

2023 C L C 2110

[Lahore (Multan Bench)]

Before Anwaar Hussain, J

SHAHID WAZEER----Petitioner

Versus

ADDITIONAL DISTRICT JUDGE, MUZAFFARGARH and 4 others----Respondents

Writ Petition No.17366 of 2021, heard on 6th October, 2022.

(a) Guardians and Wards Act (VIII of 1890)---

----Ss. 12 & 25---Custody of minors---Visitation schedule---Welfare of minor---Scope---While deciding a guardian petition, including chalking of a visitation schedule, it is the 'welfare of the minor' which is of paramount consideration---Limited hours of meeting within the Court premises is the policy generally adopted by the Courts which is certainly not an appropriate solution inasmuch as it only enable a minor to identify his relation with the non-custodial parent without developing any bonding due to the lack of proper interaction between the minors and such non-custodial parent because of non-conducive environment of the Court premises---As a natural corollary, there is great chance that the minor will turn against such non-custodial parent---Thus, the Courts are to consider the impact that the proposed visitation schedule may have on the child---Failure to protect the development of healthy and secure attachment of a minor with non-custodial parent can have long-term negative effects on the development of the minor, hence, the basic consideration while chalking out the visitation schedule is to ensure that the minor will not turn against one parent because of inadequacy of time given to the non-custodial parent---Petition was allowed.

Umer Farooq v. Khushbakht Mirza PLD 2008 Lah. 527 rel.

(b) Guardians and Wards Act (VIII of 1890)---

----Ss. 12 & 25---Custody of minors---Visitation schedule---Modification of earlier visitation schedule chalked out by the Guardian Court---Mother contracting second marriage---Over night stay of minor with non-custodial parent, importance of---Perusal of the visitation schedule revealed that the Trial Court had granted fortnightly overnight stay of the minor with the petitioner/father being non-custodial parent which had been converted by the Appellate Court into day stay in the Court premises---Similarly, the trial Court had granted overnight stay on the second day of both Eid-ul-Fitr and Eid-ul-Azha which had also been converted into second day stay on both Eids---Per Trial Court, the fortnightly overnight stay of the minor would continue during summer and winter vacations till the minor turned 7 years of age whereafter subject to the pleasure of the minor, the same would extend to 03 days---On the other hand, as per the Appellate Court, the minor would stay first two days of winter holidays with the father and first 7 days with the father during summer vacations---Admittedly, the mother had remarried having a child from the second marriage whereas the father was still unmarried---Similarly, the minor was residing with the maternal grandparents and maternal uncle, which fact had been asserted by the petitioners side and same had not been denied by the respondents---Most crucial aspect of the case was that the minor was residing without the supervision and control of both the parents under the

custody of the maternal grandparents and maternal uncle---In the absence of overnight stay with the father (petitioner), it could have an extremely detrimental impact on the well-being and welfare of the minor as he would lead his life without both the parents which aspect had been overlooked by the Appellate Court---Since the mother had contracted second marriage and left the minor behind with her father and brother, therefore, the plea of the petitioner (father) being non-custodial parent, to have more access to the minor was not only tenable but also in the interest and welfare of the minor---Denial of overnight stay with the father in such like situation was likely to result in social estrangement of the minor and it was also unjustified to deprive the petitioner of overnight stay of his son particularly when the minor was not even residing with the mother/custodial parent---Case of the petitioner (father) in the present case was on better footing as the minor was not residing with the mother rather with his maternal grand-parents and maternal uncle---Said fact made it imperative that the petitioner (father) being non-custodial parent who had already relinquished his right to custody as a good-will gesture got more time to spend with his son in order to develop fatherly bond and intimacy---Petition was allowed accordingly.

Memoona Ilyas v. Additional District Judge and others 2017 CLC 1747 and Mst. Madiha Younus v. Imran Ahmed 2018 SCMR 1991 ref.

Abdul Rehman Khan Laskani for Petitioner along with.

Haji Muhammad Tariq Aziz Khokhar, along with Fatima Yousaf for (Respondent No.3).
Muhammad Yousaf (father of Respondent No.3) and minor Shayan Wazeer for Respondent No.3.

Date of hearing: 6th October, 2022.

JUDGMENT

ANWAAR HUSSAIN, J.---The petitioner, namely, Shahid Wazeer is the father of Shayan Wazeer ("the minor") whereas respondent No.3, namely, Fatima Yousaf is the mother of the minor. In application, under Section 25 of the Guardians and Wards Act, 1890 ("the Act") filed by the petitioner, it was contended that after the divorce became effective between the parties, respondent No.3 is married with one Asif Jamal with whom the petitioner has animosity and the minor was left in the house of respondents Nos.4 and 5, who are mother and brother of respondent No.3 respectively and, hence, the welfare of the minor, does not lie with the respondents. On 27.01.2020 when the guardian petition was filed, the minor was approximately six years of age. Respondent No.3 also filed a guardian petition and both the petitions were consolidated. Thereafter, issues were framed and during the course of proceedings, on 20.03.2021, the petitioner filed an application for chalking out a schedule of visitation in the light of cases cited as "Memoona Ilyas v. Additional District Judge and others" (2017 CLC 1747) and "Mst. Madiha Younus v. Imran Ahmed" (2018 SCMR 1991), while waiving his claim regarding permanent custody of the minor. Accordingly, vide order dated 10.06.2021, with the consent of the parties, the learned Trial Court chalked out schedule of meeting. However, respondent No.3 preferred an appeal against order dated 10.06.2021 on the ground that her thumb impression was obtained on the order sheet on 29.05.2021, which was later on used to chalk out the schedule on 10.06.2021 and it has been erroneously incorporated in the said order that the minor can overnight stay with the petitioner, which was never agreed to by respondent No.3. Through impugned judgment dated 01.10.2021, the appeal of respondent No.3 was partially accepted and the schedule was modified. Hence, instant constitutional petition has been filed by the petitioner.

2. Learned counsel for the petitioner submits that the learned Guardian Court chalked out visitation schedule with the consent of the parties, however, through impugned judgment dated 01.10.2021, the learned Appellate Court below has modified the same to the prejudice of the petitioner, who is real father, hence, the learned Appellate Court below has committed grave irregularity inasmuch as the visitation settled through consent cannot be modified and appeal was not maintainable against the consent order. Adds that even otherwise modifying the schedule is not in the welfare of the minor, who at present is about 7 1/2 years of age and requires regular meet up with the petitioner to develop and promote intimacy and a close bonding between the petitioner and the minor.

3. Conversely, learned counsel for respondent No.3 supported the impugned judgment, however, left it to the wisdom of this Court in securing the interest of respondent No.3 as a mother in relation to welfare of the minor. Respondent No.3, present in person, was also inquired about her point of view, who stated that she has no objection regarding the overnight stay but has apprehension that overnight stay might be misused by the petitioner in removing the minor away from the jurisdiction of the learned Guardian Court.

4. Arguments heard. Record perused.

5. Once a marriage is dissolved, the parents of a minor may get entangled in a legal battle to satisfy their self-nurtured ego, which is a path chosen by them on their own and they may, at any time, get out of and/or put an end to such fight. However, the minor, in such a battle, suffers the most as he is dragged in the battle. The fighting parents are least bothered about the psychological and other toll on the minor on account of such a fight. In such situations and proceedings, the parents often lose sight of the fact that the children face mental and emotional trauma because of the ill chalked visitation schedule when the custody is handed over to one of the parents that may result into multiple personality disorders. Seldom do we come across an erstwhile couple which keeps the welfare of the minor as their paramount consideration. That is why, the role of the Court attains immense significance as it is the Court, which is obligated to keep the welfare of the minor as its paramount consideration.

6. The law on the subject is contained in the Act. The parent who does not have custody has the visitation rights, being a non-custodial parent. A non-custodial parent has a right to file a suit for visitation rights. The law in vogue on the subject lacks any guidelines about the duration or frequency of such visits or the overnight stay of the minor with non-custodial parent. The Act does not contemplate a set pattern of the visitation schedule for the minors inasmuch as it is silent on the frequency of visitation or the venue thereof. It is trite law that while deciding a guardian petition, including chalking of a visitation schedule, it is the 'welfare of the minor' which is of paramount consideration. Limited hours of meeting within the Court premises is the policy generally adopted by the Courts which is certainly not an appropriate solution inasmuch as it only enables a minor to identify his relation with the non-custodial parent without developing any bonding due to the lack of proper interaction between the minors and such non-custodial parent because of non-conducive environment of the Court premises. As a natural corollary, there is great chance that the minor will turn against such non-custodial parent. Therefore, the Courts are to consider the impact that the proposed visitation schedule might have on the child. Failure to protect the development of healthy and secure attachments of a minor with non-custodial parent can have long-term negative effects on the development of the minor, hence, the basic

consideration while chalking out the visitation schedule is to ensure that the minor will not turn against one parent because of inadequacy of time given to the non-custodial parent. In case reported as "Umer Farooq v. Khushbakht Mirza" (PLD 2008 Lahore 527), this Court has held that the parents, especially father being natural guardian, has an inherent right to properly and effectively participate in the upbringing of the minors while developing proper bonding and love with the minors that can only be achieved if the visitation schedule is chalked out in such a manner that the non-custodial parent meets the child in a pleasant, homely and responsive environment on frequent and regular basis. Certainly, the Court's premise is not such place where a minor can have congenial feeling towards his/her parent. Moreover, a balanced annual visitation plan would benefit the child as it would allow significant time to develop a meaningful relationship with both parents. Overnight access could also benefit the child by giving him or her an opportunity to interact with the family of the non-custodial parent and maintain relations with them. Learned Guardian Courts are obligated to chalk out a schedule in such a manner that both the parents must be accommodated in such a way that one parent should not be deprived from participating in the important aspects and events of the minor's life, inter alia, school and leisure time activities, annual vacations, birthdays, and other important occasions and festivals such as Eid etc. The fundamental rule which the Court must follow is to ensure that the minor spends proper and adequate time with non-custodial parent who can also exhibit his or her love and affection towards the child for which overnight stay with non-custodial parent is one of the most appropriate steps and in this regard different arrangements work better for children of different ages. Overnight stay of a child of tender age with non-custodial parent may not be advisable. Similarly, there appears to be no harm in allowing overnight stay in case of a male child above 07 years of age. These aspects should be kept in mind while chalking out the visitation schedule. Therefore, the fact whether the Guardian Court can or should assume that an overnight stay of the minor with non-custodial parent is harmful or beneficial until proved otherwise is a question which cannot be answered by way of applying a straitjacket formula and invariably has to be decided by keeping in view peculiar facts of every case on its own merits, including but not limited to factors such as the age of the minor, the environment in the house of the non-custodial parent, availability of time with the non-custodial parent and his/her other social and moral obligations and commitments.

7. Having analyzed the law and the objectives behind a balanced visitation schedule and some of the factors principles to be considered by the learned Guardian Court while chalking a visitation schedule and granting or refusing overnight stay, it is imperative to put in juxtaposition the schedules, chalked out by the learned Courts below before rendering opinion of this Court regarding the suitability of visitation schedule in the instant case. However, before doing the same, it is pertinent to mention that schedule chalked out by the learned Trial Court was after the petitioner waived his right to have the permanent custody and with mutual consent of the parties that has been upset by the learned Appellate Court without appreciating the fact that sanctity is attached to the judicial proceedings and attempt on part of respondent No.3 to question the same by way of appeal was not justifiable in the first instance, which fact has not been addressed by the learned Appellate Court below. Be that as it may, reverting to examination of the visitation schedules chalked out by the learned Courts below, the same are reproduced hereunder:

Schedule chalked out by the learned Trial	Schedule chalked out by the learned
---	-------------------------------------

Court (on 10.06.2021).

1. On every alternate weekend the minor Shayan Wazeer would make overnight stay with the petitioner who shall pickup the minor from the house of the respondent on Friday at 06:00 PM and shall drop the minor at the house of respondent on Saturday at 06:00 PM. 2. During the summer and winter vacations the practice mentioned in para No.1 would be continued. No change would occur until the minor attains the age of 07 years and after that with the pleasure of minor the stay may be continued for 03 days during the supra mentioned vacations. 3. During Eid-ul-Fitr and Eid-ul-Azha the second day of Eid would be spent by the minor with the petitioner with full overnight stay and pick and drop of the minor would be practiced as mentioned in para No. 1. 4. The expenses of the minor incurred upon his education, food and clothing etc., would be afforded by the petitioner

Appellate Court (on 01.10.2021).

(First part) 1 Minor shall be handed over to the father twice in a month on second Saturday and last Saturday of every month. He shall be handed over to the father at 09:00 am till 12 pm in the court premises and this schedule will continue for about one year so that familiarity with the father could be developed. 2. After completion of one year the minor shall visit the father every month on second Saturday. The minor shall be handed over to the father at 09:00 am and he shall return the minor and drop him back at his mother's house in evening at about 5:00 pm. This schedule will continue for six months. (Second part) 3. On 2nd day of each Eid i.e. Eid ul Fitar and Eid ul Azha at 10:00 am the appellant will pick the minor from the house of the respondent respectively and will be responsible for safe dropping of the minor at the house of respondent on same day at 4:00 p.m. 4. In winter holiday, the minor will spend 2 days with appellant. The minor shall live with father for first two days of holidays and minor shall be handed over at 10:00 am to the father and he shall be returned to the mother in evening at 5:00 pm in both days. Appellant will be responsible for picking and safe dropping. 5. In summer vacations, the minor shall spend first week with his father. Start from second day of vacation and ends on 7th day. The appellant will pick the minor at 10:00 a.m on the second day of summer vacations and dropped them (sic) on 7th day to the respondent's house at 11:00 a.m. 6. On birth days of minor, the minor shall be handed over to the appellant at 10:00 am and he shall return the minor at 2:00 p.m on the same day."

(Emphasis supplied)

Perusal of the schedule reveals that the learned Trial Court had granted fortnightly overnight stay of the minor with the petitioner/father being non-custodial parent which has been converted by the

Appellate Court into day stay in the Court premises. Similarly, the learned Trial Court had granted overnight stay of the second day of both Eid-ul-Fitr and Eid-ul-Azha which has also been converted into second day stay of both Eids. Per Trial Court, the fortnightly overnight stay of the minor would continue during summer and winter vacations till the minor turns 7 years of age whereafter subject to the pleasure of the minor, the same would extend to 03 days. On the other hand, per the learned Appellate Court, the minor would stay first two days of winter holidays with the father and first 7 days with the father during summer vacations.

8. Admittedly, the mother has remarried having child from the second marriage whereas the father is still unmarried. Similarly, the minor is residing with the maternal grandparents and maternal uncle, which fact has been asserted by the petitioner side and same has not been denied by the respondents. This is the most crucial aspect of the case that the minor is residing without the supervision and control of both the parents under the custody of the maternal grandparents and maternal uncle. In the absence of overnight stay with the petitioner, it could have an extremely detrimental impact on the well-being and welfare of the minor that he is to lead his life without both the parents which aspect has been overlooked by the learned Appellate Court below. Since the mother has contracted second marriage and left the minor behind with her father and brother, therefore, the plea of the father, being non-custodial parent, to have more access to the minor is not only tenable but also in the interest and welfare of the minor. Denial of overnight stay with the father in such like situation is likely to result in social estrangement of the minor besides being unjustified to deprive the petitioner of overnight stay of his son particularly when the minor is not even residing with the mother/custodial parent. The child is well above seven years of age and one-year period for which the overnight stay was denied by the learned Appellate Court below has also expired. The only assertion against overnight stay on part of respondent No.3 is fear in her mind that, in the garb of overnight stay, the minor would be removed away out of the jurisdiction of the learned Guardian Court to defeat the right of custody of respondent No.3. The said apprehensions and concerns fade away and fail to hold any water in the face of the fact that the said apprehensions seem to have sprouted out of self-harboured apprehensions. Even otherwise, such apprehensions are present in every case of custody and guardianship where visitation schedule is designed and chalked out. Therefore, such apprehensions cannot be used as a sword to slay the rights of non-custodial parents to demand overnight stay of minor. In the instant case, it is noted that as per the visitation schedule chalked out by the Appellate Court, the day-time custody is to be given to the petitioner/father to which no such apprehension of respondent No.3 exists even though there is always a possibility that the petitioner can remove the minor out of the jurisdiction of the Guardian Court during his day-time custody. Similarly, it has been contended that the minor does not feel comfortable with the petitioner as the petitioner does not have any parental bonding with the minor. This is yet another reflection of personal preferences and disputes of the parties taking precedence over the welfare of the minor. The absence of congeniality inter se the father and the minor does not militate against the father rather it is imperative that such a non-custodial father is allowed to spend some time including overnight stay to foster and nourish the bonding between the minor and his father. If such deliberated attempt is not made, there would never develop any such relation between the minor and the petitioner, who is real father, leaving the minor to grow in the society with embedded biases against the relation of father which may entail its own concomitant socio-economic consequences for the minor. Even otherwise, apprehension of respondent No.3 that the minor would be removed is not something which cannot be taken care of by imposing conditions such as surrender of the valid passport of

the petitioner with the learned Guardian Court and submission of third-party surety bond etc. It is also noticed that the learned Appellate Court while drawing the visitation schedule chalked by modifying the schedule drawn by the learned Trial Court has overlooked and ignored the guiding principles laid down by the august Supreme Court in case Madiha Younas supra where though the matter was settled on the basis of a compromise between the parties therein yet such visitation rights were acknowledged and recognized by the Hon'ble Supreme Court, while endorsing the principle that visitation schedule needs to be equally balanced. The case of the petitioner father in the instant case is even on better footing as the minor in the instant case is not residing with the mother rather with his maternal grandparents and maternal uncle. This makes it imperative that the petitioner father being non-custodial parent who has already relinquished his right to custody as a good-will gesture gets more time to spend with his son in order to develop fatherly bond and intimacy.

9. In view of the above, this petition is allowed, the Impugned Judgment of the learned Appellate Court below is set aside and that of the learned Trial Court is restored. Petitioner is directed to submit third party local surety bond in the sum of Rs.2,000,000/- to the satisfaction of the learned Guardian Court prior to receiving the minor from the respondents for overnight stay and also surrender his international valid passport against receipt issued by official of the learned Guardian Court, as earlier directed by the learned Trial Court, vide order dated 23.12.2021.

JK/S-8/L

Petition allowed.