

## CASE COMMENT:

# RAJA MUHAMMAD OWAIS v. MST. NAZIA JABEEN AND OTHERS

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### 1. INTRODUCTION

On the 5<sup>th</sup> of October 2022, the Supreme Court of Pakistan issued a judgment in *Raja Muhammad Owais v. Mst. Nazia Jabeen*,<sup>1</sup> declaring that a woman's second marriage does not disqualify her from the right to custody of her children. The Petitioner, the father, filed this case against the Respondent, the mother, impugning a prior judgment of the Rawalpindi Bench of the Lahore High Court in favour of the mother retaining custody. This case is of great significance as it contradicts the disqualification of a mother's right to custody after a second marriage, and instead reaffirms that this right cannot be taken away on this basis alone. This disqualification was customary practice, as highlighted in the judgment that 'the general rule is that the mother on contracting a second marriage forfeits her right of custody.'<sup>2</sup> However, this case establishes precedent that a woman's second marriage cannot be a stand-

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<sup>1</sup> 2022 SCP 29

<sup>2</sup> Paragraph 6, 2022 SCP 29

alone reason for the disqualification of her right to custody, and that the welfare of the children<sup>3</sup> is the main consideration in determining which parent maintains primary custody.

## 2. BRIEF OVERVIEW OF THE FACTS

The Petitioner and Respondent were married and had four children: Faizan Ullah Raja, Rabia Awais, Ayesha Awais, and Ummama Awais. At the time of the Supreme Court judgment, their ages were 8 years, 13 years, 16 years and 17 years respectively. On the 30th of January 2017, the parties dissolved their marriage, after which the Respondent filed an application for custody on the 8th of November 2017 under the Guardians and Wards Act, 1890. She disclosed that she had re-married, although the judgment does not mention when the second marriage took place. On the 15th of November 2017, two of the children left the father's home of their own free will to move in with the mother.

Subsequently, the Respondent moved an application under sections 22-A/22-B of the Code of Criminal Procedure, 1898 (Cr.P.C.) seeking a direction to refrain the Petitioner from harassing her family members, which was disposed of by an Additional Sessions Judge. The Senior Civil Judge accepted her application for custody of the children and awarded a judgment in favour of the Respondent on the 25th of April 2019. This judgment was disputed by the Petitioner, who challenged the decision made by the Senior Civil Judge in the Appellate Court. The judgment by the Senior Civil Judge was set aside, and the Appellate Court awarded custody to the Petitioner on the 8th of

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<sup>3</sup> 'Children/child' and 'minor' will be used interchangeably.

November 2019. The Respondent assailed the judgment through Writ Petition No.3800 of 2019, whereby the High Court restored the initial judgment of the Senior Civil Judge that granted custody to the Respondent. Thereafter, the Petitioner sought an appeal in the Supreme Court.

**3. MAIN ISSUES**

The Petitioner claimed that the mother had lost her right to custody since she had remarried, whereas he did not.<sup>4</sup> Furthermore, he contended that the man the Respondent had married already had another wife and four sons. The sons were between the ages of 20-24, whereas the Petitioner's daughters were between the ages of 13-17. Because of this, the Petitioner alleged that it was inappropriate for his daughters to live with a stepfather and stepbrothers, as they would be living with *na-mehram* men (i.e., within prohibited degrees of affinity under Islamic law).<sup>5</sup> Furthermore, the Petitioner stated that he would be better suited for custody due to his financial position and would thus be able to provide for his children. Moreover, his family members, including his mother, brother, and sister-in-law, all resided with him and were able to help care for the children in the Respondent's absence.<sup>6</sup>

The Respondent confirmed that she had indeed remarried, and her husband did have another family.<sup>7</sup> However, she clarified that the families lived in separate homes, and that the husband only visited the Respondent in her

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<sup>4</sup> Paragraph 3, 2022 SCP 29

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> Paragraph 4, 2022 SCP 29

home.<sup>8</sup> Moreover, the Respondent stated that she runs a successful private school and is thus financially independent. Most importantly, the Respondent's children testified as witnesses before the Senior Civil Judge and the Appellate Court that they would like to continue living with their mother.<sup>9</sup>

In deciding for the Respondent, the High Court relied on the mother's financial independence, her education, and the children's desire to live with their mother. The High Court found that it was in the best interests of the children for all four of them to live together with their mother, the Respondent. The Petitioner contested this based on the remarriage of the mother, which he alleged to be grounds for automatic disqualification for custody. It is pertinent to examine the applicable legal framework to the claims made by both parties in the dispute to determine what factors influence the decision of which party maintains custody of their children.

#### 4. THE APPLICABLE LEGAL FRAMEWORK

The Supreme Court has continuously emphasised the welfare of the minors as the paramount factor in custody cases. In fact, even if the parents agree on custody arrangements, courts can decide against such arrangements if they believe that the child's welfare is not protected.<sup>10</sup> In this judgment, the Supreme Court clearly states that the welfare of children is not a 'mathematical' calculation, but rather depends on many factors.

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<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> Taj Bibi v Khuda Bakhsh PLD 1988 Pesh 57; Tahira v A. D. J. Rawalpindi 1990 SCMR 852.

In custody cases, courts often render inconsistent judgments due to differing legal frameworks. In Pakistan, the Guardians and Wards Act, 1890, is the primary legislation under which custody cases are decided. However, such cases are also determined with reference to Islamic law, with judges incorporating principles from Muslim personal law into their decisions. Judgments are also guided by the United Nations Convention on the Rights of the Child (UNCRC) although this is not a primary source of law as far as the domestic legal framework is concerned, it is a useful point of reference for the construction of certain principles, such as the welfare of the child. The consolidation of the myriad of laws relating to the rights of children is required to ensure that the best interests of the minor are protected.

#### The Guardians and Wards Act, 1890

The Guardians and Wards Act, 1890 governs disputes regarding child custody. According to section 17 of the Guardians and Wards Act, the welfare of the child is given paramount importance. It is to be noted that ‘welfare’ has not been defined in the Act, which gives courts the discretion to determine what constitutes ‘welfare’ according to each case’s individual circumstances. In this judgment, welfare is defined as a consideration of all factors, including ‘the parents’ ability to provide for the child including physical and emotional needs’, their ability to provide medical care, and their ‘ability to provide a safe secure home where the quality of the relationship between the child and each parent is comforting for the child.’<sup>11</sup> Hence, if a child is well-settled with his/her mother, changing this arrangement can decidedly disturb the welfare of the child.

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<sup>11</sup> 2022 SCP 29

Moreover, section 17 of the Guardians and Wards Act takes into consideration the preference of the minor if they are old enough to state it intelligently. In this case, the children have actively voiced their desire to live with the mother, which is a relevant factor when assessing welfare. However, this is not a mandatory consideration for the courts.

Nevertheless, this Act has many deficiencies. Firstly, it fails to differentiate between ‘custody and ‘guardianship’. Custody refers to the bringing up, nursing, or fostering of the child, and taking care of the child’s emotional and personal affairs on a daily basis. Guardianship refers to the power to effect legal transactions of the child.<sup>12</sup> Unlike guardianship, in custody, the child must live with the custodian.<sup>13</sup> Pakistani courts consider custody to be a kind of guardianship. Traditionally, custody belongs to the mother, while guardianship of property and marriage belong to the father. However, there have been cases in which guardianship of marriage and property are both awarded to the mother if the welfare of the child demands so. Generally, a mother has the right to custody of her son until the age of seven, and the daughter until she reaches puberty.

### Islamic Law

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<sup>12</sup> Muhammad Mustafā Shalabī, *Ahkām-al-Usra fil Islām* (Dār-al-Nahdah Al-‘Arabīyah 1973) 736; Mahdi Zahraa and Normi A. Malik, ‘The Concept of Custody in Islamic Law’ (1998) 13(2) *Arab Law Quarterly* 156, 157

<sup>13</sup> Dr. Mudasra Sabeen, ‘Law on the Custody of Children in Pakistan: Past, Present and Future’ 73, <[https://sahsol.lums.edu.pk/sites/default/files/law\\_on\\_the\\_custody.pdf](https://sahsol.lums.edu.pk/sites/default/files/law_on_the_custody.pdf)>

According to Islamic Law, a woman is entitled to custody as long as she does not re-marry.<sup>14</sup> Tradition states that the Prophet (pbuh) said to a woman demanding custody: ‘thou hast a right in the child prior to that of thy husband, so long as thou dost not marry with a stranger.’ It means that the mother will be given priority for custody unless she has remarried.<sup>15</sup>

Despite this general rule, a mother’s remarriage alone is not sufficient to determine what is best for the child’s welfare. In *Muhammad Bashir v Gbulam Fatima*,<sup>16</sup> the Lahore High Court observed that a mother’s disqualification upon remarriage is not based on the Quran. Since the rules of custody are not provided by the Quran or the Sunnah, courts are able to make decisions that deviate from textbooks on Islamic law, as the rules given by these textbooks are not uniform. Hence, courts may depart from the rules if the child’s welfare is being affected.

By making use of *ijtihad*, the process of deriving the laws of the *shari’ah* (Islamic law) from its sources, courts can incorporate principles of the *shari’ah* when exercising discretion in custody cases. There has been much criticism of courts performing *ijtihad* as judges are not considered competent *mujtahids* i.e., they do not possess the qualifications necessary for performing *ijtihad*. However, Justice (R.) Tanzil-ur-Rahman stated that although courts are not equipped to perform *ijtihad*, they can substitute one rule of Islamic law with

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<sup>14</sup> DF Mullah, Principles of Muhammadan Law, Para 354: “either a mother nor any other female relative mentioned is entitled to the custody of an infant, if she marries a person not related to the infant within the prohibited degrees.”

<sup>15</sup> Charles Hamilton (trs), The Hedāya: A Commentary on the Islamic Laws (Kitab Bhavan 1870) 138; Abī Dā’ud Sulaimān b. Al-Ash\_ath b. Ishāq Al-Uzrī Al-Sajistānī, Mukhtasar Sunan Abī Da’ud (Dar-al-Ma\_rafah 1980) 3:185.

<sup>16</sup> PLD 1953 Lahore 73

another.<sup>17</sup> For instance, the rule of a mother losing her right to custody upon remarriage can be substituted with the rule of giving paramount consideration to a child's welfare. If a contradiction is presented, the latter rule can be implemented. Therefore, the welfare of the child takes precedence, even according to Islamic law, where this rule of substitution can be validly exercised.

Another condition for custodianship is that the custodian should be *mabram* (i.e., not within prohibited degrees of affinity) to the child. If the mother retains custody, she should not be married to a person who is a stranger to the child, especially if this child is female, since the second husband comes within prohibited degrees of affinity to the daughter. In this particular case, the Petitioner's emphasis on the second marriage being with someone who is *na-mabram* man founds his claim, with regard to the second marriage disqualifying the mother of her right to custody. His argument is furthered by the Respondent's husband and sons being *na-mabram* to his daughters.

The position on the choice of the child is also not consistent across courts. According to the *Hanafi* school of Islamic jurisprudence, a minor does not have the right to choose between parents for the purposes of custody. However, some courts consider the minor's choice. In *Mst Aisha v Manzoor Hussain*,<sup>18</sup> the Supreme Court held that the minor is not the best judge for his/her own welfare, and that their choice will only be considered if it is in the child's best interest. Hence, a child's preference is given due importance,

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<sup>17</sup> Tanzil-ur-Rahman, A Code of Muslim Personal Law (Hamdard Academy 1978) 744-745; Abdul Ghafur Muslim, 'Islamisation of Laws in Pakistan: Problems and Prospects' in H. S. Bhatia (ed), *Studies in Islamic Law, Religion and Society* (Deep and Deep Publications 1996) 146

<sup>18</sup> PLD 1985 SC 436



and can be an important factor that contributes to determining where the child's welfare lies.

The UN Convention on the Rights of the Child (UNCRC)

The UNCRC was ratified by Pakistan in 1990, initially with reservations. It is material to the case since its articles are used as guiding principles to assess the welfare of children in custody cases. The UNCRC recognises that a child should grow up in 'an environment of love, happiness and understanding.'<sup>19</sup> Similarly, Article 3 establishes that a child's welfare is to be placed above all by courts of law, a consideration incorporated into this judgment.

Article 7 of the UNCRC provides that every child has the right to be cared for by their parents, and Article 9 requires that in the case of separation between the parents, the child should remain in contact with both parents unless either one can cause harm.<sup>20</sup> This article is a critical one, since defining 'harm' is challenging. In this case, the Petitioner considered it 'unacceptable' for his daughters to live with a *na-mahram* stepfather, but failed to prove any tangible 'harm'. The Court thus found this concern to be unfounded and decided that it is for the welfare of the children to remain with their mother.

Article 12 of the UNCRC states that a child capable of forming their own view should be given 'due weightage.'<sup>21</sup> This is an essential guiding factor, since it allows courts to recognise a child's care and comfort when determining measures in the interests of the child's welfare. While it cannot

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<sup>19</sup> Paragraph 8, 2022 SCP 29

<sup>20</sup> Ibid

<sup>21</sup> Paragraph 8, 2022 SCP 29

be the sole determining factor, it is one that should be given importance, especially if the child's entire living arrangement is subject to change. In the case of a remarriage, the new environment which the child will adjust to must be re-assessed to ensure that the welfare and interest of the child is prioritized,<sup>22</sup> making the child's opinion becomes even more crucial. The Supreme Court judgment authored by Justice Malik highlights that a second marriage cannot become a standalone reason for disqualification, especially when the minors' preference too dictates comfort with the Respondent. However, the welfare of the child is not necessarily the same as what the child may choose. Similarly, a child's best interest may not align with their preference of custodian. For that reason, article 12 is not absolute, and has to be weighed alongside other factors determining welfare. Hence, the minor's choice is an important factor, but not a determinant one.

## 5. SIMILAR CASES

### 5.1. Custody Despite Remarriage

The present judgment contributes to existing jurisprudence on a mother's right to custody despite her remarriage. In *Mst. Hifsa Naseer v ADJ Gujjar Khan*,<sup>23</sup> the Lahore High Court awarded custody to the mother despite her remarriage. The case was fought between the paternal grandmother and the mother, since the father had no interest in raising the child. In this case, it was decided that the welfare of the child would better be served with the mother rather than the grandmother. However, it is to be noted that this was a case that did not involve the presence of the father, and hence the disqualification

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<sup>22</sup> Ibid

<sup>23</sup> PLD 2017 Lahore 153

according to Islamic law was not applicable. Hence, this case establishes the mother's right to retain custody, but is not strictly relevant due to the father's lack of involvement.

Similarly, in *Amar Elabi v Rashida Akhtar*,<sup>24</sup> the Lahore High Court decided that a mother's remarriage does not disqualify her from the right of custody. Rather, she only loses her preferential right, the principle of granting the mother custody over others, and as such other factors to decide welfare have to be weighed. The same was decided in the case of *Muhammad Siddique v. Lahore High Court*,<sup>25</sup> wherein it was decided that the general rule of a mother's second marriage disqualifying her from her right of custody is not absolute.

Moreover, in *Shabana Naz v. Muhammad Saleem*,<sup>26</sup> it was stated that there is no substitute for a mother of the minor child. Hence, there was no obligation to follow the rule of custody forfeiture in the case of remarriage<sup>27</sup> when the child's welfare is not in line.

In the above cases, it is evident that if a child's welfare is best served under the mother's custody, then her remarriage does not disqualify her from the position. The general opposition presented for forfeiture of custody in case of remarriage is deemed to be less significant than the child's welfare, which is paramount in Islamic law, and has to be protected strictly.

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<sup>24</sup> PLD 1955 Lah 412

<sup>25</sup> PLD 2003 SC 887

<sup>26</sup> 2014 SCMR 343

<sup>27</sup> DF Mullah, Muhammadan Law, Para 354

### 5.2. Minor's Choice:

The role of the minor's choice in custody cases has also been dealt with by the Pakistani courts, though less extensively. In *Uzma Wahid v Guardians Judge*,<sup>28</sup> the Lahore High Court awarded custody of two minor daughters to the father, despite his second marriage. This was due to the children's attachment to him, giving importance to the minor's choice (in accordance to the Guardians and Wards Act). This establishes that if able to voice views, the minor's perspective is to be given importance. It is to be noted that this decision may have been influenced by the fact that this concerned the father's second marriage, as opposed to the mother's.

In other cases, the courts have dismissed the minor's position on the matter. In *Abdul Razzaque v Dr. Rehana Shabeen*,<sup>29</sup> the Karachi High Court decided that the minors are unfit to decide where their welfare lies. The custody case was between the paternal grandparents and the mother. While the children showed their disinclination towards the mother, the court gave the custody to her regardless, stating that children can be influenced by elders. Hence, a minor's perspective is given significance only when it is in line with the child's welfare. While it contributes to the decision, other factors have to be considered as well. Since the minor's choice is not a determinant factor, there is a lack of jurisprudence on the matter.

## 6. ANALYSIS

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<sup>28</sup> 1989 MLD 3064

<sup>29</sup> PLD 2005 Kar 610

The Supreme Court's judgment in *Raja Muhammad Owais v Mst. Nazia Jabeen* has created much discussion. This landmark case has brought forward more clarity and finality to the issue of allowing a mother to retain custody of her children despite remarriage, so long as the child's welfare is in residing with the mother. While there have been previous Supreme Court judgments that set this precedent, this case has upheld and reaffirmed it.

The significance of this judgment is two-fold. Primarily, it is a decision that establishes that a mother's remarriage is not an adequate, sole basis for disqualification. More important than that is the minor's welfare, which is reinforced by the first point. Even the rule of forfeiture of custody in case of remarriage is trumped by a child's welfare, and all factors have to be considered in light of that. As summed up by Asma Sajid writing for ProPakistani, this judgment reinforces the importance given to a child's welfare above all.<sup>30</sup>

Furthermore, no absolute rules should exist in custody cases except for the paramount importance of child welfare being above all, as is established by courts. In an article by Business Recorder, it was argued that "more often than not, the father gets the custody without due consideration to particular circumstances of a case, which is unfair not only to a mother but also children of a broken marriage," and goes on to state that, "few can quarrel with the

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<sup>30</sup> Asma Sajid, 'Mother's Second Marriage Cannot Stop her from Getting Custody' (2022) ProPakistani  
<<https://propakistani.pk/2022/10/26/mothers-2nd-marriage-cannot-stop-her-from-getting-custody-of-children-sc/amp/?fbclid=IwAR3jWRipi-Ql2tkgSh8h1yvH8cG9e8eFcX2j8kUSCq2iRJOl6N8iTQMONII>>

fact that no one can give unconditional love to a child like a mother.”<sup>31</sup> While a father getting custody without consideration of factors is right to be challenged, the latter statement seems problematic. Mothers are often better equipped as caretakers when children are of tender age, but that does not mean that all mothers will be better suited for retaining custody of the children.<sup>32</sup> The welfare of a child is determined by several factors, including the ability to provide financially and emotionally. The environment of the living arrangement needs to be one of comfort. In some cases, it will be in the best interest of the child to reside with the father, and decisions have been awarded in favour of the father as custodian wherein the minors were attached to said father, such as *Uzma Wabid v Guardians Judge*.<sup>33</sup>

Moreover, the value of the minor’s choice in this judgment is significant. If a child is able to intelligently express a preference, their preference should be considered to determine the comfort of a child with either parent. For this reason, the testimonies before the Senior Civil Judge and the Appellate Court of the children involved in this case are pivotal. The consideration of the minor’s choice coincides with the UNCRC’s Article 12. It is to be noted that it is within the discretion of the courts to make use of the UNCRC’s principles, even if they are not in line with Islamic law, since a child’s opinion is unmentioned in Islamic law. As a party to the UNCRC, Pakistan is obliged to incorporate the principles of the UNCRC in its legislation as well as in the interpretation of all obligations pertaining to the rights of children, especially when determining their welfare in custody cases. In this case, Justice Ayesha

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<sup>31</sup>“SC on Child Custody Battles’ (2022) Business Recorder  
< <https://www.brecorder.com/news/40205659/sc-on-child-custody-battles>>

<sup>32</sup> Bashir Ahmad v Rehana Umar 1976 SCMR 28

<sup>33</sup> 1989 MLD 3064

Malik's judgment giving weightage to the 'desire as expressed by the children' is an important factor. This is of particular importance because Ummama Awais and Ayesha Awais left their father's home to reside with their mother, a relevant factor according to the Court (although not the sole one). Hence, the minor's choice should not be an absolute one, since it may be in line with the child's welfare. However, if other factors pointing towards welfare and stability are aligned with the minor's choice, it should be taken as a confirmation that the welfare of the child is indeed in residing with the desired parent.

It is understandable that the father's major reservations were with his daughters living with *na-mahram* men, including a stepfather and stepbrothers. However, the Respondent had a separate home for her children, and that lessens the impact of his concern substantially. Although the frequency of the visits made by the husband of the Respondent are not mentioned, it is clear that the children are comfortably and actively residing with the mother in her home. Moreover, there is no mention of the stepbrothers living in close proximity to the children, thereby reducing the concerns even further. If the living arrangement was different, whereby the stepfather and stepbrothers were living together with the Respondent and her two daughters, the outcome of this judgment may have been different as their *na-mahram* status would be a more material factor.

A significant outcome of the judgment is regarding a woman's right to re-marry. In cases where women have children from a previous marriage, they prefer to lead single lives if the alternative is to lose custody of their children.<sup>34</sup>

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<sup>34</sup> 'Progressive Custody Laws' (2022) The Nation

This discourages women from re-marrying, while in most cases men tend to re-marry and can exercise this inherent right. This case allows women to exercise their right to re-marry while retaining custody of their children, as long as the welfare of the child aligns with the new living arrangement. It is a positive step in rectifying the taboo that prevents women from re-marrying, as there is no automatic disqualification from custody.

## 7. CONCLUSION

The judgment written by the Honourable Justice Ayesha Malik is commendable and allows women to exercise their right of re-marriage while retaining custody of her children. According to this judgment, a woman's second marriage cannot be the sole reason for disqualification of her right to custody, especially since the welfare of a child is measured by multiple factors. Indeed, no two cases are exactly the same; each case has to be individually assessed on its individual circumstances to see what would be in the best interest of the child. This case reinforces that a child's welfare is of overriding importance, and that a mother's remarriage does not necessitate her removal from guardianship, since the child's welfare may still be to remain with her.

To sum up, the concept of welfare is all-arching, and includes the child's physical, mental, and emotional well-being. It is essential to put a child's interest first, and besides that, no absolute rule should be applied. While settled rules matter, the judge must consider each case individually. As the judgment states, there is 'no mathematical solution' to such cases. Thus, the

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<[https://www.nation.com.pk/26-Oct-2022/progressive-custody-laws?version=amp&fbclid=IwAR0NMuTOY2pP\\_UbMalkWPgpDzA\\_AFxbZGaClqf oisKqsCTRfE29d9px\\_mh8&gt;](https://www.nation.com.pk/26-Oct-2022/progressive-custody-laws?version=amp&fbclid=IwAR0NMuTOY2pP_UbMalkWPgpDzA_AFxbZGaClqf oisKqsCTRfE29d9px_mh8&gt;)>



significance of this judgment lies both in its substantive ruling, i.e., allowing remarried mothers to retain custody of their children, as well as the methodology used by the judges to reach their final decision.