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Cruel complications

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over custody when mixed marriages crumble

by Chibli Mallat
Law editor

If two Druze marry in Lebanon, they marry according to Druze custom and personal law. If two Shias marry, they marry under Shia family law. But what happens if a Druze marries a Shia? And what happens if they later want to separate? What happens to the children?

Very complex legal issues and problems can result from so-called mixed, or inter-marriages: marriages between a man and a woman who belong to different countries, or different religions, or different communities within one religion, or different schools of law, as is the case within Islam.

Mixed marriages touch upon a raw nerve in the public sphere, especially in the Middle East. In the repeated discussions on the impossibility of 'civil marriage' in Lebanon, the issue becomes rapidly fraught with political overtones.

Nor is Lebanon special in this case. In Iraq, for instance, the norm used to be that Iraqi Shi'is would not marry Iraqi Sunnis (and vice-versa), and that Iraqi Kurds would not be married to Iraqi Arabs. This changed slowly in the course of the century. Increased inter-communitarian marriage, as Hanna Batatu showed in his masterful book on *The Old Social Classes and the Revolutionary Movements in Iraq* (Princeton University Press 1978), was a sign in the 1950s that Iraq was becoming a more integrated country.

Today's law page examines some live issues of mixed marriages in the Middle East, focusing on custody of the children in mixed unions which fall apart. The case investigated by *Reem Haddad* expresses some of the most cruel dimensions imposed by legal systems and procedures on an inter-state and inter-community marriage.

Because he is Lebanese and his wife is American, a father is denied access to his three-year old son, who was taken to the US by his mother.

The case reported from the United Arab Emirates shows another angle to a similar problem, which concerns custody over a child whose parents belong to different nationalities, but who are both Muslim.

Basem Ajami explains the importance in this context of different Sunni schools of law in cases of custody in the Gulf, and the law report shows a unique jurisprudential development in the United Arab Emirates, where the law of a foreign father is applied to a domestic case in Dubai. This is a rare instance of intermarriage involving Muslims from different schools of law in an international context.

Had the Court of Cassation of Dubai applied the Malaki law of the land, the daughter over whom guardianship is disputed would have remained under the custody of her mother until marriage.

Also included is a decision pronounced last week on a related case by the House of Lords, the highest court in Britain. The case is particularly relevant for Lebanon and the Arab and Muslim world, as Jewish law as applied in Israel is close in matters of custody to Islamic law as applied in the region.

The opening sentence of Lord Browne-Wilkinson will sound particularly relevant to the Faouz case.

"In this appeal three young children were removed by their mother, the respondent, from their home in Israel and brought to England without the consent of the appellant, their father.

"Some six months after the date of such removal, the father applied to the courts in England for an order directing the summary return of the children to Israel under the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

"Under the convention, the English court was bound to order such summary return unless the father had 'acquiesced' in the removal of the children."

The trial judge, Sumner, held that the father had not so acquiesced. The Court of Appeal reversed that decision, holding that the father had acquiesced.

In November 1996 the House of Lords, Britain's highest court, reversed the decision of the Court of Appeal, and ordered the immediate return of the children to their father in Israel.

Earlier this month, the written 'reasons' for the decision were published.

British ruling: Lord Browne-Wilkinson

House of Lords
In *re H and others (minors)*
April 10, 1997

In the present case, therefore, the following points had to be considered and determined by the English court:

1. Whether the father had rights of custody in Israel: Article 3. This was admitted by the mother.

2. Whether the children were habitually resident in Israel: Article 4. The burden of so proving was on the father. The point was disputed by the mother but the judge held them to be so resident and there was no appeal on this point.

3. Whether the father had consented to the removal of the children from Israel, the burden of proof being on the mother: Article 13. The mother did not contend before the judge that the father had consented to the removal of the children.

4. Whether the father had acquiesced in the removal or retention of the children, the burden of proof being on the mother: Article 13. If he had not so acquiesced, the judge was bound by Article 12 to order the summary return of the children to Israel. The mother alleged that the father had acquiesced in the removal of the children. The judge held that he had not.

5. If, contrary to the judge's finding, the father had acquiesced in the removal of the children, under Article 13 the judge, although not bound to order their summary return, had a discretion whether or not to do so....

In my view the applicable principles are as follows:

1. For the purposes of Article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said in *In re S. (Minors)* "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact".

2. The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.

3. The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.

> The mother, as an Orthodox Jew, must have known of the requirement to go first to religious court

4. There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced....

Applying that approach to the present case, the judge found that in fact the father never acquiesced in the retention of the children in this country.... The question therefore is whether this was one of those exceptional cases when, by his actions, the father has led the mother reasonably to believe that, contrary to the father's true intentions, he was not seeking the summary return of the children.

In order to bring this case within the exception, the mother would have to show that the father's actions were clearly and unequivocally inconsistent with his pursuit of his summary remedy under the convention.

The facts are far from satisfying that test.

As to the father's recourse to the Beth Din [which is the competent religious court in Israel], the mother as an Orthodox Jew must have known of the religious requirement to go first to the Beth Din before resorting to the other courts with the consent of the Beth Din.

Moreover, the exact nature of the proceedings in the Beth Din was not demonstrated. If (improbably) the Beth Din proceedings related only to the marriage and not to the children, there is no inconsistency between the Beth Din proceedings and the right to the summary return of the children: they would be concerned with different matters.

If, as was not proved, the Beth Din proceedings related also to the children, they do not disclose anything other than that the father, as his faith required, was seeking to secure the decision of his religious court in Israel as to the future of the children.

There is nothing inconsistent in a wronged father pursuing remedies in the courts of habitual residence (whether religious or civil) and subsequent recourse to the convention for the summary return of the children by the courts of the country to which the child has been abducted.

The judge [in first instance] reached the only possible conclusion, bearing in mind his finding that the father never in fact acquiesced in the removal of the children.

In my judgment, for the reasons I have given the Court of Appeal misdirected itself in law.

It is for these reasons that I joined with your lordships in allowing the appeal and ordering the summary return of the children to Israel."

The opinion of the court was written by Lord Browne-Wilkinson. Lord Jauncey of Tullichettle, Lord Mustill, Lord Hoffmann, Lord Clyde, concurred in reversing the decision of the Court of Appeal.
To read the full reported case on the internet, which is available within two hours from issue by the House of Lords, you can go to www.parliament.the-stationery-office.co.uk

Dubai ruling: Dr Mustafa Kira

Court of Cassation of Dubai
President Dr Mustafa Kira; members 'Abd al-Baqi al-Sayf Nasr; Dr 'Ali Ibrahim al-Imam; Muhammad Ibn Mustafa al-Khalidi
Judgment pronounced 1 Ramadan 1417/January 21, 1997

It appears from the judgment against which cassation is sought, and from related documents, that the respondent in cassation had brought a case in the court of first instance in Dubai asking the removal of the right of custody from the appellant over their daughter. The plaintiff is a Lebanese national, and had contracted a marriage in Lebanon with the appellant, who presently holds custody over the daughter born on June 10, 1986.

The daughter has reached nine years of age, and, according to Article 391 of the law on personal status in application in Lebanon, which is the country of the two parties, the law which must be applied is the law of the husband following Article 13 from the law of civil procedure of 1985.

Custody [the plaintiff/respondent argued], is among the personal effects of the contract of marriage.

On April 24, 1995, the court of first instance decreed the revocation of the mother's custody and the surrender of the daughter to her father. The mother lodged an appeal, and on June 24, 1995, the court of appeal rejected the appeal.

[The mother] brought the case to the present Court of Cassation on July 15, 1995, arguing that the appeal decision was void because it had considered custody as one of the effects of marriage and was subject to the law of the husband on the basis of Article 13 of the law of civil procedure, whereas that article is limited to the formation of the marriage contract and pertains to its object, form and the personal and financial relations between the spouses, and to the procedure related to divorce and separation...

Custody was not part of the aforementioned article, [she argued], but is subject to Article 16 of that law, which states that "objective questions which are specific to guardianship and custody and other regulations in place for the protection of the incapable, minor or absent, are subject to the law of the protected person"...

> The Lebanese father is a bachelor and goes out to work and no one looks after the girl in his absence

Since the protected person holds both Lebanese and American citizenship, and resides permanently in the United Arab Emirates, then the law to be applied is the law of the country in which she resides, so as to avoid the conflict between American and Lebanese law.

The appeal judgment [she further argued] is therefore groundless, ... since it applies Lebanese law, which ends the mother's custody when the girl is nine.

The judgment did not examine the ability of the father to take over custody of the minor girl, and did not pay attention to the girl's best interests, nor did it examine who will look after the daughter and protect her in his absence, especially since he is a bachelor and goes out to work and no one looks after the girl in his absence....

This argument is to be rejected [the Court of Cassation concluded], since Article 16 is not relevant to decide the rule upon which custody is decided.

It is therefore necessary to go back to the general rules in this respect, and to apply the law of the country to which belongs the person requesting custody... That law also regulates legal filiation and personal guardianship.

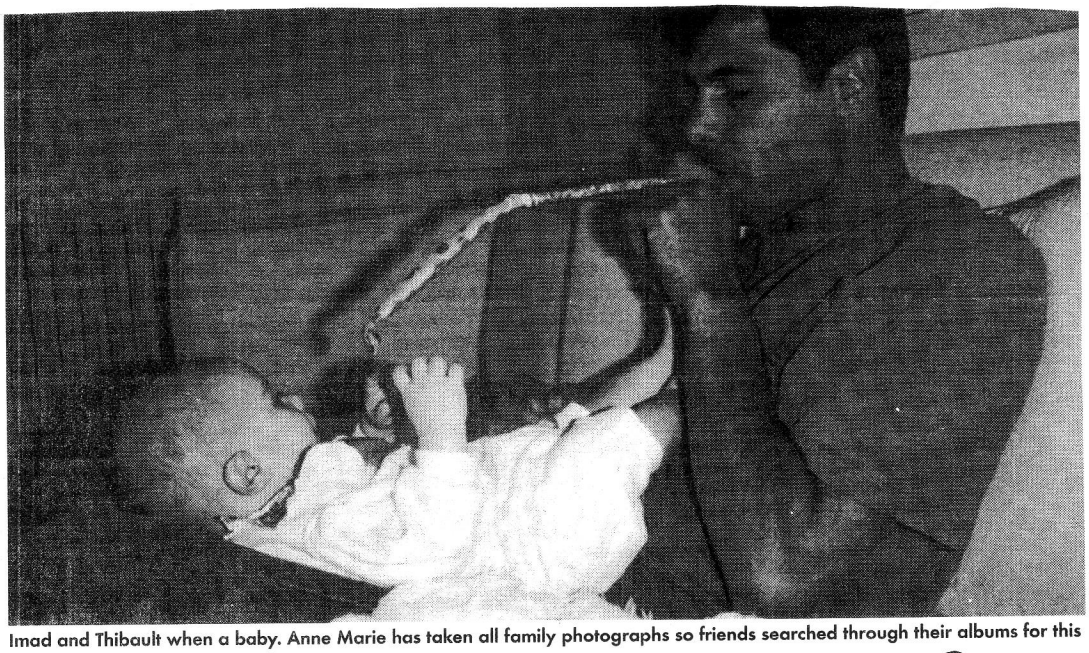
Since there is no doubt that the respondent [the father] is Lebanese, and since Lebanese law as documented in the file allows the father to be united with his daughter when she is nine, the attacked decision is correct in law. The Court of Cassation may correct a mistake in law, but the appeal's argument that the protected daughter holds both American and Lebanese citizenship, and that the court did not examine the ability of the father to exercise his guardianship properly cannot be accepted.

The present court is well established in rejecting the defence argument, which is mixed with fact and which has not been previously presented to the trial court. Such defence cannot be produced for the first time before the Court Cassation.

The appellant in cassation did not produce the argument before the trial court for that court to examine it in the light of the facts surrounding the case.

Its presentation for the first time before the Court of Cassation is therefore not accepted.

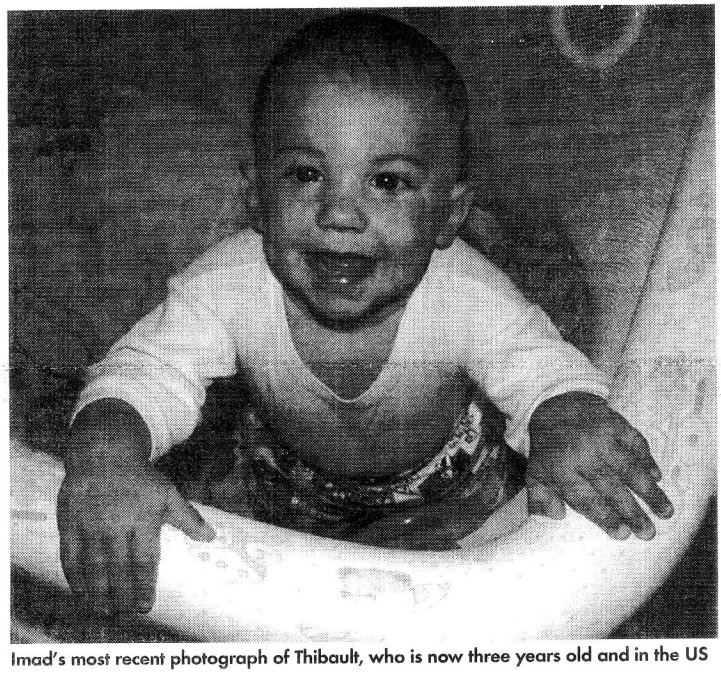
Upon which, the court rejects the appeal and requests the appellant in cassation to pay costs and 300 dirham in attorney fees...



Imad and Thibault when a baby. Anne Marie has taken all family photographs so friends searched through their albums for this

Son taken by wife

by Reem Haddad
Daily Star staff



Imad's most recent photograph of Thibault, who is now three years old and in the US

What would you do if your wife takes your child, says she is going on a holiday and disappears without a trace? This is the question that architect Imad Faouz, 31, has gone hoarse asking both the Lebanese and US authorities. Last year his American wife Anne Marie, 29, and three-year-old son, Thibault, went to the US and never came back.

The couple had met in 1991 in Paris and moved to Aleya'at, Lebanon a year later where Anne gave birth to Thibault.

Problems began to surface when the new parents went to the American Embassy in Syria to seek a passport for their son. There, Imad, discovered that Anne Marie was – and still is – married to a Frenchman residing in New York. She claimed that the union had been merely to allow her to gain the 'green card' needed to work in the US. Two months later, she went to the US with Thibault, for a four week stay, to visit her parents.

When Imad called her a few days later, she told him that she was not returning to Lebanon. "I didn't believe her," recalls Imad. "I really thought she was only joking."

So he called her again, the next day, only to discover that the phone line had been disconnected. When he called her other family members, they claimed not to know her.

He soon discovered that her departure was carefully planned: she had taken their marriage licence, the boy's birth certificate and school papers. Every single picture that she or Thibault appeared in was gone as were her clothes, with the exception of a few unwanted outfits.

"It's like she wanted to leave nothing behind that showed she was ever in Lebanon," says Imad.

To add credibility to her departure, Anne Marie had asked all family members and friends to make a list of items they requested from the US.

"She even went to the extent of insisting that I do not buy a Swatch watch for my niece, because she would buy one from Switzerland's airport on her way back."

He admits to having some problems in their marriage, "like all marriages."

But he does not want anyone to think she left because he harmed her in any way. "I never hit her, or abused her in any way. If that were the case, I wouldn't have willingly just let her take my son and go."

Anne Marie did, however, express to an American friend (who prefers to remain anonymous) that she disliked Lebanon, thought it was a "boring mess" and yearned for "civilisation".

Whatever the reason, Anne-Marie left for her mother's house in South Carolina. Desperate, Imad contacted a lawyer in the US but even, he couldn't locate Anne Marie: she had apparently moved from the state leaving no return address. The lawyer hired a private investigator – and again came up against a brick wall.

"Whether those two have done their job well, I have no way of telling," says Imad. "I have never been to America and don't know much about it. They ask for money and I wire it to them."

Finally, he decided to go to the US and see for himself what is happening. But his plans were forcefully dropped when the American embassy in Syria denied him a visa.

"I still don't understand why," he says. "They think I am going to take up residence there. Well, if I wanted to do that I would have obtained a green card from Anne Marie but I didn't because I never had any intention of leaving here."

When *The Daily Star* contacted the American embassy in Awkar, it was informed that it "had no comment on this issue."

Unsure where to turn, Imad sought the advise of the ministry for foreign affairs which, in turn, sent a letter to the Lebanese embassy in Washington DC, requesting that Anne-Marie face trial in Lebanon. The letter was returned, unopened.

There is nothing more that the ministry can do, says spokesman Khaled Kilani.

"As long the father consented to let his wife and son leave the country," he says, "then it is no longer a Lebanese matter but an American one."

Today, Imad resides in Beirut, because memories of Anne Marie and Thibault' haunt him in the Aleya'at home they shared.

"That first night, I stayed up all night just staring at my son's room, " he says tearfully.

"I kept feeling that he's somewhere in the house and I will soon take him to school. I couldn't take it so I locked up the house as it is and moved to the city."

In the beginning, his one thought was to bring his son back. But now, he has not even been able to see him.

"I know that a court might award her custody because he's so young," he says.

"But he has to know that he has a father. I don't want him to be told that his father is dead or doesn't care."

Islamic personal law dependent on different schools and codes

by Bassem Ajami
Special to The Daily Star

Islam expresses itself best in its law. Monotheism, the cornerstone of the faith, is certainly not unique to Islam, and its political history illustrates lengthy periods of turmoil and confusion within Islamic communities.

While, since the middle of the seventh century, Muslims yearned for political unity, they always found bonding in a consistency of laws that regulated their societies. In the late ninth century, for example, a Muslim could travel from Cordoba, where the Umayyads ruled, to Baghdad, the seat of the Abbasid Caliphate, and still conduct his affairs under customary judicial principles. The main reason for this was that Islamic law developed not around localities but around personalities.

Nonetheless, ancient schools of law were identified according to certain geographical designations, such as the Kufans, the Medinans and the Syrians. Yet such designations only lasted until the early part of the eighth century, when individual scholars began to sway Islamic thought.

Islamic law evolved out of open debate. A school of law, also known as madhhab, is technically an opinion that must be tested against an opposing opinion in order to survive. No madhhab can be traced to a specific date as to its establishment or disappearance. This is because the foundation of schools of law depended not on a particular act but on the continued presence of advocates who were willing and capable of defending it against opposing opinions.

Moreover, it is interesting to note that rulers usually remained aloof from such debates. This, however, was more out of expediency than out of tolerance. It was politically unwise for a ruler to risk his standing by favouring a particular school of thought, knowing the limits of his influence on the survivability of one medhab or another.

By the ninth century, four schools of law had survived in Sunni Islam: The Shafi'i, Hanbali, Hanafi and Maliki. They were named after celebrated reflective thinkers who lived between the seventh and the eighth centuries.

This remained the case until the early 19th century, when Western methods began to influence Islamic communities, sparking a heated debate throughout the Muslim world as to the merit of an ancient set of rules in a modernised environment.

The debate rages to this day, and it has increased in intensity with the proliferation of Islamic states following the collapse of the Ottoman empire. However, while most such states have incorporated Western codes into their legal systems, with the exception of Turkey, Islamic law remains a vital source of legislation in all the Islamic countries.

In the case of the United Arab Emirates, it is important to note that two emerates, Dubai and Abu Dhabi follow the Maliki school of law for the application of domestic family law. This is crucial to understanding the Dubai law report (left), as the judiciary has deferred in the case to Hanafi law, which regulates, generally, the law of Lebanese Sunnis.

There is an effort that is championed by the Arab League to establish a unified family law that would apply to all the Arab countries – as inter-marriages between citizens of different Arab states have created a serious confusion as to which family law should regulate the marriage.

While the variations in the four Sunni schools of law are insignificant to the layman, they are magnified when such laws are tested to the limit, as is often the case when a marriage collapses.