

Family Relationships Quarterly

THE NEWSLETTER OF THE AUSTRALIAN FAMILY RELATIONSHIPS CLEARINGHOUSE



Welcome

Elly Robinson, AFRC Manager | June 2010

Welcome to this edition of *Family Relationships Quarterly*, the newsletter of the Australian Family Relationships Clearinghouse.

There has been much interest in the concept of "genuine effort" since the 2006 family law reforms. In our lead article, an opinion piece by Professor Hilary Astor, the issues surrounding the use of the "genuine effort" principle in practice are considered. To give the article some practice context we asked for thoughts on the article from service providers, which is also included.

Myfanwy McDonald provides a summary of the findings from the *Engaging Hard-to-Reach Families and Children* study, which was conducted as part of the former Stronger Families and Communities Strategy national evaluation. The article builds upon the study by applying the findings to practice. Ann Black presents the second article in our two-part series on shariah law, which examines the Islamic law as it applies to divorce.

Our Program Spotlight, by Heather Brookes and Tony Smith from Anglicare Tasmania, examines the interesting and innovative methods they have used to address the geographical isolation of some of their clients, by providing a Virtual Online Counselling Room.

In other articles, Clare Witnish and Catherine Caruana overview the Mental Health Support Program in the Family Law Court, and Bridget Tehan summarises the findings from a report on social inclusion outcomes for families who live in non-metropolitan areas of Australia.

We hope you enjoy this edition. Feedback is always encouraged and very welcome at afrc@aifs.gov.au

Window into shariah family law

Part 2—Aspects of divorce

Ann Black

This paper provides a brief overview of key aspects of Islamic family law as it relates to divorce. A companion piece in *Family Relationships Quarterly* 15 discussed the diverse application and significance of Muslim family law and focused on aspects of shariah law as it relates to marriage. Both articles aim to provide a contextual framework for practitioners working with Muslim families in the family relationship services sector. Box inserts appearing throughout the article outline and contrast family law as it applies in Australia,¹ providing some insight into the gulf navigated by Australian Muslims in regulating relationships within the context of a secular society.

Aspects of divorce

Although divorce is allowed in Islamic law, it is seen as undesirable with the Prophet Mohammad noting that there is nothing God dislikes more than divorce. The percentage of Muslims in Australia who were divorced at the time of the 2001 Census was 13.5%—slightly higher than that of Greek Orthodox (11.7%) but lower than Anglicans (18.2%), Buddhists (18%) and those citing no religion (22.3%) (de Vaus, 2004).²

Under Islamic law, divorce follows a different legal path according to the spouse's gender. A man can declare divorce (*talaq*) extra-judicially and the wife must accept this. *Talaq* divorce requires no cause or fault to be established and does not typically require court approval though registration may be required. There is a 3-month period in which a reconciliation can occur and after this time has passed he can remarry.

The Australian context: In Australia, the only ground for divorce is irretrievable breakdown of the marriage with 12 months separation establishing this. The court must be sat-

isfied that proper arrangements have been made for any children of the marriage.

It is not necessary under Australian law for fault to be established. Unlike shariah family law, there is no provision for extra-judicial, or informal divorce declared unilaterally by one party.

Whilst a wife lacks the same power of unilateral divorce pronouncement she does have several divorce options. However, unless there is mutual agreement (*mubarat*) to divorce, each divorce option requires a determination by an Islamic judicial authority and she must find an authoritative Muslim individual or body to effect an Islamic divorce. As there is no shariah court or tribunal in Australia, a



1 This information has been provided by Catherine Caruana, Senior Research Officer, Australian Family Relationships Clearinghouse.

2 These data are not divorce rates per se, simply the percentage of people currently divorced at the time of the Census. De Vaus notes that, while the proportions of divorced people from those religions that strongly disapprove of divorce are quite similar to each other, they are not vastly different from those of the mainstream religions.

woman seeking a lawful divorce in Australia may go to a local legal scholar or group of scholars, such as Majlis Ulama (Council of Islamic Scholars in Queensland), an organisation such as Australian Federation of Islamic Councils,³ an Imam or a Sheik from her own or another state, or she may choose to go overseas to a court in Muslim jurisdiction.

Her divorce options include *kbula*—divorce whereby the wife returns her *mahr*⁴ effectively buying her way out of the marriage; *ta'liq* or *talaq-i-tafwid*—where the husband has breached a condition in the marriage contract (outlined in)⁵; and *fasakh* which requires her to establish fault in one of the recognised categories, such as absence, impotency, certain illnesses, cruelty, or failure to maintain his wife and child.

There are other forms as well, but in all cases, the absence of an established state (such as the shariah Court, Singapore) or community designated authority (such as the unofficial *Shari'a* Courts in England) can leave some Muslim women in Australia in a vulnerable position. This is especially true for recent immigrants whose English is limited or who are not well educated. Without a divorce in accordance with Islamic law she may be regarded as not lawfully divorced in the eyes of her Muslim community, nor in her own (or her husband's) eyes.

The Australian context: A “religious divorce” granted in Australia by a person or body with religious authority within an Islamic community group is not recognised by Australian law as the “dissolution” of a previous marriage for the purposes of remarriage. The Family Court must have awarded a divorce if one of the parties wishes to remarry.

Financial support

A husband is required to maintain his wife or wives and children. Even if a wife works (for which she may require the permission of her husband) the income earned is hers and as with the *mahr* does not relieve the husband of his maintenance obligations. In Muslim countries this right to maintenance can be lost through a wife's misconduct. There are

3 The website for the Australian Federation of Islamic Councils can be found at <www.afic.com.au>.

4 *Mahr* is a payment of value to the bride, which becomes her property. It can be a sum of money, material goods, investment or other.

5 See <www.aifs.gov.au/afrc/pubs/newsletter/newsletter15#shariah>.

various forms of disobedience (*nusyuz*), and cultural practices in some countries have impacted upon the ways in which maintenance is provided, however, the principle is enshrined in the Qur'an (2:233) and maintenance obligations continue throughout a marriage and for 3 months after divorce.

The Australian context: When a marriage or a de facto relationship breaks down, either party can apply to the court for the provision of spousal maintenance from the other party. The obligation to support a former party is determined by the extent to which one party is unable to support themselves adequately and the capacity of the other party to pay.

Parents who have separated are required to make provision for the financial support of any child under the age of 18. In most cases, this is done by way of an administrative assessment under the Child Support Scheme.

Arrangements for children after separation

When a Muslim couple separate, decisions about the custody of children are based on the presumption (*badhanab*) that a young child should be with the mother. Depending on the school of law, this presumption can end when a child is old enough to make an informed choice as to which parent he or she wishes to be with. A mother can lose custody in situations where she mistreats a child, remarries, converts out of Islam or makes it difficult for the father to have contact with his children.

The Australian context: Under Part VII of the Family Law Act the “best interests of the child” is the paramount consideration in making decisions about where, and with whom a child should live, and have contact.

Irrespective of custody arrangements, the father will retain guardianship of his children until they are adults. If the father is deceased or incapable it will devolve along paternal lineage to the grandfather or uncle.

The Australian context: Until a court rules otherwise, each parent has parental responsibility, (formerly known as guardianship), for children under the age of 18, whether they are together, separated, divorced or have remarried. When parents separate and are unable to agree on arrangements for their children, except in some circumstances such as child abuse, the court must apply a rebuttable presumption that they will have equal shared parental responsibility.

Where an order for shared parental responsibility is made, the court must consider whether an order for the child to spend equal, or substantial and significant time with each parent would be both in the best interests of the child and reasonably practicable.

Conclusion

This paper has highlighted features of Islamic family law relating to divorce. While many Muslims are willing and able to negotiate the two family law systems—the religious and the secular—others would prefer a dual approach in which a shariah court or arbitration board would be established to make determinations for Muslim Australians in accordance with Islamic family law that would be legally recognised and enforced by our courts. As any consideration of the establishment of a dual system in Australia involves constitutional considerations,⁶

⁶ Section 116 of the Australian Constitution states that: “The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”

the issue is likely to be the subject of considerable debate for Muslims, non-Muslims and governments in the years ahead.

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