

257661 - Moving Child Away Due to Husband's Inability to Maintain Them

the question

I moved to the USA from Australia to be with my husband, I have been back and forth since 2014. I haven't been very unhappy lately in the marriage due to my rights not being fulfilled, I've sought many counsillings with the Muslims in the community but my husband keeps violating my rights. I recently asked my husband for a divorce due to my rights constantly being violated in numerous ways but then I found out I am pregnant. My husband isn't able to provide for me or the child and depends on me and his mother to financially support him, we were recently homeless and staying in motels due to the fact that his mother didn't accept our marriage or respect our religious beliefs (she is not Muslim) and my parents had to send me \$4000 just to get us off the street and put us in a place with furniture ect...because my husband wasn't able to do what he had to. in the USA I am not able to have any type of Financially easy healthcare which leaves me with very large bills and he expects me to pay all of this on my own. When My husband does have money he worries about himself first before me. I have the option to go back to my parents where myself and the child will be taking care of but that is back in Australia, I've given my husband the option to move to Australia but he doesn't want to leave the USA. Please can you provide any evidence and explanations to the evidence that it is ok for me to stay in Australia with the child due to the fact that he cannot provide for me?

Detailed answer

Firstly:

The maintenance of the wife is mandatory upon the husband even if she is wealthy; due to the saying of Allah (translation of the meaning): Let a man of wealth spend from his wealth, and he whose provision is restricted - let him spend from what Allah has given him. Allah does not burden a soul beyond what He has given it. Allah will bring about, after hardship, ease. (At-Talaq 65:7), and His saying (translation of the meaning): But the father of the child shall bear the cost of the mother's food and clothing on a reasonable basis. (Al-Baqarah 2:233)

And the saying of the Prophet (peace and blessings be upon him) in his sermon during the Farewell Pilgrimage: "Fear Allah with regard to women, for you have taken them as a trust from Allah and intimacy with them has become permissible to you by the words of Allah. Your right over them is that they should not allow anyone to sit on your furniture whom you dislike; if they do that then hit them but not in a harsh manner. And their right over you is that you should provide for them and clothe them on a reasonable basis." Narrated by Muslim (1218).

And his saying (peace and blessings be upon him) to Hind, the wife of Abu Sufyan: "Take what is sufficient for you and your child on a reasonable basis." Narrated by Al-Bukhari (5364).

The wife is not obliged to work, and if she does to assist her husband, she is doing good and volunteering.

The mandatory maintenance includes accommodation, food, drink, and clothing. It is estimated according to the condition of both spouses. If they are affluent, then she is entitled to the maintenance of the affluent; if they are in hardship, then she is entitled to the maintenance of those in hardship; if they are of moderate means, then she is entitled to the maintenance of those of moderate means; and if one of them is affluent and the other is in hardship, then she is entitled to the maintenance of those of moderate means, whether he is the affluent one or she is.

This is the opinion given by the Hanafis, the relied upon opinion among the Malikis, and the opinion of the Hanbalis, reconciling between the texts and considering the circumstances of both sides.

See: Al-Mawsu'ah Al-Fiqhiyyah (5/254).

Secondly:

If the husband is unable to provide maintenance, the wife has the choice to be patient and stay with him, or to choose to leave him according to the majority of Jurists.

In Al-Mawsu'ah Al-Fiqhiyyah (41/66): "They differed in the case where the husband is in hardship, and his wife is not pleased to stay with him, regarding her right to request separation between her and him, on two opinions:

The first opinion: She does not have the right to request separation, and the husband should not prevent her from earning to spend on herself. This was the opinion of Ibn Shubrumah, Hammad ibn Abi Sulayman, `Ata', Az-Zuhri, Al-Hasan, Ibn Abi Layla, and others, and it is the opinion of the Hanafis...

The second opinion: The woman has the right to request separation from her husband due to his inability to provide maintenance, and if he refuses, the judge should separate them.

This is the opinion of the Malikis, the more apparent opinion among the Shafi`is, and the correct opinion among the Hanbalis.

This separation is considered dissolution (annulment) according to the Shafi`is and Hanbalis, and a revocable divorce according to the Malikis, and this is narrated from `Umar, Abu Hurairah, and Ibn `Umar (may Allah be pleased with them), and it was the opinion of Sa`id ibn Al-Musayyib, Al-Hasan, Ishaq, Abu Thawr, and others.

They based this on the words of Allah (translation of the meaning): Then keep them in an acceptable manner or release them with good treatment. (Al-Baqarah 2:229), for Allah Almighty has commanded to keep the wife in a reasonable manner, or to release her with good treatment, and the husband's failure to provide for her negates keeping her in a reasonable manner, so the second option, which is releasing her with good treatment, becomes necessary.

It was narrated that `Umar (may Allah be pleased with him) wrote to the commanders of the troops who were away from their wives in Madinah, ordering them to return to their wives. They could either divorce them or maintain the marriage, sending them maintenance. And whoever separated from their wives should send maintenance for what had passed.

It was narrated from Sa`id ibn Al-Musayyib that Abu Az-Zinad asked him about a man who does not find what to spend on his wife, he said: They should be separated. Abu Az-Zinad said: A Sunnah? He said: A Sunnah.

Ash-Shafi`i said: And it seems that it is the Sunnah of the Prophet (peace and blessings be upon him).

Since dissolution (annulment) is established due to inability to have intercourse, and the harm in it is less, then it is more fitting to be established due to inability to provide maintenance, which the body cannot do without" End quote.

Thirdly:

If the wife chooses dissolution (annulment), then custody of her child is hers until the child reaches seven years of age, unless she travels or marries, then custody moves to the next in line, according to the difference among Jurists.

The majority of Jurists have gone to the opinion that the most entitled to custody after the mother is her mother - provided that she is also in the father's country. See: "Al-Mughni" (8/197), "Al-Mawsu'ah Al-Fiqhiyyah" (15/122).

Someone scholars have gone to the opinion that the father takes precedence over the mother's mother, and this is the preferred view of Shaykh Al-Islam Ibn Taymiyyah and Ibn Al-Qayyim (may Allah have mercy on them). The basis for this is the Hadith of `Abdullah ibn `Amr (may Allah be pleased with them) that a woman said: O Messenger of Allah, this son of mine was carried by my womb, suckled from my breast, and took refuge in my lap. His father has divorced me and wants to take him away from me.

The Messenger of Allah (peace and blessings be upon him) said to her: "You are more entitled to him as long as you do not marry." Narrated by Ahmad (6707) and Abu Dawud (2276), and Al-Albani graded it sound in Sahih Abu Dawud, and Ibn Kathir authenticated it in "Irshad Al-Faqih" (2/250).

As for the custodian's travel, it causes her to lose her right to custody; as it is in the child's best interest to be close to his father to see him and be cared for.

It is stated in "Al-Mawsu'ah Al-Fiqhiyyah Al-Kuwaitiyyah" (17/308-309):

"The place of custody is the residence where the father of the custodian lives if the custodian is his mother
and she is still married to him

,or in her waiting period from a revocable or irrevocable divorce...

If the mother's waiting period is over, then the place of custody is the city where the father of the custodian or his guardian resides, and likewise if the custodian is not the mother, because the father has the right to see the custodian and supervise his upbringing, and this cannot be achieved unless the custodian resides in the city of the father or the guardian.

This is a shared view among the schools of thought, and it is what the Hanafis explicitly stated and what is indicated by the expressions of the other schools of thought" End quote.

For benefit, please see the answer to question no. (8189).

Fourthly:

If the wife chooses to dissolve (annul) the marriage and separate from her husband, it is apparent that she has taken control of her affairs, and she may return to her country and reside where her family lives.

However, if she does not choose dissolution (annulment), then it is not permissible for her to travel or leave the house without the permission of her husband, due to the general evidence indicating the necessity of her staying at home, the obligation of being with her husband, and seeking his permission to leave his house.

However, with the husband's inability to provide, some Jurists said that he does not have the right to prevent her from working and earning.

See: Ash-Sharh Al-Mumti` (13/493).

In conclusion:

If the husband is unable to provide the mandatory maintenance, and you - the wife - are content with the continuation of the marriage: then you do not have the right to travel except with his permission and approval, so let there be understanding between you about what is best and most suitable.

And the husband should take the means, seek permissible work, ask Allah Almighty for provision and help, and increase in righteous deeds, for they are among the means of provision, as Allah Almighty said (translation of the meaning): And whoever fears Allah - He will make for him a way out and will provide for him from where he does not expect. And whoever relies upon Allah - then He is sufficient for him. Indeed, Allah will accomplish His purpose. Allah has already set for everything a [decreed] extent. (At-Talaq 65:2-3).

And Allah knows best.