

Child Visitation Right of Non-Custodial Parents in Islamic law, International law & the Pakistan Legal System

(A comparative and Analytical study)



Accession No. TH15356

Researcher:

NAZIA BIBI

(17-FSL/LLMMFL/F11)

Supervisor:

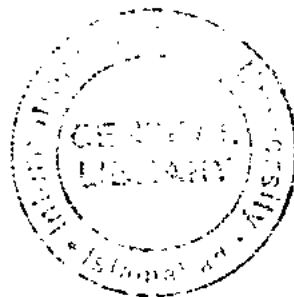
Ms. RUKHSANA MIR

Faculty of Shari'ah & Law

INTERNATIONAL ISLAMIC UNIVERSITY,

ISLAMABAD

2015



MS
346-015
NAC

K
H. Hill

AUTHOR'S DECLARATION

It is hereby declared the author of the study has completed the entire requirement for submitting this research work in partial fulfillment for the degree of LLM (Muslim Family Law). This thesis in its present form is the original work of the author expecting those which are acknowledged in the text. The material included in the thesis has not been submitted wholly or partially for award of any other academic certification than for which it is being presented.

NAZIA BIBI

Reg. No. 17-FSL/LLMMFL/F11

APPROVAL SHEET

“Child Visitation Right of Non-Custodial Parents in Islamic law, International law & the Pakistan Legal System”

(A comparative and Analytical study)

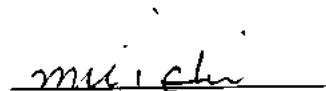
By

NaziaBiBi

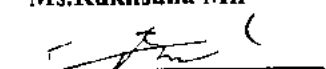
Reg. No. 17-FSL/LLMMFL/F11

This thesis has been accepted by the Faculty of Shari’ah & Law, International Islamic University, Islamabad, in partial fulfillment of the degree of LLM (Muslim Family Law).

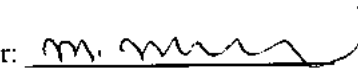
Supervisor:


Ms. Rukhsana Mir

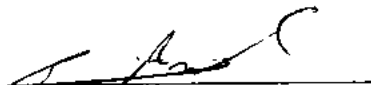
Internal Examiner:


Mrs. Samina Bashir

External Examiner:


Dr. Muhammad Munir

Dated: 20/10/2015



Chairperson

Department of Shari’ah & Law
International Islamic University,
Islamabad- Pakistan



Dean

Faculty of Shari’ah & Law
International Islamic
University, Islamabad-Pakistan



BISMILLAH IR-RAHMAN IR-RAHIM

"(I START) IN THE NAME OF GOD, MOST GRACIOUS, MOST MERCIFUL"

CERTIFICATE

It is certified that Ms. NaziaBiBi, Reg. # 17- FSL/LLMMFL/F11 has completed her thesis titled “**Child Visitation Right of Non-Custodial Parents in Islamic law, International Law and the Pakistan Legal System (A comparative and analytical study)**” under my supervision. I am satisfied with the quality of student’s research work and allow her to submit her thesis for further process as per IIUI rules and regulation.

mirchi
Ms.Rukhsana Mir
Research Supervisor

ACKNOWLEDGEMENT

Praise to the ALLAH! The major source of researcher's inspiration, who "taught man that which he knew not". He enlightened the researcher more and more and made her able to accomplish this task successfully.

The researcher would like to extend her sincere and deepest appreciation and gratitude to her supervisor Ms. Rukhsana Mir, for providing guidance, encouragement, wisdom and thoughtful criticism throughout her studies, who kindly supervised the whole work of the thesis and provided consistent assistance.

Researcher owes a debt of deep appreciation and gratitude to her parents, specially her late father who taught her to believe in Allah and herself and who prayed and gave her every possible support at all stages for the completion of this research work. He will be missed forever at every stage of her life. They deserve to be credited for all she has achieved in life and what she aspires. The researcher is very thankful to her siblings specially her brother who has encouraged and motivated her to carry the task.

Deep appreciation is expressed by the researcher to her teacher Mr. Mohsin Akhtar Kayani a tremendous mentor for her and for his valuable assistance and encouragement during different phases of her study and data analysis, generous help, knowledge and patience she would forever remain indebted. He has enriched her ideas by his practical advice. She is not only thankful for his insightful comments and encouragement, but also for the hard questions which incited her to widen her research from various perspectives.

Researcher is indebted to gratefully and lovingly acknowledge the support and solace that her friend who is more than a sister, Syeda Mehmoona Khushbakht, offered in all these years for

researcher's study. She contributed in her own way in work and gave her interminable moral support to accomplish this task.

Researcher is thankful to her friend as well as sister, Zahida Abdullah for her great assistance and patience during the work.

Researcher would also like to thank and convey her respect and reverence to all the faculty members who contributed in educating the researcher. She also places on record, her sense of gratitude to one and all, who directly or indirectly, have lent their hand in this venture.

May Allah Almighty bless all of them for their support. Ameen!

NAZIA BIBI

ABSTRACT

This research attempts to deliberate on the child visitation laws in classical Islamic texts and the International Law with special focus on the development of child visitation laws in Pakistan. For classical Islamic law, the research refers to the laws as stated in the compendiums of *the Fiqh of Sunni* four schools of thought as well as decisions of the Holy Prophet(ﷺ), his companions and views of leading Muslim jurists.

For the purpose of this study, Pakistani law upon child visitation is provided and section 12 of the Guardian & Wards Act 1890 is critically analyzed, further the area is highlighted which is need to be amended in the light of the judgments decided by the learned courts of Pakistan.

The child visitation laws of the UK, USA and India are described in detail to ascertain what mechanism they have adopted to resolve the parenting issues. The study is based on the judgments decided by their respective courts and provisions of law. Beside this child visitation right also provided and protected in International law. The Hague Convention on the Civil Aspect of International Child Abduction, the Convention on the Rights of Child and regional convention, e.g. Convention on contact concerning Children is discussed in detail. The gray areas of conventions needed to be fulfilled are also highlighted in the light of International case laws worldwide.

Effort is made to bring out similarities, differences and developments in child visitation laws in Islamic Law, international law and the Pakistani law. In the end it is suggested that uniform laws can be formulated for the Pakistan, in the light of Islamic principles and contemporary practices of other countries e.g. UK, USA and India.

Table of Contents

ACKNOWLEDGEMENT	ix
ABSTRACT.....	xi
INTRODUCTION TO THE RESEARCH.....	1
1.1 Statement of the Problem	4
1.2 Research Questions	4
1.3 Objectives of Research.....	4
1.4 Hypothesis.....	5
1.5 Significance of study	5
1.6 Literature Review	6
1.7 Methodology	8
CHAPTER 1	10
1.6.1 Concept of Child Visitation.....	10
a) Residential parent.....	12
b) Nonresidential parent	12
1.6.2 Current arrangements in visitation patterns.....	13
1.6.3 Visitation and Children’s Well-being.....	14
1.6.4 Correlates of Visitation Patterns.....	15
1.6.5 Legal trends in child visitation decisions in domestic violence cases	16
1.6.6 Types of child visitation	18
a) Supervised Visitation	18
b) Unsupervised Visitation	18
c) Restricted Visitation.....	18
d) Virtual Visitation.....	19
e) Graduated Visitation.....	19
1.6.7 Problems in child visitation	20
i. Parental Conflicts	21
ii. Parental satisfaction.....	22
1.6.8 Child visitation interference by custodial parents	24
1.6.9 Types of Visitation Interference.....	24
1. Acute Interference	25
2. Parental Alienation Syndrome.....	26
3. Divorce Related Malicious Mother Syndrome.....	27
CHAPTER 2	29

2.1	Concept of Child Visitation in Islam.....	29
2.2	Views of Jurists.....	31
2.3	Relocation of child.....	35
2.4	Child Visitation Law in Pakistan.....	37
2.5	Judgments on child visitation.....	39
2.6	Analysis of Sections 12/25 of Guardian & Wards Act 1890 in the light of Judgments.....	52
CHAPTER 3		59
3.1.	Child Visitation Laws of UK, USA and India	59
3.2.	Child visitation law in United Kingdom.....	60
3.2.1.	Who can apply for contact order?	61
3.2.2.	Contact activity conditions and directions of the court.....	62
3.2.3.	Speedy disposal of the contract disputes.....	64
3.3.	Child visitation law in United States of America.....	65
	States' legislation upon child visitation.....	67
3.3.1.	Florida	67
3.3.2.	Virginia.....	70
3.3.3.	South Carolina.....	70
3.3.4.	Ohio.....	74
3.4.	Uniform Child Custody Jurisdiction and Enforcement Act (the UCCJEA).....	76
3.5.	Child visitation laws in India.....	78
3.6.	Doctrine of Welfare of Child.....	81
CHAPTER 4		86
4.	International Conventions.....	86
4.1.	Hague Convention on the Civil Aspects of International Child Abduction.....	86
4.1.1	Child abduction linked with Visitation.....	89
4.1.2	Weaknesses	90
4.2	Protocol between High Courts of Pakistan and the United Kingdom	99
4.3	Convention on the Rights of the Child.....	102
ANALYSIS		104
CONCLUSION.....		108
RECOMMENDATIONS		111
BIBLIOGRAPHY		115

INTRODUCTION TO THE RESEARCH

Family is the primary and essential unit of social organization; its proper constitution and functioning is therefore necessary for the health and happiness of society. This state is attained through the proper upbringing of children. Children are a blessing of *Almighty Allah* upon us as *Almighty Allah* said in His holy book:

*“And Almighty Allah hath given you wives of your own kind, and hath given you, from your wives, sons and grandsons, and hath made provision of good things for you. Is it then in vanity that they believe and in the grace of Almighty Allah that they disbelieve? ”!*¹

He has ordered us to fulfill the rights of the children. Primarily, children have two rights: to receive love and to receive proper upbringing.²As the Holy prophet (ﷺ) said; narrated By *Ayub Bin Musa*:

*“Parents can provide nothing their offspring's better than proper upbringing”*³

Both these rights are equally important. Love to the child enhances compassion and proper upbringing enhances righteousness. While both the parents have to make an effort to enhance both these qualities only with a joint effort by both parents fulfilling their respective roles can the children be balanced and fulfill a meaningful role in society. In case of divorce or

¹ Abdullah Yousuf Ali, *The Holy Qur'an* (Pakistan:DawahAcadmy,n.d), 16:72.

²Tanzeel al-Rehman, *Majmooa-e-Qawaneen-e-Islam* (Islamabad: Islamic Research Institute,1976), 877.

³ Muhammad Muhsin Khan, *Sunan al-Tirmidhi* (Al Riyadh:Darussalam,n.d) Book of Al Adab, Hadith no.1952.

separation of parents, Although *Shari'ah* has addressed the rights of custody and visitation; children still suffer the lifelong consequences of their parents' disputes and subsequent divorce when there is a dispute and no understanding between the parties.

Islamic law grants a right of child visitation to the non-custodial parents and gives all means and measures that within what capacity and extent one can exercise this right. Islamic law too gives preference to the child's best interest.⁴ Mother and father both conclusively play vital role for the betterment of their children, for that purpose interference by one custodial parent in visitation right of non-custodial parent is strictly prohibited by *Shari'ah*.

There are different types of visitation e.g. overnight visitation, supervised, unsupervised or voluntary and graduated visitation. Generally, the party having the rights of custody uses the child as a weapon to punish the other party by depriving them of visitation rights.⁵ This is un-Islamic and also harmful to the child. This is especially true in the many cases where the court order simply says the noncustodial parent is entitled to reasonable or reasonable and liberal visitation.

Sometimes, a parent's abuse of visitation will be sufficient to change the visitation, or even the custody order. For example, in a case where the custodial parent continually interferes with the

⁴Muhammad Tahir Mansoori, *Family Law in Islam: Theory and application* (Islamabad:Shari'ah Acadmy,2009),198.

⁵James J. Gross, *A Legal Guide to Protecting the Best Interests of Your Children* (Naperville, IL, USA: sphinx publisher, 2004), 63.

back to court and seek a change in the order to be more specific about when visitation will occur.⁶

In granting visitation, there is no set rule on how much visitation to grant. How often the visitation will occur, and under what circumstances, depends on the particular circumstances of the parents and the child. In the past, grandparents have not had any right to visit their grandchildren, but legislatures and courts began to increasingly recognize the importance of this relationship to the child. Some states also allow other third parties, such as aunts and uncles, to file for visitation under certain limited circumstance.⁷

The legal factors and guidelines are intentionally broad and generalized because the parent-child relationship is not so easily captured on paper with set times, places, and amounts. Yet, to some extent, that is what the law of child custody and visitation is about, the effort to reduce the intangible relationships between parent and child to some defined level of affection and support could be made. This is why it is important, whenever possible, to try to work out an agreement that recognizes that both of parents want the best for their child and that provides the maximum flexibility under the law to allow them to succeed in being good parents and observing what is in the best interests of their child.

⁶Mary L Boland, *Your Right to Child Custody, Visitation, and Support*(Naperville, IL, USA: sphinx publisher,2004), 79.

⁷ *Ibid*, 27.

1.1 Statement of the Problem

There must be proper legislation upon child visitation right of non-custodial parents in Pakistan through amendment in section 12 of Guardians & Wards Act, 1890, stipulations regarding clear terms, time and venue of visitation in the light of international law and the Islamic concept of child visitation.

1.2 Research Questions

- 1 Does the Pakistani law is compatible with the Islamic concept of child visitation?
- 2 What is the international position of the child, visitation rights in perspective of the UK, USA and Indian laws?
- 3 Whether Pakistani child has been granted with due visitation rights in terms of welfare of children?
- 4 Whether the state of Pakistan is in compliance of International conventions (CRC), treaties and practices in terms of child rights?

1.3 Objectives of Research

- 1 To highlight the area of tension between the Islamic concept of child visitation, modern legal system of Pakistan and International law with the perspective of the UK, USA and Indian child visitation laws.
- 2 To compare and analyze the Pakistan's child visitation laws with UK, USA and Indian child visitation laws.
- 3 To highlight the gray areas in child visitation law of Pakistan and to make visitation

laws more clear and comprehensive on the basis of judgments available the, recommendations of the Council of Islamic Ideology of Pakistan and comparison made with different countries.

1.4 Hypothesis

1. Child visitation law of Pakistan is compatible with Islamic law of visitation and International law.
2. Child visitation law of Pakistan is not compatible with Islamic law of visitation and International law.
3. Child visitation law of Pakistan is partially compatible with Islamic law of visitation and International law.

1.5 Significance of study

This work would be expected to open new horizons to the readers, to explore answers about the almost every query in their minds regarding the terms and conditions of visitation and its schedule. This research is about to spread awareness about the standard laws of child visitation right, its importance and to explore the differences between custody and visitation of children, and it would be a generous attempt to highlight the compatibility between Islamic law of child visitation, International law, and Pakistani law.

1.6 Literature Review

1. *Hidayah* is written by Al Marghinani one of the *Hanafi* jurists. It is an interpretation of Muslim laws, which is translated by Charles Hamilton. This is a guidebook of *Hanafi Fiqh*. Charles Hamilton was mainly concerned with Laws such, Zakat, Marriage, Divorce, Sales, and other transaction so this book does not deal with Prayer, Fasting and *Ibadāh* issues in general. In this book right of custody is discussed in detail, but the concept of visitation is not highlighted in the details. Only a concept of relocation of child by the custodial parent is being restricted to safeguard the visitation right of non-custodial parent.
2. *Majmooa-e-Qawaneen Islam* by Dr. Tanzeel-ur-Rehman, the writer discussed and elaborated the concept of custody in the light of Holy *Qur'ān* and hadith of the Holy Prophet (ﷺ). He also discussed the laws of different countries about custody and gave his recommendations in the light of cases decided by the superior courts of Pakistan. But in this book the difference between custody and visitation of children has not been made. The writer did not explore the concept of visitation clearly.
3. *Al-Fiqh al-Islāmī wa Adillatuhū* by Dr. Wahbah al-Zuhaylī, in this book the writer discussed the details about custody and visitation. He has elaborated the concept of visitation in the light of the views of four major Sunni schools of thought. There has not been made suggestions that how a proper and comprehensive law could be made in the light of the opinions of these four schools which might be applicable in all Muslim states.
4. *The Islamic Law of Personal Status* by Jamal J. Nasir. In his book he told the contribution to the general understanding of an area of law that is of specific significance to the lives of many millions of people of the Islamic faith throughout the

world. In his book writer has given brief information about personal law, which also include the custody and access right of non-custodial parent.

5. ***Family law in Islam*** by Dr. Muhammad Tahir Mansoori, this book discussed the custody in the light of the verses of the *Holy Qur'an* and quoted so many *Ahadith* to clear the concept of custody in Islam, further, this book enumerates period of custody, persons entitled to custody, qualification of a custodian and laws of different Muslim countries upon child custody. This book is a comprehensive source of knowledge about child custody, but, it does not provide child visitation which is an essential element to be considered while granting child custody. However, it provides the basic principle, while granting child custody and visitation which is "The best interest of the minor".
6. ***Family Law*** by P.M Bromley. This book is concerned with legal rights and applications created an affected by the relationship of husband and wife and of parents and child. Professor Bromley deals with the ways in which these relationships can be brought into existence or changed for example, by marriage, divorce or adoption. Consideration is given to such matters as personal protection, custody and access to the children, financial relief and family property. But in this book concept of visitation/access is not described in detail as it is silent about parenting plans manner to enforce these plans in the family courts.
7. ***A Legal Guide to Protecting the Best Interests of Your Children*** by James J. Gross, the writer discussed in detail about custody and visitation in the light of case laws, he also gave visitation schedules, elaborated different types of visitation and highlighted related legislations. But he did not elaborate the measures for applicability of these schedules; neither highlighted any penalty in the case of non-fulfillment.

8. *Your Right to Child Custody, Visitation, and Support* by Mary L Boland, this book explains the procedure for obtaining custody and factors which usually courts keep in front while awarding custody and visitation. It also gives details about visitation schedules and also explained in detail the “best interest standard”. But did not tell how this standard would be determined?
9. *Women and Children* by Mamta Rao, this book is consisting two parts. Part 1 highlights the problems faced by women, the laws to safeguard their interests and the judgments given by various courts. The other part of the book deals with the rights of children, because they are a national asset. In this book various conventions and committees formed for the rights of children are also mentioned. But this book is silent about specifically custody and visitation issue.
10. *Guardian and Wards Act 1890*, Section 12 of the Act tells briefly about visitation, but it is too vivid and not clear. However, it could be used as a basic tool for further legislation.
11. *Family Courts Act 1964*, the schedule of the act, although too brief on the issue, but provides a base for further legislative and enhancement.

1.7 Methodology

This research is a descriptive and comparative research based on primary and secondary sources. Research based on different books and articles. The primary sources that are the Holy *Qur’ān* and *Hadīth* books and classical books secondary sources are used along with primary sources, i.e. Encyclopedias, Dictionaries, research articles, law journals, books and internet and Acts and statutes of Pakistan and other countries with whom the comparison is made in the

research.

The researcher looked into the books, journals, articles, etc. to gather information for technical and general analysis. Moreover the lawyers and judges have been consulted. Concept and principles of child visitation are elaborated from the basic books of Fiqh.

CHAPTER 1

1.6.1 Concept of Child Visitation

In a divorce or separation of spouses, one parent is awarded custody of child, and the noncustodial parent is usually awarded visitation rights in a divorce decree. Visitation rights can be seized if evidence is provided that proves it is in the best interest of child not to visit the parent.⁸ Visitation rights may determine by the agreement of the parties or by a court order. If the court concludes that parents will be cooperative, it may not issue a detailed visitation schedule.⁹ This means that parents must amicably work out reasonable terms and time that work best for both the parents and child.

Initially, children generally experience emotional turmoil, including a deep sense of sadness, hurt, worry and fear of losing their safe haven. The younger the children at the time of divorce, the greater the short-term impact and the more they tend to blame themselves for the divorce. The emotional trauma becomes a form of immense adversity for the young minds. Many do not have the language to express the emotional turmoil and also may not possess the mental capacity to work out the crisis of a family break-up.¹⁰

⁸ Olive M Stone, *The Child's Voice In The Court of Law*(Tronto:Butterworth& Co,1982),89.

⁹Spanier G & Glick P, "Mental instability in the United States: some correlates and recent changes", *Family Relation* 8:31(1981), 329-338.

¹⁰Kasmani Siti Sohanah, "World views and Resilience in children of Divorced families", *Asia Pacific Journal Of social work and development* 11:1(2001),39.

Divorce or separation brings a lot of changes in the living arrangement of the children. These children face confusion and frustration, worsened when both parents continue to talk badly about each other. In cases where child support from the father is wanting, the financial stability of the single-parent household is adversely affected.¹¹ The basic needs of the children may then be compromised when the families fall into poverty. The stress of managing the household chores by the lone parent often necessitates that older children share the load of supervising the younger children and managing household responsibilities. Adjusting to the additional responsibilities can be one area of difficulty with the children becoming inevitably prettified in some instances.¹²

Different terms are used for custody and visitation in different countries, e.g. in UK custody is termed as “residence” and visitation as “contact”¹³ whereas In USA visitation is termed as “access”.¹⁴ In Texas custody is termed as “possession”, the custodial parent is called “managing conservator” and the noncustodial parent is called “possessory conservator”¹⁵ while in Pakistan the term visitation is used in the schedule of Family Courts Act 1964.¹⁶ These visits are

¹¹Koch M & Lowery C, “Visitation and the non-custodial father”, *Journal of divorce*8:2(1984),47-65.

¹²Sohanah,Op.Cit, 40.

¹³Helen Rhoades & Susan B Boyd, “Reforming Custody Laws: A Comparative Study”, *International journal of Law, Policy & Family* 18:119 (2004), 28.

¹⁴Alexander S, “Influential factors on divorced parents in determining visitation arrangements”,*Journal of Divorce* 3:3(1980), 223-239.

¹⁵<http://www.lanwt.org/txaccess/visrights.asp>accessed on 08-07-2014.

¹⁶Family Courts Act 1964 (Schedule).

sometime managed and supervised by a third person through an order of a court. First of all, here is necessary to differentiate between residential and nonresidential parents.

a) Residential parent

Residential parent is that parent with whom the children are staying in the majority of the time. This term has started to be used for the implementation of the joint custody since both parents have the custody of the child, but usually the child lives in the house of one of them the majority of his time.¹⁷

b) Nonresidential parent

The non-residential parent is that parent who has been granted with the child custody, but only accommodates the child in his house for limited periods of time.¹⁸

The issue of visitation primarily focuses on fathers and their children. It seems that most divorcing parents are able to settle on visitation arrangements without much legal assistance and that they tend to consider the child's and non-custodial parent's needs more heavily than the custodial parent's needs or the quality of the parental relationships.¹⁹ Although visitation is the main focus of this discussion, it is important to note that visitation patterns are only one aspect of paternal involvement and the father child relationship. Another important factor includes the range of activities in which the father participates, parenting skills and parent's specific

¹⁷Eleanor E Maccoby & Robert H Mookin, "Dividing the Child: Social and Legal Dilemmas of Custody", *Journal of marriage and Divorce* 92:279 (1992), 87.

¹⁸Spanier G & Glick P, "Mental instability in the United States: some correlates and recent changes", *Family Relation* 8:31(1981), 329-338.

¹⁹Alexander, Op.Cit, 223-239.

behaviors.

1.6.2 Current arrangements in visitation patterns

Frequency, duration and regularity are important aspects of visitation arrangements. It seems that many fathers spend a lot of time with the children immediately following the separation, but that time together quickly decreases post-divorce.²⁰ Using a representative sample of children, ages of 7 to 11, Furstenberg and Nord, reported that 52% of non-custodial fathers had not seen their children in the past year. Only 16% had seen their children weekly and 17% had seen them biweekly or monthly. It seems that a regular, bimonthly pattern of visitation is maintained by many fathers, for the year or two following the divorce, but that the frequency and regularity of visitation then diminish. The pattern of telephone contact is similar to visitation.²¹

Although contact with non-residential fathers diminishes following divorce for many children, for some families, as the frequency of visitation decreases, the length of duration increases.²² In addition, there is evidence from research on a non-representative sample that children in step families (either father or the mother had remarried) see their father regularly for lengthy periods of time.²³ Jacobson found that the average time children spent with the nonresidential father

²⁰ Hess R & Camera k, "Post-divorce Family relations as mediating factors in the consequences of divorce for children", *Journal of social issues* 35:4(1979),79-96.

²¹ Furstenberg F F Jr & Nord C W, "Parenting apart: Patterns of childrearing after marital disruption", *Journal of Marriage and the Family* 47(1985), 893-904.

²² Trop W, "An exploratory examination of the effects of remarriage on child support and personal contacts", *Journal of Divorce* 7:3(1984),57-73.

²³ Jacobson D, *Family type, visiting patterns, and children's behavior in step family, A linked family system* (New York:Gullford:KPasley & M Thinger-Tallman, 1987), 257-272.

ranged from 32 to 41 hours every two weeks. Thus, there is variation in the amount of contact maintained by nonresidential fathers and their children, and also frequent, regular contact is not the norm, variability in visitation patterns should not be disregarded.

1.6.3 Visitation and Children's Well-being

Research on children's wellbeing highlights the importance of continuing relationships with both parents following divorce.²⁴ Acknowledging that visitation frequency is an inadequate indicator of father involvement, kurdek used four indicators of paternal involvement to investigate the relationship between involvement and children's wellbeing: visitation frequency, duration and regularity, and the regularity of child support payments.²⁵ He found that 76% of significant correlations indicated that father involvement was associated with higher levels of children's wellbeing. He also found that this relationship occurred more often when parental conflict was lower than when it was high.

Peterson and Zill measured the children's assessment of the parent and child relationship and the parent's assessment of dimensions of children's behaviors such as depressed/withdrawn, antisocial, and impulsive/hyperactive and two types of schools related problems. Children who reported a positive relationship with both parents had fewer behavior problems than other children.²⁶ Generally, children who reported a positive relationship with their neither parent had

²⁴Wallerstein J & Kelley J, *Surviving the breakup: how children and parents cope with divorce*(New York: Basic Books,1980), 123-153.

²⁵Kurdek L, "Custodial mothers' perceptions of visitation and payment of child support by non-custodial fathers in families with low and high levels of perspiration interpret conflict", *Journal of Applied Developmental Psychology*1(1986),307-323.

²⁶Paterson J&Zill N, "Marital disruptions, parent child relationship, and behavior problems in children", *Journal of Marriage and Family*48(1986),295-307.

the most severe problems, whereas children who reported a positive relationship with only one parent were in the middle. These findings thus reinforce the importance of father involvement following divorce.

1.6.4 Correlates of Visitation Patterns

The majority of research on visitation has been conducted with the purpose of identifying important correlates of frequency and regularity. The strongest correlates have been indicators of quality, of family relationships following the divorce.²⁷ Specifically, several researchers have found that parental conflict is related negatively to visitation regularity and the total amount of time the non-custodial parent spends with the children.²⁸ Another important relationship variable includes the mother's attitude, the children's understanding of the father's situation, the quality of the father child relationship, the father's level of involvement in child rearing before separation and the regular payments of child support.²⁹

Evidence on the relationship between remarriage and visitation has been mixed. Koch found that visitation was most frequent when the father was single and least frequent when both former spouses had remarried.³⁰ On the other hand, Lowery found that the time spent together was greater in families in which the child lives with a remarried mother and visits a remarried

²⁷Edward S Rue, Lawrence M Berger, Patricia R. Brown et al, "The Stability of Shared Child Physical Placements after Divorce: Evidence from Wisconsin", *Institute for Research on Poverty, University of Wisconsin Madison, January (2007)*.

²⁸Ahrons C, "Predictors of Paternal Involvement Post Divorce, Mothers' and fathers' perceptions", *Journal of Divorce*6:30(1983),55-69.

²⁹ Ibid.

³⁰Koch, Op.Cit, 49.

father than in families in which the child lives with a remarried father and visits a single mother. When fathers had remarried the length of visits increased while the frequency decreased.³¹ And yet others have found no relationships between marital status and visitation. It is clear that this is an area for further research that should take into consideration various living and marital arrangements, as well as use multiple indicators of parental involvement.

1.6.5 Legal trends in child visitation decisions in domestic violence cases

Over the past 200 years, the bases for child custody decisions have changed greatly. The patriarchal doctrine of father's ownership of children gave way in the 1920's and 30's little preference for one parent or the other obtaining custody. When given such broad discretion, judges tended to award custody to mothers, especially of young children.³² The mother-child bond during the early tender years was considered essential for children's development. In the 1970's, "the best interests of the children" became the predominant guideline and presumably was neutral regarding parental rights.³³

Exposure to domestic violence was not originally included in the list of factors used to determine the child's best interest. States recently came to recognize that domestic violence needs to be considered in custody decisions.³⁴ While a growing number of states specifically

³¹Lowery, Op.Cit, 50.

³² Fine M A & Fine DR, "An examination and evaluation of recent changes in divorce laws in five western Countries: A critical role of values", *Journal of Marriage and the Family*56(1994), 249-263.

³³Stone, Op.Cit, 90.

³⁴Cahn N R, "Civil images of battered women. The impact of domestic violence on child custody decisions" *Vanderbilt Law Review*44(1991), 1041.

mention domestic violence as a factor to be considered, most of them allow wide discretion and do not give it special weight. It is simply one additional factor when considering the best interests of the child.

By the end of the 1997 legislative session, 13 states had adopted the Model Code of the Family Violence Project of the National Council of Juvenile and Family Court Judges.³⁵ These statutes specify that there is a "rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence".³⁶ Statutes now address other concerns related to custody and the recent proliferation of legislation seems likely to continue.

Recent case law makes it easier for battered women to relocate far away from their abusers.³⁷ Unfortunately, courts may apply psychological pressures that keep women tied to their abusers. "Friendly parent" statutes ask courts to assess each parent's willingness to cooperate when making custody decisions.³⁸ Despite their reasonable reluctance to co-parent, battered women may end up being labeled "uncooperative," with an increased risk of losing their children. Along with legal changes, training and resource manuals for judges and court managers have recently been published, including guidelines for selecting custody evaluators and guardian *ad litem*.³⁹

³⁵Family Violence Project, National Council of Juvenile and Family Court Judges. (1998). Family violence: Legislative update (Vol. 3).

³⁶Family Violence Project, National Council of Juvenile and Family Court Judges, Op.Cit, 33.

³⁷DunfordJackson, National Council of Juvenile and Family Court Judges, manual on custody practices for battered women.

³⁸Zorza J, "Friendly parent" provisions in custody determinations", *Clearing house Review* 26(1992), 921-925.

³⁹A guardian *ad litem* is a person appointed to defend an action or another proceeding on behalf of a minor or a person under a disability (Osborn's Law Dictionary by John Burke).

1.6.6 Types of child visitation

Parent-child visitation allows parents who do not have physical custody to see their children on a regular basis. Types of visitation include:

a) Supervised Visitation

Supervised visitation means that another responsible adult must be present for the duration of the visit. Depending on the circumstances, the courts may allow the non-custodial parent to select an individual to serve as the supervisor, such as a grandparent or any other person. In other cases, the parent and child must meet at a specified location so that an appointed social worker or court-appointed designee can supervise the visit.⁴⁰

b) Unsupervised Visitation

Parents with unsupervised visitation are generally permitted to take their children to their own homes or may enjoy an outing during their scheduled visitation. Sometimes limitations are being placed on unsupervised visitation; for example, a non-custodial parent may be asked to visit his infant child at the mother's home until the child is accustomed to taking a bottle.⁴¹

c) Restricted Visitation

Custodial parents may restrict visitation for non-custodial parents for several reasons, including medical concerns, age of a child, or because a non-custodial parent may be

⁴⁰Saunders Daniel G, "Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations" *National resource Centre on domestic violence* (1998), 1.

⁴¹ Boland, Op.Cit, 70.

institutionalized.⁴²The court will order restricted visitation according to circumstances of the case.

d) Virtual Visitation

Virtual visitation offers the promise of an additional alternative way for parents to maintain contact with their children when distance makes personal visits impossible or impracticable. Virtual visitation typically takes place over the internet and may include video chatting, instant messaging, and email. If the current visitation rights are no longer desirable for either parent, the parent should seek a modification of visitation rights by starting a case in family court. Additionally, a parent should communicate openly about possible changes to the visitation schedule with the child or the other parent.⁴³

e) Graduated Visitation

Sometimes the Court may set up a graduated access schedule. This means that the access parent has very limited time with the child at first, but gradually has more access over time.⁴⁴A graduated schedule gives your child a chance to get to know and trust the access parent. The Court may use a graduated schedule if your child has not spent much time with the access parent or if you separated when your child was very young.

⁴² Gross James, *A Legal Guide to Protecting the Best Interests of Your Children* (Naperville, IL,USA: Sphinx publisher,2004),120.

⁴³ Sarah Gotterfried, "Virtual Visitation: The Wave of the Future in Communication between Children and Non-Custodial Parents in Relocation Cases", *Family Law Quarterly* 36:3(2002), 477.

⁴⁴Daniel,Op.Cit, 25.

1.6.7 Problems in child visitation

Many children have little contact with their non-custodial fathers, and contact generally declines over time.⁴⁵ Yet contact is crucial if nonresident fathers want to maintain relationship to their children, and fathers who visit their children every week are likely to establish different relationships than fathers who rarely visit.⁴⁶ Geographic distance, time since the separation, and remarriage of one or both parents associate with declining father contact. Factors positively associated with further contact include higher parental socioeconomic status, older children, and children born within marriage, joint custody, and a positive Co parental relationship, including the mother's attitudes toward the father as a parent.

Some studies report that sons enjoy more frequent and longer visits than daughters, but others find little or no association.⁴⁷ Different types of father involvement tend to be correlated. Fathers who maintain social contact with their children are more likely to provide economic assistance and to play a role in child rearing decisions.⁴⁸ Such finding discounts the

⁴⁵ KingVellary, "Nonresident father involvement and child well-being: Can dads make a difference?", *Journal of Family Issues* 15(1994), 78-96.

⁴⁶ Seltzer J A & Bianchi S M, "Children's Contact with Absent Parents", *Journal of Marriage and the Family* 50(1988), 663-677.

⁴⁷ Bowman M E & Ahrons C R, "Impact of legal custody status on fathers' parenting post-divorce", *Journal of Marriage and the Family* 47(1985), 481-488.

⁴⁸ Seltzer J A, " Relationships between fathers and children who live apart: The father's role after separation", *Journal of Marriage and the Family* 53(1991), 79-101.

notion that fathers who are unable to provide one source of involvement compensate by offering another. Rather, they suggest that there is a subset of fathers who are particularly concerned about their children

i. Parental Conflicts

Many parents have a moderate to highly conflictual relationship after divorce, and visitation is a common source of conflict.⁴⁹ However, conflict tends to decline over time. A typical pattern is for couples to disengage within a year or two of the separation.⁵⁰ Even when fathers maintain ties to their children, they often engage in parallel parenting and have little to do with their ex-spouse. Restricted communication with the mother may be a way to avoid conflict.⁵¹ Fathers may begin to avoid their children if it means having a fight with the child's mother, or mothers may try to reduce visitation to avoid hostile interactions with the father. Several studies have found this negative correlation between conflict and contact; many others find little or no association. Indeed, several studies based on national data report a positive association between father involvement and parental conflict.⁵²

Contact provides increased opportunities for conflict. If a father, for example, has completely disengaged from the family, not only will there be no father-child contact, but the lack of contact with his ex-wife will preclude conflict. Some amount of contact must exist before

⁴⁹ Arendell T, *Mothers and divorce: Legal, economic, and social dilemmas* (Berkeley: University of California Press, 1986), 84.

⁵⁰ Furstenberg F F Jr & Cherlin A J, *Divided families: What happens to children when parents part* (Cambridge, MA: Harvard University Press, 1991), 250.

⁵¹ *Ibid.*, 4.

⁵² Amato P R & Rezac S J, "Contact with non-resident parents, interparental conflict, and children's behavior", *Journal of Family Issues* 15(1994), 191-207.

conflict can occur. In this sense, some conflict may be "good," in so far as it shows a father's continued involvement as a parent.

ii. Parental satisfaction

Parental satisfaction is likely to be linked to the viability of cooperative parenting arrangements. Satisfied fathers may be more likely to stay involved with their children; given that some fathers report that the emotional pain involved in visitation causes them to decrease their contact with their children. In addition, because of the mother's role of gatekeeper, her satisfaction might have implications for her support of a father's involvement. Advocates of fathers' rights claim that men are locked out of the family and the mother's interference with visitation is reported to be a problem with many nonresident fathers.⁵³ Yet studies based on custodial mothers find little evidence that mothers frequently deny or obstruct fathers' visitation.⁵⁴

Few studies have directly explored the level of father involvement in which mothers are most satisfied. They found that divorced mothers who experienced the least economic hardship and had the most parenting support from ex-husbands were the most satisfied. It appears that in some families, father contact is welcomed and leads to feelings of satisfaction, but in others it

⁵³ Furstenberg F Jr, "Dealing with dads: The changing role of fathers", In P. L. Chase-Lansdale & J. Brooks, *Escape from poverty: What makes a difference for children?* (1995), 189-210.

⁵⁴ Arendell T, *Mothers and divorce: Legal, economic, and social dilemmas* (Berkeley: University of California Press, 1986), 84.

creates a source of dissatisfaction..⁵⁵ It is unknown which family type is more common.

Fathers who visit are more likely to pay child support, which can ease some of the economic hardships of divorce for women and children.⁵⁶ Evidence supporting this assumption, however, has been limited. Most studies based on large national surveys have found little association between father visitation and child well-being. Researchers have begun to examine the contexts or conditions under which visitation may promote child well-being.⁵⁷ However, few studies have reported strong or consistent effects. Studies examining the direct effect of conflict on child well-being often do report a negative association, although this effect is often not particularly strong.⁵⁸ Again, not all conflict may be "bad." Indeed, most intimate relationships involve some conflict. Conflict can vary in its content, frequency, intensity, process, and resolution, as well as in the extent to which children are directly exposed to it.⁵⁹

Finally, the level of satisfaction may be an important context that potentially moderates the influence of visitation or parental conflict on child well-being. Perhaps it is when mothers are satisfied with high levels of father visitation that children benefit the most. Conversely, children may be worse off if mothers are dissatisfied with the father's involvement, particularly if

⁵⁵ Furstenberg, Op.Cit, 211.

⁵⁶ Nord C W&Zill N, "Noncustodial parents 'participation in their children's lives: Evidence from the Survey of Income and Program Participation" Vol. II: Synthesis of literature (1996) (DHHS-100-93-0012).

⁵⁷ King Valarie & Heard Holly E, " Nonresident Father Visitation, Parental Conflict, and Mother's Satisfaction: What's Best for Child Well-Being?", *Journal of Marriage and Family* 61:2(1999),387.

⁵⁸ McLanahan, S Seltzer, J Hanson T & Thomson E, "Child support enforcement and child well-being: Greater security or greater conflict?", Paper presented at the Conference on Child Support Reform, Arlie House, VA. (1991).

⁵⁹ Cummings E M & Davies P, *Children and marital conflicts: The impact off Family dispute and resolution* (New York: Guilford Press, 1994), 184.

conflict over this ensues. This suggests that in addition to possible direct effects on child well-being, interactions may exist among visitation, conflict, and satisfaction.

1.6.8 Child visitation interference by custodial parents

Child visitation interference may be acute or may represent chronic disorders, such as Parental Alienation Syndrome and Divorce Related Malicious Mother Syndrome. In certain cases, visitation interference is accompanied by vicious behaviors toward the noncustodial parent, including violence and violations of law.⁶⁰ It is assumed that frequent visitation with the noncustodial parent is an important right to both parent and offspring. The overwhelming majority of custodial parents are female.⁶¹

Unfortunately, the desire for ongoing and liberal visitation between child and nonresidential parent has frequently not kept pace with actual practices. In some cases, visitation interference has been associated with malicious, unlawful acts against the non-custodial parent of such children. On rare occasions, a parent may actually kidnap the child. The problem of child visitation interference has yet to be adequately addressed in the national media.

1.6.9 Types of Visitation Interference

Before discussing the specific types of visitation interference, it is important first to describe "noninterference." Here, a child's parents divorce but the child is not estranged from either parent. The residential parent (typically the mother) encourages the child and the nonresidential parent to interact frequently and to be fully involved in each other's life. The child visits

⁶⁰King Valarie and Heard Holly E, " Nonresident Father Visitation, Parental Conflict, and Mother's Satisfaction: What's Best for Child Well-Being?", *Op.Cit*, 385.

⁶¹TurkatDaniel, "Child Visitation Interference In Divorce", *Clinical Psychology Review* 12:8(1994),737.

frequently with the nonresidential parent, speaks on the phone with the parent whenever needed or desired, and enjoys the benefit of that parent involvement in school, extracurricular, religious, and other activities.

Unfortunately, it is becoming increasingly apparent that millions of children and parents are suffering from the problem of child visitation interference. From the clinical and legal literature, there appear to be at least three types of situations related to child visitation interference: (1) acute interference; (2) Parental Alienation Syndrome;⁶² and (3) Divorce Related Malicious Mother Syndrome.⁶³

1. Acute Interference

The custodial parent who engages in acute interference has no systematic or devious plan for ongoing disruption of the relationship between child and nonresidential parent. Rather, the custodial parent intermittently or transiently denies visitation either through direct action (e.g., informing the nonresidential parent that his or her visitation is being denied) or passively (e.g., the nonresidential parent arrives to meet with his or her child and neither the custodial parent nor the child are at home). Such instances of child visitation interference are typically associated with anger at the nonresidential parent for any matter (e.g., lack of payment of child support), poor advice from a friend, or other reasons (e.g., abusive behavior by the father toward the

⁶² Gardner R. A., *The parental alienation syndrome and the difference between fabricated and genuine child sex abuse* (Cresskill, NJ: Creative Therapeutics, 1987), 220.

⁶³Turkat I D, "Divorce Related Malicious Mother Syndrome", *Journal of Family Violence*14:8(1987), 738.

custodial mother.⁶⁴

2. Parental Alienation Syndrome

In certain cases, child visitation interference is a direct result of a custodial parent suffering from a parental Alienation Syndrome.⁶⁵ Here, the custodial parent engages in a variety of direct and indirect methods designed to alienate the child from his or her nonresidential parent. The result is that the child becomes preoccupied with unjustified criticism and hatred of the nonresidential parent.

Gardner (1989) has outlined four factors that he believes contributes to the development of Parental Alienation Syndrome. These include: (1) brainwashing, (2) subtle and unconscious parental programming, (3) factors arising within the child, and (4) situational factors.

Gardner uses the term brainwashing to refer to “conscious acts of programming the child against the other parent”.⁶⁶ Examples include accusing the father of being an “adulterer” and “abandoner.” More subtle attempts to program the child against the nonresidential parent include comments such as, “there are things I could say about your father that would make your hair stand on end, but I’m not the kind of person who criticizes a parent to his children”.⁶⁷

Clearly, statements such as this create much negative emotion in the child. In regard to

⁶⁴ Shepard N, “Child-visiting and domestic abuse. *Child Welfare*”, *journal of marriage and divorce* 6:71(1992), 357-367.

⁶⁵Turkat, Op.Cit, 740.

⁶⁶ Gardner, Op.Cit,233.

⁶⁷ Gardner R A,“*Family evaluation in child custody mediation, arbitration, and litigation*” (Creskill, NJ: Creative Therapist,1989), 239.

visitation, the child in such a home becomes astutely aware of the mother's desire for the child to hate the father.

Finally, a variety of situational factors contribute to the development of the syndrome as well. For example, a child who views a sibling being punished for having expressed positive feelings towards the father will learn quickly not to express such feelings openly.⁶⁸ A child who observes the mother verbally abuse the father may declare an emotional preference for the mother for self-protection purposes.⁶⁹ Gardner notes that Parental Alienation Syndrome varies in degree from case to case. While the overwhelming majority of adult cases are female, he believes that 90% of all custody battles reveal some aspects of the Parental Alienation Syndrome.

3. Divorce Related Malicious Mother Syndrome

Some cases of chronic visitation interference go beyond attempts at alienating a child from a parent. From a variety of clinical and legal cases, Turkat has identified the Divorce related Malicious Mother Syndrome. The specific criteria for this disorder can be seen as follows

The disorder is characterized by the mother:

- (1) Attempting to unjustifiably punish her divorcing husband;
- (2) Interfering with the father's visitation and access to the child; and
- (3) Engaging in a variety of malicious acts towards the husband, including lying and violations of law.

⁶⁸Turkat I D, "Questioning the mental health expert's custody report", *American Journal of Family* 7:1(1993),175-179.

⁶⁹Gardner,Op.Cit,241.

Turkat provides some dramatic examples of the kind of behavior engaged in by individuals suffering from Divorce Related Malicious Mother syndrome: burning down the house of the ex-husband; falsely accusing the father of sexual abuse; manipulating mental health professionals to testify in court that the divorcing husband is in need of therapy (even when the mental health professional has never met the father); manipulating a secretary at a school to participate in kidnapping the child etc.⁷⁰ Divorce Related Malicious Mother Syndrome is a serious disorder. Turkat has noted that such individuals rarely see themselves as having a problem, are adept at manipulating others in the campaign against the father, and are skilled fabricators. The classification, etiology, and treatment of such cases is unknown.

⁷⁰Turkat, Op.Cit,180.

CHAPTER 2

2.1 Concept of Child Visitation in Islam

In Islamic law the term used for visitation is “*Zayārah*”⁷¹ which means to see or visit. “*Zayārah al-walad*” denotes the visitation of child by noncustodial parent. The Muslim jurists stated that it is the father’s right to see his child if the child is in the mother’s custody, and that he should not be prevented from visiting him.⁷² But they differed as to the time frame within which he should visit him.

The *Hanbalis* referred the matter to custom (al-‘Urf), such as visiting him once a week. The jurists pointed out that after divorce, the husband becomes a stranger or non-Marian with his ex-wife, so attention must be paid to that. If he visits the child in his mother’s house, he should not stay for too long, and it is essential that he should not be alone with his ex-wife. She may prevent him from entering her house, but she should bring the child out to see him. If the child falls sick, the father should not be prevented from visiting him. Thus, each person should be given their due rights.⁷³

It is not permissible for mother to deprive the father of seeing his child and vice versa, rather she must allow him to see him and visit him, because that is *haraām*, as it is a call to sever ties

⁷¹Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmi wa Adillatuhu* (Damascus: Dar al-Fikr, 1984), 730.

⁷²Asaf A Afyze, *Outlines of Muhammadan Law* (New Delhi: Oxford University Press, 1949), 98.

⁷³Zuhaylī, *Op.Cit*, 730.

of kinship. *Almighty Allah* says (interpretation of the meaning):

“Would you then, if you were given the authority, do mischief in the land, and sever your ties of kinship?”⁷⁴

“Such are they whom Almighty Allah has cursed, so that He has made them deaf and blinded their sight”⁷⁵

If mother is afraid that the child may be influenced by some of his father’s bad attitudes, this may be remedied by raising him well and directing him properly, without speaking ill of the father or distorting his image in the child’s mind.⁷⁶

If the wife leaves the marital home or the couple becomes separated by divorce, for example, and they have a child or children, it is not permissible according to *Sharī’ah* for one of them to prevent the other from seeing or visiting their children because Almighty Allah has enjoined upholding ties of kinship, as He says (interpretation of the meaning):

“Worship Almighty Allah and join none with Him (in worship); and do good to parents, kinsfolk...”⁷⁷

In case father has the custody of the child, he is not allowed under *Sharī’ah* to prevent the

⁷⁴ AL- Qur’ān(47:22)

⁷⁵ AL- Qur’ān (47:23)

⁷⁶ Hammudah Abd al-Ati, *The Family Structure In Islam*(American Trust Publication,nd),234.

⁷⁷ AL- Qur’ān (4:36)

mother from visiting the child. As according to hadith:

“If anyone separates a mother and her child, Almighty Allah will separate him and his loved ones on the Day of Resurrection.”⁷⁸

These were the Shari rulings on this issue, the mother should beware of resorting to the courts of man-made law to deny the father, his right to see and visit his children, although she has right to go to court to prevent him from wronging and harming her or the child, or taking her child away from her.

2.2 Views of Jurists

Visitation is the time the children spend with each parent when physical custody is shared, or the time they spend with the noncustodial parent when one parent has physical custody.

Under the *Sharī'ah*, no *hadīna* or no mother may prevent the father from seeing his child in her custody. Nor shall she be compelled to send it to his home, but shall be ordered to bring the child to a place where the father can see it.⁷⁹ Nor can the father to whom the child has been handed over bar the mother who has lost her right or has terminated its custody, from seeing it but, again he shall not be compelled to send it to her residence, but shall be ordered to bring it to a place where she could meet it.⁸⁰

⁷⁸Tirmīdhī, Op.Cit,1204.

⁷⁹AbulAinainBadran, *Huquq al-Awliādfi al-Sharī'ah al-Islāmiyyah*(Alexendria:1981), 82.

⁸⁰ Ibid, 85.

Child visitation right of non-custodial parents is fixed by the *Sharī'āh* but there is a difference of opinion between *fuqahā* upon the duration of visitation.

According to *Hanafts* when child is in the custody of mother, father has right to visit the child and take her/him to a place where he can spend the whole day with the child. And when he is in custody of father, or when his period of custody with mother has over after fosterage, the mother has the same right to visit the child and may take the child to the place where she can visit whole day. The maximum time to visit is once in a week. The maternal aunt is like the mother, she too has a right to visit the child as the mother can but, she can visit once in a month.⁸¹

According to *Malikīs*, mother has right to visit her minor child daily and major child once in a week. Similarly the father has the same right to visit his child when he is under age of upbringing. When age of education and upbringing is over and the child is in the custody of the mother, it is upon father to take care of the child, contact him regularly and ask about his studies and routine affair.⁸²

According to *Shaafīs* if a mature child chooses his father as custodian, the father cannot prohibit him to visit his mother. However father can forbid his daughter to visit her mother because it's more convenient for a mother to come out of home and visit her instead of a daughter. The father cannot forbid mother to meet her child, whether girl or boy because it

⁸¹Muhammad Ibn Ahmad Al-Sarakhsi, *Al-Mabsut*(Cario:Matba'at al Sa'adah,1322 AD),4,193.

⁸²Muhammad AlāuddīnHaskafī,Trans. B.M. Dayal,*Al-Durr al-Mukhtār*(Lahore:law Publishing Company,n.d),2.

breaks the ties of kinship, but she cannot stay too long in the house of the father. If father does not like to come to his home, he will send the child out of home so she could meet the child out of the home.⁸³

The mother can meet the child daily if her house is near to the house of father otherwise she can visit her child after two or three days. And if a son or daughter is sick, the mother has prior right of nursing because mother is most kind hearted and more patient than father towards her children. She can nurse them at the house of father if he agrees, if he does not, she can take them to her house for nursing. If she nurses the child in the house of the father it should be taken care that they should not meet in isolation.⁸⁴

According to *Hanabills* if a mature child chooses his father as custodian, he will remain day and night in the custody of the father and he would not forbid mother to meet or nurse her child. And if he chooses his mother, he will stay with her at night and will spend the whole day with father for better education and upbringing. However daughter will be in custody of father after the age of seven years till marriage and no one from parents will prohibit another to visit her during custody with one parent. And when daughter is sick, her mother has prior right of visitation and nursing her at the house of the father or at any other appropriate place. Habitually son visits her mother and daughter is visited by a mother once in a week.⁸⁵

⁸³Ibn-Abidin, *Radd al-Mukhtār* (Quetta: Matba'ah Majidiya, 1982), 2, 885.

⁸⁴Zuhaylī, *Op.Cit*, 740.

⁸⁵Ibid, 750.

The *IthnaAshariShia* school maintains that the mother shall retain her right to access to the child, even if she does not suckle it or loses her right to its custody.⁸⁶

The visitation right according to laws of Muslim countries is secure for both the parents under the following articles;

Art.148(5) of Syrian Penal Code:

“Each parent shall have the right to see children entrusted to the custody of the other periodically at the place where the ward lives, and if this is disputed, the judge shall order such right to be secured and the method to put it into effect forthwith without any need to an order by the trying judge. Any person who objects to access or the method thereof shall refer to the court. Any noncompliance with the judge’s order shall render the offender liable to the sanctions of Article 482 of the Penal Code.”⁸⁷

Art.66 Tunisian Code of Personal Status:

“If the child is under the care of one parent, the other parent shall not be prevented from visiting and supervising it. Said the other parent shall incur the expenses of the child travelling to visit her or him if she or he asks for such a visit.”

⁸⁶Shaikh Abdul Karim Rida Al-Hilli, *Al Ahkam al Jaafariyyafi al-Ahwal al-Shakhsiyya : Jaafri Provisions on personal Status* (Baghdad:Muthana Library: Cairo,1947AD), 101.

⁸⁷ Article 482 of the Syrian Penal Code reads as follows: “The father, mother or any other person who does not comply with a judge’s order, by refusing or delaying to bring in a minor under 18 years of age, shall be liable to imprisonment for three months to two years and a fine of S.£ 100.00.”

Art.111 Moroccan Family Code:

“If the child is in the custody of one parent, the other shall not be prevented from seeing it and following its conditions. If the other parent asks for the child to be taken to visit him or her, this request shall be granted for once a week at least, unless the judge rules otherwise in the interests of the child.”

Under article 20 of the *Egyptian Act* No. 25/1920 as amended by Act No.100/1985, both parents, and in their absence grandparents have the right of access to the minor. If it is difficult to reach an amicable arrangement, the judge shall arrange for access, provided that it shall be at such a place as to spare the child any psychological stress. The access order shall not be executed forcibly, but should be the person entrusted with the custody of minor refuse to carry out the order without a reasonable excuse, he (she) shall first be warned by the judge, and, on repeating the offence, the judge may issue an enforceable order of passing custody provisionally to the next in line for the right thereto, for a period set by the court.⁸⁸

2.3 Relocation of child

A mother cannot remove with her child to a strange place. If a divorced woman is desirous to move with her child out of a city and go to her native place, where the contract of marriage was executed, in this case her removal is lawful because the father is considered as having also

⁸⁸Egyptian Act No. 25/1920,Article 20.

undertaken to reside in that place.⁸⁹ The prophet (ﷺ) has said: “whoever marries a woman of any city is thereby rendered a Denizen of that city”⁹⁰; and hence it is that if an alien were to come into the Muslim territory, and there to marry an infidel subject, she has also become an infidel subject.⁹¹

If a divorced woman be desirous of moving with her child to a place which is not the place of her nativity, but in which her marriage contract was executed, she is not at liberty to do it.⁹² She may take her child because where a marriage contract is executed in any place, it occasions all the ordinances thereof to exist and have force in that place in the same manner as sale amounts to a delivery of the article sold in the place of sale and the woman’s right to the care of her children is one of the ordinances of the marriage whereof she is entitled to keep her child in the place where she was married.⁹³ But if they be so near that the father may go to see his child and return the same night, there is no objection to the wife going to the other place with the child, but if her removal from city to the village would be injurious to the child, as he would be liable to acquire low manners and mean sentiments of villagers; whereof a woman is not at liberty to carry her child from a city to a village.⁹⁴

⁸⁹Zuhaylī, *Op.Cit*, 740.

⁹⁰Burhānuddīn Marghīnānī, *Al-Hidāyah*, Trans. Ch. Hamilton (London: S.G Grady, 1870), 139.

⁹¹Marghīnānī, *Op.Cit*, 140.

⁹²David Pearl, *A Textbook on Muslim Law* (London: Croom Helm, 1979), 24.

⁹³Zuhaylī, *Op.Cit*, 738.

⁹⁴Jamal J Nasir, *The Islamic Law Of personal Status* (U.S.A: Kluwer Academic group, 1990), 148.

Thus the Islamic law protects the visitation right of non-custodial parent by restricting the removal of the child by the custodial parent from the place where the custodial parent usually visits the child.

2.4 Child Visitation Law in Pakistan

Child custody and visitation issues are worldwide and every state has enacted respective laws to overcome child custody and visitation disputes. In Pakistan the basic law for governing child visitation is section 12 of The Guardian & Wards Act 1890. Section 12 of the Act as follows;

“ Power to make an interlocutory order for production of minor and interim protection of person and property”

1. The court may direct the person, if any, having the custody of a minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.
2. If the minor is a female who ought not to be compelled to appear in public the direction under subsection (1) for her production shall require her to be produced in accordance with the customs and manners of the country.
3. Nothing in this section shall authorize;
 - a) The court to place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any; or
 - b) Any person to whom the temporary custody and the protection of property of a minor is entrusted to dispossess otherwise than by due course of law, any person

in possession of any of the property.”⁹⁵

The definition of term visitation rights does is not mentioned in the Guardians and Wards Act, 1890. But according to Black's Law Dictionary visitation or visitation rights mean in family law, “*visitation refers to non-custodial parent's right of access to his child*”;⁹⁶ while non-custodial parent is responsible for the care of child during visits. In a marriage dissolution or custody action, permission is granted by the Court to a non-custodial parent to visit the child or children.

Ordinarily an application for permanent custody of a minor under Section 25 of the Guardians and Wards Act, 1890 is accompanied by an application under Section 12 for interim custody of minor. While deciding applications under Sections, 25/12 of the Guardians and Wards Act, 1890 a guardian judge lays down a visitation schedule by which a parent whose application for interim or permanent custody, having dismissed is granted visitation rights to meet his or her minor child once or twice a month for one or two hours in or outside the Court.⁹⁷ The application under Section 12 is decided on the basis of prima facie evidence available on record with a guiding factor of the welfare of the minor. Whereas the application under Section 25 of the Guardians and Wards Act, 1890 is decided after taking down evidence of the parties and recording finding on a single or main issue whether it is in the interest and welfare of the minor that the petitioner is entitled to the permanent custody of minor or, in whose custody welfare of

⁹⁵The Guardian & Wards Act, 1890, Section 12.

⁹⁶ Black's Law Dictionary.

⁹⁷KhawajaArshadMobeenAnwari, *The Manual Of Family Laws* (Lahore: Khyber Law Publisher, 1981), 281.

the minor lies.

After fixation of visitation schedule pragmatically in order to streamline it and have a close watch and monitor of visitation rights by the guardian judge a meeting sheet or ParchaMulaqaat is also drawn up which contains following particulars:--

- a) Title of case;
- b) Name of party / parent to produce the minor (s);
- c) Name of party / parent to meet the minor (s);
- d) Name(s) or number of minor(s);
- e) Venue/place of meetings;
- f) Number and days of periodic of meetings in a month;
- g) Time and duration of periodic meetings.⁹⁸

After chalking out a detailed schedule, both the parties are directed to follow the schedule with keeping in mind the welfare of the minor. In Guardian & Wards Act there are certain lacunas which are need to be fulfill in the light of judgments decided by the learned courts.

2.5 Judgments on Child Visitation

I. Khalid Mahmood VS. Additional District Judge (Riaz Ahmad Khan) Islamabad(2011 CLC 889)

In this case court awarded the custody of the child to the father keeping in mind the prime consideration of the welfare of the child. The marriage was dissolved on the basis of *khula*. A compromise was effected between the parties and the petitioner (mother) handed over custody

⁹⁸Munir Mughal, *Manual of Muslim Family Laws*(Pakistan: Muneeb Book House,2009), 50.

of minor to the father and also agreed that she in the future would not demand custody of the minor. On the basis of said compromise decree was passed. Thereafter the mother filed petition for the custody of the minor under section 25 of Guardian and Wards Act and also contracted a second marriage during this period. The learned Senior Civil Judge accepted the application and ordered that custody of the minor be handed over to the applicant. The father filed an appeal, but the appeal was dismissed. The father filed writ petition. Whereas Honorable High Court set aside the judgments of two courts below and custody of the minor was handed over to the father. He decided the case on the following ground;

- Minor is a special child and needs special treatments. These treatments require huge expenses which the mother cannot provide and the father has been providing all medical facilities to the minor.
- Secondly the mother has contracted second marriage with a stranger who is not related in any way to the minor. Under section 352 of Muhammadan Law, Mother has the first right to the custody of the minor but she loses this right if she contracts second marriage and the custody of the minor goes to the father.⁹⁹

There is no doubt that in appointing the guardian of the minor paramount consideration for the court should be the welfare of the minor. In this regard custody of the minor is required to be given to the mother even if she has contracted a second marriage, but in that case the onus would shift to the mother to prove that the father is not a person entitled to the custody of the minor. The reason in that case must be sound and convincing, e.g. if the father is reputed to be of bad character, of unsound mind, criminal, etc. if no such evidence against the father is

⁹⁹Khalid Mahmood VS. Additional District Judge Islamabad, 2011CLC,889.

available then the mother on second marriage would lose the right to the custody of the minor.¹⁰⁰ The welfare of the minor is the paramount consideration in each and every case to decide custody and visitation right and even custody may be awarded to either party despite of second marriage if the court determines that it is in the best interest of the child. Mere second marriage is no ground of terminating custody order.

II. Mst. Muhammad Jan Vs. District Judge, Attock before Jamila Jahanoor Aslam (2010 MLD Lahore 42)

The respondent after the death of her husband filed petition under section. 491 Code of Criminal Procedure for recovery of the minor, which with the statement of the minor that he would prefer to live with his paternal grandmother was dismissed. Respondent later on file petition under S.7 of the Guardian & Wards Act 1890 to appoint her as guardian of person and property of the minor. This again was dismissed with the statement of the minor in favor of his grandmother. Respondent filed an appeal against the judgment and decree, however, having been accepted, and it was directed to hand over custody of the minor to the mother. Grandmother had impugned said order in constitutional petition.¹⁰¹

The petition was decided in favor of the mother and custody was handed over to the mother on the ground that the minor was brainwashed to the extent that he abhorred his real mother and was making up stories of her having inflicted physical violence on him even in the court, which was abnormal. Grandmother of the minor had not adhered to the visitation schedule as

¹⁰⁰P M Bromley, *Family Law*(United Kingdom:Butterworth& Co.,1985),395.

¹⁰¹Mst. Muhammad Jan Vs. District Judge, Attock,2010 MLD Lahore,42.

determined by the Guardian Court and was teaching the minor how to lie and hate. Danger to the child's life was not only physical, but it was also mental. The extent of the mother's sacrifice for her son that despite being a young woman she had not remarried after the death of her husband.

Moreover, under Islamic law the custody of paternal grandmother was subservient to the custody of the mother.¹⁰² Furthermore, what had to be taken into consideration in each and every stage of litigation involving minors and their custody is the welfare of the minor and the welfare of the minor in the case lay with his real mother. The Order of custody can be terminated on the ground of brainwashing of children or teaching bad to them.

III. Umar Farooq V. KhushbakhtMirza and Others (PLD2008Lah 527)

The petitioner filed an application under section 25 of the Guardian & Wards Act, 1890 for custody of two minors. An application under section 12 of the Guardian & Wards Act 1890 was also filed for interim custody of the minors. Guardian judge chalked out a schedule of meeting of the petitioner with the minors. According to this schedule the petitioner was directed to meet the minors from 1:00 p.m. to 2:00 p.m. on first and last Saturday of each calendar month in the court of Guardian Judge. The petitioner has also objected upon the venue of meetings in the court premises and wanted to meet the minors in Avari hotel or any other nearest five star hotels. The petitioner filed an appeal against this arrangement resultantly the time frame of the meeting was extended from 12:00 noon to 2:00 p.m. on first and last Saturday of each calendar month, the petitioner again aggrieved hence filed writ petition.

¹⁰²IbnQadama, *Al-Mughni*(Beirut:Dar al-Fikr,1405 H/1985),183.

The honorable Lahore High Court Syed Asghar Haider held that

“In guardianship matters, courts exercise quasi parental jurisdiction, the supreme consideration in this context is the welfare of minors; to achieve this purpose courts have unfettered powers. It is an inherent right of the parents to seek visitation of the minor, especially a father who is the natural guardian, he not only is required to participate in the upbringing of the minor but should develop a love, bondage and infirmity with them, to achieve this purpose, the court should facilitate homely and friendly environment which cannot be provided in the court premises.”¹⁰³

The request of petitioner for change of venue to Avari hotel and enhancement in the time span was allowed because father had to travel all the way from Dubai to Lahore and he was needed reasonable time to familiarize with his children. But the enhancement of visitation days was not allowed because the minors were too young. Resultantly the petition of visitation rights was allowed in the following manner and subject to fulfillment of the following conditions:

1. The venue of the meeting shall be changed from the court of guardian judge Lahore, to Avari hotel, on the first and last Saturday of each calendar month, the time span of the meeting shall be 11 a.m. to 4-30 p.m.
2. The names of the minors are placed on the Exit Control List.
3. The petitioner shall furnish a surety bond in the sum of Rs. 2.2 Million in this court, giving an undertaking that the minors shall not be removed from the jurisdiction of the court of the guardian judge, Lahore.
4. A bailiff of this court is deputed to collect minors from the residence of the respondent,

¹⁰³Umar Farooq Vs. Khushbakht Mirza and Others, PLD 2008 Lahore, 527.

produce the minor with a view to his being made over to the petitioner.¹⁰⁹

A view different from the one taken in the case of *Mumtaz Begum v. Azmatullah* was taken in *KhalidaShafqatkhanamv.MahmoodSadiq*¹¹⁰ and it was observed that the case cited in AIR 1929 Lah 487 was overruled by a Division Bench of the court in *Mst. Nazir Begum V. Ghulam Qadir Khan*¹¹¹ and others and this letter were not brought to the notice of the court.

The learned justice of the high court has contemplated that even if by the process of some reasoning it may be said that section 12 is not applicable to proceedings under section 25 of the Act, the guardianship court cannot be deprived of its inherent parental jurisdiction to pass such order as necessary for the advancement of the welfare of the minor.

In absence of the any provision to the contrary, it is open to the guardian judge to pass any order which may promote the welfare of the minor.¹¹² It was held that the question of the welfare of the minor has been considered in his detailed order by the learned Guardian Judge and the discretion has been rightly and judicially exercised by him.

The above referred judgment contemplates that section 12 provides for visitation rights and it

¹⁰⁹NematUllahQureshi& other Vs. Mst. BilquisSitara,Op.Cit, 445.

¹¹⁰KhalidaShafqatkhanam v.MahmoodSadiq, PLD 1965 Lahore, 389.

¹¹¹Mst. Nazir Begum v. GhulamQadir Khan. AIR 1938 Lahore, 313.

¹¹²Sir DinshahFardunjiMulla,*Principles Of Mahomedan Law*, Revised by: M.Hidayatulla (Lahore: Mansoor Book House,1981), 338.

1. It is settled that during the week the father will be entitled to take the custody of both the minors after 6:00 pm on Thursday and return them punctually before 10:00 am on Saturday.
2. That during the summer vacation the father will be entitled to the children for the first two weeks and last two weeks and last one week in the winter vacation except for the present summer vacation in which it will be one week.
3. That on 22-06-1996 the children will be handed over to the mother by the father.
4. That the father agrees to pay maintenance of the minors at the at the rate of Rs, 10,000 per month and also provides full medical cover to the minors.
5. That on the night before the Eid day the father will collect the minors and will return them in the evening on Eid day.

The petition was disposed off on the above agreement. The mother never followed the schedule as agreed upon.¹¹⁴ After so much litigation between the parties this order remained in force till the end. Justice Khwaja Naveed Ahmad had decided the case on following terms:

1. Minors were brainwashed against their father and they were not ready to meet their father. Custody of the children will remain with the mother, but visitation right of the father cannot be denied.
2. Statements of the children cannot be accepted since having remained under the custody and the complete supervision of the mother and maternal parents.
3. The respondent has also raised serious allegations against father for having sexually abused ward no.1 Sarah and stress was placed upon report of a Gynecologist Dr.

¹¹⁴Saad Amanullah Khan Vs. IVth Senior Civil Judge (South) and Others, PLD 2008 Karachi, 499.

Parveen Kanji who has changed her report afterward that the ward no.1 has changed her story. The judge said:

“In the light of above I am of the considered view that for the purpose of stopping the visitation of the petitioner the allegations against him are not sustained. On the contrary, from record and discussion above it is petty clear that the allegations have not only been made so as to prevent a father from even meeting the children. Also the statements of children do not inspire any confidence since the allegation pertain a time when the ward no.1 was too young much time has lapsed and all along the children have remained under the influence of the respondent no. 2 who allowed their tender minds to be brainwashed”¹¹⁵

The welfare of the children lies in meeting with their father who should have a clear say in the affairs and upbringing of the children in particular, the education of the son and marriage of the daughter.¹¹⁶

The Judge Khwaja Naveed Ahmad said;

“In this long battle with allegations and counter allegations both the father and the mother lost sight of the fact that in the ultimate result the losers were the children as their welfare lay in the fact that both the parents should have an effective say in their upbringing and children should be attached to both the parents.”¹¹⁷

VI. Dr. Ayesha Yousaf Vs. Khalid Muneer and 2 others (PLJ 2011 Karachi 139)

The husband has filed an application under Section 25 of the Guardians and Wards Act Learned Family Judge Shahid Anwar Bajwa dismissed the application under Section 25 of the Guardians

¹¹⁵Saad Amanullah Khan Vs. IVth Senior Civil Judge (South), Op.Cit, 500.

¹¹⁶Nasir, Op.Cit, 450.

¹¹⁷Saad Amanullah Khan Vs. IVth Senior Civil Judge (South) and Others, Op.Cit, 501.

and Wards Act and in conclusion observed as under:--

"The respondent has leveled several allegations upon the character, attitude and health upon the applicant, but failed to prove a single one. The attitude of respondent shows that she only wants to keep away child from her father due to her wrong presumptions and shows that she wants to deprive the applicant of his right to meet his daughter which is absolutely right of a father."¹¹⁸

Thus, the custody of the child was left with the mother and following visitation rights were allowed:-

- a. Alternate Saturday from 6-00 p.m. to 6-00 p.m. on following Sunday.
- b. On the second day of every Eid custody of a minor be handed over to applicant from 10-00 a.m. to 7-00 p.m.
- c. During the summer vacations custody of minor be handed over for one month to the applicant and in the winter vacation custody of a minor be handed over for 7 days to the applicant.
- d. Meeting on Birthday from 6.00 p.m. to 8.00 p.m.
- e. The Child is not to be removed from the jurisdiction of the Court, except with the permission of the Court.

It was submitted by the petitioner the she has got a job in Dubai and she would like to take her daughter with her. She stated that she will come back to Pakistan with the child every month and shall give full opportunity to the husband to meet the child. The court permitted the mother to take the child out of Pakistan along with her when she goes to Dubai for her employment. The court has ordered to bring the child from Karachi once every month. Moreover, she will be

¹¹⁸Dr. Aisha YousufVs.Khalid Muneer and 2 Others, PLJ 2012 Karachi, 139.

required to execute a bond for Rupees One Million with one surety to the satisfaction of the Court.

The father was granted visitation for 14 days during summer vacations and 7 days during winter vacation and for the day next to Eid and meeting on the birthday of the child. However, the parties may, by mutual consent, combine such visitations with monthly visits.¹¹⁹

On above both the judgments, the court has decided with keeping in mind the principle of the welfare of child remaining the custody with mother and father had given visitation right.

2.6 Analysis of Sections 12/25 of Guardian & Wards Act 1890 in the light of Judgments

The Guardians and Wards Act, 1890 is an old statutory law came into force on the first day of July 1890 which is one of the subjects and enactment of family law but it embodies no provisions regarding visitation rights. In Pakistan it was in the year 2002 when visitation rights were given statutory effect by an amendment in the Schedule of West Pakistan Family Courts Act, 1964 and visitation rights were granted to the non-custodial parents.¹²⁰ It does not mean that prior to the said amendment the Courts did not grant visitation rights to the non-custodial parents, but Courts keeping in view the facts and circumstances of each and every case used to award visitation rights to the non-custodial parents.

It has often been observed that a Guardian Judge, while holding a person entitled to custody of a ward under Section 25 of Guardian and Wards Act, 1890, invariably makes an order that the non-custodial parent will have a right to visit the Ward periodically at a given place for

¹¹⁹ Dr. Aisha Yousuf Vs. Khalid Muneer and 2 Others, PLJ 2012 Karachi, 140.

¹²⁰ The West Pakistan Family Courts Act, 1964.

certain duration of time. Sometimes it is also supplemented with an order allowing the losing party to take away the Ward to its house for a certain period.

Such visitation orders, having been so consistently passed, seem to lend to believe that the temporary transfer of the ward to the losing party is an essential part thereof and has matured into a right. Such visitation orders are also, sometimes, passed under Section 12 of the said Act independently.

Both the said sections do not permit the transfer of temporary custody of the ward to the losing party, as a sequel to order of custody under Section 25 of the Act. Section 12 forms part of Chapter II of the Act, which deals with the appointment and the declaration of Guardians.

The said Section plays an ancillary role during the pendency of application for appointing or declaring a person to be guardian of person or property or both, of a minor.

It is intended to provide for temporary custody and protection of the person or property of the minor when the main application is pending and final order is yet to be passed under Section 7 of the Act. An Order under this Section may entail the transfer of custody of minor from a person, presently holding it, to another person, whom the Court thinks to be proper, till the decision of the main application.¹²¹

It is a sort of provision analogous to Order XXXIX of Civil Procedure Code, enabling the grant of Temporary Injunction during pendency of the suit.

It does not exist independent of application for appointment or declaration of Guardian. No

¹²¹Tahir Mahmood, *The Muslim Law of India* (Allahabad: Law book company, 1982), 384.

direct application under this Section can be filed.

In *Surraiya Begum Vs. Tassaduq Hussain*(PLD 1959Lah750)¹²² it has was held

"Section 12 empowers the Court to make interlocutory orders for production of the minor, and to pass such orders for the temporary custody and protection of the person or property of the minor as it thinks proper. It will thus be seen that in the scheme of the Act, Section 12 applies only when as an application for guardianship is pending in the Court and not otherwise. In the decision of Dalip Singh, J. In *Indar Singh V. Kartar Kaur*¹²³, the learned Judge held as follows:-

"I am of opinion that Section 12 by reason of the wording used as well as by reason of its location in the statute only applies during the pendency of guardianship proceedings."

Besides, I am clearly of the view that this Section does not empower the Court to order the production of a minor for the purpose of giving access to any person entitled to visit and see the child. It only aims at making an ad-interim arrangement for temporary custody of the minor during the pendency of the guardianship application.

Section 25 (1)

Title of guardian to custody of ward:

- (1) If a ward leaves or is removed from the custody of a guardian of his person, the court, if it of opinion that it will be for the welfare of the ward to return to the

¹²²*Surraiya Begum Vs. TassaduqHussain Shah, PLD 1959 Lahore, 750.*

¹²³*Inder Singh v. KartarKaur, AIR 1938 Lahore, 313.*

custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.¹²⁴

A cursory analyses of the said Section show that it can be invoked only at the instance of a Guardian from whose custody a ward leaves or is removed and he seeks the return of the ward, and the court, on being satisfied that it is for the welfare of the ward to cause him returned to his custody, will pass an order of his return and for the purpose of enforcing the order may cause the ward to be arrested and delivered into the custody of the guardian.

The word 'guardian' has been defined in Section 4(2) of Guardian & Wards Act 1890, as:

"A person having the care of the person of a minor or his property, or of both his person and property."

The said definition covers a person having *de facto* or *de jure* care of person or property of the minor as held in PLD 1968 Karachi, 774.¹²⁵

The said Section embraces within its fold not only Guardian appointed or declared under Section 7 of the Act, but also a person who is a Guardian under the personal law to which he is subject.

The prime question to be decided in a proceeding under this Section is the welfare of the ward and his custody will go to a person in whose custody the welfare of the Ward lies, whether he is an applicant or the person in whose custody the ward already is.

¹²⁴ The Guardian & Wards Act, 1890, Section 25(1).

¹²⁵ Kaniz Vs. Noor Muhammad, PLD 1968 Karachi, 774.

However, once the question of entitlement to custody of Ward is finally decided under this Section then it cannot be allowed to be tampered with by passing an order allowing the losing party to take away the Ward from the custody of the successful party. Such an order militates against the order of entitlement in favor of a winning party. So the visitation right of a losing party under Section 25 cannot include the transfer of custody of minor from the winning party to the losing party, for however short period it may be.

The very word 'visitation' denotes that the losing party can visit the minor at a place selected by the winning party or the one fixed by the court, the Ward throughout remaining in custody of the winning party. If the Court fixes a meeting place then it has to make arrangements of such safeguards which can prevent the visitor from taking away the minor.¹²⁶

This view finds eloquent expression in PLD 1979 (W-P) Lahore 750¹²⁷, which is reproduced hereunder:-

“In my opinion the jurisdiction of a Guardian Judge in regard to minors is confined to the powers expressly conferred on him by the Guardians and Wards Act. It is a cardinal principle of law that the jurisdiction must be acquired before a judgment is given, and a judgment rendered by a Court which has no jurisdiction in the matter, is a nullity in the eye of law. It is true that according to Sunni law, the parents have a right to visit and see their child, the rule regarding access is stated thus:

"When a child is with one of its parents, the other is not to be prevented from

¹²⁶Hoodkinson Keith, *Muslim Family Law*(London:Groom Helm Ltd,1984), 126.

¹²⁷Zahid Qureshi Vs. Yaseen Qureshi, PLD 1979 (W-P) Lahore, 750.

seeing and visiting it."¹²⁸

Among *Hanafis*, the accepted doctrine is, that the mother's *hidhanah* terminates when the son has completed seven years of age. So long as the child is under the lawful custody of the mother, the father undoubtedly has a right to see and visit the child¹²⁹, but at the same time I do not find any warrant for the proposition that the mother can be forced to send the child to him for this purpose, or can be ordered to produce the child in Court for giving access to the father. As pointed out earlier, there is no clear provision of law under this Act for working out such a right to be claimed under Section 12 and 25 of the Guardian and Wards Act. In the absence of any provision in the Act, such a right cannot be given effect by invoking the principles of equity, justice and good conscience.

Meanwhile, if the authority of section 12 is accepted regarding visitation rights, hence the certain lacunas are still there which are needed to fulfill e.g. the said section is silent about the venue and the time of exercising visitation right. In a judgment of Lahore High Court, reported in PLD 2008 Lahore 527¹³⁰ parameter of visitation right has been spelled out, with a rider that the minor cannot be allowed to be taken away by the visitor to a place outside the territorial jurisdiction of the guardian judge and the meeting, if it is to take place, outside the Court room, is to be supervised by the bailiff of the court, who will ensure the return of the minor to the party from whose custody the minor was taken for the purpose of meeting.¹³¹

¹²⁸Malik Ibn Anas, *Al-Mudawwanah al-Kubra* (Beirut: Dar Sadir, n.d), 1410.

¹²⁹Zuhayli, Op.Cit, 735.

¹³⁰ Ibid, 25.

¹³¹Neil B E Baillie, *A Digest of Muhammadan Law* (Lahore: Premier Book House, n.d), 2, 439.

The existing section regarding child custody and visitation, as stated before is ambiguous. In above stated judgments the learned judges have set out a pathway to enact clear law upon child visitation rights to avoid frustration. However, it is a bounden duty of a guardian judge while granting visitation rights to maintain equilibrium between a father and mother because psychologically any disassociation or deprivation of fatherly or motherly love and affection to the minors may likely cause them split personality disorder which is highly injurious to their future upbringing and welfare.

CHAPTER 3

3.1. Child Visitation Laws of UK, USA and India

With the marked increase in marriage dissolution and family separation in Western countries over the last quarter century, there has been considerable research into the circumstances and needs of the parents who provide the majority of the care of children following the relationship breakdown. Such custodial parents are generally women and most spend at least a short period as a 'sole' parent.¹³² There is usually a second 'non-resident' parent of the children somewhere. These non-resident parents are overwhelmingly male. Although sometimes referred to as 'absent fathers'. Whilst some non-resident parents have little or no contact with their children, most have some contact, and many provide significant amounts of direct care for their children.¹³³ This commonly involves their children staying with them on weekends and/or holidays and is referred to as 'contact' or 'access'.¹³⁴

The right of visitation, or access of noncustodial parents to a child, is favored in many states. In the west, denial of visitation is rare and generally requires a finding of actual harm, such as

¹³² Lorraine Radford, "For The Sake Of The Children: The Law, Domestic Violence and Child Contact In England", *Women's Studies International Forum* 20:4 (1997), 473.

¹³³ Gramme Bwillson, "The Non-Resident Parental Role For Separated Fathers: A Review", *International Journal of Law, Policy and the Family* 20:6 (2006), 287.

¹³⁴ Bacon B L & Mc Kenzie B, "Parent education after separation/divorce: Impact of the level of parental conflict on outcomes", *Family Court Review* 42 (2004), 85-97

physical violence to the child. In a 1988 U.S case, *Suttles v. Suttles*¹³⁵, the father was convicted on four counts of assault with intent to murder. Even though two of these counts were against the wife and child, the father was allowed to phone and write to his child and possibly regain visitation if he underwent successful psychological counseling while in prison. In addition, drug addiction, sexual abuse, severe conflict or the child's absolute refusal to cooperate may result in the denial of visitation more often the court is likely to order supervised visitation, that is visitation in special safe place or in the presence of a neutral third party. The object is to enable the noncustodial parent to maintain a relationship with the child while assuring the child's security.¹³⁶

Child visitation laws are different in different countries. Few states have detailed laws upon the issue, whereas some are with comprehensive provision regarding child custody and visitation dispute. Here are discussed child visitation laws of some countries, e.g., United States of America, United Kingdom and India.

3.2. Child visitation law in United Kingdom

In UK Contact Orders are made under section 8 of the Children Act 1989 to require the person with whom a child lives to allow that child to visit, stay or have contact with a person named in the order. Orders continue until the child is 16 years. So long as the child is not under the care of a local authority.¹³⁷

¹³⁵*Suttles v. Suttles*, 748 S.W.2d 427 (Tenn. 1988).

¹³⁶Barbara Stark, *International Family Law: An Introduction*(USA: Ashgate Publishing, 2005),159.

¹³⁷Helen L Conway, *Family law* (New York: Routledge 2 Park square,2014),138.

3.2.1. Who can apply for contact order?

The following people can apply for a Contact Order:

1. Any parent or guardian of a child.¹³⁸
2. Any person who has parental responsibility for the child.¹³⁹
3. Anyone with a Residence Order.¹⁴⁰
4. A step-parent.¹⁴¹
5. Any civil partner in a civil partnership (whether or not subsisting) in relation to whom the child is a child of the family.¹⁴²
6. The person with whom the child has lived for at least three years.¹⁴³(This period need not have been continuous but must have been recent)
7. Anyone who:
 - a) Where there is already a Residence Order in place has the consent of everyone who holds that order or

¹³⁸ Children Act,1989. Section,10 (4)(a).

¹³⁹ Children Act,1989. Section, 10(4)(aa).

¹⁴⁰ Children Act,1989.Section,10 (4)(b).

¹⁴¹ Children Act,1989. Section , 10(5)(a).

¹⁴² Children Act,1989. Section, 10(5)(aa).

¹⁴³ Children Act,1989. Section,10(5)(b).

- b) Who has the consent of the local authority where the child is in their care or
- c) Has the consent of everyone who has parental responsibility for the child.¹⁴⁴

A local authority foster parent is entitled to apply for a residence order if the child has lived with him for a period of at least one year immediately preceding the application.¹⁴⁵ A relative of a child is entitled to apply for a residence order if the child has lived with the relative for a period of at least one year immediately preceding the application.¹⁴⁶

A contact order which requires the parent with whom a child lives to allow the child to visit, or otherwise have contact with, his other parent shall cease to have effect if the parents live together for a continuous period of more than six months.¹⁴⁷

3.2.2. Contact activity conditions and directions of the court

Section 11(7) Children Act allows the court to impose conditions to be complied with by:

- The person in whose favor the order is made;
- A parent;
- A person with parental responsibility for a child;
- A person with whom the child is living.

A section 8 order may also impose directions about how it is to be implemented. A court may

¹⁴⁴Children Act,1989. Section ,10(5)(c).

¹⁴⁵ Children Act,1989. Section, 10(5)(A).

¹⁴⁶ Children Act,1989. Section 10(5)(B).

¹⁴⁷ Children Act,1989.Section10(A)(6).

3.2.3. Speedy disposal of the contact disputes

Under Section 11, the court must attempt to avoid delays in making an Order. The court will only make contact orders for children over sixteen years old in exceptional circumstances. Contact can either be direct e.g. face-to-face meetings with a person or indirect e.g. by letter, video, exchange of greeting cards, etc.¹⁵³ Some orders will be very specific as to times, dates and arrangements for contact; other orders will be more open with detailed arrangements to be made between the parties by agreement. These orders are not just obtained by parents for contact with their children, there can also be ordered for contact between siblings or the child and wider family members. Sometimes the order will give directions that the contact is to be supervised by a third person.¹⁵⁴ The order may also only be for a specific period or contain provisions which operate for a specific period. These are Orders of the court and a failure to comply can be a contempt of court with serious consequences.

Contact represents a change in the fundamental concept to disputes involving the upbringing of children. Prior to The Children Act 1989 in the jurisdiction of England & Wales and in Scotland in the Children (Scotland) Act 1995, an adult was usually granted 'access to' a child; now a child is to be allowed 'contact with an adult' [or step brother/sister]. Sixteen years after the Children Act 1989 became law, judges and the media in England still on occasion refer to 'custody and access' instead of 'residence and contact', and some judges are making orders such as 'father to have contact with the child' contrary to 'the child be allowed contact with father' as it argued by

¹⁵³Chechire and North, *Private International Law* (New York:Oxford University Press,2004),858.

¹⁵⁴ Lorraine Radford, *Op.Cit*,476.

certain legal establishments the difference is minimal and in nomenclature only.¹⁵⁵ The law is quite clear that 'a residence order' undoubtedly gives additional rights to the residential parent, and does diminish the parental responsibility of the non-residential parent, in various ways.

3.3. Child visitation law in United States of America

America is a society with a substantial divorce rate. Each year, more than 1,000,000 children in the United States are affected by the divorce of their parents, and of all children who are born to married parents this year, half are likely to experience a divorce in their families before they reach their 18th birthdays.¹⁵⁶

America is also a highly mobile society. On the dissolution of family ties, it is not uncommon that a parent, perhaps even both parents, may move out of the State in which the family resided at the time of their separation.¹⁵⁷ Thus, it is not surprising that courts in different States are becoming involved in child-custody and visitation disputes concerning the same children. In addition, roughly a third of all children are born to parents who are not married.¹⁵⁸ Many of these parents, of course, will never live together, and those who do face a high risk of breaking up before the children are grown.¹⁵⁹

¹⁵⁵ Ibid, 480.

¹⁵⁶ Michael Grossberg, "Governing The Hearth: Law and The Family In Nineteenth-Century America"(1985), 235, 240.

¹⁵⁷ Andrew I. Schepard, *Children, Courts, And Custody: Interdisciplinary Models For Divorcing Families*. 28 (2004).

¹⁵⁸ David D. Meyer, "The constitutional Rights of Non-Custodial parents" 35:1461(2006), 1.

¹⁵⁹ Ibid, 7.

However, the child, at or around the age of 13, depending on the state, may have a right to testify in court about custody and parenting plan arrangements that may have a big impact on the court decision.¹⁶⁰ Parents (and in most States grandparents) frequently believe that they have a right to visitation or access.¹⁶¹ However, when custodial parental interference with visitation occurs, civil courts in the United States do not enforce their own court orders. Usually citing, “best interest of the child” and reasoning punishment of the custodial parent to enforce the visitation order would further harm the child in question. Some States are looking at changing that by making visitation interference a criminal offense.¹⁶²

Most noncustodial parents have visitation orders that allow the child to visit with them without any supervision, away from the custodial residence. But sometimes when there are safety problems or child abuse history, the court can set up a supervised or “safety-focused” parenting plan.¹⁶³ Also, the court can order the visitation to be supervised by a social worker, parenting coordinator, guardian ad litem¹⁶⁴, or other third party while the noncustodial parent visits with the child.

¹⁶⁰Judith A Seltzer, “Children’s Contact with absent parents”, *Journal of marriage and the Family*, 50(1988), 663.

¹⁶¹*Troxel v. Granville*, 530 U.S. 57(2000).

¹⁶²Furstenberg, Frank F Jr, S. Philip Morgan & Paul D Allison, “Paternal participation and children’s well-being after marital disruption” *American Sociological Review* 52(1987), 695-701.

¹⁶³ Michael Grossberg, *Op.Cit.*,240-242.

¹⁶⁴Guardian *ad litem* is a person appointed to defend an action or other proceeding on behalf of a minor or a person under disability.

States' legislation upon child visitation

3.3.1. Florida

In the United States, there is separate legislation in all states. Florida statute, civil practice and procedure, chapter 61 section 13 describe the child visitation law which is termed as time sharing. According to this section, the court may approve, grant, or modify a parenting plan, whether the child is not physically present in this state at the time of filing any proceeding or not.¹⁶⁵ The section further enumerates the particulars of a visitation schedule. A parenting plan approved by the court must, at a minimum, describe in adequate detail how the parents will share and be responsible for the daily tasks associated with the upbringing of the child; the time-sharing schedule arrangements that specify the time that the minor child will spend with each parent; a designation of who will be responsible for any and all forms of health care, school-related matters including the address to be used for school-boundary and the methods that the parents will use to communicate with the child.¹⁶⁶

The court shall determine all matters relating to parenting and time sharing of each minor child of the parties in accordance with the best interests of the child and in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act, except that modification of a parenting plan and time-sharing schedule requires a showing of a substantial, material, and unanticipated change of circumstances.¹⁶⁷

It is the public policy of Florida that each minor child has frequent and continuing contact with

¹⁶⁵ Civil practice and procedure, Chapter 61, Section 13(2)(a).

¹⁶⁶ Civil Practice and Procedure, Section, 13(2)(b).

¹⁶⁷ Civil Practice and Procedure, Section, 13(2)(c).

both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of child rearing..¹⁶⁸

The court orders that the parental responsibility to be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child. It may order sole parental responsibility and make such arrangements for time-sharing as specified in the parenting plan as will best protect the child or abused spouse from further harm.¹⁶⁹

Access to records and information pertaining to a minor child, including, but not limited to, medical, dental, and school records, may not be denied to either parent. A parent having rights and manner of access as are available to the other parent of a child, including, without limitation, the right to in-person communication with medical, dental, and education providers.¹⁷⁰

3.3.1.1. Modification of parenting plan with the court

The court may modify the parenting plan and change the venue for purposes of establishing or modifying parental responsibility and creating, developing, approving, or modifying a parenting plan, including a time-sharing schedule, which governs each parent's relationship with his or her minor child and the relationship between each parent.

Determination of the best interests of the child shall be made by evaluating all of the factors affecting the welfare and interests of the particular minor child and the circumstances of that

¹⁶⁸ Emery R E, *Marriage, divorce, and children's adjustment* (Newbury Park, CA: Sage, 1988), 97-98.

¹⁶⁹ Civil Practice and Procedure, Section, 13(c)(2).

¹⁷⁰ Civil Practice and Procedure, Section, 13(c)(3).

family.¹⁷¹

3.3.1.2. Child visitation denial by non-custodial parent

The custodial parent may not refuse to honor the time-sharing due to failure of the payment of child support or alimony by non-custodial parent.¹⁷² When a parent refuses to honor the time-sharing schedule in the parenting plan without proper cause, the court:

1. Shall, after calculating the amount of time-sharing improperly denied, award, the parent denied time a sufficient amount of extra time-sharing to compensate for the time-sharing missed, and such time-sharing shall be ordered as expeditiously as possible in a manner consistent with the best interests of the child and scheduled in a manner that is convenient for the parent deprived of time-sharing.

2. May order the parent who did not properly exercise time-sharing under the time-sharing schedule

i. To pay reasonable court costs and attorney's fees incurred by the non-offending parent to enforce the time-sharing schedule.

ii. To attend a parenting course approved by the judicial circuit.

iii. To do community service if the order will not interfere with the welfare of the child.

iv. To have the financial burden of promoting frequent and continuing contact when that parent and child reside farther than 60 miles from the other parent.

Court upon the request of the parent who did not violate the time-sharing schedule, modify the

¹⁷¹ Civil Practice and Procedure, Section, 13(c)(d)(3).

¹⁷² Civil Practice and Procedure, Section, 13(4)(b).

parenting plan if modification is in the best interests of the child.¹⁷³

3.3.2. Virginia

In Virginia laws a biological parent, grandparents (even when the parents weren't married or are not currently divorced) and step-parents may be awarded visitation rights. While there are no reported cases of brothers or sisters being given visitation, a strong argument could be made that it would be in the best interest of the child. Section 20-107.2 of the Virginia Code provides in part:

*"In any case involving the custody or visitation of a child, the court may award custody or visitation to any party with a legitimate interest therein, including but not limited to, grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is otherwise properly before the court. The term "legitimate interest" shall be construed broadly to accommodate the best interests of the child."*¹⁷⁴

The court has the power to deny visitation. Normally the court will only stop visitation for a certain time or until a certain task is performed e.g. non performing financial obligations.

3.3.3. South Carolina

According to section 63-15-50 of the south Carolina children's code, A court may award

¹⁷³ Civil Practice and Procedure, Section,13(4)(c).

¹⁷⁴ Virginia Code,Section20-107.2.

visitation to a person who has committed domestic violence, only if the court finds that adequate provision for the safety of the child and the victim of domestic violence can be made.¹⁷⁵

3.3.3.1. Visitation Order

1. In a visitation order, a court may order;
 - a. An exchange of a child to occur in a protected setting;
Visitation supervised by another person or agency;
 - b. A person who has been found to have committed domestic violence, or in cases in which complaints were made against both parties, the person found by the court to have been the primary aggressor,
 - c. To attend and complete, to the satisfaction of the court, a program of intervention for offenders or other designated counseling as a condition of the visitation;
 - d. To abstain from possession or consumption of alcohol or controlled substances during the visitation and for twenty-four hours preceding the visitation;
 - e. To pay a fee to defray the costs of supervised visitation;
- (2) Prohibit overnight visitation;
- (3) Require a bond from a person for the return and safety of the child if that person has made a threat to retain the child unlawfully.
- (4) Impose any other condition that is considered necessary to provide for the safety of the

¹⁷⁵ South Carolina Children's Code, Section 63-15-50.

child.¹⁷⁶

3.3.3.2. Supervised visitation

A judge may, upon his own motion or upon the motion of any party, prohibit or limit the visitor when necessary to ensure the safety of the child or the parent who is a victim of domestic violence. If visitation is not allowed or is allowed in a restricted manner to provide for the safety of a child or parent who is a victim of domestic violence, the court may order the address of the child and the victim to be kept confidential.¹⁷⁷

3.3.3.2. Parenting plan

At all temporary hearings where custody is contested, each parent must prepare, file, and submit to the court a parenting plan, which reflects parental preferences, the allocation of parenting time to be spent with each parent, and major decisions, including, the child's education, medical and dental care, extracurricular activities and religious training. The court issues temporary and final custody orders only after considering these parenting plans; however, the failure by a party to submit a parenting plan to the court does not preclude the court from issuing a temporary or final custody order.¹⁷⁸

3.3.3.4. Telephonic and electronic communication between minor child and parents

As the world gets smaller and moving cross-country becomes routine, family courts are

¹⁷⁶South Carolina Children's Code, Section 63-15-50.

¹⁷⁷ South Carolina Children's Code, Section (F).

¹⁷⁸South Carolina Children's Code, Section 63-15-220.

increasingly considering virtual visitation for non-custodial parents in relocation cases. Virtual visitation involves using tools such as video-conferencing, webcams and other wired technologies to supplement face-to-face visits and court-ordered phone contacts between a non-custodial parent and a child.¹⁷⁹ Such innovations got a boost in 2001 when a New Jersey appeals court in *McCoy v. McCoy*¹⁸⁰ ruled that a family court judge did not sufficiently consider virtual visitation when he prevented a mother from relocating cross-country with her daughter. Although the father opposed the move, the mother argued that her ex-husband could keep in touch by using an interactive web site that she planned to develop. In addition to granting the mother's permission to relocate, the court praised the mother's virtual visitation proposal as "creative and innovative."

In addition to all rights and duties given to parents pursuant to Section 63-5-30, When a court order sole custody to one parent, the custodial parent, except in cases of abuse, neglect, or abandonment, should facilitate opportunities for reasonable telephonic and electronic communication between the minor child and the noncustodial parent, as appropriate, as provided for by court order if the court determines that this type of communication is in the best interest of the child; and When a court order joint custody to both parents, each parent should facilitate opportunities for reasonable telephonic and electronic communication between the minor child and the other parent, as appropriate, as provided for by court order if the court determines that this type of communication is in the best interest of the child.¹⁸¹

¹⁷⁹Sarah Gotterfried, Op.Cit,477.

¹⁸⁰*McCoy v. McCoy*, 764 A.2d 449 (NJ. Super. Ct. App. Div. 2001).

¹⁸¹South Carolina Children's Code, Section 63-15-250.

3.3.4. Ohio

According to the Ohio Revised Code, If a divorce, dissolution, legal separation, or annulment proceeding involves a child, the court makes a just and reasonable order or decree permitting non-custodial parent to have parenting time with the child. The order or decree permitting the parenting time shall ensure the opportunity for both parents to have frequent and continuing contact with the child, unless frequent and continuing contact with either parent with the child would not be in the best interest of the child. The court shall include in its final decree a specific schedule of parenting time for that parent.¹⁸²

3.3.4.1. Grandparent's visitation right

In a divorce, dissolution of marriage, legal separation, annulment, or child support proceeding that involves a child, the court may grant reasonable visitation rights to any grandparent, any person related to the child by consanguinity or affinity, or any other person other than a parent, if all of the following apply:

- a) The grandparent, relative, or other person files a motion with the court seeking companionship or visitation rights.
- b) The court determines that the grandparent, relative, or other person has an interest in the welfare of the child.
- c) The court determines that the granting of the companionship or visitation rights is in the best interest of the child.¹⁸³

In determining whether to grant parenting time to a parent, the court shall consider all of the

¹⁸² Ohio Revised Code, Chapter 3109, Section 31(A).

¹⁸³ Ohio Revised Code, Op.Cit.,(B).

following factors:

- a. The prior interaction and interrelationships of the child with the child's parents, siblings, and other persons related by consanguinity or affinity;
- b. The geographical location of the residence of each parent and the distance between those residences;
- c. The child's and parents' available time, including, employment schedule, the child's school schedule, and the child's and the parents' holiday and vacation schedule;
- d. The age of the child;
- c. The child's adjustment to home, school, and community;
- f. If the court has interviewed the child in chambers, his/her wishes and concerns;
- g. The health and safety of the child;
- h. Each parent's willingness to reschedule missed parenting time and to facilitate the other parent's parenting time rights.
- i. In relation to parenting time, whether either parent previously has been convicted of or pleaded guilty to any criminal offense;
- j. Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully been denied the other parent's right to parenting time in accordance with an order of the court;
- k. Whether either parent has established a residence or is planning to establish a residence outside this state;¹⁸⁴

¹⁸⁴Ohio Revised Code, Chapter 3109, Section 31(D).

The remarriage of a residential parent of a child does not affect the authority of a court under this section to grant parenting time rights to non-custodial parent.¹⁸⁵

3.3.4.2. Relocation of child

If the residential parent intends to move to a new residence, the notice of the new residence is necessary to be given to nonresident parent. If the court determines that the parent who is granted the parenting time rights has been so convicted or has been determined to be the perpetrator of an abusive act that is the basis of a child abuse adjudication, the court shall issue an order stating that the parent who is granted the parenting time rights will not be given a copy of any notice of relocation unless the court determines that it is in the best interest of the children to give that parent a copy of the notice of relocation.¹⁸⁶

3.4. Uniform Child Custody Jurisdiction and Enforcement Act (the UCCJEA)

The Uniform Child-Custody Jurisdiction and Enforcement Act, has been proposed by the National Conference of Commissioners on Uniform State Laws. The proposed uniform State law is designed to deter interstate parental kidnapping and to promote uniform jurisdiction and enforcement provisions in interstate child-custody and visitation cases. The Act has been enacted by 25 States of America and the District of Columbia and introduced in legislatures in several other States.

The UCCJEA governs State courts' jurisdiction to make and modify "child-custody determinations," a term that expressly includes custody and visitation orders.

¹⁸⁵ Ohio Revised Code, Chapter 3109, Section 31(E).

¹⁸⁶ Ohio Revised Code, Chapter 3109, Section 31(G)(2).

Enforcement: Article 3

The UCCJEA establishes uniform procedures for interstate enforcement of child custody and visitation determinations. In particular, article 3 of the UCCJEA:

- a) Authorizes temporary enforcement of visitation determinations.¹⁸⁷
- b) Creates an interstate registration process for out-of-State custody determinations.¹⁸⁸
- c) Establishes a procedure for speedy interstate enforcement of custody and visitation determinations.¹⁸⁹
- d) Authorizes issuance of warrants directing law enforcement to pick up children at risk of being removed from the State.¹⁹⁰
- e) Authorizes public officials to assist in the civil enforcement of custody determinations and in Hague Convention cases.¹⁹¹

The nationwide enactment of the UCCJEA has improved interstate child-custody practice. To recap a few, the UCCJEA adopts the priority for home State jurisdiction in initial custody cases and codifies the principle of exclusive, continuing jurisdiction. These provisions clarify where child-custody proceedings should be brought and substantially reduce the number of competing custody proceedings in sister States.

¹⁸⁷ UCCJEA, Section 304 (Temporary Visitation).

¹⁸⁸ UCCJEA, Section 305 (Registration of Child-Custody Determination).

¹⁸⁹ UCCJEA, Sections 308–310 (Expedited Enforcement of Child-Custody Determination; Service of Petition and Order; Hearing and Order).

¹⁹⁰ UCCJEA, Section 311 (Warrant To Take Physical Custody of Child).

¹⁹¹ UCCJEA, Sections 315–317 (Role of [Prosecutor or Public Official]; Role of [Law Enforcement]; Costs and Expenses). In States that enact these sections, prosecutors (or other designated public officials) and law enforcement officers are able to use the procedures to locate children, return them to the jurisdiction of the court, and enforce custody determinations.

3.5. Child visitation laws in India

In India the statutes governing child custody and visitation issues are The Guardian & Wards Act 1890 and The Hindu Marriages Act 1955. In Pakistan custody and visitation disputes are governed by Section 25/12 of Guardian & Wards Act 1890 while in India the main petition for custody is filed under section 26 of Hindu Marriages Act 1955. Section 26 provided as follows;

"In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made."¹⁹²

While determining the question as to which parent the care and control of a child should be given, the paramount consideration remains the welfare and interest of the child and not the rights of the parents under the statute,¹⁹³ the Supreme Court of India has held in Giving this ruling, a Bench of Justices P. Sathasivam and B.S. Chauhan said:

"While considering the welfare of the child, the moral and ethical welfare of the child must also weigh with the court as well as his physical wellbeing. The child cannot be

¹⁹² Hindu Marriage Act 1955, Section 26.

¹⁹³ Ashish Ranjan v. Anupam Tandon, Contempt Petition (Civil) No. 394 of 2009 - Transfer Petition (Civil) No. 195 of 2008.

treated as a property or a commodity and therefore, such issues have to be handled by the court with care, caution, love, and affection and applying a human touch to the problem.”¹⁹⁴

This contempt petition has been filed by the applicant alleging that the consent order passed by the Court has deliberately been violated by the respondents, as it has been ensured by them that the applicant may not visit his son. So many civil and criminal proceeding arose between the parties. So far as the issue relating to custody and visitation of the child, Kislay, as per the said consent order is concerned, the following clauses are relevant:

“As agreed between the parties, Dr. AnupmaTandon (mother) shall have the physical custody and guardianship of the child Master KislayRanjan, who is at present four and a half years old. Dr. Ashish Ranjan and his parents shall have visiting rights to Master KislayRanjan, who is at present living in Ajmer with his maternal grandparents. Since Dr. Ashish Ranjan and/or his parents would have to come to Ajmer from Gopalganj a long distance, they would naturally advise about the dates and the length of their visits at Ajmer beforehand either by telephone or through a letter. In Ajmer, Dr. Ashish Ranjan and/or his parents will visit Master KislayRanjan at mutually convenient time(s) in the house where he is living. They will stay with the child for a few hours or as long as the child might wish.”

The respondent stated before the LokAdalat that while visiting Master KislayRanjan, Dr. Ashish Ranjan and his parents will be treated with courtesy and she would do everything reasonable to facilitate their meeting with the child.

According to visiting scheduled on 10.9.2009, the applicant travelled along with his parents to

¹⁹⁴AshishRanjanvsAnupamTandon,Op.Cit,52.

Ajmer by car to see the child, but they found the house of the respondent No.2 locked and could not meet the child.

In terms of the earlier direction the Court passed the order dated 03.05.2008, followed as under:

“It is brought to our notice that at present the Child Master KislayRanjan is studying in Sanskriti School, Ajmer. The petitioner Dr. Ashish Ranjan is permitted to visit the above referred school from 12.07.2010 to 23.07.2010. We request the Principal of the School to permit Dr. Ashish Ranjan and his parents to meet the child Master KislayRanjan after school hours in his/her chamber or any suitable place within the school premises. We also request the Principal to render all assistance for a conducive atmosphere and send a report to this Court about the behavior and attitude of the child Master KislayRanjan towards his father Dr. Ashish Ranjan.”¹⁹⁵

The court considered the rival submissions made by both the parties and perused the record. The learned court talked to the parties, as well as to the child. They were of the opinion as quoted below:

“We are of the view that the applicant could not get the benefit of his visitation right under the final order passed by this Court on 3.5.2008, and, to a certain extent, the respondents are responsible for tutoring the child as the conversation between the applicant and the child reveals many things which a child is not supposed to know/understand at the tender age of 2-1/2 years. Even in conversation with us, the child, Master Kislay, has narrated many things which could not be in his personal knowledge and which he could not say by his own memory. During our conversation with the child, we could clearly note that the child has been tutored by the

¹⁹⁵ AshishRanjan v. Anupam Tandon, Op.Cit.53.

respondents to make him completely hostile towards his father.¹⁹⁶

The Bench granted liberty to the applicant to approach the appropriate court/forum for seeking custody of the child, Kislay, or any other appropriate relief in this regard.

3.6. Doctrine of Welfare of Child

It is settled legal proposition that while determining the question as to which parent the care and control of a child should be given, the paramount consideration remains the welfare and interest of the child and not the rights of the parents under the statute. Such an issue is required to be determined in the background of the relevant facts and circumstances and each case has to be decided on its own facts as the application of doctrine of *stare decisis*¹⁹⁷ remains irrelevant in so far as the factual aspects of the case are concerned.¹⁹⁸ While considering the welfare of the child, the moral and ethical welfare of the child must also weigh with the court as well as his physical well-being. The child cannot be treated as a property or a commodity and, therefore, such issues have to be handled by the court with care and caution with love, affection and sentiments applying human touch to the problem. Though, the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is

¹⁹⁶ Ashish Ranjan v. Anupam Tandon, Op.Cit.52.

¹⁹⁷ The "Sacred principle" of English law by which precedents are authoritative and binding, and must be followed.

¹⁹⁸ Mausami Moitra Ganguli v. Jayant Ganguli (2008) 7 SCC 673, para no 19 pg.678.

nothing which can stand in the way of the court exercising its *parens patriae*¹⁹⁹ jurisdiction arising in such cases.²⁰⁰

Statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact, no statute on the subject, can ignore, or obliterate the vital factor of the welfare of the minor.²⁰¹

Another landmark judgment related to child custody and visitation, the Karnataka high court has allowed father to have custody of his son for first 6 months of the year, and the next 6 months with the mother.

In this case court ordered that expenses of the child to be shared equally by father and mother, there being a common misconception that the father has to pay up everything, even if wife has income of her own, however he can't get more than few hours visitation per month (unnecessary as a father). Father's care and love has a powerful and positive impact upon the development and health of a child..²⁰²

I. Vikram Vir Bhalla Vs. Shalini Vohra

In this case, the Supreme Court of India refused to interfere with the order passed by the High

¹⁹⁹ A doctrine that grants the inherent power and authority of the state to protect persons who are legally unable to act on their own behalf.

²⁰⁰ *Gaura Nagpal v. Sumedha Nagpal*, AIR 209 SC 557.

²⁰¹ *Elizabeth Dinshaw v. Arvand M. Dinshaw*, AIR 1987 SC 3; *Chandrakala Menon v. Vipin Menon*, (1993) 2 SCC 6; *Nil Ratan Kundu & Anr. v. Abhijit Kundu*, (2008) 9 SCC 413; *Shilpa Aggarwal v. Aviral Mittal & Anr.* (2010) 1 SCC 591; and *Athar Hussain v. Syed Siraj Ahmed & Anr.*, (2010) 2 SCC 654).

²⁰² *Vikram Vir Vohra V. Shalini Bhalla*, Civil Appeal No. 2704 OF 2010 (Arising out of SLP(C) No. 19935/2009).

Court which awarded custody of the child to the mother and father had been awarded visitation rights. The decree of divorce on mutual consent was passed by the Additional District Judge, Delhi. The parties have agreed that the custody of the minor son shall remain with the mother, It is however, agreed that the father shall have the right of visitation only to the extent that the child shall be with the father, once in a fortnight from 10 AM to 6.30 PM on a Saturday. The father shall collect the child at 10 AM on a Saturday where the child is with his mother. And on the same day at by 6.30 PM, the father would leave the child back at the same place with the mother and in case he does not do so the mother shall collect the child from father on the same day. Both parties agreed before Court that they would not create any obstruction in implementation of this arrangement.

Thereafter the father and the mother both filed applications under Section 26 of the Act seeking modification of those terms and conditions about the custody of the child. The mother was basing her claim on the fact that she wanted to take the child with her to Australia where she was employed for gain with a request to revoke the visitation rights granted to the appellant for meeting the child. The Trial Court had allowed the respondent to take the child with her to Australia, but also directed her to bring the child back to India for allowing the father visitation rights twice in a year i.e. for two terms - between 18th of December to 26th of January and then from 26th of June to 11th of July.

The appellant appealed to the High Court. It was argued by the appellant since no decree was passed by the Court while granting a mutual divorce, an application under Section 26 of the Hindu Marriage Act does not lie and in the absence of specific provision in the decree regarding the custody and visitation rights of the child, the Trial Court has no jurisdiction to entertain the

petition afresh after passing of the decree.

The High Court took into consideration the provisions of Section 26 of the Act and was of the view that the aforesaid provision is intended to enable the Court to pass suitable orders from time to time to protect the interest of minor children. However, the High Court held that after the final order is passed in the original petition of divorce for the custody of the minor child, the other party cannot file any number of fresh petitions ignoring the earlier order passed by the Court.

The Court took into consideration that even if the terms and conditions regarding the custody and visitation rights of the child are not specifically contained in the decree, they do form part of the petition seeking divorce by mutual consent. It was of the view that the absence of the terms and conditions in the decree does not disentitle the respondent to file an application under Section 26 of the Act seeking revocation of the visitation rights of the appellant. The High Court affirmed the order of the lower court. Being aggrieved by the judgment of the High Court the appellant has approached the Supreme Court. The supreme court was at the view..

“We talked with the child in our chambers in the absence of his parents. We found him to be quite intelligent and discerning. The child is in school and from the behavior of the child, we could make out that he is well behaved and that he is receiving proper education. The welfare of the child is of paramount importance in matters relating to child custody and this Court has held that welfare of the child may have a primacy even over statutory provisions.”²⁰³

The father’s visitation right was varied, but was not totally ignored. In another case a three judges

²⁰³VikramVir Vohra v.Shalini Bhalla,Op.Cit,14.

CHAPTER 4

4. International Conventions

4.1. Hague Convention on the Civil Aspects of International Child Abduction

As part of an international response to the growing number of children illegally taken abroad, the Hague Conference on Private International Law²⁰⁵ at its Fourteenth Session enacted the Hague Convention on the Civil Aspects of International Child Abduction. The Convention was given the force of law in the United Kingdom by the Child Abduction and Custody Act, 1985. In the United States, the Convention was implemented by the International Child Abduction Remedies Act (ICARA).²⁰⁶

One purpose of the Convention is to secure the immediate return of children wrongfully removed or wrongfully retained in a different nation.²⁰⁷ Another purpose of the Convention is to secure the effective exercise of access rights²⁰⁸ granted to the noncustodial parent. The Hague Abduction Convention has been quite successful in returning children taken from their custodial

²⁰⁵ The Hague Conference is an international organization of member governments whose Permanent Bureau is located at The Hague, Netherlands. The sole mission of the Hague Conference on Private International Law is to unify the rules of private international law by enacting multilateral treaties.

²⁰⁶ International Child Abduction Remedies Act, 42 U.S.C. 11601-10 (1988).

²⁰⁷ Hague Abduction Convention, Art. L (a) at 1501 (stating that one of objects of Hague Abduction Convention is "to secure the prompt return of children wrongfully removed to or retained in any Contracting State.").

²⁰⁸ Remarks by Adair Dyer on Access (Visitation) for the North American Symposium On International Child Abduction (Sept 30, 1993).

parents.²⁰⁹ Under the Convention, when parents show that their children have been removed or retained in a another country in breach of their custody rights, a court applying the Hague Abduction Convention must order the immediate return of the children to their place of habitual residence.²¹⁰

The Hague Abduction Convention does not, however, effectively reunite children with parents who previously enjoyed access rights because under the Hague Abduction Convention, only a removal of a child in breach of custody rights is abduction. Parents have custody when they are responsible for the care of their children and have the right to determine where the children live. By contrast, parents with access rights may take their children for a limited period of time to a place other than their children's habitual residence.²¹¹

The removal of a child to another country which ends contact between the child and the non-custodial parent is not abduction under the Convention.²¹² Although studies have shown that leaving the country and prohibiting contact between a parent and child has the same deleterious effect on the child, regardless of which parent has the custody right,²¹³ A court does not have to

²⁰⁹ Geoffrey L Greif & Rebecca Hagar, *When Parents Kidnap: The Families behind the Headlines*(1993) 194-95 (attributing success of Convention to high number of countries ratifying it).

²¹⁰Hague Abduction Convention, Art.12, at 1502 (mandating immediate return of abducted children).

²¹¹Hague Abduction Convention,Art.5(b) 1501.

²¹² ElisaPerez Vera Report, at 444-45 (stating that majority of drafters were unwilling to place breach of access rights in same category as breach of custody rights and thus unwilling to make breach of access rights wrongful).

²¹³Adair Dyer, "The Hague Convention on the Civil Aspects of International Child Abduction towards global cooperation. Its successes and failures", *International Journal Of Children Rights* 52:8 (1993), 273, 282.

return a child to his or her original environment unless the removal breaches a right of custody. Access rights, although beneficial to the child, do not receive protection equal to that afforded custody rights under the Convention. Legal commentators have noted that the Hague Abduction Convention does not adequately address issues concerning the access rights of non-custodial parents.²¹⁴ Although the Convention provides a separate article that deals with rights of access under Article 21, scholars and courts criticize the Convention because it fails to give direction to judicial authorities regarding their jurisdiction and their ability to provide ways to secure and facilitate the exercise of access rights.²¹⁵ Indeed, in the United Kingdom, article 21 has been described as toothless: "*There are no teeth to be found in article 21 and its provisions have no part to play in the decision to be made by the judge.*"²¹⁶ This Note argues that the aspect of the Hague Abduction Convention addressing access rights is ineffective because it has forced some courts to misconstrue provisions of the Hague Abduction Convention in order to carry out the Convention's intent. This Note further argues that the burden of establishing the absence of a wrongful removal or retention should fall upon the parent who has removed the child. This Note also argues that the Hague Conference should amend the Convention to order a court to enforce previously ordered access rights in the child's new habitual residence. This Note concludes that without clearer and more equitable direction, the courts may never respect the original custodial arrangement established to benefit the child.

²¹⁴Nigel Lowe, "Problems Relating to Access Disputes Under the Hague Convention on International Child Abduction", *International Journal Of Children Rights*(2000), 374, 375, 381.

²¹⁵Second Special Commission, at 244 (stating that "whilst Article 21 recognizes rights of access, it has no firm legal provisions to enforce such rights."); Access Symposium, at 4 (recognizing weakness in Article 21 of Hague Abduction Convention).

²¹⁶ Nigel Lowe, Op.Cit, 385.

4.1.1 Child abduction linked with Visitation

Often child abduction has been attended with a heated custody dispute following divorce proceedings that result in feelings of rage, fear, and jealousy thereby motivating the abductor to take the child. Sometimes a parent will abduct a child to maintain a relationship with the other parent through conflict. Other times, the children are used as pawns to hurt the other parent. A parent may abduct the child, additionally, to ensure custody. A parent, for instance, might abduct a child before a court can finalize an order of custody in order to gain leverage by using a new location as a forum for deciding custody issues.²¹⁷

Child abduction is often tied to visitation rights. A non-custodial parent, for example, might exercise visitation rights by taking the child out of the country with the permission of the custodial parent, but, subsequently, refuse to return the child at the end of the visitation period.²¹⁸ Even a late return may trigger fear in the custodial parent a sense of mistrust that the child will not be returned at all. In such a case, the custodial parent may try to frustrate the visitation rights of the non-custodial parent by keeping the child away from that parent.²¹⁹ An increased restriction on visitation rights, however, may increase the desire of the non-custodial parent to abduct the child to ensure a meaningful relationship with the child.

²¹⁷ ElisaPerez Vera Report , at 429 stating that "the abductor will hold the advantage since it is he who has chosen the forum in which the case is to be decided, a forum which, in principle, he regards as more favorable to his own claims."

²¹⁸Bodenheimer, at 100 (discussing how some parents abuse visitation rights).

²¹⁹ Dyer Remarks, (stating visitation may be attended with fear that visiting parent will retain child abroad).

A change in the circumstances of a parent may lead to the decision to take a child abroad.²²⁰ A parent, for example, may relocate for employment purposes or to marry an individual in another country. Although the parent may not have a malicious motive, taking the child abroad may frustrate the lawful access rights of the non-custodial parent. The abducting parent frequently speaks negatively about the other parent.²²¹ Due to such negative reinforcement, children may suffer great psychological problems and behavioral maladjustments including resentment of both parents.

4.1.2 Weaknesses

Although Article 21 recognizes the rights of access, the Convention has no provisions that enforce such rights." Experts say that one of the Convention's biggest failures is its ineffectiveness at securing rights of access. Some experts say that Central Authorities may not act unless there is a legal requirement that they do so.²²²

The drafters of the Convention carefully considered the best way to fairly secure the access rights of non-custodial parents. The Canadian delegation, during negotiations, first suggested that a breach of rights of access should be given the same protection as a breach of custody

²²⁰*Viragh v. Foldes*, 415 Mass. 96, 612 N.E.2d 241, 244 (1993) (noting that custodial parent remarried man with dual citizenship in United States and Hungary).

²²¹ M. Feinberg & Lori S Loeb, "Custody and Visitation Interference: Alternative Remedies", *Journal of marriage and Divorce* 12:5(1994), 271, 272. (noting that such behavior is called the Parental Alienation Syndrome).

²²²Lowe, at 382-83 (suggesting that Convention should have obligated Central Authorities to assist in instituting access proceedings). Experts were also concerned that without legal mandates, judges may be unwilling to give sufficient weight to access rights.

rights.²²³ Although the drafters acknowledged that a breach of access rights caused by the removal of a child by the custodial parents caused problems, the drafters were reluctant to afford the same protection as for a wrongful removal or retention of a child.²²⁴ They were concerned that giving both sets of rights equal protection would eventually lead courts to look at both parents as if they had equivalent rights.²²⁵ The drafters further believed that strict rules in the field of access rights would be too impractical to draft.

From its inception, Article 21 of the Hague Abduction Convention has been characterized as soft law.²²⁶ One of the main purposes of the Hague Abduction Convention is to ensure that parents and children maintain meaningful relationships.²²⁷ When the drafters of the Convention first considered the issue of access rights, their concern was to give children, family relationships that were as complete as possible. Research indicates that a breach of access rights through removal is just as damaging to children as is the breach of custody rights through removal.²²⁸ Some authorities, however, believe that it is in the best interest of the child to sever ties with one of the parents when both parents are separated either factually or legally because of possible animosity the parents have against each other.²²⁹ The Hague Abduction Convention,

²²³ Access Symposium, at 2 (noting that drafters subsequently rejected proposal after some discussion).

²²⁴ Perez Vera Report, at 445.

²²⁵ *Ibid.*

²²⁶ Dyer, at 287 (referring to weak nature of legal provisions governing access rights).

²²⁷ Perez Vera Report, at 429-30 (explaining that drafters of Convention wanted to ensure contact between parents and children).

²²⁸ Perez Vera Report, *Op.Cit.*, 428-29.

²²⁹ Perez Vera Report, at 432 (stating that Hague Conference generally disagreed with this school of thought, but agreed that separation from one parent may be appropriate in some situations). Hague Abduction Convention, article.7(f) and 21, at 1502, 1503.

nevertheless, adheres to the notion that access rights and custody rights should work together. The Convention demonstrates that the authorities should recognize access as a valid interest in custody.

4.1.2.1 The Special Issues of Access Rights and Article 21

Few courts have decided issues concerning rights of access since the enactment of The Hague Abduction Convention. Some case law, however, has demonstrated a developing problem with regard to the application of Article 21 of the Hague Abduction Convention and the proper role of the Central Authority.²³⁰ An English court in *In Re T* deciding the validity of Article 21 dismissed the application based on lack of jurisdiction.²³¹ In *In Re T*, a father attempted to enforce in England his access rights granted by the Superior Court of California, but the court held that Article 21 does not give a judicial authority the jurisdiction to enforce access orders issued in another country. The court found that the application should have been filed instead under the Custody and Children Act of 1989, which is the English implementing legislation of The Hague Abduction Convention.²³² In England, the Family Court decided *B v. B*, a case regarding court jurisdictional issues in securing access rights.²³³ In September 1985, after receiving custody of the couple's three children, the mother moved from Canada to the United Kingdom with the children. The father obtained an order from the Supreme Court of Ontario permitting him to take possession of the children in order to exercise his access rights and he

²³⁰Hague Abduction Convention, art.21, at 1502 (providing section dealing with access rights).

²³¹*In Re T (Minors) (International Child Abduction: Access)*(United Kingdom 1993) [1993] 1 W.L.R. 1461 (deciding that court decided that Central Authority should not have issued originating summons).

²³² *Ibid.*

²³³*B v. B (Minors: Enforcement of Access Abroad)* [1988] 1 All ER at 652, 655 (holding that wrongful removal need not be proved for court to hear case).

tried to enforce the order in the United Kingdom. The mother argued that because she had the right of custody over the children, the father's application should be dismissed because there was no wrongful removal or retention. The court refused the mother's argument because such a reading of the Convention would undermine the provisions of the Convention designed to secure access rights.²³⁴

In *B v. B* the court, however, dismissed the application to secure the father's access rights because the access order was made in Canada, and by the time the breach of the father's rights of access accrued, the child's habitual residence changed to the United Kingdom. Interpreting Article 4 of the Hague Abduction Convention, the *B v. B* court concluded that in order for his rights to be enforced, those rights must arise in the Contracting State in which the child was habitually resident before any breach occurred.²³⁵

Finally, the *B v. B* court criticized Articles 7 and 21 for their inability to provide adequate remedies to secure access rights for non-custodial parents.²³⁶ The court specifically criticized the provisions because they do not impose any specific duties upon a judicial authority to take any steps to secure the access rights of non-custodial parents.²³⁷ Neither Article 7 nor Article 21

²³⁴*B v. B*, Op.Cit,656. (stating that "The Convention would be of no assistance and it is difficult to envisage any circumstances in which a mere breach of rights of access on the removal of a child abroad by a custodial parent could be remedied or dealt with under the Convention.")

²³⁵*B v. B*, Op.Cit, 657. (reasoning that rights conferred by court of child's habitual residence are those upon which application is based and habitual residence in Contracting State in which rights existed is sufficient for that State's jurisdiction).

²³⁶*Ibid*, 658.

²³⁷ *B v. B* (Minors: Enforcement of Access Abroad), 1 All ER at 658 (finding lack of guidance to enforce Article 21).

provides any direction or limitation upon which a court can exercise its discretion in facilitating access rights.

The English court's decision in *Re G* overruled the decision in *B v. B*.²³⁸ In *Re G*, the Canadian family court granted custody of a divorced couple's child to the mother and permitted the mother to live in either Canada or England while granting access rights to the father. The mother subsequently settled in England and the father had not seen the child since shortly after the move. The father brought proceedings under the Hague Abduction Convention to enforce the access rights granted him by the Canadian court.²³⁹ The English court again considered whether Article 4 of the Convention requires that an access order arise under the Contracting State of the child's habitual residence in order to be enforced. In *Re G* court held that the decision in *B v. B* was too narrow a reading of Article 4. The court noted instead that Article 4 does not specify under which State, the right of access must arise.²⁴⁰

The court further stated that an application for the procurement of access rights should not be brought under Article 21, but should be brought instead, as an independent request upon the court of the child's habitual residence. Because Article 21 provided no guidance to the judicial authority in securing the access rights of non-custodial parents the access order issued in Canada could not be enforced.²⁴¹ Instead, the court found that in cases regarding access rights,

²³⁸ *Re G (A minor) (Enforcement of Access Abroad)* [1993] 3 All ER 657.

²³⁹ *Ibid*, 660 (stating that Central Authority of England and Wales assisted father in making application to protect his access rights).

²⁴⁰ *Ibid*, 662.

²⁴¹ *Re G (A minor) (Enforcement of Access Abroad)* [1993] 3 All ER 657.

courts should exercise their discretion and consider the best interests of the child while regarding the existing access order as persuasive guidance in their decisions.

The greatest hurdle that non-custodial parents face is that under the Hague Abduction Convention, the removal of a child by the custodial parent is not wrongful.²⁴² The Hague Abduction Convention provides little remedy even if such removal was made to deliberately frustrate their ability to effectively exercise their rights of access. The Superior Court of California, for example, refused to order the return of a child removed from Israel by the custodial mother when such removal interfered with the father's access rights.²⁴³ The California Superior Court found that the removal of the child to the U.S. was not wrongful under the laws of Israel because the mother had custody rights while the father had nothing more than access rights.²⁴⁴ Some courts, however, have interpreted the Hague Abduction Convention in order to comply with its goals.²⁴⁵ In *Gross v. Boda*, after the dissolution of their marriage the mother had sole custody of the parties' child while the father had visitation rights under the laws of Arizona. According to the Court of Appeals in Wellington, New Zealand, visitation rights give a parent's position and a right care for the child for an indefinite period. The court's definition of visitation rights overlaps with the definition of rights of custody. The court, therefore, construed a right of

²⁴² *B v. B (Minors: Enforcement of Access Abroad)* 1 All ER at 656 (stating that Hague Abduction Convention offers little assistance despite non-custodial parent's expectation that Hague Abduction Convention would help reestablish contact between parent and child).

²⁴³ *District Attorney v. Officer*, Superior Court, County of Santa Barbara No. 215833 (Dec. 17, 1996) (unpublished opinion) (noting that Israeli court, upon separation of parties, granted sole custody to mother while giving visitation rights to father).

²⁴⁴ *Ibid.*

²⁴⁵ *Gross v. Boda*, [1995] 1 N.Z.L.R. 569 (December 2, 1994) (ensuring father's ability to maintain contact with his child).

visitation as a type of custody right and concluded the removal of a child in breach of visitation rights is wrongful.

4.1.2.2 Bearing the Increased Cost of Access Rights

Some courts have attempted to accommodate a non-custodial parent where removal of the custodial parent frustrated the custody arrangements made by a court which assumed that the child would remain within the jurisdiction.²⁴⁶In *Costa v. Costa*, a couple divorced in May 1989 and the New York State Supreme Court granted custody of the couple's child to the mother and granted access to the father. When the mother took the children out of the country to live in England, the father applied to the English court for an access order under the Child Abduction and Custody Act of 1985. The court decided that Article 7 (f) of the Hague Abduction Convention permitted the judicial authority to make arrangements for the exercise of the applicant's visitation rights. In ordering access, the court ordered the mother to bear some of the cost of the father's travel expenses to facilitate his visitation right.²⁴⁷

Similarly, the Supreme Court of Minnesota in *Viragh v. Foldes*²⁴⁸remanded the case to consider the mother's financial ability to pay the father's expenses for international travel to visit his children. The *Viragh* court noted that the Hague Abduction Convention does not mandate any remedy for a non-custodial parent seeking access rights.²⁴⁹ The lower court found that the

²⁴⁶ *Costa v. Costa* (Aug. 21, 1991) <[http:// www.hiltonhouse.com/File htm/Costa.UK](http://www.hiltonhouse.com/File htm/Costa.UK)>visited on Dec. 30, 2014.

²⁴⁷ Grych J H & Fincham F D, " Marital conflict and children's adjustment: A cognitive-contextual framework", *Psychological Bulletin* 108(1990),267-290.

²⁴⁸ *Viragh v. Foldes*, 415 Mass. 96, 612 N.E.2d 241 (1993).

²⁴⁹ *Viragh*, 612 N.E.2d. at 246 (stating, however, that court had discretion to order return of children to effectuate visitation under Article 18 of the Convention).

children should not be ordered to return to Hungary for visitation. The court, however, used its interpretation of Article 26²⁵⁰ to order the moving custodial parent to pay the necessary travel expenses of the non-custodial parent in the exercise of his access rights.

The Hague Abduction Convention should adequately protect rights of access without forcing courts to consult the implementing legislation in their respective States. Without uniform rights throughout the Contracting States, parents will be faced with differing custody judgments depending on the State to where the child has been removed. It seems erroneous that Article 21 does nothing more than order Central Authorities to get aggrieved parents to the courtroom and then leaves non-custodial parents without further remedy once they get to court. A careful reading of The Hague Abduction Convention, however, gives no further instructions for securing the access rights of non-custodial parents. In order for a judicial authority to carry out the spirit of the Convention, it must add its own interpretation to the word of the treaty without any substance to support its decision. With regard to access rights, the Hague Abduction Convention at best grants the judicial authority so much discretion that it can either do something to help non-custodial parents enforce their access rights or it can do nothing at all.

1. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation In Respect Of Parental Responsibility and Measures For the Protection Of Children (Concluded 19 October 1996)

In October 1996, the 18th Session of the Hague Conference on Private International Law concluded the Convention on jurisdiction, Applicable Law, Recognition, Enforcement and Co-

²⁵⁰Hague Abduction Convention, art.26, at 1504.

operation in Respect of Parental Responsibility and Measures for the Protection of Children, and Decisions on Matters Pertaining to the Agenda of the Conference (Hague Child Protection Convention).²⁵¹ The objectives of the Hague Child Protection Convention are to resolve conflicts of jurisdiction, applicable law, recognition and enforcement of proceedings for matters relating to the care and protection of children, including parental responsibility.²⁵² Article 5 of the Hague Child Protection Convention states that the country of the child's habitual residence has the jurisdiction to decide issues pertaining to the child's interests.²⁵³ If the child's habitual residence changes, the first country is divested of jurisdiction and jurisdiction is conferred upon the new country. The Hague Child Protection Convention provides that the State having jurisdiction over the child may request that another State assume jurisdiction if such a transfer would be in the child's best interests.²⁵⁴

The procedures for securing access rights are set forth in Article 35 of the Hague Child Protection Convention, which encourages authorities of one State to co-operate with authorities of other States in securing access rights. One attempting to secure access rights in another country may submit evidence and information to the authorities in his own State.²⁵⁵ That State will make findings and a decision as to whether that parent should have access to the child

²⁵¹ Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, and Decisions on Matters Pertaining to the Agenda of the Conference, done at the Hague, October 19, 1996, reproduced in 35 I.L.M. 1391 [hereinafter Hague Child Protection Convention].

²⁵² Hague Child Protection Convention, Article 1.

²⁵³ Hague Child Protection Convention, Article 5.

²⁵⁴ Hague Child Protection Convention, Article 8.

²⁵⁵ Hague Child Protection Convention, Article. 35(2).

habitually resident elsewhere and will decide under what conditions such access should take place. The parent seeking access may then present that decision in the State of the child's habitual residence which must use the other court's findings as evidence in making its decision as to whether access would be granted and, if so, under what conditions.²⁵⁶ The Hague Child Protection Convention does not preclude a parent from bringing an action for the return of the child or the protection of access rights under The Hague Abduction Convention.

The Hague Child Protection Convention provides substantial improvement on the gaps left by The Hague Abduction Convention. Where the Hague Abduction Convention left judicial authorities deciding that they were without jurisdiction to decide issues concerning access, the Hague Child Protection Convention specifically provides that courts in the child's habitual residence maintain jurisdiction and apply their own laws concerning the care of the person of the child including matters relating to access rights. The Hague Child Protection Convention, additionally, directs authorities of the Contracting States to co-operate with each other in the securing of access rights. Such a mandate was missing in The Hague Abduction Convention.

These provisions in the Hague Child Protection Convention give greater protection than does the Hague Abduction Convention to parents seeking to exercise access rights to their children while giving children a greater opportunity to maintain more complete relationship with both parents.

4.2 Protocol between High Courts of Pakistan and the United Kingdom

In Pakistan, there are no basic statistics of trans-national parental child abduction/custody except for the data between Pakistan and the UK. There were 11 cases of parental child

²⁵⁶ Ibid, 1402.

abduction reported between Pakistan and the UK in 2008, 24 cases from April 2009 to March 2010, and 55 cases in 2011.²⁵⁷

In January 2003, the Higher Courts of Pakistan and the United Kingdom signed the UK-Pakistan protocol, which enables them to deal with parental child abduction cases. The purpose was to ensure abducted children's safe return to their habitual country. The UK-Pakistan Protocol has been enforced by Pakistani courts and mothers are allowed to take their children back to the UK.

The Institute for Social justice (ISJ) urges the government of Pakistan to sign and ratify the Hague Convention 1980 because,

1. Pakistani courts have judiciously decided cases and extended complete support to foreign mothers as per the law and justice. The verdicts of Pakistani Courts are not merely influenced by the parents' culture and religion, but that they are carefully crafted and take into account the foundations of collective logic and wisdom and human values, as well as the law and child welfare.
2. It can also be assessed that many foreigner parents (except for the French and the British) do not approach Pakistani courts, perhaps due to a lack of knowledge about the relevant legal process in Pakistan. However, the problem of trans-national parental child abduction prevails across the world and millions of Pakistanis have settled in countries all over the world.
3. As a matter of fact, Pakistani courts already judiciously follow the principles enforced by the Hague Convention, seeing as they provide legal and social justice for foreigner

²⁵⁷Patricia E. Epy, "Managing Child Custody Cases Involving Non-Hague Contracting states", *Non-Hague Contracting states* 14:9(1997), 80.

mothers and give them complete consideration to the child welfare and best interests. It is therefore high time for Pakistan to become a party to the Hague Convention 1980 and to ensure a system protecting.²⁵⁸

In 2006, the prominent case of Misbah Rana a twelve-year-old, Scottish-Pakistani girl attracted considerable media attention. Misbah's mother, Louise Campbell, approached the High Court of Lahore and filed a lawsuit against her ex-husband and Misbah's elder sister, both of whom had illegally taken Misbah to Pakistan. She claimed that Misbah should be sent back to Scotland and the custody matter decided by the relevant court in Scotland, as per the Protocol. After listening to both parties' arguments, the Court ordered that she should be handed over to the British High Commission within seven days, so that the case could be decided as per the Protocol and the custody heard in Scotland's relevant court. Upon hearing that she would be handed over to her mother, Misbah protested against the Court's decision and expressed the desire not to go back to Scotland. Owing to Misbah's wish to stay with her father, both parties decided to settle the issue outside the court. The court allowed her to stay with her father and granted access to her mother, so that she could visit her daughter under certain measures.²⁵⁹

In Misbah's case, many people still consider that the High Court violated the UK-Pakistan Protocol and that the child custody was decided by mutual agreement rather than the legal system created under the Protocol against the TNPCA. On the other side, the court respected her point of view, which is central in the field of child rights as envisaged in Article 9 (2) of the UNCRC: "*States Parties shall assure to the child who is capable of forming his or her own*

²⁵⁸ Patricia, Op.Cit, 85.

²⁵⁹ https://en.wikipedia.org/wiki/Misbah_Rana Retrieved on 02-07-2015.

*views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*²⁶⁰ Article 12 of the UNCRC also states that the child's point of view should be taken into consideration by the courts.

*"For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*²⁶¹

In Pakistan's case, increasing migration of Muslim Pakistanis in the West led to multi-cultural and multi-national marriages and, simultaneously, divorce rates of such marriages increased. Separation between couples led to an increase in trans-national parental child abduction. Hence, it is recommended for Pakistan to ratify the convention to avoid the increasing number of trans-national child abduction issues.

4.3 Convention on the Rights of the Child

It is generally recognized that children should for their well-being, maintain personal relationships and have regular contact with both of their parents unless it is unsafe or otherwise contrary to their interests to do so. This remains the case even when the parents are living apart and in different countries, and even though the primary care of the child is vested in one of the parents. While different legal systems adopt varying approaches to the substantive issues

²⁶⁰ Convention on the Rights Of Child, Article 12(1).

²⁶¹ Convention on the Rights Of Child, Article 12(2).

surrounding contact, certain fundamentals are subscribed to by almost all States. Under Article 9, paragraph 3 of the United Nations Convention on the Rights of the Child:

“States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”²⁶²

“A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.”²⁶³

²⁶² Convention on the Rights Of Child, Article 9(3).

²⁶³ Convention on the Rights of Child, Article 10(2).

ANALYSIS

As we have analyzed the Islamic law upon child visitation, there is consensus of *Fuqāhā* that visitation right must be granted to non-custodial parent and custodial parent cannot interfere with this right. There are restrictions upon relocation of the child by the custodial parent to protect the visitation right of non-custodial parent. But Islamic law differed upon the time of visitation that how frequently a non-custodial parent can visit a child. In all these opinions one thing is common which is the welfare of children. In each and every case according to the facts and circumstances of the case welfare of the minor will be kept in mind while deciding these issues. In Islamic law there are no hard and strict rules upon the issue, but one thing is clear that stress is laid down to awarding custody to mother in most of the cases and the father is given visitation right.

As far as the laws of other countries, e.g. UK and USA are concerned; their laws are extended and comprehensive. In UK Section 8 of the Children Act 1989 outlines the orders which can issue by the court. A *contact order* outlines the requirements, of the person the child resides with, to allow contact with another person. A *prohibited steps order* prevents a parent from exercising their full parental responsibility without consent of the court. A *residence order* puts in place the arrangements for whom a child should live with and a *specific issue order* relates to directions given by the court to address a query that has arisen regarding parental responsibility for a child. In the USA there are different laws of different states, but each state is having its own complete set of laws, e.g. in Florida, Virginia, South Carolina, Texas and Ohio have their separate child custody and visitation laws as discussed in detail in chapter 4.

As far as the Indian laws are concerned, they have not legislated upon the child visitation like

Pakistan, they follow the same provision, section 12 of the Guardian & Wards Act 1890 and they have also Hindu Marriages Act 1955. The most of custody petitions are filed under section 26 of Hindu Marriage Act 1955. The Supreme Court of India had given judgments upon child visitation in the light of which it can be, determined that they too have adopted the doctrine of best interest of the child.

In Pakistan, As decided in judgments referred in chapter 2, the courts have acted upon the doctrine of welfare of the child and have given appropriate judgments keeping in view the interest of minors. From all these judgments following rules can be drawn;

1. The welfare of minor is paramount consideration. In each and every case to decide custody and visitation right and even custody may be awarded to either party despite of second marriage if court determines that it is in the best interest of child. Mere second marriage is no ground of terminating custody order.
2. The order of custody may be terminated on the ground that the custodial parent did not comply the order of visitation and child was extremely brainwashed against the non-custodial parent, which has deleterious effects on the child's mind.
3. The court kept in mind the children's best interest and chalked out a schedule of meeting of children with their father. This type of detailed schedules should be already existed in the statute that on what terms the visitation should be granted to avoid disputes and to save time of the court.
4. These judgments contemplate that section 12 provides for visitation rights and it does not mean merely to grant temporary custody under section 12. It also does not mean that an application under section 12 can only be made when application under section 25 is

pending. An Application under section 12 for visitation rights can also be made independently of an application under section 25 of Guardian & Wards Act.

5. It is necessary for child's upbringing to be intact with both the parents.

There are many international conventions provided to secure visitation right e.g. the Hague Convention on the Civil Aspects of International Child Abduction. Although this convention has lacuna about visitation right, but basically it's purpose is to secure custody and access rights both. Another important convention is the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation In Respect Of Parental Responsibility and Measures for the Protection of Children which is also called The Hague Child Protection Convention. It provides substantial improvement on the gaps left by The Hague Abduction Convention.

There is another important convention. The Convention on the Rights of the Child which does not provide for visitation right in detail, but articles 9 (3) and 10(2) specifically deals with visitation right. Pakistan has also ratified this convention. In case of Hague Abduction Convention to date, there are 89 contracting countries which are part of the Convention, but Pakistan has not ratified it yet.

In January 2003, the Higher Courts of Pakistan and the United Kingdom signed the UK-Pakistan protocol. The purpose was to ensure abducted children's safe return to their habitual country. The UK-Pakistan Protocol has been enforced by Pakistani courts and mothers are allowed to take their children back to the UK. The Institute for Social justice (ISJ) urges the government of Pakistan to sign and ratify the Hague Convention 1980. Because, Pakistani courts have been deciding cases and extended complete support to foreign mothers as per the

law and justice. It is a fact that Pakistani courts already follow the principles enforced by the Hague Convention, seeing as they provide legal and social justice for foreigner mothers and give them complete consideration to the child welfare and best interests. It is therefore high time for Pakistan to become a party to the Hague Convention 1980 to ensure a system protection.

CONCLUSION

Concluding up this thesis with the glory of Almighty Allah who has given me courage and stamina to do this work. The family is essential and primary unit of the society and the children are the main factor to rejuvenate us for the participation in the betterment of society. In case of parental conflict, both the parents should cooperate each other for the welfare of children. The "welfare principle" is the proper test to be applied in cases of disputes between the parents and is now universally accepted as applicable in all courts dealing with this issue.

In the Courts at the time of the visitation of minors with their non-custodial parents very sentimental scenes are, seen where often an emotionally charged atmosphere is created. Such situation is created due to the egocentric attitude of parents of minors, which substantially affects the welfare of innocent minors a lot and demands parents to resolve their disputes of child custody amicably by adopting a tolerant attitude only for the welfare of the minors. It is my personal experience that a guardian judge through his concerted efforts by convincing the parents of the minors and with their mutual consensus can decide extremely complicated and knotty cases amicably which shall not only result in expeditious and inexpensive justice, but also reduce the heavy backlog of cases and objectively prime consideration of the welfare of the minors can also be achieved significantly.

Forming a parenting plan while deciding custody of visitation disputes is also a very important aspect. A parenting plan must be in the best interest of children. When both parents are active in their children's lives and do not fight over custody and visitation schedules, the children will usually do much better.

Children can get attached to caregivers when they have good relationships that are consistent over time. In many instances, it may make sense for infants and toddlers to be able to see each

parent regularly, especially if a child is safe with either parent. Younger children's concept of time is different from that of older children, and they often need more consistency. It is generally a good idea to have a regular schedule and stick to it. Most children benefit from having a routine they can count on. When parents make a schedule, they should think about the quality of the relationships. Not just the relationship between the children and each parent, but also between the parents and between the children and any other caregivers.

The legal system has a variety of attributes that unfortunately help to perpetuate child visitation interference by a parent who is dedicated to such interference. Research shows that detection of fabrication is generally poor, and this provides an additional problem when it comes to child visitation interference. For example, a father who accuses the other parent of interfering with visitation may find that the other parent not only denies such interference, but accuses the nonresidential parent of not appearing at designated visitation times. Relatedly, a parent who has continually interfered with visitation may state in the courtroom that he or she will comply with the nonresidential parent's visitation request. Immediately following the hearing, the custodial parent returns to the visitation interference pattern, knowing those months may go by before a return to court. As such, many parents who are aware of the court's ineffectiveness take full advantage. It should be noted that the judicial system is well aware of its own inadequacies in this Area

Child visitation is a very important and complicated issue. Every state has a particular set of laws and rules governing these sensitive family issues. But unfortunately in Pakistan's family laws, there is not proper legislation upon the topic neither any comprehensive law exists. Related legislations about the child visitation are the Family Courts Act 1964 and the Guardians

& Wards Act 1890. But these Acts do not fulfill the social needs of our family system. There are not provided clear terms, time and venue of visitation, etc. so there is the need to minimize the extending issues of visitation by comprising a clear law upon the topic. In Pakistan Children usually meet with the non-custodial parent in court premises which has a very bad impact on the tender minds of children. As usually they are unfamiliar with the courts atmosphere, it makes them scared and in such type of atmosphere they are unable to enhance a friendly relationship with the noncustodial parent.

Courts have tried to fulfill this deficiency of legislation to some extent by giving appropriate judgments e.g. PLD 2008 Karachi 499, 2010 MLD Lahr 42, 2011 CLC 889 Islamabad, PLD 1973 Lahore 442, PLD 2008 Lahore 527 etc. But, it would be more appropriate if a comprehensive law could be passed by the legislature in the light of these judgments. There is also made attempts to analyze Pakistan's Child Visitation law with Islamic law and comparison is also made Pakistan's visitation law with visitation laws of the UK, USA, and India to access what mechanism they have adopted to resolve these issues. Their laws are very detailed and comprehensive. The legislation should take guideline from their laws to amend child visitation law in Pakistan more effectively.

RECOMMENDATIONS

Section 12 of Guardian & Wards Act 1890 should be amended in respect of the following terms;

1. The venue/place of meeting should be cautiously decided and in deciding the same primarily factors like welfare of the minor(s), convenience and mutual antipathy between the parties should always be considered.
2. Number, time and duration of periodic meetings must be rational and reasonable not affecting the minors.
3. The visitation rights for overnight should be granted in exceptional cases because shuttling of minors from one parent to the other may environmentally mal-adjust them which materially impacts the mental health and education of the minors.
4. Courts should not be a venue for meeting of non-custodial parent with the child. Meeting in the court premises leaves a bad impact on the child's mind and the purpose of visitation that is to create a bond of love and trust between child and non-custodial parent, cannot be achieved. In Pakistan usually on every Saturday and Sunday an average of hundreds of minors used to meet their non-custodial parents in a congested and packed atmosphere of Court premises, but in many courts separate rooms are being constructed, e.g. in Lahore District Bar under the direction of Chief Justice Lahore High Court a beautiful, well-arranged and facilitated meeting room has been constructed where non-custodial parents of minors meet with their minor children conveniently, safely and comfortably.

5. Custodial parents who interfere with child visitation must be imprisoned, penalized financially, or forced to lose primary custody of the children.
6. There should be mediators in court to negotiate with parents upon the issue of child visitation. The cost of mediator may be paid out of parent who vitiated the process of court.
7. To help avoid disputes, the order should be as specific as possible about visitation rights. The order should set forth the starting and ending days and times for visitation and allocate vacations, holidays, birthdays, and other special days or events. If telephone access is contemplated, this should also be addressed in the order.
8. To avoid problems of enforcing reasonable visitation rights in working out a plan for visitation, it is usually best to specify the visitation details e.g. length, frequency, location, notice of missed visitation, etc.

Things to be considered while thinking about parenting plan:

9. Both the parents should meet their children's basic needs for love, protection, guidance, healthy diet, good medical care and Enough rest. They should consider the children's Ages, personalities, experiences, and abilities. Every child is different. They should adjust their plan to children, not children to their plan. Give children regular, consistent times with each of them for day-to-day care, overnights, activities, schoolwork, vacations, and holidays.
10. Except in cases of abuse or violence, a parenting plan should have made sure that both the parents can have information about the children and both can look at the children's medical and school records. Parents must determine that where should our children be during the week, on weekends, for holidays, summer vacations, and special

days. Which parent will be in charge of which activities (sports, music, and homework) and how will our children get from one parent to the other. Who will pay the costs of transportation?

11. During the tender years, the noncustodial parent should have frequent and regular visitations with the child. These periodic visits should be at least two hours in duration and no overnight stays are recommended.
12. Children from the ages of 6 months to 18 months can begin to realize when a parent is absent and if visits are not regular and frequent, the child many times can exhibit separation anxiety. During this period of development, the non-custodial parent should be using these frequent visits with the child to bond while building an emotional support for the child. It is not recommended for the non-custodial parent to leave the child with a non-custodial parent, the focus of these frequent visits should be on establishing attachment with the non-custodial parent.
13. From the ages of 18 months to 3 years, a child begins to move towards independence, at this stage a child must develop confidence that the parent will be remaining in their life to avoid questioning if the parent still loves him. Several and more frequent visits are preferable over the standard 1st, 3rd, and 5th weekend stays. During this stage of development, the child will sense whether or not the parent is, both dependable and reliable concerning the parent-child relationship.
14. After the age of 3 years, the child will benefit if the parents have a cordial relationship. Parents who maintain a congenial relationship usually work out visitation among themselves; therefore allowing more frequent visits with the non-custodial parent. Parents who have many conflicts usually use a more structured visitation schedule.

Parents need to encourage their children to develop friends and extracurricular activities and the visitation schedule should not be used as a barrier which can stunt the emotional and physical needs of the child.

15. Visitation interference by either parent is a great hindrance for exercising this right absolutely. There can be many psychological reasons behind it as stated in 1st chapter, which includes 'parental alienation syndrome' or 'divorce related malicious mother syndrome'. There should be psychological treatment of parent who interferes with visitation schedule. Some sort of rehabilitation centers should be formed where parents could educate make aware of the visitation importance for their children's mental and psychological development.

16. Exit from Paistan(Control) Rules 2010 Rule 2 provides Grounds to prohibit persons from proceeding from Pakistan to a destination outside Pakistan. According to rule 2(f) as provided under;

"Any case and his name forwarded by the Registrar of a High Court, Supreme Court of Pakistan or Banking Court only"

Only the order of High court, Supreme Court and Banking Court can prohibit a person to leave from Pakistan. So it is highly recommended that the lower courts should also have authority to place such restrictions upon wrongful removal of a child by his parent to protect the visitation right of non custodial parent.

BIBLIOGRAPHY

Books

1. Abd al-Ati, Hammudah. *The Family Structure In Islam*. USA: American Trust Publication, n.d.
2. A D, Ajjola Alhaji. *The concept of family in Islam*. India: Adam Publishers and Distributors, 1999.
3. Ahmad, Khurshid. *The Family: Its Objectives and Functions*. Islamabad: Dawah Academy, 1998.
4. Ahmad, Khurshid. *Family Life in Islam*. United Kingdom: The Islamic Foundation, 1974.
5. Ala'eddin, Kharofa. *Islamic Family Law*. Kuala Lumpur: International Law Book Service, 2004.
6. Al-Sarakhsi, Muhammad Ibn Ahmad. *Al-Mabsut*. Cario: Matba'at al Sa'adah, 1322 AD.
7. Ali, Abdullah Yousuf. *The Holy Quran*. Pakistan: Dawah Academy, n.d.
8. Ali, Syed Amir. *Mohammedan Law*. Lahore: Law publishing company, n.d.
9. Anas, Malik Ibn, *Al-Mudawwanah al- Kubra*. Beirut: Dar Sadir, n.d.
10. Anwari, Khawaja Arshad Mobeen. *The Manual OF Family Laws*. Lahore: Khyber Law Publisher, 1981.
11. Arendell, T. *Mothers and divorce: Legal, economic, and social dilemmas*. Berkeley: University of California Press, 1986.

12. Baalbaki, Dr. Rohi. *Al-Mawrid Al-Waseet: a concise Arabic- English dictionary*. Beirut: Dar el-ilmilimalayin, 2001.
13. Badran, AbulAnain. *Huquq alAowlad fi al-Shariah al-IslamiyyawalQanoon :The Children's Rights under the Islamic Shariah and the Law*. Alexendria, 1981.
14. Baillie, Neil B E. *A Digest of Moohummudan Law*. Lahore: Premier Book House, n.d.
15. Boland, L Mary. *Your Right to Child Custody, Visitation, and Support*. Naperville, IL, USA: sphinx publisher, 2004.
16. Bromley, P M. *Family Law*. United Kingdom: Butterworth & Co., 1985.
17. Collins Donald, Jordan Cathleen, Coleman Heather. *An Introduction to Family Social Work*. U.S.A: wadsworth/Thomas Learning, n.d.
18. Conway, Helen L. *Family law*. New York: Routledge 2 Park square, 2014.
19. Cummings, M E & P, Davies. *Children and marital conflicts: The impact of Family dispute and resolution*. New York: Guilford Press, 1994.
20. Doi, AbdhurRehman. *Shariah, The Islamic Law*. Landon: Law Publishing Company, 1987.
21. Edward, SRue. Lawrence, M Berger. Patricia, R Brown. *The Stability of Shared Child Physical Placements after Divorce: Evidence from Wisconsin*. USA: Institute for Research on Poverty, 2007.
22. Emery, E R. *Marriage, divorce, and children's adjustment*. Newbury Park, CA: Sage, 1988.
23. Farani, M. *Manual of Family Laws in Pakistan*. Lahore: Lahore Law Times Publications, n.d.

24. Furstenberg, Jr F F & A. J Cherlin. *Divided families: What happens to children when parents part*. Cambridge : Harvard University Press, 1991.
25. Fyzee, Asaf A A. *Outlines of Muhammdan Law*. NewDehli:Oxford University Press,1949.
26. Gardner, L. *The impact of domestic violence on your legal practice: A lawyer's handbook*. Washington, D.C: ABA Commission on Domestic Violence,1996.
27. Gardner, A R. *The parental alienation syndrome and the difference between fabricated and genuine child sex abuse*. Cresskill, NJ: Creative Therapeutics, 1987.
28. Gross, James J. *A Legal Guide to Protecting the Best Interests of Your Children*. Naperville USA: Sphinx Publisher, 2004.
29. Hashim, M Ramdan. *Understanding Islamic Law: from Classical to Contemporary*. UK: RowmanAltimeria, 2006.
30. Hassan, Ahmad. *The Early development of Islamic Jurisprudence*. Islamabad:Islamic Research institute,1970.
31. Haskafi, MuhammadAla-uddin. *Durr-ul-Mukhtar*. Lahore:law Publishing Company,n.d.
32. Hotkinson, keith. *Muslim Family Law: A source Book*. Australia: British Library Cataloguing , 1984.
33. Ibn-Abidin. *RaddulMukhtar*. Quetta:Matba'ahMajidiya,1982.
34. IbneKathirImaduddin, Al Mubarakpuri. *Tafsir Ibn Kathir*. Riyadh:Darrussalam,2000.
35. Jacobson, D. *Family type, visiting patterns, and children's behavior in step family, A linked family system*. New York: Gullford:KPasley & M Thinger-Tallman,1987.

36. Kamaruddin, Zaleha. *Islamic Family Law Issues 200*. Malaysia: Research center International Islamic University, 2001,
37. Khan, Tauqir Mohammad Edi. *Law of Marriage and Divorce in Islam*. New Dehli: Pentagn Press, 2007.
38. Mahmood, Tahir. *The Muslim Law of India*. Allahabaad: Law book company, 1982.
39. Mehdi, Rubya. *The Islamization of the Law in Pakistan*. Rishmond: Curzon Press, 1994.
40. Mansoori, Muhammad Tahir. *Family Law in Islam Theory and application*. Islamabad: Shariah Acadmy, 2009.
41. Maududi, Sayyid Abbula'la. *The Law of Marriage and Divorce in Islam*. Kuwait: Islamic book publishers, 1983.
42. Mir Hosseini, Ziba. *Marriage on Trail*. London: I.B. Tauris & Co Ltd, 1993.
43. Muhammad Ullah, Al-Haj. *The Muslim Laws of Marriage*. New-Dehli: Kitab Bhavan, 2005.
44. Muhammad Ullah, Al-Haj. *Woman in Islamic Shariah: laws of Marriage and Divorce*. New Dehli: Islamic Book Services, 2004.
45. Mulla, Sir Din shah Fardunji. *Mohammedan law*. Lahore: Mansoor Book House, 1984.
46. Mulla, Sir Dinshah Fardunji. *Principles Of Mahomedan Law*. Lahore: Mansoor Book House, 1981.
47. Murghanani, Burhanuddin. *Al-Hidaya*. Trans. Ch. Hamilton, London: S.G Grady, 1870.
48. Mutada, Mutahhari. *The Rights of Women in Islam*. Iran: WOFIS, 1981.
49. Nasir, Jamal J. *The Islamic Law Of personal Status*. U.S.A: Kluwer Academic group, 1990,

50. Nawab, A F M Abdur Rahman. *InstituesOfMussalmanLaw*. Lahore:Law Publishing Company,1980.
51. Nyazee,ImranAhsan Khan. *Outlines of IslamicJurisprudence*. Islamabad:Fedral Law House,2002.
52. Pearl,David. *A Textbook on Muslim Law*. London:Croom Helm,1979.
53. Qadri,Anwar Ahmad. *Islamic Jurisprudence in the Modern World*. Lahore:Ashraf Printing Press,1981.
54. Quraishi,Asifa Edi. *TheIslamic Marriage Contract:Case Studies in Islamic family Law*. Cambridge:Islamic Legal Studies Program,2008.
55. Rida Al-Hilli, Shaikh Abdul Karim, *Al AhkamulJaafariyya fi Ahwal-as-Shakhsiyya: Jaafri Provisions on personal Status*. Baghdad: Muthana Library Cairo,1947AD.
56. Rizvi,Sayyid Muhammad. *Marriage& Morals in Islam*. Canada: Vancouver Islamic Educational Foundation, 1990.
57. Shafqat, C M.*The Muslim Marriage,Dower and Divorce*. Lahore:Law Publishing Company, 1979.
58. Simon, Schusta. *New world Dictionary*. New York, New World Dictionaries, 1980.
59. Sircar, S C. *Al-Shari'ah: Sunni AndImamiyahcode*. Lahore:Law Publishing Company,n.d.
60. Stark, Barbara.*International Family Law:An Introduction*. USA: Ashgate Publishing, 2005.
61. Stone , Olive M. *The Child's Voice In The Court of Law*. Tronto:Butterworth& Co,1982.

62. Suliman bin Ash'ath, Imam hafiz Abu dawud. *Sunan Abu Dawud*. Al-Riyadh: Darussalam, 2008.
63. Susanne, Louis. B, Mikhail. *Child Marriage and Child Prostitution: Two Forms of Sexual Exploitation, Gender and Development*. New York: Basic Books, 2002.
64. T, Arendell. *Mothers and divorce: Legal, economic, and social dilemmas*. Berkeley: University of California Press, 1986.
65. Tyabji, Faiz Badruddin. *Muslim Law: The Personal law of Muslims in India and Pakistan*. Bombay: Tripathi Private limited, 1968.
66. Usmani, Allama Shabbir Ahmad. *Tafsir Usmani*. Karachi: Darul Ishaat, 2003.
67. Verma, B R. *Muslim Marriage Dissolution and Nafaqa*. India: The Law Book Company, 1988.
68. Wallerstein, J & Kelley, J. *Surviving the breakup: how children and parents cope with divorce*. New York: Basic Books, 1980.
69. Wani, Dr M Afzal. *The Islamic Institution of Mahr: A Study of its Philosophy, Working and related Legislation in the Contemporary World*. Srinagar: Upright Study Home, 1996.
70. Waris, Maqsood Ruqaiyyah. *The Muslim Marriage Guide*. Iran: Amana Publications, 2000.
71. Wilson, Ronald. *Anglo Muhammadan law*. Lahore: Law Publishing Company, n.d.
72. Zafar, Fareeha. *Finding our way: reading about women in Pakistan*. Lahore: ASR publications, 1991.
73. Zuhayli, Al-Wahbah. *Al Fiqh al Islami wa Adillatuhu*. Damascus: Dar al-Fikr, 1984.

Articles

1. Adair, Dyer. "The Hague Convention on the Civil Aspects of International Child Abduction towards global cooperation, Its successes and failures". *International Journal Of Children Rights* 52:8 (1993).
2. Ahrons, C. "Predictors of paternal involvement post-divorce, Mothers' and fathers' perceptions". *Journal of Divorce* 6:30(1983).
3. Alexander, S. "Influential factors on divorced parents in determining visitation arrangements". *Journal of Divorce* 3:3(1980).
4. Amato, P R. &Rezac, S J. "Contact with non-resident parents, interparental conflict, and children's behavior". *Journal of Family Issues* 7:15(1994).
5. Andrew, ISchepard. "Children, Courts, And Custody: Interdisciplinary Models For Divorcing Families". *Journal of Marriage and Divorce* 92: 28 (2004).
6. Bacon, B L. &McKenzie, B. "Parent education after separation/divorce: Impact of the level of parental conflict on outcomes". *Family Court Review* 42 (2004).
7. Bowman, M E. &Ahrons, C R. "Impact of legal custody status on fathers' parenting post-divorce". *Journal of Marriage and the Family* 2:47(1985).
8. David, D Meyer. "The constitutional Rights of Non-Custodial parents". *International Journal of Law, Policy and the Family* 35:1461(2006).
9. Eleanor, E Maccoby& Robert, H Mnookin. "Dividing the Child: Social and Legal Dilemmas of Custody". *Journal of Marriage and Divorce* 92:279 (1992).
10. Feinberg, M. & Lori S Loeb. "Custody and Visitation Interference: Alternative Remedies". *International Journal Of Children Rights* 12:5(1994).

34. Paterson, J & Zill, N. "Marital disruptions, parent child relationship, and behavior problems in children". *Journal of Marriage and Family* 48:9(1986).
35. Patricia, E Epy, "Managing Child Custody Cases Involving Non-Hague Contracting States". *Non-Hague Contracting States* 14:9 (1997).
36. Philip, Morgan. & Paul, D Allison. "Paternal participation and children's well-being after marital disruption". *American Sociological Review* 52:9(1987).
37. Rhoades, Helen & Susan, B Boyd. "Reforming Custody Laws: A Comparative Study". *International journal of Law, Policy & Family* 18:119 (2004).
38. Shepard, N. "Child-visiting and domestic abuse. Child Welfare". *Journal of marriage and divorce* 6:71(1992).
39. Seltzer, J A. & Bianchi, S M. "Children's contact with absent parents". *Journal of Marriage and the Family* 12:7(1988).
40. Seltzer, J A. "Relationships between fathers and children who live apart: The father's role after separation". *Journal of Marriage and the Family* 12:53(1998).
41. Sohanah, Kasmani, siti and Rosaline Ow. "Worldviews and Resilience in children of Divorced families". *Asia Pacific Journal Of social work and development* 11:1(2001).
42. Spanier, G. & Glick, P. "Mental instability in the United States: some correlates and recent changes". *Family Relation* 8:31(1981).
43. Theodore, Earnest & Ruth, Altis. "Joint Custody and Co-Parenting: Not by Law But by Love". *Child Welfare* 2:669 (1981).
44. Trop, W. "An exploratory examination of the effects of remarriage on child support and personal contacts". *Journal of Divorce* 7:3(1984).

45. Turkat, I D. "Questioning the mental health expert's custody, report" *American Journal of Family* 7:1(1993).
46. Turkat, I D. "Divorce Related Malicious Mother Syndrome" *Journal of Family Violence* 14:8(1987).
47. Weigel, Daniel J. "The Concept of Family" *Journal of Family Issues* 29:11 (2008).

Websites

1. www.Google.com
2. www.childabductionrecovery.wordpress.com
3. www.hec.gov.pk.com
4. www.lanwt.org/txaccess/visrights.asp
5. www.thefreelibrary.com
6. www.hamariweb.com
7. www.wikipedia.org.com
8. www.globalpost.com.
9. www.islamic-world.net.
10. www.vuhelp.net.
11. www.islamhouse.com.
12. www.dailytimes.com

Selected Legislative Tools

1. Pakistan Penal Code 1860.
2. Wisconsin Statute (1999-2000).
3. Syrian Penal Code.
4. The Guardian & Wards Act, 1890.
5. The West Pakistan Family Courts Act, 1964.
6. The Children Act, 1989.
7. Code of Civil practice and procedure.
8. Virginia code.
9. South Carolina Children's Code.
10. Ohio Revised Code.
11. Uniform Child Custody Jurisdiction and Enforcement Act.
12. Hindu Marriages Act 1955.
13. International Child Abduction Remedies Act.

Indexes

Index of Qura'nic Verses

S/N	Verses	Surah No	Verse No	Page No
1	وَلَقَدْ لَعْنَهُمْ لَكُم مِّنْ أَنفُسِكُمْ.....	16	72	1
2	فَهَلْ عَسَيْتُمْ إِن تَوَلَّيْتُمْ أَن تُفْسِدُوا فِي الْأَرْضِ وَتَقَطُّعُوا أَرْحَامَكُمْ	47	22	29
3	لَيْكُمُ الَّذِينَ لَعَنَهُمُ اللَّهُ فَأَصَمَّهُمْ وَأَعَمَّتْ أَبْصَارَهُمْ	47	23	30
4	وَأَعْبُدُوا اللَّهَ لَا تُشْرِكُوا بِهِ شَيْئًا بِالْقُرْبَىٰ وَالْيَتَامَىٰ وَالْمَسَاكِينِ الْجَارِئِينَ الْقُرْبَىٰ وَالْيَتَامَىٰ وَالْمَسَاكِينِ وَالصَّالِحِينَ.....	4	36	30

Index of Ahadith

Hadith	Source	P/No
"Parents can provide nothing their offspring's better than proper upbringing"	Imam Tirmīdhī, Abu Isa Mohammed Ibn Isa, <i>Sunan al-Tirmīdhī</i> , trans; Muhammad Muhsin Khan (Al-Riyadh: Darussalam, n.d) Book of Al Adab, Chap: AlBirwaSila, Hadith no.1952.	1
"If anyone separates a mother and her child, Almighty Allah will separate him and his loved ones on the Day of Resurrection."	Imam Tirmīdhī, Abu Isa Mohammed Ibn Isa, <i>Sunan al-Tirmīdhī</i> , trans; Muhammad Muhsin Khan (Al-Riyadh: Darussalam, n.d) Book of Al Adab, Chap: AlBirwaSila, Hadith no.1204.	30