268514 - If the husband disappears without a trace, who is obliged to spend on his wife?

the question

What should a wife do if her husband has abandoned her but she wants to remarry? By this, I mean that a husband has disappeared without a trace and has been gone for a year. He has not left any maintenance for her. Are his family obliged to pay the maintenance? In any case, the wife now wants to remarry but how can she when she can't divorce him because he is missing?

Detailed answer

Praise be to Allah.

Firstly:

If the husband is missing, in other words, if there is no word of him and his whereabouts is not known, then the wife should go to the Islamic judge, who can stipulate a specific time period, after which he may be presumed dead, according to whatever he sees fit. If that time period expires without any trace of him being found, then the judge may rule that the husband is presumed to have died, and his wife should observe the ‘iddah of one whose husband has died, which is four months and ten days. After doing that, it will become permissible for her to remarry.

But if the wife knows where he is, and he has forsaken her for this length of time, then this comes under the ruling on eelaa’ [a vow on the part of the husband who is able to have intercourse never to have intercourse with his wife, or not to have intercourse with her for more than four months]. In that case, the wife or her guardian should contact him, or refer the matter to the judge, who may force him to return to her, then if he refuses to do so, the judge may separate them by means of one divorce (talaaq) or annulment of the marriage.

For more information, please see the answer to question no. 178188.

Secondly:

Maintenance of the wife of a man who is absent or missing is due from her husband's wealth during the period of his absence, and during the waiting period stipulated by the judge for the missing person to return.

If the husband left some wealth in his wife's possession, then she may take from it what she needs for her maintenance, on a reasonable basis.

If his wealth is not in her possession, or he does not have any wealth, then she should refer the matter to the judge.

Regarding this issue there is a difference of opinion among the fuqaha'. The view that seems most likely to be correct is that the judge should order that her maintenance be paid for from the husband's wealth if there is any such wealth, or he may give her permission to borrow money to spend on her own maintenance, then if it becomes clear that the husband has died, what she spent after his death is to be regarded as being part of her inheritance, because she is not entitled to maintenance from him after he dies.

In al-Mawsoo'ah al-Fiqhiyyah (50/41), it says: The fuqaha' differed regarding the imposition on the husband of the wife's maintenance, or the like, if he is absent.

The Maalikis, Shaafa'is and Hanbalis are of the view that the wife's maintenance must be paid for from her husband's wealth, whether that is imposed by the judge at the wife's request or otherwise. That is because of the report from the Messenger of Allah (blessings and peace of Allah be upon him) that he said to Hind, the wife of Abu Sufyaan: "Take (from his wealth) enough to suffice you and your children on a reasonable basis." In this instance, the Prophet (blessings and peace of Allah be upon him) was making it obligatory for Abu Sufyaan to spend on his wife's maintenance, although he was not present at that time.

Among the Hanafis there are two views regarding maintenance being obligatory upon a husband who is absent:

The first view is that the judge may oblige her absent husband to spend on her maintenance, so long as she requests that, because the problem is with the husband, and the wife should not be deprived of her maintenance. This is the view of Abu Hanifah, initially, and it is the view of an-Nakha'i, because of the hadith of Hind mentioned above.

The second view is that the judge cannot impose maintenance, even if the wife requests it, and even if the judge knows that they are a married couple, because when the judge imposes something on one who is absent, it is like passing judgement against him, and the Hanafis have clearly stated that it is not permissible to pass judgement against someone who is absent, unless there is someone present who can defend him. In this case, there is no one who can do that. This is the final view of Abu Haneefah and it is also the view of Shurayh.

All of this applies if the husband is absent and there is no accessible wealth that he left behind.

But if he left behind some accessible wealth, then it is either in the possession of the wife or someone else.

If the wealth is in the possession of the wife, and is a kind of wealth that may be spent on her maintenance, then the Hanafis are of the view that she may spend on herself without instructions to that effect from the judge, because of the hadith of Hind, the wife of Abu Sufyaan, referred to above.

If the wealth is in the possession of someone else, and is a kind of wealth that may be spent on her maintenance, then the Hanafis differed about the wife taking her maintenance, on the instructions of the judge, from her husband's wealth that is in the possession of other people, whether the husband left that wealth behind as a trust or it is owed to the husband by those people. There are two views:

Ibn Nujaym said: If he had no wealth at all, and she asked the judge to allocate some maintenance to her, then in our view the judge should not listen to this case and ask for proof, because it is like passing judgement against someone who is absent. But according to Zafar, the judge should listen to the case (and to the wife's proof), but he should not pass judgement concerning the marriage,

and he may issue instructions that maintenance be given to the wife from the husband’s wealth.

If the husband has no wealth, the judge may instruct her to borrow money, then if the husband returns and confirms that he is married to her, the judge should instruct him to repay the debt. End quote.

Ibn Qudaamah (may Allah have mercy on him) said: If the wife spends on herself from her absent husband’s wealth, then it turns out that he died before she began to spend on herself, then what she spent should be worked out and deducted from her inheritance, whether she spent it on her maintenance on her own initiative or on the instructions of the judge. This is the view of Abu’l-‘Aaliyah, Muhammad ibn Sireen, ash-Shaafa‘i and Ibn al-Mundhir, and I do not know of anyone who disagreed with them, because she spent that which she had no right to spend.

If there is anything left over (of the inheritance, after deducting what she had spent on her maintenance), then it is hers. If her inheritance did not cover it all, and she is entitled to the second part of the mahr (dowry), or her husband owed her a debt, then it will be counted as part of that maintenance. If she has nothing like that, then the difference (between her inheritance and what she spent on her maintenance) becomes a debt that she owes. And Allah knows best.

End quote from al-Mughni (8/208).

Conclusion:

The wife should refer to the shar‘i judge if her husband has gone missing or is absent, and he has not left any wealth in her possession, so that the judge can issue a decree that she is entitled to maintenance, or he can give her permission to borrow money.

It is not permissible for a woman to remarry unless the judge issues her a divorce or issues a ruling that the missing husband is to be presumed dead and she observes the ‘iddah of one whose husband has died.

If this is in a non-Muslim country where there are no shar‘i courts, then the Islamic centres take the place of the shar‘i courts, so the wife should refer her case to them, so that they can

investigate the matter, and their ruling concerning it is like the ruling of a judge. After that, she may go to the civil court in order to obtain official papers only, not to get the ruling, as has been explained previously in question no. 194467.

And Allah knows best.