Religious Law Cannot Be Enforced by Any Civil Court in the United States

by
Gerald L. Nissenbaum[1] and Wendy O. Hickey[2]

Mantra

> "Preparation is necessary even in commonplace matters, for you cannot reach the significant without beginning with the insignificant."[3]

Introduction[4]

More people now live on this Earth than ever before. When people move,[5] they take with them their family history, education, training, experience, and – if any – their beliefs about religion. One consequence of mobility is increased diversity in the destination-states.[6] Understanding history and religion and faith in the context of the development and evolution of Western law is critical to understanding how and why international marriage and divorce law is a complex web of policy and practice which –

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[1] Mr. Nissenbaum practiced law from 1967-2017 in Boston, Massachusetts. He retired in 2017 from the firm of Nissenbaum, Hickey.

[2] Ms. Hickey is the managing partner at Wendy Hickey Law in Boston, Massachusetts.

The opinions in this article are those of the authors and are not intended to reflect the opinions of the American Academy of Matrimonial Lawyers or the *Journal of the American Academy of Matrimonial Lawyers*.

[3] Abraham Joshua Heschel, Moral Grandeur and Spiritual Audacity: Essays 57 (Susannah Heschel ed., 1996).

[4] A full presentation of each topic mentioned in this article would require documentation that would fill a library. Thus, this article provides information relevant to a full understanding of the respective rights of men and women in their respective societies and marriages – material that has been helpful when shared with clients, opposing counsel, and judges.

[5] People leave their places of birth for an unlimited number of reasons, among them seeking a new job or safety from negative events that have occurred or are about to occur in their respective homelands.

[6] As used here, the word "state" refers to a country, e.g., Australia, Egypt, France, Lebanon, United States, etc. But use of "state" within a quotation has not been changed. And a division of a country is identified by name, e.g. New York, California.

when brought into the United States – is bounded by constitutional and statutory strictures.

Our exploration of this "web" begins with questions divorce lawyers[7] need to consider asking their potential client to obtain relevant information. We consider most of these questions in the context of Islamic/sharia law.[8] Then we examine the relevant history, substance, and applicable law – including analysis of the two clauses in the First Amendment to the U.S. Constitution regarding religion, the Free Exercise Clause (freedom of religious practice) and the Establishment Clause (providing separation of church and state). In section V we summarize much of this material by examining one of our court-tried cases. Last, in section VI, we suggest twelve overall conclusions.

I. Questions, Questions, and More Questions

Diversity of religion and nation-of-origin presents divorce lawyers with complex facts and legal issues. These issues may arise individually or in combination. Divorce lawyers usually need to extract information from prospective clients and gather as many documents as possible, including originals or certified copies together with – if need be – certified translations.[9] Docu-

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[7] Our use of the phrase "divorce lawyers" or the word "lawyers" includes whatever you believe is the work of matrimonial or family law lawyers, mediators, arbitrators, special judges, and facilitators of adoptions and of procreation by means other than those first known to the earliest human beings.

[8] These strategic and legal principles also apply to the law of other religious-based marriages and divorces.

[9] If a language other than English is involved in the case, the divorce lawyer needs to be sure translators for both parties are not affiliated with either party, his/her lawyer, or expert witnesses. If so – and if the other party, after consultation, refuses to change translators – file a motion to prevent the other party from using or offering such translations for any part of the case. Also, it is critically important for you to have a person who is a certified, preferably by the local federal or state district court, as a translator in the relevant language. Then, beyond translating documents for your client, also have that translator review all translations provided by the other party. If a party or witness will be providing oral evidence in a language other than English, have your translator at depositions and in court to be certain the other party's translator – even if s/he is a member of or certified by the local organizations or provided by the court – is properly translating that foreign language. If the client is indigent, your local rules may permit a request to use court-appointed services or fees.

ments do not lie. They have the same words each and every time the document is read.

The following is a series of questions which, depending on the issues in a case, have helped the authors gather necessary evidence and documents used in negotiations and at trial. Did the parties marry? If yes, where did they marry? If no, did they live in a jurisdiction that recognizes common law marriages?[10] At the time of marriage, were both the bride and groom of the legal age required: (1) in that jurisdiction, and (2) in the current jurisdiction?

Were one or both parties previously married? If so, did that jurisdiction require a prior marriage to be disclosed? Did any prior marriage have to be validly dissolved before the parties could validly enter into this subsequent marriage?[11] Did the jurisdiction where the marriage occurred have a waiting period

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Be sure that a court-provided translator does not engage in a discussion with the witness about the meaning or substance of a question or of a word used in the question. The translator's job is to translate, not explain. If there is a question about meaning, the question can be rephrased.

[10] Marriage is the "legal union of a couple as spouses. The essentials of a valid marriage are (1) parties legally capable of contracting to marry, (2) mutual consent or agreement, and (3) an actual contracting in the form prescripted by law." "A common-law marriage is one that "takes legal effect, without license or ceremony, when two people capable of marrying live together as husband and wife, intend to be married, and hold themselves out to others as a married couple. * * * Today a common-law marriage, which is the full equivalent of a ceremonial marriage, is authorized in 11 U.S. states and the District of Columbia. If a common-law marriage is established in a state that recognizes such marriages, other states, even those that do not authorize common-law marriage, must give full faith and credit to the marriage." BLACK'S LAW DICTIONARY 1117-18 (10th ed. 2014).

[11] For example, if both parties were Muslims and Egyptian citizens who married in and lived only in Egypt, the husband's unilateral divorce of his wife in Egypt – merely by his pronouncing "talaq" ("you are divorced") before a Ma'azoun (divorce-notary who also serves as a marriage-notary) the divorce would be valid. The validity stands even if he did not notify his wife of his intention to divorce her and she did not attend the procedure. In fact if she had attended, she would not have been permitted to object. And, if she wanted to contest the procedure, Egyptian courts have no law that permits such a case to be filed or heard. In Egypt that notary uses a state-provided form on which he – in Egypt the notary is always a "he" – records the names of the husband, wife, and witnesses. Thereafter the notary is obligated to file that signed form in the Office of Personal Status.

before one could re-marry? And, if so, was the subsequent marriage in compliance with that law? If the current marriage occurred before the end of the waiting period, does that automatically result in the subsequent marriage being invalid?

Does that jurisdiction permit polygamy or polyandry?[12]

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[12] Polygamy occurs when a married man marries a second, third, etc. wife while still married to a prior wife. Polyandry occurs when a married woman marries a second, third, etc. husband while still married to a husband. The *Quran*, Sura Nisa' Chapter 4, verses 22 to 24 prevents Muslim men from marrying relatives within certain relationships. Of importance here is Verse 24 which reads: "Also [prohibited marriage of] women already married." The latter provision has been interpreted in this way:

> If it is said, how come men are taken care of and given free rein to satisfy their desires and move from one wife to another according to their desires and needs, when a woman's sex drive is the same as a man's?
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> The answer is that because women are usually hidden behind veils and inside their houses, and women tend to be more even-tempered than men, and less active than men, and men have been given more physical strength and energy which makes men's desires greater than woman's and men are affected by these desires more than women, a man is allowed to marry more partners than a woman is. This is one of the things that have been given exclusively to men and not to women, one of the things in which they have been given something more than women, just as they are also favoured over women in that only men can be Messengers, Prophets, caliphs, kings, governors and judges, and go out for jihad, etc., and men have been made qawwaamoon (protectors and maintainers) of women, taking care of them, working to provide them with the means of living, exposing themselves to danger, travelling about in the land and exposing themselves to all sorts of trials in order to take care of their wives.
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> The Lord is Ever-Appreciative and Forbearing, so He appreciates the men's efforts and has rewarded them by giving them something that He has not given to the women.
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> If you compare the exhaustive efforts and hard work that men do for the sake of woman with the jealousy that women suffer, you will find that the men's share of effort and exhaustion is greater than the women's share of having to put up with jealousy.
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> This is the perfect justice, wisdom and mercy of Allaah, may He be praised as He deserves.

Shaykh Muhammad Saalih al-Munajjid, *The Reason Why Plural Marriage Is Permitted for Men but not for Women*, Islam Question and Answer, www.islamqa.info/en/21459 (last visited Oct. 13, 2017).

If so, how many spouses are permitted?[13] If a subsequent wife filed for divorce in a civil law jurisdiction, will that jurisdiction

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[13] The Muslin spiritual basis for polygyny appears in the *Quran*, Sura 4 (An-Nisa), Ayah 3 which permits men to have up to four spouses:

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

The *historical context* of some of the various laws of marriage and divorce, traditions, etc. will be considered throughout this article. For example, when Sura was written, "one that your right hands possess" meant "slave." And Sura 4 was revealed to Muhammad after the March 23, 625 CE Battle of Uhud – a battle between the early Muslims and their Quraish-Meccan enemies.

Interpreters of Muslim's religious documents claim that Sura 4 was revealed to Muhammad "because of Allah's concern for the welfare of women and orphans who were left without husbands and fathers who died [in the Battle of Uhud] fighting for the Prophet and for Islam. Therefore Sura 4 is a verse about compassion towards women and their children; it is not about men or their sexuality." Alia Hogben, *Polygamy in Context*, COMMON GROUNDS NEWS SERV. (Mar. 2, 2010), http://www.commongroundnews.org/article.php? *See also* Javaid Rehman, *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, 21 INT'L. J. L., POL'Y & FAM. 108, 115 (2007) ("Theological and legal disputes concerning polygamy and polyandry cross many cultures and national systems. Given the changes in the social, political and legal environment, the continuation of the practice of polygamy demands a substantial explanation. Many of the historic reasons within the Islamic world for justifying polygamous marriages (for example, the surplus of women and loss of men through battles and armed conflict) are no longer tenable. Yet, it is undoubtedly the case that there remains a huge socio-economic imbalance between the position of men and women within Islamic societies."). A classical Islamic scholar Ash-Shirbeeni from the Shaafi'l School of Jurisprudence, declared: "It is a Sunnah not to marry more than one wife if there is no apparent need." That is: a man ought not to marry more than one wife – unless there is an apparent need, e.g. because no children were born of his first marriage so he must marry another woman in order to have children. Muslims believe that after Muhammad received each revelation, he recited it to his companions who, in turn, either memorized or wrote what was said. After Muhammad's death those revelations were gathered into what is now the *Quran*.

Sunnah is the verbally transmitted record of the Muhammad's teachings, deeds, and sayings, silent permissions (or disapprovals), as seen or heard by his companions. Mughni al-Muhtaj 4/207, www.islamweb.net/emainpage/index.php ?page=showfatwa&Option=FatwaId&Id=257272; *See also Sunnah*, Encyclopedia Britannica, www.britannica.com/topic/Sunnah (last visited Oct. 23, 2017).

treat the woman as validly married to the husband? Or, if applicable, give comity to the husband's first unilateral divorce if pronounced anywhere other than where that prior marriage occurred? If that claimed prior divorce is not deemed to be valid, is the civil law jurisdiction prohibited from treating a subsequent wife as the current spouse?

What was the religion of each party at the time of each marriage?[14] Does marriage in the Muslim religion require only an oral agreement between an eligible man and woman saying, each to the other, that they are married? Does the country where that oral exchange occurred require both an oral and written contract? If so, what authority requires a written marriage contract? Does the Muslim religion – of itself or as interpreted in the jurisdiction at issue in your case – require that there be a marriage contract or marriage ceremony? If a ceremony is required, is it civil or religious?

Did the marriage occur in a jurisdiction which had a centralized administrative document center(s)[15] in which a duplicate original of the marriage contract must be filed before that marriage will be recognized as valid by that state? If so, was their marriage contract properly filed?

Did the parties negotiate and then sign a marriage contract? If so, who negotiated the terms of the marriage contract for each party? Who said what and what was agreed upon by whom? Did the parties know and approve of the negotiated terms before the written marriage contract was presented to each of them for signing? Was it just before the marriage notary was to record required information that one or both of the parties first saw the terms of the marriage contract? At the time of signing, was either party permitted to seek different terms and conditions? Would

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[14] QURAN: 30:21: "And among His signs is that He created mates for you from among yourselves so that you may find tranquility in them; and He placed between you love and compassion. In these are sighs for people who reflect."

[15] For example, a bureau of vital statistics, or the Office of Personal Status in which births, marriages, divorces, deaths, etc. are filed and indexed. The concept of a central registry is not new. *See* Arthur J. Barratt, *Migratory American Divorces. Their International Status. Is a Central Registry Practicable*?, 17 YALE L.J. 589, 599 (1908) ("The creation at Washington, or some central place, of a central registry for the recording of all such matrimonial decrees throughout the United States-to be done at the expense of the several States agreeing to use").

the court in which the case is to be tried permit oral evidence that attempts to add religious or civil provisions to the marriage contract?

If the written law of a jurisdiction's marriage incorporates Islamic/sharia religious law, does the marriage contract also designate which "school" of interpretation of Islamic Law applies? Will a civil jurisdiction permit automatic incorporation of that law into the marriage contract?[16]

If the parties signed their marriage contract containing words that read that the contract "was signed according to the Law of Islam" – and assuming a party proved which part of Islam and which country's interpretation was applicable – would a civil law jurisdiction enforce the Islamic religious provisions or any provisions which violate the public policies and other civil law of that jurisdiction? Has any civil court treated all or a part of a marriage contract because those are equal to a premarital agreement? Or is such a contract, entirely void or voidable as a matter of policy? If void or voidable, why or why not?

If the parties signed a standard marriage contract form provided by the notary for every Muslim marriage in that jurisdiction, did they understand that contract does not cover or provide for a division of marital assets? If the parties wrote into that contract a provision providing for a division of all assets, of assets acquired during the marriage, or assets that appreciated during the marriage, would the Muslim law of that state permit enforce such a provision?

[16] The application of so-called Western rules of contract to marital agreements or other international contracts is a complex issue which is still evolving. *See* Allison Gerli, *Living Happily Ever After in a Land of Separate Church and State: Treatment of Islamic Marital Contracts*, 26 J. AM. ACAD. MATRIM. LAW. 113 (2013). If, for example, the marriage contract contains a statement that it was signed according to the Law of Islam, but that contract is litigated in a non-Muslim court or country, must that court apply Islamic law? If so which school of Islamic law would apply? Would the parol evidence rule prevent testimony about what, if any, portions of Islamic law mean or apply? *See* Cristina Puglia, *Will Parties Take to Tahkim?: The Use of Islamic Law and Arbitration in the United States*, 13 CHI.-KENT J. INT'L & COMP. L. 151 (2013). Practice Point: if a court permits oral testimony by an expert on the religious law for the purpose of providing the court with those religious-law details, that witness may actually be improperly *re-drafting* the marriage contract, rather than providing *clarification* of a term or condition in the contract.

Is the signing of a Muslim marriage contract "the" marriage? Did the parties understand the husband would be giving the wife a gift, called a "mahr"?[17] Will you be able to convince the civil-court that the use of the word "dowry": (1) does not stand in place for or mean that it is a division of marital property, and (2) to define the mahr means something quite different in an Islamic marriage than what the word "dowry" means in the English language?

Did the parties' religion require a written marriage contract? If not, is an oral agreement related to marriage or divorce enforceable in that state? If so, were the required steps taken to secure validity? If there was no centralized office of personal status, or if the marriage contract was not filed in such an office, how would one prove s/he was married?

Must the Islamic marriage be witnessed? Must each witness provide state-issued documents to confirm their identity? Is there a need for the marriage contract to be signed before a notary public or before someone who has duties similar to those of a notary public in the United States? If a witness is required, must that witness be a member of the same religion as the parties? Or a citizen of the same country as the parties? Or both? Does the gender of the witness matter?

If signed in another jurisdiction, in order to enforce the marriage contract in a U.S. state, must that agreement comply with provisions of the Uniform Premarital Agreement Act (UPAA)?[18] Or with other U.S.-state-based requirements for disclosure and fairness? Was the marriage contract prepared according to Arabic (Katb el-Kitab), Hebrew (Ketubah), Urdu (Nikah-Nama), or another set of religious, tribal, or state rules? Was the marriage contract based only on religious principles? Only on civil law? Or both? Or a mixture of the religious and civil rules? Did the state where the marriage occurred adopt elements of or all of the law of a religion as its civil law? If so, in

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17 The *Quran* 4:4 reads: "and give the women their dowries with a good heart." The mahr is a mandatory payment, in the form of money or possessions paid or promised to be paid by the groom, or by groom's father, to the bride at the time of marriage, which payment legally becomes her property.

18 For an overview of the UPA and its variation among states, see Amberlynn Curry, *The Uniform Premarital Agreement Act and Its Variations Throughout the States*, 23 J. AM. ACAD. MATRIM. LAW. 355 (2010).

those religion-based family-law jurisdictions, do judges hearing divorce cases look for guidance from religious law? From civil law? Or both?

If the marriage contract, which is based upon religious doctrines, is presented in a civil law jurisdiction, what is the claimed basis for following religious, rather than civil law? Have those religious doctrines been interpreted by commentators or interpreters of the same or different sects of that same religion? Are any or all of those interpretations considered valid? If so by whom? Are the different interpretations compatible with each other?

Does the religion of one or both parties require that they sign a marriage contract? If yes, what steps must be taken, if any, before the marriage contract is signed? Are the requirements of the state in which the marriage occurred different from those of the requirements of the jurisdiction where the parties have filed for divorce?

Did the parties agree on the terms of their pre-marital agreement?[19] Did each party have their respective separate independent representative or counsel to help negotiate the terms and preparation of their pre-marital agreement? Was the pre-marital agreement signed before necessary-witnesses and/or a notary public?[20]

Was either party directly or indirectly bullied, coerced, forced, intimidated, pressured, or threatened to sign that marriage contract or pre-marital agreement against that party's objection and wishes? If one provision in a marriage contract or pre-marital agreement required that a party was to and did receive – on signing the marital contract/pre-marital agreement – a sizeable[21] marital gift, what are that party's chances of successfully claiming coercion – or prevailing on another affirmative claim or defense – in an effort to convince the court to vacate the marital contract or pre-marital agreement?

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[19] For purposes of this article, unless otherwise specified, a document must be written and signed for there to be a marital contract or pre-marital agreement.

[20] As used in this document, the job description of a notary public references the types of work done by notary publics in the United States and, as well to the name given to a person doing similar work in other jurisdictions.

[21] "Sizeable" is defined by the judge who is trying the case.

Would a U.S. court enforce religious law?[22] Does a Muslim court, a Jewish Bet Din, or other religious court have the power or authority to enforce U.S. civil law? If so, will it do so? And if "yes," is it only upon the consent of the parties and the presiding person who then treat the proceedings as an arbitration? Does the marriage contract meet the standard for its enforcement in the jurisdiction in which it was signed? And/or in the jurisdiction in which one or both of the parties was/were domiciled[23] at the time of signing?[24] Or at the time of enforcement? Or in the state where a divorce is sought, pronounced, or ordered?

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[22] As used in this article, references to religious and civil law are only as they apply to the law of marriage, divorce, and related issues.

[23] Domicile is often spelled as "domicil." Because both are correct, be certain of the spelling that is considered correct for your filings in each court.

[24] "Domicile is a noun which describes the "place at which a person has been physically present and that person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere. Domicile may be divided into (1) domicile of origin, (2) domicile of choice, and (3) domicile by operation of law – Also termed *permanent abode; habitancy.*" BLACK'S LAW DICTIONARY, *supra* note 10, at 592. *See also* Bangs v. Inhabitants of Brewster, 111 Mass. Reports [of SJC] 382 (Jan. Term 1873) (domicile held to have been obtained in Orleans, Massachusetts by a ship-master who – before the May 1 Brewster, Massachusetts tax assessment date – sent his wife ahead to live in Orleans, Massachusetts where she waited for him to return from his being out to sea. And, even though, he was at sea on that May 1st – which was why he did not arrive in Orleans until after that May 1st date – Brewster sent him a property tax bill. The SJC ruled the Sea Captain did not have to pay the tax assessed by the town of Brewster on what was his former and abandoned burned-out home, because – before going out to sea – he told the assessor of his abandonment); Caffyn v. Caffyn, 411 Mass. 487 (2004) (holding that the wife properly filed for divorce because, after being in Massachusetts for a few days and because it was only after those few days that she then decided the marriage was over. So the cause of action accrued in Massachusetts. So, per the applicable Massachusetts General Law, the wife did not have to meet the one-year statutory residence requirement for someone who had decided to get divorced before moving to Massachusetts. Domicile has been defined as "the place of one's actual residence with intention to remain permanently or for an indefinite time and without any certain purpose to return to a former place of abode."); Fiorentino v. Probate Ct., 365 Mass. 13, 17 n.7 (1974), quoting Tuells v. Flint, 283 Mass. 106, 109 (1933). Whether a person has established a domicile in a State is a question of fact for the trial judge. *Caffyn*, 411 Mass. at 492, citing with approval to *Fiorentino*, 365 Mass. at 21-22. The judge can make "a reasonably accurate determination" of the plaintiff's claim of Massachusetts domicil based on numerous factors, including, without limitation, whether the plaintiff has "a Massachusetts

Does the civil court know of and, if so, will it enforce the decisions of the U.S. Supreme Court which provide that unless a party was validly domiciled in the state – such as Nevada – where the divorce was unilaterally granted, that divorce does not have to be recognized nor given full faith and credit by another U.S. state?[25]

If parts of the marriage contract, prepared as a religiously required document, are similar to the civil law of the state where enforcement is sought, will enforcement of those provisions be granted?

Can a marriage contract include a choice of law or choice of jurisdiction? Would such a choice of law and jurisdiction be enforced by a civil law jurisdiction? Would such a choice of law and jurisdiction – other than the religious jurisdiction – be enforced by the religious court?[26] If not, would a civil court follow suit by granting comity to that religious law?

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driver's license and automobile registration; whether he or she has purchased a home or has leased an apartment in the Commonwealth; . . . whether any children have been brought to live in Massachusetts; whether personal property, including household goods, has been brought here; . . . whether there is evidence of abandonment of previous domicil, e.g., cancellation of bank accounts, leases, memberships, and so forth, sale of property, and issuance of change of address notices." *Fiorentino*, 365 Mass. at 22, n.12. The length of residence in the State is "one, but only one, relevant consideration" in determining domicil. *Id*. at 22. *See* Kennedy v. Simmons, 308 Mass. 431, 434-435 (1941) (domicile established in Massachusetts where person intended to remain permanently but died in a hospital one week after arriving in Massachusetts from Florida); Winans v. Winans, 205 Mass. 388, 391-392 (1910) (domicile established in Massachusetts even though a person had stayed in Massachusetts for less than two weeks living in a hotel while looking for more permanent accommodations).

25 *See* Williams v. North Carolina, 312 U.S. 287 (1942) (Williams I) (The federal government determines marriage and divorce statuses between state lines, primarily looking at the validity of the claim of domicile made by the plaintiff in the divorce case; remanded so the state court can make that determination); Williams v. North Carolina, 325 U.S. 287 (1945) (Williams II) (upholding a state – court finding that Mr. Williams did not have valid domicile in Nevada at the time he obtained a unilateral divorce there and other related factors). Mr. William's criminal conviction of adultery was properly entered by the trial court.

26 Strict Muslims, Orthodox Jews, and strict members of other religions which believe in a God, also believe that the word of God cannot be changed by mere human beings. So if it is believed that God requires this or that, then this and that must be done.

Does the marriage contract make a compulsory selection of a forum in which any dispute must be tried? Or a compulsory choice of law to use during court proceedings? Or both?[27] If so, if those choices are based on religious law, will those choices be enforced by a civil court in the United States? Will a decision made in a U.S. state be given comity in another U.S. state? Will another jurisdiction give comity to a decision made by a court in a U.S. federal or state court?

What facts or law do you need to know before giving advice to a client? What law of the foreign country do you need to get the judge to take judicial notice of? What do you have to do to get that law into evidence? To what extent will answers to these and other questions enhance, reduce, or prevent your client's desired result?

The permutations that arise from these questions may reflect future variations as more people enter or engage in intimate transactions throughout the world and then move for work or family formation or immigration or refugee status to the United States. It is, however, possible to at least predict the legal framework in which U.S. courts will hear and decide these cases. To find that answer, we next examine the U.S. constitutional issues and weave through the connections to an actual family law case as a means to understand best practices.

II. Knowing (Even If Just Barely) the History of "Rights" May Give Your Client a Head Start

> [Citizens] possess individual rights independently of all social and political authority, and any authority which violates these rights becomes illegitimate. The rights of the citizens are individual freedom, religious freedom, [and] freedom of opinion, which includes the freedom to express oneself openly, the enjoyment of property, [and] a guarantee against all arbitrary power. No authority can call these rights into question without destroying its own credentials. The sovereignty of the people is not unlimited, and since its will is not sufficient to legitimate whatever it happens to wish, the authority of the law, which is nothing

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[27] *See* Boland v. George S. May Int'l Co., 969 N.E.2d 166 (Mass. App. Ct. 2012). *Boland* is Massachusetts' leading case on forum selection and choice of law.

> but the true or supposed expression of that will, is not unlimited either.[28]

So wrote, in May 1815, Swiss-French political activist/philosopher Henri-Benjamin Constant *de* Rebecque,[29] a/k/a Benjamin Constant[30] about then-deceased French-speaking Genevan [Swiss] philosopher Jean-Jacques Rousseau's[31] and his 1700's-concept of liberty. Constant went on to write that:

> The sovereignty of the people is not unlimited; it is, on the contrary, circumscribed within the limits traced by justice and by the rights of individuals. The will of an entire people cannot make just what is unjust. The representatives of the nation have no right to do what the nation itself has no right to do. No monarch, whatever the title he may claim, whether the title rests upon divine right, the right of conquest or assent of the people, possesses a power without limit. * * * The assent of the people cannot legitimate what is illegitimate, because the people cannot delegate to anyone authority which they do not themselves possess.[32]

In his *The Social Contract*, Rousseau wrote in language oft quoted but rarely read today in context, "'Man is born free, and everywhere he is in chains. . . . How did this change take place? I do not know? What can render it legitimate? I believe I can answer this question." For Rousseau "legitimacy is a matter of liberty . . . and chains of political obligation are legitimate when they are self-imposed in a social contract."[33] Rousseau then argued that: "Specifically, obedience to self-imposed law is 'moral liberty, which alone makes man truly master of himself." And then concluded centuries ago that "it is possible to be at once

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28 *Principles of Politics Applicable to All Representative Governments* (first published as *Principes de Politique* (May 1815), examining the then-Constitution of the French Republic; republished in *Cours de Politique Constitutionnelle* (Edouard Laboulaye ed. 1861), *in* BENJAMIN CONSTANT, POLITICAL WRITINGS 180 (4th ed., Biancamaria Fontana trans. and ed. 1988).

29 (1767-1830).

30 *Principles of Politics Applicable to All Representative Governments, supra* note 28, at 180.

31 (1712-88).

32 *Principles of Politics Applicable to All Representative Governments*, *supra* note 28, at 182.

33 ZEV M. TRACHTENBERG, MAKING CITIZENS: ROUSSEAU'S POLITICAL THEORY OF CULTURE 213 (1993).

free and subject to law, since the laws are merely registrations of our will."[34]

Constant criticized Rousseau who, in turn, had criticized that part of Ancient Greek philosopher Plato's Socratic dialogue[35] which asserted[36] that the order and character of a "just" city-state – controlled by the best qualified, who are selected by that city-state – will develop the "just" men who will – whether they like it or not – be obliged to engage in work designed for them, all to have a more efficient city-state.[37] The distinction between a social contract between a society and its citizens and a contract between two individuals effecting rights drawn from the social contract is one of profound consequence. As described below, this intersection remains a source of much of the tensions that arise in this area of divorce law and public policy.

One example are the claims about the method and terms of rights according to the law in a foreign jurisdiction and its influence on whether marriage contracts may include payments to the bride or her family – or from the bride's family to the groom – known collectively as bride wealth, bridewealth, or brideprice.[38] Bridewealth was commonly paid in a currency that was not generally used for other types of exchanges. Its payment is *not* the purchase of a woman – which was the belief of twentieth century commentators.[39] Rather, it was a symbolic gesture acknowledg-

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34 *Id.* at 213-14. "Under the social contact each member of society 'puts in his person and all of his powers under the direction of the general will.' . . . [G]eneral will explains why the members of society are motivated to impose a law on themselves, and hence obtain the autonomy that grounds legitimacy. . . . Social ties are effective precisely because 'in fulfilling them, we cannot work for others without also working for ourselves.'" *Id.* at 214.

35 PLATO, THE REPUBLIC, bk. VIII, (c. 380 B.C.E.) (dissecting the character and order of the "just man" and the "just city-state").

36 Another Ancient Greek philosopher, Aristotle – born 384 B.C.E. in Stagira, Greece – became, at age seventeen, a student in Plato's Academy. In 335 Aristotle started his own school, the Lyceum, where in 338 he began tutoring Alexander the Great. *Aristotle*, BIOGRAPHY.COM https://www.biography.com/people/aristotle-9188415 (last visited Aug. 28, 2017).

37 *See* JASON STANLEY, HOW PROPAGANDA WORKS 36 (2015).

38 George Dalton, *Brief Communications: "Bridewealth" vs. "Brideprice,"* 68 AM. ANTHROPOLOGIST 732–37 (1966).

39 Various societies – because they believed it to be unnecessary – did not educate women to read or write. AKIKO KUSUNOKI, GENDER AND REPRESENTATIONS OF THE FEMALE SUBJECT IN EARLY MODERN ENGLAND CREATING

ing, but never paying off, the husband's permanent debt to the wife's parents.[40]

In another example of Islamic law – in collections of Islamic jurisprudence (*Figh*)[41] – Muslim child custody cases fall under *muamlat*.[42] Muslims believe s*haria* is divine law as revealed in the

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THEIR OWN MEANINGS 38 (2015) ("Although learning in women was still admired in some seventeenth-century writings, Jacobean people in general, as with Sir Thomas Overbury in *A Wife* showed appreciation of 'Knowledge' in women only in its restricted sense of wisdom, regarding learning as unnecessary or dangerous. Thus, John Donne preached that '*wit, learning, eloquence, musick, memory, cunning*' were unnecessary for a woman, and perhaps even undesirable because they would 'make her never fit' for 'a Helper' (Sermons, 1955 Vol. II.346").

40 DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 131-32 (2011).

41 *Fiqh,* ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/fiqh (last visited Aug. 29, 2017)

42 Islamic law divides all legal acts into either "ibadat" or "muamalat." Ibadat are acts of ritual worship such as prayer or fasting. Muamalat are acts involving interaction and exchange among people such as sales and sureties. "Muamalat" refers to commercial and civil acts or dealings under Islamic law. Matters involving ibadat are not susceptible to innovations or change (ittiba). In muamalat, there can be changes to facilitate human interaction and promote justice. Muslim jurists disagree whether certain legal acts, such as marriage or divorce, fall under the category of muamalat or ibadat. *Muamalat*, THE OXFORD DICTIONARY OF ISLAM, http://www.oxfordislamicstudies.com/article/opr/t125/e1564 (last visited Aug. 29, 2017).

Ittiba or Taqlid is deemed compulsory upon Muslims. It refers to submitting to and acceptance of the authority of an expert without demanding proof and justification for every view, opinion, or verdict expressed by that expert authority. Accepting – without question – those expert opinions is claimed to be a blessing for common people because "it is beyond their capacity to understand the extremely complex and complicated mechanics of Islamic law. Ijtihad is one of the four sources of Sunni-Islamic law which is defined as "independent reasoning" as opposed to taqlid (imitation). Tjtihad is only used when the *Quran* and *Sunnah* – the first two sources – are silent. To qualify to give such an interpretation, one must have knowledge of sharia/Sunni law, "theology, revealed texts, * * * and a sophisticated capacity for legal reasoning." According to many scholars, the resulting opinion "may not contradict the *Quran*, and it may not be used in cases where consensus (ijma) has not been reached. Sunnis believe ijtihad is fallible since more than one interpretation of a legal issue is possible. Islamic reformers call for a revitalization of ijtihad in the modern world. Ijtihad, THE OXFORD DICTIONARY OF ISLAM, http://www.oxfordislamicstudies.com/article/opr/t125/e990 (last visited Oct. 23, 2017).

A mujtahid is an individual who is qualified to exercise ijtihad in the evaluation of Islamic law. The female equivalent is a mujtahida.

Quran and the *Sunnah* (the teachings and practices of the Islamic prophet Muhammad). Figh is the expanded and developed by interpretation of the *Quran* and *Sunnah* by legal opinions (*Fatwa*) issued by Islamic jurists (*Ulama*).[43]

For divorce lawyers, having just this limited information about Islamic law may guide an inquiry in a U.S. court into the foundation for any contract being proffered for enforcement and for qualification of any so-called expert in Islamic law. The several states of the United States must defer to the supreme law in the Constitution and other federal law and treaties. Whatever the claim, the tensions inherent in a system of federalism arise in this arena with the key being that decisions in divorce cases must be consistent with the Establishment and Supremacy Clauses of the First Amendment to the U.S. Constitution.

It is important to avoid the assumption that any of this discussion is static or that political changes globally may not alter legal principles clear today.[44] The mere assertion of a "right" recognized by a foreign jurisdiction is likely *not* sufficient, in and of itself, to render that right inviolable in the United States.[45] The

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Authors' comment: This information may assist in qualifying or prevent qualification of a proffered expert in sharia law.

43 To become an Ulama member, students must be educated by knowledgeable teachers. If the teacher certifies that a student has successfully completed his education, he will be given permission to teach and to issue legal opinions *(fatwa)*. This practice continues to this day. Ulama has three subgroups. (1) "Principles of Faith" deals with one's belief in resurrection, prophets, God, and, among other things, "prophethood"; (2) "Moral behaviour and ethics" necessary to improve human behavior such as "justice, generosity, submission to the Will of Allah, etc.; (3) Practical laws which focus on rules and regulations for various acts and to "provide guidelines for the way these acts be performed. *Ulama*, ENCYCLOPAEDIA OF ISLAM ___ (2nd ed. 2012).

44 *See* Andreas Fischer-Lescano & Gunther Teubne, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1014 (2003) ("Legal collisions are lent a final increased intensity by virtue of their constitutional anchoring. The fragmentation of global society has ramifications for constitutional theory as well.").

45 Common law in the United States has always recognized the inherent limitations on contracts so the principle is not just a matter of some modern trend toward foreign law. For a case with language that should make lawyers pause for the so-called good old days of elegant language, see *Wheeler v. Russell*, 17 Mass. 258, 281 (1821) ("The Chief Justice observed, that the cause had been so elaborately argued on both sides, and the points and authorities so thoroughly displayed, that it was quite unnecessary for the Court to go into a

role of constitutional doctrine and its intersection with divorce law must be understood. So in the next section, we address the specific role and application of the First Amendment and religious law in both U.S. state and federal courts.

III. The First Amendment of the U.S. Constitution Meets Divorce Law

1. *The First Amendment*

The First Amendment to the U.S. Constitution, contains two clauses – the "Establishment" and the "Free Exercise" clause. The First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[46]

a. *The Establishment Clause*

Although that first phrase is called the Establishment Clause, this clause may more accurately be described as the non-establishment clause. That's because no valid law can prevent people from practicing their religion or faith.[47] And, because the government is prohibited from paying money to further any religious-belief system or institution, there cannot be any state-sponsored churches.[48]

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formal discussion of the case. They were all of opinion that the shingles, for the price of which the note in suit was given, having been sold in direct violation of the statute, the consideration of the promise was clearly illegal, and insufficient to support it. No principle of law, his honor added, is better settled than that no action will lie upon a contract made in violation of a statute, or of a principle of the common law. The authorities cited by the counsel for the defendant to this point, are irresistible.").

46 U.S. Const. Amend. I.

47 There is no historical definition of the phrase "establishment of religion." It may be, that having seen the power of the Church of England, the Framers of the Constitution wanted to avoid having any government-imposed religion. However, such a provision was not in the four corners of the Constitution, which is why Jefferson urged that be included in the First Amendment.

48 "None of the Framers believed that a governmental connection to religion was an evil in itself. Rather, many (though not all) opposed an established [Governmental] church because they believed that it was a threat to the free exercise of religion. Their primary goal was to protect free exercise. That

"Separation of church and state" is a phrase used by Thomas Jefferson and others expressing their understanding of the intent and function of the First Amendment's Establishment and Free Exercise Clauses. The phrase "separation of church and state" is usually traced to a January 1, 1802 letter by Thomas Jefferson, sent to the Danbury Connecticut's Baptist Association, the content of which was later-published in a Massachusetts newspaper.

In 1644, Roger Williams, founder of the first Baptist church in America described a concept as: "[A] hedge or wall of separation between the garden of the church and the wilderness of the world."[49] Thomas Jefferson may have had Williams' words in mind when he wrote on January 1, 1802: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & state."[50]

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was the main thrust of James Madison's famous *Memorial and Remonstrance* (1785), https://founders.archives.gov/documents/Madison/01-08-02-0163, in which he argued that the state of Virginia ought not to pay the salaries of the Anglican clergy because that practice was "an impediment to a person's free connection to whatever religion his conscience directed him." For an elongated presentation of cases dealing with the separation of church and state, see *Establishment of Religion*, THE HERITAGE GUIDE TO THE CONSTITUTION, Teacher's Companion Lesson, Amendment 1, http://www.heritage.org/constitution/#!/amendments/1/essays/138/establishment-of-religion (last visited Aug. 30, 2017).

[49] *See* John M. Barry, *God, Government and Roger Williams' Big Idea*, SMITHSONIAN MAG. (Jan. 2012), http://www.smithsonianmag.com/history/god-government-and-roger-williams-big-idea-6291280/.

[50] *See Jefferson's Letter to the Danbury Baptists* (Jan. 1, 1802), Library of Congress, https://www.loc.gov/loc/lcib/9806/danpre.html:

> To messers. Nehemiah Dodge, Ephraim Robbins, & Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut.
>
> Gentlemen
>
> The affectionate sentiments of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, & in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing.
>
> Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith

The Supreme Court has often cited Jefferson's wall-of-separation metaphor. In 1879, the Court found that Jefferson's comments "may be accepted almost as an authoritative declaration of the scope and effect of the [First] Amendment."[51]

As a matter of original jurisprudence, the Bill of Rights applied only to the federal government – not to any state of the United States. To ensure states could not violate the rights granted citizens in the Constitution and Bill of Rights, the Four-

or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection & blessing of the common father and creator of man, and tender you for yourselves & your religious association, assurances of my high respect & esteem.

Th Jefferson

Jan. 1. 1802.

51 Reynolds v. United States, 98 U.S. 145, 164 (1879) (Waite, C.J.) ("In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the Unites States. Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion (2 Jeff. Works, 355), but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. 1 Jeff. Works, 79. Five of the States, while adopting the Constitution, proposed amendments. Three — New Hampshire, New York, and Virginia — included in one form or another a declaration of religious freedom in the changes they desired to have made, as did North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted."). After adoption, Jefferson wrote his letter to Roger Williams. *See supra* note 50 and accompanying text.

teenth Amendment was ratified on July 9, 1868.[52] Section 2 of the Fourteenth Amendment reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[53]

One example of these tensions was the Supreme Court's decision in *Everson v. Board of Education of the Township of Ewing*,[54] where a New Jersey statute let district boards of education (Board) make rules and contracts to transport children to and from schools – other than to for-profit private schools. A Board approved paying to transport children to Catholic schools where they were supervised by a Catholic priest and given secular and religious instruction.

A district taxpayer claimed that, first, the due process clause was violated by taking taxpayers' private property – taxes paid – and giving it to others so they could get paid transportation for their children to attend parochial schools; and second, the state power was improperly used by forcing inhabitants to pay taxes to help support and maintain the parochial schools. The New Jersey trial court ruled the Board could only provide transportation to public schools.[55] That decision was reversed by a New Jersey appellate court[56] and affirmed by the U.S. Supreme Court which ruled:[57]

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt

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52 Murdock v. Pennsylvania, 319 U. S. 105 (1943) (applying the Bill of Rights to the states by the Fourteenth Amendment).

53 U.S. CONST. Amend XIV.

54 330 U.S. 1 (1947).

55 39 A.2d 75 (N.J. 1944).

56 44 A.2d 333 (N.J. 1945).

57 330 U.S. at 18.

> to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[58]

The Supreme Court ruled a public purpose would be served by using tax-raised money to pay bus fares for all children, including those who attend parochial schools. The Court also ruled it could not reverse a state-passed law designed to satisfy a public need, even though the law fulfills "the personal desires of those directly affected."[59] So that tax was deemed to be for a public purpose which the Court ruled did not violate the Fourteenth Amendment,[60] nor was it a "law respecting an establishment of religion."[61]

As the majority summarized, the "broad meaning given the [Fourteenth] Amendment * * * has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom."[62] Justice Jackson dissented, writing that "much of [the majority's] reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation."[63] In his dissent, Justice Wiley Rutledge argued a position that continues to re-occur in constitutional jurisprudence:

> The funds used here were raised by taxation. The Court does not dispute nor could it that their use does in fact give aid and encouragement to religious instruction. It only concludes that this aid is not "support" in law. But Madison and Jefferson were concerned with aid and support in fact not as a legal conclusion "entangled in precedents." Here parents pay money to send their children to parochial schools and funds raised by taxation are used to reimburse them. This not only helps the children to get to school and the parents to send them. It aids them in a substantial way to get the very thing which they

58 *Id.* at 15-16.

59 *Id.* at 6.

60 *Id.* at 5-8.

61 *Id.* at 8-18.

62 *Reynolds*, 98 U.S. at 164.

63 330 U.S. at 19 ("The Court sustains this legislation by assuming two deviations from the facts of this particular case; first, it assumes a state of facts the record does not support, and secondly, it refuses to consider facts which are inescapable on the record.").

> are sent to the particular school to secure, namely, religious training and teaching.[64]

In *Everson*, however, the Court opened a door which – instead of closing – has, in decades of subsequent cases, continued to tiptoe along the top of the Jeffersonian wall between church and state. Rutledge would say the *Everson* Court crumpled the wall into dust.

b. *Free exercise and freedom of speech permit challenges to organized religions*

The second, Free Exercise, clause of the First Amendment gives everyone in America the right of "freedom of speech" on almost every topic.[65] In 1962, the U.S. Supreme Court held it was unconstitutional for state officials to compose an official school prayer and encourage its recitation in public schools.[66] However, the Court has not always interpreted this constitutional principle as absolute. In 1971, the Court developed a three-part test which permitted the government to assist a religion if: 1) the purpose is primarily secular; 2) the action neither inhibits nor promotes religion; and 3) there is no "excessive entanglement" between the state and the church.[67]

On June 26, 2017, the Court decided *Trinity Lutheran Church of Columbia, Inc. v. Comer, Director, Missouri Department of Natural Resources*.[68] The department offered to reimburse non-profit organizations for installing its playground surfaces with recycled tires. But, because Missouri's state constitution prevented the state from spending public money on "any church, sect, or denomination of religion" the department refused to reimburse the church. The church's lawsuit soon followed, claiming the reimbursement was for a secular purpose – to avoid harm to children – so the money was not being paid for a religious purpose.

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[64] 330 U.S. at 45.

[65] But that's a topic for another article. *See, e.g.,* Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that the state can force inoculation of children whose parents would not allow such action for religious reasons because there is an overriding interest in protecting public health and safety).

[66] Engel v. Vitale, 370 U.S. 421 (1962).

[67] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[68] 137 S. Ct. 2012 (2017).

Chief Justice Roberts "delivered the opinion of the Court, except as to footnote 3,"[69] deciding the state could not deny – that is exclude – churches from secular-purpose government grants which are "generally available"[70] to other charitable groups. To do so violated the "Free Exercise Clause" guaranteed by the U.S. Constitution. "The consequence is, in all likelihood, a few extra scraped knees. But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand."[71] Having gone that far, Justice Roberts added his footnote 5 which reads: "Based on this holding, we need not reach the Church's claim that the policy also violates the Equal Protection Clause."[72] Justice Roberts' full decision was joined by Justices Kennedy, Alito, and Kagan.

Justices Thomas and Gorsuch joined the decision except for footnote 3. Justice Gorsuch wrote: "The general principles here do not permit discrimination against religious exercise – whether on the playground or anywhere else."[73] Justice Breyer agreed with "much of what the [majority] held." However, he believed the Court "need not go further" than to hold that

> [t]he fact that the program at issue ultimately funds only a limited number of projects cannot itself justify a religious distinction. Nor is there any administrative or other reason to treat church schools differently. The sole reason advanced that explains the difference is faith. And it is that last-mentioned fact that calls the Free Exercise Clause into play.[74]

Justice Sotomayor, citing *Everson*,[75] dissented, writing:

> To hear the Court tell it, this is a simple case about recycling tires to resurface a playground. The stakes are higher. This case is about nothing less than the relationship between religious institutions and the civil government – that is, between church and state. The Court today

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69 *Id*. at 2041. Footnote 3 reads: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."

70 *Id.* at 2019.

71 *Id.,* at 2024-25.

72 *Id.* at 2041.

73 *Id.* at 2026. (Gorsuch concurring on a more limited basis and not agreeing with footnote 3).

74 *Id.* at 2026-27 (Breyer, J., dissenting).

75 *Everson*, 330 U.S. at 16.

> profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decisions slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state for the benefit of both.[76]

Thus, the decision of the Missouri court was reversed and Missouri had to pay the church's expenses, as it had paid those of other non-church schools. The *Trinity Lutheran* opinion needs to be carefully read by divorce lawyers because the door is now more open than ever before so future refined statutes or tax policies may pass constitutional muster. *Trinity Lutheran* is also particularly interesting because it was mostly the so-called conservative Justices who carried the shredded tires, so to speak. Surely, there are more church and state cases to come.

2. *Additional Considerations Regarding Separation of Church and State*

Since the 1868 ratification of the Fourteenth Amendment its doctrine of incorporation has taken and will continue to take decades to further refine.[77] Then and now, the question is: What was originally meant by the separation of church and state. Is the separation violated when the government adds "so help me God" to oaths of office, appoints "chaplains" to speak at various events, permits voluntary prayer meetings in government departments and before or after meals served to members of the U.S. Armed services?[78] All of these have been deemed part of each individual's free exercise of religion.

On the other hand, the Supreme Court ruled that requiring children to say prayers every morning before classes was a forced – not a free – exercise of religion,[79] as was both "state-sponsored devotional Bible readings" in public schools[80] and having a student say a prayer over the stadium's public address system before

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[76] *Trinity Lutheran*, 137 S. Ct. at 2027-28 (Sotomayor, J., dissenting).

[77] On this point, Justice Gorsuch's concurring opinion is of particular interest.

[78] *See, e.g.,* Brett A. Geier & Annie Blankenship, *Praying for Touchdowns: Contemporary Law and Legislation for Prayer in Public School Athletics*, 15 First Amend. L. Rev. 381 (2017).

[79] *Engel*, 370 U.S. at 421.

[80] Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

the start of football games.[81] And offering religious instruction in a public school and permitting students to leave required classes to attend religious instruction was "use of tax-supported property for religious" reasons.[82] Nevertheless, schools can offer time for students to pray as each may see fit. But inviting clergy to give an opening prayer at graduation ceremonies violates the First Amendment.[83]

Further, the creation of a school district unit of government designed to coincide with the neighborhood boundaries of a religious group[84] constitutes an unconstitutional aid to religion. The "government should not prefer one religion to another, or religion to irreligion."[85] And, "[t]here is more than a fine line between the voluntary association that leads to a political community comprising people who share a common religious faith, and the forced separation that occurs when the government draws explicit political boundaries on the basis of peoples' faith."[86]

The Supreme Court also stuck down an Arkansas law which advanced a particular religion's belief about how man was created[87] and ruled that Pennsylvania's reimbursing salaries and costs of teachers of secular subjects in private religious schools violated the Establishment Clause.[88]

The Ninth Circuit Court of Appeals ruled that a classroom recitation of the Pledge of Allegiance, which included the phrase

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81 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

82 McCollum v. Board of Educ. Dist. 71, 333 U.S. 203 (1948).

83 Lee v. Weisman, 505 U.S. 577 (1992).

84 Satmar is an ultraconservative, anti-Zionist Hasidic – a Hebrew word meaning "pious ones" sect founded in 1928 by Yo'el Teitelbaum (Reb Yoelish) whose heirs continue as leaders of this sect and –with an estimated 65,000 to 75,000 men, women, and children. *See* Allan Nadler, *Satmar Hasidic Dynasty*, THE VIVO ENCYCLOPEDIA OF JEWS IN EASTERN EUROPE, http://www.yivoencyclopedia.org/article.aspx/Satmar_Hasidic_Dynasty (last visited Oct. 23, 2017).

85 Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994).

86 *Id.* at 733 (Kennedy, J. concurring).

87 Epperson v. Arkansas, 393 U.S. 97 (1968) (Arkansas passed an anti-evolution statute making it unlawful for a teacher in any state supported school or university to teacher to use a textbook that teaches "that mankind ascended or descended from a lower order of animals" – a statute the Arkansas supreme court said was permissible).

88 Lemon v. Kurtzman, 403 U.S. 602 (1971).

"under God" violated the Establishment Clause. But the Supreme Court reversed on the technical ground that there was no right for a non-custodial parent to have filed the case.[89] And when Louisiana passed a law requiring public school biology teachers to teach "creationism" and "evolution" in classrooms, the Court ruled the law unconstitutional because it was advancing a particular religion.[90]

From these and other cases, people can make their own conclusions about what a publicly financed community can and cannot do within constitutional strictures. The more interesting question for divorce lawyers is: How much, if any, of this provides guidance about how a court should deal with parties seeking to have sharia law enforced in a U.S. civil court?

3. *U.S. Civil Law Is not Bound by and Will not Enforce Religious Law*

It is our conclusion from our practice and case law that because of the unique role of the First Amendment's religion clauses, no U.S. civil court will recognize, nor grant comity to, nor enforce a divorce granted to a couple by a Jewish Court (Bet Din), nor recognize, nor civilly enforce an annulment granted by the Catholic Church, nor recognize, nor enforce a unilateral divorce pronounced by a husband according to sharia law.[91]

In *Reynolds v. United States*,[92] a case involving a branch of the Mormon Church, Reynolds' defense to his having more than one wife was that the Federal Morrill Anti-Bigamy Act should not have been enacted because it cannot supersede religious be-

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[89] Elk Grove Unif. Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[90] Edwards v. Aguillard, 483. U.S. 578 (1987).

[91] *See* Adelaide Madera, *Civil and Religious Law Concerning Divorce: The Condition of Women and Their Empowerment*, 12 J.L. & FAM. STUD. 365, 367 (2010) ("Problems relating to human rights arise in two main situations. First, in a model of weak multiculturalism, in some instances the state is likely to enforce foreign decisions (not always viewed as compulsory in the West) in the light of a system increasingly modified to accommodate new needs. Second, problems occur when doubt is cast on the principle of the unity of jurisdiction by the admission of forms of private, including religious, jurisdiction (either de facto or de jure) and contractualization of aspects of marriage—including the conditions of its dissolution or its non-dissolution (covenant marriage).").

[92] 98 U.S. 145, 164 (1879).

liefs.[93] The Supreme Court rejected that argument. When living in America or a country with a similar legal system, a person's belief – about what his professed religion requires of him – is just that – his belief. That belief is not a defense in a civil or criminal law case alleging a violation of U.S. law.[94]

This was not a new concept in 1887 when Reynolds lost his appeal. An older English case, cited in *Reynolds*, highlights the issue. There, parents of a sick child, because of their religious belief, did not get medical attention for their child which resulted in the child's death. The evidence was that – if they had called for assistance – there was a cure which would have been effective. Because they took no affirmative action, those parents were found not guilty of manslaughter.[95] But if they had taken a positive act, as did Mr. Reynolds – by marrying a second wife – it would be dangerous to permit the offender to escape punishment because he religiously believed the law – which he knowingly violated – ought never to have been enacted. That concept places the belief of each individual, as an individual, above the law. And we did not find any case supporting that concept.

4. *Enforcing Religious Marriage Contracts in the United States*

It would be unconstitutional for a U.S. civil court to enforce a divorce or annulment granted by operation of sharia, Jewish, or Catholic law, or any other religious process. Going through a religious divorce may permit the party(ies) to be divorced insofar as their religion is concerned. But from the civil authority's point of view, nothing has changed, so the parties remain married.

As discussed above, the First Amendment to the U.S. Constitution requires all levels of government to maintain a separation of church and state. Part of that separation is to not enforce any religious declaration or religious law. In practice, as reported

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93 For a more detailed discussion of this set of cases, see Cassiah M. Ward, *I Now Pronounce You Husband and Wives:* Lawrence v. Texas *and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131 (2004).

94 *Reynolds*, 98 U.S. at 164.

95 Regina v. Wagstaff, 10 Cox's Crim. Cases 531 (1846). *Cox's Criminal Cases* are Reports of Cases in Criminal Law argued and determined in all the Courts in England and Ireland. Edward W Cox, Cox's Criminal Cases Volume I (1843 to 1846). Reports on criminal cases continued from 1846 to 1948, when they were then incorporated into the *Times Law Reports*. *See* A FIRST BOOK OF ENGLISH LAW 188 (7th ed. 1977).

in various cases, some Muslim spouses have argued that its Islamic/sharia marriage contract is similar to a pre-marital agreement. Not so!

A careful reading of an Islamic marriage contract discloses that it makes no comment about the value or division of marital assets. That contract focuses on other specific issues. Sharia – and to some extent Hindu – law assigns to each party to a marriage the right to keep ownership of whatever he or she brought to, earned during, and received during the marriage. These religious laws create a "title" right to ownership while rejecting the concept of equality of a spouse based on that spouse's responsibilities and non-cash contributions to and during the marriage.

For example, unlike a pre-marital agreement or in violation of the UPMA, negotiations of the Islamic marriage contract do not require any – never mind a full and fair – disclosure of each party's assets. Nor does that marriage contract have to be – as does a pre-marital agreement – fair or substantively conscionable at the time of signing and – in some states – not unconscionable at the time of enforcement.[96]

Thus, a party who signed an Islamic marriage contract should *not* be successful in trying to convince a U.S. court to rule that the marriage contract is equal to a pre-marital agreement. While some "it's a pre-marital agreement" findings have been entered, a careful reading of those cases demonstrates the judge was wrong in basing the result on the common erroneous findings that the mahr provision is equal to a pre-marital agreement.

A well-prepared and experienced U.S. divorce lawyer should be able to convince a judge that the Islamic marriage contract is not a pre-marital agreement. Even if it was a pre-marital

[96] *See, e.g.*, Eyster v. Pechenik, 887 N.E.2d 272, 280 (Mass. App. Ct. 2008) ("A prenuptial agreement is enforceable only if a judge determines the agreement to be valid. . . . When determining the validity of an agreement, we look to the 'fair disclosure' rules set out in Rosenberg v. Lipnick, . . . 389 N.E.2d 385 (1979), which require a judge to determine whether '(1) [the agreement] contains a fair and reasonable provision as measured at the time of its execution for the party contesting the agreement; (2) the contesting party was fully informed of the other party's worth prior to the agreement's execution, or had, or should have had, independent knowledge of the other party's worth; and (3) a waiver by the contesting party is set forth'. . . The court must also consider the circumstances at the time of the divorce to ensure that the agreement does not leave the contesting spouse without necessary means of support.").

agreement it could not be enforced because of, among other things, a lack of disclosure.

It may be that some parts of a religious marriage contract do not violate U.S. federal or U.S. state law. If so, those parts of the contract may be enforced. However, the non-working spouse should still be awarded assets and alimony s/he would otherwise be entitled to under community property or equitable division laws.[97]

IV. Comity and Judicial Notice: A Practice Primer

1. *Educating the Court on How Far Judicial Notice Goes*

Based upon the experience of the authors and the experience reported to us by many other divorce lawyers around the United States, we believe that many, if not most, U.S. judges have not previously dealt with the complexities that arise in an international divorce case, just as many judges have never had to hear and rule on a case brought under the Hague Convention on the Civil Aspects of International Child Abduction.

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97 *See, e.g.,* Dajani v. Dajani, 204 Cal. App. 3d 1387, 1389-90 (1988) ("[D]enying the dowry because the wife initiated the dissolution is an unjust result and against public policy." "[T]he Jordanian marriage contract must be considered as one designed to facilitate divorce." "The contract clearly provided for wife to profit by a divorce, and it cannot be enforced by a California court."); *See also* Shaban v. Shaban, 88 Cal. App. 4th 398 (2001). In *Shaban* the judge refused to let the husband or his expert provide oral – that is parol – testimony regarding the document written in a foreign language. In fact, California would permit such testimony. *See* Reamer v. Nesmith, 34 Cal. 624, 628 (1868). Nevertheless, the California Court of Appeal sustained the *Shaban* judgment because under the statute of frauds "a writing must state with reasonable certainty what the terms and conditions of the contract are." *Shaban*, 88 Cal. App. 4th at 406. The only substantive statement in the agreement was that it was made in accordance with "Islamic Law." That provision does not contain certainty as to the contract's terms and conditions. If the judge allowed the expert to testify, the expert – in effect – would have written a contract for the parties. See *Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388, at *1 (N.Y. Sup. Ct. July 10, 1995), which is cited with approval in *Ahmed v. Ahmed,* 261 S.W.3d 190 (Tex. App. 2008) (holding that the mahr agreement cannot be enforced as a premarital agreement because the parties made the agreement after being married); *See also* TEX. FAM. CODE ANN. § 4.001(1) (2016).

It is as critically important to educate the trial court about Islamic/sharia law and also the court's ability to take judicial notice of applicable U.S. and foreign judgments, statutes, the content of certified foreign documents with their certified translations, decrees, and – as needed – the content of relevant cases and sections or sub-sections of the U.S. Tax Code. By way of example, the *Handbook of Massachusetts Evidence*, section 202 reads:

> (a) Mandatory. A court shall take judicial notice of:
>
> (1) the General Laws of the Commonwealth, public acts of the Massachusetts Legislature, the common law of Massachusetts, rules of court, the contents of the Code of Massachusetts Regulations, and Federal statutes, and
>
> (2) the contents of Federal regulations and the laws of foreign jurisdictions that are brought to the court's attention.
>
> (b) Permissive. A court may take judicial notice of the contents of Federal regulations and the laws of foreign jurisdictions not brought to its attention, legislative history, municipal charters, and charter amendments.
>
> (c) Not Permitted. A court is not permitted to take judicial notice of municipal ordinances, town bylaws, special acts of the Legislature, or regulations not published in the Code of Massachusetts Regulations.[98]

The laws of another country may lose their mandatory nature when someone tries to enforce the law beyond the borders of that country. Nevertheless, Massachusetts courts and most other U.S. courts may take judicial notice of "material" foreign law.[99] So divorce lawyers need to provide the court with – if possible – certified copies of the laws (and if necessary, with a certified translation of those laws into English). The law of several countries has been translated from its non-English language into English and been scrutinized to assure accuracy.[100] In many countries, the ministerial decrees from its various departments

98 MARK S. BRODIN & MICHAEL AVERY, HANDBOOK OF MASSACHUSETTS EVIDENCE § 202 (2016).

99 MASS. GEN. LAWS. ANN. ch. 233 § 70 (2016) ("The courts shall take judicial notice of the law of the United States or of any state, territory or dependency thereof or of a foreign country whenever the same shall be material.").

100 *See generally* Jason E. Prince, *Chipping Away at the "Wall of Stone": Foreign Country Law and Federal Rule of Civil Procedure 44.1*, 54 ADVOCATE 30 (Feb. 2011).

(e.g. Treasury, Agriculture, etc.) and decisions of its Minister of Justice are the source for numerous mandates and, among other things, validity of old laws, and implementation of new laws.

To the extent judicial notice cannot be used, counsel must be sure to offer all of the various documents as trial exhibits. In that way, the court can treat the content of documents as evidence. The court may, *sua sponte*, seek out additional law of the country under discussion. However, when evidence is accepted by the court, the court's determination is a "ruling on a question of law."[101]

Get an early start in trying to determine every potential law of the other country that might be needed to help your client's case.[102] Some countries, Egypt for one, are prohibited from valu-

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[101] FED. R. CIV. P. 44.1: "A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law."

[102] By way of example, if real estate is to be transferred in another state or country, find out if there are transfer taxes or other charges and fees which must be paid by your client. If those fees are substantial, the other side might agree your client – if your client also agrees to pay all transfer fees – can end up with that property.

Assume that your client owns a $2 million home on the Caribbean island of St. Martin – a home that the other spouse wants to end up with in a pending divorce. In addition, there is other real estate and assets worth $2 million. So you agree – knowing that recipient will need to pay St. Martin between 6.58% to 23.43% in transaction costs and that your client will pay 1.8% to 5.98% in transactional costs.

Assume there is a written separation agreement which has been notarized and that the parties appeared before a judge who asks if each of you know the details of the division of assets, etc. and confirms you both know and are satisfied with the term of the agreement. Assume also the judge finds the agreement fair and reasonable under the circumstances, and enters a divorce judgment which becomes final. Then your ex-spouse tries to record your deed to her of that house in St. Martin at which point she learns about her need to pay about 20% of the value of the house as a transfer tax.

Who is that ex-wife going to blame? Will she hire a new lawyer to sue her divorce lawyer for negligence? Or will her new lawyer try to set aside the agreement because the other party knew – but violated a claimed fiduciary duty to tell her about the transaction fees? Either way you don't want to be the other party's lawyer. But, if you, as husband's lawyer, knew about – but did not advise the other party about those transactional fees – did you have an obligation to

ing or considering in any way real estate, business, or other immovables which are not located inside Egypt.[103] And because Egyptian divorce law wholly incorporates Islamic/sharia law, the Egyptian court starts with the irrefutable presumption that Egypt's separate property regime applies – which means one spouse cannot be awarded any property owned by the other party. In fact the Egyptian court has no authority to grant such a request.[104]

The Egyptian, French, Swiss, and many other legal systems do not provide the parties with any U.S.-style discovery. Egyptian courts cannot order depositions in civil cases. So, for example, if a party had to litigate a premarital agreement in Egypt, that party would be prevented from identifying, locating, and valuing the other party's assets in Egypt.[105] And if a U.S.-based court declined to hear the case filed by your client, that client would end up with the Egyptian court applying sharia law, which

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inform the court, if not the spouse of your client? Were you obligated to withdraw from the case to avoid being dragged before the court and the Board of Bar Overseers for some violation of the Rules of Professional Conduct? Will a letter from your client – stating you told him to disclose but he refused to do so – help your being on the wrong end of the publicity? Or a suspension from practicing law for a year and a day?

The mantra is: be prepared. If you are a divorce lawyer in Massachusetts and there is real estate in New York, Miami Beach, Florida, Egypt, Spain, etc., you need to find out all of the costs involved in transferring out-of-state and out-of-country assets to be better able to net out values.

103 Articles 18 and 29, Egyptian Civil Law, at 9-10.

104 Egyptian System of Separate Property, at 7-8. *See* Yakare-Oule Jansen, *Muslim Brides and the Ghost of the Shari'a: Have the Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women's Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make it Stick*, 5 NW. UNIV. J. INT'L HUM. RTS. 181, 191 (2006) ("The Egyptian family as "the basis of the society founded on religion, morality and patriotism" is described in article 9 of the constitution. Under article 11 the Egyptian State is to guarantee a proper coordination of a woman's duty towards her family and her duties towards society. In the fields of political, social, cultural and economic life she should be considered equal with men, but without violation of "the rules of Islamic jurisprudence.").

105 Supposedly Egypt, France, and other countries provide that the judges can – if the judge decides it is proper – do discovery. But what may be available and what happens does not mean discovery will occur. And in some countries, taking a financial deposition is a criminal offense.

means the client would be awarded no part of the other party's assets located in Egypt.

If a U.S. court were to order a spouse to transfer property in Egypt to the other spouse; and if the other spouse – who never left or has now returned permanently to Egypt – refused to comply, that court would *not* give comity to the Massachusetts order. That is because ordering a spouse to transfer his or her property to the other spouse is against sharia law and therefore against Egypt's public policy.

Sharia law is referred to in the United States as a "title state." What is owned by a husband and wife at the start of their marriage, what is earned by each of them or what is given to them by others, remains their separate property. The one difference is that the husband is obliged to support the wife and children during the marriage, even if the wife has a separate income. In the U.S. courts Muslim husbands argue – so far without success – that the reason for having a "title state" is because the wife can amass assets from her own work.

The mahr is not a lump sum settlement, nor is it a dowry, as that term is used in the United States. It is a sum that should be paid to the wife at the time of the marriage. However, usually the wife receives a gold coin at the time of marriage, with the balance to be paid by the husband if there is a divorce. Some, and perhaps many, Islamic/sharia marriage contracts provide that the couple will decide the amount of the balance of the mahr at the time needed – be it a divorce, or death of the husband. In the former circumstance, if there is no amount stated and the parties live in Egypt, the husband can ask the court to set the amount. But, when the case is decided outside Egypt, say in the United States, the judge can apply state law when awarding temporary and permanent support/alimony and division of assets. By way of example, the next section provides an inside look into a case which demonstrates how to use the information in this article combined with tactical and legal strategies.

V. A Case Example[106]

A wife and husband are both Muslims. They were both born and raised in Egypt. In December 2000, they married in Egypt. This was the wife's second marriage; and the husband's third marriage. Until then, the wife had only been domiciled in Egypt.

The husband left Egypt after graduating from college to attend – on scholarship – a college in Canada where he earned a Master's Degree. He then earned a Ph.D. in acoustical engineering at Syracuse University in New York. He then worked for a U.S. corporation which got him a "green card" and, in due course, he became a citizen of the United States. At some point he moved to live in Massachusetts where, shortly thereafter, he started his own company. Because of what his company sold and various public events, the husband's business grew much larger during the marriage. He chose not to return to Egypt to fulfill his mandatory military service. So, even if, after some thirty or more years, he had returned to Egypt, he might well have been arrested and jailed. But, after amnesty was given to all who had not served in Egypt's armed services, he visited Egypt. That is when and where he met his next wife.

Prior to meeting the wife, the husband had twice married and twice divorced. He had one child with his first wife and two with his second wife. He claimed he had – but never produced – premarital agreements with each of these women.

The wife had attended grade and high school in Germany. She fluently speaks and can read Arabic, English, and German. She attended college and earned a degree in Engineering. Her

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[106] A full copy of the January 5, 2015 Memorandum decision (Memorandum) is available by going to www.wendyhickeylaw.com and typing *Bassiouni* into the "search." You will then have access to the entire 80-page decision [32 page "Memorandum of Decision and Order on the Issues of Validity of the Parties' Egyptian Divorce and Whether this Court will Grant Comity thereto" (hereafter cited as "Memorandum, p. ___"), 3 page Judgment of divorce ("Judgment, p. __"), and 45 page Procedural History, Findings of Fact and Rationale ("Findings, p. ___")] written by Probate and Family Court Judge Elaine Moriarty. Your authors represented the wife in this case from start to finish. The court-file is open to the public, although each party's financial statements are automatically impounded. A copy of the first [Memorandum] decision – in which the husband unsuccessfully sought to have the court grant comity to his Egyptian divorce – was published in the *Massachusetts Lawyers Weekly*. For purposes of this article, the information is sharply condensed.

family is well-off and considered one of the most respected in Egypt. The family home had a maid and a driver and others who helped care for the home, a vacation home on the north coast of Egypt, a country house on the outskirts of Cairo, and a vacation home in Spain.

The wife's father and brother are exclusive manufacturers' representatives in Egypt for several medical supply companies who are located in Europe and elsewhere. They bid mostly on contracts solicited by the Egyptian government. They typically have various medical and related items on stock in their Cairo warehouse so, unlike other bidders, they can quickly deliver what was purchased.

The wife was first married in Egypt. She had two children. Without going into the reasons why, she wanted a divorce from that husband. In Egypt, a husband can divorce his wife by merely saying she is divorced before a divorce notary and two male witnesses (or one male and two female Muslim women). But if the wife wanted to divorce her husband, she'd have a long and difficult court case. Her husband agreed to divorce her if she returned to him everything he ever gave her and, as well, agreed that he would have sole legal custody of their two sons. She agreed – in part because at that time the two children were almost adults; and she always had and still has a great relationship with her children.

Also at that time she and her mother had a high quality and high fashion women's clothing business with two shops in Cairo, Egypt and, later, a shop in Spain. Later still, because of the financial problems in Spain that store was closed. Then there were financial problems in Egypt, where one and eventually the other of the two stores were closed.

The husband convinced the wife to give up her interest in her women's clothing business so she could marry and then live with him in Boston, Massachusetts. He also agreed the wife could continue to help what would then be her mother's business using long distance telephone calls, and going to trade shows and other professional events.

The husband promised that they would see the world together. She agreed. They signed an Egyptian marriage contract which is based on the Islamic religious practice. Their signature was properly witnessed by two men and a marriage-notary. The

original copy of the marriage contract was filed by the notary in the Egyptian Office of Personal Status, at which point the marriage was officially recognized in Egypt.

Before their marriage, and although it was not stated in their marriage contract, the husband negotiated the mahr with the wife's father. That resulted in the husband promising to buy and furnish a condominium apartment for the wife and to put title in her name, and to do all needed repairs. In that way, the wife would have a place to stay when, as the husband also promised, the wife would spend several months a year in Egypt so she could visit her parents, her two sons born of her first marriage, her friends and other relatives, and help out in her mother's business. It took about three years to buy, rehabilitate, and furnish that condominium at a total cost of about one million U.S. dollars. Until that condominium was ready for occupancy, when the wife or both wife and husband visited Cairo, they stayed in a condominium apartment owned by the wife's mother.

Fast forward to May 10, 2012. Both parties were visiting Cairo. On that day, the husband – without giving any notice to the wife – went before a divorce notary in Cairo, Egypt to – and he did then and there – unilaterally and *ex parte* pronounce before two witnesses that he divorced the wife. The husband immediately returned to Massachusetts after stopping a day in New York on personal business. He held off telling the wife about the divorce for about two weeks. That gave him time to change the locks on the condo the husband owned in his name on one of Boston's wharfs, to change the locks on his duplex apartment on the top two floors of a "town house" building he bought during the marriage and refurbished located on a "Park block" in New York City's Silk Stocking district, and to change locks on two condo units in the W hotel in Miami Beach, Florida, also in his name and also purchased during the marriage.

By early June 2012 the wife hired your authors. By mid-June 2012 the authors filed the wife's complaint for divorce in the Suffolk Probate and Family Court in Boston. In Massachusetts, proof of foreign law is governed by the Rules of Domestic Relations Procedure, Rule 44.1,[107] which requires the court, "in determining foreign law, [to] consider any relevant material or source,

107 MASS. R. DOM. REL. PROC. R. 44.1.

including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."[108] Most states in the United States have a similar rule.

From the start to the end of this case, the husband argued that because (1) he married the wife in Egypt, (2) they were both Muslims and Egyptian citizens, (3) they signed their Egyptian marriage contract pursuant to Islamic law, and (4) the wife promised to be bound by Islamic law, he had no need for a premarital agreement because, if the parties divorced, he'd own everything that was in his name and Egyptian law would determine the amount of support, if any, he'd have to pay to the wife. The husband filed several motions, among them, to: (1) stay all proceedings; (2) order the wife to return to Egypt to challenge his divorce there; and (3) dismiss her Massachusetts divorce case. But if the case was not dismissed, the husband requested the court grant comity to his Egyptian divorce and use Islamic law in deciding the issues of division of assets, alimony, and other related issues. The husband claimed there were cases that permitted a U.S. court to grant comity to his Egyptian divorce. But he and his expert witness failed to provide the court with one such U.S. case.

In the Boston court, the wife challenged the validity of the husband's unilateral Egyptian divorce. She used her detailed review – converted to a chart – of the husband's passports, and she sent a request to her husband to admit facts, among them that before, at the time of, and after he pronounced the divorce, the husband was domiciled in Massachusetts.[109] As a practice point, if the husband denied those facts and if the wife proved otherwise at trial, Massachusetts law requires the court to consider ordering the husband to pay the wife's legal fees in connection with having to prove what he should have admitted. The practical lesson is that on jurisdictional and on most other issues, the early

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108 *See* Roger Minor, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 AM. J. COMP. L. 581, 584-85 (1995); *See also* Matter of Hassan, 16 I & N Dec. 10 (BIA 1976) ("To assist us in answering this question, we have asked the Library of Congress to provide us with information on the Egyptian law of divorce. From a memorandum submitted, we have learned that in Egypt, marriage and divorce are performed by a government official called al-Ma'zoun.").

109 *See* Rice v. Rice, 336 U.S. 674 (1949); Rubinstein v. Rubinstein, 86 N.E.2d 654 (Mass. 1949).

and precise use of detailed requests to admit facts often truncates contested divorce cases.

It is appropriate to argue that because the wife and the husband were both Egyptian and both Muslims who married in Egypt, Egyptian law claims the power to divorce them – no matter where in the world they may live or reside. Courts may grant comity to a divorce judgment entered in another country *if* the plaintiff is validly domiciled there, and that country has a system of law that provides due process as well as a system of alimony and equitable division of marital property similar to that in Massachusetts. Experts for both parties testified that Egyptian law would, first, deem the husband's Egyptian divorce to be valid, just as Nevada deems each of its unilateral divorces to be valid, and second, not enforce an order requiring the husband to turn over part of his property or assets to the wife.

The Massachusetts court ruled that on May 10, 2012, the husband was domiciled in both Massachusetts and Egypt,[110] and that the husband's Egyptian divorce (talaq) was valid there and could be considered a no-fault divorce.[111] But, more importantly, the Massachusetts court did not recognize or grant comity to the husband's non-judicial, self-proclaimed act before a notary public done in another forum because the wife had no procedural due process as defined by decades of U.S. federal and state case law and because she had no notice or opportunity to object.[112]

The important point for divorce lawyers is that a cohesive understanding of due process – or lack thereof – in the other jurisdiction resulted in the reality that the husband's Egyptian divorce did him no good; and it cost him a substantial amount of money to hear a judge verbally slap him on the back of his hand with a "ruling."

Historically, the law in the United States was male-centric. In Massachusetts, before 1974, a husband – at the time of a divorce – kept what was in his name and the wife kept what was in her name. If the house, business, bank accounts, and the car driven by the wife were all in the husband's name, he kept those assets. And, the wife got nothing to balance out the value of those assets. At that time, Massachusetts was then a "title state,"

110 Memorandum, *supra* note 106, at 18-20.

111 *Id.* at 27.

112 *Id.* at 25-30.

as was Egypt when the parties signed their Egyptian marriage contract right up to the day the husband pronounced his unilateral divorce in Egypt.

In 1974, as a matter of public policy, the Massachusetts legislature passed a law, signed by the Governor, which did away with its "title state" system in favor of a system of equitable division of marital assets.[113] So in 2014, when the first part of what became a bifurcated case was heard by Judge Moriarty, the public policy of Massachusetts required that court to *not* use, nor permit use of, a "title state" system to divide marital property at the time of divorce. Instead the Massachusetts public policy required the judge to determine whether to grant comity to the foreign divorced based on whether the law of another jurisdiction is "reasonably comparable" to that of Massachusetts in terms of substance[114] and due process.[115]

In addition, the alimony system in Egypt is substantially different from the equitable system available to spouses in Massachusetts. In Egypt, if any alimony is granted it will be only for 3 to 27 months. And the amount granted will not be based on the amount needed by the wife to maintain the standard of living she had while the parties lived together.

According to the Egyptian marriage contract, the wife is entitled to a mahr. Usually the mahr is an unconscionably small sum. But in this case, the mahr – as written into the marriage contract – was "to be decided at the time of the divorce." The parties were not able to arrive at an amount the husband would pay the wife. And, actually from start to finish, the husband insisted the wife should get no part of his property. The marriage contract is a civil document in Egypt. There is every reason to

113 MASS. GEN. LAWS, ch. 208, § 34.

114 *See* Akinci-Unal v. Unal, 64 Mass. App. Ct. 212, 220-21 (2005) (citing Schiereck v. Shiereck, 14 Mass. App. Ct. 378, 380 (1982)), Moriarty v. Stone, 41 Mass. App. Ct. 151 (1996) (contributing being a key factor when deciding property division in divorce).

115 *See* Aleem v. Aleem, 404 Md. 404 (Md. App. 2008) (noting the strong public policy in favor of equal protection), Hogan v. Hogan, 320 Mass. 658 (1947) (a spouse has an interest in the marital status itself), Garnett v. Garnett, 114 Mass. 379 (1874) (the parties have an interest in the marital res, that is, the status of their being married thus requiring the appointment of a guardian ad litem for incompetents).

consider the husband's mahr obligation as money due per a civil contract.

The husband also encouraged the Massachusetts court to treat the marriage contract as a pre-marital agreement. But the court declined, finding that the husband had failed to make any disclosure of his assets to the wife at the time he signed the marriage contract.[116]

The Massachusetts court allowed the husband's motion for a bifurcated trial on the above issues. That trial resulted in the Memorandum of Decision. Other than getting the court to find that his Egypt divorce was valid there, the husband lost on all of his other arguments. That meant that the second part of the case required discovery and valuation of assets on three continents and eventually a 24-day trial, including evidentiary depositions of witnesses in Spain and Egypt. The testimony of those witnesses was put onto a DVD which, together with a transcript, was given to the judge, marked as exhibits and taken into evidence.

After the long trial, preparation of requests for findings, rulings of law, and a proposed rationale and decision, on February 21, 2017 the court ordered the husband to pay the wife a seven ($7,000,000) million dollar lump sum. Both the initial Memorandum of Decision (dated January 5, 2015) and the subsequent Judgment, Findings, and Rationale were extremely well written by the judge who supported her decision with citations to the evidence and case law. Despite the husband's threats throughout the case to do so, he did not appeal the final judgment.

VI. Twelve Conclusions

Our overall conclusions are:

1. For those who are in the United States., whether citizens, holders of a green cards or work permits, or not, the U.S. Constitution[117] *requires* separation of church and state *and* guarantees everyone's freedom of religion. Thus, you can – or not – choose or practice any religion; and you can speak or write what you

[116] *See* DeMatteo v. DeMatteo, 436 Mass. 18 (2002); Rosenberg v. Lipnick, 377 Mass. 666 (1979).

[117] The Constitution and the first ten amendments were passed by Congress on Sept. 25, 1789; and ratified by the required number of states on Dec. 15, 1791.

want within legal and constitutional limits, albeit the latter may be within limits proscribed by the Supreme Court.[118]

2. A divorce may be deemed valid where issued. If so, a U.S. court may grant comity to that divorce if the party obtaining that divorce was domiciled in that jurisdiction even though, when the divorce was granted, the other party was domiciled in another state or country. The divorcing spouse has the burden of proving that: (1) s/he was domiciled in or had significant contacts with that issuing-jurisdiction; (2) the issuing jurisdiction provided the other party with due process – as that term is defined in the United States; and (3) the issuing jurisdiction does not enforce laws that are contrary to the public policy of this jurisdiction.

3. Orders regarding division of property, alimony, maintenance, and child support issued by a court – where a defendant spouse did not assent to the issuing jurisdiction and that defendant and the parties' children were not domiciled in that state – will probably not be granted comity, nor full-faith-and-credit, by another state in the United States. This article argues that pre-marital agreements and marital contracts do not have the same genes. So each requires different tactical and legal treatment.

4. In examining and arguing sharia issues in court, make clear that the religious marital contract – such as the Islamic marital contract – does not address, mention, or consider a party's ownership of real property or property, whether earned, gifted, or inherited during the marriage, nor consider the increase in value of property during the marriage. In a jurisdiction such as Egypt where its so-called Civil Code of Law incorporated the Islamic family and divorce laws as its civil family law, the husband and wife each always keep whatever assets they brought to the marriage, all gifts to them, and all income earned by each spouse. An exception is that the husband must use his income and assets to support his wife and children during the marriage. And the wife

118 The Constitution and other federal law supersedes all constitutions and laws enacted or decreed by all other law-making groups in the United States. The analysis in this article applies throughout the United States. *See* Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 Am. J. Int'l. L.57 (2004); Penny M. Venetis, *The Unconstitutionality of Oklahoma's SQ 755 and Other Provisions Like It That Bar State Courts from Considering International Law*, 59 Clev. St. L. Rev. 189 (2011).

must keep – or if not paid by then, the husband must then pay – the mahr. So, because those issues are resolved by Islamic/sharia/ religious law, there is no need in an Egyptian marital contract to include a waiver by each party of rights to the other's property.

5. Jurisdictions that issue unilateral divorces or that permit husbands to unilaterally declare a divorce will likely find those divorces are valid. By way of example, Nevada finds its unilateral divorces to be valid. This is so even if the plaintiff came to Nevada, rented a room or apartment for six weeks, took trips out of Nevada during the six-week waiting period necessary to become a resident, but on the day after the sixth week, the plaintiff filed for divorce. Nevada will grant the divorce even if the plaintiff, promptly after filing the divorce, gave up the rental and left Nevada, returning only for a hearing on the divorce case. The defendant will be notified of the filing of the pending divorce. But most defendants refuse to file an appearance so Nevada never gets jurisdiction over both parties. If challenged, it is not likely those unilateral Nevada divorces will be given full, faith, or credit by another U.S. state.[119]

6. Even if another jurisdiction finds its so-called quickie divorces to be valid and your jurisdiction also finds the divorce valid where entered, that does *not* mean your jurisdiction will grant comity or full faith and credit to that divorce. And if comity is not granted, your jurisdiction will go forward as if that other divorce was void or a nullity.

7. Merely claiming that a marital contract is like a pre-marital agreement does not make it so. The requisites of the Uniform Premarital Agreement Act (UPMA), which are similar to requirements in most other states that have not adopted the UPMA, would require a finding that the sharia marital contract does not address marital property or that there was no full disclo-

119 The issue of comity and Nevada has a long and fascinating history. *See* Frank W. Ingram & G. A. Ballard, *The Business of Migratory Divorce in Nevada*, 2 Law & Contemp. Prob. 302, 302 (1935) ("Divorce in Nevada, like all social phenomena, is in part a product of the history and geography of the state, and consequently, before proceeding to a discussion of the subject of this article, it might be well to give a few descriptive facts about Nevada.").

sure of assets held by each party.[120] So, if a party were to push his/her pre-marital agreement-like claim to trial, that claim should fail.

8. Sharia law does not provide for, nor does it have a history of permitting marital assets to come into existence. So individuals married under and living in sharia law jurisdictions have no joint, community, or other-party-interest in assets. And sharia law countries have no rules for addressing division of marital assets. Because of the U.S. Constitution's requirement of separation of church and state, imposed by incorporation on each U.S. state by passage of the Fourteenth Amendment, it is probable that no state will approve of or enforce religious law.[121]

9. The sharia separate property regime violates the community property or equitable division of assets regimes in place in all U.S. states. Therefore, that part of sharia law violates the public policy of every U.S. state. Sharia law also violates the U.S. concept of due process of law by not requiring a husband to notify his wife that he intends to divorce her, by not permitting her attendance or participation in the husband's unilateral pronouncement of his divorce, by not permitting her – if she were to attend – to participate in the husband's pronouncement, and by not providing the wife any relief from those procedural rules or an opportunity to obtain a fair division of the marital assets. And, if the wife objected to any of these provisions, there is no court that has jurisdiction to hear such a claim.

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120 Cases cited as authority for this issue are in the documents available on Wendy Hickey's web site. *See* Procedural History, Findings of Fact and Rationale, *supra* note 106, ¶ 177.

121 *See* Karin Carmit Yefet, *Israeli Family Law as a Civil-Religious Hybrid: A Cautionary Tale of Fatal Attraction*, 2016 U. Ill. L. Rev. 1505, 1523–24 ("In the *Shari'a* courts, in contrast, the *qadis*, unanimous in their staunch opposition to secular property law, routinely apply Islamic law's separatist property regime—one that deprives women of any share of – what are called in the U.S. – the marital assets. In their quest to circumvent the civil law, the *qadis* have gone so far as to instruct marriage registrars to persuade couples to stipulate in their marriage contracts that any marital property disputes will be governed by Islamic law, rather than Israeli civil law. Today, this tactic has purportedly become a 'widespread' practice for *gadis* marriage registrars to insert this condition *sua sponte* and in secret, *after* the couple {i.e. the future husband and his wife's male patron} has executed the contract.").

10. If a party insists that only sharia law applies to the parties' divorce, division of assets, spousal and child support, and custody of children, that case will take much longer and cost the more vulnerable spouse-client more money for experts and legal fees. But at the end of that process, the state court should decide that sharia or other religious law and its accompanying concepts fail to provide due process of law, violate the public policy of your jurisdiction, cannot be enforced because of the required separation of church and state, and, generally, are not applicable to and have no control over the outcome of the case.

11. If, in a U.S. divorce case where both parties are before the court, either party owns property in a sharia law jurisdiction, the court can assign those assets to that spouse and assign to the other spouse all other assets – presumably up to 50% of the total marital estate – located in the United States.

12. To get to the result mentioned in the previous paragraph, a state court should both permit extensive discovery and allow or require the divorce lawyers to have the other party, according to rules of procedure, "admit" facts, hold a trial, and have the court make findings of fact, conclusions of law, rationale, and a judgment. And, along the way, the court should, if the facts warrant it, enter an order that one party pay temporary support to the other party together with – and, if necessary – child support. That order should issue despite a party's argument that in the sharia law country, the other spouse would *not* be entitled to much, if any, alimony or child support, something that would occur even if the husband was awarded sole physical custody of the children.