

Form No: HCJD/C-121  
**ORDER SHEET**  
**LAHORE HIGH COURT, LAHORE**  
**JUDICIAL DEPARTMENT**

**Writ Petition No.15203/2021**

**Sajida Rehmat Ullah**

**Vs.**

**Guardian Judge-II etc.**

S.No. of order/ proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties or counsel, where necessary
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**10.12.2021** Syed Mujahid Naqvi, Advocate, for the Petitioner.  
Mian Waheed Nazir, Advocate, for Respondents  
No.2 & 3.

Fizza Chaudhry was born to Respondents No.2 & 3 on 06.03.2010. Immediately after her birth they handed her over to the Petitioner, real sister of Respondent No.2, and she adopted her. Presently she is studying in Class-IV at the Educators, Awab Ujala Campus, Johar Town, Lahore. According to the Petitioner, on 12.04.2019 Respondent No. 2 & 3 came to her and asked for return of the minor and when she refused they snatched her. On 07.05.2019 the Petitioner moved an application under section 491(1A) Cr.P.C. before the Additional Sessions Judge, Daska, for recovery of Fizza Chaudhry which succeeded. Respondents No.2 & 3 assailed that order before this Court in Writ Petition No.37723/H/2019 but the learned Single Judge vide order dated 28.6.2019 refused to intervene and directed the parties to approach the Guardian Court for permanent custody of the minor.

2. On 25.05.2019 the Petitioner filed a petition under section 7 of the Guardian and Wards Act, 1980 (GWA), in the Guardian Court at Lahore for appointment as guardian of the person of Fizza Chaudhry and for her permanent custody. She also moved an application under section 12 of the GWA to keep her

during the pendency of the main petition which was allowed. Respondents No. 2 & 3 preferred an appeal which failed. In the meanwhile, the Guardian Court recorded evidence of the parties and when the case was about to be concluded the Petitioner moved an application for recording the statement of the minor to ascertain her preference in terms of section 17(3) of the GWA. The said application was dismissed vide order dated 17.02.2021. Aggrieved, she has assailed that order before this Court through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

3. The learned counsel for the Petitioner contends that Fizza Chaudhry is old enough to form an intelligent preference so the Guardian Court is obligated to record her statement under section 17(3) of the GWA. He maintains that her statement is vital for deciding the question of her welfare which is the paramount consideration in guardianship proceedings. He argues that the Guardian Court has committed material irregularity while turning down the Petitioner's request.

4. The learned counsel for Respondents No. 2 & 3 has vehemently opposed this petition. He contends that section 17(3) of the GWA is an enabling provision; it is not mandatory. Fizza is with the Petitioner for more than 11 years. She is under her influence so no useful purpose would be served if her statement is recorded.

5. I have heard the learned counsel and perused the record. At the very outset, it may be pointed out that in this case the parents are not vying for the custody of a minor. The contest is between paternal aunt (*Phoophi*) and real parents. Section 17 of the GWA gives guidelines regarding the matters to be considered by the court in appointing a guardian. It reads as follows:

**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 capability 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) *Repealed by Ordinance XXVII of 1981.*

(5) The court shall not appoint or declare any person to be a guardian against his will.

6. A child's personality can develop and he can groom only in a healthy environment which includes a happy home. However, when there are disputes in the family – whether it is between the parents or otherwise – and the matter reaches the court and it is asked to decide the question of custody of the minor, its primary consideration is his welfare. Section 17(1) of the GWA gives statutory recognition to this principle.

7. “Welfare” is an all-encompassing word. On the one hand, “it includes material welfare, both in the sense of an adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained.”<sup>1</sup> On the other hand, it signifies “the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents.”<sup>2</sup> In *Rahimullah Choudhury v. Sayeda Helali Begum*

<sup>1</sup> *Walker v. Walker & Harrison*, 1981 N.Z. Recent Law 257, cited by the British Law Commission, Working Paper No.96.

<sup>2</sup> *ibid.*

*and others* (1974 SCMR 305) the Hon'ble Supreme Court of Pakistan held that "welfare" is a question of fact and has to be determined on the basis of the materials placed before the Judge and not on presumptions.

8. Indeed, the question as to what is for the welfare of minor depends on the facts of each case. Section 17(2) mentions some of the factors which the court is required to take into consideration for this purpose. These include: the age, sex and religion of the minor, the character and the 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. Section 17(5) states that the court shall not appoint any person as guardian without his consent and against his will.

9. Sub-section (3) of section 17 of the GWA makes the preference of the minor also a relevant factor. It is this provision which is central to the controversy involved in this case. Article 12 of the Convention of the Rights of the Child (1989) (CRC), which has been ratified by Pakistan, also requires that the child who is capable of forming his own views should be given the right to express them freely in all matters affecting him. Further, his views should be given due weight in accordance with his age and maturity. In *Mst. Talat Nasira v. Mst. Munawar Sultana and 2 others* (1985 SCMR 1367) the august Supreme Court of Pakistan held:

"It is axiomatic that in the matter of appointment of a guardian the welfare of the minor coupled with his own wish, particularly when he can make a reasonable preference on account of his age, is the primary consideration for a court of law for the decision of such cases".

Similarly, in *Nil Ratan Kundu and another v. Abhijit Kundu* [(2008) 9 SCC 413] the Supreme Court of India held:

“In selecting a guardian, the court is exercising *parens patriae* jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or even more important, essential and indispensable considerations ... Therefore, the paramount consideration of the Family Court exercising *parens patriae* jurisdiction while deciding the question of custody is the welfare and well-being of the minor children and not the rights of their parents who are at loggerheads with each other.”

10. The minor's interview helps in the decision of the case. It may bring certain facts to the court's notice which may have been concealed or overlooked by the parties while getting their evidence recorded. It is, therefore, preferable that the court should quiz him in detail. However, it needs to be emphasized that ascertaining the preferences of the minor and the weight to be attached to it are two different things. Further, while questioning the minor the court should not only consider his age and maturity but also see whether he has been tutored or is under undue influence of the person with whom he is living for the time being. It should not allow itself to be swayed by emotions. This approach is in consonance with the CRC. In ***Muhammad Afzal v. Parveen Bibi*** (2017 MLD 1116) it was held that the court may reject the minor's preference if it finds that he has been tutored or is acting against his interest.

11. In the instant case, Fizza Chaudhry is old enough to form an intelligent preference so the Petitioner was justified in invoking section 17(3) of the GWA. However, perusal of the impugned order dated 17.02.2021 shows that the Guardian Court has declined the Petitioner's request not on the ground that it was contrary to law but for the reason that it had interviewed her on 16.01.2020. This is correct and vouched from the record. Relevant excerpt from the court's order of the said date is reproduced below:

“Meeting of the minor has been held with the respondents. Further, I have interviewed the minor. Minor is school going and happy. Minor continuously kept on saying that she wants to go with the petitioner and not with the respondents. However, when I asked the minor about respondents No.2 & 3 she stated that respondents No.2 & 3 are her uncle and aunt”.

12. The learned counsel for the Petitioner has failed to explain as to what was the necessity for making an application before the Guardian Court for recording of Fizza’s statement again when order dated 16.01.2020 holds the field.

13. The impugned order does not suffer from any legal infirmity which may call for interference by this Court. This petition is, therefore, **dismissed**.

**(Tariq Saleem Sheikh)**  
**Judge**

Approved for reporting

Judge

*Naeem*