



**Rights of Divorced Parents upon the Children**  
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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

The great scholar of Islaam, Abu Dawud as Sijistaanee in his Sunan in the Chapter of, “The One Who has the Most Right to the Children” in the book of divorce brings the following Hadeeth:

On the authority of Abdullah bin ‘Amr:

“A woman came to the Messenger of Allaah sallallaahu alaihi wasallam and said: ‘O Messenger of Allaah! Indeed my son grew in my stomach, and was nursed on my breasts, and was sheltered in my home. His father divorced me and now he wants to take him from me.’ So the Messenger of Allaah said to her: “You have more right to him as long as you don’t remarry.”<sup>1</sup>

Looking at the explanation of this narration, the great scholar of Hadeeth, Atheem Aabaadee rahimahullaah says in his explanation of this narration in his book Awnul Ma’bud:

“This Hadeeth is a proof that the mother has more right to the children than the father as long as there does not come something to prevent it, like her marrying someone else, due to the specification of the Messenger of Allaah to the rights of custody by his statement “as long as you don’t remarry”. And this is the statement of Imaam Maalik, the Shafi’eyah, the Hanafiyyah, and ibnul Mundhir has mentioned that there is consensus of the scholars upon that...”<sup>2</sup>

Ibnul Qayyim al Jawziyyah rahimahullaah says in explanation of this Hadeeth:

“And there is no other Hadeeth besides this one from the Prophet about the loss of the rights of guardianship by marriage, and it is the opinion of the four Imaams and other than them.”<sup>3</sup>

He says later in the same book: “And this Hadeeth establishes that if two spouses separate and have children between them; then the mother has more right to

<sup>1</sup> Hadeeth.2273 This Hadeeth has been graded Hasan by the great scholar of hadeeth, Shaykh Muhaamad Naasirud Deen al Albaanee in his book Saheeh Abu Dawud (2/32), As-Saheehah (1/2/709), and Irwaa (no. 2187)

<sup>2</sup> v.6 p.298

<sup>3</sup> Zaadul Ma’aadh

them than the father as long as the mother does not do that which will prevent her taking precedence...”

The statement of Ibnul-Qayyim here, ‘as long as the mother does not do that which will prevent her taking precedence’, ‘that’ which is intended here is her marrying someone else.

There is also another Hadeeth that comes in this issue that is also collected by Imam Abu Dawud in the same chapter:

On the authority Abu Maymunah Salmaa, a freed slave from the people of Madinah who said:

“While I was sitting with Abu Hurairah, a woman from Persia, whose husband had divorced her, came to him with a child that they were both claiming. So she said to him in Persian, ‘O Abu Hurairah! My husband wants to take my son.’ So Abu Hurairah said to her: ‘Draw lots for him.’ So her husband came and said: ‘Who challenges me about my child?’ So Abu Hurairah said: “Indeed I do not say this except that I was sitting with the Messenger of Allaah and I heard a woman come to him and say: ‘O Messenger of Allaah! My husband wants to take my child, but he draws water for me from the well of Abu ‘Inabah and he helps me.’ So the Messenger of Allaah said: ‘Draw lots for him.’ So her husband said, ‘Who challenges me about my child?’ So the Prophet said [to the child], ‘This is your father, and this is your mother, so take the hand of whichever one of them you desire to go with.’ So he chose the hand of his mother, and she went off with him.”

Atheem Abaadee rahimahullaah says in explanation of this narration:

As Sindee rahimahullaah says, “Draw lots for him” meaning for the child. He says in An-Nayl: In this is proof that drawing lots is a legislated means when deciding between two affairs, and that it is permissible to refer to it just as it is permissible to refer to the choice of the child, and it is said that the choice of the child takes precedence over it, but there is not found in the Hadeeth of Abu Hurairah evidence for this. Rather, perhaps it points to the opposite because the Prophet commanded them firstly to draw lots and when they did not do that, he left the choice to the child, and it is said that the choice of the child takes precedence because of the agreement of the wordings of the different Ahaadeeth, and the rightly guided Khulafaa working by this.

“So take the hand of whichever one of them you desire to go with.”

Al-Khataabee said in al-Ma’aalim: “This is for the child who can reason and is no longer in need of nursing, if so then he chooses between the two parents. The scholars have differed in this. Ash-Shaafi’ee says, “If he turns seven or eight years of age he chooses.” This is what Is’haaq said. Ahmad said: He chooses when he has grown. The people of Ra’y and Sufyaan ath-Thawree say, “The mother has

more right to the child until he can eat by himself and dress himself, and with the girl until she has her menses, then the father has more right.” Maalik said, “The mother has more right to the girls until they marry, even after having their menses, and as for the boys he has more right to them until they reach the age of puberty.” Al-Khataabee said, “It is likely that those who leave off the choice [of the child] and go to the father having more right as long as the child is no longer in need of nursing, go to that the mother’s lot is the nursing of the child because she is more caring in that, and when the child passes the age of nursing then he is in need of the father, and sustenance, and the father is a better protector for him than the mother...” [End of quote from Awnul-Ma’bud]