

**CUSTODY OF MINOR**  
**(A case/comparative study with U.S Laws)**

**BY**

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**FACTS:**

The brief facts of the case are that one Tahir Ali Khilgi and Miss Anne Zahra got married in Pakistan (Sargodha) on March 31, 1989 and thereafter lived in Lahore. On May 3, 1990, the couple got a baby son namely Khaqan Ali Khilgi. Mr. Tahir Ali Khilgi, for further studies went to U.S.A. and later took his wife Anne Zahra and minor son along with him. Disputes arose between the husband and wife in the U.S.A and the wife took her minor child and started living with her real sister in Virginia State, without the consent of Mr. Taher Ali Khilgi who was living in Maryland. Mr. Taheer Ali Khilgi came back to Pakistan for good in July, 1997. He divorced Miss Anne Zahra on July 17, 1997 and filed the "Deed of Divorce" on stamp paper, in the Union Council on this date.

Mr. Tahir Ali Khilgi filed a petition No.478/97 under sections 12 and 25 of the Guardian & Wards Act in the Court of Guardian Judge I, Lahore on September 30 1997. The Guardian Judge dismissed the Petition under Order 7 Rule 11 of C.P.C on 18-02-2004. Mr. Khilji filed an appeal, No. 48/2004, dated 31-03-2004, before the District judge, Lahore which too was dismissed on 24-03-2005. He then filed a Writ petition before the Lahore High Court, Lahore.

In the Lahore High Court Lahore, it was held by Mr. Justice Malik Mohammad Qayyum that under Section 26 of the Punjab Family Court Act 1964, the Government has promulgated West Pakistan Family Court Rules, 1965, rule 6 of which provides that the court which shall have the jurisdiction to try such suit will be that within the local limits of which the cause of action wholly or in part has arisen, where the parties reside or last resided together. The same view was affirmed by the Supreme Court (Justice Munir A. Sheikh) and the case was remanded to the trial court for decision afresh **on the question of jurisdiction**.

Para No.3 of the Supreme Court judgment states that,

“ The judgments of the original court and of the Learned Addl. District Judge show that the question as to first said court was rested with the jurisdiction to entertain the said application was decided under the provisions of Guardian & Wards Act... and not under the provisions of the West Pakistan Family Courts Act, 1964 and the Rules (West Pakistan Family Courts Rules, 1965) framed there-under. Para No.5 of the Supreme court judgment provides;

“ 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 it 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 and Wards Act therefore, the question of territorial jurisdiction is to be decided under the said Act and the rules framed there-under and the Guardian & Wards Act for that matter has no relevancy. 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.” (Emphasis added)

Again in the second round of litigation the Guardian Judge and the District Judge gave concurrent judgments to the effect that the question of territorial jurisdiction in Pakistan and motion in U.S.A should be decided after considering Rule No.6 of the West Pakistan Family Courts Rules 1965.

### **U.S. LITIGATION**

While Mr. Taher Ali Khilji filed petition for custody of minor before the Guardian Judge-I, Lahore under Section 18 & 25 of the Guardian & Wards Act on Sept 30, 1997, Miss Anne Zahra (mother) also filed a petition for custody **“In the Juvenile and Domestic Relations District Court of Fairfax County, Virginia U.S.A. on October 7 1997.”**The Court decided that the mother shall have custody of the child. The father should have no right of visitation. The mother shall keep the legal documents, passport of the minor, etc. The father shall provide financial child support. The petition later was dismissed on July 8, 1998 for lack of jurisdiction.

Mr. Khilgi filed an appeal against the above stated decision. The case was heard by **“NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA(Fairfax County)”**. The Judge states that “ This matter came before me on Mr. khilgi’s Motion to Dismiss the Child Custody Petition for lack of Jurisdiction. The Motion was dismissed on July 1, 1999. The case was then appealed by Mr. Khilgi in Circuit Court, Fairfax, which also decided the matter in favor of Miss Anne Zahra on the point of Jurisdiction as well as on the point of welfare of the minor.

The Law called **“Uniform Child Custody Jurisdiction Act (UCCJA) 1968”** is applicable in Virginia, U.S.A. It was adopted by the Commonwealth of Virginia **Section 20-125 to 146 is the controlling authority before the court for determination of the question of jurisdiction.** On July 1, 1999 **“NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA”** decided the case in favor of Anne Zahra. The relevant parts of the decision are reproduced below.

“Child custody jurisdiction is governed by the **Uniform Child Custody Jurisdiction act (“UCCJA”)**. Under the UCCJA, Virginia courts may retain jurisdiction under No. 20 -126 of the **code of Virginia**. However, the commonwealth must decline jurisdiction under Va.Code NO.20-129 and may decline jurisdiction under Va. Code NO. 20-130 or Va. Code NO. 20-131. the general policies of the UCCJA extend to the international arena under No. 20-146 of the code Virginia”.

“The Commonwealth retains jurisdiction over this child custody dispute under Va. Code NO. 20 – 126, which states:

- A.** A court of this Commonwealth which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
1. This Commonwealth (1) is the **home state** of the **child** at the time of **commencement of proceeding**...[or]
  2. It is in the best interest of the child that a court of this Commonwealth assume jurisdiction because (1) the child and his parents, or the child and at least one contestant, have a significant connection with this commonwealth, and (2) there is available in this commonwealth substantial evidence concerning the child’s present or future care, protection, training, and personal relationships...”

Under Va. Code. NO. 20-126(A)(1), the commonwealth is the home state of Khaqan. Home state is defined in Va.Code. NO. 20-125 as **“the state in which the child immediately preceding the time involved lived with his parents, a parent, [or] a person acting as parent, for at least six consecutive months...”**. On April 6, 1997 both Ms.Zahra and Khaqan moved from Maryland to Virginia. On October 7, six months after the move to Virginia, Ms.Zahra filed for custody of her son in the Juvenile and Domestic Relations Court of Fairfax County, thus fulfilling the six month requirement.

In addition, this court retains jurisdiction under Va. Code §20-126(A)(2). Both Khaqan and Mrs. Zahra have significant connections with Virginia: they have lived in the Commonwealth since April 1997; they formed religious affiliations in the Commonwealth; they have family and friends in the Commonwealth; Mrs. Zahra own property in the Commonwealth; and Khaqan has been educated for two years in the Commonwealth. Similarly, these connections provide “a substantial evidence” concerning the child’s present and future care, protection, training and personal relationship because the child’s teachers, friends, and religious mentors are here.”

Mr. Khilji filed a petition for custody in the Guardian and Wards Court in Pakistan on September 30, 1997, eight days before Ms. Zahra filed her petition in the Fairfax Court Juvenile and Domestic Relations Court. Mr. Khilji’s petition in the Guardian and Wards Court was later dismissed for lack of jurisdiction. This decision was upheld in Pakistan District Court. The Lahore High Court, however, reversed this decision and remanded the petition to the Guardian and Wards Court for an evidentiary hearing. The Supreme Court of Pakistan stayed the remand. As of this date, there is no pending petition in Pakistan. Therefore, Va. Code &20-129 is inapplicable at this time. If, however, the stay is lifted and a Pakistan court determines that it has jurisdiction to determine child custody, I will stay this proceeding until I communicate with the appropriate Pakistani court as required under §20-129 (e) Code of Virginia.

**The Commonwealth may decline jurisdiction if it is an inconvenient forum under Va. Code &20-130. The determining it is the interest of the child that another state assume jurisdiction.** The court should take into account the following factors:

- I. If another state is or recently was the child's home state;
- II. If another state has a closer connection with the child and his family or with the child and one or more of the contestants.
- III. If substantial evidence concerning the child's present or future care, protection, training, and personal relationship is more readily available in another state; and
- IV. If the parties have agreed on another forum which is no less appropriate.

**The Commonwealth is not an inconvenient forum under sec. 20-130 of the Code of Virginia. Khaqan has lived in the United States since 1995, and in the Commonwealth since 1997; therefore Pakistan was not recently the child's home state.** Similarly, most of the evidence of the child's current well-being is located in Virginia. In regard to "closer ties," it is clear that Khilji has ties to Pakistan. Khilji was born and raised there for the early portions of his life, and Pakistan continues to have strong cultural influence on his life. In addition, Khilji has numerous family members in Pakistan. On balance, however, Khaqan does not have closer connections to Pakistan that he does to the United States. Khaqan have spent the last four years of his life in the United States, with the last two years spent in Virginia. Khaqan has numerous family members in Virginia. Furthermore, his school friends and religious institutions have been located in the Commonwealth for the last two years.

### **CONCLUSION:**

"In conclusion, the Court retains jurisdiction over this child custody dispute under Va Code sec. 20-126, and does not decline jurisdiction under either Va, Code sec. 23-130 or Va. Code sec. 201-31. At this time Va. Code sec. 20-129 is inapplicable because there is no pending petition in Pakistan. If a petition in Pakistan proceeds, I will stay the child custody determination until I communicate with the appropriate Pakistani court as required under sec. 20-129 of the Code of Virginia. I do not address the possibility of Mr. Khilji's consent to jurisdiction in the Juvenile and Domestic Relations Court because I have found that this court already retains jurisdiction under the LCCJA. For the above reasons, Mr. Khilji's Motion to Dismiss the Child Custody Petition for Lack Jurisdiction is denied. Ms. Zahra's Motion for Attorney's Fees is also denied."