

Maintenance of the Wife and Children in Islamic Law and Pakistani Legal System: An Appraisal

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Abstract

This work examines the complex difficulties surrounding a wife's and children's right to maintenance under Islamic law, Pakistani statute law, and high court rulings. The several problems that are investigated here include maintenance, statutory law on maintenance, forums for establishing maintenance allowance, the proper procedure that the Family Courts must follow to ascertain the husband's means and sources in determining the amount of maintenance for the wife and children, High Court intervention when approached under writ petitions against interim maintenance orders by the Family Courts, higher courts have been giving guidance, a disobedient wife is entitled to maintenance, a wife who is willing to live with her husband but the husband does not permit her to do so is entitled to maintenance, the extent of the father's obligation to maintain both his son and daughter, whether or not the father should maintain an unmarried daughter, maintenance by the grandfather in the event that his son is either unable or unwilling to maintain himself, and maintenance by the father in the event that his son is incapable of or unwilling. This research was conducted using a doctrinal technique.

Key Words: Maintenance, Wife, Children, Islamic Law, Shar'ia, Supreme Court, Lahore High Court

Introduction

The husband has a responsibility to support his wife and children. He has a duty under the law to support his wife for the duration of their marriage connection. While it can be challenging to locate case law on maintenance while marriage is still intact, issues arise as soon as it dissolves because the wife always demands maintenance payments until the end of her *Iddat* period and permanent allowances for her children in the event that she is granted custody. The first part of Islamic law is an explanation of significant topics pertaining to wife maintenance. The primary areas covered here are as follows: what is maintenance? What is the maintenance statute of limitations? Does the Chairman of the Arbitration Council have the authority to set maintenance allowance in addition to the Family Court? How will the Family Court analyse the husband's financial situation in order to determine how much support the wife and children would receive? Why have the

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Higher Courts been issuing directions and recommendations to Family Courts to be extra cautious while deciding the quantum of maintenance? Can the High Courts interfere under their constitutional authority if judgments of interim maintenance are challenged? Can Family Courts review their own rulings in family disputes? What is the equivalency standard under which Family Courts should acquire information regarding the means and sources of the husband before fixing the allowance? When does a father's responsibility to support both his daughter and son end? Is the father required to support his son when he reaches the age of majority? Is the parent required to support his unmarried daughter? Is a grandfather obligated to take care of his grandkids if their father is unable or unwilling to do so? The questions that are discussed in the paragraphs that follow are a few of the more difficult and confusing ones. The aforementioned topics are first explored in terms of Islamic law, and then statute law and case law are discussed after that.

Maintenance of Wife and Children in Islamic Law

In Qur'an, Allah says, "(During the waiting period) lodge them according to your means wherever you dwell, and do not harass them to make them miserable. And if they are pregnant, provide for their maintenance until they have delivered their burden. And if they suckle your offspring whom they bore you, then give them due recompense, and graciously settle the question of compensation between yourselves by mutual understanding. But if you experience difficulty (in determining the compensation for suckling) then let another woman suckle the child."² About breastfeeding infants, Allah the Almighty declares in the Qur'an that "(In such a case) it is incumbent upon him who has begotten the child to provide them (i.e. divorced women) their sustenance and clothing in a fair manner. But none shall be burdened with more than he is able to bear; neither shall a mother suffer because of her child nor shall the father be made to suffer because he has begotten him. The same duty towards the suckling mother rests upon the heir as upon him (i.e. the father)."³ Furthermore, Allah says, "Whoever has abundant means, let him spend according to his means; and he whose means are straitened, let him spend out of what Allah has given him. Allah does not burden any human being beyond the means that He has bestowed upon him. Possibly Allah will grant ease after hardship."⁴ The Prophet Muhammad (peace be upon him) emphasized the maintenance of women in his last sermon when he said, "[A]nd it is incumbent upon you [men] to provide them [your wives] clothing and sustenance in a fair manner."⁵ Moreover, it is said that the Prophet informed Hind, Abu Sufyan's wife, when she complained about him, "[T]ake from the property of Abu Sufyan what

² Qur'an, 65:6.

³ Qur'an, 2:233.

⁴ Quran, 65:7.

⁵ Abu Dawud, Sunan, hadith no. 1908, and Ahmad b. Hanbal, Al-Musnad, 3:320.

you need for yourself and your child in a fair manner.”⁶ In one of his well-known hajj sermons, he is supposed to have stressed the rights, protection and maintenance of women, saying: “Fear Allah concerning women! Verily you have taken them on the security of Allah, and intercourse with them has been made lawful unto you by words of Allah. You too have right over them, and they should not allow anyone to sit on your bed whom you do not like. But if they do that, you can chastise them but not severely. Their rights upon you are that you should provide them with food and clothing in a fitting manner.”⁷

According to *Fatawa Alamghiriyah*, “It is obvious that maintenance of the wife is obligatory for the man whether the wife is Muslim or non-Muslim; whether she is poor or rich; whether the marriage is consummated or not consummated, [and] whether she is old or so young that sexual intercourse cannot be done with her.”⁸ It is further mentioned that if a woman asked for her maintenance from her husband while she is not yet in her husband's house and when the husband has not yet demanded that she be living with him in his house, she is maintained by him “although some scholars from Balkh argue that she cannot demand maintenance when she is not in her husband's house the *fatwa* is on the first opinion.”⁹ The *Fatawa Alamghiriyah* argues that “as per *Fatawa Ghyathiyah* that she refused to live with her husband upon his demand, she will not be maintained (by him). That if her refusal is justified such as if she wants to receive her prompt dower, she will be entitled to maintenance; but if her refusal is not justified such as when her prompt dower is paid by her husband or when the dower is to be at a time which is fixed but which is not yet arrived or when she has gifted her dower to her husband, then she is not entitled to maintenance.”¹⁰ Similarly, she is not entitled to maintenance if she is disobedient. A disobedient (*nashizah*) woman is one who quits her husband's house and who prevents him from his marital obligations. A woman is not disobedient when she lives in her husband's house but stops him from control over herself.¹¹ If the house is the property of the wife and she prevented her husband from entering the house, she is not entitled to maintenance.¹² But the rule changes if she requested her husband to take her from her house to his house or hire a house for her. Similarly, when she is no more

⁶ Bukhari, Al-Jami‘, kitab al-Nafaqat, hadith no. 5364. Also see, Muslim b. al-Hajjaj al-Nayshapuri, Sahih Muslim, kitab al-Aqdiyah, hadith no. 1714.

⁷ Sahih Muslim, Book 15, Hadith no. 159, available at <<https://sunnah.com/muslim:1218a>> (last visited January 25, 2023).

⁸ *Fatawa Alamghiriyah*, trans. Syed Amir Ali, ed., Abu ‘Ubaidullah (Lahore: Maktaba Rahmaniyyah, n.d.), 2:560.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid., 2: 561.

¹² Ibid.

disobedient, she is entitled to maintenance. If the wife surrendered herself to her husband and then refused herself to him because of unpaid dower, she is not disobedient according to Imam Abu Hanifah, so in *Fatawa Qadi Khan*.¹³ If a woman refused to go with her husband to a city where he wants to go and he has paid her entire dower already, she will not be entitled to maintenance. However, she will be entitled to maintenance in the above case if her dower is not yet paid. In both cases, the consummation of marriage is a precondition as per the opinion of *Sahibain*. Abu Hanifah however, does not consider consummation of marriage as a condition in this case. *Fatawa Alamghiriyah* mentions that Sheikh Imam Abul Qasam Safa differs from the Abu Hanifah and his top two disciples and argues that in our times the husband cannot force his wife to accompany him on a journey even if he has paid her entire dower.¹⁴ It seems that superior Courts in Pakistan have given decisions that favour the positions of women in this regard. In *Muhammad Sharif v Additional District Judge*¹⁵ the Hon'ble Supreme Court ruled that "a Muslim husband is under a legal obligation to maintain his wife and if she is forced to live away from him for no fault on her part, even then he has to provide maintenance allowance to her."¹⁶ In case she gets such a disease that makes her unable for her marital duties or she becomes insane, her husband must maintain her in such a situation.¹⁷ If the wife gets a disease that she is unable to establish a marital relationship with her husband, As long as she has asked for maintenance and is prepared to live in her husband's home, she is entitled to it. It is the same when she gets old and is unable to keep marital relationship with her husband.

In the event of a divorce, whether reversible or irrevocable and regardless of whether she is pregnant or not, she is entitled to housing and maintenance during the *iddat* period as long as the marriage was consummated.¹⁸ According to the parallel above, a woman is also entitled to housing and maintenance when a separation occurs without a divorce.¹⁹ She will still be entitled to maintenance but not lodging because lodging carries the right of God, therefore she cannot renounce it. Nevertheless, if the separation is brought about by the husband initiating *khul*, she will not be entitled to both maintenance and lodging.²⁰ Yet she has the right to do so if she requested a separation through *khul'* in exchange for giving up child

¹³ Ibid.

¹⁴ Ibid. 2: 562.

¹⁵ 2007 SCMR 49.

¹⁶ Ibid.

¹⁷ *Fatawa Alamghiriyah*, 2: 562.

¹⁸ Kasani, *Bada'i'*, 3:419.

¹⁹ Ibid.

²⁰ Ibid.

support.²¹ This is true because her claim to maintenance has already been established, and she is free to do so as payment to *khul'*.

Statutory Law on Maintenance and Its Interpretation by the Courts

Section 9 (1) of the Muslim Family Laws Ordinance, 1961 mentions maintenance and the law related to it. It says, in subsection (1) that "If any husband fails to maintain his wife adequately or where there are more wives than one fails to maintain them equitably, the wife or all or any of the wives may in addition to seeking any other legal remedy available, apply to the Chairman who shall constitute an Arbitration Council to determine the matter and Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband. (2) A husband or wife may in the prescribed manner, within the prescribed period and on payment of the prescribed fee prefer an application for revision of the certificate to the Collector concerned and his decision shall be final and shall not be called into question in any Court. (3) any amount payable under sub-section (1) or (2) if not paid in due time shall be recoverable as arrears of land revenue."²²

It is pertinent to note that there is no case law or at least reported judgements in which a wife or wives have resorted to subsection (1) during the existence of marriage and requested the Chairman Arbitration Council to fix the maintenance allowance. However, the problem always surfaces when the marriage is broken and relations between the parties have deteriorated. The section has mentioned that the wife can ask the Chairman Arbitration Council to fix her maintenance allowance. Secondly, both the husband and the wife may give an application for revision of the maintenance allowance to the relevant Collector. In practice, however, it is rare to find women giving applications to the Arbitration Council for fixing the amount of maintenance. In the vast majority of cases, an application is given to the Family Court for fixing maintenance and an appeal is made to the First Appellate Court. In the majority of cases, the findings of the First Appellate Court are challenged in the relevant High Court through writ petitions. The MFLO, 1961 has an overriding effect as compared to any other statute. Sections 5 and 21 of the West Pakistan Family Courts Act, 1964 show that without any ambiguity the Muslim Family Laws Ordinance, 1961 is given a higher status. Section 5(1) mentions that "Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in [Part I of the Schedule].

²¹ Ibid.

²² Section 9 of the Muslim Family Law Ordinance, 1961.

[(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898), the Family Court shall have jurisdiction to try the offences specified in Part II of the Schedule, where one of the spouses is a victim of an offence committed by the other. Section 21 mentions that provisions of the Muslim Family Laws Ordinance, 1961 shall not be affected. It says, that “Nothing in this Act shall be deemed to affect any of the provisions of Muslims Family Laws Ordinance, 1961, or the rules made thereunder.”²³ The crux of the aforementioned is that a battered woman can give an application under Section 9(1) of the MFLO, 1961 to the Chairman of the Arbitration Council for having her maintenance fixed. The second forum which is most often used for fixing maintenance allowance is the Family Court. The Court is usually asked under the Family Courts Act, 1964 (FCA) to decide many family issues arising from a broken marriage and one of the prominent issues is to fix the past or future maintenance or maintenance during the *Iddat* period for the ex-wife along with or without fixing maintenance for the minor children. The Family Courts Act, 1964 as amended in 2015 for the province of Punjab by the Punjab Family Courts (Amendment) Act, 2015²⁴ is produced below as it deals with interim as well as final maintenance allowance:

“17A. Suit for Maintenance

- (1) In a suit for maintenance, the Family Court shall, on the date of the first appearance of the defendant, for interim monthly maintenance for the wife or a child and if the defendant fails to pay the maintenance by fourteen days of each month, the defence of the defendant shall stand struck off and the Family Court shall decree the suit for maintenance on the basis of averments in the plaint and other supporting documents on record of the case.
- (2) In a decree for maintenance, the Family Court may:
 - (a) Fix an amount of maintenance higher than the amount prayed for in the plaint due to afflux of time or any other relevant circumstance; and
 - (b) prescribe the annual increase in maintenance.
- (3) If the Family Court does not prescribe the annual increase in maintenance, the maintenance fixed by the Court shall automatically stand increased at the rate of ten per cent each year.

²³ Section 21 of the West Pakistan Family Courts Act, 1964

²⁴ Punjab Family Courts (Amendment) Act, 2015 (Act XI of 2015).

- (4) For purposes of fixing the maintenance, the Family Court may summon the relevant documentary evidence from any organization, body or authority to determine the estate and resources of the defendant.]”²⁵

Section 17 B of the FCA is also very helpful in determining the final maintenance allowance. The Court can issue a Commission under this section to examine any person; make a local investigation; and inspect any property or document. Under Section 17 A the Court fixes interim maintenance whereas under 17 A (4) the final maintenance allowance is fixed. In many cases, the amount of interim or final maintenance fixed by the Family Courts is challenged in the First Appellate Courts on the ground that it is excessive and that the Family Courts have not followed the due and proper procedure as mentioned in Section 17-A and 17-B of the FCA, especially 17-A(4) for determining the quantum of maintenance. In practice, the affected party, usually the father or husband challenges the interim maintenance order in First Appellate Court and if unsatisfied with its decisions, brings it to the relevant High Court in a writ petition. The question is whether any remedy is available against an interim order or interlocutory order and whether the writ is maintainable or not. In *Syed Saghir Ahmed Naqvi v Province of Sindh*²⁶ the apex Court has ruled that “[C]onstitutional jurisdiction, the exercise of a statute excluding a right of appeal from the interim order could not be bypassed by bringing under attack such interim orders in constitutional jurisdiction. Party affected has to wait till it matures into a final order and then attack it in the proper exclusive forum created for the purpose of examining such order.”²⁷ In other words, no remedy is provided under the relevant laws and legislature for appeal, revision or review against an interim order. Interim orders can be passed at any stage of the proceedings and the family disputes it is passed after filing the written statements of the parties to a suit. In *Ali Adnan Dar v Judge Family Court*²⁸ the Hon’ble Lahore High Court observed that if “the defendant found the same (that is the maintenance order) to be excessive or if the order suffers from some illegality or irregularity or it is arbitrary, fanciful, void ab initio without jurisdiction or if the same has attained the status of a final order, then writ under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 will become maintainable.”²⁹ The same is ruled in many other cases such as *Sikhawat Hussain v Farzand Bibi*³⁰, *Ghulam Mohy-ud-Din v Mst. Mehvish*³¹, *Muhammad Khalid Javeed v Mst.*

²⁵ The Family Courts Act, 1964 (Act XXXV of 1964) as amended in 2015 for Punjab, available at <http://punjablaws.gov.pk/laws/177.html> (last visited January 21, 2023).

²⁶ 1996 SCMR 1165.

²⁷ Ibid.

²⁸ PLD 2016 Lahore 73

²⁹ PLD 2016 Lahore 73, para. 12.

³⁰ 2004 MLD 1834 (Lahore).

³¹ 2002 YLR 3771 (Lahore).

*Shahida Parveen*³², *Aamer Mehmood Hussain v Naeha Aamer Sayed*³³, *Abrar Hussain v Mehwish Rana*³⁴, and *Nadeem Raza v Judge Family Court*³⁵.

The Hon'ble Lahore High Court has laid down some guidelines in *Mst. Sitwat Chughtai v Judge, Family Court, Lahore*³⁶ to the Family Courts in Punjab for determining the quantum of maintenance in family disputes. The most important ones are that the Family Courts "should look into the social status of parties, earnings of the defendant, his capacity to pay and requirements of a minor is the touchstone on which Family Court should fix interim maintenance;"³⁷ and "For the reason that no right of appeal etc. has been provided against fixation of interim maintenance, such order being tentative and interim in nature, the Family Court should be more careful and precise in such context to ward off any injustice."³⁸ Despite the above-mentioned cases and guidelines interim orders or maintenance passed by the Family Courts are challenged on some pretext or excuse. In *Ali Adnan Dar v Judge Family Court*,³⁹ the Hon'ble Lahore High Court has formulated more guidelines in addition to the above. The more important ones are that the maintenance order be passed at a convenient stage of the proceedings; that "it must be passed after hearing "both of the parties" unless the attitude and conduct of the defendant/father are evasive."⁴⁰ That "[T]he order for grant of interim maintenance is made on the basis of tentative assessment of the material available on file and keeping in view the social status of the parties. Further, both the above, material available and social status, should be mentioned in the order for the grant of interim maintenance. Further, the quantum of interim maintenance should be the "bare minimum"⁴¹ to meet the day-to-day needs of the recipient in the narrow context.⁴² "Although the family laws have been enacted to promote, protect and advance the rights of women and children yet at the interim stage, the version of the respondent/defendant be given a sympathetic or somewhat preferable consideration because non-payment of interim maintenance allowance will cut the throat of his invaluable right i.e. "right to defence" and inconsequential effects, children/women would be the loss and deprived parties."⁴³ That "if the case

³² 2007 YLR 1366 (Lahore).

³³ 2011 MLD 1105 (Lahore).

³⁴ PLD 2012 Lahore 420.

³⁵ 2013 YLR 965 (Lahore).

³⁶ PLD 2009 Lahore 18.

³⁷ Ibid.

³⁸ Ibid.

³⁹ PLD 2016 Lahore 73

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

is not decided within the statutory period as given in Section 12-A of the West Pakistan Family Courts Act, 1964 either party may apply to the High Court for appropriate direction. However, the order for grant of interim maintenance shall hold the field unless reviewed by High Court under section 12-A or Family Court itself reviews it at any stage as observed below.”⁴⁴ That “Family Court, according to section 12-A of the West Pakistan Family Courts Act, 1964, is under legislative direction to decide the case within six months. Although this provision is directive as no penalty/consequences are mentioned for non-compliance.”⁴⁵ That “in case the matter is not decided within six months and the delay is due to the plaintiff party, then Family Court either on its own motion or on the application of the defendant/father review its earlier order for grant of interim maintenance allowance.”⁴⁶ The Court ruled that “if the father found that the interim maintenance was excessive or order suffers from any illegality, irregularity or is arbitrary, fanciful, and void ab initio without jurisdiction or same had attained the status of the final order, then the constitutional petition is maintainable.”⁴⁷ The Court stated that the interim maintenance order passed by the Family Court under the FCA, 1964 at the rate of 10,000 rupees per month for the minor “could not be assailed in the writ petition because when a statute does not provide any appeal against an interlocutory order, same could not be challenged by way of Constitutional petition as it will tantamount to defeat and divest the intent of the legislature.”⁴⁸ That “the order passed by the learned Judge Family Court is neither void ab initio nor without jurisdiction. The order impugned is also not a final order as under section 17-A of the West Pakistan Family Courts Act, 1964, Family Court has the jurisdiction to fix the interim maintenance of the minor, therefore, the order cannot be termed to be without jurisdiction.”⁴⁹ The Court dismissed writ petitions against interlocutory orders by both parties. In

There is no statutory provision for review of the decision by the Family Court, however, in *Muhammad Saad Ali v Mst. Maryam Khan*⁵⁰ the Hon’ble Peshawar High Court has ruled that “The Family Court has got every jurisdiction to adopt any procedure/law to meet the situation to do the substantial justice between the parties and to secure the ends of justice.”⁵¹ That since FCA, 1964 “is not comprehensive enough to meet every conceivable eventuality. So, the Family Court can adopt every procedure/law in furtherance of the dispensation of justice

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid. para. 21.

⁴⁹ Ibid. para. 22.

⁵⁰ 2014 CLC 715.

⁵¹ Ibid. para. 7.

unless the procedure/law going to be adopted is specifically prohibited. The Family Court when came across the situation of failure of the defendants to file a written statement, borrowed the provision of striking off defence from the C. P. C. and passed an order in this regard, then the said Court while facing the situation of review of the same can take shelter of non-availability of the provisions of review in the Act, 1964."⁵² Therefore, "The Family Court cannot refuse to exercise the jurisdiction on the ground of non-availability of the provision of review. It is the principle of law that recourse to general law is permissible when the provisions of special law are silent on a particular point except where the provisions of general law are inconsistent with the provisions of a special law."⁵³ This view has been endorsed by the Hon'ble Lahore High Court in *Ali Adnan Dar v Judge Family Court*⁵⁴ discussed above.

In *Tahir Ayub Khan v Miss Alia Anwar*⁵⁵, it was held that "Family Courts have no unfettered or unbridled powers to fix the interim maintenance at its discretion as they are required to adopt a pragmatic, rational and judicial approach, broadly keeping in mind the social status of the parties, the earnings of the petitioner/father, his capacity to pay and requirement of the minor."⁵⁶ Parties.

In *Maryam Bibi v Azhar Iqbal*⁵⁷ where the monthly maintenance allowance for the minor was fixed at the rate of 5,000 rupees per month by the Family Court, Attock and appeals by the parties were dismissed by the First Appellate Court, a single Bench of the Hon'ble Lahore High Court has to determine whether the Family Court had rightly fixed the said allowance by applying the provisions of 17 A(4) or not. The petitioner wanted the allowance to be enhanced by arguing that the Family Court had not followed the procedure laid down in Section 17 A(4) as it did not summon the relevant record from anyone to determine the allowance. Counsel for the defendant argued that the ex-husband is very poor and has a very small salary and is unable to pay the decreed allowance. The Court urged the Family Courts and stated that the Family Courts are not properly following the procedure in this regard as time-consuming litigation in the shape of family suits involving the issue of maintenance allowance is being decided without adhering [to the] provisions of Section 17-A(4) of the Act and procedure laid down therein, which is meant to aid none else but to advance [the] cause of justice as the intent of legislature involved therein was to equip Family Court with easily enforceable mode enabling absolute and just determination of 'estate' and 'resources' of

⁵² Ibid.

⁵³ Ibid.

⁵⁴ PLD 2016 Lahore 73.

⁵⁵ 2015 YLR 2364.

⁵⁶ Ibid

⁵⁷ PLD 2022 Lahore 840.

husband/father for fixing maintenance allowance."⁵⁸ Justice Jawad Hassan expressed his dismay by stating that "adjudications in Family Courts reflect their detachment from the realities of the current socio-economic situations of the country. Stereotype orders are passed arbitrarily and mechanically, that too, in deviation to the legislation which can benefit nothing, but they will make way for multiplication of litigation amongst parties forcing not only into unfathomable agonies but burdening them with certain financial obligations as well ending up in further economic distress and plight."⁵⁹ The Court allowed the writ petition and set aside the judgments and decrees of the lower courts. The case was remanded back to the Family Court to fix the maintenance allowance of the minor by applying the due procedure in Sections 17-A and 17-B of the FCA. In *Muhammad Asim v Mst. Samro Begum*⁶⁰ the apex Court declined leave to appeal to the husband in which the Family Court had awarded rupees two thousand as a monthly allowance each to the wife for her *Iddat* period and the minor daughter. On appeal by the husband, the First Appellate Court enhanced the monthly allowance of the minor by ten per cent per year and also awarded the wife five tolas of gold as the balance amount of her dower. Both parties challenged the decision of the First Appellate Court in the Peshawar High Court which was disposed of by consent of the parties by keeping the order of the Family Court intact. In another round of litigation, the husband challenged the jurisdiction of the Family as well as the First Appellate Court unsuccessfully. In his leave to appeal application, the petitioner objected to the increase in the maintenance allowance and the payment of five tola gold as the balance of dower. The husband was working in the government but had never disclosed his designation or salary even after he was asked to produce the same. The Court observed that the First Appellate Court had rightly awarded the dower amount to the wife and that the increase of ten per cent in the maintenance allowance was also justified. The Court ruled that "[W]here a husband is required to maintain his wife, former wife during her *iddat* period or child and is required to pay maintenance, including the arrears of maintenance, his present and past earnings must be disclosed by him because his financial status determines the amount of maintenance that should be awarded. In the case of non-disclosure, an adverse inference can be drawn against him. Family judges should try to ascertain the salary and earnings of the husband/father who is required to pay maintenance."⁶¹ The apex Court mentioned that the petitioner's husband "did not disclose his salary and earnings but considers the maintenance that has been awarded to be excessive. However, willful non-disclosure of his earnings suggests that the maintenance amount is well within his means; his conduct further betrays

⁵⁸ PLD 2022 LHC 840, para. 46.

⁵⁹ *Ibid.*, para. 47.

⁶⁰ PLD 2018 SC 819.

⁶¹ *Ibid.* para. 6.

that he does not want to be fair and has unnecessarily embroiled his former wife and child in needless litigation."⁶² The Court declined leave to appeal with costs throughout in favour of the wife.

The best guidelines for Family Courts in determining the quantum of interim as well as permanent maintenance is *Dr Aqeel Waris v Ibrahim Aqeel*⁶³ in which Justice Kayani of the Islamabad High Court has given very detailed guidelines are provided by the Islamabad High Court for determining the quantum of maintenance by the Family Courts. Among the guidelines are: that the "Financial status of the father shall be kept in view, which should be based upon salary slips, bank statements, income tax record, and business income reflected on record or through any other documentary proof placed by either side in the Court."⁶⁴ That the "Family Court may also call the employer of the father, HR department, admin department, bank managers, land revenue department, tax record, and banking details as well as salary details of the father directly from the relevant offices while deciding the question of interim maintenance for a prima facie view to fixing the allowance in favour of minor so that no inadequacy is attributed while fixing the maintenance allowance."⁶⁵ The Court further observed that "In cases, where father being a civil servant or employee of any organization, department or company has not appended his salary slips or bank statements, the Family Court shall ask for an undertaking or affidavit regarding his salary and thereafter shall fix the interim maintenance, however after the trial of the case, if the court comes to the conclusion that at the time of fixation of interim maintenance allowance the father/husband has stated a fact beyond his pleadings or undertaking, which is found to be false, such father be burdened with heavy costs and action of perjury may also be initiated against him."⁶⁶ The Court directed the Family Court to fix the final maintenance order within a month because the father had stated that he is unable to pay an interim allowance of 50,000 rupees per month for his minor child. The petition of the father was dismissed accordingly.

In *Alaf Din v Mst. Parveen Akhtar*⁶⁷ the apex Court highlighted the word child. The Court observed that "[T]hrough the word "child" in its widest sense may mean any son or daughter or any progeny yet, it cannot extend to embrace within its fold a person of 40 or 50 just because his parents are alive. In most cases, however, no difficulty will arise, for, the condition that section 488, Cr. P. C. imposes that the child must be "unable to maintain itself". Normally a child, after attaining majority,

⁶² Ibid.

⁶³ 2020 CLC 131.

⁶⁴ Ibid. para. 17.

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ PLD 1970 SC 75.

would be physically in a position to maintain itself, for, it would then be capable of earning some kind of livelihood."⁶⁸ The Hon'ble Court further observed that "[T]hus an infirm or decrepit or deformed son or daughter may be entitled to claim maintenance even up to a very advanced age, while an able-bodied son or daughter might be deprived of the right if he/she has already found suitable gainful employment and is in a position to maintain himself or herself."⁶⁹ The apex Court also interpreted the word 'maintenance' and stated that "in interpreting the word "maintenance" some reasonable standard must be adopted. Whilst it is not confined merely to food, clothing and lodging, it cannot, by any stretch of the imagination, be extended to incorporate within it education at higher levels ad infinitum. What is necessary to decide in this connection is to find out what amount of education has to be attained by the child concerned, having regard to the status and other circumstances of his family, to enable it to earn a complete livelihood by honest and decent means.... what is required is that the child must be maintained until it is in a position to earn its own livelihood in an honest and decent manner in keeping with its family status."⁷⁰ In other words, cases of maintenance would differ from case to case as the circumstances of each case and each family would differ from every other case. The Peshawar High Court granted maintenance to the wife and her child in *Shazia v. Muhammad Nasir*⁷¹ at a rate of Rs. 2000 per month for the duration of her petition, and granted maintenance to the minor child at a rate of Rs. 1500 per month for the duration of the petitioner's petition till his majority with a 10% annual increase. Additionally, the respondent entered into a second marriage without the petitioner's consent. The respondent's spouse was unable to demonstrate that his wife had departed of her own volition. The court determined that a husband's need to pay maintenance is unquestionable and is not a gift or a benefit. The Peshawar High Court ruled in *Syed Abu Talib Shah v. Bibi Rukhsar Zahra*⁷² that a wife who lives apart from her husband because of a legal justification is entitled to her right to maintenance, in contrast to *Kashif Akram v. Mst. Naila*⁷³ (2011), which determined that a wife who deserted her husband without a legal justification was not entitled to past maintenance. The woman can then make a claim for past maintenance. In such a case the wife can claim past maintenance. In *Muhammad Sharif v Additional Session Judge*⁷⁴ the apex held that "It is a settled law that a Muslim husband is under a legal obligation to maintain

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ 2014 YLR 1563 (Pesh).

⁷² 2012 CLC 1272 Pesh.

⁷³ MLD 571 Karachi.

⁷⁴ 2007 SCMR 49.

his wife and if she is forced to live away from him for no fault on her part, even then he has to provide maintenance allowance to her.”⁷⁵

In *Rukhsana Ambreen v District Judge*⁷⁶ the petitioner had challenged the decree and judgment dated July 15, 2013, passed by Judge Family Court Khushab and endorsed by the District Judge in which her suit was partially decreed whereby the Court ruled that she was entitled to maintenance of 9,000 rupees during the *iddat* period but her claim for recovery of rupees 3,00,000 as per the stipulation in column 19 of the *Nikahnama* (marriage contract) was dismissed. The petitioner left her house in June 2006 and forced her husband out of the joint family home with the help of her two brothers. There was no contact between the husband and wife for almost four years and the husband filed suit for restitution of conjugal rights only on June 4, 2010. The wife filed suit for maintenance allowance on June 12, 2010. The Court observed why was the husband silent for all this period and did not attempt any reconciliation. The Court, therefore ruled that the lady was entitled to past maintenance at the rate of 1500 rupees per month for the four years period. Her claim to the stipulated amount was dismissed as the entry in column 19 was declared controversial. The Court, however, did not take into consideration the fact that the husband was forced out of the joint family home and that since he could not live with his wife, therefore, he was not supposed to maintain her as well. In *Muhammad Imran v Judge Family Court*⁷⁷ the petitioner had challenged the decision of the District Judge that also awarded rupees 5000 per month as breastfeeding maintenance allowance for the minor for a period of two years. The Hon’ble Lahore High Court criticized the Family Court for not looking at section 17-A(4), “rather a final judgment has been delivered without undertaking any such enquiry as is envisaged in Section 17-A(4). This is fatal, crucial and of the essence when viewed in the context of what follows in the narrative ahead and quite erroneous and bad in law in view of the judgments of the Superior Judiciary.”⁷⁸ The Court reproduced judgments some of which are loaded with Qur’anic verses on the issue of maintenance and breastfeeding. One such decision is *Naveed Ahmad v Mst. Mehvish Riaz*⁷⁹ that has given mentioned the Qur’anic verses 2: 233 and 65: 6 that are mentioned above.

The learned judge accepted the view that the lower courts should have taken into consideration the capacity of the husband in paying such allowance and that the trial court ought to have employed Section 17-A(4) of the Family Courts Act,

⁷⁵ Ibid., para. 5. The same principle was also applied in PLD 1968 Lah. 93; 1980 SCMR 385; PLD 1991 SC 543; PLD 1975 Lah. 690; PLD 1981 Lah. 761; PLD 1977 Kar. 477; and 1985 CLC 649.

⁷⁶ W.P. No. 3462 of 2015.

⁷⁷ PLJ 2022 Lah 184 is also available as W.P. No. 278 of 2022.

⁷⁸ Ibid., para. 11.

⁷⁹ 2019 CLC 511.

1964 as amended in 2015, that is, summoning relevant documentary evidence by the court for gauging the financial health of the petitioner before passing the judgment. The Hon'ble Court set aside the breastfeeding allowance as determined by the Family Court, remanded the case and ordered the trial Court to properly evaluate the evidence under Section 17-A(4) of the FCA, 1964 and decide afresh the quantum of maintenance for breastfeeding the minor. There are many decisions of the higher Courts in which breastfeeding allowance was duly awarded and the same is mostly not denied when reasonable. Such judgments include *Muhammad Aslam v Muhammad Usman*⁸⁰, *Captain sm. Aslam v Mst. Rubi Akhtar*⁸¹, and *Naveed Ahmad v Mst. Mehvish Riaz*⁸² perhaps because the relevant Family Courts had properly evaluated the financial capacities and sources of the maintainers. Perhaps remanding a case to the Family Court for properly ascertaining thoroughly the financial means, sources of income and capacity to provide for the maintenance allowance of breastfeeding of a token amount of rupees 5,000 per month with unusually harsh remarks by the High Court is not usual. Although an Appellate Court can remand a case back to the trial Court under Order XLI, Rule 23 of the Code of Civil Procedure (C.P.C.), 1908 under Rule 24 of the same Code could finally determine the suit without referring it back to the trial Court. Thus, an alternative is provided to Rule 23 above which is that the Appellate Court may decide the lis after resettling the issues. A third route is provided in Rule 25 of the C.P.C. In *Mst. Ghafooran Bibi v Muhammad Amin Nasir*⁸³ the Hon'ble Lahore High Court "The analogy behind the said provision would be that unnecessary remand results in undue delay in cases and addition to the agony of the litigant besides overburdening the Court docket as well as wastage of its precious time, whereas constitutional imperative demands inexpensive and speedy justice, that is why the practice of frequent remand orders has time and again reprimanded by the superior Courts."⁸⁴ The Court has relied on many cases to arrive at this conclusion.⁸⁵ On the other hand, a Family Court has the statutory duty to determine interim maintenance for the wife and child as per the language of Section 17-A(1) in the very first hearing. He is not under an obligation to wait for the collection of all the relevant documents, financial means and sources of income of the father. In many cases, the father refuses to provide his salary slip and other details of his income just to cause unnecessary delay in the outcome of the interim allowance. In *Rozi Khan v Nasir* and

⁸⁰ 2004 CLC 473.

⁸¹ 1996 CLC 1.

⁸² 2019 CLC 511.

⁸³ 2020 M L D 1773.

⁸⁴ *Ibid.*, para. 5.

⁸⁵ Some of these cases are *Robeena Shaheen v Muhammad Munir Ahmad*, PLD 2013 Lahore 106; *Arshad Ameen v Messrs Swiss Bakery*, 1993 SCMR 216; and *Mst. Shahida Zareen v Iqrar Ahmed Siddiqui*, 2010 SCMR 1119.

others⁸⁶ the Hon'ble Supreme Court held that "Remand of the case is not a routine matter, it should be adopted only when compelling circumstances exist because it results in unnecessary procrastination of proceedings."⁸⁷ Thus, higher Courts may finally determine the suit after resettling the issues, if necessary. This has been reiterated in many cases.⁸⁸ Similarly, in the *Province of the Punjab v Qaiser Iqbal*⁸⁹ a full Bench of the Lahore High Court ruled that "It is also well-settled law by the apex Court that remand should only be resorted to when it is absolutely necessary for a fair and proper adjudication of the case. Unnecessary remand not only results in undue delay in cases but consequently also prolong the agony of the litigants."⁹⁰ Similarly, *Mst. Shahida Zareen v Iqrar Ahmed Siddiqui*⁹¹ the Hon'ble Supreme Court ruled that "Remand of the case should be ordered in exceptional circumstances when it is found necessary by the Appellate Court to determine the question of fact which appears to the Appellate Court to be essential for a right decision of the suit upon the merits. However, where evidence on record is sufficient for the Appellate Court to decide the question involved, then an order of remand ought not to be passed."⁹² The upshot of the above is that remanding a case to the Family Court for reevaluating a token allowance of maintenance for breastfeeding a minor was quite unnecessary and should have been avoided.

The most important factor that shapes the outcome of the interim as well as the final decree for maintenance is the financial condition of the father which must be thoroughly evaluated. In *Tauqeer Ahmad Qureshi v Additional Session District Judge, Lahore*⁹³ the apex Court held that "The minors are entitled to be maintained by the father in the manner befitting the status and financial condition of the father and for this reason the Family Court is under an obligation while granting the maintenance allowance, to keep in mind the financial condition and status of the father. It has to make an inquiry in this regard. It cannot act arbitrarily or whimsically. Furthermore, at the same time, the unjust enrichment of the minors cannot be permitted at the cost of the father."⁹⁴ In addition, it was held by the apex Court in *Muhammad Asim v Mst. Samro Begum*⁹⁵ discussed above that "where a

⁸⁶ 1997 S C M R 1849.

⁸⁷ *Ibid.*, para. 9.

⁸⁸ *Chairman WAPDA v Gulbat Khan*, 1996 SCMR 230; *Arshad Ameen v Swiss Bakery*, 1993 SCMR 216; *Sher Muhammad v Ghulam Ghous*, 1983 SCMR 133; *Nasir Ahmad v Khuda Kakhsh*, 1976 SCMR 388; and *Fateh Ali v Pir Muhammad*, 1975 SCMR 221.

⁸⁹ PLD 2018 Lahore 198.

⁹⁰ *Ibid.*, para. 42.

⁹¹ 2010 SCMR 1119.

⁹² *Ibid.*

⁹³ PLD 2009 SC 760.

⁹⁴ *Ibid.*, para. 9.

⁹⁵ PLD 2018 SC 819.

husband is required to maintain his wife or child the Judge Family Court should try to ascertain the salary and earnings of the husband who is required to pay maintenance.⁹⁶ Similarly, in *Khalid Mahmood v Naseem Akhtar*⁹⁷ It was the paramount duty of learned Family Court as enshrined above to keep in mind the financial status of the Petitioner/husband before fixing the quantum of maintenance. The financial status and resources of father/Petitioner and his capacity to pay could only be ascertained through the summoning of documentary evidence from the concerned organization, body or authority where he is employed.⁹⁸ In *Nazia Bibi v Additional District Judge, Ferozewala*⁹⁹ it was ruled by the Hon'ble High Court that "the [Family] court must determine the income of the father either through proper documentary evidence or on the basis of social status and earning capacity of the father."¹⁰⁰ In *Muhammad Shakir v Additional District Judge, Islamabad*¹⁰¹ the Hon'ble Islamabad High Court held that "It was incumbent upon the courts to determine the income of the father for which recourse in terms of subsection (4) of section 17(A) of the West Pakistan Family Courts Act, 1964 can be adopted which is meant to facilitate the court to determine the financial position of the father."¹⁰²

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Similarly, in *Khan Muhammad v Additional Session Judge*¹⁰³ in which the decree of the Family Court Faisalabad which had awarded past maintenance at the rate of 2500 rupees per month from January 2010 with an annual increase of 15%, maintenance allowance of rupees 5,000 per month for the *Iddat* period but denied the dower amount of three tolas gold. On appeal, the First Appellate Court modified the decree and awarded maintenance allowances at the rate of 2500 rupees per month and awarded the dower amount as claimed. In a writ petition, the Lahore High Court observed that the woman was entitled to maintenance only if she was obedient. It further stated that "the jurists have not reached a consensus as to the accepted legal definition, interpretation and application of "disobedience"."¹⁰⁴ The Court opined that "if on the one hand, a disobedient lady living separately from her husband without any reason should not be paid maintenance allowance for the period, she had not performed her matrimonial

⁹⁶ Ibid. at para. 6.

⁹⁷ 2019 MLD 820

⁹⁸ Ibid., para. 6.

⁹⁹ PLD 2018 Lahore 916

¹⁰⁰ Ibid.

¹⁰¹ 2021 CLC 809.

¹⁰² Ibid., para. 22.

¹⁰³ W.P. No. 15906 of 2016

¹⁰⁴ Ibid. para. 8.

obligations."¹⁰⁵ The Court, however, awarded rupees 2500 per month as an allowance to the mother for breastfeeding the baby for two and a half years. The Court observed that "As per 'Sharia' the father is duty bound to maintain his wife who was feeding his child."¹⁰⁶ The Court awarded her 5,000 rupees as allowance for the *Iddat* period. In *Muhammad Naveed Akhtar v Mst. Ghazala Batool*¹⁰⁷ the petitioner had challenged the judgment and decree passed by the Family Court which had awarded maintenance allowance for his two minor daughters who were living with his ex-wife. The husband was wealthy but never paid the interim allowance of 10,000 rupees per month for each daughter nor did he pay the allowance of 20,000 each per month fixed by the Court. He also did not pay rupees 50,000 as maintenance for the *Iddat* period of his ex-wife. The husband challenged the decision of the Family Court in the First Appellate Court Pir Mahal which ordered him to pay the same within one month but the husband never paid anything. Because of the failure of the husband to pay any of the allowances his right to defend the suit was struck off on April 26, 2022. The same was challenged by the husband again in the First Appellate Court which was dismissed. The husband brought the writ petition which revealed that the husband even failed to appear before the executing court and had to be arrested and brought to the Court. The petitioner's counsel submitted that judgments and decrees are harsh, disproportionate and unfair because his right to defend his suit has been struck off. The Lahore High Court ruled that since the petitioner failed to abide by the terms of the judgment passed by the first Appellate Court, the trial Court as well as the Appellate Court in the second round, rightly found against the petitioner. The Court reproduced *Rai Muhammad Riaz (decd) through L.Rs. v Ejaz Ahmed*¹⁰⁸ of the apex Court in which it was ruled that "it is settled law that where the revival of the suit is based upon a conditional order and such condition is not fulfilled by the Applicant, for all intents and purposes the suit does not get restored."¹⁰⁹

The Court stated that pursuant to Section 17-A(1) of the Family Courts Act, 1964 the Court is under an obligation to fix the interim monthly maintenance for the wife or child and "if the defendant fails to pay the maintenance by fourteen days of each month, the defence of the defendant shall stand struck off and the Family Court shall decree the suit for maintenance on the basis of averments in the plaint and other supporting documents on record of the case."¹¹⁰ Failing to pay the maintenance each month makes it mandatory for the Court to strike off the defence of the defendant. The Court ruled that "the right of any litigant to defend his cause

¹⁰⁵ Ibid. para. 9.

¹⁰⁶ Ibid.

¹⁰⁷ W.P. No. 43023 of 2022.

¹⁰⁸ PLD 2021 Supreme Court 761

¹⁰⁹ Ibid., at para. 10.

¹¹⁰ Section 17-A(1) of the Family Courts Act, 1964.

before the passage of any adverse order, as sacrosanct as it is, cannot be allowed to interfere in the dispensation of justice especially in a manner so as to endorse his repeated defiance of valid orders passed against him."¹¹¹ The Court observed that the petitioner never wanted to pay the decreed amount and had agreed to pay only to get the judgment and decree reversed and prolong the litigation. The single Bench, therefore, dismissed the petition.

In *Muhammad Sajid v Judge Family Court*¹¹² the Hon'ble Lahore High Court has already held that the word "shall" in Section 17-A(1) above sufficiently clarifies "the legislative intent and since an adverse consequence is expressly provided for defiance of an order of payment of interim maintenance, the such consequence would mandatorily follow." In *Mehdi Khan v Shumaila Bibi*¹¹³ the husband sent a divorce document to his wife dated May 12, 2013. The wife claimed that she was deserted some 7 or 8 years ago and that she is entitled to past maintenance for that period. The Arbitration Council has issued certificates of divorce to both parties and awarded past maintenance to the ex-wife at the rate of 5,000 rupees per month with arrears for the last three years totalling rupees 180,000. The ex-wife had given an application for maintenance under section 9(1) of the MFLO, 1961 to the Chairman of the Arbitration Council on July 25, 2013, but she filed suit before the Family Court for maintenance on July 31, 2013. She was granted maintenance on August 8, 2013, whereas the suit for maintenance was dismissed on March 19, 2015, and she did not challenge the judgement and decree of the Family Court. Interestingly, the petitioner (husband) did not challenge the order. However, after a period of two and a half years, he moved a revision on June 7, 2016. The husband had brought a writ petition before the LHC which observed that it "is cognizant of the fact that when a party has more than one forum for redressal of its grievance and if it opts for one of them then it cannot be allowed to switch over to the rest of the remedies. Insofar as the case in hand is concerned, if proceedings before two forms were not maintainable the suit before the Family Court, being later in time, could be attacked on the said point but by no stretch of the imagination order dated 26.08.2013 could be declared illegal mere dismissal of the suit by the learned Judge Family Court on 19.03.2015."¹¹⁴

Counsel for the petitioner argued that Chairman Arbitration Council was not empowered to grant past maintenance to the ex-wife. The Court observed that the word 'maintenance' mentioned in section 9(1) of the MFLO, 1961 includes both future and past maintenance as well as maintenance during the *Iddat* period. The Court ruled that "the husband's obligation to maintain his wife commences simultaneously with the creation of marital bond and being in obligation and not

¹¹¹ W.P. No. 43023 of 2022, para. 28.

¹¹² 2020 CLC 1524.

¹¹³ W.P. No. 2772 of 2017

¹¹⁴ Ibid., para. 9.

an *ex gratia* grant it is enforceable even with respect to the past period of marital life.”¹¹⁵ The Court also brushed aside the argument of the counsel of the petitioner that the Chairman cannot assume himself to be Arbitration Council, "suffice it to note that Rule 5 of the West Pakistan Family Court Rules framed under the Muslim Family Laws Ordinance, 1961, provides an answer to this query. Sub-clause (6) of the Rule under reference envisages that all decisions of the Arbitration Council shall be taken by majority and where no decision can be so taken the decision of the Chairman shall be the decision of the Arbitration Council."¹¹⁶ The Court further stated that under Rule 16(1) of the FCA, 1964 that application for the revision of a decision of the Arbitration Council, under subsection (4) of Section 6 or of a certificate under subsection (2) of section 9 of the MFLO, "shall be preferred within thirty days of the decision or of the issue of the certificate, as the case may be, and shall be accompanied by a fee of two rupees." That the petitioner had failed to file a revision within 30 days of the decision. In fact, he filed the revision on June 7, 2016, that is, after passing more than two and a half years and without giving a solid reason. That the revision application was duly dismissed by the Collector, Gujrat. That the order was not challengeable before any Court. The Hon'ble Court dismissed the petition.

In *Khalid Bashir v Shamas-un-Nisa*¹¹⁷ it was held that a child is to be maintained by the father even though the mother earns a livelihood. According to Marghinani, “[T]he maintenance of minor children is the liability of the father and no one else participates in this with him, just like no one else participates with him in the maintenance of the wife.”¹¹⁸ As explained above the Qur’an has put this duty on the father.¹¹⁹ In *Shayan through Mst. Shamim v Nisar Ahmad*¹²⁰ the Lahore High Court ruled that a mother cannot waive the maintenance right of a child by entering into an agreement with a father. In *Mst. Farida v Judge Family Court*¹²¹ where a suit for maintenance was partly decreed and the ex-wife was awarded maintenance allowance during her *Iddat* period at the rate of 15000 rupees per month and the minor baby girl was allowed maintenance allowance at the rate of 5,000 rupees per month with an annual increase of 10%. The husband contested the same and argued that since the ex-wife had left his house on her own along with the baby, therefore, she is not entitled to any maintenance. Since the respondent was serving abroad and despite summons, after summons were sent to him, he did not appear before the Court, therefore, *ex-parte* proceedings had to be carried out against him. The

¹¹⁵ Ibid. para. 10.

¹¹⁶ Rule 5(6) of the West Pakistan Family Courts Act, 1964.

¹¹⁷ 2015 MLD 11 (Lah).

¹¹⁸ Marghinani, *Al-Hidayah*, 2:95.

¹¹⁹ Qur’an, 2:233.

¹²⁰ 2010 MLD 695 (Lah).

¹²¹ W.P. No. 18625 of 2016.

husband argued that since his ex-wife was disobedient therefore, she was not entitled to any maintenance when she left his house in the middle of 2013 although she had to feed his baby. The High Court observed that whether she left the house herself or was forced to quit it she was entitled to be maintained, especially when she was feeding the baby. An important issue, in this case, is that the ex-husband produced a document under which the ex-wife had agreed that she will not demand any maintenance for the minor baby. The woman told the Court that she was asked to put her thumb impression and sign a blank document and that she was unaware of the contents of the document as per the decision of the *Panchayat* (village council). The Court rejected the said document and stated that a mother cannot waive the undisputed right of the minor to maintenance by her father and that this is a violation of the Qur'anic injunction. The single Bench of the LHC accepted the petition partially and allowed the ex-wife past maintenance allowance at the rate of 5,000 per month from July 24, 2013, to July 13, 2014, with a 10% annual increase. The Court upheld the decision of the Family Court regarding maintenance to her for the *Iddat* period and allowance for the minor.

Is a wife, who is willing to perform her marital obligations but cannot do so because she is prevented by her husband, entitled to receive maintenance? In *Haseenullah v Mst. Naheed Begum*¹²² wherein a husband refused to pay maintenance and dower to his estranged wife and his five minor children. The husband had contracted a second marriage and was living with his second wife. Her suit was decreed by the Family Court to the extent of her claim for maintenance of her minor children but rejected her claims for recovery of her dower and maintenance and the District Court dismissed her appeal, maintaining the judgment of the Family Court. In a writ petition, the Hon'ble Peshawar High Court allowed her petition, reversed the judgments of the Courts below, and decreed her claims of dower and maintenance, vide its judgment dated April 09, 2020. The husband appealed the decision of the PHC. The apex Court ruled that "As for the claim of the respondent for her maintenance, the Family Court and the District Court held that since the respondent is not residing with the petitioner she is not entitled to maintenance."¹²³ That the High Court has rightly overturned these findings and held the respondent entitled to receive maintenance from the petitioner while observing that the respondent showed her willingness to go with the petitioner during the hearing of the petition, but the petitioner, who had contracted second marriage, flatly refused to take her to his house."¹²⁴ The Supreme Court observed that "We find nothing wrong in the decision of the High Court. A wife who is willing to, but cannot, discharge her marital obligations for no fault

¹²² PLD 2022 SC 686.

¹²³ Ibid. para. 7.

¹²⁴ Ibid.

of her own, rather is prevented to do so by any act or omission of her husband is legally entitled to receive her due maintenance from her husband, and the latter cannot benefit from his own wrong.”¹²⁵ Speaking for the full Bench Justice Mansoor Ali Shah observed that “Under the Islamic law a wife’s right to be maintained by her husband is absolute so long as she remains faithful to him and discharges, or is willing to discharge, her own matrimonial obligations. A Muslim husband is bound to maintain his wife even if no term in this regard is agreed to between them at the time of marriage or she can maintain herself out of her own resources.”¹²⁶ The Court, after observing that the husband has to pay his wife her maintenance as well as her dower of seven tola gold plus the four Kanal of agricultural land and that the land was not alternate to the seven tola gold, dismissed the husband’s petition with 3 costs throughout.

Can maintenance allowance be subsequently enhanced by the Court? The Supreme Court has answered this question in the affirmative. In *Lt. Col. Nasir Malik v Additional District Judge Lahore*¹²⁷ the Hon’ble Supreme Court of Pakistan held that the "Family Court had exclusive jurisdiction relating to maintenance allowance and the matters connected therewith. Once a decree by the Family Court in a suit for maintenance (for minors) was granted, thereafter, if the granted rate for monthly allowance was insufficient and inadequate, in that case, an institution of a fresh suit was not necessary rather the Family Court may entertain any such application (under S. 151, C.P.C) and if necessary, make alteration in the rate of maintenance allowance.”¹²⁸ The same was endorsed in *Mst. Farida v Judge Family Court*¹²⁹ discussed above. In *Amir Sohail v Judge Family Court*¹³⁰, the Multan Bench of the Hon’ble Lahore High Court held that “It should be noted that judgements/orders passed with the consent of the parties could not be challenged by any of the parties.”¹³¹ A minor cannot be burdened with [the] onus to prove the financial status of and payment capacity of his father to be declared entitled to maintenance allowance rather it is for the father to prove his financial sources which, if he fails to prove, the inference is to be drawn against him ...”¹³²

When does the obligation of a father end to maintain his son? In *Humayun Hassan v Arsalan Humayun*¹³³ the respondent son had filed a suit for maintenance

¹²⁵ Ibid.

¹²⁶ Ibid. para. 9.

¹²⁷ 2016 SCMR 1821.

¹²⁸ Ibid.

¹²⁹ W.P. No. 18625 of 2016.

¹³⁰ 2023 CLC 161

¹³¹ Ibid., para. 12.

¹³² Ibid.

¹³³ PLD 2013 SC 557.

on April 4, 1999, which was decreed by the Family Court in his favour; that the execution decree was pending but in the meanwhile, the respondent son had attained the age of majority; that the petitioner (father), thereupon moved an application and stated that since his son is no more a minor from March 1, 2011, therefore, he (the father) has no obligation to pay him maintenance allowance and that the executing Court is ceased to have jurisdiction in the matter. The executing Court rejected the application of the petitioner on November 28, 2011. The main question for the apex Court was "whether the respondent after having attained the age of majority (under the codified law of the country) is still entitled to and/or the appellant is bound to maintain his adult son; besides, whether the Executing/Family Court has the jurisdiction to compel the appellant to pay the maintenance allowance when the respondent admittedly has crossed the age of 18 years."¹³⁴ It was argued that the respondent is now 19 years and 11 months; that he went to Australia to study without the consent of his father; that he keeps no contact with the appellant, therefore, the father should not be forced to maintain him anymore. The respondent argued that since he is not capable of maintaining himself as he is studying, therefore, his father is bound to maintain him till he completes his education and earns a living. The august Supreme Court cited D. F. Mulla's book *Muhammadan Law* to discuss the meaning of maintenance and to mention that a father is bound to maintain his son till the age of puberty unless he is disabled by infirmity or disease.

The Hon'ble Court ruled that "the executing court, which under the settled law has no jurisdiction to go beyond the decree cannot require and direct the father (judgment debtor) to continue paying the maintenance to his adult son, only for the reason that he is yet studying. The decree dated 3-2-1999 (which had attained finality) contains no specific command, that it shall remain in force even beyond the majority of respondent No.1, thus it shall cease to have effect automatically the day said respondent, attained the age beyond 18 years, and thus for all intents and purposes the said decree was rendered in-executable."¹³⁵ The Court further mentioned that "the executing court was divested of its jurisdiction to enforce it further, the such court directly or indirectly had no jurisdiction to extend the life of the decree, when the decree in the ordinary and normal course had to lapse the day respondent No.1 became adult."¹³⁶ The Court allowed the appeal, set aside the impugned order and declared the execution proceedings against the petitioner as ended from the date when the respondent attained the age of majority.

Can the grandfather be ordered to maintain his grandchildren when the father is either unable or unwilling to maintain them? In *Ghafoor Ahmad Butt v Mst. Iram*

¹³⁴ Ibid., para. 1.

¹³⁵ Ibid., para. 6.

¹³⁶ Ibid.

*Butt*¹³⁷ the petitioner was aggrieved by the orders of the Family Court which were endorsed by the First Appellate Court whereby the petitioner was ordered to pay monthly rupees 2,000 to his three minor grandsons. The father of the minors was abroad and initially, the respondent and the minors lived in the house of her husband but she had to quit it and shift to her parents' home. The grandfather systematically resisted paying any maintenance despite the fact that he assured the Family Court that he will pay. The Hon'ble High Court observed that "the Family Judge's order dated 24-11-2009, passed against the petitioner, cannot be challenged as it is the necessary consequence of the petitioner's non-compliance of the Family Judge's order dated 7-10-2009 in view of the provisions of section 17A of the West Pakistan Family Courts Act, 1964."¹³⁸ The Court mentioned that "There can be no cavil to the proposition that as a rule the paternal grandfather is bound to maintain his grandchildren if their father is not alive." The Court cited *Abdul Ghani v Muhammad Ashfaq*¹³⁹ in which the apex Court had held "that the paternal grandfather was under an obligation to provide maintenance to the children of his pre-deceased son even though he was an old man and only owned a small piece of land."¹⁴⁰ The Court also supported its view by *Haji Nizam Khan v Additional District Judge, Lyallpur*¹⁴¹ which emphasized the obligation of a paternal grandfather to maintain his desperate grandchildren who have a corresponding right to be maintained by their paternal grandfather. The Court stated that "[S]uch an obligation or right is not limited in scope and cannot be excluded where the father, though alive, cannot or does not attend to the needs of his destitute minor children."¹⁴² The Court ruled that "[T]he paternal grandfather is bound to maintain his minor grandchildren in need regardless of whether or not they are orphans with the difference in the former case the paternal grandfather has the right to be reimbursed by the father of minors."¹⁴³ The Court upheld the decision of the Family Court and dismissed the petition.

What about the maintenance of unmarried daughters? In *Gakhar Hussain v Surrayya Begum*¹⁴⁴ it was held that a father is required to maintain his unmarried daughter even when she is earning her living. The LHC has held in *Ch. Muhammad Bashir v Ansarun Nisa*¹⁴⁵ that a father is to maintain his unmarried adult daughters. This is so even if an unmarried daughter refused to marry according to the wishes

¹³⁷ PLD 2011 Lahore 610.

¹³⁸ Ibid., para. 7.

¹³⁹ PLD 1991 SC 543.

¹⁴⁰ Ibid.

¹⁴¹ PLD 1976 Lah. 930.

¹⁴² PLD 2011 Lahore 610.

¹⁴³ Ibid. para. 8.

¹⁴⁴ PLD 2013 Lah 464.

¹⁴⁵ 2012 MLD 1394 (Lah).

of her father.¹⁴⁶ Similarly, a divorced daughter, even when living separately, is to be maintained by the father in *Manzoor Hussain v Safiya Bibi*.¹⁴⁷ The same was held in *Mian Muhammad Sabir v Uzma Parveen*¹⁴⁸ in which the divorced daughter was living with her divorced mother and not the father. The question of whether an adult son should be maintained by his father depends on the circumstances of his father and the son. In general, a son is maintained till attaining the age of puberty.

Conclusion

Every husband is under a legal obligation to maintain his wife and children. However, he is not supposed to maintain a disobedient wife, that is when she is not accompanying him without a legal and justifiable excuse. He must maintain whether the wife is sick and is even unable to perform her matrimonial duties whether the marriage is consummated or not. As per the apex Court in Pakistan maintenance is not confined merely to food, clothing and lodging but it cannot be extended to incorporate within it education at higher levels ad infinitum. Under Section 9(1) of the MFLO, 1961 a woman can request the Chairman Arbitration Council to fix maintenance allowance for herself. Application for revision can be given to the Collector within 30 days and his decision is final. Similarly, maintenance allowance may be fixed by the Family Court as well under Sections 17-A and 17-B of the FCA, 1964. Family Court has to obtain information regarding the means and sources of the husband before fixing the allowance under 17-A(4). Higher Courts have been issuing directions and guidelines to Family Courts to be extra careful while determining the quantum of maintenance. Higher Courts have also ruled time and again that they will not interfere in their constitutional jurisdictions if orders of interim maintenance are challenged. Higher Courts have also allowed Family Courts can review their own decisions in family disputes.

Maintenance may be for the future, past or the *Iddat* period of a woman. As per the decision of the Supreme Court, the obligation of the father to maintain his son ceases when he attains the age of majority which is 18 years of age. As per pronouncements of the higher Courts in Pakistan, the father is under an obligation to maintain his unmarried daughter. In addition, Courts have ruled that the grandfather is under any obligation to maintain his grandchildren when their father is either incapable or unwilling to maintain them.

¹⁴⁶ *Muhammad Ali v Judge Family Court, Depalpur*, 2010 YLR 520 (Lah).

¹⁴⁷ PLD 2015 Lah 683.

¹⁴⁸ PLD 2012 Lah 154.