296680 - If he sets up a waqf for his children and their children, that does not include the children of his daughters

the question

My father died, and he had sons and daughters. He made his property a waqf for his sons and daughters, which means that they cannot sell it; rather the money generated from the waqf is distributed monthly to his heirs, both sons and daughters. But before he died, our father wrote a will, as follows: that if one of his married daughters dies, the waqf [in her case] ends, and nothing is to be given to her sons and daughters. On the other hand, if one of his sons dies, the waqf passes to the sons and daughters of the deceased heir. This was signed by the heirs, but not all of them. My mother did not know about this will, because her father – as is written in the will – went to the judge himself, but there is no signature of her father or any witnesses in the will; there is only the signature of the judge. Is this will valid? Is it to be executed? If the will is not valid, then what should we do? Is it possible to contest the will?

Detailed answer

Praise be to Allah.

It is valid to set up a waqf for one’s offspring, for one’s children, or for one’s children then their children.

If someone sets up a waqf for his children, that does not include the children of his daughters.

It says in Zaad al-Mustaqni‘: If someone sets up a waqf for his children or for the children of someone else, then for the poor, then it is to be interpreted as being a waqf for his children, both male and female equally, then for the offspring of his sons, but not of his daughters, as if he said it is for the offspring of his children, that is, the offspring of his own loins.

Shaykh Ibn ‘Uthaymeen (may Allah have mercy on him) said: The words “but not of his daughters” mean that the offspring of his daughters are excluded, because the offspring of his daughters are

not regarded as being his own offspring. If he said: This is a waqf for my children, and he has three sons and a daughter, and these four – the sons and the daughter – died, leaving behind children, then the children of his sons are entitled to the waqf, but the children of the daughter have no share of it.

The evidence for this is in the Holy Qur'an. Allah, may He be exalted, says (interpretation of the meaning):

"Allah instructs you concerning your children: for the male, what is equal to the share of two females"

[an-Nisaa' 4:11].

The scholars are unanimously agreed that the children of daughters are not included in a man's children (offspring), because the children of daughters come under the heading of dhawi'l-arhaam (relatives), not his own offspring (from his own loins).

The same applies if he says, This is a waqf for my children, and he has children of his sons and children of his daughters; the children of his daughters are not entitled to anything (of the waqf), because they do not come under the heading of his children or offspring. This is clearly mentioned in the Qur'an and it is what is implied by both custom and linguistic usage. The poet said:

Our sons are the sons of our sons;

as for our daughters, their sons are the sons of men who are not related to us.

Even in cases where close relatives are required to pay diyah (blood money), the children of daughters are not expected to contribute. And with regard to guardianship for marriage, the sons of daughters cannot be guardians.

Based on that, we say: the children of daughters are not included in a man's waqf for his children (and offspring). The evidence for that comes from the Qur'an and from linguistic usage.

End quote from ash-Sharh al-Mumti' (11/44).

This applies if the one who sets up the waqf spoke in general terms (without specifying further), and said: This is for my children and their children, or for my children then their children.

But if he clearly stated that the children of his daughters are not to be included, then that makes it even clearer and more blunt, and leaves no room for dispute.

It should be understood that the Hanbalis, who made it obligatory to be equitable in the giving of gifts to one's children – in contrast to the majority – do not make that obligatory in the case of a waqf, even if the waqf is made for a man's own children; rather they only regarded that as mustahabb (encouraged or recommended).

It says in Daleel at-Taalib (p. 191): It is makrooh (disliked) to give precedence to some of his children over others for no reason; the Sunnah is not to give more to males than females. End quote.

Conclusion:

The waqf mentioned is valid, as the judge approved it. If anyone has any concerns about it, he should refer to the judge who approved it or to the sharee'ah court.

And Allah knows best.