310425 - She left instructions that her land be made a waqf (endowment) but some of the heirs are refusing to carry out this bequest

the question

My grandmother (may Allah have mercy on her) left instructions that her land be made a waqf, but two out of the six heirs are refusing to let it become a waqf and are insisting that it be divided. Please note that the land is agricultural. What is the correct shar'i way to proceed in this case?

Detailed answer

Praise be to Allah.

Firstly:

It is valid to leave instructions for a waqf (endowment), but that is limited to one third of the estate; anything more than one third depends on the consent of the heirs.

In al-Mausuu'ah al-Fiqhiyyah (44/123) it says: But according to the majority of scholars, an exception is made in the case of a waqf that is conditional upon death, such as if a person says: When I die, then this land of mine is a waqf for the poor. In that case, the waqf (endowment) is valid, because it was a donation that was conditional upon his death, so it is regarded as leaving instructions for a waqf. In that case, it comes under the rulings on bequests, with regard to one-third [of the estate], like all other bequests.

The evidence for its being valid to make a waqf conditional upon death, and to regard it as being a valid bequest (wasiyyah), is the fact that 'Umar (may Allah be pleased with him) left instructions in his will saying: This is the bequest of the slave of Allah 'Umar Ameer al-Mu'mineen: when he dies, the land called Thamgh is to be given in charity [as a waqf]. This waqf of his was made on the instructions of the Prophet (blessings and peace of Allah be upon him); it was well known among the Sahaabah and no one objected to it, so there was consensus. End quote.

Secondly:

The heirs are obliged to carry out the instructions of the deceased concerning his wealth, within the boundary of one third of the estate, because Allah, may He be exalted, says (interpretation of the meaning): "...(The distributions in all cases is) after the payment of legacies or debts..." [an-Nisa' 4:11].

Ibn Katheer (may Allah have mercy on him) said in his Tafseer (2/201): Debt takes precedence over bequests, then come bequests, then the division of the inheritance. This is a matter concerning which there is consensus among the scholars. End quote.

So your grandmother's estate should be checked; if the land is no more than one third of her estate, then the entire land must be made a waqf, in accordance with her instructions.

If the land is more than one third of the estate, then of that land, whatever is equivalent to one third of the estate should be made a waqf. After that, the heirs have the choice as to whether or not the rest of the bequest should be carried out. Whoever among them agrees to do that, the instructions should be applied to his share.

If she did not leave anything behind except this land, then one third of it should be made into a waqf, and the remainder should be divided among the heirs.

It is not permissible for an heir to refuse to carry out the instructions of the deceased within the boundary of one third of the estate, and whatever he takes of this bequest is unlawful. The rest of the heirs may refer the matter to the shar'i court so that the one who is refusing may be compelled to comply with the instructions of the deceased.

And Allah knows best