146836 - Is precedence given to the maternal grandmother over the father with regard to custody of children?

the question

My sister died as a result of a car accident, and she had three daughters, the oldest of whom is five years old. To whom should custody be given – to their father or to their maternal grandmother? Please note that the father is asking for textual evidence if custody is given to the maternal grandmother. Right now the girls are with their grandmother, and the father is demanding custody of them. The husband – the father of the girls – is the one who was driving when the accident happened, and he was driving too fast.

Is he obliged to pay diyah (blood money)? And is it regarded as accidental killing?

Detailed answer

Praise be to Allah.

Firstly:

Custody means taking care of a minor and the like, protecting him from harm, and raising him in a manner that maintains his well-being.

The majority of jurists are of the view that the most deserving of being awarded custody after the mother, if she dies or is not fit to be granted custody, is the mother's mother or grandmothers, the closest then the next closest, meaning the child's maternal grandmother, no matter how far the line of ascent reaches. See: *Al-Mughni*, 8/197; *Al-Mawsu`ah al-Fiqhiyyah*, 15/122.

Some of the scholars are of the view that the father should be given precedence over the maternal grandmother. This is the view favoured by Shaykh al-Islam Ibn Taymiyah and Ibn al-Qayyim (may Allah have mercy on them).

Ibn al-Qayyim (may Allah have mercy on him) discussed this issue and explained the reason for the difference of opinion concerning it.

He (may Allah have mercy on him) said: Because women have more knowledge and experience in raising children, are more able to do it, are more patient and more kind, and have more time for it; for that reason the mother is given precedence over the father.

As men are more able to provide for the child and meet his needs, and are more able to arrange his marriage when he grows up, precedence is given to the father over the mother. Thus giving precedence to the mother with regard to custody is one of the beautiful teachings of Islam and better serves the children's interests; giving precedence to the father because he is able to spend money on the child and arrange his marriage, is also one of the beautiful teachings of Islam.

Once this is understood, is the reason for giving precedence to the mother over the father with regard to custody that she is a mother, or is she given precedence over the father because women in general are more able to raise children and take care of them than males, and thus she is given precedence just because she is female?

There are two scholarly views regarding that which are both found in the madhhab of Ahmad. These two views will lead to either of two scenarios: either precedence will be given to the women on the father's side over the mother's relatives, or vice versa – such as [giving custody to] the maternal grandmother or the paternal grandmother, the sister through the father or the sister through the mother, the maternal aunt or the paternal aunt, the mother's maternal aunt or the father's maternal aunt. There are two views narrated from Imam Ahmad regarding that, one of which is that precedence is to be given to the mother's relatives over the father's relatives. The second view – which is based on sound evidence – is the view favoured by Shaykh al-Islam Ibn Taymiyah, that precedence is to be given to the father's relatives. This is what was mentioned by al-Khiraqi in his *Mukhtasar*, where he said: The sister through the father has more right [to custody] than the sister through the mother, and has more right than the maternal aunt, and the father's maternal aunt has more right than the mother's maternal aunt. Based on that, the paternal grandmother takes precedence over the maternal grandmother, as was stated by Ahmad

in one of the two reports narrated from him.

And he [al-Khiraqi] said: The correct view is that precedence should be given to the female when they are of equal standing [in terms of how closely they are related to the child], just as the mother is given precedence over the father because they are of equal standing. So precedence should not be given to the male over the female when they are of equal standing, because the female has the advantage of being better at taking care of children and raising them.

And he (may Allah have mercy on him) said: Our shaykh, Shaykh al-Islam Ibn Taymiyah, explained this issue further, as he said: The clearest way to determine who is more entitled to custody is to say that as custody is like guardianship, which requires compassion towards the child, educating him and showing kindness and gentleness towards him, the most deserving of people [to be given custody of the child] are those who are better in terms of these qualities, and are his relatives, among whom the ones who are to be given precedence are the ones who are more closely connected to him and are better in terms of these qualities that are required for custody. Therefore if there are two or more who are candidates for custody, if there are of the same standing [in terms of how closely they are related to the child], the female is to be given precedence over the male. Thus the mother is to be given precedence over the father, the grandmother is to be given precedence over the grandfather, the maternal aunt is to be given precedence over the maternal uncle, the paternal aunt is to be given precedence over the paternal uncle, and the sister is to be given precedence over the brother. If there are two males or two females, lots should be drawn to determine which of them is given precedence – meaning when they are of the same standing. If they differ in how closely they are related to the child, then if they are related to the same parent, the one who is more closely related to the child is to be given precedence. Thus the sister is to be given precedence over her daughter, and the maternal aunt is to be given precedence over the maternal aunt of the parents. … If they are from different sides, such as if one of them is related to the mother and the other is related to the father, as in the case of the paternal aunt and the maternal aunt, and the sister through the father and the sister through the mother, the paternal grandmother and the maternal grandmother, the father’s maternal aunt and the mother’s maternal aunt, then precedence should be given to the relative on

the father's side in all of these cases, according to one of the two reports narrated from Imam Ahmad concerning that.

End quote from *Zad al-Ma`ad*, 5/438-451.

Shaykh Ibn `Uthaymin (may Allah have mercy on him) said: This order of precedence that is mentioned by the author is not based on textual evidence or any rational justification. Moreover, there are some contradictions in it and one does not feel at ease with it. Hence the scholars differed concerning the order of precedence with regard to custody, and there are several views, but they all have no reliable basis. Hence Shaykh al-Islam (may Allah have mercy on him) was of the view that precedence should be given to the closest relative of the child, regardless of whether that is the father or the mother, or a relative on the father's side or a relative on the mother's side. If they are equal in terms of how closely related they are to the child, precedence should be given to the female, and if they are both male or both female, then lots should be drawn between them if they are both related on the same side, otherwise precedence should be given to the relative on the father's side…

This explanation is that which Ibn al-Qayyim (may Allah have mercy on him) preferred, and he said that it is what makes the most sense. Based on that, if there is a mother and a grandfather, precedence is to be given to the mother, because she is more closely related to the child. If there is a father and a maternal grandmother, precedence should be given to the father, because he is more closely related to the child. If there is a mother and a father, precedence should be given to the mother, because they are equal in terms of how closely they are related to the child, so precedence is to be given to the female. If there is a grandfather and grandmother, precedence is to be given to the grandmother; if there is a maternal uncle and a maternal aunt, precedence is to be given to the maternal aunt – and so on and so forth. If there is a maternal grandmother and a paternal grandmother, then precedence is to be given to the paternal grandmother according to the view of Shaykh al-Islam (may Allah have mercy on him), which is contrary to the view of the author.

End quote from *Ash-Sharh al-Mumti`*, 13/536.

To sum up: this issue is one concerning which there was a difference of scholarly opinion, and the father and grandmother should reach an agreement based on what is in the best interests of the children. If they disagree, then the matter should be referred to the shar`i court to decide.

Secondly:

If the husband was driving the car too fast, to the extent that he could not avoid the accident that could have been avoided if he was driving at a reasonable speed, then he is to blame for the accident, and he is liable for the damage caused by it. Therefore he must offer expiation for accidental killing of everyone who died in the accident. He must also pay diyah (blood money) to the heirs of the deceased if they demand it. But the diyah must be paid by his `aqilah (male relatives on his father's side), because this is a case of accidental killing. If the relatives are not able to pay it, then it becomes obligatory for him to pay it. Experts should be consulted to determine whether excessive speed was the cause of the accident, or was the cause his of not being able to avoid it.

Shaykh Muhammad ibn Ibrahim (may Allah have mercy on him) said:

From Muhammad ibn Ibrahim to the respected head of the court of [the city of] `Ar`ar:

Peace be upon you and the mercy of Allah and His blessings. To proceed:

We received your letter no. 125, dated 19/2/1383 AH, with an enquiry about a car that rolled over on the Al-Qasim Road, in which one man died and another suffered broken bones. The driver said that the cause was the blowout of a front tire, otherwise he was not going more than 60 kilometers per hour. The brakes were in good condition and the driver was experienced… And so on.

Response: Praise be to Allah alone. In principle, the driver is not at fault, but if it is proven that he fell short in some matters that are regarded as transgressions or negligence – such as driving at an excessive speed, or the brakes were faulty, or the air pressure of the tire was low, or the vehicle was overloaded, and other matters because of which the driver may be regarded as having been negligent, then he is responsible. Otherwise the other party has no recourse except to ask

him to swear an oath [saying that he did nothing wrong].

End quote from *Fatawa ash-Shaykh Muhammad ibn Ibrahim*, 11/278.

See also the answer to question no. 93687.

And Allah knows best.