

256517 - If he gives his wife the authority to decide about divorce, can she make it dependent upon a condition? And is it invalidated by intercourse?

the question

I have two questions about the same topic. Firstly: assuming that a man gave his wife the authority to decide about divorce, is it valid for her to make the issue of divorce dependent upon a condition? Or is that a kind of toying with it? Is the giving of the authority to decide about divorce cancelled in the event of intercourse, even if there is no intention to cancel it from either spouse, or the wife is not aware that she was given that authority?

Is the giving of the authority to decide about divorce cancelled if she says, “I reject it and I reject any authority to make the most hated of permissible things happen?” Is this wording valid? What about if the wife wants to rid herself of this responsibility, and she does not want this authority at all?

The second question is: assuming that the husband made the divorce conditional on the wife’s wanting it, can the wife stipulate a condition and connect the divorce to some action or specific event, such as happens when a divorce is made dependent upon a condition? Or must she only state that she wants it, without any conditions, or not? I hope you can explain.

To sum up: is there any specific situation in which it is permissible for the wife to make divorce dependent upon a condition, and when? How can she rid herself of that responsibility?

Detailed answer

Firstly:

Giving the wife the authority to decide about divorce means that the man says to his wife: “Divorce yourself,” or “Divorce yourself if you wish,” or “Choose for yourself.”

It says in *al-Mawsoo‘ah al-Fiqhiyyah* (13/1119): The majority of fuqaha’ are of the view that the possible wordings used for giving the wife the authority to decide about divorce may be divided

into those which are explicit and those which are implicit. In their view, that which is explicit is that which mentions the word divorce, such as: “Divorce yourself if you wish.” That which is implicit includes words other than divorce, such as: “Choose for yourself”, or “It is up to you.”

The Hanbalis differentiated between them, and they regarded the word *amr* (matter) – that is: “Amruki bi yadiki (lit. Your matter is in your hand, or It is up to you)” – as being a clear metaphor, whilst they regarded the word *khiyaar* (choice) as being a subtle metaphor. And they said that metaphorical words giving the wife the authority to decide about divorce requires the clear intention of divorce, unlike the clear wording. End quote.

Secondly:

Most of the fuqaha’ are of the view that giving the wife the authority to decide about divorce is invalidated if intercourse occurs, and it is invalidated if the wife rejects it, such as if she says: I do not want a divorce, or I reject the authority to decide about divorce.

It says in *Zaad al-Mustaqni*: If she rejects that authority or if the husband has intercourse with her, or divorces her, or cancels the delegation of authority to her, then she no longer has that option.

Shaykh Ibn ‘Uthaymeen (may Allah have mercy on him) said in his commentary: If he says: “It is up to you,” or “Choose for yourself,” and she says: “No, I do not want that,” then she does not have the authority to decide about divorce. That is like if you say to someone: “Take this thing and sell it for me,” and he says: “No, I will not sell it for you,” then after that he takes it and sells it, that is not permissible. So long as he rejected it, he has no authority to act as a proxy.

Similarly, if he has intercourse with her, or divorces her, or cancels the delegation of authority to her, as noted above, then she no longer has that option. "*Ash-Sharh al-Mumti*“(13/87)"

An example of the husband cancelling the giving of the authority to decide about divorce to his wife is if he says: “I retract my words, ‘It is up to you.’”

Ibn Qudaamah (may Allah have mercy on him) said: If the husband has intercourse with her, he has taken her back. It is a type of delegation, and taking back the control of what he delegated

someone else to do renders that delegation null and void and if the woman rejected what was delegated to her, it becomes invalid, just as delegation of an agent or proxy becomes invalid when the one who was appointed nullifies it.

Thirdly:

If a man gives his wife the authority to decide about divorce, she does not have the right to make it dependent upon any condition. If she makes it dependent upon a condition, that is not valid.

It says in *al-Mubdi'* (6/300): She has no right to stipulate any condition. So if he says: "Divorce yourself," and she says: "I will be divorced if Zayd comes" – that is not valid, because he gave her permission to decide about divorce, but his permission does not include the condition on which that depends. End quote.

It says in *Sharh Muntaha al-Iraadaat* (3/78): If he says: "Divorce yourself," and she says: "I will be divorced if Zayd comes" – she will not be divorced when Zayd comes, because her husband gave her permission to decide about divorce, but his permission does not include the condition on which that depends. End quote.

Fourthly:

The wife has the right to decide about divorce if she is aware that she has been given the authority to do so, but is that limited to the gathering in which she comes to know of it, or does it extend beyond that? That is subject to further discussion and there is a difference of scholarly opinion concerning it.

It says in *al-Mawsoo'ah al-Fiqhiyyah* (13/112): Timescale of the wife's authority to decide about divorce:

The wording of the giving of authority to the wife is either without any limit or qualification, or it is limited to a specific time, or the phrasing clearly indicates all times.

a.. If the wording is without any limit or qualification:

The majority of fuqaha' are of the view that the woman's right to decide about divorce is limited to the gathering in which she came to know of it, even if she stays there for a long time, unless she moves from where she was sitting, such as getting up from that place, or she does something that is not connected to this issue which would indicate that she has no interest in it. Imam Maalik used to say that the choice and the authority to decide about divorce remain in her hands until she stands before the judge or allows her husband to be intimate with her, knowingly and willingly. But he subsequently retracted that view and adopted the view of the majority. This is the view that was adopted by Ibn al-Qaasim and was regarded as more correct by ad-Dardeer and ad-Dasooqi.

The Shaafa'is say: If she delays her response to the extent that her accepting it is no longer valid, then she divorces herself, it does not count as such.

The Hanbalis issued a specific ruling for each phrase of giving the wife the authority to divorce herself.

So if he says to her: "It is up to you (lit. your matter is in your hand)," that is not limited to the gathering in which he said that to her, and she still has the right to divorce herself later on, because it is a kind of delegating authority to do that at any time, unless he said something to limit it. The same ruling applies if he says to her: "Divorce yourself;" she still has the right to do that even later on, because he delegated that authority to her, as when he says, "It is up to you."

If he says to her: "Choose for yourself," that is limited to the meeting in which he said it, provided that they do not pay attention to anything that may customarily be regarded as changing the subject. This was narrated from 'Umar, 'Uthmaan, Ibn Mas'ood and Jaabir. That is because it is giving her the choice to have that right, so she should make a decision immediately, like when she has the choice of accepting it, unless he gives her more time than that, by saying to her: "Choose for yourself within a day" – or a week or a month, and the like. In that case, it becomes her right.

b.. If the phrase used to give her the authority to decide about divorce implies an unlimited time span, then she has the right to divorce herself whenever she wishes, and it is not limited to the

gathering in which this authority was given to her..

The Maalikis restricted it, provided that she does not stand before the judge to ask for a divorce, or says that she does not want this authority, or says or does anything to indicate that she does not want it, such as allowing him to be intimate with her. That is because they said that the spouses must be separated during the timeframe indicated when he gave her the authority to decide about divorce, until she responds one way or another, otherwise it could lead to intimacy within the framework of a marriage concerning which there is doubt as to whether it will continue.

c.. If the wording used to give her that authority is restricted to a specific timeframe, then she continues to have the right to divorce herself until that time ends, and the temporary authority does not end with the end of the gathering or the changing of the subject.

According to the Maalikis, it lasts so long as she does not go to stand before the judge and as long as there is no indication that she no longer wants this authority. End quote.

And Allah knows best.