

W.P. No. 153370/2018

Zahida Tahira

Javed Iqbal etc.

25.01.2019 Petitioner in person.
Mr. Asim Nawaz Gujjar, Advocate alongwith
respondent No.1.

Through this Constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 orders dated 20.09.2017 and 02.12.2017 have been challenged whereby the Guardian Court disposed of the application under Section 12 of the Guardian and Wards Act, 1890 for interim custody of the minors namely, Ali Hashmi, aged 7 years and Zain Hashmi, aged 5 years while chalking out the meeting schedule and permitted the respondent No.1 to retain the custody of the minors.

2. Brief facts giving rise to the filing of this Constitutional petition are that respondent No.1 filed a petition under Section 25 of the Guardian and Wards Act, 1890 alongwith application under Section 12 of the

said Act seeking interim custody of the minors. The petitioner filed reply to both the petitions under Section 25 as well as under Section 12 of the Guardian and Wards Act, 1890. Meanwhile, on 23.12.2016 petitioner also filed similar petition under Section 25 of the Guardian and Wards Act, 1890 alongwith application under Section 12 of the Act, in which reply was also filed by respondent No.1. On 20.09.2017, a meeting schedule was made permitting the petitioner, the real mother, to meet the minors while disposing of the said applications on the ground that welfare of the minor could not be decided summarily without recording of evidence. Similar order was passed on 02.12.2017 on the petition under Section 12 of the Guardian and Wards Act, 1890 filed by the petitioner. Both these orders have been assailed through this writ petition. The notice was, therefore, issued in this case on 26.01.2018.

3. On 05.06.2018, respondent No.1 was summoned in person through special

messenger who appeared on 07.06.2018. On 25.06.2018 the case was heard on merits and keeping in view the fact that marriage was still intact, a chance of an amicable settlement was given to the parties. The children were allowed to accompany the petitioner being real mother as interim measure and respondent No.1 was also allowed to meet the minors and their mother without any hindrance. This Court adjourned the case to 26.07.2018 to monitor the conduct of the parties. On 26.07.2018, a joint request was made by the parties as their counsels were not available. Today, the case was fixed on which a compromise deed was placed on the record duly signed by the petitioner and respondent No.1 but the said respondent disowned his signatures as well as contents and prays for decision on merits.

4. Precisely, the case of the petitioner is that keeping in view the ages of the minors their interim custody must remain with the mother and permanent custody may be

decided while deciding the application under Section 25 of the Guardian and Wards Act, 1890 on the basis of evidence whereas the case of respondent No.1 is that the writ petition is not competent against the order passed on the application under Section 12 of the Guardian and Wards Act, 1890.

5. Arguments heard. File perused.

6. After hearing the learned counsel for the parties and perusing the file, I am of the view that ages of the minors are 8 years and 6 years who need proper care and attention of real mother. The respondent No.1 is admittedly a government servant who mostly remains on duty outside the house in view of the nature of his job in police department. The petitioner, on the other hand, is a household lady who stays at home and can very well look after the minors even during the pendency of the guardianship petition. The schedule so chalked out may be followed but after giving interim custody of the minors to the petitioner since they are also required

to maintain and develop close proximity as well as intimacy with the petitioner, real mother. In my humble view, since the schedule of meeting is interim in nature and at the time of decision of application under Section 25 of the Guardian and Wards Act, 1890 on the basis of evidence can always be modified/changed.

7. The judgment cited by learned counsel for respondent No.1 reported as MUHAMMAD ANWAR KHAN versus Mst. YASMIN ZAFAR (1987 SCMR 2029), is a leave granting order so as to examine whether order passed on the application under Section 12 of the Guardian and Wards Act, 1890 was an appealable order or not which is obviously not a final decision. The other judgment cited as Dr. KIRAN QADIR versus Maj. Dr. MUHAMMAD ALI YOUSAF KHAN (PLD 2014 Lahore 17) is a judgment in a guardianship matter given by this Court in ICA dismissing it was obviously on the ground that said appeal was not competent since the appeal

was provided against the order passed on the application under Section 12 of the Guardian and Wards Act, 1890. However, in the present case, schedule of meeting was challenged by the mother which can be decided on the basis of the welfare of the minors as it is always a prime consideration also for this Court exercising parental jurisdiction.

8. In this view of the matter, this writ petition is **allowed** impugned orders are set aside and the following schedule is made out for meeting of the minors with respondent No.1 while giving the custody of the minors to the petitioner till the decision on petitions under Section 25 of the Guardian and Wards Act, 1890 pending before the Guardian Court.

Schedule of meeting.

The petitioner shall ensure meeting of the minors with respondent No.1 on first Saturday of every month from 11:00 A.M. to 1:00 P.M. through bailiff in visitation room. On the occasion of Eid-ul-Fitar and Eid-ul-Azha, respondent No.1 will be entitled to meet

the minors on the second day of *Eidain* from 11:00 A.M. to 2:00 P.M. and on the occasion of birthday, respondent No.1 will be entitled to meet the minors from 11:00 A.M. to 2:00 P.M. in the visitation room.

(ALI BAQAR NAJAFI)
JUDGE

Approved for reporting.

JUDGE

Shahzad