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### Judges in a web of normative orders: judicial practices at the Court of First Instance Tunis in the field of divorce law

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## **Chapter six**

### **The consequences of divorce when children are involved**

A hot Wednesday morning in the summer of 2009. The Family Judge for endangered children at the CFI Tunis receives a 13-year-old girl named Fathiyya and her mother. The judge invites them to tell their story. The mother begins: she was married to Fathiyya's father, a man of Tunisian origin with double nationality (Tunisian and French), with whom she has one child, Fathiyya. They lived together in Paris, until the couple got divorced, and the mother was granted custody over Fathiyya. The man continued to live near mother and child, and they saw each other often; the mother even maintained him financially as he did not have a job. Fathiyya spent every summer with her father and their family in Zarzis, a small provincial town in the south of Tunisia, near Jerba.

At the end of the summer of 2008, a few days before school began in Paris, her father took away Fathiyya's French passport. According to Fathiyya, her father had told her that she would stay with her grandmother, and he took off to France. During the next months, while Fathiyya's mother tried to get her back to France, the girl lived with her old and senile grandmother, who did not prepare her food nor did she give her any clothing for the winter. In this period, Fathiyya did not see her father once. After five months, the mother quit her job and moved to Tunisia to live with her daughter in Carthage (Tunis) – the father was still living in Paris.

At the session of the Family Judge, Fathiyya and her mother were represented by Mrs Radhia Nasraoui, an internationally famous human rights lawyer who is the president of an anti-torture organisation. Nasraoui asked a provisional (24 Hours) measure, enabling mother and daughter to return to France together. Nasraoui was desperate: 'How could this situation occur?' She exclaimed. 'This child does not even speak Tunisian! She has lived all her life in France!' The Judge asked Fathiyya if she wanted to go back to France. 'Yes', the child replied. 'Why?', the judge asked, 'Don't you like it here in Tunisia?'. 'No, not really, I like France better, because my friends are there', the child replied. The judge, probably intending to console

the girl, said 'Well, when I was in France last year, I was very unhappy and extremely homesick. I don't like France at all'.

The Judge deliberated with the representative of the Children Protection Service. The representative advised negatively. He argued that because the child had the Tunisian nationality (she was a double national), she should grow up in Tunisia. If they would grant a provisional measure, the child would leave Tunisia and never come back. The Judge followed the representative's advise and rejected the demand.<sup>677</sup>

This chapter examines judicial practice in the field of custody, visiting rights, child maintenance and housing of the caretaker after divorce. The material consists of 44 divorce decisions issued by the two Family Chambers of the CFI Tunis in which (minor) children were involved, as well as the observation of reconciliation sessions between October 2008 and September 2009 and interviews with the two Family Judges in the same period. The material with regard to the amendment of custody-arrangements in cases where the plaintiff has not yet filed for divorce or where the divorce decision obtained force of *res judicata* consists of the observation of custody sessions of the 'Family Judge for endangered children' at the CFI Tunis and interviews with two Family Judges who act as such (both women) as well as the representative of the Child Protection Brigade (a man). I was not allowed to photocopy the decisions from this Judge.

The chapter proceeds as follows. Section one describes the procedure with regard to decisions on matters related to

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<sup>677</sup> Session of the Family Judge for endangered children, CFI Tunis, 12 August 2009.

the children after divorce. Section two gives an overview of the material. Section three analyses the material, focusing on the dominant norm affirmed by the court and examining the sources invoked by judges.

### **Section one**

#### **A description of the procedure**

During marriage, the parents share custody (*hadana*) over their children, while the father is the legal guardian (*wali*).<sup>678</sup> This means that both parents are responsible for the child's upbringing, while the father takes decisions with regard to the child's education, travel and finances. When the parents get divorced, the reconciliation judge takes provisional measures with regard to custody, visiting rights, child maintenance and the question of who is to stay in the marital home.<sup>679</sup> These decisions are affirmed or amended in the final divorce decision.<sup>680</sup>

In the first reconciliation session, the Family Chamber attributes custody to one of the parents and visiting rights to the other.<sup>681</sup> This decision is important as it enables the spouses to live separately during the divorce proceedings: if the mother is granted custody, she can leave the marital home without risking to be prosecuted for violation of the husband's custody rights. If the mother wishes to move

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<sup>678</sup> Articles 57 (modified by law 66-49 of 3 June 1966) and 154 PSC.

<sup>679</sup> In conformity with Article 32 par. 6 PSC as modified by law 93-74 of 12 July 1993.

<sup>680</sup> Article 32 par. 9 PSC as modified by law 93-74 of 12 July 1993.

<sup>681</sup> Article 67 PSC modified by law 93-74 of 12 July 1993.

out with her children *before* the divorce case, she should file a case at the Family Judge for endangered children (see below). If the mother obtains custody, this means that the children shall live with her. Legislation provides her with the authority to decide on the child's education, travel and finances.<sup>682</sup> Visiting rights are attributed with or without the right to take the children away (*bidun* or *ma'a istishab*) in the sense that the father should visit the children in their home.

If the mother obtains custody, the father is obliged to allow her to live in a house that he owns (for example the previous marital home) and if he does not own a house, he should rent her a home and pay for it.<sup>683</sup> Also, if the mother obtains custody, the father should pay maintenance for the child. The right to child maintenance ends when the children attain the age of majority or, if they study, until the age of 25. With regard to the daughter, the right ends when she earns a living or gets married. The right to maintenance of handicapped children does not end.<sup>684</sup>

The provisional measures are immediately enforceable

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<sup>682</sup> Article 67 par. 3 PSC as modified by law 93-74 of 12 July 1993.

According to a lawyer who works for AFTURD and ATFD, judges do not apply this with regard to the right to travel, requiring the father's consent for the child's travel abroad. (interview with a lawyer, 26 June 2009).

<sup>683</sup> Article 56 par. 2 and 3 PSC. This provision was added in 2008 (law 2008-20 of 4 March 2008).

<sup>684</sup> Article 43 sub b PSC (as modified by law 93-74 of 12 July 1993) and Article 46 PSC (as modified by law 93-74 of 12 July 1993).

but are open to revision by the Family Judge during the divorce proceedings.<sup>685</sup> As soon as the divorce decision obtained force of *res judicata*, the person wishing to change the arrangement with regard to custody or visiting rights should file a case at the special Family Judge for 'endangered children' at the CFI. This position was installed by the Child Protection Code, issued in 1995.<sup>686</sup> If one of the ex-spouses or the child wishes to change the amount of child maintenance, he or she should file a case at the special maintenance judge of the Cantonal Court. If one wishes to amend the arrangement with regard to the housing of the caretaker, one should start a procedure at the civil chamber of the CFI.<sup>687</sup> My material mostly contains information about the procedure of changing custody<sup>688</sup> as opposed to changing the arrangement with regard to the marital home (no data) and maintenance (limited data).<sup>689</sup>

The person who wishes to change the custody arrangement should address the representative of the

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<sup>685</sup> Article 32 par. 8 PSC as modified by law 93-74 of 12 July 1993.

<sup>686</sup> Law 95-92 of 9 November 1995

<sup>687</sup> Article 56 par. 6 PSC as added by law 2008-20 of 4 March 2008.

<sup>688</sup> I observed sessions behind closed doors of the Family Judge for endangered children, I interviewed two women who practiced as such, and I interviewed the delegate of the Child Protection Brigade. This took place in the months May and June 2009, when I spent much time with the Family Judge for endangered children.

<sup>689</sup> In the month August 2009, I spent relatively much time at the Cantonal Court of Tunis, where I interviewed two maintenance judges, assisted to reconciliation sessions in maintenance cases, to a court hearing of the maintenance judge, and a court hearing of the penal maintenance judge.

Child Protection Brigade, stating that the current situation (living with the caretaker or being visited by the parent who has visiting rights) *endangers* the child. The delegate shall investigate the case by convoking the family in his office or visiting the family at their home, or even by ordering a social inquiry (*bahth ijtima'i*). The delegate will draw a report on his/her findings that shall be presented to the Family Judge for endangered children. If he finds that the child is in danger, he can transfer the case to the Family Judge for endangered children, either for an emergency measure (e.g. the urgent placement of the child in a home)<sup>690</sup> or for a judgment.<sup>691</sup> The judge shall convoke the persons involved, including the child, during a hearing.<sup>692</sup> These are the hearings I observed.

At the CFI Tunis, the sessions of the Family Judge for endangered children take place every Wednesday morning in the office of this judge that is situated in the Family and Children's division of the Court. Unlike the court hearings of the Family Chamber, the hearings of the Family Judge for endangered children take place behind closed doors. The Judge is assisted by a scribe. In every case, the delegate of the Child Protection Brigade gives his/her advice (the delegate in the district of the CFI Tunis is a man and so is the scribe). The judge treats about 20 cases per morning. The guard calls out the names of the parties involved, who can bring their lawyer (court representation is not required). The judge can summon all

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<sup>690</sup> Articles 45-50 Child Protection Code

<sup>691</sup> Article 59 Child Protection Code

<sup>692</sup> Article 58 Child Protection Code

persons that she wishes to hear, including the child. The lawyers and the litigants stand in front of the judge's desk. The judge is seated behind this desk and the delegate as well as the scribe are seated at the corners at the opposite side of the desk. The lawyers are invited to plea, after which the judge asks questions to the people involved. Finally, the delegate gives his opinion and hands in documents, such as the social inquiry. The judge dictates to the scribe what has been said and the p.-v. of the hearing is put in the file together with the representative's report. Once the judge has taken her decision, this is deposited at the register of the court. I was not allowed to photocopy these decisions.<sup>693</sup>

## **Section 2**

### **Judicial practices**

#### **Case one: Souhayma versus Fawzi<sup>694</sup> (CFI Tunis 5 January 2009, 68470)**

On 27 February 2008, a woman called Souhayma (born and living in Tunis) files a petition for divorce without grounds at the CFI Tunis. According to the text of the judgment, the petition states: 'she is married to the defendant by means of a legal marriage contract issued on 5 March 2004, and they consummated the marriage and they have

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<sup>693</sup> Although 'officially' I was not allowed (in the sense that the President of the court had not mentioned that I could photocopy these decisions and I was reluctant to ask more every time I saw him), I did conclude a deal with one of the clerks to photocopy some anonymised decisions. However, I soon realised that something was expected from me out of gratitude (not so much money, but 'companionship'), so I declined. A similar situation prevented me from obtaining penal decisions from the Cantonal Court Tunis.

<sup>694</sup> The names are fictitious out of respect for the litigants' privacy.

one child, Ala. However, the marital bond deteriorated between them and she asks to bring about divorce between them for the first time after consummation on her demand in accordance with Article 31 par. [1 sub] 3 PSC.<sup>695</sup>

Souhayma's husband Fawzi (born and currently living in Tripoli, Lebanon) is summoned to attend the first reconciliation session to be held on 5 May 2008 at 9 o'clock. At this session, he is absent although he was correctly summoned.

During the first reconciliation session the following provisional measures are taken:

- Custody over Ala is accorded to Souhayma.
- Visiting rights are accorded to Fawzi on Sundays and religious and national holidays from 9 o'clock in the morning to four in the afternoon without company.
- The husband is obliged to pay 100 DT child maintenance.

The reconciliation session is repeated twice, but the husband remains absent. The case is transferred to the plenary session. Here, the wife is represented by a lawyer, and the husband is again absent.

In its decision, the court confirms the provisional measures taken during the first reconciliation session, arguing that Article 46 PSC obliges the father to pay child maintenance. With regard to the custody, the court argues that 'Given that it comes forward from Article 67 PSC that if marital life ends, custody is awarded to one of the spouses or someone else in accordance with the best interest of the child. Given that the reconciliation judge awarded custody to the mother, granting visiting rights to the father without company. [...] Given that this decision is in accordance with the legislation and is in the best interest of the child, it is confirmed.'<sup>696</sup>

To summarize, in this case, Souhayma, of Tunisian nationality and living in Tunis, files a petition for divorce without grounds. Her husband is of Lebanese nationality

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<sup>695</sup> لذا فانها يطلب ايقاع الكلاق بينهما للمرة الاولى بعد البناء برغبة جاصة منها

<sup>696</sup> حيث جاء بالفصل 67 من م ا ش انه اذا انفصمت الحياة الزوجية و كان الزوجان يقيد الحياة عهت الحضانة الى احدهما او الى غيرهما و على الحاكم عند البت في ذلك ان يراعي مصلحة المحضون

and living in Lebanon.<sup>697</sup> They got married in 2004 and have one daughter, Ala. The husband does not present any defense. The court pronounces the divorce, granting custody to the mother and visiting rights to the father, on Sundays from 9 to 4, although the father is living in Lebanon. He is also obliged to pay 100 DT maintenance, but nothing is stated with regard to the home where the mother will live. The decision is quite elaborate when it justifies its decision to attribute child custody to the mother, invoking Article 67 PSC. This Article provides that after divorce, custody is awarded to the mother or the father, in accordance with the best interest of the child.<sup>698</sup>

I have a bunch of similar divorce decisions where custody is granted to the mother and the father is awarded visiting rights on Sundays and holidays from 9 to 4 or 5 o'clock. This is not only true in decisions on divorce without grounds, but also with regard to divorce with mutual consent and generally in cases of divorce for harm, indicating that when spouses contract divorce with mutual consent, husbands do not impose the condition that they obtain child custody.<sup>699</sup> When the children are small, the decision provides for visiting rights *bidun*

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<sup>697</sup> His family name indicates that he is Druze, which might have played a role in the decision in the sense that for some Muslims, Druze are not Muslim which would mean that the presumed Muslim woman married a non-Muslim.

<sup>698</sup> Article 67 par. 1 and 3 PSC as modified by law 93-74 of 12 July 1993.

<sup>699</sup> This is not a matter of judicial practice but of litigants' strategies.

*istishab* (meaning that the father should visit the children in their home), otherwise he can visit them *ma'a istishab*.

The only exceptions are witnessed by two decisions: the one where the wife was convicted to imprisonment for adultery and the one in which the husband obtained divorce for harm on these grounds.<sup>700</sup> Also, I witnessed one session of the Family Judge for endangered children that concerned a case where custody had been awarded to the father as the mother was a French national living in France. This is the case of Fathiyya, described at the beginning of this chapter. I will come back on this case below.

I have three decisions involving children where nothing is decided on custody and visiting rights. One of these cases concerns the husband's petition for divorce without grounds; his wife, a Moroccan woman living in Morocco with the child, does not attend the reconciliation session.<sup>701</sup> In the second case, the wife files for divorce with mutual consent; it is possible that the children in this case were from a previous marriage.<sup>702</sup> In the third case,

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<sup>700</sup> CFI Tunis 26 February 2008, 63237, CFI Tunis, 20 October 2008, 65040. A lawyer once told me that this is the principal reason why husbands accuse their wife of adultery: to obtain custody rights (interview with a lawyer, 26 June 2009).

<sup>701</sup> CFI Tunis 13 January 2009, 67957

<sup>702</sup> CFI Tunis 12 January 2009, 70522. The spouses, born in 1970 and 1960 respectively, were married in 2006. The decision states that they have two children. As the wife was 36 when she got married, and filed for divorce a little less than two years after having signed the marriage

the wife files for divorce for harm on the grounds of expulsion from the marital home. In this case, the husband changed the locks of their house. In this case, the children are all adults (the youngest is a 23-year-old boy at the moment the wife files for divorce).<sup>703</sup>

My material from reconciliation sessions and sessions from the Family Judge for endangered children indicates that sometimes, the husband does *ask* for custody, and on other grounds than the wife's presumed adultery or living abroad. In one case, the husband stated: 'If she wants a divorce, she can have it, but I want the children'.<sup>704</sup> In another case, the husband reasoned that as he was unemployed, he would not be able to pay child maintenance, and therefore, it would be better if the child lived with him.<sup>705</sup> In yet another case, the husband stated that his wife was depressed and tried to commit suicide three times, and therefore, he wanted custody.<sup>706</sup> Besides, I also witnessed two sessions in which the *wife* wanted the husband to have custody.<sup>707</sup> It should be noted here that I did not come across *any* cases where the husband filed for custody on the grounds that the wife remarried (this is provided for by law: the husband should file for custody

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contract (begin 2008), it is possible that the children result from a previous marriage.

<sup>703</sup> CFI Tunis 12 January 2009, 69211

<sup>704</sup> Reconciliation session CFI Tunis 5 November 2008

<sup>705</sup> Reconciliation session CFI Tunis, 26 November 2008

<sup>706</sup> Reconciliation session CFI Tunis 19 November 2008

<sup>707</sup> Reconciliation session CFI Tunis 16 April 2009 (mother of five children is ill and depressed), 21 January 2008, and 29 January 2009 (mother is working as a prostitute in Saudi Arabia)

within one year after he discovered the marriage).<sup>708</sup> Therefore, I do not know how the judges treat such cases (the legislation provides that the custody shall be attributed to the father unless the judge finds this contrary to the best interest of the child).

I do not know whether in the cases where the father filed for custody, it was indeed *awarded* to him: the reconciliation judge generally did not reply to such remarks, taking provisional measures attributing custody to the mother and stating that the Family Chamber would take the final decision on the matter. In two cases however, the reconciliation judge did give some indication of the likeliness that custody would be attributed to the father. In the first case, where the children were 1 and 4 years old, the reconciliation judge underlined that 'small children are better off with their mother',<sup>709</sup> and in the second case, the reconciliation judge asked 'do you have someone?' (*'andik shkun?'*), in the sense of a mother or sister who could take care of the child, which implied that the man could not obtain custody if he did not 'have someone'.<sup>710</sup>

During the sessions of the Family Judge for endangered children I observed that a significant part of the cases where custody is contested concern a conflict between a

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<sup>708</sup> Article 58 PSC as modified by law 81-7 of 18 February 1981

<sup>709</sup> Reconciliation session CFI Tunis, 16 April 2009

<sup>710</sup> Reconciliation session CFI Tunis 12 November 2008

parent (or both) and the *grandparents*.<sup>711</sup> In one case, the mother had died and the mother's parents wished to obtain custody over the children.<sup>712</sup> In another case the mother had died and the father was imprisoned; the child living with its maternal grandfather; as the father was being released from prison and would reclaim the child, the grandfather filed a case to have his custody affirmed in court.<sup>713</sup> In yet another case the grandfather obtained custody as the parents moved to Milan for work. The parents reclaimed custody over their 14-year-old son on the grounds that the child was in danger, as he was behaving as if he was a girl (he put on his mother's make-up).<sup>714</sup> In all cases, the Family Judge affirmed that the parents have the principal right to custody, before the grandparents, while in the last case, the judge added that even if they did not, the child was endangered by his grandfather who was making him into a homosexual. I do not know the final outcome of these cases.<sup>715</sup>

During the sessions of the Family Judge for endangered children I observed that a significant part of the cases concern the mother's wish to move out with the children

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<sup>711</sup> In 2006, a new Article was inserted in the PSC providing that if one of the parents has passed away, his/her parents can be granted visiting rights to the child (Article 66 bis PSC as introduced by law 2006-10 of 6 March 2006).

<sup>712</sup> Session at the Family Judge for endangered children, 20 May 2009

<sup>713</sup> Session at the Family Judge for endangered children, 20 May 2009

<sup>714</sup> Session at the Family Judge for endangered children, 19 August 2009

<sup>715</sup> I was not allowed to obtain decisions from the Family Judge for endangered children.

*before* she starts a divorce case. In these cases, a decision attributing custody to her alone (as she is still married, custody belongs to both parents) is necessary to prevent to be prosecuted for violating the other parent's custody rights. However, in all these cases, the Family Judge for endangered children stated that she would not take a decision, and advised the woman to start a divorce procedure, where a decision would be taken during the first reconciliation session.<sup>716</sup>

With regard to visiting rights, it should be noted that all judgments grant visiting rights to the father if the mother obtained custody, and vice versa. These rights are attributed on Sundays, between specified hours (e.g. from 9 o'clock in the morning to 5 o'clock in the afternoon), and national and religious holidays. This is even done if the father lives abroad (see the case between Souhayma and Fawzi).

If the spouses would state during the reconciliation session that they would arrange for the visiting rights *ad hoc* (for example, in some cases the wife said that 'he can come whenever he wants'), reconciliation judges would respond in different ways. Sometimes, the judge would reject this type of arrangement, stating that this did not give enough stability to the children, while in other cases, the judge would say something like 'do whatever pleases

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<sup>716</sup> For example, session at the Family Judge for endangered children, 12 August 2009

you, but I have to write down specific hours in the p.-v.<sup>717</sup>  
The difference might be related to the age of the children,  
but I am not sure.

I witnessed some reconciliation sessions as well as sessions of the Family Judge for endangered children where the father's visiting rights were contested. For example, in two divorce cases, the wife accused her husband of sexual abuse of the children,<sup>718</sup> and in one case, the mother accused her husband of physical violence with their children.<sup>719</sup> In the cases concerning sexual abuse, the reconciliation judge granted visiting rights regardless of the accusation. In the first case, which considered a couple with two very small daughters where the wife told the judge in tears that once when she came home she found her two-year-old daughter attached to her chair naked, the judge told me that 'when people are getting a divorce, they receive a bulk of advice from their family of how they should proceed to get the most out of their divorce, which is why she is accusing him of sexual abuse'. The judge granted visiting rights but as the children were very small, the husband was obliged to visit his children in their home. In the second case where the wife told the judge that her 5-year-old son touched her 'like a man touches a woman', and that he told her that his father always came with him to the toilet, 'putting

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<sup>717</sup> For example, session at the Family Judge for endangered children, 20 May 2009; this concerned visiting rights of the *mother* (the father had custody while the mother was living in Libya).

<sup>718</sup> Reconciliation session CFI Tunis 30 October 2008 and 26 May 2009

<sup>719</sup> Reconciliation session CFI Tunis 25 June 2009

his hand between his buttocks', she presented evidence in the form of a psychiatric report of the son and the daughter; in this case, the judge obliged the husband to bring his brother along when he visited his children.<sup>720</sup> I do not know the outcome of the case where the wife accused her husband of physical violence with the children.

**Case two: Selwa versus Fathi<sup>721</sup> (CFI Tunis 5 January 2009, 68538)**

On 15 March 2008, Selwa (1983, born and living in Tunis) files a petition for divorce with mutual consent at the CFI Tunis. According to the text of the judgment, the petition states: 'she is married to the defendant by means of a legal marriage contract issued on 31 May 2003, and they consummated the marriage and they have one child.' According to the judgment, the petition continues by stating: 'But finally marital life deteriorated between them until the point that it was not longer possible to continue it and the plaintiff asks a decision to bring about divorce for the first time after consummation on the grounds of Article 31 par. [1 sub] 1 PSC.'

Selwa's husband Fathi (1978, born and living in Tunis) is summoned to attend the first reconciliation session to be held on 13 May 2008 at 9 o'clock. At this session, both spouses are present, and confirm that they are married and that the marriage is consummated and that they have one child. They persist in their demand of divorce with mutual consent.

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<sup>720</sup> Some sessions of the Family Judge for endangered children also concerned the petition to change visiting rights. In one case, the mother accused her husband of sexual abuse, presenting a medical certificate as evidence, and in another case she accused him of maltreatment. I do not know the outcome of these cases. Session of the Family Judge for endangered children, 20 May 2009 and 12 August 2009

<sup>721</sup> These names are fictitious out of respect for the litigants' privacy.

During the reconciliation session, provisional measures are taken with regard to custody (awarded to the wife) and visiting rights (awarded to the husband, on Sundays and national and religious holidays from 9 o'clock in the morning until 5 in the evening in the child's home). The reconciliation session is not repeated as the judge immediately transfers the file to the court hearing to be held on 22 December 2008. Here, both spouses are present and persist in their demand. In its decision, the court confirms that the petition concerned divorce with mutual consent, that the marriage was proven with a marriage contract, and that the attempt to reconcile the parties failed. The court grants the demand, confirming the provisional measures taken during the reconciliation session.

In this case, the wife files for divorce with mutual consent (see chapter 3). During the first reconciliation session, the reconciliation judge takes provisional measures with regard to custody and visiting rights, granting custody to the mother and visiting rights to the father, on Sundays and holidays in the mother's home. The reconciliation judge remains silent on child maintenance and housing of the caretaker and her child. In the final decision, the provisional measures are confirmed, and nothing is added with regard to maintenance and housing.

An overview of all divorce decisions in which (minor) children were involved shows that in those cases where the court decides on child maintenance, it is the husband who is obliged to pay for it (unless he obtains custody, in which case nothing is decided on maintenance); if the court decides on the marital home, it is the husband who is supposed to provide for housing for the mother who has custody. However, only a minority of the decisions actually decide on custody, visiting rights, child maintenance and housing, while the large majority

remains silent on housing, or housing and child maintenance.

Of the 23 decisions on divorce with mutual consent, 12 cases concern couples with children. Out of these judgments, only 3 decide on custody, visiting rights, child maintenance and housing.<sup>722</sup> One of these refers to an agreement set up by the spouses<sup>723</sup>, the second refers to a court decision issued in France that decided on these issues,<sup>724</sup> and in the third decision it is the reconciliation judge who decided on all four matters.<sup>725</sup> The cases were instigated by both husbands (1, French judgment) and wives (2, agreement and no agreement/judgment). The other judgments are less complete on the consequences of the divorce: 5 decisions decide on custody, visiting rights and child maintenance, without addressing the marital home<sup>726</sup>, three judgments decide on custody and visiting rights without addressing child maintenance,<sup>727</sup> and one judgment decides on neither one of these topics (see above).<sup>728</sup> Of the five decisions stating on all matters

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<sup>722</sup> CFI Tunis 5 January 2009, 69776, CFI Tunis 6 January 2009, 69357 and 70637

<sup>723</sup> CFI Tunis 6 January 2009, 70637

<sup>724</sup> CFI Tunis 5 January 2009, 69776. According to the judgment, the French decision accorded € 2.000 to the wife for child maintenance and rent of the home (she has custody over 4 children and is living in France) and she renounces maintenance for herself.

<sup>725</sup> CFI Tunis 6 January 2009, 69357

<sup>726</sup> CFI Tunis 5 January 2009, 69944, CFI Tunis 6 January 2009, 70571, CFI Tunis 12 January 2009, 68948, 69414 and 71004

<sup>727</sup> CFI Tunis 5 January 2009, 68538, 69082 and 70642

<sup>728</sup> CFI Tunis 12 January 2009, 70522.

except housing, both husbands (2) and wives (3) filed for divorce. Of the 3 decisions remaining silent on both housing and child maintenance, 2 cases were instigated by the wife and one by the husband.

Of the decisions on divorce without grounds, 20 cases concern couples with children. Out of these judgments, 8 decide on custody, visiting rights, child maintenance and housing.<sup>729</sup> All these cases except one concern the husband's petition for divorce without grounds where the wife is present at the first reconciliation session; in the single case where the wife files for divorce, she previously filed for harm.<sup>730</sup> The other decisions are less 'complete': 6 judgments decide on custody, visiting rights and child maintenance, without stating on the housing (these concern petitions of both men (2) and women (4)),<sup>731</sup> 1 judgment contains a decision on custody, visiting rights and housing, remaining silent on child maintenance (husband's demand; the court underlines that as the marital home is the wife's property, she can stay there),<sup>732</sup> 4 judgments decide on custody and visiting rights, remaining silent on child maintenance and housing (these concern petitions of both women (2) and men (2)),<sup>733</sup> and

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<sup>729</sup> CFI Tunis 5 January 2009, 66546, 67906, 68664, 6 January 68019, 68567, 68585, 69295, 13 January 2009, 67835

<sup>730</sup> CFI Tunis 6 January 2009, 69295

<sup>731</sup> CFI Tunis 5 January 2009, 66634, 67138, 68470, 68658, 6 January 2009, 68055, 13 January 2009, 67443

<sup>732</sup> CFI Tunis 5 January 2009, 64562

<sup>733</sup> CFI Tunis 5 January 2009, 68266, 68330 and 6 January 2009, 69179 (the wife does not respond), 12 January 2009, 64948

one decision remains silent on all matters.<sup>734</sup> The decision that remains silent on all matters concerns the husband's petition in a case where the wife is of Moroccan nationality (see above).

Of the cases where the court granted divorce for harm, 12 cases involved children. In three cases, the court decided on custody, visiting rights, child maintenance and housing.<sup>735</sup> These cases concerned two petitions of the wife (for non-payment of maintenance and abandonment from the marital home) and one of the husband (for the wife's refusal to follow him when he moved house). In two cases, the court remained silent on housing.<sup>736</sup> These cases concerned a petition of the wife (domestic violence) and of the husband (abandonment from the marital home). In one case, the court decided on custody, visiting rights and housing, remaining silent on child maintenance.<sup>737</sup> This case concerned the wife's adultery. In 5 cases, the court decided on custody and visiting rights, remaining silent on housing and child maintenance.<sup>738</sup> All these cases concerned the wife's demand, either for non-payment of maintenance (3), expulsion from the marital home (1) or sexual abuse of the stepdaughter; in the latter case, the husband was still in prison. In one case, the court

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<sup>734</sup> CFI Tunis 13 January 2009, 67957 (the wife does not respond)

<sup>735</sup> CFI Tunis 27 October 2008, 63944, 6 January 2009, 66985 and 67963

<sup>736</sup> CFI Tunis 5 January 2009, 66028 and 12 January 2009, 65054

<sup>737</sup> CFI Tunis 21 April 2008, 61660

<sup>738</sup> CFI Tunis 26 May 2008, 65614, 5 January 2009, 68484, 69210, 12 January 2009, 67292 and 69314

remained silent on all matters.<sup>739</sup> It concerned a case where the husband changed the locks of the marital home, thus expelling his wife (see above).

I came across one case where the wife filed for *ujrat al-hadana*, that is: wages for the caretaker. The decision does not go into this.<sup>740</sup> I do not have any judgments that decide on this matter.

In reconciliation sessions, I observed that judges asked whether the children were studying (*yaqraou?*). I am not sure whether they only asked this question if they were adults (i.e. attained the age of 18), but if the children attained the age of eighteen and they were studying, the court awarded child maintenance. I have one decision where the children are adults but the husband is nevertheless convicted to pay maintenance, while in another decision, the youngest child is a 23-year-old boy and the decision remains silent on maintenance and housing.

The wife's housing could be the subject of a long discussion in reconciliation sessions. Spouses would discuss the issue of who gets to stay in the marital home, contesting each other with regard to the question of who owns it, and, if it is rented: how much the rent costs. If the spouses agreed that the wife moves out (or if she already had), they would quarrel about the question of how much it costs to rent a house that is acceptable for the wife and

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<sup>739</sup> CFI Tunis 12 January 2009, 69211

<sup>740</sup> CFI Tunis 6 January 2009, 68585

children. Also, I often witnessed that husbands insist that the wife moves back in with her parents. If she agreed, some wives would argue that they could not live with their parents without paying anything. These issues were often conscientiously examined by the judge; in fact, I had the impression that judges paid more attention to this topic than to the question of maintenance. This might be explained by the fact that the litigants are supposed to address the maintenance judge to have this sorted out for them, as this judge is more specialised in these issues. The decision on the marital home was repeatedly the cause of a petition for revision of the provisional measures.<sup>741</sup>

I observed one case where the wife was living with her 40-year-old daughter who was handicapped. The couple had been living separately for the past 15 years, but when the husband found out that his wife filed for divorce, he sold the marital home, where his wife and daughter were living. The reconciliation judge intervened immediately. She stated that the sale of the house where the caretaker is to live is prohibited by law, and started to make a phone call. The judge found out that the sale had been annulled by the court on these grounds, and the judge asked the wife: 'What kind of lawyer do you have?! He should have resolved this for you!'<sup>742</sup>

### **Section 3**

#### **Norms and sources**

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<sup>741</sup> For example revision session CFI Tunis 25 June 2009

<sup>742</sup> Reconciliation session CFI Tunis 3 November 2009

In this section, I will derive norms from the material described above with regard to the following questions: who has a right to custody after divorce and whether or not the court decides on questions of child maintenance and housing. In a second stage, I will look at the sources invoked.

### **Custody and visiting rights**

It can be concluded from the material that generally, the Family Chamber awards custody to the mother and visiting rights to the father after divorce. This means that the dominant norm is that after divorce, the mother obtains custody, regardless of the sex and age of the children. Moreover, the Family Judge for endangered children affirmed repeatedly that the custody of the parents has prevalence over the custody of the grandparents. Besides, this judge stated more than once that the father's custody right would not be nullified during marriage in anticipation on the divorce procedure: if the wife wanted to leave and take the children with her, she should await the first reconciliation session in the divorce case where provisional measures would be taken. However, there are two exceptions to the rule that the wife obtains custody rights after divorce. The first exception concerns cases where the wife is convicted for adultery, and the second exception concerns cases where the wife lives abroad.

That an adulterous mother cannot obtain custody is confirmed in two decisions, but it is not a hard rule: in one case where the husband filed for divorce for harm on

the grounds of adultery, the husband filed for and obtained custody as a provisional measure which was confirmed in the final decision. In this case, the wife was in prison during the divorce proceedings and did not contest the husband's custody.<sup>743</sup> In the second case where the husband filed for divorce for harm on the grounds of adultery, the *wife* obtained custody as a provisional measure (she was not in prison as she went to appeal against the conviction). However, the husband contested this and in the final divorce decision, the court changed this and attributed custody to the husband.<sup>744</sup> In the third case, the husband was awarded custody over her two children as a provisional measure, but the wife asked revision. The provisional measure was indeed revised, and custody was attributed to the mother. This was affirmed in the final decision.<sup>745</sup> This shows that if the husband obtained divorce for harm on the grounds of adultery, and if he files for custody, he might obtain it, but whether or not he actually does, depends on additional factors, which do not become clear from the decision. When I asked the Family Judge who decided in the third case mentioned before why she attributed custody to the mother, she replied that in this case 'the father was not a good catholic [*sic!*] either.'<sup>746</sup> In an interview with the Family Judge with regard to one of the 'digital affair'-cases, she stated that the mother was awarded custody rights 'because the father has a more

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<sup>743</sup> CFI Tunis 20 October 2008, 65040

<sup>744</sup> CFI Tunis 26 February 2008, 63237

<sup>745</sup> CFI Tunis 21 April 2008, 61660

<sup>746</sup> Interview Family Judge CFI Tunis 22 June 2009

than full-time job as a lawyer and the children would be brought up by a nanny'.<sup>747</sup> It should be noted in this respect that a lawyer told me in an interview that one of the reasons men file for divorce for harm on the grounds of adultery in the first place, is indeed to obtain custody.<sup>748</sup>

The second exception to the rule that a mother obtains custody (the mother lives abroad) was witnessed in the case of Fathiyya as described above. However, when the litigants in question had left the office, the Family Judge for endangered children confided in me that actually she would have wanted to grant the provisional measure to allow the child to go back to France. The reason why she could not, was that the President of the court had taken a judgment on the passport issue, and, the judge told me, 'a judgment has a higher hierarchical value than a provisional measure, so I cannot go against it.' She added that she was disappointed with the mother's lawyer, who had actually pointed out that the President had issued this judgment: 'If she would have simply kept quiet about this, I could have pretended not to know and simply granted the provisional measure.' Thus, the case of Fathiyya does not necessarily affirm that the court indeed denies the foreign woman living abroad to have custody. On the other hand, it should be noted that in reconciliation sessions concerning a husband who lived in Tunisia and a wife (a Tunisian or foreign national) living abroad (for example in France), I observed that if the

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<sup>747</sup> Interview Family Judge CFI Tunis 23 June 2009

<sup>748</sup> Interview with a lawyer, 21 November 2008

husband stated that he would not file for custody, the reconciliation judge would express her incomprehension.<sup>749</sup> In one of those cases, the reconciliation judge said: 'you are Arabs, you are Tunisians!' (*antuma 'arab, antuma twensa!*).<sup>750</sup> However, the court does grant custody to the mother in these cases, which shows that the court does not decide to grant custody to the husband living in Tunisia *of law*.

The judgments in the case between the Tunisian husband and the Moroccan wife living in Morocco with their child does not decide on custody at all. In this case, the husband does not file for custody, and the wife is absent at the reconciliation session. It is possible that the court remains quiet on the question of custody to leave the possibility open to the husband to file for it at a later stage (in a separate procedure at the Family Judge for endangered children).

### Sources

With regard to the decision to grant custody to the mother, it should be noted that generally, judgments do not mention the source underlying the decision to grant the mother custody: decisions simply state under the paragraph of the *ijra'at* that custody was granted to the

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<sup>749</sup> Reconciliation session CFI Tunis 30 October 2008 (children live in Paris), session of the Family Judge for endangered children, 20 May 2009 (woman lives in US)

<sup>750</sup> Reconciliation session CFI Tunis 11 August 2009 (woman wants to return to France)

mother<sup>751</sup> as a provisional measure, and under the paragraph of the final decision (*al-mahkama*), the court simply states that the provisional measures are confirmed.<sup>752</sup> Thus, the judgments do not invoke legislation or any other source as the ones underlying this decision.

That the court does not explain why it attributes custody to the mother is different in some cases. Here, the court's decision to grant custody rights to the mother is based on the consideration that 'it comes forward from Article 67 PSC that if marital life ends, custody is awarded to one of the spouses or someone else in accordance with the best interest of the child.'<sup>753</sup> Thus, the court employs the law (Article 67 PSC par. 3 provides that custody is awarded in conformity with the best interest of the child) to decide that the mother is granted custody. However, 'the best interest of the child' is clearly an open norm, and the court does not explain why it would be in the best interest of the child to be with the mother.<sup>754</sup> In one reconciliation

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<sup>751</sup> اسناد حضانة الابن لوالدته

<sup>752</sup> وحيث ترى المحكمة اقرار الوسائل الوقتية المتعلقة بالحضانة و الزيارة

<sup>753</sup> CFI Tunis 5 January 2009, 68266, 68330, 68658, and 68470

<sup>754</sup> I'm not sure why in some cases the decision to grant custody to the mother is explained while in others it is not. In the case between Souhayma and Fawzi (outlined above) it can be explained by the fact that this is an international situation: the elaborate explanation to attribute custody to the wife might serve to explain it to the foreign court who is to recognize this decision. However, the other three decisions do not concern an international situation. Possibly, the court simply made use of another standard form than in those cases where the decision was not justified.

session, a reconciliation judge confirmed that children are better off with their mother because they are very young. This does not explain why older children are considered to be better off with their mother.

In those cases of a custody conflict between parents and grandparents, the Family Judge for endangered children did not explain why the parents have prevalence over the grandparents. The same lack of explanation characterized the treatment of cases where the mother filed for nullification of the father's custody during marriage in anticipation on divorce proceedings.

With regard to the situation where the father filed for divorce for harm on the grounds of adultery and where custody is awarded to him, one decision invoked the best interest of the child (*maslahat al-tifl*)<sup>755</sup>, while in the other case, the decision was not justified.<sup>756</sup> In an interview, one of the Family Judges told me that the reason to grant custody to the father is that a mother 'who does something like that' (the interview concerned one of the 'digital affair'-cases) cannot be considered 'a good mother'. The judge did not give a definition or a source of her understanding of a 'good mother' and thus, she seemed to refer to her own personal understanding of how mothers should behave.

The second exception to the rule that a mother obtains custody (the mother lives abroad) is explained as follows.

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<sup>755</sup> CFI Tunis 26 February 2008, 63237

<sup>756</sup> CFI Tunis, 20 October 2008, 65040

In the case of Fathiyya, the Family Judge for endangered children stated that the child is a *Tunisian national*, and therefore, she should live in Tunisia and not in France (even though Fathiyya had the double nationality). This indicates that the fact that the child has the Tunisian nationality is the principal consideration in international cases, which is confirmed by the fact that in one international case, the reconciliation judge said: 'you are Arabs, you are Tunisians!' (*antuma 'arab, antuma twensa!*).<sup>757</sup> The judge did not explain why the child's Tunisian nationality would prevent the foreign mother living abroad from obtaining custody.

With regard to visiting rights, most decisions simply state that the father is attributed visiting rights without explaining why. However, the same judgments that elaborate on the question of why custody is awarded to the mother, explain why the father obtains visiting rights, stating that 'Given that if the child is with one of the parents, the other cannot be denied his visiting rights as is provided by Article 66 PSC.' Here, the court invokes legislation (Article 66 PSC provides that the father or the mother cannot be denied his or her visiting rights and surveillance over the child, and that the Family Judge shall decide on this issue).<sup>758</sup>

In the case where the mother accused the father of sexual abuse of the children, the judge explained to me why she

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<sup>757</sup> Reconciliation session CFI Tunis 11 August 2009 (woman wants to return to France)

<sup>758</sup> The latter part has been inserted by law 2006-10 of 6 March 2006.

nevertheless accorded visiting rights to the father, saying that women make such things up as 'they talk to many people about their divorce and they are advised to accuse their husband of sexual abuse.'<sup>759</sup> This indicates that the judge bases her decision not to take the allegations seriously on her *experience* with 'such cases'.

### **Child maintenance and housing**

The material shows that if the court decides on child maintenance and housing, it condemns the father to pay child maintenance and *sakan*, housing expenses. In some cases, the court decided who was to stay in the marital home, without deciding on *sakan* (an amount), which might be explained by the fact that the house was the property of one of the spouses. I did not come across a decision where the wife was granted maintenance (*ujrat al-hadana*).

However, the material also shows that the majority of the divorce judgments only contains a decision on custody and maintenance, remaining silent on housing, and sometimes even on child maintenance: of the 44 divorce decisions where children were involved, 14 contained decisions on all matters, including child maintenance and housing; 13 contained decisions on all matters except housing, 12 on custody and visiting rights only and three on none of these matters. Apparently, the court upholds a rule according to which it is not obliged to decide *always*

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<sup>759</sup> Reconciliation session and interview, CFI Tunis 30 October 2008

on questions of child maintenance and housing, even if the children are still under the custody of one of their parents. I derive the following rules from the material.

In the first place, there is an important correlation in cases of divorce with *mutual consent* between the presence of an agreement/foreign decision and whether or not the court decides on (child maintenance and) housing: in three cases, the court decided on all four issues, and in two of these the spouses presented a foreign decision or an agreement. I'm not sure why the court decided on all matters in the third case as well.

In the second place, there is a correlation in cases of divorce *without grounds* between the court's decision on maintenance and housing on the one hand, and the question of who files for divorce (husband or wife) and whether or not the defendant responds: in 7 out of 8 cases where the court granted child maintenance and housing, it was the *husband* who filed for divorce without grounds and the wife was present on the first reconciliation session, claiming her rights. This might indicate that in cases of divorce without grounds, the court will generally decide on child maintenance and housing if the *husband* files for divorce and the wife responds. However, this is not a hard rule, because in 2 similar cases the court did not decide on housing, in one such case it remained silent on

child maintenance, and in one case the court decided on neither one.<sup>760</sup>

In the third place, there is an important correlation in cases of divorce for *harm* between the grounds for the harm and whether or not the court decides on (child maintenance and) housing: the five cases where the court did *not* decide on child maintenance and housing concerned situations of non-payment of maintenance, expulsion from the marital home and the husband's imprisonment. Possibly, this might be explained by the presence of a maintenance decision, although this does not explain why the court did not decide on housing. However, that the court does not decide on maintenance and housing in similar cases is not a hard rule, as in another case of non-payment of maintenance, as well as in a case where the husband abandoned the marital home (*hajr*), the court *did* decide on all four matters.

### Sources

In those cases where the court decides on child maintenance, it does not explain why it does so. Similarly, judges affirmed repeatedly during reconciliation sessions that they were obliged to take provisional measures obliging the father to pay child maintenance, even if the spouses agreed that the husband was not obliged to pay child maintenance. In the same vein, decisions stating on

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<sup>760</sup> In one case, the court decided on custody and visiting rights only, while in another it remained silent on all matters. In both of these cases however, the wife did not respond.

housing do not explain why the court should decide on this matter. Thus, the court does not refer to legislation or another source in its decision on maintenance or housing.

In those cases where the court does *not* decide on these matters, the court does not explain why it does not do so either.<sup>761</sup> If no arrangements are made, the decisions remain simply silent on the matter. There is a number of possible explanations for the lack to decide on these matters. A possible explanation for the silence on *child maintenance* is that the wife obtained a maintenance decision. This might justify that in some cases the court does not decide on maintenance, which is especially true for cases where the wife obtained divorce for harm on the grounds of non-payment of maintenance and expulsion from the marital home (but it does not explain why they do not decide on housing). Indeed, in reconciliation sessions I often had the impression that for reconciliation judges, the situation where the wife obtained a maintenance decision is considered as the *rule*, why situations where the wife did not are treated as an exception.<sup>762</sup> This became clear during a reconciliation

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<sup>761</sup> Reconciliation session CFI Tunis 23 June 2009

<sup>762</sup> A maintenance decision (*hukm nafaqa*) is a decision issued by the maintenance judge at the Cantonal Court. The wife or the husband (or the child or the parents, or the ex-wife) can ask the maintenance judge to decide on the amount. The large majority of maintenance cases takes place during marriage between the spouses (interview maintenance judge Cantonal Court Tunis 20 August 2009). The couple is invited to attend a reconciliation session in the office of the maintenance judge behind closed doors, where they can discuss about their respective means and the needs (observed on 26 August 2009). During a court

session where the wife filed for divorce with mutual consent. The judge asked : “*andik hukm nafaqa?* (do you have a maintenance decision?). ‘No’, the wife replied. ‘What do you mean? What do we do now? (*Kifesh tawwa?*)’ the judge exclaimed.<sup>763</sup>

A possible explanation for the silence on *housing* is that the court does not decide on housing *of law*, meaning that decisions remain silent on the matter if the caretaker did not ask for a decision. A similar feature was *possibly* witnessed for example in cases of divorce for harm: if the plaintiff does not file for damages, the court remains silent on it (see the previous chapter). In this case, it is possible that wife-defendants in cases of divorce without grounds always file for housing.

Another explanation for a lack of decision on housing can be that the wife moves in with her family. Indeed, during one reconciliation session I obtained the impression that this is considered as the *rule*, while a mother staying by herself with her children is considered the exception. In this case, the wife filed for divorce with mutual consent and asked about the housing. The reconciliation judge replied: ‘What do you mean? Will you not move back in

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hearing, they repeat their arguments and the judge takes his decision. Maintenance decisions are revisable every two years (interview maintenance judge Cantonal Court Tunis 20 August 2009). If the person liable to pay maintenance in accordance with the maintenance decision does not pay, he (or she) can be convicted for neglect of the family in a penal case (also at the Cantonal Court, observed on 26 August 2009).

<sup>763</sup> Reconciliation session CFI Tunis 23 June 2009

with your parents?’<sup>764</sup> It should be noted in this respect that a lawyer told me that in cases where the judgment does not decide on the housing, both spouses tend to remain in the previous marital home: the wife as she thinks it is her right, and the husband as he has nowhere else to go and cannot afford two houses.<sup>765</sup> However, these are top-down considerations of my side, the judges did not indicate this.

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<sup>764</sup> Reconciliation session CFI Tunis 23 June 2009

<sup>765</sup> Interview with a counselor at the *centre d'écoute*, 25 June 2009