128654 - A mother has more right to custody of her disabled son, even if he is grown-up, so long as she does not get married again

the question

I have taken Shariah Khula (Divorce) approximately two years ago. I have three children (19yr Son, 17yr Daughter, 16yr Son), Alhumdulillah. Presently the Father is the primary parent with the custody of the children. Two of my children, the 19 yr old son (cerebral palsy-wheelchair bound) and the 17 yr old daughter(mentally retarded) are children with special needs (handicapped). They are totally dependent for their everyday needs (wearing diapers and have to be fed). Their physical, emotional and cognitive age at present has been diagnosed, for the 19 yr old son to be somewhere around 5 yrs and for my 17 yr old daughter to be under 3 yrs old, according to the psychiatrist. Both of these handicapped children have their own estate money (a mistake from the doctors which they compensated in the form of money/settlement of a law suit). This money is controlled by the 'Trust'/Bank-along with a judge through the American law. Each month they are assigned an ($6000.00 approx) amount from this 'Estate money' for their everyday needs. They also have their own home(wheelchair accessible) which the 'Trust' provided and also a Van(wheelchair accessible) for their everyday needs. The 'Trust' also pays the taxes for their house along with the 'fuel' for the van. These two children are totally independent financially. The Father lives with the children in their home and uses their money for every day needs. I have been with my children for all their life as a caretaker and they are very close to me than anyone else. I have not 'worked' for the same purpose. I still go to my children's house every day from morning till evening to take care of them as their father has to go to work. At least ten days out of a month, they come to stay at my house (a one bedroom apartment). The Father compensates me for my work with a $1000.00 every month. The question I have is since the kids are diagnosed under the age of 7 yrs, can I have the primary custody? And also what is the ruling if I want to get married? I know that when the mother marries, the custody goes to the other party, but here since the kids are handicapped and I am the only one to take care of them during the day, and since they are already coming to stay with me for approx ten days out of a month, can I still have the primary custody? If not (If I have to forfeit the primary custody), can I at least take them to my house for

10/15 days, since I am still the caretaker for their everyday needs during the day for the whole month. Can I use their money for their needs for the given time/period they are with me, divided accordingly?.

Detailed answer

Praise be to Allah.

Firstly:

What is meant by custody is keeping the dependent person and taking care of his interests.

The person in custody is the one who cannot take care of his own affairs independently and keep away from that which may harm him, because he has no discernment, such as a child or an adult who is insane or disabled.

It says in al-Mawsoo'ah al-Fiqhiyyah (17/301):

Custody of a small child is a necessity according the consensus of the fuqaha'. The same ruling applies according to the majority – the Hanafis, Shaafa'is and Hanbalis, and one opinion of the Maalikis -- with regard to an adult who is insane or disabled. End quote.

Al-Hajaawi said in Zaad al-Mustaqni' (p. 206) in the chapter on custody:

It is essential to take care of children, the disabled and the insane. End quote.

The mother is more entitled to custody of her small or insane child than the father.

Al-Mardaawi said in al-Insaaf (9/416):

The most entitled of people to custody of the child or disabled person is his mother, without any dispute. End quote.

Ibn Qudaamah said in al-Mughni (8/192):

The child is only to be given the choice [i.e., between his parents, when he has reached the age of seven years] if two conditions are met:

(i)That both parents should be qualified to have custody. If one of them is not qualified to have custody, then it is as if that one is absent and the other one should be awarded custody.

(ii)That the child should not have a mental disability. If he has a mental disability, then he should stay with his mother, and not be given the choice because the mentally disabled person is like a child even if he is an adult. Hence the mother is more entitled to have custody of her mentally disabled child after he reaches adulthood. If the child is given the choice and chooses his father, then loses his reason, he is to be returned to the mother and his choice is rendered invalid, because he was given the choice when he was independent; if he loses his independence, this mother is more entitled to custody, because she has more compassion for him and is more able to take care of him, as is also the case in childhood. End quote.

Based on that, you are more entitled than your husband to have custody of your children who are mentally ill, so long as you do not get married again. But if you do get married again, then the father is more entitled to custody of his children.

Ibn Qudaamah said in al-Mughni (8/194):

If the mother marries again, her right custody is waived. Ibn al-Mundhir said: All of the scholars from whom I learned were agreed on that, because the Messenger of Allaah (blessings and peace of Allaah be upon him) said to the woman: “You will have more right to him so long as you do not marry again.” And because if she gets married, the rights of her husband will distract her from taking care of the child. End quote.

If the mother’s right to custody is waived as the result of her marriage, it passes to the next person. With regard to specifying who is more entitled after the mother, there is a difference of opinion among the fuqaha’. The correct view is that the father is the one who has more right after the mother, and this is the view of Shaykh al-Islam Ibn Taymiyah (may Allaah have mercy on him), and was also regarded as more correct by Shaykh Ibn ‘Uthaymeen.

See: al-Sharh al-Mumti', 13/535.

Before all that it is essential to pay attention to the aim of custody, which is taking care of the affairs of the child who is in custody, looking after him and caring for him. If the father is going to neglect his children and their staying with their mother is better for them, they should stay with the mother. The one who should judge concerning this is the shar'i qaadi. As there are no sharee'ah courts in your country, you have no choice but to work out an agreement with their father concerning that or to refer the matter to the Islamic centre in your city, and they will do what they can to solve this problem.

Secondly:

With regard to your disposing of the money that they get:

If you are in need, there is nothing wrong with you doing that. But if your own wealth is sufficient for you and you do not have any need of their money, then it is better for you to do without their money, because Allaah says with regard to the orphan's guardian consuming the orphan's wealth (interpretation of the meaning): "and whoever (amongst guardians) is rich, he should take no wages, but if he is poor, let him have for himself what is just and reasonable (according to his labour)" [al-Nisa' 4:6].

And because if you are poor, spending on your maintenance is obligatory on them, from their wealth.

We ask Allaah to make good easy for you wherever it is.

And Allaah knows best.