


Family Law News

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Islamic Marriage Contracts and Enforceability in Ontario

As family law practitioners we have noticed an increase in the number of clients coming to our offices with Islamic Marriage Contracts in hand. The question that arises is whether or not the marriage contracts are valid in Ontario and enforceable by our Courts. This is not a surprising trend since the number of Muslim people in Ontario seems to be on the rise. In 2001, the Canada census indicated that there were just over 350,000 Muslim people in Ontario; a number that appears to be increasing (approximately 0.9 million in Canada in 2010). As a result, the issue of Islamic marriage contracts has become a more prevalent topic in Ontario family courts, and an issue that family law practitioners may need to be equipped to advise upon. These discussions could be held either in a prenuptial context, or alternatively, a post-separation (enforcement) context.

Many traditional and "observant" Muslims enter into Islamic Marriage Contracts. As a condition of the marriage a gift is given; this is called a Mahr (also transliterated, "Mehr, Maher, or Meher"). Unlike the English term of 'Dowry', wherein the bride or her parents provide goods or money to her husband, the Mahr is provided to the bride by her future husband. In some cases, the bride requires that the Mahr be paid in advance, but in other circumstances a deferred Mahr may be negotiated and accepted. If a Mahr is deferred it is typically payable on demand or upon marriage dissolution. Sometimes a Mahr may be something small, yet symbolic, however, in more traditional families, the Mahr could be a significant amount of money dependent upon the groom's financial circumstances, and the bride's social status.

Initially Canadian courts provided conflicting opinions about whether or not a Mahr would be enforced by the courts, as a result of the religious nature of the contract. However, our own Hamilton court has spoken on this issue recently. *Ghaznavi v. Kashif-Ul-Haque*, [2011] O.J. No. 3023, ONSC 4062, is a newly-released local judgment of the Honourable Mr. Justice A. Pazaratz which addresses the enforceability of a $25,000.00 Meher, pursuant to an Islamic Marriage Contract.

In this case, the Applicant wife was a 24 year-old Canadian Citizen, resident in Hamilton, Ontario. The Respondent husband was 35 years old, an American citizen, and resident in Tuscon, Arizona. The parties had no children and were both "observant" Sunni Muslims. The parties entered into an Islamic Marriage Contract, signed on July 2, 2009, hours before their wedding in Brampton, Ontario. The contract required the groom to pay the bride a Mahr worth $25,000.00 USD, payable on demand. The contract was a one-page prefabricated form, with certain blanks filled in. It was negotiated ahead of time, signed and witnessed.

While the parties never lived together, the wife testified that it was a real marriage, entered into in good faith and that it was indeed consummated. The wife agreed to move to Arizona, but shortly before her contemplated relocation, she discovered that the husband was having an affair. She cancelled her relocation plans and immediately demanded a divorce and payment of the $25,000.00 Mehr.

The proceedings were commenced in Arizona and all issues but the Mehr were dealt with by the Arizona courts. The parties agreed that the United States was not the proper jurisdiction to deal with the issue of the Mahr and that the wife could bring her claim in the jurisdiction of the Province of Ontario. The wife thereafter brought

her claim in Hamilton. The claim was not defended by the husband. However, the American defence, which was referenced in Pazaratz J.'s decision, confirmed many of the material facts; that the husband signed the contract; that the money was payable on demand; that it was a legitimate marriage; and that the proper jurisdiction for the determination of the Mahr was Ontario, Canada.

Justice Pazaratz ruled that the statutory basis for enforcement of such an agreement is governed by section 52 of the *Family Law Act*. The *Act* allows two people to enter into an agreement with respect to their respective rights and obligations upon separation. The contract may cover ownership and division of property, spousal support obligations and various other matters of settlement. Section 55 of the *Family Law Act* sets out the formal requirements of such an agreement. The *Act* requires that the contract be made in writing, signed and witnessed. In his American pleadings, the Respondent's defence was that it was a religious document, and as a result it was not enforceable as a legal contract. Justice Pazaratz, in no uncertain terms states that while that position may prevail in Arizona, it did not reflect the law in Ontario.

In 2007, in the case of *Bruker v. Marcovitz*, 3 S.C.R. 607, the Supreme Court of Canada ruled that a contract is not precluded from judicial consideration and enforceability simply as a result of a religious aspect or basis, provided of course that the contract otherwise satisfies the requisite form and content requirements to make the contract valid and binding.

In *Khanis v. Noormohamed*, [2011] O.J. No. 667, W.D.F.L. 1531, the Ontario Court of Appeal upheld a similar Meher agreement, in which the contract was clear, made in writing, signed by both parties, and witnessed. In the *Khanis* decision, the trial judge classified the Meher as excluded net family property pursuant to s.4(2)(6) of the *Family Law Act* (i.e. property that the spouses have agreed by a domestic contract that is not to be included in a spouse's NFP). In doing so, the court considered that to include the Meher as a debt existing at the date of marriage and at the date of separation would undermine the express intention of the agreement and the contract would have no meaning. In *obiter dicta* the court in *Ghaznavi* suggests that the Meher from the *Khanis* decision could have been equally enforceable under s.52 of the *Act*, effectively providing two different paths to the same result.

This line of cases identifies a whole series of questions for a couple of young (no argument please) lawyers: Will we be consulted in relation to the drafting of the terms of a Mahr? Would doing so subject the terms of a Mahr to greater scrutiny by the courts? Is a client better served to rely upon the simple and cost effective prefabricated forms that are clearly available? What, if any, interplay between the enforceability of a Mahr, and spousal support exists? Is there an argument to be made that a Mahr represents some form of support? Could the ranges of spousal support suggested by the SSAG's be reduced because of the Mahr or would this interplay also render the terms of the Mahr meaningless? We will certainly be interested to see the evolution of these issues in the context of the increasing judicial consideration of these contracts in the family courts. ■

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