



# No-Nuptial Agreements: Another Option for Nikāḥ



## Table of Contents

Table of Contents .....	2
Introduction and Purpose .....	4
Civil Marriage .....	4
<b>Conditions</b> .....	5
<b>Rights and Benefits</b> .....	5
<b>Marital Property</b> .....	6
Inheritance .....	7
<b>Ending Marriage</b> .....	7
<b>Spousal Support</b> .....	8
<b>Child Custody</b> .....	8
Islāmic Marriage .....	9
<b>Conditions of an Islāmic Marriage</b> .....	9
Eligibility Between the Partners .....	9
Proposal and Acceptance .....	10
Witnesses .....	10
Consent .....	11
The Guardian [ <i>Walī</i> ] and Suitability .....	11
Dowry [ <i>Mahr</i> ] .....	11
Permanency .....	12
<b>Its Ruling</b> .....	12
<b>Rights and Benefits</b> .....	12
<b>Marital Property</b> .....	13
Inheritance .....	13
<b>Ending Marriage</b> .....	14
How to Divorce .....	14
Retraction of Divorce .....	15
Remarriage .....	15
Expressions of Divorce .....	15
Wife Demanding Release [ <i>Khul'</i> ] .....	16
The Waiting Period .....	16
Dowry Rights After Separation .....	16

<b>Maintenance .....</b>	<b>17</b>
During Marriage .....	17
After Divorce .....	17
<b>Child Custody.....</b>	<b>17</b>
<b>Standard Marital Procedures for Muslims in the West.....</b>	<b>17</b>
<b>Marriage.....</b>	<b>17</b>
<b>Divorce .....</b>	<b>18</b>
<b>Preuptial and Postnuptial Agreements.....</b>	<b>19</b>
<b>No-Nuptial Agreements.....</b>	<b>20</b>
<b>Advantages.....</b>	<b>21</b>
<b>Disadvantages .....</b>	<b>22</b>
<b>How about No Agreement? .....</b>	<b>23</b>
<b>Islāmic Validity of a No-Nuptial Agreement .....</b>	<b>24</b>
The Fiqh Maxim: “Acts are judged by their goals and purposes” .....	24
The Branched Fiqh Maxim: “the consideration in contracts is the functional meaning, not the wording” .....	24
<b>Legal Enforceability of a No-Nuptial Agreement .....</b>	<b>25</b>
<b>Drafting a No-Nuptial Agreement .....</b>	<b>25</b>
<b>A Humble Recommendation.....</b>	<b>28</b>
<b>Changing a Civil Marriage to a No-Nuptial Agreement.....</b>	<b>28</b>
<b>No-Nuptial Agreement Template.....</b>	<b>28</b>
<b>Proposed Next Steps .....</b>	<b>32</b>
<b>Conclusion .....</b>	<b>33</b>

## Introduction and Purpose

This paper is being written as a part of the iftā' program at Darul Ilm Birmingham. It is atypical in the sense that most other students tend to write on the legal permissibility [or impermissibility] of things, largely focusing on Islāmic jurisprudence books of the past, and/or exercising effort (ijtihād) to possibly derive specific rulings, and such rulings may be dependent on a context, a time/place, and specific conditions. This paper takes a different approach, although the topic still falls within the domain of Islāmic jurisprudence.

A no-nuptial agreement provides a means to establish an Islāmic marriage (i.e. “nikāh”) without a civil marriage. However, with the exception of a recent article on the Muslim Matters web site, there has been little exploration of this topic, and almost nothing has been written about no-nuptial agreements as an option to combine with nikāh. This paper seeks to establish the following objectives:

1. Introduce the reader to no-nuptial agreements and raise awareness.
2. Define some use cases for no-nuptial agreements.
3. Consider advantages and disadvantages of no-nuptial agreements.
4. Define considerations for formulating such agreements.
5. Provide a template for no-nuptial agreements.

Before delving into the domain of no-nuptial agreements, it is important to first understand how marriage, property rights, divorce etc all work in civil marriages and Islāmic marriages. The paper assumes little existing knowledge of these topics, and as such, it provides somewhat detailed context to people who may not be familiar with one of these topics or the other, or perhaps both.

While the topic will be discussed in a broad and general sense, where necessary, in order to narrow the scope, the paper will consider the Ḥanafī school of Islāmic law, and it focus on the state of California. The reader should keep in mind though, that the concepts are easily extended to other schools of law and other states of the USA as well.

## Civil Marriage

“Marriage”, also called “matrimony” or “wedlock” is conventionally, commonly, and generically defined as “a culturally recognized union between people, called spouses, that establishes rights and obligations between them, as well as between them and their children, and between

## No-Nuptial Agreements: Another Option for Nikāh

them and their in-laws”<sup>1</sup>. In the U.S., a large body of law, called “family law” governs various family-related issues, including establishing, maintaining, and terminating relationships such as marriages, civil unions, and domestic partnerships. Marriage has legal requirements which vary state to state in the USA, as each state has been provided authority by the federal government to determine what a valid marriage is, how it gets created, how valid marriages are regulated, and how the marriage should be terminated.

As an example, in California, there are nearly 450 statutes that deal with the rights, duties, and privileges associated with marriage<sup>2</sup>. However, there are some overall requirements that apply to all states for a marriage to be considered valid, and they are not specific to California alone. These include consent, capacity, and the age of each person. If a person gets married in one state and subsequently moves to another, most states will recognize the marriage based on the “full faith and credit” that the state gives others, even though their own marriage laws may be different.

### Conditions

By state law, a marriage can only be between two people, not less nor more. Additionally, marriage can only be between two human beings, not between animals or other objects, nor between a human and an animal, or a human and an object, etc. However, all these rules are subject to change, as has been witnessed particularly in the few decades. The definition of marriage has and continues to evolve over time. Historically, marriage was only possible between a male and a female. This changed in the late 1900's, as same-sex marriage also became an acceptable concept.

Most states require both parties in a marriage to be 18 or older. People already married cannot remarry until they get a divorce. Some states require a blood test to for venereal diseases. A state may also have laws around who can officiate the marriage. Most states require that a couple a marriage license before the marriage is officiated.

### Rights and Benefits

A civil marriage results in certain rights and benefits. Some of these include:

1. Tax benefits. A husband and wife can file joint income tax returns. Sometimes this lowers the total amount of income taxes paid each year. At other times, this results in what is known informally as the “marriage penalty”, where the two spouses, due to their marriage, end up paying more taxes together with their combined income than they would have as individuals earning the same total amount of income, but separately.

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<sup>1</sup> Haviland, William A.; Prins, Harald E.L.; McBride, Bunny; Walrath, Dana (2011). *Cultural Anthropology: The Human Challenge* (13th ed.).

<sup>2</sup> 445 statutes from Deering Annotated California Codes (1992)

## No-Nuptial Agreements: Another Option for Nikāh

2. Social Security, Medicare and disability benefits. If one of the spouses is not eligible for social security, Medicare, or disability benefits, they may be eligible to receive the other spouse's benefits.
3. Health insurance. Conventionally, employees and entrepreneurs receive health insurance from their company, and they can usually add their spouse to their health insurance plans.
4. Immigration. A person may sponsor their spouse for a permanent residency (i.e. a "green card"), ultimately leading to U.S. citizenship.

## Marital Property

Property is anything that can be bought or sold, such as a house, cars, furniture, or clothing. It is also anything that has value, such as bank accounts, stocks, a business, etc. Property rights in a marriage vary from state to state in the USA. In case of divorce, the local court serves as the final authority to divide up property between spouses.

In the 1970s, most states ended up adopting "equitable distribution" laws for fairness. This allowed homemakers to receive some compensation for their unpaid work and contribution to the marriage. Only nine states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin) do not use "equitable distribution" and instead adopt "community property" laws.

As mentioned, California is a "community property" state. What does that mean for property ownership? All property owned by spouses in a marriage is considered either "separate property" or "community property". The former consists of anything that was acquired by a spouse prior to the marriage or after marriage, whereas the latter is any asset acquired or income earned by a person during the marriage. Acquisition of gifts, devises, or bequests are considered as "separate property", even if they take place during the marriage.

If there is no written agreement, by default, there is no consideration for which spouse contributed more income and assets to the marriage. Any community property is divided exactly equally between spouses as the result of a divorce. This is accomplished by calculating the total market value of all the community property assets, and then subtracting any joint obligations such as debts, resulting in the net market value of the "community estate". This estate is then divided in half and given to each spouse. The California law does not require "in kind" distribution of the community property. This means that it does not care which actual property goes to which spouse, as long as the net value of the properties received by each spouse is equal to the other.

States with "equitable distribution" operate a bit differently. Assets and earnings accumulated during marriage belong to the spouse that earned it. In case of divorce, the property is divided

## No-Nuptial Agreements: Another Option for Nikāh

“equitably” (a.k.a. fairly) between the spouses, not necessarily “equally”. There is no set rule for how this is accomplished, or who may get how much. The court looks at a variety of factors to make the determination. They may look at the relative earning contributions for each spouse, consider the value provided by a spouse in staying home to raise children, and the earning potential that each spouse brings. A judge may award each spouse a percentage of the total value of the properties. A spouse can receive between one-third and two-third of the marital property.

## Inheritance

Again, laws vary state by state, but we will discuss the example of California.

If one of the spouses passes away without any surviving biological or adopted children, parents or siblings, the surviving spouse will receive all community property as well as all separate property by default, i.e. if there is no will. A person can build into their will that their half of the community property go to someone else.

But if a person leaves behind any surviving child or parent or sibling, the surviving spouse is given all community, but only half of the separate property. The second half of separate property goes to siblings, parents, children or grandchildren.

The laws get more complicated from there, but getting into such details is beyond the scope of this paper. Important to note is how different these laws are from the Islāmic laws of inheritance, which are discussed later in the paper.

## Ending Marriage

Civil marriages are ended through a civil procedure. Each state typically has three primary ways to end a marriage: divorce, legal separation, and annulment. It is not necessary for both spouses to agree to end the marriage. Either spouse can decide to end the marriage, and the other spouse, even if he or she does not want to get a divorce, cannot stop the process by refusing to participate in the case. If a spouse does not participate in the divorce case, the other spouse will still be able to get a “default” judgment and the divorce will go through.<sup>3</sup>

Along with 18 other states, California is a “no fault” divorce state, meaning that the spouse asking for the divorce does not have to prove that the other spouse did something wrong. In the other 32 states, “no fault” is optional, so a spouse may claim some sort of fault on the other, such as adultery, bigamy, impotence, abuse etc. Claiming fault may provide the advantage of making the divorce happen faster.

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<sup>3</sup> Source: Material obtained from the California Courts

## Spousal Support

In the civil system, the end of a marriage does not necessarily bring an end to all obligations of one spouse to the other, particularly if one spouse is more well-off than the other. The partner who is less well-off may be eligible to receive financial support, also known as alimony, even after the marriage ends. The rules vary state by state. In California, spouses can request temporary alimony, permanent alimony, or both.

Temporary alimony is a regular payment made by the spouse who earns more money to the one who earns less. It is called “temporary” because it is meant to provide financial support to the lower-earning spouse during the divorce proceeding, and it ends once a permanent alimony is in place.

Permanent alimony, sometimes referred to as “long-term support,” is a regular support payment from the payor spouse to the supported spouse. Unlike temporary alimony, which is paid to help the supported spouse meet expenses during the divorce, permanent alimony is granted in order to place the supported spouse at or near the “marital standard of living” (the financial standard of living established during the marriage) AFTER the divorce.

Interestingly enough, “permanent alimony” does not last forever. Awards that persist are actually quite rare. Permanent alimony for marriages less than ten years lasts no longer than half the length of the marriage, with “marriage” defined as the time between the date of marriage and the date of separation. Thus, if a marriage lasted for six years, permanent alimony would last for three years. There is no hard-and-fast rule for determining permanent alimony for marriages that lasted over ten years. The decision is made by judges, and they may consider a variety of factors, with an attempt to place the supported spouse in a position as close as possible to the standard of living during marriage, until that spouse can “reasonably” become self-supporting.

## Child Custody

Each state has its own laws for child custody. All states, however, attempt to make rulings that consider the best interest of the child. This is generally a complex procedure that specifies which parent the child(ren) will live with, how visitation rights will work, who will provide financial support, and who has decision-making authority over the child.

Parents are generally free to agree on the terms of custody, but the courts will intervene if they are unable to do so. The court will take many factors into account, including the fitness of a person to parent, their career, childcare, disabilities, which parent has served as the primary caretaker during the marriage, etc. In California, custody may be assigned to one of the parents, or parents may share custody. The final decision about custody and visitation is made by the judge, but he or she will usually approve the arrangement (the parenting plan) that both parents agree on.

## Islāmic Marriage

In Islām, marriage (called *nikāh* in Arabic) is a legal contract to establish a *ḥalāl* (i.e. *lawful*) social and sexual relationship between a man and a woman, and it is also considered a type of worship. The institution of marriage is both important and sacred. Marriage acts as a core building block for building families, which are the social units and building blocks of societies and the entire Muslim community (*ummah*). Strong marriages form the basis for creating a strong community.

Marriages are a means for society to regulate relations between the sexes and a mechanism by which the relation of children to the community can be determined. The larger wisdom and effective cause of marriage is procreation, which enables the propagation and survival of the human species, thus supporting one of the five core necessities (*ḍarūriyāt*) in order to meet the objectives of the religion (*maqāṣid al-sharī'ah*). It also enables achieving many secondary objectives, examples of which include achieving chastity, or providing means for permissible pleasure<sup>4</sup>.

### Conditions of an Islāmic Marriage

Marriages in Islām are governed by the rules of fiqh (Islāmic jurisprudence). As such, marriages must abide by certain conditions.

#### Eligibility Between the Partners

The following are eternally prohibited for marriage:

- Due to blood relationship:
  - Parent – or any grandparent
  - Child – or any grandchild
  - Sibling
  - Uncle & Aunt – or uncles/aunts of your parents
  - Sibling's child [i.e. nieces and nephews]
- Due to family relationship:
  - Stepparent [spouse of actual parent] – or step-grandparent

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<sup>4</sup> Maqāsid al-Sharī'ah, Sh Abdullah Juday, p. 24

## No-Nuptial Agreements: Another Option for Nikāh

- Parent-in-law [spouse's parent] – and all grandparents
- Step-child – from a spouse whom you have consummated marriage with
- Child-in-law [child's spouse] – and grandchildren
- The parent or child of someone you had an intimate relationship outside of marriage with.

Due to a nursing relationship:

- Nursing relationships are treated just like blood and family relationships. So the nursing mother [who breastfed the child] and her husband, father, brother, grandfather or uncle are all prohibited in marriage. Also, one nursed sibling is prohibited to the other [the child who nursed with the same woman]. Conditions of foster relationship: any amount of suckling during the period of breastfeeding. Likewise, this applies when milk is stored and given to a child.

The following are temporarily prohibited for marriage:

- Being married to two sisters, to a woman and her aunt, or to a woman and her niece at the same time.
- A woman who is already married or a man who already has four wives.<sup>5</sup>
- A woman must marry a Muslim but a man may marry a Jew or Christian who believes in a prophet and a book, even though their beliefs are considered to be distorted.

## Proposal and Acceptance

The marriage contract requires a proposal for marriage and an acceptance, in unequivocal words that are according to local custom. For example, the man may say “marry me” and the woman may respond “I have married you”. However, she should not respond with “I will marry you”, because that could be interpreted as a future intent rather than a confirmation.

## Witnesses

Marriage is a public affair that should be announced. To ensure compliance with this, two adult, sane Muslim males are required to witness the proposal and acceptance. In place of one male, two females may be substituted. The witnesses do not need to be upright Muslims to serve

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<sup>5</sup> Islām allows a man to marry up to four wives at a time. A woman may only marry one man at a time.

## No-Nuptial Agreements: Another Option for Nikāh

their role, because they are merely listening to the contract rather than articulating it [as one would do in a court of law]. If a man is marrying a woman who is a Jew or Christian, at peace with the Muslims, then the witnesses may be Jews or Christians.

### Consent

Both a man and a woman must consent to the marriage. If the woman is a virgin and she shows her consent through shyness by remaining quiet, giggling, or crying, that is taken to be a sign of her approval. However, if she says no, then it is a sign of her refusal. A previously married woman must articulate her answer, and no one can agree on her behalf without her permission. However, she may appoint someone to agree on her behalf.

### The Guardian [*Walī*] and Suitability

This guardian of a woman plays a major role in ensuring that a woman is making the right decision concerning her marriage. This guardian is her nearest sane and mature Muslim male blood relative according to the following order: father, paternal grandfather, mature son, mature grandson, brother, nephew, paternal uncle, paternal cousin, etc. If there are no male relatives, a mother, sister, or aunt may take the place as guardian. If there are no blood relatives at all who qualify to be her guardian, then the Muslim leader will represent her.

The guardian should not object to someone who is suitable for her, according to cultural norms. If the spouse is unsuitable in terms of religiosity, wealth, lineage, or beauty, then he may take the case to a Muslim judge. If the judge agrees that the match is unsuitable, then the marriage may be invalidated.

### Dowry [*Mahr*]

Dowry is a necessary ingredient to the marriage and serves as a gift from the husband to the bride for accepting the proposal. The minimum amount of dowry is something that is considered to be of value, according to custom, and there is no maximum. If the husband decides not to give the dowry immediately, it acts like a debt that must be paid someday. The dowry does not need to be announced as part of the marriage contract.

When the marriage is consummated<sup>6</sup>, or if the husband dies before that, the entire amount of dowry is due. However, if she is divorced before consummation, then half the dowry is due. If it has already been paid, then half of it must be returned.

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<sup>6</sup> Or if the couple had been together alone such that nothing prevented them, such as a physical or purification related impairment, from intercourse.

## No-Nuptial Agreements: Another Option for Nikāḥ

If no dowry was specified, or if an agreement was made that she receives nothing, she is still entitled to the customary dowry that women of her status receive<sup>7</sup>. Furthermore, if the dowry is initially set [or modified through increase or decrease] after the marriage, she is entitled to it.

### Permanency

Marriages are intended to be permanently. So for example, the following would not be allowed:

- Marrying someone for a specified time is invalid, such as saying, “I propose to marry you for one year.”
- Marrying someone with the intention to divorce them, so that they can remarry their former husband.

### Its Ruling

The default legal ruling regarding marriage is that it is encouraged and recommended *sunnah* (i.e. practice) of the Prophet (ṢAW). The Prophet (ṢAW) is reported to have said:

يَا مَعْشَرَ الشَّبَابِ مَنِ اسْتَطَاعَ الْبَاءَةَ فَلْيَتَزَوَّجْ، فَإِنَّهُ أَغْضُ لِلْبَصَرِ<sup>8</sup>

“O young people! Whoever among you can marry, should marry, because it helps him lower his gaze and guard his modesty [i.e. his private parts from committing illegal sexual intercourse etc.]”

In general, a person should get married as soon as they are ready, in terms of maturity, financial ability, etc. However, marriage may also take other rulings. For example, it would be considered obligatory (*wājib*), if a person meets all the requirements for marriage, and fears that he may commit unlawful sexual acts such as fornication, adultery, watching pornography, etc. It could also be considered impermissible (*harām*), such as the marriage between a man and his mother.

### Rights and Benefits

A marriage contract in Islām takes effect immediately, resulting in consequences, some of which include:

1. The permissibility of the husband and wife becoming ḥalāl (i.e. lawful) for each other, allowing them to engage in sexual relations.

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<sup>7</sup> All factors, such as her religiosity, beauty, lineage, wealth, intellect, property, etc. are taken into consideration.

<sup>8</sup> Ṣaḥīḥ al-Bukhārī, ḥadīth 5066

## No-Nuptial Agreements: Another Option for Nikāh

2. Inheritance between the husband and wife. If one of the two spouses passes away, the surviving spouse inherits from the estate of the deceased.
3. Eternal prohibition for the husband to marry the wife's mother, and the wife to marry the husband's father or the husband's son.

## Marital Property

Property rights in Islām are nothing like civil property rights. All property, by default, is considered “separate property.” Anything acquired by a spouse prior, during, or after the marriage is their own and stays that way, regardless of how it was acquired (earned, purchased, gifted, inherited, etc). With the exception of dowry rights (see below), maintenance (see below), and inheritance (see below), neither spouse is entitled to property of the other. Of course, either spouse is free to give gifts to the other, and the wife may give charity to the husband if she so wishes.

## Inheritance

As discussed earlier, there is bias in the civil system of the United States towards giving everything to the surviving spouse. Homes are often owned through joint tenancy with right of survivorship, and the beneficiary designations for retirement and insurance assets by default tend to benefit the spouse. Islām does not have such a bias, and the rights of inheritance are well-defined in the Qur’ān (specifically versus 4:11, 4:12, and 4:176). More importantly, the verses that come after these highlight the importance of following the rules specified:

تِلْكَ حُدُودُ اللَّهِ وَمَنْ يُطِيعِ اللَّهَ وَرَسُولَهُ يُدْخِلْهُ جَنَّاتٍ تَجْرِي مِنْ تَحْتِهَا الْأَنْهَارُ خَالِدِينَ فِيهَا وَذَلِكَ الْفَوْزُ الْعَظِيمُ  
وَمَنْ يَعْصِ اللَّهَ وَرَسُولَهُ وَيَتَعَدَّ حُدُودَهُ يُدْخِلْهُ نَارًا خَالِدًا فِيهَا وَلَهُ عَذَابٌ مُهِينٌ

“These are the limits set by Allah. Whoever obeys Allah and His Messenger, He will admit him to gardens beneath which rivers flow, where he will live forever. That is a great success. Whoever disobeys Allāh and His Messenger and transgresses the limits set by Him, He shall admit him to the Fire, where he will remain forever, and he will have a humiliating punishment.” [Qur’ān, 4:13-14]

The Qur’ān mandates other beneficiaries than just the spouse, and giving everything to the surviving spouse after death when there are other beneficiaries is prohibited. Inheritance in Islām is distributed based on a formula of primary beneficiaries and contingent beneficiaries. Primary beneficiaries are beneficiaries (assuming they are Muslim) no matter what, and they include spouses, children, and parents. Contingent beneficiaries are people who get an inheritance or not depending on the existence or non-existence of individual primary beneficiaries – and they include a range of people, upstream, downstream, and sideways. This

## No-Nuptial Agreements: Another Option for Nikāḥ

may be grandparents, siblings, grandchildren, uncles and aunts and so forth. As a result, a surviving husband's share is either 1/4 or 1/2, depending on if there are children. For the wife, it is either 1/8 or 1/4, again, depending on if there are children.

## Ending Marriage

Marriage is a contract with rights and responsibilities. When it is felt that these responsibilities are difficult to fulfill, the contract may be terminated through a special procedure.

Divorce (*ṭalāq*) may fall into one of the following categories:

- Recommended: This is when someone neglects fulfilling the rights of Allah.
- Allowed: This is when someone neglects fulfilling the rights of the spouse.
- Disliked: This is to divorce someone for no good reason.
- Prohibited: This is to pronounce divorce during the wrong time, such as during a wife's menstrual period.

## How to Divorce

In order for a divorce to be valid, it must be done by a male who is sane and in a state of consciousness. The correct way of divorce is to pronounce one statement of divorce after the wife's menstrual period has ended<sup>9</sup>, but before he has intercourse with her, and then wait until she completes three menstrual periods. This is the best method of divorce because it gives the husband sufficient time to reflect on whether or not this marriage should continue. Also, because sexual relations are permissible outside of the menstrual period, the possibility of intimacy will help alleviate tensions and the man will be tempted to take his wife back and resume the relationship.

However, if he divorces her during her menstrual period, it counts, but is sinful. Therefore, it is recommended that he take her back, and decide what to do after waiting for her period to end<sup>10</sup>.

There are three types of divorce:

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<sup>9</sup> If the marriage had not been consummated or if the wife doesn't have a period, then the divorce can be at any time of the month because the unconsummated marriage has not tasted intimacy yet so the desire is there, and the non-period may have intimacy at any time and will not delay the waiting period.

<sup>10</sup> This is one opinion reported by Abū Ḥanīfah. Another, more famous one, is that he must wait until another full menstrual cycle passes before being allowed to divorce her a second time.

## No-Nuptial Agreements: Another Option for Nikāh

- Revocable: this is when one divorce is pronounced and the husband has the right to revoke it and take her back during her waiting period.
- Irrevocable: this is when the time period for waiting expires and the man has not revoked the divorce. The couple may get remarried again if they both consent, with a new marriage contract.
- Final: this is when a woman has been divorced three times, in three separate periods of purity. The divorce is now irrevocable and the relationship is finished, such that the couple may never remarry again until she marries another man, consummates the marriage, and that marriage ends<sup>11</sup>. This is because she needs to move on with her life and try another man before continuing with the previous spouse.

A man may delegate the option to his wife whether or not she is divorced. If he adds a statement like “whenever you want”, then it applies at any time. He may also give authority to another person, and it will count when that person pronounces a divorce.

### Retraction of Divorce

A man may retract a divorce before the couple is separated without the permission of the wife. During a revocable divorce, she is treated like a normal wife with the right to maintenance and living in the house, but there will be no intimacy. In order to retract, he may speak it by saying “I have taken you back” or kiss her or do anything indicating touching with desire. It is recommended to have two witnesses for the retraction. A woman waiting for the retraction of divorce who wants to remain married should make herself up and try to be nice to her husband, so he retracts.

### Remarriage

If the time elapsed for the waiting period but it was not the third divorce, the man may marry her with a new contract and dowry. After the third divorce, there is no retraction and no remarriage until she weds and consummates with another. It is unlawful to marry someone in order to let them marry their previous husband, but if it happened it would count.

### Expressions of Divorce

Divorce will be enacted through the following statements, whether or not they were said in a state of seriousness or jest:

- Explicit: “You are divorced”, “You are a divorced woman”

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<sup>11</sup> <sup>11</sup> It is prohibited to marry someone with the intention of being able to remarry your previous husband.

## No-Nuptial Agreements: Another Option for Nikāh

- Conditional: “You will be divorced if you visit that bar”
- Implicit: “Go back to your family” or “I don’t want you anymore” or “We are finished” or “You are now single”. Since the statement is not explicit, it will only count if the man had the intention to divorce, and he must admit to this.

## Wife Demanding Release [Khul’]

A woman has a right to remove the marriage contract by returning part or all of her dowry. This must be done for a good reason. The husband is not allowed to keep the wife in marriage in order to harm her, so if she has legitimate grounds, he must let her go. If the discord is from the husband’s side, it is disliked for him to take anything from her, and if it is from her side, it is disliked for him to take more than what he gave her in dowry.

## The Waiting Period

When a man divorces his wife with a final or revocable divorce, or a separation [by a judge] was issued, her waiting period is three full menstrual cycles. If she does not menstruate, then it is three months. If she is pregnant, then it is after she gives birth or loses the child. She should not move to another house during this period.

If a man dies, then his wife’s waiting period is four months and ten days. If she is pregnant, then it is after giving birth or losing the child. Her period is actually a mourning period and she must refrain from wearing perfume, adornment, makeup, and jewelry, unless there is a valid reason. The woman in her mourning period must not be proposed to for marriage, but it is fine to make an allusive reference to the idea of a marriage proposal, such as “I want to marry and I hope I can find a righteous woman.” She may leave the house, but must sleep in her own house and not elsewhere.

The waiting period of a woman who is in an adulterous relationship begins either when they separate or they resolve to stop having intercourse.

A divorce which takes place before consummating the marriage does not require any waiting period.

## Dowry Rights After Separation

- After consummation or if they are alone in private where consummation would have been possible: she gets full dowry
- After he dies but before consummation: she gets full dowry
- Divorced before consummation: she gets half the dowry

### Maintenance

#### During Marriage

During marriage, maintenance is a requirement for the wife and minor children from her husband as long as she decides to remain in the house, and that is according to his financial status. It includes housing, clothing, food, etc. If she leaves the house, she has no right to maintenance.

A woman has the right to live in a separate house where no other family members live, if she chooses. The husband may prevent her parents or other family members from visiting her in her home, but he may not prevent her from meeting them or speaking to them elsewhere. If a man cannot provide adequate maintenance for his wife, she may take a loan on his behalf, and he is liable to pay it. If a man is absent, or does not spend on his wife, but has wealth, the judge apportions maintenance for the wife and children from his wealth. If she does not receive maintenance over a period of time, she cannot claim what is past unless a decree was previously issued by a judge or the husband had agreed to give her a certain amount.

#### After Divorce

During a divorced wife's waiting period, she is entitled to maintenance as well, even if she was divorced prior to consummation, but there is no maintenance after that. Pregnant women get maintenance until the baby is delivered.

### Child Custody

The mother generally has more right to the custody of the child upon separation, then the maternal grandmother, then paternal grandmother, then sisters, then maternal aunt, then paternal aunt. They must not be married [except the grandmother], otherwise they lose their right of priority.

When either spouse is a Muslim, the children will be raised on Islām. If one spouse is from the People of the Book and the other a disbeliever, the child will be from the People of the Book.

## Standard Marital Procedures for Muslims in the West

### Marriage

The standard and common procedure for performing marriage for Muslims in the West is to perform both a civil marriage as well as an Islāmically-valid nikāḥ. Both types of marriages are relatively straightforward to execute, and the requirements are easily met.

## No-Nuptial Agreements: Another Option for Nikāh

The civil marriage generally requires obtaining a marriage license from the appropriate local governmental authority prior to the marriage, following the laws to ensure that the marriage is performed by a person who is legally authorized to officiate marriages, and then filing a marriage certificate with the appropriate governmental authority.

As discussed earlier, the Islāmic marriage has its own set of conditions, such of which include offer and acceptance, two witnesses, and giving dowry.

The people looking to get married, their families, and religious leaders (*imāms*) all generally look to establish both types of marriage. The Islāmic marriage is performed because a husband and wife coming together with only a civil marriage and no Islāmic marriage would result in a *ḥarām* (unlawful) relationship between them. Rarely will a Muslim perform a civil marriage and not an Islāmic marriage, as practicing Muslims are aware of the importance of fulfilling the requirements of an Islāmic marriage.

But why do people perform a civil marriage? There are a few reasons for this. Firstly, most people are not aware of alternate options, and this is the default, most well-known, and customary option. Secondly, a civil marriage results in certain rights and protections, protecting from certain types of deception, fraud, exploitation, and abuse.

While a civil marriage without an Islāmic marriage between Muslims is extremely rare, there are scenarios where some people will perform an Islāmic marriage without a civil marriage. One such scenario is for the purpose of practicing polygamy. Polygamy is the practice of having more than one spouse at the same time, conventionally referring to a situation where all spouses know about each other<sup>12</sup>. Polygamy is illegal in the United States of America, and there are laws against it in all 50 states. Islām, however, allows a man to marry up to four wives as long as certain conditions are met, and he treats them all justly and fairly. Some Muslims in the U.S. are interested in polygamous marriages, and they will generally achieve their objective through completing Islāmic marriages with all of their wives, but performing a civil marriage with only one of them or none of them.

## Divorce

The procedures for each (Islāmic divorce and civil described) were already described.

Unfortunately, divorce is a topic that many Muslims are not sufficiently educated about. It is important to understand that just like marriage itself, Islāmic divorce and civil divorce are two entirely separate things, and both must be performed independently. Performing one does not result in the other. Yet, many people are not aware of this fact and only go through the civil divorce procedure, assuming that it is enough.

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<sup>12</sup> George Monger (2004). [Marriage customs of the world: from henna to honeymoons](#)

## Prenuptial and Postnuptial Agreements

By default, the family code of the state determines what happens to the assets and debts of the two spouses in case of breakup, death (i.e. inheritance), spousal support, and child custody and child support. The family code is usually very-well defined, and however, family courts are responsible for resolving any conflicts in these matters.

Prenuptial agreements (sometimes called “premarital agreements”) can be negotiated and put in place along with a civil marriage in order to make changes from the default family code. These agreements can describe a variety of financial responsibilities for each partner, they can include division of assets, and property, estate planning, and spousal or child support. Such agreements commonly focus on property rights of a married couple and act as a type of “insurance” in case of death or divorce. This protects the financial interest of the spouses and avoids future conflict.

Muslims can make use of prenuptial agreements to ensure that all settlements after death or divorce follow proper Islāmic principles. Most commonly, spouses, young and not as wealthy at the time of marriage, are not well-aware of prenuptial agreements. If they decide to enter such an agreement after marriage, it would actually be very similar to a prenuptial agreement, but is instead called a postnuptial agreement.

For a prenuptial or postnuptial agreement to be considered valid in California, it must meet the following requirements<sup>13</sup>:

1. Be in writing
2. Be signed by both parties
3. Each spouse must have received complete financial information about the other party prior to signing it
4. Each spouse must have had seven days to review the agreement before signing (or the opportunity to have it reviewed by an attorney)
5. Been represented by an attorney (other than the one representing the other spouse)
6. Cannot include anything illegal

As stated above, prenuptial agreements generally cover property rights, but they may cover a variety of subjects as long as they do not violate law. However, there are some terms which are not enforceable, and these are those that relate to the rights of children and custody. This is

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<sup>13</sup> California Family Code, Uniform Premarital Agreement Act, Unenforceable Prenups, Family Code Section 1615

## No-Nuptial Agreements: Another Option for Nikāh

because the state has a special interest in ensuring that children are always supported and maintained by their parents.

It is this author's view that if a civil marriage is to be performed, it should always be accompanied by a prenuptial or postnuptial agreement in order to at least implement Islāmic guidelines for property rights and distribution in a marriage. Having spoken to a number of lawyers on the topic, it is obvious that people have good intentions when entering a marriage, but if things turn sour, a “messy” divorce is often the result. While sad, it is true that many a times, one of the spouses may want to “hurt” the other by trying to extract as much money out of them as they can. A prenuptial or postnuptial agreement can provide protection in such scenarios.

## No-Nuptial Agreements

No-nuptial agreements are a relatively novel concept, so much so, that there is not even a Wikipedia page on the topic. Couples may utilize no-nuptial agreements when they want to have a legally enforceable contract governing their relationship, but they do not want to subject themselves to the family court system or the family code. As written agreements, they provide protection for both parties and the understanding they had when they entered into the relationship. They are similar to prenuptial and postnuptial agreements in the sense that they can include provisions of mahar, sharing expenses, equity as well as dispute resolution processes such as arbitration and mediation. They may also document certain limits on what they agreed to. As an example, during a breakup, one party may be able to claim an oral promise the other party never made and potentially have it enforced in court.

No-nuptial agreements have broad use cases and benefits for many types of couples. Most interestingly, and what allows Muslims to consider this option for an Islāmic marriage, is that they establish documentation that nobody is under the illusion that this is a marriage under state law. It is a private contract between two individuals. Yet, the two people involved are free to call each other husband and wife, and so can others refer to them as such.

No-nuptial agreements started originally in the form of “cohabitation agreements” (sometimes also called “Marvin agreements”), which DO have a Wikipedia page for them. A cohabitation agreement is defined by Wikipedia as “a form of legal agreement reached between a couple who have chosen to live together.” The reason for using the description “no-nuptial agreement” instead of “cohabitation agreement” is to signify that it is not mandatory that the spouses live together. Cohabitation and no-nuptial agreements are not considered legally binding in the United Kingdom, but they are practicable in the USA and Canada.

The primary difference between a prenuptial or postnuptial agreement and a no-nuptial agreement is that the former works in combination with a civil marriage and builds on top of the family code of the state, and the latter entirely replaces it. A civil marriage has defined expectations and restrictions by law, and the prenuptial agreement can only go so far to break outside these restrictions. The no-nuptial agreement can go a lot further as discussed below.

## No-Nuptial Agreements: Another Option for Nikāh

Why did no-nuptial agreements come about? For hundreds of years in the United States, it was considered taboo and improper for a man and a woman to live together, have sexual relationships outside of marriage, have children together, or raise families. All of these acts were associated with marriage. However, with evolving times, corruption, and a decline in morality, these things not only started becoming more common outside of marriage, they also started taking place between two people of the same gender. This gave the rise to cohabitation agreements. For some, they were a means to live together on a trial basis before committing to marriage. For others, interested in homosexual partnership, cohabitation agreements served the purpose because same-sex marriages were not permitted. For yet others, the purpose was to marry but without all of the financial burdens and risks that come in a legally defined marriage.

No-nuptial agreements can be entered into by anyone at any time, and there is no restriction on age, waiting periods, officiation, etc. They are easily easy to end informally without having to go through a detailed legal procedure.

A no-nuptial agreement by definition is not a marriage, and therefore allows for building a structure from scratch. This provides both the advantages and the disadvantages of starting with a clean slate. Unmarried couples are considered “legal strangers” under law. For example, doctors won’t share healthcare information, and there is no inheritance under law by default. Things such as inheritance must explicitly be added to no-nuptial agreements in order to make it equivalent to an Islāmic marriage.

### Advantages

Why should a Muslim consider no-nuptial agreements as an alternative to a civil marriage? Here are some reasons:

1. If a person knows that he will engage in, or that he may potentially engage in polygamy. If the person was to marry one wife through civil marriage, and not have civil marriage with the other wives, this creates a level of “injustice”. It would be best, instead, if the person got Islāmically married to all of them, but did not conduct civil marriage with any of them – this brings fairness and consistency (one wife is not “preferred” over the others by being the only in the civil marriage), and it is the more ethical path. While polygamy is illegal in the United States, it is only illegal to the extent that one person cannot have civil marriage with multiple people at the same time. This does not prevent one from getting into an Islāmic marriage with them, while instating no-nuptial agreements with all of them.
2. It can allow someone to Islāmically marry someone who they may be prohibited to marry by the “law of the land”. As a simple example, 24 states in the USA (AR, DE, IA, ID, KS, KY, LA, MI, MN, MS, MO, MT, NE, NV, NH, ND, OH, OK, OR, PA, SD, TX, WA and WV) prohibit marriages between first cousins, and 7 states (AZ, IL, IN, ME, UT, WI and NC)

## No-Nuptial Agreements: Another Option for Nikāh

only allow some marriages between first cousins. If someone was interested in an Islāmic marriage with their first cousin in one of these states, a no-nuptial agreement can provide an answer to that.

3. No-nuptial agreements can provide a superior and more “Islāmic” solution for even a standard monogamous marriage, by removing certain elements that a civil marriage enforces that are actually not from Islām. Some of “benefits” of marriage under state law are against Islamic principles. The “legal stranger” aspect of the relationship (discussed earlier) serves as more of a benefit than a downside in most cases. For example, the laws of inheritance and divorce in most states are out-of-line with the Islāmic laws. In case of divorce or death of one spouse, the other spouse often receives more wealth than they their eligibility under Islāmic laws. Pre-nuptial agreements do not have things like tenancy by the entirety, community property, or elective shares in places where such things exist.

Some state laws that provide for “elective shares” are diametrically opposed to the Quran’s share of inheritance. Muslims must follow Islāmic rules of inheritance anyway, which are different from default state rules, so being under state law is no special advantage. By eliminating the civil marriage contract, a more Islāmic-compliant and valid marriage contract can be represented in the no-nuptial agreement, explicitly honoring the Islāmic laws of inheritance and divorce. While another solution to this issue could be prenuptial or postnuptial agreements, they fall under civil marriage, and their enforceability in courts is often inconsistent and sometimes even unpredictable.

## Disadvantages

There also exist some disadvantages to no-nuptial agreements:

1. Any governmental or employment benefits that are made available to “spouses” would normally be lost without a civil marriage. These could include (as mentioned earlier) tax benefits, social security, Medicare, and disability benefits, healthcare insurance, and immigration. It should be noted, however, that due to marriage falling more and more “out-of-fashion” in the West during contemporary times, and also because of the increasing popularity of same-sex marriages, employers (and even the government) is shifting such benefits from “spouses” to “domestic partners”. While this would not resolve such issues in a polygamous marriage, it is certain helpful for monogamous marriages, essentially removing the disadvantage. It is expected that more and more employers will continue in this direction, mitigating this disadvantage over time. Additionally, immigration rights are not required in all marriages.
2. No-nuptial agreements are not well-understood by the common people, nor religious scholars and leaders (*imāms*). Additional education and awareness is needed. This paper is only a start towards that objective.

## No-Nuptial Agreements: Another Option for Nikāh

3. If the no-nuptial agreement is not carefully defined and executed, it can be used for exploitation, deception, and fraud, resulting in one of the spouses benefitting more than the other, by utilizing legal and Islāmic loopholes and workarounds (*hīlah*). Hence, the contracts themselves need to be matured, with the help of specialists from both domains: Legal and Islāmic. One of the primary objectives of this paper is to draft an initial no-nuptial agreement, which can become a draft document for further vetting, critique, and refinement – with the eventual goal to build a template that can be used more broadly and commonly in the Muslim community.

This no-nuptial is not a one-answer-fits-all.

1. While legally valid in California, for example, its enforceability needs to be evaluated in each of the other states. Laws vary greatly between different states in the USA, and this is no small task that requires deep legal study.
2. A no-nuptial agreement does not resolve the issue of someone wanting to Islāmically marry someone who would be considered “underage” legally. The laws vary greatly by state<sup>14</sup>, with 30 states placing the minimum age for civil marriage as 16 or 17. Only 2 states allow the age of 2 and 4 allow the age of 15. A no-nuptial agreement does not resolve this issue due to statutory rape laws. In order to engage in sexual intercourse, there is an established “age of consent”, which ranges from 14 to 18.

### How about No Agreement?

What if a couple decides to enter an Islāmic marriage with no civil agreement at all, as some people do, particularly when they engage in “secret marriages” or polygamous marriages. This creates a number of disadvantages. It opens up the spouses to a variety of potential conflicts and liabilities.

A written agreement allows the two spouses to build a formal contract between themselves with rights, duties, and economic aspects well-defined. It puts them in a stronger position. A written document not only builds a strong understanding between the spouses, in case of potential conflict, it can ease arbitration, mediation, and even potential litigation. The lack of an agreement does not mean that the conflict will not result in litigation. A no-nuptial agreement provides protection for both spouses in case such conflicts arise.

While many spouses may agree to have an Islām-based marriage in spirit, a no-nuptial agreement formalizes that and legally protects their intentions, particularly in case of financial settlement due to divorce, or inheritance due to death.

Going through the process of writing a no-nuptial agreement also forces discussions about many difficult questions. This is not an easy activity and can be emotionally challenging, but it

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<sup>14</sup> [https://en.wikipedia.org/wiki/Marriage\\_age\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Marriage_age_in_the_United_States)

## No-Nuptial Agreements: Another Option for Nikāḥ

creates a heightened sense of awareness of each other's values and concerns and develops deeper mutual understanding.

### Islāmic Validity of a No-Nuptial Agreement

Are no-nuptial agreements permitted in Islām? After all, this means a person is essentially signing a “no-marriage” contract with the person they are actually getting into an Islāmic marriage with. In order to understand this, one needs to look at one of the basic maxims of fiqh (al-qā'idah al-fiqhiyyah) and more specifically, one of its branches.

#### The Fiqh Maxim: “Acts are judged by their goals and purposes”

“Acts are judged by their goals and purposes.” Explanation: “In other words, the ruling that results from the action of a legally accountable person will be looked at in the light of his intention. The ruling will take effect as per his intention, in ownership and lack of ownership, reward and lack thereof, punishment and lack thereof, accountability and lack thereof, guarantee and lack thereof. So whoever killed a person intentionally without a legitimate reason, there is a ruling for his action. And if it was by mistake, then there will be a different ruling for it. If someone said to his wife: “You to me are like my mother's back”, his intention will be looked at. If he intended *ḡihār*, then he is committed of *ḡihār*. And if he intended respect, it will be considered respect, and if he intended divorce it will be considered divorce, because the word carries all of these possible meanings. And whoever finds lost property with the intention of taking it for himself, he is [considered] an usurper. And if he picked it up with the intention of protecting it, announcing it, and returning it to its owner when he becomes apparent, then he is [considered] a trustworthy person, and he will not be responsible for it if it is lost without his misuse of it, or negligence in protecting it. This is a comprehensive rule derived from the famous ḡadīth reported by the six [books], and it is his (ṢAW) saying: “Actions are only [judged] by intentions. So each man will have what he intended...” etc.”<sup>15</sup>

#### The Branched Fiqh Maxim: “the consideration in contracts is the functional meaning, not the wording”

The major fiqh maxim mentioned above branches into many others. One of these branches is the legal maxim: “the consideration in contracts is the functional meaning, not the wording” [al-'ibrah fī l-uqūd li l-ma'ānī lā li l-alfāz]. For example, if someone says, “I will give you this gift if you give me that gift”, the contract is viewed as a type of sale transaction. Even though the word ‘gift’ is used, since two items are being exchanged, it is functionally a sale contract and not a gift at all. Islām considers how a contract functions practically, and not the words that are used in it. For example, consider a modern car lease, a portion of which may be called “interest”, but it is functionally and practically considered a portion of the lease rental amount and is not a type of forbidden *ribā*. Another example would be selling an item [using a

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<sup>15</sup> Al-Qawā'id al-Fiqhiyyah. Shaykh 'Azat 'Ubayd al-Dī'ās, p.12-13

## No-Nuptial Agreements: Another Option for Nikāh

murābahah contract] with a higher deferred price than the immediate cash price and labeling the difference between the two profits “interest” — again, this is not considered forbidden ribā. The term interest is used in conventional finance to describe a portion of the profit in both of these examples. However, this type of “interest” is Islamically permissible since it is not additional money on a monetary loan.<sup>16</sup>

Based on this, even though a person would be signing a contract that literally is titled “no-nuptial” (i.e. no marriage), Islām would consider the substance of the contract, and not the words. The substance of the contract is functionally equivalent to an Islāmic marriage, including meeting all of the conditions discussed earlier in the paper (offer and acceptance, witnesses, dowry, etc). Also, Islām encourages us to follow the law of the land, and no law of the land will be broken by entering such a contract.

### Legal Enforceability of a No-Nuptial Agreement

Laws for cohabitation agreements and no-nuptial agreements vary state-by state, and comprehensive research and analysis across all 50 states of the USA is a tremendous amount of work and beyond the scope of this paper. Rather, this paper focuses on the state of California in order to reduce the scope, and make it manageable.

In the leading case governing cohabitation contracts, *Marvin vs Marvin*<sup>17</sup>, the California Supreme Court reached three important conclusions:

1. Unmarried couples may make written contracts.
2. Unmarried couples may make oral contracts.
3. Where no written or oral contract exists, the court may examine a couple’s life and decide whether an implied contract or joint venture exists.

A contract will not be enforced if it states, or even implies, that the promises in it were made in exchange for sexual services. Therefore, it is essential that the contract exclude any mention of sex or sexuality, and it is better, for example, to identify the parties as “partners” rather than “lovers”.

### Drafting a No-Nuptial Agreement

A no-nuptial agreement is a “contract” in law, and as such, it contains legally binding language. As a result, it will in it many of the same features as other normal contracts. Both parties entering it must have the legal and mental capacity to enter into it. There must be a “meeting

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<sup>16</sup> Mahmoud El-Gamal, An Economic Explication of the Prohibition of Ribā in Classical Islamic Jurisprudence (Islamic Economic Studies, 2001, vol. 08-2, 29-58)

<sup>17</sup> Marvin v Marvin, 557 P.2d 106 (Cal. 1976)

## No-Nuptial Agreements: Another Option for Nikāh

of the minds and unity about the stipulations involved”<sup>18</sup>. Everything in the agreement must meet legal criteria and requirements. Beyond that, there is a much flexibility in what to include in the contract, with some exceptions as discussed below.

Each contract must be adapted to reflect the particular situation, and the desires of the individuals entering into it. It should be noted that no sample agreement or template can possibly account for all the issues that a potential couple may want to consider. This paper attempts to provide a checklist to work through objectives and intentions. This serves as a valuable starting point for discussion and consideration before a final agreement is drafted.

Some things may not be appropriate to include in the no-nuptial contract itself, and are better included in separate written documentation, such as wills, trusts, and estate planning documents. This is due to the formalities required for such documents. Another document to consider making separately is the “durable power of attorney.” A durable power of attorney allows someone (such as a relative or friend) to make necessary financial or medical decisions on a person’s behalf in the scenario where they are incapacitated. While such a document would not be required for a spouse in case of a civil marriage, it needs to be explicitly made due to spouses in a no-nuptial agreement being “legal strangers”. In California, such a document has to be created by a person while they have legal capacity. So such a document should be created by each spouse for the other in order to assure the right to visit in a hospital, make decisions about medical treatments, and even to make decisions about if medical treatment should be continued. It also allows the spouse to use a checking account and make investments or engage in other financial decisions as an “agent” of the other spouse.

A primary motivation for prenuptial and postnuptial agreements is to clearly define the financial aspects of a marriage. A no-nuptial agreement, similarly, should clearly define all financial aspects. For example:

- Shared assets. Property or items that are owned individually by one partner, and they retain their right of ownership to that if the marriage ends. In case of death, that asset would be treated as solely belong to the ownership of that one person.
- Shared assets. Property or items that have shared ownership across husband and wife, and will be divided based on percentage ownership in case of breakup or death.
- Liabilities and debt obligation. Which liabilities or loans may already exist on an individual and how should they be handled in the case of breakup or death.
- Treatment of income. How is incoming income to be treated? How will wages, investment returns, etc to be classified, and who will they belong to?

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<sup>18</sup> “Family Law for Paralegals”, p.20 (2009)

## No-Nuptial Agreements: Another Option for Nikāh

- Support payments: How would financial support be provided from one party to another in case of breakup.
- Inheritance. How should it be distributed upon the passing away of one or both spouses?

As Muslims, these aspects should all be based on Islām. Therefore, the concept of “separate property” should be applied as a default. Enforceability also requires that both spouses completely declare all of their assets and obligations to each other.

It should also consider health and medical care. For example:

- Who is authorized to make medical decisions in the event of incapacity?

It should consider dispute resolution:

- For example, is arbitration and mediation preferred over litigation? If so, that should be specified. Muslims should strongly consider services as [Islāmic Dispute Resolution Services](#), to provide faith-based, confidential, and cost-effective means of resolving conflicts over litigation, which is public, expensive, and not necessarily in alignment with the principles of Islām.

Other aspects to include in the agreement may be similar to those topics that should be considered, discussed, and worked out between a couple prior to a marriage through effective pre-marital counseling. This may include:

- Children. Which duties and rights of raising children will be shared? Which ones will be assigned to an individual as the primary responsible party?
- General expectations, duties, and responsibilities of each spouse. For example: How will the couple share responsibilities? Who will bring in the income, and how will the income be utilized?

A lawyer is not required in order to establish a no-nuptial agreement. However, engaging two lawyers (one for each spouse) is highly recommended as it provides comfort that a legal expert has reviewed the contract to ensure that it includes all relevant details and that it does not include any invalid conditions. Furthermore, having attorneys involved adds to the strength of enforceability of the contract in courts, as well as mediation and arbitration. At minimum, if lawyers are not involved, the contract must at least state that both parties had the opportunity to seek legal counsel before entering fully into the contract, and they chose not to exercise the right.

## A Humble Recommendation

Discussing the possibility of a prenuptial agreement with a potential spouse, or a postnuptial agreement with an existing spouse can be a difficult conversation. Reactions and responses can often be emotional:

- “Do you think this marriage is not going to end well, and that’s why you want to talk about it?”
- “Are you so greedy and selfish that if the marriage does end, you want to ensure that your assets are protected?”
- “Do you not trust me to do the right thing and follow an Islāmically-valid process in case of divorce or death?”

Due to the potential of these concerns being raised, prenuptial and postnuptial agreements are rarely implemented by Muslims in practice. Interestingly, these same types of concerns do not come up, or at least nowhere near the same magnitude, when implementing Islāmīc wills and estate plans based upon Islāmīc principles. They are simply described as the best means of implementing Islāmīc principles combined with local laws.

The recommendation for no-nuptial agreements is that they should simply be positioned like wills and estate plans are, i.e.: “the best way to implement an Islāmīc marriage contract from a civil law statement. Applying the Islāmīc principles of marriage while operating within the confines of state law, and leveraging protections that the state law provides.” Property rights, divorce settlement, and inheritance clauses should be included as defaults.

## Changing a Civil Marriage to a No-Nuptial Agreement

What if a person is interested in changing their Islāmīc and civil marriage into an Islāmīc marriage with a no-nuptial agreement (for example, if they are in a current monogamous marriage, but wish to change it to be polygamous)? The topic can sound awkward and taboo, but in reality, because of the jurisprudential maxims discussed earlier, this is really not an issue. One can simply offer civil divorce to the first wife, being careful to NOT effect any kind of Islāmīc divorce, while simultaneously entering into a no-nuptial agreement.

## No-Nuptial Agreement Template

### **NO-NUPTIAL AGREEMENT**

**In the name of Allah, the Most Compassionate, the Most Merciful**

## No-Nuptial Agreements: Another Option for Nikāh

This agreement is made on \_\_\_\_\_ [date], between  
\_\_\_\_\_ [first party] and \_\_\_\_\_ [second party].

### **Recitals**

The parties to this agreement are two adults who desire to live in a nonmarital relationship in which First Party financially supports Second Party and Second Party renders services to First Party as companion and homemaker. The parties desire to combine their efforts and earnings and share the property accumulated through their individual or combined efforts. While the parties will complete a religious ceremony known as “nikah” in the Muslim tradition, both parties acknowledge that this is a non-marital relationship under California Law.

The Parties therefore agree as follows:

### **Sharing of Earnings, Services, and Properties**

1. (a) Any earnings and income that are a result of personal services after the execution of this Agreement shall remain as belonging to each individual and will not be considered as joint.  
(b) First Party shall use his best efforts through his personal services and skills to generate earnings, salaries, commissions, or income sufficient to provide a standard of living acceptable to the parties.  
(c) Second Party shall render services to First Party as companion, homemaker, and shall assume responsibility for related household tasks.  
(d) Second Party is under no obligation to earn income during the course of this agreement. However, any earnings of Second party shall be the sole property of the Second Party but may be used in joint expenses with First Party at the sole discretion of Second Party.  
(e) The parties shall accumulate all property separately in separate trusts, as further provided in Paragraph 4.
2. First Party shall provide for all of Second Party’s financial support for the duration of this Agreement. This support obligation shall cease as of the date of the termination of this Agreement pursuant to Paragraph 8. Each Party waives and disclaims any right to support from the other Party after the termination of this Agreement.

### **Disclosure of Present Assets and Obligations**

3. Each Party has fully disclosed to the other Party the full extent of all assets presently owned and obligations presently owed by

## No-Nuptial Agreements: Another Option for Nikāh

that Party, as set forth in the attached Exhibits \_\_\_\_\_ [example 1 through 5], which are incorporated into this Agreement by reference.

### **Ownership of and Inheritance of Property**

4. The Parties agree that they have separately owned personal property in the past and will continue to do so. All property and money received by either Party by gift, descent, or devise shall remain the sole property of the Party receiving it. The Parties shall hold all property in individual trusts and for property that cannot be held in trusts, beneficiary designated to a trust, with beneficiary provisions consistent with the Islamic Rules of Inheritance. All Estate Planning Documents and Beneficiary Designations shall be updated regularly.

### **Termination of Agreement**

5. This Agreement shall terminate as to all unexecuted provisions on the first to occur of any of the following events: (a) on the written consent of the Parties (b) written notice of First Party and a payment of \$\_\_\_\_\_ to Second Party for or (c) written notice of Second Party and a payment of \$\_\_\_\_\_ to First Party.

### **Division of Property**

6. On termination of this Agreement, the Parties shall immediately divide their property. They will also update their estate planning documents to eliminate each other as beneficiaries. The jointly held property shall be divided equally, unless otherwise agreed to by the Parties. If the Parties are unable to agree on a division of their property, the Parties agree to submit the valuation, characterization, and division of their property to binding arbitration, as further provided in Paragraph 11.

### **Arbitration of Disputes**

7. If the Parties separate and are unable to agree on a division of their property or on any other right or obligation under this Agreement, they shall submit the matter for resolution by arbitration to be conducted in accordance with the provisions of this Paragraph. Each Party shall designate a person to act as an arbitrator. The two persons designated by the Parties shall then agree on a third person to act as an arbitrator, making up an arbitration panel of three persons. Each Party shall submit to the arbitration panel a written statement regarding all issues in dispute along with any relevant documents. In making its decision, the arbitration panel shall take into account all relevant facts and circumstances. The decision of the arbitrators

## No-Nuptial Agreements: Another Option for Nikāh

shall be binding on both Parties. Each Party shall pay one half of the fees, if any, charged by the arbitrators for their services. Notwithstanding this Paragraph, however, any issue regarding the custody, visitation, or support of any child born to the parties or adopted by them shall be submitted to a court of competent jurisdiction unless both parties separately settle these issues.

### **Representation by Independent Counsel**

8. Each Party acknowledges that he or she is fully aware of the legal of this Agreement. Each Party also acknowledges that he or she has had the right to independent counsel in the negotiation and execution of this agreement.

### **Attorneys' Fees and Costs**

9. If any legal action is necessary to enforce the terms of this Agreement, the prevailing Party shall receive reasonable attorneys' fees and costs, in addition to any other relief ordered.

### **Entire Agreement; Modification**

10. This Agreement contains the entire agreement of the Parties. No terms have been wholly or partially omitted. Neither Party entered this Agreement in reliance on any term or representation not stated herein. This Agreement supersedes any and all other agreements, either oral or in writing, between the Parties relating to their rights and liabilities arising out of their nonmarital relationship. This Agreement may be amended or modified only by a written instrument signed by the Parties.

### **Severability**

11. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining portions shall continue in full force and effect.

### **Governing Law**

12. This Agreement shall be governed by, and construed in accordance with, the laws of the State of California.

Executed at \_\_\_\_\_ [city], California, on  
\_\_\_\_\_ [date].

\_\_\_\_\_ [signature] [typed name],  
FIRST PARTY

\_\_\_\_\_ [signature] [typed name],  
SECOND PARTY

### ACKNOWLEDGMENT

*A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.*

State of California,

County of \_\_\_\_\_

On \_\_\_\_\_ [date] before me,  
\_\_\_\_\_ [name and title of officer taking  
acknowledgment], personally appeared  
\_\_\_\_\_ [names of persons signing  
instrument], who proved to me on the basis of satisfactory evidence to  
be the persons whose names are subscribed to the within instrument and  
acknowledged to me that they executed the same in their authorized  
capacities, and that by their signatures on the instrument the persons  
executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of  
California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: \_\_\_\_\_ [Name of officer] (**Seal**)

### Proposed Next Steps

- The proposed agreement template has been reviewed and approved by one attorney. However, much more legal due diligence needs to be completed to turn the template into a meaningful reusable document by Muslims in general. It should ideally be reviewed by at least five attorneys who specialize in family law, and are heavily engaged in litigation.
- This paper mostly focused on California laws by studying the California family law code. While no-nuptial agreements are possible and enforceable in many other states, a more comprehensive analysis needs to be performed in other states to determine factors that need to be considered, or adjustments that need to be made.

## No-Nuptial Agreements: Another Option for Nikāh

- The concept of no-nuptial agreements needs to be more broadly communicated, such that imāms and scholars can become familiar with them and evaluate them more deeply. They need to consider if no-nuptial agreements should actually be the default to accompany Islāmic marriages, replacing civil marriages altogether.

## Conclusion

No-nuptial agreements can serve as a beneficial alternative to a civil marriage. They can be particularly useful in instances of Islāmic polygamy in any state, or for example, if someone wants to Islāmicly marry their first cousin in a state where it is not allowed. In each of these situations, civil marriages would not be prohibited, but Islāmic marriages (nikāh) plus a no-nuptial agreement serves as a strong alternative. However, no-nuptial agreements can also serve simple to replace simple monogamous civil marriages, in order to put together a contract that is built from scratch based on Islāmic principles of property, and in particular how such property is dealt with upon termination of marriage through either divorce or death.

There are certainly some drawbacks to no-nuptial arrangements. One of these is the impact on immigration rights. Other benefits from the government or employers may also be impacted. Despite these issues, no-nuptial agreements should be looked at in more detail and considered as a default for Muslim marriages in North America, replacing civil marriages altogether.