

Shared Parenting: A New Concept towards Gender Equality and Child Welfare in Pakistan

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Abstract

Pakistan's family justice system perpetuates a restrictive and outdated approach, granting non-custodial parents' mere fleeting moments with their children, typically two hours, once or twice a month, within the confines of court premises². This antiquated system neglects the evolving concept of shared parenting, which unequivocally concentrates on the children's welfare. Courts must recognize the paramount importance of minors' welfare, superseding personal law considerations. The International Council on Shared Parenting emphatically recommends default shared parenting arrangements, acknowledging equal parental authority and responsibility. Research unambiguously demonstrates shared parenting's transformative benefits such as mitigating conflict, preventing parental alienation, and fostering healthier relationships. Pakistan's system urgently requires a paradigm shift, adopting shared parenting legislation, establishing comprehensive family relationship centers, and prioritizing the children's best interests above parental control. This revolutionary change can ensure collaborative decision-making and shared care, creating a foundation for lifelong success and happiness for both parents and children.

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² Siddiqi, F. A. (2022). *Shared Parenting, A Sociological Study*. Lahore: Muneeb Book House, pp. 35-117.

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Introduction

The concept of Shared Parental Rights in Pakistan's Child Custody Disputes needs immediate attention amidst rapid social and economic changes, leading to diverse family structures and complex dynamics of our society. With the increasing complexity of family dynamics, reforming the family laws in Pakistan is essential. Currently, Pakistan's legal framework for the custody and guardianship of children assumes a single-party award, determined case-by-case. However, just as divorce grounds changed from fault-finding to joint agreement, it is essential to reexamine the custody and guardianship arrangements. A more nuanced approach, considering each family's unique circumstances, would enable separating parents to collaboratively determine the most suitable custodial arrangement for their children.

Analysis

The judicial attitude in Pakistan towards the guardianship litigation has undergone a significant change. However, the courts still grapple with the notion that a child's wellbeing can be guaranteed by maintaining simultaneous association with both the parents in the absence of an inherent conflict between procuring the best interest. The statutes should be amended to accommodate the concept of joint guardianship, subject to certain conditions being met. I will discuss these in later part of the paper.

Pakistan's family justice system needs to shed its colonial-era mindset and adapt to modern times. With women's roles evolving,

it's time to replace outdated laws³ and focus on collaborative parenting, rather than determining a single 'better parent'.

The time has come to abandon the outdated mindset perpetuated by our justice system since the British era, which assumes one parent is inherently superior to the other in caring for their child. Both the Acts⁴ regulating the family cases in Courts are antiquated statutes that fail to account for the rapid societal evolution in Pakistan. The Pakistani society has embraced new values and concepts, particularly with regards to women's rights and empowerment. Unlike in 1964, many Pakistani women are now career-oriented, financially independent, and assertive of their rights and self-esteem. The standards established in 1890 and 1964, as they were then, are no longer applicable to the litigants of the 21st century, particularly in the urban centers like of Lahore, Karachi, and Islamabad, to name a few.⁵ Therefore, it is essential to shift our focus from determining which parent is superior to exploring how both parents can collaboratively assume responsibility and provide their child with the best possible care and support.

Throughout my legal practice, I have witnessed a disturbing trend in which children are exploited as tools for manipulation in failed marriages. In the heat of emotional confrontations, the child is often held hostage by the parent with physical custody, leading to parental alienation (PA)⁶. Pakistan urgently requires legislative

³ E.g., the Guardian and Wards Act 1890 was enacted almost 135 years ago and in the colonial era. There is a movement in this country where laws are now restated either through amendments or by enacting an altogether a new legislation repealing the old ones. Its one example is the Juvenile Justice System Act, 2018.

⁴ Guardians & Wards Act 1890 & Family Courts Act 1964.

⁵ See the impact of urbanization and rural-urban migration. As per UNFPA Pakistan, almost 50% of Pakistan's population will be living in urban areas up to 2030. See <https://pakistan.unfpa.org/en/topics/migration-and-urbanization>. Last accessed 29 December 2024.

⁶ Siddiqui, Fahad Ahmad, "Children of divorced parents manipulated to give false accounts." *Courting the Law*, accessible online at <https://courtingthelaw.com/2016/10/15/commentary/children-of-divorced->

and judicial intervention to prevent PA and ensure the child's access to both the parents. A solution could be to penalize a parent who intentionally alienate his/her child from the other parent by limiting his/her custody rights. The underlying assumption is that depriving a child of a biological parent's love and guidance is never beneficial.

This article highlights another critical issue that has been overlooked in our jurisprudence: the importance of joint guardianship and joint decision-making authority.

The legal framework governing child custody is intricately linked with guardianship. While guardianship encompasses a comprehensive set of rights and powers regarding a minor's person and property, custody⁷ is a more limited concept focused on the minor's upbringing, daily care, and control. Notably, Pakistani family laws, both secular and religious, fail to provide a clear definition of "custody." In contrast, the Guardians & Wards Act, 1890 (the Act, 1890) defines a "guardian" as an individual responsible for a minor's person, property, or both. Additionally, the Act, 1980 recognizes the concept of a "natural guardian," who is legally empowered to make decisions for the minor. Section 15 of the Act introduces the concept of "joint guardianship", subject to the minor's personal law, although relevant jurisprudence is scarce. Nevertheless, the law permits the appointment of multiple guardians for the same individual, a provision worth considering in light of evolving family structures, particularly in urban areas where both parents often share responsibilities for their child's maintenance, health, and education.

parents-manipulated-to-give-false-accounts/. Last accessed 29 December 2024.

⁷ Badaruddin, M. (1977). Guardianship in South Asia, with special reference to alienation and limitation. (PhD thesis) submitted at the SOAS University of London. Accessible at <https://eprints.soas.ac.uk/33660/1/11010421.pdf>. Last accessed 29 December 2024.

Shared Parenting

The Act, 1890, passed by the imperial legislature, perpetuated the Common Law tradition of paternal supremacy in the guardianship and custody decisions. Although sections 7 and 17 of the Act recognized the child's wellbeing as the utmost concern, yet sections 19 and 25 subordinated this principle to the authority of the father. However, the Family Courts Act, 1964 (the Act, 1964), enacted by Pakistani legislature, marked a significant shift by placing the minor's welfare at the forefront of decision-making, superseding all other factors.⁸

This progression has been further reinforced by our courts paving way for a discussion on the shared parenting and joint guardianship arrangements for separated parents in Pakistan.

In legal contexts, a "guardian" refers to an individual authorized to care for a minor's person and manage their property, unless disqualified by law or fact, in which case the Family Court or legislation may intervene to substitute another guardian. Any person acting on behalf of the minor without legal recognition as a guardian can only bind the minor and their estate through estoppel or demonstration, which can be endorsed or repudiated by the minor upon reaching the age of majority. Terms like "de jure guardian" and "de facto guardian" serve as protective measures for the minor's benefit, operating as public guiding principles rather than indicative of actual legal status or consequences. In the absence or demise of the biological father, or when the parent's interests conflict with those of the minor, the mother or another individual may act in the minor's best interests and bind them within legal regulations. In the case of *Shazia Akbar Ghazali v. Additional District Judge, Islamabad East*⁹, the court clarified the distinction between custody and guardianship, as well as the respective rights and

⁸ Munir, Muhammad Amir, "Family Courts in Pakistan in Search of 'Better Remedies' for Women and Children" (September 1, 2006). *Lawasia Journal*, pp. 191-226, 2006, Available at SSRN: <https://ssrn.com/abstract=1922837>.

⁹ 2021 MLD 817 Islamabad.

obligations of custodians and guardians under the Act. Notably, the term 'custody' remains undefined in the Act, whereas "guardian" is defined under Section 4(2) and embodies the principle of custody, except the guardian court awards exclusive custody to a non-guardian parent. Previous cases have interpreted custody as actual custody (*Mst. Atia Waris v. Sultan Ahmed Khan*¹⁰), actual or constructive possession for protection purposes (*Jumna Khan v. Mst. Gull Ferocha*¹¹), and the right to upbringing as is held in *Sultana Begum v. Afzal*¹². Furthermore, guardianship involves caring for the minor, even without physical custody as is reported in *Bushra Asghar v. Dr. Rehmat Ali*¹³. An examination of case law reveals a significant overlap between the concepts of custody and guardianship, particularly when the guardian also retains care and supervision of the child. But when someone is awarded care and control other than the guardian, the distinction between the two concepts becomes crucial. In such cases, the custodian and guardian are separate individuals, with the guardian maintaining constructive custody for discharging their duties while lacking physical custody. This highlights the distinct responsibilities associated with each role: custody encompasses the daily care and nurturing of a child, addressing their personal and emotional needs, whereas guardianship involves maintaining the child, managing legal transactions on their behalf, and preserving trust-like control over their person and property to fulfill guardian duties.

Traditionally, in cases of parental separation, custody of minor children is generally awarded to the custodial parent (mothers mostly), while the non-custodial parent assumes the role of guardian for the child's person and property (*Mohammad Haneef*

¹⁰ PLD 1959 Lahore 205.

¹¹ PLD 1972 Peshawar 1.

¹² PLD 1988 Karachi 252.

¹³ 2012 MLD 1755.

*v. Abdul Samad*¹⁴). However, this general principle is not final and can be replaced by the child's interest and well-being as the dominant concern under the Act. Sections 17, 19, and 41 of the Act, 1890, clarify the father's inherent right to guardianship¹⁵, even in cases where the mother is awarded custody, and that custody is not a prerequisite for guardianship of the minor's person or property, reliance is placed on *Mst. Ghulam Fatima Alias Shammi Bai v. Chanoomal and another*¹⁶, *Fahimuddin Khokhar v. Mst. Zaibunnisa*¹⁷, and *Mohammad Sadiq v. Mrs. Sadiq Safoora*¹⁸. This emphasizes that the child's welfare takes precedence over traditional roles.

The Supreme Court of Pakistan has laid down that responsibility of maintaining a child lies with the father, and a mother's inability to provide maintenance does not justify depriving her of custody. This principle was first observed in *Mst. Feroze Begum v. Lt-Col. Muhammad Hussain*¹⁹ and later reaffirmed in *Munawar Bibi v. Muhammad Amin*²⁰. These rulings emphasize that a mother's custody rights should not be compromised due to financial constraints, as the father is obligated to provide maintenance for the child.

As noted in the Islamabad High Court's decision in *Ahmad Bilal v. Khurram Javed*²¹ the concept of a minor's welfare is applied differently in custody and guardianship claims. In custody disputes, the court considers a comprehensive range of factors to adjudicate welfare of the minor child. In contrast, guardianship claims operate under the legal assumption that the child's overall well-being is most effectively procured with their biological father as guardian, unless he is deemed unfit, as inferred from the

¹⁴ PLD 2009 SC 751.

¹⁵ Natural Guardianship.

¹⁶ PLD 1967 Karachi 569.

¹⁷ PLD 1968 Karachi 774.

¹⁸ PLD 1963 Lahore 534.

¹⁹ 1983 SCMR 606.

²⁰ 1995 SCMR 1206.

²¹ PLD 2023 Islamabad 83.

combined provisions (Sections 7, 15, 17, 19, and 41 of the Act, 1890)

To gain a deeper understanding of the topic, let's examine the provisions of the Guardians and Wards Act 1890. Section 4(2) defines a "guardian" as an individual responsible for the guardianship of a minor's physical and financial well-being. Notably, the Act defines anyone responsible for a minor's care as a guardian, without explicitly defining "custody" or "custodian." The term "custody" is only mentioned in Sections 12 and 24, which empower the court to require the production of the minor and create interim custody plans pending guardianship claims. There are no provisions in the Act that permit the permanent or semi-permanent award of custody to someone who is not already appointed as the minor's guardian.

Pursuant to Section 17, Chapter [II], of the Guardians & Wards Act, in appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. Additionally, Section 15 permits, appointment or declaration of multiple guardians for a minor, including:

- Joint guardianship of the person or property (Section 15(1))²²
- Separate guardians for the person and property (Section 15(4))
- Separate guardians for multiple properties (Section 15(5))

Although there is limited jurisprudence related to Section 15, the language clearly supports joint guardianship and multiple guardianship arrangements when circumstances require it.

²² *Ahmad Bilal v Khurram Javed*, PLD 2023 Islamabad 83.

In *Zohra Begum v. Maimuna Khatun*²³, the court relied on *Mst. Siddiq un Nisa Bibi v. Nizam uddin Khan*²⁴, which established that when appointing a guardian under the Act *ibid*, the court should consider the minor's personal law but is not bound by it. Instead, the court must prioritize the minor's welfare, even if it means deviating from personal law.

The court in *Zohra Begum* held that the appointment of a guardian should be based on both Mohammedan Law and the minor's welfare, rather than solely on the mother's preferential rights or her marital status.

Unfortunately, our family justice system still relies on outdated concepts like custody, interim custody, and sole guardianship, which arise from a paradigm shift from duties to rights. Internationally, the emphasis has shifted from parental control to children's welfare, highlighting parents' responsibilities. Following the enactment of the UK's Children Act 1989, terms like "custody," "guardianship," and "custody orders" have become obsolete.²⁵ The Hague Conference's 1996 Convention on Parental Responsibility for the Protection of Children marks a significant shift towards a responsibilities-based regime, emphasizing parental responsibility and treating children as individuals with their own needs, rather than mere extensions of their parents.'

Understanding the following two concepts is vital in this context: Joint physical and legal guardianship, with shared parental rights. Joint legal guardianship denotes shared rights and obligations of both biological parents in making decisions about their child's life, including education and upbringing. Having said that, "joint physical custody" involves both biological parents sharing

²³ PLD 1965 Dacca 290.

²⁴ AIR 1932 All. 215.

²⁵ Cheshire, G. C., & North, P. M. (2013), *Private International Law* (14th ed.), Oxford: Oxford University Press, p. 857.

physical care of the child, with equal time and contact, allowing for a balanced and shared nurturing environment.

The International Council on Shared Parenting (ICSP)²⁶ has arrived at certain areas of consensus as under:

- (i) There is increasing agreement among researchers, legal experts, and mental health professionals that shared parenting is the best interest of the child for promoting child's growth and well-being. As such, there is a pressing need for swift implementation of default shared parenting arrangement, backed by full support and endorsement of professional organizations and associations, to ensure its seamless integration into both judicial and psycho-emotional guidelines.
- (ii) The legal standard for parental arrangements should recognize shared parental authority, encompassing joint decision-making power, shared responsibility, and joint authority for nurturing and caring for children, as the default arrangement for both fathers and mothers, irrespective of their residential circumstances. This means enshrining in law the assumption that both parents will share responsibilities and have equal rights in parenting their children, tailoring decisions to the child's individual developmental pace and age.
- (iii) Given that SPA is widely acknowledged as the most effective approach to minimize high parental conflict and prevent initial instances of family violence, there is a strong consensus that its legal and psycho-social implementation should be prioritized to reduce conflict among divorced parents. Furthermore, there is agreement that shared parenting should be particularly

²⁶ In its 2nd conference held at Bonn, Germany, in July 2014.

encouraged and supported by professional organizations and associations for high-conflict families, with the aim of mitigating the negative impacts of conflict on children and families.

- (iv) While shared parenting is suitable for most families, exceptions include situations involving evidence-based findings of family violence and child exploitation. In such situations, shared parenting should be presumptively denied, with the possibility of rebuttal. Future research on shared parenting²⁷ should focus on the intricate dynamics between child custody arrangements, family violence, and child maltreatment in its various manifestations. Additionally, both the research and judicial communities must collaborate to develop laws and guidelines that prioritize preventive measures for confirmed domestic abuse, ensuring the protection of vulnerable children and families.
- (v) Given the growing body of research indicating that by implementing shared parenting, separated families can both prevent parental alienation from happening and address existing cases of alienation, promoting healthier relationships and outcomes, there is a consensus that further investigation is warranted to explore the feasibility of introducing a starting point of equal parenting in situations where parental alienation is a concern.
- (vi) Emphasizing the vital importance of therapeutic support and mediation in facilitating successful shared parenting outcomes, there is a widespread agreement that easily accessible family relationship centers offering mediation, counseling, and support services are crucial, counseling, and other support services are

²⁷ Torres Perea, J. M., Kruk, E., & Ortiz-Tallo, M. (Eds.). (2021). *The Routledge International Handbook of Shared Parenting and Best Interest of the Child*. Routledge.

essential to the demand of a child-centered approach. We recommend that governments invest in and establish extensive family support networks to supplement the introduction of a legal presumption of shared parenting, fostering a collaborative and child-centered approach, ensuring that families receive the necessary support to navigate SPA effectively.

These six consensus statements reflect the latest global research and expert opinions on co-parenting after divorce, aligning with the 2015 Council of Europe Resolution on Equal and Shared Parental Responsibility, suggesting member states introduce shared custody legislation, marking a significant shift towards prioritizing children's best interests through shared parenting. In the wake of divorce, the principle of shared parenting gains paramount importance, as biological parents' obligations towards their children remain unchanged, leading to pivotal concerns around custody, visitation, and guardianship, and the development of innovative legal frameworks, notably joint legal guardianship and joint physical custody, acknowledging the value of dual parental involvement and responsibility in nurturing children's growth and development.

The UNCRC ²⁸comprehensively protects children's inherent rights and freedoms.²⁹ As a signatory, Pakistan is committed to

²⁸ United Nations Convention on the Rights of the Child (1989). It is accessible at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>. Last accessed 29 December 2024.

²⁹ See generally, Justice Project Pakistan, *Policy Brief: Pakistan's Compliance with the United Nations Convention on the Rights of the Child (UNCRC)* (June 2023), available online at <https://jpp.org.pk/wp-content/uploads/2023/06/Pakistan%E2%80%99s-Compliance-with-the-Convention-on-the-Rights-of-the-Child.pdf>. See also <https://www.mohtasib.gov.pk/SiteImage/Downloads/childrights.pdf> and website of the National Commission on the Rights of the Child, accessible at <https://ncrc.gov.pk/about-us-3/>. Last accessed 29 December 2024.

upholding these rights. Applicable law guides the core value that children of separated parents should retain a relationship with both parents, unless a court deems separation necessary and in the welfare of minor.

The rights of the parents were subservient to the welfare of the minor³⁰ and thus it was the duty of the courts to assess and determine a course that would have served the best interest of the minor. Any decision regarding the custody of a child without assessment and determination of the latter's welfare and best interests by taking into consideration the relevant factors and variables cannot be sustainable, nor can the exercise of discretion be lawful. The wellbeing of the child and the latter's best interest is the foundational principle for deciding custody disputes. In order to appreciate significance of the principle governing custody disputes it would be beneficial to highlight the settled law which ought to guide a court³¹.

Conclusion

To conclude, the promotion of Shared Parenting and Joint Guardianship arrangement as a legal and social norm in Pakistan has the potential to revolutionize the way we approach post-separation childcare. By recognizing the inherent value of both parents' involvement in a child's life, we can move beyond the outdated principles of custody and visitation rights and instead

³⁰ Yassari, N., Möller, L.-M., & Gallala-Arndt, I. (Eds.). (2017). *Parental Care and the Best Interests of the Child in Muslim Countries*, The Hague: T.M.C. Asser Press. (<https://doi.org/10.1007/978-94-6265-174-6>).

³¹ PLD 2024 SC 629.

focus on the child's best interests. By embracing shared parenting, we can promote a more collaborative and inclusive approach to childcare, one that prioritizes the child's physical, emotional, and psychological betterment and welfare. As the apex Court has emphasized, the wellbeing of the minor is the guiding principle, and shared parenting offers a promising solution to ensure that their needs are met, even in the event of separation. By working together, we can create a more compassionate and effective childcare system that truly puts the child first.