JUDGEMENT SHEET

IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 2383/2021

Ahmed Bilal
Vs.
Khurram Javed

PETITIIONER BY:	Mr. Muhammad Waqas Ali Malik, Advocate.
RESPONDENT BY:	Raja Yasir Shakeel Janjua and Mr. Muhammad Aamir Naeem, Advocates. Ms. Hadiya Aziz, Advocate (amicus)
DATE OF HEARING:	28.02.2022.

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BABAR SATTAR, J.- One of the most daunting challenges of parenthood is to reach decisions regarding how best to raise your children so they grow up to be sane, happy and conscientious individuals. Even harder is for anyone to decide wherein lies the best interest of the child of another. That is what Family Courts are obliged to do while deciding guardianship applications when parents who brought children into the world either split up or pass away.

2. The decision regarding the welfare of a child sometimes seems akin to crystal ball gazing. And this is exactly why it can neither be left to a pre-determined formula applied as a straight-jacket nor the whims of a court. It requires the exercise of solemn judgment by the court in view of relevant considerations guided by hard facts, scientific research and expert option.

3. While deciding guardianship requests in the 21st century, we are still working with the roles assigned to genders

in a patriarchal society, in disregard of studies carried out to determine what impacts the well-being of children during their early years leading into their youth, and without relying on the advice of professionals such as child psychologists and psychiatrists. Judges are not professionals trained in determining the means for optimally promoting child welfare within broken or divided families. And yet they are required to do so without any expert advice being made available to them while making consequential decisions that have a major impact on shaping the sense of self and identity of a young person.

4. This case involves the future of a young girl (Meher Fatima) who lost her mother to epilepsy when she was barely two years old. At the time when her mother was unwell and subsequently in hospital, she was at the house of her maternal grandmother being looked after by her maternal family, including a maternal uncle and unmarried aunt along with the grandmother. When her mother passed away at the hospital, her father and her maternal family were beside her mother.

5. The dispute regarding the child's guardianship arose three months after the mother's demise when her maternal family **("Respondents")** refused to hand over her physical custody to her father **("Petitioner"**). The petitioner filed a section 491 application before the Sessions Court to regain custody. The court ruled that this was not a case of abduction and the correct course of action for the father would be to initiate proceedings under the Guardians and Wards Act, 1890 **("Guardians Act").**

6. The father brought an action under the Guardians Act seeking custody of his daughter. The Respondents contested the claim and argued that the maternal grandmother and maternal uncle were more educated and better placed to secure the welfare of the Petitioner's daughter. The demise of a loved one can either bring families (tied by the bond of marriage) together or draw them apart. In this unfortunate case the latter happened.

7. The Petitioner claimed that he loved his wife and was by her side till the very end. He claims that he loves his daughter and while the child has already lost her mother, she should not be made to lose her father and be made an orphan while her father is still alive and ready, willing and able to provide for her and raise her in a happy home where her paternal family lives.

8. The Respondents claimed that the Petitioner abandoned his wife when she was sick and that they have raised the Petitioner's daughter ever since she was born. They claim that the petitioner has only passed his intermediate and is engaged in private business and cannot cater for the educational needs of his daughter like they can. That the Petitioner married again almost nine months after his first wife's demise and lives in a 5-marla house with his parents and siblings which is not the best environment to raise his daughter.

9. The Petitioner on the other hand alleges that it was the Respondents who were attending a family wedding in Lahore, when his first wife was in hospital and close to her end. He asserts that the child's maternal grandmother has a second

husband who works in the Middle East and provides for the home she lives in but does not own. In contrast, he lives in a family-owned home. The Petitioner asserts that the maternal uncle of his daughter has his own wife and kids and cannot love or look-after his daughter as her biological father can.

10. The learned Family Court found in favour of the Respondents on the basis that the Petitioner had re-married, that the Respondents were better educated and had looked after the Petitioner's daughter when her mother was sick and in the hospital, and that the maternal grandmother was to be given preference in a custody disagreement according to the treatise written by Dinshah Mulla. The Additional District Court endorsed the judgment of the learned Judge Family Court.

11. The learned counsel for the petitioner contended that the Petitioner had neither abandoned her daughter nor was otherwise unfit to be a guardian. And while he was alive and not unfit or unwilling to be the guardian of his own daughter, no other relative could be appointed the guardian or custodian of the child merely because her mother had passed away. He submitted that in the absence of any evidence of the Petitioner being unfit to be his daughter's guardian, the courts had handed over custody of his daughter to the maternal grandmother and maternal uncle in disregard of provisions of the Guardians Act.

12. The learned counsel for the Respondents supported the impugned judgments. He submitted that the learned Family Court and the appellate Court had exercised their discretion

judiciously to grant custody of Meher Fatima to the Respondents as they were better placed to ensure the welfare of the child.

13. The questions that arise for the consideration of this Court are the following:

(i) Can a relative be declared the guardian of a child whose father is alive and not unfit or incapable of being the guardian of such child?

(ii) Can custody of a minor be awarded to a relative, whose mother is not alive, without declaring such relative a guardian, when the father is alive and remains the guardian?

(iii) Is there any evidence in the instant case on the basis of which it can be concluded that the Petitioner is unwilling, incapable or unfit of being the guardian of his daughter?

14. Let us take into account the jurisprudence produced in relation to consideration for award of guardianship before we turn to the scheme of the Guardians Act.

I. *In* ***Zohra Begum Vs. Maimuna Khatun*** ***(PLD 1965 Dacca 290)*** reliance was placed on *Mst. Siddiqunnisa Bibi Vs. Nizamuddin Khan (AIR 1932 All. 215)* where it was held that while appointing a guardian under section 17 of the Guardian and Wards Act, *"the personal law of the minor concerned is to be taken into consideration, but that law is not necessarily binding upon the Court, which must look to the welfare of the minor consistently with law".* And that, *"personal law can be ignored if the welfare of the minor requires that someone else, even inconsistently with that law, is the more proper person to be appointed guardian of the minor."* In ***Zohra Begum*** it was held that *"the Court, having regard to the provision of the Mohammedan Law and also the welfare of the minor, should appoint a guardian and not*

blindly merely because a mother has a preferential right or merely because a mother has lost her preferential right after having taken a second husband…"

II. ***Mst. Fahmida Begum Vs. Habib Ahmed* (PLD 1968 Lahore 1112.**

It was reemphasized that welfare of the minor was the dominant consideration in appointing guardian under sections 17 and 25 of the Act sans availability of Quranic or Traditional Text or Ijma on a point of law, if there is difference of opinion between A'imma and Faqihs, a Court may form its own opinion on the point of law.

III. *In* ***Rahimullah Choudhury Versus Helali Begum (1974 SCMR 305)*** it was clarified that "*Welfare being a question of fact will, therefore, have to be resolved on the material placed before the Guardian Judge and not on the basis of any presumption"* and that*, "the question to be decided under section 25 is, however, not the right of the guardian to obtain the custody of the ward as that right is given to him by the statute but the welfare of the ward. A natural or certificated guardian may turn out to be an undesirable person or the Court may find it not for the welfare of the minor to deliver him into the custody of the guardian. It is, therefore, provided specifically that although the guardian is entitled to such custody no order will be made to that effect unless the Court is satisfied that it will be for the welfare of the ward.*"

IV. *In* ***Imtiaz Begum Versus Tariq Mahmood* (1995 CLC 800)** the learned Lahore High Court held that the *"right of Hizanat is to be exercised by the females at one time and at another time this vests in the males".* With all due respect, it appears to an outdated view neither rooted in law nor in any considered concept of the welfare of minor, but instead in a patriarchal conception of gender roles to be performed by the two sexes. In this case the custody of a minor boy was handed over to the father essentially on the ground that he was more than seven-years old. "*Such ground alone was sufficient for giving minor boy in custody of father"*

it was held by the learned Lahore High Court. With respect, this Court is not inclined to heed such opinion. The welfare of a child cannot be determined in some mathematical fashion based on proxy factors such as the clock striking a certain hour and a child reaching a certain age. Welfare of a child cannot hinge on lazy use of proxy factors without taking into account the sum-total of the facts and circumstances that would impinge on the child's welfare, sanity and happiness.

V. ***Mst. Nighat Firdous Vs. Khadim Hussain (1998 SCMR 1593)***

The august Supreme Court dealt with a case where the minor's mother died when he was 15 days old and he was brought up by his maternal aunt. The question of guardianship came up when the child reached the age of seven. It was reiterated that *"welfare of the minor is the paramount consideration in determining the custody of a minor"* and further held that, *"the right of the father to claim custody of a minor is not an absolute right, in that, the father may disentitle himself to custody on account of his conduct, depending upon the facts and circumstances of each case."* In the circumstances of the case the august Supreme Court found that welfare of the minor, about 15 years old at the time, lay with the maternal aunt retaining his custody.

VI. *In* ***Mst. Firdous Iqbal Vs. Shifaat Ali (2000 SCMR 838)*** it was held that *"the custody of a minor can, however, be delivered by the Court only in the interest of the welfare of the minor and not the so-called right of one parent or another. It is true that a Muslim father is the lawful guardian of his minor child and is ordinarily entitled to his custody provided it is for the welfare of the minor. It would, thus, be noticed that right of the father to claim the custody of a minor son is not an absolute right, in that, the father may disentitle himself to custody on account of his conduct…"* The Court found that the father had neglected the child since separation of spouses, and had remarried, and being in army would not be present in the house where he proposed to lodge his son. And the minor son would be at the mercy of the

step-mother. It was found that welfare of his child was in staying with the mother, who had also remarried.

VII. ***In Khan Muhammad Vs. Mst. Surrayya Bibi (2008 SCMR 480)*** it was held that the right of father to custody, being the natural guardian, would be subject to the child's welfare.

VIII. In ***Nasir Raza Vs. Addl. District Judge (2018 SCMR 590)*** the mother of the children had died and they had been raised by their maternal grandmother. The guardian court awarded guardianship to the father. The High Court reversed the decision. And the apex Court, in view of the facts and circumstances of the case, held that the welfare of the children lay in being raised by the father. And that as the minors had developed an emotional bond with the grandmother, such bond ought to be preserved with regular visitation rights for grandmother.

15. Let us turn to the provisions of the Guardians Act. Section 4(2) defines the term guardian as *"a person having the care of the person of a minor or his property, or of both his person and property".* It must be pointed out that anyone having the care of the person of the minor is defined as a guardian and the word custody or custodian is not a term defined by the Guardians Act. The word custody is used in sections 12 and 24 of the Guardians Act while empowering the court to require a person having the custody of the person to produce the minor before the court and for purposes of making temporary custody arrangement in relation to the minor pending adjudication of a guardianship claim before the Court. There is no other provision in the Act which contemplates the award of custody of the minor on a permanent or semi-permanent basis to a person who is not otherwise appointed as a guardian of the minor.

16. Section 7 of the Guardians Act empowers the court to appoint a person as a guardian of the person or property of a minor. And it provides for the removal of any other person, by implication, who has not been appointed guardian of the minor by the court. The paramount consideration for making such appointment of the guardian is the welfare of the minor. Pursuant to section 7, the court has the authority to appoint a person as the guardian of the person of the minor or the property of the minor or both.

17. Section 15 of the Guardians Act contemplates appointment of several guardians in relation to a minor at the same time. Section 15 states the following:

> ***15. Appointment or declaration of several guardians.*** *(1) If the law to which the minor is subject admits of this having two or more joint guardians of his person or property, or both, the Court may, if it thinks fit, appoint or declare them.*
>
> *(2) & (3) Omitted by the Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981.*
>
> *(4) Separate guardians may be, appointed or declared of the person and of the property of a minor.*
>
> *(5) If a minor has several properties, the Court may, if it thinks fit, appoint or declare a separate guardian for any or more of the properties.*

There is scant jurisprudence in relation to section 15. But the language clearly conceives of joint guardianship for the person of the minor as well as multiple guardians for the person and for the property of the minor, if the situation so requires.

18. Section 19 places limitations upon the powers of the court to appoint a guardian for the person or the property of the minor and states the following:

> ***19. Guardian not to be appointed by the Court in certain cases.*** *Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the person--*
>
> *(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.*

Relevant for our present purposes is subsection (b) of section 19, which will be discussed later in this opinion.

19. Section 25 provides the mechanism to seek the recovery of the ward who has been removed from the custody of the guardian and states the following:

> ***25. Title of guardian to custody of ward.*** *(1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.*
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> *(2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the First*

> *Class by Section 100 of the Code of Criminal Procedure, 1898 (Act V of 1908).*
>
> *(3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.*

Section 25(1) provides the mechanism through which a guardian can seek to re-acquire the custody of the ward and section 25(3) clarifies that a ward being removed from the custody of the guardian against the guardian's will does not result in automatic termination of guardianship.

20. Other than the Guardians Act also relevant for our present purposes is Islamabad Capital Territory Child Protection Act, 2018 **("ICT Child Protection Act")**, pursuant to which the State has undertaken to discharge its obligation to uphold the life, liberty and dignity of the child guaranteed by Articles 9 and 14 of the Constitution. It vests in the State the power to take away a child even from the custody of his/her parent where the child is at the risk of significant harm, abuse or exploitation while in the care of his or her biological parents. Section 2(m) of the said Act defines guardian as a person *"other than a biological parent who has parental responsibility for a child, which may include a guardian appointed under the Guardians and Wards Act, 1890".* The other relevant provisions of the ICT Child Protection Act which places restrictions on the exercise of parental custody and control over a child and vests powers in the State to assume the custody of the child who is at the risk of significant harm, abuse or exploitation, includes the following:

> ***4. Restriction on parental custody.*** *- The Court may restrict the exercise of parental custody and control of a child when,-*
>
> *(a) a child is at risk of significant harm and is in need of care;*
>
> *(b) a child is subject of a child care plan; or*
>
> *(c) a child is subject of emergency powers exercised by a Child Protection Officer under this Act.*
>
> ***5. Child in need of care.*** *---A child in need of protection and care shall include a child who-*
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> *(a) has been subjected to or is under serious threat of being subjected to child abuse or child exploitation while in the care of parents, legal guardian or any other person who has custody of the child in any manner; or*
>
> *(b) is unattended, victim of an offence, child, domestic and such other workers, found begging, imprisoned with the mother or lives in an immoral environment.*
>
> ***15. Consent of the parents or guardian.*** *---Subject to section 16, the Child Protection Officer shall seek the consent of the parent, legal guardian or current carer of the child, if any, on the action to be taken and the services to be offered to the child. Such consent, under child care plan, shall be recorded in writing in the form of an agreement, as may be prescribed.*
>
> ***16. Care and placement of a child.*** *---Notwithstanding the provision of section 15, where the child care plan specifies that the child will be at risk of significant harm, abuse or exploitation if he remains in care of his parent, legal guardian or other current carer, if any, an application shall be made immediately to the Court for the care and placement of the child in an appropriate form of alternative care.*

21. The ICT Child Protection Act provides for an institutional framework to give effect to provisions of the Act, including Child Protection Advisory Board headed by a Federal Minister comprising high officials of the State as well as members of the

civil society. It also provides for establishment of Child Protection Institutions. And included within the functions of Child Protection Institutions under section 11 of the ICT Child Protection Act is an obligation to *"assess or based on reports whether a child requires care under the provisions of this Act"*. The Act requires a Child Protection Officer appointed under the Act to make an assessment regarding the need of the child to protection and care. The Act obliges the State to put together child care plans for children in need of care and protection and identification and establishment of care-giving institutions which can look after children whose parents or legal guardians are unable to provide for their welfare and care or for such unattended children who do not have parents or guardian. The ICT Child Protection Act recognizes biological parents as individuals in whose custody the child ordinarily remains and who are responsible for the child and consequently biological parents have been excluded from the definition of "guardian" under the ICT Child Protection Act.

22. The ICT Child Protection Act is a welcome step forward by the State in assuming the ultimate responsibility for the care and protection of minor citizens of the State. The provisions of the ICT Child Protection Act clarify that the State is under an obligation to protect children in all circumstances, including where they are suffering abuse at the hands of their own biological parents. In the ordinary scheme the individuals who elect to bring a child into this world are ultimately responsible for the care, nurturing and upbringing of such child. As a rule, the parents of a child have the best interest of such child at heart and are best placed to provide for his/her upbringing, welfare

and happiness. In the natural course of things there is nothing to gainsay that no one can love a child or be concerned with his or her welfare and upbringing more than his or her parents. There are, however, exceptions to this rule, in which case the State can exercise its authority and place the child in the care of another caregiver declared as his or her guardian pursuant to provisions of the Guardians Act as contemplated and reinforced by the ICT Child Protection Act.

23. The parents of a child are his or her natural guardians and do not need to seek a declaration from a court for such purpose under the Guardians Act. The laws of Pakistan envisage that a child is in the custody of his or her parents. The question regarding the custody and guardianship of a child arises in situation where the nuclear family unit is under stress or breaks up due to the separation or divorce of the parents. In such circumstance a court is obliged to decide who retain primary custody of the person of the child when both parents are not living together any longer. The situation where the custody of the person of a minor is to be shared by his or her biological parents and the question of guardianship arises in such scenario is significantly different from a situation where a relative or another caregiver is seeking custody of a child when one or both the parents are still alive. It is in this latter scenario the aforementioned definition of guardian in the ICT Child Protection Act would have to be read together with provisions of the Guardians Act to determine circumstances where a person other than a biological parent of a minor can seek to be declared the

guardian of the child and acquire custody of the person of the minor.

24. The definition of guardian in the ICT Child Protection Act as mentioned above excludes natural parents. The provisions of the ICT Child Protection Act assume that a child will be in the custody of his or her biological parents. And appointment of a third person as a guardian is the exceptional arrangement required to be made where the natural parents are either not present or unable to look after their child. The distinction drawn within our jurisprudence between custody and guardianship is in the context of sharing of custody between the parents of the child when they are both alive and not living together and not the sharing of custody of a child by his/her parent with a relative or third-party caregiver.

25. Section 24 of the Guardians Act identifies duties of the guardian and states the following:

> ***24. Duties of guardian of the person****. A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires.*

In situations where there is a dispute arises between parents as to who would retain primary custody of the child, the courts have clarified that even where the custody of a child is primarily awarded to the mother, the father remains the guardian of the child and consequently responsible to provide for the maintenance and education of the child while being afforded visitation rights. It is only in the context of custody arrangement to be shared between natural parents of the child that custody

can be granted to the natural mother of the child without finding that the father is disqualified from being guardian in terms of section 19(b) of the Guardians Act requiring appointment of another adult as a guardian of the child. This is so because the mother being a parent of the child is deemed to have lawful custody of the person of the child. And where the court finds that parents of the child are not living together and the welfare of the child would be served by granting custody over the person of the child to mother, it can do so without declaring that the father is no longer a guardian and consequently no longer responsible to provide for child. In other words, this distinction between custody and guardianship in custody disputes between spouses or former spouses in relation to their own children has been drawn by the courts to protect the interests of the child and the mother and to ensure that the father still remains responsible for the maintenance, health and education of the child. However, in the context of custody of the minor being awarded to another person who is not biological parent of the child, the concept of custody and guardianship cannot be segregated such that the custody is awarded to a third party and the guardianship remains with the father.

26. Section 15 permits appointment of two or more guardians for the person or property of a minor. There is scant jurisprudence regarding the said provision. But the law does provide for two or more guardians being appointed for the same person. In an appropriate case this is an area that needs consideration given changing family structures, especially in urban areas, where both parents often work and can assume the

responsibility for maintenance, health and education of the child. There is no reason why a mother who works and is able to support a child ought not be formally recognized as the guardian of the child, if the circumstances so requires. In situations where the mother and father of the child are separated or divorced, while granting joint guardianship to such parents the court can enumerate their respective responsibilities in relation to the child.

27. However, provisions of sections 15 and 24 would need to be read together with sections 19(b) and 41(1)(e) of the Guardians Act in the context of grant of custody and declaration of guardianship in favour of someone who is not the child's natural parent. A collective reading of provisions of the Guardians Act clarifies that in a situation where the father of a child is alive and not unfit to be the guardian of the person of his child, no third party can be appointed as guardian of the child. And in view of the definition of "guardian" read together with sections 12 and 24 no third party who is not a parent of the child can be appointed as a guardian of the child while the father is still alive and fit to be his or her guardian. This is manifest from the reading of section 41, which in subsection (1)(e) provides that *"the powers of a guardian of the person cease 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."*

28. In view of provisions of section 19(b) read together with section 41(1)(e), it is patent that where father of a minor is

alive the only consideration in which a third person, who is not the biological parent of the minor, can be appointed as guardian is where the father is found by the court to be unfit to be the guardian of the child or has abandoned his child rendering him unfit. In such situation, the authority vested in a guardian appointed by a declaration made by the court will stay intact only till such time that father remains unfit to be the guardian. Provisions of the Guardians Act therefore do not contemplate the appointment of a third party, even where such party is a close relative of the child, with whom the child shares a bond of love and affection, to be appointed guardian in addition to or in the stead of his/her father who is living and not unfit to be the guardian of the child.

29. It would be misconceived to assume that a contest for custody and guardianship of a child between the natural parent of a child and a relative is similar to the contest for the custody of a child between such child's natural parents. The best interest of the child ordinarily lies in him or her being raised in a happy household with his or her parents discharging their roles and responsibilities in nurturing the child. In the unfortunate situation that the bond of marriage breaks up and the parents otherwise no longer live together, the court is called upon to determine a custody arrangement between the parents in the best interest of the child. These cases are completely distinct from cases where a close relative such as maternal grandmother or paternal grandmother or paternal aunt seeks guardianship over a child who is under the guardianship of a living biological parent. In such situation, in view of provisions of the Guardians

Act read together with provisions of ICT Child Protection Act, a court must first reach a conclusion that the child is at the risk of significant harm, abuse or exploitation and that his welfare is not protected if his or her natural parent retains his/her custody. While section 19 read together with section 41(1)(e) only mentions the father, the definition of "guardian" under the ICT Child Protection Act suggests that same principle would apply even to the mother as she is also excluded from the definition of "guardian". Such reading of the law is supported by scientific data as well. There is hardly any need to cite research in support of the proposition that no individual is better placed to love a child and care for him/her than his or her natural parents. Taking away the custody of a child from a natural parent (when the contestant is not a parent) is a truly extraordinary matter and such claim can only be granted where the court comes to the conclusion that the welfare of the child lies in being taken away from the custody of a natural parent. The threshold to be met by someone who seeks guardianship over somebody else's child when such person is alive and willing to look after his or her child requires the meeting of a fairly high threshold.

30. It is not enough to look at the age or sex of the child or the educational credentials or financial situation of the third-party eager to be appointed as a guardian of the child in the stead of his/her biological parent. For a court to conclude that a person other than child's natural parent is best placed to secure the welfare of the child in the immediate, medium and long term, the court must be satisfied that a child would be at the risk of significant harm, abuse or exploitation if he or she remains in

the custody of his or her parents, as stated in section 16 of the ICT Child Protection Act. Even in such situation the court must order professional assessment for the needs of the child to be made by professionals as contemplated in section 11 of the ICT Child Protection Act. A court cannot pretend to be a child psychologist or psychiatrist which can undertake such assessment and then project on a medium or long term basis as to where the best interest of the child lies and what conditions would be congenial for the physical and emotional wellbeing of the child. Unfortunately, the Child Protection Institutions to be established under the ICT Child Protection Act and are required to possess the requisite professional resources to make such assessments have not yet been put in place. The delinquency of the State in giving effect to provisions of the ICT Child Protection Act does not however absolve the Government from making available to Family Courts duly qualified professionals who can undertake the assessment of the psychological state of a child in relation to whom a guardian is to be appointed. It is the obligation of the State to make such resources available to Family Courts and the Family Courts ought to base their judgments regarding appointment of guardians while taking into account such professional assessment and advice.

31. Physiological, emotional and psychological needs of children evolve over time and are affected by their circumstances. Where a court is required to make a declaration to appoint a guardian in the stead of a child’s biological parents, the court remains under an obligation to evaluate the welfare of the child and ensure that the guardianship arrangement made by

it continues to serve the welfare of the child over time. In other words, where a guardian has been appointed by the court, such arrangement in view of the evolving the physiological, emotional and psychological needs of the child needs must be revisited in order for the court to determine whether the guardianship arrangement needs to be tweaked or altered. In short, other than situation where a child is in the custody and under the guardianship of his/her biological parents, guardianship arrangements are not permanent. In situations where a third-party guardian is appointed while a natural parent of the child is still alive, such arrangement can only last till such time that the parent remains disabled or unfit to serve as a guardian of the child in view of section 41(1)(e) of the Guardians Act. Even in other situations where the parents are not alive and a caregiver or guardian is to be appointed, the intent of the Guardians Act as well as the ICT Child Protection Act is that it is the court that is ultimately responsible for the welfare of the minor and under an obligation to continue to assess that the guardianship arrangement is serving the welfare and interest of the child.

32. It was clarified by this Court in ***Mumtaz Bibi Vs. Qasim and others*** ***(W.P No. 4227 of 2021)*** that the treatise of Dinshaw Mulla is not a divine text or a statutory source of law on the basis of which alone legal rights and obligations of parties can be determined. It is merely a legal treatise or commentary and the priority to be accorded to aspirants of guardianship over someone else's child cannot be based on any priority list supplied by Dinshaw Mulla. Further, in the 21st Century, it can no longer be presumed that the obligation to nurture and care

for children vests exclusively in the female gender. A man who marries to bring progeny into this world is equally responsible for the care of his children as is the mother of such children. Providing for the physical, emotional and day-to-day needs of children is a joint responsibility of their father and mother. And the responsibility to care for children cannot be outsourced to female relatives in the family merely because the children's mother has passed away. Another person can only be endowed with such responsibility when the father is found, on tangible basis, to be incapable, unfit or unwilling to care for his children after the demise of the mother of the children.

33. Let us now revert to the facts of the case. The Petitioner is the father of the child in relation to whom Respondent No.2 being the maternal grandmother of the child has been declared a guardian. Such declaration could only be made if the court had come to the conclusion that the welfare of the child would be undermined if she remained under the custody and guardianship of the Petitioner as the Petitioner is unfit to be the guardian of the child. For such determination the financial status of the father (whether or not he belongs to a lower economic class), his educational credentials, or the age of the child are irrelevant considerations. A father cannot be declared unfit to serve as the guardian of his own child whom he has brought into the world merely because he is poor or uneducated or that his relatives or the relatives of his former spouses are better educated or financial better off or possess better accommodation. The only relevant consideration is the bond of love and affection between the parent and the child and

the willingness of the parent to look after the wellbeing of the child. The only factor disqualifying a parent in a guardianship contest with a relative is where custody of the minor if it were to remain with such living parent would put the child at the risk of significant harm, abuse or exploitation in terms of section 16 of the ICT Child Protection Act.

34. In a custody contest between spouses, who are separated, the set of consideration in determining the welfare of the child is different as has already been explained. The marriage of a parent with a stranger is one of the factors taken into account by courts in determining whether the home provided by such parent, where his or her spouse lives too who has no blood relationship with the child, provides a congenial and amiable environment for nurturing the child. To the contrary, in a situation where there is only one living parent, the marriage of the living parent with stranger must be seen with a different lens. The question then is whether the home provided by the living parent where the child's step-parent lives too is a safe space for the child and whether staying in such home places the child at the risk of harm, abuse or exploitation at the hands of anyone in the house, including the child's step-parent. The mere incident of marriage of a living parent is not a disqualification unless there is tangible evidence before the court to reach the conclusion that living in the house places the child at the risk of harm, abuse or exploitation within the meaning of section 16 of the ICT Child Protection Act.

35. In the instant case the child has never been placed in the custody of the Petitioner in the house where he lives along

with his second wife that he contracted marriage with nine months after the demise of his first wife. There was no evidence produced before the learned Family Court or the Additional District Court to suggest that the Petitioner as a father was unfit to be the guardian of his own daughter or that placing his daughter in his custody in a house where he lives along with his second wife would expose the child at the risk of significant harm, abuse or exploitation.

36. The maternal grandmother of the child has also married a second time and her husband is working in the Middle East and provides for his family. The learned Family Court has taken into account the fact that the maternal uncle of the child is a teacher and is better qualified to look after the welfare of the petitioner's daughter. There was no basis for the Family Court to conclude that respondent No.1 being the maternal uncle of the child would give her more love and affection than her own biological father. No matter how loving an uncle, can it be expected that he would love a nephew or nice equally or more than his own children? Or that he will place the educational and financial needs of a nephew or niece before those of his own children? Or that he can ensure that his wife also does not discriminate between her own children and her husband's niece? Meher Fatima will grow up. She will have educational needs that will cost money. She will have other material needs too. She has a father who is alive and responsible for her. Why deny her the supervision, love and care of her father, and why deny him the right, responsibility and privilege of raising his daughter as he feels right.

37. A perusal of the record reflects that there was absolutely no basis for the Family Court to conclude that in the medium to long term the interest of the child would be better served while staying with her maternal grandmother or maternal uncle. There was also no expert or professional assessment before the Family Court to facilitate a determination as to the long-term emotional and psychological effects on the petitioner's daughter if she were to be brought up by her maternal grandmother and her maternal uncle while her own father is alive and lives in the same city.

38. The bottom line is that there was no evidence, material or basis for the Family Court to determine in the present case that the Petitioner is unfit to act as a guardian for the person or the property of his own daughter. To appoint another guardian in his stead while he is alive and well and eager and willing to act as a guardian of his own daughter, who unfortunately has already deprived of her natural mother, is in breach of provisions of section 19(b) read together with section 41(1)(e) of the Guardians Act.

39. This Court had appointed a consultant psychiatrist as an amicus. The amicus undertook an evaluation of the child in the presence of the Petitioner as well as of the Respondents. The recommendation of the psychiatrist was that the Petitioner, as the biological parent, is a stable and responsible person and quite capable of caring and providing for his daughter. She also recommended that the maternal grandmother is the main attachment figure for the petitioner's daughter for the past three years but *"suffers from her own emotional needs"* and that *"her*

fear of losing Fatima overshadowed her responsibility towards her fostering the child's relationship with her father." There is no doubt that respondent No.2 loves the child and sees her own daughter in her. But the love of a grandmother does not endow her with a legal right to assume guardianship over a grandchild, which trumps the right of the father to guardianship and custody.

40. Given that the petitioner has been found on the basis of professional assessment of a psychiatrist to be stable and capable of caring and providing for Meher Fatima, no other person can be appointed as a guardian while he is alive, willing and able to act as a guardian towards his own daughter in view of sections 19(b) and 41(1)(e) of the Guardians Act.

41. This Court is however cognizant of the fact that the maternal grandmother is the main attachment figure for the petitioner's daughter, as has also been noted by the consultant psychiatrist. To suddenly disrupt such relationship between Meher Fatima and her grandmother would not be in the welfare of the child. This Court therefore declares that the Petitioner is the sole guardian of his own daughter and will retain custody over his daughter. He will, however, include the Respondents in the life of his daughter in order to continue to provide for her emotional and psychological wellbeing of his daughter. Consequently, the schedule proposed by the learned Family Court shall be reversed. The time determined by the Family Court that the child was to be spent with the Petitioner would be the time that the child would spend with the Respondents. And the role carved out by the learned Family Court for the

Respondents would be the role that is to be discharged by the Petitioner. This arrangement will last for a period of six months. The petitioner will make an appointment with Dr Asma Humayun, the consultant psychiatrist who was consulted by this Court in the instant case, and will seek a consultation along with his daughter and her maternal grandmother in order to enable the consultant psychiatrist to make a subsequent evaluation of the emotional, physiological and psychological wellbeing of the child before the expiry of six month period. The matter will be fixed before the learned Family Court for hearing on **20.12.2022**. The Petitioner will present a sealed report from the consultant psychiatrist to the learned Family Court who after taking into account such report will determine whether the guardianship and custody arrangement for Meher Fatima needs any interference. In the event that the learned Family Court finds that the petitioner is still able and willing to provide for the welfare of his daughter and that she is not at the risk of harm, abuse or exploitation under the Petitioner's custody and guardianship, the learned Family Court may tweak the visitation arrangements as it deems fit. If its finding is to the contrary, it may appoint another guardian for Meher Fatima in place of the Petitioner in view of provisions of the Guardians Act and the ICT Child Protection Act.

42. The petition is therefore **allowed** in the aforementioned terms with the following directions:

1. No third party, caregiver or guardian can be appointed a guardian in the stead of a biological parent of the child while the

biological parent is alive and not found unfit by the Family Court to act as the guardian of his or her own child.

2. The custody of a child can be granted to the mother, while the father is alive and remains the guardian of the child. The Guardians Act, does not however contemplate granting of custody to a third party, caregiver or appointing an additional guardian for the person of the minor while his/her father is alive and willing and able to act as a guardian for the child and exercise custody over the person of the child.

3. The test for declaring that a third party, caregiver or guardian must be appointed for the welfare of the child while one or both of his or her biological parents are still alive is that provided under section 16 of the ICT Child Protection Act i.e. that the child should be at the risk of significant harm, abuse or exploitation if he or she were to remain in the custody of the parent, or in a situation where the child has been abandoned by the living parent or parents and is deemed to be an unattended child as defined in section 2(1)(v) of the ICT Child Protection Act.

4. Where a Family Court appoints a guardian who is not the biological parent of the child in place of his or her biological parent, it is under continuing obligation to oversee the welfare of the child and to ensure that the emotional, physiological and psychological wellbeing of the child is being catered for in the guardianship arrangement made by the court. And such arrangement ought to be reviewed on an ongoing basis at least once in a year to ensure that the guardianship decision rendered by the court continues to serve as a source of welfare for the child.

5. In reaching a custody and guardianship decision, the court must rely on professional assessment regarding the emotional, physiological and psychological needs of the child, which assessment the courts concerned are not trained to make independently. For such purpose it is the obligation of the State to ensure that duly qualified experts, including child psychologists and psychiatrists, are made available as a resource to the Family Courts to seek expert opinion while making guardianship decisions. And it is for the State to compensate such professionals for the services they render.

6. The Federal Government is under an obligation to ensure that provisions of ICT Child

Protection Act are given effect and functional Child Protection Institutions are put in place. And that services of child psychologists, psychiatrists and other required professionals are made available at such Child Protection Institutions, which resources can also used by Family Courts while making guardianship decisions.

7. Till such time that Child Protection Institutions are rendered functional and services of experts are made available at such Child Protection Institutions, the Chief Commissioner in his capacity as provincial government for purposes of Islamabad Capital Territory will put together a penal of duly qualified professional psychologists and psychiatrists who may be consulted by Family Courts seized of guardianship matters and the Chief Commissioner, ICT, will ensure that such professionals are compensated for the services that they provide to Family Courts in assessing needs of the children subject to guardianship decisions. The Chief Commissioner shall put together such penal within a period of sixty (60) days from the receipt of this judgment and details of how the services of experts may be used by Family Courts shall be shared by the Chief Commissioner, ICT with the Registrar

of this Court who through the MIT will bring the same to the attention of the Family Courts.

(BABAR SATTAR)
JUDGE

Announced in the open Court on **16.06.2022.**

JUDGE

Saeed.

Approved for reporting.