

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

C.P. No.S-888 of 2021

Date	Order with signature of Judge
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Hearing of Priority case

1. For hearing of CMA No.5830/2021 (Stay Application)
2. For hearing of main case.

05.01.2022

Ms. Kaneez Fatima, Advocate for the petitioner
Ms. Kiran Akhtar Channer, Advocate alongwith respondent No.1
SIP Chan Muhammad, P.S. Steel Town, Karachi

This petition has been filed to challenge the orders dated 26.08.2021, 17.09.2021 and 13.04.2021 passed by learned trial court as well as learned First Appellate Court.

2. Petitioner's case is that he married with respondent No.1 and out of said wedlock, one baby boy named Muhammad Zayn Usman was born on 22.10.2016, who was allegedly being looked after by the petitioner himself since his birth. It is also alleged in the memo of petition that respondent No.1 was patient of schizophrenia and on the advice of doctors the minor was kept away from her due to such an ailment. It is further alleged that due to matrimonial disputes, a consent divorce deed was executed between the petitioner and respondent No.1 on 16.08.2019 in which the respondent No.1 relinquished her right of custody of minor. It is further mentioned in the memo of petition that respondent No.1 filed an application under Section 25 of the Guardians and Wards Act, 1890 which was allowed by the learned trial court on 13.04.2020 and the petitioner was directed to hand over the custody of the minor to the respondent No.1, nonetheless, the petitioner impugned the said order before the learned District Judge Malir, Karachi by filing an appeal which was also dismissed and the findings of the learned Family Judge/trial court was upheld, thereafter, the petitioner approached this court by filing the instant petition.

3. Notice of this petition was issued to the respondent No.1 who in deference of the notice, filed her reply and strongly challenged this petition and declined all statements of the petitioner as self-serving and lies, and claimed custody of her child withheld from her despite two courts orders in her favour.

4. Vide order dated 03.01.2022 notice was directed to be served upon the petitioner through learned VIII Family Judge Malir, Karachi for the production of the minor and today the minor Muhammad Zaym Usman was produced by Hamid Pervez being paternal grandfather of the minor, upon this Court having been informed that the petitioner on account of natural cause died on 14.12.2021, leaving no reasons to keep mother away from her child in wrongful custody of minor's grandparents.

5. Learned counsel for the petitioner stood before this Court on the strength of Vakalatnama signed by the deceased petitioner to argue that custody be retained by the grandparents in the interest of welfare of the child, to which the mother responded as *she belongs to a well-to-do family residing in Cantonment Area of the city and her father is also a Director in a multinational company as well as she is working for an international brand earning Rs.150,000/- per month, therefore, she can well looks after her minor.*

6. The battle between the parties was originally of a custody and guardianship of the minor. In my considerate view, the guardianship and the custody having two different aspects, guardianship 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, whereas, the custody denotes the actual or constructive possession over the minor for the purpose of his protection and these two aspects can be enjoyed by the same person or by two different persons. It is an admitted position that the petitioner has died on 14.12.2021 and such death certificate has also been introduced on record and admitted by his counsel and his parents. The concurrent findings of the two courts below suggest that the respondent No.1 being a mother of the minor is entitled to the

custody of minor being her natural guardian. Courts are of the established view that a mother who always has a better understanding with her children with whom the children enjoy the intimacy, has a superior right for the custody of the minors. A child needs a proper control as well as room for free thoughts and actions and no one can take care of a minor more than their real mother for being their first institution. Depriving minors of company of their real mother would create deprivation in their lives, which could not be restored back (2010 YLR 1468).

7. In view of above, instant petition is dismissed upon becoming infructuous on the death of the petitioner on this ground alone, so also learned counsel for the petitioner has failed to point out any material illegality or irregularity in the concurrent findings of the courts below. Hence, in sequel to the deliberations hereinabove, the impugned Orders dated 26.08.2021, 17.09.2021 and 13.04.2021 passed by learned trial court as well as learned First Appellate Court are maintained and the minor Muhammad Zaym Usman produced by paternal grandparents today be handed over to the respondent No.1.

JUDGE