RENDERED: March 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001531-MR

MARIE AQEL — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 01-CI-02731

MOHAMMAD AQEL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

GUIDUGLI, JUDGE: In this appeal, we are asked to interpret and apply Islamic domestic relations law in determining whether Mohammad's marriage to Marie, which took place after he had divorced his Jordanian wife, but prior to the expiration of the three-month *idda* period, was valid under Kentucky law. Because we agree with the Kenton Circuit Court that it was valid, we affirm.

Marie, an American citizen, and Mohammad, a native of Jordan who at the time of the hearing in this matter had permanent residence status in the United States, were originally married in Boone County, Kentucky on September 30, 1996. Mohammad had previously been married in Jordan to a woman named Amani, against whom he pursued a divorce claim on March 6, 1996. That divorce never became finalized. Because he had a living wife when he married Marie, their marriage was annulled in Boone County by a final decree entered January 21, 1997. Following the annulment, Mohammad went to the Jordanian Embassy in Washington, DC, to get legal assistance in obtaining a divorce from Amani in Jordan. To that end, Mohammad completed the required documents to hire counsel to represent him in Jordan. On May 13, 1997, the Sharia Court in Amman, Jordan entered a revocable divorce decree. During the three-month *idda* period[1] following its entry, Mohammad did not reclaim Amani as his wife. Mohammad and Marie remarried on June 7, 1997, in Boone County, Kentucky.

On December 21, 2001, Marie filed a Petition for Annulment of Marriage in Kenton Circuit Court, alleging that their marriage was prohibited pursuant to KRS 402.020(b),

[1] The trial court explained the "idda" period as follows: "That feature of Islamic law appears to be designed in part to protect any children of the parties conceived near the time of the divorce judgment. Thus, if, during the 90-day period, it is determined that the wife is pregnant, the husband may declare his desire to resume the marriage."

because Mohammad was still married to a living wife as he never completed the divorce from his first wife. Mohammad, on the other hand, asserted that he was legally divorced in Jordan prior to his second marriage to Marie. He then filed a motion to dismiss the annulment action or to convert the action to a dissolution claim, continuing to argue that he had obtained a final, valid divorce from his prior wife under Jordanian law. He also raised a statute of limitations defense.[2]

The issue before the trial court boiled down to when Mohammad's divorce from Amani became final. Marie argues that it did not become final until after the three-month *idda* period had expired, meaning that Mohammad was still married to Amani when he married Marie. Mohammad argues that because he did not reclaim Amani during the three-month *idda* period, the divorce became final on the date the revocable decree was filed. In other words, once the three-month *idda* period ended, the divorce decree became final and irrevocable from the date it was originally filed, meaning that the divorce was final when he married Marie. In support of their respective arguments, Mohammad and Marie each presented an expert witness, who testified about the application of Islamic law. Fatima A. Al-Hayani, who has a PhD in Islamic studies, testified on behalf of

[2] Marie's purpose in seeking an annulment was to obtain the restoration of her military benefits available to her as her first husband's widow. Mohammad, on the other hand, needs to obtain a dissolution in order to legally remain in the United States.

Marie. She testified that the revocable divorce would become final after ninety days if the husband did not take his wife back. In her opinion, Mohammad's divorce from Amani would not become effective until August 13, 1997, ninety days after it was filed. Mohammad presented expert testimony from Aly A. Faraq, a religious leader/advisor at a local Islamic center and president of the Islamic School in Louisville, Kentucky. He testified that Mohammad's divorce from his first wife was effective in May when it was originally filed. Both testified that a woman must wait until the expiration of the *idda* period before remarrying. However, a man is permitted to be married to up to four wives at a time.

On July 9, 2004, the trial court entered an Order, holding as follows:

> This Court is of the opinion and finds that the Judgment of the Jordanian Court entered on May 13, 1997[,] dissolved the marriage between [Mohammad] and his Jordanian wife. Thus, he was free to marry [Marie] on June 7, 1997. The fact that he retained the right to return to Jordan and resume his marriage for the 90-day period of "idda" did not affect the validity of his marriage to [Marie]. As of the date of his marriage to [Marie], he was divorced from his Jordanian wife. See, In Re: Hassan, 1965 BIA LEXIS 50; 11 I&N Dec. 179. The Jordanian Decree of Dissolution was a final Judgment as of May 13, 1997.
>
> [Mohammad] did not exercise his right to resume the marriage within the 90-day period of "idda".

The trial court declined to address the statute of limitations argument because it found that the marriage was not prohibited. The trial court then dismissed the annulment petition and converted the matter to a dissolution proceeding. By agreed order entered July 20, 2004, the Order was made final and appealable. This appeal followed.

On appeal, Marie presents several arguments, all but one of which were either not reviewed or not raised below. She argues that her marriage to Mohammad was invalid because his divorce from his first wife was not yet finalized when they were married; that the one-year statute of limitations contained in KRS 403.120(2)(b) should not bar her annulment claim; that it is a violation of the Equal Protection Clause to give any credit to this Islamic law; and that it is against public policy to give credence to this law due to its arbitrary nature. Mohammad addresses each argument in turn, essentially arguing that his marriage to Marie was valid because his divorce from Amani was final.

As to Marie's statute of limitations argument and her attacks on the validity of this aspect of Islamic law, we decline to review those issues. The trial court did not review the statute of limitations issue because it had already

determined that the marriage was valid.[3] Furthermore, Marie failed to raise the other arguments below, and they were certainly not considered by the trial court in its order. We shall, however, address Marie's argument concerning the validity of her marriage as it relates to the finality of Mohammad's divorce from Amani.

Because this case was tried before the trial court without a jury, CR 52.01 provides our standard of review as follows:

> [T]he court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

This Court in Sherfey v. Sherfey[4] addressed this standard further, albeit as applied to custody determinations:

> A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion. "'Abuse

[3] There is some indication in the November 26, 2003, hearing that the trial court had entered a bench ruling that the statute of limitations of KRS 403.120(2)(b) would not apply in this case. However, there is no written order memorializing that ruling.

[4] 74 S.W.3d 777, 782-83 (Ky.App. 2002).

> of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.'" . . . "The exercise of discretion must be legally sound." (Citations omitted).

With this standard in mind, we shall review the trial court's decision.

Pursuant to KRS 402.020(1)(b), "[m]arriage is prohibited and void . . . [w]here there is a husband or wife living, from whom the person marrying has not been divorced." The decision in the present case turns on whether Mohammad had obtained a valid and final divorce from his Jordanian wife prior to being married to Marie in 1997. After considering the testimony of the two expert witnesses and the parties, the trial court chose to agree with Mohammad's expert in determining that the divorce decree was final from the date on which it was filed, regardless of the fact that Mohammad had ninety days to reclaim his first wife during the *idda* period. This determination appears to be a mixed question of law and fact.

We must first determine whether the trial court's findings of fact regarding the interpretation of Islamic law were supported by substantial evidence. We hold that there is substantial evidence in the record from the testimony of both Mohammad and his expert witness to support the finding that the Jordanian divorce was final, at least as to Mohammad, as of the

date it was filed. Therefore, this finding is not clearly erroneous.

Likewise, there is legal support for the trial court's determination, although there are no Kentucky cases directly on point. While not binding on Kentucky courts, the Board of Immigration Appeals addressed this issue in Matter of Hassan.[5] In Hassan, which also dealt with the validity of a revocable divorce decree entered in Jordan, the Board stated as follows:

> [T]he judgment of May 6, 1962, made by a single pronouncement, was a revocable divorce and did not cancel the marriage definitely during the test or idda period of three months thereafter. . . . There is no indication that the beneficiary returned to his first wife during the revocable period, that is, during the idda period of three months. The divorce, therefore, became final as of May 6, 1962.[6]

As did the trial court, we find this holding to be persuasive in the matter before us. Therefore, we hold that the trial court's factual findings were supported by substantial evidence and that it did not abuse its discretion in ruling that the Jordanian divorce decree was final as of the date of filing, because Mohammad did not exercise his right to reclaim his first wife during the *idda* period. Marie's annulment petition was properly converted into a dissolution claim.

[5] 11 I&N Dec. 179.
[6] Id. at 182.

For the foregoing reasons, the Order of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Shane Sidebottom Covington, KY	Thomas L. Rouse Ft. Wright, KY