

98452 - If he says: "If I marry So and so then she is divorced"

the question

I needed your help please. A statement of divorce (such as "if i marry xyz then she is divorced") made BEFORE marriage while a man is still single then will this cause automatic divorce in his future marriage as soon as the person gets married? I believe Hanafis and Malikis count this as divorce while others like Shafae and Hanbalis do not. Can you please tell me which opinion is more correct and which opinion is followed by the majority? Do Hanafis and Malikis have evidence to support their opinion that a divorce statement made before marriage will cause automatic divorce in future marriage? And finally is there any difference on the legal ruling if the statement was made in general form (without mentioning a specific woman) as compared to a specific form (where a woman was mentioned in the statement)?.

Detailed answer

The fuqaha' differed concerning the case where a man says, "If I marry So and so - and mentions a specific woman by name - then she is divorced."

The Shaafa'is and Hanbalis are of the view that if he marries her, the divorce does not take place. The Hanafis and Maalikis are of the view that she is divorced.

But if he says, "Any woman whom I marry is divorced," and he does not mention a specific woman, then this does not count as a divorce, except according to the Hanafis.

The Maalikis disagreed with them, so in their view the divorce does not count as such unless he mentioned a specific woman, or a

specific time or place, such as saying, “Every woman whom I marry in the next ten years is divorced.”

The view of the Shaafa’is and Hanbalis is the more correct view, as indicated by the saheeh evidence. Al-Tirmidhi (1181) narrated from ‘Amr ibn Shu’ayb from his father that his grandfather said: The Messenger of Allaah SAWS (peace and blessings of Allaah be upon him) said: “The son of Adam cannot make any vow concerning that which is not his, he cannot free (any slave) who is not his, and he cannot divorce any wife who is not his.” Classed as saheeh by al-Albaani in Saheeh al-Tirmidhi.

And Abu Dawood narrated from ‘Amr ibn Shu’ayb, from his father from his grandfather that the Prophet SAWS (peace and blessings of Allaah be upon him) said: “You cannot divorce (any wife) who is not yours, you cannot free (any slave) who is not yours and you cannot sell (any goods) that are not yours.” Classed as hasan by al-Albaani in Saheeh Abi Dawood.

Al-Bayhaqi (may Allaah have mercy on him) stated that the majority of the Sahaabah and Taabi’een understood from these texts that if a man says, “If I marry So and so then she is divorced,” then he marries her, no divorce takes place, because he issued a conditional divorce and said it at a time when she was not his wife. This was narrated from him by al-Haafiz in Fath al-Baari.

Ibn ‘Abbaas (may Allaah be pleased with him) was asked about a man who said: “Every woman whom I marry will be divorced.” He said: It is of no significance, because Allaah says (interpretation of the meaning): “O you who believe! When you marry believing women, and then divorce them ...” [al-Ahzaab 33:49].

Ibn Khuzaymah also narrated that he [Ibn 'Abbaas] was asked about a man who said: "If I marry So and so then she will be divorced." He said: It is of no significance, because only the one who is married to a woman can divorce her. They said: Ibn Mas'ood said: If he specifies a time then it is as he said (i.e., that the divorce counts as such). He said: May Allaah have mercy on Abu 'Abd al-Rahmaan; if it was as he said, then Allaah would have said: "When you divorce believing women and then marry them."

Ibn Qudaamah (may Allaah have mercy on him) said in al-Mughni (9/416): If he said: If I marry So and so, then she is divorced, she is not divorced if he marries her. Then he quoted Imam Ahmad (may Allaah have mercy on him) as saying that, then he said: This was also narrated from Ibn 'Abbaas, and it was the view of Sa'eed ibn al-Musayyab, 'Ata', al-Hasan, 'Urwah, al-Shaafa'i, Abu Thawr and Ibn al-Mundhir. It was narrated by al-Tirmidhi from 'Ali, Jaabir ibn 'Abd-Allaah, Sa'eed ibn Jubayr, 'Ali ibn al-Husayn, Shurayh and others among the fuqaha' of the Taabi'een. He said: It is the view of most of the scholars. End quote.

Imam al-Bukhaari (may Allaah have mercy on him) favoured the view of the majority, which is that no divorce takes place. He narrated this view from 'Ali and Ibn 'Abbaas (may Allaah be pleased with them both) and a number of the Taabi'een. He (may Allaah have mercy on him) said: Chapter: There is no divorce before marriage, and the verse in which Allaah says (interpretation of the meaning): "O you who believe! When you marry believing women, and then divorce them before you have sexual intercourse with them, no 'Iddah [divorce prescribed period] have you to count in respect of them. So give them a present, and set them free (i.e. divorce) in a handsome manner" [al-Ahzaab 33:49]. Ibn 'Abbaas said: Allaah has decreed that divorce be after marriage. It was narrated concerning that from 'Ali, Sa'eed ibn al-Musayyab, 'Urwah ibn al-Zubayr, Abu Bakr ibn 'Abd al-Rahmaan, 'Ubayd-Allaah ibn 'Abd-Allaah ibn 'Utbah, Abaan ibn 'Uthmaan,

'Ali ibn Husayn, Shurayh, Sa'eed ibn Jubayr, al-Qaasim, Saalim, Tawoos, al-Hasan, 'Ikrimah, 'Ata', 'Aamir ibn Sa'd, Jaabir ibn Zayd, Naafi' ibn Jubayr, Muhammad ibn Ka'b, Sulaymaan ibn Yasaar, Mujaahid, al-Qaasim ibn 'Abd al-Rahmaan, 'Amr ibn Harim and al-Sha'bi that she is not divorced. End quote.

See: Fath al-Qadeer (3/114); al-Muntaqa by al-Baaji (4/117); Sharh al-Kharashi 'ala Khaleel (4/38).

And Allaah knows best.