ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI
C.P. No.S-202 of 2024

Date	Order with signature of Judge

1.For order on CMA No.2120/2024
2.For order on office objection
3.For order on CMA No.2121/2024
4.For hearing of main case

21.02.2024

Mr. Ali Gohar Masroof, Advocate for the petitioner.

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1. Urgency granted.

2. Deferred.

3-4. Learned counsel impugns an order dated 23.11.2023 passed in G&W Application No.2021/2017 by learned Guardian Court. Learned counsel contends that the father is also a natural guardian and cannot be deprived visitation as well as custody of the minor but the learned Guardian Court allowed the application of the Respondent mother to take the minor abroad for her welfare as well as advance education. Perusal of record reveals that petitioner moved an application under Section 25 of the Guardian and Wards Act, 1890 for permanent custody of the minor which application of the petitioner was turned down vide order dated 21.12.2019 (available at page 43), however, the petitioner father was allowed visitation rights. With the passage of time, the respondent No.1 moved an application seeking indulgence of the Guardian Court to allow her to take the minor abroad for advance studies as the respondent No.1 is a Doctor by profession have gotten Job in Qatar and looking into the

prayer of the respondent mother, the Guardian Court allowed the application of the respondent mother vide order dated 23.11.2023, however, the petitioner was also allowed visitation rights as depicted in the order and the petitioner impugned the said order in this petition.

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*
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> *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.*
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> *(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.*

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.

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.

Admittedly the world is a global village and countless people are migrating overseas for better opportunities for themselves and especially their children. The respondent mother is a Doctor by profession doing medical practice in Qatar and for a bright future of

the minor 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[1], however, considering the facts of the present case where the respondent mother's sole reason of seeking permission for international travel is for her daughter 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 authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

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

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[1] 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.

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.

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 respondent 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".

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 respondent mother that the she has gotten a job in Qatar 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 Qatar rather facing proceedings where the petitioner/father has not shown that he is diligently providing bare maintenance to the minor.

In view of the above reasons delineated above, the instant petition is dismissed alongwith pending applications, however, the visitation rights granted to the petitioner father by the learned Guardian Court in the impugned order shall remain same.

JUDGE

Aadil Arab