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Accepting request of divorce for renouncing child's custody

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بِسْمِ اللهِ الرَّحْمَنِ الرَّحِيمِ

In the name of Allaah, the Most Merciful, the Bestower of Mercy

Question: We would like - may Allaah reward you - that you answer a question a sister asks. She will be very grateful to you. Indeed Allaah does not fail to reward the good doers. In a nutshell, this woman after it turned out that she could no longer live with her husband for different reasons, she tried to get her divorce. She could not get it except against a condition he made in a meeting attended by witnesses. This condition states that the woman should entrust the child, who were then a foetus, to the man after two years. The woman accepted the condition apparently and out of constraint, because she did not find another means other than that. Now, she asks whether this condition is permissible in the Sharee'ah. Is she obliged to abide by it? Does she incur sin if she does not abide by it?

This is the question in sum. Glory and praise be to You, Allaah. I testify that there is none worthy of worship except You, I ask your forgiveness and repent unto You.

Answer: All praise is due to Allaah, the Lord of the Worlds. Peace and blessing be upon whom Allaah sent as a mercy to the Worlds, upon his Family, his Companions and his Brothers until the Day of Resurrection.

This question depends on the divergence over the nature of custody in the Sharee'ah: is it a right of the nurse or an obligation upon her? Is it a common right that the child and his mother share, or it is specific to the child? Knowing that, as a rule, children custody is for women - whether they are boys or girls – because women are more compassionate, lenient and more arranged to educate children.

The preponderant opinion in this question is that custody is a specific right to the child, because he needs someone to take care of him, protect and educate him. In fact, custody is instituted to achieve the benefit of the child. It is a right that is established in this regard, and not to achieve the benefit of the one who deserves custody. Accordingly, everyone who is more able to achieve his benefit and take care of him will be more deserving to keep him.

This being said, as custody is a specific right to the child, the mother should be imposed it if the child needs it, lest his right to protection, care and education be violated. Moreover, any condition that implies the violation of the child's legal right to custody and deprives him of the one who is more able to achieve his benefit is vain. So if the woman asks her husband divorce on condition that she leaves her child to him, the divorce is valid, but the condition

is vain. Accordingly, she is not required to abide by it, because as this is a specific right of the child, neither she nor he can annul it by a condition whatsoever, because the Messenger صلّى الله عليه وسلّم says: "**Any condition that is not in Allaah's Book is invalid even if there were one hundred conditions.**"**[1]** .i.e. it is not stated in the Qur'aan that it is permissible or obligatory. The Messenger صلّى الله عليه وسلّم says: "**The Muslims should abide by their conditions, except a condition that makes an illicit thing licit or makes a licit thing illicit.**"**[2]**

However, if the woman remarries, she will not be worthier of keeping him, because she will be preoccupied with serving her husband. The child's benefit will not be achieved by staying with her. What indicates this ruling is the following hadeeth: "**You are worthy of keeping him, lest you remarry.**"**[3]** [In this case] the custody of the child will be entrusted to the one who comes after her in terms of priority; this is in order to achieve the child's benefit, due to the impediment of remarriage. The right of custody goes back to her if the impediment disappears according to the following rules: "If the impediment disappears, the interdiction should be reapplied" and: "If the danger disappears, the interdiction should be reapplied".

The perfect knowledge belongs to Allaah عزّ وجلّ. Our last prayer is all praise is due to Allaah, the Lord of the Worlds. Peace and blessing be upon our Prophet, his Family, his Companions and Brothers till the Day of Resurrection.

Algiers, Rabee` Al-Awwal 17th, 1425 H

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[1] Reported par Al-Bukhaaree in as-Saheeh, chapter of « Commerce », concerning the prohibited conditions required in trade (hadeeth 2060). Muslim also reported it in as-Saheeh, chapter of « Manumission », concerning the fact that the slave should not swear allegiance except to the one who manumits him (hadeeth 3779); the version was as follows: "Every condition that is not in Allaah's Book…" Ibn Maajah also reported it in As-Sunan, chapter of « Manumission » (hadeeth 2521); the version was as follows: "Any condition that is not in Allaah's Book", on the authority of `A'ishah رضي الله عنها. See Irwaa' Al-Ghaleel by Al-Albaanee (5/152).]

[2] Reported by At-Tirmidhee in As-Sunan, chapter of « Judgments », concerning what is reported about the way the Messenger صلّى الله عليه وسلّم used to reconcile between people (hadeeth 1352), Ad-Daaraqutnee in As-Sunan (3/27) and by Al-Baihaqee in As-Sunan Al-Kubra (6/79) on the authority of `Amr Ibn `Awf رضي الله عنه. Ibn Taymeeyyah said in Majmoo` Al-Fataawaa (29/147): "These chains of narration, even if one of them is weak, their different ways of narration reinforce each other". This hadeeth is judged authentic by Al-Albaanee in view of its ways of narration in Irwaa' Al-Ghaleel (1303).])

[3] Reported by Aboo Dawood, chapter of « Divorce » (hadeeth 2276), Ad-Daaraqutnee (hadeeth 418), Al-Haakim (hadeeth 2830), Ahmad (hadeeth 6668) and Al-Baihaqee (hadeeth 16191), on the authority of `Abd Allaah Ibn `Amr رضي الله عنهما. It is also judged authentic by Ibn Al-Mulaqqin in Al-Badr Al-Muneer (8/317), by Ibn Katheer in Irshaad Al-Faqeeh (2/250) and by Ahmad Shaakir in his recension of Al-Musnad of the Imaam Ahmad (10/177). It is judged Hassan (good) by Al-Albaanee in Irwaa' Al-Ghaleel (7/244) and in As-Silsilah As-Saheehah (1/709).