

Cases of Forfeiture of Maternal Child Custody (*Hadanah*) Under Algerian Family Law: A Comparative Juridical and Legislative Study

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Abstract

Under Islamic jurisprudence and codified personal status legislation, child custody (*hadanah*) is recognized primarily as a maternal prerogative grounded in profound affective, psychological, and physiological bonds. While a mother shares the general grounds for custody forfeiture with other eligible female custodians, Islamic jurisprudence (*Fiqh*) establishes notable exceptions where maternal custody remains protected even upon the occurrence of nominal disqualifiers, notably remarriage. Conversely, the Algerian legislature in the Family Code (Law No. 84-11, as amended by Ordinance No. 05-02) treats the best interests of the child (*maslahat al-mahdun*) as the sole operative statutory standard for granting, denying, or revoking custody—particularly upon a divorced mother's marriage to a non-prohibited stranger (*ajnabi ghayr mahram*). However, because the legislature left the concept of "the best interests of the child" undefined, judicial assessments often succumb to discretionary subjectivity and disparate interpretations. This study conducts a rigorous comparative analysis examining the substantive conditions of maternal custody eligibility, the grounds for its statutory and jurisprudential forfeiture, and the specific jurisprudential exceptions shielding the mother. Furthermore, it scrutinizes judicial standards governing the child's best interests, drawing insights from the Algerian Child Protection Act (Law No. 15-12). Finally, the paper articulates concrete legislative proposals to reform Article 66 and introduce

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Articles 66 bis and 66 bis 1 to reconcile child welfare with maternal dignity and social stability.

Keywords: Maternal Custody (*Hadanah*); Algerian Family Code; Forfeiture of Custody; Best Interests of the Child; Remarriage to a Stranger (*Ajnabi*); Islamic Jurisprudence (*Fiqh*); Child Protection Act.

Introduction

Among the most critical and delicate legal consequences arising from the dissolution of marriage is the determination of custody (*hadanah*) over children born of the union. The core challenges revolve around securing the welfare, physical protection, moral upbringing, and existential stability of minors against abandonment or neglect. Under Article 62 of the Algerian Family Code (Law No. 84-11, amended by Ordinance No. 05-02), custody is defined as:

"The nurturing, schooling, and upbringing of the child in the religion of their father, as well as the safeguarding of their physical health and moral development. The custodian must be legally qualified to fulfill these responsibilities." (Diabi, 2008; Kerval, 2013)

Classical Islamic jurisprudence firmly establishes that following spousal separation, maternal custody takes precedence over all other familial claims. This principle is codified in Article 64 of the Algerian Family Code, which unequivocally affirms: *"The mother is primarily entitled to the custody of her child..."*

Nonetheless, this intrinsic maternal right is perpetually vulnerable to legal revocation if the mother decides to enter into a second marriage, specifically when marrying a person who is not within the child's prohibited degrees of consanguinity (*ajnabi ghayr mahram*). This legal reality has engendered widespread apprehension among divorced mothers. Many are coerced into abstaining from remarriage out of terror of losing their children, while others resort to unregistered customary marriages (*zawaj 'urfi*) or face severe existential vulnerability. Women are often forced to choose between personal companionship and retaining custody of their offspring (Ammari, 2015; Hamidou, 2005).

Although the Algerian legislature introduced the best interests of the child as the foundational criterion for conferring or forfeiting custody, the application of Article 66 has prompted calls for legislative reform. Scholars, civil society, and legal practitioners continue to advocate for adjustments that respect Islamic jurisprudence while reflecting modern societal realities.

Significance and Objectives of the Study

The significance of this investigation stems from its focus on the biological mother as a unique custodial entity. The bond connecting a mother to her minor child transcends detached legal concepts of compassion; the child is an intrinsic part of her being. Treating the biological mother on an identical normative footing with collateral female custodians (e.g., grandmothers or aunts) represents a systemic

mischaracterization of motherhood. Hence, establishing specific statutory provisions for maternal custody is essential.

This study aims to provide concrete legislative proposals for reforming the Algerian Family Code by:

1. Delineating the substantive eligibility criteria governing maternal custody and establishing the jurisprudential basis of maternal priority.
2. Identifying specific jurisprudential exceptions where maternal custody persists despite remarriage to a non-prohibited stranger, leading to proposed statutory amendments for Article 66.
3. Scrutinizing the concept of the best interests of the child (*maslahat al-mahdun*) to provide objective parameters that constrain unguided judicial discretion.

Research Questions and Problem Statement

This investigation addresses the following overarching legal inquiry:

Under what specific circumstances is maternal custody forfeited under the Algerian Family Code compared to classical Islamic jurisprudence? Furthermore, what substantive criteria and judicial standards must guide family court judges in determining the best interests of the child?

To address this inquiry, the study is structured across three core analytical axes:

- **Axis I:** Conditions of Custody Eligibility and Maternal Priority.
- **Axis II:** Grounds for Forfeiture of Maternal Custody and Remarriage Jurisprudence.
- **Axis III:** The Doctrine of the Best Interests of the Child and Judicial Standards.

Axis I: Conditions of Custody Eligibility and Maternal Priority

Section 1: Conditions Governing Maternal Custodial Capacity

Custodial capacity requires that the custodian possess the cognitive, moral, and physical ability to fulfill the duties of child-rearing. If any essential condition is compromised, custody lapses. Classical jurists and contemporary statutory codes establish four fundamental prerequisites (Badran, 1961; Sabiq, 2008):

1. **Mental Capacity (*Al-'Aql*):** The custodian must possess full legal capacity and cognitive soundness. Custody is legally void for individuals afflicted by insanity, cognitive deficiency, or chronic mental incapacitation.
2. **Physical and Pedagogical Capability (*Al-Qudrah 'ala al-Tarbiyah*):** The custodian must be physically and logistically capable of attending to the child's daily needs. Custody is withheld from individuals with severe visual impairment, chronic debilitating illness, contagious diseases,

advanced age-related frailty, or chronic domestic neglect.

3. **Moral Integrity and Trustworthiness (*Al-Amanah wa-al-Khuluq*):** The mother must demonstrate uncompromised moral character and behavioral reliability, ensuring the child is not exposed to ethical corruption or endangerment.
4. **Religious Harmony (*Al-Islam*):** Classical majority opinion maintains that a non-Muslim female custodian cannot exercise custody over a Muslim minor, because custody involves guardianship (*wilayah*), and non-believers hold no legal guardianship over Muslims. However, Hanafi jurists, Ibn al-Qasim from the Maliki school, and Abu Thawr held that custody remains valid despite differences in religion during early childhood, since custody primarily concerns nursing, physical sustenance, and basic care rather than ideological indoctrination (Abu Zahrah, n.d.; Al-Bahuti, 1983).

Section 2: The Juridical Basis of Maternal Priority

In Islamic jurisprudence, custody is entrusted primarily to women due to their patience, instinctive tenderness, and innate aptitude for nurturing young children. However, female relatives are ranked hierarchically based on proximity of kinship, affection, and capacity to nurture. The biological mother holds uncontested primacy.

This primacy is grounded in sound Prophetic tradition. As recorded in the *Sunan* of Abu Dawud on the authority of Abdullah ibn Amr ibn al-Aas:

A woman came before the Messenger of Allah (peace be upon him) and pleaded: "O Messenger of Allah, indeed my womb was a vessel for this son of mine, my lap was a shelter for him, and my breast was a waterskin for him. Yet his father has divorced me and intends to wrest him away from me." Thereupon, the Messenger of Allah (peace be upon him) declared: "You possess greater right to him, so long as you do not marry." (Abu Dawud, Book of Divorce, Chapter: Who Holds Greater Right to the Child; Ibn Hazm, 2003, Vol. 10)

Axis II: Forfeiture of Maternal Custody and the Impact of Remarriage

Under the Algerian legal framework, maternal custody is subject to forfeiture under two principal circumstances: the failure to maintain core statutory requirements under Article 62, or voluntary surrender and remarriage as regulated under Article 66.

1. Remarriage to a Non-Prohibited Stranger (*Ajnabi Ghayr Mahram*)

Islamic jurists diverged significantly regarding whether a mother's remarriage to a stranger constitutes an absolute or qualified bar to custody. Their arguments coalesce around three distinct doctrines:

The First Trend: Absolute Forfeiture (The Majority View)

The majority of classical jurists (Hanafis, Malikis, Shafi'is, and Hanbalis) maintain that maternal custody

lapses upon marriage to a man unrelated to the child within prohibited degrees, regardless of whether the ward is male or female (Al-Hasuqi, n.d.). They rely on the Prophetic condition: *"You possess greater right to him, so long as you do not marry."* They also cite the judicial precedent of Caliph Abu Bakr al-Siddiq, who awarded custody of Asim ibn Umar to his mother after Umar divorced her, observing in the presence of the Companions: *"Her saliva is better for him than your honey, O Umar, so long as she does not marry"* (Ibn Hazm, 2003).

The Second Trend: Non-Forfeiture (Al-Hasan al-Basri and the Zahiri School)

Prominent scholars, notably Al-Hasan al-Basri and Ibn Hazm al-Zahiri, held that maternal custody does not lapse upon remarriage under any circumstances. They assert that the mother retains priority until the child attains puberty or discretion, provided she maintains moral integrity. Ibn Hazm supported this position through Anas ibn Malik's account of entering the Prophet's service while under the custody of his mother, Umm Sulaym, who was married to Abu Talha (a non-relative) with the explicit approval of the Prophet (Ibn Hazm, 2003). Similarly, Ibn al-Qayyim highlighted that the Prophet granted custody of Hamza's orphaned daughter to her maternal aunt while she was married to Ja'far ibn Abi Talib, demonstrating that marriage in itself is not an absolute bar to custody (Al-Zaidi, 2011).

The Third Trend: Qualified Non-Forfeiture (Conditional Exceptions)

This jurisprudential orientation identifies specific exceptions where maternal custody remains protected despite marriage to a non-prohibited stranger:

- **Custody Over Young Female Wards:** Imam Ahmad ibn Hanbal differentiated between male and female minors, holding that while a young boy may be reassigned, a young girl remains with her mother up to the age of seven despite remarriage, drawing upon the precedent of Hamza's daughter (Al-Bahuti, 1983).
- **Stepfather as Legal Representative:** If the stepfather serves as the child's legal guardian (*nasi* or *muqaddam*), custody remains with the household by consensus.
- **Mutual Spousal and Parental Agreement:** If the biological father and the mother agree that the children will remain in maternal custody, and the new husband consents, custody is legally sustained. As Ibn al-Qayyim noted: *"There is no doubt that it is not prohibited for a married woman to retain custody of her child if she, her new husband, and the child's relatives mutually consent"* (Sabiq, 2008).

2. Synthesis and Reinterpretation Under Algerian Family Law

These diverse opinions reveal that classical jurists ultimately anchored their reasoning to child welfare. Those advocating forfeiture feared that an unrelated stepfather might treat the child harshly, while those permitting continued custody prioritized the biological mother's nurturing bond.

Article 66 of the Algerian Family Code provides:

"The right to custody is forfeited upon marriage to a person who is not within the prohibited degrees of kinship to the child, and upon voluntary waiver, provided that such forfeiture does not prejudice the best interests of the child."
(Ben Chouikh, 2008)

By granting judges wide discretionary authority to evaluate the child's best interests without defining the term, the statute has introduced judicial unpredictability. In practice, many family courts rule mechanically in favor of the biological father upon proof of maternal remarriage, effectively penalizing women for remarrying (Hamidou, 2005). To align codified law with Islamic principles and social stability, the legislature should incorporate specific statutory exceptions. We propose enacting an explicit provision, designated as **Article 66 bis**:

Proposed Article 66 bis:

"Maternal custody shall not be forfeited upon marriage to a person who is not within the prohibited degrees of kinship to the child in the following circumstances:

- 1. If the child is under the age of ten (10) years, or if separation from the mother causes verified psychological or physical harm.*
- 2. If the new husband is the legally appointed guardian (wasi or muqaddam) of the child.*
- 3. If an explicit agreement is established between the biological parents granting custody to the mother, with the formal consent of the new husband.*

In such cases, the biological father shall be exempted from providing custodial housing, while remaining fully obligated to provide child maintenance (nafaqah)."

The proposed ten-year threshold harmonizes with the Shafi'i doctrine of early child development and aligns with Article 56, Paragraph 1, of the Algerian Child Protection Act (Law No. 15-12), which exempts children under ten years from criminal prosecution due to incomplete developmental discernment.

Furthermore, when a biological father passes away, custody should remain with the mother despite her remarriage, provided her new husband formally commits before the family judiciary to care for the minor. As jurist Rachid Ben Chouikh (2008) observed, this arrangement integrates smoothly with statutory legal sponsorship (*kafalāh*) under Articles 116–125 of the Family Code. Accordingly, we propose **Article 66 bis 1**:

Proposed Article 66 bis 1:

"In the event of the father's decease, the family court judge may confirm maternal custody notwithstanding the mother's marriage to a person who is not within the prohibited degrees of kinship, on condition that the new husband executes a formal judicial undertaking to care for and nurture the minor in the manner of a responsible parent."

3. Voluntary Waiver of Custody (*Al-Tanazul*)

The Algerian legislature treats custody as an individual right that a custodian may waive, subject to child protection constraints. Any waiver that threatens the child's safety or well-being is void. For example, if a mother waives custody over an infant requiring maternal breastfeeding, the court must reject the waiver. This doctrine was established by the Supreme Court of Algeria in Decision No. 176140 (dated April 21, 1998):

"It is legally established that a waiver of custody is disregarded if it prejudices the child's interests. Therefore, when trial judges awarded custody to the mother despite her prior waiver, giving primacy to the child's best interests, they applied the law correctly." (Judicial Magazine, 2006; Supreme Court, 1998)

Axis III: The Doctrine of the Best Interests of the Child

Within Articles 62 through 72 of the Algerian Family Code, the legislature designates child welfare as the primary standard governing custody disputes, explicitly referencing it across five separate articles. However, the Code provides no statutory definition of the concept.

Section 1: Conceptual and Juridical Definition

In Islamic jurisprudence, the child's best interests are grounded in the higher objectives of Islamic law (*Maqasid al-Shari'ah*), specifically the preservation of religion, life, intellect, lineage, and property. Custody is defined as the holistic nurturing, moral guidance, and physical protection of a dependent minor.

The absence of a statutory definition in the Family Code creates the risk of inconsistent judicial rulings. Because judges are human and subject to subjective outlooks, leaving child welfare undefined can lead to outcomes driven by personal discretion rather than clear legal standards (Hamidou, 2005). Establishing objective statutory criteria is therefore essential.

Section 2: Criteria for Assessing the Child's Best Interests

Judicial assessments should be structured around two interconnected categories: moral-psychological factors and material-environmental factors.

1. Moral, Psychological, and Social Factors

- **Psychological Stability and Maternal Bonding:** Child development and psychiatric literature confirm that early emotional bonds with the mother are vital for balanced personality formation. Abrupt separation from the primary maternal figure frequently induces severe anxiety and emotional distress. Judges must consider psychological assessments, as underscored by the Algerian Supreme Court in its decision of July 13, 2005: *"Upholding a ruling awarding custody to the grandmother without evaluating the child's interests and without addressing pleadings concerning the child's mental*

state and social inquiry reports constitutes insufficient reasoning."

- **Health, Safety, and Environmental Stability:** The custodian must provide a stable domestic environment, adequate healthcare, and protection from physical abuse or neglect.

2. Material and Financial Factors

Custodial care requires adequate living arrangements, nutrition, clothing, and access to education. While financial maintenance (*nafaqah*) and housing remain legal obligations of the biological father under Algerian law, material stability becomes an important comparative factor if the father is deceased or indigent.

The enactment of Law No. 15-12 of July 15, 2015 (The Child Protection Act) provides a useful model. Article 7 of Law No. 15-12 provides:

"The best interests of the child shall be the primary consideration in all judicial, administrative, or protective measures taken concerning them. Assessment of these interests shall account for the child's gender, age, health status, psychological, educational, affective, and physical needs, familial environment, and all related personal circumstances."

To bring consistent criteria to family proceedings, we propose incorporating an analogous standard into the Family Code via an amendment to Article 64:

Proposed Supplementary Clause for Article 64:

"A child shall not be separated from their parents, particularly the mother, except where their best interests strictly require such separation. In assessing the child's best interests, the court shall consider the child's age, gender, physical and mental health, emotional and educational needs, and familial environment, based on a mandatory social inquiry report."

Conclusion

Maternal custody represents an essential pillar of child protection following marital breakdown. Across centuries of Islamic jurisprudence, maternal priority has been grounded in maternal affection and developmental necessity. While the current Algerian Family Code recognizes maternal priority in principle, its provisions on maternal remarriage (Article 66) and the undefined standard of "the child's best interests" have created significant legal insecurity for divorced mothers.

The findings and recommendations of this study are summarized as follows:

1. **Recognizing Maternal Primacy:** The legislature should distinguish the biological mother from other female relatives by creating dedicated statutory protections for maternal custody.
2. **Codifying Exceptions to Remarriage Forfeiture:** Drawing on classical jurisprudence (notably Hanbali, Shafi'i, and Zahiri doctrines), the legislature should enact proposed **Article 66 bis** to

maintain maternal custody where the child is under ten years of age, where parental consent is established, or where the stepfather is the child's legal guardian.

3. **Regulating Paternal Decease:** Under proposed **Article 66 bis 1**, upon the biological father's death, the mother should retain custody despite remarriage if her new husband executes a formal judicial undertaking of care.
4. **Standardizing the Best Interests Criteria:** To eliminate subjective judicial determinations, the Family Code should incorporate objective assessment factors modeled after Article 7 of Law No. 15-12, supported by mandatory social and psychological inquiry reports.

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