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In the name of Allah the most compassionate and the most merciful

Thanks be to Allah the lord of both worlds and may He pray over his servant and prophet Muhammad and his family and companions until Judgment Day.

The following are answers to questions posed by immigrant sisters about custody of children and related issues. I pray to Allah that He will grant us and all our brothers and sisters success and help us to be on the right path.

The questions:

In the name of Allah the most compassionate and the most merciful

First - what are the woman's rights in custody of her children after the death of her husband or his move away from her?

Second - If a woman wants to get married after her idah, what are her custody rights, keeping in mind that her in-laws are not religious and her husband did not want his children to be raised like his brothers and sisters. Keep in mind that her in-laws live too far from her and if she sends her kids there, she will not see them all her life. The children will be raised irreligiously. What would be the ruling (religious opinion) in this case?

Third - If the in-laws ask for the kids of their son, what would be the ruling? Can they be given the kids, keeping in mind that the mother did not get married or they have no rights to the kids?

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Fourth - What are the limitations of the husband's will to his wife? Is it obligatory to her as it is to the kids? If they are obligated by the will, when are they supposed to implement it? May Allah reward you well.

An introduction to the answer:

Custody is a religious issue as much as marriage and money. It depends on compassion, raising, and gentle treatment. Therefore, women are often granted custody as a result of being closer to the child. Furthermore, they should have the ability to do what is necessary. When there is a dispute among relatives, they always refer to a judge or a ruler.

When we say that women have more rights to it, it is because they are closer and more proper to look after, care, protect while awake or asleep, feed, dress, clean, calm, play with, treat and

do all necessary in education. There is no doubt that these are duties for women and no man can perform them with patience, ever. Even if a man ends up winning custody of a child - a father or any of his relatives - this custody has to be represented by a woman from the side of the man, which is one of the conditions for scholars to allow men custody.

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Custody is a legal mandate because the child might die or get hurt if left alone. Therefore, he should be protected from death. The rule of law is obligatory if there is only one custodian. Furthermore, it is mandatory if the custodian is not willing to accept the child or if there is more than one custodian and the child chose a certain one.

Therefore, the custodian and the one in custody have the right to custody. In this case, it is a choice for the custodian and not a mandate. That is to say, if the custodian refrains, he cannot be forced to it because it is not forced on him. This is when we have multiple custodians. If the custodian refrains, he will not be forced, because it is a right that he can go back and assume again as long as he is still fit. It is a right that is renewed throughout time. The child's right is honored. For example, when he accepts nobody except his mother and when the father and the child have no money, the mother is forced into custody.

The issue of custody has been the one with the most disagreements among religious scholars, as a result of the absence of a straightforward reference in the Shari'a. Ibin Al-Qayym, may Allah bless his soul, was able in "A'lam Al-Mawqi'in" to list what was said by the prophet about this entire issue in five cases only. Some of these cases were even weak as far as attribution to the prophet. The two cases that are accepted by all with no doubts and suspicions are those, "You have the right to his custody unless you get married" and his saying about his son Hamzah. These two and many other sayings attributed to the prophet, may Allah pray for him, and to his followers have connotations within them. Therefore, religious scholars have disagreements about them and different legal opinions.

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However, they all agree that the religious and living interests of the child are to be protected. Therefore, he should not be committed to hands that are not able to protect him. He should be committed to hands that clearly prioritize his interest over theirs.

Two dominating schools of thought have emerged from this issue. One that gives precedence to practice (practicality) over text and the other gives precedence to practice (practicality) over meanings.

In order to understand these two approaches and what scholars wrote about them, let us consider the attitude of the companions, may Allah be pleased with them, when they read the saying of the prophet, Allah's blessings and peace be upon him, "None of you can pray the evening prayer unless he is among the tribe of Bani Quraydhah" and its explanation by the scholars.

There are many examples in the doctrine and in the behaviors of the scholars.

What is needed here is to attract the attention to the wide range of interpretation and to excuse the scholars with their differences. It is known that the final say in these matters is to the Mufti or the judge of a particular case at a particular time.

May Allah grant us success.

The answers asking Allah for success:

First question: What are the woman's rights in custody of her children after the death of her husband or his move away from her?

Answer:

In the event that a husband and a wife get divorced or the husband dies, the custody of the kids goes to the mother (before the age of discretion) unless she gets married. All legal

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scholars agree on this. The prophet saying, Allah's blessings and peace be upon him, is to that effect that, "You have to right to it unless you get married."

Therefore, a woman has the right of custody of her kids in the event of divorce, whether he is around or not.

She also has the right to the custody of her kids in the event the husband dies. She has precedence over the grandfather, grandmother, paternal uncles, aunts, paternal aunts, and the rest of the relatives, as long as she is not married. If she gets married, this will be a different matter that we have to deal with later on in detail, Allah willing.

As we said earlier, as long as the kids are under the age of discretion and the age of discretion has been agreed upon by most scholars to be seven years. Please note that the issue here is discretion and not age. Al-Nawawi, may Allah have mercy upon him, said in Al-Rawdah, "The judgment goes to discretion and not to age" 1 H. When the kids reach the age of discretion, they should

be given the choice to choose their custodian. It has been agreed on unanimously as Ibin Kudamah said in "Al-Maghna". The truth is that there are disagreements. He disagrees with the two Imams Abu Hanifa and Malik. It seems that Ibin Kudamah did not know that there were disagreements, and Allah knows best.

This is about the boy (the male). As for the girl (the female) the issue is different. Some scholars said that she should be given the choice and some of them forbade her from choosing, such as Abu Hanifa and Malik. It has been said that Ahmad went with assigning her one of the parents (father or mother). She cannot choose and she cannot go back and forth between them. They had disagreement among them. Some of them preferred the mother and others preferred the father. Shaykh Al-Islam Bin Taymeyyah chose to let the girl stay with her father. This was a popular choice among Hanbalis and Al-Kharqi.

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Shaykh Bin 'Uthaymin, who is one of the modern shaykhs, preferred that the girl stays with her mother.

Only Allah knows.

The period of custody for the boy is until his maturity. Most scholars agree with this. There are disagreements among scholars about the period of custody for the girl. The most common is until she gets married. This is the doctrine of Malikis, and Ibin Taymeyyah chose it, too.

The benefit of listing what scholars said in regards to the rights of a woman to have custody of her children if she gets married and what the prophet, Allah's blessings and peace be upon him, said, "You have the right to it unless you get married."

The conclusion is that scholars have six opinions about this matter.

First: The woman loses her right to custody completely when she gets married.

Second: The woman does not lose her right to custody. If she gets married, it will have no effect on it.

Third: If she gets married, she loses the custody of the boy and she keeps the girl.

Fourth: If she gets married to someone with kinship to the kids, she does not lose their custody.

Fifth: If the husband accepts custody and he does not object to the child staying with him in the same room, the mother will not lose custody.

Sixth: If the custodian is the mother and the father is disputing this custody, she loses custody if she gets married. If the maternal aunt disputes, the custody goes to the mother, even if she gets married. If anyone related to the child disputes the custodial rights of the mother, she gets custody of the children even if she gets married. This is what Al-Tabari said.

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All of these are sayings by Salafi scholars and imams. Some of them are stronger and more evident by means of supportive evidence than others. Bringing evidence and weighing it in is another issue that we will not deal with here. For more information about this issue, go to "Zad Al-Ma'ad" By Ibin Qaym.

Subtitle:

From the issue of custody of the kids when their father dies another issue arises which is the issue of sponsoring them and guarding their money. In addition, the issue of curatorship of girls in marriage arises.

Custodianship is a different matter from guardianship and different from curatorship in marriage. These three could be present in one person and could be in separate people.

The scholars have warned that when the mother is granted custodianship of her children, it does not mean that the father has no more responsibilities. On the contrary, he has the right and the duty of watching his children and supervising them. If he deems that the custodian is not doing the right job, he can take it up to court to ask the court to remove custody from their mother and so on and so forth.

Al-Shawkani, may he rest in peace, in Al-Sayl Al-Jarrar said, "This does not negate (meaning giving priority to the mother) the fact that the father knows better the interest of his son and he is more aware of what is good for his son in regards to life and money. It is possible for the father to keep an eye on his son in spite of being in the custody of his mother." 1 H

Also, all curators are like a father when he is not there.

The guardianship of the orphan's money has been discussed in the Kuwaiti Jurisprudence Writing Encyclopedia, "The religious scholars have different opinions about the ranks of custodianship among those considered curators for a young child.

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The Hanafis say that the curatorship of a child's money goes to the father and then to the custodian, then it goes to the

custodian of the custodian even if he is not a close relative. If a father died and did not designate a curator, curatorship goes to the father's father then to his custodian and then to the custodian of the custodian. If none of that is available, it will go to the judge and his appointee. The father's custodian has precedence over the child's grandfather because the father's curatorship is moved to the custodian by means of will. This makes the custodianship stand and takes precedence over the grandfather. It is also because the father saw that the custodian is more responsible and better for his kids than the grandfather.

The Malikis and the Hanbalis see that curatorship of the child's money goes to his father and then it goes to the father's chosen custodian and then to the judge. They exclude grandfathers, uncles, and brothers, because they do not inherit directly from the child, while the father does.

On the other hand, Malikis say that a mother can assign custodianship with the presence of the following three conditions:

First: The decrease in the amount of money which is the subject to choosing a custodian. The determinant of the decrease would be the tradition.

Second: The child does not have a curator or a custodian assigned by the father or assigned by a judge.

Third: The child must have inherited the money from his mother who had it before she died and assigned a custodian.

The Shafi's' see that the father cannot assign a custodian in capacity of curators to his young children or those children who are mentally challenged while the grandfather is alive, because he is legally considered the curator. There is no need for the father to take away from the grandfather curatorship, as the case would be in marriage curatorship. However, if the grandfather is absent, Al-Zarkashi said that the father can assign a custodian until the grandfather returns. The standard to what the Shafis' said is that suspension of custodianship to the immature is marriage and it is possible to be withheld, because absence does not stop the right to curatorship.

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As for paying debts the father has the right to assign a custodian while the grandfather is still alive; therefore, the custodian has more precedence than the grandfather. If the father did not assign a custodian, the grandfather would take over paying their debt and taking care of them. The judge has more rights to implement the execution of the wills as documented by Al-Baghawi and others.

It is unanimously agreed that the father is the one who has the right to curatorship of managing his orphan kids' money. If there is an obstacle preventing it, that would be a different matter.

In the event the father dies and wills someone to be his kids guardian in managing their money, that will be their guardian and he has the right to their curatorship as long as the grandfather is not available. If the grand father is available, the Shafi's disagree and Allah knows the truth.

If the father dies without assigning one, the grandfather has the first right to it if available then the judge and Allah knows better.

This is the curatorship of orphans and the general responsibility towards them and their money which should be protected and invested until they are old enough to manage it themselves.

As for curatorship in marriage that would be a different issue. It goes to the father and then to the first in kin. The best prioritizing of marriage curatorship is: Her father then his father, her son or his son, her blood brother, father's brothers then their kids, and finally uncles.

This is what the Malikis and the majority of Muslim scholars say. To explain, if for example the one in custody is a girl and she is with her mother (the custodian) and the curator wanted to get her married, he can do that. In this example the marriage curatorship is different from custody. This is what I wanted to explain.

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Second question:

If a woman wants to get married after her idah (end of waiting period), what are her rights in the custody of her kids keeping in mind that her in laws are not religious and her husband did not want his children to be raised like his brothers and sisters. Keep in mind that her in laws live too far from her and if she sends her kids there, she will not see them all her life. The children will be raised irreligiously. What would be the ruling (religious opinion) in this case.

The answer:

As mentioned earlier in the answer to the first question when a woman gets married, she loses her priority to custody of her children either unrestricted or with the restriction that the father is not close by or with the restriction of the refusal of the father. This is contrary to those who see that a woman's marriage would have no effects on her children and she should not

lose the custody rights to her children to others. Scholars have differed about "others" to whom the right of custody should go to after the mother. They also differed a lot in arranging the priorities. Majority of the scholars gave the first priority to the mother's mother.

There are other opinions about this issue.

I see that the strongest and the most accepted opinion is that of Shaykh Al-Islam Ibin Taymiyah and Nasra Ibin al Qaym.

He said in Zad Al-Mi'ad, "Our Shaykh, Shaykh Al-Islam, has regulated this issue by a different measure. He said, "The best in controlling custody issue is the following:

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Since custody is a form of curatorship and requires compassion, raising and gentleness in treatment, the most people have the right to it are those who possess these qualities. They are relatives and the closest gets priority over the others. If two or more exist with the same degree of relation to the child, the right is given to the female over the male. Therefore, a mother takes precedence over the father, grandmother over grandfather, maternal aunt over maternal uncle, paternal aunt over paternal uncle and a sister over a brother. If they were two males and equally related to the child, precedence of one over the other is determined by lot. If the degree of relationship to the child is not the same and they are from one side, the closed to the child in kin takes precedence over the other. Sister takes precedence over sister's daughter. Maternal aunt takes precedence over the maternal aunt of both parents and the parents' maternal aunt over the grand parents' maternal aunt. The grandfather from the mother's side takes precedence over mother's brother. This is true because the mothers and fathers take precedence over brothers and sisters. Some said that the mother's brother takes precedence over her father because he is closer in inheritance. Both are in Ahmad's doctrine. There is a third side to it. The brother from a woman's mother only and her brother cannot get custody because they are not considered blood and not one of the females with rights to custody. No doubt that the mother's father and her mother take precedence over her maternal uncle, even if they are related to the mother on both sides. There is no dispute that the mother's father takes precedence over the maternal uncle. If they get to be the same degree from the mother's side and the father's side, those on the father's side take precedence, provided that the father's side is closer to the child. But if the father's side is distant from the child, such as the mother's mother or the mother of the father's father and the paternal aunt of the child's father. Therefore, the closer takes precedence because of the fact of compassion. This way we can limit all the measure related to this issue to the legal standard and its agreement with the religious doctrine.

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Any problem you face can be resolved using this measure with the presence of true and required evidence. May Allah grant you success."

Mentioned by Shaykh Ibin 'Uthaymin, may his soul rest in peace.

Therefore, in our issue at hand the right of custody goes from the mother to the grandmother from the father's side who is the mother of the kids' father. As long as she is alive and she asks for that right, she should get custody of the kids.

If the grandmother did not ask for the custodianship, the mother can keep them as long as there is no dispute by someone else. If the custody of the kids is being disputed by any other than the father's mother, the issue will be looked into then. If there is a reason that forbids the father's mother from the custody, the right to go to whoever is next in kin to the children according to what Shaykh Al-Islam said above. We will talk about hindrances Allah willing.

As for the "keep in mind that her in-laws are not religious and her husband did not want his children to be raised the way his brothers and sisters were raised."

There should have been more details about this.

If it is evident that something wrong is going to happen to these children as far as daily life and raising them such as not getting enough food, the right clothing

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cleanliness, affection, right treatment from disease and so on and so forth; further-more, his right for education, bare minimum of religious education, his right of knowing right from wrong, faithfulness, chastity, virtue and good manners. If the child does not get all of the above satisfactorily from the custodian, custody should be taken away and given to the next in line of those who have the right to it.

However, minor disorder or seeing peers being in a better condition would not be enough grounds for taking custody away and the right does not go to anybody else. The proof for this is what I said that scholars agree on the fact that custody depends on some luck for the child to be good in life and religiously. Scholars of different doctrines have said a lot about this and I will not discuss it any further.

As we said, if the child does not get average of his rights, if the custodian is bringing the child up irreligiously and if he

does not give the child enough education or what is comparable to his peers, the child should be taken away from the custodian and given the next in line.

Therefore, when she said in the question, "The children will be raised irreligiously"

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This is general talking and there is a need for explanations or specifics. The term here does not have a defined meaning. We do not look at expressions and words. The duty is that the child gets what is standard and measurable in comparison with the attention, education, and religious knowledge his peers get.

Scholars talked about the conditions of custody. It all should be taken from jurisprudence books. There are types of custody such as general (what applies to all custodians whether men or women) and some are specific to men or women separately.

They also talked about the conditions of the place of custody and the distance to cover in getting to that place. Anything against these conditions or the absence of any of them is considered a hindrance.

General conditions: equality, some scholars mean "honesty" or religious honesty." The essence of this condition is that debauchers have no rights to custody.

Most scholars prescribe to this. A lot of them said that there is no custody to debauchers. Some scholars did not stress equality as a major condition and some of them had explanations which I will get in due time.

The Kuwaiti Jurisprudence Writing Encyclopedia says in discussing the conditions a custodian should have:

Custodian should be honest religiously. No custody for debauchers because a debaucher cannot be trusted. Debaucher here means someone who is known to be a drunkard, theft, adultery and having fun illegally while the one minding his own business can be a custodian. Ibin Abidin said (Hanafi),

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"If the custodian is so debaucher to the point where the child will be lost, she loses her right to custody. Otherwise, she has the full right to the child's custody until he reaches an age where he can understand his mother's debauchery and then he should be taken from her. Al-Ramli (Shafi') said, "Two witnesses would be enough to identify her." Al-Dasuki (Maliki) said, "A custodian is assumed to be faithful and straightforward until proven otherwise."

The encyclopedia also said, "Scholars agreed that a debaucher should not get custody because a debaucher cannot be a curator and cannot be trusted. Furthermore, the child in his custody will not get his chance in life since he will be raised following his footsteps. The Hanafis attached debauchery that forbids custody of a child to the fact that this custody will ruin the boy." Ibin Al-Qaym, may his soul rest in peace, criticized the scholars who said that straightforward is a condition to custody. He said in Zad Al-Mi'ad, "what is surprising is that they are saying, "No custody to debauchers" what debauchery is greater than infidelity (Meaning that they allow an infidel mother to have custody of her child.) How does the bad effect of the debaucher on the child compare to the effect of an infidel mother? The truth of the matter is that straightforwardness should not be a condition to custody although Ahmad and Al-Shafi'i followers did. If straightforwardness is a condition for custody, the kids of the world will be lost and Islam would be facing a dilemma. Since the beginning of Islam nobody had said anything about the real kids of debauchers. Since when in Islam can anybody separate a child from his father or mother because one of them or both are debaucher. This is similar to predetermine that a debaucher is not acceptable to be a custodian. It is not different from predetermining that a marriage curatorship is subject to straightforwardness.

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In other words, a curator has to be straight forward in order to be able to represent a girl in marriage. We cannot deny that most of marriage curators are debauchers. Debauchery is still a trend among humans. The prophet, Allah's prayer and peace be upon him, and his companions did not stop a debaucher from raising his kids or from representing their daughters in marriage. Tradition is a witness by which a debaucher would watch out and protect his daughter and does his best for her. If other than this happens, it would be beyond the norm. The public accept the norm. If depriving a debaucher of his rights to custody and marriage curatorship is an important issue, the nation scholars would have discussed it long time ago and since the beginning of Islam. If debauchery takes away the right to custody, those who were drunkards and adulterers would have lost their children and were placed with others. This is a strong method but it does not apply to details mentioned above where a child in custody could be lost. There should be differentiation between debauchery that would affect the child and debauchery that affects the debaucher himself. In this case a judge would be needed to make that differentiation. Only Allah knows.

She said, "Keep in mind that her in laws live too far from her and if she sends her kids there, she will not see them all her life."

I would say that if they have the legal right to the custody, then the children should be given to them. However, it should be proven beyond any doubt that the grandparents have the legal right for the custody. That is to say, it has been proven that the husband's parents (the kids' grandfather and grandmother) are the custodians originally by going through the ranks of those who have priorities to the custody.

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If it has been determined that they have the right to the custody and there are no objections from their side, the following issues should be looked into:

First: The process of transporting the kids is safe.

Second: Are these kids being sent to a home of infidels (such as house of apostates) and what are the effects?

Third: Does depriving the mother from seeing her children as a result of distance have any effect on the judgment to place the children with their grandparents?

As for the first issue:

Travelling and the way of travelling should be safe. There is no difference about this among scholars. Furthermore, the place they are going to is safe, too.

As for the second issue:

Scholars have agreed that a custodian does not have the right to send a child in custody to the enemy's country.

Al-Kasani, may his soul rest in peace, said, "The woman does not have the right to take her child to the enemy's country even if her husband, whether a Muslim or a thimi, lives there, because that will hurt the boy. He will emulate the infidels in their morals which will hurt him. However, if they were both in the enemy's country, she can do that because the child belongs to both of them.

Al-Khatib Al-Sarbini said in Mughni Al-Mutaj, "He cannot take him (child) to enemy's country as permitted by Al-Maruzi. Al-Azra'i said that it is apparent even if they are not at war." It is well known that a country ruled by infidels does not abide by Allah's religion and His rule. It is considered an enemy's country.

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It is the duty of all Muslims to fight the apostates there until they destroy their government and establish an Islamic country that abides by the rules of Islam. He who is able to that is

obligated to it and he who cannot do it because he is preparing for jihad is excused. If he can present religion while not being under the rule of the infidels and does not fall under their judiciary rule, he is fine; otherwise, he should move out of their country to a place where he can practice his religion. It is no doubt that it is not right for someone to send his kids to live in an enemy's country and mingle with its people unless there is no other option. This is true for the custodians or parents who are good Muslims, because we understand human weaknesses and shortcomings.

We only ask Allah for help and there is no power or strength but by Allah.

As for the third issue:

The majority of scholars agree that if the parents were separated as a result of the departure of one of the parents, such as divorce or so, the father has the right to take his son with him. Same thing applies to curators or custodians. The departure in this case has to be where the father could not see his son every day and look after him. They said so because the father is the one who keeps and protects his son's lineage and he looks after him. Therefore, if the father and mother separate, the father can take the son from his mother.

Ibn Hazm said in Al-Mahla, "Malik said that the father can take his children with him if he is moving to a different place whether they are young or old and that applies to the father's father if the father dies.

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He also said that a mother cannot take them with her. Al-Layth and Al-Shafi'i said the same.

In Al-Mudawanah by Sahnun "If the kids are still too young and sit in their mothers lap for care and the father divorces her, he has the right to take his kids with him anywhere he goes even if he gets married in his new place. If the mother wants her children, she should follow them. Malik said that same thing applies to custodians. When they leave the place where the mother is, they can take the children with them. Malik said that if the father travels and comes back home, he does not have the right to take the kids with him because he did not move permanently. By the same token, a mother does not have the right to move her children to a faraway place where the father or the curator cannot get them. I asked, "Can she live in such a place where the father and the curator have access to the children?" He said, "Yes."

Al-Nawawi said in Al-Rawdah, "If he moves to a faraway place, the father has the right to take him from his mother and take him

where he moves whether the father is moving or the mother or each of them is moving to a different place. This is done in order to protect the lineage and in order to educate, raise and provide for the child. It makes no difference if he married the mother in her town or somewhere else.

Al-Mardawi said in Al-Ansaf, "When one of the parents wants to move away to a different country, the father has the right to custody. This is the rule whether the traveling is the father or the mother.

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The majority of scholars accepted this opinion and it has been accepted in Al-Wajiz and others as well, and has been documented by Al-Furu' and others. Some said that the mother has that right. This opinion is available in Al-Mustaw'b and Al-Targhib provided that she is not the one who is moving faraway. Ibin Manja said in his explanation, "This condition (She is the one who is not moving faraway) must be present and most colleagues did not require it." It has been said that whoever is not moving has the right to keep the kids. Al-Huda states, "If the one moving away intends to hurt the other by taking the child, this should not be permitted. The kids' interest should be looked at first. He said in Al-Furu', "This should be the intention and the goal." I said that the bad effect is apparent and there is no doubt about it. He did not accept this. Warning: the saying "to a faraway country" here means a far distance. A judge accepted it and been accepted by others in Al-Hidayah, Al-Mathhab, Masbuk Al-Thahab, Al-Mustaw'b, and others. It has been introduced in Al-Nudhum, Al-Ri'ayatain and Al-Furu'. It has been said that according to Imam Ahmad it is a distance that cannot be travel in one day. This explanation has been accepted by Al-Musanaf and documented them in Al-Muharir and Al-Hawi."

Ibin Qudamah said in Al-Maghni, "If one of the parents wanted to travel for work and come back, the non traveler gets the custody of the kid because traveling affects the child. However, if one of the parents is moving to another place to settle down there and the road to that place or that place itself is worrisome, the non travelling parent keeps the kid because in traveling like this the child will be affected. If the child chooses to travel, he should not be granted that because he could have been convinced by the travelling parent. If the place a parent is moving to is safe and the road to the place is safe, the father has the right to keep the kid whether he is staying or he is travelling. If the move is close by where the father can see the kids every day, the mother gets the custody. The Judge said, "If the travel is not a faraway distance, it is not considered residency." Some Shafi'i agreed to that because the father can look after the child.

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What is mentioned by Ahmad has more precedence because the distance in seeing the child stops him for disciplining him. As for the father's right to custody in the event the household is split, Sharih, Malik and Al-Shafi'i said that if the father moves away, the mother gets custody. If the mother moves to the place of the original marriage, she has the right to custody but if she moves to a different place, the father has the right. It has been written about Abi Hanifa: If she moves from a city to a village, the father gets the right to custody. If she moves to a city, she has the right to custody because she can offer the child education and help him graduate. Since the parents are living in different places, the father has the right to custody as well as if the mother moves from a city to a village or if she moves to a place other than the place of original marriage. What they mentioned is not true because the father is the one who disciplines, raises, and protects the lineage of his son. If the father is not with him in the city, he will be lost as if he is in a village. If they move to the same town, the mother has the right to custody. If the father gets custody as a result of being in a different place from the mother and they reunite to be in the same place, the mother regains the custody or any woman on the mother's side who has the right to it. Similarly, for the father blood relatives who has the right to it in the absence of unavailability of the father.

The Kuwaiti Jurisprudence Writing Encyclopedia: The place of custody is where the father lives and where the mother lives, if she is still legally married and not divorced. It is because a wife is supposed to stay with her husband anywhere he goes. The woman whose idah is not over is supposed to stay in her husband's residence until her idah is over, whether there is a child or not. "And turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness, those are limits set by God." (Quranic verse). When the idah is over, the place of custody would be where the father or the curator lives. Similarly, if the custodian is not the mother, the place of custody would be the father's residence because he is supposed to look after and educate his son.

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This could not happen unless the custodian lives in the same city where the father lives. This is acceptable by all doctrines. However, there are differences among the doctrines if the custodian moves to a different place from where the father is.

Malikis, Shafi'is and Hanbalis scholars differentiate between the travel of the custodian or the curator to a complete move and the travel for means of business or visit. If the custodian or curator is moving permanently, he loses his right and will move to who is next in line provided the road to him is safe and the place is safe too. A father has priority to custody whether he

is staying or moving because he is the one who disciplines the young one and protect his lineage. If the child is not in the city where his father is, he will be lost. The Hanbalis restricted the priority to the father by saying unless the father is doing it to hurt the mother by taking her son away from her. If that is the father's intention, the interest of the child should be taken into consideration. If the mother travels with the father, she keeps custody of the child. This is the scholars' opinion but they disagreed on defining the distance.

As has been stated, this is the opinion of scholars.

The Hanafis has some details pertaining to the city where marriage contract was written or not. What Ibin Qayym and Ibin Qudah said is a hit to the above discussed.

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There is an opinion mentioned by Al-Mardawi from Ahmad the essence of which is that a mother has the right to custody which was restricted to if she is not moving.

Those who go by this say, "There should be no effect if the father or the curator moves in relation to the mother's right to custody. They support their argument by referring to the saying that prohibits the separation between the mother and her son. These sayings were true and they are agreed upon implicitly which is one of the great characteristics of Muhammad's Shari'. A prophetic saying is quoted. To confirm this go to Muntaha Al-Akhbar by Abi Al-Barakat Ibin Taymiyah and in Nil Al-Awtar by Al-Shawkani. They both collected the prophetic saying related to this issue.

The mother's right takes precedence in spite of the permanent of the father or the curator. This is clear in what Ibin Hazm says. Ibin Al-Qaym comes close to this with more details which is taken from Ahmad especially if the mother is the one who is not moving and he added restrictions.

There is a third opinion as has been introduced by Al-Mardawi too, "The one who is not moving (the father or the mother) get the custody. This opinion seems to be looking for the interest of the child because in moving there is always a disadvantage for the child. He agrees with Ibin Al-Qaym.

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Ibin Al-Qayym said in Zad Al-Mi'ad, "In the event the house hold is united and one of the parents has to travel for certain needs and returns, the non traveling parent gets the custody because traveling hurts the boy or the child. This is agreed on and even the travel for pilgrimage is not excluded. If one of them is moving permanently to another city and the way to that city is

scary, the non traveling parent gets the custody. Whoever, if the road and the place are safe, there are 2 opinions. First: the father gets custody of his son so he can raise and discipline him and educate him. This is what Malik and Al-Shafi'i say and approved it. Second: the mother has the right to custody. There is a third opinion: if the father is moving away and the mother is staying, the mother gets custody. If the mother moves to the city where the marriage took place, she gets the right to custody. If she moves to a different place, the father has the right to it. This is what the Hanafis say. They narrated a different story by Abu Hanifah, "If she is moving from a city to a village, the father gets the right to custody. If she moves from a city to a city, she gets the right to custody." As you can see, all of these are opinions that cannot be right all the time. The right thing is to watch out for the benefit of the child whether in staying or with moving. This is all good as long as neither of the parents is doing it to hurt the other and take away the child. If this is the intention, the parent doing this should not get custody of the child.

He said in 'I'lam Al-Mawqi'ain, "Allah and his prophet would prefer a child to stay with his mother, whether the father is staying or moving away. The prophet, God's peace and prayers be upon him, told the mother, "You have the right to him unless you get married." How can we say that you have the right to him unless the father departs? Where is this mentioned in the Qur'an, the prophetic sayings, or the religious opinions to be used in juristic reasoning? There is no text.

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This supports what we have said at the beginning of the answer. This issue should be decided by Shari'a law. As for religion, what I see and what I advise in these days considering our situation that the young children should stay with their mother whether if immigrated, stayed in an enemy's country or with a group of Mujahidin unless it cannot be done. Allah knows best and we ask him for success and glory.

## **Conclusion:**

Scholars in general advise a woman whose husband has died to get married and not to allow her worries about custody of her children stop her from marriage. If the situation is hard on children and mothers and similar to our state these days where there is immigration, war, and living in foreign land, it is advised that women should get married. May Allah grant us success. This is particularly true if the woman is beautiful or religious and still young, knowing the man's need to such marriage. It is clear that the scale tips towards marriage.

Third question:

If the in-laws asked for the kids of their son, what would be the ruling? Can they be given the kids, keeping in mind that the mother did not get married or they have no rights to the kids?

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Answer:

If the mother gets married and it has been determined that the grandparents stand first in line for custody rights, and all the requirements for custody are present while other objections are ruled out, the judge can give them the kids but keep them separate. That is to say, the judge can tell them, "You have the right to custody. Come over and take the kids if you wish." The mother is not required to send the kids to them.

This is true before the kids reach the age of discretion.

If they reach the age of discretion, the rule will be as we mentioned in the answer to the first question, which is allowing the boy to choose and the best will be chosen for the female between her mother or her blood relatives from her father's side, while all conditions are fulfilled and no objections are raised. When there is a dispute, a judge should rule on this.

All of this is if the woman gets married.

If she does not get married and the kids are under the age of discretion, she has the right to their custody. She cannot be forced to give up her children to the parents of her dead husband, whether they are close or far or in her city or her husband's city. It seems to me that the family has immigrated and the kids live in the area where their father died and buried.

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Only Allah knows.

Fourth question:

What are the limitations of the husband's will to his wife? Is it obligatory to her as it is to the kids? If they are obligated by the will, when are they supposed to implement it?

The executable will (which must be carried out) from a Shari'a point of view, is the man's will about his money (possessions) provided that the will has less than the third after paying his debts and burial expenses. This is the executable will that Allah mentioned in the Qur'an, "The distribution in all cases, after the payment of legacies and debts. Ye know not whether your parents or your children are nearest to you in benefit". "In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of

legacies and debts. In what ye leave, their share is a fourth, if ye leave no child; but if ye leave a child, they get an eighth; after payment of legacies and debts. If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies and debts; so that no loss is caused (to any one). Thus is it ordained by God. and God is All-knowing, Most Forbearing. "(Qur'anic verses). Another Qur'anic verse to that effect, the prophet, God's peace and prayer be upon him, said, "It is prescribed, when death approaches any of you, if he leave any goods, that he make a bequest to parents and next of kin, according to reasonable usage; this is due from the God-fearing." (Qur'anic verse 2:180)

Same thing applies when writing a will designating certain items to certain people or saying that certain people left certain things with me.

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This in fact is a return of rights to their owners, whether the dead wrote in his will or he did not. Legally, he should will such things within the first two nights. This is a mandatory will that the prophet, God's peace and blessings be upon him, talked about, "If a Muslim has something for another, he should write a will before the end of two nights.

Another executable will is when a father assigns a person to take care of his kids after his death, subject to the acceptance by the receiving person. A father cannot force him. He has the right to accept or to refuse.

However, other wills referred to as spoken wills are those when a father advises his children to do so and so which he deems right for them. Another example is when a husband tells his wife to be careful or to watch out. If the recipient sees the advice acceptable, he can live by it; otherwise, he is not obligated to it. It is advice. It is preferable if the receiver of the advice lives up to it.

The value of the advice is determined by how much it urges the receiver to do good deeds. Since it is coming from a loving side, it can hold value, especially when the adviser is about to die. In a case like this the father advises his family and relatives to do good.

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If the adviser is a good man who can influence the receivers with his knowledge and goodness, this would be an added value to the advice and the receivers would even value it more.

We have to be careful. If a husband asks his wife not to get married after he dies, this falls under the category of advice that she has the choice to listen to or not. There is nothing that forces her to listen to this advice. She can do what is good for her.

Under the same category falls the father's advice to his children not to live in a certain place or a certain city.

Are the kids obligated to obey and listen to their father after his death, as it is obligatory for them to obey and listen to him when he is alive, especially if he advises them to do something good?

The answer, only Allah knows may He be exalted, it is not obligatory. The difference between a living father and a dead one is influential. He should be obeyed in his life as long as he does not advise the committing of vice. However, after his death, children do not have to listen to his will other than money. It does not fall under mandatory obedience. It is preferable if it could be carried away.

An answer to a question came by means of fatwa from Shaykh 'Abdullah Al-Faqih in Al-Islamiya net over the Internet. The question is, "We are brothers and sisters. Our father left a will but we did not obey it. What is the Sharia rule in this case?" The Fatwa, "If the will was about something religiously legal, it should be obeyed especially there are rights to others in it. Al-Kharshi said in his explanation to Mukhtasar Khalil,

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"After death all should be obeyed except for illegal demands. We would like to attract attention to the fact that if the will calls for more than one third or it is for a person who has rights to inheritance, it should not be obeyed. Refer to Fatwa No. 2609. If it has been proven, you have to carry out the will and deliver the right to their owner. "the payment of legacies and debts. Ye know not whether your parents or your children are nearest to you in benefit." (Qur'anic verse). This is true if your father has willed a monetary will. If his will is about non monetary issues, it is desirable to fulfill it. However, if it is about an illegal issue, it should not be fulfilled.

This desirability is parallel to that when a person wills after his death to a particular person to wash him and a particular person to perform on him the burial prayer before burying him. The majority of scholars look at this desirably unless countered by what is stronger and more pressing issue. There are details and restrictions to this that will be discussed when needed.

Al-Nawawi, may his soul rest in peace, listed in his book Al-Athkar, many examples to what is desirable and what is not in

fulfilling wills. He said, "If his will is to be buried in a certain place in the cemetery in his town, such a will should be honored. If he wills that a foreigner performs the burial prayer on him, scholars differed on this. The truth is that the closer in kinship to the dead should have precedence but it would be acceptable if the one willed for is a man of letters and has good knowledge and reputation. It is desirable for the relative. If he willed to be buried in a coffin, his will should not be accepted unless the ground for his burial is loose or muddy. The coffin should be from his money.

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If his will is to be taken to a different city for burial, transportation is forbidden, as been expressed by the majority of scholars. Al-Shafi'i said, "The transportation of the dead would be acceptable if it is to be near Mecca, Al-Madina, or Jerusalem, because these are religious place."

Scholars' opinions in this matter are known and will be discussed when needed.

I pray that Allah, be exalted, will grant us and all Muslims serenity and open our eyes. He is the best supporter and best deputy. There is no power and no strength but by Allah. Thanks be to Allah from the beginning to the end. May Allah's prayers and blessings be upon his servant and his prophet Muhammad, his family, his companions, and their followers.

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