

September 9, 2002

## Court Enforces Mahr Provision in Muslim Marriage Contract

**By Abed Awad**

Muslim marriage contracts include a provision called mahr, which American courts have misconstrued to be prenuptial agreements. Recently, the New Jersey Superior Court, in *Odatalla v. Odatalla*, Docket No. FM-16-366-01 (Ch. Div. June 24, 2002), properly used a simple contract approach to resolve a dispute over a mahr. This approach is the most consistent with the character of mahr under Islamic law and with American notions of equity and justice.

It is estimated that six to eight million Muslims live in the United States. Like the majority of other Americans, Muslim Americans opt for a religious matrimonial ceremony; for Muslims that means a local Imam would solemnize the marriage consistent with Islamic traditions.

From my experience as a family lawyer for Muslim Americans, I estimate that there are at least one million Muslim marriage contracts in the United States, most if not all of which, include a mahr provision.

### **ISLAMIC LAW**

Islamic law is referred to as Shari'a. Shari'a literally means straight or clear path. Islamic law is a divine law. The Shari'a governs relations between man and God and between man and man.

The two primary sources of Islamic law are (1) the Quran; and (2) the Sunna. The Quran is the Muslim's holy scripture. It is a compilation of revelations -- the Word of God -- received by the Prophet Mohammad beginning in 610 A.D. The Sunna is essentially the prophetic example embodied in the sayings, conduct and traditions of the Prophet.

In addition, there are two secondary sources of Islamic law: (1) qiyas (reasoning by analogy), and (2) ijma (consensus of the jurists and sometimes the community). Other sources of Islamic law of less significance exist, such as istihsan (equity or juristic preference), istishab (presumption of the continuity or permanence in juristic reasoning), istislah (public interest as a source of law), darura (necessity) and urf (custom).

A Muslim jurist would first rely on the primary sources to reach a legal opinion or ruling on a particular matter. If no express provision in the Quran or Sunna applied to the issue, the Muslim jurist would then turn to the secondary sources for guidance.

The process of analytical legal reasoning that is used to deduce or derive the law from the primary sources is called *ijtihad* (*ijtihad* is the process through which the secondary sources are utilized). *Ijtihad* literally means to exert, strive and/or endeavor.

A jurist would use *ijtihad* by engaging and exerting his independent intellectual faculties and reasoning based on the express scriptures and/or spirit of the scriptures to reach a legal or theological ruling. For a more detailed discussion on the sources of Islamic law see, Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (1991) and Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to the Sunni Usul Al Fiqh* (1997).

## **MAHR UNDER ISLAMIC LAW**

Mahr is a gift that the husband has to give the wife when the contract of marriage is concluded. Upon receipt, a woman's mahr automatically becomes her separate property. See the *Encyclopedia of Islam*.

The Quran expressly states that mahr is a gift. See, for example, Quran, Chapter 4 (*Al-Nisa*), verse 4 (And give the women (on marriage) their Mahr as a free gift); and verse 24 (Ye seek (them in marriage) with gifts from your property ... seeing that ye derive benefit from them, give them their Mahr (at least) as prescribed).

A mahr provision is intended to assist the wife financially post-dissolution of the marriage, and to discourage the husband from exercising his at-will unilateral right to repudiate the marriage.

Mahr has also come to denote certain social and cultural connotations for the wife. Mahr is usually seen, besides being a legal obligation upon the husband, to be a mark of respect for the wife. When the Mahr is a large sum of money, Muslim societies view such an amount as a sign of the husband's appreciation and respect for the wife. See generally Jamal J. Nasir, *The Islamic Law of Personal Status* (2d ed. 1990), and David Pearl and Werner Menski, *Muslim Family Law* (3d ed. 1998).

## **IT'S A CONTRACT**

Under Islamic law, marriage is considered a civil contract. Thus, the contracting parties must have legal capacity to contract. If an offer of marriage is accepted in the presence of two witnesses, the marriage contract is concluded.

Mahr is not an essential term for the validity of the marriage contract; it is an effect of a valid Muslim marriage contract. It is customary practice to discuss the amount of mahr prior to entering into the marriage contract. In some cases, the wife may want to stipulate that the payment of mahr is to be triggered on the happening of a certain event, such as if the husband decides to marry a second wife, or fails to purchase the marital home he promised, and so on.

Mahr is not an exchange or consideration given by the husband for the marriage contract. As noted in *Muslim Family Law*, mahr is not a consideration for the contracting of the marriage; the dower must be clearly seen as an effect of the contract of marriage rather than the price paid by the husband for acquiring the various rights which accrue to him on marriage. See, also, Joseph Schacht, *An Introduction to Islamic Law*, (1964), wherein mahr is described as the wife's nuptial gift.

Mahr is an effect of every Muslim marriage contract whether mahr is specified in the contract or not. A marriage contract entered into without specifying mahr is still valid. In such event, a Mus-

lim court implies a proper mahr. Generally, this entails a proceeding to ascertain the custom of the community and the socio-economic status of the wife to determine the proper mahr for the wife.

Mahr is usually divided into two parts: immediate and deferred. The immediate gift is usually a symbolic amount, such as one gold coin, while the remainder of the gift is postponed to an agreed upon date or event -- usually, the dissolution of the marriage or the death of the husband. Although the marital gift is due upon the wife's demand, many defer demanding the gift until a marital dispute arises or divorce is imminent.

In one certain factual scenario, the wife waives her right to her mahr amount if she initiates the divorce proceeding without a valid ground for divorce. There are three primary methods to dissolve a marriage under Islamic law: (1) talaq (husband's unilateral at-will right to repudiate a marriage); (2) tafriq (judicial dissolution based on grounds); and (3) Khul' (mutual consent to dissolve the marriage).

The first method represents the husband's at-will unilateral right to repudiate a marriage. If the husband thus repudiates the marriage, the wife is generally entitled to her mahr.

The second method is where a wife initiates the divorce proceeding and proves grounds for the divorce, such as mental cruelty or physical abuse. In this type of divorce the wife is entitled to her mahr. However, if the wife is not able to demonstrate harm committed by the husband, then she generally is asked to provide some compensation for divorcing the unblameworthy husband, and this compensation is often the mahr amount.

The third method is where a wife chooses to dissolve the marriage by mutual agreement. By such method the wife obtains the consent of her husband to dissolve the marriage in exchange for her waiving her mahr.

The authority for the Khul' dissolution method is based on a tradition wherein a woman came to the Prophet Mohammed explaining to him that her husband was a pious Muslim and had no character flaws yet she could not bear living with him and wanted a divorce. The Prophet asked whether she would be willing to return the garden her husband gave to her as mahr. She agreed and the Prophet permitted her to dissolve the marriage. Thus, where a wife initiates the divorce where the husband was not at fault, the wife forfeits her mahr.

To emphasize the separate nature of the mahr, Islamic law provides that the wife may not be asked to use her mahr to purchase any household goods. Given that mahr is the separate property of the wife -- and is due depending on the terms of the contract, or upon the death of the husband or dissolution of the marriage -- such property right is assignable. The wife can assign her mahr to anyone she wishes.

Mahr is separate from the wife's claim for alimony. In the event of divorce the wife is entitled to nafaqa (alimony), although generally of short duration. In the event of the death of the husband, the wife inherits her rightful share of the husband's estate in addition to her entitlement to her mahr.

Thus, looking at Islamic jurisprudential treatment of marriage obligations as a whole, mahr represents a husband's contractual obligation to make payment to the wife of a sum certain (or tangible object) on the happening of a certain event, usually at the time of divorce or death of the husband.

Mahr is a nuptial gift/contract. The mahr does not resolve all the financial issues arising out of the marital relationship and does not foreclose the wife's right to alimony and inheritance.

### **AMERICAN CASE LAW**

A majority of American cases construe the mahr agreement as an Islamic prenuptial agreement, whether the court enforced the mahr or not.

For example, in *Aziz v. Aziz*, 488 N.Y.S.2d 123 (N.Y. Sup. Ct. 1985) and *Akileh v. Elchahal*, 666 So.2d 246 (Fla. Dist. Ct. App. 1996), the mahr agreement was enforced as a valid Islamic prenuptial agreement that conformed to the requirements of the statute of frauds and state contract jurisprudence.

On the other hand, in *In re Marriage of Dajani*, 204 Cal.App.3d 1387 (Cal. App. 4th dist. 1988), *Habibi-Fahnrich v. Fahnrich*, 1995 WL 507388 (N.Y. Sup. Ct. 1995), *Shaban v. Shaban*, 88 Cal.App.4th 398 (2001) and *Ahmad v. Ahmad*, 2001 WL 1518116, it was held that the mahr agreement was an unenforceable Islamic prenuptial agreement because (1) it did not satisfy the requirements of the statute of frauds in three respects -- materiality, specificity, and insufficiency, or (2) it failed to satisfy the formalities required for valid prenuptial agreements, such as full financial disclosure and advice of counsel.

These foregoing American cases on mahr inaccurately interpreted Islamic law regarding mahr: they all fundamentally misunderstood what a mahr agreement actually is.

The fatal flaw in the reasoning of these courts (whether the court enforced or refused to enforce the mahr agreement) is that the courts were unable to accurately articulate the appropriate legal conception in American jurisprudence to define mahr. Instead, both courts and the parties' Islamic law experts' all fell into the trap of defining the mahr agreement as a prenuptial agreement. This misconception of the mahr as a prenuptial agreement has in turn generated inconsistent and contradictory case law.

The mahr agreement is simply not a prenuptial agreement. A prenuptial agreement is an agreement between prospective spouses made in contemplation of marriage, which becomes effective upon marriage.

In essence, it is an agreement between the bride and groom to resolve all the financial issues arising out of the prospective marital relationship in the event of divorce or death of either party. The financial terms of a prenuptial agreement are set up to function in lieu of any inheritance, or the application of other community property, equitable distribution or alimony laws.

The mahr agreement of Islamic law in no way resembles a prenuptial agreement. In addition to the mahr amount, a Muslim wife under Islamic law has a right to alimony (although for a short duration) and can inherit her rightful share of the decedent's estate if he predeceases her. A woman's mahr also has no impact on her right to full ownership of any property she separately acquires at any time before or after the marriage, nor does it detract from any financial support obligations of her husband during the marriage.

Unlike a prenuptial agreement, the Muslim mahr agreement is a simple contractual arrangement that serves as a supplement, not a substitute, to other legal obligations between spouses. Because it is seen in this supplementary rather than substitute nature, most mahr agreements are entered into without detailed financial disclosures or advice of counsel -- something generally required of all valid prenuptial agreements.

Thus, when a court characterizes a mahr agreement as a prenuptial agreement, it automatically must find it unenforceable if the party seeking to set it aside demonstrates that full and fair disclosure of the earnings, property and financial obligations of the other party was not provided, and/or the party seeking to set it aside did not consult with independent legal counsel.

The Shaban case of California, is a good example. The husband, a prominent and successful physician earning substantial income, sought to enforce the very small mahr agreement (\$30) made with his wife as a valid prenuptial agreement that was meant to supercede alimony, equitable distribution, community property and all other legal obligations his wife would have upon divorce.

At the time of the marriage, no financial disclosure of the parties' assets was made, nor did the wife have independent legal counsel. Therefore, the court declined to enforce the mahr agreement because it did not satisfy the essential requirements under the prenuptial agreement law.

Even if there had been full and fair financial disclosure and advice of counsel, the financial terms and conditions of this prenuptial agreement would likely be unenforceable because a compensation of only \$30 foreclosing the wife's rights under equitable distribution and alimony, in a 20-year marriage where the parties accumulated in excess of four million dollars worth of marital assets, would be clearly unconscionable.

## **NEW JERSEY LAW**

Recently, a New Jersey Superior Court decision on mahr recognized the inconsistency and contradiction generated by the mahr/prenuptial analogy.

In Odatalla, the parties were married in a religious ceremony on June 15, 1996, by a Muslim Imam in New Jersey. Prior to the actual ceremony of marriage, the parties negotiated the terms and conditions of a mahr agreement. The mahr agreement provided in relevant part:

According to Islamic Law Dower is:

Prompt: One golden pound coin.

Postponed: Ten Thousand U.S. Dollars.

The court set the stage for its analysis by stating: [W]hy should a contract for the promise to pay money be less of a contract just because it was entered into at the time of an Islamic marriage ceremony? Clearly, this Court can enforce so much of a contract as is not in contravention of established law or public policy.

In its discussion, the court noted that the mahr agreement, like other religious agreements, are enforceable provided certain requirements are met: If the Court can apply neutral principles of law to the enforcement of a mahr agreement, though religious in appearance, then the mahr agreement is not void for any constitutional reasons.

Applying the neutral principles of contract law to the mahr agreement, the court enforced it, holding:

Clearly, the videotape in evidence showed the defendant, Zuhair Odatalla signing the Islamic marriage license, including the mahr agreement of \$10,000, and thus making an offer to the plaintiff. Also the tape clearly showed the plaintiff, Houida Odatalla, signing this same agreement with the same terms, \$10,000, and thus making an acceptance of the offer, i.e., a contract. In fact, this same video tape shows Mr. Odatalla making the symbolic first payment

of the mahr Agreement, one gold coin, thus, confirming his intention to be bound by the mahr agreement. Clearly, the mahr agreement in this case at bar is nothing more and nothing less than a simple contract between two consenting adults. It does not contravene any statute or interest of society. Rather, the mahr agreement continues a custom and tradition that is unique to a certain segment of our current society and is not at war with any public morals.

Unlike the string of American cases on mahr, the Odatalla court in clear and logical analysis of the factual circumstances leading to the mahr agreement concluded that mahr is nothing more and nothing less than a simple contract.

The Odatalla approach is the proper approach for judicial resolution of Muslim mahr agreements: they are enforceable simple contracts, as long as the requirements of a valid contract are met.

This simple contract approach is not only the most consistent with Islamic law but also with American notions of equity and justice. Enforcing Muslim mahr agreements as simple contractual obligations is not contrary to public policy under American jurisprudence. A request to enforce a mahr agreement is simply a request to enforce a valid contractual agreement between two consenting adults.

The Odatalla decision should play a significant role in correcting the inconsistency and confusion generated from erroneously construing the mahr as a prenuptial agreement. Lawyers and courts could learn much from the Odatalla approach, which should define the next trend of American mahr cases.