

S B L R 2011 Foreign 18

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF ORANGE*Before: James L. Waltz, J*

Saddia Shah---Petitioner

versus

Sher Shah---Respondent

Case No. 07D007950

A) Division of assets between husband and wife---Application of Pakistani Law---Pakistan law is in sharp conflict with California law insofar as characterizing and dividing assets acquired during the marriage and insofar as establishing any long term spousal support. Applying Pakistan law to this dissolution proceeding will deprive the wife with due process of law under the California Constitution and subvert fundamental policies of the State of California. Compare Family Code § 2550, 4320, 4336.

B) Division of assets between husband and wife----Application of Pakistani Law---There is no factual or legal basis to apply Pakistani substantive law to these dissolution proceedings over California law and for that reason, Pakistani law is not relevant---Pakistani law is in sharp contrast to California law and applying Pakistani law to these proceedings will violate fundamental fairness and subvert California polices of equal division of community assets.

C) Pakistani Citizenship---Application of Pakistani Law---The fact that the parties maintain their Pakistani citizenship or practice their Muslin faith does not control the outcome of the "choice of law" question. (Ref: Conclusion No. 5 (3) on page 4)

C) Application of Pakistani Law on Californian Courts---Even if Pakistani law is relevant and there exists a lawful basis to apply Pakistan law over substantive California law, this court would not do so.

Reasons: a. Applying Pakistan law here is unconscionable. b. In the absence of a valid prenuptial agreement, depriving this court of its discretion to award (or not) spousal support following a long term marriage is contrary to the fundamental policies of this state. See FC 4336; 4320. c. Any foreign law that deprives a spouse of an equal share of community assets is contrary to the fundamental policy of this State and not enforceable. See FC 2550. d. In the absence of a valid prenuptial agreement, a California trial court shall retain discretion to award (or not) spousal support until the court terminates its jurisdiction for cause or by operation of law. See Fam C § 4337.

Barbara Mc Namara Attorney at Law, John R. Denny, Minyard Morris

Emad ul Hasan, called as a witness by and on behalf of the Respondent,

MINUTE ORDER

Ruling on submitted (bifurcated) matter: "Whether the court should apply Pakistani law to the above captioned dissolution proceedings ongoing within the Orange County Superior Court."

Introduction: respondent/husband seeks a declaration from the court regarding a choice of law question, to wit; "Whether the court should apply Pakistani law to the above captioned dissolution proceedings." If Pakistani law is applied to this case, as the respondent/husband urges, then:

- The court's jurisdiction to establish long term spousal support is terminated upon the entry of the final judgment;
- The wife's claim to Dubai rental property acquired during the marriage (but held in husband's name) is cut off and under Pakistani law, the rental property is declared the separate property of the husband;
- The Wife's claim to husband's pension accumulated while employed with the City of Los Angeles is cut off.

The Parties: The petitioner is Saddia Shah, hereinafter referred to as "wife" and responding party. The respondent is Sher Shah, hereinafter referred to as "husband" and moving party. The wife and husband are collectively referred to as the "parties."

Relevant Hx: The parties were born and raised in Pakistan and more or less adhere to their Muslim faith, custom and practices. Following Muslim traditions, their courtship was arranged by relatives and in 1985 the parties married in Pakistan; at the time the wife was 20 years old and the husband was 30 years old. The parties lived briefly in Pakistan, then England for a short time and for the past 12 years, the parties have resided in California. The parties have two children in common, a son Omar born in Pakistan - now twenty-two years old and their daughter Saira is ten years old and was born in Lakewood, California. While domiciled in California, the parties held dual citizenships in Pakistan and the United States. After 22 years of marriage, the parties separated. The wife filed a petition for dissolution in Orange County, California and the husband filed a response. No other family law proceedings are pending elsewhere. Both parties are represented by counsel.

Basis for Relief: Husband claims Pakistani law applies on the following basis:

1. Because the parties are Muslim Citizens of Pakistan and married in Pakistan, under Pakistani law, substantive Pakistani law applies "wherever they may be". See husband's closing argument, page 10, line 6-7. See testimony of Mr. Emad-ul-Hasan, an expert on Pakistani law (trial exhibit 104).
2. On the day of their marriage in Pakistan, the parties signed a two page document called a Nikahnama¹ - its characterization is disputed by the parties.² While the Nikahnama does not mention spousal support nor designate Pakistani law as governing law, the Nikahnama does make a general reference to Pakistani law in the sub-title of the document.
 - a. To understand this reference, the respondent presented the testimony of a Pakistani attorney, Mr. Emad-Ul-Hasan, an expert on Pakistani law.

¹ By stipulation, trial exhibit 101 is a translated version of the Nikahnama that was admitted into evidence without objection.

² The moving party/husband characterizes the Nikahnama as a marital deed or contract, common among in the Muslim culture while the responding party/wife characterizes the Nikahnama as a marriage license or certificate.

Mr. Hasan avers that the general reference to Pakistani family law at the top of the Nikahnama form is enough to wholesale incorporate substantive Pakistani law including its prohibition against awarding a divorcing wife any long term spousal support.

b. The husband also avers that the Nikahnama, as interpreted by Mr. Hasan, memorizes the expectations of the parties at the time of their marriage including limiting many property rights of a divorcing wife. The husband claims:

- i. The expectations of the parties should be enforced, the effect being to limit the wife's property rights and eliminate any spousal support claim;
- ii. The expectations of the husband, as seen through his paradigms, should be imposed on the wife notwithstanding detriment to her within these dissolution proceedings.

Basis of Opposition: the wife characterizes the Nikahnama as a standardized "marriage license or certificate" signed by the parties on the day of the marriage ceremony. Whatever its characterization, the wife points out the Nikahnama is silent about limiting spousal support, does not mention any choice of law option, and does not limit or restrict property rights in favor of the husband. The wife points out that there is no factual or legal basis to wholesale adopt and apply Pakistani law to these proceedings and the husband's expert is attempting to retroactively "re-write" the Nikahnama to include substantive terms adverse to the wife. The wife asks the court to apply California law, characterize assets and equally divide community assets and allow her to present evidence in support of her spousal support claim responsive to the relevant factors set forth in Family Code § 4320.

Findings:

1. The parties were born, raised and married in Pakistan.

2. Before marriage the parties signed a document called a Nikahnama, which is fairly characterized as a marriage license.
3. The Nikahnama is silent about any choice of law option and silent about any reference to spousal support or division of property upon divorce.
4. The parties have continuously resided in CA for the last 17 years;
 - a. The parties have been domiciled in California for the 6 months preceding this action [FC 2320];
5. The parties are citizens of both Pakistan and the United States.
6. The parties have two children, their ten year old daughter born in Lakewood, CA and a son, now an adult; see parties UCCJEA Declarations;
7. The wife filed a petition for dissolution of marriage on 9-6-07 and the husband filed his response on 9-17-2007; on that basis the parties submitted to the jurisdiction of this court.
8. No related family law proceedings exist in Pakistan or elsewhere.

Conclusions of Law:

1. This superior court has exclusive subject matter jurisdiction over these family law proceedings (Fam C § 200) and the parties have submitted to the court's personal jurisdiction.
2. This court has both the authority to enforce the terms of any judgment (Fam C § 290) and a compelling state interest in the enforcement of its laws and policies over that of Pakistan's interests and laws and policies.
3. The Nikahnama is not enforceable as a pre-marital agreement. Compare Fam C § 1503, 1601.

4. Pakistan law is in sharp conflict with California law insofar as characterizing and dividing assets acquired during the marriage and insofar as establishing any long term spousal support.

- (1) Applying Pakistan law to this dissolution proceeding will deprive the wife with due process of law under the California Constitution and subvert fundamental policies of the State of California. Compare Family Code § 2550, 4320, 4336.

5. There is no factual or legal basis to apply Pakistani substantive law to these dissolution proceedings over California law and for that reason, Pakistani law is not relevant. Accordingly,

1. While the court did considered the expert testimony of Mr. Hasan (trial exhibit 104) regarding his knowledge of Pakistani law and its application to this case, in the end the court gave the expert's opinions little weight, except as his testimony supported the court's conclusion that Pakistani law is in sharp contrast to California law and applying Pakistani law to these proceedings will violate fundamental fairness and subvert California polices of equal division of community assets. Reasons:

- a. Mr. Hasan's testimony violates the Parol Evidence Rule. See generally IRMO Shaban (2001) 88 CA4th 398. The legal affect of the Nikahnama a side, the court otherwise found the content of the Nikahnama clear and unambiguous and the court did not require any interpretation of its contents.

- b. Mr. Hasan attempts to expand the content of the Nikahnama by miles. For example, Mr. Hasan points out the Nikahnama, at the top of the document, generally references Muslim Family Law Ordinance, 1961.

- i. According to Mr. Hasan, the legal reference to a Pakistani Ordinance serves to incorporate the entire width and breath of Pakistani family law into the Nikahnama and under Pakistani law, the home county laws bind these Muslim parties wherever they may be residing. The husband cites no convincing legal authority for that position.
 - ii. Mr. Hasan avers that under Pakistani law, a divorcing wife is not entitled to long term spousal support or equal division of community assets. In effect, Mr. Hasan is re-writing the document twenty two after the fact, so conform with the husband's views and expectations under Muslim tradition, culture and law, all in a way to favor the husband during these dissolution proceedings and doing so subverts California laws and policies, and without any legal basis – doing so also violates the statute of Frauds.
 - iii. As written, the Nikahnama is not ambiguous, nor unclear nor uncertain; therefore Mr. Hasan's interpretation as to its content is not relevant. See generally IRMO Shaban (2001) 88 CA4th 398.
2. The Nikahnama is characterized as a marriage license and nothing more.
 3. The fact that the parties maintain their Pakistani citizenship or practice their Muslim faith does not control the outcome of the "choice of law" question.
 4. Even if relevant to these legal proceedings, the Nikahnama does not contain any provision relating to the division of assets acquired during the marriage, nor does it mention spousal support nor does the Nikahnama contain a pre-marital agreement to curtail

the court's jurisdiction to establish long term spousal support.

a. The Nikahnama does not serve, nor does the record support any implied contract between the parties related to any choice of law issue.

i. The evidentiary hearing produced no facts to suggest the parties manifested any intent to waive long term spousal support. Compare Civ. Code § 1503.

ii. There was no substantial and satisfying evidence that in 1985 the parties agreed to any limitation relating to spousal support or division of assets.

b. The Nikahnama is fairly characterized as a marriage license and does provide a factual or legal basis to limit the establishment of spousal support nor provide a legal basis to apply Pakistan substantive law over California substantive law.

5. Even if Pakistani law is relevant and there exists a lawful basis to apply Pakistan law over substantive California law, this court would not do so. Reasons:

a. Applying Pakistan law here is unconscionable.

b. In the absence of a valid prenuptial agreement, depriving this court of its discretion to award (or not) spousal support following a long term marriage is

contrary to the fundamental policies of this state. See FC 4336; 4320.

- c. Any foreign law that deprives a spouse of an equal share of community assets is contrary to the fundamental policy of this State and not enforceable. See FC 2550
- d. In the absence of a valid prenuptial agreement, a California trial court shall retain discretion to award (or not) spousal support until the court terminates its jurisdiction for cause or by operation of law. See Fam C § 4337.

RULING:

1. The above captioned dissolution proceedings shall be governed under California Laws and policies.
2. The Nikahnama fails to qualify as a valid prenuptial agreement.
3. The Nikahnama fails to qualify as an implied contract affecting the court's jurisdiction to divide community property or establish long term spousal support.
4. The court reserves to trial all remaining trial issues, including but not limited to the establishment of long term spousal support and the characterization/division of assets under California law.

The Court orders all exhibits released to Petitioner's counsel thereby relieving the clerk's responsibility for maintaining the records until the time for appeal has elapsed.

Clerk to give notice.

It is so ordered.
