IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

In the Matter of the Marriage of:

FARAMARZ SOLEIMANI,

Petitioner,

vs.

Case No. 11CV4668
Chapter 23, Div. 7

ELHAM SOLEIMANI,

Respondent.

FINAL DIVORCE DECREE

After 30 years of marriage, Faramarz ("Fred") Soleimani, petitioner, known as a local restauranteur, sought and obtained a divorce from his wife of thirty years, Zohreh Bahmani, on February 19, 2008.[1] Immediately prior to this divorce action, petitioner had engaged in an internet relationship with respondent Elham Moghadam, an Iranian citizen and a woman twenty-four years younger than him. Pursuant to Iranian and Islamic customs, petitioner undertook to transfer over $116,000 in premarital funds to her, beginning in November of 2006, culminating in an Iranian marriage contract-signing ceremony on July 19, 2009. Thereafter, after celebrating in Dubai, the new couple traveled to the United States, following the execution of necessary visas and other related paperwork so that respondent could reside here. A Johnson County judge conducted a separate ceremony August 19, 2009.

The new couple seemed very happy and Mr. Soleimani, by all accounts, was devoted to his new wife, and she to him. He even had her name tatooed to his chest. Less than two years later, he filed for divorce on June 1, 2011.

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[1] Doc. 20, Case No. 07CV1207. That action was filed by petitioner on February 15, 2007. Doc. 1.

Background to the Current Action

That is the simple description of this case. The more acrimonious background involves allegations of domestic violence, rape, a petition for protection from abuse which respondent filed in Case No. 11CV6179, (granted and finalized on February 3, 2012), and a separate action, alleging a marital tort case, alleging assault and battery, and repeating many of the allegations from the abuse case. That matter was dismissed on June 21, 2012, Doc. 22 in Case No. 11 CV7007, because respondent did not want to proceed without completion of a pending police investigation. Now, petitioner does not even recognize his wife's signature on the marriage contract he signed and cannot recall executing copies of the very documents that were submitted to the Department of Homeland Security to allow his wife to enter the country. Since the domestic violence that has been alleged to have occurred, respondent has been living at a domestic violence shelter and has obtained no employment. Petitioner has been unemployed with the exception of his working for his ex-wife in exchange for living expenses. At 60 years old, petitioner is bankrupt, according to his counsel. According to his ex-wife, finding employment in the restaurant industry will be difficult for him.

In addition to the foregoing, two unique legal issues exist in this matter.

Issues of First Impression in Kansas

Under Iranian/Islamic custom and law, a man can commit to a temporary marriage through an espousal deed so long as there is a written contract to enter into marriage in the future. Additionally, a more permanent marriage contract can be reached by which muslim couples reach a mahr agreement. In this instance, the parties signed a mahr agreement and respondent contends that because of the divorce, she can demand the payment of 1,354 gold quare (coins valued at $500 apiece or the equivalent of $677,000), from petitioner, which has been deferred while married.

An additional and unique issue is whether petitioner is obligated to support respondent through what is known as an I-864 Affidavit of Support which is filed with federal immigration authorities when a person seeks to sponsor a fiancée or spouse traveling to reside in this country. As will be discussed later, the purpose of this affidavit is to ensure that the sponsoring party does not abandon the spouse that would necessitate the need for public support. Respondent contends that she is entitled to have the Court order petitioner to pay her the equivalent of 125% of the federal poverty level guideline, which, for 2011, was $10,890 for a single person. Petitioner disputes respondent's status.[2]

Finally, to further complicate the issues in this matter is the passage recently of House Substitute for Senate Bill No. 79, which is intended to preclude the courts from applying foreign law, legal codes or systems that violate the public policy of our state or federal constitutions. Kan. Sess. Laws, Chap. 136, p. 1089-90 (2012). This act went into effect on July 1, 2012, and has been widely viewed as precluding courts from applying Shari'a law, although it does not mention the same.[3]

The Court will now address its Findings of Fact and Conclusions of Law.

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[2] At trial, respondent repeatedly tried to introduce into evidence copies of alleged government documents without appropriate authentication, including an Iranian Office Translation and the federal the I-864 form. This occurred in the face of repeated denials by petitioner as to what he had signed or recognized. At the end of the day, respondent conceded that she had failed to obtain authenticated copies, although counsel had been given sufficient time to obtain such an authentication. The issue had been raised at a hearing on December 19, 2011, the Court sustained a motion filed on February 27, 2012, to continue the trial scheduled for March 13, because this was "crucial to Respondent's case." Doc. 43. The Court granted that continuance on February 27. Petitioner's counsel also sought time to brief the issue of this affidavit of support but never submitted any authority, content to simply deny its existence and respondent's failure to obtain a certification of documents.

[3] *See "Kansas lawmakers pass anti-Islamic law measure,"* Associated Press, May 11, 2012 (noting the supporters of bill, which does not mention Shari'a law, cited a pending Sedgwick County case in which a man seeking to divorce his wife asked for property to be divided in accordance with a prenuptial agreement in line with Shari'a law). This bill was passed unanimously by the Kansas House and in a 33-3 vote in the Kansas Senate, and was signed by Governor Brownback on May 21, 2012.

FINDINGS OF FACT

1. Petitioner Faramarz ("Fred") Soleimani was born in1951 and is 61 years old.

2. Respondent Elham Moghadam Soleimani was born in 1976, and is 36 years old.

3. Petitioner was married to Zohreh Bahmani for over 30 years. They were married in 1977 in Esfahan, Iran, and came to the United States a year before the Shah was deposed in the Iranian revolution. They attended school in the United States, received amnesty to remain here and both eventually became naturalized citizens, operating several restaurants, including the Westside diner.

The Parties Enter Into a "Temporary" Iranian Marriage

4. Following petitioner's subsequent chat room contact with respondent over the internet in July of 2006, and trips to Iran to enter into a "temporary" marriage relationship with respondent, *see infra*, Mr. Faramarz filed for divorce from Ms. Bahmani on February 15, 2007, alleging incompatibility. Doc. 1 in Johnson County Case No. 07CV1207. A Separation and Property Settlement Agreement was filed on February 19, 2008, along with a divorce decree. *See* Doc. Nos. 20, 21 in Case No. 07CV1207. Petitioner received business property located at 117/121 Kansas Avenue, Olathe, which had been known as the Westside Diner, as part of the divorce settlement. Ms. Bahmani received a business known as "Pegah's Family Restaurant" at 11005 Johnson Drive, Shawnee.

5. On November 11, 2006, petitioner traveled to Iran to enter into a "temporary" marriage relationship with respondent. Exhibit 203, which was not admitted into evidence, purports to be an official translation of an Espousal Relationship Deed for a marriage of one year. However, the parties have testified that they each entered into such an agreement. Petitioner testified that such "temporary marriages" are, essentially, a form of legally sanctioned prostitution in Iran.

6. As part of this "temporary" marriage, an exchange of a Quran, a mirror, a pair of candlesticks and a promise to pay 14 gold coins (valued at $500) was required. According to testimony by both parties, the sum of $116,000 thereafter was paid by petitioner to respondent through a Canadian transfer agency called the Taheri Exchange, which exists because of prohibitions by federal law that bar direct money transfers to Iran from the United States. Exhibits 10, 249 (*see* Answer to Interrogatory No. 8).

7. Although there is a dispute about what happened to all the funds, which is not material to the Court's disposition of the issues related to the marriage contract, respondent testified that petitioner had satisfied any obligations under this "temporary" marriage obligation.[4]

8. There was disputed testimony about property owned by petitioner prior to the marriage. Respondent testified that petitioner bragged that he had $7 million worth of business and other property in Iran, that he had an apartment there, and that he was in business with an uncle. Petitioner, however, testified he only had an inheritance related to his father's house, a portion of which he shared with other relatives. The Court finds petitioner's testimony to be more credible in light of the complete absence of any documentation showing petitioner received income, much less has ownership in, any property in Iran. Even if petitioner inherited a portion of a house, the same would be and is hereby assigned to petitioner as his sole property.

Petitioner's Current Financial Status

9. Petitioner, moreover, testified that he is essentially bankrupt. The Court finds credible

[4] Respondent testified that she suffered an automobile accident while visiting Iran and had to sell property obtained with funds from petitioner in order to pay her medical bills and that some of the money had been transferred to petitioner's sister, who is a lawyer in Iran, after a business deal between petitioner and her father failed to materialize.

evidence that petitioner's current financial status is dependent on his ex-wife, in light of her testimony that she has been funding his living expenses until this divorce will be finalized. She testified that at his age, petitioner is unlikely to find significant employment in the restaurant industry, which is one of the reasons why she is helping him. She further denied that she has any relationship with petitioner beyond helping him through a rough period of his life. The Court finds Ms. Bahmani's testimony to be credible but there is no credible evidence that petitioner has made a bona fide effort to obtain other employment and he appears to be awaiting the end of this case before he seeks re-employment in some capacity. Likewise, Ms. Bahmani suggested the same thing, that she was waiting for this case to be over so he can obtain other employment and support himself. The Court believes that Mr. Soleimani's extensive restaurant experience should lead to gainful employment in some capacity, in spite of his age.

10. Petitioner testified that he went into debt to marry the respondent, that he had paid back a loan from a friend, Saleh Ghavami, in the amount of $39,000, which he obtained so that he could marry respondent, *see* Exhibit Nos. 8, 9. While respondent has referred to this letter as hearsay, it was admitted without objection, along with petitioner's testimony that this debt was related to the premarital funds paid to respondent. In addition to this debt, petitioner testified that he was paying many business-related expenses. He also transferred $10,000 to his ex-wife on October 14, 2011, as repayment for his attorney fees. The Court construes this as a payment out of marital funds and, therefore, awards respondent the sum of $5,000 in the form of an equalization payment, offset by the Nebraska Furniture Mart outstanding bill, which petitioner is to pay.

11. Other than working for his ex-wife to reimburse her for expenses paid on his behalf, petitioner testified that the only monies he has received since his restaurant burned in July of 2011,

Exhibit 5, is the sum of $103,134, from insurance proceeds, *see* Exhibit 9 (first page), from Travelers Insurance Company, $50,000 of which was for restaurant equipment lost in the fire, with the balance for the loss of business revenues or $53,134 [$103,134 - $50,000]. Insurance payments were made as follows: $10,000 on August 9, 2011; $25,000 on September 21, 2011; $35,500 on October 11, 2011; $10,000 on November 7, 2011; and $22,634.74 on December 12, 2011. Exhibit 9.

12. Petitioner has paid all of the debts associated with the marriage, including premarital debt incurred so that he could marry respondent. Exhibit 8 reflects unpaid business expenses bills of $85,547.69. Respondent is not entitled to any business insurance proceeds related to the fixed assets insurance, which were premarital. Further, deducting such cost leaves business interruption insurance of $53,134. The Court believes it would be inequitable to divide this as a marital asset when the insurance proceeds and debts were generated by a business which was premarital, leaving petitioner with more business debt than value. These debts will be assigned to petitioner.

13. The parties also have marital debt related to the purchase of furniture of the family home, which was voluntarily repossessed, leaving a debt of $3,800, according to petitioner's unchallenged testimony. This debt shall be paid by petitioner but the Court will allow an offset to his obligation to pay respondent for the monies he transferred to his ex-wife from marital funds to pay for his attorney fees. Respondent is entitled to the difference between her half of the funds transferred, $5,000 minus the NFM bill of $3,800, for a total equalization payment of $1,200.

14. In addition to the foregoing, respondent subpoenaed petitioner's ex-wife, testified to payment petitioner's living expenses in exchange for working at Ms. Bahmani's restaurant 25 to 30 hours a week, conferring the equivalent of $12,000 in wages on petitioner, or, about $270 per week.

Respondent's Minimal Work Experience and Efforts

15. Respondent has not worked during her marriage, or, for that matter, most of her adult life. She said that petitioner did not want her to work, although it is also apparent at some point she was pregnant and miscarried and may have intended not to be employed outside the home. She testified that she has limited English skills. The Court observed respondent on a number of occasions, responding to and, apparently, comprehending English statements even before a translation had occurred. Ms. Bahmani testified that could not speak English when she first came to the United States and, without any formal classes or instruction, she learned it mostly by watching television. The Court believes that respondent is capable of some minimal employment even though she has been restricted by her available transportation. The Court has no idea what attempts respondent has made to find a job, obtain transportation or assistance of others in this endeavor. She has lived in a shelter since August of 2011 where, apparently, all of her living needs are being met. She describes her current activities as involving very little. She notes that she is under the care of two doctors for "stress." When asked why she does not return to Iran where she was supported by her family, since she is not legally precluded from returning, she said that it was degrading for her to marry an older man like petitioner but she did so anyway and returning now would be a further humiliation. Thus, it is apparent if respondent can remain in the country, she will have to support herself eventually in a manner that is decidedly different from a paternalistic society.

16. Respondent testified that she has a bachelor of arts degree from a university in Iran. She is an educated woman. She worked briefly in an accounting position at a public utility but otherwise has not been employed for any significant length of time. While the Court credits respondent's testimony that her relationship with petitioner reflected a more conservative relationship consistent

with Islamic culture that precluded her from working and learning English, the Court finds more credible Ms. Bahmani's testimony that her husband never prevented her from either learning English or working outside the home. The Court, in part, finds the respondent's lack of progress in either employment or language development after her separation cannot be solely attributed to petitioner's abusive or domineering relationship, as she suggests. There is no credible testimony that justifies respondent's failure to obtain any kind of work, even though she may have been traumatized by petitioner, as she alleges. She has been in a protective environment for a sufficient period of time that she could have begun employment earning at least a federal minimum wage job. There are many immigrants in this country who, with limited English skills, find employment. In that respect, the Court will impute the minimum wage level of income to respondent, which is about $13,000 a year.

17. In addition to the foregoing, the Court credits the testimony of petitioner's ex-wife, who remains friendly to her ex-husband, that she never was precluded from working outside the home or getting an education. The Court infers from this that respondent was hesitant to find full time employment outside the home.

The Parties' Property Acquired During or Prior to Their Marriage

18. In 2009, the parties filed an adjusted gross income of $28,049. Exhibit 18. In 2010, their adjusted gross income was $25,038. Exhibit 19. In 2011, petitioner filed an individual tax return and showed adjusted gross income of $20,285. Exhibit 20. Respondent has never contributed any income to the family.

19. The parties bought a marital home on August 31, 2010, at 13102 Hemlock St., Overland Park, Kansas, for $289,534. Exhibit 12. Recent county tax appraisals show its value is flat at $289,400 in 2012 and the same amount in 2011. Exhibit 14. The monthly payments on the mortgage

are $2,235.57. Exhibit 12 (First Payment Notice). Only petitioner was obligated on the Note. His loan application showed a monthly combined income of $6,209. *Id.* At the time, he showed a total of $200,000 in real estate assets without any mortgages or liens at 117 S. Kansas Avenue and 10424 W. 56th Street.

19. On April 27, 2012, a petition to foreclose the mortgage on the marital property was filed. Exhibit 13, Johnson County Case No. 12CV3480. That matter is assigned to this division. Respondent signed a mortgage on the property. Exhibit B to Petition in 12CV3480. The mortgagee alleges that no payment was made as of November 1, 2011. ¶ 11 of Petition.

20. The divorce petition in this matter was filed on June 1, 2011. Accordingly, petitioner made four payments on the mortgage before ceasing payments. He testified that he could no longer make payments and was trying to accomplish a short sale. Petitioner also continued to reside in the residence. Petitioner will be assigned the house for purposes of any disposition and, upon either a foreclosure judgment or short sale, any associated debt for purposes of any disposition of the same will be divided between the parties. If the house is sold with a waiver of any deficiency judgment, the parties will be left as the Court finds them. In the unlikely case that the house is sold with any resulting equity, petitioner will be entitled to recover any payments made on the house after June 1, 2011, and any surplus, after reimbursement of associated sales expenses, will be shared equally by the parties.

21. Petitioner owned three automobiles prior to the marriage, a 2003 Land Cruiser, a 1999 Isuzu truck, and a 1995 Acura. Respondent has been using the Acura since leaving the marital residence but contends that without insurance and a proper registration, the car is unusable. Petitioner produced the insurance card (which expires in September) and the car registration, which

is good through November, at the second day of trial. Respondent's counsel complained about the late delivery of these items. Neither party, however, sought the Court's intervention and, accordingly, it will not otherwise address this matter. None of the vehicles have liens associated with the same. Petitioner has offered to give the car to respondent. Accordingly, the Acura will be awarded to respondent, who will be responsible for any further licensing and insurance requirements. Petitioner shall be assigned the 2003 Land Cruiser and the 1998 Isuzu truck as premarital assets.

22. The petitioner has a joint CD account in Gardner National Bank that was intended for his child, Pegah M. Soleimani. It is in the amount of $17,185.26, Exhibit 21. The Court sets aside account no.19563 to petitioner for the benefit of his child which existed before the marriage to respondent.

23. The Commerce Bank account, xxxxxx8931, Exhibit No. 28, shall divided equally.

24. Petitioner shall assume all debts associated with any credit card accounts, including the American Express account and the Capital One account. Exhibit Nos. 24-27.

25. Petitioner also owned premarital business property referenced during the trial as the Westside Diner, with a street address at 117/121 S. Kansas Avenue, Olathe, Kansas. It is legally described as:

> The South half (½) of Lot 15, and all of Lot 16, Block 53, City of Olathe, a subdivision in City of Olathe, Johnson County, Kansas, according to the recorded plat thereof.

This is premarital property bought in 1998 for $125,000. Exhibit 1. The Court finds that this property has not appreciated in value during the marriage to respondent. Its 2012 appraised value is the same as its purchase value. Exhibit No. 3. The property also has a mortgage in the amount of $118,109.11, as a result of a promissory note petitioner executed to Gardner Bank on January 14,

2010, during the marriage. Exhibit No. 2. Both the property and the debt associated with this property are assigned to petitioner.

26. A portion of the Westside Diner property has been leased since November 1, 2003 to Patricia Diaz, who operates a Mexican restaurant there. Lease payments paid to petitioner are $2,782 a month. Petitioner's payment on the note associated with this property is $2,090 a month, netting him $692 a month, according to his testimony. The marital income being used to service the debt is appropriate for premarital property. In that respect, it would be inequitable for the Court to impose that debt on petitioner without the concurrent means to use the income generated to pay for the debt.

27. Petitioner testified that he has no retirement funds or pension. Respondent has not been employed outside the home and also has no retirement funds.

28. Respondent filed a counter-petition for divorce on June 17, 2011. Doc. 8. At trial, the Court bifurcated the case and found the parties, who resided in this state 60 days prior to the filing of the petition, were incompatible and divorced them on that basis. Additionally, since the divorce was granted, respondent has asked that her maiden name be restored to her. Accordingly, the Court grants respondent's request and restores her maiden name of Elham Moghadam

The Premarital Mahr Contract

29. During trial, both parties admitted to signing an agreement known in Islamic custom as a "mahr" agreement. They signed it on July 18, 2009, prior to a religious ceremony, which, according to a videotape, Exhibit 219, appears to have occurred immediately afterwards.[5] The parties then

[5] Some courts have held that a prenuptial mahr agreement with a substantial financial obligation that is presented in a very short period of time before a marriage ceremony reflects overreaching or coercion. *Zawahiri v. Alwatter*, 2008 WL 2698679 *5 (Ohio Ct. App. July 10, 2008) (court rejects wife's equal protection argument over trial court's suggestion that the wife obtain relief through religious means as reflection of prejudice against Muslim marriages and Establishment Clause prohibition under Ohio constitution). Petitioner has not raised any similar issues.

came to the United States and another marriage ceremony was performed before a Johnson County judge on August 19, 2009. The marriage certificate reflecting the mahr agreement was marked as Exhibit 202, but respondent could not authenticate the same and, consequently, the Court entered into evidence only pages 3-8 of that exhibit, which are in Farsi, and identified by both parties as a document they signed. Later, respondent introduced an additional page of the agreement and identified Exhibit No. 248 as the original marriage contract. Petitioner, throughout the trial, consistently denied recognizing his own signature on immigration documents related to any federal affidavit of support which he denied recalling. Likewise, he denied recognizing his wife's signature on the same mahr documents which contained the signature that is tatooed onto his chest. A video of the signing ceremony, Exhibit 219, clearly shows the same "picture framed" mahr document that was introduced at trial and signed by both parties. The video appears to show a government registry official of some kind, directing the parties to sign, at various locations, this mahr agreement. Thereafter, it appears a brief marriage ceremony followed, attended by what appear to be two brothers and the parents of Ms. Moghadam, along with the officiating imam. The Court does not find petitioner's amnesia about his wife's signature on the mahr agreement or even his denials about whether he recognized his own signature on the copy of the affidavit of support, to be credible. His equivocations were, frankly, evasive and obviously intended to avoid responsibility to respondent, whether through an affidavit of support or the mahr agreement. Even though the Court has not admitted the "Official Translation" or the Affidavit of Support into evidence because of authentication failures, the result in this case would be the same, as will be discussed below.

Here, the Court simply finds a lack of proof related to the mahr agreement. Respondent simply did not prove a contract existed that the Court could interpret, while adhering to the rules of

evidence. No competent English translation of the actual Farsi document that was introduced and admitted, was ever provided.[6] There was limited testimony about the terms of the mahr agreement but not all of its terms and conditions. Respondent's counsel repeatedly identified the "Official Translation" of the mahr agreement. [The Court is not even sure that the "Official Translation" reflects the actual terms of the mahr, as opposed to an Iranian version of the same.] Accordingly, because the Court has no way to interpret the same, it cannot begin to enforce the mahr contract. Although petitioner did admit, in his testimony, to some of the critical terms, such as the payment of the mahr amount in the event he filed for divorce, he testified that this would occur under Iranian law. Respondent, on the other hand, simply argued that she could demand this amount any time, but, of course, this would not occur unless a divorce action was filed, so there is clearly some reason for deferring the obligation that is not apparent to the Court. Both parties, then, sought to impose their respective and conclusory arguments about the legal effect of the mahr commitment and what triggers the same. The Court rejects any such testimony because it assumes the contract is ambiguous, a determination the Court cannot make without a complete understanding of the agreement.

Assuming, for argument sake, that the Court could interpret the mahr agreement but found it ambiguous with regard to the payment of 1,354 gold coins, and that it was dependent upon certain conditions, such as petitioner's filing a petition for divorce, this may require evidence of Islamic law and the effect of respondent also filing for divorce. For example, under the "Official Translation"

[6] For some reason, respondent never identified a translation of the mahr agreement, other than insisting on admitting into evidence the "Official Translation" by assuming it could be authenticated as a government document but without meeting the standards for such authentication after contemporaneous objections were made to the same. And, respondent could not testify that it accurately reflected the Farsi document because she admitted she has limited English skills so she was not competent to both read the "Official Translation" and then identify it as being an accurate translation of the Farsi document she signed.

proffered but rejected, one of those events would include a divorce initiated by the wife, precipitated by a failure of petitioner to produce a child within five years of marriage [a fact he strenuously denied, noting respondent's subsequent pregnancy and, unfortunately, miscarriage]. But for reasons that will be discussed below, even if the mahr contract is reflected by what was presented in the "Official Translation," it could not be enforced.

30. Sequentially, the testimony shows that the marriage agreement followed the temporary espousal deed, Exhibit No. 203, which, according to the parties, involved a "temporary marriage" for a term which was extended twice. Petitioner pejoratively described this as the Iranian equivalent of legally sanctioned prostitution. It allows a man to engage in relations with a woman for a negotiated period of time. It is not impeded by an existing marriage, apparently, because petitioner remained married to Ms. Bahmani during this temporary marriage. Respondent described it as a "legal agreement to be together and to – go outside and be recognized by others. It's okay for them to be together."

31. Under the "permanent" marriage agreement, the mahr agreement, according to the parties' oral representations about the mahr financial obligation, in the event of a divorce or other conditions, the mahr amount could be demanded. This amounts to 1,354 gold coins called quare or, the equivalent of $677,000 [each coin now about $500]. Other "conditions" in the "Official Translation" cannot be interpreted but they incorporate Iranian and Islamic law. [7]

[7] Under the "Official Translation," other conditions exist, including a fault-based concept that allows a wife to have half of the husband's property, and it outlines grounds for a wife seeking a divorce, such as a refusal to meet the wife's cost of maintenance for six months and a "failing to discharge wife's other necessary rights for six months," the husband's "misconduct or ill-nature association so that it would render the continuance of marriage intolerable to the wife," the husband "suffering from a refractory disease as it would endanger continuation of matrimonial life to the wife," the "husband's insanity in cases where marriage dissolution is canonically impossible," a legal writ prohibiting the husband from engaging in occupations that are inconsistent with the family interest or the wife's prestige, the husband's conviction of a penal term of five or more years, the husband's involvement in a

32. Respondent produced what she says is the original of her marriage certificate, Exhibit 248. The Court admitted pages 3-8 of Exhibit No. 202, reflecting the parties' signatures on the same, but did not allow admission of the "Official Translation" because it was not authenticated. During trial, both parties agreed that they had been married and had signed the mahr agreement. Respondent also introduced a videotape of the signing ceremony. Exhibit No. 219.

Identity Cards

33. During the trial of this matter, petitioner requested that respondent return his Iranian identity card to him which he testified was akin to a birth certificate but has a much greater significance to Iranian residents because the same are used to record significant events in one's life. The Court, after questioning respondent, who was not forthcoming about the location of this identity card, eventually admitted that her father was holding the same at his house. Accordingly, the Court has ordered the return of any personal papers or identity cards to be restored to each party, which may be in the custody or control of either party, for whatever reason.[8]

CONCLUSIONS OF LAW

1. In any divorce action, the Court's authority stems from K.S.A. 23-2802 (Supp. 2011):

The decree shall divide the real and personal property of the parties, including any retirement

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"harmful addiction,"desertion of the family or an absence for six consecutive months, conviction of a crime by the husband that would threaten the wife's family prestige, the husband's sterility or physical defects "making the wife unable to give birth to offspring within five years of marriage," the husband's absence so that he is not "untraceable and not to be found within six months from the wife's application [to the court]." Further, the "husband's marriage with another woman without the consent of the wife or if he does not administer justice between his wives upon the court's discretion" is another basis for a wife's divorce.

[8] Respondent has argued that she possesses a power of attorney under the marriage certificated and that she needs petitioner's identity card to effect a divorce under Iranian law and, thereby, requests the Court to order petitioner to comply with the submission of the appropriate paperwork to the Pakistani interest section acting on behalf of Iran so that a divorce may also be processed under Iranian law. The Court will address such an extrajudicial request at a hearing that has been scheduled to address the same.

> and pension plans, whether owned by either spouse prior to marriage, acquired by either spouse in the spouse's own right after marriage or acquired by the spouses' joint efforts, by: (A) a division of the property in kind; (B) awarding the property or part of the property to one of the spouses and requiring the other to pay a just and proper sum; or (C) ordering a sale of the property, under conditions prescribed by the court, and directing the proceeds of the sale....In making the division of property the court shall consider the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other facts as the court considers necessary to make a just and reasonable division of property.

2. A marital estate is created when a divorce case is filed and all property of the parties, however, acquired, comes under the jurisdiction of the Court. *In re Marriage of Takusagawa*, 38 Kan. App. 2d 401, 406 (2007). K.S.A. 23-2801(a) (Supp. 2011) (previously 23-201(b)) provides that "[a]ll property ***owned by married persons*** ... and whether held individually or by the spouses in some form of co-ownership, such as joint tenancy or tenancy in common, shall become marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce...." (Emphasis added.) A trial court is not obligated to award to each party all property owned by such party prior to the marriage, nor is the court required to award to each the property inherited by each during the marriage. The court is required only to make a fair and equitable division of the property. *McCain v. McCain*, 219 Kan. 780, 787, 549 P.2d 896, 902 (1976).

3. In this manner, all property, inherited or otherwise, comes within the purview of the court's equitable powers.

> Two statutes govern a district court's division of property upon divorce. Under K.S.A. 23–201(a), any inheritance to a married person remains that person's sole and separate property. Subsection (b) further provides that all property owned by persons, including property described in subsection (a), becomes marital property when one spouse files a divorce or separate maintenance action. K.S.A. 23–201(b). And at that time: "Each spouse has a common ownership in marital property which vests at the time of commencement of

such action, the extent of the vested interest to be determined and finalized by the court, pursuant to K.S.A. 60–1610 and amendments thereto." K.S.A. 23–201(b).

K.S.A. 60–1610(b)(1) provides that the district court "shall divide the real and personal property of the parties, including any *retirement* and pension *plans*, whether *owned by either spouse prior to marriage,* acquired by either spouse in the spouse's own right after marriage or acquired by the spouses' joint efforts." (Emphasis added.) In making the division of property, the court may consider property-value fluctuations that occur before and after the valuation date and must consider the following factors:

> "[T]he age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; *the time, source and manner of acquisition of property;* family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other factors as the court considers necessary to make a just and reasonable division of property." (Emphasis added.) K.S.A. 60–1610(b)(1).

In re Marriage of Farris-Burton and Burton, 2012 WL 139268, *4-5 (Kan. Ct. App., Jan. 13, 2012).

4. In case of inheritance, a district court can remove an inheritance from the marital property to be divided. *Almquist v. Almquist,* 214 Kan. 788, 792, 522 P.2d 383 (1974) (not necessary for property inherited before divorce filing to be subject to division); *In re Marriage of Hair,* 40 Kan.App.2d 475, 479–83, 193 P.3d 504 (2008), *rev. denied* 288 Kan. 831 (2009) (while husband's inheritance constituted marital property, court could set it aside as his separate property). A district court can also award inherited property, or property acquired after divorce filing, exclusively to the acquiring party. *See In re Marriage of Gaschler,* No. 97, 271, 2008 WL 440751, at *4 (Kan.App.2008) (unpublished opinion) (court's decision to give entire post-filing real estate acquisition to husband justified under "time, source, and manner" factor); see also *In re Marriage of Torline,* 2006 WL 1976551, at *5 (court can include wife's inheritance on property division worksheet but decline to award any of it to husband).

5. K.S.A. 23-2601 (Supp. 2011), allows for inherited property or gifts to remain "the

person's sole and separate property." In this instance, all monies conferred on respondent prior to the marriage will be viewed as gifts to be removed from the marital estate and all inherited sums by petitioner related to his father's residence will likewise be removed from the marital estate. It would be unjust to have either party disgorge amounts that were conferred on them in this manner. That does not mean, however, the if petitioner incurred a loan to gift funds on respondent and then paid back the loan out of marital funds, that respondent should be able to attribute the same as marital funds and demand half back. Essentially, this would force petitioner to pay twice for a "temporary marriage" and would be inequitable. The Court will not consider payment of the Ghavami loan as stemming from marital funds that require credit to be given to respondent.

Maintenance

6. K.S.A. 23-2092(a) provides for latitude with respect to the award of maintenance when circumstances to the court appear to be "fair, just and equitable under all of the circumstances." This was a very short term marriage. It would not be just, based on the age of petitioner, his current unemployment and, conversely, the relative youth of the respondent, who is educated, to require petitioner to pay any long-term maintenance. Respondent is an educated, and young woman who, eventually, will have to find a means of supporting herself, assuming she can remain in this country. The fact that she no longer wants to resume living with her parents where she lived a protected existence for almost 30 years, is understandable, but it also does not justify imposing a substantial maintenance obligation on petitioner, who, frankly, may have employment opportunities with his skill in restaurant management, although the Court believes those efforts have been restrained during the pendency of this action. Ordinarily, the Court would not award maintenance in a very short term marriage. This case calls for an exception. The issuance of a final protection from abuse order

justifies a finding that respondent requires additional support from petitioner that requires a transition period after being abandoned by her husband under circumstances that involved abuse. Her limited language skills further make her vulnerable and in need of additional support, albeit for a limited time.

Even thought there have been minimal efforts by respondent to obtain employment, respondent lacks any kind of support system other than, it seems, personnel associated with the shelter where respondent resides. The Court is convinced that petitioner brought respondent into this country under circumstances that rendered her more vulnerable to becoming homeless, in addition to the abuse that precipitated this Court's order. Coupled with this vulnerability, petitioner repeatedly denied or "failed to recall" obvious issues related to his obligation to support respondent while in the country. Even though the Court cannot credit the affidavit of support, it can recognize the dilemma faced by respondent and the public policy behind immigrant internet marriages that leave divorced spouses as public wards with little or no responsibility of those who brought them here. Petitioner should recognize that telling respondent to simply return to Iran because there is no law that precludes the same is wilful blindness to the significant cultural indignities and shame attended by such a divorce. Consequently, even though the Court has concluded that respondent has made a minimal effort at employment, it appears that petitioner has followed the same track. The Court believes that both are capable of much greater employment opportunities beyond which they have demonstrated. Thus, even though the Court has not allowed for temporary maintenance up to this point, it is firmly convinced that if petitioner has the ability to pay back debts for his marriage, and can work 25 to 30 hours a week for his ex-wife, with his long restaurant experience and skill, as well as family support, he should be able to meet both his living expenses and his

obligations. Respondent is such an obligation.

Beginning on September 15, 2012, and for a term of 24 months, petitioner is ordered to pay maintenance of $692 to allow respondent's transition to an independent life for the same period of time that the parties resided together. This will not be a burden on petitioner, who has not provided the Court with any significant attempts to become fully re-employed and the Court believes his lack of efforts in this regard may be related to the pendency of this case. Such maintenance will be paid in accordance with K.S.A. 23-2905 (Supp. 2011), through the central unit for collection and disbursement of support payments, designated pursuant to K.S.A. 39-7,135 (Supp. 2011), unless the parties agree otherwise to make direct maintenance payments. Maintenance shall terminate upon the death of either party, the remarriage of respondent or the cohabitation by respondent with a non-relative adult in a marriage-like relationship, as defined by Kansas caselaw, regardless of the gender of such non-relative, and/or the expiration of the maintenance term.

Kansas Law on Premarital Agreements

7. Parties may contract for a premarital agreement, between prospective spouses, made in contemplation of marriage, and that agreement will be effective upon marriage, without consideration, so long as it is in writing and signed by both parties. K.S.A. 23-2402(a) (Supp. 2011); K.S.A. 23-2403 (Supp. 2011).

8. Parties to a premarital agreement may contract with regard to any property, upon marital dissolution, and with regard to the choice of law governing the construction of an agreement, so long as it is not in violation of public policy. K.S.A. 23-2404(a)(1), (7), (8) (Supp. 2011).

9. A premarital agreement can be revoked or amended only by a written agreement, signed by the parties, without consideration. K.S.A. 23-2406 (Supp. 2011).

10. A premarital agreement is not enforceable, in pertinent part, if it is unconscionable as a matter of law. K.S.A. 23-2407(c). Ordinarily, however, a premarital agreement is not enforceable unless the party to be bound failed to receive a proper disclosure of the other party's assets before signing such an agreement.

11. Equitable defenses limiting the time for enforcement of a premarital agreement, including laches and estoppel, are available to either party. K.S.A. 23-2409 (Supp. 2011).

12. Premarital agreements can provide for the payment of a sum of money, depending on the length of the marriage. *In re Marriage of Cutler*, 251 P.3d 112, 2011 WL 1877703 at *2 (Kan. Ct. App., April 29, 2011). They can provide for maintenance. *Id.* at *4.

13. Premarital agreements are interpreted in the same manner as any other contract. K.S.A. 23-2402(a), except in instances where applying foreign law is limited by public policy of the forum.

> Kansas cases consistently hold that a Kansas court will not apply the law of another state to a claim if that other state's law is contrary to Kansas public policy. See *Safeco Ins. Co. of America v. Allen*, 262 Kan. 811, 822, 941 P.2d 1365 (1997) (using *lex loci contractus* rule); *In re Estate of Troemper*, 160 Kan. 464, 469, 163 P.2d 379 (1945) (choice of law issue in probate case involving effect of divorce in Nebraska).

Raskin v. Allison, 30 Kan.App.2d 1240, 1244, 57 P.3d 30, 33 (2002). Courts also evaluate premarital agreements based on where performance is anticipated at the time of marriage, as opposed to where execution of the premarital agreement occurred. *Black v. Powers*, 48 Va. App. 113, 628 S.E.2d 546, 554 (Va. Ct. App. 2006).

14. A party who seeks to attack a premarital agreement has the burden of showing it is not enforceable. *Davis v. Miller*, 269 Kan. 732, 740, 7 P.3d 1223 (2000).

The Parties' Iranian Marriage and the Mahr Agreement

15. In the pretrial order, respondent alleges a "dowry agreement." Petitioner acknowledges

this theory of recovery but otherwise defends against the same because he is "virtually bankrupt, in part due to his payment of large sums of money for the Respondent's dowry." Doc. 62 at 1-2. The parties have stipulated, however, that "[t]he law of Kansas applies to ***all issues*** in the case." (Emphasis added.) Petitioner has presented no particular contract defense to any premarital agreement other than disputing the same. Respondent gave notice, however, on her witness and exhibit list, ¶ 36, that her exhibits would include documents relating to "prenuptial agreements and premarital relationship in Iran, including those documents in Farsi (language) relating to Respondent's dowry." Doc. 42 at 2.

16. During closing statements, petitioner's counsel argued that enforcement of the written mahr agreement was "irrelevant" and that it would be against public policy because it would interfere with the Court's ability to make a just and equitable division under Kansas law. Petitioner argued, essentially, that he could not afford the mahr obligation.

17. In *Davis*, a dispute over a post-nuptial agreement, the court construed the agreement under the Kansas Uniform Premarital Agreement Act ("KUPAA"), because it expressly referenced the same, and then examined the unconscionability defense *Id.* at 738.

> The district court found that the agreement was not unconscionable as set forth in K.S.A. 23-807(a)(2).
>
> Under the KUPAA, unconscionability is only an issue if there is "inadequate disclosure." 1 Elrod, Kansas Family Law Handbook § 2.03. As noted earlier, previous law required marital agreements to be "fair and equitable in its provisions"; however, under the KUPAA, there is no evaluation of "fairness." 1 Elrod, Kansas Family Law Handbook § 2.033.
>
> The ULA Comment to § 6 of the UPAA, 9B U.L.A. 376-77, sets forth a discussion concerning unconscionability and describes how a court might go about determining if an agreement is conscionable:
>
> > "The test of 'unconscionability' is drawn from Section 306 of the Uniform Marriage

> and Divorce Act (UMDA) [citations omitted.] The following discussion set forth in the Commissioner's Note to Section 306 of the UMDA is equally appropriate here:
>
> 'Subsection (b) undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property disposition are binding upon the court unless those terms are found to be unconscionable. The standard of unconscionability is used in commercial law, where its meaning includes protection against one-sidedness, oppression, or unfair surprise [citations omitted], and in contract law [citations omitted]. It has been used in cases respecting divorce settlements or awards. [Citations omitted.] Hence the act does not introduce a novel standard unknown to the law. In the context of negotiations between spouses as to the financial incidents of their marriage, the standard includes protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.
>
> 'In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party. If the court finds the agreement not unconscionable, its terms respecting property division and maintenance may not be altered by the court at the hearing.' "

269 Kan. at 742-743, 7 P.3d at 1231 - 1232.

18. This case presents no disclosure issue defense to enforcement. Petitioner also has not claimed he was pressured into signing a mahr agreement or that the mahr amount was too high.[9] Rather, respondent testified that petitioner bragged about his extensive business holdings in Iran, which, as it turns out, were non-existent.

19. The question remains, however, whether the mahr agreement is enforceable. Other courts have found mahr agreements enforceable under the UPAA, so long as they are premarital. *Ahmed v. Ahmed*, 261 S.W.3d 190, 193-94 (Tex. Ct. App. 2008) (finding mahr contract was not enforceable as a "premarital" agreement because it was entered into after the parties were married).

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[9] As noted *infra* at ¶ 32, mahr amounts can be determined by the bride's relative worth in relation to other females in the family, her beauty, age, virginity, etc. In this instance, petitioner was apparently satisfied that respondent justified the rather large mahr amount because he has not challenged the same.

20. In *Ahmed*, the wife argued that the mahr agreement could be enforceable as a post-marital contract, but the husband argued it was too vague to be enforced because it allowed for a marriage "against a Mahr of $50,000 of which prompt payment is nil and deferred payment is $50,000." The court, however, found this was specific enough. 261 S.W.3d at 195.

> Both parties were raised in the Islamic faith, and Afreen testified that the Mahr agreement is a contract based on Islamic custom and religious principles. Amir offered no testimony regarding the Mahr, but Afreen explained that the Mahr constitutes a promise of an amount to be paid to the bride and if not given before, it must be given at the time of a divorce. If credited by the trial court as factfinder, this evidence establishes that the parties understood their agreement and that the terms are sufficiently specific to be enforced. *See id.*; *see also O'Farrill Avila v. González*, 974 S.W.2d 237, 244–45 (Tex. App.–San Antonio 1998, pet. denied).

261 S.W.3d at195. Ultimately, the court remanded the matter to determine whether the mahr agreement was enforceable as a post-nuptial agreement. *Id.*

21. In Kansas, courts are obligated to recognize "[a]ll marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted," and, as such, they "shall be valid in all courts and places in this state." K.S.A. 23-2508 (Supp. 2011).[10] In this instance, that means the Iranian marriage conducted on July 19, 2009, should be recognized. Both parties acknowledge the that they signed a mahr agreement on July 18, and were then married.

22. But here, although the Court allowed the parties leeway in the examination of witnesses and testimony regarding the mahr contract, it assumed that a competent translation of the same would have come into evidence before deciding whether it was unambiguous. No such competent

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[10] This provision goes on to state the "strong public policy of this state only to recognize as valid marriages from other states that are between ***a*** man and woman." (Emphasis added.) Thus, while this statutory provision is intended to allow recognition of marriages from other jurisdictions, it also precludes the concept of multiple wives, which Islamic law apparently allows in light of the proposed Official Translation that suggests a ground for divorce can be the "husband's marriage with another woman without the consent of the wife or if he does not administer justice between his wives upon the court's discretion." *Id.* at n.6.

and admissible translation came into evidence. Consequently, parol evidence offered by the parties about the contract's terms cannot be used to aid the Court before it determines whether am ambiguity exists. *Robertson v. McCune*, 205 Kan. 696, 699, 472 P.2d 215 (1970) (parol evidence may be used to clarify an ambiguity but not to nullify a clear provision); *Gore v. Beren,* 254 Kan. 418, 426-27, 867 P.2d 330 (1994) ("An ambiguity in a contract does not appear until two or more meanings can be construed from the contract provisions.").

Respondent repeatedly attempted to admit into evidence the "Official Translation" of the mahr agreement and marriage certificate, but without proper authentication. *See* K.S.A. 60-465 (requiring extrinsic evidence of authenticity or, if from a foreign country, an attestation certificate from a secretary of an embassy or consular agent with a seal from the relevant office); *State v. Gonzalez*, 282 Kan. 73, 86, 145 P.3d 943 (2008). Even if admitted into evidence, however, this agreement appears to incorporate conditions of the wife's right to divorce under Islamic and Iranian law that are precluded by Kansas law which allows a divorce to be granted on three distinct grounds. K.S.A. 23-2701(a) (Supp. 2011), states: "The district court ***shall grant*** a decree of divorce or separate maintenance for any of the following grounds: (1) Incompatibility; (2) failure to perform a material marital duty or obligation; or (3) incompatibility by reason of mental illness or mental incapacity of one or both spouses." (Emphasis added.) These grounds are exclusive and not permissive. Our law recognizes that in all but the most extremely gross and rare cases, fault is not a factor. Further, financial penalties are not to be imposed on a party on the basis of fault. *In re Marriage of Sommers*, 246 Kan. 652, 657, 792 P.2d 1005 (1990). Here, the Court finds the exorbitant mahr payment, while perhaps culturally justified, would function as a penalty.

23. Courts throughout the United States have struggled with interpreting similar matters:

> The rationale of *In re Marriage of Noghrey* (1985) 169 Cal.App.3d 326, 215 Cal.Rptr. 153 is particularly apt. There, a couple executed a "kethubah" in California before their marriage. The court explained the kethubah was "embedded in religious doctrine" and described it as "a marriage document which represents the obligation of the husband under the Jewish faith to, *inter alia*, provide for his wife upon divorcing her. Since the husband could apparently divorce his wife at will, the *kethuba* was a device created to provide economic security for the wife; but was also intended to discourage divorce by making it costly and undesirable [*sic*] for the husband. The wife, on the other hand, was not as free to divorce and was subject to loss or reduction of her rights should she divorce her husband on certain grounds. [Citation.]" (*Id.,* at p. 329, fn. 2, 215 Cal.Rptr. 153.) It mattered not that the kethubah originated in order to discourage divorce; the effect in that case was to encourage a dissolution by providing wife with cash and property in the event the marriage failed. The result in this case is no different. Wife claims she was entitled to the dowry upon husband's death or dissolution of the marriage, no matter which party initiated that action. The provision pertaining to dissolution is before us, and it can only be viewed as encouraging "profiteering by divorce." (*Id.,* at p. 331, 215 Cal.Rptr. 153.) It is of no moment that the court believed husband's expert on the issue; if the court had accepted the position of wife's expert, the contract would not have been enforceable under the public policy of this state.

In re Marriage of Dajani, 204 Cal.App.3d 1387, 1390, 251 Cal. Rptr. 871, 872 - 873 (Cal. Ct. App. 1988); *but see In re Marriage of Bellio*, 129 Cal. Rptr. 2d 556, 634-35 (Cal. Ct. App. 2003) (noting payment of $100,000 did not threaten marriage relationship because amount was reasonably determined to compensate wife for loss of support after remarriage involved loss of support payment by former spouse).

24. Similar to the traditional Jewish law discussed in *Noghrey*, which allows men to unilaterally declare a divorce, under Islamic law, a husband enjoys similar unilateral rights and the mahr obligation is viewed as a means of tempering the inequities of traditional religious law:

> The mahr is property given by the husband as an effect of the marriage and as a mark of respect for the wife. Although often equivocated in translation to a "dower," the two arrangements are different. A mahr is not a dower in the sense that it is a "bride price" for the bride's father to pay the groom, but rather the groom pays the wife a specified amount upon marriage. The mahr is not a gift, but a mandatory requirement for all Muslim marriages. If the marriage contract does not contain a specified mahr, the husband still must pay the wife a judicially determined sum, typically based on the mahr amount that women of equivalent social status receive.

The structure of the mahr agreement reflects the inherent purpose of easing financial and social inequities between the husband and wife. For instance, the mahr is separated into two parts. First, there is the muajjal or the prompt mahr, which the husband gives to the wife immediately after the marriage ceremony. The second part of the mahr, the muwajjal, is often referred to as the deferred mahr and is held in trust strictly for the wife and paid only in the event of divorce or the husband's death. The deferred mahr saves the wife from complete financial destitution if the husband ceases to support the family financially. Hence, the mahr acts as the wife's security deposit for the marriage in case she suddenly loses her husband and her means of financial support. Accordingly, the majority of the mahr is deferred because the wife may only consider a large sum necessary upon divorce or her husband's death.

Although expressed differently in contemporary jurisprudence, traditional Islamic family law consisted of three main forms of divorce. First, talaq divorce allows the husband to unilaterally divorce his wife without cause through oral or written pronouncement. The deferred mahr counterbalances the husband's right to talaq by making divorce more costly. The wife has no similar inherent right to unilateral divorce; the parties must have expressly delegated any such right within the marriage contract. However, the wife may initiate a khul divorce, a form of divorce that requires her husband's prior consent and court approval. By seeking divorce, the wife typically forfeits her right to the deferred mahr. The third form of divorce, a faskh divorce, occurs when the wife initiates the divorce, but proves that the husband is at fault. With faskh divorce, the woman is sometimes still entitled to her deferred mahr.

The importance of a mahr agreement and the husband's obligation to comply with its terms is firmly rooted in religious law. The Qur'an states that “the divorced women, too, shall have [a right to] maintenance in a goodly manner: this is a duty for all who are conscious of God,” and later decrees, “[m]arry them, then, with their people's leave, and give them their dowers in an equitable manner—they being women who give themselves in honest wedlock, not in fornication, nor as secret love-companions.”

Since the mahr arrangement is a fundamental theological right of the wife, the husband may not reduce the mahr; Islamic courts strictly enforce the agreement and could imprison the husband for not complying with the contract. Even upon the husband's death, the deferred mahr is paid from his estate before all other debts. Because there is no monetary cap on the mahr, the agreed amounts can range from a small token, real estate to a million dollars in cash. Although the parties specifically bargain for the arrangement and appropriate sum, the parties often draft mahr agreements by filling in the blanks of form contracts that employ standard boilerplate terms. The typical mahr agreement consists of the names of the parties, the amount of the mahr, the imam's signature, the signature of two male witnesses, and a disclaimer that Islamic law will govern the contract.

Sizemore, *Enforcing Islamic Mahr Agreements: The American Judge’s Interpretational Dilemma*,18

GEO. MASON L. REV. 1085, 1087 -1089 (2011) (citations to footnotes omitted).

25. The parties agreed in the Pretrial Order to the application of Kansas law. By urging the Court to adopt and interpret a mahr contract that is written in Farsi and dictated by interpretations of Iranian and/or religious law, the Court would be compelled to apply a contract 1) it cannot read and 2) that is contrary to the public policy of Kansas law.

26. It is apparent that the financial obligation by the event of divorce exacts a specific and sizable financial divorce penalty. *See Gross v. Gross*, 11 Ohio St.3d 99, 464 N.E.2d 500, 506 (Ohio 1984) (noting that a prenuptial agreement violates public policy if the contract "provides a significant sum either by way of property settlement or alimony at the time of a divorce, and after the lapse of an undue short period of time one of the parties abandons the marriage or otherwise disregards the marriage vows"). Here, both parties sought a divorce. But, if the mahr amount was blindly adhered to without evidence of its purpose, the amount could function as a negotiated support payment or as a penalty. Ordinarily, when courts decide support obligations, they determine an award that is fair, just and equitable under all the circumstances. *See* K.S.A. 23-2802(c)(7) (Supp. 2011) and K.S.A. 23-2902 (Supp. 2011). Kansas law applies here.

27. Another cautionary concern in enforcing a mahr agreement is that they stem from jurisdictions that do not separate church and state, and may, in fact, embed discrimination through religious doctrine. This, in turn, creates an obvious tension between the Establishment and Equal Protection Clauses under the federal constitution [and similar state provisions]:

> Notably, the Equal Protection Clauses of the United States and Michigan Constitutions provide that no person shall be denied the equal protection of the law. US Const, Am XIV; Const 1963, art 1, § 2. "The essence of the Equal Protection Clauses is that the government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment." *Crego v. Coleman*, 463 Mich. 248, 258, 615 N.W.2d 218 (2000).

> If the state distinguishes between persons, the distinctions must not be " 'arbitrary or invidious.' " *Id.* at 259, 615 N.W.2d 218, quoting *Avery v. Midland Co., Texas,* 390 U.S. 474, 484, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968). Wives have no right to pronounce the talaq. *Pathan, supra,* part 2, section 13; *Islamic "Purse Strings," supra* at 123. This distinction is arbitrary and invidious. To accord comity to a system that denies equal protection would ignore the rights of citizens and persons under the protection of Michigan's laws. *Dart I, supra* at 580, 597 N.W.2d 82.

Tarikonda v. Pinjari, 2009 WL 930007 *3 (Mich. Ct. App. April 7, 2009) (noting basic denial of due process in Indian divorce under Muslin act where husband's invocation of triple talaq permits summary divorce by stating "I divorce thee," three times). Perpetuating such discrimination under the guise of judicial sensitivity to Establishment Clause prohibitions would, in effect, abdicate the judiciary's overall constitutional role to protect such fundamental rights, a concern that presumably lead to the recently-enacted House Substitute for Senate Bill No. 79, 2012 KAN. SESS. LAWS, p. 1089, § 4, which provides:

> A contract or contractual provision, if capable of segregation, which provides for the choice of foreign law, legal code or system to govern some or all of the disputes between the parties adjudicated by a court of law or by an arbitration panel arising from the contract mutually agreed upon ***shall violate the public policy of this state and be void and unenforceable if the foreign law, legal code or system chosen includes or incorporates any substantive or procedural law, as applied to the dispute at issue, that would not grant the parties the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions***, including, but not limited to, equal protection, due process, free exercise of religion, freedom of speech or press, and any right of privacy or marriage.

(Emphasis added.)[11] Gender-based equal protection challenges are determined under an intermediate

[11] This provision was enacted after Oklahoma's discriminatory act against Shari'a law was struck down as an unconstitutional violation of the Establishment Clause to the First Amendment. *Awad v. Ziriax*, 670 F.3d 1111, 1129-1133 (10th Cir. 2012) (affirming, in January of 2012, preliminary injunction against enforcement of constitutional amendment). In one respect, this recent enactment appears to be superfluous. The judiciary already is charged with protecting constitutional rights. Under Section 1 to the Kansas Bill of Rights: "All men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness." This provision is construed in a similar manner to the Fourteenth Amendment. *State ex rel. Tomasic v. City of Kansas City*, 237 Kan. 572, 583, 701 P.2d 1314 (1985). Likewise, KAN. CONST. ART. § 6, states that the "legislature shall provide for the protection of the rights of women in acquiring and possessing property, real, personal and mixed, separate and apart from the husband; and shall also provide for their equal rights in the possession of their children."

standard of review which requires any classification to substantially further a legitimate legislative purpose. *In re K.M.H.*, 285 Kan. 53, 68, 169 P.3d 1025 (2007). Thus, if a premarital agreement in the context of KUUPA, was the product of a legal system which is obnoxious to equal rights based on gender, a court could not become a proxy to perpetuating such discrimination.

28. Respondent's counsel has argued, essentially, that the right to mahr is severable and independent of any other obligations in the marriage contract. This is argument, at this point, assumes facts not evidence. An actual agreement must be interpreted from all of its provisions to ascertain the parties' intent. *Anderson v. Dillard's Inc.*, 283 Kan. 432, 436, 153 P.3d 550 (2007). This requires construction of the entire instrument to determine a reasonable interpretation. *Johnson County Bank v. Ross*, 28 Kan.App.2d 8, 10–11, 13 P.3d 351 (2000). That cannot happen based on the record here.

29. Even assuming this Court could interpret the contract, it would then be put in the dilemma of fashioning a remedy under a contract that clearly emanates from a legal code that may be antithetical to Kansas law. To suggest the mahr obligation is neutrally severable from its religious context is not apparent. Such flawed reasoning was utilized in *Chaudry v. Chaudry*, 388 A.2d 1000, 1006 (N.J. Ct. App. 1978), to justify upholding a premarital contract derived from Pakistani law, on choice of law grounds, rather than on public policy grounds. *Id.* at 1005, 1007. The result was judicial adoption of Pakistani law that inherently accords women no marital property rights. Oman, *How to Judge Shari'a Contracts: A Guide to Islamc Marriage Agreements in American Courts*, 2011 UTAH L. REV. 287, 314 (2011) ("In other words, under Pakistani law, the limitation on the wife's rights arose not because she bargained those rights away, but from the fact that there was no marital property under Pakistani law upon which she might have a claim.")

30. There are also cases where experts or the parties testify as to their opinions about whaat the law and custom require. In *Mayer-Kolker v. Kolker*, 819 A.2d 17, 20-21 (N. J. Sup. Ct. App.), *cert. denied*, 828 A.2d 922 (N.J. 2003), a ketubah involved conflicting English and Hebrew translations. The ketubah is akin to a dowry, and this one required the marital partners to comply with the laws of Moses and Israel, which, in turn, imposed certain obligations on the husband to grant a dowry to the wife, while agreeing to support and care for her. *Id.* The court, in addition to finding there was no competent evidence to decide the controversy, deferred from resolving the matter on First Amendment grounds:

> [T]he parties do not present competent evidence, which we assume would consist of appropriate expert testimony, about what Mosaic law would require in this instance. Even if a civil court may properly enforce such religious premarital agreements, notwithstanding First Amendment concerns, we are not competent to determine without an evidentiary basis whether this *ketubah* effectively subjected defendant to comply with religious law and what that religious law demands here. Interpreting the effect of this *ketubah*, and then determining whether defendant's signature of this document subjects him to Mosaic law, and further determining what Mosaic law commands on this point are not tasks which we should assume in the first instance and in any event are not tasks for which we are properly suited in the absence of expert testimony and other evidence. *See Hernandez v. C.I.R.*, 490 *U.S.* 680, 699, 109 *S.Ct.* 2136, 2148, 104 *L.Ed.*2d 766, 786 (1989) (determining that fees for Scientology audits were not deductible from federal income tax as "charitable contributions," the Court stated, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds[ ]"); and *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 *U.S.* 440, 449, 89 S.Ct. 601, 606, 21 L.Ed.2d 658, 665 (1969) (refusing to decide whether a local church has failed to follow tenets of a denomination, stating:
>
> > First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern .... the Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.).

819 A.2d at 21.

31. This Court will not avoid a case and controversy before it simply because the task is difficult. Parties should have a right to an adjudication of their controversy. If this Court had been presented with expert testimony and an accurate translation of the contract at issue, it might have the ability to separate religious doctrine from that which is obnoxious to our public policy.

32. The challenge, however, in mahr agreements are that they are "too short on operative details, definitions, and explicit requests to have their terms represent an entire remedy at law in a civil courtroom." *See* Lindsey E. Blenkhorn, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 210 n.5 (2002). Parol evidence is almost always required in such cases because the mahr is fundamental to Islamic marriage custom and, therefore, ill-defined, leaving some Islamic courts to infer a mahr amount, if not to provided, to reach a judicial determination of a bride's worth, which, in turn, may be inferred "according to other females in the bride's family, her own beauty, her age, or her virginity." *Id.* Such concepts, however, suggest women are, comparatively-speaking, chattel, not human beings. This entire valuation process is contrary to American jurisprudence even if a Western court could somehow divine a purpose for in the mahr amount for anticipated spousal support, as opposed to simply divining an intangible value for a wife's cultural value.

33. In *Odatalla v. Odatalla*, 810 A.2d 93, 94-95 (N.J. Sup. Ct. App. 2002), the issue was whether a civil court could enforce the terms of an Islamic mahr agreement where the wife sought a divorce based on grounds of extreme cruelty. There was a videotaped ceremony involving the wife's family and a negotiated mahr ageement and further conditions of an Islamic marriage license. *Id.* at 95. This was followed by a religious marriage ceremony performed by an imam. It involved

a deferred payment of $10,000. *Id.* The court considered the First Amendment clause and its prohibition about making any laws that affect the free exercise of religion if it should refuse to enforce a mahr agreement simply because it reflects Islamic tenets. *Id.* at 95. The court found that it could enforce such agreements if the agreement is based upon "neutral principles of law" and not on religious policy or theories. *Id.* at 96 (*citing Jones v. Wolf*, 443, U.S. 595, 603 (1979)). The court looked to "secular parts" of the mahr agreement for enforcement. *Id.* at 97. Interestingly, the wife offered her testimony about Islamic custom, which is that the mahr demand for payment typically is deferred unless there is the death of the husband or a divorce action. *Id.* at 97-98. The court enforced the agreement.

34. The First Amendment prohibits civil courts from resolving church disputes on the basis of religious doctrine and practice. *Jones*, 443 U.S. at 602 (*citing Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976)). It does not, however, preclude a civil court from adjudicating disputes if there is no consideration of doctrinal matters. *Id. Jones* espoused the "neutral principles of law" and secular approach to resolving property rights. Writing for a divided Court, Justice Blackmun opined:

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, *the neutral principles analysis shares the peculiar genius of private-law systems in general flexibility in ordering private rights and obligations toreflect the intentions of the parties.*

Id. at 603 (emphasis added). Here, that analysis cannot be performed.

35. Justice Blackmun's prediction of a neutral analysis, however, may be more hopeful than

realistic. With interpretation of a mahr agreement drawn under the "pertinence of the Islamic shadow behind which husband and wife negotiate, bargain, and determine mahr and its amount, courts have paradoxically refused an appreciation of contract law that would account for the parties' particular, peculiar, private ordering regime." Sizemore, *supra* at 1099 (*quoting* Pascale Fournier, *Flirting with God in Western Secular Courts: Mahr in the West*, 24 INT'L J.L. POL'Y & FAM. 67, 69 (2010)).

36. This Court, while ultimately determining that respondent has not met her evidentiary burden of proof, is not convinced that a mahr agreement qualifies as a prenuptial agreement.

> In other jurisdictions, courts classify the mahr agreement as a prenuptial contract and then proceed to void the mahr agreement for failure to meet the state's statutory standards for prenuptials. For example, the Uniform Premarital Agreement Act, adopted by 26 states, provides that premarital agreements must be conscionable, entered into voluntarily, and executed only after both parties fully disclose their financial assets. Some states also require that independent legal counsel represent each party or that parties expressly waive representation. Most mahr agreements do not meet these requirements, and so, if treated as a prenuptial, many courts refuse to enforce the contracts.
>
> Each voided mahr agreement establishes the misleading precedent that mahr agreements are equivalent to prenuptial contracts, when, in fact, the two are conceptually distinct. Indeed, the mahr developed for the sole benefit of the wife, as a way to ease an inequitable marriage custom and prevent financial destitution. In contrast, American prenuptial contracts formed to protect the economically superior party from sharing assets with the economically inferior party upon divorce. Thus, the mahr and the prenuptial contract developed to protect different parties and accomplish disparate goals.
>
> Also dissimilar to prenuptials, mahr negotiations do not represent an attempt to bargain around default divorce law. When forming marital contracts in their home countries, Muslim parties most likely did not anticipate litigating in American courts and confronting state equitable division or community property laws. In Islamic tradition, each spouse retains their own assets as separate property during the marriage, and so marital or community property is foreign to Islam. And, finally, prenuptials represent the final financial agreement upon divorce, but Muslim couples may not have intended the mahr agreement to represent the exclusive post-divorce settlement because, under some schools of thought, the woman is entitled to alimony separate from her mahr.

> Hence, the mahr agreement's vagueness creates a judicial guessing game that allows non-Muslim judges to falsely equivocate the mahr agreement with a prenuptial contract that preempts equitable division laws. One scholar explains that these cases have "created a serious warping of American judicial understanding of Islamic law as well as a hindrance to providing justice to US Muslim litigants." Thus, this insensitive use of parol evidence creates deceptive precedent that frustrates the proper enforcement of mahr agreements.

Sizemore, *supra* at 1104 -1105 (footnoted citations omitted).

37. In disregarding the mahr agreement in the case at bar, the parties are not denied justice or a remedy. Rather, the protection of Kansas law, applicable to the parties here, requires an equitable division of property in a secular system that is not controlled by the dictates of religious authorities or even a society dominated by men who place values on women in medieval terms.[12] *See, e.g., In Re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865-67 (Calif. Ct. App. 2001) (husband argued for enforcement of an equivalent $30 mahr agreement); and *Aleem v. Aleem*, 947 A.2d 489, 493 n.5 (Md. 2007) (husband argued for mahr of only $2,500 when, under Maryland law, wife was entitled to at least half of $2 million in marital assets).

38. In the present case, the Court does not find it inequitable to allow petitioner to retain, for the most part, premarital property he possessed, after conferring the equivalent of $116,000 in gifts on respondent before any legitimate marriage had occurred.

The Affidavit of Support

39. The last issue the Court addresses is respondent's argument that she is entitled to an order of support because it is compelled by federal law. Respondent initially filed a motion for temporary support and maintenance, Doc. 35, based on the theory that petitioner had executed a

[12] *E.g.*, in *Harrison v. Abouelseoud*, 2012 WL 753761 *7-8 (Conn. Sup. Ct. 2012), found a mahr agreement enforceable but ignored its provision waiving alimony and exercised its equitable powers and discretion to provide for alimony.

Form I-864, a federal affidavit of support. Such affidavits are required when immigrant fiancées or spouses are brought into the United States pursuant to the Immigration and Nationality Act, § 213A, 8 U.S.C. § 1183a, to ensure support an annual income of not less than 125 percent. It provides:

> "No affidavit of support may be accepted by the Attorney General or by any consular officer to establish that an alien is not excludable as a public charge under section 1182(a)(4) of this title unless such affidavit is executed by a sponsor of the alien as a contract–
>
> **(A)** in which the sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable;
>
> **(B)** that is legally enforceable against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit (as defined in subsection (e) of this section), consistent with the provisions of this section; and
>
> **(C)** in which the sponsor agrees to submit to the jurisdiction of any Federal or State court for the purpose of actions brought under subsection (b)(2) of this section."

40. Kansas courts have addressed this issue only once. *In re marriage of Sandhu*, 41 Kan. App. 2d 975, 207 P.3d 1067 (2009). In *Sandhu*, the court noted that state and federal courts may enforce such affidavits of support by the sponsored immigrant as a "legally enforceable contract and that the sponsored immigrant 'has independent standing to enforce the sponsor's obligation' in any federal or state court." *Id.* at 978 (*quoting Moody v. Sorokina*, 40 A.D.3d 14, 18-19, 830 N.Y.S.2d 399 (2007)).

41. 8 U.S.C. § 1184, titled "Admission of non-immigrants," authorizes the United States Attorney General to promulgate regulations prescribing specific admission requirements for the admission of non-immigrants into the United States. It provides:

> A visa shall not be issued under the provisions of section 1101(a)(15)(K)(I) of this title until the consular officer has received a petition filed in the United States by the fiancée

> or fiancé of the applying alien and approved by the Secretary of Homeland Security. The petition shall be in such form and contain such information as the Secretary of Homeland Security shall, by regulation, prescribe.

42. The specific provision referenced in the quoted portion above refers to the "fiancée or fiancé of a citizen of the United States" which is defined as a non-immigrant class in 8 U.S.C. § 1101 cited herein. 8 C.F.R. Sec. 213a.2 expressly conditions the issuance of the fiancée visa on an affidavit of support filed by the putative American spouse. 8 C.F.R. § 213a.2 provides:

> (b) Affidavit of support sponsors. The following individuals must execute an affidavit of support on behalf of the intending immigrant in order for the intending immigrant to be found admissible on public charge grounds:
>
> (1) For immediate relatives and family-based immigrants. The person who filed a relative, orphan or fiancé(e) petition, the approval of which forms the basis of the intending immigrant's eligibility to apply for an immigrant visa or adjustment of status as an immediate relative or a family-based immigrant, must execute an affidavit of support on behalf of the intending immigrant. If the intending immigrant is the beneficiary of more than one approved immigrant visa petition, it is the person who filed the petition that is actually the basis for the intending immigrant's eligibility to apply for an immigrant visa or adjustment of status who must file an affidavit of support.

43. There is little doubt in the Court's mind, as a question of immigration law, that petitioner must have executed an affidavit of support consistent with the foregoing authorities, despite his failure to recollect doing so. But even respondent's failure to prove the affidavit in this instance is irrelevant in light of the fact that the Court has imputed the ability of respondent to earn a minimum wage for the period of time after the petition was filed.

44. Under the I-864 contractual obligation, divorce does not terminate the same. *Id.* at 979 (*citing Shumye v. Felleke*, 555 F. Supp. 2d 1020, 1024 (N.D. Calif. 2008)). Presumably, respondent would be free to pursue any such action so long as she remains in this country. In *Sandhu*, however, the court affirmed a finding that the immigrant spouse's earnings exceeded the federal poverty level

and, therefore, she was not entitled to support. *Id.* at 980.

45. At trial, it was evident that respondent had made no real effort obtain employment and the Court has imputed her ability to earn federal minimum wages, in addition to the gift of living expenses conferred upon her by the shelter in which she is residing. As such, the evidence fails to demonstrate that she is living below the 125 percent federal poverty level needed to establish a cause of action under the affidavit of support.

46. Accordingly, the Court concludes that respondent is not entitled to support on this basis.

IT IS SO ORDERED, ADJUDGED AND DECREED.

8/28/12 /s/ David W. Hauber

Dated DAVID W. HAUBER
District Court Judge, Div. 7

NOTICE OF ELECTRONIC SERVICE

Pursuant to KSA 60-258, as amended, copies of the above and foregoing ruling of the court have been delivered by the Justice Information Management System (JIMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the e-mail addresses provided by counsel of record in this case. Counsel for the parties so served shall determine whether all parties have received appropriate notice, complete service on all parties who have not yet been served, and file certificate of service for any additional service made.