

**HIGH COURT OF AZAD JAMMU AND KASHMIR**  
*[SHARIAT APPELLATE BENCH]*

Appeal No.02/2020.  
Date of inst.03.01.2020.  
Date of decision 22.06.2022.

1. Mst. Iqbal Jan W/o Muhammad Rafique Khan (Maternal Grandmother of minor).
2. Muhammad Shafique Ahmed S/o Muhammad Rafique; father of minor R/o Gala Gujran Tehsil Thorar, District Poonch.

Appellants

VERSUS

1. Public at large.
2. Khalifa Beugm D/o Khadam Hussain caste Qureshi R/o Pachioat, Tehsil Rawalakot presently R/o Tain Janoobi Tehsil Rawalakot.

Respondents

**FAMILY APPEAL**

Before:- **Justice Syed Shahid Bahar, J.**

**PRESENT:**

Sardar Muhammad Saeed Shafi, Advocate for the appellants.  
Respondent No.2 in person.

**ORDER:**

Captioned appeal has been filed against the impugned order passed by learned ADJ/Judge Family Court/Guardian Judge Rawalakot on 05.12.2019, whereby mother of the minor has been appointed her guardian.

In view of proposed conclusion reached by the Court, facts of the case need not to be reiterated for the sake of brevity.

I have heard learned counsel for the appellant, respondent No.2 and gone through the impugned order as well.

A perusal of file reveals that through the impugned order the Court below has erroneously appointed respondent No.2, as guardian, that too, when she has contracted second marriage with an unknown person who has no blood relation with the minor.

On previous last date of hearing the minor was present before the Court. For my own satisfaction, I have inquired her about her living

status. She found prudent who told that she is 17 years old, studying in 1<sup>st</sup> year and is happily living with her paternal grandmother-appellant No.1 and father-appellant No.2. She further deposed that she desires to live permanently with them. However, wants to meet with her mother-respondent No.2, once in every month at the house of her paternal or maternal uncle. In this regard her statement has also been recorded.

Today, respondent No.2, appeared before the Court and submitted that she is real mother of the minor and wants to get custody of the minor. No doubt the aforesaid respondent is real mother of the minor but she has been divorced by the appellant No.2, also remarried and living with her husband, who is stranger and has no relation with the minor. Therefore, in such like situation it is not appropriate to give custody of the minor to the said respondent at any cost. There are plethora of judgments of the superior Courts on the said point.

On the other hand the respondent No.2, has contracted second marriage to a stranger and she would certainly remain dependant upon her second husband, who may not provide maintenance and care to the minor. So, there is no reason to disentitle the appellant No.2-father for the custody of the minor.

No doubt custody of minor is a paramount importance and while appointing guardian the Court has to look welfare of the minor and if circumstances of the peculiar case Court comes to the conclusion that a deviation be made from the reference given in the Islamic Law i.e. custody of the minor is required to be given to the mother even if she has contracted second marriage, the same would be possible but in that case the onus would shift to mother to prove that the father is not a person, entitled to the custody of the minor. The reasons in the case

must be sound and convincing e.g. if the father is reputed to be of bad character, of unsound mind, criminal etc. If no such evidence against the father is available then the mother on second marriage would lose the right to the custody of minor. While appointing the guardian, the Court must see as to who is the most likely to contribute to the well being of the minor, who would be in a better position to look after and take care of the minor. It is clear from deposition of the minor that the appellant No.2-father take proper care to the minor. The same proposition came under consideration in [2018 LYL 1771]. At page 1773 of the report it was held as under:-

*“.....while the course of law have always consider the welfare of minor to be the paramount consideration for deciding as to whether the hisanat of the minor to be entrusted to the father or to remain with the mother. Father is the natural guardian and there is no need of appointment of father as guardian of the minor. The issue is of custody of minor. Their lordships of the Hon’ble Suprmee Court in various judgments have considered this aspect of the matter and while determining the facts to be considered under Section 17 of the Guardians and Wards Act, had laid down he criteria, which is reported in the case of Mst. Akbar Bibi Vs. Shoukat Ali (1981 CLC 78 Lahore). Furthermore, according to various judgments pronounced by the Courts of law, it has been held that while determining the qustion of custody of a female ward, the question of chastity to be jealously guarded, in case, if they lady contracts second marriage with stranger, she loses her right of hisanat.”*

The aforesad point came under consideration in reported judgment in case titled Mst. Nazir Vs. Hafiz Ghulam Mustafa and others (1981 SCMR 2000), wherein it has been held as under:-

*“It is conceded before us that after the divorced, the petitioner has married another husband and is living with him. In these circumstnaces it is obvious that the custody of minor duaghter of the petitioner from her previous wedlock with Hafiz Ghulam Mustafa cannot be given to her because in the very context hereinbefore mentioned it will amount to place the minor in the cutody of new husband of the petitione who does not fall within a prohibited degree to the ward.”*

Moreover, para 352 of the Muhammadan Law provides the mother is entitled to the custody (hisanat) of her male child until he

has completed the age of 07 years and of her female child until she has attained puberty and the right continues though she is divorced by the father of his child unless she marries to a second husband in which case the custody belongs to the father.

While para 354 provides for disqualification of female from custody of the minor, which includes the mother and one of the instances laid down is that if she marries a person not related to the child within the prohibited degree e.g. a stranger but the right reverts on the dissolution of marriage by death or divorce.

Therefore, it is apparent from reading of the two paras of the Muhammadan Law that though the mother is entitled to the custody (Hizanat) of her minor child but such right discontinues when she takes second husband, who is not related to the child within the prohibited degree and is a stranger, in which case the custody of minor child belongs to the father. It has been construed by the Courts in Pakistan that this may not be an absolute rule but it may be departed from, if there are exceptional circumstances to justify such departure and in making of such departure the only fact, which the Court has to see where the welfare of minor and there may be a situation where despite second marriage of the mother, the welfare of minor may still lie in her custody.

In the present case nothing has been shown nor any fact cited, which may disentitle the appellant No.2-father of the minor daughter in the wake of fact that the mother has contracted second marriage with a person, who admittedly is a stranger to the minor and is not within prohibited degree and no exceptional circumstances whatsoever have been argued before the Court which may entitle the respondent No.2, to have custody of the minor.

In view of above, by accepting the captioned appeal, impugned order dated 05.12.2019, passed by ADJ/Judge Family Court/Guardian Judge Rawalakot, is hereby set aside. The appellant No.2, Muhammad Shafique Ahmed (father of the minor), who is natural guardian of the minor too, is hereby declared as entitled to the custody of the minor Tooba Shafique. Appeal is accepted in the manner indicated herein above.

*Announced*

*-Sd-*

Circuit Rawalakot,  
22.06.2022 (MM)

JUDGE

**(APPROVED FOR REPORTING)**

*-Sd-*

**JUDGE**

*NOTE:-*

Order is written and duly signed. The office is directed to transmit the captioned file to Circuit Rawalakot forthwith.

Muzaffarabad,  
07.07.2022

*-Sd-*  
JUDGE