza although the time spent together varies according to the certifications. On July 15, 1993, the plaintiff left Gaza for the United States and claims that the defendant was to return to New York with Nader in a few weeks. The defendant claims the plaintiff knew he had a job offer in Gaza from ABC News, which the plaintiff denies, and that he would remain permanently in Gaza with Nader.

On July 28, 1993, the defendant obtained an *ex parte* divorce from the **Sharia** Court in Gaza, which granted him custody of Nader, and published notice to the plaintiff in *Al-Quds,* an Arabic newspaper in Jerusalem and the Occupied Territories. The defendant 163*163 claims the plaintiff received "actual notice" of the divorce and her right to appeal through her family members, who reside on the West Bank, and that the defendant spoke to the plaintiff on the phone and confirmed the divorce proceedings. The defendant claims the plaintiff knew she had ninety days to appeal the **Sharia** Court's custody and divorce decision and that, furthermore, the plaintiff should have known her rights since her father divorced her mother in a similar fashion. The plaintiff states her first "notice" of the divorce came with the defendant's moving papers, which were filed with this court on March 7, 1994.

Based upon the fact that the defendant was amenable to using New Jersey for purposes of "convenience" although he now denies that he ever had sufficient contacts with New Jersey since it would be quite "inconvenient" for him to litigate this matter here, this court is satisfied that it has *in personam* jurisdiction over the defendant. Although the defendant is a Palestinian national, and evidently intends to continue living in Gaza, he has had sufficient contact with New Jersey so that the exercise of *in personam* jurisdiction would not offend "traditional notions of fair play and substantial justice."

(2) THE SHARIA COURT CUSTODY DECREE

The defendant asserts that he is entitled to custody of Nader based upon the **Sharia** Court's decree entered on July 28, 1993, from which the plaintiff failed to appeal, and based upon the doctrine of comity. The doctrine of comity has been defined as:

neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws....

The recognition of a judgment of a foreign court under the principle of comity is subject generally to two conditions: (1) that the foreign court had jurisdiction of the subject matter; (2) that the foreign judgment will not offend the public policy of our own State.

[*Fantony v. Fantony,* 21 *N.J.* 525, 533, 122 *A.*2d 593 (1956) (internal citations omitted).]

164*164 Under this doctrine, the lack of notice provided to the plaintiff raises serious due process concerns at the outset.

In *In re the Marriage of Malak,* 182 *Cal. App.*3d 1018, 227 *Cal. Rptr.* 841 (1986), the court enforced a Lebanese custody decree, which the husband had obtained and sought to have enforced. The husband had filed the Lebanese judgment requesting that it be enforced pursuant to the applicable provisions of the Uniform Child Custody Jurisdiction Act [hereinafter "UCCJA"].[4] Although the Lebanese decree had been entered *ex parte,* the wife was personally served with the decree and had fifteen days after service to file opposition and have the issues tried de novo. The wife failed to appeal and the decree was thereafter finalized. *Id.*

The UCCJA apparently applies to international decisions as long as they are made by "legal institutions similar in nature." *Id.,* 227 *Cal. Rptr.* at 845. The UCCJA, which is codified in New Jersey at *N.J.S.A.* 2A:34-28 to -52, provides that:

The general policies of this act extend to the international arena. The provisions of this act relating to the recognition and enforcement of custody decrees of other states apply to *custody decrees and decrees involving legal institutions similar in nature* and to custody rendered by appropriate authorities of other nations, *if reasonable notice and opportunity to be heard were given to all affected persons.*

[*N.J.S.A.* 2A:34-51 (emphasis added).]

To effectuate comity under the UCCJA the first requirement is that a "certified copy of a custody decree" must be filed with the court clerk so that it may be enforced. *In re the Marriage of Malak, supra,* 227 *Cal. Rptr.* at 846; *see also N.J.S.A.* 2A:34-43 a. Here, the defendant has failed to file a certified copy of the **Sharia** Court's order, which he seeks to enforce. He merely attached a copy of the published notice of the divorce along with a translation. Thus, the defendant has not taken the first required step towards enforcement.

165*165 In *In re the Marriage of Malak,* the divorce and custody decree were entered *ex parte;* however, the wife was later personally served with the documents. 227 *Cal. Rptr.* at 846. "Thus, while the ex parte order was obtained without due process, the same cannot be said of the final decree." *Ibid.* To the contrary, the defendant herein never states that the plaintiff was personally served with the *ex parte* order obtained from the **Sharia** Court in Gaza. The defendant attempts to impute knowledge to the plaintiff based upon her relatives' alleged knowledge, a telephone

call between the defendant and plaintiff, and plaintiff's prior knowledge of how her father divorced her mother. The defendant's position hardly can be construed as "actual knowledge" to satisfy due process considerations and cannot supplant the requirement of personal service. On this basis alone, the **Sharia** Court's decree cannot be enforced under principles of comity since it directly offends all due process requirements of notice.

Recognition of the Lebanese custody order by the *Malak* court was also warranted since the order specifically enumerated the various underlying factors which were considered in the final determination; the *Malak* court found the considerations to be substantially similar to those into which a Californian court would make an inquiry. *Id.* 227 *Cal. Rptr.* at 847-48 and n. 1. Thus, enforcement was justified.

In *Custody of a Minor (No. 3),* 392 *Mass.* 728, 468 *N.E.*2d 251, 252 (1984), the court analyzed a request to enforce an Australian custody decree obtained by the father with "adequate notice" to the mother in Massachusetts. The court observed that:

One can imagine a case in which recognition of a foreign country's custody determination would not be due.... The foreign court must have jurisdiction over the parties and the subject matter.... The procedural and substantive law applied by the foreign court must be reasonably comparable to the law of the Commonwealth.... We would grant that we might not enforce a foreign custody determination made in an arbitrary or capricious manner, even if the applicable law were comparable.

[*Id.,* 468 *N.E.*2d at 255.]

The court enforced the Australian decree since the wife was provided with notice and was represented by counsel, and the 166*166 foreign order encompassed the same substantive law, i.e. "the best interests of the child." *Ibid.*

In *Klont v. Klont,* 130 *Mich. App.* 138, 342 *N.W.*2d 549 (1983), the plaintiff/husband was an American citizen whereas the defendant/wife was a West German citizen. The parties resided in Michigan where a child was born. Subsequently, they moved to Germany, where they remained together for eight months before separating. The wife filed for divorce and custody in a West German court and the husband was served with the papers and retained counsel. However, prior to the scheduled hearing date, the husband took the child and fled to Michigan. The West German court awarded custody to the wife. The husband instituted suit in Michigan, which was eventually dismissed on appeal since the West German decree warranted recognition by the Michigan courts. Although the UCCJA was not enacted in West Germany, the *Klont* court acknowledged that "even if the foreign jurisdiction has not adopted the act, so long as the foreign court's exercise of jurisdiction conforms with the criteria enumerated in the act" it is enforceable. *Id.,* 342 *N.W.*2d at 550-51. Since the West German court had jurisdiction over the parties and the

husband received notice but chose to flee the country rather than appear, the West German custody decree was entitled to enforcement.

Similarly, a Pennsylvania court accorded comity to a custody decree issued by an Israeli court since the wife received "reasonable notice of an opportunity to be heard at the Israeli proceedings [instituted by her husband], an opportunity she did not avail herself of." *Hovav v. Hovav,* 312 *Pa.Super.* 305, 458 *A.*2d 972, 974 (1983). Significantly, the children had been born in Israel and had spent most of their lives there; their only connection with Pennsylvania arose from their visit with their maternal grandparents in the state. The *Hovav* court deemed the children's connection to the state to have been "tenuous." *Id.,* 458 *A.*2d at 975. But most importantly, comity was applied to the Israeli decree since that court had "heard testimony from witnesses who knew the children 167*167 and made its decision to further the best interests of the children." *Id.* at 974. Furthermore, since the Israeli court referred to both civil and religious law wherein there existed "an overwhelming principle which is the good of the child," the foreign decree was entitled to enforcement in Pennsylvania. *Id.* at 976.

In the present matter, the defendant does not provide a copy of the Gaza decree awarding him custody. This court has no knowledge as to whether the **Sharia** Court made specific findings as to what was in Nader's "best interests." However, it is revealing that the defendant submitted proof in support of his request for comity which indicates that under **Muslim** law, a father is automatically entitled to custody when a boy is seven (Article 391 of **Islamic Sharia** Law); the mother can apply to prolong custody until the boy is nine (Article 118 of the Law of Family Rights), however, at that time, the father or the paternal grandfather are irrebuttably entitled to custody. Such presumptions in law cannot be said by any stretch of the imagination to comport with the law of New Jersey whereby custody determinations are made based upon the "best interests" of the child and not some mechanical formula.

It is firmly established in New Jersey that in determining custody, the standard is the "best interest of the child." It has been noted that "[t]he uncontroverted and long standing acceptance of the application of the `best interest of the child' doctrine forms the basis of each and every custody decision in New Jersey." *MC v. MC,* 215 *N.J. Super.* 132, 139, 521 *A.*2d 381 (Ch.Div. 1986). In *Beck v. Beck,* 86 *N.J.* 480, 497, 432 *A.*2d 63 (1981), the New Jersey Supreme Court stated that "[t]he paramount consideration in child custody cases is to foster the best interests of the child. This standard has been described as one that `protects the safety, happiness and welfare of the child.' The happiness and welfare of the children shall determine the custody or possession." In addition, *N.J.S.A.* 9:2-4 provides that:

[t]he Legislature finds and declares that it is in the public policy of this State to assure minor children of frequent and continuing contact with both parents after 168*168 the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to

share the rights and responsibilities of child rearing in order to effect this policy. In any proceeding involving the custody of a minor child, the rights of both parents shall be equal.

There is no mechanical presumption that either the father or the mother is entitled to custody at a fixed age. Thus, New Jersey's standard of the "best interest of the child" recognizes "that the paramount consideration is the safety, happiness, physical, mental and moral welfare of the child. Neither parent has a superior right to custody.... Each case is decided on its own facts and circumstances." *Fantony v. Fantony, supra,* 21 *N.J.* at 536-37, 122 *A.*2d 593.

In *In Re Baby M,* Chief Justice Wilentz indicated:

"Best interests" does not contain within it any idealized lifestyle; the question boils down to a judgment, consisting of many factors, about the likely future happiness of a human being.... Stability, love, family happiness, tolerance, and, ultimately, support of independence — all rank much higher in predicting future happiness than the likelihood of a college education.

[109 *N.J.* 396, 460, 537 *A.*2d 1227 (1988) (internal citation omitted).]

It has been acknowledged, both legally and by psychologists, that the psychological parentage relationship (bonding) is a primary factor in determining custody cases. This factor can even be used to award custody to a foster parent over a natural parent, where it will avoid psychological harm. *Hoy v. Willis,* 165 *N.J. Super.* 265, 398 *A.*2d 109 (App.Div. 1978). The bonding theory again is set out in *Beyond the Best Interests of the Child,* which indicates:

[F]or the child, the physical realties of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become his "psychological parent" in whose care the child can feel valued and "wanted."

[Joseph Goldstein et al., *Beyond the Best Interests of the Child* 17 (1979).]

Thus, a preference in custody cases is given to the parent with the strongest psychological bond with the child.

It has further been held and *N.J.S.A.* 9:2-4 specifically provides for the child's preference to be considered in a custody 169*169 determination and this is particularly relevant when the age of the child is considered. In *Lavene v. Lavene,* the court indicated that:

[t]he age of the child certainly affects the quantum of weight that his or her preference should be accorded, but unless the trial judge expressly finds as a result of its interview either that the child lacks capacity to form an intelligent preference or that the child does not wish to express a preference, the child should be afforded the opportunity to make [his or] her views known. We

would think that any child of school age, absent the expressed findings as we have indicated, should have that opportunity and that the judge would be assisted thereby.

[148 *N.J. Super.* 267, 272, 372 *A.*2d 629 (App.Div.), *certif. denied,* 75 *N.J.* 28, 379 *A.*2d 259 (1977).]

However, as indicated in *W.W. v. I.M.,* 231 *N.J. Super.* 495, 511, 555 *A.*2d 1149 (App.Div. 1989), the court stated: "A trial judge is not bound by a young child's preference to live with one parent over the other." The judge is only required to give "due weight to the child's preference;" the preference is a factor which the judge should consider along with all of the other relevant factors. Thus, stated preferences are not conclusive but must be considered in applications for modification.

In *In re the Marriage of Malak, Hovav, Klont,* and *Custody of a Minor,* as discussed *supra,* the courts recognized the foreign decrees since their decisions were based on an analysis and inquiry similar to that of the American jurisdiction and thus did not offend public policy. To the contrary, the defendant seeks to have this court place its imprimatur on a decree that is diametrically opposed to the law of New Jersey and which is repugnant to all case law concerning factors to be considered in making a custody determination.

Thus, for the foregoing reasons, the **Sharia** Court custody decree cannot be enforced or recognized by New Jersey courts under the doctrine of comity.

(3) "HOME STATE" OF NADER

The Superior Court of New Jersey has jurisdiction over child custody issues pursuant to *N.J.S.A.* 2A:34-31. In this particular instance, *N.J.S.A.* 2A:34-31 a(1)(ii) and -31 c empower this court to exercise jurisdiction since:

170*170 This State ... had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State....

....

c. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

Prior to Nader's departure for Paris in July 1993, it is undisputed that he had completed both kindergarten and the first grade in the Elizabeth public school system. The stories diverge after the parties were reunited in Gaza on or about July 15, 1993. The plaintiff claims that she left Nader with the defendant in Gaza with the defendant's assurances that Nader would be returned to New

Jersey in time to begin the second grade in Elizabeth. To the contrary, the defendant asserts that Nader's residence in New Jersey was always deemed to be temporary and that the plaintiff had agreed to permit Nader to reside in Gaza with his father as of July 1993. Putting aside these conflicting accounts, this court is satisfied that New Jersey was Nader's "home state" for the two (2) years prior to his departure in July 1993 for Paris and eventually Gaza. It was not until Nader was retained in Gaza past the agreed-upon return date that the plaintiff sought this court's assistance. As plaintiff has remained a resident of New Jersey, this court finds that the jurisdictional requirements of *N.J.S.A.* 2A:34-31 a(1)(ii) are satisfied thereby permitting a custody determination to be made in New Jersey.

(4) FORUM NON CONVENIENS

The defendant asserts that the tremendous burden of litigating this custody issue in New Jersey requires that the **Sharia** Court's decree be enforced. In support of his allegation that New Jersey is an inconvenient forum, the defendant sets forth various factors, such as, the travel restrictions imposed on Palestinian nationals, Nader's current enrollment in an **Islamic** school in Gaza, the residence of both defendant's family in Gaza and plaintiff's family on the West Bank, Gaza as the site of the marriage ceremony under **Muslim** law, the residence of the parties 171*171 in Gaza during the major portion of their marriage, the location of most witnesses in Gaza, and the plaintiff's unrestricted and frequent travels to Gaza.

To this effect, *N.J.S.A.* 2A:34-46 provides a procedure for reducing inconvenience and impossibility:

In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses, *including parties and the child,* by deposition or other form of sworn statement, in another state. The court on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony shall be taken. (emphasis added).

Thus, the defendant may avail himself of these various forms of discovery and testimony. In addition, it is clear that the plaintiff resides in New Jersey, as does her mother, and Nader in addition to having resided in Elizabeth for the two years prior to July 1993 has attended the Elizabeth public schools during both kindergarten and the first grade. It can thus be reasonably expected that persons from New Jersey will be called upon to testify regarding Nader's relationship with his mother, how he has performed in school, and what his living accommodations are in New Jersey.

Notwithstanding the many factors supporting Gaza as the "most convenient" forum for the defendant, this court cannot sanction the **Islamic** law imposed by the **Sharia** Court, as represented to this court in the certifications of both the defendant and Raji Sourani, an attorney in Gaza and

close friend of the defendant. As previously discussed, the law of the **Sharia** Court in regard to custody determinations offends the public policy of New Jersey.

CONCLUSION

Although the logistics appear daunting, this court cannot refuse to exercise its proper jurisdiction under the UCCJA as the "home state" of Nader. The law of the **Sharia** Court is undeniably arbitrary and capricious and cannot be sanctioned by this court, which uses the "best interest of the child" as the overriding concern. The procurement of a home evaluation in Gaza as well 172*172 as psychological evaluations of the parties and Nader may not be feasible or particularly simple; however, this court must order them. In child custody cases, a "plenary hearing is virtually a necessity ... unless there are overwhelming admitted facts (*e.g.,* child abuse). Such a hearing must be held ... where serious and long standing effects on the life and well-being of the child may result." *MC v. MC, supra,* 215 *N.J. Super.* at 140, 521 *A.*2d 381. Accordingly, a plenary hearing to determine custody will be scheduled as soon as possible.

The attorney for the defendant shall prepare and submit an order in accordance with this decision within seven (7) days.

[1] The substantial wealth of decisions concerning *in personam* jurisdiction involve economic transactions. *See Burger King Corp. v. Rudzewicz,* 471 *U.S.* 462, 105 *S.Ct.* 2174, 85 *L.Ed.*2d 528 (1985); *World-Wide Volkswagen v. Woodson,* 444 *U.S.* 286, 100 *S.Ct.* 559, 62 *L.Ed.*2d 490 (1980).

[2] It has been recognized that the:

jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless, and our jurisdiction *parens patriae* is firmly established in our jurisprudence and is derived from common law, our case law and the statutes.

[*Fantony v. Fantony,* 21 *N.J.* 525, 535, 122 *A.*2d 593 (1956).]

[3] The plaintiff's father is Palestinian and her mother is Puerto Rican.

[4] Note that since Gaza is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, the Convention's provisions are not an option.

CATEGORY: Shariah Marriage Law

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: ACSY

COUNTRY: Pakistan

URL:
http://scholar.google.com/scholar_case?case=3281311257582002443&q=Islamic+OR+Sharia+OR+Muslim+OR+Islam&hl=en&as_sdt=4,31

159 N.J. Super. 566 (1978)

388 A.2d 1000

PARVEEN CHAUDRY, PLAINTIFF-RESPONDENT AND CROSS-APPELLANT, V. M. HANIF CHAUDRY, M.D., DEFENDANT-APPELLANT AND CROSS-RESPONDENT.

Superior Court of New Jersey, Appellate Division.

Argued February 22, 1978.

Reargued May 9, 1978.

Decided June 5, 1978.

569*569 Before Judges LYNCH, KOLE and PETRELLA.

Mr. John Kuhn Bleimaier argued the cause for defendant-appellant and cross-respondent.

Mr. Bruce Lubitz argued the cause for plaintiff-respondent and cross-appellant (*Messrs. Warren, Goldberg & Berman,* attorneys).

The opinion of the court was delivered by KOLE, J.A.D.

Plaintiff wife and defendant husband are citizens of Pakistan. The wife and the children of the marriage reside in Pakistan. The husband practices medicine as a psychiatrist in this State, and resides here.

The wife filed an "amended complaint" alleging (1) a subsisting marriage, unjustifiable abandonment by the husband in May 1972 and his refusal adequately to support her and the children, then aged 13, 10 and 1, and seeking separate maintenance, as well as support of the children, and that (2) if the court were to find that defendant was lawfully divorced from her, she should receive alimony and equitable distribution and the children should receive adequate support. The defenses essentially were as follows: (1) the husband already had obtained a valid divorce in accordance with the laws of Pakistan; (2) the Pakistan court had confirmed the divorce, had full jurisdiction to deal with all of the issues, including support, raised in this proceeding and its actions were "dispositive of the matters raised" in the complaint; (3) the husband had met all financial obligations to the wife in accordance with the antenuptial agreement between them and the laws of Pakistan, "the country with jurisdiction over the 570*570 parties, the marriage and divorce;" (4) the proper forum for the resolution of the financial needs of the wife is the Pakistan court, "which already has jurisdiction over the parties and the subject matter, and in which there is currently an action pending * * * brought by plaintiff [wife] against defendant [husband];" and (5) the court was without jurisdiction to grant equitable distribution.

The trial judge, in a judgment entered August 12, 1976, under principles of comity refused to recognize the Pakistan divorce and awarded the wife separate maintenance in the sum of $430 a month. Relying on *Shikoh v. Murff,* 257 *F.*2d 306 (2 Cir.1958), he held that the husband's method of obtaining the divorce in the Pakistan consulate in New York, while he resided in New Jersey, rendered it invalid under the laws of New Jersey. Although it is not too clear, apparently the judge also was of the view that Pakistan law, pursuant to which a divorced wife is not entitled to alimony, and the antenuptial agreement, under which the wife's sole property or other financial right was to receive 15,000 rupees ($1,500) from the husband, were so offensive to this State's public policy as to invalidate the divorce and to entitle her to separate maintenance, where, as here, the husband was found to have abandoned her. *N.J.S.A.* 2A:34-24.

In support of his separate maintenance award, the judge found that the husband was "domiciled in New Jersey" since he "is a resident here * * * has practiced medicine here" in excess of nine years, has a medical license and owns real estate and other property here, and "in every other respect demonstrates an intention not to return to Pakistan but to remain here to enjoy the pleasures" of these assets and "the protection and benefits of our laws and sovereignty." He further found that

The only purposes for which he [the husband] returns to Pakistan * * * are connected with his plan and intention that the plaintiff and his children shall remain in Pakistan, subject there to the lesser benefits and rights and share of his earnings and property which he enforces against them by the judgment he can secure from 571*571 the Pakistani courts. He has * * * taken affirmative action to prevent the plaintiff [wife] from coming to reside in this Country, and I feel that in addition to the grounds which I have already detailed that there is an essential injustice in the de-

fendant accepting all the benefits of living in New Jersey and earning a substantial income here while requiring his wife and family to live in Pakistan and be circumscribed by their law which is far less beneficial to them than the American law would be if they were to reside with the husband and father here.

Now, with respect to the application of the * * * [antenuptial] agreement which was in fact entered into between the parties in this case, * * * this is contrary to the public policy of the State of New Jersey. While the State does recognize [such] agreements, it is essentially because there is a freedom of choice between the parties, and if they with full knowledge of their rights and with proper guidance and counselling come to a certain determination to waive or give up rights this certainly may be enforced in the proper case in this State; but, where as here there was no choice given to the plaintiff under the law of Pakistan and the **Islamic** law, which I do not criticize * * * she had no choice. She had to waive, give up or not claim support or alimony in the event of a divorce, and it cannot be said that with that choice she chose to do it, because there was no choice involved. To that extent it is so clearly contrary to the public policy of this State that I decline to enforce it, and, therefore, I find that it is open to her to prove by proper evidence that she would be entitled to certain support by way of separate maintenance.

Although the judgment awarded separate maintenance to the wife, it denied support for the three children, predicated on the court's asserted lack of authority over support for children beyond its jurisdiction. Indeed, the trial judge refused to take proofs on that issue.

The husband appeals from the separate maintenance award. The wife cross-appeals from the judgment to the extent that it denies support for the children.[1]

We consider first the separate maintenance award.

We hold that (1) the trial judge erred in refusing to recognize the Pakistan divorce as valid under principles 572*572 of comity and, accordingly, he should not have awarded the wife separate maintenance; and (2) the wife was not entitled to equitable distribution or alimony under the proofs presented below.

In 1958, by negotiation between their parents, a marriage contract between the husband and wife was entered into. They were then, and when they were married in 1961 some three years later, citizens of Pakistan. The marriage contract is called a *nikahname.* It will hereafter be referred to as the antenuptial agreement.

Expert testimony on Pakistan law relating to marriage and divorce was supplied by the husband's witness, Kurshid Anwar Sheikh, an advocate or attorney in Pakistan. He had represented the husband in connection with his marital disputes, including the wife's appeal from the confirmation of the divorce by the lower court in Pakistan and the pending actions by the husband for cus-

tody and for an injunction against the wife from proceeding in any action anywhere to endeavor to obtain support or alimony.[2]

It is clear from the proofs that the antenuptial agreement provided that the wife, at any time during or after the marriage, on demand could obtain from her husband 15,000 rupees, about $1,500. Although such agreement could have provided that she have additional rights in her husband's property, this one contained no such provision. Under Pakistan law she was not entitled to alimony or support upon a divorce. A provision in the agreement to the contrary would be void as a matter of law.

After the parties were married in 1961 they lived in Pakistan until the husband left for England in May or June 1962. The wife remained behind with their first child and her parents. She was able to join her husband in England when 573*573 her parents paid for the plane tickets for her and the child. The family stayed in England for about seven months before coming to the United States.

From December 1963 to December 1966 the parties and their two daughters lived in Connecticut. The second child had been born in Connecticut in 1964. In December 1966 the family moved to New Jersey where defendant obtained a job with the Trenton Psychiatric Hospital. In December 1968 the wife and two children returned to Pakistan, with the permanent intention, according to the husband, to remain there. But the wife claimed that he had informed her that he would return permanently to Pakistan to join them once he had completed his state medical examination, since his visa was then expiring. It was not until October 1970 that the husband returned to Pakistan, according to him, for the purpose of finding a position and remaining there. He stayed with his wife and children until February 1971, when the Trenton Psychiatric Hospital sent him papers permitting him to enter the United States. Although the husband claimed that his wife would not accompany him back to this country, she testified that he agreed to arrange for her and the children to join him at the New Jersey hospital once he was able to obtain the necessary immigration visa for this purpose. There is a conflict in the proofs as to his good faith efforts in endeavoring to have his wife and children return to New Jersey after his arrival here in February 1971. He returned to Pakistan in April 1972 for about four weeks, during which time he lived with his wife. He then returned to New Jersey without his family. The parties' third child was born in Pakistan in January 1973. He remained away from Pakistan from May 1972 until December 29, 1975. Meanwhile, he had instituted and had obtained a Pakistan divorce, as hereafter set forth.

The trial judge plainly believed the wife's testimony as to her reason for leaving New Jersey in December 1968 to go to Pakistan and for not returning thereafter to this State to join her husband. There is sufficient credible evidence to 574*574 support the judge's findings that she intended to live with her husband, either here or in Pakistan, wherever he wanted her; but that the husband planned and intended, since 1968, that she and the children remain in Pakistan and, in

fact, had taken affirmative action to prevent her from coming to live here. We accept those findings, *Rova Farms Resort v. Investors Ins. Co.,* 65 *N.J.* 474, 483-484 (1974), but, as hereinafter indicated, we hold that they do not suffice to justify an award of alimony or equitable distribution to the wife.

We now proceed to the facts surrounding the husband's obtaining of the Pakistan divorce.

On December 16, 1973 the husband dispatched a letter from Trenton to his wife in Pakistan, stating that he had filed divorce papers with the Pakistan consulate in New York City. We note that the Pakistan appellate court found that the wife had received this letter. The husband also sent her a copy of the divorce pronouncement or deed (*talaq*) after it was effected at the Pakistan consulate. The divorce was confirmed by the Pakistan lower court on November 5, 1974. The wife then petitioned the appellate court, contending that for various reasons the divorce was invalid. The validity of the divorce was upheld, after a hearing by the Pakistan appellate court, in a written opinion dated December 30, 1975. The wife was represented by counsel in both Pakistan courts. The time for appeal to the highest court of Pakistan has apparently run. Accordingly, the judgment of the appellate court validating the divorce is final. We note that the document executed by the husband and which resulted in the divorce stated as the reason for divorce, "incompatibility on account of emotional problems of the [wife] * * *."

Prior to the confirmation of the divorce by the Pakistan lower court the wife, on May 1, 1974, instituted a separate maintenance action in New Jersey. That was dismissed for failure to answer interrogatories. The present action was commenced March 4, 1975.

575*575 The trial judge's reliance on *Shikoh v. Murff, supra,* 257 *F.*2d 306 was misplaced. Unlike the facts in that case, here there was more than the mere declaration of divorce — *talaq* — before the Pakistan consulate in New York City. The divorce was actually confirmed by a court in Pakistan after being contested by the wife; and thereafter, after an appeal by the wife in a further contested proceeding, the Pakistan appellate court held the divorce to be valid. Under these circumstances, principles of comity require that the divorce be recognized here. Thus the status of the parties as being divorced should have been acknowledged by the trial judge.

Both parties were citizens of Pakistan during the entire period of the Pakistan divorce proceedings and the hearing in the court below. The expert testimony is to the effect that such citizenship constitutes a sufficient basis for the divorce judgment in Pakistan, at least where the matter, as here, was contested. For the purposes of validity of the divorce, it is immaterial that the husband was residing here or, as appears to have been found by the court below, was "domiciled" here. Pakistan had jurisdiction to enter a divorce that should be recognized here by reason of (1) the Pakistan citizenship of the parties, (2) the wife's residence there, even though it may have been against her will and by reason of the husband's acts, and (3) the judgment of the appellate court in Pakistan which validated the divorce. Irrespective of the manner in which the divorce action

was instituted and the legal effect of the divorce document at the time it was filed in the New York consulate or thereafter when it was acted upon in Pakistan, the final result was a divorce judgment entered after contested proceedings in Pakistan in which the parties appeared through counsel. We see no reason for holding that this foreign judgment adjudicating the status of the parties as divorced offends the public policy of this State. The reason for the divorce — the incompatibility of the parties by reason of the wife's emotional problems and the 576*576 failure to effect a reconciliation — is not such a departure from grounds for divorce in this State as to justify nonrecognition on public policy grounds. See *N.J.S.A.* 2A:34-2(d).

An analysis of the opinion of the appellate court in Pakistan satisfies us that the validity of the divorce was amply litigated and determined there in that country. The Pakistan judgment should have been recognized and enforced to the extent it affects the marital status of the parties. The need for predictability and stability in status relationships requires no less. See *Borys v. Borys,* 76 *N.J.* 103, 386 *A.*2d 366 (1978); *Fantony v. Fantony,* 21 *N.J.* 525 (1956); *Warrender v. Warrender,* 79 *N.J. Super.* 114 (App. Div. 1963), aff'd o.b. 42 *N.J.* 287 (1964); *Zanzonico v. Neeld,* 17 *N.J.* 490 (1955); *Restatement, Conflict of Laws* 2d, § 98; Peterson, "Foreign Country Judgments and the Second Restatement of Conflict of Laws," 72 *Col. L. Rev.* 220, 243, 244 (1972). See also, *Kram v. Kram,* 52 *N.J.* 545, 548 (1968); *Meeker v. Meeker,* 52 *N.J.* 59, 68-70 (1968) *Mrowczynski v. Mrowczynski,* 142 *N.J. Super.* 312 (App. Div. 1976); *Sherif v. Sherif,* 76 *Misc.*2d 905, 352 *N.Y.S.*2d 781 (Fam. Ct. 1974).

Thus, the parties were no longer married when the trial judge entered the judgment for separate maintenance.

The question remains as to whether the judge should nevertheless have entertained, under the second count of the amended complaint, the wife's claims for alimony and equitable distribution.

The issues of alimony and the wife's property rights were not adjudicated by the Pakistan courts. The expert testimony establishes that alimony does not exist under Pakistan law and an antenuptial agreement providing therefor is void as a matter of law in that country. It also makes it clear that the antenuptial agreement could have provided for the wife's having an interest in her husband's property, but 577*577 no such provision was made; instead, it provided only for her receiving 15,000 rupees.

For the purpose of this opinion, we assume, without deciding, that where there is a sufficiently strong nexus between the marriage and this State — *e.g.,* where the parties have lived here for a substantial period of time — a claim for alimony and equitable distribution may properly be considered, in the court's discretion, after a judgment of divorce elsewhere, under *N.J.S.A.* 2A:34-23, even though such relief could not have been obtained in the state or country granting the divorce. See *Healey v. Healey,* 152 *N.J. Super.* 44 (App. Div. 1977); *Pierrakos v. Pierrakos,* 148 *N.J. Su-*

per. 574 (App. Div. 1977). See also, *Woliner v. Woliner,* 132 *N.J. Super.* 216 (App. Div. 1975), aff'd o.b. 68 *N.J.* 324 (1975).[3]

Nevertheless, we are satisfied that the proofs here do not support a conclusion that there was an adequate nexus of the marriage to this State to justify an award to the wife of alimony or equitable distribution under *N.J.S.A.* 2A:34-23. Such a relationship to New Jersey is not established merely because the wife and children resided here from 1966 to 1968, even though, as the trial judge found, it was the husband's conduct that prevented the wife from returning to this State after 1968. Under these circumstances the denial of alimony or equitable distribution to the wife cannot be said to offend our public policy.

Additionally, we have concluded that the wife is not entitled to equitable distribution by reason of the antenuptial 578*578 agreement, which was negotiated on her behalf by her parents. It could have lawfully provided for giving her an interest in her husband's property, but it contained no such provision. It limited her rights to some $1,500, or 15,000 rupees. There is no proof that the agreement was not fair and reasonable at the time it was made. We also note that there was no antenuptial or similar agreement in *Pierrakos, supra.*

We see no reason of public policy that would justify refusing to interpret and enforce the agreement in accordance with the law of Pakistan, where it was freely negotiated and the marriage took place. See *N.J. Title Guar. & Trust Co. v. Parker,* 85 *N.J. Eq.* 557 (E. & A. 1915); *Stein-Sapir v. Stein-Sapir,* 52 A.D.2d 115, 382 *N.Y.S.*2d 799 (App. Div. 1976); *Fernandez v. Fernandez,* 194 *Cal. App.*2d 782, 15 *Cal. Rptr.* 374 (D. Ct. App. 1961); *Hill v. Hill,* 262 *A.*2d 661 (Del. Ch. 1970), aff'd 269 *A.*2d 212 (Del. Sup. Ct. 1970). See also, *In re Alexandravicus,* 83 *N.J. Super.* 303 (App. Div. 1964), certif. den. 43 *N.J.* 128 (1964); 10 *N.J. Practice Marriage, Divorce and Separation,* § 275. *Cf. Smith v. Smith,* 72 *N.J.* 350 (1977); *Carlsen v. Carlsen,* 72 *N.J.* 363 (1977); *Ganther v. Ganther,* 153 *N.J. Super.* 226, 229 (App. Div. 1977); *Caruso v. Caruso, supra.*

We next consider the denial of child support.

We hold that the court erred in refusing to consider evidence with respect to that issue. It had jurisdiction to award such support, if justified by the proofs, even after a valid foreign divorce. See *Daly v. Daly,* 21 *N.J.* 599 (1956); *Conwell v. Conwell,* 3 *N.J.* 266, 273 (1949); *N.J.S.A.* 2A:34-23.

In his opinion the trial judge also appears to have refused child support on the alternative ground of affording comity recognition to an order of the Pakistan court awarding an aggregate of $150 a month for the three children, even though the record is barren of any indication of the nature of the proceedings in which the order was entered or the 579*579 basis therefor. In this respect it may be of some significance, among other things, to determine whether the Pakistan court was adequately aware of the financial status of the husband and the wife when its order was entered,

and whether that court's order may be subject to modification in Pakistan.[4] See *Daly v. Daly, supra,* 21 *N.J.* at 605; *Woodhouse v. Woodhouse,* 17 *N.J.* 409, 416-418 (1955). See also, *Grotsky v. Grotsky,* 58 *N.J.* 354 (1971); *Ionno v. Ionno,* 148 *N.J. Super.* 259 (App. Div. 1977). Compare *Yarborough v. Yarborough,* 290 *U.S.* 202 and dissenting opinion at 213, 54 *S.Ct.* 181, 185, 78 *L.Ed.* 269, 276 (1933), referred to in *Borys v. Borys, supra.* In any event, we question whether, under the inadequate proofs disclosed by the record, there was any justification for the trial court's recognizing the Pakistan child support order on what appears simply to be some abstract notion of comity. See *Caruso v. Caruso, supra,* 106 *N.J. Eq.* at 138-144.

We note that in *Hachez v. Hachez,* 124 *N.J. Eq.* 442, 448 (E. & A. 1938), which dealt with the question of child custody in the context of comity among nations, the court referred to the importance of protecting children, but indicated that "`our courts will hold aloof *when intervention* is *unnecessary for the welfare of the child.'"* (emphasis supplied). See also, *Fantony v. Fantony, supra; Salmon v. Salmon,* 88 *N.J. Super,* 291, 303-305 (App. Div. 1965); *Casteel v. Casteel,* 45 *N.J. Super.* 338 (App. Div. 1957).

It may well be that since the three children reside in Pakistan, presumptively the $150 a month order entered by a Pakistan court (the Court of the First Family Judge and Senior Civil Judge at Karachi) for their support is adequate. Again, it may well be that if the husband will voluntarily submit himself to the jurisdiction of that court for further proceedings relating to the sufficiency of such support and 580*580 fully disclose to it his assets and income, an award of child support here may not be warranted. But the wife has the right to present proofs on these matters so that the trial court may be satisfied that the welfare of the children is being sufficiently protected by the Pakistan order against the husband who resides here. In short, the existence of the Pakistan order, if the wife wishes to contest its adequacy, could be the beginning, rather than the end, of the inquiry by the trial court.

It is not clear from the record whether the wife, in the trial court, was attacking the Pakistan order on the ground that it did not adequately provide for the children. There was merely a fleeting reference by the husband's attorney to the existence and the amount of the order; and, as indicated, the judge refused to take any proofs at all as to child support.[5]

Under these circumstances, we believe that the appropriate course is to affirm the judgment denying child support, without prejudice to the wife's filing a petition below in the cause, if she so desires, attacking the Pakistan order as to such support and seeking a hearing and a determination with respect thereto.

581*581 In conclusion we hold that (1) the trial judge should have afforded recognition to the Pakistan divorce; (2) he should not have awarded separate maintenance or $6,880 arrears therefor to the wife; (3) the wife is not entitled to equitable distribution of assets or alimony; and (4) although the trial judge should not have denied support for the children for the reasons he gave,

the judgment denying such support should be affirmed, without prejudice to the wife's filing a petition with respect to the Pakistan child support order, as heretofore discussed.

Paragraphs 1 and 2 of the judgment below are reversed. The provision of the judgment denying support for the children is affirmed, subject to the conditions set forth in this opinion. Neither party has argued the question of the $4,000 counsel fees, inclusive of costs, awarded the wife's attorney by the trial court. We see no basis for disturbing that award. See *R.* 4:42-9(a) (1). Thus, paragraph 3 of the judgment is affirmed. Paragraphs 5 and 6 of the judgment, requiring the husband to provide the wife with a return airline ticket to Pakistan and requiring his previous counsel to turn over exhibits to his present counsel, are affirmed.

The stay of the judgment, as herein modified, is vacated.

We do not retain jurisdiction.

[1] The Supreme Court granted a stay of the judgment pending appeal, thus disposing of another basis of the wife's cross-appeal — the trial court's stay of the judgment in part.

[2] On June 6, 1976 the Pakistan court issued an *ad interim* restraint enjoining the wife from "styling herself as the wife of the applicant and prosecuting any judicial proceedings on that basis or arising in any manner out of that relationship."

[3] The instant case does not present the question of the extent to which generally a divorce judgment of a court of another country, which also has actually decided alimony or property rights, should be afforded recognition here under comity principles. Compare *Manfrini v. Manfrini,* 136 *N.J. Super.* 390 (App. Div. 1975), certif. den. 70 *N.J.* 526 (1976); *Higginbotham v. Higginbotham,* 92 *N.J. Super.* 18 (App. Div. 1966). See *Caruso v. Caruso,* 106 *N.J. Eq.* 130, 138 *et seq.* (E. & A. 1929); *Growe v. Growe,* 2 *Mich. App.* 25, 138 *N.W.* 2d 537, 540 (App. Ct. 1965).

[4] The husband claims that the wife has substantial assets and income. She denies this. The court below obviously believed her.

[5] The husband has a pending action in Pakistan seeking custody of the children. We note that prior to the last hearing of July 7, 1976 the parties, with the court's approval, settled all of the matters here involved in open court. Part of the settlement involved dismissal of the husband's custody action; recognition of the divorce as valid and the payment by the husband to the wife of $250 a month alimony, a reasonable rental for an apartment and the cost of furnishing the apartment; a waiver by each party of any interest in the other's property, and the payment by the husband of certain items of additional support for the children. The settlement occurred on April 1, 1976. It appears from the record that this settlement agreement was not effected by reason of subsequent advice received by the husband from his Pakistan attorney. The wife did not seek to enforce the agreement. See *Skillman v. Skillman,* 136 *N.J. Super.* 348, 353 (App. Div. 1975).

CATEGORY: Shariah Marriage Law

RATING: Relevant

TRIAL: TCSY

APPEAL: ACSY

COUNTRY: N/A

URL:
http://scholar.google.com/scholar_case?case=13247658963701480706&q=Islamic+OR+Sharia+OR+Muslim+OR+Islam&hl=en&as_sdt=4,31

ARIFUR RAHMAN, PLAINTIFF-RESPONDENT, V. OBHI HOSSAIN, DEFENDANT-APPELLANT.

No. A-5191-08T3.

Superior Court of New Jersey, Appellate Division.

Submitted April 14, 2010.

Decided June 17, 2010.

Neal J. Berger, attorney for appellant.

Respondent has not filed a brief.

Before Judges Sabatino and J. N. Harris.

PER CURIAM.

Defendant Obhi Hossain ("the ex-wife") appeals certain aspects of a Final Judgment of Divorce ("FJD") entered by the Family Part on June 19, 2009, following a default proceeding. In particular, the ex-wife seeks to vacate the trial court's disposition of equitable distribution, specifically its directive that the ex-wife refund to plaintiff Arifur Rahman ("the ex-husband"), the sum of $12,500 that had been paid to the ex-wife at the time of their wedding. We affirm.

The pertinent facts may be readily summarized. The parties were married in the State of Maryland on September 9, 2006. It was an arranged marriage, with both parties being of Bangladeshi descent. The ex-husband was from New Jersey and the ex-wife was from South Carolina. At the

time of the marriage, both spouses agreed to be united "under the law of Islam." Pursuant to Islamic customs, a sum of $12,500 was paid to the ex-wife as an initial payment of "sadaq" or "mahr" by the ex-husband or his family.[1]

The marriage was short-lived, and the parties cohabitated only briefly. According to the ex-husband, the ex-wife would sleep throughout the day, frequently take anti-depressants, refused to look for a job, refused to engage in marital relations, and did not sufficiently attend to her personal hygiene. About one year into the marriage, the ex-wife moved back to South Carolina and did not return to New Jersey.

The ex-husband filed a complaint for divorce or annulment in the Family Part in December 2007. The ex-wife, then represented by counsel, filed an answer and counterclaim, but her pleadings were ultimately suppressed and she ended up in default status. The default was not cured and the matter was scheduled by the court for a default hearing, pursuant to Rule 5:5-10, on issues of equitable distribution.

On April 6, 2009, the trial court conducted a default hearing. At that hearing, the ex-wife and her then-attorney[2] were present, but, because of the default posture, they did not present proofs or otherwise participate.

The ex-husband presented at the default hearing expert testimony from a New Jersey attorney knowledgeable in Islamic law. The court accepted him as an expert. Among other things, the expert testified that under Islamic law a marriage is a civil contract and that the payment and retention of the sadaq is contingent upon neither party having fault that leads to the termination of the marriage.[3] The expert opined that, under Islamic law and customs, the court would have the authority to order the $12,500 initial payment of sadaq to be returned, if it made a finding that the ex-wife was "at fault" in precipitating the divorce. The court also heard testimony from the ex-husband describing the circumstances that preceded the marriage and those which led to its demise.

Following the default hearing, the trial judge issued a letter opinion. In that opinion, the judge denied the ex-husband an annulment, finding that there were no misrepresentations that would suffice to satisfy the statutory grounds for such relief under N.J.S.A. 2A:34-1(1)d. The judge did grant a judgment of divorce to the ex-husband, because of the ex-wife's "failure to engage in marital relations, her unilateral move out of state, and her alleged failure to care for her personal hygiene[,]" all of which the judge determined to constitute extreme cruelty under N.J.S.A. 2A:34-2c.

The judge then turned to the question of the refund of the sadaq. Relying specifically on the uncontroverted testimony of the expert, the court found that the ex-wife's "undisclosed mental illness constituted an impediment to the marriage under Islamic law." Accordingly, the judge granted a judgment of divorce, with a finding of fault on the part of the ex-wife. The judge also

found that the ex-wife had "omitted information of grave consequence at the time the marriage was entered into." For these reasons, the judge ordered the ex-wife to return the $12,500 within sixty days.

Lastly, the judge's opinion dealt with other incidental issues of equitable distribution. The judge concluded that the ex-wife was entitled to keep jewelry—which was valued by the parties at $15,000—that was given to the parties' as a joint present at the time of their wedding. However, the ex-wife was required to pay the ex-husband one-half of an appraised value of the jewelry.[4]

On appeal, the ex-wife raises two arguments in an effort to set aside the trial court's ruling concerning the repayment of the $12,500 and the court's associated finding that she was at fault in precipitating the divorce. First, she contends that the ex-husband's expert on Islamic law had an undisclosed conflict of interest that disqualified him from testifying at the default hearing. Second, she asserts that the trial judge erred in finding that she was at fault in causing the marriage to fail, and thereby the ex-husband did not sustain his burden of proof to recover the sadaq.

Our standard of review is a limited one. Given the Family Part's special expertise in matrimonial and other family disputes, appellate courts must accord particular deference to the determinations of trial judges hearing such cases. Cesare v. Cesare, 154 N.J. 394, 411-13 (1998). The ex-wife argues that the trial judge's determinations in this case nevertheless must be set aside. We disagree.

The ex-wife's allegation of a conflict of interest on the part of the ex-husband's expert is speculative at best. She essentially maintains that the expert had a dual relationship, functioning not only as an expert representing the interests of the ex-husband, but also as an expert (or as a prospective expert) on her own behalf.

The ex-wife asserts in her brief, without citation to any documents or testimony in the record, that "[i]n June and July of 2008, Appellant [the ex-wife] contacted [the expert] to consult with him regarding this litigation and discussed in detail certain issues regarding immigration law and the [s]adaq document, pertaining to the $12,500[] purportedly paid to Appellant [the ex-wife] by Respondent [the ex-husband]." Her brief further asserts that "[n]ot only did Appellant and her [former] attorney consult with [the expert] and obtain legal opinions regarding immigration and the issue of Sadaq/Mahr, but counsel did in fact bill Appellant for said consultations." The brief then cites to an April 8, 2008 invoice the ex-wife received from her former attorney—containing a March 19, 2008 billing entry for 0.20 hours reflecting a call from the ex-wife's counsel to the expert—and a May 12, 2008 invoice—containing an April 1, 2008 billing entry for 0.30 hours stating "Review e[-]mail" and "Spoke with [the expert]."

The ex-wife argues that the expert, because he is an attorney, violated the Rules of Professional Conduct, by allegedly consulting with her as a prospective client and thereafter using unspecified information that he gained from that consultation in a substantially-related matter adverse to her

interests. See RPC 1.18(a) and RPC 1.18(b). Based upon this factual premise, the ex-wife contends that the expert's testimony of the default hearing was tainted, and must now be stricken, thereby warranting a remand for a new hearing.

There is not a shred of competent proof in the record to substantiate the ex-wife's conflict-of-interest allegations. When the expert testified at the default hearing, neither the ex-wife nor the attorney then representing her raised any concern to the trial court about the propriety of the expert testifying in the ex-husband's presentation on equitable distribution issues. We are mindful that because the ex-wife was indisputably in default status at the time of the hearing, she and her attorney were foreclosed from adducing proofs at the hearing. Even so, there was no timely application to adjourn the hearing or to bring the alleged conflict to the court's attention before the expert testified.

Nor did the ex-wife or her attorney file a motion under Rule 4:50-1 with the Family Part seeking to vacate the FJD on the basis of an asserted conflict of interest, an application that would have allowed the record to be appropriately developed on the issue. Instead, the ex-wife raises the conflict issue for the first time on this appeal.

The record is also bereft of any affidavit or certification by the ex-wife attesting to the unsworn and undocumented assertion in her brief that she met with the expert before the expert was retained by her ex-husband. The ex-wife also has not specified what personal information, not otherwise known by her spouse, that she shared with the expert privately and which the expert somehow used to her disadvantage at the default hearing. Without a proper citation to the trial court record, the brief's unsubstantiated factual assertion of such prior consultation is not suitable for our consideration. See R. 2:5-4(a) (defining the record on appeal to include only materials presented to the trial court); see also Cipala v. Lincoln Technical Inst., 179 N.J. 45, 54-55 (2004). Moreover, we customarily do not reach or resolve on appeal issues that a litigant failed to raise in the trial court. Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234 (1973).

Even if we were required to address the ex-wife's conflict-of-interest allegation for the first time in this appeal, the record that has been supplied to us does not demonstrate such a conflict. The mere fact that the billing records of the ex-wife's trial attorney reflect that the attorney had two brief conversations with the expert—totaling no more than a half hour—does not prove that the expert was acting in a dual or improper capacity. It is not unusual or per se inappropriate for an expert witness retained by one litigant to have conversations with counsel representing an opposing party in the same matter. Counsel sometimes legitimately may need to speak with such an expert concerning scheduling issues, or to arrange access to materials or information that the expert may require to perform his or her work.[5]

The ex-wife has supplied no affidavit or certification from her former attorney explaining the purpose or substance of that attorney's telephonic communications with the expert. We will not

presume that those contacts were inappropriate, absent much more definitive proofs than the two billing entries. Indeed, it is conceivable that the ex-wife's contentions of a conflict here are founded upon a misunderstanding or misperception of the expert's role. The ex-wife simply has failed to develop an adequate record to establish an impermissible taint. Consequently, we reject the ex-wife's demand to strike the expert's testimony and to vacate the default proceeding.

We are likewise unpersuaded that the trial court erred in finding a sufficient circumstantial basis to order a refund of the $12,500 payment for the sadaq. The ex-wife provides no contrary legal support to the expert's assertion, which was adopted by the trial court, that under Islamic law and customs the payment of a sadaq is refundable if there is a proven impediment to the marriage such as a spouse's undisclosed mental illness. See also Alicea v. New Brunswick Theological Seminary, 128 N.J. 303, 313 (1992) (noting the relevance of religious customs and principles in certain civil disputes, particularly with respect to contractual promises that can be decided by applying neutral principles of law). Having failed to cite to contrary legal authority, the ex-wife instead challenges the sufficiency of the factual proofs of fault and impediment that were adduced before the trial judge.

At the default hearing, the ex-husband testified that, after she moved in with him, his new spouse was "sleeping all through the day" and that he discovered she was "taking a depression medication without prescription." There was also testimony from the ex-husband about his spouse's refusal to engage in marital relations or to seek employment, and her ultimate departure and relocation to South Carolina. The ex-wife denies, again without citation to any sworn proofs in the record, that she has ever taken medication without a prescription. She also complains that the ex-husband's testimony did not mention the identity of the medication she was taking, the dosage amounts, or the frequency. We do not regard the absence of those additional details as warranting relief to the ex-wife on this appeal. The trial court obviously perceived that the ex-husband's testimony was credible. Although we understand that the ex-wife now contests the trial court's factual findings, there is ample and substantial credible evidence in the record sufficient to support those findings. Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974). Moreover, if the ex-wife wished to contest her spouse's factual assertions, she should have complied with the Court Rules and not allowed her case to lapse into, and remain in, default.

In sum, we sustain the Family Part's determinations in all respects, substantially for the reasons set forth in Judge Katherine R. Dupuis's letter opinion dated May 13, 2009.

Affirmed.

[1] See, e.g., Odatalla v. Odatalla, 355 N.J. Super. 305, 311-14 (Ch. Div. 2002) (describing the facets of a mahr agreement under **Islamic** customs).

[2] The ex-wife is represented by different counsel on her present appeal.

[3] According to the expert, sadaq is divided into two parts; one that is paid to the wife at the time of marriage and one that is payable upon either the death of the husband or the dissolution of the marriage. The expert indicated that, if the wife is found to be at fault in the dissolution, she could forfeit her claim to the deferred sadaq payment.

[4] The judge established a transfer of the jewelry to the ex-husband for appraisal purposes. After this appraisal the ex-husband could either give the ex-wife back the jewelry, receiving payment of half the appraisal value in return, or he could keep the jewelry and pay the ex-wife half the appraised value. The ex-wife's appeal does not contest the trial court's disposition of the jewelry.

[5] For example, a forensic accountant performing the valuation of a litigant's business may need to communicate with opposing counsel to gain access to the company's relevant books and records, or a psychological expert performing a bonding evaluation of both parents and their children in a custody dispute may need to speak with opposing counsel (or, for that matter, to his or her client) in order to proceed with the necessary interviews and to obtain appropriate background data.

CATEGORY: Child Custody

RATING: Relevant

TRIAL: TCSI

APPEAL: ACSNA

COUNTRY: Morocco

URL: http://scholar.google.com/scholar_case?case=3937575338054006500&q=Islamic+OR+Shari a+OR+Muslim+OR+Islam&hl=en&as_sdt=4,31

288 N.J. Super. 575 (1996)

672 A.2d 1226

JEAN JACQUES MARCEL IVALDI, PLAINTIFF-RESPONDENT, V. LAMIA KHRIBECHE IVALDI, DEFENDANT-APPELLANT.

Superior Court of New Jersey, Appellate Division.

Argued February 6, 1996.

Decided March 15, 1996.

578*578 Before MICHELS, BAIME and VILLANUEVA, JJ.

Daniel C. Fleming argued the cause for appellant (*Wong, Tsai & Fleming,* attorneys; (*Mr. Fleming,* on the letter-brief)).

579*579 *Patricia E. Apy* argued the cause for respondent (*Chattman, Sutula, Friedlander & Paul,* attorneys; *Ms. Apy,* on the brief).

The opinion of the court was delivered by BAIME, J.A.D.

We granted defendant's motion for leave to appeal from the Family Part's order directing her to return her child to the United States, restraining her from continuing custody proceedings in any other jurisdiction, and awarding temporary custody of the child to plaintiff. Defendant had taken the child to Morocco, where the parties had resided before coming to the United States, pursuant to a separation agreement which granted her sole physical custody and permitted her to take up

residence with the child in another country. We hold that the Family Part lacked subject matter jurisdiction and, in any event, should have deferred to the divorce and custody proceedings that had already commenced in Morocco.

I.

The facts are not in dispute. Plaintiff holds both American and French citizenship. Defendant is a citizen of Morocco. The parties were married pursuant to **Islamic** law by a Moroccan court in 1992. Following their marriage, the couple moved to France where their daughter Lina was born in 1993. In the latter part of 1993, the parties moved to Morocco. When their business plans failed, the couple emigrated to New Jersey, where plaintiff's parents operated a restaurant. While residing in New Jersey, the parties' marital relationship deteriorated, causing plaintiff to leave the family residence and move into his parents' house.

On February 22, 1995, the parties entered into a separation agreement under which they retained joint legal custody, but physical custody was granted to defendant. The agreement provided that defendant and Lina could take up residence in another country so long as defendant abided with the provisions of the agreement. Plaintiff was given twelve weeks of visitation with the child each year in the country where he resided, but was required 580*580 to pay all travel expenses incurred in connection with that visitation. The period of visitation was to be determined by plaintiff. In turn, plaintiff was required to pay child support in the weekly amount of $125 until Lina's emancipation. The agreement granted defendant permission to obtain a divorce pursuant to **Islamic** law.

In the event of a breach of the agreement, the non-breaching party was required to provide the defaulting party with written notice of the breach by certified mail and allow thirty days to cure the breach. The agreement, which was to be interpreted according to the principles of New Jersey law, was to be incorporated into any divorce judgment obtained by the parties.

Within a week of the execution of the agreement, Lina was sent to live with defendant's parents in Morocco. Defendant herself moved to Morocco in April 1995. Sometime between April 27 and May 3, 1995, defendant filed a petition for divorce and custody in the Primary Court of Rabat. Plaintiff was served with the summons and complaint and was ordered to appear before the Primary Court on October 16, 1995 for a hearing on the petition.

Plaintiff filed a complaint in the Family Part on May 2, 1995, in which he sought a judgment of divorce, equitable distribution, sole custody of Lina, and child support. Defendant was served with the summons and complaint on August 8, 1995, and filed a motion to dismiss several days later. The court denied defendant's motion. Although the Family Part judge's oral opinion is not a paragon of clarity, he apparently found that the New Jersey courts had subject matter jurisdiction and that New Jersey constituted Lina's "home state." The judge seemingly determined that defendant had wrongfully removed Lina from New Jersey to Morocco. We derive that interpreta-

tion from the judge's allusion to defendant's holding the New Jersey courts "hostage." In any event, the judge scheduled a hearing to determine the child's best interests, ordered defendant to return Lina to the United States within a week, and awarded plaintiff sole custody of the child pending disposition of the issues. In addition, the judge restrained 581*581 defendant from proceeding with her petition for custody in Morocco.

Defendant filed a motion for leave to appeal. We granted a temporary stay pending disposition of the motion and requested the Family Part judge to supplement his oral opinion with a written statement of reasons. In his supplemental opinion, the judge acknowledged that the Uniform Child Custody Jurisdiction Act (*N.J.S.A.* 2A:34-28 to -52) (UCCJA) was not applicable. The judge also noted that the Hague Convention was not applicable because Morocco is not a signatory to the treaty. The judge nevertheless determined that New Jersey was Lina's home state based upon the length of time she had resided here. The judge also found that defendant had removed Lina from New Jersey by "subterfuge" and that the provision in the separation agreement allowing defendant to take up residence in another country with Lina was not applicable because defendant had breached the agreement by refusing to permit plaintiff to exercise his right of visitation. We granted defendant's motion for leave to appeal following receipt of the Family Part judge's supplemental opinion. We also continued our stay of the Family Part's order pending disposition of the appeal, which has been accelerated.

II.

Initially, we find no basis in the record for the Family Part judge's conclusion that defendant wrongfully removed Lina from New Jersey to Morocco. The separation agreement clearly contemplated that defendant would leave the United States with Lina and take up residence in another country. This is not a matter of interpretation. The agreement expressly granted defendant permission to take this course.

So too, the record is barren of anything supporting the judge's finding that defendant breached the agreement by denying plaintiff's right of visitation. Although plaintiff in his affidavit which accompanied his complaint alleged in conclusory fashion that he had not been permitted to visit Lina, it is undisputed that 582*582 he never made any support payments as required by the agreement. He also neither tendered nor offered to tender travel expenses, a precondition to his right of visitation, until April 17, 1995. Moreover, plaintiff never gave written notice of the alleged breach which would have triggered the opportunity to cure the alleged default within thirty days. It is true that on April 17, 1995, plaintiff's lawyer represented in a letter to defendant's attorney that plaintiff was willing to travel to Rabat to pick up the child and exercise his right of visitation. However, defendant was reluctant to accept this arrangement because of problems involving Lina's passport and her fear that the child would not be returned. In any event, assuming that defendant's refusal to accede to plaintiff's demand constituted a breach of the agreement, this default occurred long after the child had been lawfully removed from the United States to Mo-

rocco. Moreover, plaintiff filed his complaint sixteen days after his attorney's demand, a clear violation of the provision in the separation agreement allowing the defaulting party an opportunity to cure within thirty days. Of course, once plaintiff filed his complaint seeking custody in derogation of the express terms of the agreement, defendant's fear that plaintiff would not return the child if visitation were permitted became a concrete reality.

This is not a case in which a child was spirited away from his or her custodial parent. The judge's finding to the contrary is clearly a mistaken one and is so plainly unwarranted that the interests of justice demand our intervention and correction. *See State v. Johnson,* 42 *N.J.* 146, 162, 199 *A.*2d 809 (1964). The judge went so wide of the mark that a mistake must have been made. *Ibid.*

III.

The Family Part judge's determination that the New Jersey courts had subject matter jurisdiction was less than precise. We thus examine possible sources of jurisdictional authority.

583*583 A. *State Statutes*

We agree with the judge's determination that the UCCJA is not applicable to this case. The UCCJA was formulated by the National Conference of Commissioners on Uniform State Laws in response to the United States Supreme Court's failure to delineate in detail the extent to which the Full Faith and Credit Clause, *U.S. Const.* art. IV, § 1, requires states to honor the child custody decrees of other states. *E.E.B. v. D.A.,* 89 *N.J.* 595, 602-03, 446 *A.*2d 871 (1982), *cert. denied,* 459 *U.S.* 1210, 103 *S.Ct.* 1203, 75 *L.Ed.*2d 445 (1983); *see generally Neger v. Neger,* 93 *N.J.* 15, 24-25, 459 *A.*2d 628 (1983); *Borys v. Borys,* 76 *N.J.* 103, 109-18, 386 *A.*2d 366 (1978). In line with the vast majority of states, New Jersey enacted its version of the UCCJA in 1979. *L.* 1979, *c.* 124, § 1. According to the legislative findings, the articulated objectives of the statute were to avoid jurisdictional conflict between the courts of different states in child custody matters, discourage protracted child custody controversies in the interest of promoting a stable environment for the child, deter child abductions, ensure that a particular custody dispute is decided in the state "with which the child and his family have the closest connection," and "[f]acilitate the enforcement of custody decrees of other states" here in New Jersey. *N.J.S.A.* 2A:34-29.

The focus of the UCCJA is thus on the relationship between the states. Significantly, a "state" is defined as "any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia." *N.J.S.A.* 2A:34-30j. Notable in its absence from this definition is any reference to a foreign country. Nevertheless, the UCCJA contains one provision dealing with international custody disputes. Specifically, *N.J.S.A.* 2A:34-51 provides:

The general policies of this act extend to the international area. The provisions of this act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature and to custody rendered by appropriate

authorities of other nations, if reasonable notice and opportunity to be heard were given to all affected persons.

[*Ibid.*]

584*584 In a series of decisions, New Jersey courts have construed this section as conferring jurisdiction only where the court is asked to recognize and enforce a custody decree entered by the authorities of a foreign country. *See Schmidt v. Schmidt,* 227 *N.J. Super.* 528, 533, 548 *A.*2d 195 (App.Div. 1988); *Loos v. Manuel,* 278 *N.J. Super.* 607, 621, 651 *A.*2d 1077 (Ch.Div. 1994); *Roszkowski v. Roszkowska,* 274 *N.J. Super.* 620, 629, 644 *A.*2d 1150 (Ch.Div. 1993). The Chancery Division's decision in *Ali v. Ali,* 279 *N.J. Super.* 154 (Ch.Div. 1994), is not to the contrary. That case also involved a party's attempt to enforce a custody decree entered in a foreign territory. *Id.* at 158. To the extent that the *Ali* decision can be read as asserting original jurisdiction over a custody dispute involving a child residing in another country, it is plainly inconsistent with Justice (then Judge) Coleman's opinion in *Schmidt v. Schmidt,* 227 *N.J. Super.* 528, 548 *A.*2d 195, that "[t]he UCCJA only applies to an international child custody case when the State is asked to recognize and enforce decrees of foreign countries." *Id.* at 533, 548 *A.*2d 195.

Schmidt and its progeny distinguish between the exercise of original jurisdiction in a child custody dispute and the enforcement of foreign decrees. This distinction permeates the UCCJA. Our Supreme Court commented upon the distinction in *Neger v. Neger,* 93 *N.J.* 15, 459 *A.*2d 628. There, the Court noted that "[t]wo main threads run through the [UCCJA]." *Id.* at 25, 459 *A.*2d 628. "The first bears upon when a state should exercise original jurisdiction in a custody proceeding, that is, when no other state is in the midst of custody proceedings or has made a custody award after such proceedings." *Ibid.* "The second significant statutory strand relates to enforcement and modification of a custody decree of another state." *Id.* at 27, 459 *A.*2d 628.

Legal commentators have also discussed this distinction. *See, e.g.,* Brigitte M. Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State,* 46 *U.Colo.L.Rev.* 495, 501 (1975); Julia R. Rutherford, Note, *Removing the Tactical Advantages of International* 585*585 *Parental Child Abductions Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction,* 8 *Ariz.J.Int'l & Comp.Law* 149, 152 (1991). This limitation has been described in the following terms:

while the UCCJA is reciprocal among those states and territories of the United States which have enacted it; it is not reciprocal between the United States and any other country. While Section 23 of the UCCJA makes it applicable to the international arena, the UCCJA does not contain language providing for judicial reciprocity. Thus, the UCCJA only recognizes and enforces foreign and domestic custody decrees within the United States and its territories. A state court in the United States, under the UCCJA, may enforce custody or visitation rights ordered by a foreign court against a United States citizen but it cannot order a citizen of another country to return a

child to the United States.... In international child custody disputes, United States courts should favor ICARA [International Child Abduction Remedies Act, 42 *U.S.C.A.* §§ 11601-11610] over the UCCJA.

[Rutherford, Note, *Removing the Tactical Advantages of International Parental Child Abductions Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction,* 8 *Ariz.J.Int'l & Comp.Law* at 152.]

We do not suggest that this view is universal. Our examination of the decisions of other jurisdictions discloses that the issue has received uneven treatment. *Compare In re Stephanie M.,* 7 *Cal.*4th 295, 27 *Cal. Rptr.*2d 595, 867 *P.*2d 706, *cert. denied sub nom. Jose M. v. San Diego Cnty. Dep't of Social Servs.,* ___ *U.S.* ___, 115 *S.Ct.* 277, 130 *L.Ed.*2d 194, *and cert. denied sub nom. Mendez v. San Diego Cnty. Dep't of Social Servs.,* ___ *U.S.* ___, 115 *S.Ct.* 337, 130 *L.Ed.*2d 294 (1994); *Zenide v. Superior Court,* 22 *Cal. App.*4th 1287, 27 *Cal. Rptr.*2d 703 (1994); *Ruppen v. Ruppen,* 614 *N.E.*2d 577, 582 (Ind. App. 1993); *Dincer v. Dincer,* 666 *A.*2d 281, 284 (Pa.Super. 1995); *Black v. Black,* 441 *Pa.Super.* 358, 657 *A.*2d 964, *app. denied,* 668 *A.*2d 1119 (Pa. 1995) (applying UCCJA to international child custody disputes and construing the definition of "State" to encompass foreign nations) *with Koons v. Koons,* 161 *Misc.*2d 842, 615 *N.Y.S.*2d 563, 567 (Sup. 1994); *Klien v. Klien,* 141 *Misc.*2d 174, 533 *N.Y.S.*2d 211, 214 (Sup. 1988) (holding that UCCJA applies to international disputes but that foreign countries are not "states" for purposes of the statute). We perceive no need to revisit the area in the context of the facts 586*586 presented here. We adhere to our opinion in *Schmidt v. Schmidt,* 227 *N.J. Super.* 528, 548 *A.*2d 195. The UCCJA is thus inapplicable because this case involves the assertion of original jurisdiction over a custody dispute involving a child who resides in a foreign country.

We have examined other New Jersey statutes as well. *N.J.S.A.* 2A:34-23 authorizes the Family Part to resolve questions relating to alimony, maintenance and the "care, custody, education and maintenance of ... children." We do not construe this general grant of power as conferring original jurisdiction in international custody disputes. *But see Macek v. Friedman,* 240 *N.J. Super.* 614, 618, 573 *A.*2d 996 (App.Div. 1990). To do so would render nugatory most of the provisions of the UCCJA. We are convinced that *N.J.S.A.* 2A:34-23 simply authorizes the courts to enter various orders in matrimonial actions where subject matter jurisdiction otherwise exists.

We are also satisfied that *N.J.S.A.* 9:2-2 does not confer jurisdiction. This statute prohibits the removal of children of divorced or separated parents from New Jersey without the consent of both parents unless by court order. *See Holder v. Polanski,* 111 *N.J.* 344, 544 *A.*2d 852 (1988); *Cooper v. Cooper,* 99 *N.J.* 42, 491 *A.*2d 606 (1984); *Cerminara v. Cerminara,* 286 *N.J. Super.* 448, 669 *A.*2d 837 (App.Div. 1996). As noted above, plaintiff effectively consented to the removal of Lina from New Jersey under the separation agreement, and, in any event, this section is inapplicable because it covers only children who are "natives of this State, or have resided five years within its limits...." *N.J.S.A.* 9:2-2.

B. *Federal Statutes*

The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) was ratified by the United States on April 29, 1988. Later that same year, Congress passed the International Child Abduction Remedies Act (ICARA), 42 *U.S.C.A.* §§ 11601 to 11610, which provided a set of procedures designed to implement the treaty. *See generally* *Duquette v.* 587*587 *Tahan,* 252 *N.J. Super.* 554, 556, 600 *A.*2d 472 (App.Div. 1991). The ICARA confers concurrent jurisdiction of all "actions arising under the Convention" on the federal district courts and the courts of the states. 42 *U.S.C.A.* § 11603(a). Four jurisdictional requisites must be satisfied to invoke the Hague Convention. First, the nations involved must be signatories to the Hague Convention. *Roszkowski v. Roszkowska,* 274 *N.J. Super.* at 633, 644 *A.*2d 1150. Second, "the party petitioning the court must demonstrate that the child involved was `habitually resident in a Contracting State [i.e., one which is a signatory to the Convention] immediately before any breach of custody....'" *Ibid.* (quoting *Hague Convention* art. 4). Third, the child must be under the age of sixteen. *Id.* at 634, 644 *A.*2d 1150 (citing *Hague Convention* art. 4). Fourth, the removal to or retention of the child in a country other than the child's habitual residence must have been wrongful. *Id.* at 635, 644 *A.*2d 1150 (citing *Hague Convention* art. 3).

Plaintiff has failed to meet the first, second, and fourth requirements for invocation of the Hague Convention. First, Morocco is not a signatory to the Convention. Second, plaintiff did not have custody rights in the child prior to her removal from the United States, but merely visitation rights. "[T]he Convention does not mandate the return of children to the noncustodial parent for the purpose of visitation." *Viragh v. Foldes,* 415 *Mass.* 96, 612 *N.E.*2d 241, 246 (1993). Although plaintiff and defendant have joint legal custody under the separation agreement, the right to custody as contemplated by the Convention consists of "`in particular, the right to determine the child's place of residence.'" *Ibid.* (quoting *Hague Convention* art. 5(a)). Any fair reading of the separation agreement reveals that plaintiff does not have that right. All he has under the agreement is a "right of access" to the child. *See Hague Convention* art. 5(b) (a complete copy of the Convention is available as an appendix to this court's decision in *Duquette v. Tahan,* 252 *N.J. Super.* at 563-79, 600 *A.*2d 472). Breach of such a right does not trigger an automatic duty under 588*588 the Convention to return the child. Finally, as noted, there is no evidence in the record to support a finding that Lina was wrongfully removed from the United States.

We have also reviewed the Parental Kidnapping Prevention Act, 28 *U.S.C.A.* § 1738A (PKPA). The PKPA provides that the courts of each state are required to enforce child custody decrees entered by any sister state. 28 *U.S.C.A.* § 1738A(a). The federal statute is inapplicable because it concerns only the enforcement in one state of decrees previously entered by the courts of another state. Moreover, there is nothing in the language or history of the PKPA suggestive of a congressional intent to apply the statute to decrees issued by foreign governments.

C.

We thus conclude that the Family Part lacked subject matter jurisdiction in this case. In reaching this conclusion, we nevertheless emphasize the limited contours of our holding. We stress that there is no evidence in this case indicating the child was kidnapped or otherwise wrongfully removed from New Jersey to a foreign country. New Jersey has long exercised *parens patriae* jurisdiction to protect the safety and welfare of children having substantial contacts with this State. *See Fantony v. Fantony,* 21 *N.J.* 525, 535-36, 122 *A.*2d 593 (1956); *Lippincott v. Lippincott,* 97 *N.J. Eq.* 517, 519-21, 128 *A.* 254 (E. & A. 1925); *Clemens v. Clemens,* 20 *N.J. Super.* 383, 389-90, 90 *A.*2d 72 (App.Div. 1952); *Lavigne v. Family and Children's Soc'y,* 18 *N.J. Super.* 559, 575-76, 87 *A.*2d 739 (App.Div. 1952), *rev'd on other grounds,* 11 *N.J.* 473, 95 *A.*2d 6 (1953). This inherent jurisdiction is not dependent upon statutory grants. *Clemens v. Clemens,* 20 *N.J. Super.* at 389, 90 *A.*2d 72. Indeed, there is authority for the proposition that the inherent jurisdiction of the courts to protect children residing or having a substantial connection with New Jersey is more extensive than the grants conferred by statute. *Hachez v. Hachez,* 124 *N.J. Eq.* 442, 446, 1 *A.*2d 845 (E. & A. 1938); *Clemens v. Clemens,* 20 *N.J. Super.* at 389-90, 90 *A.*2d 72. We 589*589 have no occasion to determine whether our inherent jurisdiction might be implicated in other circumstances.

IV.

Even were we to find that the Family Part had subject matter jurisdiction, the result would not be different. In our view, the court would have been obliged to abstain and defer to the jurisdiction of the Moroccan court under recognized principles of international comity. Comity "`is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other.'" *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.,* 830 *F.*2d 449, 451 n. 3 (2d Cir.1987) (quoting *Hilton v. Guyot,* 159 *U.S.* 113, 163-64, 16 *S.Ct.* 139, 143, 40 *L.Ed.* 95 (1895)), *cert. denied,* 488 *U.S.* 923, 109 *S.Ct.* 303, 102 *L.Ed.*2d 322 (1988). It is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard to the rights of its own citizens or of other persons falling within its protection. *Ibid.* In other contexts, it has been said that "a court may abstain from [asserting] jurisdiction when the extraterritorial effect of a particular remedy is so disproportionate to harm within the United States as to offend principles of comity." *Consolidated Gold Fields, PLC v. Minorco, S.A.,* 871 *F.*2d 252, 263 (2d Cir.), *cert. dismissed,* 492 *U.S.* 939, 110 *S.Ct.* 29, 106 *L.Ed.*2d 639 (1989); *see also Virgin Atlantic Airways v. British Airways,* 872 *F. Supp.* 52, 60-61 (S.D.N.Y. 1994).

Nothing has been presented to the Family Part or this court indicating that the question of custody cannot be fairly resolved by the courts of Morocco. The record is devoid of evidence suggesting in any way that the best interests of the child will not be protected. Under these circumstances, we believe that the Family Part should have abstained even assuming that it had subject matter jurisdiction.

Reversed.

CATEGORY: Child Custody

RATING: Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: Lebanon

URL:
http://scholar.google.com/scholar_case?case=16249725286499695504&q=Islamic+OR+Sharia+OR+Muslim+OR+Islam&hl=en&as_sdt=4,31

824 A.2d 268 (2003)

361 N.J. Super. 135

M. KAMEL ABOUZAHR, M.D., PLAINTIFF-RESPONDENT, V. CRISTINA MATERA-ABOUZAHR, M.D., DEFENDANT-APPELLANT.

Superior Court of New Jersey, Appellate Division.

Argued September 10, 2002.

Decided June 11, 2003.

270*270 James M. Andrews, Cherry Hill, argued the cause for appellant (Blank, Rome, Comisky & McCauley, attorneys; Mr. Andrews, of counsel and on the brief).

Kimberly J. Hines, Newark, argued the cause for respondent (McCarter & English, attorneys; Alfred L. Ferguson, of counsel; Ms. Hines and Mr. Ferguson, on the brief).

Before Judges STERN, COLLESTER and ALLEY.

269*269 The opinion of the court was delivered by COLLESTER, J.A.D.

This appeal raises the issue whether a former spouse may alter the terms of a property settlement agreement ("PSA") to prevent visitation in a country which is not a signatory of the Hague Convention on the Civil Aspects of International Child Abduction and whose laws could be employed to inhibit the return of the child to the primary custodial parent.

Plaintiff M. Kamel Abouzahr and defendant Cristina Matera-Abouzahr were married by civil ceremony on April 11, 1986, in St. Louis, Missouri and participated in both **Muslim** and Catholic ceremonies the following year.

Kamel, a citizen of Lebanon, came to the United States in 1984 to complete the medical studies he began at the American University of Beirut and met Cristina, who was born in the United States and lived here since her birth. After their marriage, they became dual citizens of the United States and Lebanon. Their daughter, Alessandra, was born in the United States on March 18, 1992, and she also has dual citizenship.

Both parties are medical practitioners. Cristina is a gynecologist, and Kamel, a plastic surgeon. Both practiced their medical specialties in New York while living in Alpine, New Jersey. Kamel was also on the medical faculty at Columbia University and New York University. During their marriage, they traveled to Lebanon twice. The second time they took Alessandra, then age two. Both times they stayed with Kamel's parents in Sayden and visited with his relatives and friends in Batroun, Beirut, Tyre and the Bakaa Valley. The Abouzahr family is renowned in southern Lebanon. Kamel's late father was head of the Ministry of Health as well as a physician for over fifty years. Kamel's uncle, also a physician, founded a hospital and achieved political prominence. They both influenced Kamel to follow them into a medical career.

Neither Kamel nor Cristina actively practiced their religions, but they agreed that Alessandra should be exposed to both **Islam** and Catholicism. Although she was not baptized Catholic, Alessandra attended Cofraternity of Christian Doctrine (CCD) classes with Kamel's consent. Her exposure to **Islam** was more limited and based in large part on her interaction with her 271*271 paternal grandmother, who came to live with the family after the death of Kamel's father, and her aunt, who also lived with the family for a time.

Cristina testified that she learned a great deal about Lebanese customs and culture because of her marriage to Kamel and her two trips to Lebanon. While she was aware that Lebanese law favored the husband, she claimed to be unaware that it could hinder or preclude her from retrieving her daughter if Kamel absconded with her to Lebanon. However, as the marriage began to unwind, she became more fearful and took Alessandra's passports from the home to give them to her mother.

In May 1998, Cristina told Kamel that she wanted a divorce. They obtained separate legal counsel and also retained a mediator, Linda Fish, Esq., to assist in negotiations for a property settlement agreement (PSA). It was during mediation that Kamel first told Cristina that he was considering returning to Lebanon to establish a plastic surgery practice. He proposed that he have one month of parenting time with Alessandra in Lebanon during the summer. When asked by the mediator, Cristina said she did not believe that Kamel would retain Alessandra in Lebanon beyond the agreed time.

Others alerted Cristina to potential problems with out-of-country parenting time in Lebanon. On three occasions before the divorce hearing Cristina discussed the subject with John McCann, a friend who was also a lawyer. McCann testified he told Cristina that she should prevent Alessandra from traveling to Lebanon or any Middle Eastern country for reasons of safety. Cristina testified that she recalled speaking to McCann on one occasion, but she did not recall any conversation about difficulties if Kamel retained Alessandra in Lebanon.

Moreover, despite Cristina's testimony that her divorce attorneys did not discuss with her potential consequences if Kamel retained Alessandra in Lebanon, the other testimony was to the contrary. S. Robert Allcorn, Esq. told of several conversations with Cristina about the issue, and he said that she was aware that problems could result. When he offered to research the issue, she instructed him not to do so because she trusted Kamel. Another of Cristina's attorneys, Jean Temmler, testified that Cristina knew that the rights of a father prevailed over those of the mother in Lebanon. She even told Cristina of a case she had worked on involving a mother who kidnaped her child to a non-Hague Convention country. She also said to Cristina that she did not believe that Lebanon was a signatory to the Hague Convention and that, as a result, additional language should be put into the agreement as a rider. When Temmler suggested that it would be "problematic" if Kamel took Alessandra to Lebanon, Cristina "pushed the issue aside" by saying that she trusted Kamel.

During the time prior to the divorce, Kamel traveled frequently to Lebanon to investigate professional and business opportunities. He obtained a **Muslim** Sunni religious divorce in Lebanon on March 13, 1999. About a month later, on April 22, 1999, he filed a complaint for divorce in New Jersey. On August 10, 1999, the date of the divorce hearing, Cristina and Kamel signed the PSA, which was incorporated into the judgment of divorce. The agreement granted joint legal custody of Alessandra, then age seven, while specifying her primary residence was with Cristina. Kamel was to have liberal visitation, which included the following:

[Kamel] shall have Alessandra for one month each summer. Alessandra shall be permitted to spend this month with 272*272 her father in Lebanon or in such place as the husband may reasonably choose.

The PSA further stated that Alessandra "shall be exposed to the religions of both parties and she shall choose to follow a religion of her own selection." In the event of disagreement or conflict as to the visitation, education and welfare of Alessandra, the parties agreed to return to mediation before seeking relief in court. The following rider was handwritten into the PSA at the request of Cristina's attorney, Jean Temmler:

This Agreement shall supercede any order or other decree that may issue from any other court or tribunal, religious or civil, wherever located, at any time whatsoever. The parties agree that New Jersey is the home state of Alessandra, as that term is used in the Hague Convention.

Two days after their divorce Cristina drove Kamel and his mother to Newark Airport for their flight to Lebanon. Alessandra became upset as she said goodbye to her father. As he walked away, Kamel turned to Cristina and said she "better take care of Alessandra." Cristina testified later that she interpreted the remark as a threat. Kamel denied any such intent, saying that he was expressing his final wish before he left the United States to live in Lebanon.

Difficulties in communication began almost immediately. While Kamel spoke to Alessandra weekly, Cristina was unable to reach him on several occasions. The only telephone number she had was at his uncle's house and was answered by persons who did not speak English. After several attempts to reach Kamel about filing a joint tax return, she was told that he was then in Saudi Arabia. When she did speak with him, she claimed he refused to give her his address or phone number and said it was none of her business.

A significant event took place during the Thanksgiving weekend of 1999, which led to further hostility and distrust between Cristina and Kamel. Cristina arranged to have Alessandra baptized Catholic on the Sunday after that Thanksgiving in preparation for her first communion the following spring. Kamel was not told of these plans. He found out during his weekly phone conversation with Alessandra when she asked him if he was coming to her party that Sunday. Kamel became very upset and said, "Alessandra, I don't want you to do it. If you do it, I'll never speak to you again." Alessandra was understandably upset by her father's reaction. When Cristina was told, she canceled the baptism. The following Monday she spoke with Kamel on the phone.

When I had said, you know, please let's try to talk between you and I and-and leave Alessandra out of it, he started to tell me I don't need to speak with you; I never need to speak with you again; you're essentially an intermediary between myself and my daughter and I will only speak with her.

I said, Kamel, it can't be that way. You know, I'm here. I'm taking care of her day in and day out. It can't be that you only speak with her and not with me.

His next comment was well, if you don't want to take care of her, then I will take her and I will take care of her. And I said, Kamel, I said, it has been my joy to take care of Alessandra from the moment that she was born.

The other thing I remember him saying was you're scheming to take away the-my custody or the joint custody, which struck me, because that thought had not even crossed my mind. And that was-I believe that was pretty much all. He was clearly very angry.

273*273 According to Cristina, Kamel's anger did not subside. In January, 2000, he came to the United States to attend a conference and visited with Alessandra. Cristina said she had a "huge argument" with him on the telephone during this time.

[B]asically, there was just lots of screaming on the telephone regarding religion. He called me an indecent human or indecent person for not teaching Alessandra about **Islam**.

He basically blamed me that—because I wanted the divorce that he was now separated from his child. There was a lot of fighting and screaming going on back and forth.

Cristina testified that following this argument, she began searching the Internet to find out about **Islamic** and Lebanese laws of child custody and was disturbed by what she found out.

I learned that Lebanon was not [a] signatory to the Hague [Convention]. I learned really more details of what the Hague [Convention] was. I learned that child custody issues fell pretty much totally under the jurisdiction of the **Islamic** courts.

I learned that as of age nine, that basically the father is the sole custodian. That's when I started to learn more about what it would be like to get her back here and, you know, what had happened in other circumstances.

Cristina then retained a New York attorney to find out more about **Islamic** law and the Lebanese judicial system.

I didn't really know whether or not we were divorced or not at that point in time in Lebanon, either civilly or religiously. So I didn't even know whether that was done.

So I didn't know whether, if I went there to try to get Ali, whether I would be held there as a-as a disobedient wife.

That was also when I started to learn that I would be considered unfit because of the baptism and that potentially—I'm in another relationship [with a Jewish man]-that that would be perceived as something that would be considered— make me unfit.

Through her New York attorney, Cristina met and consulted with Wafa Hoballah, a Lebanese attorney also licensed to practice in New York and California. Cristina said that she learned that

If Kamel were to retain [Alessandra] and that I basically—it would be years, four, five, six years; obviously no guarantee; that things can be manipulated in various court situations there; that it would make it really hard for me to maneuver around, also particularly since I don't really know anybody and don't really understand the Middle Eastern ways, because I'm an American.

I learned of other people who have lost their children obviously to many different countries, but situations in Lebanon clearly. I learned that ... Kamel has a cousin named Kamal Abouzahr who's an attorney, and I know that—because I've met him, and I know that Kamal has represented Kamel on legal matters that have to do with real estate and that he represents a father who abducted his two children to Lebanon last May.

Kamel was scheduled for visitation with Alessandra in Lebanon for the month of August 2000. The initial arrangements were for Cristina to accompany her to Lebanon since Kamel and Cristina agreed one of them should be with her on the long flight. However, Cristina told Kamel during the last week of July that her work schedule prevented her from making the trip. Kamel agreed to fly to New Jersey, pick up Alessandra and fly with her to Lebanon and back after the visitation. He 274*274 made the round-trip arrangements for himself and Alessandra.

Kamel arrived in New Jersey on August 3, 2000. He called Cristina and said he would pick up Alessandra the next morning at 9:00 a.m. When he arrived at Cristina's home the following day, no one answered the bell. A man walked up to him and served him with an order to show cause and temporary restraint against his removing Alessandra from the State of New Jersey.

Kamel appeared on the return date to dissolve the restraint and in opposition to Cristina's application to modify the visitation provision of the PSA. Judge Ellen L. Koblitz changed the restraint to permit Kamel to have parenting time with Alessandra anywhere in the United States and set down a plenary hearing on Cristina's order to show cause. Cristina's application for a stay of the *pendente lite* visitation was denied by Judge Koblitz, and we denied an emergent application to stay the order. Kamel went with Alessandra to San Diego for two weeks and returned her to New Jersey without incident.

The plenary hearing took place over five trial days in March 2001. In her testimony Cristina gave the following explanation as to why she agreed and signed the PSA permitting out-of-country parenting time in Lebanon.

[I]t was very difficult for me to make the decision to get divorced, mostly because of Alessandra, and when I did make the decision I was committed 100 percent to insuring that my daughter had a relationship with her father.... So when he told me the end of May that, in fact, he was going to leave and he told me I'm closing the practice as of June 30th and I want out of here as soon as possible, I was devastated by what that meant for my daughter.

So that first and foremost I was really trying to allow my daughter to have—to have a relationship with her dad when he was going to move half way across the world. The other reason was because I sort of rationalized in my mind that he really didn't partake very much in her day-to-day activities, and he didn't play with her very much or read with her or bathe her or do all those sorts of things, so I-I figured that if he didn't want to do it when we were living together, he wouldn't want to do it there either.

I was trusting, and I wanted to make sure that my daughter always had a relationship with her father. I also wanted to make sure that he had a relationship with her too.

Cristina claimed that her divorce attorneys did not discuss **Islamic** or Lebanese law with her or what actions, if any, she could take if Kamel refused to return Alessandra from Lebanon. She

said she was then unaware that Lebanon was not a signatory to the Hague Convention. She further testified that she would not have agreed to permit Kamel to take Alessandra to Lebanon if she had known that **Islamic** or Lebanese law could delay or prevent her return. When asked if she was presently concerned that Kamel would keep Alessandra in Lebanon, she replied,

I have concerns that he would based on his anger over the year and his—and his persistently secretive behavior. I asked him multiple times to give me ways—to give—to let me know where he was, even to send him things. And you know, he had a—he had a PO box in Saudi Arabia that—or has, that would make it very easy for me to have sent things to him. He never told me that. I found out from [his lawyer's] secretary.

275*275 He kept telling me its none of your business; I don't want to speak with you again; I don't want to listen to you and I just—I—I would be an irresponsible mother if I sent her and something ever happened to her, and I'm not an irresponsible mother.

On cross-examination Cristina gave similar responses.

Q. Dr. Matera, as you sit here today, do you believe that if Dr. Abouzahr takes—takes Alessandra for a visit to Lebanon that he will keep her there?

A. I believe he could keep her there.

Q. You say could. Do you believe he will?

A. He certainly may keep her there.

Q. He may. Do you believe he will keep her there?

A. [I] can't predict the future ... I can't guarantee that he would not keep her there ... [G]iven his behavior this years, I have major concerns that he would keep her there. And if I didn't have major concerns, I wouldn't be doing this to myself or to him.

Wafa Hoballah testified for Cristina as an expert on the application of Lebanese law if a Lebanese parent retains a child in Lebanon against the will of an American parent. She explained that family matters are under the jurisdiction of the religious courts of Lebanon, and, as Kamel was a Sunni **Muslim**, the matter would be heard by a Sunni **Muslim** court. She then explained that under **Muslim** law the father has custody of a daughter over the age of nine. Moreover, if a father established that the mother was unfit or lacking good moral character, she would lose any right to the child. **Muslim** law requires a child to be raised in the **Muslim** faith, and since Cristina tried to have Alessandra baptized a Catholic, she could be found unfit. In Ms. Hoballah's opinion, Cristina's chances of retrieving Alessandra would be negligible if the matter was decided in accordance with religious law.

According to Ms. Hoballah, Cristina's best recourse would be to seek the jurisdiction of the Lebanon civil courts, which would mean petitioning an appeals court for a determination that the Sunni **Muslim** court did not have jurisdiction. However, issues of custody in Lebanon are generally decided under religious law, and even if the matter were referred to a civil court, it would take up to two years to have the court assume jurisdiction and a minimum of four to five years to have the case decided. During this time Alessandra would remain in the sole custody of Kamel in Lebanon.

Cristina also called Leila Ben Debba, an international case specialist with the National Center for Missing and Exploited Children in Washington, who testified to the extreme difficulties in returning a child to the United States from Lebanon when retained by the father. She noted that Lebanon is not a signatory of the Hague Convention; there are no extradition treaties between Lebanon and the United States; and Lebanon does not recognize international parental kidnaping as a crime. It does not generally consider United States custody orders, and, even in the exceptional circumstance, it may take up to seven years for recognition with no guarantee of enforcement. Moreover, the likelihood is that since Alessandra was a citizen of Lebanon, she would be bound by Lebanese law in the eyes of the Lebanese courts. The State Department would not intervene in any action and could not offer any real assistance even if there were a United States court order directing the return of the child.

276*276 Ms. Ben Debba testified, however, that if Kamel retained Alessandra in Lebanon and a warrant was issued in the United States on a charge of international parental kidnaping, Interpol would issue a "red notice" for his arrest and extradition. The "red notice" could be executed in a country with which the United States has an extradition treaty, but not in the Middle East.

Kamel did not dispute the testimony given as to Lebanese law, and he did not minimize the difficulties Cristina would have in enforcing a New Jersey custody order in Lebanon. He agreed that Alessandra should live in the United States because she would have a better education and greater opportunities. He emphatically denied any intention of keeping her in Lebanon after visitation. He believed spending time in Lebanon was important for Alessandra because she would learn about her heritage first-hand and spend time with her extended Lebanese family, including her eighty-one year old grandmother who had lived with her in New Jersey. As proof of his intentions to comply with the PSA, Kamel pointed out that during the *pendente lite* parenting time in the summer of 2000, he took Alessandra to San Diego and could have easily crossed the border into Mexico, obtained a new Lebanese passport for his daughter and absconded with her to Lebanon.

Following the conclusion of the testimony and prior to the decision by Judge Koblitz, Cristina applied to reopen the hearing in order to present evidence of the current political situation in Lebanon. Kamel objected on grounds of relevance and because there had been no request for parenting time in Lebanon for 2001. The application was denied.

On April 27, 2001, Judge Koblitz gave an oral opinion in which she denied Cristina's application to restrict visitation. The judge found that before Cristina signed the PSA, she was aware of potential difficulties if Kamel took Alessandra to Lebanon and refused to return her. The judge noted that the issue was touched upon in mediation and was discussed with Mr. McCann. She accepted the testimony of Cristina's prior lawyers that the issue was discussed with her, but she rejected any research or discussion of the matter because of her trust in Kamel. The judge further found that Cristina knew earlier of a potential problem since she hid Alessandra's passport with her mother. Judge Koblitz concluded that while Cristina may not have been aware of specific provisions of Lebanese law,

[t]here's no question in my mind that the evidence demonstrates that Dr. Matera was well aware of the general proposition that it is difficult to retrieve children from other jurisdictions; that Lebanon favors men over women, in general, with regard to any dispute, and, specifically, with regard to disputes over children.

Judge Koblitz determined that Cristina agreed to parenting time in Lebanon because she trusted Kamel and subsequently brought this action because she changed her mind and became concerned about the possibility that Kamel would take Alessandra to Lebanon and not return her. She reviewed the evidence to determine if there had been a change in circumstances justifying modification of the visitation provision of the PSA. In reviewing the incidents which Cristina claimed caused her concern, the judge found Kamel's anger at Alessandra's scheduled baptism was Cristina's fault for not consulting him, and, that while his angry reaction on the phone with Alessandra was inappropriate, it was understandable. She stated:

The episode over Thanksgiving about the baptism is, admittedly, the fault of the mother for not consulting with the 277*277 father ahead of time. The father's reaction that I won't talk to you-saying to the child, I will not talk to you if you go ahead with the baptism, is in no way a threat or indicative of a threat or idea to abscond with the child.

To the contrary. What he's saying is that he will cut off all relations with his daughter. That wasn't a proper thing to say on his part. It wasn't a good message to send his daughter.

[I]t was provoked by the mother violating the agreement, by arranging a baptism a few short months after the agreement. That clearly was not the intention of the parties when they said that the daughter will choose whichever religion she wants.

I would agree with the mother that the child, having not truly been exposed to the Moslem religion, is very unlikely to choose to be Moslem. But be that as it may, it was inappropriate for the mother to arrange a baptism without telling the father and she knew it and she knows it now.

...

So, to say that his somewhat inappropriate reaction to her absolutely inappropriate plan, legitimately creates concern that he's going to abscond with the child, is just not reasonable. Especially because the mother did what she should have done, which is cancel the baptism. And so that was that, that's the end of that episode. It creates no reasonable belief in my mind that the father is now going to abscond with the child.

Similarly, Judge Koblitz found Cristina's difficulty in reaching Kamel by phone and his refusal to supply a phone number did not indicate a risk that Kamel would abscond with his daughter. She stated:

With regard to the difficulty in locating the father, I don't find anything of any great concern about that either. If the mother was concerned about that issue of his address, she should have sought mediation to get a better address from him.

And certainly, if he was going to take the child, she was entitled to have a phone number that could reach directly through to him and an address where he would be at all times with the child. And that absolutely was the intention of the agreement and that is the way it should be.

But the fact that he's not eager to talk to his ex-wife, is of no moment to me and does not, in any way, impress me that he is going to abscond with the child.

The judge found credible Kamel's testimony that he had no intention of abducting Alessandra or refusing to return her. She held, therefore, that there was no change of circumstances to justify modifying the PSA.

They entered into the agreement August 10, 1999. The very first time that the father attempts to exercise the visitation that they agreed upon, he is served with papers. Nothing happened that legitimately could cause concern on the part of the mother, about the father taking the child and not returning her.

Turning to the question of the best interests of Alessandra, Judge Koblitz stated:

I find that, as the parties agreed in their agreement, it is the best interest of Alessandra to spend time with her father in Lebanon, to see and have contact with her grandmother, and to travel throughout the world with her father. And I find no reason to be concerned about Dr. Abouzahr keeping the child in Lebanon.

In reaching that conclusion, the judge did not fail to consider the risks involved.

278*278 The only concern that I have is the difficulty in retrieving the child. That is a concern because everybody can be wrong. And, perhaps the mother was wrong when she entered into the agreement, and perhaps I am wrong in my analysis today. And when evaluating a risk one always looks at the likelihood of the occurrence and the severity of the occurrence.

...

Here, I understand the severity is extreme. For the child to be uprooted from her mother and from her home and kept in Lebanon, I take as a given would be a very serious consequence to Alessandra and that's not disputed by the father. Even though he loves her, I'm sure she loves him, and he's a law-abiding appropriate father, it still would be extremely traumatic to the child. But I find no basis, whatsoever, to conclude that it is at all likely to happen.

Now, I base that analysis not only on Dr. Abouzahr's testimony as to the reasons why he entered into the agreement, what he wants that is best for his child, but also in part on the testimony of the experts.

If Dr. Abouzahr were to take Alessandra to Lebanon, according to the experts,... he would not ever be able to return to the United States. Nor would he be able to return to any country which is a signatory of the Hague Convention.

Dr. Abouzahr testified, and it was uncontroverted and I believe him, that he, even without his daughter being in the United States, he would come to the United States once a year for a conference. He has many contacts in the United States. He worked here. He receives patients through his contacts in the United States. He also goes to conferences in the European countries.

Plastic surgery is his specialty where, apparently, his expertise needs to be updated, honed. His contacts need to be encouraged. He is someone who travels for his profession and to be successful, and it would certainly significantly impinge on that if he were not able to go into any country that is a signatory to the Hague Convention without being arrested. And that could be accomplished, according to the experts....For him to go into any European country would be impossible if he were to take Alessandra and not to return her.

So, first of all, I find that he genuinely and sincerely believes it's in Alessandra's best interest to be raised in the United States for the reasons I mentioned before.

Secondly, for his own self interest and his desire to further his career and be a successful doctor and travel, he will not take Alessandra and keep her in Lebanon.

Although she was convinced that Kamel would return the child after visitation, Judge Koblitz attempted to eliminate one of the difficulties mentioned by experts in enforcing an order for Alessandra's return. Relying upon the testimony of Wafa Hoballah that the civil courts would be more amenable to returning a child wrongfully retained in Lebanon, she conditioned out-of-country parenting time on Kamel petitioning the Lebanese courts to change his Lebanese divorce from a religious to a civil decree. However, the judge added if Kamel took the appropriate steps and the change could not be accomplished within one year, the condition would be deemed satis-

fied to enable him to have parenting time consistent with the PSA. It is undisputed that since the decision, Kamel did take steps consistent with the judge's directive.

279*279 Following the terrorist attack of September 11, 2001, on the United States, Cristina moved for reconsideration and a stay of the order dissolving the restraint against Kamel taking Alessandra out of the United States. Judge Koblitz denied the application, stating:

If and when the father requests out-of-country visitation and the mother disagrees with the plan, she must mediate the issue under the agreement. I have no reason to believe that the father will even suggest a plan involving a trip to Lebanon under the current political situation.

On appeal Cristina argues that Judge Koblitz erred in finding insufficient proof of a change of circumstances to modify the PSA to prohibit out-of-country visitation and, moreover, that such visitation is not in the best interests of Alessandra. Our scope of review mandates that we defer to the factual findings of the trial judge. As stated in *Rova Farms Resort, Inc. v. Investors Ins. Co.,* 65 *N.J.* 474, 484, 323 *A.*2d 495 (1974),

[W]e do not disturb factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interest of justice.

We find substantial and credible evidence in the record as a whole to support the finding of Judge Koblitz that prior to executing the PSA, Cristina was aware of significant problems if Kamel refused to return Alessandra from Lebanon. As found by Judge Koblitz, Cristina declined legal and personal advice for an extensive review of Lebanese law on child custody before agreeing to such visitation. The record clearly supports the finding that she did not seek further information because she trusted Kamel and sought modification of the PSA only after she changed her mind because of what she perceived was a change of attitude by Kamel.

A party seeking modification of a judgment, incorporating a PSA regarding custody or visitation, must meet the burden of showing changed circumstances and that the agreement is now not in the best interests of a child. *Todd v. Sheridan,* 268 *N.J.Super.* 387, 398, 633 *A.*2d 1009 (App.Div.1993); *Mastropole v. Mastropole,* 181 *N.J.Super.* 130, 137, 436 *A.*2d 955 (App.Div.1981); *Sheehan v. Sheehan,* 51 *N.J.Super.* 276, 287, 143 *A.*2d 874 (App. Div.1958). *See also, Lepis v. Lepis,* 83 *N.J.* 139, 416 *A.*2d 45 (1980) (application of "changed circumstances" to PSA provisions respecting alimony and child support). Here, Cristina argues that the changed circumstances were her increased knowledge of Lebanese and **Islamic** law and the hostile attitude of Kamel after the divorce, which gave rise to her genuine fear that Kamel could retain Alessandra in Lebanon if he were permitted to take her there.

Cristina's fear must be given careful consideration. There is no greater devastating loss to a parent than loss of a child. With only a general understanding of the risk and an expressed trust in

Kamel, it is understandable that the deterioration of her relationship with Kamel led to an erosion of her trust in him and a growing fear of awful consequences if Alessandra were retained in Lebanon.

We cannot say that Cristina's fear is without merit. While the PSA mentioned the Hague Convention, that international agreement gives no remedy to assuage her fear. The Hague Convention provides for a civil remedy to return a child to his or her "habitual residence" after unlawful abduction or wrongful retention in a foreign nation.[1] However, a jurisdictional requisite 280*280 is that the nations involved must be signatories to the Hague Convention, and Lebanon, like all Middle East countries except Israel, is not a signatory and thereby not bound to its terms. *Ivaldi v. Ivaldi,* 147 *N.J.* 190, 198-99, 685 *A.*2d 1319 (1996); *Roszkowski v. Roszkowska,* 274 *N.J.Super.* 620, 633, 644 *A.*2d 1150 (Ch.Div.1993); *Loos v. Manuel,* 278 *N.J.Super.* 607, 651 *A.*2d 1077 (Ch.Div. 1994). *See also, Mezo v. Elmergawi,* 855 *F.Supp.* 59 (E.D.N.Y.1994) (dismissing a parent's complaint to direct the Secretary of State to enforce the Hague Convention against an abducting parent who took a child to Egypt and Libya).

In an effort to deal with the growing problem of international abduction of children[2] and to supplement the civil remedies of the Hague Convention when its civil remedies are inapplicable or ineffective, Congress enacted the International Parental Kidnaping Crime Act (IPKCA), 18 *U.S.C.* § 1204 (1993), making it a federal offense punishable by up to three years imprisonment for a parent to wrongfully remove a child from the United States. *See, United States v. Amer,* 110 *F.*3d 873, 877 (2d Cir.1997) (holding the statute constitutional). Moreover, the Legislature of this State enacted *N.J.S.A.* 2C:13-4, stipulating that a person, including a parent, guardian or other lawful custodian is guilty of interference with custody by taking a child outside the United States for more than twenty-four hours, declaring it to be a second degree crime. *See, State v. Jones,* 346 *N.J.Super.* 391, 788 *A.*2d 303 (2002); *see also, Matsumoto v. Matsumoto,* 335 *N.J.Super.* 174, 762 *A.*2d 224 (App. Div.2000), *modified,* 171 *N.J.* 110, 792 *A.*2d 1222 (2002). However, both the state and federal statutes are largely ineffective unless the other country has an extradition treaty with the United States.[3] As testified at trial, there is no extradition treaty between the United States and Lebanon, and Lebanon does not recognize parental child abduction as an offense.

While this is a case of first impression in this State, other jurisdictions have considered 281*281 the problem of out-of-country parenting time and the risk of unlawful retention. Generally, courts have approved out-of-country visitation when the country is a signatory to the Hague Convention and there is insufficient proof of an intention to wrongfully retain the child. *See, e.g., Lolli-Ghetti v. Lolli-Ghetti,* 162 *A.D.*2d 198, 556 *N.Y.S.*2d 324 (1990) (Monaco); *Markus v. Markus,* 75 *A.D.*2d 747, 427 *N.Y.S.*2d 625, *lv. denied,* 51 *N.Y.*2d 705, 432 *N.Y.S.*2d 1028, 411 *N.E.*2d 798 (1980) (Israel); *In re Marriage of Hatzievgenakis,* 434 *N.W.*2d 914 (Iowa App.1988)

(Greece); *Creech v. Creech,* 367 *So.*2d 1244 (La.Ct.App.1979) (Mexico); *Milne v. Goldstein,* 202 *Cal.App.*2d 582, 20 *Cal.Rptr.* 903 (Cal.App.1962) (South Africa).

However, there is less agreement where the out-of-country visitation is in a non-Hague country. The Supreme Court of North Dakota upheld a custody and visitation restriction to the United States where the mother seeking visitation remarried and moved to Dubai, one of the United Arab Emirates. The decision turned in part on the daughter's statements to her guardian ad litem that she did not trust her mother to bring her back. *Bergstrom v. Bergstrom,* 320 *N.W.*2d 119 (Sup.Ct. N.D.1982).

However, in *Long v. Ardestani,* 241 *Wis.*2d 498, 624 *N.W.*2d 405 (Ct.App.), a father was not restrained from taking his four children to Iran to visit his family. The mother objected on grounds that there was no way for her to retrieve the children if her former husband carried through on prior threats to keep the children in Iran. The trial judge noted the father's significant ties to the United States. He became a citizen, lived here for over twenty years and worked for the same company for nineteen years. He also offered to pledge his pension as security for the return of his children. The Wisconsin Court of Appeals affirmed, holding that the mother had not met her burden of proof to show by a preponderance of evidence that a geographical restraint on visitation was in the children's best interest.

We are satisfied that the standard of the best interests of the child, comprehensive as it is, permits a full consideration of concerns both about a parent's intention in abducting a child and about the lack of a remedy should that occur. We are also satisfied that there is no need to alter the deference appellate courts give to trial courts decisions on a child's best interests in order to insure a full consideration of those concerns.

[*Id.* at 418. *See also, Al-Zouhayli v. Al-Zouhayli,* 486 *N.W.*2d 10 (Ct.App. Minn.1992) (no abuse of discretion in declining supervised visitation where father denied intention to take children to Syria); *Jawad v. Whalen,* [326 *Ill. App.*3d 141, 259 *Ill.Dec.* 941] 759 *N.E.*2d 1002 (App.Ct.Ill.2001) (denying preliminary injunction to supervised visitation where evidence insufficient that husband was at risk to abduct children and return to Iraq).]

We do not doubt that Cristina's fear is genuine, but fear alone is not enough to deprive a non-custodial parent of previously agreed upon visitation. We decline to adopt a bright-line rule prohibiting out-of-country visitation by a parent whose country has not adopted the Hague Convention or executed an extradition treaty with the United States. Such a rule would unnecessarily penalize a law-abiding parent and could conflict with a child's best interest by depriving the child of an opportunity to share his or her family heritage with a parent. Moreover, it would mistakenly change the focus from the parent to whether his or her native country's laws, policies, religion or values conflict with our 282*282 own. Such an inflexible rule would border on xenophobia, a long word with a long and sinister past.

The danger of retention of a child in a country where prospects of retrieving the child and extraditing the wrongful parent are difficult, if not impossible, is a major factor for a court to weigh in ruling upon an application to permit or to restrain out-of-country visitation. But it is not the only factor. In addition to the laws, practices and policies of the foreign nation, a court may consider, among other things, the domicile and roots of the parent seeking such visitation, the reason for the visit, the safety and security of the child, the age and attitude of the child to the visit, the relationship between the parents, the propriety and practicality of a bond or other security and the character and integrity of the parent seeking out-of-country visitation as gleaned from past comments and conduct.

In this case the substantial and credible evidence substantiates Judge Koblitz's conclusion that the best interests of Alessandra are not served by a geographical restraint on visitation with her father. Kamel came to the United States because its medical education and training were superior. A **Muslim** from Lebanon, he married an American woman who was Catholic, and he became a citizen of this country. His daughter was raised as an American in a secular household but attended Catholic CCD classes with his consent. He lived in the United States for sixteen years, practicing a medical speciality and teaching at two medical schools. Following the death of his father, he brought his mother to this country to live with his American wife and child. No testimony indicates that Kamel disrespects the United States, its culture, customs, laws or values. Nothing in the record suggests he believes that Alessandra would have greater religious or moral values, greater opportunities or greater happiness in Lebanon. In fact, his words and deeds indicate he believes the opposite.

While his relationship with his former wife has deteriorated, there is no evidence of a desire, much less an intention, by Kamel to deprive Alessandra of the opportunities for a superior education and better life which he acknowledges exist for her in the United States. Nor is there any indication that he has such animosity toward Cristina that he would punish her at the expense of his daughter.

Since the divorce, Kamel has had parenting time with Alessandra on numerous times in New Jersey as well as in California and Colorado. He has made no effort to sneak her out of this country, although he had opportunities to do so. If Judge Koblitz's assessment is wrong and Kamel is of such a base nature to abduct his daughter, the chances are that no geographical limitation on visitation could realistically prevent him from that despicable act. A restriction to the Hague signatory countries, to the United States, to New Jersey, even to Alpine, New Jersey would not eliminate all risk or absolve Cristina of all fear if she continues to doubt Kamel. Only denial of visitation or, perhaps, supervised visitation would suffice, and the record does not justify such extreme action.

Judges of the Family Part are regularly called upon to make exceedingly difficult and delicate decisions as to the best interest of children, and we are obliged to give deference to both their

findings and the exercise of their sound discretion. *See, e.g., DeVita v. DeVita,* 145 *N.J.Super.* 120, 123, 366 *A.*2d 1350 (App. Div.1976). Here the record discloses substantial and credible evidence to support the findings of the trial judge and her conclusion that there were no changed circumstances 283*283 to support modification of parenting time provided in the PSA and that such visitation serves the best interests of Alessandra.

In her statement of reasons denying Cristina's application for reconsideration, Judge Koblitz made reference to the political situation in the Middle East and Lebanon. She stated that under the circumstances she did not anticipate that Kamel would make a request to bring Alessandra to Lebanon. Since that decision, the Middle East has become even more dangerous, especially to Americans after September 11, 2001, and the wars in Afghanistan and Iraq. While it may be understood, we nonetheless direct that prior to any proposed visitation by Kamel with Alessandra in Lebanon, or any other country in the Middle East, notice must be given to Cristina no later than four weeks in advance so that she may make application to the Family Part for evaluation as to the safety and security of Alessandra during the proposed visitation along with other factors we have discussed in this opinion. We therefore remand for entry of an order to that effect.

Finally, we reach the issue of counsel fees. After the conclusion of the hearing, the trial judge awarded counsel fees to Kamel in the amount of $19,726.92. Cristina argues the entire award should be vacated while Kamel contends the amount awarded was inadequate since it represented only a portion of his fees. After review, we affirm both the order granting counsel fees and the amount of the award based on the reasons set forth by Judge Koblitz in her written opinion of June 25, 2001. *Williams v. Williams,* 59 *N.J.* 229, 281 *A.*2d 273 (1971).

Affirmed as modified.

[1] The United States ratified the Hague Convention in 1988, and the same year Congress implemented the treaty by passing the Child Abduction Remedies Act, 42 *U.S.C.* §§ 11601 to 11610.

[2] Estimates run about 5,000 international child abductions since the early 1970s, most to countries which were non-signatories to the Hague Convention. About one quarter of the abductions are from the United States to the Middle East. *See,* Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century's End,* 15 *Ariz. J. Int'l & Comp. L.* 791 (1998); Kreston, *Prosecuting International Parentla Kidnaping,* 15 *Notre Dame J.L. Ethics & Public Policy* 533 (2001); Note, 40 *Fam. Ct. Rev.* 251 (2002).

[3] Even where extradition is not an issue, there is no guarantee of the return of the child. In *Anyanwu v. Anyanwu,* 333 *N.J.Super.* 231, 235-36, 755 *A.*2d 593 (App.Div. 2000) (*Anyanwu I*) and 339 *N.J.Super.* 278, 771 *A.*2d 672 (*Anyanwu II*) a father kept two children in Nigeria. He was arrested on his return to the United States and was kept in jail for four years under *R.* 1:10-3 for failure to disclose the location of his children. During this time, one of the children died. De-

fendant was subsequently released. The child has not returned to the United States. Similarly, in *United States v. Amer, supra,* 110 *F.*3d at 873, the defendant father absconded with his children to Egypt. When he returned to the United States, he was arrested, prosecuted and convicted under the IPKCA. The sentencing judge placed him on a one year term of supervised release with the special condition that he effect the return of his children to the United States. He was soon incarcerated for violation of his supervised term and served his sentence. The children were never returned from Egypt. *See,* Note: *United States v. Amer and the International Parenting Kidnaping Crime statute—The Final Answer to the Problem of International Parental Abductions?,* 23 N.C.J. and Com. Reg. 405 (1998); *see also,* Winterbottom, *The Nightmare of International Child Abduction: Facing the Legal Labyrinth,* 5 *J. of Int. L. and Pr.* 495 (1996).

CATEGORY: Shariah Marriage Law

RATING: Highly Relevant

TRIAL: TCSY

APPEAL: ACSN

COUNTRY: N/A

URL: http://scholar.google.com/scholar_case?case=17690081954141610726

S.D., PLAINTIFF-APPELLANT, V. M.J.R., DEFENDANT-RESPONDENT.

No. A-6107-08T2.

Superior Court of New Jersey, Appellate Division.

Argued March 24, 2010.

Decided July 23, 2010.

Jennifer J. Donnelly argued the cause for appellant (Northeast New Jersey Legal Services, Inc., attorneys; Ms. Donnelly, of counsel; Ms. Donnelly and Michelle J. McBrian, on the brief).

M.J.R., respondent pro se, waived appearance.

Before Judges Cuff, Payne and Miniman.

The opinion of the court was delivered by

PAYNE, J.A.D.

Plaintiff, S.D., appeals from the denial of a final restraining order following a finding of domestic violence. On appeal, she raises the following issues:

POINT ONE

THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THAT DOMESTIC VIOLENCE HAD BEEN COMMITTED BUT FAILING TO ISSUE A FINAL RESTRAINING ORDER.

A. Defendant's conduct constituted an egregious act of domestic violence.

B. The pendency of simultaneous court proceedings, does not negate the importance of affording domestic violence protections when justified by the record.

C. Given that the parties were about to have a child in common, the trial court erred in determining that the parties would have no further need for communication.

POINT TWO

THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THAT DEFENDANT LACKED THE REQUISITE INTENT TO COMMIT SEXUAL ASSAULT AND CRIMINAL SEXUAL CONTACT BASED UPON HIS RELIGION.

We reverse and remand for entry of a final restraining order.

I.

The record reflects that plaintiff, S.D., and defendant, M.J.R., are citizens of Morocco and adherents to the **Muslim** faith. They were wed in Morocco in an arranged marriage on July 31, 2008, when plaintiff was seventeen years old.[1] The parties did not know each other prior to the marriage. On August 29, 2008, they came to New Jersey as the result of defendant's employment in this country as an accountant. They settled in Bayonne, where they were joined one month later by defendant's mother.

As plaintiff described it at trial, the acts of domestic abuse that underlie this action commenced on November 1, 2008, after three months of marriage. On that day, defendant requested that plaintiff, who did not know how to cook, prepare three Moroccan dishes for six guests to eat on the following morning. Plaintiff testified that she got up at 5:00 a.m. on the day of the visit and attempted to make two of the dishes, but neither was successful. She did not attempt the third. At 8:00 a.m., defendant arrived at the couple's apartment with his guests. He went into the kitchen, but nothing had been prepared. Defendant, angry, said to plaintiff, "I'm going to show you later on, not now, I'm not going to talk to you right now until the visitors leave." Approximately two hours later, the visitors departed. According to plaintiff:

At that time I was sitting in my room. I was afraid. I was afraid, what is he going to do to me? So I started to read some of our holy book the Koran and the visitors left around 10 o'clock a.m. and he said to me, now I'm going to start punishing you. So he started to pinch me all over my body. He would go — the pinching he would do it like a sensation with his fingers over circulation in my flesh, then he'd pull his fingers out.

I felt he was enjoying hurting me.

When asked to describe specifically where defendant was pinching, plaintiff responded that the pinching took place on her breasts, under her arms, and around her thighs; that the pinches left

bruises; and that some of the bruises remained at the time that a detective from the Hudson County Prosecutor's office took pictures of her body on November 22, 2008. The punishment continued for approximately one hour, during which time plaintiff was crying. Plaintiff testified that, while administering the punishment, defendant said "I am doing all that to correct you. You have to learn to do something." Nonetheless, plaintiff stated that she "kept all this inside of [her] and we started to live again together, normal life."

An additional incident took place on November 16, 2008. At approximately 3:00 p.m., defendant announced that he planned to have guests who were to arrive at approximately 9:00 or 10:00 that night, and he asked plaintiff to prepare a supper for them. Plaintiff responded that she did not know how to cook. Defendant then left the apartment, returning at 6:00 with his mother and stating that she would do everything. The mother-in-law refused plaintiff's offers of help, so plaintiff went to her room. At some time thereafter, plaintiff, in anger and frustration, pushed papers that defendant had placed on a desk in the bedroom to the floor.

Plaintiff stated that the guests left at approximately midnight, and that defendant came into the bedroom between twelve and one.

When he came in and he saw everything on the floor — so he entered and he came toward me and he took all my clothes off me. It was very cold day. I had two pants on. He said, what, you think you're going to escape my punishment to you? Let's see what we're going to do now.

After that he took off all my clothes and he said the first — before we start punishing you, now you're nude. You have no clothes on. Even my underwear wasn't on. So I felt I was an animal, like an animal. So he said first of all, you better go and pick [up] everything from the floor. Then he said, now we're going to start punishing you. Then he started to pinch my private area. And he was pinching my tits or my chest area. I was crying.

Additionally, plaintiff testified that defendant pulled her pubic hair.

Plaintiff stated that her vaginal area was very, very red and that it was hurting. Although she attempted to leave, defendant had locked the door. As a consequence, she attempted to lie on the other side of the bed. Plaintiff testified:

He said to me, no, you can not go and sleep on the side of the bed. You're still my wife and you must do whatever I tell you to do. I want to hurt your flesh, I want to feel and know that you're still my wife. After that — he had sex with me and my vagina was very, very swollen and I was hurting so bad.

The judge then asked: "You told him that you did not wish to have . . . intercourse, is that correct?" Plaintiff responded: "Of course because I was — I had so much pain down there." According to plaintiff, the entire episode took approximately two to three hours.

On the following morning, plaintiff asked defendant why he had done what he did. As she reported it, defendant responded

[by] mak[ing] like a list and he would read the list and he started to say, okay, now you don't know how to cook, but there's other stuff you're going to do in the house, around the house. And when I come back from work, I will see — look at the list and see what you did and what you didn't do. Whatever you didn't do, I'm going to punish you the same way I punished you for the stuff that you didn't do before.

An additional incident occurred on November 22, 2008. That morning, following an argument with her mother-in-law, plaintiff locked herself in her bedroom. Defendant, having been refused entry, removed the latch from the door, entered the bedroom, and engaged in nonconsensual sex with plaintiff. Although plaintiff's mother-in-law and sister-in-law were in the apartment, and although plaintiff was crying throughout the episode, neither came to her assistance.

Defendant and his relatives then left the apartment, and plaintiff started to break everything in the bedroom, including one of its two windows. After defendant returned with his mother at approximately 4:00 p.m., plaintiff attempted to leave the apartment. However, defendant pulled her back into the bedroom and assaulted her by repeatedly slapping her face, causing her lip to swell and bleeding to occur. He then left the room, and plaintiff escaped without shoes or proper clothing through the unbroken window.

Once outside, plaintiff encountered a Pakistani woman from whom she requested shoes. Seeing plaintiff's condition, the woman called the police, who arrived shortly thereafter, along with an ambulance. Plaintiff was taken to Christ Hospital in Jersey City, where her injuries were treated, photographs were taken, and an attempt was made by detectives from the Hudson County Prosecutor's Office to interview her. However, she was too distraught to speak with them at length. Four of the photographs of plaintiff's body, introduced as exhibits at trial, appear in the appendix to defendant's brief. They depict bruising to both of plaintiff's breasts and to both of her thighs, as well as her swollen, bruised and abraded lips. Testimony of Detective Johanna Rak, the person who took the photographs, established that the remaining photographs disclosed injuries to plaintiff's left eye and right cheek. She testified that bruising appeared on plaintiff's breasts, thighs, and forearm. Additional police testimony established that there were stains on the pillow and sheets of plaintiff's and defendant's bed that appeared to be blood.

On the day of this episode, a domestic violence complaint was filed, and a temporary restraining order was issued. However, the action was later dismissed for lack of prosecution.

Following the November 22 incident, plaintiff took up residence with a Moroccan nurse from Christ Hospital, and she remained with her until January 15, 2009. On December 22, she was determined to be pregnant. Following a meeting between plaintiff, defendant, the nurse, and the Imam of the mosque at which plaintiff and defendant worshiped, the couple was persuaded to

reconcile on the condition that defendant stop mistreating and cursing at plaintiff, that they move back to Morocco at the conclusion of defendant's employment, and that defendant obtain an apartment where the couple could live away from his mother. Plaintiff and defendant moved together into an apartment in Jersey City on January 15, 2009. Defendant's mother lived elsewhere.

However, on the night of the reconciliation, defendant again engaged in nonconsensual sex three times, and on succeeding days plaintiff stated that he engaged in further repeated instances of nonconsensual sex. According to plaintiff, during this period, she was deprived of food, she lacked a refrigerator and a phone, and she was left by her husband for many hours, alone. She responded to her plight by breaking dishes, and on January 18, defendant called plaintiff's parents in Morocco, informed them that plaintiff was "in very bad condition," and asked them to send $600 for a ticket back to Morocco. On January 22, 2009, defendant took plaintiff to a restaurant for breakfast. Upon their return to the apartment, defendant forced plaintiff to have sex with him while she cried. Plaintiff testified that defendant always told her

this is according to our religion. You are my wife, I c[an] do anything to you. The woman, she should submit and do anything I ask her to do.

After having sex, defendant took plaintiff to a travel agency to buy a ticket for her return to Morocco. However the ticket was not purchased, and the couple returned to the apartment. Once there, defendant threatened divorce, but nonetheless again engaged in nonconsensual sex while plaintiff cried. Later that day, defendant and his mother took plaintiff to the home of the Imam and, in the presence of the Imam, his wife, and defendant's mother, defendant verbally divorced plaintiff.[2]

Plaintiff remained at the Imam's house until January 25, 2009, at which time she filed a complaint in municipal court against defendant and obtained a temporary restraining order. A complaint was also filed in Superior Court on January 29, 2009, and an additional temporary restraining order was issued. The two actions were merged for trial in the Superior Court.

Plaintiff testified at the trial that she wanted a final restraining order because "I don't want anybody to interfere or push me back to him. So if I have the restraining order, that will protect me from him." Plaintiff testified additionally that she remained in fear of defendant. At the time of the domestic violence trial, a parallel criminal action was also pending.

Defendant did not testify at the domestic violence trial. However, his mother did so, stating in connection with the November 16 incident that defendant did not complain about plaintiff's lack of cooking skills, and she did not hear evidence of discord between the two. With respect to the November 22 incident, the mother testified that after defendant opened the door with a screwdriver, plaintiff hit him and pulled his beard. Plaintiff also allegedly stated that she was going to destroy the family. The mother stated that the reason defendant wished to go into the room was to get his jacket and health insurance information, needed in order to take the mother to the doc-

tor. Upon their return, they found plaintiff asleep, and she refused to leave her room when guests came over. Neither she nor defendant knew that plaintiff had left the house through the bedroom window.

The mother testified additionally regarding the events of January 22, 2009. She stated that, on that day, she pulled up in front of the couple's apartment and opened the car door to permit defendant to sit in the front and plaintiff to sit in the back seat. When defendant announced that he was going to the Imam to procure a divorce, plaintiff commenced to grab defendant's hair and beard and to "beat" him. According to the mother, defendant then took the car, while she and plaintiff walked to the Imam's house. During their walk, plaintiff allegedly stated that she was going to "destroy" defendant for divorcing her, and that she did not care if she were destroyed in the process, as well. When they arrived at the Imam's house, the mother heard plaintiff say that she loved defendant, that she did not wish a divorce, and that she would do anything for him. She did not hear plaintiff complain about nonconsensual sex. The mother stated that, after the divorce, on January 24, she received a phone call from plaintiff, during which plaintiff accused the family of having no decency and stated that the mother was an old, ugly woman.

The nurse who sheltered plaintiff also testified for the defense. She stated that plaintiff's statement that she wanted her baby to be with his father prompted the nurse's attempt to arrange a reconciliation between plaintiff and defendant. However, she admitted that plaintiff had complained of domestic abuse during the course of the reconciliation meeting, and that defendant had been instructed to cease abusing her. The nurse testified further that, during plaintiff's three-day stay with the Imam, plaintiff called her in seeming distress. When the nurse visited plaintiff the next day, plaintiff complained about the divorce but not any mistreatment. Although plaintiff was supposed to make arrangements to go to Morocco, she determined to stay in the United States, saying "after what [defendant] did, I cannot leave his life like that."

Testimony was additionally offered for the defense by the Imam regarding matters in issue. The Imam testified that defendant sought to divorce plaintiff because she threatened to go to the police, but that she never mentioned to him being forced to engage in nonconsensual sex. According to the Imam, although defendant sought a divorce, plaintiff opposed it. The Imam testified additionally that arrangements were made for plaintiff's return to Morocco, but when he and his wife sought to take her to the airport, she refused.

At the conclusion of this testimony, in response to the judge's questions, the Imam testified regarding **Islamic** law as it relates to sexual behavior. The Imam confirmed that a wife must comply with her husband's sexual demands, because the husband is prohibited from obtaining sexual satisfaction elsewhere. However, a husband was forbidden to approach his wife "like any animal." The Imam did not definitively answer whether, under **Islamic** law, a husband must stop his advances if his wife said "no." However, he acknowledged that New Jersey law considered coerced sex between married people to be rape.

On June 30, 2009, the judge rendered an oral opinion in the matter. He commenced his opinion by stating that plaintiff alleged that defendant engaged in conduct that constituted assault, criminal restraint, sexual assault, criminal sexual contact, and harassment under the Prevention of Domestic Violence Act. The judge found from his review of the evidence that plaintiff had proven by a preponderance of the evidence that defendant had engaged in harassment, pursuant to N.J.S.A. 2C:33-4b and c,[3] and assault. He found that plaintiff had not proven criminal restraint, sexual assault or criminal sexual contact. In finding assault to have occurred, the judge credited, as essentially uncontradicted, plaintiff's testimony regarding the events of November 1, 16 and 22, 2008. The judge based his findings of harassment on plaintiff's "clear proof" of the nonconsensual sex occurring during the three days in November and on the events of the night of January 15 to 16. He did not credit plaintiff's testimony of sexual assaults thereafter, since there was no corroboration in plaintiff's complaints to the police.[4] The judge also found no criminal restraint to have occurred.

While recognizing that defendant had engaged in sexual relations with plaintiff against her expressed wishes in November 2008 and on the night of January 15 to 16, 2009, the judge did not find sexual assault or criminal sexual conduct to have been proven. He stated:

This court does not feel that, under the circumstances, that this defendant had a criminal desire to or intent to sexually assault or to sexually contact the plaintiff when he did. The court believes that he was operating under his belief that it is, as the husband, his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited.

After acknowledging that this was a case in which religious custom clashed with the law, and that under the law, plaintiff had a right to refuse defendant's advances, the judge found that defendant did not act with a criminal intent when he repeatedly insisted upon intercourse, despite plaintiff's contrary wishes.

Having found acts of domestic violence consisting of assault and harassment to have occurred, the judge turned to the issue of whether a final restraining order should be entered. He found such an order unnecessary, vacated the temporary restraints previously entered in the matter and dismissed plaintiff's domestic violence action. In doing so, the judge characterized November as a "bad patch" in the parties' marriage and plaintiff's injuries as "not severe." The judge then stated:

[T]his is a case where there is no history of domestic violence. In fact, they have been — they were together for only three months. Then the bad patch was three weeks, and then another week.

And then — and then, the record indicates that this defendant has filed for a divorce, he got divorced in — with the Imam, but the record indicates that he has filed for divorce in Morocco.

This plaintiff has answered that complaint in Morocco. Divorce proceedings will occur in Morocco.

The defendant has indicated that he is finished with the marriage. The parties are living separate and apart now. This defendant's visa expires in July, I believe.[5]

The judge therefore found that the parties had no reason to be together again, but immediately thereafter, he noted that their baby was expected in August and "[t]hat will require that the parties be in contact presumably." The judge then concluded:

In this particular case, this court does not believe that a final restraining order is necessary under the circumstances. There's no need for the parties to be associated with one another. They are divorced now. They don't live together. They don't have to be together. . . .

[T]his was a situation of a short-term marriage, a very brief period of physical assault by the defendant against the plaintiff and it's now a situation where the parties don't live together, won't be living together and won't have a need to be in contact with one another.

Under those circumstances, the court finds that a final restraining order is not necessary to prevent another act of domestic violence. The Court will not enter a final restraining order.

Nonetheless, the judge cautioned defendant not to have any contact with plaintiff and to instruct his family members and friends to have no further contact with plaintiff's family. Additionally, the judge acknowledged that the two would have to be involved in litigation over the baby and child support.

As a final matter, the judge recognized the pendency of a criminal action against defendant, and indicated its existence constituted an additional basis for the judge's ruling denying a final restraining order, since he assumed that a no-contact order had been entered as a condition of bail. Plaintiff has appealed.

II.

The Supreme Court enunciated the standard of review for an appeal from a trial court's decision in a domestic violence case in Cesare v. Cesare, 154 N.J. 394 (1998). It stated:

The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence. Deference is especially appropriate "when the evidence is largely testimonial and involves questions of credibility." Because a trial court "`hears the case, sees and observes the witnesses, [and] hears them testify,' it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Therefore an appellate court should not disturb the "factual findings and legal conclusions of the trial judge unless [it is] convinced that

they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." . . .

Furthermore, matrimonial courts possess special expertise in the field of domestic relations. . . . Moreover, the [Prevention of Domestic Violence Act] specifically directs plaintiffs to file their domestic violence complaints with the Family Part of the Superior Court . . . .

Because of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding.

[Id. at 411-13 (citations omitted).] We, of course, review the judge's legal conclusions de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

III.

We first address the judge's dismissal of plaintiff's claims of domestic violence premised on sexual assault and criminal sexual contact. The New Jersey Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, was enacted in its present form in 1991. In N.J.S.A. 2C:25-18, the Legislature set forth its findings and declaration, stating in relevant part:

The Legislature finds and declares that domestic violence is a serious crime against society; that there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants; that a significant number of women who are assaulted are pregnant; that victims of domestic violence come from all social and economic backgrounds and ethnic groups; that there is a positive correlation between spousal abuse and child abuse; and that children, even when they are not themselves physically assaulted, suffer deep and lasting emotional effects from exposure to domestic violence. It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.

. . . .

The Legislature further finds and declares that even though many of the existing criminal statues are applicable to acts of domestic violence, previous societal attitudes concerning domestic violence have affected the response of our law enforcement and judicial systems, resulting in these acts receiving different treatment from similar crimes when they occur in a domestic context.

. . . .

[I]t is the responsibility of the courts to protect victims of violence that occurs in a family or family-like setting by providing access to both emergent and long-term civil and criminal remedies and sanctions, and by ordering those remedies and sanctions that are available to assure the safety of the victims and the public. To that end, the Legislature encourages . . . the broad appli-

cation of the remedies available under this act in the civil and criminal courts of this State. It is further intended that the official response to domestic violence shall communicate the attitude that violent behavior will not be excused or tolerated, and shall make clear the fact that the existing criminal laws and civil remedies created under this act will be enforced without regard to the fact that the violence grows out of a domestic situation.

The PDVA defines "domestic violence" in N.J.S.A. 2C:25-19 to mean the infliction of one or more of an enumerated list of crimes upon a protected person. Among the crimes listed are assault, N.J.S.A. 2C:12-1; sexual assault, N.J.S.A. 2C:14-2; criminal sexual contact, N.J.S.A. 2C:14-3; and harassment, N.J.S.A. 2C:18-3. N.J.S.A. 2C:25-28a authorizes a victim to file a complaint alleging an act of domestic violence in the Family Part of the Chancery Division and to seek temporary restraints. N.J.S.A. 2C:25-28f-j. N.J.S.A. 2C:25-29 then requires that a hearing be conducted within ten days, at which time the judge shall consider, among other things, in making his dual decisions whether to find the occurrence of domestic violence and whether to issue a final restraining order, "(1) [t]he previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse; (2) [t]he existence of immediate danger to person or property;" and other factors that are not relevant to the present proceeding. N.J.S.A. 2C:25-29a. The plaintiff must prove an act of domestic violence by a preponderance of the evidence. Ibid. Following the hearing, the judge may, among other relief, issue a final order "restraining the defendant from subjecting the victim to domestic violence, as defined in this act" or from making contact with the plaintiff. N.J.S.A. 2C:25-29b.

In the present matter, the judge found harassment and assault to have occurred, but declined to find sexual assault or criminal sexual contact, determining that the complained-of conduct occurred, but that defendant lacked the requisite criminal intent.

N.J.S.A. 2C:14-2c provides that "[a]n actor is guilty of sexual assault if he commits an act of sexual penetration with another person" under several circumstances, including when "[t]he actor uses physical force or coercion, but the victim does not sustain severe personal injury." N.J.S.A. 2C:14-2c(1). To establish physical force for the purposes of N.J.S.A. 2C:14-2, the plaintiff does not have to prove force in addition to "that necessary for penetration so long as the penetration was accomplished `in the absence of what a reasonable person would believe to be affirmative and freely-given permission.'" State v. Velasquez, 391 N.J. Super. 291, 319 (App. Div. 2007) (quoting State in the Interest of M.T.S., 129 N.J. 422, 444 (1992)). Testimony by plaintiff at trial adequately established the absence of freely given permission.

N.J.S.A. 2C:14-3b provides that "[a]n actor is guilty of criminal sexual contact if he commits an act of sexual contact with the victim under any of the circumstances set forth in section 2C:14-2c." "Sexual contact" is defined as "an intentional touching by the . . . actor, either directly or through clothing, of the victim's . . . intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor." N.J.S.A. 2C:14-1. Neither the

sexual assault statute nor the criminal sexual contact statute specifies the mental state that must be demonstrated in order to establish the defendant's criminal intent.

The trial judge found as a fact that defendant committed conduct that constituted a sexual assault and criminal sexual contact, but that defendant did not have the requisite criminal intent in doing so. His conclusion in this respect cannot be sustained. N.J.S.A. 2C:2-2c(3) establishes the principle that criminal statutes that do not designate a specific culpability requirement should be construed as requiring knowing conduct.

A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist . . . .

[N.J.S.A. 2C:2-2b(2).]

Defendant's conduct in engaging in nonconsensual sexual intercourse was unquestionably knowing, regardless of his view that his religion permitted him to act as he did.

As the judge recognized, the case thus presents a conflict between the criminal law and religious precepts. In resolving this conflict, the judge determined to except defendant from the operation of the State's statutes as the result of his religious beliefs. In doing so, the judge was mistaken.

Early law in this area arose out of prosecutions of Mormons who practiced polygamy. In Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 244 (1878), the Supreme Court considered an appeal from a Mormon's conviction under a Congressionally passed bigamy statute applicable to the Utah territory. At trial, the defendant proved that, at the time of his second marriage, it was an accepted doctrine of the Church "that it was the duty of male members of said Church, circumstances permitting, to practice polygamy" and "[t]hat he had received permission from the recognized authorities in said Church to enter into polygamous marriage." Id. at 161, 25 L. Ed. at 248. As a consequence, defendant sought a charge to the jury that "if he was married . . . in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be `not guilty.'" Id. at 162, 25 L. Ed. at 249. The judge refused to give the charge, ibid., and defendant was convicted of the crime.

In affirming the conviction, the Court framed the issue in the following fashion: "Upon this charge and refusal to charge the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land." Ibid. In resolving the issue, the Court noted that "Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation." Ibid. Nonetheless, the Court found that the First Amendment's guaranty of religious freedom was not intended to preclude the prohibition of polygamy and, therefore, enactment of the statute was within the legislative power of Congress "as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive

control." Id. at 166, 25 L. Ed. at 250. The Court further determined that those who made polygamy a part of their religion were not excepted from the statute's operation. Ibid.

If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

[Id. at 166-67, 25 L. Ed. at 250.]

The Court then observed that "criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does." Id. at 167, 25 L. Ed. at 250. Because the defendant knew he had been married once and that his first wife was living, and he also knew that his second marriage was legally forbidden, when he married a second time he is presumed to have intended to break the law, thereby committing a crime. Ibid.

Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defen[s]e of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion; it was still belief, and belief only.

[W]hen the offense consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made. No case, we believe, can be found that has gone so far.

[Ibid., 25 L. Ed. at 250-51.]

See also Cleveland v. United States, 329 U.S. 14, 67 S. Ct. 13, 91 L. Ed. 12 (1946) (affirming the conviction of defendant practitioners of polygamy under the Mann Act upon a determination that they transported their wives across state lines for immoral purposes and a rejection of defendants' claim that, because of their religious beliefs, they lacked the necessary criminal intent).

Similarly, in Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940), the Court, relying on Reynolds, held in an often-quoted statement:

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

[Id. at 303-04, 60 S. Ct. at 903, 84 L. Ed. at 1218.][6]

Reynolds and the language of Cantwell were utilized by the New Jersey Supreme Court in State v. Perricone, 37 N.J. 463, 472-74 (1962), an action affirming the appointment of a special guardian for the child of Jehovah's Witnesses in order to permit him to obtain a potentially lifesaving blood transfusion.

Over the years, the United State Supreme Court's treatment of Free Exercise Clause cases has changed. In brief, in Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), the Court reversed a denial of unemployment benefits to the plaintiff, a Seventh Day Adventist, because of her unwillingness to accept Saturday employment. In reversing, the court held that the government's action substantially burdened plaintiff's free exercise of religion, Id. at 403-04, 83 S. Ct. at 1793-94, 10 L. Ed. 2d at 970-71, and that its action was not justified by a compelling government interest in the regulation of a subject within the State's constitutional power to regulate. Id. at 406-09, 83 S. Ct. at 1795-96, 10 L. Ed. 2d at 972-73.[7] See also, Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717-19, 101 S. Ct. 1425, 1432, 67 L. Ed. 2d 624, 634 (1981) (applying Sherbert and holding that the denial of unemployment benefits to plaintiff who lost his job when he refused on religious grounds to manufacture armaments substantially burdened his exercise of religion and was not justified by a compelling governmental interest); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141-42, 107 S. Ct. 1046, 1049, 94 L. Ed. 2d 190, 197-98 (1987) (holding that the State could not condition the availability of unemployment insurance benefits on a person's willingness to forego conduct required by his religion).

However, in Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), the Supreme Court held that the Free Exercise Clause did

not require Oregon to exempt the sacramental ingestion of peyote by members of the Native American Church from Oregon's criminal drug laws. Id. at 876-82, 110 S. Ct. at 1599-1602, 108 L. Ed. 2d at 884-88. The Court determined that such valid, generally applicable, and neutral laws may be applied to religious exercise even in the absence of a compelling governmental interest. Id. at 882-89, 110 S. Ct. at 1602-06, 108 L. Ed. 2d at 888-92. In doing so, the Court held that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." Id. at 881, 110 S. Ct. at 1601, 108 L. Ed. 2d at 887.[8] Further, the Court confined the balancing test of Sherbert v. Verner to cases invalidating denials of unemployment compensation, and it concluded that where a Sherbert analysis was applied in another context, it never resulted in an invalidation of the statute at issue. 494 U.S. at 883-84, 110 S. Ct. at 1602-03, 108 L. Ed. 2d at 888-89.

The Court stated:

Even if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The Sherbert test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct.

[Id. at 884, 110 S. Ct. at 1603, 108 L. Ed. 2d at 889.]

The Court concluded:

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" — permitting him, by virtue of his beliefs, "to become a law unto himself," — contradicts both constitutional tradition and common sense.

[Id. at 885, 110 S. Ct. at 1603, 108 L. Ed. 2d at 889-90 (citations and footnote omitted).]

Congress responded to Smith by passing the Religious Freedom Restoration Act (RFRA), 42 U.S.C.A. § 2000bb to 2000bb-4, which resurrected the substantial burden test, providing that "[g]overnment shall not substantially burden a person's exercise of religion[,] even if the burden results from a rule of general applicability . . . [unless] it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest[] and is the least restrictive means of furthering that interest." 42 U.S.C.A. § 2000bb-1(a) and (b).

However, in City of Boerne v. Flores, 521 U.S. 507, 536, 117 S. Ct. 2157, 2172, 138 L. Ed. 2d 624, 649 (1997), the Supreme Court held that in enacting the RFRA, Congress had exceeded its enforcement power under § 5 of the Fourteenth Amendment, and thus the statute was unconstitutional as applied to the states. In response to Boerne, Congress enacted the Religious Land Use and Institutionalized Persons Act (the RLUIPA), 42 U.S.C.A. § 2000cc to 2000cc-5, which has the same substantive standard as the RFRA but a considerably narrowed applicability. The RLUIPA applies when a substantial burden to the exercise of religion is imposed as the result of the government's regulation of land use by religious assemblies or institutions or by regulations affecting persons residing in an institution such as a prison. See 42 U.S.C.A. § 2000cc and § 2000cc-1. In either case, the receipt of federal financial assistance by the program or institution is required. Ibid.

No statute has been enacted that affects legislation of general application of the sort that is at issue here. It consequently appears that Smith continues to control our decision in this case. Because it is doubtlessly true that the laws defining the crimes of sexual assault and criminal sexual contact are neutral laws of general application, and because defendant knowingly engaged in conduct that violated those laws, the judge erred when he refused to recognize those violations as a basis for a determination that defendant had committed acts of domestic violence.

In this context, we note, as well, the Legislature's recognition of the serious nature of domestic violence, the responsibility of the courts to protect victims of such violence and its directive that the remedies of the PDVA be broadly applied. See N.J.S.A. 2C:25-18, quoted at length earlier in this opinion. The Legislature's findings and declaration provide an additional basis for the rejection of the judge's view of defendant's acts as excused by his religious beliefs, and for a recognition of those acts as violative of New Jersey's laws.

IV.

Following a finding that a defendant has committed a predicate act of domestic violence, the judge is required to consider whether a restraining order should be entered that provides protection to the victim.

Although this second determination — whether a domestic violence restraining order should be issued — is most often perfunctory and self-evident, the guiding standard is whether a restraining order is necessary, upon an evaluation of the factors set forth in N.J.S.A. 2C:25-29a(1) to -29a(6), to protect the victim from an immediate danger or to prevent further abuse. See N.J.S.A. 2C:25-29b (stating that "[i]n proceedings in which complaints for restraining orders have been filed, the court shall grant any relief necessary to prevent further abuse") . . . .

Silver v. Silver, 387 N.J. Super. 112, 127 (App. Div. 2006).

In the present matter, the judge properly found that defendant had assaulted and harassed plaintiff in violation of the PDVA. However he declined to enter a final restraining order, determining that the domestic violence constituted merely a bad patch in a short-term marriage and did not result in serious injury to plaintiff, and that plaintiff and defendant had separated, a divorce proceeding was pending in Morocco, and the parties had no reason for further contact. Nonetheless, the judge recognized that contact between the parties would necessarily occur upon the birth of their child. The judge additionally appeared to be sufficiently concerned about the likelihood of renewed domestic violence to instruct defendant to have no contact with plaintiff. In this regard, he also relied upon the likelihood that a no contact order had been put in place as a condition of defendant's bail in the pending criminal proceedings against him arising from the acts of domestic violence that formed the basis for the civil action.

The judge's ruling raises several areas of concern that we regard as warranting reversal and a remand to permit the entry of a final restraining order. We construe the judge's characterization of the violence that took place as a bad patch in the parties' marriage and plaintiff's injuries as not severe as manifesting an unnecessarily dismissive view of defendant's acts of domestic violence. Although it is true that the November episodes spanned only three weeks, that period constituted approximately one-fourth of the parties' marriage. Moreover, we find it significant to the issue of whether a final restraining order should have been granted that the violence resumed on the very first night of the parties' reconciliation, and after defendant had assured the Imam that he would not engage in further such acts. We additionally note plaintiff's testimony that the significant bruising to her body shown on the photographs taken on November 22 merely represented the remnants of the bruising inflicted on November 1 and 16. In our view, the abuse that took place in this case was far removed from the domestic contretemps found not to constitute abuse in cases such as Kamen v. Egan, 322 N.J. Super. 222, 227-28 (App. Div. 1999); Corrente v. Corrente, 281 N.J. Super. 243, 248-50 (App. Div. 1995); and Peranio v. Peranio, 280 N.J. Super. 47, 54-56 (App. Div. 1995). We are also concerned that the judge's view of the facts of the matter may have been colored by his perception that, although defendant's sexual acts violated applicable criminal statutes, they were culturally acceptable and thus not actionable — a view that we have soundly rejected.

Additionally, we are troubled by the judge's seeming acknowledgement, at one point in the course of his decision, that restraints might be appropriate and his reliance on a no contact order that he presumed had been put in place in the pending criminal proceeding as affording adequate protection to plaintiff in the civil domestic violence matter. As a preliminary matter, we note that the judge did not verify the existence, terms or duration of the presumed order. Further, we have previously recognized that a complaint brought under the PDVA and a criminal proceeding brought for the same conduct "are separate and distinct matters." State v. Brown, 394 N.J. Super. 492, 504 (App. Div. 2007). There, we observed that "[t]he legislative history demonstrates that the Act `anticipates and provides for simultaneous or subsequent criminal proceedings' unim-

pacted by the other, except for a contempt proceeding." Id. at 505 (quoting Cannel, New Jersey Criminal Code Annotated (Gann 2007), comment on N.J.S.A. 2C:25-29 (2007); N.J.S.A. 2C:25-29). We stated in Brown:

As the Prevention of Domestic Violence Act demonstrates, the purpose of an action in the Family Part, designed to protect an individual victim, is quite different than a criminal case in which the State prosecutes a defendant on behalf of the public interest. The Act was enacted "to assure the victims of domestic violence the maximum protection from abuse the law can provide." N.J.S.A. 2C:25-18. The Legislature found that "it is the responsibility of the courts to protect victims of violence that occurs in a family or family-like setting by providing access to both emergent and long-term civil and criminal remedies and sanctions[.]" Ibid. The Act further states that "[a] victim shall not be prohibited from applying for, and a court shall not be prohibited from issuing, temporary restraints pursuant to this act because the victim has charged any person with commission of a criminal act." N.J.S.A. 2C:25-26(f).

[Brown, supra, 394 N.J. Super. at 504.]

We find it inappropriate, when restraints are civilly required, for a Family Part judge to rely on restraints issued in a parallel criminal proceeding. This is particularly the case because the need to protect the victim-spouse may outlive the termination of the criminal action.

As a final matter, we find that the judge failed to give sufficient measured consideration to the imminence of the birth of the couple's child — an event that the judge acknowledged would bring the two into contact and almost inevitably be a source of conflict. In this regard, we note that defendant's previous misconduct consisted not only of sexual acts that were unlikely to be repeated given the couple's estrangement, but also acts of assault and harassment that were more likely to be repeated in the future.

Viewing the evidence as a whole, we are satisfied that the judge was mistaken in determining not to issue a final restraining order in this matter in order to protect plaintiff from future abuse and in dismissing plaintiff's domestic violence complaint. We therefore reverse and remand the case for entry of such an order.

Reversed and remanded.

[1] Plaintiff was born on October 10, 1990.

[2] The Imam testified that defendant divorced plaintiff on January 24, 2009, and called him to announce the fact shortly thereafter. Because plaintiff was pregnant, the divorce would not become effective until the child was delivered. If she had not been pregnant, the divorce would have become effective after three months if plaintiff's husband did not reconcile with her.

[3] The statute provides in relevant part that

a person commits a petty disorderly persons offense if, with purpose to harass another, he:

. . . .

b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or

c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

[4] In response to an objection by plaintiff's counsel, the judge later recognized that the police report upon which he relied in finding no corroboration for plaintiff's claims had not been admitted in evidence because of its hearsay nature. However, he declined to modify his ruling.

[5] The judge indicated that plaintiff's visa status was unclear, because she was seeking to stay in the United States as a victim of domestic violence.

[6] In Cantwell, however, the Court reversed convictions of Jehovah's Witnesses charged with violating a state statute prohibiting solicitation for an alleged religious, charitable or philanthropic cause unless the cause was approved by the secretary of the public welfare council, who was directed to approve the same if he regarded the cause as a religious or bona fide charitable one. The Court held that conditioning the issuance of a permit on the secretary's view of what constituted a religious cause constituted censorship of religion, prohibited by the First Amendment. Id. at 305, 60 S. Ct. at 904, 84 L. Ed. at 219. But see Prince v. Massachusetts, 321 U.S. 158, 84 S. Ct. 438, 88 L. Ed. 645 (1944), construing a state child labor law as validly prohibiting a Jehovah's Witness adherent from permitting a child to sell religious pamphlets on the street, even if accompanied by an adult guardian, and stating: "The right to practice religion freely does not include liberty to expose . . . the child . . . to ill health or death." Id. at 166-67, 64 S. Ct. at 442, 88 L. Ed. at 653.

[7] We note, however, that the Sherbert Court observed:

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such . .. . On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles for "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.

[Id. at 402-03, 83 S. Ct. at 1792, 10 L. Ed. 2d at 969-70.]

[8] The Court cited to Cantwell, supra, 310 U.S. at 304-07, 60 S. Ct. at 903-05, 84 L. Ed. at 1218-19; Murdock v. Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943) (invali-

dating a flat tax on solicitation as applied to the dissemination of religious ideas); Follett v. McCormick, 321 U.S. 573, 64 S. Ct. 717, 88 L. Ed. 938 (1944) (same); and Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1536, 32 L. Ed. 2d 15 (1972) (finding Wisconsin's interest in compulsory education to be insufficient to overcome Amish parents' objection to such education as contrary to their religious beliefs).

OHIO

CATEGORY: Child Custody

RATING: TBD

TRIAL: TBD

APPEAL: TBD

COUNTRY: Saudi Arabia

URL:
http://scholar.google.com/scholar_case?case=12459142634128971246&q=Saudi&hl=en&num=100&as_sdt=fffffffffffe04

2004-Ohio-4083

HANADI RAHAWANGI, PLAINTIFF-APPELLEE, V. HUSAM ALSAMMAN, DEFENDANT-APPELLANT.

Case No. 83643.

Court of Appeals of Ohio, Eighth District, Cuyahoga County.

DATE OF ANNOUNCEMENT OF DECISION: August 5, 2004.

Vincent A. Stafford, Esq., Stafford & Stafford Co., L.P.A., 380 Lakeside Place, 323 Lakeside Avenue, West, Cleveland, Ohio 44113, for plaintiff-appellee.

Nate N. Malek, Esq., Malek, Dean & Associates, L.L.C., 350 Lakeside Place, 323 Lakeside Avenue, West, Cleveland, Ohio 44113, for defendant-appellant.

JOURNAL ENTRY AND OPINION

FRANK D. CELEBREZZE, JR., Judge.

{¶1} The appellant ("Husband"), Husam Alsamman, appeals from the judgment of the Court of Common Pleas, Domestic Relations Division, which granted a divorce to the appellee ("Wife"), Hanadi Rahawangi, claiming the trial court had no jurisdiction to hear the case. After reviewing the record and for the reasons set forth below, we affirm the decision of the trial court.

{¶2} Husband and Wife were married on May 15, 1991 in Damascus, Syria; both are Syrian citizens. Two weeks after they were married, Husband and Wife moved to Cleveland, Ohio in order for Husband to complete his medical training and receive his board certification in anesthesiology. Husband and Wife traveled to the United States on J-1 and J-2 visas respectively. Wife claims she has not been back to Syria since her wedding and has no intention of returning.

{¶3} While living in Cleveland, Ohio, Husband and Wife had their first child, Lynne Samman, born March 17, 1994. Shortly thereafter, Husband received a fellowship at U.C.L.A., and they moved to Los Angeles, California. While in California, Husband and wife had their second child, Tarek Samman, born September 18, 1995. Both children are United States citizens. After Husband completed his fellowship at U.C.L.A., the family moved back to Cleveland, Ohio.

{¶4} In October 1997, the family returned to Riyadh, **Saudi** Arabia, where Husband found employment at King Faisal's Specialist Hospital. In early February 1999, Husband and Wife fought. Husband ordered Wife to take the children and leave his home in **Saudi** Arabia and return to Syria. Wife refused to do so because she believed that Husband had damaged her honor by making false statements about her to people living in Syria. Wife instead took her children and went to her sister's home in Kuwait.

{¶5} On February 19, 1999, Husband filed for divorce in the Spiritual Court of Syria. Wife had no notice of those divorce proceedings and did not participate. Husband did not personally attend the proceedings, but was represented by a family member. In March 1999, while staying with her sister in Kuwait, Wife obtained a B-2 tourist visa and returned to the United States with her children. The Syrian divorce became official on April 24, 1999.

{¶6} During this time, Husband kept in contact with Wife and knew she had gone to the United States; however, Husband provided no financial assistance to Wife or his children. Wife testified that Husband did not tell her about the Syrian divorce or about the fact that he had remarried.

{¶7} Husband married another woman in August 1999. Husband remained in **Saudi** Arabia until July 2000; thereafter, Husband and his new wife returned to southern California and set up a medical clinic known as Samman Medical Corporation. Husband and his new wife had a child named Samia; they currently reside in Alpine, California.

{¶8} Wife has been living in the Cleveland area since June 1999. She currently resides in Broadview Heights. In 2001, Wife applied to the Immigration and Naturalization Service for political asylum. At the same time, Wife also received a work permit. In February 2002, the Immigration and Naturalization Service conducted an interview with Wife. Wife was told that she did not have to renew her B-2 Visa anymore; however, the case is still pending as to whether asylum will be granted to her. Wife currently works in the billing department for a cardiologist.

{¶9} On October 27, 1999, Wife filed for legal separation from Husband in the domestic relations trial court (Case Number D-270364). The case was assigned to the docket of the Honorable Kathleen O'Malley. On April 12, 2000, the trial court dismissed the case without prejudice. No appeal was taken.

{¶10} In March 2000, Husband filed a writ of habeas corpus in the Cuyahoga County Court of Common Pleas, Juvenile Division, to have the children returned to him. The action was dismissed by the trial court on the basis that Syria was not a signatory nation of the Hague Convention; therefore, the court lacked jurisdiction to hear the matter.

{¶11} On April 17, 2000, Wife filed a complaint for divorce in the domestic relations trial court (Case Number D-273402). The case was assigned to the docket of the Honorable Anthony Russo. On May 26, 2000, Husband moved the trial court to dismiss the complaint based on the divorce decree obtained in Syria and also due to the fact that this case had been heard and dismissed previously by Judge Kathleen O'Malley; Husband's motion was denied by the trial court.

{¶12} Trial in case number D-273402 began on April 30, 2002 and was concluded on May 7, 2002. On October 1, 2002, the trial court issued the judgment entry of divorce. On October 25, 2002, Husband appealed the judgment entry of divorce to this court (Case Number 81952). This court dismissed the appeal for lack of a final appealable order on July 10, 2003, holding the trial court failed to address the health care needs of the children in its judgment entry. On October 7, 2003, the trial court issued a nunc pro tunc judgment entry of divorce correcting the clerical mistake raised by this court.

{¶13} Husband now brings this timely appeal alleging five assignments of error for review.

{¶14} "I. The trial court erred in not dismissing the action brought by appellee because res judicata prevented appellee from relitigating the validity of a prior divorce proceeding that had been dismissed for lack of jurisdiction."

{¶15} In his first assignment of error, the appellant claims the appellee is barred by the doctrine of res judicata from filing the instant complaint for divorce before Judge Russo because her previously filed complaint for legal separation had been already heard and dismissed by Judge O'Malley. We disagree.

{¶16} The issue of whether the doctrine of res judicata is applicable is a question of law which appellate courts review de novo. *Rohner Distributors v. Pantona* (Apr. 8, 1999), Cuyahoga App. No. 75066.

{¶17} The doctrine of res judicata applies if there is a valid, final judgment that is rendered upon the merits by a court of competent jurisdiction, which is conclusive of all rights, questions, and facts in issue of the parties. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226. If the doctrine applies, it bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. Id.

{¶18} A review of the record indicates that the dismissal of the appellee's claim for legal separation was without prejudice and not on the merits. The journal entry of Judge O'Malley does not specifically state for what reasons the complaint for legal separation was dismissed. The appellant claims the trial court dismissed the complaint because it lacked subject matter jurisdiction, while the appellee claims the complaint was voluntarily dismissed because she could not perfect

service of process on the appellant. Regardless of the trial court's reason for dismissing the complaint for legal separation, the dismissal was not on the merits. Furthermore, a complaint for legal separation and a complaint for divorce are two separate legal actions that would not be barred by the doctrine of res judicata.

{¶19} Given the fact that the appellee's claim for legal separation was not dismissed on the merits and that she filed a distinct and separate complaint for divorce, we hold the doctrine of res judicata is not applicable to the instant claim; therefore, the appellant's first assignment of error is hereby overruled.

{¶20} "II. The trial court lacks jurisdiction over a non resident alien traveling on a B-2 visitor visa for purposes of a divorce action in Ohio."

{¶21} In his second assignment of error, the appellant claims the trial court lacked subject matter jurisdiction to hear the complaint for divorce because the appellee was a Syrian citizen visiting the United States on a B-2 visitor visa. The appellant specifically argues that the B-2 visitor visa only confers a "tourist" status on the appellee within the United States; therefore, the appellee's failure to obtain a Permanent Residency Card deprives the trial court of jurisdiction to hear her complaint for divorce because the appellee is not a permanent resident. We disagree.

{¶22} R.C. 3105.03 states, "The plaintiff in actions for divorce and annulment shall have been a resident of the state at least six months immediately before filing the complaint."

{¶23} "The word `residence' in R.C. 3105.03, means `domiciliary residence,' a concept which has two components: (1) an actual residence in the jurisdiction, and (2) an intention to make the state of jurisdiction a permanent home." *Coleman v. Coleman* (1972), 32 Ohio St.2d 155 at 162, 291 N.E.2d 530 at 535. The trial court must examine the surrounding facts and circumstances to determine whether the individual has the intention to remain in Ohio indefinitely. Id.

{¶24} "Residence" imports an actual physical presence within the state. *Franklin v. Franklin* (1981), 5 Ohio App.3d 74, 449 N.E.2d 457; see, also, *Hager v. Hager* (1992), 79 Ohio App.3d 239, 243, 607 N.E.2d 63, 66. It signifies an abode or place of dwelling. Id.

{¶25} "`Domicile' *** conveys a fixed, permanent home. It is the place to which one intends to return and from which one has no present purpose to depart ***. [It is] the relationship which the law creates between an individual and a particular locality ***. A party's domicile usually coincides with his place of residence. However while an individual may have several residences, he can be domiciled in only one place at a given time. ***." *Hager*, 79 Ohio App.3d 239, at 244, 607 N.E.2d, 63, at 66.

{¶26} A person effectively changes her domicile when she actually abandons the first domicile, coupled with the intent not to return to it, and acquires a new domicile. *Polakova v. Polak* (1995), 107 Ohio App.3d 745, 669 N.E.2d 498, citing, *Winnard v. Winnard* (1939), 62 Ohio App. 351, 23 N.E.2d 977.

{¶27} In a divorce action, the burden of proof is on the plaintiff to prove domiciliary residence in the state by a preponderance of the evidence. *Hager*, 79 Ohio App.3d 239, at 243, 607 N.E.2d 63, at 66. Proof of the first component of the concept of domiciliary residence, i.e., actual residence in the state, is prima facie evidence of the second component, i.e., an intent to be domiciled there.

{¶28} In the instant matter, it is undisputed that the appellee was a Syrian citizen. In May 1991, the appellee was married to the appellant in Syria; they then left Syria two weeks later to live in the United States. The appellant and appellee came to the United States on J-1 and J-2 visas, respectively. The appellant maintains a Syrian residence. While in the United States, the appellant and appellee had two children; both are American citizens. In October 1997, the family returned to Riyadh, **Saudi** Arabia, where the appellant found employment. In February 1999, the couple fought, and the appellant told the appellee to leave his home and take the children back to Syria. Instead of doing so, the appellee took the children to Kuwait, obtained a tourist visa, and returned to the United States.

{¶29} The appellant married again in August 1999 and had another child. The appellant and his new wife moved to Alpine, California, where they currently reside.

{¶30} Since June 1999, the appellee has been living with her children in Cleveland, Ohio. The appellee has applied to the Immigration and Naturalization Service for political asylum. The appellee also obtained a work permit and is employed in the billing department of a cardiologist. Appellee is also working towards obtaining a general education degree (GED). At trial, the appellee testified that she does not have any intention of returning to Syria and plans to make Cleveland, Ohio, her permanent home.

{¶31} After reviewing the facts in this case, we find that the appellee has effectively changed her domiciliary residence from Damascus, Syria, to Cleveland, Ohio, even though she is here on a tourist visa. She has a physical residence in Broadview Heights, Ohio, and expressed her intention to remain permanently in Ohio by filing for political asylum with the Immigration and Naturalization Service. In February 2002, the Immigration and Naturalization Service conducted an interview with the appellee, and she was told that she did not have to renew her B-2 tourist visa; that issue is still pending.

{¶32} Because the appellee has met the requirements of R.C. 3105.03, and established her domiciliary residence by a preponderance of the evidence, we overrule the appellant's second assignment of error.

{¶33} "III. The trial court should have been precluded from hearing the refiled case because it was not reassigned to the judge who originally was assigned by lot to hear the case."

{¶34} In his third assignment of error, the appellant claims that the trial court erred in not reassigning the appellee's complaint for divorce to the docket of Judge Kathleen O'Malley. Appellant claims that because Judge O'Malley was originally assigned by lot to hear the parties' first case for legal separation, the complaint for divorce also should have been heard by her.

{¶35} As discussed previously, a complaint for legal separation and a complaint for divorce are two separate and distinct legal actions; therefore, the complaint for divorce does not have to be assigned to the docket of the same judge that dismissed the complaint for legal separation. The appellant's third assignment of error is overruled.

{¶36} "IV. The trial court erred in not enforcing the divorce decree between the parties from Syria on the basis of comity because enforcing the laws of the Syrian divorce decree was not and would not be contrary or repugnant to the laws of the United States and Ohio."

{¶37} In his fourth assignment of error, the appellant claims the divorce decree obtained in Syria is controlling and dispositive of his marriage to the appellee; therefore, the trial court, through the doctrine of comity, should have been barred from rehearing the matter.

{¶38} Comity refers to an Ohio court's recognition of a foreign decree and is a matter of courtesy rather than of right. *State ex rel. Lee v. Trumbull Cty. Probate Court*, 83 Ohio St.3d 369, 374, 1998-Ohio-51, 700 N.E.2d 4; *Walsh v. Walsh*, 146 Ohio App.3d 48, 2001-Ohio-4315, 764 N.E.2d 1103. "*** [S]everal states of the United States are empowered, if they freely elect to do so, to recognize the validity of certain judicial decrees of foreign governments where they are found by the state of the forum to be valid under the law of the foreign state, and where such recognition is harmonious with the public policy of the forum state, taking into consideration all of the relevant facts of the particular case." *Yoder v. Yoder* (1970), 24 Ohio App.2d 71, 72, 263 N.E.2d 913.

{¶39} "This principle is frequently applied in divorce cases; a decree of divorce granted in one country by a court having jurisdiction to do so will be given full force and effect in another country by comity, not only as a decree determining status, but also with respect to an award of alimony and child support. The principle of comity, however, has several important exceptions and qualifications. A decree of divorce will not be recognized by comity where it was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy of the state in which recognition is sought, or where the foreign court lacked jurisdiction." *Kalia v. Kalia*, 151 Ohio App.3d 145, 155, 2002-Ohio-7160, 783 N.E.2d 623.

{¶40} In the instant matter, the trial court found and the record indicates that the appellee did not receive actual or constructive notice of the divorce proceedings in Syria. It is undisputed that Syria is not a signatory of the Hague Convention. The appellant sent notice of the divorce proceedings to the appellee's mother's house in Syria, with full knowledge that the appellee and the children were residing in the United States. The trial court found that this lack of due process fatally flawed the Syrian divorce proceeding and thus refused to uphold the Syrian divorce decree. We agree with the trial court's holding.

{¶41} A decree of divorce will not be recognized by comity where it was obtained by a procedure which denies due process of law, i.e., the lack of service of process; therefore, the appellant's fourth assignment of error is overruled.

{¶42} "V. The trial court's factual findings and its failure to admit evidence were contrary to the law and against the manifest weight of the evidence."

{¶43} In his final assignment of error, the appellant claims the trial court's findings regarding the Syrian divorce proceedings, the appellee's nationality, and the court's failure to admit certain documentary evidence, amounted to a ruling which is against the manifest weight of the evidence.

{¶44} In civil cases, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus. Moreover, evaluating evidence and assessing credibility are primarily for the trier of fact. *Crull v. Maple Park Body Shop* (1987), 36 Ohio App.3d 153, 521 N.E.2d 1099. Thus, a reviewing court should not reverse a trial court's decision when it merely has a difference of opinion on questions of credibility or the weight of the evidence; rather, a trial court's decision should be overturned only when there is no competent and credible evidence. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273.

{¶45} First, the appellant claims that the trial court erred in its judgment entry for divorce by stating that the appellee is a Palestinian instead of a Syrian. Testimony in the record indicates that the appellee is, in fact, a Syrian citizen. Although the trial court erred by stating that the appellee was Palestinian, this error did not prejudice the appellant, nor did it create a manifest miscarriage of justice. Whether or not the appellee is Syrian or Palestinian, she is still a domiciliary resident of this state for jurisdictional purposes.

{¶46} Second, the appellant claims the trial court mistakenly found that the appellee did not have actual or constructive notice of the Syrian divorce proceedings that began in February 1999. The appellant claims the trial court erred by finding that the appellee came back to the United States March 1, 1999. The appellant produced a witness, Ammar Almasalkhi, who testified that the appellee came to his home from Kuwait on April 9, 1999. Almasalkhi also testified that the appellee told him she and the appellant had been divorced. The appellant and Almasalkhi are both doctors and have been friends for years.

{¶47} The trial court primarily determines questions of credibility and the weight given to evidence. There exists competent and credible evidence to indicate that the appellee had no actual and constructive notice of the Syrian divorce proceedings and came to the United States before the Syrian divorce was filed. The trial court's findings were not against the manifest weight of the evidence.

{¶48} Last, the appellant claims the trial court excluded documentary evidence of the Syrian marriage decree and the Syrian divorce decree. The appellant claims these documents substantiated the fact that the parties were subject to the jurisdiction of the Syrian court.

{¶49} A trial court's decision to exclude evidence is not grounds for reversal unless the record clearly demonstrates that the trial court abused its discretion and that the complaining party has

suffered a material prejudice. *Columbus v. Taylor* (1988), 39 Ohio St.3d 162, 164, 529 N.E.2d 1382. An abuse of discretion connotes more than an error of law or judgment, it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Tracy v. Merrell-Dow Pharmaceuticals, Inc.* (1991), 58 Ohio St.3d 147, 152, 569 N.E.2d 875.

{¶50} The trial court acknowledged and the parties stipulated that the appellant and appellee were married in a Syrian spiritual court. Contrary to the appellant's assertion, the Syrian marriage certificate was admitted into evidence. The trial court refused to admit into evidence the Syrian divorce decree and other Syrian post-judgment documents because the trial court held that the Syrian divorce proceedings violated the appellee's right to due process. The trial court refused to grant recognition of the decree through the doctrine of comity. We find the trial court did not abuse its discretion in excluding documentary evidence of the Syrian divorce decree.

{¶51} After reviewing the record, we find that the trial court's judgment entry for divorce was not against the manifest weight of the evidence. The appellant's fifth assignment of error is hereby overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Blackmon, P.J., and Rocco, J., concur.

SOUTH CAROLINA

CATEGORY: Child Custody

RATING: Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: Iran

URL:
http://scholar.google.com/scholar_case?case=7799731386002251308&q=pirayesh&hl=en&as_sdt=2,9

MICHAEL M. PIRAYESH, RESPONDENT/APPELLANT, V. MARY ALICE PIRAYESH, APPELLANT/RESPONDENT.

Opinion No. 3793.

Court of Appeals of South Carolina.Heard March 10, 2004.

Filed May 11, 2004.

J. Falkner Wilkes, of Greenville, for Appellant-Respondent.

Bobby H. Mann, of Greenville, for Respondent-Appellant.

HEARN, C.J.:

Michael M. Pirayesh (Husband) and Mary Alice Pirayesh (Wife) were granted a divorce on the ground of one year's continuous separation without cohabitation. Husband was granted custody of the parties' two children, but was prohibited from traveling with the children outside the United States. Wife was granted visitation rights and was ordered to pay child support. The parties were ordered to split the guardian ad litem fees and pay their own attorney's fees. Both parties appeal this order. We affirm in part, reverse in part, and remand.

FACTS

Husband, who was born in Iran, moved to the United States in 1978 and has since become a United States citizen. On June 11, 1984, he and Wife married. The parties had two children during their marriage, a son, now fifteen years old, and a daughter, now thirteen years old. Although Wife and children have always lived together in Greenville, South Carolina, Husband worked for six months in Portland, Oregon in 1996 and thereafter in Atlanta, Georgia until 1998. At the time of the divorce hearing in March 2001, Husband had obtained a job in Charlotte, North Carolina, and had been living there for approximately one year. The children resided with Wife during the couple's one year's separation as well as during the pendency of this litigation.

Husband claims the marital breakdown was a result of Wife's inability to handle the family finances and the accrual of a large amount of credit card debt. When asked if he and Wife tried to budget their money, Husband testified:

Yes, we did. . . . Like for example, we said we don't have . . . certain money to spend on certain things. . . . [W]e said, if you are going to make a long distance phone call let's just keep it under a hundred dollars. . . . She did not follow that. As a matter of fact, I have one conversation that she had with her mom for a hundred and twenty minutes. My ear get[s] hurt after fifteen (15) minutes. . . . Grocer[ies] for example, you know. We bought grocer[ies]; that's fine. Half of the grocery throw away (sic). Either she burned it cooking or she didn't like to eat left over food.

Husband also testified that Wife had been un- or under-employed for much of the marriage despite the fact that she has always been in good health.

Wife contended that the failure of the marriage was largely a consequence of Husband's emotional and physical distance from her and the children, due namely to his out of town employment and his preoccupation with playing tennis. According to Wife, the couple's problems began when, on the day of their daughter's birth, Wife called Husband to inform him that their newborn had to be monitored because she had stopped breathing. Wife testified as follows:

[T]hat evening I had fed Debra, she stopped breathing. And I tried to wake her up. And nothing was happening. . . . And I rang the nurse's station from the bed. . . . They came and they got her to start breathing again. I called [Husband and] told him what had happened. . . . It was probably 10 o'clock when I called back. And his response was, "[Wife], I was asleep." And he hung up.

Wife testified that Husband's response to their daughter's health problems made her "wonder[] what kind of man [she] had married" and that their marital problems only increased from then on.

Both parties sought custody of their two minor children. During the presentation of Husband's case, Husband and three witnesses testified on his behalf. The witnesses, all of whom knew Husband through his tennis hobby, testified that *both* Husband and Wife were loving parents. Husband testified that his primary reason for seeking custody was because, during the pendency of the litigation, the water in the Wife's home was cut off twice, the phone was disconnected five times, and the electricity was also turned off. He also complained that Wife was late dropping the

children off to visit with him a number of times and that Wife did not effectively discipline the children while they were in her care. Husband felt he was the better parent because he had a flexible job that paid $60,000 a year, he knew how to budget his money, and he could control the children.

During the presentation of Wife's case, seven witnesses testified that Wife was a good parent.[1] One of those witnesses was a neighbor who has lived next door to the couple for six years. The neighbor testified that he and his wife had to care for Wife after she had a hysterectomy because Husband was in Atlanta during the week and playing tennis on the weekend.[2] The neighbor also testified that Husband seemed volatile with the children. Another witness testified that she helped Wife with her daughter's birthday party, and at the party, Husband complained to the witness about Wife. The witness testified that Husband seemed "very alienated and angry."

Wife testified that, in addition to having primary custody of the children during the couple's separation, she had been the primary caretaker for the children during the marriage. In addition to Husband working out of state for two-and-a-half years, she claimed Husband played tennis five days a week, no matter what was going on in their children's lives.[3] She also testified that Husband gets agitated easily and that he was always critical of her and the children.

Wife testified that she has worked during most of the marriage and that the periods during which she was unemployed occurred when the children were newborns or when they were ill.[4] While she admitted that she had trouble paying the utilities during the parties' separation, she pointed out that she and Husband were having trouble paying their bills while they were a two-income family and that those problems were amplified during the separation. She further explained that she missed several days of work during the parties' separation when she severely burned her leg from her knee to her hip, which put a further strain on her finances.

On cross-examination, Wife was asked about counseling appointments the children had missed.[5] Wife explained that the December visit was rescheduled because the counselor was on vacation. Wife testified that she rescheduled the next visit because she was working with a woman who was nine-and-a-half months pregnant, and Wife felt she could not leave the woman alone. On the third attempted visit, Wife and children went to the office, but when they arrived, they found out that the fee had increased from ten to fifteen dollars; when Wife did not have the extra money, she was told she would have to reschedule. On the fourth attempt at rescheduling, the brakes on Wife's car went out on the way to the appointment.

Wife was also asked about why the parties' daughter had not had a psychological evaluation, as previously ordered by the family court, and why the daughter had missed three dentist appointments. Wife explained that she could not afford the psychological evaluation and Husband would not help her pay for it because he did not agree that the daughter needed to be evaluated. As for the missed dentist appointments, Wife claimed daughter had been ill.

In addition to custody of the children, another major issue was whether or not Husband would be allowed to travel with the children to Iran. When questioned about his desire to bring the children to Iran, Husband explained he wanted his children to visit his parents and other Iranian rela-

tives.[6] However, he stressed that he had no desire to relocate to Iran and said he wanted Wife to remain a major part of their children's lives.

According to Wife, Husband threatened on more than one occasion to move back to Iran and take the children with him. Wife offered the testimony of Christine Uhlman to show the inherent risks to children in travel to Iran, the specific risks of parent/child abduction in similar situations, and the lack of any legal remedy should this occur. Due to her extensive experience in this area, Uhlman was qualified by the court as an expert witness on child abduction in the Middle East and the remedies that might be available for people who find themselves in that predicament. The court found, however, that she did not have an adequate education or background to be qualified as an expert on the law of Iran, and limited her qualification to the topics listed above.

The family court also heard the guardian ad litem's final report concerning Husband's travel outside of the United States and custody of the two children. The guardian testified that she believed Wife's fears that Husband would abduct and relocate the children were baseless, but acknowledged that travel restrictions may nevertheless be warranted. She also testified to some psychological, social, and physical problems of both the children and her perception that these problems were not being adequately addressed. The guardian was also troubled by Wife's apparent inability to meet the basic health and day-to-day living needs of the children. In her opinion, Husband appeared to be in a better position to meet these needs and it was therefore in the best interests of the children to grant him custody. The guardian made this recommendation to the court.

The family court followed the guardian's custody recommendation, granting Husband custody of both children and granting Wife standard visitation rights. The family court also prohibited Husband from taking the children out of the United States. The parties were ordered to pay for their own attorney's fees, and the cost of the guardian was split between them. Both parties appeal this order.

ISSUES ON APPEAL

I. Was the guardian's recommendation the product of an independent, balanced, and impartial investigation?

II. Did the family court err in its reliance on the guardian's recommendation in determining custody of the children?

III. Did the family court err by requiring each party to pay half of the guardian ad litem's fees?

IV. Did the family court err by ordering the parties to pay their own attorney's fees and costs?

V. Did the family court err by restricting Husband from traveling outside of the United States with the children?

VI. Did the family court err in the apportionment of the marital debt?

STANDARD OF REVIEW

On appeal from the family court, this court has jurisdiction to find the facts in accordance with its own view of the preponderance of the evidence. Murdock v. Murdock, 338 S.C. 322, 328, 526 S.E.2d 241, 244-45 (Ct. App. 1999). This court, however, is not required to disregard the family court's findings; nor should we ignore the fact that the family court judge, who saw and heard the witnesses, was in a better position to evaluate their testimony. Badeaux v. Davis, 337 S.C. 195, 202, 522 S.E.2d 835, 838 (Ct. App. 1999); Smith v. Smith, 327 S.C. 448, 453, 486 S.E.2d 516, 519 (Ct. App. 1997). Because the appellate court lacks the opportunity for direct observation of witnesses, it should give great deference to the family court's findings where matters of credibility are involved. Kisling v. Allison, 343 S.C. 674, 678, 541 S.E.2d 273, 275 (Ct. App. 2001); Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996). This is especially true in cases involving the welfare and best interests of children. Id.; see also Cook v. Cobb, 271 S.C. 136, 140, 245 S.E.2d 612, 614 (1978) (stating that the welfare and best interests of children are the primary, paramount, and controlling considerations of the court in all child custody controversies).

LAW / ANALYSIS

Wife challenges the custody order by arguing: (1) that the guardian's recommendation to the court was a product of an incomplete and biased investigation; and (2) that the family court improperly relied on the guardian's recommendation. We agree.

I. Was the guardian's recommendation the product of an independent, balanced, and impartial investigation?

In Patel v. Patel, 347 S.C. 281, 555 S.E.2d 386 (2001), the Supreme Court of South Carolina set the base line standards for the responsibilities and duties of a guardian ad litem. Foremost in the court's list of duties, the guardian shall:

> ... conduct an independent, balanced, and impartial investigation to determine the facts relevant to the situation of the child and the family, which should include: reviewing relevant documents; meeting with and observing the child in the home setting and considering the child's wishes, if appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case.

Id. at 288, 555 S.E.2d at 390 (emphasis in original); see also South Carolina Private Guardian Ad Litem Reform Act, S.C. Code Ann. § 20-7-1549 (Supp. 2003) (codifying the Patel guidelines with more specificity, but only directly applicable to guardians ad litem appointed after January 15, 2003).

In Patel, the guardian's investigation reflected overwhelmingly favorable treatment toward the husband and negligible consideration of the wife's capacity to competently parent the children. For example, the guardian contacted the husband's attorney nineteen times, but failed to contact the wife's counsel once. The guardian had frequent contact with the husband but minimal contact

with the wife, and the guardian only met with the children when they were with the husband. The guardian even secretly listened in on phone conversations between husband and wife while visiting with the husband. Id. at 286, 555 S.E.2d at 388-89. The Patel court held that the actions and inactions of the guardian so tainted the decision of the family court that the wife was not afforded due process, and the court remanded the issue of custody to the family court. Id. at 286-87, 291, 555 S.E.2d at 389, 391.

We recognize that the case at hand is different from Patel in that Wife's argument stems, not from the guardian's incomplete investigation of her, but rather from the guardian's allegedly superficial investigation of Husband's parenting abilities. However, we believe the requirements set forth in Patel were meant not only to protect the parents who are the subjects of the guardian's investigation but also to ensure that the fate of a child's living arrangements does not rest in the hands of a guardian whose investigation is biased or otherwise incomplete. Thus, a parent, whether the focus of the guardian's investigation or largely ignored by the investigation, may appeal a custody decision if that parent believes the family court's order was tainted by the guardian's improper investigation.

Here, the guardian visited Wife's home several times to interview her and the children. However, there is no indication that she ever interviewed Husband and the children while they visited his home in Charlotte. Instead, she testified she met with him and the children at a McDonald's restaurant one time. She further testified that she went to Charlotte to view Husband's residence and the schools the children would attend if custody was changed and talked on one occasion to a college student who babysat the children during their two-week summer visitation with Husband.

The guardian testified that her recommendation was largely based upon the concerns of the children's counselor regarding counseling appointments they had missed and a psychological evaluation that had still not been scheduled for the parties' daughter. Apparently, the guardian blamed Wife for the missed appointments and did not believe Husband had any responsibility to make sure these appointments were made. However, the record indicates that the counselor had sent a letter to both Husband and Wife about the missed counseling sessions. Furthermore, where Wife at least attempted to schedule a psychological evaluation, there was no evidence that Husband did anything to ensure that the evaluation was completed. On cross-examination, the guardian was asked:

Q: [Y]ou have concerns too about the father . . . as far as your investigations?

A: Right

Q: But your concerns aren't listed necessarily on your report because you didn't mention them in your report that you had concerns that the father had not complied with the psychological evaluation for [the daughter], and not attended counseling, and not attended co-parenting counseling, and has also exposed the children as far as to more — that both parents have exposed the children to the divorce related issues. So those aren't reflected on your report on the second page that I was able to see?

A: Right

When asked whether she wanted to explain why she had not mentioned Husband's shortcomings in her report, the guardian merely stated that she did not omit them for any particular reason and again pointed out that the children spent more time with Wife.

Additionally, the record indicates that the guardian was mistaken about some of the facts she reported to the family court. For instance, the guardian testified that the parties' daughter had nine absences from school, which contradicted Wife's testimony. However, at the hearing for reconsideration, the school verified Wife's assertion that daughter had five absences. While this mistake by the guardian appeared to be inadvertent, the guardian was adamant during her testimony that the daughter had four additional unexcused absences.[7] Thus, the guardian's recommendation was at least partially biased because of her mistaken belief that the daughter had several unexcused absences while in Wife's care.

Based on the guardian's superficial investigation of Husband, her failure to hold Husband partially responsible for the children not attending counseling, and her over-reporting the number of absences daughter has had at school, we agree with Wife that the guardian's recommendation did not result from a fair and impartial investigation.

II. Did the family court err in its reliance on the guardian's recommendation in determining custody of the children?

In determining the best interest of the child in a custody dispute, the family court should consider several factors, including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties (including the guardian, expert witnesses, and the children); and the age, health, and sex of the children. Patel, 347 S.C. at 285, 555 S.E.2d at 388. Rather than merely adopting the recommendation of the guardian, the court, by its own review of all the evidence, should consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child as well as all psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational aspects of the child's life. See Woodall v. Woodall, 322 S.C. 7, 11, 471 S.E.2d 154, 157 (1996); Epperly v. Epperly, 312 S.C. 411, 415, 440 S.E.2d 884, 886 (1994); Wheeler v. Gill, 307 S.C. 94, 99, 413 S.E.2d 860, 863 (Ct. App. 1992). When determining to whom custody shall be awarded, the court should consider all the circumstances of the particular case and all relevant factors must be taken into consideration. Woodall, 322 S.C. at 11, 471 S.E.2d at 157 (1996); Ford v. Ford, 242 S.C. 344, 351, 130 S.E.2d 916, 921 (1963).

A key component of the supreme court's decision to remand the custody order in Patel was the fact that "the custody question was hotly contested, with no clear choice for custodial parent apparent from the testimony in the record." 347 S.C. at 286-87, 555 S.E.2d at 389. Since there were no substantial considerations made on record as to the issue of custody apart from the guardian's recommendation, the court refused to declare harmless the judge's reliance on a biased guardian's report. Id. Here, a total of ten witnesses (not counting the Husband, Wife, and the guardian) testified about each party's parenting abilities. All ten, three of whom were called by Husband, described Wife as a loving and caring mother. Five witnesses testified that Husband was a capable

parent, but two specifically questioned his parenting ability.[8] Thus, aside from Husband, the guardian was the only witness who believed Husband was the better parent.

Because the family court obviously gave a great deal of weight to the guardian's recommendation, which we have found was based on a biased and incomplete investigation, we reverse the award of custody and remand the case for a new custody hearing.[9]

III. Did the trial court err by requiring Wife to pay half of the guardian's fees?

Wife next argues that the family court erred by requiring her to pay half of the guardian's fees because the guardian failed to conduct an independent, balanced, and impartial investigation. We reverse and remand this issue to the family court.

Section 20-7-1553(B) of the South Carolina Code (Supp. 2003) provides that a court-appointed guardian "is entitled to reasonable compensation, subject to the review and approval of the court." That subsection goes on to list the following factors to guide family courts when awarding guardian fees:

(1) the complexity of the issues before the court;

(2) the contentiousness of the litigation;

(3) the time expended by the guardian;

(4) the expenses reasonably incurred by the guardian;

(5) the financial ability of each party to pay fees and costs; and

(6) any other factors the court considers necessary.

While the ultimate work product of the guardian is not specifically listed under section 20-7-1553, it certainly qualifies as another factor "the court considers necessary." Thus, we remand this issue along with the issue of custody. Upon remand, the family court should consider the guardian's incomplete investigation, along with the other factors listed in section 20-7-1553, in determining the amount of fees owed to the guardian.

IV. Did the trial court err by restricting Husband from traveling outside of the United States with the children?

Husband first contends that the family court erred in restricting his travel with the children because the court wrongfully relied on testimony from Wife's expert that went beyond her qualification as an expert witness. We disagree.

Wife's expert witness was qualified by the court as an expert on child abduction in the Middle East and the remedies that might be available for people who find themselves in that predica-

ment. The court went on, however, to limit that qualification to those precise topics and expressly held that she was not qualified as an expert on the law of Iran. Husband contends that her subsequent testimony on legal remedies for the recovery of abducted children and the recognition of American passports in Iran was admitted in error as it overstepped the limitations of her qualification as an expert.

Permitting an expert witness to testify beyond the scope of his or her expertise can constitute reversible error. See Nelson v. Taylor, 347 S.C. 210, 218, 553 S.E.2d 488, 492 (Ct. App. 2001). We find, however, that the specific testimony at issue here fell within the expert's qualification. While the family court expressly found that the expert witness was not an expert in the law of Iran, certain issues relating to that law are so intertwined with the parameters of the expert's qualification as to be manifestly compounded. One would be hard pressed to discuss the remedies for child abduction in Iran without at least tangentially touching on the law of Iran. Therefore, we find that Wife's expert witness's testimony fell within that narrow area of Iranian law applicable to her qualification as an expert.

Second, Husband asserts error by the family court on the merits of the restriction itself. Citing cases from other jurisdictions which held that fear of abduction and lack of foreign remedy, without more, are an insufficient showing to reverse a family court on a custodial parent's right to travel with his children, Husband argues that the family court erred in limiting his right to leave the United States with his children. See Long v. Ardestani, 624 N.W.2d 405 (Wis. Ct. App. 2001) (finding that difficulty of obtaining the return of the child in the event of abduction is but one factor for a court to consider in imposing restrictions and deferring to the family court); Al-Zouhayli v. Al-Zouhayli, 486 N.W.2d 10 (Minn. Ct. App. 1992) (deferring to the family court's decision not to restrict travel despite threats of abduction and lack of Saudi remedies). We disagree with this argument as well.

The prevailing rule gleaned from the cases to which Husband cites is that appellate courts generally defer to a family court's decision regarding a parent's ability to travel with his or her children. We agree with the Wisconsin Court of Appeals that:

> We are satisfied that the standard of the best interests of the child, comprehensive as it is, permits a full consideration of concerns both about a parent's intention in abducting a child and about the lack of a remedy should that occur. We are also satisfied that there is no need to alter the deference appellate courts give to trial courts' decisions on a child's best interests in order to insure a full consideration of those concerns.

Long, 624 N.W.2d at 417-18.

At trial, Wife presented evidence of both specific threats by Husband to relocate the children to Iran as well as testimony concerning the inherent dangers in these types of situations. Testimony was also presented regarding the generalized dangers in travel with children born of Iranian descent to that country and the possibility that Husband could easily fly from another country into Iran if he was allowed to travel with the children outside the United States. Furthermore, even if

Husband had every intention to return the children after their visit to Iran, if he were to become incapacitated while he and the children were there, Wife could do very little to retrieve the children. Based on the evidence regarding Husband's threats, the risks of abduction, and the lack of legal recourse in a country which is not a signatory to the Hague Convention, we affirm the family court order banning Husband from travel with the children outside the United States.

V. Did the family court err in the apportionment of the marital debt?

Husband argues the family court erred in not equally splitting the parties' debts between them. He contends that since all the debt was accrued during the marriage, the entirety of the debt should be split between the parties regardless of whose name it is in. We disagree.

Marital debt should be divided in accord with the same principles used in the division of marital property and must be factored into the totality of equitable apportionment. See S.C. Code Ann. § 20-7-472 (Supp. 2003); Jenkins v. Jenkins, 345 S.C. 88, 103, 545 S.E.2d 531, 539 (Ct. App. 2001); Thomas v. Thomas, 346 S.C. 20, 27, 550 S.E.2d 580, 584 (Ct. App. 2001). The apportionment of marital property is within the discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. Thomas v. Thomas, 346 S.C. 20, 27, 550 S.E.2d 580, 584 (Ct. App. 2001).

There are many factors which the family court may consider in the apportionment of marital property. On review, the appellate court looks to the fairness of the overall apportionment, and if the end result is equitable, the fact that the appellate court may have weighed specific factors differently than the family court is irrelevant. Johnson v. Johnson, 296 S.C. 289, 300-301, 372 S.E.2d 107, 113 (Ct. App. 1988). In this review, our focus is on whether the family court addressed the statutory factors governing apportionment with sufficiency for us to conclude that the court was cognizant of these factors. Doe v. Doe, 324 S.C. 492, 502, 478 S.E.2d 854, 859 (Ct. App. 1996).

In its final order, the family court noted the income of each party, the absence of an alimony grant to Wife and her duty to pay child support, the sale of the marital residence, the tax benefits of the apportionment to each party, and the child custody arrangements. Because these specific findings of the family court comport with those considerations mandated by section 20-7-472, we are satisfied that the court was, in fact, cognizant of the statutory factors of marital apportionment when allocating the marital debt between the parties. Therefore, the family court acted within its discretion in ordering Husband to pay all debts held in his name.

CONCLUSION

For the foregoing reasons, the order of the family court is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

ANDERSON and BEATTY, JJ., concur.

[1] Two of Wife's witnesses testified that Husband was a fine parent as well.

[2] After Husband testified on direct that Wife had no health problems, he was specifically asked on cross-examination about Wife's hysterectomy. Husband claimed he did not know she had one. Wife testified she had a hysterectomy in December of 1997, before the parties separated. Husband then returned to the stand on reply, re-called the hysterectomy, and claimed he took nine days off from work in order to care for her and the children.

[3] During Husband's cross-examination, he admitted playing tennis every other day during the marriage.

[4] The parties' son had ear problems when he was little and now cannot hear out of his right ear. Their daughter was born with three kidneys.

[5] The children had seen the counselor regularly from June 2000 to November 2000; however, at the time of the divorce hearing, they had not been to a session in four months.

[6] Husband's father is ninety-one years old; thus, travel by him to America is not feasible.

[7] In fact, the daughter did not have any unexcused absences. When questioning the guardian, Wife's attorney at-tempted to explain that the lower case "u's" on the daughter's attendance record denoted a tardy; however, the guard-ian stated: "Your eyes might be better than mine. I can't — I just see it as a U."

[8] The parties' next-door neighbor testified that Husband seemed volatile with the children. Another witness de-scribed Husband as "very alienated and angry."

[9] Because we remand the issue of custody, we also remand the issue of attorney's fees and costs.

TEXAS

CATEGORY: Shariah Marriage Law

RATING: Relevant

TRIAL: TCSI

APPEAL: ACSI

COUNTRY: Iran

URL: http://scholar.google.com/scholar_case?case=9024387214503440770&q=Iran&hl=en&as_sdt=4,44

118 S.W.3d 868 (2003)

IN THE MATTER OF THE MARRIAGE OF MINA VAHEDI NOTASH AND ALI AMORLLAHI MAJDABADI AND IN THE INTEREST OF SHAHAB ADIN AMROLLAH-MAJDABADI AND HASSAM ADIN AMROLLAH-MAJDABADI, MINOR CHILDREN.

No. 06-02-00144-CV.

Court of Appeals of Texas, Texarkana.

Submitted September 25, 2003.

Decided September 26, 2003.

870*870 Ronald B. Pruitt, Houston, for appellant.

Wayman L. Prince, Houston, for appellee.

Before MORRISS, C.J., ROSS and CARTER, JJ.

OPINION

Opinion by Justice CARTER.

Ali Amorllahi Majdabadi appeals the post-divorce division of community property and judgment finding breach of fiduciary duty entered in connection with a motion to modify an Iranian divorce decree.

Majdabadi raises three issues on appeal. Majdabadi argues the trial court erred in: (1) granting a judgment for breach of fiduciary duty, (2) granting a judgment for exemplary damages on the breach of fiduciary duty, and (3) awarding both a disproportionate split of the community estate and damages. We reverse the award based on breach of fiduciary duty and for exemplary damages. We affirm the judgment awarding a disproportionate division of the community estate.

In 1987, Ali Amorllahi Majdabadi and Mina Vahedi Notash were married in **Iran**. The parties lived together in the State of Texas as husband and wife from 1989 until Notash returned to **Iran** in January 1994. While in Texas, Majdabadi and Notash had two children. Notash and the children moved to **Iran** in January 1994. Majdabadi and Notash were divorced in **Iran** on or about February 1995. The Iranian divorce decree awarded Notash 200,000 rails (approximately $25.00). While the Iranian divorce decree made Notash the sole managing conservator of the children, it did not award any child support or divide community property in Texas. Majdabadi conceded he had not paid the award in the Iranian divorce, although Majdabadi occasionally sent her small amounts of cash. Notash and the children returned to the United States in 1998.

871*871 Eventually, Notash filed an action to divide the community property in Texas, which had not been previously divided, and to modify the Iranian decree. Majdabadi filed a counterclaim for joint managing conservatorship of the children. The property in question consisted of two lots at 6328 and 6330 West 34th Street in Houston, which were owned by the parties during their marriage. The lots had been used for a variety of purposes, most recently a used car dealership. Notash also alleged Majdabadi had breached the fiduciary duty he owed her based on failure to give her any of the profits derived from the property from the time she moved to **Iran**. Additionally, Notash alleged several counts of sexual assault and physical abuse committed by Majdabadi both during and after the marriage. The trial court held that the Iranian divorce was valid and that the Iranian "Prenuptial Agreement" was void under the law and public policy of this State.[1] The parties stipulated that Majdabadi will pay $482.00 per month in child support.[2] The trial court awarded retroactive child support to be paid into a trust for the children's education. The jury found that Notash should receive sixty percent of the community estate and that Majdabadi should receive forty percent. The jury also found Majdabadi had breached his fiduciary duty owed to Notash. The jury found the profit derived from the operation of the business was $150,000.00 and awarded $100,000.00 in exemplary damages for the breach. The jury failed to find the allegations of sexual and physical abuse occurred. Notash was retained as the sole managing conservator of the children, and Majdabadi was awarded standard visitation rights. The trial court signed a final judgment and order clarifying the Iranian divorce decree on June 6, 2002, granting Notash a judgment for $150,000.00 in actual damages and $100,000.00 in exemplary damages.

Breach of Fiduciary Duty

Majdabadi argues the trial court erred in submitting the special issues on fiduciary duty and granting judgment for a breach of fiduciary duty. A trial court's conclusions of law are reviewed de novo. *Panola County Appraisal Dist. v. Panola County Fresh Water Supply Dist. No. One,* 69 S.W.3d 278, 287 (Tex.App.-Texarkana 2002, no pet.). However, an incorrect conclusion of law requires reversal only if the controlling findings of fact do not support a correct legal theory. *Hitzelberger v. Samedan Oil Corp.,* 948 S.W.2d 497, 503 (Tex.App.-Waco 1997, writ denied).

Majdabadi argues that, since the trial court held the Iranian divorce was valid, he did not owe Notash any fiduciary duty. In the context of a divorce, a claim for a breach of fiduciary duty is the same as a claim for fraud on the community. *In re Marriage of Moore,* 890 S.W.2d 821, 827 (Tex.App.-Amarillo 1994, no writ). In response to Majdabadi's argument, Notash cites *Vickery v. Vickery,* 999 S.W.2d 342 (Tex.1999) (Hecht, J., dissenting) (dissent of the Texas Supreme Court's denial of petition of review which argued the Court of Appeals' decision was inconsistent with prior holdings and attached the lower court's opinion, *Vickery v. Vickery,* No. 01-94-01004-CV, 1996 WL 745881, 1997 Tex.App. LEXIS 6275 (Houston [1st Dist.] 1996, pet. denied) (not designated for publication), (in an appendix)). In *Vickery,* the Houston Court of Appeals held that a 872*872 wife could recover actual and exemplary damages for actual fraud in connection with a divorce. *Vickery,* 1996 WL 745881, 1997 Tex.App. LEXIS 6275 (husband fraudulently induced wife to enter into divorce settlement). Although we note that an unpublished opinion has no precedential value,[3] we believe *Vickery* is distinguishable from the current situation. The Houston Court of Appeals based its opinion on actual fraud on her separate estate and the fact that the husband was an attorney who gave his wife legal advice during commission of the fraud. *Id.* The court explicitly held the wife's claim was not one of constructive fraud on the community. *Id.* The husband was liable for fraudulently inducing his wife to sign the agreement, not for fraud on the community. *Id.* In this case, the jury was only instructed on fiduciary duty arising out of a marital relationship, i.e., fraud on the community. The only fiduciary duty instruction submitted to the jury was that their relationship as husband and wife established a fiduciary duty. The fiduciary duty between husband and wife terminates on divorce. *Grossnickle v. Grossnickle,* 935 S.W.2d 830, 846 (Tex.App.-Texarkana 1996, writ denied); *see also Parker v. Parker,* 897 S.W.2d 918, 924 (Tex.App.-Fort Worth 1995, writ denied), *overruled on other grounds, Formosa Plastics Corp. USA v. Presidio Eng'rs & Contrs.,* 960 S.W.2d 41 (Tex.1998); *Boyd v. Boyd,* 67 S.W.3d 398, 405 (Tex.App.-Fort Worth 2002, no pet.); *Bass v. Bass,* 790 S.W.2d 113, 119 (Tex.App.-Fort Worth 1990, no writ). Therefore, Majdabadi did not owe Notash a fiduciary duty based on their marital relationship after February 1995.

When a court fails to divide property at the time of the divorce, the ex-spouses become tenants in common as to the ownership of the property. *Busby v. Busby,* 457 S.W.2d 551, 554 (Tex.1970), *questioned on other grounds, Jeffrey v. Kendrick,* 621 S.W.2d 207 (Tex.App.-Amarillo 1981, no writ); *In re Taylor,* 992 S.W.2d 616, 619 (Tex.App.-Texarkana 1999, no pet.); *Soto v. Soto,* 936 S.W.2d 338, 340 (Tex.App.-El Paso 1996, no writ); *Burgess v. Easley,* 893 S.W.2d 87, 90 (Tex.App.-Dallas 1994, no writ). "There exists no fiduciary or agency relationship between cotenants, or tenants in common, in the absence of an agreement or contract providing for such." *Donnan v. Atl. Richfield,* 732 S.W.2d 715, 717 (Tex.App.-Corpus Christi 1987, writ denied); *see Mims v. Beall,* 810 S.W.2d 876, 879 (Tex.App.-Texarkana 1991, no writ). Therefore, Majdabadi did not owe Notash a fiduciary duty based solely on their relationship as cotenants.

Majdabadi did owe Notash a fiduciary duty from 1989 until they were divorced in February 1995. However, "no independent cause of action exists in Texas to recover separate damages when the wrongful act defrauded the community estate." *Schlueter v. Schlueter,* 975 S.W.2d 584, 589 (Tex.1998). Because a spouse has an adequate remedy through disproportionate division of the community estate, fraud on the community is properly considered when dividing a community estate.[4] 873*873 The breach of fiduciary duty may be considered as a factor in the disproportionate division of the community estate, but Notash cannot pursue separate damages through an independent cause of action.

Furthermore, there is no evidence of a wrongful transfer of community property. The time period for the breach of fiduciary duty that Notash argued at trial included profits from before the divorce, although the bulk of the profits was after the Iranian divorce. There is no evidence of actual fraud on the community during this time period. Actual fraud requires the nonmanaging spouse to show that the other spouse dishonestly and purposely intended to deprive the nonmanaging spouse of the use and enjoyment of the assets of the joint community property. *Horlock v. Horlock,* 533 S.W.2d 52, 55 (Tex.Civ.App.-Houston [14th Dist.] 1975, writ dism'd).

If a managing spouse unfairly deprives the other spouse of the benefit of the community property, he or she may have committed constructive fraud even without fraudulent intent. *Jackson v. Smith,* 703 S.W.2d 791, 795 (Tex.App.-Dallas 1985, no writ). Notash and Majdabadi lived together in Texas as husband and wife from 1989 to January 1994. During this time, Majdabadi provided the sole income and support for the family. The only issue which remains is whether Majdabadi committed constructive fraud on the community from January 1994 to February 1995. During this time, Notash and the children were in **Iran** and only received occasional small cash payments from Majdabadi. However, the record does not indicate an improper disposition of the profits of the business.

Notash had the burden of proof to establish transfer of property outside of the community. "Although the burden of proof to show the fairness of a transfer is upon the spouse responsible for the transfer, it is the burden of the complaining spouse to show that there was a transfer of community property in the first place." *In re Marriage of DeVine,* 869 S.W.2d 415, 423 n. 11 (Tex.App.-Amarillo 1993, writ denied). There is no evidence that Majdabadi (1) transferred property to third parties, (2) made excessive gifts to third parties, or (3) used community property to benefit his separate estate during this time period. The evidence is legally insufficient when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *Uniroyal Goodrich Tire Co. v. Martinez,* 977 S.W.2d 328, 334 (Tex.1998). The evidence is legally insufficient to support a breach of fiduciary duty, or fraud on the community, during the marriage.

Exemplary Damages

Majdabadi contends the trial court also erred in granting a judgment which included exemplary damages for breach of fiduciary duty. "Recovery of punitive damages requires a finding of an

independent tort with accompanying actual damages." *Fed. Express Corp. v. Dutschmann,* 846 S.W.2d 282, 284 (Tex.1993) (per curiam). Because we have already held that no fiduciary duty existed after the 874*874 Iranian divorce and that insufficient evidence exists to support fraud on the community before the divorce, there is no independent tort. "The mere availability of a tort-based theory of recovery is not sufficient; actual damages sustained from a tort must be proven before punitive damages are available." *Twin City Fire Ins. Co. v. Davis,* 904 S.W.2d 663, 665 (Tex.1995). Further, the Texas Supreme Court has held that, because fraud on the community is not a tort independent of the divorce, exemplary damages could not be awarded. *Schlueter,* 975 S.W.2d at 588. Therefore, no exemplary damages can be recovered because no independent tort was proven, no actual damages due to an independent tort exist, and fraud on the community is not an independent tort.

Disproportionate Division of the Community Estate

Majdabadi argues the trial court erred by awarding both a disproportionate split of the community estate as well as damages. Because we have already held that no breach of fiduciary duty occurred, we will not examine whether damages can be awarded in addition to a disproportionate split of the estate and will only examine whether a disproportionate split of the prior community estate was proper.[5]

The Texas Family Code was amended in 1987 to permit a "just and right" division of the property in a post-divorce suit. *See* Tex. Fam.Code Ann. §§ 9.201-.203 (Vernon 1998). "The trial court's division of the property should be corrected on appeal only if the trial court clearly abused its discretion by ordering a division that is manifestly unjust and unfair." *Grossnickle,* 935 S.W.2d at 836; *see McKnight v. McKnight,* 543 S.W.2d 863, 866 (Tex.1976). "A presumption arises on appeal that the trial court correctly exercised its discretion in dividing property in a divorce proceeding, and the burden rests on the appellant to show from the record that the division was so disproportionate, and thus unjust and unfair, as to constitute an abuse of discretion." *Grossnickle,* 935 S.W.2d at 836. Evidence was introduced that Majdabadi sent Notash to **Iran** knowing she could not leave the country without his permission or return to the United States without a proper visa. Evidence introduced at trial indicates that the small amounts of cash sent by Majdabadi represented only a fraction of the amount necessary for Notash's support during the time Notash was in **Iran**. Further, Notash, who has a high school degree, has much less potential earning capacity than Majdabadi, who has a master's degree in chemistry. Therefore, Majdabadi has not shown the division was so disproportionate as to be unjust or unfair. Absent a clear abuse of discretion, we hold the disproportionate division of the prior community property was proper.

We reverse the trial court's award of actual and exemplary damages based on a breach of fiduciary duty and render judgment that Mina Vahedin Notash take nothing on those claims. We affirm the remainder of the trial court's judgment.

[1] Neither Majdabadi nor Notash contend on appeal the Iranian divorce is invalid.

[2] Notash did not argue that Majdabadi, who holds a master's degree in chemistry, was underemployed and should be liable for a larger amount of child support.

[3] Effective January 1, 2003, unpublished cases can now be cited in documents to the court. Tex.R.App. P. 47.7. Although an unpublished case still has no precedential value, it may be an "aid in developing reasoning that may be employed ... be it similar or different." *Carrillo v. State,* 98 S.W.3d 789, 794 (Tex.App.-Amarillo 2003, pet. ref'd).

[4] *Schlueter v. Schlueter,* 975 S.W.2d 584, 588 (Tex.1998). We note, however, that, in certain circumstances, other remedies may be available, such as setting aside the transfer of the property wrongfully conveyed or reimbursement of the value of the wrongfully conveyed property to the community estate. *See Zieba v. Martin,* 928 S.W.2d 782, 789-90 (Tex.App.-Houston [14th Dist.] 1996, no writ); *Edgington v. Maddison,* 870 S.W.2d 187, 189-90 (Tex.App.-Houston [14th Dist.] 1994, no writ); *Belz v. Belz,* 667 S.W.2d 240, 246-47 (Tex.App.-Dallas 1984, writ ref'd n.r.e.); *Carnes v. Meador,* 533 S.W.2d 365, 371 (Tex.Civ.App.-Dallas 1975, writ ref'd n.r.e.).

[5] Before 1987, undivided community property could only be divided by a suit to partition the cotenancy. *See Walton v. Lee,* 888 S.W.2d 604, 605 (Tex.App.-Beaumont 1994, writ denied), *overruled on other grounds, Havlen v. McDougall,* 22 S.W.3d 343 (Tex.2000). The presumption was that the prior community property held as a tenancy in common would be split equally. *Boniface v. Boniface,* 656 S.W.2d 131, 134-35 (Tex.App.-Austin 1983, no writ).

CATEGORY: Shariah Contract Law

RATING: TBD

TRIAL: TBD

APPEAL: TBD

COUNTRY: Saudi Arabia

URL: http://scholar.google.com/scholar_case?case=9968569714336003002&q=Saudi&hl=en&num=100&as_sdt=ffffffffffffe04

IN RE ARAMCO SERVICES COMPANY, RELATOR.

No. 01-09-00624-CV.

Court of Appeals of Texas, First District, Houston.

Opinion issued March 19, 2010.

Panel consists of Justices KEYES, SHARP, and MASSENGALE.

MEMORANDUM OPINION[1]

JIM SHARP, Justice.

By a petition for writ of mandamus, relator, Aramco Services Company ("Aramco"), challenges three orders of the trial court concerning arbitration.[2] Aramco contends that the trial court abused its discretion by (1) appointing arbitrators (2) who are not Muslims or **Saudi** nationals. We agree that the trial court lacked authority to appoint arbitrators, and therefore do not reach whether the trial court abused its discretion by empaneling arbitrators who are not Muslims or **Saudi** nationals. Thus, we vacate the trial court's three orders and conditionally grant mandamus relief.

Background

Real party in interest, DynCorp International, LLC ("DynCorp"), and Aramco signed a contract ("the Contract") for an advanced computer system.[3] Under the Contract, DynCorp was to manufacture the computer system in the United States and then install it at Aramco's facilities in

Saudi Arabia. The Contract contains an arbitration agreement, written in English, which provides, in part,

1. Choice of Law

The laws of **Saudi** Arabia shall control the interpretation and the performance of this Contract and any other agreements arising out of or relating to it, regardless of where this Contract shall be entered into or performed.

2. Arbitration

Any dispute, controversy or claim arising out of or relating to this Contract . . . which is not settled by agreement between the parties shall be finally settled in accord with the Arbitration Regulations, Council of Ministers Decision No. 164, dated 21 Jumada II 1403 ("the Regulations") and the Rules For Implementation of the Arbitration Regulations effective as of 10 Shawal 1405 ("the Rules") and any amendments to either then in force, by one or more arbitrators appointed in accordance with the Regulations, the Rules and this Contract.

2.1 Arbitration by One Arbitrator

If the parties agree to a one-arbitrator arbitration, the parties shall agree upon and appoint an arbitrator, after first ascertaining that the appointee consents to act, within thirty (30) days from the date on which written notice of referral to arbitration by one party is received by the other party (the "notice date").

2.2 Arbitration by Three Arbitrators

If the parties are unable to agree on a one-arbitrator arbitration, or, having so agreed, are unable to agree on the arbitrator within thirty (30) days from the notice date, then the arbitration shall be conducted by and before three arbitrators, who shall be appointed as follows. Each party shall appoint one arbitrator, after first ascertaining that the appointee consents to act, and notify the other party in writing of the appointment withing sixty (60) days from the notice date. The appointed arbitrators shall agree upon and appoint the third arbitrator, after first ascertaining that the appointee consents to act, and notify the parties in writing of the appointment within ninety (90) days from the notice date.

2.3 Arbitrator Qualifications

The arbitrator(s) selected shall be impartial, and shall have had no interest in or previous connection with the matters in dispute. Neither past or present employees or directors of either party, legal counsel retained by either party, nor persons related to these persons shall be selected as arbitrators.

2.4 Arbitration Procedures

The parties shall agree upon the rules of procedure which shall govern the arbitration proceedings. If the parties are unable to agree upon the applicable rules of procedure, the arbitrators shall by majority vote establish the applicable rules of procedure.

2.5 Arbitrators Not Conciliators

The parties hereby explicitly consent to the appointment of arbitrators in accordance with the Regulations and Rules and this Contract. . . .

. . . .

2.9 Finality

This arbitration provision shall be specifically enforceable by both parties under the Regulations and Rules, and the award of the arbitrators shall be final and binding upon the parties.

The Arbitration Regulations ("the Regulations"), referenced repeatedly in the Contract, are written in Arabic, and they provide, in part:

Article 8

The Secretariat of the Authority originally competent to hear the dispute shall be in charge of all the summons and notices provided for in this Decree.

. . . .

Article 10

If the parties have not appointed the arbitrators, or if either of them fails to appoint his arbitrator(s) . . . and there is no special agreement between the parties, the *Authority originally competent to hear the dispute shall appoint the required arbitrators upon request of the party who is interested in expediting the arbitration,* in the presence of the other party or in his absence after being summoned to a meeting to be held for this purpose. The Authority shall appoint as many arbitrators as are necessary to complete the total number of arbitrators agreed to by the parties; the decision taken in this respect shall be final.[4]

(Emphasis added.)

The Rules for Implementation of the Arbitration Regulations ("the Rules"), also referenced repeatedly in the Contract, are written in Arabic, and they provide, in part:

Article 3

The Arbitrator must be a **Saudi** national or a Moslem foreigner chosen amongst the members of the liberal professions or other persons. He may also be chosen amongst state officials after agreement of the

authority on which he depends. Should there be several arbitrators, the Chairman must know the Shari'a, commercial laws and the customs in force in the Kingdom.

. . . .

Article 12

The notice must be in Arabic. . . .

. . . .

Article 25

Arabic is the official language and must be used for all oral or written submissions to the arbitral tribunal. The arbitrators as well as any other persons present shall only speak in Arabic and a foreigner unable to do so must be accompanied by a sworn translator who shall sign with him the record of his oral arguments in the minutes.

. . . .

Article 39

The award is made by the arbitrators who are only bound to comply with the rules of procedure contained in the Arbitration Act and its Implementation Rules [i.e., the "Rules" and "Regulations"]. The award must comply with the provisions of the Shari'a and the laws in force.

DynCorp sued Aramco in Houston, Texas, asserting entitlement to certain funds in a letter of credit opened pursuant to the Contract. On March 25, 2008, Aramco moved to compel arbitration, which the trial court granted on November 13, 2008. Subsequently, DynCorp filed its own motion to compel arbitration. Specifically, Dyncorp sought arbitration before JAMS or the American Arbitration Association ("AAA"). The trial court granted DynCorp's motion in part and denied it in part in an order dated April 16, 2009. The order provides, in part:

[T]he Court determines that the motion should be granted in part as follows:

1. On November 13, 2008, this Court ordered the Plaintiff to submit its claims in this lawsuit to arbitration in accordance with the arbitration provision in the contract at issue in this case.

2. The Arbitration provision in the contract provides generally that disputes arising out of or relating to the Contract shall be finally settled in accord with the Arbitration Regulations . . . ("the Regulations") and the Rules For Implementation of the Arbitration Regulations . . . ("the Rules") and any amendments to either then in force, by one or more arbitrators appointed in accordance with the Regulations, the Rules and this Contract.

3. More specifically thereafter, the Contract provides that, in the absence of an agreement to a one-arbitrator arbitration, "[e]ach party shall appoint one arbitrator . . . and notify the other party in writing of the appointment within sixty (60) days from the notice date—that is, the date on which written notice of referral to arbitration by one party is received by the other party."

4. Under any computation of the "notice date," whether Defendant's March, 2008 motion to compel arbitration; this Court's November, 2008, order granting that motion; or Plaintiff's pre-December, 2008, Demand for Arbitration. More than sixty days have elapsed from the notice date.

5. Defendant has not appointed an arbitrator. Although Plaintiff has notified Defendant of its desire to arbitrate with neutrals associated with JAMS, Plaintiff has not appointed an arbitrator.

6. Thus, the Contract refers to the Regulations, Rules and the Contract for appointment of arbitrators.

7. Article 10 of the Regulations provides that if the disputants fail to appoint the arbiters . . . "the authority originally responsible for looking into the case shall appoint the necessary arbiters in response to a request by the party who is interested in expediting the procedure and the arbitration. . . ."

8. If necessary for this Order, the Court specifically determines that this Court is "the authority originally responsible for looking into the case." The parties have each acknowledged this Court's authority by request of this Court, through competing motions to compel arbitration, for Order regarding arbitration.

Thus, granting, in part, the motion of Plaintiff and in enforcement of this Court's prior order, the Court compels arbitration and orders each party to submit, no later than May 18, 2009, the name, address, and qualifications of one or more arbitrators who consent to act as arbitrators in this matter. Absent agreement of the parties, this Court will consider appointment of arbitrators on the Court's June 15, 2009 submission docket. A party's failure to submit one or more proposed arbitrators will be treated by this Court as a waiver of that party's right to complain of the Court's selection of arbitrators.

Further, Plaintiff's motion to compel, to the extent it asks this Court to determine any procedure for the conduct of the arbitration (language, venue, etc.), the motion is denied, as the Contract does not provide this Court with the authority to resolve the arbitration procedure disputes.

Aramco filed a motion to clarify and for reconsideration of the trial court's April 16, 2009 order. The motion for clarification and reconsideration contained the affidavit of Mohammed Al-Sheikh, an attorney practicing in Riyadh, **Saudi** Arabia with an expertise in **Saudi** Arabian law. The affidavit provides, in part,

The paramount body of law in The Kingdom of **Saudi** Arabia is the *Shari'ah.* The *Shari'ah* is comprised of a collection of fundamental principles derived from a number of different sources, which include the Holy *Qu'ran* and the *Sunnah.*

. . . .

The legal regime in The Kingdom of **Saudi** Arabia includes *Sharia'ah* principles that are often expressed in general terms, providing a **Saudi** Arabian adjudicatory body with considerable discretion as to how to apply such principles. Previous decisions of **Saudi** Arabian adjudicatory bodies are not considered to establish a binding precedent for the decision of later cases; the principle of *stare decisis* is not accepted in The Kingdom of **Saudi** Arabia. In addition, decisions of various **Saudi** Arabian adjudicatory bodies are not generally or consistently indexed and collected in a central place or made publicly available.

. . . .

For the reasons set forth below, **Saudi** Arabian law, including its Arbitration Law, contemplates that the authority originally competent to hear the dispute is a **Saudi** Arabian court.

. . . .

Council of Ministers Decision No. 221, dated 6 Ramadan 1423 (corresponding to 11 November 2002) grants to Board of Grievances jurisdiction over any **Saudi** Aramco commercial disputes (including arbitration). . . . Thus, in my opinion, the **Saudi** Board of Grievances is the authority originally competent to hear this dispute. . . .

The trial court denied Aramco's motion for clarification and reconsideration on June 2, 2009. Aramco complied with the April 16, 2009 order by designating Dr. Sherif Hassan, a Muslim, as an arbitrator. DynCorp proposed Ted Akin, Levi Benton, and Trey Bergman, all non-Muslims, as arbitrators. Aramco filed an objection to DynCorp's designation of arbitrators on grounds that the arbitrators proposed by DynCorp were unqualified to serve under the Regulations and Rules because they were neither Muslims nor **Saudi** nationals. On June 22, 2009, the trial court signed an order that overruled Aramco's objections and appointed Dr. Sherif Hassan, Ted Akin, and Trey Bergman as arbitrators.

Standard of Review

The mandamus relief here sought is available only when a trial court "reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law" and there is no adequate remedy by appeal. *Walker v. Packer,* 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (citing *Johnson v. Fourth Court of Appeals,* 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding)). The reviewing court may not substitute its judgment for that of the trial court when reviewing factual issues. *Id.* at 839-40. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless the decision is shown to be arbitrary and unreasonable. *Id.* at 840. Mandamus relief is proper when a trial court improperly designates an arbitrator. *See In re La. Pac. Corp.,* 972 S.W.2d 63, 65 (Tex. 1998).

The Arbitration Agreement

Aramco contends that the trial court should not have designated itself as the "Authority" referenced in Article 10 of the Regulations. Specifically, Aramco asserts that "[b]ecause the term

`Authority' is not expressly defined in the Regulations, resort to other **Saudi** law is necessary to determine its meaning." Aramco states that the term "Authority" is referenced in the Regulations and Rules in a context that does not anticipate application to the trial court. Aramco also asserts that the trial court should have relied on, but instead disregarded, Mohammed Al-Sheikh's affidavit stating that the Authority is the **Saudi** Board of Grievances. Finally, Aramco contends that the trial court could not designate arbitrators because neither party had requested it to do so. DynCorp responds that the trial court properly determined that it was the "Authority" referenced in Article 10, that DynCorp had, in fact, requested the trial court to designate arbitrators in its motion to compel arbitration before JAMS and the AAA, and that Texas procedural laws should apply to the Contract. DynCorp also contends that the Contract is ambiguous and therefore improper for mandamus review.

"Arbitration agreements are interpreted under traditional contract principles." *J.M. Davidson, Inc. v. Webster,* 128 S.W.3d 223, 227 (Tex. 2003). "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." *Coker v. Coker,* 650 S.W.2d 391, 393 (Tex. 1983). "To achieve this objective, courts should examine and consider *the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless." *Id.* (emphasis supplied). "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Id.* "Texas courts generally apply Texas procedural law even while applying the parties' contractual choice of law for substantive matters." *Nexen, Inc. v. Gulf Interstate Eng'g Co.,* 224 S.W.3d 412, 417 (Tex. App.—Houston [1st Dist.] 2006, no pet.). "When the only evidence before the court is the uncontroverted opinions of a foreign law expert, a court generally will accept those opinions as true as long as they are reasonable and consistent with the text of the law." *Ahumada v. Dow Chemical Co.,* 992 S.W.2d 555, 559 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

The determination of whether a contract is ambiguous is a question of law for the court to decide by examining the contract as a whole in light of the circumstances present when the contract was entered. *Universal Health Servs. v. Renaissance Womens Group,* 121 S.W.3d 742, 746 (Tex. 2003). If contract language can be given a certain or definite meaning, then it is not ambiguous and should be interpreted by the court as a matter of law. *DeWitt County Elec. Coop. v. Parks,* 1 S.W.3d 96, 100 (Tex. 1999). On the other hand, a contract is ambiguous when it is susceptible to more than one reasonable interpretation. *Frost Nat'l Bank v. L & F Distribs.,* 165 S.W.3d 310, 312 (Tex. 2005). Lack of clarity does not create an ambiguity, and "not every difference in the interpretation of a contract . . . amounts to ambiguity." *Forbau v. Aetna Life Ins. Co.,* 876 S.W.2d 132, 134 (Tex. 1994). "Whether a contract is ambiguous is a question of law, subject to de novo review." *Bowden v. Phillips Petroleum Co.,* 247 S.W.3d 690, 705 (Tex. 2008). A court should construe an unambiguous contract according to the plain meaning of its express wording. *Lyons v. Montgomery,* 701 S.W.2d 641, 643 (Tex. 1985).

Here, "no party . . . interested in expediting the arbitration" requested that the trial court appoint arbitrators under Article 10 of the Regulations. Even if the request contemplated by Article 10 had been presented to the trial court, the trial court is not the "Authority" empowered to appoint arbitrators. For example, Article 8 of the Regulations provides that the "Secretariat" of the

"Authority . . . shall be in charge of all the summons and notices," and Article 12 of the Rules specifies that notice must be provided in Arabic. Article 9 of the Rules provides that the clerk of the "Authority" will act as "secretary of the arbitral proceedings," which Article 25 specifies are to be conducted in Arabic. Unrebutted expert testimony accepted into evidence by the trial court suggested that the "Authority" had to be a court of **Saudi** Arabia. In the face of such evidence and the plain provisions of the Contract, the Rules, and the Regulations, the trial court erred when it concluded that it could act as the "Authority." In light of our conclusion that the trial court could not be the "Authority" empowered to appoint arbitrators pursuant to the parties' agreement, we do not reach the question concerning the empanelment of non-Muslim arbitrators.

Conclusion

The trial court improperly designated arbitrators in the instant matter. We therefore conditionally grant the petition for writ of mandamus, and direct the trial court to vacate its April 16, 2009, June 2, 2009, and June 22, 2009 orders.

[1] The underlying case is*Dyncorp International LLC,* No. 2008-01281, in the 334th Judicial District Court of Harris County, Texas, the Hon. Sharon McCally, presiding.

[2] The orders are dated April 16, 2009, June 2, 2009, and June 22, 2009.

[3] When the Contract was executed, both DynCorp and Aramco were headquartered in Houston and incorporated in Delaware.

[4] DynCorp provided an alternate translation that provides, in part: "If the disputants fail to appoint the arbiters . . . the *authority originally responsible for looking into the case shall appoint the necessary arbiters in response to a request by the party who is interested in expediting the procedure*. . . ." (emphasis added). The parties have not suggested any material difference in their proffered interpretations of the Regulations that would affect our decision in this proceeding.

CATEGORY: Shariah Contract Law

RATING: TBD

TRIAL: TBD

APPEAL: TBD

COUNTRY: Saudi Arabia

URL:
http://scholar.google.com/scholar_case?case=13751848148042226863&q=Saudi&hl=en&num=100&as_sdt=ffffffffffffe04

911 S.W.2d 18 (1995)

CPS INTERNATIONAL, INC., AND CREOLE PRODUCTION SERVICES, INC., APPELLANTS, V. DRESSER INDUSTRIES, INC., DRESSER A.G. (VADUZ), DRESSER RAND ARABIAN MACHINERY, LTD, F/D/B/A DRESSER AL-RUSHAID MACHINERY COMPANY, LTD., ABDULLAH RUSHAID AL-RUSHAID, AL-RUSHAID TRADING CORPORATION, AL-RUSHAID GENERAL TRADING CORPORATION, AND AL-RUSHAID INVESTMENT COMPANY, APPELLEES.

No. 08-93-00250-CV.

Court of Appeals of Texas, El Paso.

May 4, 1995.

Rehearing Overruled October 5, 1995.

19*19 Rufus Wallingford, Lee Haag, Jeff Cody, William J. Boyce, Fulbright & Jaworski, L.L.P., Houston, for appellants.

Robert M. Hardy, Jr., Hughes & Luce, L.L.P., Parker C. Folse, III, Susman Godfrey, Houston, for appellees.

Before BARAJAS, C.J., and LARSEN and McCOLLUM, JJ.

OPINION

BARAJAS, Chief Justice.

This is an appeal from a summary judgment dismissing Appellants' claims for breach of contract, breach of fiduciary duty, misappropriation of trade secrets, tortious interference with contractual relations, and civil conspiracy. The trial court found **Saudi** Arabian law controlling and dismissed the case after concluding that **Saudi** Arabian law did not recognize Appellants' causes of action. We affirm in part and reverse in part. We further remand Appellants' claims for breach of contract to the trial court for a new trial.

I. SUMMARY OF THE EVIDENCE

Critical to our decision is the complex set of relationships that existed between the parties at various times and each party's conduct with regard to those relationships. We therefore set out these relationships and chronicle the parties' conduct in some detail.

20*20 A. The Parties

Appellants are a Delaware corporation (Creole) with its headquarters and principal place of business in Houston, Texas, and its wholly owned subsidiary, a Panamanian corporation. Appellants provide project management, maintenance, repair, installation, overhaul, design, and other services in connection with compressors, pumps, turbines, engines, and related equipment used in the energy and refining industry. Creole has no offices outside the United States. Although Creole provides (from its Houston headquarters) to CPS all physical facilities, employees, resources, and capabilities to enable CPS to provide services, CPS is not registered to conduct business in Texas or any other state of the United States, nor does it have any offices in the United States. The record shows, in accordance with a judicial decision in a previous federal anti-trust lawsuit, that CPS was formed by Creole to operate outside the United States, while Creole performs essentially the same work in the United States.

Appellee Abdullah Rushaid Al-Rushaid is a **Saudi** Arabian citizen and businessman. Appellees Al-Rushaid Trading Corporation (ARTC), Al-Rushaid General Trading Corporation (ARGTC), and Al-Rushaid Investment Company (ARIC) are **Saudi** Arabian business entities and the business interests of Abdullah Rushaid Al-Rushaid.[1] Appellants sued the Al-Rushaid Appellees for breach of contract, breach of fiduciary duty, misappropriation of trade secrets, and conspiracy.

Appellee Dresser Industries, Inc., is a Delaware corporation with its headquarters and principal place of business in Houston, Texas. Appellee Dresser A.G. (Vaduz) is a Liechtenstein corporation and a wholly owned subsidiary of Appellee Dresser Industries. We shall refer to these entities collectively as the Dresser Appellees. Appellants sued the Dresser Appellees for tortious interference with contractual relations and conspiracy.

In 1978, CPS and Abdullah Rushaid Al-Rushaid formed a **Saudi** Arabian company called Creole Al-Rushaid, Ltd. (CARL), whose purpose was to conduct business in **Saudi** Arabia. This business relationship was embodied in a writing called the Contract of Kriol El Rashid Company, Ltd. (the Kriol contract). Three other contracts accompanied the Kriol contract: (1) a Working Agreement, which provides for a 70-30 ownership division between CPS and ARGTC; (2) a Technical Assistance Agreement, which provides for the supply of staff, technical, and other re-

sources to CARL; and (3) a Loan Agreement, under which CPS agreed to loan two million **Saudi** Riyals to CARL, apparently to satisfy initial capitalization requirements of **Saudi** Arabian law.

In 1981, Dresser A.G. (Vaduz) and ARIC formed Dresser Al-Rushaid Machinery Company, Ltd. (DARMCO), a **Saudi** Arabian company whose purpose was to conduct business in **Saudi** Arabia. Appellants sued DARMCO for tortious interference with contractual relations and conspiracy.

B. The Conduct

CARL was formed to satisfy the requirements for qualifying to do business in **Saudi** Arabia. Appellants' CEO, Richard Flowers, understood that CARL would be formed under **Saudi** Arabian law and would have to abide by the law of **Saudi** Arabia. Flowers several times traveled to **Saudi** Arabia to meet with Al-Rushaid for the purpose of setting up a **Saudi** Arabian company in accordance with **Saudi** Arabian law. On one of these visits, Flowers met with Al-Rushaid's lawyer, Ahmed Audhali. Audhali explained to Flowers that **Saudi** Arabian law required disputes to be brought in a **Saudi** Arabian forum. He further explained that a CPS representative would have to sign before a **Saudi** Arabian notary a Memorandum of Association, which sets out the foregoing requirements and operates as the company's charter after publication in the **Saudi** Arabian Official Gazette.

CARL's articles of association provide that it will operate under the laws of **Saudi** Arabia, that disputes will be submitted to arbitration 21*21 in **Saudi** Arabia and, if arbitration fails, they will be resolved in **Saudi** Arabia. CARL was intended to operate exclusively in **Saudi** Arabia and never conducted operations outside **Saudi** Arabia. Appellants claim that the Al-Rushaid Appellees' violated contractual and other duties they owed to Appellants by their involvement with the Dresser Appellees and that the Dresser Appellees conspired to and did interfere with Appellants' relations with the Al-Rushaid Appellees.

C. The Litigation

In 1983, both CPS and Al-Rushaid stated they wished to dissolve CARL. Dissolution under **Saudi** Arabian law, however, proved cumbersome and difficult, and Appellants accuse Al-Rushaid of deliberately slowing the process.

In 1985, CPS brought a federal anti-trust action against Dresser Industries and the Al-Rushaid defendants, claiming a conspiracy to drive CPS out of the **Saudi** Arabian market. This suit was dismissed the following year for lack of a sufficient impact on United States commerce. Before dismissal, Appellants collectively filed a separate suit in the same court against all present Appellees. This second federal suit was dismissed in 1988, the court finding that "[i]f there are any anticompetitive effects, surely they are in **Saudi** Arabia, where CARL was eliminated as a competitor." In finding only a tenuous relationship between the United States and the subject matter of the suit, the court reasoned that it concerned merely the "decline of a **Saudi** joint venture

[that] indirectly affected the parent company [Creole] whose foreign subsidiary [CPS] participated in the venture."

In 1985, CPS also brought suit in a **Saudi** Arabian court against Al-Rushaid for breach of contract, breach of fiduciary duty, misappropriation of confidential information, and conspiracy. The cause was heard by a three-judge panel of the court, which deemed the claims not actionable under **Saudi** law, but went on to seek alternative methods to resolve the dispute. Both sides agreed before the court to settle the suit, Al-Rushaid agreeing to cooperate in CARL's dissolution and CPS agreeing to drop the then pending federal anti-trust suit. This agreement is contained in a letter from CPS to Al-Rushaid, which letter was notarized by a Texas notary, the Texas Secretary of State, and verified by United States Secretary of State George P. Schultz.

II. DISCUSSION

Appellants attack the judgment of the trial court in three points of error that challenge the dismissal of Appellants' claims against the (1) Dresser Appellees, (2) DARMCO, and the (3) Al-Rushaid Appellees. Because our disposition of Appellants' contract claims differs from our resolution of their tort claims, we necessarily segregate our discussion of them. We treat Appellants' breach of contract claims in our contract analysis, and address Appellants' remaining claims in our tort analysis.

A. Standard of Review

We begin with the traditional standards employed to review a summary judgment. The standard of review on appeal is whether the successful movant at the trial level carried its burden of showing that there is no genuine issue of material fact and that a judgment should be granted as a matter of law. *Lear Siegler, Inc. v. Perez,* 819 S.W.2d 470, 471 (Tex.1991); *Nixon v. Mr. Property Management Co.,* 690 S.W.2d 546, 548 (Tex. 1985); *Hernandez v. Kasco Ventures Inc.,* 832 S.W.2d 629, 631 (Tex.App.—El Paso 1992, no writ). Thus, the question on appeal is not whether the summary judgment proof raises fact issues as to required elements of the movant's cause or claim, but whether the summary judgment proof establishes, as a matter of law, that there is no genuine issue of material fact as to one or more elements of the movant's cause or claim. *Gibbs v. General Motors,* 450 S.W.2d 827, 828 (Tex.1970). In resolving the issue of whether the movant has carried this burden, all evidence favorable to the non-movant must be taken as true and all reasonable inferences, including any doubts, must be resolved in the non-movant's favor. *Nixon,* 690 S.W.2d at 548-49; *Stoker v. Furr's, Inc.,* 813 S.W.2d 719, 721 (Tex. App.—El Paso 1991, writ denied). When, as here, the defendants are the movants and 22*22 they submit summary evidence disproving at least one essential element of each of plaintiff's causes of action, then summary judgment should be granted. *Perez,* 819 S.W.2d at 471; *Bradley v. Quality Service Tank Lines,* 659 S.W.2d 33, 34 (Tex.1983); *Hernandez,* 832 S.W.2d at 633.

Our research has yielded no case addressing the propriety of using summary judgment standards to review a conflict of laws issue. Appellants urge us to employ the foregoing standards to review the two primary issues presented by the instant case: (1) whether **Saudi** Arabian law applies to Appellants' claims and, if **Saudi** law applies to any claims, (2) the outcome of those

claims under **Saudi** law. Although they might be awkwardly applied to the instant case, we think the traditional summary judgment standards either are inapplicable or require some modification because of the nature of the issues presented to the trial court for decision.

Our inclination to use traditional summary judgment standards is greatest with respect to the second primary issue because the task of determining foreign law intuitively strikes us as a factual inquiry into the content or text of foreign rules of law. Texas Rules of Evidence 203 informs us, however, that the determination of the content of foreign law is a question of law for the court[2]. Thus, although one might label the parties' dispute over the second primary issue a disagreement over the "fact" of what **Saudi** Arabian law says, Rule 203 makes clear that the determination of the content of **Saudi** law is a question of law. Accordingly, the better inquiry is not whether there existed a fact question regarding the content of **Saudi** law, but whether the trial court reached a proper legal conclusion about its content. Any fact question presented by evidence of the content of **Saudi** law was for the trial court to resolve because Rule 203 commits to the trial court the exclusive responsibility to discern foreign law.

On the parties' motion, the trial court in the case at hand conducted a separate hearing to determine foreign law wherein the court heard expert testimony, the substance of which reappeared in affidavit form in later summary judgment motions. We find the application of traditional summary judgment standards inappropriate because a reversal for a mere factual conflict would result in the remand of the case to the trial court, which would simply repeat the procedures it used to determine foreign law without regard to any identified factual conflict. Whether presented before summary judgment, simultaneously with it, or during trial, the issue is one for the trial court to resolve. We see no virtue in employing a standard of review that increases the potential for forcing the trial court to conduct duplicative procedures because of a factual controversy when it is the same trial court that will eventually be called upon to resolve that controversy.

Similarly, the Texas Supreme Court has deemed the determination of which state's law will apply to a case to be a question of law. *See Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414, 421 (Tex.1984) ("[T]he question of which state's law will apply is one of law.") For the same reasons, then, we also think summary judgment standards inappropriate for use in reviewing the trial court's determination that **Saudi** Arabian law applied to this litigation.

Although we are committed to the foregoing analysis, we apply it only to review the judgment of the trial court with respect to the first primary issue, the applicability of **Saudi** Arabian law, because we are equally committed to the jurisprudential canon that appellate courts, especially intermediate appellate courts, should fashion new law in disposing of a case only when the facts of the case do not present grounds for decision based on already established principles. We therefore use traditional summary judgment 23*23 principles to review the trial court's judgment with respect to the second primary issue, the outcome of Appellants' claims under **Saudi** Arabian law, because we find that the summary judgment evidence bearing on this issue is not in conflict. Accordingly, we review the trial court's determination of the first issue as a question of law and review its determination of the second issue as a conventional summary judgment[3].

B. Contract Claims

The Texas Supreme Court has addressed what effect should be given to contractual choice of law provisions with respect to claims sounding in contract.

> We begin with what Chief Justice Marshall referred to as a principle of "universal law... that, in every forum, a contract is governed by the law with a view to which it was made." *Wayman v. Southard,* 23 U.S. (10 Wheat.) 1, 6 L.Ed. 253 (1825). This principle derives from the most basic policy of contract law, which is the protection of the justified expectations of the parties. *See* E. Scoles & P. Hay, Conflict Of Laws 632 (1984) ["Scoles"]; Reese, *Choice of Law in Torts and Contracts and Directions for the Future,* 16 Colum.J. Transnat'l L. 1, 21 (1977). The parties' understanding of their respective contractual rights and obligations depends in part upon the certainty with which they may predict how the law will interpret and enforce their agreement. *Id.*

When parties to a contract reside or expect to perform their respective obligations in multiple jurisdictions, they may be uncertain as to what jurisdiction's law will govern construction and enforcement of the contract. To avoid this uncertainty, they may express in their agreement their own choice that the law of a specified jurisdiction apply to their agreement. Judicial respect for their choice advances the policy of protecting their expectations. This conflict of laws concept has come to be referred to as party autonomy. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 269-271 (1971) ["Weintraub"]. However, the parties' freedom to choose what jurisdiction's law will apply to their agreement cannot be unlimited. They cannot require that their contract be governed by the law of a jurisdiction which has no relation whatever to them or their agreement. And they cannot by agreement thwart or offend the public policy of the state the law of which ought otherwise to apply. So limited, party autonomy furthers the basic policy of contract law. With roots deep in two centuries of American jurisprudence, limited party autonomy has grown to be the modern rule in contracts conflict of laws. *See* Scoles, *supra* at 632-652; Weintraub, *supra* at 269-275; Restatement (Second) Of Conflict Of Laws ["The Restatement"] § 187 (1971).

The party autonomy rule has been recognized in this state. The Legislature has provided in the Uniform Commercial Code:

> [W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.

TEX.BUS. & COM.CODE ANN. § 1.105(a) (Vernon Supp.1989). In a different context, one court of appeals has elaborated further:

> [A]n express agreement of the parties that the contract is to be governed by the laws of a particular state will be given effect if the contract bears a reasonable relation to the chosen state and no counter-vailing public policy of the forum demands otherwise.

First Commerce Realty Investors v. K-F Land Co., 617 S.W.2d 806, 808-09 (Tex.Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (citing, *inter alia,* the RESTATEMENT § 187). We believe the rule is best formulated in section 187 of the RESTATEMENT 24*24 and will therefore look to its provisions in our analysis of this case.

Section 187 states:

Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of Sec. 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677-78 (Tex.1990), *cert. denied,* 498 U.S. 1048, 111 S.Ct. 755, 112 L.Ed.2d 775 (1991). The initial issue before us with respect to the Al-Rushaid Appellees—whether and the manner in which the Al-Rushaid Appellees could compete with CARL—is one "which the parties could have resolved by an explicit provision in their agreement". *See* Restatement (Second) Of Conflict Of Laws § 187 comments c and d (1971). We therefore apply Section 187(1).

The contracts evincing the parties' choice of law conflict with each other. Four separate documents contain provisions that may operate as choice of law provisions. The first is the Kriol contract[4], the original of which is in Arabic[5] and was signed by a CPS representative and Al-Rushaid in his personal capacity. It begins "IN THE NAME OF GOD THE MERCIFUL," and recites that:

On this day 9/11/1398 Hegriya (which corresponds to 11/10/1978 A.D.) ...

....

The ... parties ... have agreed to establish a limited liability company in accordance with the Act of the Minister of Industry Number 26 dated 17 Moharrem 1399 and in accordance with the **Saudi** Arabian Companies Act promulgated under Royal Decree No. M/6 dated 22/4/1385 Hegriya and the Foreign Capital Investment Code promulgated under Royal Decree No .35 dated 22/4/1383 Hegriya and the provisions set forth in these articles....

....

ARTICLE SEVENTEEN—ARBITRATION AND SETTLEMENT OF DISPUTES

....

If arbitration fails to settle the dispute the case will be taken to the committee of settling the [sic] commercial disputes at Dammam (Hayat Hasam El Menasaat El Tegariya)....

ARTICLE TWENTY—GENERAL RULES

1) The company shall abide by all the rules and regulations existing in force in the Kingdom of **Saudi** Arabia.

2) All provisions not stated in this contract will be governed by the code of the Companies Act.

The second relevant choice of law provision appears in CARL's bylaws, which were signed by a CPS representative and AlRushaid 25*25 in his capacity as a representative of ARGTC, and reads in pertinent part:

In the Name of God the Merciful, the Compassionate

....

ARTICLE TWENTY-FOUR: DISPUTES

If any difference or dispute shall arise between the Parties as to the interpretation of [the bylaws] or any matter or thing arising therefrom or in connection therewith, then, upon either Parties [sic] giving notice of difference or dispute to the other, the same shall be referred to arbitration... [the venue for which] shall be the Committee for Settlement of Commercial Disputes, Dhahran, **Saudi** Arabia.

The third relevant choice of law provision appears in the Working Agreement. CPS and Creole were both parties to this document and were represented by the same person; ARGTC and CARL were both parties to the document and both represented by Al-Rushaid. It reads in pertinent part:

4. [E]ach director of CAR[L] will meet [the] responsibilities imposed [on him] by the laws of **Saudi** Arabia. Creole agrees to manage the joint venture company in accordance with **Saudi** Arabian laws....

....

7. Any controversy or claim among the parties to this Agreement arising out of or relating to this Agreement shall be settled in accordance with the provision in the Bylaws of CAR[L] for the settlement of disputes.

DARMCO and the Al-Rushaid Appellees rely on the foregoing provisions and claim they redundantly evince an agreement to subject to **Saudi** law all disputes arising from CARL's activities. Specifically, they argue that CARL's Articles of Association control the parties' relationship and preempt all other agreements because the Articles can be altered only by application to the **Saudi** Arabian Ministry of Trade. Appellants respond that mere agreements to "abide by" **Saudi** law are not binding choice of law clauses. In support of their argument, Appellants point to what they characterize as the only genuine choice of law provision in any of the contracts. It appears in the Technical Assistance Agreement, to which CPS and CARL were parties, with Al-Rushaid signing on CARL's behalf, and reads in pertinent part:

4.6 *Applicable Law*

Any controversy, dispute or question arising out of, or in connection with, or in relation to this Agreement or its interpretation, performance, or nonperformance or any breach thereof shall be determined in accordance with the Laws of the United States of America.

Significantly, the foregoing clause is located in a section of the document that might properly be titled "Miscellaneous & Prudent" and appears between a force majeure clause and clauses concerning complete integration, assignability, and the extent to which the contract binds the parties' successors.

Appellants' are correct in their assertions that no other clause in the relevant documents is as explicit or as broad as the foregoing. They are also correct in their assertion that no other provision even purports to preempt it. Indeed, we find persuasive Appellants' argument that it is the only traditional choice of law provision in any of the contracts, which argument is supported by the clause's location among other standardized contractual clauses such as force majeure and complete integration clauses, an attribute lacking in the provisions referring to **Saudi** Arabian law.

We find the argument equally persuasive even without reference to quantitative notions of the clauses usually or even prudently incorporated into a contract or of the conventional phrasing of a particular type of clause. We here find it useful to evaluate each clause's suitability for service as a model choice of law provision. We conceive of this issue as the extent to which each approximates the phrasing of a normatively optimal choice of law clause or, alternatively, as a question of which clause would most likely result were the parties to draft a provision with the clear intention of producing the choice of law clause least vulnerable to attack. We find, for reasons we set out below, that both formulations point to the clause in the Technical Assistance Agreement that identifies United States law as controlling.

26*26 In reaching our conclusions, we find profitable a comparison of the language of each clause and an examination of its scope as evinced by its language, the document in which it appears, and the relationship between that document and the other documents. We begin with those clauses most easily dismissed as facially insufficient as choice of law clauses.

We think it unlikely that either Article 2 of the Kriol contract or Paragraph 4 of the Working Agreement were conceived and drafted as choice of law clauses. They speak more to the status of CARL than to the law applicable to all disputes involving it. They are essentially agreements not to operate an illegal enterprise. A promise to *abide* by **Saudi** law and *manage* CARL in accordance therewith is little more than a promise to refrain from criminal conduct. It addresses only the concern that a citizen of the United States would attempt to operate a business in a foreign locale without regard to the law of the locality. These clauses fail altogether to implicate what law will apply to disputes between the parties. Similarly, the pledge to meet one's legal responsibilities is not even a pledge not to be a criminal, but merely a pledge not to shirk a contractual undertaking. This, too, is unrelated to the parties' choice of law.

The remaining clauses, Article 24 of CARL's bylaws, Article 17 of the Kriol contract, and Paragraph 7 of the Working Agreement (collectively, the arbitration clauses) are slightly more difficult to overcome. These clauses at least address disputes or controversies among the parties. The broadest language in the arbitration clauses is Article 24's reference to "any matter or thing arising therefrom or in connection therewith...." One might seize on the nature and scope of the document in which this clause appears or on its ambiguous relationship to the other documents to argue the clause concerns only disputes arising from or connected with the bylaws. We think this restriction too facile, for it simply replaces the ambiguity regarding those disputes to which the clause applies with an ambiguity regarding those agreements to which the clause applies. Although the latter ambiguity is clearly the lesser evil, we find the clause inconclusive. This does not, however, end our textual analysis.

Although the content of the arbitration clauses is inconclusive, much can be gleaned from what is lacking in them, especially when compared with the relative breadth of Paragraph 4.6 of the Technical Assistance Agreement. None of the arbitration clauses expressly applies to issues of interpretation, performance, nonperformance, or breach of the contract, which issues we think the gravamen of contractual disputes. Although Article 24 attempts to broaden its scope by invoking any matter connected with the bylaws, we find this generic attempt at universal relevance far less meaningful than Paragraph 4.6's methodical and deliberate expression of application to specific issues.

We end our textual analysis with an examination of the significance of the arbitration clauses' common theme: arbitration. Interestingly, no party cites a failure to submit this dispute to arbitration, and we cannot discern from the record whether arbitration was explored by the parties. This ambiguity notwithstanding, the arbitration clauses clearly contemplate arbitration as a prerequisite to litigation. Whether or not these clauses can colorably be characterized as choice of law clauses, they can certainly be deemed arbitration clauses. We here think it useful to return to our second formulation of the reasons we find the arbitration clauses inadequate, that being a question of the clause most likely to result from an overt, deliberate attempt to draft the clearest, least

vulnerable choice of law clause. Given the arbitration clauses' common theme, we are then forced to question why the parties would bury a choice of law clause deep within an arbitration clause. We find an answer not in poor lawyering but in the intended purpose of the clauses. The arbitration clauses are precisely that, arbitration clauses. They are qualitatively different from the choice of law provision in the Technical Assistance Agreement. Although perhaps not the definitive choice of law clause, when compared to the arbitration clauses, Paragraph 4.6 occupies an extreme position on a spectrum that represents the range of clarity and quality 27*27 resulting from an effort to draft a model choice of law provision. One simply does not clutter an intended choice of law clause with sundry arbitration procedures[6]. We conclude that Paragraph 4.6 of the Technical Assistance Agreement, which provides that United States law will apply, is the only choice of law provision in any of the relevant contracts.

Having found the operative choice of law clause among the contracts, we now determine its scope. The signatories to the Technical Assistance Agreement are two: Appellant CPS and CARL. Al-Rushaid signed the contract in his representative capacity as CARL's president. Al-Rushaid at once concedes that he signed the document and claims without elaboration that the record lacks evidence to establish that he actually knew of its existence. We find his argument transparent and therefore hold him accountable for knowledge of the contract's content and legal effect. The question remains whether the contract and its election for United States law encompass Al-Rushaid's various business interests involved in CARL and him personally.

At stake in the determination of the scope of the choice of law clause is the identity of those contract claims that will be governed by Texas law[7]. This turns initially on those causes of action that are contractual[8], and secondarily on which contractual causes of action are subject to the choice of law clause. If construed in its narrowest sense, the choice of law clause in the Technical Assistance Agreement binds only CPS and CARL, the immediate parties to it. At its broadest, it binds both Appellants and the Al-Rushaid Appellees. In resolving this issue we find helpful an examination of the relationships among the relevant documents and the nature of each. We conceive of this issue as a question of whether the documents are more properly characterized as a primary contract with several subsidiary contracts, what we term the hierarchical model, or as several contracts of initial organization that were executed in sequence out of logical necessity, what we term the sequential model. For the reasons set out below, we favor the latter characterization.

The five documents[9] at issue serially (1) create a joint venture, (2) establish its bylaws, (3) identify ownership interests, (4) make provision for its initial capitalization, and (5) make provision for its staffing and other resource requirements. All functions are characteristic of the launching of a new enterprise. We think it conventional and nearly necessary to undertake an international business venture involving many parties by setting out in writing the nature of and rules for operating the venture, clarifying who will own it, and making clear how it will be funded and staffed. All are done at the outset of the business because all collectively provide the framework for its operation. Although each function is distinct, all are interrelated; although each function is performed in a separate writing, all are only facets of a single transaction and collectively comprise the very business into which the parties entered. The participants' ownership interests, for example, do not render unnecessary provision for the company's funding. They do, however,

create expectations for individual contributions to the enterprise and are consequently wisely clarified before cash antes are sought. Similarly, although staff and technical resources might be secured 28*28 without regard to the business' funding, they are prudently sought with an eye to the financial resources necessary to obtain them. A third example is the loan agreement's purpose to meet the initial capitalization requirements of **Saudi** Arabian law. This requirement could have been satisfied in the same instrument that created CARL. The parties chose, however, to use a separate writing. Indeed, the parties used five instruments to accomplish what might have been awkwardly done in a single omnibus agreement. That they did so does not segregate each contract from the others or from the larger transactional undertaking to launch an international joint venture. The parties simply elected to place the various agreements necessary to operate a new multi-participant business in separate, more digestible writings. Their unremarkable choice can no more confine the scope of each contract than a dispute with the **Saudi** government over CARL's capitalization could be limited to the loan agreement, leaving unscathed CARL's existence as evinced by the Kriol contract.

The Al-Rushaid Appellees do not expressly challenge the foregoing analysis as it applies to any of them. In the single brief filed on behalf of all Al-Rushaid Appellees, they implicitly challenge only the applicability of the choice of law clause with respect to Al-Rushaid personally, arguing that he was not a party to the Technical Assistance Agreement. We have already resolved this issue against Al-Rushaid because of his failure to even allege that he represented the other Al-Rushaid Appellees in any kind of restricted capacity. Although in their brief they make little of this issue generally, the Al-Rushaid Appellees alternatively might be thought to attempt to characterize four of the contracts as subsidiary agreements of the Kriol contract. We find this characterization inappropriate. As we have discussed above, these contracts collectively comprise a single transaction. The Kriol contract is not so different in purpose or scope from the other contracts as to be subject to examination without reference to them. Neither is it more important than the others. While it might exhibit a temporal primacy over the other agreements, this is a necessary byproduct of the parties' decision to memorialize their agreement in separate writings and does nothing to establish a hierarchical relationship among the contracts. To the contrary, the temporal arrangement of the agreements supports a sequential model of the larger transaction. Before a company is funded, its owners should be known. Before ownership is established, it must be created. The five agreements embody only different, albeit perceptibly distinct, steps in the creation and organization of a sophisticated new business. The separate contracts reflect only the structure of the joint venture and its operational beginning. The creation and organization of the joint venture itself comprise a single legally significant event. Thus, we are presented with a single transactional event from which Appellants' contract claims arise. We therefore find the contract binding on all litigants that were parties to the five documents we have discussed[10]. Accordingly, we enforce the parties' choice to subject their disputes to United States law, and, consistent with Section 187(1) of the Restatement, find Appellants' contract claims governed by United States law. Appellants' third point of error is sustained with respect to the contract claims they assert against the Al-Rushaid Appellees.

C. Tort Claims

Appellants brought several tort claims against Appellees. Appellants asserted claims for tortious interference against DARMCO and the Dresser Appellees, civil conspiracy claims against those parties and the Al-Rushaid Appellees, and misappropriation of trade secrets and breach of fiduciary duty claims against the Al-Rushaid Appellees. The Texas Supreme Court has identified the choice of law principles applicable to tort claims, stating that

> [I]t is the holding of this court that in the future all conflicts cases sounding in tort 29*29 will be governed by the "most significant relationship" test as enunciated in Sections 6[11] and 145[12] of the RESTATEMENT (SECOND) OF CONFLICTS [OF LAWS]. This methodology offers a rational yet flexible approach to conflicts problems. It offers the courts some guidelines without being too vague or too restrictive. It represents a collection of the best thinking on this subject....

Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex.1979) (footnotes added). We therefore apply Section 145 to the facts of the instant case. Before we begin our Section 145 analysis, however, we turn to Section 156 of the Restatement for guidance as to the relative importance of the four factors identified in Section 145. Section 156 reads:

> Tortious Character of Conduct
>
> (1) The law selected by application of the rule of § 145 determines whether the actor's conduct was tortious.
>
> (2) The applicable law will usually be the local law of the state where the injury occurred.

RESTATEMENT § 156 (emphasis added). Thus, the Restatement reveals an emphasis on the situs of the injury, at least with respect to the application of Section 145. Accordingly, it is to this factor that we first turn.

The injury occurred in **Saudi** Arabia. Appellants themselves appear to recognize this when they allege that the Dresser Appellees acted to "wrest[] field servicing business in **Saudi** Arabia" away from CARL and Appellants and that the Dresser Appellees and Al-Rushaid "have attempted to keep [Appellants] from doing any further business in **Saudi** Arabia." Although Appellants now argue they were harmed financially in Texas, that financial harm is a mere measurement of and was produced by Appellants' inability to operate in **Saudi** Arabia. The record lacks any evidence that any party acted to hinder Appellants' ability to operate outside of **Saudi** Arabia or that Appellants' competitiveness in the United States suffered. Indeed, the trial judge in the previous federal anti-trust litigation correctly found that any anticompetitive effects were felt in **Saudi** Arabia. Section 145's first element favors **Saudi** Arabia.

The second element we consider under Section 145 is the situs of the injury-producing conduct. The parties here engage in a discourse largely duplicative of their argument about the situs of the injury. Not surprisingly, we reach the same conclusion and again find Appellants' pleadings revealing. Appellants allege that the Dresser Appellees "spread false and malicious statements to [Appellants] and CARL's customers" and that "Dresser used its dominant market power to ... entice Al-Rushaid into 30*30 agreeing not to do any further business with [Appellants]." Appel-

lants now argue for the application of Texas law because the conduct they allege to be tortious was directed from Texas. First, we find this argument to be inapplicable to the Al-Rushaid Appellees, a **Saudi** Arabian citizen and his affiliated **Saudi** Arabian business interests. Appellants do not allege that the Al-Rushaid Appellees engaged in any relevant conduct outside of **Saudi** Arabia. Second, that tortious conduct may have been directed from Texas does not alter the reality that the conduct was directed to and carried out in **Saudi** Arabia, and it was the carrying out of the conduct that was the source of its harmful nature. Section 145's second element favors **Saudi** Arabia.

The third Section 145 element we consider is the parties' domiciles and residences. The present litigation involves nine litigants domiciled in four countries and as many continents, with residences in **Saudi** Arabia, Liechtenstein, Houston, Dallas, and New York. Of nine litigants, none is a Texas corporation and only two have offices in Texas. Significantly, although Appellant Creole and Appellee Dresser Industries are headquartered in Texas, neither was a direct signatory to any of the documents creating and controlling CARL or DARMCO. The signatories to CARL's seminal agreement were Appellant CPS, a Panamanian Corporation with no Texas office, and Al-Rushaid; the participants in DARMCO were Appellant Dresser A.G. (Vaduz) and an Al-Rushaid entity. Appellants here offer only the weak argument that Creole was involved in the transactions because it provided various resources to CPS. Creole, however, was not a party to CARL. CPS was. It is undisputed that CPS is a Panamanian corporation with no offices in Texas. The trial judge had a firm grasp on this issue.

It strikes me as if you have an offshore corporation and CPS was created for the purpose of having the benefits of an offshore corporation to carry out business without reference to the laws of the United States.... And if you live by a foreign corporation, you die by a foreign corporation.... [Y]ou had this offshore business for a particular reason to achieve the benefits of having an offshore corporation and also carry out some liability that comes along with this kind of way of doing business. You have to accept the risk of those liabilities along with accepting the benefits that you get from that kind of business.

So, it strikes me that we have here a Panamanian corporation entering into a deal with a **Saudi** national under the laws of **Saudi** Arabia to carry the business that **Saudi** Arabia—and I don't see any way that I can rule but that **Saudi** Arabia[n] law applies.

Because five of the nine litigants are **Saudi** Arabian, Section 145's third element favors **Saudi** Arabia slightly.

The foregoing analysis of the first three of Section 145's four elements does much to foretell the outcome of the analysis of the fourth element. Indeed, we think it rare that the injury, the conduct producing it, and the parties' domiciles would point to the same foreign state, yet the relationship would somehow be centered in Texas. Although we do not trivialize Section 145's fourth element, we find it potentially duplicative of an analysis of the first three, which finding is supported by the recognition, present in the language of Section 145(2)(d) itself, that analysis of an extant relationship will only be intermittently possible. We nonetheless find two relationships worthy of discussion.

The first is the relationship between Appellants and the Dresser Appellees, which we think most properly characterized as a competitive one. These parties competed in the **Saudi** Arabian market to provide energy equipment maintenance and repair services. We find **Saudi** Arabia to be the center of gravity of this competitive relationship. *Cf. DeSantis,* 793 S.W.2d at 680-81 (finding that Florida has no interest in restraints on competition in Texas). The second relevant relationship existed between Appellants and the Al-Rushaid Appellees. While we could chronicle Appellants contacts with each of the Al-Rushaid entities, we think these relationships more efficiently examined by focusing on the contacts between Appellants and Al-Rushaid, in part because Al-Rushaid's testimony does not clearly define his relationships 31*31 with his business interests and because he was obviously the driving force behind all of them. Appellant CPS and Al-Rushaid were joint venturers in an enterprise that was designed to and actually did operate exclusively in **Saudi** Arabia. Thus, their relationship was centered in **Saudi** Arabia. *Cf. Maxus Exploration Co. v. Moran Bros., Inc,* 817 S.W.2d 50 (Tex.1991) (applying Kansas, not Texas, law to a contract for drilling services to be performed in Kansas notwithstanding that contract was negotiated in and contracting parties were headquartered in Texas). Section 145's fourth element favors **Saudi** Arabia.

Mindful that a proper Section 145 analysis is much more than a bean-counting exercise, we find that both the quantity and quality of the contacts among the parties and **Saudi** Arabia mandate the application of **Saudi** Arabian law to all tort claims asserted by Appellants because the parties and the subject matter of this litigation have a more significant relationship to **Saudi** Arabia than to Texas. Accordingly, we overrule Appellants' points of error to the extent they challenge the applicability of **Saudi** Arabian law to Appellants' tort claims. Having found **Saudi** law applicable, it remains to determine the outcome of these claims under **Saudi** law.

The trial court found that **Saudi** law did not recognize Appellants' tort claims. Appellants claim that extensive expert testimony conflicted over the extent to which **Saudi** law provided causes of action similar to Anglo-American tort claims. We find any factual conflict in the expert testimony insufficient to preclude summary judgment.

The parties agree that **Saudi** Arabia generally provides remedies for wrongs. They further agree that **Saudi** law employs different nomenclature than Texas law for certain causes of action in what is known to Texas law as tort. They agree that **Saudi** Arabian law offers no cause of action termed tortious interference with contractual relations, civil conspiracy, or breach of fiduciary duty. Appellants claim, however, that conduct that is actionable in Texas as one or more of the foregoing torts is actionable in **Saudi** Arabia, though it may be known by another name. They rely heavily on the agreed upon notion that **Saudi** law provides redress for wrongs. This, however, begs the question, for it fails to delineate what is wrong or to identify the form of relief available for any given wrong. Appellants claim the evidence at least presents a fact question sufficient to preclude summary judgment. A careful review of the evidence leads us to conclude otherwise.

1. Tortious Interference

The expert testimony produced by the parties is in greatest agreement with regard to whether **Saudi** Arabian law recognizes claims for tortious interference. The following is the strongest testimony provided by Appellants' expert, William Van Orden Gnichtel[13]:

Q. [W]ould **Saudi** law allow a claim to redress a wrong against a party for interfering with a contract that Plaintiff might have had?

A. Yes.

Q.... Is it your testimony that type of cause of action would exist but the label tort may not be known in **Saudi** Arabia?

A. Yes, I would set aside or disregard the nomenclature and get to the essence, and the essence is basically that if one does a wrong to another he will be required to compensate the wronged party.

Although Gnichtel's first response might preclude summary judgment if considered alone, his second response is fatal. It is death by qualification. It reveals that Gnichtel relied on a general principle without regard to the specific conduct at issue in the instant case and without regard to the particular cause of action known to Texas law as tortious interference with contractual relations.

The Dresser Appellees' expert, Joseph Saba, was more precise about the content of **Saudi** law and carefully exposed the modesty 32*32 of Gnichtel's statements. In an affidavit available to the trial court for summary judgment, Saba stated:

The American concept of tortious interference with contracts is not among the acts giving rise to a cause of action in **Saudi** Arabia. The nonexistence of such a cause of action is consistent, inter alia, with the Hanbali School's emphasis on individual free will and responsibility. If a person does not perform his contractual obligations or does not enter into a contract or breaches his duties to another, such conduct is his own responsibility, not that of anyone else. Even if another person persuades, requests or otherwise influences such conduct, that other person is not liable in a civil action for monetary payments to the plaintiff, in the absence of a direct contractual obligation running from that other person to the plaintiff.

Saba went on to address a specific statement from Gnichtel's affidavit, in which Gnichtel foreshadowed his live testimony we quoted above, saying, "[T]he Shari[`]a [Islamic scripture] recognizes civil liability for wrongful acts resulting in damages. This is an overriding principle of the Shari[`]a. It is not dependent on specific contractual arrangements or specific regulations promulgated by the government." Saba responded:

This passage is literally correct, so long as it is read to involve concepts of **Saudi** Arabian law rather than more general American usages. Thus, there is liability for "wrongful acts," but only for those acts that are recognized as wrongful under **Saudi** Arabia's application of the Shari'a or under the Regulations [of the Kingdom of **Saudi** Arabia]. The **Saudi** scope of liability of one private party to another does not en-

compass all acts which American law might consider to be wrongful.... Finally, while the existence of liability is not necessarily dependent upon "specific contractual arrangements or specific regulations," the conduct in question still must lie within an appropriate category of actionable conduct under **Saudi** Arabia's strict construction of the Shari'a. As stated above, based upon my review of the pleadings in this case, the claims against Dresser in this suit do not fit within such a category. There is no nexus under **Saudi** law between Dresser and the plaintiffs giving the plaintiffs the cause of action they assert.

Thus, Saba exposed the hollowness of Gnichtel's conclusions by defining the terms Gnichtel used and then applying the definitions to Gnichtel's statements to reveal their precise content. He made clear the inadequacy of Gnichtel's reliance on a general principle of justice by showing the principle to itself be dependent on **Saudi** law's definition of terms used to articulate the principle. Further, he specifically examined the viability of Appellants' particular causes of action for tortious interference and expressed his opinion that they were not viable. Significantly, Appellants did not respond to Saba's deconstruction of Gnichtel's statements and in their brief offer no argument to overcome his conclusions. Indeed, on cross-examination Gnichtel conceded that **Saudi** law would not recognize a claim for contractual interference against a non-contracting third party and acknowledged that his statements stopped short of saying that Dresser could be liable to Appellants for interfering with Appellants' contracts with Al-Rushaid. Absent even argument that Saba's testimony is inaccurate, the trial court was justified in finding there existed no genuine issue of material fact and in applying **Saudi** Arabian law to Appellants' claims against the Dresser Appellees for tortious interference with contractual relations, which application resulted in their dismissal. Accordingly, we overrule Appellants' first and second points of error to the extent they challenge the outcome of Appellants' tortious interference claims under **Saudi** Arabian law.

2. Breach of Fiduciary Duty

Appellants brought claims for breach of fiduciary duty against the Al-Rushaid Appellees. The parties agree that **Saudi** Arabian law recognizes the concept of fiduciary duty and provides a cause of action for the breach thereof. Appellants claim that the trial court erred by granting summary judgment in favor of the Al-Rushaid Appellees based on the Al-Rushaid Appellees' contention that **Saudi** law allows lawsuits among parties to a business enterprise over matters arising from the 33*33 company's activities only during the existence of the company. The Al-Rushaid Appellees offered testimony to this effect, their expert specifically stating that all claims not settled prior to dissolution are waived. Appellants in their brief do not challenge that **Saudi** law requires claims to be asserted prior to dissolution. Neither do they claim they asserted their breach of fiduciary duty claims in this lawsuit before CARL was dissolved or that these claims do not involve CARL. Appellants address only the Al-Rushaid Appellees secondary argument that Appellants' breach of fiduciary duty claims are barred by res judicata and estoppel. Absent argument that **Saudi** law allows parties to a business enterprise to bring against each other claims involving the business after its dissolution, and absent competent evidence to establish that **Saudi** law follows a different rule, the trial court was justified in dismissing Appellants' claims for breach of fiduciary duty. Accordingly, we overrule Appellants' third point of error to the ex-

tent it challenges the outcome of Appellants' breach of fiduciary duty claims under **Saudi** Arabian law.

3. Misappropriation of Trade Secrets

Appellants brought claims for misappropriation of trade secrets against the Al-Rushaid Appellees. Appellants' brief mystifyingly omits any argument that the trial court erred in dismissing these claims. We presume Appellants rely on their general contention, which we addressed in our discussion of Appellants' tortious interference claims, that **Saudi** Arabian law provides redress for wrongs. If our presumption is correct, we do not disturb the trial court's judgment on this issue for the reasons we cited in our discussion of Appellants' tortious interference claims. If our presumption is incorrect, we do not disturb the trial court's judgment because of Appellants' failure to brief this aspect of their point of error directed to the Al-Rushaid Appellees, which failure offends Texas Rules of Appellate Procedure 74(f). We therefore overrule Appellants' third point of error to the extent it challenges the outcome of Appellants' claim for misappropriation of trade secrets under **Saudi** Arabian law.

4. Conspiracy

Appellants brought civil conspiracy claims against all Appellees. Aside from a reference to Appellees' contentions that **Saudi** law does not recognize claims for civil conspiracy, Appellants offer no argument on this issue and do not even allege that such claims are viable under **Saudi** law. They make no attempt to challenge expert Saba's opinion that:

> The law of **Saudi** Arabia does not provide a private party with a cause of action or other remedy against a third party for conspiring to perform an act, whether that act is itself a compensable wrong or not. Depending upon the nature of the act, the person who commits the act may or may not be liable to his victim. In any event, however, another person is not liable for conspiring with the actor.

Given that Appellants direct us to no record evidence to controvert the notion that **Saudi** law provides no cause of action for conspiracy independent of the underlying conduct and, alternatively, our conclusion that Appellants' other tort claims are not viable under **Saudi** Arabian law, the trial court was justified in dismissing Appellants' claims for civil conspiracy. Accordingly, we overrule all of Appellants' points of error to the extent they challenge the outcome of Appellants' civil conspiracy claims under **Saudi** Arabian law.

D. Public Policy

Appellants alternatively urge that none of their claims should be governed by **Saudi** Arabian law because their claims involve rights the vindication of which implicates the fundamental public policy of Texas. Appellants rely on Sections 6(2)(b) and 6(2)(c) of the Restatement and on *DeSantis,* 793 S.W.2d 670, in which case the Texas Supreme Court found that enforcement of a noncompetition agreement that constituted an unreasonable restraint on work performed in Texas implicated the fundamental public policy of the State. *DeSantis* involved a contract claim gov-

erned by Section 187(2) of the Restatement, which is particularly deferential to the public policy of a state with a materially greater interest than the state 34*34 selected by the parties in the determination of the issue. That *DeSantis* involved a contract claim renders it irrelevant to Appellants' tort claims. Moreover, we resolved Appellants' contract claims under Section 187(1) of the Restatement, which does not expressly consider the public policy of the chosen state. Thus, we found Appellants' contract claims controlled by Texas law because the parties' contractually agreed to subject disputes to United States law, not because the public policy of the State of Texas favored the application of its law.

Sections 6(2)(b) and 6(2)(c) of the RESTATEMENT do not alter our conclusion that Appellants' tort claims are governed by **Saudi** Arabian law. These sections direct courts to consider the policies of the forum. Whether or not Texas has an important policy interest in policing the conduct of subsidiaries of businesses with Texas offices that occurs outside Texas and has no effect on its territory, this is only one of several factors listed in Section 6. Further, Section 145 of the Restatement directs us to consider Section 6 factors in light of the specific contacts listed in Section 145. Appellants labor under a heavy burden when they allege error in a failure to consider two of seven factors, which seven factors are to be applied in light of four other factors, which in turn are subject to varying applications depending on their relative importance to a particular issue. In a discussion of the fundamental state policy exception to the general rule of Section 187(2), which we emphasize is irrelevant, the Texas Supreme Court indicated the exception's narrow scope.

> Comment *g* to section 187 does suggest that application of the law of another state is not contrary to the fundamental policy of the forum merely because it leads to a different result than would obtain under the forum's law. We agree that the result in one case cannot determine whether the issue is a matter of fundamental state policy for purposes of resolving a conflict of laws. Moreover, the fact that the law of another state is materially different from the law of this state does not itself establish that application of the other state's law would offend the fundamental policy of Texas. In analyzing whether fundamental policy is offended under section 187(2)(b), the focus is on whether the law in question is a part of state policy so fundamental that the courts of the state will refuse to enforce an agreement contrary to that law, despite the parties' original intentions, and even though the agreement would be enforceable in another state connected with the transaction.

DeSantis, 793 S.W.2d at 680 (emphasis added). We think this indication of the narrowness of the fundamental policy exception in Section 187(2) applicable to tort claims examined under Section 145 to the extent Section 145 directs courts to consider the policies of the forum and other interested states as directed by Section 6. We therefore approach Sections 6(2)(b) and 6(2)(c) with the presumption that they will rarely be dispositive.

There is no evidence to suggest the trial court failed to consider or attributed too little weight to the public policy of Texas. We have examined the relationships among the parties, Texas, **Saudi** Arabia, and the subject matter of this litigation pursuant to the Restatement and concluded that the parties and this litigation have the most significant relationship to **Saudi** Arabia. Interestingly, the Texas Supreme Court's adherence to the Restatement leads us to further conclude that

the Restatement's most significant relationship test itself is woven into the fabric of Texas policy. Thus, even if Texas had a significant policy interest in giving extraterritorial effect to its own laws, it would be countered by Texas' interest in having the tort claims in this litigation governed by the state with the most significant relationship to the claims and parties. We therefore overrule all of Appellants' points of error to the extent they challenge the trial court's judgment based on the fundamental policy of the State of Texas.

III. CONCLUSION

Having overruled Appellants' first and second points of error with respect to all claims, having overruled Appellants' third point of error with respect to tort claims, and having sustained Appellants' first point of error with 35*35 respect to contract claims asserted against the Al-Rushaid Appellees, we affirm the judgment of the trial court dismissing all of Appellants' claims against DARMCO and the Dresser Appellees and their tort claims against the Al-Rushaid Appellees, and reverse the judgment of the trial court dismissing the contract claims against the Al-Rushaid Appellees. We hold Appellants' contract claims against the Al-Rushaid Appellees governed by Texas law and remand the case for trial of these claims[14].

McCOLLUM, J., not participating.

[1] Although Al-Rushaid is never unambiguous, he states in one pleading that he "does business as" ARTC and ARIC. We shall refer to Al-Rushaid and his affiliated business interests collectively as the Al-Rushaid Appellees.

[2] The rule reads in pertinent part:

The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises.... The court, and not a jury, shall determine the laws of foreign countries. The court's determination shall be subject to review as a ruling on a question of law.

(emphasis added).

[3] We recognize that summary judgment is most appropriate when the only disputed issues are questions of law, and we do not imply otherwise. We mean only that a question of law is less sensitive to extant factual controversies because it is the trial court that must resolve them, while summary judgment with respect to issues not exclusively committed to the trial court is precluded by any genuine issue of material fact.

[4] DARMCO and the Al-Rushaid Appellees refer to this document as CARL's Articles of Association. Although this is not self-evident, the document's appearance supports such a characterization.

[5] Perhaps obviously, we work from certified English translations of the Arabic documents.

[6] That one of the arbitration clauses provides a procedure for dispute resolution in the event arbitration fails does not alter our conclusion. First, one would expect to find such a provision in an arbitration clause, not in a choice of law clause. Second, we find this contention neutralized by the clauses' unexplained direction to what is apparently the same **Saudi** Arabian entity both for arbitration and for resolution in the event arbitration fails.

[7] No party suggests that the choice of law clause's reference to United States law should implicate the law of any other American State.

[8] Because Appellants bring contract claims against only the Al-Rushaid Appellees, the following discussion does not directly apply to DARMCO and the Dresser Appellees or to the tort claims against the Al-Rushaid Appellees. It applies only to Appellants' claims against the Al-Rushaid Appellees for breach of contract.

[9] The Kriol contract, CARL's bylaws, the Working Agreement, the Loan Agreement, and the Technical Assistance Agreement.

[10] We find all Al-Rushaid Appellees encompassed by the choice of law clause because of Al-Rushaid's failure to even attempt to clarify his relationships with his business interests. Appellants allege each is Al-Rushaid's alter ego, and he directs us to no record evidence that controverts this allegation.

[11] Section 6 sets out the general principles by which the more specific rules are to be applied, and states in full:

Choice-of-law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

[12] Section 145 lists factual matters to be considered when applying the principles of Section 6 to a tort case, and states in full:

The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

[13] As a preliminary matter, Appellees challenge the admissibility of Gnichtel's testimony, claiming it is hearsay because Gnichtel conceded that many of his opinions and much of his knowledge of **Saudi** law resulted from conversations with a colleague who, unlike Gnichtel, is a licensed **Saudi** Arabian lawyer. We find it unnecessary to resolve this allegation because of our conclusions about the results of Appellants' tort claims under **Saudi** law.

[14] In what they denominate a conditional cross-point of error, the Al-Rushaid Appellees purport to challenge the trial court's alleged implicit overruling of their Plea In Abatement, which they filed simultaneously with their Motion For Summary Judgment, and urged as an alternative ground for disposition of the case. Their Plea In Abatement sought abatement based on comity and forum non conveniens. That the trial court never ruled on the plea is fatal to their claim that it was implicitly overruled when the trial court granted their Motion For Summary Judgment. The Al-Rushaid Appellees cite no authority to support their apparent contention that comity and forum non conveniens are necessarily prerequisite issues to a conflict of laws issue. Because the trial court has not ruled on the Al-Rushaid Appellees' Plea In Abatement, there exists no order or judgment from which they can appeal. We therefore do not address the issue, and our opinion does not prevent the Al-Rushaid Appellees from urging their plea on remand.

VIRGINIA

CATEGORY: Shariah Marriage Law

RATING: Highly Relevant

TRIAL: TCSNA

APPEAL: ACSNA

COUNTRY: Pakistan/Algeria

URL:
http://scholar.google.com/scholar_case?case=2168631726409730647&q=Islamic+OR+Sharia+OR+Muslim+OR+Islam&hl=en&as_sdt=4,47

AHMED FARAH V. NAIMA MANSUR FARAH.

Record No. 0184-92-4.

Court of Appeals of Virginia.

May 11, 1993.

627*627 Ted Kavrukov, Arlington (Kleiman & Kavrukov, on briefs), for appellant.

George E. Tuttle, Jr., for appellee.

Present: BARROW, BENTON and COLEMAN, JJ.

COLEMAN, Judge.

In this appeal from a declaratory judgment and divorce decree, we hold that a proxy marriage celebrated in England will not be recognized as a valid marriage in Virginia. Accordingly, we hold that the trial judge erred by declaring the Farahs' marriage to be valid in Virginia based on the trial judge's finding that the marriage was valid under **Islamic** or Pakistani law. Thus, because no valid marriage existed under Virginia law, the trial judge erred by granting the parties a divorce and by equitably distributing their property pursuant to Code § 20-107.3. We remand the case to the trial court to vacate the declaratory judgment and divorce decree and for such further proceedings as may be necessary.

Ahmed Farah is a citizen of Algeria. Naima Mansur is a citizen of Pakistan. They have resided in Virginia for several years. They belong to different **Muslim** sects. They signed a proxy marriage form (the "Nikah") that is used to solemnize marriages by members of the Ahmadiyya **Muslim** community. The "Nikah" or marriage contract also provided that Ahmed Farah would receive a deferred payment of $20,000 as the wife's dower. On July 31, 1988, Ahmed Farah and Naima Mansur purported to enter into a **Muslim** marriage through their proxies in London, England. Neither Ahmed Farah nor Naima Mansur was present in England during the ceremony. No marriage certificate was issued by any court or governmental authority in England. According to testimony at trial, under **Islamic** law and Pakistani law, which generally recognizes **Islamic** religious law, the parties to the "Nikah" are legally married once the proxy ceremony is complete. During the ceremony, a member of the **Muslim** community solemnizes the marriage in the presence of the parties' proxy representatives and their witnesses.

Approximately one month after the "Nikah" was solemnized in London, the parties 628*628 went to Pakistan for three days, where Naima Mansur's father held a reception (the "Rukhsati") in their honor. Under the tradition of the wife's **Islamic** sect, the "Rukhsati" symbolizes the sending away of the bride with her husband. The parties returned to Virginia in September of 1988 and purchased a house that was jointly titled in both names. They had intended to have a civil marriage ceremony when they returned to the United States, but they never did so. They lived together in Virginia as husband and wife for about one year when, on June 29, 1989, they separated, and Ahmed Farah filed a bill to have the marriage declared void and Naima Mansur filed for divorce and equitable distribution.

At trial, Ahmed Farah introduced testimony from a solicitor of the Supreme Court of England and Wales[1] that a marriage performed in England is void *ab initio* unless all statutory formalities of the Marriage Act[2] are satisfied. The Marriage Act of England requires issuance of a marriage license, fifteen-day residence in England by one of the parties before the marriage, and the issuance of a certificate of marriage by a duly authorized registrar of marriages. Ahmed Farah and Naima Mansur, in their proxy marriage, did not obtain a special license nor did they comply with any of the formalities required by the Marriage Act of England.

Naima Mansur contends that, even though they did not comply with the requirements of the Marriage Act of England, her marriage to Ahmed Farah is valid and must be recognized in Virginia. She asserts that the English law governing her marriage is not applicable because the marriage ceremony was completed in Pakistan 629*629 by conducting the "Rukhsati," and, furthermore, that the proxy marriage conducted in London was valid under Pakistani law, which recognizes a valid **Islamic** marriage.

A marriage that is valid under the law of the state or country where it is celebrated is valid in Virginia, unless it is repugnant to public policy. *Kleinfield v. Veruki,* 7 Va.App. 183, 186, 372 S.E.2d 407, 409 (1988). A marriage that is void where it was celebrated is void everywhere.

Spradlin v. State Compensation Commissioner, 113 S.E.2d 832, 834 (W.Va.1960). Although the trial judge found that the marriage was celebrated in England, he ruled, however, that

the marriage of the parties took place in London under Moslem law which was applicable to the parties, that the marriage by proxy is sanctioned under Moslem law and that the law of the state of Pakistan sanctions marriages performed under the personal law of the parties which in this case was Moslem law.... The Commonwealth of Virginia recognizes the marriage as consistent with **Islamic** law and therefore as valid by a state, viz., Pakistan, to which the comity of recognition is due.

The trial court granted the parties a divorce based upon a separation of more than one year and ordered equitable distribution of their jointly owned marital residence by evenly dividing the equity of approximately $62,000.

The fact that Pakistan may recognize the parties' marriage as valid because it was valid according to **Islamic** religious law does not control the issue of the validity of the marriage under Virginia law. In Virginia, whether a marriage is valid is controlled by the law of the place where the marriage was celebrated. *Kleinfield,* 7 Va.App. at 186, 372 S.E.2d at 409. Thus, the question is whether aspects of the marriage were performed in Pakistan, as the wife contends, so that it was a marriage celebrated in Pakistan, or whether it was a valid marriage celebrated in England.

The only aspect of the **Muslim** ceremony that occurred in Pakistan was the "Rukhsati," or reception, which the evidence showed is merely a custom that has no legal significance and is not a formality required for a legal marriage in Pakistan. Furthermore, at trial, evidence was presented that even Pakistan would not recognize the proxy marriage in England as valid because, contrary to **Islamic** law, the parties had not signed the "Nikah" at the same time and also because the wife was a member of a controversial **Muslim** sect that the Pakistani government did not recognize. No evidence established that a marriage ceremony, or any part of it, occurred in Pakistan or that it was celebrated in any jurisdiction other than England.

Because the marriage was contracted and celebrated in England, the validity of the marriage is determined according to English law. *Id.* at 186, 372 S.E.2d at 409. The Marriage Act of England requires that a marriage be contracted in strict compliance with its statutory formalities.[3] None of those formalities were complied with in the proxy marriage. Therefore, the marriage was void *ab initio* in England and is void in Virginia.

Furthermore, Ahmed Farah and Naima Mansur did not enter into a common-law marriage that Virginia recognizes. Virginia does not recognize common-law marriages where the relationship is created in Virginia. *Offield v. Davis,* 100 Va. 250, 253, 40 S.E. 910, 914 (1902). Virginia does recognize a common-law marriage that is valid under the laws of the jurisdiction where the common-law relationship was created. *Kleinfield,* 7 Va.App. at 186, 372 S.E.2d at 409; *Metropolitan Life Ins. Co. v. Holding,* 293 F.Supp. 854, 857 (E.D.Va.1968). There is no evi-

dence, however, that Ahmed Farah and Naima Mansur created a common-law marriage by entering into a relationship as husband and wife in any jurisdiction that recognizes common-law marriages.

For these reasons, we hold that Ahmed Farah and Naima Mansur never entered 630*630 into a marriage that is recognized as valid in Virginia. Accordingly, no marriage existed from which the trial judge could grant a divorce according to Virginia law. Therefore, we reverse the trial judge's declaratory judgment finding that the parties entered into a valid marriage, and we remand the matter for the circuit court to vacate the divorce decree and order of equitable distribution. We leave the parties to seek such other remedies as are appropriate to determine and resolve their property rights.

Reversed and remanded.

[1] The Supreme Court of England and Wales is the highest appellate court in England and Wales, consisting of the Court of Appeal and the High Court of Justice and formally known as the Supreme Court of Judicature of England and Wales. *See The Bluebook: A Uniform System of Citation,* 252-53 (15th ed. 1991).

[2] "Requisites of valid marriage and presumption of validity. The requisites of a valid marriage according to English law include ... that certain forms and ceremonies should be observed. Absence of the requisites of a valid marriage results in the marriage being void or voidable, and, in the case of marriages celebrated after 31st July 1971, the only grounds on which they may be void or voidable are those laid down by statute. *See* Matrimonial Causes Act, 1973, ch. 18 § 11 (Eng.) and Marriage Act, 1949, 12, 13 & 14 Geo. 6, ch. 76, § 25 (Eng.).

* * * * * *

Methods of lawful marriage in England and Wales. The Marriage Acts require that every marriage should be by banns, license or superintendent registrar's certificate or certificate and license or naval officer's certificate, and, except in the case of a marriage according to the usages of the Jews or Quakers and of a marriage by special license, that it should be solemnised in a church or chapel of the Church of England in which marriages may lawfully be solemnised, or in a superintendent's registrar's office, or in a nonconformist church or building duly registered for the solemnisation of marriages or in a naval, military or air force chapel.

Effect of disregard of requirements as to forms and ceremonies. Where persons knowingly and wilfully intermarry in disregard of certain requirements as to the formation of marriage, the marriage is void. (citing Marriage Act, 1949, 12, 13 & 14 Geo. 6, ch. 76, § 25 (Eng.))."

22 Halsbury's Laws of England, *Husband and Wife* ¶¶ 907, 913-14 (4th ed. 1979).

Section 25 of chapter 76 of the Marriage Act, 1949, provides, in pertinent part:

"25. If any persons knowingly and wilfully intermarry according to the rites of the Church of England (otherwise than by special license)—

(a) in any place other than a church or other building in which banns* may be published;

(b) without banns having been duly published, a common licence having been obtained, or a certificate having been duly issued under Part III of this Act by a superintendent registrar to whom due notice of marriage has been given;

* * * * * *

or if they knowingly and wilfully consent to or acquiesce in the solemnization of the marriage by any person who is not in Holy Orders, the marriage shall be void."

The Matrimonial Causes Act, 1973, declares certain purported marriages to be a nullity, as follows:

"11. A marriage celebrated after 31st July 1971 shall be void on the following grounds only, that is to say—

(a) that it is not a valid marriage under the provisions of [the Marriages Acts 1949 to 1986] that is to say where—

* * * * * *

(iii) the parties have intermarried in disregard of certain requirements as to the formation of marriage; ...."

* Banns is notice of a proposed marriage proclaimed in a church or other place prescribed by law in order that any person may object who knows of an impediment to the marriage.

[3] *See* fn. 2 *supra.*

CATEGORY: Child Custody

RATING: Relevant

TRIAL: TCSY

APPEAL: ACSNA

COUNTRY: N/A

URL:
http://scholar.google.com/scholar_case?case=16847921671131278039&q=Sharia,+OR+Muslim,+OR+Islam,+OR+Islamic&hl=en&as_sdt=4,47

403 S.E.2d 1 (1991)

ACCOMACK COUNTY DEPARTMENT OF SOCIAL SERVICES V. KHALIL MUSLIMANI.

Record No. 0051-90-1.

Court of Appeals of Virginia.

April 2, 1991.

Bruce D. Jones, Jr., Accomac, for appellant.

J. Nicholas Klein, III (Klein & Hopkins, Keller, on brief), for appellee.

Thomas B. Dix, Jr. (Glen A. Tyler; Tyler, Custis, Lewis and Dix, Accomac, on brief), guardian ad litem.

Present: BAKER, BARROW and WILLIS, JJ.

BARROW, Judge.

This appeal is from three orders denying a petition of the Accomack County Department of Social Services (the "Department") for the custody of three infant children. The trial court determined that the children were not neglected and allowed them to remain in the custody of their father, Khalil Muslimani. The Department contends that the trial court erred in not reopening the proceeding to receive additional evidence and in denying the Department's petition for custody. We hold that it is in the best interests of the children to reopen the proceeding to receive the ad-

ditional evidence offered by the Department, and, therefore, we do not reach the issue of whether the trial court erred in denying the Department's petition for custody.

On January 6, 1978, Khalil Muslimani married Ruth Johnson. Ruth had two children of her own when she married Muslimani: Stacey, age three, and Selena, age two. During the marriage, Ruth and Muslimani produced three female children: Samira, Fatina, and Somiah ("the three children" or "the three girls"). At the time of trial, these children were eleven, ten, and nine years old, respectively.

Gail Walker, child protective service coordinator for the Department, testified that Muslimani acknowledged to the Department that he began a sexual relationship with Stacey when she was eleven. At trial, Muslimani did not explicitly verify this and, in fact, invoked his fifth amendment right not to incriminate himself. However, when Muslimani was asked at trial whether he became sexually interested in Stacey at age ten or eleven, he answered that "this sudden relationship" came about as the result of a dream in 1985 in which his grandfather told him that he was going to have a son even though Ruth could no longer have children. Ms. Walker further testified that when Stacey was twelve, Muslimani fathered a son by her, Rasheed Muslimani. One year and nine months later, Muslimani fathered another child by 2*2 Stacey, Christina Muslimani.[1] Muslimani also acknowledged that when Stacey was eleven, she aborted a child he believed to be his.

In February, 1988, Ruth obtained a Dominican Republican divorce from Muslimani. In August, 1988, the Department received a complaint from Ruth. As a result of the complaint, the Department conducted a sexual abuse investigation. However, a few days later Ruth called back and said she had "made the whole thing up." On July 30 or 31, 1989, Ruth called again and made allegations of sexual abuse of Stacey. After further investigation, the Department removed Selena from Ruth's custody and the remaining three children from Muslimani's custody and placed all the children in foster homes.

The Juvenile and Domestic Relations District Court entered an emergency order granting temporary custody to the Department and providing limited visitation to the father. However, twelve days later, after a hearing, the court returned custody of the children to their father, and the Department noted its appeal. On October 19, 1989, following that decision but before the appeal was heard in circuit court, Muslimani and Stacey were married in Maryland.

On October 31, 1989, the trial court held a custody hearing concerning the children. In addition to her testimony described above, Gail Walker testified that Muslimani, in all other ways, was a good father to the children and that the children did not like foster care. However, she stated that Muslimani was a "high risk" because his relationship with Stacey was incestuous (he raised her as a daughter) and incestuous fathers "tend to move from one child to another."

Dr. Richard Shea, a child psychologist, testified as an expert for the Department. Since he had not interviewed any of the children or Muslimani, he testified by way of hypothetical question. He stated that Stacey is sexually abused and that the relationship might cause short term confusion, insecurity and emotional disturbance in the younger children, which, if untreated, might have long term effects. When asked if it would be best for all the children to stay together with their father, Dr. Shea stated, "If somebody had determined that they are not at risk."

Dr. Paul Mansheim, a psychiatrist who was originally contacted by the Department to interview Muslimani, was Muslimani's expert witness. Dr. Mansheim, who had interviewed Muslimani and all the children, testified that Muslimani is not a pedophile because when he embarked on his relationship with Stacey, he intended to be responsible for her and to marry her. He explained that Muslimani began his relationship with Stacey because he felt compassion for her (her mother was "off gallivanting with Selena") and because he wanted a son and Ruth could no longer have children. He stated that it was not uncommon in Muslim culture for a man to marry a very young woman. Further, Dr. Mansheim testified that Stacey was not sexually abused, that the three girls were not at risk, and that it was in their best interests to remain with Muslimani (as they wished to do). He did admit, however, that Stacey was raised as a daughter by Muslimani, that incestuous fathers tend to move down the line of available children, and that the three girls will be more likely than other girls to accept sex with older men as appropriate.

The trial judge stated that he was "very much impressed" with Dr. Mansheim's testimony even though "there are a few things that I don't agree with."

The Department put on two witnesses in rebuttal. First, Dr. Satar Abdul Ahmadi, a Muslim, testified that it is absolutely forbidden in Muslim culture to marry one's stepdaughter. Second, Selena Johnson, Stacey's sister, testified that Muslimani had sexually assaulted her repeatedly beginning when she was nine years old.

3*3 Selena, who left Muslimani's home with her mother Ruth and is now in foster care, testified that Muslimani began to make "passes" at her when she was nine years old, that he would "grab me on the behind if I was walking past him, or ... little things ... [that] I didn't pay much attention to ... at first." He then began to come into her bedroom at night and would lie beside her rubbing her arm or body. He then began to try to have sex with her and, finally, made her perform oral sex on him. He also performed oral sex on her. She said that he "made it seem like it was my fault ... [t]hat I was wrong, that I wanted to do it."

Muslimani denied Selena's allegations. He described them as fabrications and attributed them to her mother and to her mother's animosity toward him. He explained that Selena, when she lived with him, shared a bedroom with Stacey and that it would have been impossible for the events Selena described to have occurred without Stacey having been aware of them.

In granting Muslimani custody of the three girls, the trial judge stated that "there is absolutely no evidence before this Court that these three children have ever been abused in any way" and that "we should [not] take children away from a parent on speculation or fear of what possibly could happen in the future when there is no evidence of that." In his final orders dated December 13, 1989, the trial judge found that Samira, Somiah, and Fatina were not neglected and were not "subject to risk of sexual abuse and impairment of mental and bodily functions."

On December 29, 1989, the Department made motions to vacate the orders on the basis of an affidavit in which Dr. Joseph Allen, a psychiatrist who is a member of the same professional group as Dr. Mansheim, swore to the following facts: that he had read the testimony of Dr. Mansheim; that sexual intercourse with a ten or eleven year old girl by a thirty-eight year old man constituted sexual abuse; that a decision as to custody of the three girls "should not be based to any extent upon the testimony of Paul Mansheim, M.D." The trial court denied the motions.

Muslimani argues that the motion to reopen the proceeding and admit new evidence should be treated as a motion for a new trial based on after-discovered evidence and, therefore, the Department had to prove that even with the exercise of reasonable diligence, the evidence could not have been secured for use in the trial. *See* *Odum v. Commonwealth,* 225 Va. 123, 130, 301 S.E.2d 145, 149 (1983). *Odum* does not provide the standard by which a trial court should be guided in considering a motion to reopen a case regarding the disposition of a child custody case under Code § 16.1-279. Except after sixty days from the date of an order committing a child to the Department of Corrections, a trial court on its own motion may reopen any case disposed of under Code § 16.1-279 and modify or revoke its order. Code § 16.1-289.

The overarching concern in all custody cases is the best interests of the child. *Bailes v. Sours,* 231 Va. 96, 99, 340 S.E.2d 824, 826 (1986). Finality, not the child's best interests, underlies the after-discovered evidence rule. *See* *Powell v. Commonwealth,* 133 Va. 741, 751, 112 S.E. 657, 660 (1922) ("a failure of justice ... is not so great an evil as that there should be no certain end to litigation"). Finality in litigation is only one of the factors used in determining a child's best interests. Since circumstances affecting a child's best interests may change periodically, finality is not a paramount consideration. Concerns for finality particularly diminish in comparison to concerns that a child may be "at risk of being abused or neglected by a parent or custodian who has been adjudicated as having abused or neglected another child in the care of the parent or custodian." Code § 16.1-279. Whether a disposition under Code § 16.1-279 should be reopened is, therefore, determined by the child's best interests.

Additionally, the goal of finality was not furthered by the trial court's denial of the Department's motion to reopen because the children remained with Muslimani. The 4*4 status quo would not be affected unless the court reversed Its original decision.

The trial court's order states only that there was "no adequate reason" to vacate its previous order. There was no transcript of any hearing on this motion, and we cannot determine why the trial court chose not to reopen the matter.

Muslimani not only did not dispute but admitted that he had had sexual intercourse with a child no more than eleven years old as to whom he stood *in loco parentis,* an act so offensive to this society's mores that it constitutes a serious criminal offense. *See* Code § 18.2-61(A)(iii); *see also* *Roe v. Roe,* 228 Va. 722, 727-28, 324 S.E.2d 691, 694 (1985). The affidavit of the psychiatrist filed with the motion to reopen the case directly contradicted and challenged the testimony of Dr. Mansheim, the only evidence upon which the trial court could have relied in awarding Muslimani custody. Admittedly, it remains unexplained why the Department failed to present the testimony of the other psychiatrist at trial; however, this failure, although an appropriate concern reflecting on the need for finality, has nothing to do with the best interests of these children. The affidavit of the psychiatrist bore directly on the children's best interests, the credibility of the testimony relied upon by the trial court in the original hearing and the correctness of the earlier order. Therefore, the trial court abused its discretion in refusing to reopen the proceeding to take further evidence. Therefore, the trial court's denial of the motion to reopen the case for the presentation of additional evidence is reversed and this matter is remanded for further proceedings consistent with this opinion.

Reversed.

[1] At the time of trial, Rasheed was two years old and Christina was eleven months old. Custody of these children are not at issue in this appeal.

CATEGORY: Shariah Marriage Law

RATING: Relevant

TRIAL: TCSI

APPEAL: ACSNA

COUNTRY: N/A

URL: http://scholar.google.com/scholar_case?case=3242900300587812172

ALI AFGHAHI, V. NEDA GHAFOORIAN

Record No. 1481-09-4.

Court of Appeals of Virginia, Alexandria.

March 30, 2010.

Fred M. Rejali for appellant.

Jahangir Ghobadi (Jahangir Ghobadi, P.C., on brief), for appellee.

Present: Judges Humphreys, Kelsey and Petty.

MEMORANDUM OPINION[*]

JUDGE ROBERT J. HUMPHREYS.

Ali Afghahi ("husband") appeals a ruling of the Circuit Court of Fairfax County ("the circuit court") ordering him to pay 514 gold coins to Neda Ghafoorian ("wife"), pursuant to what the circuit court construed as a premarital contract between the parties.[1] On appeal, husband argues that the circuit court erred in (1) allowing the marriage contract into evidence; (2) allowing wife to testify as to Iranian and Islamic law; (3) re-opening the case to take additional evidence after it had taken his motion to strike under consideration; (4) awarding wife 514[2] gold coins when the unrebutted evidence was that the parties had no assets and never owned 514 gold coins; and (5) awarding wife 514 gold coins without any expert testimony as the contents of the marriage contract and the law of the forum where it was executed. Husband also contends that the circuit court erred in finding that the marriage contract was not unconscionable. For the following reasons, we affirm.

ANALYSIS

A. Procedurally Defaulted

Rule 5A:18 provides, in pertinent part, that "[n]o ruling of the trial court . . . will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling." "An appellate court must dispose of the case upon the record and cannot base its decision upon appellant's petition or brief, or statements of counsel in open court. We may act only upon facts contained in the record." Smith v. Commonwealth, 16 Va. App. 630, 635, 432 S.E.2d 2, 6 (1993). "[O]n appeal the judgment of the lower court is presumed to be correct and the burden is on the appellant to present to us a sufficient record from which we can determine whether the lower court has erred in the respect complained of." Justis v. Young, 202 Va. 631, 632, 119 S.E.2d 255, 256-57 (1961). "In the absence [of a sufficient record], we will not consider the point." Jenkins v. Winchester Dep't of Soc. Servs., 12 Va. App. 1178, 1185, 409 S.E.2d 16, 20 (1991) (citation omitted).

More specifically, "[w]e cannot review the ruling of a lower court for error when the appellant does not bring within the record on appeal the basis for that ruling or provide us with a record that adequately demonstrates that the court erred." Prince Seating Corp. v. Rabideau, 275 Va. 468, 470-71, 659 S.E.2d 305, 307 (2008). Where we do not have the benefit of a transcript of the proceedings, we can consider only that which is contained in the written statement signed by the trial judge. Jenkins, 12 Va. App. at 1185, 409 S.E.2d at 20.

1. Admissibility of Evidence: Marriage Contract

Husband argues that the circuit court abused its discretion in admitting the marriage contract and its BBC Multilingual English translation ("BBC translation") into evidence for two reasons: (1) it was not the original document, therefore the best evidence rule barred its admission; and (2) they were not properly authenticated as government documents.

In this case, there is nothing in the record noting either husband's objection to the admission of the marriage contract or the grounds for it. Nor is there anything in the record providing the basis for the trial court's decision overruling husband's objection. The statement of facts merely notes that the marriage contract was ultimately admitted "over the objection by [husband]" without stating what the specific objection was. In addition, the statement of facts does not even reference the BBC translation or whether husband objected to its admission into evidence. Further, the notations on the final decree simply state, "evidentiary objections made in ct [sic] as to best evidence rule pertaining to documents presented and translation of said documents not being accurate was ultimately overruled by the court." To reach the merits of this argument, this Court would have to assume that the objections noted on the final decree were made contemporaneously and specifically with regards to the admitted marriage contract and BBC translation. We decline to do so as the burden is on the appellant to present us with a sufficient record upon which we can determine whether the circuit court erred. Justis, 202 Va. at 632, 119 S.E.2d at 256-57.

2. Lack of Expert Testimony

Husband further argues that the circuit court erred in awarding wife the coins on the basis that the marriage contract was vague and unenforceable because expert testimony was not presented at trial. Specifically, he contends that the marriage contract is vague on its face because (1) the marriage portion is referred to as both a "gift" and an "obligation" with no specific due date provided; and (2) there was no expert testimony regarding the meaning of "marriage portion" or the law of the forum where it was executed.

However, this issue is also procedurally barred under Rule 5A:18 because there is nothing in the record showing that it was specifically raised before the circuit court. The record simply notes in the final decree that husband objects because "[t]he marriage certificate was executed in a foreign forum and no expert testified as to the law of that forum. The certificate itself is not sufficient to make such award and is vague." We have nothing in the record establishing when or in what context husband raised the issue of the marriage contract being vague to the circuit court or the circuit court's ruling on this issue. See Prince Seating Corp., 275 Va. at 470-71, 659 S.E.2d at 307 ("We cannot review the ruling of a lower court for error when the appellant does not bring within the record on appeal the basis for that ruling or provide us with a record that adequately demonstrates that the court erred."). Therefore, this issue was not preserved and we cannot reach its merits.

3. Marriage Contract Unconscionable

Husband also argues the circuit court erred in finding that the marriage contract was not unconscionable. Specifically, he contends that the marriage contract was unconscionable based on extreme inequity, which justifies equitable relief.

Once again, the record fails to show that the husband presented this issue to the trial court or the basis for the circuit court's ruling on the issue, as required by Rule 5A:18. Further, husband's objection on the final decree simply states "It is unconscionable." Because we are limited to the record before us, and the burden is on the appellant to present a sufficient record upon which we can determine if the trial court erred, there is nothing upon which this Court can turn to determine if the circuit court committed reversible error. Thus, we do no reach the merits of this issue.

B. Wife's Testimony

Husband argues that the circuit court erred in allowing wife to testify as to Iranian and Islamic law, since she was neither qualified nor offered as an expert on these subjects.

In this case, wife merely testified "she was owed 514 Bahar-E-Azadi gold coins as her marriage portion and that she was entitled to receive them at any time she demanded in accordance with [the marriage contract] executed by the parties in presence of witnesses." She further testified that "by signing the [marriage contract] [husband] had obligated himself to pay her 514 coins upon demand." Husband contends that this testimony was wife opining as to the meaning of a term in the marriage contract. However, these statements do not constitute expert testimony as to

the meaning of a term in the contract or specifically what Iranian or Islamic law was with regard to marriage contracts. It was merely the testimony of wife as to what she believed she was owed in a contract that she had signed.

Thus, she was not required to be qualified as an expert on Iranian and Islamic law and the circuit court did not err in allowing wife to testify.

C. Admittance of Additional Evidence

Husband contends that the circuit court abused its discretion when it re-opened the case and admitted additional evidence after wife rested and the court had taken husband's motion to strike under consideration.

[T]he reopening of a case and the admission of additional evidence after one or both parties have rested is a matter within the discretion of the trial court and its action will not be reviewed unless it affirmatively appears that this discretion has been abused or unless the admission of such additional evidence works surprise or injustice to the other party.

Laughlin v. Rose, 200 Va. 127, 129, 104 S.E.2d 782, 784 (1958).

In this case, there is no showing that the trial court abused its discretion in admitting the additional evidence, or that it was a surprise or injustice to the other party. As part of her case-in-chief, wife attempted to admit a copy of the marriage contract and an English translation into evidence, and further testified that she had an original copy but did not have it presently with her in court. Thus, it was to be anticipated and even expected that she would seek the admission of the original and an English translation of the marriage contract into evidence. Therefore, we hold that the trial court did not abuse its discretion nor was the admission a surprise or injustice to husband.

D. Award of 514 Gold Coins

Lastly, husband contends that the circuit court erred in awarding wife the 514 gold coins when the unrebutted evidence was that the parties had no assets and had never owned the coins. Husband specifically argues that the trial court abused its discretion in that it misapplied Code §§ 20-107.3 and 20-109 by granting a monetary award when no value had been set for the award, the estate or the coins.[3]

In this case, the circuit court did not equitably distribute the coins pursuant to Code § 20-107.3 because it did not view the property as marital property. In its letter opinion on October 27, 2008, the circuit court ordered husband to pay wife the 514 gold coins because it found them "due and payable under the *binding contract* entered by the parties, ..." (Emphasis added). In Virginia, parties are permitted to enter into premarital agreements, which are akin to contracts, in which they can "contract with respect to . . . [a]ny other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." Code § 20-150. Because the circuit court found the coins due under a premarital agreement, the trial court

did not abuse its discretion in that it did not even apply Code § 20-107.3 to the facts in this case. Thus, we hold that the circuit court did not err in ordering the 514 gold coins due and payable.

Affirmed.

[*] Pursuant to Code § 17.1-413, this opinion is not designated for publication.

[1] The parties were married in Iran after executing a "Deed of Marriage" in that country which in pertinent part states as follows:

Ushering in prosperity and auspiciousness: The gift of a tome of Holy Koran valued at 50,000 Rials [Iranian currency], a bar of rock candy, and the pledge of five hundred fourteen (514) full Bahar-e Azadi (Liberty Spring) gold coins remaining totally the liability of the husband who must pay the above-mentioned wife.

For informational purposes, and to provide perspective for the issue in this case, we note that based upon current exchange rates 50,000 Iranian Rials is equivalent to approximately $5 in United States currency, and a Bahar-e Azadi (Liberty Spring) gold coin is legal tender in Iran and a single coin is the equivalent of 2,800,000 Iranian Rials. Thus, at current exchange rates, the 514 gold coins in dispute in this case approximate $141,100 in United States currency.

[2] Husband on brief has the number of gold coins owed as 540, yet the final decree of divorce and the statement of facts note that the number of gold coins owed is 514.

[3] Code § 20-107.3 establishes the procedures that the courts must follow in determining the equitable distribution of marital assets and that a monetary award can only be granted "based upon the equities and rights and interests of each party in the marital property." Robinette v. Robinette, 4 Va. App. 123, 129, 345 S.E.2d 808, 811 (1987). Code § 20-109 provides the rules for changing the maintenance and support for a spouse.

WASHINGTON

CATEGORY: Child Custody

RATING: Highly Relevant

TRIAL: TCSY

APPEAL: ACSN

COUNTRY: Phillippines

URL:
http://scholar.google.com/scholar_case?case=3451076662061183171&q=Islamic+Law&hl=en&as_sdt=100000000000004

947 P.2d 745 (1997)

88 Wash.App. 746

IN RE THE CUSTODY OF R., MINOR CHILD. DATO PADUKA NOORDIN, RESPONDENT, V. DATIN LAILA ABDULLA, APPELLANT.

No. 21565-9-II.

Court of Appeals of Washington, Division 2.

November 14, 1997.

As Modified on Denial of Reconsideration January 16, 1998.

747*747 Theodore C. Rogge, Geoffrey C. Cross, P.S. Inc., Tacoma, for Appellant.

Robert Everett Prince, Prince Kelley Marshall & Coombs, P.S., Seattle, for Respondent.

746*746 HUNT, Judge.

Datin Laila Abdulla (Ms. Abdulla) appeals an emergency habeas corpus order granting custody of her son, R., to his father, Dato Paduka Noordin (Mr. Noordin), based on a prior custody decree of the Muslim Shari'a Court of the Philippines. The trial court denied Ms. Abdulla's request

for a continuance to obtain a certified copy[1] of an order of the Philippine Regional Court for Pasig City (the Regional Court), a suburb of Manila, which held that the Shari'a Court lacked jurisdiction.

We reverse and remand.

FACTS[2]

I

MARRIAGE—PHILIPPINES AND BRITISH COLUMBIA

Mr. Noordin and Ms. Abdulla each seek custody of their son, R., born out of wedlock[3] on July 10, 1987, in the Philippines. Mr. Noordin is a national of the Independent State of Brunei, located on the Island of Borneo. Ms. Abdulla is apparently a national of the Philippines. They were married under Muslim rites on November 28-29, 1988, in Majlis Ugama Islam Sabah, Malaysia. After their marriage they apparently lived in Brunei and then, in the early 1990's, moved to Victoria, British Columbia, where they remarried in a civil ceremony on June 2, 1992. A year or so later, they returned to Pasig City, Manila, Philippines.

II

ANNULMENT PETITION—PHILIPPINE REGIONAL COURT

By June 1995, the marriage had deteriorated. The parties separated on July 2, 1995, on which date Mr. Noordin assaulted Ms. Abdulla. He threatened to take R., telling Ms. Abdulla's family that they would never see him again. Alleging emotional and physical abuse, on June 30, 1995, Ms. Abdulla filed a petition in the Pasig City Regional Court, located in Manila, for annulment of the marriage and for custody of R. Mr. Noordin claims that he was not served with notice of the annulment action, but acknowledges that his attorney was notified.

III

SUBSEQUENT DIVORCE—MUSLIM SHARI'A COURT

Four days later, on July 4, 1995, Mr. Noordin flew to the Island of Denowel, outside Manila, and filed for a divorce by "talaq"[4] in the Muslim Shari'a Court in Cotabato City. Ms. Abdulla was allegedly served with notice on July 6. During this time both parties and 748*748 their son were still living in Pasig City, Manila.

Three weeks later, on July 27, 1995, the Shari'a Court, proceeding without Ms. Abdulla and R., granted Mr. Noordin's petition for divorce and full custody of R. In the court order, the Shari'a Court stated:

After a judicious evaluation of the petitioner [Mr. Noordin] and the evidence adduced by the Petitioner ex-parte, this Court finds the Petitioner's Notice of Talaq dated July 4, 1995 as meritorious and in order, and in accordance with the General Principle of **Islamic law**.

On this point, the Holy Qur'an says:

"Do divorce woman at their prescribed period"

The anxillary [sic] petition for custody of a minor child is also granted.

"In **Islamic** Jurisprudence, when one of the spouses turn into a `murtad'[5] the custody of their child/children is awarded to the innocent spouse, and if both are guilty of turning into a `murtad' the state shall determined custody of the same."

WHEREFORE, in the light of the foregoing, and considering the nature of Talaq as non-adversarial, the same is hereby approved....

III

PHILIPPINE REGIONAL COURT RULED MUSLIM SHARI'A COURT LACKED JURISDICTION

Meanwhile, the annulment[6] and custody proceeding initiated by Ms. Abdulla in the Regional Court of Pasig City was still pending. Mr. Noordin filed a motion to dismiss the Regional Court action on grounds that the Muslim Shari'a Court had jurisdiction. On August 18, 1995, the Regional Court of the Philippines in Pasig City granted Ms. Abdulla temporary custody of R. pending resolution of Mr. Noordin's motion to dismiss. On August 29, 1995, the Regional Court denied Mr. Noordin's motion and concluded that the Regional Court, not the Muslim Shari'a Court, had jurisdiction.

On December 19, 1995, the Regional Court denied Mr. Noordin's motion for reconsideration:

The motion is denied. Presidential Decree No. 1083 [recognizing Muslim Court Authority] does not preclude Muslims from resorting to remedies available in ordinary courts like the Regional Trial Courts as in the case of the parties here who are residents of Pasig City, a place where there is no Shari'a Court. Being so, when the petition was filed on June 30, 1995, this Court acquired jurisdiction over the case to the exclusion of other courts including the Shari'a Circuit Court, Shari'a district, Maganoy, Miguindanao, where respondent filed another petition on July 4, 1995.

The Philippine Court of Appeals denied Mr. Noordin's request for review of the Regional Court's order.

The Regional Court apparently gave custody to Ms. Abdulla pending final determination of the case, and allowed her to remove R. from the Philippines.[7]

IV

PIERCE COUNTY SUPERIOR COURT

Without informing Mr. Noordin, Ms. Abdulla and R. left the Philippines and moved to the United States in late 1995. Ms. Abdulla 749*749 has since remarried and enrolled R. in school in the State of Washington.

On September 24, 1996, Ms. Abdulla obtained a temporary order for protection in Pierce County Superior Court, restraining Mr. Noordin from having any contact with his son. Mr. Noordin did not know the whereabouts of R. or his mother until October 8, 1996, when he received a report from Interpol.

On Friday, January 24, 1997, Mr. Noordin filed a petition for a writ of habeas corpus, asking that custody of his minor son be restored to him in accordance with the Muslim Shari'a Court order. On that date a Pierce County court commissioner entered an order granting temporary custody of R. to Mr. Noordin, pending an emergency hearing scheduled for Monday, January 27, 1997, at 11:00 a.m. Later that same day, the court commissioner reversed his order sua sponte and returned R. to the custody of Ms. Abdulla pending the hearing.

The following Monday, the parties appeared before Pierce County Superior Court Judge Nile Aubrey. At this emergency hearing, Ms. Abdulla's attorney asserted that the Muslim court did not have jurisdiction over the parties because Ms. Abdulla had filed suit first in the Regional Court of Pasig City. The trial court initially tried to determine which of the two foreign court actions had priority, looking both at which action was commenced first and whether there had been valid service. It asked whether Ms. Abdulla's attorney had certified copies of any court orders. Because in the Philippines it was then 2:00 A.M. the following day, and because he had had only hours to prepare for the emergency hearing, Ms. Abdulla's attorney requested additional time to obtain certified copies of the orders issued by the Regional Court.

As an offer of proof, Ms. Abdulla's attorney asked the court to examine uncertified copies of documents from the Regional Court:

[COUNSEL]: I would note from a couple of documents I will hand up, there is an issue concerning the jurisdiction of this Muslim court to enter the decree.

THE COURT: I don't entertain motions as far as jurisdiction. That will have been determined by the court there and not here. You know, this is entitled to the same full faith and credit as a decree from Alaska or Tennessee or California. So if you want to argue jurisdiction you have to do it in the court where the certified copy of decree of divorce was entered.

[COUNSEL]: The court in Manila has previously ruled that that decree was invalid because they lacked the jurisdiction—

THE COURT: You mean another court?

[COUNSEL]: No, the court where the annulment action has ruled that the Muslim decree—

THE COURT: But, what I'm saying is those are two different courts.

[COUNSEL]: That is correct.

THE COURT: So, what I'm saying is I'm not convinced by what the court for the annulment said, because I have a certified copy that says this man is entitled to custody.

[COUNSEL]: Your Honor—

THE COURT: I don't think one court— in other words, a court in Connecticut can't rule this court doesn't have jurisdiction.

[COUNSEL]: And, that is precisely the issue here. I'm asking the court today to make a determination that one decree isn't any more valid than the action that is ongoing. The Philippines Court of Appeals has ruled it was not a valid action. Mr. Noordin here brought a motion to set aside the annulment on the basis of the decree entered by the Muslim court. That motion was denied. So, he brought a motion for reconsideration, and that was denied. And, it was because of the fact they did not have jurisdiction.

I've had four hours of preparation and I don't have all the documents. I can get them from the Philippines, but not in that short period of time, so I can show the court what the status of this case is.

When counsel handed the court a copy of the Regional Court order denying Mr. Noordin's motion for dismissal, the court stated:

750*750 THE COURT: Well, this [the copy of the Pasig City Order] is not certified or anything. This is just a piece of paper.

[COUNSEL]: And, all I'm asking for is the opportunity to get the certified copies of the doc[u]ments here so I can prepare this matter. I have had three hours notice in which to prepare for this hearing.

The Court denied counsel's repeated requests to continue the hearing.

The trial court called Ms. Abdulla to the stand and questioned her. At one point during the questioning, Ms. Abdulla asked the judge, "Are you mad at me, your honor?" The judge responded, "I don't like what you did. You took his son with the intent of never telling him where he was. We don't like that as judges."

At the conclusion of the hearing, the court gave full faith and credit to the Muslim Shari'a Court order and granted custody of R. to Mr. Noordin, with reasonable visitation to Ms. Abdulla. The court also authorized Mr. Noordin to take R. with him to Brunei the following Friday.

V

APPEAL

Ms. Abdulla obtained an emergency stay from the Court of Appeals, Division II, and retains custody of R. pending the outcome of this appeal.

On appeal, Ms. Abdulla contends that (1) the trial court erred in denying her request for a continuance to challenge the jurisdiction of the Muslim Shari'a Court; and (2) the trial court erred when it failed to apply the best interest of the child standard. Ms. Abdulla also requests that Judge Aubrey be disqualified from hearing the case on remand and that she be awarded attorney fees.

Mr. Noordin argues that Ms. Abdulla is precluded from contesting the validity of the Muslim Shari'a order because she recognized the Shari'a Court divorce and has since remarried. Mr. Noordin also requests attorney fees.

ANALYSIS

I

HABEAS CORPUS PROCEEDINGS

RCW 7.36.020 provides that:

Writs of habeas corpus shall be granted in favor of parents, guardians, limited guardians where appropriate, spouses, and next of kin, and to enforce the rights, and for the protection of infants and incompetent or disabled persons within the meaning of RCW 11.88.010; and the proceedings shall in all cases conform to the provisions of this chapter.

The person bringing an action in habeas corpus must be able to show a preexisting legal right to custody. Where one parent seeks custody of a minor child from the other parent by writ of habeas corpus, in order to warrant issuance of writ and hearing thereon, the writ-seeking parent must make a prima facie showing of legal right to custody of the child, paramount to the right of the other parent. *Schreifels v. Schreifels,* 47 Wash.2d 409, 414, 287 P.2d 1001 (1955). Accordingly, the party seeking custody by way of habeas corpus proceeding must affirmatively show that he is entitled to custody of the child.[8] Ms. Abdulla attempted to show that Mr. Noordin had no legal right to custody by virtue of the Muslim court order, but the trial court would neither honor her uncertified copy of the Regional Court order showing that the Shari'a Court lacked ju-

risdiction nor grant her a short continuance to obtain a certified copy. The record before us indicates that Mr. Noordin's claimed right to 751*751 custody was questionable at best. His request for a writ should have been denied.

A. Enforcement of Foreign Custody Decree

Article IV, section 1 of the United States Constitution provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

American courts extend "full faith and credit" only to sister states, not to foreign jurisdictions.[9] The Muslim Shari'a Court of the Philippines is not a sister state of the State of Washington; Washington courts therefore do not extend full faith and credit to that court's judgments.

An American court will enforce a foreign judgment in the United States only if convinced that the foreign court had jurisdiction to act. RESTATEMENT (SECOND) OF CONFLICT OF **LAW**, § 98 cmt. c, § 92, § 104 (1971). A party may challenge enforcement of a foreign order by raising any defense to the validity of the order which would be cognizable in the foreign jurisdiction. *State ex rel. Eaglin v. Vestal,* 43 Wash.App. 663, 719 P.2d 163 (1986). *See generally* RCW 26.21.530; *see also Wampler v. Wampler,* 25 Wash.2d 258, 170 P.2d 316 (1946); RESTATEMENT (SECOND) OF CONFLICT OF **LAW**, § 112-15 (1971). Accordingly, when a court is called upon to enforce the judgment of a foreign court, the opposing party must be given an opportunity to show the foreign judgment would not be entitled to cognition in the foreign state itself. *Eaglin,* 43 Wash.App. at 663, 719 P.2d 163; *see also In re Estate of Wagner* 50 Wash.App. 162, 748 P.2d 639 (1987).

B. Trial Court Discretion

Here, the trial court decided to enforce the Muslim Shari'a Court order without affording Ms. Abdulla a meaningful opportunity to contest the validity of that order. Ms. Abdulla made a credible offer of proof that the Muslim Shari'a order would not have been enforceable in the Philippines, and therefore, was not entitled to recognition in this state. In addition, Ms. Abdulla had less than one working day to respond to Mr. Noordin's pleadings; in fact, her lawyer had only four hours. At the very least, if the trial court would not honor the non-certified copies, it should have given Ms. Abdulla an opportunity to obtain certified copies of the Regional Court orders, which cast doubt on the validity of the Muslim Shari'a Court's jurisdiction.

II

CONTINUANCE

We review the trial court's denial of a motion for a continuance for abuse of discretion. *Port of Seattle v. Equitable Capital Group, Inc.,* 127 Wash.2d 202, 898 P.2d 275 (1995).

Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

This case involves enforcement of a foreign custody decree, entered by a court which, according to another foreign court, lacked jurisdiction. The trial court abused its discretion in denying a continuance to Ms. Abdulla, who, with her attorney, had appeared on very short notice. At the very least the trial court should have allowed the parties reasonable time to prepare for a full hearing on the enforceability of the foreign Shari'a Court custody order, which the trial court initially questioned because that action was filed after Ms. Abdulla's annulment petition in the Regional Court. Moreover, the trial court asked for copies of certified court 752*752 orders. It appears to have been swayed by Mr. Noordin's certified court order from the Shari'a Court but refused to accord Ms. Abdulla's attorney an equal opportunity to obtain a certified copy of the Regional Court's contrary order.

Furthermore, the Regional Court's ruling that the Shari'a Court lacked jurisdiction appears supported by these undisputed facts: (1) The couple's son had never resided in the jurisdiction of the Shari'a Court or appeared before that court; and (2) he was born out-of-wedlock, rendering Mr. Noordin's paternity questionable, if not nonexistent, under Muslim **law**.[10] Ms. Abdulla also raised the issue of whether the Shari'a Court would have extended to her due process in a divorce by talaq,[11] even if that court had had jurisdiction over her and her son.

Accordingly, we reverse the trial court's habeas corpus grant of custody of R. to Mr. Noordin and remand for further proceedings consistent with this opinion. If on remand Ms. Abdulla can show that the Muslim Shari'a Court did not have jurisdiction under the laws of the Philippines, the court must find that order unenforceable.

III

THE BEST INTEREST STANDARD

The proceeding below was for the limited purpose of determining whether to grant Mr. Noordin's petition for a writ of habeas corpus. Even if Mr. Noordin can prove on remand that the Muslim Shari'a Court order is valid under Philippine **law**, the court below may need to determine whether, in light of the substantive **law** and procedure employed by the Muslim Shari'a Court, the Shari'a Court order is enforceable in the State of Washington.

When determining whether to enforce a foreign custody decree, the courts must abide by general principles of comity[12] and the Uniform Child Custody Jurisdiction Act ("UCCJA"), codified at RCW 26.27.010 to 26.27.910. The UCCJA has been adopted with minor variations in all 50 states and the District of Columbia. *See* UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 115-16 (1988). The UCCJA is the jurisdictional **law** that governs both interstate and, to some extent, international child custody disputes. The UCCJA mandates enforcement of valid custody decrees rendered in other states.

RCW 26.27.130 provides:

Recognition of out-of-state custody decrees. The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this chapter or which was made under factual circumstances meeting the jurisdictional standards of this chapter, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those in this chapter.

753*753 The UCCJA applies to international custody cases by virtue of RCW 26.27.230, which states:

International application. The general policies of this chapter extend to the international area. The provisions of this chapter relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

RCW 26.27.900 provides that the UCCJA shall be construed in conjunction with chapter 26.09 RCW,[13] which controls in the event of irreconcilable conflict. The plain language of RCW 26.27.230, which states that the foreign legal institutions must be similar in nature, also supports the conclusion that the trial court may consider the substantive **law** of the foreign court when determining whether to enforce a foreign custody decree.

In *In re Ieronimakis,* 66 Wash.App. 83, 831 P.2d 172 (1992), Division One of this court held that Washington courts should give effect to custody decrees of foreign nations in the same manner they would to sister states. But Washington courts presented with foreign custody judgments should consider our strong public policy favoring the best interests of the child.[14] *See e.g. Al-Fassi v. Al-Fassi,* 433 So.2d 664 (3d Dist.Ct.App.1983). In *Ieronimakis,* Division One noted that the foreign court involved (Greece) had given its assurances that custody decisions were based on the best interests of the child.

The Maryland courts have formulated the following test for determining whether to enforce foreign custody decrees: An order is presumed to be correct; this presumption shifts to the party

contesting the order, who has the burden of proving by a preponderance of the evidence that (1) the foreign court did not apply the "best interest of the child" standard, or that (2) in making its decision, the foreign court applied a rule of **law** or evidence or procedure so contrary to public policy as to undermine confidence in the outcome of the trial. *Malik v. Malik,* 99 Md.App. 521, 638 A.2d 1184 (Spec.App.1994).

Based on this analysis and RCW 26.27.230, even if the Shari'a Court had jurisdiction to enter the custody decree, Ms. Abdulla is entitled to an opportunity to prove that the Shari'a Court proceedings were conducted in a manner contrary to Washington state **law** and public policy.

IV

REMARRIAGE OF MS. ABDULLA

Jurisdiction cannot be conferred by consent of the parties. *See Wampler,* 25 Wash.2d at 267, 170 P.2d 316. The fact that Ms. Abdulla has remarried does not preclude her contest of the Shari'a Court's jurisdiction. Mr. Noordin's argument, that Ms. Abdulla is estopped from attacking the jurisdiction of the Muslim Shari'a,[15] is without merit.

Moreover, even if Ms. Abdulla were somehow estopped from challenging the Shari'a Court's divorce, such estoppel would have no bearing on the question of the Shari'a Court's jurisdiction to determine custody of R., especially where, under the facts and laws before this court, Mr. Noordin does not appear to meet the Muslim **law** requisites for establishing paternity.[16]

V

BIAS

Ms. Abdulla seeks disqualification of Judge Aubrey on remand. In considering 754*754 this argument we assume no actual bias. Nonetheless justice must satisfy the appearance of impartiality. *State v. Romano,* 34 Wash.App. 567, 662 P.2d 406 (1983); *Brister v. Council of City of Tacoma,* 27 Wash.App. 474, 619 P.2d 982 (1980); *Chicago, Milwaukee, St. Paul and Pac. R.R. Co. v. Washington State Human Rights Comm'n,* 87 Wash.2d 802, 557 P.2d 307 (1976) (judiciary should avoid even mere suspicion of irregularity, or appearance of bias or prejudice.)

Here, Ms. Abdulla spontaneously responded to the trial court's questioning of her with this question, "Are you mad at me, your honor?" To which the judge replied, "I don't like what you did.... We don't like that as judges." Based on this dialogue, coupled with the trial court's denial of Ms. Abdulla's requested continuance, we remand for a hearing before a different judge to promote the appearance of fairness.

VI

ATTORNEY FEES

Attorney fees may be awarded in a civil case when authorized by statute or upon a recognized equitable ground. *Woodcraft Constr., Inc. v. Hamilton,* 56 Wash. App. 885, 887, 786 P.2d 307 (1990) (citing *Clark v. Horse Racing Comm'n,* 106 Wash.2d 84, 92, 720 P.2d 831 (1986)). Ms. Abdulla cites to no authority in support of her proposition that she is entitled to attorney fees. Accordingly, we deny her request.

Mr. Noordin requests attorney fees pursuant to RCW 26.27.150(2), which provides that "[a] person violating a custody decree of another state which makes it necessary to enforce the decree in this state may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody...." But Mr. Noordin has not shown that Ms. Abdulla violated a *valid* custody decree of "another state." Moreover, Ms. Abdulla also apparently has a temporary custody decree issued by the Philippine Regional Court. Mr. Noordin has failed to demonstrate that he is entitled to attorney fees. We therefore deny his request.

CONCLUSION

For the foregoing reasons, we reverse and remand for further proceedings before a different trial court judge, consistent with this opinion.

HOUGHTON, C.J., and SEINFELD, J., concur.

[1] Because Ms. Abdulla had less than 24 hours notice of the emergency hearing, she had presented only uncertified copies of the Philippine court orders.

[2] The facts herein recited are gleaned from the scant record, the parties' briefs and their appendices.

[3] That R. was born more than one year before his parents' marriage is significant under Muslim **law**, which apparently establishes legitimacy only if the child is conceived during marriage or born no earlier than six months following consummation of marriage. *See* OFFICIAL GAZETTE, Republic of Philippines, Vol. 73, No. 20, *Philippine Presidential Decree No. 1083,* Title III, Art. 58, 59 (1997).

[4] Under the Shari'a Muslim **law**, a man may effectuate a divorce under "talaq," which is defined as "repudiation of the wife by the husband."

[5] "Murtad" is an apostasy to Islam. The court's finding that Ms. Abdulla had committed murtad is apparently based on Mr. Noordin's allegations that Ms. Abdulla practiced the Catholic faith and had R. baptized.

[6] The Philippines apparently do not recognize divorce of a Philippine national, especially one who is Catholic.

[7] A January 30, 1997, telefax from Wilhelmina Joven, Ms. Abdulla's counsel in the Philippines, explains:

the custody of the minor may have been considered to have been awarded to Datin Laila (Ms. Abdulla) due to the Order of the Court dated July 17, 1995[,] ordering a hold departure order of the child without prior court approval.... This motion was filed because Dato Noordin was then trying to kidnap the child and was attempting to bring him out of the country.

The Pasig Court however allowed Datin Laila to bring the child out of the country subsequent thereto.

[8] No recent Washington cases have discussed use of habeas corpus proceedings to obtain custody of children. It is not clear whether in Washington the court may proceed with a custody determination in a habeas proceeding, as apparently allowed in some states. *See May v. Anderson,* 345 U.S. 528, 532, 73 S.Ct. 840, 842, 97 L.Ed. 1221 (1953), noting

the procedure in states where a court, upon securing the presence before it of the parents and children in response to a writ of habeas corpus, may proceed to determine the future custody of the children. *See e.g., People of State of New York ex rel. Halvey v. Halvey,* 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (New York Procedure) [1947].

May, 345 U.S. at 542 n. 4, 73 S.Ct. at 843 n. 4.

[9] "No such right, privilege or immunity, however, is conferred by the Constitution ... in respect to the judgments of foreign states or nations...." *Aetna Life Ins. Co. v. Tremblay,* 223 U.S. 185, 190, 32 S.Ct. 309, 310, 56 L.Ed. 398 (1912).

[10] *Presidential Decree No. 1083,* ch. 3, § III, art. 58-59 states:

Legitimacy, how established.—Legitimacy of filiation is established by evidence of valid marriage between the father and mother at the time of the conception of the child.

Legitimate children.—(1) Children conceived in lawful wedlock shall be presumed to be legitimate. Whoever claims illegitimacy of or impugns such filiation must prove his allegation.

(2) Children born after six months following the consummation of marriage or with two years after the dissolution of the marriage shall be presumed to be legitimate. Against this presumption no evidence shall be admitted other than that of the physical impossibility of access between the parents at or about the time of the conception of the child.

[11] *Presidential Decree No. 1083,* ch. 3, § 1, art. 46 states:

Divorce by tala ~ g. (1) A divorce by tala ~ g may be effected the husband in a single repudiation of his wife during her non-menstrual period (tuhr) within which he has totally abstained from carnal relation with her. Any number of repudiations made during one tuhr shall constitute only one repudiation and shall become irrevocable after the expiration of the prescribed `idda.

[12] Usually, the court must also consider treaties such as the Hague Convention. However, since the Philippines is not a signatory to that treaty, it does not apply here.

[13] The best interest of the child standard is codified at RCW 26.09.002 and 26.09.260.

[14] *See also* RESTATEMENT (SECOND) OF CONFLICTS OF **LAW** § 90 (1971): "No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum."

[15] It appears that under Muslim talaq, it would have been futile for Ms. Abdulla to protest her husband's repudiation and request for divorce, which apparently is granted to the husband automatically upon his unilateral repudiation of his wife (*see* note 4).

[16] *See* notes 2, 9.

CATEGORY: Shariah Marriage Law

RATING: Highly Relevant

TRIAL: TCSY

APPEAL: ACSN

COUNTRY: Afghanistan

URL: http://scholar.google.com/scholar_case?case=11471974690494340511&q=Islamic+Law&hl=en&as_sdt=100000000000004

226 P.3d 787 (2010)

IN RE THE MARRIAGE OF HUSNA OBAIDI, RESPONDENT, AND KHALID QAYOUM, APPELLANT.

No. 27616-3-III.

Court of Appeals of Washington, Division 3.

February 23, 2010.

788*788 Eric J. Engel, Andre L. Lang, Engel Law Group PS, Seattle, WA, for Respondent.

Timothy Harold Esser, Roger J. Sandberg, Esser & Sandberg PLLC, Pullman, WA, for Appellant.

KULIK, C.J.

¶ 1 A mahr is a prenuptial agreement based on **Islamic law** that provides an immediate and long-term dowry to the wife. Husna Obaidi and Khalid Qayoum, both children of Afghan immigrants, signed a mahr agreement written in Farsi during an engagement ceremony known as a Nikkah ceremony. Mr. Qayoum, who does not speak, read, or write Farsi, did not know about the mahr until 15 minutes before he signed it. An uncle explained the mahr to Mr. Qayoum after he had signed it. After a 13-month marriage, Ms. Obaidi filed a petition for dissolution of the marriage. Ms. Obaidi asserts that the mahr requires Mr. Qayoum to pay her $20,000 upon divorce.

¶ 2 The question presented here is whether the mahr is a valid agreement. We conclude that under neutral principles of contract **law**, the parties did not enter into an agreement for payment of

$20,000 to the wife upon divorce. Therefore, we reverse the trial court's enforcement of the mahr. We affirm the trial court's award of attorney fees.

FACTS

¶ 3 Ms. Obaidi and Mr. Qayoum were married for approximately 13 months. At the time of the marriage, Ms. Obaidi was 19 and Mr. Qayoum was 26. Mr. Qayoum is a United States citizen and has lived in the United States since he was three. Ms. Obaidi is from Canada.

¶ 4 The parties are both children of Afghan immigrants and the couple was married according to Afghan custom. As part of these customs, the parties signed a "mahr" agreement during an engagement or Nikkah ceremony held on December 30, 2005. The Nikkah ceremony is a religious ceremony that is similar to a wedding reception at a typical Christian wedding. At some point during the Nikkah ceremony, Ms. Obaidi and Mr. Qayoum, along with a small group of family and friends, went into a smaller room. Verses from the Koran were read and Ms. Obaidi and Mr. Qayoum each swore to take the other as his or her spouse. As part of the ceremony, the parties signed the mahr.

789*789 ¶ 5 A mahr is an agreement based on **Islamic law** under which a husband agrees to pay a dowry to his wife. Generally, there is a short-term portion and a long-term portion. The short-term portion is due immediately. The long-term portion is the amount that the wife is entitled to take with her in the event of a divorce. In the mahr at issue here, the short-term portion was $100 and the long-term portion was $20,000.

¶ 6 The Nikkah ceremony was conducted in Farsi, except when Mr. Aji-sab, who performed the ceremony, asked Mr. Qayoum if he wanted to marry Ms. Obaidi. Mr. Qayoum does not speak, read, or write Farsi. Mr. Qayoum has lived in the United States for all but two or three years of his life. He considers himself "American first." Report of Proceedings at 107. He explained that he went through the Afghan marriage process because his mother was concerned that he would lose even the small amount of cultural knowledge he had about Afghanistan.

¶ 7 Mr. Qayoum testified that he had never heard the word "mahr" before the day of the Nikkah ceremony. He acknowledged that he had previously attended a couple of receptions, but he stated that he was unfamiliar with the Nikkah ceremony. According to Mr. Qayoum, he was not informed of the Nikkah ceremony until 10 or 15 minutes before the event took place. At some point, Mr. Qayoum selected an uncle to act as his representative during the discussions that took place as part of the Nikkah ceremony. The mahr, in total, states:

Marriage Certificate (Nekah Certificate)

Marriage Ceremony between Mr. Khalid Qayoum and Ms. Husna (the daughter of Mr. Habebullah Khan Obaidi) on December 29, 2005 took place in the presence of:

Witnesses:

1 — Mr. Abdullah Khan {Signed}

2 — Mr. Mohammad Aref Khan {Signed}

The proxy for groom (Khalid) was Mr. Abdul Sabour Khan {Signed}

The proxy for bride (Husna) was Mr. Hafezullah Khan {Signed}

Experts:

Haji Hayatullah Khan, Lateefullah Khan, Hemayetullah Khan, Abdul Khalil Qayoum, Javid, and Ehsan Khan {Signatures}

Short term marriage portion: One hundred Canadian Dollars

Long term marriage portion: 20,000.00 Dollars

The organizer: Mohammad-Ullah Faizi

Signatures of each witnesses [sic], proxies and experts {Signed and dated 12-29-2005}

Clerk's Papers (CP) at 42.

¶ 8 In the Afghan culture, the couple is considered married upon the completion of the Nikkah ceremony and, after this ceremony, Ms. Obaidi and Mr. Qayoum began holding themselves out as husband and wife. They later had an **Islamic** marriage ceremony on July 21, 2006, and solemnized their marriage civilly in Whitman County on November 6, 2006.

¶ 9 The parties lived with Mr. Qayoum's mother, starting in August 2006. On May 8, 2007, Ms. Obaidi, at her husband's request, went to Afghanistan for three and one-half months. Shortly after her return, she was asked to leave her mother-in-**law's** house. On December 7, Ms. Obaidi filed a petition for dissolution of marriage in King County Superior Court. In February 2008, the case was moved to Whitman County.

¶ 10 After the dissolution trial, the court entered findings of fact and conclusions of **law**. The written findings of fact and conclusions of **law** incorporate the court's oral ruling. The trial court concluded that Ms. Obaidi was entitled to the $20,000 mahr. Ms. Obaidi was awarded $8,250 in attorney fees and costs. This appeal followed.

¶ 11 On appeal, Mr. Qayoum contends the mahr contravenes the Washington policy of no fault divorce, the mahr is not enforceable as a contract or as a prenuptial agreement, the court's award of attorney fees to Ms. Obaidi was improper, and Mr. Qayoum should have been awarded his attorney fees in connection with the motion to change venue.

790*790 ANALYSIS

¶ 12 A party challenging decisions made in a dissolution proceeding must show that the trial court abused its discretion. *In re Marriage of Griffin,* 114 Wash.2d 772, 776, 791 P.2d 519 (1990). A court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds for untenable reasons. *In re Marriage of Tower,* 55 Wash.App. 697, 700, 780 P.2d 863 (1989).

¶ 13 On appeal, a trial court's findings of fact will be upheld if supported by substantial evidence. *Sunnyside Valley Irrigation Dist. v. Dickie,* 149 Wash.2d 873, 879, 73 P.3d 369 (2003). "Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise." *In re Marriage of Hall,* 103 Wash.2d 236, 246, 692 P.2d 175 (1984).

¶ 14 A New Jersey case, *Odatalla v. Odatalla,* 355 N.J.Super. 305, 309, 810 A.2d 93 (2002), provides a helpful framework for considering the application of state **law** to a mahr agreement. In *Odatalla,* the trial court ordered the specific performance of the mahr agreement. The husband appealed, arguing that review of the mahr by a state court was precluded under the doctrine of separation of church and state. The husband also argued that the agreement was not a valid contract under New Jersey **law**. *Id.*

¶ 15 The *Odatalla* court looked for guidance to *Jones v. Wolf,* 443 U.S. 595, 602-03, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979), which explained the "neutral principles of **law**" approach that allows agreements to be enforced based on neutral principles of **law**, not religious doctrine. In *Jones,* a dispute over the ownership of church property was taken to a civil court in Georgia. The court set aside the separation of church and state issues by applying the neutral principles of **law** doctrine. Justice Blackmun explained, "We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even when no issue of doctrinal controversy is involved." *Id.* at 605, 99 S.Ct. 3020. In other words, the court determined that the controversy over the ownership of the property could be decided on neutral principles of **law**, not upon religious beliefs or policies. *Id.*

¶ 16 Based on *Jones,* the *Odatalla* court determined that the mahr did not violate the separation of church and state doctrine if the court could apply neutral principles of **law** to the enforce the mahr. *Odatalla,* 355 N.J.Super. at 311, 810 A.2d 93. The court concluded that the mahr could be enforced by applying neutral principles of contract **law**. *Id.* at 312, 810 A.2d 93. Notably, the court found all the elements of a contract even though the husband argued that the mahr was too vague to apply because it did not state when the money would be due. *Id.* at 313, 810 A.2d 93. Because the court determined that the mahr was simply a contract between two consenting adults, the court concluded that the mahr was not against public policy. *Id.* at 314, 810 A.2d 93.

¶ 17 Here, we apply neutral principles of Washington **law**. However, the trial court found the wife was not abused, not unfaithful, and did not do anything to create a forfeiture of the mahr

under **Islamic law**. The trial court also found that the husband was not unfaithful, but that he had initiated the separation without good cause. Consequently, the court erred by considering **Islamic law** or fault.

¶ 18 Applying the neutral principles of contract **law**, we can resolve this case by using these neutral principles of **law**, not **Islamic** beliefs or policies. We apply Washington **law** to resolve the issues of the formation and validity of the agreement.

¶ 19 Mr. Qayoum raises arguments under the **law** applying to prenuptial agreements and the **law** of contract. Prenuptial agreements are subject to the principles of contract **law**. *In re Marriage of DewBerry,* 115 Wash.App. 351, 364, 62 P.3d 525 (2003).

¶ 20 Mr. Qayoum asserts the mahr agreement was invalid under contract **law**. We agree. For a valid contract to exist, there must be mutual assent, offer, acceptance, and consideration. 25 DAVID K. DEWOLF, KELLER W. ALLEN & DARLENE BARRIER CARUSO, WASHINGTON PRACTICE, CONTRACT 791*791 **LAW** & PRACTICE § 2:2, at 34 (2d ed.2007). Here, there was no meeting of the minds on the essential terms of the agreement. There were only two terms in the written mahr:

Short term marriage portion: One hundred Canadian Dollars

Long term marriage portion: 20,000.00 Dollars

CP at 42. There was no term promising to pay and no term explaining why or when the $20,000 would be paid.

¶ 21 A valid contract requires a meeting of the minds on the essential terms. *McEachern v. Sherwood & Roberts, Inc.,* 36 Wash.App. 576, 579, 675 P.2d 1266 (1984). Mr. Qayoum was not told that he would be required to participate in a ceremony that would include the signing of a mahr until 15 minutes before he signed the mahr. Here, Mr. Qayoum was unaware of the terms of the agreement until they were explained to him by an uncle after the mahr had been signed.

¶ 22 The negotiations preceding the execution of the agreement were conducted in Farsi. Also, the document was written in Farsi which Mr. Qayoum does not read, write, or speak. Mr. Qayoum did not have the opportunity to consult with counsel although he was advised by his uncle, who is neither an attorney nor an expert in **Islamic law**, *after* the agreement was signed. Because Mr. Qayoum could not speak, write, or read Farsi, there was no meeting of the minds as to the terms of the mahr agreement.

¶ 23 In addition, the court indicated that the agreement was influenced by duress. In its oral decision, incorporated by reference in the findings of fact, the court stated:

[Y]ou had the opportunity to — if you didn't like the Mahr, if you didn't like what you signed — uh you could have cancelled it. Nobody was holding a gun or sword to your head. You could have decided not to go ahead and get married, uh but you were told, granted at the last minute, what it meant — hey you were going to owe her twenty grand for [the] Mahr — uh, and you went ahead and signed. That there was a lot of pressure from both families that you know you felt kind of psychologically backed into a corner and didn't really have a choice, psychologically coerced in your own mind with family pressures, certainly.

RP at 126-27.

¶ 24 The trial court's finding that the mahr was a valid contract was not supported by substantial evidence. Because we conclude no valid contract was formed, we need not reach the other assertions of error raised by Mr. Qayoum.

¶ 25 Under RCW 26.09.140, the court may award attorney fees after balancing the need of the requesting party against the ability to pay of the nonrequesting party. If a court grants attorney fees under RCW 26.09.140, the court must state on the record the method used to calculate the award. *In re Marriage of Knight,* 75 Wash.App. 721, 729, 880 P.2d 71 (1994). An award of attorney fees is reviewed for an abuse of discretion. *Chuong Van Pham v. Seattle City Light,* 159 Wash.2d 527, 538, 151 P.3d 976 (2007).

¶ 26 Mr. Qayoum does not question the *award* of attorney fees to Ms. Obaidi. Instead, he raises two arguments challenging the *amount* awarded to her.

¶ 27 The court awarded Ms. Obaidi $8,500 in attorney fees. In its oral decision, the court stated:

Now as to the issue of attorneys' fees — clearly the wife has a need; clearly the husband has an ability to pay. I hereby order that he pay her $8,500 — flat fee — towards her costs and fees. She has the ability to pay some, she makes about $15,000 a year; he makes about a hundred grand a year. It doesn't take rocket scientists to figure out where I'm coming from on the proration there.

RP at 128.

¶ 28 Mr. Qayoum asserts that the court abused its discretion by failing to state on the record what method was used to calculate the amount of the attorney fees. The court suggests a method but does not give us all of the relevant figures. Here, the court prorated the attorney fees based on the parties' salaries. The missing figure is the amount of Ms. Obaidi's attorney fees. However, 792*792 Ms. Obaidi testified that she had incurred around $8,000 in fees through the first day of trial. Although the trial court's method is not completely transparent, we cannot say that the court abused its discretion in setting attorney fees.

¶ 29 Based on Mr. Qayoum's motion for reconsideration, the court reduced Ms. Obaidi's award of $8,500 by the $250 Mr. Qayoum requested. Mr. Qayoum now seeks an award of fees under

RCW 4.12.090, but he has waived this argument by failing to ask for an award of fees in his motion for reconsideration.

¶ 30 Ms. Obaidi asks for attorney fees based on her argument that this is a frivolous lawsuit. An appeal is frivolous if there are no debatable issues upon which reasonable minds could differ, and it is so totally devoid of merit that there was reasonable possibility for reversal. *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.,* 107 Wash.2d 427, 443, 730 P.2d 653 (1986) (quoting *Boyles v. Dep't of Retirement Sys.,* 105 Wash.2d 499, 509, 716 P.2d 869 (1986) (Utter, J. concurring in part, dissenting in part)). This appeal is not frivolous.

¶ 31 We hold that under neutral principles of contract **law**, Mr. Qayoum and Ms. Obaidi did not enter into a valid agreement for payment of $20,000 to Ms. Obaidi upon divorce. Thus, we reverse the trial court except as to the award to Ms. Obaidi of $8,250 in attorney fees.

WE CONCUR: BROWN and KORSMO, JJ.

CATEGORY: Shariah Marriage Law

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: Iraq

URL:
http://scholar.google.com/scholar_case?case=16931661244017543438&q=Islamic+Law&hl=en&as_sdt=100000000000004

IN THE MATTER OF THE MARRIAGE OF SOUHAIL ALTAYAR, APPELLANT, AND SARAB ASSWAD MUHYADDIN, RESPONDENT.

No. 57475-2-I

The Court of Appeals of Washington, Division One.

Filed: July 23, 2007

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Souhail Altayar (Appearing Pro Se), 1815 Sw 100th St, Seattle, WA, 98146-3746.

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PER CURIAM

Souhail Altayar challenges a dissolution order under which the trial court divided both community and separate assets. He argues the trial court incorrectly characterized a vacant lot titled in his name as his separate property and ignored a valid prenuptial agreement contained in his **Islamic** marriage contract under which his former wife agreed to accept 19 pieces of gold if the parties divorced. The trial court correctly rejected the prenuptial agreement because the exchange of 19 pieces of gold and one Quran for all community property rights under Washington **law** is unfair on its face. And because there is no evidence establishing that Altayar did not own the vacant lot, the court did not err by including it in the property available for division. We affirm.

FACTS

Souhail Altayar and Sarab Muhyaddin were married in Amman, Jordan, in July 2000. Their marriage was arranged by their families in Iraq after a three day meeting. At the time of their marriage, Altayar had been living in the United States since at least 1982. Muhyaddin joined her husband in the United States in October 2000. The couple's marriage certificate was issued under **Islamic law**, specifying a dowry of one Quran and a payment of 19 grams of 21 karat gold due in the event of divorce or death. The marriage certificate stated that the bride's brother accepted the dowry and Altayar responded by saying "I accept." Judge Wadah Abdelaziz Ibrahim solemnized the contract after "carefully reviewing all documents and authorizations." On September 13, 2001, their daughter was born. The couple separated in May 2004. Muhyaddin alleged that Altayar beat her in their home; Altayar denied this allegation.[1] Altayar filed for dissolution in August 2005. At the time of trial, Muhyaddin had been in the United States for approximately five years and had limited English language skills and no job history.

Before the marriage, Altayar held title to two parcels of real estate, a service garage and a vacant lot. The lot is valued at approximately $110,000. Altayar and his brother testified that the property was titled in Altayar's name so he could manage it for his brother, Faird Altayar, the true owner. At trial, there was evidence that the couple purchased a home in December 2001, valued at $129,000, where they lived with their daughter as the marital home. Muhyaddin testified that Altayar never told her that the marital home would be owned by Faird. In December 2001, Muhyaddin signed a quitclaim deed transferring her interests in the garage, valued at $150,600, and the marital home to Faird Altayar.[2] She testified that she did not understand the documents she was signing but did so because Altayar threatened to kill her if she did not sign. At the time of the trial, the vacant lot, valued at $113,000, remained in Altayar's name.

In its oral ruling, the court found that the quit claim deed for the marital home "was signed under duress and without any understanding on her part." It also held that Muhyaddin did not appear to have any property rights or rights of management to any of the community property during the course of the marriage because she had no credit cards, no checking account, no use of a car and limited use of telephones. Further, it found that even though the marital home had been transferred out of the community, there was still separate property to divide. Despite testimony that all of Altayar's separate property was owned by Faird, there was no evidence that property to which Altayar held title belonged to anyone other than Altayar. The court noted that while the brothers testified that Faird owned separate property and Altayar managed it, there was no evidence Faird paid management fees or any records indicating that it did not belong to Altayar. The court considered a number of factors in its ruling, including the economic circumstances of the parties, the duration of their marriage, and the nature and extent of community and separate property.

On November 28, 2005, the trial court entered its Findings of Fact and Conclusions of **Law**. It identified $16,554 in community property assets, consisting of personal property and checking and savings accounts, and $114,000 of separate property owned by Altayar, consisting of a 1989 Mazda truck worth $2,000 and a parcel of real property, a vacant lot, worth $113,800. The trial court awarded Muhyaddin a judgment of $65,000 on the vacant lot, $3,690 from their bank account, and half the couple's personal property. It awarded Altayar all interest in the vacant lot, subject to the judgment owed to his wife, his 1989 Mazda truck, and all remaining personal property and monies from their bank accounts. The trial court found that there was no written separation contract or prenuptial agreement.[3]

DISCUSSION

Altayar argues that the trial court erred by (1) finding that no separation or prenuptial agreement existed because the parties intended that their marriage contract would control any property division in the event of divorce, and (2) dividing his separate property without making a finding concerning the property's character or considering the nature and extent of the couple's community property. We reject both arguments.

I. Marriage Certificate

Altayar asserts that the trial court made an error of **law** by finding that no prenuptial agreement existed. He contends that the couple's marriage certificate was a fair and reasonable prenuptial agreement, and the trial court erred by failing to analyze it using the factors outlined in In re the Marriage of Matson.[4] He also argues that Muhyaddin waived her right to contest the prenuptial agreement when she acknowledged the existence of the marriage contract.

Muhyaddin argues that her **Islamic** marriage certificate, while enforceable under **Islamic law**, does not limit her community property rights under Washington **law**. She contends that she did not waive her right to contest the existence of a prenuptial agreement by acknowledging her **Islamic** marriage certificate. Alternatively, she asserts that if the marriage certificate is a prenuptial agreement, it is invalid because it was economically unfair on its face. She also contends that Altayar did not present any evidence that she was given a full disclosure of his assets when they married or that she had an opportunity to seek independent advice. Because this was an arranged marriage, she argues that she lacked power to negotiate the terms of the marriage contract.

A prenuptial agreement, created freely and intelligently, is "'conducive to marital tranquility and the avoidance of disputes about property in the future.'"[5] Although prenuptial agreements are not directly authorized by statute, we have long recognized the right of the members of a prospective marital community to contract between themselves regarding their property.[6] But when a prenuptial agreement operates to waive the marital partners' statutory right to an equitable distribution, courts apply a two-prong analysis for evaluating the agreement's validity, as described in In re Marriage of Matson.[7] The court must first determine whether the agreement was sub-

stantively fair and reasonable for the party not seeking to enforce it.[8] If so, the court analyzes whether the agreement was entered into voluntarily and with full knowledge by determining whether the parties fully disclosed their respective assets and had an opportunity to obtain independent counsel.[9] In its written order, the trial court stated that no prenuptial agreement existed. Altayar's arguments do not persuade us otherwise.

A prenuptial agreement is valid only when it is plainly shown that the transaction was fair. The marriage contract in this case was not a substitute for a prenuptial contract under Washington **law**. On its face, the exchange of 19 pieces of gold for equitable property rights under Washington **law** is not fair, and Altayar presented no evidence to prove otherwise. Even if it were a fair agreement, there is no evidence that he disclosed his assets or that Muhyaddin received any independent advice during the three days between their initial meeting and marriage. We reject Altayar's argument that she had an opportunity to seek independent advice because she anticipated an arranged marriage her entire life because any advice during the period before the marriage was arranged would be abstract and essentially meaningless.

II. Property Division

Altayar argues that the $65,000 judgment against him was unfair because the community estate was only $16,000, the marriage was of a short duration, and there was no reasonable basis to award half the value of the vacant lot to his former wife. He does not dispute the division of community assets but argues that the trial court erred by including the vacant lot in the distribution or basing its reasoning on the transfer of the marital home because the transfer was complete and was not before the court. He asserts that the trial court made an error of **law** by declaring the vacant lot his separate property without analyzing the exact nature of his ownership in the land, which he contends was owned by his brother, Faird, but held in his name for management purposes only. He states that Muhyaddin had no part in the acquisition of this land and contributed nothing to its value. He also asserts that 35 year old Muhyaddin is more likely than he to have future earning power because she is in fine health and worked as a high school teacher in Iraq prior to their marriage. He, on the other hand, is 51 years old, in poor health, and has limited employment skills because he has worked only as a general manager and handyman for his brother.

Under RCW 26.09.080, a court has jurisdiction to divide all property owned by a married couple in a dissolution proceeding, whether that property is separate or community. Under the statute, a court may consider the following factors:

(1) The nature and extent of the community property;

(2) The nature and extent of the separate property;

(3) The duration of the marriage; and

(4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time.[10] A property division made during a dissolution proceeding will be reversed on appeal only for manifest abuse of discretion.[11] "'A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.'"[12]

A trial court may not consider "marital misconduct" when dividing property. That phrase refers to immoral or physically abusive conduct within the marital relationship. But the court may consider a spouse's waste, concealment of assets or other actions bearing on the couple's economic interests.[13] The trial court is limited in the manner in which it may consider concealment or waste of assets and liabilities that are not before it.[14] In re Marriage of Kasesurg, we held that the trial court could not consider concealment and waste because it took into account property interests that were extinguished by a proper, unchallenged foreclosure action.[15] Here, the trial court heard testimony about the circumstances surrounding the transfer of the marital home, but it did not divide any interests in that property or consider it when dividing the remaining interests. Rather, it divided the property the parties still held, community and separate, as mandated by RCW 26.09.080.

Nor did the court fail to characterize Altayar's separate property or abuse its discretion in including it as property available for division. The trial court correctly identified the vacant lot as Altayar's separate property in its final written order and in its oral ruling. Although Altayar and his brother testified that he did not own the vacant lot, the trial court's oral ruling made clear that Altayar failed to produce any documentary evidence that he did not own the property. It was clearly within its discretion when it ruled that the documentary evidence of title was more persuasive than the brothers' testimony.

We affirm.

ELLINGTON, and BECKER, JJ.

[1] Both parties maintain that they are divorced according to **Islamic law** because Altayar told Muhyaddin three times that he was divorcing her. On June 30, 2004, Muhyaddin filed for a protection order and was issued a temporary order through July 14, 2004. This temporary order was continued to August 11, 2004. An Order of Protection was issued on August 25, 2004, and the case was transferred to Family Court Services for a domestic violence assessment. At the August 25, 2004 hearing, the court ordered that Altayar's contact with his daughter be professionally supervised at his expense.

[2] In these quitclaim deeds, consideration was listed as a "[g]ift" for one parcel and "[l]ove and [a]ffection" for the other.

[3] Other orders were entered in this matter concerning the couple's daughter. Because these orders are not the subject of this appeal, we do not discuss them.

[4] 107 Wn.2d 479, 482, 730 P.2d 668 (1986).

[5] In re Marriage of Matson, 107 Wn.2d at 482 (quoting Friedlander v. Friedlander, 80 Wn.2d 293, 301, 494 P.2d 208 (1972)).

[6] Id.

[7] Id.

[8] Id.

[9] Id. (citing Whitney v. Seattle-First Nat'l Bank, 90 Wn.2d 105, 110, 579 P.2d 937 (1978)).

[10] RCW 26.09.080.

[11] In re Marriage of Muhammad, 153 Wn.2d 795, 803, 108 P.3d 779 (2005) (citing In re Marriage of Kraft, 119 Wn.2d 438, 450, 832 P.2d 871 (1992)).

[12] Id. (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)).

[13] See, e.g., In re Marriage of Steadman, 63 Wn. App. 523, 527-28, 821 P.2d 59 (1991) (holding that the "marital misconduct" at issue in RCW 26.09.080 "refers to immoral or physically abusive conduct within the marital relationship[,] . . . not . . . gross fiscal improvidence, the squandering of marital assets or . . . the deliberate and unnecessary incurring of tax liabilities" (footnote omitted)); see also In re Marriage of Clark, 13 Wn. App. 805, 808-09, 538 P.2d 145, review denied, 86 Wn.2d 1001 (1975) (taking account of how labor or negatively-productive conduct created or dissipated certain marital assets is appropriate).

[14] In re Marriage of Kaseburg, 126 Wn. App. 546, 562, 108 P.3d 1278 (2005).

[15] In re Marriage of Kaseburg, 126 Wn. App. 546, 562, 108 P.3d 1278 (2005).

CATEGORY: Shariah Marriage Law/Child Custody

RATING: Highly Relevant

TRIAL: TCSN

APPEAL: ACSN

COUNTRY: Iran

URL: http://scholar.google.com/scholar_case?case=5926844127302415 99&q=Iran&hl=en&as_sdt=4,48

IN THE MATTER OF THE MARRIAGE OF: BITA DONBOLI, RESPONDENT, AND NADER DONBOLI, APPELLANT.

No. 53861-6-I

The Court of Appeals of Washington, Division One.

Filed: July 18, 2005

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APPELWICK, J.

In a dissolution action, the father claimed that the Washington court lacked jurisdiction because a divorce decree had already been issued in **Iran** and a custody proceeding was pending in **Iran** before the Washington proceeding commenced. The trial court determined that the child's home state was Washington and that Washington courts had jurisdiction to enter an initial child custody order. In addition, the trial court found that Iranian law does not procedurally or substantively comport with Washington law, and contradicts the strong public policy of Washington.

Thus, the trial court refused to enforce the Iranian custody order and addressed the dissolution petition in full. The father appeals. Because we hold that the trial court correctly determined it had jurisdiction to address the dissolution petition and the child-related issues in this matter, we affirm.

FACTS

This is a marital dissolution action brought by Bita Donboli, the wife, against Nader Donboli, the husband. Prior to his marriage to Bita, Nader lived in the United States for 27 to 28 years, and was a dual citizen of the United States and **Iran**. He owned an auto repair business in Redmond. In 1995, Nader traveled to **Iran** to find a wife. Nader and Bita met a couple of times, and were married within five or six days. Nader returned to the United States shortly afterward, and Bita was authorized to enter the United States in January 1996. Eventually, Bita also became a dual citizen of the United States and **Iran**.

Bita lived with Nader in his Carnation home. She spoke no English, could not drive and had no money or credit cards. Starting about two months later and continuing throughout their marriage, Bita alleges that Nader physically and verbally abused her. In June 1996, Bita started taking English as a second language classes at Lake Washington Technical College. She then studied child care management and earned her Associate of Arts degree in 1999.

In 1998, Nader decided to sell the Carnation home and move into a larger home in Sammamish. The new home cost $340,000. As part of the closing papers, Bita signed a quit claim deed transferring the home to Nader as his separate property. Bita alleges she did not know what she was signing, was tricked by Nader, and would never have signed the document if she knew what it was. Nader also sold his auto repair business. Bita alleges he sold the business for $200,000. Bita alleges Nader then started a practice with a friend of purchasing damaged vehicles at auto auctions and reselling them through the newspaper. Bita alleges his dealings in this business were shady.

On April 22, 2000, Bita gave birth to Shayan, their son. He was conceived and born in Washington. Bita's mother came to the United States to assist Bita with Shayan for about six months. Nader and Bita twice visited **Iran**, from mid-March to mid-May in 1998 (before Shayan's birth) and from mid-September to early November in 2000 (with Shayan).

In spring 2001, because Shayan was `extremely active,' Bita decided to take him to **Iran** for an extended four-month visit, so she could have her mother's help. Before Bita left, she and Nader decided to sell the Sammamish home because it was too expensive and, after selling his business, Nader had lost the source of his monthly income. To facilitate the sale in her absence, Bita gave Nader a six-month power of attorney to sell the home, which was listed for $520,000. Bita alleges that they planned to use the appreciation from the Sammamish home to purchase a smaller, less expensive home. Nader alleges that they sold the home and his business because they intended to permanently relocate to **Iran**, which was Bita's wish.

Bita and Shayan arrived in **Iran** around April 24, 2001, and stayed with Bita's parents. Nader called her at least weekly. In June they found a potential buyer for the home, and at Nader's request Bita returned to Washington for 12 days, from June 30 through July 12, to pack up the household goods. Shayan stayed in **Iran** with Bita's mother. After Bita returned to **Iran**, Nader informed her that the sale had fallen through. Even though the home had not yet sold, Nader went to **Iran** to visit his family in August 2001, claiming that he missed them and was not working anyway. He joined them at Bita's parents' home. Bita alleges they planned to return to the United States in October, whether or not the house sold. If it had not sold, they planned to take it off the market and list it again the following spring. Nader again alleges that their move to **Iran** was to be permanent.

On October 11, six weeks after Nader's arrival, Nader and Bita had a disagreement over some light bulbs. Bita alleges that in front of her parents and child, Nader beat her so badly that she was hospitalized for two weeks and required subsequent physical therapy. Nader alleges that Bita's injuries were caused when she tried to attack him and had to be restrained by members of both families. Bita alleges that right after the altercation, Nader stole her jewelry, as well as her and Shayan's United States passports and other papers. Nader did not take their Iranian passports. Nader disputes Bita's claim that he took their United States passports.[1] Bita and her parents filed a police report, but the police were unable to find Nader and had no idea where he was.[2] Shayan has lived with Bita continuously since the altercation. Bita and Nader have had no contact since October 11, 2001.

When Bita returned from the hospital, she tried to leave **Iran** and return to the United States with Shayan. She tried to enter Turkey to have replacement documents issued, but she and Shayan were stopped by Iranian officials. They advised Bita that Nader had written a letter denying them permission to leave **Iran**. Although this is a permissible practice for husbands and wives who are Iranian residents, Bita's passport showed that her domicile was changed from **Iran** to U.S.A. on August 20, 2000. Nevertheless, Bita and Shayan were not permitted to leave. Bita started working towards obtaining new passports.

In late November or early December 2001, Bita was served with Nader's Iranian divorce action. Bita's understanding was that in **Iran**, an Iranian court could divorce a couple only if both were residents of **Iran**; neither she nor Nader was. Bita gave her father a power of attorney so that he could hire an Iranian attorney to dismiss the case as improperly filed. With the help of the Pakistani Embassy, Bita obtained letters confirming that she and Nader both lived in the United States, and that Nader therefore could not keep her in **Iran** under Iranian law. Bita and Shayan received replacement passports on January 11, 2002, issued by the United States Embassy in Switzerland, and promptly used these passports and the letter to return to the United States on January 27, 2002. Upon her return she discovered all their money was gone. She could not locate any funds from the sale of their home. Bita has no idea what happened to their clothes, furniture, and personal belongings.

The only financial documents that Bita was able to find were tax returns she had earlier sent to her parents. From these returns, Bita learned about an annuity contract at Hartford Life Insurance Company, the only remaining asset she could locate in the United States. This account contained

approximately $78,000 and was in Nader's name. It was purchased during their marriage. Bita discovered that Nader had requested that the account be liquidated and proceeds sent either to him or to his brother in Arizona. Bita hired an attorney to stop the transfer. This started the current action.

The timeline of events related to the **Iran** and Washington divorce proceedings is set forth below.

October 31, 2001	Nader files divorce petition in **Iran**. Petition does not mention child support, child custody, maintenance, or any issues other than dissolution of marriage.
Nov. or Dec. 2001	Bita is served in **Iran** with notice of the divorce petition.
March 29, 2002	Bita files dissolution, child custody, child support, and maintenance action in Washington, requesting attorney fees. Bita obtains order in Washington court against Hartford restraining transfer of funds from Hartford account
April 12, 2002	Nader makes a special appearance in Washington court, through his attorney, to contest lack of service and jurisdiction of the court.
April 20, 2002	**Iran** court issues verdict in divorce proceeding. This verdict allows Nader to obtain a revocable divorce after making certain payments to Bita by applying at an official divorce registry.
May 4, 2002	Through Iranian court Bita obtains a writ of execution against Nader for the collection of funds due to her. The writ prohibited Nader from leaving **Iran**.
May 14, 2002	Washington court indefinitely extends restraining order against Hartford.
May 16, 2002	Bita files an amended petition in the Washington action. This petition restates the claims in the March 29 petition and adds Hartford as a defendant in the action.
May 17, 2002	Bita moves for an order in Washington court transferring the Hartford account proceeds to her in payment of child support and legal fees.
May 27, 2002	Bita files appeal in **Iran**. The principal

	ground for the appeal is that the adjudication should be in the United States because Bita and Nader are United States citizens. Bita also argued that the **Iran** court failed to address issues such as child support or legal fees. This is the first mention of these issues in the **Iran** court.
May 31, 2002	Nader moves to dismiss Bita's action in Washington for lack of jurisdiction on the ground that he had commenced a dissolution action in **Iran** before Bita filed her action in Washington.
July 12, 2002	The Washington Family Court Commissioner denies Bita's motions for child support and attorney fees, and grants Nader's motion to dismiss based on the earlier-filed **Iran** divorce proceeding.
August 2, 2002	On Bita's motion for revision, the Washington Superior Court remands to the Commissioner for a factual determination of `whether under Iranian law, there are procedures for child support orders substantially like Washington law.'
Unknown	Nader petitions **Iran** court for custody of Shayan. Nothing in the record proves when this occurred.
August 13, 2002	**Iran** court sends a letter to the Washington court stating that custody proceeding was pending in **Iran**. Letter does not state when custody proceeding was initiated.
October 12, 2002	**Iran** court enters a default decree awarding custody of Shayan to Nader.
February 5, 2003	Washington Superior Court instructs Commissioner to consider whether **Iran** custody order should be given full force and effect, and to further consider issues in its August 2 order.
March 19, 2003	**Iran** court issues a `written judgment' which, like the April 22, 2002 verdict, permits Nader to get a revocable divorce by applying for one at an official divorce registry after making certain payments to Bita.
April 7, 2003	**Iran** court issues what appears to be an order setting new support and alimony amounts for Bita and Shayan. This may be at

	Bita's request.
June 9, 2003	Commissioner enters an order denying Nader's motion to dismiss the Washington action for lack of subject matter jurisdiction, and rules that **Iran** custody order should not be given full force and effect. Commissioner enters temporary order for child to reside with Bita, interim attorney fees of $7000, and interim child support. Nader is directed to respond within 60 days.
August 11, 2003	Washington Superior Court denies Nader's motion for revision, affirms the Commissioner's June 9 order, and sets a January 26, 2004 trial date.
January 26, 2004	Scheduled trial date in Washington action. Nader objects that the court lacks jurisdiction to grant a dissolution because the parties have already been divorced in **Iran**. Nader produces no witnesses or evidence on this date. Court sets January 29, 2004 hearing on Nader's objection.
January 29, 2004	Bita appears at hearing and presents testimony that parties had never been divorced in **Iran**. Nader does not appear or otherwise present evidence.
April 7, 2004	Nader files supplemental memorandum objecting to Washington court's jurisdiction on the ground that when the Commissioner dismissed Bita's action on July 12, 2002, Bita did not appeal the portions of the Commissioner's order pertaining to dissolution or dismissal of Hartford.
April 27, 2004	Bita responds to Nader's supplemental objection, citing pleadings considering and denying Nader's motion to dismiss on all issues.
June 24, 2004	Superior Court issues final orders: Findings of Fact and Conclusions of Law Decree of Dissolution Final Parenting Plan Permanent Restraining Order Order of Child Support Order for Security for Future Child Support and Preschool Expenses Findings of Fact, Conclusions of Law, and Order Regarding Attorneys Fees and Costs Judgment for Attorneys Fees

July 6, 2004 Nader files an appeal with this court.

Nader argues that the trial court lacked jurisdiction to hear this matter. Nader argues that because Bita did not specifically appeal the portion of the commissioner's initial July 12, 2002 order dismissing the case for lack of jurisdiction as to the dismissal of the dissolution action and the dismissal of Hartford, the trial court was without jurisdiction to issue a decree of dissolution or an order for disbursement from the Hartford account. Nader argues that if the Iranian courts did not have jurisdiction over Bita, she waived the lack of jurisdiction defense by appearing in the courts and instituting actions there. Nader also argues that the trial court erred by making factual findings not supported by the evidence, including that Washington is Shayan's home state, and that Iranian custody proceedings do not comport with Washington parenting laws and are contrary to Washington public policy. Nader argues that the trial court therefore erred when it found that Washington had jurisdiction to issue a parenting order and when it refused to enforce the Iranian child custody order that gave Nader custody of Shayan. Nader further argues that the trial court considered inadmissible evidence and erred in not applying applicable United States federal law. Nader seeks attorney fees on appeal.

ANALYSIS

I. Standards of Review and Burdens of Proof & Persuasion

The determination of subject matter jurisdiction is a question of law reviewed de novo. In re Marriage of Kastanas, 78 Wn. App. 193, 197, 896 P.2d 726 (1995). Subject matter jurisdiction is `the authority of the court to hear and determine the class of actions to which the case belongs.' In re Adoption of Buehl, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976). But a superior court always has jurisdiction to determine whether it has subject matter jurisdiction and whether it should exercise its jurisdiction. Kastanas, 78 Wn. App. at 201. The trial court's findings of the underlying facts supporting or not supporting jurisdiction are reviewed by the same deferential standard that applies to other factual findings. See Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777, 779 (9th Cir. 1991) (upholding factual findings underlying a jurisdictional issue because they were not clearly erroneous); Bruce v. United States, 759 F.2d 755, 758 (9th Cir. 1985) (holding that trial court's factual findings on the jurisdictional issue must be accepted unless they are clearly erroneous, but that the ultimate legal conclusion is subject to de novo review).

The trial court's factual determinations will not be disturbed if they are supported by substantial evidence. Davis v. Dep't of Labor & Indus., 94 Wn.2d 119, 123-24, 615 P.2d 1279 (1980). Evidence is substantial if it is sufficient to persuade a fair-minded person of the truth of the declared premise. Holland v. Boeing Co., 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). If substantial evidence supports the finding, it does not matter that other evidence may contradict it, because credibility determinations are left to the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Appellate courts do not weigh conflicting evidence. Reynolds Metals Co. v. Electric Smith Const. & Equip. Co., 4 Wn. App. 695, 699, 483 P.2d 880 (1971).

`The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence.' Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993). A party relying on foreign law bears the burden of pleading and proving the elements of foreign law relied on. Byrne v. Cooper, 11 Wn. App. 549, 555, 523 P.2d 1216 (1974). A party seeking to assert the doctrine collateral estoppel bears the burden of proving that the parties to the prior proceeding had a full and fair hearing on the issue at hand. In re Marriage of Murphy, 90 Wn. App. 488, 498, 952 P.2d 624 (1998).

II. The Trial Court Had Jurisdiction to Enter a Dissolution Decree and Order Disbursement from the Hartford Account

Nader argues that the superior court's dissolution decree and orders directing disbursement from the Harford account are void because the dismissal entered by the family court commissioner on July 12, 2002, was final as to both Hartford and the divorce petition. An order dismissing a divorce action is a final order from which appeal is permitted under RAP 2.2(a)(3). On July 12, 2002, the family court commissioner entered an order dismissing Bita's divorce petition based on a finding that a divorce action was first filed in **Iran**.[3] The commissioner reserved the question of child support because it was uncertain whether child support was at issue in the Iranian court. The commissioner also entered an order dismissing with prejudice all claims against Hartford.

On July 22, 2002, Bita filed a motion for revision of the commissioner's order. The superior court affirmed the dismissal of Hartford as a defendant. The superior court revised the commissioner's order, ordering a fact finding hearing on the parenting issue. The superior court deferred a determination on Bita's request for temporary child support and attorney fees until after the commissioner decided the jurisdictional question. Bita's motions for reconsideration and for discretionary review were both denied.

Nader argues that because Hartford's dismissal was affirmed, the trial court's subsequent orders for disbursement of funds from the Hartford account were void for lack of jurisdiction over Hartford. But, it is apparent that the only reason Hartford was made a party to the lawsuit is because Hartford informed Bita's counsel that it would not honor a court order to disburse funds if it was not a party to the proceeding. Hartford was not an interested party in this action, but was only the custodian of the Hartford account funds. In the order dismissing Hartford, and in the order affirming the dismissal, both the commissioner and the trial court kept in place a restraining order against the disbursement of funds from the Hartford account without a court order. Neither that restraining order nor the court's subsequent orders for disbursement of Hartford account funds required Hartford to be a party to the underlying action. We hold that the dismissal of Hartford as a party to the action between Bita and Nader does not render void the subsequent orders for disbursement from the Hartford account for which Hartford was custodian.

Nader also argues that Bita's motion for revision did not seek revision of the commissioner's order dismissing the dissolution action. Nader argues that by failing to specifically raise the issue of the dissolution decree in her motion for revision or any subsequent appeal, the July 2002 dismissal was final. A superior court commissioner's ruling is subject to revision by a superior court judge. In re Marriage of Dodd, 120 Wn. App. 638, 643, 86 P.3d 801 (2004). Where the evidence

before the commissioner does not include live testimony, the judge's review of the record is de novo. Dodd, 120 Wn. App. at 643. The superior court judge reviews the commissioner's factual findings under the substantial evidence standard and its conclusions of law de novo. Dodd, 120 Wn. App. at 643.

But, the revision court has full jurisdiction over the entire case and is authorized to determine its own facts and make its own legal conclusions based on the record before the commissioner, or order or conduct further proceedings in its discretion. Dodd, 120 Wn. App. at 643 (citing In re Smith, 8 Wn. App. 285, 288-89, 505 P.2d 1295 (1973)); see also RCW 2.24.050 (`All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court.'). The In re Smith court specifically held that it is the `duty of the trial court to take jurisdiction of the entire case as heard before the commissioner.' In re Smith, 8 Wn. App. at 288-89 (quoting State ex rel. Biddinger v. Griffiths, 137 Wash. 448, 242 P. 969 (1926)). In Dodd, the wife argued on appeal to the Court of Appeals that the husband had failed to challenge the commissioner's findings of fact when he sought a revision of the commissioner's order. Dodd, 120 Wn. App. at 643. The Dodd court held that a superior court may re-determine facts, even those to which the party seeking review did not specifically assign error, without abusing its discretion under RCW 2.24.050. Dodd, 120 Wn. App. at 645-46. Under Dodd, because of the superior court's full jurisdiction over the case, `the superior court revision order supersedes the commissioner's ruling.' Dodd, 120 Wn. App. at 644.

Likewise, the judge's order here superseded the commissioner's ruling. The entire matter was before the judge on the motion for revision, and the scope of review was not limited to issues expressly raised by Bita. In its June 9, 2003 order after remand by the superior court, the commissioner noted

Default should not be granted to the Petitioner at this time because this matter was dismissed on July 12, 2002 and has been under review ever since. This order is the first order to determine that the State of Washington has jurisdiction to proceed with the action. The Respondent should be required to respond to the petition within 60 days.

The commissioner's June 9, 2003 order thus reversed its July 12, 2002 order dismissing the matter for lack of jurisdiction. The June 9 order does not narrow the scope of Nader's response to the petition to exclude the dissolution proceeding, but instead allows `the action' to proceed. Further, when the superior court denied Nader's motion to revise the commissioner's June 9 order, it set the entire matter for trial. This order effectively reinstated the entire petition for dissolution and other relief. Nader makes no other argument on appeal as to the superior court's jurisdiction to enter a dissolution decree. We hold the trial court had jurisdiction to consider the petition.

III. Nader Assaulted Bita and Abandoned Bita and Shayan

Nader argues that the trial court erred in finding that he assaulted Bita and that he abandoned Bita and Shayan.

Bita alleges that while at her parents' home in **Iran** and in the presence of her parents and Shayan, Nader beat her so badly she was hospitalized for several weeks and needed subsequent physical therapy. Nader alleges that Bita was injured when she tried to attack him and had to be restrained by members of both families, ten of whom were present at the time. Bita disputes Nader's claim, stating that only she, Nader, Shayan, her parents, and a male neighbor were present at the time. Bita supported her allegations with medical certifications provided by her Iranian doctors. The court found that Nader assaulted Bita on October 11, 2001. The court noted that Bita's claim of injury was corroborated by the medical certifications, and that the `overwhelming evidence in this case is that the father assaulted the mother, resulting in serious bodily injury.' Substantial evidence supports this factual finding.

Bita testified that neither she nor Shayan have seen Nader since the October 11 assault. In his Opening Brief to this court, Nader stated that October 11 `was the last time either of the Donbolis saw each other.' Bita testified that Nader has not supported her or Shayan since October 11, and instead has absconded with practically all of their assets. He did not pay any money in support of Bita or Shayan for at least the year prior to Bita filing the Washington action, and has paid no support for Shayan to date.

Nader alleges that he was required to stay away from Bita in **Iran** because of her police report, that he had to return to the United States to sell the family home, that Bita actually left him when she left **Iran**, that Bita's order restrained him from leaving **Iran** after Bita returned to Washington, and that Bita has had a United States restraining order against him since filing her action in Washington court. Therefore, he did not abandon them; he was prevented from contacting them.

The trial court found that on October 11, 2001, Nader left Bita and Shayan. The trial court noted that Nader `does not contest the mother's factual assertion of his abandonment of her and their son following the October 2001 altercation.' While Nader does allege in his brief on appeal that he stayed away from Bita due to her actions and did not abandon Bita and Shayan, he did not contest her statement to the trial court by declaration to the contrary. Therefore, substantial evidence supported the trial court's finding that Nader abandoned Bita, and the trial court did not err. Further, neither of these findings affects the outcome of any of the ultimate issues in this case.

Nader challenges other factual findings of the trial court. We address those below in context of the legal conclusions they support.

IV. Washington Is Shayan's Home State

The threshold determination of whether a court can exercise jurisdiction for child custody determinations is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified in chapter 26.27 RCW. This determination is a question of law reviewed de novo. Kastanas, 78 Wn. App. at 197.

Under the UCCJEA, there are limited circumstances in which a state may exercise jurisdiction to make initial child custody determinations:

(1) Except as otherwise provided in RCW 26.27.231 {allowing for temporary emergency jurisdiction}, a court of this state has jurisdiction to make an initial child custody determination only if:

(a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(b) A court of another state does not have jurisdiction under (a) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under RCW 26.27.261 or 26.27.271, and:

(i) The child and the child's parents, or the child and at least one parent . . . , have a significant connection with this state other than mere physical presence; and

(ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

. . .

(2) Subsection (1) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

RCW 26.27.201. The child's home state is defined as:

the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding . . . A period of temporary absence of a child, {or} parent . . . is part of the period.

RCW 26.27.021. When a child custody proceeding commences depends upon state procedural rules. In re Marriage of Payne, 79 Wn. App. 43, 50, 899 P.2d 1318 (1995). Here, the proceeding commenced when Bita filed her petition for dissolution on March 29, 2002.

The UCCJEA does not define `temporary absence.' The intent of the parties is a factor in considering whether an absence is temporary. Payne, 79 Wn. App. at 50. In Payne, the family moved from Virginia to Washington. Payne, 79 Wn. App. at 46. Just prior to having lived in Washington for six months, the father returned to Virginia and filed a child custody action there. Payne, 79 Wn. App. at 46. The court concluded that neither Virginia nor Washington was the children's home state, because the children had not lived in either state with a parent for the six months preceding the filing. Payne, 79 Wn. App. at 51. The court held that in making this determination, the children's absence from Virginia was not a period of Stemporary absence,' because the parties intended to relocate to Washington. Payne, 79 Wn. App. at 52.

Several states have declined to apply a bright-line six-month rule to determine whether a child's absence from the child's original `home state' qualifies as a temporary absence. In In re Parentage of Frost, 681 N.E.2d 1030, 1032 (Ill. App. Ct. 1997), the mother went with the child to California in May 1994. The father asserted that the mother's intention was to spend the summer there with her own parents and the child, and then return to their home in Illinois. Frost, 681 N.E.2d at 1032. The mother claimed that the father knew in May that she did not intend to return to Illinois. Frost, 681 N.E.2d at 1032. The father filed a child custody petition in Illinois in January 1995, more than six months after the mother and child arrived in California. Frost, 681 N.E.2d at 1032. The mother appeared specially to seek a dismissal for lack of subject matter jurisdiction on the basis that California, not Illinois, was the child's home state. The Frost court declined to adopt a bright-line rule defining the home state as the state where the child resided for the six months prior to the filing of the petition. Frost, 681 N.E.2d at 1036. Instead, the court adopted a rule allowing consideration of the parents' agreements as to extended absences from a home state and their intent regarding the temporary or permanent nature of any absence when deciding whether an absence was temporary under the UCCJEA. Frost, 681 N.E.2d at 1032. The Frost court adopted this reasoning from Richardson v. Richardson, 625 N.E.2d 1122 (Ill. Ct. App. 1993), and held that even an 11-month absence would not absolutely determine the home state:

> the child's eleven-month presence in Illinois was a temporary absence from California since `at the time {the child} came to Illinois, and throughout her entire stay, it was the clear understanding of all parties that {the child} would not remain in {Illinois}.'

Frost, 681 N.E.2d at 1034 (quoting Richardson, 625 N.E.2d at 1125). Nader argues that the superior court incorrectly applied the Frost case. Nader argues that the Frost reasoning is inapplicable here, where both the parties intended the move to **Iran** to be permanent. This argument is addressed to the trial court's factual finding of the temporary nature of the parties' move, discussed below, not the applicability of Frost. Nader's attempt to distinguish Frost based on its review of cases dealing with visitation agreements is likewise addressed to the trial court's factual findings; it speaks to the parents' intent to permanently relocate the home state of the child.

The issue of the effect of unclean hands on the jurisdictional determination is considered in In re Marriage of Ieronimakis, 66 Wn. App. 83, 831 P.2d 172 (1992). In Ieronimakis, both the children were born in Greece. Ieronimakis, 66 Wn. App. at 85. Without the husband's knowledge, the wife took the children to Seattle, where her parents lived. Ieronimakis, 66 Wn. App. at 85. She told the husband that she did not intend to return. Ieronimakis, 66 Wn. App. at 85. Within a week, she filed a petition for dissolution of marriage seeking a parenting plan with the children residing with her. Ieronimakis, 66 Wn. App. at 85. Six days later, the husband commenced a child custody proceeding in Greece. Ieronimakis, 66 Wn. App. at 86.

The Greek court issued a permanent order granting custody to the father. Ieronimakis, 66 Wn. App. at 86. Subsequent to the Greek order, the Washington court commissioner communicated with the Greek court and was satisfied that the Greek system `provides equal rights for women and that child custody decisions are based on the best interests of the child.' Ieronimakis, 66 Wn. App. at 87. The mother sought revision of the commissioner's order and also appealed the Greek order in Greece.

Ieronimakis, 66 Wn. App. at 87. While the revision was pending, the Greek court ruled in the mother's favor on appeal and awarded her custody of the children. Ieronimakis, 66 Wn. App. at 87. The superior court then granted the mother's motion for revision and exercised initial child custody jurisdiction in the `best interests of the children.' Ieronimakis, 66 Wn. App. at 88. On remand, a commissioner granted the mother's parenting plan, and the father appealed. Ieronimakis, 66 Wn. App. at 84, 89.

The Ieronimakis court reversed the trial court's order, and held that the trial court should not have exercised jurisdiction. Ieronimakis, 66 Wn. App. at 90-91. The court cited former RCW 26.27.230 (1979),[4] which requires the recognition and enforcement of custody decrees `of other nations if reasonable notice and opportunity to be heard were given to all affected persons.' Ieronimakis, 66 Wn. App. at 91. The court held that the mother could not benefit from taking the children from the home state and keeping them away long enough to circumvent the provisions of the relevant jurisdictional statutes:

> To allow Washington courts to assert jurisdiction because {the mother} generated significant contacts with the state is in effect telling any abducting parent that if you can stay away from the home state long enough to generate new considerations and new evidence, that is a sufficient reason for the new state to assert a right to adjudicate the issue. Such a holding circumvents the intent of the jurisdiction laws.

Ieronimakis, 66 Wn. App. at 92. The court further held that there had been no showing that the Greek court would not protect the children's best interests; in fact, there was proof to the contrary. Ieronimakis, 66 Wn. App. at 92.

Similarly, in Furnes v. Reeves, 362 F.3d 702, 705-08, 723 (11th Cir. 2004), the mother violated a Norwegian child custody order awarding custody to the father and concealed the whereabouts of the children in the United States for over a year. When the father located the mother and child in Georgia, he filed a petition for their return under the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601-11611 (1988). Furnes, 362 F.3d at 707-08. The Furnes court held that although ICARA imposes a one year limitation period for petitions, that period was equitably tolled until the father located the child, because otherwise the mother would be rewarded for her misconduct. Furnes, 362 F.3d at 723.[5]

Here, likewise, if Nader tried to keep Bita and Shayan from leaving **Iran**, under Ieronimakis and Furnes he should not benefit from that misconduct and thereby change the home state to **Iran**. The trial court found that Nader committed misconduct by delaying Bita and Shayan's departure beyond their wishes, and it was only because of Nader's misconduct that they did not return to the United States within six months. For the same reasons, the trial court found that the doctrine of equitable tolling applied.

Thus, the trial court's finding that Washington is Shayan's home state is based, essentially, on three factual determinations: that Bita and Nader's intention when they went to **Iran** in April 2001 was to make a temporary visit and not a permanent move; that Nader improperly prevented

Bita and Shayan from leaving **Iran** within six months; and that, but for Nader's misconduct, Bita and Shayan would have returned to Washington within six months. If these factual findings are supported by substantial evidence, then the trial court did not err in determining that Shayan's home state was Washington. We address each of these findings in turn.

A. The Visit to Iran Was Intended to Be Temporary

Bita claimed that she and Nader intended their trip to **Iran** to be a temporary, four-month visit. Although Bita and Nader were selling their Washington home, Bita

claimed that was so that they could purchase a smaller home to reduce their expenses after Nader sold his business and their income decreased. Bita further claimed that they intended to return to the United States after four months, whether or not the house sold. Bita claimed that the condominium she and Nader purchased in **Iran** was intended for their use when they visited **Iran**, because owning a condominium was much more economical than staying in a hotel for the extended trips they made to **Iran**. Bita's brother loaned them the money for the down payment, and was supposed to be reimbursed with some of the proceeds from the sale of their home. Because Nader did not reimburse him, Bita's brother has lived in the condominium since January 2002. It is undisputed that Bita and Nader never resided in the condominium.

Nader disputed Bita's statement of their intent. Nader claimed he sold his business and the Washington home and purchased the condominium in **Iran** because he and Bita intended to permanently move to **Iran**. Nader further claimed that it was Bita who wanted to return permanently to **Iran**, so she could have the support of her family in raising Shayan.

Bita testified that if Nader had intended the trip to **Iran** to be a permanent move, he did not tell her. She stated that under Iranian law, if the husband decides to live in **Iran**, the wife must obey. She testified that if she had any idea this was Nader's intent, neither she nor Shayan would have returned to **Iran**. Bita alleged that Nader either changed his mind about where to live and did not tell her, or intentionally tricked her into visiting **Iran**, where laws heavily favor the husband.

The trial court found that Bita and Nader's move was intended to be temporary. This court reviews the trial court's factual findings under the substantial evidence standard. The standard is not whether the evidence would support an alternate view of the facts, such as Nader's assertion that their intent was to permanently move back to **Iran**. While the trial court noted that an evidentiary hearing might be appropriate to resolve the dispute, substantial evidence in the record supports the trial court's factual finding despite the lack of such a hearing.

B. Nader Improperly Prevented Bita and Shayan from Leaving Iran

The trial court buttressed its finding that Bita and Shayan intended a temporary visit to **Iran** by the findings that Nader took Bita's and Shayan's passports after the altercation, and that Nader does not deny that he directed the government to prevent Bita from leaving **Iran**.

Bita alleged that Nader wrote a letter to Iranian officials directing them to prevent Bita and Shayan from leaving **Iran**. Bita testified that a wife cannot leave **Iran** or take the children from the country without the husband's permission if both husband and wife are Iranian residents. Bita testified that she and Shayan were not permitted to leave **Iran**, and Iranian officials informed her that Nader had written a letter denying them permission to leave. In his response to Bita's appeal of the divorce verdict in **Iran**, Nader's attorney stated, `the wife . . . was the one who wanted to leave **Iran** and after my client understood her intention {he} prohibited her from leaving **Iran**.' Bita testified that she and Shayan were able to leave only after obtaining new United States passports.

Nader argued that a restraining order prohibiting a party from leaving **Iran** is commonly issued ex parte in `divorce and custody' proceedings, and that Bita was therefore restrained from leaving **Iran** by a lawful state order, not by his misconduct. But, Bita testified that as of May 27, 2003, she was not aware of any court order prohibiting her from leaving **Iran**. Nader has not produced any document purporting to be the court order restricting Bita's departure. Also, Nader has not disputed by declaration or affidavit that he wrote a letter such as Bita described.

Nader correctly points out that the letter Bita presented as an attachment to her declaration, purporting to be this letter, does not seem to be. The attached letter addresses parties other than Bita and Nader, and mentions neither Bita nor Shayan. After excluding this letter, the trial court's finding that Nader directed a governmental agency to prevent Bita and Shayan from leaving **Iran** is still supported by substantial evidence in the record. The trial court found that `the evidence supports the conclusion that the mother received neither notice nor an opportunity to be heard with respect to the father's directive to the Iranian government that his wife and son be prohibited from leaving the country.' Substantial evidence supports the trial court's factual finding that Nader improperly delayed Bita and Shayan's departure from **Iran**.

Bita testified that Nader took her and Shayan's United States passports and other documentation right after the October 2001 altercation. It is uncontested that Bita and Shayan received new passports, which noted that they were replacements for stolen passports. Nader disputed Bita's claim that he took the passports. The trial court found that Nader took Bita and Shayan's passports, stating that Nader `does not contest that following a dispute with Mrs. Donboli in October 2001, he took the U.S. passports of both Mrs. Donboli and Shayan.' But Nader did deny that he took the passports, so the trial court erred in finding that he did not deny taking them.

The trial court's finding that Nader directed the government to prevent Bita and Shayan from leaving **Iran** is supported by substantial evidence even after excluding the finding that Nader took the United States passports. Therefore, the trial court's error in overlooking Nader's denial that he took the passports is harmless.

C. But for Nader's Misconduct, Bita and Shayan Would Have Returned to Washington Within Six Months

The trial court found that Bita would have returned to the United States with Shayan within six months of their departure but for the improper conduct of Nader. The court's finding is supported

by (1) its finding that Nader improperly prevented Bita and Shayan from leaving **Iran**; (2) evidence of Bita's persistent and consistent attempts to secure new passports for herself and Shayan; and (3) the fact that Bita and Shayan promptly returned to the United States upon receiving those passports. This is substantial evidence to support the finding that Bita and Shayan would have returned to Washington within six months but for Nader's misconduct.

In sum, the trial court's findings that Nader and Bita intended a temporary absence from Washington, that Nader's efforts to prevent Bita and Shayan from leaving **Iran** constituted misconduct on his part, and that Bita and Shayan would have returned to the United States within six months but for that misconduct are all supported by substantial evidence. Therefore, under Payne, Ieronimakis, and Furnes, the trial court did not err in determining that Shayan's home state was Washington.

V. Washington Courts Are Not Required to Enforce the Iranian Custody Order

Because Washington is Shayan's home state, the trial court correctly concluded that Washington had jurisdiction under the UCCJEA to make an initial child custody order. Therefore, an Iranian custody order would not be enforceable in Washington. But, an Iranian child custody order was issued before the final order was entered in Washington, and the UCCJEA places a very strong emphasis on enforcing valid custody orders. As an alternate ground to its holding that Washington courts had jurisdiction here, the trial court proceeded to analyze whether, if **Iran** did have jurisdiction to issue the initial order, Washington courts were required to enforce it. We address Nader's assignments of error to the trial court's rulings on this issue.

The trial court determined that it was unclear whether, under Iranian law, a divorce petition puts child custody at issue. The trial court noted that the translations of Iranian law on dissolutions and custody it had received did not explain whether Iranian custody actions are divisible from dissolutions. The court held that if Iranian child custody determinations are separate from dissolution actions, then no child custody proceeding was pending in **Iran** when Bita filed her action in Washington. The court noted that the record supported the inference that Nader petitioned for child custody following the entry of the divorce verdict.[6] But, the court did not find that custody and dissolution actions are necessarily divisible under Iranian law, and therefore proceeded to determine whether the UCCJEA required the court to enforce the Iranian custody order.

The UCCJEA requires that if prior foreign child custody proceedings or determinations[7] in substantial conformity with chapter 26.27 RCW exist, Washington courts cannot exercise jurisdiction and must recognize and enforce the foreign actions:

> {A} court of this state may not exercise its jurisdiction under this article if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter.

RCW 26.27.251(1)

A court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this chapter.

RCW 26.27.421(1). The UCCJEA explicitly extends this obligation to the determinations of foreign countries:

{A} child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced.

RCW 26.27.051(2).

The UCCJEA requires procedural conformity with Washington law. Chapter 26.27 RCW `does not govern the enforceability of a child custody determination made without notice or an opportunity to be heard.' RCW 26.27.241(2). Washington courts have long required that responding parents be given proper notice and a full opportunity to be heard on custody proceedings. In re Thorensen, 46 Wn. App. 493, 501, 730 P.2d 1380 (1987) (refusing to enforce Florida order entered without notice or opportunity to be heard). Washington courts have made clear the significance of rights afforded to parents with respect to custody decisions, and have required that the responding parent receive notice that will reasonable apprise him or her of the contemplated action that is pending and its potential effect on custodial rights. RCW 26.27.241; In re Olson, 12 Wn. App. 682, 690, 531 P.2d 508 (1975).

The trial court then discussed the validity of considering the substantive law of the foreign country when determining if it should enforce a foreign child custody determination. In In re Custody of R., 88 Wn. App. 746, 761, 947 P.2d 745 (1997), the court concluded that the plain language of former RCW 26.27.230 supported the conclusion that the trial court `may consider the substantive law of the foreign court when determining whether to enforce a foreign custody decree.' The Custody of R. court held that Washington courts presented with foreign custody judgments should consider our strong public policy favoring the best interests of the child. Custody of R., 88 Wn. App. at 761 (citing Ieronimakis, 66 Wn. App. at 87, 94 (upholding a Greek custody determination because the Greek courts applied the best interests of the child standard); Malik v. Malik, 638 A.2d 1184, 1991 (Md. Ct. Spec. App. 1994) (holding that foreign custody decrees will not be enforced if the foreign court did not consider the best interests of the child standard); and Al-Fassi v. Al-Fassi, 433 So. 2d 664, 668 (Fla. Dist. Ct. App. 1983) (holding that principles of comity do not require recognition of foreign decrees that are offensive to the state's public policy that a custody decision be based upon the best interests and welfare of the minor children)).

The trial court noted that the UCCJEA had been amended since the decision in Custody of R. Former RCW 26.27.030(b) allowed Washington to exercise jurisdiction if:

{I}t is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents . . . have a significant connection with this state, and (ii) there is available in this state

substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

This statute was recodified as RCW 26.27.201, which removed the `best interest of the child' language. The trial court noted that, although other Washington statutes still contain references to the best interests of the child (citing RCW 26.09.002, 26.09.184), the language has been removed from the UCCJEA. Thus, the trial court questioned the continuing persuasiveness of case law addressing the application of the best interests standard under former RCW 26.27.030.

In the official committee comments to the UCCJEA, the committee explained that it removed the `term `best interests' in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody and visitation of children.' Unif. Child Custody Jurisdiction & Enforcement Act (UCCJEA), Prefatory Note, 9 U.L.A. 649, 652 (1997). The committee did not remove the best interests of the child from the purposes of the Act, which was designed to promote the best interests of the children whose custody was at issue by discouraging parental abduction and providing that, in general, the State with the closest connections to, and the most evidence regarding, a child should decide that child's custody.

UCCJEA, Prefatory Note, 9 U.L.A. at 652. The term was removed because it `created confusion between the jurisdictional issue and the substantive custody determination.' UCCJEA sec. 201 cmt., 9 U.L.A. at 672. Thus, a foreign country's substantive law cannot be used to take away its jurisdiction under the UCCJEA.

But the substantive law of the foreign country may be considered as a basis to decline to enforce its custody order if enforcement would violate Washington's strong public policy. The trial court noted that Custody of R. quoted the Restatement of Conflicts of Law, which provides that `{n}o action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.' Custody of R., 88 Wn. App. at 761 n.14 (quoting Restatement (Second) Of Conflicts Of Law sec. 90 (1971)).

The Custody of R. court adopted the substantive approach set out in the Malik case. In Malik, the court rejected the mother's argument that a foreign paternal preference would automatically be contrary to Maryland's public policy. Malik, 638 A.2d at 1190-91. The Malik court held that if the foreign court did apply the best interests of the child standard, its custody determination would be enforced despite the paternal preference. Malik, 638 A.2d at 1191. Thus, the Malik court held that the trial court must determine whether the foreign court applied law in substantial conformity with Maryland law. Malik, 638 A.2d at 1191.

Thus, under the UCCJEA a foreign custody determination must be enforced in Washington unless it was not issued with the required procedural safeguards. And, Washington courts can refuse to enforce foreign custody orders that violate Washington's strong public policy. The trial court found that the Iranian child custody order was issued without notice to Bita[8] or an opportunity for her to be heard. The trial court also found that Iranian child custody laws are contrary to Washington's strong public policy. Nader argues that the trial court erred in making these findings. We review the factual findings under a substantial evidence standard. If substantial evi-

dence supports the trial court's findings, it did not err in refusing to enforce the Iranian child custody order.

A. The Iranian Child Custody Order Was Issued Without Notice or an Opportunity to Be Heard

Nader argues that the record does not support the finding that no hearing was held and that no notice of the custody proceedings was given to Bita. Nader argues that the Iranian custody order expressly states that notice was given and a hearing held. The custody order stated, `The defendant did not attend the hearing by court's notification and did not send rejoinder.' Bita testified that she did not receive any notice of Nader's petition for child custody in **Iran**. The trial court noted that Nader had not provided any evidence that Bita had notice of the hearing, or even that any hearing had in fact occurred. Other than a letter from the **Iran** court confirming that a custody proceeding was pending and the custody order itself, there is no evidence in the record relating to the custody proceeding.

Nader claims that Bita appeared and was represented by counsel in all Iranian proceedings. But, by its own terms the custody order is `a judgment of default,' so if a hearing was held, Bita was not present. The trial court noted that the fact that the custody order was entered by default, despite Bita's retention of counsel in **Iran** to represent her and challenge jurisdiction in the dissolution action, supported Bita's claim that she had no notice.

The trial court noted that it was undisputed that Nader filed a dissolution action on October 31, 2001, and that the resulting divorce decree issued on April 20, 2002, did not mention child custody or child support. Nader argued that Bita's counsel appealed the issue of child custody when she appealed the April 20 divorce verdict. But, the appeal was of the verdict in the divorce proceeding, not of the custody order. Further, the appeal first argued that because they are United States citizens, Bita and Nader's divorce should be heard in American courts. The appeal then argued that the verdict was flawed and should be canceled because it failed to consider or provide for `guardianship of the child and related expenses.' Finally, the appeal argued that the **Iran** court violated Bita's rights by announcing several times that a hearing would occur on May 1, 2002, and then issuing the divorce verdict on April 20, 2002, and by appointing an arbiter who attested to `long negotiations with the parties,' when Bita was in the United States and could not have been involved in such negotiations.[9]

The trial court's findings that there was no evidence in the record of a hearing scheduled in **Iran**, and that there was no evidence in the record of any notice to or opportunity to be heard by Bita if such a hearing was scheduled, are supported by substantial evidence. Therefore the court did not err in finding that the procedural protections in the Iranian child custody proceeding were not substantially in conformity with Washington statutes governing such proceedings.

B. The Iranian Child Custody Proceeding Is Contrary to Washington's Strong Public Policy

Nader argues that the trial court erred in concluding that Iranian law is not in substantial conformity with Washington law. Article 1169 of the Iranian Civil Code provides:

The mother enjoys priority in maintenance of her child up to two years from the child's birth; after the expiry of this period the custody is with the father except in case of daughters whose custody is with the mother up to the seventh year.[10]

Nader cites Article 1173 of the Iranian Civil Code to argue that the award of custody to the father is not automatic:

Where the physical health or moral upbringing of the child is endangered by lack of care or moral degradation of the father or the mother who is the custodian, the court may, on the request of the child's relatives, his or her guardian or the Public Prosecutor, take whatever decision appropriate for the child's custody.

Nader argues that under Articles 1169 and 1173, a custody award to the father is not automatic and does consider the child's welfare. As the Malik court noted, a paternal preference alone is insufficient to determine that a foreign country's custody determination should not be enforced. Malik, 638 A.2d at 1190-91. The Malik court required a determination of whether the foreign court applied the best interests of the child standard in conformity with Maryland law and public policy. Malik, 638 A.2d at 1190-91.

The trial court disagreed with Nader's interpretation of Iranian law and concluded that on its face, Article 1173 mandates an automatic award of the son to the father after age 2, and does not create a mere paternal preference. The court found that there was no evidence that Iranian courts consider the best interests of the child in making custody determinations. The court considered Article 1173 and concluded that it does not impose a best interests standard, but is instead most analogous to a Washington modification action in which there is a considerably higher threshold to alter the initial custody award. The court noted that the custody order made no reference to or analysis of Shayan's best interests. Instead, the Iranian court appeared to have, in a default judgment, `blanketly applied Article 1169 providing for the award of sons over the age of two to their father in custody determinations.'

The court noted that Washington has mandated a strong public policy recognizing `the fundamental importance' of the parent-child relationship to the child's welfare, and that the relationship `between the child and each parent should be fostered unless inconsistent with the child's best interests.' RCW 26.09.002. Washington has set forth the best interests of the child as the standard under which to allocate parental responsibilities. RCW 26.09.002.

We agree with the trial court's conclusion that Iranian law did not consider the best interests of the child but rather awarded custody on the sole consideration of the child's age. Therefore, the trial court did not err in determining that Iranian law `flies in the face of {Washington's} strong public policy.' We affirm the trial court's refusal to enforce the Iranian custody order.

VI. The PKPA Is Inapplicable to International Custody Disputes

Nader argues that the federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. sec. 1738A (1994 & Supp. 2005), is the controlling standard for determining the home state of the child and thus the trial court erred by applying the standards set forth in the UCCJEA. The PKPA does not apply to international custody disputes and is inapplicable here. The UCCJEA governs international child custody disputes in Washington. RCW 26.27.051. The PKPA applies only to custody determinations made by a state, which it defines as `a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.' 28 U.S.C.A. sec. 1738A(b)(8). See also Dare v. Sec'y of Air Force, 608 F. Supp. 1077 (D. Del. 1985), aff'd, 787 F.2d 581 (1986) (refusing to apply the PKPA to the mother's efforts to make the father obey the Delaware family court's orders because the father was in the Philippines, a sovereign state, and therefore the PKPA did not apply).

VII. Bita's Waiver of Jurisdiction Is Immaterial

Nader argues that if **Iran** did not have jurisdiction over Bita, she waived the defense by seeking affirmative relief in the Iranian action. Nader asserts Bita took three actions waiving her objection to **Iran's** jurisdiction: first, she sought the **Iran** court's jurisdiction in obtaining a writ of garnishment against Nader, seeking a restraining order against him, and barring him from leaving **Iran**; second, she appealed the April 20, 2002 divorce verdict, seeking custody of Shayan and increased support payments; and third, she initiated her own action against Nader in **Iran** in October, 2003.

As Bita argues, even if there is any issue that **Iran** had personal jurisdiction over her, the issues here are of subject matter jurisdiction, not personal jurisdiction. Subject matter jurisdiction must be considered whenever it is raised, and cannot be waived by a party. In re Marriage of Murphy, 90 Wn. App. 488, 496, 952 P.2d 624 (1998).

Bita's action against Nader seeking return of her possessions may constitute a waiver of personal jurisdiction. By making a claim in the **Iran** court, Bita subjected herself to the personal jurisdiction of that court for actions subsequent to the filing of her claim. The State argues that since Bita apparently had no choice but to participate in the divorce action, it is not surprising that she attempted to collect funds the court ordered Nader to pay her. That nevertheless subjects her to the court's personal jurisdiction.

Yet the evidence in the record is that the parties were never divorced in **Iran**. Nader produced no evidence that he finalized the divorce verdict by satisfying its terms and applying to an official divorce registry. Thus, new proceedings in **Iran** would be necessary to obtain an Iranian divorce. Although Bita would be under the personal jurisdiction of the courts for any subsequent actions, she would still have to receive notice and an opportunity to be heard, and there would also have to be subject matter jurisdiction.

In sum, a party may not waive the lack of subject matter jurisdiction. A party may waive the lack of personal jurisdiction, and Bita may have done so here. But, any waiver is immaterial because the divorce verdict was not finalized and the parties would have to enter into a new Iranian ac-

tion to obtain an Iranian divorce. There is no proof such an action was commenced, or that Bita had any notice of any action other than the earlier divorce proceeding.

VIII. The Trial Court Did Not Err By Considering Inadmissible Evidence

Nader claims that the trial court erred by considering inadmissible evidence. Evidence Rule 1005 requires that copies of public records be certified, if possible. Nader objects to the consideration of a document that Bita purported was a translation of the letter Nader wrote to Iranian officials prohibiting Bita's departure from **Iran** on the grounds that it is an uncertified translation and neither Nader nor Bita are named in the document. Nader objects to the consideration of a letter written by Bita's Iranian attorney, on the grounds that it is unsworn and uncertified and therefore inadmissible. Finally, Nader objects to the consideration of a copy of an appeal to the Tehran Court of Appeals filed by Bita's Iranian attorney, on the grounds that it is unsworn, uncertified, and inadmissible hearsay.

Nader did not object to any of this evidence at the trial court level. `It is well settled that objections to evidence cannot be raised for the first time on appeal.' Sepich v. Dep't of Labor & Indus., 75 Wn.2d 312, 319, 450 P.2d 940 (1969). This court `may refuse to review any claim of error which was not raised in the trial court.' RAP 2.5(a).

Finally, in his reply brief, Nader argues that the superior court erred in considering evidence not before the commissioner when it revised the commissioner's order. Nader asserts that `this is in addition to the errors cited {in the} opening brief that the respondents have disputed in their briefs.' An appellant cannot raise an issue for the first time in the reply brief; each error the appellant argues must be set forth in the appellant's opening brief. RAP 10.3(a)(3). The reply brief should be limited to responding to issues raised in the respondent's brief. RAP 10.3(c). See also Dickson v. U.S. Fidelity & Guaranty Co., 77 Wn.2d 785, 787-88, 466 P.2d 515 (1970). We refuse to reach this issue.

We hold that Nader waived his evidentiary objections by failing to timely assert them.

IX. Nader Is Not Entitled to Attorney Fees

Nader seeks fees and costs under Payne and former RCW 26.27.070, which allowed such an award for matters brought in `clearly an inappropriate forum.' See Payne, 79 Wn. App. at 53-54 (quoting former RCW 26.27.070). RCW 26.27.070 has been repealed. RCW 26.27.511(1) is the relevant statute here, but allows an award of attorney fees only to the prevailing party. Nader is not entitled to fees because he does not prevail. Bita has not sought an award of fees or costs. See RAP 18.1(b).

We affirm.

KENNEDY and COX, JJ., Concur.

[1] In his reply to the motion for revision, Nader argued that Bita could have left **Iran** anytime, with just her Iranian passport. He further argued that Shayan did not have a United States passport when he went to **Iran** because as an infant he traveled on his father's passport. Nader argues that Bita fabricated the story that he took both United States passports so that she could obtain a passport for Shayan. Otherwise Shayan would not have been able to leave **Iran**. None of these statements is supported by a declaration, an affidavit, or any evidence.

[2] Bita claims that she discovered the documents were missing when she returned from the hospital. But, a letter from the Iranian Justice Department certified that Bita filed a complaint on October 11, 2001, for both the assault and the stolen documents. The source of this discrepancy is unclear, and may be a result of translation.

[3] Bita does not dispute that a divorce proceeding was started in **Iran** on October 31, 2001, and admits being served with papers related to that action. The record establishes that on April 20, 2002, the Iranian court issued a divorce verdict that allowed Nader to obtain a divorce after payment of certain sums to Bita by applying to an official divorce registry. Bita has declared that the decision to finalize a divorce verdict in **Iran** is up to the husband, and that the wife may not finalize the verdict. Bita has also declared that Nader made no payments to her and that they were not divorced by virtue of the April 20 verdict. Finally, Bita alleges that a divorce registration must be made within 90 days of issuance of the verdict or the divorce is considered dismissed. Despite Nader's declaration that he is no longer married to Bita due to the April 20 verdict, he submitted no evidence that he had finalized the divorce by following through on the requirements set out in the verdict.

[4] RCW 26.27.230 has since be repealed and recodified as RCW 26.27.201. See infra part V.

[5] Nader argues that the trial court incorrectly cited Lops v. Lops, 140 F.3d 927 (11th Cir. 1998), for the proposition that the federal court invoked the doctrine of equitable tolling on the basis of concealing a child's whereabouts for the limitation period under the Hague Convention. While the federal court's language supported the district court's invocation of the doctrine, the federal court did not reach the issue because it upheld the district court's ruling on other grounds. Lops, 140 F.3d at 946. Nevertheless, the trial court's application of equitable tolling is supported by other case law cited above.

[6] The court found that the `October 21, 2002 Iranian Judgment awarding custody of Shayan to his father implies the father filed a separate petition regarding child custody.' In addition, Nader admitted, in his initial May 31, 2002 motion to dismiss for lack of jurisdiction, that he had `not sought custody of his son, but is seeking reasonable visitation rights. The two sides have not been able to agree on the amount of child support that {he} is to pay, and are presently awaiting the Iranian Court's decision on those issues.' This admission post-dates Bita's petition for child custody in Washington.

[7] The UCCJEA defines child custody determinations and proceedings:

(3) "Child custody determination" means a judgment, decree, parenting plan, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

(4) "Child custody proceeding" means a proceeding in which legal custody, physical custody, a parenting plan, or visitation with respect to a child is an issue. The term includes a proceeding for dissolution, divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. RCW 26.27.021.

[8] Bita has conceded only that she had notice of the initial divorce action filed in October 2001.

[9] It is unclear from the record whether Bita was otherwise represented in the alleged negotiations.

[10] The record contains references to a recent change in Iranian law that gives the mother custody until age seven for boys as well.

APPENDICES

APPENDIX A: SELECTED READING ON SHARIAH AND U.S. LOCAL, STATE AND FEDERAL LAW

These articles are a sample of the sizeable literature on Shariah law and U.S. or International law. They include some that focus on the conflict of law between Shariah and U.S. law, and for an opposing view, some that actively promote Shariah.

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Faisal Kutty, "Shari'a Factor in International Commercial Arbitration, The" [article] Loyola of Los Angeles International and Comparative Law Review, Vol. 28, Issue 3 (Summer 2006): 565-624; 28 Loy. L.A. Int'l & Comp. L. Rev. 565 (2006)

Thompson, Emily L. and Yunus, F. Soniya, "Choice of Laws or Choice of Culture: How Western Treat the Islamic Marriage Contract in Domestic Courts" [notes] Wisconsin International Law Journal, Vol. 25, Issue 2 (2007): 361-396; 25 Wis. Int'l L.J. 361 (2007-2008)

Janet A. W. Dray: "International Conflicts in Child Custody: United States v. Saudi Arabia" [comments] Loyola of Los Angeles International and Comparative Law Journal, Vol. 9, Issue 2 (1987): 413-444; 9 Loy. L.A. Int'l & Comp. L.J. 413 (1986-1987)

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International Journal of Legal Information, Vol. 31, Issue 2 (2003): 370-379; 31 Int'l J. Legal Info. 370 (2003)

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Onder Bakircioglu, "Socio-Legal Analysis of the Concept of Jihad, A" [article] International and Comparative Law Quarterly, Vol. 59, Issue 2 (April 2010): 413-440; 59 Int'l & Comp. L.Q. 413 (2010)

Irshad Abdal-Haqq and Qadir Abdal-Haqq, "Community-Based Arbitration as a Vehicle for Implementing Islamic Law in the United States" [article] Journal of Islamic Law, Vol. 1, Issue 1 (Spring/Summer 1996): 61-88; 1 J. Islamic L. 61 (1996)

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Jemma Wilson, "Sharia Debate in Britain: Sharia Councils and the Oppression of Muslim Women, The" [article] Aberdeen Student Law Review, Vol. 1, Issue 1 (July 2010):

46-65; 1 Aberdeen Student L. Rev. 46 (2010)

Geoffrey Fisher, "Sharia Law and Choice of Law Clauses in International Contracts" [article] Lawasia Journal, Vol. 2005: 69-82; 2005 Lawasia J. 69 (2005)

Dominic McGoldrick, "Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws" [article] Human Rights Law Review , Vol. 9, Issue 4 (2009): 603-646; 9 Hum. Rts. L. Rev. 603 (2009)

Mona Rafeeq, "Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice" [comments] Wisconsin International Law Journal, Vol. 28, Issue 1 (2010): 108-139; 28 Wis. Int'l L.J. 108 (2010)

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Nathan B. Oman, "Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization" [article] Wake Forest Law Review, Vol. 45, Issue 3 (2010): 579-606; 45 Wake Forest L. Rev. 579 (2010)

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Shaheen Sardar Ali, "Cyberspace as Emerging Muslim Discursive Space - Online Fatawa on Women and Gender Relations and Its Impact on Muslim Family Law Norms" [article] International Journal of Law, Policy and the Family , Vol. 24, Issue 3 (December 2010): 338-360; 24 Int'l J.L. Pol. & Fam. 338 (2010)

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Noor Mohammad, "Doctrine of Jihad: An Introduction, The" [article] Journal of Law and Religion, Vol. 3, Issue 2 (1985): 381-398; 3 J. L. & Religion 381 (1985)

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Norman Bentwich, "Adhesion of Non-Christian Countries to the Hague Conventions of Private International Law, The" [article] Journal of the Society of Comparative Legislation, Vol. 15, Part 1 (1915): 76-82; 15 J. Soc. Comp. Legis. n.s. 76 (1915)

APPENDIX B: AMERICAN LAWS FOR AMERICAN COURTS (ALAC) MODEL LEGISLATION

American Laws for American Courts was crafted to protect American citizens' constitutional rights and state public policy against incursion of foreign laws and foreign legal doctrines.

MODEL LEGISLATION

AN ACT to protect rights and privileges granted under the United States or [State] Constitution.

BE IT ENACTED BY THE [GENERAL ASSEMBLY/LEGISLATURE] OF THE STATE OF [_____]:

The [general assembly/state legislature] fully recognizes the right to contract freely under the laws of this state, and also recognizes that this right may be reasonably and rationally circumscribed pursuant to the state's interest to protect and promote rights and privileges granted under the United States or [State] Constitution.

[1] As used in this act, "foreign law, legal code, or system" means any law, legal code, or system of a jurisdiction outside of any state or territory of the United States, including, but not limited to, international organizations and tribunals, and applied by that jurisdiction's courts, administrative bodies, or other formal or informal tribunals.

[2] Any court, arbitration, tribunal, or administrative agency ruling or decision shall violate the public policy of this State and be void and unenforceable if the court, arbitration, tribunal, or administrative agency bases its rulings or decisions in in the matter at issue in whole or in part on any law, legal code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the U.S. and [State] Constitutions.

[3] A contract or contractual provision (if capable of segregation) which provides for the choice of a law, legal code or system to govern some or all of the disputes between the

parties adjudicated by a court of law or by an arbitration panel arising from the contract mutually agreed upon shall violate the public policy of this State and be void and unenforceable if the law, legal code or system chosen includes or incorporates any substantive or procedural law, as applied to the dispute at issue, that would not grant the parties the same fundamental liberties, rights, and privileges granted under the U.S. and [State] Constitutions.

[4]

A. A contract or contractual provision (if capable of segregation) which provides for a jurisdiction for purposes of granting the courts or arbitration panels *in personam* jurisdiction over the parties to adjudicate any disputes between parties arising from the contract mutually agreed upon shall violate the public policy of this State and be void and unenforceable if the jurisdiction chosen includes any law, legal code or system, as applied to the dispute at issue, that would not grant the parties the same fundamental liberties, rights, and privileges granted under the U.S. and [State] Constitutions.

B. If a resident of this state, subject to personal jurisdiction in this state, seeks to maintain litigation, arbitration, agency or similarly binding proceedings in this state and if the courts of this state find that granting a claim of forum non conveniens or a related claim violates or would likely violate the fundamental liberties, rights, and privileges granted under the U.S. and [State] Constitutions of the non-claimant in the foreign forum with respect to the matter in dispute, then it is the public policy of this state that the claim shall be denied.

Versions of the American Laws for American Courts has passed into law in Tennessee, Louisiana and Arizona. The Louisiana bill is a version that limits the bill to "natural persons" and can be read here: http://www.legis.state.la.us/billdata/streamdocument.asp?did=722536

APPENDIX C: ASSEMBLY OF MUSLIM JURISTS IN AMERICA BOARD MEMBERS

AMJA Heads

Name	Title
Hussein Hamed Hassan Ph.D	The Chairman of the Assembly
Ali Ahmad Al Salous Ph.D	First deputy of the Chairman of the Assembly
Wahbah Moustafa Al Zoheily Ph.D	Second deputy of the Chairman of the Assembly
Salah Al Sawy Ph.D	Secretary General
Al Sayed Abd El Halim Ph.D	Assistant Secretary General
Sadeq Al-Hasan	AMJA Secretary General Administrative Assistant
Resident Fatwa Committee	
Salah Al-Sawy Ph.D	Previosly, the shaykh assumed various prominent positions some of which were: Professor in the Faculty of Legislation and Law at Al-Azhar University, Professor at Umm Al Qura University, a visiting professor in the Institute of Arabic and Islamic Sciences in Washington DC., President of the American Open University and a VP to its Board of Trustees. Currently, the shaykh is the President of the Sharia Academy and the Secretary General for the Assembly of Muslim Jurists in America.

Main Khalid Al-Qudah Ph.D	Assistant Professor of Islamic Studies, Imam of MAS Katy center, expert of Islamic economics and finance and a speaker at regional and national conferences.
Muhammad Muwaffak Al Ghaylany Ph.D	Imam of the Islamic Center in Grand Blank City in the state of Michigan; faculty member at the Shari`a Academy in America; President of the League of Imams in North America
Waleed Idrees Al-Maneese Ph.D	VP of the Islamic University of Minnesota, Member of the Educational Committee at the American Open University, Imam and President of the board of trustees of Dar Al-Farooq Islamic Center, Minneapolis, Minnesota, and member of the board of trustees of the North American Imams Federation (NAIF)
Waleed Basyouni Ph.D	Imam of Clear Lake Islamic Center, VP and Instructor at AlMaghrib Institute, and Director of Texas Dawah Convention

Hatem AlHaj Ph.D	The Dean of Sharia Acadmey of America, Board Certification in Pediatrics by the American Board of Pediatrics. Associate Professor of Fiqh at Sharia Academy of America and Islamic University of Minnesota.
Mohammad Na'eem AlSae'i, Ph.D.	Professor at the American Open University and Islamic American Univeristy

Consultants to the members of the Resident Fatwa Committee

Name	Title
Hussein Hamed Hassan Ph.D	The Head of the Authority of the Legislative Supervision in many Islamic legislative banks, in four Islamic banks.
Ali Ahmad Al Salous Ph.D	Professor of Jurisprudence and Fundamentals at the faculty of Legislation, Qatar University. An expert in Jurisprudence and Economy in the Jurisprudential Assembly of the Islamic Conference Organization.
Wahbah Moustafa Al Zoheily Ph.D	- Professor and the Head of the department of Islamic Jurisprudence and Doctrines at the faculty of Legislation Damascus University - The former Dean of the faculty of Legislation and Law at the University of Emirate .. - A member of the Assemblies of Jurisprudence.
Muhammad Ra'fat Othman Ph.D	Professor and the Head of the department of comparative Jurisprudence. The former Dean of the faculty of Legislation and Law at Al Azhar University. A member of the Assembly of Islamic Researches.

Ahmad Ali Taha Rayan Ph.D	- Professor and the Head of the department of the Comparative Jurisprudence "Al Feqh Al Moqaran". The former dean of the Faculty of Legislation and Law at Al Azhar University. The Head of the Islamic encyclopedia of Jurisprudence in the Ministry of Awqaaf.
Abdu Allah Ben Abd Al Aziz Al Mostalah Ph.D	- The General Secretary of the International Authority for Scientific Miracle in the Holly Qur'an and Sunnah - Makka. The former Dean of the faculty of legislation and Religion Fundamentals at the University of Imam Muhammad Ben Saud Abha.
Omar Suleiman Al Ashkar Ph.D	- Professor of Jurisprudence and Creed at the faculty Legislation - Jordon University in Oman - Jordon.
Al Hafez Thana' Allah Al Madani Ph.D	- Professor of Hadith at Lahore Islamic University. The chairman of the Authority of Fatwa. The Head of Ansar Al Sunnah (Allies of Sunnah) Centre in Lahore.

AMJA Members

Abd Al Lattif Mahmoud Ibrahim Aal-Mahmoud Ph.D	The Head of the department of Arabic and Islamic studies at the faculty of Arts – Bahrain University
Abdu Allah Ben Abd Al Aziz Al Mosleh Ph.D	The General Secretary of the International Authori
Ahmad Ali Taha Rayyan Ph.D	Professor and the Head of the department of the Co
Ahmad Al Soway`ey Shleibak Ph.D	Professor of Jurisprudence at the Open University
Akram Diaa` Al Amry Ph.D	Professor of legislation at Qatar University
Al Hafez Thana Allah Al-Madani Ph.D	Professor of Hadith (Tradition) at the Islamic Uni

Al Sayed Abd Al Halim Muhammad Hussein Ph.D	President of Al-Eman Islamic Association of NY, AMJA Secretary General Assistant
Ali Mohye Al Din Al Korrah Daghy Ph.D	Professor and the Head of the department of Jurisprudence and Fundamentals at the faculty Legislation – Qatar University, A member of he European Council for Fatwa
Hamza Al-Fe`r Ph.D	
Hussein Hamed Hassan Ph.D	Professor of Legislation at the faculty of Law – C
Hussein Aal Al sheikh Ph.D	Imam of the Holly Sanctuary of Medina, A judge in the court of distinction, Professor of Legislation at the Islamic University
Khalid Shoja`a Al-Otaibi Ph.D	
Shaykh Khalil Mohye Al Din Al Mais	Mufti in Zulhah and the western Beka`,The manager of Al Azhar in Lebanon and Al Azhar in Al Beka`,A member of the Assembly of the International Islamic Jurisprudence of the Islamic Conference Organization
Mohammad Abd Al-Razzak Al-Tebteba`ei Ph.D	
Muhammad Adam Al sheikh Ph.D	The Imam of the centre and the mosque of Al Rahmah in Baltimore – The United States of America, The former Legislative judge in Sudan`s courts
Muhammad Moustafa Al Zoheily Ph.D	The Dean of the faculty of Legislation and Islamic Studies at Al Shareqah University

Muhammad Gabr Abduh Al-Alfy Ph.D	Professor of comparative Jurisprudence at the Judicial High Institute at the Islamic University of Imam Ben Saud– Riyadh – The Kingdom of Saudi Arabia, Former Professor of Legislation at Yarmulke University – Jordon
Muhammad Othman Shopir Ph.D	Professor in the department of Jurisprudence and Fundamentals at the faculty of Legislation - Qatar University
Muhammad Fouad Al Barazy Ph.D	The Head of the Islamic in Denmark
Muhammad Ra`fat Othman Ph.D	Professor of Comparative Jurisprudence, and the former Dean of the Faculty of Shari`ah and Law, Al-Azhar University, AMJA Fatwa Committee Consultant
Saleh Ben Zayen Al Marzoki Ph.D	The General Secretary of the Assembly of Islamic Jurisprudence of Islamic International League,Professor of Jurisprudence and the Fundamentals at the University of Umm Al Qura – Makka
Shaykh Saleh Al Darwish	A judge in the court of distinction,Professor of Islamic Legislation at the Islamic University in Madinah
Sayed Abd Al Aziz Al Sily Ph.D	Professor of Creed at Al Azhar University and the
Sohayb Hassan Abd Al Ghaffar Ph.D	The secretary of the Islamic Legislative Council, AMJA Permenant Fatwa Committee member
Wahbah Moustafa Al Zoheily Ph.D	Professor and the Head of the department of Islami

Yassin Muhammad Najib Al Ghadban Ph.D	Professor of Islamic History at Jordon University – Oman – Jordon
Osama AbdulRahman	
Abdul Nasir Musa Abu Basal	
Kamal Taha Muslim Saleem	
Muhammad Ben Yahya Ben Hasan Al-Nijimy	
Mostafa AbdulHaleem	
Muhammad Sayed AlJlend	
Muhammad Hussain (Mufti of Jerusalem)	
Khalid Abdullah Almadkur	
Adel Ben AbdulRahman AlOudah	
AbdulRahman Alsudays	
'Alaa' Aldeen Kharoofa	
Omar Sulieman Al'Ashqar	
Yousuf Qasim	
Ahmad Shalibak Ph.D	
Youssof Ben Abd Allah Al Shabily Ph.D	Assistant Professor in the department of Jurisprud

AMJA Experts

Abd Al Halim Uwais Ph.D	Professor of History & Islamic Civilizations, Cairo University
Shaykh Abd Al-Muhsin Ahmed	Professor of Islamic Education and the Arabic Language

Abdel Azim AlSiddiq Ph.D	Professor of Islamic Law. Islamic American University (IAU), Imam & Director, Aqsa Islamic Society
Abdu Allah Edris Ali Ph.D	President of Islamic Education Center of North Ame
Shaykh Deya-ud-Deen Eberle	Independent Translator, Researcher, Lecturer ,Lecturer at the American Open University - Formerly
Ahmad Al Sherbiny Nabhan Ph.D	Professor at the American Open University
Shaykh Ahmad Abd Al-Khaliq	Imam of the Islamic Center of Jersy City
Shaykh Bassam Obeid	
Shaykh Gamal Helmy	Chairman of Religious Affairs in the Muslim Association of Virginia (MAV)
Shaykh Gamal Zarbozo	Islamic Writer and Researcher in Denver, Colorado
Shaykh Haitham Abu Ridwan Barazanji	Imam of Islamic Center in San Pitt, Tampa, FL
Ibrahim Dremali Ph.D	Imam of the Islamic Center of Boca Raton, Florida
Shaykh Ibrahim Zidan	Imam of Al-Huda Islamic center, NY
Shaykh Moataz Al-Hallak	
Shaykh Mohammad Faqih	Khateeb and Lecturer in Columbus, OH
Shaykh Mohammad Al-Majid	Imam of Adam Center in Virginia
Shaykh Mostafa Tolbah	Imam of Islamic Center of Detroit, MI
Shaykh Muhammad Abo Al Yosr Al Beyanony	Imam of Islamic Center of Raliegh in N Carolina

Shaykh Muhammad Sayed Adly	President of Imams and Duat Association of South & North Carolina, Imam Masjid Al-Muslimeen in Columbia, SC
Muhammad Abd Al Halim Omar Ph.D	Professor of Economy in the College of Business in Al-Azhar University, and president of Saleh Kamil Center of Islamic Economy
Shaykh Muhammad Muhammad Musa	Imam of Islamic Center of Bloomfield Hills, Michigan
Shaykh Mukhtar Kartus	Member of Board of Trustees and Daia in Islamic Center of Ann Arbor, Michigan
Shaykh Mustafa Shahin	Lecturer in the Islamic American University
Shaykh Mustafa Balkhir	MA Student in the American Open University
Shaykh Mustafa Al-Turk	Chairamn of Islamic Organization, MI
Shaykh Omar Shahin	President of Executive Committee of North America Imams Federation and Lecturer in the American Open University
Othman Abd Al-Raheem Ph.D	
Ref`at Al Awadi Ph.D	Former Professor & President of the Department of Economics in the College of Business in Al-Azhar University
Br. Sadeq Muhammad Al Hassan	Director of Masjid Annur, Sacramento, CA
Shaykh Safey Al `Assem Khan	The general supervisor of Dar Al Salam – The Islam
Shaykh Samy Muhammad Masaud	Imam of Aleman Mosque in New York City
Shawki Donia Ph.D	Professor of Islamic Economics and Dean of the Col

Tho Al Fokkar Ali Shah Ph.D	President of Islamic Circle of North America (ICNA
Shaykh Yassir Fazaqa	Imam of Islamic Center in Orange County
Shaykh Sayed Abdul Halim	
Shaykh Zaidan AlKahloot	
Shaykh Salem AlSheikhy	
Shaykh AbdulBary Yahya	
Shaykh Abdul Fattaah Edrees	
Shaykh Ali Sulieman Ali	
Shaykh Ali Laylah	
Shaykh Abdullah Edrees	
Shaykh Muhammad Saeed Mitwally	
Shaykh Muhammad Abu AlNajjah	
Shaykh Yaser Birjas	
Yasir Qadhi Ph.D	
Youssof Ibrahim Ph.D	Former professor of Islamic Economy in the College of Shariah in Qatar

APPENDIX D: 50 CASES ATTRIBUTES TABLE

State	Arizona	Arkansas	California	California	California
Case Name	*NATIONWIDE RESOURCES CORPORATION, Plaintiff/Appellee, v. Bertha S. MASSABNI and Fadlo Massabni, wife and husband; and Pierre M. Zouheil, Defendants/Appellants.*	*Monir Y. EL-FARRA, Appellant, v. Khaleem SAYYED, Mostafa Mostafa, Hamid Patel, Nadeem Siddiqui, Mohammed Shaher, Ali Jarallah, Neal Al-Mayhani, Omar Robinson, Massod Tasneem, Fawzi Barakat, Ashraf Khan, Salif Siddiqui, Shagufta Siddiqui, Said Khan, Islamic Center of Little Rock, Inc., John Doe No. 1, and John Doe No. 2, Appellees.*	*In re the Marriage of LAILA ADEEB SAWAYA and ABDUL LATIF MALAK. LAILA ADEEB SAWAYA MALAK, Appellant, v. ABDUL LATIF MALAK, Appellant.*	*In re MARRIAGE OF Ahmad and Sherifa SHABAN. Ahmad Shaban, Appellant, v. Sherifa Shaban, Respondent.*	*In re the Marriage of FERESHTEH R. and SPEROS VRYONIS, JR. FERESHTEH R. VRYONIS, Respondent, v. SPEROS VRYONIS, JR., Appellant.*
Category	Shariah Property Law	Shariah Contract Law	Child Custody	Shariah Marriage Law	Shariah Marriage Law
Rating	Highly Relevant	Highly Relevant	Highly Relevant	Highly Relevant	Highly Relevant
Trial	TCSI	TCSY	TCSNA	TCSN	TCSY
Appeal	ACSI	ACSY	ACSY	ACSN	ACSN
Country	Syria/Morocco	N/A	Lebanon/UAE	Egypt	N/A

State	California	California	Delaware	Florida	Florida	Florida
Case Name	*MARYAM SOLEIMANI KARSON, Plaintiff and Appellant, v. MEHRZAD MARY SOLEIMANI, Defendant and Respondent.*	*In re JESSE L. FERGUSON et al. on Habeas Corpus.*	*SAUDI BASIC INDUSTRIES CORPORATION, Plaintiff Below, Appellant, v. MOBIL YANBU PETROCHEMICAL COMPANY, INC. and EXXON CHEMICAL ARABIA, INC., Defendants Below, Appellees.*	*Asma AKILEH, Appellant, v. Safwan ELCHAHAL, Appellee.*	*GHASSAN MANSOUR, ABBAS HASHEMI AND HAMID FARAJI, collectively as the Trustees of the Islamic Education Center of Tampa, Inc., and ISLAMIC EDUCATION CENTER OF TAMPA, INC., a non profit corporation, PLAINTIFFS, vs. ISLAMIC EDUCATION CENTER OF TAMPA,INC., a nonprofit corporation,*	*Mahmood MOHAMMAD, Appellant, v. Shala MOHAMMAD, Appellee.*
Category	Shariah Property Law	Shariah Doctrine	Shariah Contract Law	Shariah Marriage Law	Shariah Doctrine	Shariah Marriage Law
Rating	Highly Relevant	Relevant	Highly Relevant	Highly Relevant	Relevant	Relevant
Trial	TCSN	TCSN	TCSY	TCSNA	TCSY	TCSNA
Appeal	ACSY	ACSN	ACSY	ACSY	ACSI	ACSI
Country	Iran	N/A	Saudi Arabia	N/A	N/A	Iran

State	Florida	Illinois	Indiana	Iowa	Iowa	Louisiana	Louisiana	Maine
Case Name	*BLENE A. BETEMARIAM, Appellant, v. BINOR B. SAID, Appellee.*	*The PEOPLE of the State of Illinois, Plaintiff-Appellee, v. Edwin A. JONES, Defendant-Appellant.*	*Samer M. SHADY, Appellant-Respondent, v. Sheanin SHADY, Appellee-Petitioner.*	*Ahmed S. AMRO, Plaintiff, v. IOWA DISTRICT COURT FOR STORY COUNTY, Defendant*	*Upon the Petition of MANAL HUSEIN MAKHLOUF, Petitioner-Appellant, And Concerning AHMAD MOHAMMED AL-ZOUBI, Respondent-Appellee.*	*Magda Sobhy Ahmed AMIN v. Abdelrahman Sayed BAKHATY.*	*Mrs. Tahereh GHASSEMI v. Hamid GHASSEMI.*	*STATE of Maine v. Nadim HAQUE.*
Category	Shariah Marriage Law	Shariah Marriage Law	Shariah Marriage Law	Child Custody	Child Custody	Child Custody	Shariah Marriage Law	Shariah Doctrine
Rating	Relevant	Highly Relevant	Relevant	Highly Relevant	Relevant	Highly Relevant	Relevant	Highly Relevant
Trial	TCSN	TCSN	TCSN	TCSN	TCSY	TCSN	TCSN	TCSN
Appeal	ACSN	ACSN	ACSN	ACSN	ACSNA	ACSN	ACSI	ACSN
Country	N/A	N/A	Egypt	Jordan/Morocco	Jordan	Egypt/Lebanon	Iran	India

State	Maryland	Maryland	Maryland	Massachusetts	Massachusetts	Massachusetts	Massachusetts	Michigan
Case Name	*Hosain V. Malik*	*Irfan ALEEM v. Farah ALEEM.*	*Moustafa M. MOUSTAFA v. Mariam M. MOUSTAFA.*	*Hiba CHARARA, vs. Said YATIM.*	*PAMELA TAZZIZ vs. ISMAIL TAZZIZ.[*]*	*Nazih Mohamad EL CHAAR, vs. Claude Mohamad CHEHAB.*	*Emma Louise Rhodes v. ITT Sheraton Corporation et al*	*SAIDA BANU TARIKONDA, Plaintiff-Appellant, v. BADE SAHEB PINJARI, Defendant-Appellee.*
Category	Child Custody	Shariah Marriage Law	Shariah Marriage Law	Child Custody	Child Custody	Child Custody	Due Process and Equal Protection	Shariah Marriage Law
Rating	Highly Relevant	Highly Relevant	Relevant	Highly Relevant	Highly Relevant	Highly Relevant	Highly Relevant	Highly Relevant
Trial	TCSN	TCSN	TCSN	TCSN	TCSY	TCSN	TCSY	TCSY
Appeal	ACSY	AC1SN; AC2SN	ACSN	ACSN	ACSI	ACSN	ACSY	ACSN
Country	Pakistan	N/A	Egypt	Lebanon	Jordan/Israel	Lebanon	Saudi Arabia	India

State	Minnesota	Missouri	Nebraska	Nebraska	New Hampshire	New Jersey	New Jersey	New Jersey
Case Name	*Mohamed D. ABD ALLA, a/k/a Mohamed D. Abd-Alla, a/k/a Mohamed D. Abdul-Allah, Respondent, v. Mohamed MOURSSI, a/k/a Mohamed Morsy, Appellant.*	*STATE of Missouri, ex rel., Ahalaam Smith RASHID, Relator, v. The Honorable Bernhardt C. DRUMM, Jr., Judge, Division 4, St. Louis County Circuit Court, Respondent.*	*STATE of Nebraska, Appellee, v. Latif AL-HUSSAINI, Appellant*	*Mehruz KAMAL, Appellee, v. Sohel Mohammed IMROZ, Appellant.*	*IN THE MATTER OF SONIA RAMADAN AND SAMER RAMADAN*	*FAIZA ALI, PLAINTIFF, v. QASSEM IZZAT ALI, DEFENDANT.*	*S.D., Plaintiff-Appellant, v. M.J.R., Defendant-Respondent.*	*PARVEEN CHAUDRY, PLAINTIFF-RESPONDENT AND CROSS-APPELLANT, v. M. HANIF CHAUDRY, M.D., DEFENDANT-APPELLANT AND CROSS-RESPONDENT.*
Category	Shariah Contract Law	Child Custody	Shariah Marriage Law	Child Custody	Shariah Marriage Law	Child Custody	Shariah Marriage Law	Shariah Marriage Law
Rating	Highly Relevant	Relevant	Highly Relevant	Relevant	Relevant	Highly Relevant	Highly Relevant	Highly Relevant
Trial	TCSY	TCSI	TCSN	TCSI	TCSI	TCSN	TCSY	TCSN
Appeal	ACSY	ACSI	ACSN	ACSNA	ACSNA	ACSN	ACSN	ACSY
Country	N/A	Saudi Arabia	Iraq	N/A	Lebanon	Gaza	N/A	Pakistan

State	New Jersey	New Jersey	New Jersey	Ohio	South Carolina	Texas	Texas
Case Name	*M. Kamel ABOUZAHR, M.D., Plaintiff-Respondent, v. Cristina MATERA-ABOUZAHR, M.D., Defendant-Appellant.*	*JEAN JACQUES MARCEL IVALDI, PLAINTIFF-RESPONDENT, v. LAMIA KHRIBECHE IVALDI, DEFENDANT-APPELLANT.*	*ARIFUR RAHMAN, Plaintiff-Respondent, v. OBHI HOSSAIN, Defendant-Appellant.*	*Hanadi Rahawangi, Plaintiff-Appellee, v. Husam Alsamman, Defendant-Appellant.*	*Michael M. Pirayesh, Respondent/Appellant, v. Mary Alice Pirayesh, Appellant/Respondent.*	*IN RE ARAMCO SERVICES COMPANY, Relator.*	*CPS INTERNATIONAL, INC., and Creole Production Services, Inc., Appellants, v. DRESSER INDUSTRIES, INC., Dresser A.G. (Vaduz), Dresser Rand Arabian Machinery, Ltd, f/d/b/a Dresser Al-Rushaid Machinery Company, Ltd., Abdullah Rushaid Al-Rushaid, Al-Rushaid Trading Corporation, Al-Rushaid General Trading Corporation, and Al-Rushaid Investment Company, Appellees.*
Category	Child Custody	Child Custody	Shariah Marriage Law	Child Custody	Child Custody	Shariah Contract Law	Shariah Contract Law
Rating	Relevant	Relevant	Relevant	Relevant	Relevant	Relevant	Relevant
Trial	TCSN	TCSI	TCSY	TCSI	TCSN	TCSI	TCSY
Appeal	ACSN	ACSNA	ACSY	ACSI	ACSN	ACSY	ACSY/N
Country	Lebanon	Morocco	N/A	Saudi Arabia	Iran	Saudi Arabia	Saudi Arabia

State	Texas	Virginia	Virginia	Virginia	Wash	Wash	Wash	Wash
Case Name	*In the Matter of the MARRIAGE OF Mina Vahedi NOTASH and Ali Amorllahi Majdabadi and in the Interest of Shahab Adin Amrollah-Majdabadi and Hassam Adin Amrollah-Majdabadi, Minor Children.*	*Ahmed FARAH v. Naima Mansur FARAH.*	*ACCOMACK COUNTY DEPARTMENT OF SOCIAL SERVICES v. Khalil MUSLIMANI.*	*ALI AFGHAHI, v. NEDA GHAFOORIAN.*	*In re the CUSTODY OF R., minor child. Dato Paduka NOORDIN, Respondent, v. Datin Laila ABDULLA, Appellant.*	*In the Matter of the Marriage of SOUHAIL ALTAYAR, Appellant, and SARAB ASSWAD MUHYADDIN, Respondent.*	*In re the MARRIAGE OF Husna OBAIDI, Respondent, and Khalid QAYOUM, Appellant.*	*In the Matter of the Marriage of: BITA DONBOLI, Respondent, and NADER DONBOLI, Appellant.*
Category	Shariah Marriage Law	Shariah Marriage Law	Child Custody	Shariah Marriage Law	Child Custody	Shariah Marriage Law	Shariah Marriage Law	Shariah Marriage Law/Child Custody
Rating	Relevant	Highly Relevant	Relevant	Relevant	Highly Relevant	Highly Relevant	Highly Relevant	Highly Relevant
Trial	TCSI	TCSNA	TCSY	TCSI	TCSY	TCSN	TCSY	TCSN
Appeal	ACSI	ACSNA	ACSNA	ACSNA	ACSN	ACSN	ACSN	ACSN