

Form No.HCJD/C-121

**ORDER SHEET**

**IN THE LAHORE HIGH COURT,**

**MULTAN BENCH, MULTAN.**

**JUDICIAL DEPARTMENT**

W.P. No. 12826 of 2023

Mst. Arzoo      **Vs.**      District Police Officer and  
three others.

S.No. of order/ proceeding	Date of order	Order with signatures of Judge, and that of parties or counsel, where necessary.
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**11.09.2023**      Mahar Haseeb Qadir, Advocate with the petitioner.  
Mr. Mushtaq Ahmad Chohan, Assistant Advocate  
General Punjab with Munawar, Inspector.  
Rasheed Ahmad, respondent No.3 in person.

Through this petition filed in terms of the Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 read with section 491 of the Code of Criminal Procedure, 1898, the petitioner namely Mst. Arzu has sought the custody of her minor son namely Muhammad Ans.

2.      In compliance of the order dated 05.09.2023, the minor namely Muhammad Ans has been produced before the Court by Rasheed Ahmad, respondent No.3, who had gained the custody of the minor namely Muhammad Ans by way of adoption.

3.      A perusal of the record and facts and circumstances reveals that the minor namely Muhammad Ans was put up for adoption and he was adopted by Rasheed Ahmad (respondent No.3) and started to live with him. During the course of events, the instant petition was filed by the petitioner namely Mst. Arzu who claimed herself to be the biological mother of Muhammad Ans and sought his custody. In order to resolve the controversy between the parties, this Court passed an order in the connected matter bearing Writ Petition No.11308 of 2023 titled *Nasir Raza versus Additional Sessions Judge and two others* that the maternity of the minor child namely Muhammad Ans be got determined as it was the paramount question to decide the matter. In this regard, the SHO Police Station Tulamba, District Khanewal (respondent No.2) was directed to take the petitioner

and Muhammad Ans to Punjab Forensic Science Agency, Lahore with an application for the determination of the maternity of the minor child and the Director Punjab Forensic Science Agency, Lahore was directed to prepare and submit a detailed report in this regard. The said report of Punjab Forensic Science Agency, Lahore with regard to the determination of the maternity of Muhammad Ans is now available. According to the said report of Punjab Forensic Science Agency, Lahore, the conclusion, which has been drawn after the DNA Analysis, is that **the minor namely Muhammad Ans is the biological child of the petitioner namely Mst. Arzu.** The report of the Punjab Forensic Science Agency, Lahore has been made part of the record of the instant case . With the increased rate of adoption in the Muslim world especially in Pakistan, the adoption issue has taken the status of one of the sensitive issues. The concept of adoption has caught the attention of the general masses mainly due to the shift in the social paradigms and the Laws governing it, it can also be due to the rising interest of the European Immigrants adopting Pakistani children. The concept of adoption is not a new one. In Islam, there is no prohibition on adoption since it was found to be in the greater interest of humanity and also to the Muslim community of the world. Few glorious examples of adoption from Islamic history can be traced as the practice of adoption was the continuation of the prevalent custom in the Arab peninsula.

- The Holy Prophet (P.B.U.H) continued the practice by declaring Hazrat Zaid bin Harisa (R.T.A), who was a slave gifted to the Holy Prophet by His (P.B.U.H) wife Hazrat Khadija (R.T.A), as his adopted son and he was generally known as Zaid-bin-Muhammad (R.T.A).
- The Holy Prophet (PBUH) ordained to hand over the daughter of Hazrat Hamza(R.T.A) in the custody of Hazrat Jaafar (R.T.A).
- Hazrat Abu Huzifa Bin Atba bin Rabeea Bin Abd Shams (R.T.A), a companion of the Prophet (P.B.U.H) adopted one child Salim bin Ma'qal and gave his niece in Salim bin Ma'qal's wedlock.
- The Holy Prophet (P.B.U.H), Himself was an orphan, and was adopted and raised by his uncle Hazrat Abu Talib.
- The Holy Virgin Mary (P.B.U.H) was adopted by her uncle Holy Zakaria (P.B.U.H) as stated by the Holy Quran.

- The Holy Moses (P.B.U.H) was adopted by Pharaoh and His wife Ayesha (R.T.A).

In this modern era, the responsibility of the Adopted Children falls on the Society and the State, which work together for the welfare of its people, especially the children. Quran repeatedly emphasizes the good conduct for the upbringing of orphans as the rights of such orphan children have been made the duty of the society.

### **The Holy Quran states:-**

“And treat not the orphans with harshness. (93/9)”

“Seest thou one who denies the Judgment (to come)? Then such is the (man) who repulses the orphan with harshness (107/1.2)”

“And they (the righteous people) feed for the love of God the indigent, the orphan and the captive. (76/8)”

“Those who unjustly eat up the property of orphans indeed eat up a fire into their own bellies, they will soon be enduring a blazing fire. (4:10)”

“They ask thee what they should spend (in charity), say: whatever ye that is good, is for parents and kindred and orphans and those in want and for way farer. (2:215)”

In the Holy Quran, apart from the names of the prophets, no other name of any individual has been mentioned except that of Hazrat Zaid Bin Haris (R.T.A), the adopted son of the Holy Prophet Muhammad (PBUH) . However, it is to be taken into account that the word "*yateem*" in the Arabic language is not confined to the children who have lost their parents but also to the people without a guardian like widows or the disadvantaged children. The debatable issue in adoption not only involves getting the physical charge of the child but also determining the rights of such a child. The identity of the adopted child is a sensitive issue and a lot of debate has been done on that whether the adoptive parents should be declared or presumed to be the real parents of the adopted child for the sake of the Child's recognition in the society as well as in the official

records. This issue can be further diverged by classifying the adopted children into the classes of children with known parentage and that of unknown parentage/abandoned children. As far as an adopted child of known parentage is concerned, according to Islamic concept, he/she must be recognized through his /her **natural biological parents**, the evidence emerges from the following verses of the Quran;

“ Allah has not made for any man two hearts in his chest cavity, nor did he make your wives whom you subjected to Zihar, your mothers, nor did he make your adopted sons your (real) sons. That is (merely) a word uttered by your mouths. And Allah says the truth and He shows the (right) way.” (33/4)

“ Call them by (the name of) their (real) fathers; It more equitable in the sight of Allah. And if you do not know their fathers, then they are your brothers in faith and your friends. There is no sin on you in the mistake you make, but in that which you do with intention of your hear; and Allah is Most-Forgiving, Very-Merciful.” (33/5)

The above mentioned verses clearly distinguish between the adopted children of known as well as of unknown lineage. It clearly orders for relating the identity of the adopted children with their biological parents if known but for those with the unknown parentage, it permits, rather prescribes that they may be treated and identified as your brothers and associates. This issue of lineage was again emphasized in the last Sermon of the Holy Prophet (PBUH) in which he categorically warned that no one should change his lineage. The adoption of child has no legal effect in *Shariah* rather it is for emotional and psychological satisfaction. The adoptive parents may treat an adopted child as their natural child in the matters of love, affection and general behaviour. The adoption of a child with the purpose of providing shelter to him is virtuous and carries much reward for welfare of the Child but *adoption in Islam has no legal consequence*. The child should be attributed to the natural parents, and not to the father or mother who has adopted

him and marriage of adopted children with natural children of adoptive parents is not prohibited unless they relate to each other in a prohibited degree. In short, adoption does not create a new legal relationship which did not exist before adoption. According to the NADRA (National Database and Registration Authority) Registration procedure, the parentage of the adopted child with known parentage must be entered as that of natural/biological parents, whereas parentage of the children with unknown parentage can be entered with some fictitious names to avoid social stigmas but there must be evidence provided by the adoptive parents that the child is with unknown parentage to avoid any confusion or controversy over the rights or duties of the adopted child as a biological child. Until now no law in Pakistan addresses the issue of adoption. However, the process of adoption is carried out in the name of custody of the person of the child under the Guardians and Wards Act, 1890. The adoptive parents apply to the court under the provisions of the Guardians and Wards Act, 1890 and in the case of a child with known parentage, make the biological parents of the child as respondent who usually give consenting statement in favour of the applicant, adoptive parent. Adoption has not been defined nor is recognized under the Succession Act, of 1925. Succession to the movable and immovable property of any intestate Pakistani is governed under the laws of Pakistan in terms of section 5 of the Succession Act, 1925. Degree of kindred is computed in the manner set out in the Schedule 1 to the Succession Act, 1925. *The adopted child does not find any mention in the category of kindred upon whom the property of intestate upon his death may devolve.* According to the succession laid down under the Succession Act, 1925, an adopted child is not an heir or kindred entitled upon intestacy to inherit the estate of his adoptive parent. Adoption under 'Muslim Law' does not create any kindred relationship between the adopted child and adoptive parent whosoever. Therefore, this Court is left with no other option but to allow this petition

and to hand over the custody of Muhammad Ans to the petitioner namely Mst. Arzu, who has been determined to be the biological mother of the child namely Muhammad Ans. This Court, in the exercise of its jurisdiction under article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 has to exercise parental jurisdiction and is not precluded in any circumstance, from giving due consideration to the welfare of a minor and to ensure that no harm or damage comes to him physically or emotionally. There is no cavil that this Court is competent to entertain a habeas corpus petition under article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 and direct that a person in custody within its territorial jurisdiction be brought before it and satisfy itself that the said detainee is not being held in improper or illegal custody. However, the proceedings in the habeas corpus jurisdiction are summary in nature and this Court cannot conduct a detailed inquiry. The only and the paramount consideration for exercising the jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 must be the welfare of the child. The basic consideration always is to provide the child with the most natural, most considerate and most compassionate atmosphere to grow up as a better member of the society. The term *hidhana* in Arabic is derived from the root *hadhana* which in Arabic means "*the distance between the armpits to the loins*", "*the chest and the two arms and what includes in between*", that can be summed up as "embrace". Accordingly, the word *hidhana*, which can grammatically be either infinitive or noun, means, "*to clasp the baby to one's breast*", "*to nurture the baby*", "*to embrace the baby*", which can be viewed as a synonym to "nursing" and "wet nursing". In Islamic jurisprudence, the term *hidhana* is used in its lexical meaning and it does not have a new meaning (legal reality), as some believe. Thus, using the word *wilaya* in the meaning of "guardianship" for the definition of *hidhana* would not be correct. *Hidhana* (custody) can literally be said to mean "to

*embrace or hug*” and in the *Shari’a*, it means “*raising or bringing up of a child*”. *Hidhana* is a form of guardianship which women are more suitable to assume because they are more experienced in the area of looking after children and they are generally more caring and compassionate. When it comes to the care of a minor child, the legal definitions can be confusing. Many people conflate *custody with guardianship* while the two terms describe very different things. There exists a distinction between guardianship and custody. Under sections 4(2), (S), 9(i) and 25 of the Guardians and Wards Act 1890, “guardianship” and “custody” are not held to be synonymous terms. It is observed that “guardian” as defined in S. 4(2) means a person providing *de facto* or *de jure* care of the person or property of a minor. *Such a person may or may not have the custody of a minor*. Custody describes a parent’s care of a child, whereas legal guardianship is granted to someone who is not necessarily the child’s biological parent. Muslim Law, which gives the right of *hizanat* to the mother, has to be presumed to have considered it to be in the interest of the welfare of such a minor child to remain in the custody of his mother. It is true that a Guardian Court is the final arbitrator to adjudicate upon the question of custody of child but this does not mean that in exceptional cases when a person, has no remedy to regain the custody pending adjudication by the Guardian Court. In exceptional cases where the High Court finds that the interest and welfare of the minor demanded that the minor be committed immediately to the custody of his biological mother, the Court can pass an appropriate order under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 directing the custody of a minor to the biological mother as an interim measure pending final decision by the Guardian Court. Reliance is placed on the cases of “Mirjam Aberras Lehdeaho v. S.H.O., Police Station Chung, Lahore and others” (2018 SCMR 427), “Ahmed Sami and 2 others v. Saadia Ahmed and another” (1996 SCMR 268) “Shaukat Masih v. Mst. Farhat Parkash and

others”(2015 SCMR 731), “Muhammad Khalil-ur-Rehman v. Mst. Shabana Rahman and another” (PLD 1995 SC 633) and “Mst. Nadia Perveen v. Mst. Almas Noreen and others” (PLD 2012 SC 758).

9. In view of the above discussion, this petition is **allowed** and the custody of Muhammad Ans is ordered to be handed over to the petitioner, his **biological mother**. It has been brought to the notice of the Court that respondent No.3 intends to file application/applications under the Guardians and Wards Act, 1890 seeking to be appointed as a guardian of the minor and have his custody. It is, therefore, directed that if and when such application/applications is/are filed by the respondent No.3, the competent forum shall decide the same strictly in accordance with the law and expeditiously, preferably within a period of two months of the filing of the same. It is also directed that the petitioner shall produce the minor before the competent forum if, *as and when directed by the said forum* so as to allow Rasheed Ahmad (respondent No.3), to meet with the minor. However, Rasheed Ahmad (respondent No.3) shall not be allowed to take the minor out of the premises of the competent forum. It is also made clear that any such petition filed by respondent No.3 under the Guardians and Wards Act, 1890 seeking to be appointed as a guardian of the minor namely Muhammad Ans, and have his custody, the same shall be decided on its own merits, without being influenced in any manner by any observation made in this order and strictly in accordance with the law.

(SADIQ MAHMUD KHURRAM)  
JUDGE

T.M.Alvi/\*

Approved for Reporting  
Judge