

**IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR**

Constitutional Petition No.S-79 of 2022

Petitioner: Mst. Alam Khatoon w/o Gul Muhammad  
through Mr. Shabbir Ali Bozdar, Advocate.

Respondents: (1) Mst. Benazir and (2) Inayatullah  
Soomro through Mr. Ghulam Mujtaba  
Sahto, Advocate.

The State: Through Mr. Mehboob Ali Wassan,  
Assistant Advocate General.

Date of hearing: 28.10.2022  
Date of decision: 31.10.2022

**ORDER**

**Khadim Hussain Tunio, J-** Through captioned constitutional petition, the petitioner Mst. Alam Khatoon has called in question the common judgment dated **30.03.2022** passed in Guardian & Wards Appeal No.22 and 02 of 2021, by the learned District Judge / Civil Model Appellate Court, Naushahro Feroze whereby the order dated 04.12.2021 passed by the Family Judge Naushahro Feroze in G&W Application No.25 of 2020 was set aside.

2. Through G&W Application No.25 of 2020, the petitioner Mst. Alam Khatoon, being the grandmother, had sought custody of the two minor children of respondent No.1 Mst. Benazir namely baby Bisma aged 10 years and Muhammad Ali aged 7 years, who came from the wedlock of the petitioner's son Bashir Ahmed who had died in 2016 and respondent No.1 Mst. Benazir. After his death, respondent No.1 moved out of the house and contracted second marriage and had taken both the children with her. The learned Family/Guardian Judge dismissed the Guardianship Application of the applicant/petitioner Mst. Alam Khatoon while allowing for custody during winter and summer vacations, on Eid, on account of death of any relatives to attend funeral processions and also directed that the parties shall consult each other in case of marriage of minors in the future and if the

paternal uncles of the minors choose so, the minors be admitted to boarding schools so both parties have equal rights of meetings.

3. The appellant/petitioner (grandmother) challenged the order of the learned Family/Guardian Court by preferring a Guardianship Appeal bearing No.**02/2022** while the respondents/defendants also preferred a Guardianship Appeal bearing No.**22/20222**. Through the impugned judgment dated **30.03.2022**, the learned District Judge Naushahro Feroze allowed the appeal filed by the respondents and dismissed the appeal filed by the petitioner with directions that if the petitioner chooses so, they will be able to meet the minors to ensure their well-being at the house of the respondent.

4. Being dissatisfied with the judgment, passed by learned Guardian/Family Judge as well as learned Appellate Court, the petitioner has filed captioned constitutional petition with the prayer that both the orders passed by learned Guardian/Family Judge and learned District Judge, Naushahro Feroze be set-aside and custody of the minors be awarded to her.

5. Learned counsel for the petitioner mainly contended that the learned trial Court has not considered the fact that the minors are residing with their step father who is already married and has adult children; that the respondent No.2 does not possess a good character and has a criminal record; that the learned trial Judge has not considered the evidence produced by the petitioner; that the petitioner lives in a joint family and is capable of giving good upbringing to the minors in the presence of their uncles; that the petitioner collects pension of her late husband which she can also use to provide for the minors; that the minors are receiving mediocre education with their step father who is not providing the best he can; that the respondent No.1/mother has lost her right to Hizanat after getting married again.

6. Conversely, learned counsel for the respondents supported the impugned judgment passed by the learned District Judge Naushahro Feroze while contending that the respondent No. 2 is capable of giving a good upbringing to the minors; that the minors reside in a separate house with their mother; that the respondent No.2 does not have a criminal record and the FIRs were with respect to business transactions.

7. Learned Assistant Advocate General also supported the impugned judgment.

8. I have heard learned counsel for the Petitioner, learned counsel for the respondents, learned AAG and have gone through the entire material available on record with their assistance.

9. An exhaustive perusal of the order of the learned District Judge Naushahro Feroze shows that the Court has considered all the relevant aspects of the matter while keeping the welfare of the minors and the convenience of their mother in mind. This is not a run of the mill case of a father and mother fighting for the custody of their children, rather a grandmother claiming seeking custody of minors from their real mother. It is a matter of record that both the minors were ordered to be moved around between the two parties by the learned Family Judge Naushahro Feroze on occasions such as Eid, vacations and funerals. This opens up possibilities of many road risks while travelling. This will also unnecessarily burden the mother/respondent No.1 who, despite being provided maintenance, will be unnecessarily kept away from her children while left worrying about them travelling. The petitioner is also of old age, being 81 years, and it would be reasonable to assume that she herself would require more help to tend to the minors and this can hinder their upbringing negatively. Custody matters can often be very challenging because while a grandmother's love for her grandchildren on the account of death of her son, the father of the children, cannot be denied, but when put in juxtaposition with the love and care of a mother, preference

still falls in favour of the mother. Courts are to always look at the welfare of children and ascertain where their upbringing will be ensured in the best way possible for them to grow and be respectable members of the society. The Hon'ble Apex Court has also time and again observed that the welfare of children is the prime consideration in matters of custody. Reliance in this respect is placed on the case of ***Mst. Hameed Mai v. Irshad Hussain (PLD 2002 Supreme Court 267)***. In a recent judgment dated 05.10.2022 passed by the Hon'ble Apex Court in Civil Petition No. 240 of 2021, it was observed that:-

“Time and again, this Court has held that the paramount consideration where custody is concerned is the welfare of the minor; that is to consider what is in the best interest of the child. The court’s jurisdiction in custody cases is in the form of parental jurisdiction which means that the court must consider all factors from the **parents’ ability to provide for the child including physical and emotional needs, medical care but also relevant is the parents’ ability to provide a safe and secure home where the quality of the relationship between the child and each parent is comforting for the child.** Hence, there is no mathematical formula to calculate the welfare of the minor, as the **factors range from financial and economic considerations to the household environment, the care, comfort and attention that a child gets.** Accordingly, the concept of welfare of the child is an all-encompassing concept which will cover not only the manner in which the child has to be cared for, but will also include the physical, mental and emotional well-being of the child.”

**(emphasis supplied)**

10. As far as the mother losing the right of Hizanat is concerned, this is a preferential right which may be lost against the father of the children, however is not of concern when custody is sought by the grandparent who is not directly responsible for the upbringing of a grandchild. The mother does not entirely lose her right to custody on the occasion of a second marriage. It has been brought on record that the respondent No.1 is living in a separate house from the first wife of the respondent No.2 and the respondent No.2 is providing maintenance, upbringing costs and good education to the minors while they are simultaneously in the

care of their original mother in the absence of their real father. This is the best case scenario for the minors and the petitioner could not bring on record any circumstances other than the second marriage that would disentitle the mother/respondent No. 1 of the custody of the minors. Learned Appellate Court has also considered the rights of the grandmother/petitioner and allowed for meetings at the house of respondent No.1 whenever the respondent and her family is pleased to ensure that good upbringing is being given to the minors.

11. Given the above circumstances, the impugned judgment dated 30.03.2022 passed by the District Judge Naushahro Feroze, needing no interference, is upheld. Resultantly, instant petition stands dismissed being meritless.

**J U D G E**