

**The Decisive Factors of Best Interest Principle at Adjudication of Custody Cases in Pakistan**  
**Muhammad Mumtaz Ali Khan**

Punjab Higher Education Commission, Pakistan  
Corresponding author: mumtazali1214@yahoo.com

**Cite this paper:** Khan, M. M. A., (2020). The decisive factors of best interest principle at adjudication of custody cases in Pakistan. *Paradigms*, 14(2), 70-79.

With the evolution of modernisation, liberalism and human rights entitlements, the institution of family all over the world has suffered a lot and is being ruptured in the name of rights and freedom. At the rupture of family, there may be sometime amicable separation, but amicability may be there most of the times. If the spouses have no offspring, then there may not be much disputes at separation or post-separation. However there comes a huge litigation when the separating spouses have children. Both the parents want to keep children with them. However, the children practically, may not be with both parents after divorce at least in Pakistani legal and social structure. Therefore, courts have to award custody to one parent, which is more suitable for upbringing of the children. The courts while awarding custody to either parent, keep in certain factors and parameters that eventually determine the welfare and the best interest of the child. Interestingly, all financial needs are always to be borne by the father, because end of the day, the children belong to father. Anyhow, because of variety of factors that affect the award of custody, the jurisprudence over custody is not uniform, although deviation is always made in the name of the best interests of the child principle.

**Keywords:** Children, parents, best interest of the child, welfare, custody, factors, marriage, child abuse, misconduct, religion, neglect, death, child wish, remarriage.

#### **INTRODUCTION**

The courts dispose of all custody cases in the name of best interests. The best interest of the child is the standard to achieve, however courts to reach this standard, keep in mind certain parameters while adjudicating custody cases. Due to the long list of custody award factors, the courts get extensive discretion to rely on any of the factors to realise the best interest of the child principle, but this may lead to inconsistent jurisprudence of superior courts and may cause conflict of law. The Courts have been relying on the Guardian and Wards Act of 1890 where the basic standard have been welfare of the child however after the ratification of United Nations Convention on the Rights of the Child 1989, a vague but broader principle i.e., *the best interest of the child* have been the perimeter in all custody cases. Although there have been made no difference between the custody and Guardianship in the Guardian and wards Act, but the same have been interpreted interdependently. However, custody literally means to bring up, to nurse, to foster and to take care of the child's personal, emotional, and spiritual needs, child being always with custodian. On the other hand, Guardianship involves major decisions regarding child's life and to hold power to make the contracts and legal transactions on behalf of child but with guardian's responsibility for legal consequences there upon.

#### **The Decisive Factors of Best Interest Principle at Adjudication of Custody Cases**

Following may be some factors that are part and parcel while applying judicial mind in the cases of dispute over the custody of child after the divorce/separation of their parents.

#### **Financial Status of the Parents or Guardian**

One the most basic factor that determines the award of custody of child may be the financial status of parents because it is presumed that the parent having better financial status may meet

the daily, health and educational needs of the child, where the best interest of the child be best served. However, courts have been considering the financial conditions of the parents, but the courts this too have ignored where best interest of the child required otherwise<sup>1</sup>. In the absence of other competing factors, and even if the best interests of the child do not make much difference with either parent, the courts do consider always the financial conditions of the parents. The parent with better financial status, have been upper hand for the custody of the child. But, on the same hand, the poverty has not been an obstacle if the welfare of the child was in danger, if given to the rich parent. In the case of *Mst Jamila Bang v. Mirza Muhammad*<sup>2</sup>, where at the time of divorce, it was agreed upon that each parent would retain two children out of four. But, afterwards, father filed a suit for the custody of the two children who were with mother. Both the Guardian and Appellate Courts gave all the four children to the father only on the ground of mother's poverty. Evidence showed that the father was a crane operator (driver) and had contracted two subsequent marriages also. The two children with mother were happier than the two children with father and were getting education in a very good school. During the court interview, the children wanted to go with real mother. High Court in the Constitutional petition held that, in presence of two stepmothers, father being always out, and children are old enough to make their preference, it cannot be presumed that the children with father can live happily with father. Court held that for the best interests of the children and their welfare requires that they all should live with their mother. In *Riaz Ahmad v. Zahid Hussin Kahn*<sup>3</sup>, where father was living in urban area while mother in a village being illiterate and poor too, the Guardian judge handed over the child custody to the father, while Appellate Court reversed the decision of lower court. High Court in exercise of its Constitutional jurisdiction

restored the order passed by the Guardian Judge for the reason that the father had better facilities. But the Supreme Court reversed the decision of High Court and held that, *Poverty on the part of mother was no ground to disentitle her from the custody of minor*. Court found that, mother had been looking after her minor son since his birth and maintaining him in a good environment thus welfare of the minor was with the mother. On the other hand, the father who was obliged under the law to maintain his child, had not provided any maintenance till date. The Supreme Court gave child to the mother.

Very poor conditions of father or his insolvency made him take away his preferential right to child custody even when his right to child custody was ripened<sup>4</sup>. But during the tender years, the poverty was not a disqualification for real mother to hold custody of her children<sup>5</sup>. *Mst. Zahida Parveen v. Muhammad Nawaz*<sup>6</sup>, where both the father and mother contracted second marriages after divorce, but in the custody contest of their son, the custody was given to father, as he was financially stable holding government job and agriculture land. Mother and step-father of the minor were poor without any permanent source of income. Custody was given to the father that the financial needs of the child be better fulfilled, and his interests be better protected.

The financial stability is also a factor that the courts bear in mind, but this too is done for the betterment of the child, that a minor may live a stable life with the stable parent. However, the courts set aside this plea in tender years of the children or where the best interests of the child is not protected. In the case of *Muhammad Ashraf v. Farzana Bibi*<sup>7</sup>, court set aside husband's contention that, the mother of the two minors aged 1 and 3 years, was poor and he was stable. The court ordered the custody of both children to mother. The husband, having contracted a second marriage but rich, was held that it was against the best interests of the children to live with richer step- mother, and the poverty of the mother was neither a good ground to deprive her from the custody of the minors nor a disqualification in itself<sup>8</sup>. In the case of *Ghulam Mustafa v. Manzooran BiBi*<sup>9</sup> court held that mother's laps could not be denied to minor simple on the ground of her low financial means. In *Jamila Bang v. Mirza Muhammad*, Peshawar High Court held that, mother cannot be denied from the custody of the child on the sole ground of her poverty or she was incapable to properly maintain them due to her poverty<sup>10</sup>.

#### **Parental Martial Misconduct**

In post-CRC era, the Supreme Court of Pakistan has held that the illicit or extra matrimonial relation by either of the parents disentitles him/her from the custody of the child<sup>11</sup>. In the case of *Firdous Iqbal v. Shifaat Ali*<sup>12</sup>, Supreme Court held that the rights of the father to hold the child custody, was not an absolute right but a qualified right subject always to the welfare and the best interests of the child. The Court further held that the father could disentitle himself to qualify to hold the custody of the child on account of his conduct.

#### **Child Abuse, Cruelty, or Ill Treatment**

In the case of *Zahid Hussain v. Tahira Perveen*<sup>13</sup>, the minor was taken from the custody of father and paternal grandparents, as they inflicted the physical punishment, although the mother of the minor had made an agreement to the father of the minor, that she will not ask for the custody of the child, if he divorces her. Where the father, assaulted and showed the gun to the children while in his custody, that if they would go to their mother, he would kill them. The court held this as a grave child abuse on the part of father and custody was given to the mother of the children<sup>14</sup>.

#### **Moral Corruption, Criminal Behaviour or Drug Addiction**

Giving permission for prostitution to the daughter, makes father unfit for her custody<sup>15</sup>. A father of criminal behaviour, drinking alcohol, or other drugs addiction can make him ineligible for the custody of the children, even after when his right to custody of the children is ripened, and mother had contracted second marriage<sup>16</sup>.

The court even have held that the criminal behaviour of the second mother or father, whatsoever the case may be, can danger the welfare and the best interests of the child and child should never be let live with such parents or step-parents. In the case of *Mst. Rukhsana Begum v. Additional District Judge, Multan*<sup>17</sup>, where mother contracted a second marriage, the second husband had criminal record and had 7 children already. The child being old enough was not sent to school, although the other children were going to school. Both the lower courts decided in the favour of father. Court held that, in this case the welfare and the interests of the child were with real father and the minor could not be left on the mercy of a criminal step-father.

Father even has lost the custodial rights of his children against a third person, if the father had criminal record or had done heinous crimes. In the case of *Mst. Fatima v. Muhammad Baksh*, father had killed her wife and had two minor girls from his assassinated wife. Father was sent in prison, while the girls reside with their maternal grandmother. After acquittal, he remarried and then applied for the custody of the minors. The Session Court awarded custody to the father, neglecting the material issues regarding the welfare of the minors. The maternal grandmother filed a Constitutional petition for the custody of the minor girls and contented, it was against the best interests of the minor to live with the murderer of their mother, although the father of minors. Secondly, he had contracted second marriage to a stranger woman. Court handed over the minors to the grandmother and held that such a person is not fit to bring up the children.

The criminal behaviour not only disentitles the father from the right to child custody against the mother of the minor, but even in the absence of the mother, the custody should be awarded to a third person for the welfare of the minor. In another similar case of *Mst. Jamal v. Additional District Judge, Jatoi, District Muzaffargarh*<sup>18</sup>, where the father of two minor girls aged 2 and 3 three years respectively, sued for the custody of the minors. After the murder of her wife (the mother of the minors), he

contracted second marriage. The minors remained with their grandmother and father paid nothing to them for their maintenance although previously court had ordered him to pay. Court rejected father's application and held that, the welfare of the minors was the paramount consideration and held that in present case, the father having a criminal record, killed the mother of the minors and behaviour of the stepmother would definitely go against the best interests of the minor. Court awarded the custody of the minors to the maternal grandmother of the minors.

### **Family Environment and the Religion**

Courts do consider a lot the family environment of the either spouse, as the child is to grow up in that atmosphere. For the better growth and development of personality the atmosphere inside the family matters a lot. Being the joint family system in Pakistan, the other members of the family do also affect the life of the child, that is why the court see whether the other family members such as the brothers, sisters or other nears of the mother or father. Along with the family atmosphere and as ultimately child belongs to the father, so the children are supposed to follow the religion of the father. Courts do consider this while, adjudicating the custody cases. Courts, in the case of female minor, have been reluctant to award the custody of the child to father, if there was no other woman in the father's home, such as the mother of the father or sister etc<sup>19</sup>.

In the case of *Maryam Zohra v. Younus Jamal*<sup>20</sup>, where children were born out of Christian wedlock and both parents were Christian by faith too. The mother subsequently embraced Islam and got divorce from Christian husband. She remarried to a Muslim man later. In custody dispute of the children, Lahore High Court observed that Supreme consideration in guardianship proceedings consistent with personal law, to which minors are subject, would be welfare of minors. Guardian Court while considering issue of welfare held that it would be obliged to consider every circumstance which could tend to weigh on welfare of minors. The religion in which a minor is brought up would be very important factors amongst other considerations. The law gives the right to control religious education of his minor children to the father. So, the father would have a right to have his children brought up in his own religion. Court further added that, the father being a Christian, Christian household would be proper house for children in circumstances.

In the case of *Imran Ali v. Mst. Iffat Siddiqui*<sup>21</sup>, the father of two minors aged 8 and 5-1/2 years, filed a constitution petition for the custody of the minors. The father belonged to the *shia* sect and had sufficient means to look after the children, and could provide them better means for their growth as per his own sect. Both the, Guardian court and Appellate Court awarded the custody of the minors to the mother. In Constitutional petition court found that, mother had not her own source of income and was residing with her three brothers, one of whom was a convicted person and was residing abroad. Court found that the family atmosphere of father was much better for future growth of minors. Further, as mother of the father (paternal grandmother of the children) was retired principal of a school, his elder

brother was running his own school and his second brother was getting education in Australia. Father had sufficient source of income to maintain the minors in better way. Court held that although father and mother had equal love with the children but in addition to love and affection, they needed better education, mental and physical health, and civil and social atmosphere. Moreover, Court held that, children should be brought up according to the sect/religion of their father. Court added that both Courts below while granting temporary custody of minors to mother had not considered said facts and circumstances. The Court set aside the lower court decision and both the minors were given to the father.

But at the same time, the Courts have weighed more the best interests and welfare of the child rather than religious factor. For example, in *Ms. Louise Anne Fairley v. Sajjad Ahmed Rana*<sup>22</sup>, High Court handed over a child, professing Islamic faith and residing in Pakistan with his father, to her Christian mother residing in UK, although the father had contended that, it was against the welfare of the child that he be sent to UK, where culture and norms are fundamentally different to the Islamic injunctions.

In Islamic Republic of Pakistan, the religion matters to a great extent and is one of the important factors<sup>23</sup>. The Court have held that, not only physical care and health comprise the best interests of the child, but emotional, educational, and religious welfare and wellbeing have the same footing in child's best interests<sup>24</sup>. Moreover, the religion of the father has been held to be the religion of the child<sup>25</sup> and the child should be brought up according to the father's religion, even after the death of father<sup>26</sup>. If there were the custody disputes among the parents having different religious sects, and if the welfare of the child was not really in danger, the custody has been awarded to the father, so that the child be brought up by the father according to his own convictions.

### **Neglect to fulfil the Needs of the Child (Financial, Physical or Educational)**

Neglect on the part of parents or non-payment of maintenance<sup>27</sup> to the child to fulfil child needs forfeits rights to custody<sup>28</sup>. In *Abdul Razzaq v. Pari jan*, where father was working in Saudi Arabia, was unable to give due care for the child and also had contracted second marriage too, was denied the custody of the child<sup>29</sup>. The father has been denied from the custody of the children even after the he was entitled to the custody of the children, as he had never paid the mother of the children for their needs, when they were in the custody of their mother<sup>30</sup>.

In *Iftikhar Ahmad Chishti v. District Judge Chakwal*<sup>31</sup>, suit of the petitioner (father) for custody of the children was dismissed both by the Family court and appellate court. In Constitutional petition, petitioner admitted that a suit was filed against him in 2003, where he was condemned, and was asked to pay the maintenance to the children but failed to pay. Petitioner admitted that he was sent into jail due to non-payment of maintenance after the court decree against him and had continued litigation against the children throughout the said period. In 2007, he filed suit for the custody of the children, till then he was remarried

too. High Court held that, if a father failed to pay maintenance, and then litigated against the custody of minors and finally did not pay the maintenance even after the decree of the court and preferred to go to civil prison; it could be safely presumed that he was not interested in the welfare and well-being of the minors. Court further added that, petitioner appeared to be disinterested in the well-being of the minors and was living with his second wife and could not categorically deny that he had children from his second wife. Court added that, the step-mother could not bestow the love and affection which would be given by the real mother. And the courts below had rightly found, in such circumstances, that it was not in the welfare of the minors to be given to the father (petitioner).

In *Mst Karisma Bibi v. Additional District Judge, Attock*<sup>32</sup> Court held that, father of the minor had been negligent, and due to his negligence, the minors were compelled to file a suit for recovery of maintenance against the father. Even after the suit was decreed respondent father did not pay the maintenance to the children. Father neither claimed the custody of the minor nor bothered to offer to maintain them. Father only applied for the custody of the minors, after the mother had filed for maintenance. Respondent father wanted the custody of the minor son for self-aggrandizement, whereas the petitioner mother, who had been looking after the minors since birth, wanted their custody because of her unconditional love for them. The father was denied the custody of the children. The Supreme Court held that, the father is financially responsible, if he did not provide the maintenance to the child and showed neglect, he could not be entitled to the custody of the child<sup>33</sup>.

The disinterest on the part of father for upbringing the child disentitles him not against only the mother of the child, but against any third person also. In the case of *Nighat Firdous v. Khadim Hussain*<sup>34</sup>, where the High court gave the custody of the child to father on the ground that the father had an absolute right over the custody of the child over the seven years of age and maternal aunt could not ask for custody of the child. The Supreme Court set aside the High Court verdict and held that, where the maternal aunt had taken care of the child, when he was of only fifteen days after the death of minor's mother. Throughout this period since the birth of the minor, the father never took any interest in the child's affairs and left the minor with the maternal aunt. Father applied for the custody of the child, when the maternal aunt applied for the maintenance of the child. Supreme Court held in the circumstances, that the father was not entitled to the custody of the child but was obliged to pay maintenance to his adult son.

#### **Equitable Estoppels**

Where a father already abandoned his rights or had given his child to any other person to raise him/her up in return of benefit or other consideration<sup>35</sup>, or where his child was entitled to have inheritance from other person, the father could be stopped to claim for child's custody<sup>36</sup>. The laziness and elapse of a long time to apply for child custody also amounts to the estoppels. For example, father after coming into knowledge that his wife has contracted second marriage to a stranger, did not come to the

court for a long time to ask for the custody of the child. Court held that, the elapse of such a long time shows that, the father had abandoned the child and was not entitled to the child custody in the circumstances<sup>37</sup>.

#### **1.1. Wishes of The Child**

After UNCRC, the courts in Pakistan have given too much respect to the child's view for his/her custody, if he/she could make an intelligent opinion. The wishes of the child is a major factor, which the courts consider in custody cases. It constitutes one of the four basic principles of the UNCRC under its Article 12. The courts do not neglect the wishes and views of the child<sup>38</sup>, if the child is capable to form intelligent preference<sup>39</sup>. Even, on the basis of the views of the minor, both mother and father have been deprived of the minor's custody. For example, in the case of *Javed Irfan v. Additional District Judge*<sup>40</sup>, where both the parents had contracted second marriages and their son aged 12 years was living with the maternal grandfather happily and was studying in grade 5. Trial court gave the custody of the minor to father, but appellate Court below interviewed the minor who was not willing to live in the house of his father/petitioner with his stepmother and custody was given to the maternal grandfather of minor, who was looking after minor and was fulfilling satisfactorily to his educational requirements. On the other hand, the father of the minor had contracted second marriage and had children from his second wife. Court held that, it was not safe to remove minor from his present family set up and the welfare of the minor demanded that he should be permitted to continue to live with his maternal grandfather. Court added that the paramount consideration in determining the question of custody of minor was welfare of the minor, and in the present case, welfare of the minor was that, he should remain with his maternal grandfather, not with either of parents. In *Zahoor Ahmed v. Rukhsana Kausar*<sup>41</sup>, where child asked that he wanted to go to the maternal grandmother, rather than his very wealthy father. The Supreme Court of Pakistan on the ground of child wishes gave the child to maternal grandmother.

#### **Extent of Child's Wishes**

But it should be noted that, the wishes and views of the child can only be given due weight, if they do not contradict with the welfare and the best interests of the child himself. The wishes of the child can be superseded if the best interests are at stake. In the case of *Abdul Razzaque v. Dr. Rehmana Shaheen*, High Court held that, "*as far as the wishes of the minor are concerned, no doubt, it was one of the factors to be taken into consideration, but could not be decisive in the matters, as the minors being of tender age could not be expected to be able to decide where does their welfare lay*"<sup>42</sup>.

An interesting custody dispute came to the Ibn-e-Taiymiay (a qazi), In this case, the court gave the option to the child, with whom he wanted to go. The child opted to go with father. But the mother requested court to inquire, why the child wanted to go with father rather than mother. On Court's question, the child replied that, the mother compels me to go to school, where teachers punish me; but father lets me play with friends and

never compelled me to go to school. Having this answer by the child, the court gave custody of the child to mother, holding that before giving the option to choose, the welfare of the child must be considered by the court. So, in this case it is in the welfare of the child that he should live with his mother<sup>43</sup>.

Another similar of case was of *Mst. Muhammad Jan v. District Judge, Attock*<sup>44</sup>, where the views of the child were set aside for his best interests. The facts of the case were; the mother of the minor child after the death of her husband remained in the house of in-laws, but after some time, she was expelled out by mother-in-law (grandmother of the minor), keeping the minor with her. Mother of the child filed a petition u/s 491 Cr. P.C. for recovery of minor. Her petition was dismissed on the statement of the minor, as he wanted to live with grandmother. The mother again filed a petition u/s 7 of Guardian and Wards Act 1890 to appoint her as guardian of person and property of the child. But again, this was dismissed based on the views of the child in the favour of grandmother. Then mother filed an appeal to High Court, where the court set aside the orders of family court and ordered that the custody of the child be given to the mother. Court held that the minor was brainwashed by the grandmother to the extent that he abhorred the real mother and was making the stories of physical violence by the mother. The child was taught how to lie and hate. The court was of the view that the child with grandmother was not in danger physically but mentally. The mother being very young lady did not remarry for the sake to get her child. Court held that no one could take the place of real mother. And what to consider at each and every stage of the litigation is the welfare of the child and welfare of the minor in this case lies with the real mother.

In *Mst Maqbool v. Jumo Salaro Mir Khan*<sup>45</sup>, mother filed a petition of Habeas corpus, alleging that the father of the children had illegally confined minors and kept them in his wrongful custody against the wishes of the children. When the minors were produced in Court and were enquired by Court about manner in which they were being kept by their father. Both minors stated that their father was keeping them against their wishes and despite their requests he was not allowing them to go to their mother. Minors also stated that their father had been assaulting and extending threats to them and on number of occasions had pointed towards them gun and hatchet saying that if they ever would go to their mother, he would kill them. The father did not deny this statement made by the minors. Both minors stated that they wished to live with their mother, not with their father. Court held that, in view of statements of minors made in open Court, it could be concluded that even if father of minors was not detaining them illegally, but he was keeping them in his house improperly and restraint on two minors was patently unjust, cruel and not in the best interests of minors and thereby welfare and proper upbringing of the minors would be adversely affected. The custody was awarded to the mother.

But where a female minor aged hardly 7 years, when inquired in open Court to opt between the parents, she wished to live with father, her wishes were also respected<sup>46</sup>. So, the wishes of the child are entertained if those do not contradict the best

interest of the child, but could not be entertained, if come in conflict with his/her best interests<sup>47</sup>.

#### **Death of the Either Parent: The Custody of Orphans**

After the death of the wife, the probabilities for the best suited person among the grandmother or father is to be determined on the basis of case to case, but always based on sole consideration of the best interests of the child.<sup>48</sup> Although in Pakistani Law, the father is legal and natural guardian of the child, but in the absence or death of the father, the mother is sole and exclusive naturally, legally and physically custodian of the child. In the case of *Mst. Zubaida Begum v. Additional District Judge*<sup>49</sup>, where after the death of father of the 2 minor girls, the paternal grandmother of the children filed a suit for the custody of the minors. Court rejected her petition. Again, her second plea that among the girls one should be given to mother and one to paternal grandmother, Court also rejected this plea too holding that, that was a mechanical approach. The separation of the two girls would be too cruel and harsh. Both the minors had the right to share joy of childhood. Additionally, it would be in their best interests that they should be brought up together under the same roof and be not deprived of their mutual love and affection.

The death of the wife, although the parental emotional attachment is natural, but sometimes it leads the parents to do any sacrifice for their children and courts have regarded it. For example, in case of *Malik Muhammad Hussain v. Malik Ghulam Qadir*, where father did not contract second marriage after the demise of his wife, for the sake of his minor children, although he was of very young age. Supreme Court upheld the decisions of all lower courts, that the father was best suited in this situation against anyone else<sup>50</sup>. In the same way, the Supreme Court of Pakistan have held earlier, that the commitment of father not to marrying again, it was held that the welfare of the child is with father, as the minor aged 11-1/2 years too wanted to go with father<sup>51</sup>.

#### **Remarriage of the Parents**

Remarriage of either spouse is a big plea by other spouse in the child custody proceedings. Remarriage of the either spouse disentitles him/her<sup>52</sup> to have the custody of the child.

#### **Remarriage of Mother**

The mother's second marriage to a stranger (other than blood relatives) disqualifies her from child custody.<sup>53</sup> The rule is based upon the Hadith of Holy prophet (PBUH) that, "woman loses her right when she marries a stranger"<sup>54</sup>. But in the case, where the father was unfit to have the custody of the child, the courts have ignored the mother's second marriage to a stranger and have given child custody to the mother. In the cases of *Muhammad Bashir v. Ghulam Fatima*<sup>55</sup>, *Rahela Khatun v. Ramela Khatun*<sup>56</sup> and *Nazeer Begum v. Abdul Sattar*<sup>57</sup>, the custody was given to the mother, although both concerned women had contracted second marriage with strangers. But Supreme Court has held that the remarriage on the part of mother would not devolve the custody of the child on the father *ipso facto*<sup>58</sup>. Remarriage is not a thumb rule or absolute and can be departed by the courts in exceptional cases<sup>59</sup>. What is the big presumption is the welfare of the child<sup>60</sup>. Courts have held that,

it is not the second marriage of the parents, but the welfare of the child, on the basis the custody cases be adjudicated<sup>61</sup>. The courts have set aside this disqualification of the mother of remarrying even if with a stranger<sup>62</sup>, if the welfare of this was in danger to take away the child from mother<sup>63</sup>. In the case, if the mother gets married to a man, in prohibited degree with the minor, the mother has preferential right of child custody<sup>64</sup>. The courts are of the opinion, that dominant and paramount factor to be considered by Courts was question of minor's welfare and his interests. All other reasons were subordinate to the said paramount consideration. In the case of *Ruqayya Yasmin v. Muhammad Riaz*<sup>65</sup>, where the family Court handed over the child to father, only on the ground that mother had contracted second marriage. The Appellate court upheld the family court's decision. In Constitutional petition to High Court, the court held that, "dominant or rather the only factor to be considered by Courts was question of minor's welfare, all other reasons were subordinate to the said paramount consideration. The factum of remarriage of minor's mother was one of the factors which could be taken into consideration while deciding the dispute, but it could not form the sole basis". High Court held that, the lower courts have done severe error, by not considering the welfare of the child, but the remarriage of the mother. The Court set aside the decision of lower courts and the custody of the child was given to the mother. In another case, court held, the welfare and the best interests of the child is the only consideration concerned<sup>66</sup>, none else. It has been further held that, the welfare of the child is always the fundamental, paramount, and overriding consideration, but it is the sole criteria, which should prevail in all circumstances<sup>67</sup>.

The remarriage of the mother to a stranger brings more severe consequences rather than a man's remarriage, regarding their child custody<sup>68</sup>. But it is ineligibility on the part of father too<sup>69</sup>. In the case *Mst. Shumaila Akhtar and 2 others v. Abdur Rauf*<sup>70</sup>, where the mother of a 6-1/2-year-old child had contracted a second marriage to a stranger and had a child from second husband as well and the minor in dispute did not start school yet. The custody of the child was given to the father.

The remarriage of only mother to a stranger and father being unmarried always, could not hinder the mother to have the custody of children. In *Sardar Hussain v. Mst Parveen Umar*<sup>71</sup>, where husband divorced her wife and wife after divorce contracted a second marriage to a stranger. The wife had three children from the petitioner and two from the second husband. The petitioner sought the custody of the children on two grounds. Firstly, the children were of more than 7 years and secondly the mother had contracted a second marriage. Court rejected his petition and held that, in normal circumstances, the father's right to custody would ripe after the age of 7 years, but the welfare of the children would always hold supreme with the Court, irrespective of such tights. Court further held that, "right of father on the basis of age of minor to have his custody was neither absolute nor indefeasible and each case was to be decided on its own merits". Adding thereby, it was held too that second marriage of the mother could not be made a ground to

disentitle her to custody of minors when minors were admitted in a standard school, getting education, clothes, food and were enjoying every facility of life in the house of their mother.

#### **Remarriage of Father**

The remarriage of the father disentitles him from the custody of the minor child, although much older than 7 years. Father being outside from home due to his job, the stepmother posed a risk at the welfare of the child and the minor could not be left at the mercy of a stranger woman<sup>72</sup>. In *Iftikhar Ahmad Chishti v. District Judge Chakwal*, father was denied the custody of the children due to his remarriage and non-payment of maintenance to the children<sup>73</sup>. In *Asif Ali v. Mst. Tehmina Naseem Shad*<sup>74</sup>, where father had contracted a second marriage and challenged the verdict of lower courts, who gave the custody of an ill minor to the mother. The minor suffering from imperforated disease and was operated thrice and was too much attached with the mother. High Court rejected the father's petition and held that, in these circumstances, even the real father seems a stranger to the child. If custody is given to the father, the health of the child would deteriorate and could cause severe consequences. Secondly, the second wife (stepmother) could never do care as that of real mother. In *Abdul Bari v. Khalida perveen*<sup>75</sup>, where father had contracted second marriage and had a child from the second wife, filed a constitutional petition for the custody of two children from her ex-wife, the minor girl less than 7 years, and minor boy more than 7 years. Court held that Apart from care, love, and affection of a real mother of which there was no substitute, daughter required her company and association for preparing her to shoulder responsibilities in future. In this situation, father could not be a proper guide in such matters. Boy though had crossed age of seven years, was being looked after well by the mother and was being given proper education in a good school. Father having married again had a child from his second wife who being a stepmother might have little care for her stepchildren for treatment of a step-mother is proverbial in the society and she can be no match to the real mother. So, father was denied the custody of both children.

However, after considering everything, what is the paramount, is the welfare and the best interests of the child. It is evident for example, in the case of *Muhammad Ashraf v. Farzana Bibi*<sup>76</sup>, where the trial court granted the custody of the elder child of 3 years to father, while the younger child of 1 year to mother. The Appellate court reversed the decision of lower court and granted custody of both the children to mother. Father filed a constitutional petition in High Court for the custody of the children. Although father had undergone a second marriage, but mother did not. The High Court held that, the family being only juncture where brothers and sisters live together under their parents and enjoy natural harmonious affection and love and share their small secrets of happiness, it was not in the best interests of the children to live apart from each other in different environments under hatred and disputes which normally arises from broken marriages. The decision of the appellate court was upheld that both the minor would remain with mother.

The fathers have been denied child custody due to their second marriage<sup>77</sup>. In fact, the courts have tried to save the child, especially from the stepmothers, as they have been proved crueler than stepfathers. In the case of *Zahid Hussain v. Tahira Parveen* court held that, Stepmother or a step-grandmother could not be a substitute for the real mother, especially when stepmother and step-grandmother had their own children<sup>78</sup>.

As discussed above, the remarriage of the parents does not become ineligibility *ipso facto*, for the custody of the children but the surrounding circumstances, contribute too in the determination of the best interests of the child. The availability of the parents and their spending of the time with children for their proper care, guidance and surveillance have been held in the best interests of the child. In the case of *Shaukat Ali v. Mussarat Sultana*<sup>79</sup>, where the father was civil servant, remarried and had two children from the second wife. Court held that, even if there was nothing detrimental to children to live in father's house, but the continuous absence of the father and leaving the children with stepmother can never be in their best interests. The second contention was also set aside that, the two children be divided among the parents. Court held that, children being much closed to each other, it would be in their interests and welfare that they should be brought up together. The real mother always present in house to take care, have not substitute. Secondly, court further added that, affection and devotion of real mother for the minors could not be matched by anyone else. Mother of minors could give them constant attention, who had been committed to bring up the children<sup>80</sup>.

#### **Remarriage of Both Parents**

Here too, in the case of the remarriage of both parents after divorce, the courts need not to consider second marriage of the parents, but only the welfare and the way that how the best interests of the child be protected<sup>81</sup>, however in this situation with equal probabilities, mother have more chances to get custody of the child. For example, in the case of *Mst. Zahida Parveen v. Muhammad Nawaz*<sup>82</sup>, where both parents had contracted second marriage, and contested for the custody of their son of 8 years old. The father was a school teacher and owned agricultural land too. The stepmother was also a school teacher. On the other hand, the real mother and stepfather both were illiterate with no job or other permanent source of income. The court of first instance awarded the child to mother, but appellate court awarded custody to the father. While in Constitutional petition in High Court, the Court held that, while determining the custody of the child, the welfare of the child is the prime consideration. Court held that father was financially stable, thus, he was in a better position to meet material needs of minor. Father having no child from second wife could keep minor with him in school, supervise his activities and directly take care of his educational, financial, psychological, and emotional needs. Court held also that all stepmothers are not Cinderella's stepmothers.

Although in the case of marrying one parent the views of the children are got and respected but, in the cases, where both parents get remarried, then the views and wishes of the child

gather more weight. The courts have held that, in case of remarriage of both parents, along with the best interests of the child, the child wishes cannot be ignored, if he/she is capable to make his views. For example, in the case of *Mst. Naseem Kausar v. Muhammad Saleem*<sup>83</sup>, both the parents of the minor had remarried, and both had children from new spouses. The minor was of 10 years old. Although traditionally it belonged to the father, but when court inquired from the child, he opted to live with his mother. Court held, that the father of the minor being a shopkeeper was expected to remain busy outside the home, and the minor was to remain with stepmother, who already had children. So, the child with her stepmother would be uncomfortable, having no love, affection, and care of real mother. The Court ordered that the child be handed over to the real mother, although she had remarried, but she could care more than the father.

In the case of the second marriage of both parents, to determine the best interests of the child, the court consider the family links/relations of the minor to the new spouse of his/her mother or father. In the case of *Ghulam Mustafa v. Manzooran BiBi*<sup>84</sup>, both the parents of the minor had contracted second marriage. The father had 3 children from his second wife, but the mother has no issue from her second husband. The wife of the father was not from his brotherhood, but the husband of the minor's mother was related to her. The Court held that, that minor would not be comfortable with stepmother and would face severe problems and difficulties. Court further held that, remarriage does not disentitle mother absolutely from the custody of the minor. The best interests of the child would be best served if she remains with her mother.

In, *Muhammad Yousaf v. Anis Bibi*<sup>85</sup> where both the parents contracted second marriage, under the Constitutional petition the question before the court was, whether the best interests of the child would be better protected with stepmother or stepfather. As in either case, the minor child has to live with one either stepfather or stepmother. The Family court of first instance awarded the child custody to father, where the minor child had to live with stepmother. The Court of appeal reversed the lower court's decision and custody of the minor child was awarded to the mother. During the Constitutional petition, the High Court found that all the elder children of second husband were married and lived separately, but the case was not same with the second wife. Court held that, if the minor lives with her real mother, her welfare and interests be better protected with her real mother, although remarried. The stepmother can never be real mother in terms of care, love and affection.

Along with the remarriage of the either parent, the courts have held that the separation of the brothers and sisters from each other and making division of the children, such as half to mother and half to the father, is grave violation of the interests of the children. In the case of *Mst. Karisma Bibi v. Additional District Judge, Attock*<sup>86</sup>, where family court dismissed the application of the father for the custody of two children, one boy and one girl, who were with mother since birth. The Appellate Court reversed the Guardian Court's decision and gave the custody of minor

boy to father, while left minor girl to remain with mother. In Constitutional petition in High Court by mother, the Court held that, separating the minors, who seemed very much attached to each other, would be too harsh decision for them to sustain. Court added that the welfare of both the minors, in circumstances, lay in their custody remaining with the petitioner mother.

#### **Unfitness of Both Parents after Remarriage**

In the cases where both parents seem unfit to have custody of the child and the best interests and welfare of the child would be better protected if the minor remains away from both of the parents, court have been giving the child custody to third person or sent child to alternative child protection cares, run by the state. After being unfit for child custody and disentitled due to remarriages of both of the parents, the custody may also be awarded to third person. For example, in the case of *Zafar Iqbal v. Rehmat Jan*<sup>87</sup>, there were three contestants for the custody of the minor: father, mother and maternal grandmother. The father and mother of the child both remarried after their divorce and both were living outside Pakistan, while the third contestant, the maternal grandmother was living in Pakistan. Earlier the minor was also living in Pakistan with his maternal grandmother. The High Court declared both the parents unfit for the custody of the child after their remarriages and gave custody to the grandmother. On appeal to Supreme Court, the Supreme Court upheld the decision of High Court and held that the grandmother was the best person to have custody of the minor for his best interests.

In normal circumstances the mother loses the right to child custody if she contracts a second marriage to a stranger, but it does not mean that, in case of mother's second marriage the custody reverts to father automatically or exclusively<sup>88</sup>. In the case where both the parents remarried were absent, the preference between the maternal grandmother and paternal grandmother is to be decided based upon the evidence, and the custody does not go to any one of the grandmothers automatically<sup>89</sup>. Even, where the father was well-settled abroad, the Supreme Court of Pakistan ordered to give the custody of the child to the maternal grandparents, being available to the child all the times.<sup>90</sup> However, Supreme Court of Pakistan has held, irrespective of the remarriage of either spouse, or other relevant factors, only the welfare and the best interests of the child is the determinative factor<sup>91</sup>.

The Common Law, the Pakistan's legal system stemmed out from, too had similar jurisprudence even during the days, when the father had absolute custody over the children; the father was refused the custody due to "gross profligacy"<sup>92</sup>. In the case of *Shelley v. Westbrook*<sup>93</sup>, the parental rights of the Shelley (who was a poet), were terminated, because he expressed publically the atheism. Although the mother of the children was died at the time of dispute and they were given to grandparents after the death of their mother. In the case of *Wellesley v. Duke of Beaufor* father again was denied the custody of the children, who had extra-matrimonial relations with another woman, and whom he kept under the same roof, with his children and wife<sup>94</sup>.

Even in the cases, where spouses were still in marriage, the Court of chancery provided that, martial misconducts make a parent unfit to be child's guardian<sup>95</sup>. Court provided further that, the adultery<sup>96</sup> or scandalous character of father would remove his entitlement to child custody<sup>97</sup> as such type of father's character is not in the best interests of the child<sup>98</sup>.

Before 1857, when divorce was legitimized, the England was only Protestant country with an Established Church, where in the case of failure of marriage, divorce could not be obtained on the basis of cruelty, desertion or adultery but father could be denied his preferential rights to child custody in the above-mentioned cases<sup>99</sup>. Child abuse also vanished away the entitlement to child custody<sup>100</sup>. Even in 19<sup>th</sup> Century England, in the case of *Curtis v. Curtis*, where the husband was used to inflict the physical punishment, the Court of Chancery did not award the divorce to the mother, but also the custody of the child<sup>101</sup>. In Common Law, the fathers' preferential rights to child custody could also be forfeited on the basis of blasphemy, atheism, lack of religious convictions<sup>102</sup> but in recent years, especially after UNCRC the religion has not been considered as a factor to be considered in the child custody as in Pakistan. Further, the religion is not preferred over non-religion under the auspices of religious liberty. The courts seem to be neutral<sup>103</sup> in the religious matters in custody cases<sup>104</sup>, neither they prefer either father's or mother's religion<sup>105</sup>.

#### **Conclusion**

To sum up above discussion, one may conclude that although there are many factors for example, financial status of parents, parental martial misconduct, Child abuse, cruelty and ill treatment, moral corruption, criminal behaviour or drug addiction, family environment, religion, neglect to fulfil the needs of the child (financial, physical or educational), equitable estoppels, wishes of the child, death of the either parent and remarriage of the parents (either of mother, father, or both) that courts consider while adjudicating custody cases, but all the factors again depend upon the welfare and the best interest of the child that constitute the basis and spirit of both Guardian and Wards Act and UNCRC, respectively. The courts have been overriding and bypassing these standards, if custody was being awarded on the basis of said factors, violated the best interest principle. The custody right is not that of parents but that of children i.e., the right of the parents regarding the interest and control of the child was not to be exercised in the benefits and interests of the parents, but in the welfare and best interests of the children themselves. *Hizanat* (custody) is the child right, not the right of the parents. So, in all cases, even other than custody, the courts are of the opinion, that dominant and paramount factor to be considered by courts was question of minor's welfare and his best interests. All other reasons/factors were subordinate and subservient to the said paramount consideration.



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- <sup>2</sup> YLR 2003 Peshawar 1337
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- <sup>4</sup> Blisset's Case, Lofft. 748, 749, 98 Eng. Rep. 897 (1767).
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- <sup>8</sup> Abdul Bari v. Khalida perveen, MLD 1994 Lahore 150
- <sup>9</sup> MLD 1994 Lahore 1199
- <sup>10</sup> YLR 2003 Peshawar 1337
- <sup>11</sup> Muhammad Tahir v. Mst Raeesa Fatimah, 2003 SCMR 1344 Supreme Court of Pakistan
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- <sup>14</sup> Mst Maqbool v. Jumo Salaro Mir Khan, PCrLJ 1998 Karachi 1535
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- <sup>20</sup> CLC 1986 Lahore 1857
- <sup>21</sup> PLD 2008 Karachi 198
- <sup>22</sup> PLD 2007 Lahore 293.
- <sup>23</sup> Maryam Zohra v. Younus Jamal, CLC 1986 Lahore 1857
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- <sup>26</sup> Mst. Ghulam Fatima Alias Shammi Bai v. Chanoomal and another, PLD 1967 Karachi 569
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- <sup>28</sup> Blisset's Case, Lofft. 748, 749, 98 Eng. Rep. 897 (1767).
- <sup>29</sup> MLD 1989 Karachi 1285
- <sup>30</sup> Sardar Hussain v. Mst Parveen Umar, YLR 2003 Peshawar 3054
- <sup>31</sup> MLD 2012 Lahore 670
- <sup>32</sup> YLR 2009 Lahore 1522, almost similar facts and similar decision was given the Lahore High court in the case of Shamim Akhtar v. Guardian Judge, MLD 1989 Lahore 308. See also, Mst Fahmida Begum v. Habib Ahmad, PLD 1968 Lahore 1112.
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- <sup>34</sup> 1998 SCMR 1593.
- <sup>35</sup> Colston v. Morris, Jac. 257, 22 Rev. Rep. 246 (1821).
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- <sup>37</sup> Mst. Nazeer Begum and others v. Abdul Sattar PLD 1963 Karachi 465
- <sup>38</sup> 1994 MLD 1950
- <sup>39</sup> Mst. Naseem Kausar v. Muhammad Saleem, MLD 2003 Lahore 1306.
- <sup>40</sup> MLD 2007 Lahore 1089
- <sup>41</sup> 2000 SCMT 707 Supreme Court
- <sup>42</sup> PLD 2005 Karachi 610
- <sup>43</sup> Imam Shaukani, *Nayl-a- Autar*, Dar-al-Fikr, Syria , vol. 7, p.142
- <sup>44</sup> MLD 2010 Lahore 42
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- <sup>46</sup> Mst. Zohra Hilal v. Noor Sakht Shah, MLD 2009 Peshawar 258.
- <sup>47</sup> Muhammad Aslam v. Additional District Judge, CLC 2004 Lahore 160.
- <sup>48</sup> Fatima Bibi v. District and Session Judge, Mandi Baha-uddin, YLR 2004 Lahore 652
- <sup>49</sup> MLD 2002 Lahore 202.
- <sup>50</sup> 2004 SCMR 1735
- <sup>51</sup> Zahida Kiani v. Shahid Ali Khan, 1993 SCMR 2303 Supreme Court of Pakistan
- <sup>52</sup> Humayun Gohar Khan v. Guardian Judge Okara, MLD 2010 Lahore 1313, where a father was disentitled due to his second marriage, although well-settled having business of poultry.
- <sup>53</sup> Razia BiBi v. District Judge, Bahawalnagar, CLC 1992 Lahore 1981
- <sup>54</sup> PLD 1953 Lahore. 73.
- <sup>55</sup> *ibid*
- <sup>56</sup> PLD 1971 Dacca 24.
- <sup>57</sup> PLD 1963 Karachi 465.
- <sup>58</sup> Shaista Naz Vs. Muhamamd Naeem Ahmad, 2004 SCMR 990
- <sup>59</sup> Gulnaz Bibi v. Razaqat Ali Shah, PLD 2000 Peshawar 23
- <sup>60</sup> *Id.*
- <sup>61</sup> Muhammad Zaman v. Ameer Hamza, 2009 CLC 230, Shariat Court Azad Kashmir
- <sup>62</sup> A stranger in Muslim family law for the marriage purpose is he who is in not in prohibited degree to the child, such as maternal or paternal uncles, i.e., the person who can never marry with the child.
- <sup>63</sup> Mst. Aneeta Tanveer v. Muhammad Younus, YLR 210 Krachi 513; Muhammad Bashir v. Ghulam Fatima, PLD 1953 Lahore. 73.; Rahela Khatun v. Ramela Khatun, PLD 1971 Dacca 24; and Nazeer Begum v. Abdul Sattar, PLD 1963 Karachi 465; Muhammad Aslam v. Additional District Judge, CLC 2004 Lahore 160.
- <sup>64</sup> Mst. Naziran Bibi v. Additional District Judge, Mianwali, MLD 2006 Lahore 493
- <sup>65</sup> MLD 1991 Lahore 166
- <sup>66</sup> Shaheen Bibi (Nusrat Shaheen) v. Zulfiqar Ali Shah Kazmi, CLC 1995 Lahore 306
- <sup>67</sup> PLD 1994 SC(AJK) 1
- <sup>68</sup> Mst. Rukhsana Begum v. Additional District Judge, Multan, YLR 2011 Lahore 2786; Shamim Begum v. Ghulam Waris, CLC 1984 Karachi 1895.
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- <sup>94</sup> 38 Eng. Rep. 236 (Ch. 1827).
- <sup>95</sup> Ball v. Ball, 2 Sim. 25, 36-37 (1827)
- <sup>96</sup> Wellesley v. Duke of Beaufort, 2 Russ 1, 38 Eng. Rep. 236 (1827)
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