

November 20, 2006

Declaring Muslim Marriage Void Will Have Ruinous Effect on Wives

Dear Editor:

The Appellate Division's ruling, in *Yaghoubinejad v. Haghighi*, 384 N.J. Super. 339 (App. Div. 2006), declaring a Muslim marriage "absolutely void" when entered into without a state marriage license, will cause inequity to women in New Jersey.

The consequences are devastating. Without a valid marriage, the wife has no right to alimony or equitable distribution, nor the right to inherit property, to recover damages arising out of the husband's wrongful death or to share in death benefits and/or pensions.

The ruling highlights the need to amend New Jersey's statute in accordance with most other jurisdictions, which view marriages contracted without licenses as voidable, not void ab initio. New Jersey's bright line rule to the contrary - at N.J.S.A. 37:1-10, which the court in *Yaghoubinejad* strictly construed - neither serves public policy nor protects innocent women in unlicensed marital relationships.

The core facts presented in *Yaghoubinejad* would be sufficient to establish a valid marriage in most other states. In New York, for example, Domestic Relations Law § 25 provides, in relevant part: "Nothing in this article contained shall be construed to render void by reason of a failure to procure a marriage license any marriage solemnized between persons of full age."

In *Yaghoubinejad*, the parties participated in a religious marriage ceremony and executed a Muslim marriage contract. Under Islamic law, marriage is a civil contract, between parties of legal capacity to contract, which is concluded when an offer of marriage is accepted in the presence of two witnesses. All of these elements were established. To the public, to their families and to the religious establishment, Yaghoubinejad and Haghighi were married. At the trial level, Superior Court Judge Edward Torack reasonably held that because the parties lived together and executed a marriage contract, the husband was estopped from challenging the marriage's validity. The judge held that any defect caused by the absence of a marriage license was cured by the parties' conduct and the executed marriage contract. The appellate court reversed.

Fortunately for the wife, the "marriage" was of short duration. No children were born of the union, no property was acquired during the marriage and the parties did not commingle assets. Yet, in a case presenting different facts, such as where property and/or children resulted, one can easily glean the resulting inequity from the Appellate Division's holding: The wife, who is typically the nonmonied spouse, would be entitled to very little, if anything.

In our private practice, we regularly see Muslim women with marriage contracts who never procured a marriage license. There are probably thousands of Muslim marriage contracts in existence in New Jersey without the parties' first having obtained a license. Unscrupulous husbands are well aware that without a marriage license, their financial exposure in case of separation will be limited or nonexistent. Many intentionally marry without a marriage license purposefully to circumvent the applicability of New Jersey divorce and equitable-distribution laws. Recent women immigrants are often not aware of the license requirement. They may be illegal immigrants who marry without a license, fearing they would be deported if they obtain one.

It is important to note that a "mahr" is included in every Muslim marriage contract. A 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. The record in *Yaghoubienjad* does not indicate whether an outstanding mahr payment was part of the contract. A remand to develop the facts would have been more appropriate than an outright reversal. The wife may have entered into a valid marriage contract or cohabitation agreement in which she would have been entitled to her outstanding mahr/dower, regardless of the validity of the marriage. In addition, although the marriage is currently void under New Jersey law, the wife's religious marriage continues to exist and, under certain circumstances, may be recognized as a valid marriage in Muslim countries.

The wife's only avenue for redress is a palimony claim, unless such claim is barred by the entire controversy doctrine. Even without this procedural bar, in light of the heavy evidentiary burdens and associated legal costs to establish a palimony case, the wife would be disadvantaged and she certainly would not be entitled to equitable distribution.

These unfortunate consequences of the Appellate Division's strict construction of the statute could be easily curtailed by adopting the voidability standard now in place in a majority of the states.

The *Yaghoubinejad* court noted in dicta that under certain circumstances the husband may be estopped from challenging the validity of the marriage without the marriage license. These circumstances may include a prolonged duration of the marriage, property, children, financial states, reasons for not obtaining licenses, etc. This dicta comment is suggestive of the need to adopt a voidable-marriage approach.

Significantly, the "voidable" approach does not reinstitute common-law marriage. A marriage entered into without a license merely would be voidable and the party seeking to validate the marriage would have the significant burden to cure the absence of the license. Such party could begin to do so by presenting proofs, such as a written marriage contract, a religious ceremony, the birth of children, commingling of assets, the existence of a wedding reception, as well as living together as husband and wife.

To avoid the potentially devastating consequences of the inflexible "no license, no marriage" rule, we suggest that our Legislature amend the statute to adopt the "voidable" approach to marriages contracted without a license.

Abed Awad

Robert Popescu

Clifton, N.J.