

126444 - Khula' is not regarded as a talaaq even if the word talaaq is used

the question

My question is regarding khula. I have gotten khula from my husband in front of shaikh and two witnesses. After 6 months we decided to get back together and got married with a new marriage contract. Then again after about two years I asked for khula and its been about 10 months now since then. We do have one child together, inshallah his dad told me he promises Allah and me that he wouldn't give me a hard time like he did before. So for Allah's sake and my son I am willing to marry him again. My question is since I had khula done twice (this would be our "third" marriage contract if we got married again). I was just wondering if its OK in Islam for us to get married again? Does this count as three divorce? if not does it count as divorce at all? Please advise us as to what has to be done.

Detailed answer

Khula' is not regarded as a talaaq even if the word talaaq is used, according to the more correct opinion.

This may be explained as follows:

1.

If khula' takes place without using the word talaaq, and is not intended as a talaaq, then it is an annulment (of the marriage contract) according to a number of scholars. This is the view of al-Shaafa'i in his old madhhab, and it is the view of the Hanbalis. The fact that it is an annulment means that it is not counted as a talaaq. The one who separated from his wife by khula' twice may go back to her with a new marriage contract, and it is not counted as a talaaq at all.

An example of that is if the husband said, "I separated from my wife by khula' in return for such-and-such an amount of money" or "I annulled her marriage in return for such and

such.”

2.

But if the khula’ involved the word talaaq, such as saying “I divorce (talaqtu) my wife in return for such-and-such an amount of money”, then it is a talaaq according to the majority of scholars. See al-Mawsoo'ah al-Fiqhiyyah (19/237).

Some of the scholars are of the view that this is also an annulment and is not counted as a talaaq, even if the word talaaq is used. This was narrated from Ibn ‘Abbaas (may Allah be pleased with him) and was the view favoured by Shaykh al-Islam Ibn Taymiyah, who said: It is the stated view of Imam Ahmad and his oldest companions.

See: al-Insaaf (8/393).

Shaykh Ibn ‘Uthaymeen (may Allah have mercy on him) said: But the more correct view is that khula’ is not talaaq, even if the actual word talaaq is used. This is indicated by the Holy Qur’aan. Allah, may He be glorified and exalted, said (interpretation of the meaning):

“The divorce is twice, after that, either you retain her on reasonable terms or release her with kindness”

[al-Baqarah 2:229]

i.e., within the first two times, either keep her or let her go, it is up to you.

“And it is not lawful for you (men) to take back (from your wives) any of your Mahr (bridal-money given by the husband to his wife at the time of marriage) which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allah (e.g. to deal with each other on a fair basis). Then if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the Mahr or a part of it) for her Al-Khul’ (divorce)”

[al-Baqarah 2:229]

So this is a separation on the basis of giving back (all or part of the mahr). Then Allah, may He be glorified and exalted, says:

“And if he has divorced her (the third time), then she is not lawful unto him thereafter until she has married another husband”

[al-Baqarah 2:230].

If we count khula’ as a talaaq, then these words “And if he has divorced her” would refer to a fourth talaaq, and this is contrary to scholarly consensus. The words “If he has divorced her” mean a third divorce, “then she is not lawful unto him thereafter until she has married another husband”

The evidence in the verse is clear. Hence Ibn ‘Abbaas (may Allah be pleased with him) was of the view that any separation in which compensation is paid is khula’ and not talaaq, even if the word talaaq is used. This is the correct view. End quote from al-Sharh al-Mumti’ (12/467-470).

And he (may Allah have mercy on him) said:

Every wording that points to a separation in return for compensation is khula’, even if the word talaaq is used, such as saying for example, “I divorce (talaqtu) my wife in return for compensation of one thousand riyals.” We say: this is khula’, and this is what was narrated from Ibn ‘Abbaas (may Allah have mercy on him), that everything in which compensation is involved is not talaaq. ‘Abd-Allah ibn al-Imam Ahmad said: My father thought the same about khula’ as Ibn ‘Abbaas (may Allah be pleased with him) did, i.e., it is an annulment, no matter what wording is used, and it does not count as a talaaq.

An important issue stems from this: if a man divorces his wife (talaaq) on two separate occasions, then khula’ takes place using the word talaaq, then according to the view of those who say that khula’ using the word talaaq counts as talaaq, she is irrevocably divorced from him, and she is not permissible for him until she has been married to someone else. According to the view of those who say that khula’ is an annulment even if

the word talaaq is used, she becomes permissible for him with a new marriage contract even during the 'iddah. This view is more correct. But nevertheless we advise those who write down the khula' not to use the word talaaq when recording it, rather they should say "he separated from his wife by khula' in return for compensation of such and such value", because most judges in our country, and I think even in other countries, believe that if khula' occurs using the word talaaq, it is counted as talaaq, and this may be detrimental to the woman, because if it is a final talaaq she will become irrevocably divorced, and if it is not the final talaaq it will still be counted against him. End quote from al-Sharh al-Mumti' (12/450).

Based on this, if you want to go back to your husband, then it is essential to have a new marriage contract and no talaaq is counted against you.

And Allah knows best.