

IN THE HIGH COURT OF SINDH AT KARACHI

**CP NO.S-512/2020**

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Date

Order with signature of Judge  
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1. For order on office objection as at A
2. For order on CMA No.359/2022
3. For hearing of CMA No.3152/2022
4. For hearing of CMA No.2965/2020
5. For hearing of CMA No.2790/2020
6. For hearing of main case.

**12.09.2022**

Ms. Zahrah Sehr Vayani advocate alongwith Mr. Ziaul-Haq Makhdoom advocate, with petitioner.

Mr. Muhammad Najeeb Jamali advocate alongwith respondent No.3

Mr. Zahid Farooq Mazari, AAG.

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**ORDER**

**SALAHUDDIN PANHWAR, J:** Heard learned counsel for respective parties.

2. Relevant facts for disposal of this petition are that petitioner Saadia Zahir filed suit for *khula* against respondent No.3 Ali Asghar Memon, from that wedlock there were 5 kids; during pendency of family suit both parties entered into **settlement / compromise for grant of khula**. Paragraph No.2 of that compromise is reproduced as follows:-

***“That custody of four minor namely remain with the plaintiff (1) Fatima Ali (2) Khadija Ali (3) Muhammad Abdullah Ali and Amna Ali all children of plaintiff and defendant shall remain with the defendant and plaintiff have rights of meeting at any time at any place.”***

3. This compromise was signed on 25.07.2020, on same date family suit No.488/2020 was allowed as no-objection was extended by respondent; accordingly *Khula* was granted. In almost

similar fashion Guardian and Wards Application was dismissed as withdrawn. During pendency of this petition, by ad-interim order dated 17.03.2022 as an interim arrangement, custody of minors except baby Maryam was ordered to be with mother except two days.

4. Learned counsel for petitioner has relied upon PLD 2020 SC 508 and 2019 PLD Lahore 281 while contending that compromise cannot be treated as a decree and binding order passed as the matter pertains to the custody of minors and that depends on various circumstances of the case.

5. In contra, learned counsel for respondent No.3 while relying upon 1981 SCMR 200, 2013 PCrLJ 200, 2018 CLC 767, 2014 SCMR 343, 2018 MLD 591, 2002 YLR 2854, 2001 SCMR 1782, 2017 YLR 1229, 2009 PCrLJ 588 and 2001 PLD Lahore 347, contends that admittedly custody was with respondent (father), however by order dated 17.03.2022 ad-interim custody was given to the mother, whereas petitioner failed to demonstrate her case of habeas corpus before the District and Sessions Court and her application was declined; Guardian and Wards Application filed by both parties are pending; petitioner has admitted her second marriage and girls cannot be allowed to continue with mother in presence of her new husband, who is alien to the minor and also within the prohibited degree under Islamic jurisprudence.

6. Perusal of case law referred by learned counsel for respondent shows that almost same pertains to adjudication and finding of the fate of Guardian and Wards Application whereas present petition is only for ad-interim custody. Needless to mention

that compromise shows custody of the minors was with the petitioner and that compromise shows that petitioner filed compromise application rendering custody in order to get *khula*.

7. In Case of **Mst. Beena v. Raja Muhammad and others (PLD 2020 SC 508)**, relied upon by the learned counsel for the petitioner, it has been held by the Apex Court that *“The welfare of the minor cannot be relegated to the personal interest of the father and such a clause or condition is against public policy. The clause in the agreement whereby the mother agreed to give up her son’s physical custody and/or not claim it is also without consideration. The welfare of a minor cannot be subsumed by the interest of his father, and if this is done it will be against public policy, and such clause or condition will be void. Such a stipulation will also be void under section 25 of the Contract Act because it is without consideration”*. Besides that the Guardian and Wards Applications are pending adjudication before the Guardian and Wards Court which has ultimate and competent jurisdiction to determine the fate of permanent custody of the minors on the basis of settled principles of law contained under Section 17 of the Guardian & Wards Act, 1890 in respect of welfare of minors with reference to the peculiar facts and circumstances of the case after leading evidence of both the parties.

8. The framers of the law relating to Guardians and Wards Act, 1890 legislated it as a special enactment with an intent to secure the interest and welfare of the minors living within the jurisdiction while highlighting the degree of preference to establish guardianship. The sole criterion which depicts the intent of the legislature is

nothing except welfare of the minors as grundnorm of the enactment. As a general principle the degree of preference is confined to relationship depending upon the order of preference due to closeness of blood relationship and other aspects which are essential in upbringing of the minors within four corners of law. Any deviation from the general principle, where the blood relationship has to be departed, there should be very strong and compelling reasons to have a contrary view which includes upbringing, education, healthcare, congenial domestic atmosphere, physical and psychological advantages, sect, religion, character and capacity of the claimant to whom if it is assigned to take care of the minors. In short words, while ignoring/bypassing the general principle there must be very strong and exceptional circumstances which could be brought forth with reference to the intent of the legislature regarding the sole purpose of “welfare of minors”. Reference may be made to the Case of **Rashid Hussain v. Additional District Judge, Islamabad (East) and others (PLD 2022 Supreme Court 32)**.

9. It may be mentioned here to this regard that an order passed by the Guardian Court in respect of the custody of the minor (consent order or otherwise) may be an order in the best interest and welfare of the minor at that point of time but due to certain future eventuality and subsequent developments the same may not serve as such, which provides recurring cause of action. It is for this reason that the Guardian Court has been empowered to modify, set aside or alter an earlier order and pass an appropriate order at any subsequent stage to safeguard the interest and welfare of the minor and that the order passed earlier in that context will not operate as a

bar of jurisdiction for the Guardian Court for all future time to come. **A consent order, a compromise or an agreement between the parties will not absolve the Guardian Court from its basic responsibility to safeguard and protect the interest and welfare of the minor.** Moreso as in the litigation before a Guardian Court the two parties participating in such proceedings are not adversaries in the strict sense but they plead their own view-point before the Court to enable the Guardian Court to arrive at a just and proper conclusion on the question of welfare of the minor. Reference, if needed, may be made to the Case of **Ayesha Tahir Shafiq v. Saad Amanullah Khan and 2 others (PLD 2001 Karachi 371).**

10. Thus, further observations with regard to the permanent custody of the minors and paramount consideration i.e. welfare of the minors would offend and prejudice to the merits of the case. Hence without commenting further on the conduct and merits of the matter, in this petition, while modifying the interim order dated 17.03.2022 with addition that minor Maryam shall be given to the father for her stay every Saturday to Sunday as an interim measure during the interregnum and this interim arrangement shall be there. The Guardian and Wards Court is hereby directed to decide both the Guardian and Wards Applications preferably within one month. Both matters shall be consolidated and proceeded. The Guardianship Applications or Application for Interim Custody are to be decided without being influenced by the order of this court.

**J U D G E**