

**ORDER SHEET**  
**IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA**  
**Constitutional Petition No.S-177 of 2023**

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DATE                      ORDER WITH SIGNATURE OF HON'BLE JUDGE

1. For orders on office objection "A"
2. For hearing of M.A No.398/2023 (S/A)
3. For hearing of main case.

Petitioners:                                  Mst. Ghulam Fatima & 2 others  
                                                                        Through Mr. Gulsher Junejo, Advocate

Respondent:                                                  Farooque Ahmed  
                                                                        Through Mr. Ali Raza Pathan, Advocate  
                                                                        Mr. Munwar Ali Abbasi, Assistant Advocate General,  
                                                                        Mr. Sardar Ali Solangi, Deputy Prosecutor General.

Date of Hearing:                  08-09-2025  
Date of Order:                  08.09.2025

**JUDGMENT**

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**NISAR AHMED BHANBHRO, J.-** Through the instant Constitution Petition, petitioners have challenged the order dated 24-06-2023 (impugned order) passed by the Court of learned District Judge Kamber Shahdadkot (Appellate Court) in Guardianship Appeal No 03 of 2023 "Re Farooque Ahmed Versus Mst. Ghulam Fatima and 2 others" wherein the appeal filed by the respondent Farooque Ahmed was allowed and the custody of minor Oun Muhammad was granted to Respondent Farooque Ahmed.

2.            Facts in brief leading to the instant constitution petition are that Minor Oun Mohammed is son of Respondent Farooq Ahmed. The mother of minor passed away on the day when baby was born. Since the day of birth, he was brought up by Petitioners. In the year 2022 dispute for the custody of minor arose between the parties. The Respondent Farooq Ahmed filed Guardianship Application No 22 of 2022 before the Court of Learned Family Judge II Shahdadkot (Trial Court).

Petitioners also filed Guardianship application No 25 of year 2022 before Learned Trial Court. Both the applications were amalgamated, application No 25 of 2022 filed by the Petitioners was treated as leading application and application No 22 of 2022 filed by Respondent as subsequent application.

3. Out of the pleadings of the parties, following consolidated issues were framed:

- i. Whether the applicant No 1 of Leading G & W Application namely Mst. Ghulam Fatima is entitled for the custody of minor Oun Mohammed son of Farooque Ahmed Khoso aged about 6 years?*
- ii. Whether the applicant of subsequent G & W Application namely Farooque Ahmed is entitled for the custody of minor Oun Mohammed aged about 6 years?*
- iii. What should the judgment be?*

4. Parties led evidence in support of claim. The Petitioners (applicants in leading G&W Application) examined Mst. Ghulam Fatima, and Mst. Shaista Parveen. Respondent (Applicant in subsequent G&W Application) examined himself (Farooq Ahmed), Anzania and Abid Hussain, thereafter the parties closed side for evidence.

5. It is pertinent to mention that Learned Trial Court recorded the statement of minor Oun Mohammed to know his preference / choice.

6. Learned Trial after hearing the parties allowed the application filed by the petitioners and dismissed the application filed by the Respondent vide order dated 10.04.2023 with meeting rights to the Respondent once in a month.

7. Respondent Farooque Ahmed filed Guardianship Appeal before Learned Appellate Court (District Judge Kamber Shahdadkot). Learned Appellate Court after hearing the parties, allowed the appeal filed by the Respondent vide impugned order dated 24.06.2023, held Respondent entitled for the custody of minor, dismissed the application filed by Petitioner by setting aside the order dated 10.04.2023 passed by Learned Trial Court. Hence this challenge to the impugned order:

8. Mr. Gulsher Junejo Learned Counsel for the Petitioners argued that the impugned order passed by the Learned Appellate Court was against the principles of law and natural justice. He argued that the impugned order was against the spirit of Guardian and Wards Act. He argued that the law favors the grant of custody by considering the welfare but not the relations. He argued that Learned Trial Court passed a well-reasoned order after proper appraisal of the evidence, keeping in view the choice of minor and financial position of the Petitioners. He argued that the reason which weighed before the Learned Appellate Court to hand over the custody of minor was untenable. He argued that minor since the date of birth had remained in the custody of Petitioners. The minor was brought up in a healthy atmosphere and throughout the period of last more than 9 years the minor was maintained by the Petitioners. He argued that Respondent did not pay any penny for maintenance and Petitioners never demanded any maintenance charges of minor from Respondent. He contended that if the custody of the minor is removed from the Petitioners, it would put adverse effects on the career of minor. He contended that the Respondent being father was at liberty to meet with the minor in the house of Petitioner any time he desired. He prayed for maintaining the order passed by Learned Trial Court by allowing this petition, He placed reliance upon the case of Bashir Bibi Versus Ghulam Rasool and others (2005 YLR 547), Muhammad Jameel and another Versus Muhammad and 2 others (2021 YLR 39)

9. Mr Ali Raza Pathan Learned Counsel for the Respondent contended that the Respondent being father of the minor was his natural guardian. He argued that the Petitioner No 1 was an old aged lady, she herself was dependent upon her daughters. Petitioners No 2 and 3 were married and had their own children. He argued that the welfare of minor lied in the lap of his father. He argued that Respondent was looking after his daughter well and for the welfare of children he did not contract second marriage. He argued that there was no illegality in the impugned order. He prayed to dismiss the appeal. He placed reliance upon the case of Nasir Raza Versus Additional District Judge, Jehlum and another (2018 SCMR 590)

10. Heard arguments and perused material available on the record.

11. Scanning of the record revealed that both the parties intend to retain custody making claim of the welfare of the minor. Material available on record evidenced

that both the parties were financially stable to support the minor. The interests of the parties in any manner were not averse to the welfare of minor. Learned trial court after recording evidence of the parties resolved the issue of welfare of minor in favor of the petitioners. The Petitioner No 1 being maternal grandmother of the minor was accorded custody.

12. Learned trial court during proceedings of the case recorded the statement of minor Oun Muhammad to recognize his choice. It would be conducive to reproduce the statement of minor recorded before Learned Trial Court, which reads as under:

**STATEMENT OF MINOR / WARD CHILD WITNESS NAMELY OUN  
MUHAMMAD KHOSO AGED ABOUT 06 YEARS ON 27.01.2023**

The witness is child aged about 06 years in order to check the veracity of the evidence of the child witness and mental level of the witness, I asked following questions from him.

Q No 1	What is your name?
Ans.	My name is Oun Muhammad
Q No 2	What is your father's name?
Ans:	Sir My father's name is Farooque Ahmed Khoso.
Q No 3	In which class do you study?
Ans:	Sir I am study in Nursery Class.
Q No 4	Where are you standing now?
Ans:	Sir I am standing in Court.
Q No 5	Do You know who am I?
Ans:	Yes, Sir I know you are a judge.
Q No 6	With whom you want to live?
Ans:	Sir I want to live with my grandmother/ Nani namely Ghulam Fatima Chalgri

During the above queries, the child is given all the answers correctly with confidence. He is well known and having good mental approach. Therefore, I am satisfied with the credibility of the child witness and same is placed on record.

**LTI**

**Oun Muhammad**

**SRO & AC**

**Saeed Ahmed**

**Civil/ Family and Guardian Judge II Shahdadkot**

13. Learned Trial Court in its findings on issue No 1 & 2 held Petitioner No 1 entitled to retain custody of minor, Para No.18 of the order of the Learned Trial Court being relevant is reproduced below:

*18. After careful perusal of the evidence of parties and record and also minor / ward in open Court, it shows that the controversy between the parties is over the custody of minor Oun Muhammad after the death of his mother Mst. Saiqa Parveen. It is clearly stated by the minor that he wants to reside with his grandmother/ Nani Mst Ghulam Fatima. The minor has developed the love and affection with grandmother / nani and does not want to part way from his grandmother. It will not be in welfare of minor specially for his mental growth, if he handed over to the Respondent No 1 of the leading application Farooque Ahmed Khoso against his wish. As such I am of the opinion that the applicant No 1 Mst Ghulam Fatima successfully proved herself for being a fit person to take custody of minor/ ward namely Oun Muhammad aged about 6 years.*

14. Respondent Farooque Ahmed preferred Guardianship Appeal before Learned Appellate Court. Proprietary demanded that the Respondent should have preferred separate appeals against the consolidated order, as the G & W application of the Respondent was declined and G & W Application of the Petitioners filed under section 7(10) and 25 of Guardian and Wards Act 1890, for custody of minor Oun Muhammad was accepted by the Learned Trial Court. Since it was a consolidated order, therefore, the single appeal filed by the respondent Farooq Ahmed sufficed the cause.

15. Learned Appellate Court after hearing the parties, allowed the appeal filed by the Respondent Farooque Ahmed, whereby dismissed the application of the Petitioners and transferred the custody of minor in favor of Respondent being real father. The reason which weighed the Learned Appellate Court to grant custody of the minor to Respondent was that the sister of the minor was already residing with her father and she was in a better position to take tender care of her brother. The

operative para of the order dated 24.06.2023 passed by the Learned Appellate Court is reproduced below for the ease of reference:

*I have given due consideration to the arguments of both parties and gone through the entire material available on record, which shows that the appellant is real father of minor/ward. Further perusal of record shows that the mother of minor/ward has died in the year 2016. Further perusal of case file and after hearing parties, it appears that Learned trial Court has declined the custody of minor to his real father and handed over the custody of minor / ward to grandmother who was aged almost 80 years. However the real sister of minor/ward is residing with appellant / father and not with respondents on her own accord as she had chosen her father over her grandmother and maternal aunts, therefore, keeping in view the fact that real sister of minor /ward is already residing with father / appellant hence in order to create better understanding between siblings and to provide amicable atmosphere to minor / ward, her sister can play pivotal role in his better upbringing and real elder sister can better look after the minor / ward than the grandmother of minor / ward. Therefore, in above circumstances, I am of the considered view that appellant has made out his case for allowing instant guardianship appeal. Consequently, the impugned order calls for interference and same stands set aside.”*

16. Learned appellate court rendered its findings, without making an exercise of appraisal of the evidence on record, in particular without taking notice of the facts that mother of the minor had passed away, moments after giving birth to minor. The minor had all along remained in the custody of his maternal aunt and grandmother. Learned Appellate Court lost sight of the important fact that the Respondent in its G&W application filed before Learned Trial Court claimed that the custody of minor was removed forcibly six months prior to approaching the G&W Court. The record however transpired that the minor since the date of his birth remained in the custody of Petitioners. It is also another important aspect of the case that the Respondent claimed the custody of minor after about more than six and half years' time since the birth of minor. It is quite natural that minor had seen his grandmother and maternal aunt mothering him, therefore, developed a natural love and affection to them. The conduct of the Respondent manifested that his assertion of fatherly love and affection with minor Oun Mohammad was a mere insistence.

17. Learned Appellate Court rendered its findings on 24-06-2023 when the age of the minor was about 07 years. Learned Appellate Court failed to appreciate that the custody of minor was given to the Petitioners based on choice of preference and intellect of minor, he manifested in his interview before Learned Trial Court. Now minor has grown up, he is aged about 09 years and 06 months. Today minor Oun Muhammad was produced before this court. He appeared to be a well grownup boy with full understanding of the things. In the earlier hour when the matter was called, the learned counsel for the respondent requested that since the minor has remained all along in the custody of petitioners, therefore, meeting opportunity may be given to the father for some time, thereafter, inquiry as to choice and preference be made. Minor Oun Muhammad voluntarily went to his father, remained in meeting of father for 03 hours. This matter was taken up again, an inquiry was made from minor, wherein he accepted his relationship of son with respondent but refused to go to his father for the reason that he was looked after well by her grandmother and maternal aunt. He was told that under the law he should remain in the custody of father. To which he himself suggested that he can reside with his father during school vacations but he cannot leave his maternal aunt at any cost.

18. The makers of the law were live to the situations while enacting Guardian and Wards Act 1890 to regulate the custody of minor. Law makes it vivid and crystal clear that while deciding the custody of minor, paramount consideration should be his welfare. The law provides that while deciding the question of welfare of minor the age, sex, religion and nearness of kin to the minor should be taken into consideration. As far as the nearness of kin and relation is considered than parents come under the priority due to their natural relationship. At the same time law under section 17 of G&W Act, articulated that court may consider the intelligent preference of the minor if he is old enough. For the sake of convenience, the section 17 is reproduced below:

***17. Matters to be considered by the Court in appointing guardian. \_\_ (1)***

*In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.*

*(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the*

*wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.*

*(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.*

*(4) [Repeal]*

*(5) The Court shall not appoint or declare any person to be a guardian against his will*

19. The minor was inquired time and again by this Court as to his choice of preference, in presence of his father. He was told by the Court that his custody was better suited to his father but he categorically stated that he intended to reside with her mother (pointing to her maternal aunt Shaista Parveen) and grandmother. He was using the word mother for his maternal aunt. When inquired as to whether he will join his father during vacations, he replied in positive that he will be ready to reside with his father during vacations but for the time being he cannot go to the father as since childhood he has remained in the custody of his grandmother and maternal aunt.

20. No doubt under the law father is the right person to retain the custody of minor in absence of mother but such right was not unfettered right in nature because the custody of minor is regulated in terms of his preference and welfare. It is admitted position on record that since the birth of minor, the father has not paid any penny towards his maintenance and all along he has been afforded by his maternal aunt. Petitioner No 1 Ghulam Fatima and Petitioner No.2 Shaista Parveen are present in person before the Court and submit that they will not claim any maintenance charges from Respondent including the school expenses. They submit that in past Respondent was not burdened to pay maintenance and in future the Respondent will not be burdened for the said purposes.

21. Admittedly minor Oun Mohammad and Petitioners are in an affection and love since the day of the opening of the eye by the minor. He is well brought up and for the natural reasons minor has preferred to live with her maternal aunt and grandmother. Minor cannot be forced through process of the court to leave the house of his maternal grandmother and join his father. Though under the natural principles of justice the minor cannot be deprived of parental care. The right to parental care is recognized as the fundamental right of a child. It was asserted by the Respondent, that after the death of his wife (the mother of the minor) he has not contracted 2<sup>nd</sup>



marriage though this fact has been disputed by the petitioners, but will not be relevant factor to decide custody of minor. The custody of minor will be regulated keeping in view his welfare not his parental care. Since the minor has been brought up by his maternal aunt and grandmother. He is willing to stay with them and volunteers to join his father during vacations, such an intelligentsia on the part of child cannot be lightly brushed aside through court orders. It will not be a case of sympathy with father but it will amount to crushing the desire of a minor which ultimately would go against his welfare as the child may not get adequate hygienic atmosphere in the house of father which he is getting in the house of his maternal aunt and grandmother. When inquired as to the financial capacity of the grandmother to provide sufficient maintenance to the minor, she stated that she was a retired pensioner and getting monthly pension of around 100,000 rupees which were more than enough to meet the expenses of herself and minor besides she was having her own house for accommodation.

22. To render such findings, the strength is derived from the judgment of Honorable Supreme Court in the case of Rashid Hussain Versus Additional District Judge Islamabad (East) and others reported as P L D 2022 Supreme Court 32, wherein it held that:

*Prime consideration while deciding custody of minors would be their welfare keeping in view character and capacity of their proposed guardian". Today, the minor children were present in the Court. They were brought before the Court under the orders and they were very well dressed up showing mature manners and they plainly refused to accompany their own father, rather they categorically stated to reside with the maternal grandparents. It is not a matter of surprise that their body language clearly demonstrated a sign of hatred towards him. It only happened because the father of the minor children has not performed his legal, moral and religious obligation in the manner as it is provided in an Islamic society. Though there is no denial of this fact that the petitioner has remarried and there is a daughter born out of the wedlock but this aspect cannot be considered as a valid ground to defeat the preferential right of the father, rather it can have only persuasive value with respect to other aspects which compel deviation, if any, as per the dictates of justice and "welfare of the*

*minor". Further, Articles 2 and 2A of the Constitution of the Islamic Republic of Pakistan, 1973 clearly envisage that Islamic social order has to be observed while leading life within the four corners of the law. In an Islamic culture, the father has been bestowed with so many responsibilities towards his children. Even the mother of the children can claim compensation of breast feeding from her husband which is well within the tenants of Islamic fiqh. Where this responsibility has been ignored, how a father while forgetting his obligations towards minor children and that too at a belated stage, can claim the guardianship on the basis of bald claims. As an abundance of caution, we have asked the maternal grandfather about his worth to which he stated that he is the owner of 19 acres of agricultural land which is sufficient to bear the expenses of the minor children and they are already enjoying reasonable living status in the custody of their maternal grandfather. Another aspect of this case is that the children are well aware of the fact that their mother died due to unnatural consequences which must be in the back of the mind of the children that it was their father who was involved in that episode. At this stage any adventure by this Court to dislodge the custody and handover the same to the father would be instrumental into impairment of the mental faculty of the minor children which could imprint negative impact on their personality in future and that would squarely be against the dictates of "welfare of the minor" which is an attire of Guardians and Wards Act, 1890.*

23. In the case of Gul Saem Khan Versus Mst Halima and others reported P L D 2025 Supreme Court 47, the Honorable Supreme Court had enunciated the principle for grant of custody of minor in the following manner:

*It would, thus, be noticed that right of the father to claim the custody of a minor son is not an absolute right, in that, the father may disentitle himself to custody on account of his conduct in the light of the facts and the circumstances of each case. In the instant case, the evidence on the record showed that the respondent father who sought custody of the minor, neglected the child since the separation of the spouses inter se and had voluntarily left the custody to the petitioner-*

*mother. She had brought him up and educated him till she had to opt for her second marriage. Even then she had not been negligent in the care of her minor son. She had entrusted that duty to her mother and father and minor is being properly educated till date in a local school. All along this entire period, the father never bothered even to go to meet the minor much less than providing maintenance to him, when the petitioner-mother sued him for providing maintenance allowance to the minor. It is only then that he had made an application for custody of the minor.*

24. The case laws relied upon by the Learned Counsel for the Parties though relevant for deciding the question of custody, but with due reverence were not in consonance with the facts and circumstances of the present case, thus distinguishable.

25. For what has been discussed herein above, a case for indulgence of this Court is made out. Consequently, this petition is allowed. The order dated 24-06-2023 passed by the Learned Appellate Court is set aside and the order dated 10.04.2023 passed by the Learned Trial Court is maintained, however modified in the following terms:

i. The custody of minor Oun Mohammed shall be retained by the Petitioners No 1 & 2 jointly.

ii. The Petitioners No 1 & 2 shall execute a personal bond of Rs one million each to the effect that the custody of minor will not be taken away from the jurisdiction of this court (beyond the province of Sindh). In case the Petitioners take minor for a short period of time beyond the boundaries of the province, they shall inform about their travel to the Respondent through electronic modes.

iii. In case the petitioners No 1 & 2 shift their place of residence from Shahdadkot and settle anywhere else, they shall inform in writing for their migration to the respondent of their new place of residence and if they fail to inform the respondent the orders passed today may be re-called.

iv. The Respondent being father shall be at liberty to meet minor son Oun Mohammad at the house of the petitioner No.1 and 2 any time he intends.

v. On every Sunday special meeting arrangement shall be made with the father during day hours if he comes at the house of the petitioner No.1 and 2 or through video conferencing as the case may be.

vi. During school vacations, the custody of the minor shall be given to the Respondent (father) for half portion during winter and summer holidays.

vii. On Eid occasions the petitioners shall accommodate the Respondent Farooque Ahmed with the custody of minor in the manner on the next day of Eid the minor shall be handed over to the father, where he will stay for the remaining Eid holidays.

viii. This arrangement shall remain in force until the minor attains the age of 14 years. The Respondent may thereafter claim the custody of minor through Guardian Court.

ix. Parties are expected to develop cordial terms with each other so that the future of minor is not affected due to the strain in their relations.

26. The Petition stands disposed of in above terms.

**JUDGE**

Asghar Altaf/P.A  
Approved for reporting  
Larkana  
08.09.2025