

## ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI  
C.P. No.S-32 of 2023

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Date	Order with signature of Judge
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- 1.For hearing of MA No.211/2023
- 2.For hearing of main case.

Ms. Khushbakht Shah, Advocate for the petitioner, assisted by Ms. Urooj Lashari.

Mr. Nisar Ahmed Khan, Advocate for the respondent No.2  
Ms. Sania Zubair, Advocate.

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The petitioner has impugned the order dated 22.11.2022 passed by learned respondent No.1 on an application under Section 26 of the Guardians & Wards Act, 1890 (“Act”) in this Constitution Petition.

2. Precise facts of the case are that the petitioner pending adjudication of the G & W Case No. 1041/2014 filed an application under Section 26 of the Act seeking permission of the Guardian Court/respondent No.1 to travel abroad with the minor Asher Farhan (“minor”) on the ground that she has got a handsome job in UAE and earning a smart livelihood, therefore, she be permitted to travel abroad along with minor as the respondent No.2 being father of the minor failed to provide maintenance. The said application was heard by the learned respondent No.1 who declined the said application vide order dated 22.11.2022 hence the petitioner is before this Court.

3. Learned counsel for the petitioner contended that the welfare and the wellbeing of the minor is with the petitioner being her

mother as she has gotten a job in UAE and wants to travel abroad with the minor, but the learned respondent No.1 summarily decided the application filed under Section 26 of the Act ignoring the welfare of the minor.

4. Learned counsel for the respondent No.2 on the other hand contended that the matter is pending before the learned respondent No.2 and let the same be finally decided, but at the cost of losing prospects of a job in UAE? Learned counsel for the petitioner questions.

5. Heard the parties and perused the record. A bare reading of section 26 of the Act as reproduced hereunder reveals that the said provision is a mandatory requirement, failing which the guardian is to be penalized under section 44 of the said Act by imposing fine or imprisonment. However, the said section also mentions that exceptions exist within its legal framework as the Family Court under sub section 2 thereof is given the authority to grant either special or general leave.

*Section 26*

*26. Removal of ward from jurisdiction. (1) A guardian of the person appointed or declared by the Court, unless he is the Collector or is a guardian appointed by will or other instrument, shall not without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.*

*(2) The leave granted by the Court under sub-section (1) may be special or general, and may be denied by the order granting it.*

6. For compliance of the requirement of section 26, indeed a guardian has to file an application for permission for removal of the minor from the limits of the jurisdiction of the Family Court that had issued the guardianship certificate, but compared to section 7

(guardianship) and section 25 (custody) which lay down the direction for the Family Court's to decide application under the said sections by looking at the welfare of the minor, section 26, on the contrary, in my humble view purposefully omits to mention the grounds on which the same could be allowed or denied.

7. It is common knowledge that an application under section 26 has to be decided, keeping in mind the welfare of the minor. Applying the rules of statutory interpretation, the whole and entirety of the G&W Act 1860 has to be taken into consideration (PLD 1997 SC 32) to determine the legislative intent behind enactment of section 26. A detailed examination of the G&W Act (sections 7, 10, 17, 24, 25) consistently directs the Family Court to keep the welfare of the minor as primary consideration while deciding matters under the same, which argument is also supported by the dictum laid down by the Honorable Supreme Court in the judgment cited as PLD 1967 SC 402 where at page number 409 it provides that “..we are also of the view that in a proceeding under the Act the court should not lose sight of the fact that the overriding consideration is always the welfare of the minor. The Court in such cases is really exercising a parental jurisdiction as if it were in loco parentis to the minor. This is not a jurisdiction, therefore, in which there can, by its nature, be any scope for any undue adherence to the technicalities”. Considering the above, it is plain and simple that applications under section 26 seeking permission/leave to travel abroad with minor is to be decided by considering if the removal of the minor is, in fact, facilitates the welfare of the minor. Thus after an assessment of the reasons behind the guardian seeking

permission for travelling with minor, the Court, if satisfied, may grant or deny the said leave/permission.

8. Admittedly the world is a global village and countless people are migrating overseas for better opportunities for themselves and especially their children. The Petitioner in the case at hand was denied maintenance by the father of the minor (Respondent No.2), and it is with this helplessness, once she got the opportunity of a bright future, she took the difficult decision of moving abroad for the better future prospects for the minor and herself. While so far our legal jurisprudence has sparingly dealt with the situations where the minor was being removed from the jurisdiction of the court where the consideration remained the protection of the welfare of the minor<sup>1</sup>, however, considering the facts of the present case where the Petitioner's sole reason of seeking permission for international travel is for her son to have a stable future, the courts of law aligned with the international law, in my humble view, are bound to consider that while allowing/denying the permission, whether they are protecting the welfare of the minor or acting otherwise. This responsibility stems from the International Convention of the Rights of Child ("Convention") which was ratified by Pakistan on 12 November 1990, where Article 3 reinforces the said responsibility in the following words as reproduced herein below:-

*Article 3*

*1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative*

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<sup>1</sup> The following case law shall be considered but preferably affect the decision on the present case due to factual differences. Reference is made to PLD 1952 Pesh 77, 1981 CLC 1275, PLD 2012 Sindh 208 indicating that the purpose of the section 26 is to not keep the minor within the jurisdiction of the court but to see if the removal aids the welfare of the minor and to keep the child in safe hands.

*authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

9. Pakistan is also a party to three other international instruments aiming at directly or indirectly improving the rights of the child, those being the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified in 1996; the Declaration and Agenda for Action adopted at the issue of the World Congress against Commercial Sexual Exploitation of Children, signed in 1996, and reaffirmed by the Yokohama Global Commitment in 2001, and the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour Convention, ratified in 2001, all of which make the interest of the child of primary consideration and through which our Family Courts are bound to make decisions that do justice to the principle of welfare of the child.

10. Building on the above, in absence of any reported judgments in our jurisprudence available on record specifically about cases where the minor was being removed by the guardian for his/her welfare abroad, I have taken the liberty to delve into the subcontinent's jurisprudence that supports the proposition that the rationale behind movement to different countries with the minor and what reasoning is to be applied while deciding application for permission for the same. Relying on a case from Indian Court of Law, Karnataka High Court titled WP No. 892 of 2023 Smt Rakshitha vs Sri C C Shashikumar on 19 January, 2023, the Petitioner a woman was allowed the permission on the grounds that the husband seemed indolent and uninvolved in the matters of upbringing of the child. Moreover, reliance is also placed on case law from the Americas jurisdiction

where in the case of *Watson v. Watson* (Aug 03, 2004 | 2004 Neb. App. LEXIS 190), the trial court properly granted mother's motion to remove the minor children from Nebraska to pursue a job opportunity in Maryland. The court stated that final consideration is the best interests of the child where the analysis showed that the positivity of the said decision aims to maintain a meaningful parent-child relationship. In determining whether removal to another jurisdiction is in the child's best interests, the trial court in the said case considered (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent. In *Luck v. Luck*, 92 Cal. 653, 655 [28 P. 787], the U.S. Supreme Court held the rule "thus. . . if he [the parent] is entitled to the custody of the children at all, he or she has the right to name any reasonable place in which they shall abide with them".

11. It is settled principle enunciated by the apex Court in matters of custody of minor(s) that welfare of the minor shall always be the paramount consideration, and Courts have to see where the wellbeing and welfare of the minor lies. It has been introduced on record by the petitioner that the petitioner has gotten a job in UAE and is eager to travel abroad with the minor and before leaving abroad, she sought permission of the Guardian Court. It is not denied that the minor can excel better in UAE rather facing proceedings where the respondent/father has not shown that he is diligently providing bare maintenance to the minor

12. After hearing the arguments, I had allowed the instant petition by means of a short order dated 08.02.2023 which is replicated as under:

*“For the reasons to follow, this petition is allowed. The petitioner is permitted to take the minor out of the country as prayed through her application moved under section 26 of the G&W Act, 1890, as she has been provided a job in UAE, where it is an admitted position that the respondent father has even failed to regularly pay the meager amount of maintenance.”*

13. Above are the reasons of my above short order.
14. Let a copy of this order be circulated by MIT-II to a Family Court and all other Courts in the Province who deal with Family matters.

JUDGE

Aadil Arab