

LECTURE

“Custody of Minor Under Rule-6 of West Pakistan Family Court Rules, 1965 & Not Under Guardian & Wards Act”

**Khaqan Ali Khilji (Minor)
Anne Zahra Mother (Petitioner)**

Versus

**Tahir Ali Khilji (Respondent)
2001 SCMR 2000
1999 CLC 1623 Lah.**

(A Case Study)

By

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31.03.1989	Marriage – Tahir Ali Khiligi with Anne Zohra lived in Lahore.
03.05.1990	Son Khaqan Ali Khilgi born in Pakistan. They went to U.S.A for higher studies of Tahir Khilgi along with wife & minor. They lived in Maryland. Tahir Khilgi came to Pakistan for a few months and went back to USA. Dispute arose and Anne Zohra along with minor left Tahir Khilgi at Maryland and started living to Virginia State with her uncle and then with her real sister.
July, 1997	Tahir Khilgi came back to Pakistan. He had failed to get custody of minor in U.S.A.
14.07.1997	Tahir divorced Anne in Pakistan, filed Deed of Divorce in Union Council and gave the address of wife which was actually his own old address of Maryland.
30.09.1997	Tahir Khilgi filed petition for custody of minor u/s 12 & 25 of the Guardian & Wards Act in Lahore.
07.10.1997	Anny Zohra filed petition for interim custody in Fairfax County Virginia, USA.
18.02.2004	Guardian Judge dismissed petition and Order-7 Rule-11 CPC for lack of jurisdiction.
31.03.2004	Tahir Khilgi filed appeal before District Judge
24.03.2005	which too was dismissed. No further right of appeal under Guardian & Wards Act. Tahir Khilgi filed W.P. in Lahore High Court who decided to remand the case saying that the question of jurisdiction should be decided under West Pakistan Family Courts Rule-6 and not under the provisions of the

Guardian & Wards Act. Decision to be made afresh. The decision of writ petition was challenged in Supreme Court.

In Para No.5 of the judgment Supreme Court states that, “There is no doubt that prior to promulgation and coming into force of West Pakistan Family Courts Act, 1964, the matter regarding territorial jurisdiction of the Guardian Judge... were governed by the Guardian & Wards Act, 1890...”

Para No.6 of the Supreme Court judgment states that, “It is manifestly clear from the express provisions of the Family Courts Act that is the Family Court under the said Act which has to be approached in the cases relating to custody of minors which Act **has overriding effect over the Guardian & Wards Act and the rules framed thereunder and Rule 6 of the** West Pakistan Family Courts Rules, 1965 framed under the West Pakistan Family Courts Act, 1964 provides that the court which shall have jurisdiction to try a suit will be that within the local limits of which the cause of action wholly or in part has arisen or where the parties reside or last resided... [Question] was to be decided under the said Act and not under the provisions of the Guardian & Wards Act.”

Again in the second round of litigation, the Guardian Judge and the District Judge gave concurrent judgment to the effect that the question of territorial jurisdiction in Pakistan and not the U.S.A should be decided after considering Rule No.6 of the West Pakistan Family Courts Rules, 1965. Mr. Khilgi again filed another writ petition No.8245/2005 on 05.06.2005. Before the decision of the W.P., the minor had become major, so, the writ petition became infructuous.

U.S. LITIGATION

Oct. 7, 1997

Khaqan Khilgi (minor) through Anne Zohra filed a petition in “Juvenile and Domestic Relations Court at Fairfax County against Tahir Khilgi as Respondent.

July 8, 1998

The petition of Anne Zahra Chancery No.156243 was dismissed for lack of jurisdiction and appeal was filed in the Circuit Court.

May 24, 1999

Both parties conceded that Uniform Child Custody Jurisdiction Act (UCCJA) adopted by Virginia in 1979 – Sections 20 – Sub-Sections 125 to 146 is the controlling authority before this court for determination of the question whether State of Virginia should exercise jurisdiction for initial custody of minor Khaqan Khilgi.

Father appeared to testify in Fairfax, Virginia on May 24 & 25, 1999 stating it is without prejudice to litigation in Pakistan as per Section 11 of Uniform Act.

Arguments In Circuit Court By Father

- (i) As per Sect. 20 – 125, it is required that initial child custody should be declined because Virginia was not Minor’s “**home state**” and

- “Significant Contact”** is with Pakistan, therefore, jurisdiction lies in Pakistan.
- (ii) Sect. 20 – 129 directs the Court to decline jurisdiction when there are simultaneous proceedings are going on as in the instant case.
 - (iii) Sect. 20- 130 of Virginia Code read along with other provisions, it is clear that Virginia is an **inconvenient forum**. Father contends that he lives in Maryland and in any case, their **“home state”** or state of **“significant contact”** is Pakistan.
 - (iv) V.A. Code Sect. 20-146 directs the court that only general policies such as mode of evidence, welfare of minor, fair trial etc. will apply to Pakistan litigation and not the serious questions like **“jurisdiction”** and its place.
 - (v) Sect. 20 – 131 directs the court that if petitioner for initial custody decree has **wrongfully** taken a child from mother state, or engaged in similar reprehensible conduct, the court may decline to exercise jurisdiction. Here mother had taken the child without informing father and for several days there was no contact.
 - (vi) Virginia should decline to exercise jurisdiction in favour of more appropriate forum, the Guardian & Wards Court in Pakistan.
 - (vii) As per Sect. 20 – 125, it is one of the four pre-requisites for initial custody, that Virginia has served or could serve as a **“home state”** for the minor. In six months prior to October 7, 1997, he had left his father, family, home, school in the State Maryland and had spent collectively three months in Virginia schools and had moved residences at least twice. **“Home State”** is one when the parent has lived at least for six months.
 - (viii) Parental Kidnapping Prevention Act that in order for a child to acquire a new **“home state”**, in the absence of a protective order, the child’s location must be known to both parents
- (Sams Vs. Boston)**
- (ix) If there is no **“home state”**, there has to be **“Significant Contact”** for assuming jurisdiction. In this case even this aspect is not there.
 - (x) Pakistani concept of **“ordinary residence”** is in line with U.S Virginia law. Minor’s ordinary residence is Lahore Pakistan.

Arguments of Anne Zahra’s lawyer

- (i) Virginia is the **“home state”** of the child as defined in Sect. 20 – 125(5) “as the state in which the child immediately **preceding** the time lived with ... parent ... for at last six consecutive months. It is not disputed that Minor & Mother have lived in Virginia **since April 6, 1997**. Her petition was filed in the Juvenile & Domestic Relations District Court on Oct. 7, 1997 more than 6 months later from coming Virginia.
- (ii) Maryland, father’s plea of residence, does not have jurisdiction, since no custody petition was ever filed there. Instead of Maryland he is insisting on Pakistani jurisdiction. Furthermore, Father himself no more a resident of Maryland since June 17, 1997. Since **Maryland is not the residence of either parent** – no jurisdiction with Maryland.
- (iii) **Virginia Code Sect. 20 – 126(A)(2)**
 “(i) the child and ... at least one parent, have **“significant connection”** with Virginia and (ii) there is available in Virginia

evidence concerning the child's present or future care protection, training, and personal relationships.

The mother testified that the child's school record, his teachers, his therapist, his doctors, his Imam, his neighbours and friends are all in Virginia, since the date of filing her petition.

- (iv) Pakistani Courts have not assumed jurisdiction and cannot assume jurisdiction **because Pakistan was not the minors place of residence as envisaged in Rule 6 of West Pakistan Family Courts Rules which requires the place where the parties reside or last resided together.**

Further Arguments

- (i) Pakistani Courts have been conducting custody proceedings in a conservative way respectful of both the due process issues noting Mother's presence in U.S.A. and mindful of Virginia proceedings. This is exactly in conjunction with U.S. Law.
- (ii) The party opposing to foreign jurisdiction must prove that foreign proceedings are inconsistent with USSJA, Virginia Law or policy.
- (iii) That the foreign court did not apply best interest of child standard or
- (iv) The foreign court did not apply a rule of law evidence or procedure so contrary to public policy as to undermine confidence in the outcome of trial.

In the present case Mr. Justice Nisar testified as expert testimony identifying the procedure and pertinent portions of Guardian & Wards Act and other relevant provisions. Expert opinion indicated that Mother would raise custodial issues in Pakistan and welfare of minor will be given prime importance. Rule 6 of West Pakistan Family Courts Rules, 1965 states as under:

"The Court which shall have jurisdiction to try a suit will be that within the local limits of which

- (a) the cause of action wholly or in part has arisen, or
- (b) where the parties reside or last resided together:

Provided that in suits for dissolution of marriage or dower, the Court within the local limits of which the wife ordinarily resides shall also have jurisdiction."

- (v) V.A Code provides that Virginia Court could have jurisdiction if it is a **"convenient forum"**

Mother's Arguments

- (i) With regard to pending proceedings or parallel proceedings in Pakistan according to Sect. 20 – 129 Virginia Code, the Pakistani proceedings do not fall under the term **"pending"**.
- (ii) No Pakistani Court as yet assumed jurisdiction and in fact the very root question which is pending in Pakistani Court is that of **"jurisdiction"**. They have not held that they have jurisdiction. She was not aware of litigation in Pakistan. She only know that her husband had gone to Pakistan. She was not aware of even divorce which she received on the old address of husband **"Bethesda, Maryland"**.

Arguments In Nineteenth Judicial Circuit of Virginia

- Virginia court has got the jurisdiction. It is minor's home town. Khaqan & mother Zahra have significant connections with Virginia, they have lived in Virginia since April 1997. **They have formed religious affiliations in Virginia.** They have family and friends here. Ms. Zahra owns property and Khaqan has been educated two years in Virginia. Similarly these connection provide substantial evidence concerning child's **present and future care**, protection, training and personal relationships the child's teachers, friends and **Religious Mentors** are here.
- In conclusion the court retains jurisdiction. Kr. Khilgi's motion dismissed. Zohra's Motion for attorney's fee is dismissed.

ADJUDGED, ORDERED AND DECREED as follows:

1. **Custody and Visitation:** **A.** The mother shall have custody of the child. The father shall have no rights of visitation at this time. The mother shall have the right to maintain the confidentiality of her residence telephone number, as well as the name and address of the child's school. The mother shall be entitled to the child's important legal papers including his birth certificate, permanent resident alien card, and vaccination record.

B. Either party who intends to relocate his or her residence shall give thirty-day advance written notice of any such intended relocation and of any intended change of address, said notice being given to both the other party and to this Court.

2. **Support:** **A.** A Child Support: (a) The father shall pay to the mother, as child support, the sum of \$ 327 per month beginning December 18, 1997 and to be paid on the 18th day of each month thereafter until further order of this Court. This support shall continue to be paid if the child is: (i) a full-time high school student, (ii) not self-supporting, and (iii) living in the home of the parent seeking or receiving child support, until the child reaches the age of nineteen or graduates from high school, whichever occurs first.

(b) The child support set forth herein was determined by the Court, pursuant to the presumptive amount as set forth in the statutory guideline of Sec.20-108.1 and Sec. 20-108.2 using the following findings and factors:

- (i) Father's gross income is \$1,000/mo, which is based on the minimum wage for full time employment, because the Court found that the father's level of education required an imputation of income over and above the amount the father listed on his Support Guidelines Worksheet. Mother's gross income is \$1,692/mo.
- (ii) One child is to be supported pursuant to this Order. The child's principal residence is with the mother.
- (iii) The applicable guideline is sole custody.
- (iv) The work-related child care costs are: \$400/mo.
- (v) The applicable extraordinary medical costs are: zero.
- (vi) The cost of health insurance for the child is: \$75/mo.
- (vii) The presumptive support, pursuant to the support guideline of Virginia Code \$20-108.1 and 2 is: \$327/mo.

3. **Health Care Coverage:** The mother shall provide health care insurance coverage for the child which is the subject of this Order. Health insurance is not required by this order for a spouse or former spouse. The health insurance carrier which provides the coverage applicable to this order is New England Employee Benefits Group. The policy is provided all or in part as a benefit of the employment of the mother by her employer. Technology Management & Analysis Corporation.

4. **Arrearages:** No support arrearages exist as of the date of this Order.

5. This case is continued to October 13, 1998, for one day, for a trial on the issue of custody.
6. The parties are hereby authorized to conduct discovery pursuant to Virginia Supreme Court Rule 8.25(c).
7. **Attorney's Fees:** The mother is awarded the sum of \$600 for her attorney's fees for this hearing, to be paid by the father within 90 days.

ENTERED THIS _____ DAY OF _____ 1997.

Juvenile & Domestic Relations Judge.