

Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION No. 156 of 2020

Ms. Shazia Akbar Ghalzai, etc.

Vs

Additional District Judge etc.

PETITIONERS BY: Ms. Saira Khalid Rajput, Advocate.

RESPONDENT BY: Mr. Mehboob-e-Hasnain, Advocate.

DATE OF HEARING: 15.01.2021.

BABAR SATTAR, J.- The petitioner is aggrieved by judgment and decree dated 21.06.2019 passed in Family Suit No. 116/2018, whereby petition under sections 7 & 17 of the Guardians and Wards Act, 1890 for appointment of petitioner as guardian was dismissed along costs of Rs.5,000/- and the judgment and decree dated 27.11.2019 passed in Family Appeal No. 73/2019 by the learned Additional District Judge, where by the appeal was dismissed.

2. The brief facts of the case are that the petitioner is the mother of a minor namely Muhammad Rohan born on 26.09.2017 to the petitioner and respondent No.3, who got married on 14.09.2016. The petitioner is an academic and she was to proceed to France for higher studies after being awarded a scholarship for

such purpose. She proceeded to France to pursue her PhD programme in September 2, 2017 when her son was three months old, who was living in the custody of respondent No.3. She came back to Pakistan in January, 2018 to meet with her son and then finally returned to Pakistan in May, 2018. During this period differences developed between the petitioner and respondent No.3 and a criminal case was filed by the petitioner against respondent no.3 to seek custody of her minor child. The criminal proceedings and custody proceedings culminated in a judgment of the august Supreme Court, which through order dated 16.08.2018 handed over custody of the minor to the petitioner while permitting respondent No.3 to seek visitation rights in appropriate proceeding under the Guardians and Wards Act, 1890 ("**Act**"). The present petition is a consequence of suit filed by the petitioner seeking to be appointed guardian of the person of the minor child in place of respondent No.3 who is the father of the minor and is natural guardian. Meanwhile on 17.09.2018 the petitioner pronounced divorce on respondent No.3 claiming that she has such right under the Nikah Nama dated 14.09.2016, which is contested by respondent No.3. The issue of divorce was neither the subject matter of the proceedings that led to the impugned judgments nor forms subject of the instant petition.

3. Learned counsel for the petitioner has taken me through the facts of the case and submits that the petitioner seeks setting aside of the impugned judgments and decrees dated 21.06.2019 and 27.11.2019 passed by the learned trial court and the learned appellate court, respectively, and seeks her appointment as

guardian under sections 7 and 17 of the Act. Learned counsel for the petitioner submits that the petitioner is a dedicated mother of a suckling baby who has great love and affection for her child and her appointment as guardian is in the child's welfare; that respondent No.3 is disqualified from being a guardian as he was involved in the abduction of the child which led to registration of FIR No. 166/2018 and subsequently it was eventually the august Supreme Court that handed her custody of the minor; that in view of such criminal case he is unfit to be a guardian; that the petitioner is serving as a lecturer at Quaid-i-Azam University and living in the hostel as she is a native of Jamshoro and has to stay in Islamabad during the Eid holidays due to the visitation schedule determined by the Guardian Court which is too harsh; that superior courts have held that mother is entitled to being appointed guardian of minor if that is in the welfare of the child and she is only seeking appointment as guardian for the person of the child and not his property. In support of her arguments the learned counsel relies on the judgments reported as Amjad Masih vs. Mst. Bushra Bibi [2010 YLR 1468], Muhammad Noman Malik v. Rukhsan Noman [1983 CLC 2846], Hussain Bux vs. Mir Muhammad [1985 MLD 161 Karachi], Shabana Naz vs. Muhammad Saleem [2014 SCMR 343], Mst. Munazza Bibi vs. SHO Police Station Chichawatni [2012 PCr.LJ 1567], Mst. Shahmim vs. Sarfraz [2013 MLD 1885], Mst. Feroze Begum vs. Lt.Col. Muhammad Hussain [1978 SCMR 299], Talib Hussain vs. Bashiran Bibi [1985 CLC 592 Lahore], Mirjam Aberras Lehdeaho v. SHO, Police Station Chung, Lahore [2018 SCMR 427], Naveed Munir vs. Additional District and Sessions Judge, Lahore [2011 MLD 1938], Bashir Ahmed vs. Incharge (Female) Darulaman, District

Mianwali [2011 SCMR 1329], [PLD 2009 Karachi 50], Mst. Shah Bakht and 4 othres vs. Rodin and 4 others [PLD 2007 Quetta 91], Mrs. Seema Chaudhry vs. Ahsan Ashraf Sheikh [PLD 2003 SC 877], SakhawatAli vs. Shui Khelay [PLD 1981 SC 454] and Naveed Munir vs. Additional District and Sessions Judge, Lahore [2014 SCMR 1446].

4. Learned counsel for the respondent submits on the factual plain that allegations against respondent No.3 that he kidnapped his child has not been substantiated in trial proceedings and that the learned Magistrate passed a judgment of acquittal in this regard on 19.09.2020; that the petitioner left her three months suckling baby with respondent No.3 when she left for France for further studies and it was the father who looked after the child till she returned back several months later and consequently the petitioner's argument that child's welfare is of paramount concern to her is not backed by facts; that the petitioner is emotionally unstable and has admittedly attempted to hurt herself; that the petitioner already has custody of the minor child and is only seeking appointment as guardian as she wishes to take the child outside the territorial jurisdiction of Pakistan, which fact was brought before the august Supreme Court during the proceedings in which custody of the minor was handed over to the petitioner with the direction that the petitioner shall not remove the minor out of the territorial limits of Pakistan without express permission of a court of competent jurisdiction.

5. On the legal plain, learned counsel for respondent No.3 submits that section 19 of the Act prohibits the court from

appointing another individual as guardian if the father is alive and not unfit to be the guardian in the opinion of the court; that the petitioner has failed to establish any grounds leading to disqualification of the father as guardian for purposes of section 19; that respondent no.3 has continued to maintain his child, has looked after the child when the petitioner was away to France and has continued to oversee welfare of the child by staying engaged with him; that the respondent No.3 has no criminal record and even the FIR registered by the petitioner against him for abduction of his own child was based on a false story and the Guardian Court found that the petitioner had not come to the court with clean hands; that both the courts below have not found respondent No.3 to be unfit as guardian of his minor child; that the concurrent judgments of the Guardian Court and the appellate court cannot be assailed in writ jurisdiction. In support of his arguments, he relies on *Hari Chand vs. Ghulam Rasool* [A.I.R 1932 Lahore 385], *Walayat Shah and another vs. Muhammad Hussain Shah and others*[A.I.R 1932 Lahore 386], *Mst. Zebu and another v. Mizaj Gul* [PLD 1952 Peshawar 77], *Muhammad Saqib Butt vs. Mst. Khalida Parveen* [PLD 1967 Karachi 645], *Ganj Bibi vs. Muhammad Younas and another* [2011 CLC 1062 Quetta] and *Bushra Asghar v. Dr. Rehmat Ali and others* [2012 MLD 1755].

6. I have heard the arguments of the learned counsel for the parties and reviewed the record.

7. The legal questions before this Court are as follows:

(i). *Whether the petitioner has a right to be appointed as guardian of the minor child under section 17 of the Act and*

whether respondent No.3 is unfit to be the guardian for purposes of section 19 of the Act?

(ii). Whether the judgments and decrees of the Guardian Court and the appellate Court suffer from any illegality or error rendering them liable to be set aside?

8. The relevant provisions of the Guardians and Wards Act, 1890 are reproduced below:

Section 4(2)

(2) 'Guardian' means a person having the care of the person of a minor or his property, or of both his person and property;

Section 7.

"Power of the Court to make order as to guardianship. (1) Where the Court is satisfied that it is for the welfare of a minor that order should be made:- (a) appointing a guardian of his person or property, or both; or (b) declaring a person to be such a guardian, the Court may make an order accordingly. (2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court. (3) Where a guardian has been appointed by will or other instrument, or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act."

Section 17.

17. Matters to be considered by the Court in appointing guardian. (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. (2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. (3) If the minor is old enough to form an intelligent

preference, the Court may consider that preference. (4) Omitted by the Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981. (5) The Court shall not appoint or declare any person to be a guardian against this will.

Section 19

19. Guardian not to be appointed by the Court in certain cases.

Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of minor whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the persons. (a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person; or (b) of a minor whose father is living and is not, in the opinion of the Court unfit to be guardian of the person of the minor, or (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

Section 41

41. Cessation of authority of guardian. (1) *The powers of a guardian of the person cease: (a) by his death, removal of discharge; (b) by the Court of Wards assuming superintendence of the person of the ward; (c) by the ward ceasing to be a minor; (d) in the case of a female ward, by her marriage to a husband who is not unfit to be guardian of her person or, if the guardian was appointed or declared by the Court, by her marriage to husband who is not, in the opinion of the Court, so unfit; or (e) in the case of a ward whose father was unfit to be guardian of the person of the ward by the father ceasing to be so or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court.*

(2) The powers of a guardian of the property cease: - (a) by his death, removal or discharge; (b) by the Court of Wards assuming superintendence of the property of the ward; or (c) by the ward ceasing to be a minor.

(3) When for any cause the powers of a guardian cease the Court may require him or, if he is dead, his representative to deliver as it directs any property in his possession or control belonging to the ward of any accounts in his possession or control relating to any past or present property of the ward.

(4) When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as fraud which may subsequently be discovered.

9. The crux of the matter before this court is the distinction between custody and guardianship and the respective rights and obligations of a custodian and a guardian under the Act, especially where one parent has the custody of the child and the other is the guardian. The term 'custody' is not defined in the Act. The term 'guardian' has been defined in section 4(2) of the Act and seems to include the concept of custody, unless a guardian court awards custody of a child exclusively to a party/parent who is not the guardian of the minor. It was held in Mst. Atia Waris vs. Sultan Ahmed Khan [PLD 1959 Lahore 205] that custody means actual custody and not constructive custody. However, custody was defined as actual or constructive possession for purposes of protection in Jumna Khan vs. Mst. Gull Ferosha [PLD 1972 Peshawar 1]. And in [PLD 1988 Karachi 252] custody was referred to as the right to upbringing of a minor child by the mother or someone legally entitled to it. It was held in Bushra Asghar v. Dr. Rehmat Ali and 3 others [2012 MLD 1755] that guardianship entails the concept of taking care of the minor even in situations when the guardian does not have "domain over the corpus of [the] child".

10. In view of the case law it is apparent that the manner in which the concepts of custody and guardian are understood and applied, there is an overlap between the two. And where the guardian also retains custody of the minor child there is complete overlap. The question of respective obligations of the custodian and

the guardian of the minor arises where custody of a minor is awarded to someone other than the guardian as is case in the present petition. In such case, the custodian and guardian are separate persons and while the guardian would maintain constructive custody over the child for purposes of discharge of his obligations as guardian, he/she would not have physical custody of the child. So custody alludes to bringing up and nurturing a child, and taking care of his/her personal and emotional needs on a day-to-day basis. Whereas guardianship refers to the obligation of maintaining a child and affecting legal transactions in his/her name and retaining constructive custody over his/her person or property for purposes of discharging obligations as a guardian.

11. Traditionally, in the event of separation of the parents as a family unit custody of suckling minors is handed to the mother whereas the father is endowed with the responsibility to act as guardian for the person and property of the minor [see PLD 2009 SC 751]. However, this general rule is not carved in stone and for purposes of the Act, welfare of the child remains the paramount consideration (not one of the considerations or even the primary consideration). In view of sections 17, 19 and 41 of the Act, the scheme of the Act is that the father is the natural guardian even when the mother is bestowed with the child's custody, and custody of a minor is not a precondition or requirement for being a guardian of his/her person or property. (see PLD 1967 Karachi 569, PLD 1968 Karachi 774 and PLD 1963 Lahore 534).

12. A father is considered the natural guardian of a minor, since even after separation with the mother, and even when the

mother has been granted custody of a minor child, the father is obligated to provide financial assistance to the minors. In Mst. Kaneez Akhtar v. Abdul Qadoos and 2 others, [2005 MLD 828] held at para 9 that “[t]here is no cavil about the proposition that liability to maintain minor child is not only religious/moral obligation of the father but it is also his bounded legal duty.” In Nazan Bibi v. Additional District Judge, Jhang and 2 others, [2009 YLR 991 (Lahore)] held in para 10 that the father, “although a natural guardian...his right of Hizanat [custody] is...subordinate to the fundamental principle i.e. welfare of the minor, the sole criteria, which in any case should prevail”. In Habib-ur-Rehman v. Hina Saeed [2010 MLD 544], the father of the child, who was in France, wasn’t awarded custody, as the mother would have been unable to see the child, but the father was still held responsible for maintenance. The concept of guardianship thus encapsulates, in the ordinary scheme of things, the obligation of the father to maintain a minor child and the rights that come along are afforded to him to exercise oversight and to stay involved with the affairs of the child for purposes of discharging his obligations as guardian.

13. It was held by the august Supreme Court in Mst. Feroze Begum vs. Lt-Col. Muhammad Hussain [1983 SCMR 606] and reiterated in Munawar Bibi vs. Muhammad Amin [1995 SCMR 1206] that maintenance of the child was the duty of the father and the mother could not be deprived of custody due to her inability to maintain her child. It was held in Masroor Hussain vs. Additional District Judge, Islamabad [2011 CLC 851 Islamabad] that if the father failed to maintain his child, he would lose the right to custody

and guardianship. In this case the father had claimed guardianship upon mother's remarriage, but had not been maintaining the child or taking interest in her life. The court turned down his claim and granted both custody and guardianship to the mother. In short, in a claim of custody by the mother, lack of resources to maintain the child is not a disqualification as the obligation to maintain the child remains vested in the father in his capacity as guardian even if the custody of the child is handed over in the mother. But lack of resources of the father is a disqualification, in his claim for custody and in a claim to retain his status as guardian, because if he cannot discharge his fundamental obligation to maintain his child in his capacity as the natural guardian, the assumption is that it is not in the child's welfare to remain in his custody or under his guardianship, and the child ought to be placed in someone else's constructive care who is capable of discharging the obligations of a guardian.

14. The concept of welfare of child operates differently in a claim for custody versus a claim for guardianship. In a claim for custody a whole host of factors are to be considered by the guardian court to determine wherein lies the child's welfare. As the question of custody is not part of the *lis* before this court, there is no need to list the considerations germane to determination of the welfare of a child in a custody matter. But in a claim for guardianship, the law itself assumes, when Sections 7, 17, 19 and 41 are read together, that the welfare of the child is best served when his/her natural father remains the guardian, unless he is found unfit to be the guardian.

15. Section 17(2) lists the considerations for determining where the welfare of a minor lies while appointing a guardian of minor as follows: (i) age of the minor, (ii) sex of the minor, (iii) religion of the minor, (iv) character of the proposed guardian, (v) capacity of the proposed guardian, (vi) the proposed guardian's nearness to the kin of the minor, (vii) any wishes of the deceased parents, and (viii) existing or previous relations of the proposed guardian with the minor or his property. Section 17(2) thus assumes that the question of appointing a guardian would ordinarily only arise when the parents of the minor are not alive, and even then, the wishes of the deceased parents are to be taken into account as they are deemed to be the best judges of wherein lies the welfare of their child. And amongst the considerations to determine welfare, it includes affinity of the proposed guardian with the minor, his family and relations as well as familiarity with his/her property. The answer to why Section 17(2) makes such assumption is then answered by Section 19(2), which forbids a court from appointing a guardian of the person of the minor "whose father is living and is not in the opinion of the court, unfit to be guardian of the person of the minor." The intent of the law is further augmented by section 41(1)(e), which provides that the powers of a guardian cease "in case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so, or if the father was deemed by the court to be so unfit, by his ceasing to be so in the opinion of the court."

16. A combined reading of Section 7, 17, 19 and 41 leads to the following conclusions: (i) the father of a minor is his/her natural

guardian and the welfare of the child is best served when he/she remains under the father's guardianship; (ii) the question of how the welfare of the child will be best served in appointing a guardian in the stead of the father will only arise when the father is either not alive or has been determined by the court to be unfit as guardian; (iii) the court is vested with no authority to appoint a guardian in place of the father when the father is alive and not unfit to be the guardian; and (iv) even where the father is found to be unfit to be the guardian and another person is appointed in his place, such other guardian's authority ceases once circumstances leading to the father being declared unfit change and he is no longer deemed unfit by the court. Thus no one can be appointed guardian in the father's place unless the father is found unfit to serve as guardian of his child, and the onus to establish that the father is unfit is on the person bringing such claim.

17. In order to discharge his obligations as guardian, the right of a father to access to the child and to provide constructive oversight has been recognized by courts. It was observed in Muhammad Sadiq vs. Mrs. Sadiq Safoora [PLD 1963 Lahore 534] that the mother is not to keep the child at a distance from the father's residence and that if the mother "willfully prevents the father from having anything to do with the minor", she could lose her right to custody. In Chiragh Bibi v. Khadim Hussain [PLD 1967 Lahore 382] it was held that father has constructive custody over the child and if the mother who has physical custody precluded the father from accessing the child, it would be deemed as removing the child from the constructive custody of the father and a ground

for reconsidering custody given to the mother. The jurisprudence of our courts is in sync with sociological studies that suggest that splitting up of parents is a source of severe anguish for a child. It is in the best interest of the child to grow up in a manner that both parents are involved in his/her upbringing and he/she has the opportunity to develop a normal healthy relationship with both parents, whether it is a case of shared custody or where one parent has custody over the child and the other has visitation rights. It is thus that in cases where custody and guardianship is split, the law assumes that it is in the welfare of the child that the father, as natural guardian, retains the ability to oversee the upbringing of the child while discharging his obligation to maintain the child and look after his/her legal affairs.

18. It was held in Hamida Begum v. Uben Ullah [1989 CLC 604] that in a clash between the rights of parents and the welfare of a minor, the latter must prevail. Likewise, it was observed in Bulan vs. Rohiman [PLD 1963 Karachi 839] that custody is a right of a child and not of either of the parents i.e. it is the welfare of the minor that ought to be considered and not that of the person seeking custody. The petitioner's argument that the visiting schedule drawn out by the Guardian Court is onerous and she would like to travel back to her ancestral home during eid holidays when she has to stay in Islamabad to enable respondent no. 3 to meet their minor son is thus devoid of force. There is nothing preventing the petitioner to rework the visitation schedule, amicably with respondent no. 3 or with the indulgence of the Guardian Court, such that the father is not deprived of seeing his

son on eid holidays and the mother also gets to travel to her ancestral home for one or both eid holidays. But that the visitation schedule causes inconvenience to the petitioner during holidays is not a valid basis to seek guardianship over her minor son who is in her custody.

19. The learned counsel for the petitioner has not been able to identify any illegality in the impugned orders. The learned Guardian Court while relying on Abdul Ghaffar vs. AwwamuNas [1988 CLC 670] and Mst. Naseem vs. Ali Akbar [PLD 2015 Quetta 30] has held that:

"In the light of above judgments this court reached at the conclusion that the guardian petition filed by the petitioner cannot be rejected on the mere ground that petitioner has not taken any ground on the basis of which father can be declared unfit to be appointed as guardian because while deciding the guardian petition the right of the parents regarding the interest and control of their child is not to be exercised, in the interest and the benefit of the parents; but in the interest and for the welfare of the child himself. Although the father is a natural guardian but his right is also subordinate to the welfare of the minor. The overriding fundamental and paramount consideration is always the welfare of minor, rather this is the sole criteria which must prevail."

The learned Guardian Court has further held that:

25. Record further shows that after the filing of suit for maintenance allowance which is pending before this Court, Rs.5,000/- was fixed as an interim maintenance allowance of minor which is regularly paid by respondent. Petitioner despite having the knowledge of this fact had negated the same when she was asked about regular payment of maintenance by respondent.

26. in view of what has been discussed above this court is of the opinion that petitioner failed to establish from record that respondent is a negligent father who had not shouldered his responsibilities towards the financial requirements of minor by producing any cogent evidence, therefore, to this extent court is of the view that on this ground respondent is not liable to be disqualified.

The learned Guardian Court has concluded that:

"49. In the light of above circumstances, this court is of the opinion that petitioner failed to establish through evidence that respondent is unfit for being remained as guardian of person of minor and is liable to disqualify under section 19(b) of Guardian and Wards Act, therefore, this issue is decided against the petitioner and in favour of respondent.

20. The reasoning of the learned Appellate Court also suffers from no illegality and is reproduced herein below:

"16. It is also worth mentioning that a guardian of a person of a minor is appointed u/s 7 of the Guardians and Wards Act, 1890 only where the court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of the person of the minor. If the court is not satisfied that the appointment of guardian of the person of the minor is for the welfare of the minor, then there is no need to proceed further at all. The respondent being father is natural guardian having the right to supervise the upbringing of his minor son. Under the law, a mother has no right to remove a minor to a place which is inaccessible to the father of the minor. As per record, it is not for the welfare of the minor son to appoint the guardian of his person in presence of his natural guardian who is not unfit for his guardianship."

17. For what has been discussed above, the appellant/petitioner No.1 being mother is not entitled for her appointment as guardian of the person of her minor son despite she is having the custody of her minor son, hence the trial court rightly refused to appoint her as guardian of the person of the minor. It is also worth mentioning that, as discussed above, the respondent being father is a natural guardian having right to supervise the upbringing of his minor son."

21. It was held by the learned Peshawar High Court in Mst.Zebu and another vs. Mizaj Gul [PLD 1952 Peshawar 77] that:

"the view of the legislature seems to be that the father being the natural and lawful guardian of a minor does not require to be so appointed. The natural guardianship which vested in him cannot be taken away from him until and unless it is proved that 'he is unfit to be' the guardian of the person of the minor..."

22. It was held by the learned Sindh High Court in Muhammad Sadiq Butt vs. Mst. Khalida Parveen [PLD 1967 Karachi 645] that *"I am inclined to think that in a case where the father is alive and has not been found to be a person unfit to be the guardian of his minor children he must be regarded as the natural guardian and an application for the appointment of the guardian of the minors in such a case would be incompetent. But the fact that the father is the natural guardian does not, in my opinion, disentitle the mother or the mother's mother, as the case may be for claiming the custody of the minor children, which order of custody is not necessarily in disregard of the guardianship of the father which continues until an order of unfitness is passed in respect of him."*

23. In Ganj Bibi v. Muhammad Younas and others [2011 CLC 1062 Quetta], the learned Balochistan High Court held that *"though the main consideration while appointing a person as guardian of a minor, is the welfare of the minor, which is to be seen in relevance to noted provision of law. In present case, there is nothing on record, nor even asserted by the appellant, on basis of which the respondent can be considered unfit to be guardian of person of his minor son."* And further that *"for the purpose, in view of section 19(b) Guardians and Wards Act 1890, she has to establish that the*

father/respondent is unfit to remain as guardian of persons of the minor. But she has completely failed to disclose any reason, nor she has placed on record any material due to which the father has been disqualified to remain guardian of his minor son."

24. The learned Lahore High Court in Bushra Asghar v. Dr. Rehmat Ali and other [2012 MLD 1755] held as that "the minors are male, the father is their natural guardian. In the presence of the father, any other person cannot put a claim to be a guardian of the minors. Court is not authorized to appoint or declare a guardian of the person of a minor whose living father is not, in the opinion of a court, unfit to be a guardian of the person of that minor..." And held, while relying on Fahimudin Khokhar v. Mst. Zaibunnisa [PLD 1968 Karachi 774] and Muhammad Sadiq Butt v. Mst. Khalida Parveen [PLD 1967 Karachi 645], wherein it has been held that the guardianship and custody are two different expressions; the first means, having the care of a person, it prescribes the duty on the guardian to take care of the minor even without having his actual domain over the corpus of a child. The latter denotes the actual or constructive possession over the minor for the purpose of his protection. Both these capacities and characters could be enjoined by the same person or by the two different persons, keeping in view the circumstances of each and every case and definitely with the paramount consideration of the welfare of the child. No doubt, a father is the natural guardian of the minors whether they be sons or daughters. For the purpose of the welfare of the minor, the custody, however, may be entrusted to the mother."

25. Similarly, it was held in Mst. Marium Tariq v. SHO of Police Station Defence [PLD 2015 Karachi 382] that even where the custody of the minor was awarded to the mother, the guardianship of father did not extinguish and that he should have access to the minor and he should remain financially responsible for the education and maintenance of the minor even though the minor may be under the care of their divorced mother.

26. In view of a holistic reading of the provisions of the Act, as enumerated above, case law on the issue of guardianship and the reasoning of the impugned judgments, the petitioner has failed to identify any illegality that calls for interference by this court.

27. It is also settled law that concurrent findings of the Family Court and the Appellate Court ought not be interfered with in writ jurisdiction.

28. It was held by the learned Lahore High Court in Mst. Sardaran v. District Judge, Mianwali and others [2016 MLD 801] that:

"constitutional petition cannot be resorted to challenge an order on the ground that evidence was not properly appreciated as findings of the facts recorded by the Court of competent jurisdiction cannot be disturbed solely on the ground that another view could be possible on the same evidence. The High Court in its constitutional jurisdiction cannot sit as a Court of Appeal."

29. In Sitara Aslam v. Family Judge and others [2018 CLC 382 Lahore] it was held that:

"it is settled proposition of law that this Court should not interfere with the findings of facts arrived at by the primary Courts when it is satisfied that the findings of the both the learned Courts below are reasonable and were not arrived at by disregarding any of the provisions of law or any accepted principle concerning appreciation of evidence. Leaned counsel for the petitioner could not point out that the findings of fact recorded by both the learned Courts below, on the face of it, are against evidence or were patently improper or perverse that to accept it could amount to perpetuating a grave miscarriage of justice. The constitutional jurisdiction is ordinarily discretionary in character."

30. The High Court in constitutional jurisdiction does not ordinarily interfere with concurrent findings of fact given by the trial court and the appellate court. High Court can intervene in custody matters, but only on an interim basis in face of an exigency, pending adjudication of the matter by the guardian court as held by the august Supreme Court in Mirjam Aberras Lehdeaho v. SHO, Police Station Chung, Lahore [2018 SCMR 427]. This principle applies even more stringently in matters of custody and guardianship because being a matter of fact, welfare of a child has to be established on the basis of evidence and not presumptions, as held in Rahimullah v. Hilali Begum [1974 SCMR 305]. The only presumption applicable in a claim of guardianship is that supplied

by the Act itself: that the father is a natural guardian and the welfare of the child lies in vesting the responsibility of guardianship in him, unless he is unfit for the purpose and declared so by a court.

31. In view of the above, there is no infirmity in the judgments and decrees impugned through the instant petition, which is dismissed with a cost of Rs. 10,000 to be paid to respondent no. 3.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 02-02-2021.

JUDGE

Approved for reporting

Saeed.