



# THE FATE OF THE FOSTER CHILD WHEN THE FOSTER MOTHER GETS MARRIED – AN ANALYTICAL STUDY IN ALGERIAN LAW SUPPORTED BY JURISPRUDENCE

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## ABSTRACT

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Custody is viewed as the most significant consequence resulting from the disruption of the marital bond in the presence of children as it is directly related to their fate after the separation of their parents. In this case, the person who is granted custody has the right and obligation to take care of the foster child and to manage his affairs as well. For this, it is generally said that the mother is the first person that can assume the guardianship of the child as she is entitled to do so.

Except that usually, the custodial mother wants to start a new life through a new marriage, which is generally followed by the father's filing a lawsuit to drop custody.

The present study aims to determine and examine the fate of the foster child following the custodial mother's remarriage in accordance with the requirements of the Algerian Family Code and jurisprudence in this respect.

## INTRODUCTION

The separation of spouses, when children are involved, automatically entails assigning custody to the person worth of it and who is expected to take care of them. This was approved by the principles of Islamic Law, International Agreements<sup>1</sup> as well as the Legal Terms of the Algerian Family Code.<sup>2</sup>

The legislator supported the issue of custody with provisions while taking into consideration the interests of the fostered child, regardless of who takes custody over. However, he did not accurately specify what was meant by the word interests, which opened the door to jurisprudence in several issues.<sup>3</sup>

The Algerian legislator considers that the marriage of the custodial mother is one of the reasons for invalidating custody. The foster mother generally fears that, once she starts her new life and founds a new family, she may lose her child. The reality has proven that, in several cases, the father immediately after hastens to file a lawsuit to drop the custody, because in some situations, it is actually feared that the fostered child may be brought up with a non-mahram foreign person. In addition, in most other times, this is done for the purpose of disengaging oneself from paying the alimony of food expenses and rent.

As the legislator is well aware of this, and in order to guarantee the protection of the fostered child, he provided the judge with the discretionary power that allows him to assess the child's interest, based on some criteria upon which he can rely to build his judgment.

The present study attempts to answer the following research question: *To what extent is it permissible for a custodial mother to keep her child after her marriage to a non-mahram foreigner in*

*light of the discretionary power granted by the legislator to the judge in this regard?*

Indeed, the purpose of the present study is to deal with an important social issue in a legal manner that can certainly enlighten the reader's thought, whether this reader is legal or informed. This is the case of a foster mother who fears losing custody of her child after her new marriage, and thus she considers the option of customary (clandestine or unregistered) marriage in order to avoid that problem. The major purpose is to discuss the concepts and clarify the legal procedures with respect to the role of the effective judiciary through jurisprudence.

This study relies upon the descriptive and analytical methods in order to describe the concepts and analyze the legal texts as well as the operative rulings of the judicial decisions that are related to the problem under consideration.

## DROPPING CUSTODY DUE TO THE MARRIAGE OF THE CUSTODIAL MOTHER TO A NON-MAHRAM FOREIGNER

Custody is a term that derives from the Latin word *custodia* which means guarding, watching, or taking care of. The foster father or mother who is entrusted with the child is expected to raise him/her and protect him/her.<sup>4</sup> Legally, the Algerian legislator defined custody in Article 62 of the Family Code as follows:

*".....This is all about taking care of the child, teaching him/her, educating him/her according to the religious precepts and beliefs of his/her father, watching over his/her protection and preserving his/her health and morals. The custodian must be qualified for that".*

Likewise, in Article 64 of the same law, the legislator arranged those people who are worth of custody, starting with the mother, then the father, then the maternal grandmother, then the paternal grandmother, then the maternal aunt, then the paternal aunt, then the child's closest living relative,

1 *The Convention on the Rights of the Child* (1989), ratified by Algeria by virtue of Presidential Decree No. 92-41, dated 19/12/1992. The agreement approved foster care and considered it a means of alternative care.

2 Law No. 84-11 of June 9, 1984, including the Family Code, amended and supplemented by Decree No. 27 of February 2005.

3 Adel Aissaoui – The discretionary power of the judge in determining the interests of the fostered child in accordance with the jurisprudence of the Supreme Court – *Annals of the University of Algiers* 1, Volume 34, Issue 04, 2020, p. 163.

4 Muhammad Bejaq – *Considering the interests of the fostered child between jurisprudence requirements and judicial practice* – *Journal of Research and Studies*, Issue 17, 2014, p. 183.

while taking into account the interests of the fostered child.

On the comparative level, it was found that, in Indonesian law, the legislator had adopted two systems for Muslims. The age of differentiation is that of twelve. In fact, in Indonesia, custody is granted to the mother until the age of 12. Then, at that age, the foster child is empowered to choose his/her custodian. However, some exceptions may apply to granting custody to the father, even if the child is under 12 years old, or to the mother even when she is under punishment of deprivation of liberty or has an improper behavior.<sup>5</sup>

As for non-Muslims, the parents have the moral obligation to raise and care for children less than 18 years of age and those not married yet.<sup>6</sup>

The Algerian legislator framed custody invalidators or nullifiers. He considers that the marriage of the custodial mother with a non-mahram relative is one of them.<sup>7</sup> The reason for that is that it is generally feared that the custodial mother will be preoccupied rather with her foster child, while the non-mahram foreign husband does not take good care of the child, which is not the case for the mahram relative who has a certain family relationship with the child.<sup>8</sup>

The Algerian legislator followed the path of Islamic law. It was narrated that a woman said: *“O Messenger of God, this son of mine, my belly was for him a vessel, my lap was for him Eve, and my breasts were for him a waterskin. His father divorced me and claimed to take him away from me. Then, may God’s prayers and peace be upon him, said, ‘You have more right to him as long as you do not get married.’”*<sup>9</sup>

5 Dikko Ammar, Abdul Halim, Mahzaniar, and Halimatul Maryani – Implementation of Child Custody (Hadhanah) After Marriage Dissolution Due to Divorce (Juridical Analysis in Law Number 35 of 2014 concerning Child Protection and Compilation of Islamic Law), *Electronic Research Journal of Social Sciences and Humanities*, Vol. 3: Issue IV, Oct-Dec 2021, p. 35.

6 Republic of Indonesia – Law Number 1 of 1974 regarding Marriage, 1974.

7 Article 66 of the Algerian Family Code.

8 Hayat Maghari and Dalila Farkous – The Role of Jurisprudence in Protecting the Interests of the fostered Child – *Algerian Journal of Legal and Political Sciences*, Volume 58, Issue 04, 2021, p. 170.

9 Othman Al-Takrouri – Explaining the Personal Status Law at Dar Al-Fikr for Culture, Publishing and Distribution in Jordan, in 1990, p. 271.

The following gives a breakdown of the issues on which the claim for dropping custody in the Algerian law is based, as well as the discretionary power that is granted by the legislator to the judge regarding:

### 1.1. The case for dropping custody due to the marriage of the custodial mother to a non-mahram foreigner and its obligations

The right to custody is lost as soon as the custodial mother marries a non-mahram relative, as stipulated in Article 66 of the Algerian Family Code.

This ruling is derived from the Islamic law that several countries adopted in their national laws, including the Indonesian law which stipulated, in addition to that, other cases where child custody is dropped, like the punishment of deprivation of liberty.<sup>10</sup> It is worth noting that the Algerian legislator did not provide for this in the Family Code. However, the practical reality states that the judges in charge of the matter can assign custody to the person who is entitled to it when the divorced mother is sentenced to imprisonment after committing a crime. The mother's demand to regain custody of the child after being released is subject to the discretionary power of the judge who investigates the matter and builds his judgment in accordance with what is required by the interests of the fostered child.

Furthermore, it is worth emphasizing that the term custodial person does not automatically refer to the mother solely; it may refer to the grandmother, maternal aunt and paternal aunt in the event that custody is assigned to them. However, if they marry a non-mahram relative, custody is systematically dropped.

On the other hand, one has to note that the wording of Article 66 is devoid of the controls regarding the child's interests in the matter under study, which suggests that the marriage of the custodial person to a foreigner is absolutely inconsistent with the interests of the fostered child, and this is not true.

10 Farida Prihatini, Abdul Karim Munthe, Delila Stefanya Pusparani, Ali Sumihar – The Problem of the Execution of Child Custody (Hadhanah) – Decision by the The Religious Courts in Indonesia– *Journal of Syariah*, Jil. 27, Bil. 2 (2019), p. 305.

Nevertheless, in all cases, this cannot be considered as such because the legislator did not arrange the effect of losing custody by force of law in the event that the custodial mother gets married to a non-mahram relative. Rather, the custody loss would be based on a judicial ruling once the owner of the right to custody has submitted a claim for it. In this case, the judge will have the discretionary power to assess the matter.<sup>11</sup>

Based on the provisions of Article 426 regarding the Civil and Administrative Procedures Law,<sup>12</sup> the lawsuit to drop custody is supposed to be filed in the place where custody is exercised.

The plaintiff has to prove that:

- **The husband is a foreigner and is not a close relative** – This is done in accordance with the provisions of Article 66 of the Family Law and the principles of Islamic Law.
- **The marriage is well documented** – The fact is that the aforementioned provisions of Article 66 did not specify whether only customary or formal marriages are considered. Nevertheless, the jurisprudence in this regard ruled that the allegation about the marriage of the custodial mother must be confirmed with certainty, by means of a marriage contract for example, that has been established in accordance with the law in force. This means that a record that is withdrawn from the civil status registry office must prove that marriage. This is what is already being practiced in the courts.
- **The marriage is consummated with the custodial wife** – It must be noted that this case is not stipulated in the Family Code. However, the jurisprudence specified that when it ruled that the custody of a woman is conditioned by the fact that no husband has consummated the marriage with her. However, in that was the case, then he is forbidden to the custodial woman's house, and therefore the wife loses custody.<sup>13</sup>

11 Mohamed Haidara – Marriage of the foster mother in Islamic law and the Algerian Family Law – The Academia Journal of Social and Human Studies, Issue 20(June 2018), p. 196.

12 Law No. 09/08 of February 25, 2009, including the Code of Civil and Administrative Procedures – Official Gazette No. 21, issued on April 23, 2008, as amended and supplemented.

13 These judicial decisions were referred to by Mohamed

Furthermore, when the plaintiff proves the above, it is not possible to state with certainty that custody has been taken away from the mother and assigned to the husband because, in this case, the judge takes into account the interests of the foster child. These interests may be determined by the judge based on mechanisms that the law grants him the powers to use for that purpose.

## 1.2. Mechanisms for investigating the interests of the fostered child

When stipulating the parameters for assigning custody, the legislator considered that it was sufficient to refer only to the criteria that can help to achieve the interests of the child in custody, with the obligation to take care of him/her, teach him/her, and raise him/her in accordance with the religious precepts of his father, in addition to ensuring his protection. There is no need to give a specific definition for it, because its concept is flexible and can change when the temporal conditions vary. This concept may also change from one child to another.<sup>14</sup>

In a decision issued by the Supreme Court, the Personal Status Chamber ruled that the interests of the fostered child are assessed by the trial judge.<sup>15</sup> He can rely on several mechanisms in accordance with the general rules in the case of revocation of custody for the purpose of verifying the interests of the child under custody. The most prominent of these are:

- **Expertise** – This is intended as an investigative measure to obtain the necessary information from specialists, or to prove certain material facts that are the subject of a real or imminent dispute dealing with the material side and not with the legal one which is the prerogative of the judge alone.<sup>16</sup>

Haydara, *ibid.*, p. 196.

14 Boubaker Khalaf – *The interests of the fostered child – A comparative jurisprudence study* – Journal of Human Sciences, Issue 44 at Mohamed Kheidar University in the city of Biskra in Algeria (2016), p. 521.

15 A decision issued by the Supreme Court from the Personal Status Chamber, on 18-06-1991, File No. 75171. Unpublished.

16 Bousabeat Sawsan – *Protection of the fostered child between the unfairness of the legislative texts and the jurisprudence*

With regard to custody, the judge resorts to expertise by appointing a social worker to investigate the validity of the custody applicant to exercise it in accordance with the interests of the child in custody, not only through direct personal contact with that applicant, but also by assessing the place where the fostered child is going to live.<sup>17</sup> In this regard, it is worth citing the decision of the Supreme Court<sup>18</sup> that ruled that the trial judge must examine where the interests of the fostered child lie using various means, including the appointment of a social worker.

The judge may also request a medical examination to assess the physical or psychological condition of the fostered child.

- *Inspection* – The judge is expected to go to the place where the custody is practiced in order to assess the social milieu in which the fostered child lives. He can enquire about the type of neighborhood, state of the dwelling, proximity to school, and other issues through which he can determine or assess the interests of the fostered child. Based on the above, he can then make a sound judgment about the matter.<sup>19</sup>
- *Hearing witnesses* – The judge may seek the assistance of family members of the fostered child to collect the necessary information that enables him to base his judgment in accordance with what is needed for the interests of the fostered child.

Now, if the custody applicant argues that the mother married a non-mahram foreigner residing abroad, then the custody shall be forfeited. It is worth mentioning a judicial decision that was issued by the Supreme Court which ruled the loss of custody due to distance because the custodial mother resides in a foreign country without even being married, while the father's residency is in Algeria.<sup>20</sup>

Referring back to the text of Article 69 of the Family Law, one may find that the legislator once again granted the discretionary power, in this regard, to the judge according to what is required regarding the interests of the fostered child when the person entrusted with custody lives in a foreign country.

In the same context, and in another judicial decision that was issued by the Supreme Court concerning an unmarried mother residing in a foreign country, it was ruled that the judges of the Council had erred in applying the law when they assigned custody to the father because the custody was entitled to the mother who, after her divorce, gave birth in France and took care of her newborn, while the father did not oppose that, but only asked to drop the alimony. They considered that this did not violate the custody conditions that are stipulated in Article 62 of the Family Law.<sup>21</sup>

On the other hand, although the legislator provided the judge with several mechanisms to ascertain the interests of the fostered child, he, however, left the discretionary power to him. This allowed the judges, and even the courts, to resort to that discretionary power in completely different manners. This may lead to discrepancies in the rulings on the issue of dropping custody for the marriage of the custodial mother. It should be noted that, sometimes, the interests of the foster child are not taken into account and are completely neglected.

Furthermore, one has to mention that the defendant, who in this case is the custodial mother, can prove, in turn, that it is highly important to let the fostered child under her care, particularly when the child is too young or is an infant, and that taking him away from her may cause him psychological harm. She may also argue that the child has a disability or handicap that makes his custody difficult for anyone other than his mother.<sup>22</sup>

In addition, if the child goes to school, the mother can refer to his school results and highlight the good grades he gets, which indicates she

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*of the family affairs judge* – Journal of Human Sciences, Volume 31, Issue 04 – University of Mentouri Brothers in the city of Constantine in Algeria (2020), p. 246.

17 Ahmed Hiltali – Custody entitlement in the Algerian Legislation between Legal Text Arrangements and Granting Caveats – Journal of the Researcher for Legal and Political Studies, Issue 11 (September 2018), p. 376.

18 Decision issued by the Supreme Court from the Personal Status Chamber No. 337176, issued on 11/16/2005.

19 Bousabeat Sawsan – Previous reference, p. 247.

20 A decision issued by the Supreme Court from the Personal Status Chamber No. 237526, issued on 26/12/2001, and

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published in the Judicial Journal, Special Issue, 2001, p. 258.

21 Decision issued by the Supreme Court from the Personal Status Chamber No. 1302053, issued on 03/07/2019, published in the Judicial Journal Issue 02, 2019, p. 83.

22 Fawzi, Şuwar – Al-Haḍānahba'da al-ṭalāqfi Aceh al-Wuṣṭá – Indonesian Journal for Islamic Studies, volume 24, N 01(2017), p. 117.



is keen on his success and she is the only one who can take care of him in the best way.

Therefore, the discretionary power of the judge remains in all cases. Indeed, if he decides to keep the custody with the mother, then the father will be exempted from paying the rent dues. Nevertheless, if a judgment is issued to drop custody, then it will be assigned to the applicant, and the mother is then granted the right to visitation.

## 2. THE EXTENT TO WHICH CUSTODY CAN BE RECOVERED BY THE MOTHER AFTER HER DIVORCE FROM THE NON-MAHRAM FOREIGN HUSBAND OR FOLLOWING HIS DEATH

In fact, many cases have been raised regarding the custodial mother's recovery of custody of her child after her divorce from a non-mahram foreigner or following his death. This must obviously be proven by a divorce judgment issued by the court or by the husband's death certificate. Then, the mother files a lawsuit in order to restore her right to custody.<sup>23</sup> How permissible is that?

### 2.1. Disappearance of the reason for forfeiting custody

With reference to the provisions of the Algerian Family Code, and particularly in Article 71, it is asserted that the Algerian legislator provides for the possibility of returning the right to custody once the non-voluntary foregone reason has disappeared. In the sense of violation, this signifies that there are some optional reasons for which the right to custody cannot be recovered after its demise.

The lack of interpretation of that issue by the legislator engendered some ambiguity in the matter, which generally requires reference to the provisions of Islamic Sharia.

In this regard, the Maliki jurisprudence makes a distinction between the reasons for optional custody invalidators or nullifiers, as these reasons have a significant effect on the person's decision

to achieve it. Some of these reasons can be the marriage of the custodial mother or the relinquishment of custody.

However, the reasons for non-voluntary custody invalidators or nullifiers are those that are achieved without the person's will, such as illness or disability.<sup>24</sup>

Based on the aforementioned, one may wonder about the position of Algerian jurisprudence in this respect.

### 2.2. The position of the Algerian jurisprudence regarding the extent to which the mother can regain custody of her child

It is worth emphasizing that the judicial decisions issued by the Supreme Court, with regard to the interpretation of the non-voluntary reason, have varied.

In fact, this was previously considered as a non-voluntary reason for the divorce of the custodial mother from a non-mahram foreigner. In this case, the custody of the girl was assigned to her mother after she filed a lawsuit for the attribution of custody again, and the Supreme Court considered that the Council judges applied the law properly.<sup>25</sup>

By founding the decision on that, they would have made the distinction between the marriage of the custodial mother to a non-mahram relative as an involuntary dropout reason, and the relinquishment of custody, which is considered as a purely voluntary reason that prevents the mother from regaining custody after retracting from it.

Nevertheless, jurisprudence has recently been explicit in conditioning the marriage of a custodial mother to a non-mahram foreigner, among the optional reasons. It indeed ruled in a decision issued in 2017 that the principle is about returning custody once the non-optional reason has disappeared. Among these reasons, one may mention the sickness, temporary disability, or residence abroad for a legitimate reason.<sup>26</sup>

24 Ibid., p. 197.

25 Decision issued by the Supreme Court from the Personal Status Chamber No. 201336, issued on 21/07/1998.

26 Decision issued by the Supreme Court from the Personal Status Chamber No. 1067582, issued on 04/05/2017, and

23 Haidara Muhammad – Previous reference, p. 197.

## CONCLUSION

It is widely admitted that today child custody deals with a social fact that stems from the separation or disintegration of the family, whether through a divorce or the like. Its high-quality organization requires the drafting of legal texts that are related to all its aspects while ensuring the proper application of these texts.

In addition, the fact that the legislator gives the discretionary power to the judge to assess the interests of the child under custody is quite logical, because the facts related to the issue of custody raised here differ from one case to another. The judge must actually identify the interests of the fostered child through mechanisms that he is authorized to apply.

Based on the above, the following recommendations can therefore be proposed:

- The legislator should stipulate that the marriage that forfeits custody is the legal one that is clearly established in the civil status register;
- The legislator has to prevent jurisprudence

divergence in deciding about the issue of regaining custody after the divorce of the custodial mother from a non-mahram husband or his death, while taking into account the interests of the fostered child;

- The legislator should specify the date for calculating the year for the loss of custody for those who have the right to request it, as stipulated in Article 68 of the Family Law;
- A custodial mother who is married to a non-mahram relative must excuse the husband from changing the place of custody exercise so that he can exercise his right to visitation. Otherwise, she can be pursued based on the misdemeanor of deporting the fostered child and not handing him over to the one who has the right to do so, according to Article 328 of the amended and supplemented Penal Code;
- The Indonesian legislator must reconsider the issue of giving the fostered child to choose his custodian once he reaches the age of 12, because a 12 years old child does not have sufficient awareness that enables him to know his interest.

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