JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

WRIT PETITION NO. 2820 OF 2025

RAHEELA ZAHEER & ANOTHER

VS

ADDITIONAL DISTRICT JUDGE WEST-ISLAMABAD & ANOTHER

Petitioners by : Mr. Imran Feroze Malik, Advocate.
Respondents by : Mr. Muhammad Jahangir Khan, Advocate for the Respondent No. 2.
Date of hearing : 23.10.2025

MUHAMMAD AZAM KHAN, J.

1. Through the instant Writ Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, Petitioners have challenged the Judgment dated 21.09.2024 **("Impugned Judgment-I")** passed by the learned Judge Family Court, West-Islamabad **("Family Court")**. The Petitioners have also challenged the Judgment 01.07.2025 **("Impugned Judgment-II")** passed respectively by the learned Additional District Judge-XI, West-Islamabad **("Appellate Court")**.

2. The brief facts of the case in hand, as per contents of the instant petition, are that Raheela Zaheer **("Petitioner No. 1")** married to Aamir Shahzad **("Respondent No. 2")** in accordance with Muslim rites. From the said wedlock, a daughter namely Eshaal Noor **("Petitioner No.2/Minor")** was born on 03.05.2016. Due to matrimonial disputes, the marriage was dissolved through divorce dated 11.05.2018. After the dissolution of marriage, a compromise deed was executed between the fathers of both parties on 04.07.2018, wherein it was mutually agreed that, in the event Petitioner No.1 contracted a second marriage, the custody of the minor would be transferred to Respondent No. 2. In August, 2022, the Petitioner No. 1 contracted second marriage with Muhammad Zaheer, whereafter the Respondent No. 2 filed a petition u/s 25 of Guardians and Wards Act, 1890, for the custody of a minor on 04.10.2022. The Petitioners/Respondents contested the petition by filing

written statement. After framing of issues, recording the evidence and hearing arguments, the learned Family Court vide Impugned Judgment-I dated 21.09.2024, decided the petition in terms as under: -

i. *The Petitioner namely Aamir Shahzad is entitled for return of the custody of minor daughter namely Eshaal Noor from the Respondent namely Mst. Raheela Bibi, for the welfare said minor under Section 25 of the Guardians and Wards Act, 1890.*
ii. *The second Saturday and Sunday of every calendar month is scheduled for overnight visitation/meetings of the Respondent namely Mst. Raheela Bibi with the minor namely Eshaal Noor, for which the Petitioner namely Aamir Shahzad will depart the minor before sunset of Saturday at the Respondent's residence and then pick the minor before sunset of Sunday of every calendar month.*
iii. *The second half of the summer and winter vacations are hereby scheduled for the overnight visitation/meeting of the Respondent lady namely Mst. Raheela Bibi with the Ward/minor daughter namely Eshaal Noor.*
iv. *The second half of each Eid Holidays are also scheduled for the overnight visitation/meeting of the Respondent lady namely Mst. Raheela Bibi with the Ward/minor daughter namely Eshaal Noor.*
v. *That no one shall remove the custody of Ward/minor namely Eshaal Noor, from the territorial jurisdiction of this court without prior permission of this court.*

3. Being aggrieved by the Impugned Judgment-I dated 21.09.2024, the Petitioners filed an appeal before the learned Appellate Court. After hearing the arguments of the parties, the learned Appellate Court, Islamabad, vide the Impugned Judgment-II dated 01.07.2025, dismissed the appeal. Being aggrieved by the Impugned Judgment-I dated 21.09.2024 passed by the learned Judge Family Court, West-Islamabad and the Impugned Judgment-II dated 01.07.2025 passed by the learned Appellate Court, the Petitioners have filed the instant Petition.

4. The learned counsel for the Petitioners contended that the Impugned Judgments passed by the learned Trial Court and the learned Appellate Court, are against the law and facts of the case, thus, passed without properly evaluating the welfare of the minor, which is of the paramount

consideration in all guardianship matters under section 17 of the Guardian and Wards Act, 1890; that the compromise deed relied upon by the courts below is not binding on the mother and cannot override the statutory right of custody and the best interest of the child; that the remarriage of the mother is not an absolute ground to deprive her of custody, and no evidence was presented by the Respondent to prove that the minor was unsafe, mistreated, or neglected in her custody; that the learned Family Judge deprived the Petitioner of her right to fair trial by striking off her right to evidence and deciding the case without hearing her; that the Impugned Judgments are reckless exercise of discretion, hence, liable to be set aside. Lastly, the learned counsel prayed for acceptance of the instant Writ Petition, setting aside of Impugned Judgments-I & II, and for remanding the matter to the Family Court for decision afresh after affording full opportunity of evidence to the Petitioner.

5. On the other hand, the learned counsel on behalf of the Respondent No. 2 argued that the learned Family Court and learned Appellate Court have passed well-reasoned judgments keeping in view the facts and evidence available on record; and that the learned counsel for the Petitioner has failed to point out any illegality or irregularity in the Impugned Judgments. In the last, the learned counsel prayed for the dismissal of the instant Petition.

6. I have heard learned counsel for the parties and perused the record with their able assistance.

7. Perusal of the record reveals that the minor had continuously remained in the custody of the Petitioner since birth until her custody was handed over to Respondent No. 2 through the Impugned Judgment-I dated 21.09.2024. It is also an admitted fact that the Respondent No. 2 had contracted a second marriage in 2018, shortly after pronouncing divorce to the Petitioner No. 1 on 11.05.2018. Whereas, it is also ostensible from the record that the Petitioner No. 1 had contracted a second marriage with Muhammad Zaheer in August 2022. Thereafter, on 04.10.2022, the Respondent No. 2 instituted a petition under Section 25 of the Guardians and Wards Act, 1890, seeking

custody of the minor. The learned Family Court allowed the petition mainly on the basis of the compromise deed dated 04.07.2018, and in view of the Petitioner's second marriage, thereby further directing to transfer the custody of the minor to the Respondent No. 2 while extending visitation rights to the Petitioner No. 1. The learned Appellate Court subsequently maintained these findings.

8. The learned counsel for the Petitioner contended that both the courts below erred in treating the compromise deed as a determinative factor, that remarriage of the mother is not a disqualification under law, and that the welfare of the minor was not judicially assessed in its full amplitude. It was further argued that the learned Family Court proceeded without affording the Petitioner the opportunity to lead evidence. Conversely, the learned counsel for the Respondent supported the Impugned Judgments and asserted that they are well-reasoned.

9. The pivotal question before this Court is whether the mother's remarriage, coupled with a compromise deed, can override the statutory and constitutional principle, qua welfare of the minor, which is the supreme consideration in custody disputes.

10. There is no cavil to the proposition that the welfare of the minor is the cornerstone of all custody and guardianship adjudications under the Guardians and Wards Act, 1890, particularly Sections 7, 12, 17, and 25. The welfare of a minor is a composite and dynamic concept as it encompasses physical safety, emotional stability, psychological continuity, educational progress, and moral development. Section 17 of the Guardians and Wards Act, 1890, unequivocally mandates that, in appointing or declaring a guardian, the Court shall be guided by the welfare of the minor, which encompasses not merely the child's physical well-being, but also their emotional, psychological, moral, educational, and social development. Therefore, the concept of welfare has been expansively interpreted by the superior courts of Pakistan to include, but not limited to, care, affection, physical safety, emotional stability, and

educational progress that a child experiences in a healthy environment. The Honorable Supreme Court of Pakistan, dealing with a similar matter, in the judgement titled "Raja Muhammad Owais Versus Mst. Nazia Jabeen and others" **(2022 SCMR 2123)** observed the following qua the welfare of the minor: -

> *"7. The aforesaid judgments clearly dispel the stance taken by the father that on account of the mother's second marriage, she has lost the right of custody over her four children.* ***Time and again, this Court has held that the paramount consideration where custody is concerned is the welfare of the minor, that is to consider what is in the best interest of the child. The court's jurisdiction in custody cases is in the form of parental jurisdiction which means that the court must consider all factors from the parents' ability to provide for the child including physical and emotional needs, medical care but also relevant is the parents' ability to provide a safe and secure home where the quality of the relationship between the child and each parent is comforting for the child. Hence, there is no mathematical formula to calculate the welfare of the minor, as the factors range from financial and economic considerations to the household environment, the care, comfort and attention that a child gets. Accordingly, the concept of welfare of the child is an all encompassing concept which will cover not only the manner in which the child has to be cared for but will also include the physical, mental and emotional well being of the child****."*
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> (Emphasis added)

11. The August Supreme Court of Pakistan, recently in the case titled "Asjad Ullah Versus Mst. Asia Bano and others" (**PLD 2025 Supreme Court 541),** has held that the welfare and best interest of the minor shall be the prime and overriding consideration in determining an application for custody, with no other factor taking precedence. It would be relevant to mention herein that the determination of what constitutes the welfare of a minor is essentially a question of fact, which must be established in each case through cogent and reliable evidence rather than on the basis of presumptions. Therefore, the expression "welfare of the minor" includes the minor's moral, spiritual, physical, psychological, educational, and material well-being. It further encompasses considerations relating to the minor's health, academic progress, religious upbringing, and overall emotional development. In

determining the welfare and best interest of the minor, due weightage must be given to the minor's age, sex, religion, happiness, and emotional attachment to the proposed custodian, the latter's character and capacity to maintain the child, preference of the minor, etc. Further reliance in this regard is placed on "Feroze Begum v. Muhammad Hussain" **(1978 SCMR 299)**, "Khan Muhammad v. Mst. Surayya Bibi and others" **(2008 SCMR 480)**, and "Rahimullah Choudhary v. Mrs. Sayeda Helali Begum and others" **(1974 SCMR 305)**, "Tahira v. Additional District Judge, Rawalpindi and others" **(1990 SCMR 852)**.

12. Moreover, it is incumbent upon the Court to ensure that, in determining the welfare of the minor, the conduct of the litigating parties is not driven by personal grievances, vanity, or emotional claims of affection; the welfare of the minor must always be the driving factor to ascertain the child's best interest. In custody matters, therefore, the Family Court is not required to engage in technical or procedural complexities as its foremost duty is to ascertain what arrangement best serves the welfare and overall well-being of the minor. Reliance in this regard is placed on the judgment titled "Mehmood Akhtar v. District Judge, Attock and 2 others" **(2004 SCMR 1839)**, wherein the Honorable Supreme Court of Pakistan has categorically held that:-

> *"4. The right of custody of minor is not an absolute right rather it is always subject to the welfare of the minor.* ***The Court in the light of law, on the subject and facts and circumstances of each case considers the question of custody on the basis of welfare of minors and there can be no deviation to the settled principle of law that in the matter of custody of minor the paramount consideration is always the welfare of minor****. No doubt general principle of Muhammadan Law is that a Muslim father being the natural guardian of the minor, has the preferential right of custody of minor but this rule is always subject to the welfare of the minor which is the prime consideration in determination of the question of custody****...."***
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> (Emphasis added)

13. The United Nations Convention on the Rights of the Child, 1989 (UNCRC), is an international instrument that comprehensively outlines the civil, social, economic, and familial rights of children. The UNCRC underscores that every child has the right to grow up in an atmosphere of love, happiness, and understanding. Article 3 mandates that in all actions concerning children, whether by courts of law, administrative bodies, or private welfare institutions, the best interests of the child shall be the primary consideration. Article 7 guarantees every child the right to be cared for by both parents, while Article 9 ensures that, in the event of parental separation, the child maintains contact with both parents unless such contact poses harm. Article 12 further affirms that a child capable of forming a view has the right to express it freely, and that such views must be accorded due weight. This recognition of the child's voice makes clear that their preferences are an important factor in custody determinations.

14. It is now a well-settled principle that the second marriage of the mother, though a factor that may be considered in custody proceedings, does not ipso facto operate as an absolute disqualification to her right of hizanat or custody. The jurisprudence in Pakistan has evolved beyond the rigid application of classical interpretations of Muhammadan Law, which once treated a mother's remarriage to a person not related to the child within prohibited degrees as a ground for disqualification. It would be apt to discuss the relevant portions from D.F. Mullah's Muhammaden Law, qua second marriage contracted by the mother. Section 352 provides that the mother is entitled to the custody (Hizanat) of her male child until he has completed the age of 7 years, and of her female child until she has attained puberty. This right continues, though she is divorced by the father of his child, unless she marries a second husband, in which case the custody belongs to the father. Likewise, Section 354 stipulates the circumstances under which a female, including the mother, may be disqualified from the custody of a minor. One such instance arises when she contracts a marriage with a person who is not related to the child within the prohibited degrees, i.e., a stranger to the child.

However, this disqualification is temporary in nature, as the mother's right to custody revives upon the dissolution of such marriage, whether by divorce or by the death of her subsequent husband.

15. The Honorable Supreme Court of Pakistan in the judgement **Raja Muhammad Owais** (Supra), whilst relying upon various judgements of the apex courts, observed the following, qua the second marriage of the mother and her entitlement to retain the custody: -

> *"6. The basic issue is with reference to the custody sought by the mother for her four children. The emphasis by the father is on the mother's second marriage which it is argued disentitles her to custody under the Islamic Law. D.F. Mullah in Mohammadan Law in Para 352 provides that the mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. Para 352 ibid provides that this right continues whilst she is divorced from the father of the child, however, in the event she marries a second time, custody then belongs to the father. Para 354 of Mohammadan Law provides that the mother, who is otherwise entitled to the custody of a child, loses the right of custody if she marries a person not related to the child within the prohibited degrees which are specified in paras 260-261 of Mohammadan Law. So as per the principles of Mohammadan Law by D.F. Mullah where she remarries, she can be disqualified for custody. Section 17 of the Act requires the Court to consider the welfare of the minor when appointing a guardian and welfare will be decided based on the age, sex and religion of the minor, as well as the character and capacity of the guardian and the preference of the minor where they are old enough to state their preference intelligently.* ***These provisions and the principles of Mohammdan Law have been examined by this Court in several judgments where it has held that the conditions contained in Paras 352 and 354 of Mullah's Mohammadan Law are not absolute and are subject to the welfare of the child. In Muhammad Siddique v. Lahore High Court, Lahore through Registrar and others (PLD 2003 SC 887), it was held that although the general rule is that the mother on contracting a second marriage forfeits her right of custody, this rule is not absolute and if it is in the interest of the child, custody should be given to the mother. The Court further held that it is the welfare of the minor that must be considered while determining custody and there is no absolute rule or fixed criteria on the basis of which welfare of the minor can be determined or custody can be awarded. In Mst. Shahista Naz v.***

> ***Muhammad Naeem Ahmed (2004 SCMR 990), this Court concluded that the right of Hizanat having the force of Injunctions of Islam is an accepted principle of Islamic Law and a female on account of re-marriage may be disqualified to exercise this right, but a mother on account of re-marriage is not absolutely disqualified to be entrusted the custody of a minor child rather she may lose the preferential right of custody****. The Court further held that there is no denying the fact that there can be no substitute for the mother of the minor child especially of tender age, therefore, the consideration for grant or refusal of custody will always be the welfare of the minor.* ***In this case, the mother even on contracting second marriage was entitled to retain custody of the minor****. Again while looking at the Islamic provisions on custody of minor, this Court concluded in Mst. Hameed Mai v. Irshad Hussain (PLD 2002 SC 267) that the question of custody of a minor child will always be determined on the basis of the welfare of the minor and notwithstanding the father's right for custody under Muslim Personal Law, this right is subject to the welfare of the minor.* ***Again in Shabana Naz v. Muhammad Saleem (2014 SCMR 343), Paras 352 and 354 of the Mohammadan Law were considered and the Court concluded that although Mohammadan Law provides that the mother is disentitled to custody if she re-marries, this is not an absolute rule but one that may be departed from if there are exceptional circumstances to justify such departure and even in a situation of a second marriage if the welfare of the minor lies with the mother then she should be awarded custody.****"*
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> (Emphasis added)

This approach was further refined in "Asjad Ullah Versus Mst. Asia Bano and others" (**PLD 2025 Supreme Court 541**), "Shaista Habib v. Muhammad Arif Habib" **(PLD 2024 SC 629)**, "Mst. Beena v. Raja Muhammad" **(PLD 2020 SC 508)** and "Irfan Arshad Versus Mst. Zainab Noor and 2 others" **(2025 M L D 401)**, "Mst. Tahira Parveen Versus District Judge, Layyah and 2 others" **(2022 MLD 1693)**, "Mst. Shabana Kausar Versus District Judge and others" **(2020 CLC 2099)**.

16. Therefore, the law is well settled on this position that mere contracting second marriage of either the father or mother is not the sole criterion to determine the question of custody of the minor child. Ordinarily, a woman is entitled to custody of a minor, which she forfeits on contracting

a second marriage. Such a rule, however, has been held to not be absolute and depends on special consideration, which may require the custody of a minor to be retained by the mother despite having contracted a second marriage. At this juncture, it would also be apt to reproduce Ameer Ali's Muhammadan Law, page 257, Volume II, Edition 1929, wherein the entitlement of the mother, upon remarriage, has been discussed: -

> *"Although ordinarily the woman entitled to the custody of a child forfeits her right on contracting a marriage with a stranger, special consideration regarding the interest of the child may require that its custody should be retained by her. For example if a woman separated from her first husband, were to marry a second time in order to secure for her infant child better and more comfortable living, she would not forfeit her right of hizanat."*

17. Furthermore, it is equally well-settled that the principles contained in Muhammadan Law could only be consulted as a reference book; they cannot be termed to be statutory law having binding effect, upon which any presumption could be drawn against a person. It is neither a statute, nor a custom or usage, therefore, the opinion of the author of the book is not binding upon the courts. In the judgement titled "Messrs Najaat Welfare Foundation through General Secretary Versus Federation of Pakistan through Secretary Ministry of Law, Justice and Parliamentary Affairs, Islamabad and 4 others" **(PLD 2021 Federal Shariat Court 1)**, it has been held that: -

> *"D.F. Mulla did acknowledge that he largely relied upon the translation of Hedaya by Hamilton and translation of Fatawa Alamgiri by Baillie. Hence, relying on secondary sources by D.F. Mulla is itself a question mark on the validity of the opinion contained therein and on the understanding of the Islamic Law by him...**Finally, the book of D.F. Mullah titled "The Principles of the Mohammedan Law" is just a text book as stated by Mulla himself or it can be considered as a reference book but in no way it is a statute**. This has already been decided by this Court in Shariat Petitions Nos.06/I and 13/I of 2013."*
> *(Emphasis added)*

18. It is pertinent to mention herein that the D.F. Mullah's Muhammadan Law, in its traditional form, disqualifies a mother from retaining custody of her child upon contracting a second marriage with a man outside the

prohibited degree, yet it imposes no such disqualification upon the father, who may remarry without forfeiting his parental rights. This selective moral scrutiny, directed only towards the woman, betrays not only the principles of justice but also turns a blind eye towards the evolving understanding of parenthood and gender equity. It presumes unjustly that a mother's love diminishes upon remarriage, while a father's affection remains untouched. A woman's new bond does not taint her fitness as a parent. Such archaic notions offend the very principles of welfare, equity, fairness, and public policy as envisaged in the *Guardians and Wards Act, 1890*, and indeed the Constitution itself. The welfare of a child cannot be chained to the prejudices of patriarchal beliefs. A mother's remarriage may signify a step toward emotional healing and stability, qualities that will enrich, not erode, her ability to nurture the minor. To uphold a rule that punishes the mother for seeking companionship, while excusing the same act in the father, as apparent in the present case, would be wholly unjust and discriminatory, thus being contrary to the principles of impartiality. It is high time to view parental fitness through the lens of compassion and capability, not gender or social expectation, for the measure of love towards the minor is not in marital status, but in the constancy of care. Moreover, it has been entrenched in various judgements of the apex courts of Pakistan that the courts can indeed deviate from the viewpoint taken in the Mohammedan Law, especially if it is contrary to the principles of equity, good conscience, and justice. In a case titled "Khalida Shamim Akhtar Versus Ghulam Jaffar and another" **(PLD 2016 Lahore 865)**, the Court upheld that: -

> *"**Muhammadan Law by D.F. Mulla, not only in the present case, but other cases also is often quoted for a reference. The Hon'ble Federal Shariat Court, in the referred judgment, has held that, said law is in fact only a reference book and not a statutory law applicable in Pakistan, in the sense that the legislature has not enacted the same. It is just an option of the Court to consult the same on the basis of equity and refer to the principles mentioned in paragraphs of the said book, at times, and that too casually in some matters only. Moreover, the rules quoted in Muhammadan Law are not at all applicable, if in the opinion of the Court, they are found opposed to justice, equity and good conscience. These rules are not even referred to in situations***

***directly covered by the Holy Quran or Sunnah or by binding Ijma and Qisas**."*

(Emphasis added)

A similar opinion has been taken in "Mst. Mumtaz Bibi Versus Qasim and 4 Others" **(2022 PLD Islamabad 228)**, "Gulzar Ahmad Versus Ayesha Naz Sarwar and 2 others" **(2022 CLC 675)**, "Mahnoor Shabbir Versus Additional District Judge and others" **(2024 CLC 513)**. Hence, consideration of the welfare of the minor is paramount, and all rules of personal law qua the entitlement of custody are only a guidebook for determining the welfare of a minor, but are in no way binding upon the courts.

19. In the light of the above discussion, this Court in the execise of its parental jurisdiction, is fortified in believing that the learned Family Court as well the learned Appellate Court erred in transferring the custody of the minor from the Petitioner No. 1 to the Respondent No. 2, as disentitlement of the mother from custody, due to second marriage, is not an absolute rule. Remarriage of the mother would not, by itself, disentitle her from retaining custody of the minor, especially when it is not in the welfare of the minor. Therefore, the objection raised by the Respondent No. 2 that the Petitioner No. 1, on her remarriage, is not entitled to retain the custody of the minor, is hereby repelled.

20. Any compromise or private arrangement entered into between the parents regarding the custody of a minor has no binding effect on the courts. Likewise, any stipulation or condition that seeks to curtail or divest either parent of their rightful entitlement to custody, or that subjects such entitlement to contingent circumstances, shall carry no binding effect upon the Court, which remains guided solely by the paramount consideration of the minor's welfare. No agreement between adults, no matter how solemnly executed or mutually accepted, can surpass the judicial determination of what constitutes the welfare of the minor. Reliance in this regard is placed on a recent judgement titled "Asjad Ullah Versus Mst. Asia Bano and others" (**PLD**

2025 Supreme Court 541), wherein the August Supreme Court of Pakistan has observed the following: -

> *"11. Under Islamic law, the father is generally entitled to custody of a boy after the age of seven years and of a girl after puberty. This Court, however, in the case of Tahira v. Additional District Judge, Rawalpindi and others (1990 SCMR 852) has categorically held that this entitlement is subject to the overriding consideration of the minor's welfare. Even where custody would otherwise shift to the father upon attainment of the prescribed age, the Court may refuse custody if the welfare of the minor so demands.* ***It was further observed that in case of any conflict between the rights of the parents and the welfare of the minor, the welfare of the minor shall prevail****.* ***The Court is not bound by any agreement between the parents if it is contrary to the interests of the minor.****"*
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> (Emphasis added)

21. Similarly, in the case titled "Amjad Ali Versus Additional District Judge, Pattoki and 2 others" **(2025 MLD 773)**, the Honorable Lahore High Court held the following regarding remarriage of the mother as well the agreement inter se the parties qua the custody of the minor: -

> *"Neither any agreement qua custody of the Minor which is in derogation of the right of a child with respect to his welfare nor contracting of a second marriage by divorced mother of the child are impediments for such a mother to retain custody of her child. Rather, the matter of custody is to be decided on the touchstone of the principle of welfare."*

Likewise, in the judgement cited as "Mst. Haseena Bibi Versus Abdul Haleem and others" **(PLD 2024 Supreme Court 291)**, the Honorable Supreme Court of Pakistan held that: -

> *"7. So far as the custody of minor is concerned, Para 352(5) of the Muhammadan Law provides that the mother is entitled to the custody (Hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty.* ***These rights cannot be denied to her as any such action would be contrary to law****.* ***Any agreement related to the custody of minor child would be violative of law and cannot be enforced by a Court of law.*** ***This Court in a reported case titled Mst. Beena v. Raja Muhammad and others [PLD 2020 SC 508], at paragraph 8, held***

that the agreement where mother surrendered the custody of her child or the agreement which stopped the mother to claim his custody is not lawful; it is contrary to the Islamic principles governing Hizanat and the law determining the custody of minors and thus forbidden. ***An agreement the object or consideration of which is against public policy is void, as stipulated in section 23 of the Contract Act. Furthermore, in the case of Mst. Razia Rehman v. Station House Officer and others [PLD 2006 SC 533], this Court held that agreements deciding the custody of minor child lacks legal validity and enforceability***. *It explicitly held that:*

> *"It is also an undeniable fact that according to the law of the land, any agreement reached between the two parents, inter alia, regarding custody of the minor children is neither valid in law nor even enforceable. Therefore, even if it be presumed that the petitioner-lady had, through some alleged compromise(s) which she is, however, denying, waived her right of Hizanat, the said compromise or agreement had no binding force in the eyes of law."*

8. In view of the facts and circumstances of the case and the law laid-down by this Court supra, we hold that it is imperative that the wife must be made a party to the agreements concerning her rights. A wife enjoys exclusive and absolute right over her dower and the same could not be waived via Iqrarnama/ Agreement/Compromise and any such document, registered or unregistered, attempting to compromise the wife's right to dower, especially in the context of familial dissolution, lacks legal validity. ***Further, any Iqrarnama/Agreement/Compromise made by the mother waiving her statutory right of Hizanat of a minor child would be violative of law and cannot be enforced by a Court of law***.*"*

(Emphasis added)

22. Furthermore, the relevant portion is being reproduced hereunder from a related judgment titled "Nosheeba Nazeer Versus Sajjad Ahmed and 2 others" **(2021 CLC 704)**, wherein the Honorable Lahore High Court observed the following: -

> *"Prima facie no bond of love and affection exists between the minor and his father as he had not lived with his father ever prior to his handing over to him only recently.* ***Any agreement, though disputed by the petitioner, even if executed with regard to the handing over the custody of the minor, has no value in the eyes of law and cannot be relied upon***. ***There can be no dispute that questions concerning the custody and guardianship of minors cannot be settled by a private compromise or even by arbitration. An***

> ***agreement of this nature, therefore, cannot be enforced. If an agreement is entered into by a female which appears unconscionable on the face of it, there is a rebuttable presumption that the agreement was entered into by coercion and undue influence. No effective rebuttal is forthcoming to show as to why the petitioner would voluntarily part with her minor son. Hence the purported agreement to hand over the custody of the minor to the respondent No.1 has no value in the eyes of the law****. Reliance is placed on the cases of "Mst. Shehnaz Bibi v. Muhammad Akram and others" (1995 PCrLJ 307), "Mst. Riffat Bibi v. Amanat Ali"(1997 MLD 1562), "Afshan Naureen v. Nadeem Abbas Shah" (1997 MLD 197) and "Mst. Tahera Begum v. Saleem Ahmed Siddiqui" (PLD 1970 Karachi 619).”*
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> (Emphsis added)

As in the present case, an agreement inter se the respective fathers of the contesting parties should not have restrained the jurisdiction of the lower courts under the Guardians and Wards Act, 1890. The welfare of the minor must always be of paramount consideration, which must override all other legal or contractual claims. Hence, while such a compromise may serve as one of the surrounding circumstances, it has no binding legal force upon the courts. To treat it as a determinative factor would amount to subordinating the child’s rights and well-being to the convenience of the litigating parents, contrary to both public policy, the intent of the legislature, and the settled principles. Therefore, a compromise that seeks to predetermine the fate of a child based on a contingent event, such as the mother’s remarriage, is inherently flawed, as it fails to account for the dynamic and evolving nature of a child’s needs. Such an agreement rests upon presumptions rather than proof, thereby treating remarriage as a moral disqualification rather than a factual question of welfare. The welfare of the minor, which is a living concept and not a static clause in a private deed, cannot be made the subject of bargain or barter between parents. Hence, any compromise attempting to curtail a parent’s right to seek custody, based on an event such as remarriage, cannot bind the conscience of the court, which must always act as the protector of the child’s best interest and welfare above all else.

23. The continuity of care, a child welfare principle, lays emphasis on the importance of maintaining consistency, stability, and emotional security in a child's upbringing. It recognizes that a child's sense of safety and well-being is deeply tied to the caregiver who has provided sustained love, nurture, and daily care. The principle reflects that once a minor has been continuously nurtured by one parent, particularly from infancy, any disturbance of that settled arrangement must be justified by clear and substantial reasons demonstrating that change would promote, rather than imperil, welfare. Frequent disruptions in custody or changes in the child's primary caregiver can cause emotional distress and developmental instability. Therefore, the principle of continuity of care prioritizes preserving the child's existing caregiving environment, provided it is safe and nurturing, to ensure steady emotional growth and psychological balance. In *Payne v Payne* ([2001] EWCA Civ 166), the Court of Appeal reaffirmed the importance of continuity and stability in a child's upbringing when determining custody or relocation disputes by placing reliance on *Poel v Poel* ([1970] 1 WLR 1469). The doctrine of continuity of care, though not expressly termed as such, emphasized that the child's welfare is inseparable from the welfare of the primary caregiver. The judgment observed that disrupting the settled care arrangement, especially where the child has developed emotional security and daily reliance upon the custodial parent, risks inflicting psychological harm and destabilizing the child's development. The Court held that continuity of care, stability of environment, and preservation of emotional bonds are paramount considerations in welfare determinations, cautioning against decisions that might sever the nurturing relationship between a child and their primary caregiver without compelling justification. The relevant portion is reproduced hereunder: -

> *"16. The modern law regulating applications for the emigration of children begins with the decision of this court in Poel v Poel [1970] 1 WLR 1469. I doubt that the judges deciding the case recognised how influential it would prove to be.* ***Whilst emphasising that the court should have regard primarily to the welfare of the child, both Sachs LJ and Winn LJ emphasised the importance of recognising and supporting the function of the primary carer****. That consideration was*

> *most clearly expressed by Sachs LJ when he said:* ***"When a marriage breaks up, a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given****.* ***Any such interference may, as my lord has pointed out, produce considerable strains which would not only be unfair to the parent whose way of life is interfered with but also to any new marriage of that parent****.* ***In that way it might well in due course reflect on the welfare of the child****.* ***The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."***
>
> (Emphasis added)

24. The jurisprudence has also been developed by the Apex Courts of Pakistan, wherein the concept of continuity of care has been propounded, with focus on not to disrupt the environment of the minor in order to protect the latter's mental health, emotional well-being, and intellectual growth. In the judgment of ***Amjad Ali*** (Supra), the Honorable Lahore High Court held: -

> *"The Courts below while determining welfare of the Minor on the basis of evidence on record discarded the agreement qua custody of the Minor on the ground that custody of the Minor cannot be settled through a private compromise or even by arbitration and is liable to be determined on the touchstone of the principle of welfare. It was also noted that it is trite law that second marriage of a female is not an impediment for a mother to retain custody of a child if she is otherwise found suitable for custody of the child on the principle of welfare. This is particularly so when in the present case even the Petitioner has contracted second marriage and has a daughter from his existing wife. Rather, the Petitioner has presently contracted his 4th marriage with one Shahnaz Bibi and in such a situation, the Minor cannot be left at the mercy of a stepmother when the Petitioner is a police officer who remains on assignments out of his house for most of the time.* ***More so, the Minor is living with the Respondent since his birth and has developed deep love and affection with her who is being raised in a cordial and comfortable atmosphere and is being properly educated.****"*

25. Similarly, in the judgment titled as ***Nosheeba Nazeer*** (Supra), the Honorable Lahore High Court found it proper, in the interest and for the welfare of the minor, to hand over the custody to his mother, with whom he had lived since his birth. The Court observed that the bond of love and affection exists between the mother and the child, which warrants no interference to break the same. Furthermore, the relevant portion from the judgement cited as "Hafiz Shahid Khan and another Versus Sadia Rehman and 2 others" (**2020 MLD 55)** is being reproduced below: -

> *"**Perusal of record reveals that the minor remained with her mother from her childhood; therefore, she is more familiar and akin to her mother as compared to her father**. It transpires from the evidence that the mother is looking after the minor in an appropriate manner and minor is also studying in the same school where her mother teaches.*
>
> ***Moreover, minor is a female child of 4 years old, would definitely required constant care of her mother**. **Nothing has been brought on record which may indicate that the minor child is not being brought up and looked after in appropriate manner**.*
>
> *It is also pertinent to mention here that the appellant after separation from the respondent contracted second marriage and he is performing his duty as a Army personnel/Soldier and not permanently stationed at one place **hence, it would not be in the interest of minor to put her in alien environment**. **Paramount factor in case of female minor child would be guidance of her mother which has no substitute no one can look after the minor as compared to her mother. In the case in hand as the father of the minor also contracted second marriage therefore it is in the interest of the female child of such tender age to live with her mother**. No infirmity or illegality has been found in the impugned order therefore, the same is hereby maintained."*
>
> (Emphasis added)

26. In "Sardar Hussain and others Versus Mst. Parveen Umer" **(PLD 2004 SC 357)**, the custody was awarded to the mother despite her second marriage, as the minor had developed a strong emotional bond with her and regarded the father as a stranger, despite a short period of residence with him. Likewise in ***Asjad Ullah*** (Supra), the Honorable Supreme Court of Pakistan whilst relying upon "Mst. Beena Versus Raja Muhammad and others" **(PLD 2020 SC 508)** emphasized on the critical importance of the

mother-child bond, stating that removing a child from the mother disrupts their relationship and deprives the child of the love and care essential for his/her upbringing. If a child is taken away from the mother, deprived of her love and the benefit of her upbringing, the mother and the child's relationship is fragmented. The Honorable Lahore High Court in another judgement titled "Mst. Naseem Akhtar Versus Nazir Hussain and others" **(2020 C L C 1900)** observed that the minor son and daughter were living with the mother, since their birth, who had brought them up. The preponderance of the factors, therefore, indicated that the minor's welfare tilted in favour of undivided custody with the mother.

27. This principle finds universal recognition in comparative jurisprudence and aligns closely with Pakistan's welfare-oriented approach under section 17 of the Guardians and Wards Act, 1890. The principle of continuity of care thus operates as a safeguard against unnecessary disruption in the child's upbringing, thereby acknowledging that stability, routine, and the continuity of affection provided by the primary caregiver are essential to a child's sense of security and identity. In the present case, where the minor has lived under the consistent care and emotional supervision of the mother since birth, the sudden transfer of custody based merely on the mother's remarriage or a pre-existing compromise deed would contravene this settled doctrine and compromise the very welfare that the law seeks to protect.

28. In view of the principles enunciated in the international and domestic case laws cited hereinabove, it becomes evident that once a stable caregiving arrangement has been established and is functioning well, judicial interference with that structure must be approached with utmost caution, as any abrupt disruption risks unsettling the child's emotional equilibrium and sense of security. The child's welfare, therefore, is best preserved through the preservation of consistency, familiarity, and attachment with the primary caregiver. In essence, the doctrine of continuity of care serves as a protective shield for the child's developmental and emotional well-being, anchoring custody determinations firmly within the sphere of stability and nurturing that

the child has come to depend upon. Nonetheless, it is pertinent to mention herein that the principle of continuity of care is not absolute. Where a material change in circumstances arises, or credible evidence suggests that the child's wellbeing, safety, or moral development is at risk, the Court must re-examine the existing custodial arrangement. In such exceptional situations, the Court is justified in ordering a change of custody if it is deemed essential for securing the child's welfare and best interests. The guiding principle, however, remains that continuity should serve, not hamper or supersede, the child's overall well-being.

29. In view of the foregoing discussion, particularly in light of the fact that the Respondent No. 2 has also contracted a second marriage, has two children from that wedlock, and remains engaged in employment outside the home, this Court, in the execise of its parental jurisdiction, finds that the compromise deed executed between the parties cannot bind or curtail the Court's discretion in matters of custody. Such an agreement, being contrary to the settled principle that the welfare of the minor is the paramount consideration, cannot override the Court's statutory duty to independently assess what best serves the child's interest. Moreover, the mere fact of the Petitioner No. 1's remarriage does not, by itself, constitute a legal impediment disentitling her from retaining custody, particularly when no material evidence has been brought on record to show that the child's well-being, safety, or moral upbringing stands jeopardized in her care.

30. Moreover, the minor's long-standing residence and care under the Petitioner No. 1 should not be disturbed in the absence of concrete proof that such arrangement is detrimental to the child's welfare. The minor has lived with the Petitioner since birth, and all formative bonds, such as emotional, educational, and psychological, have been established in that environment. In the present case, the record reflects that the minor, since her birth, remained in the care and custody of the Petitioner No.1 until the learned Family Court vide Impugned Judgement-I dated 21.09.2024 uprooted the minor from the care of the Petitioner No. 1 to the custody of the Respondent No. 2. The uninterrupted

bond developed over these years forms the basis of emotional stability and attachment, which are indispensable components of a child's welfare. The doctrine of continuity of care, recognized in both domestic and international jurisprudence, therefore underscores that uprooting a child from their primary caregiver without compelling reasons disrupts emotional continuity and may be detrimental to their psychological growth. Article 35 of the Constitution obliges the State to protect marriage, family, the mother, and the child. This constitutional protection cannot be read in isolation for one over the other. The concept of "family" under Article 35 must evolve to include blended and remarried family structures, consistent with social reality and human dignity. To penalize a mother for remarriage is to regress to a view of a family inconsistent with constitutional mandate and international obligations.

31. Accordingly, it is held that the learned Family Court as well as the learned Appellate Court failed to properly evaluate the matter within the framework of the doctrine of continuity of care, the welfare of the minor, and the non-binding nature of a private compromise. The Impugned Judgments dated 21.09.2024 and 01.07.2025 are hereby set aside being not sustainable in law; there is misreading and non-reading of evidence in the Impugned Judgments, which have been passed in a mechanical and arbitrary manner and without application of judicious mind. The custody of the minor, namely Eshal Noor, shall be returned to the Petitioner No. 1 forthwith, subject to reasonable visitation rights of the Respondent No. 2. The visitation schedule, chalked out by the learned Family Court, is hereby reversed as below: -

i. The second Saturday and Sunday of every calendar month is scheduled for overnight visitation/meetings of the Respondent No. 2, namely Aamir Shahzad with the minor, namely Eshaal Noor, for which the Petitioner No. 1, namely Mst. Raheela Zaheer will depart the minor before sunset of Saturday at the residence of the Respondent No. 2, and then pick the minor before sunset of Sunday very calender month.

ii. The second half of the summer and winter vacations are hereby scheduled for the overnight visitation/ meeting of the Respondent No. 2, namely Aamir Shahzad with the ward/minor daughter, namely Eshaal Noor.

iii. The second half of each Eid Holidays are also scheduled for the overnight visitation/meeting of the Respondent No. 2, namely Aamir Shahzad with the Ward/minor daughter, namely Eshaal Noor.

iv. That no one shall remove the custody of ward/minor, namely Eshaal Noor, from the territorial jurisdiction of the guardian court without prior permission of guardian court.

32. The petition is accordingly ***allowed***, in view of the reasons and findings elaborated hereinabove.

(MUHAMMAD AZAM KHAN)
JUDGE

Announced in the open court on _____.

JUDGE

Approved for reporting
Blue slip added.

Sajid/--