

IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA

APPELLATE JURISDICTION

**ACTION NUMBER:** 0008/2014  
(Original DVRO Case Number: 143 of 2012)

**BETWEEN:** BROWN  
APPELLANT

**AND:** KAMINI  
RESPONDENT

*Appearances:* Appellant in Person .  
Mr. Lutumailagi, I. for the Respondent.

*Date/Place of Judgment:* Tuesday 15 November 2016 at Lautoka.

*Coram:* Hon. Madam Justice Anjala Wati.

*Category:* All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.

*Anonymised Case Citation:* Brown v. Kamini - Family Appeal number 0008 of 2014

JUDGMENT

Catchwords:

FAMILY LAW - Domestic Violence - Whether the mother committed any form of violence on the child for non-contact orders to be issues against her in favour of the child - Right of child to have contact with mother of child - best interest of child.

Legislation:

i . Domestic Violence Decree 2009 ("DVD").

## Cause and Background

1 . The father appeals the decision of the Resident Magistrate ("RM") of 16 May 2014 when his application for non-contact orders against the respondent in favour of his son was refused by the Court.

2. The child a male was born in 2005. The parties are his natural parents. The parents had been in a de-facto relationship for some time before their separation. After the separation of the parents, the child has always lived with the father.

3. By consent orders of 26 March 2010, the father has residence of the child and the child has contact with his mother. The orders in its specific terms are :

1. The father is to have residence of the child.

2. The child to have contact with the mother on:

(i). Every alternate weekends starting from 26 March 2010 from Friday 4pm to Sunday 4pm. The father has to drop the child at the Lautoka Magistrates' Court Family Registry and pick the child on Sunday from Nadi Police Station. During long weekend the father was to pick the child on Monday 4pm and not Sunday.

(ii). During the first half of the school holidays the child to stay with the mother and the second half of the school holidays to stay with his father.

(iii). On Christmas and Boxing Day, the child to be with the mother for year 2010 and the arrangement to remain for every alternate year thereafter.

3. The passport of the child was to be deposited in Court and the child was not to be removed out of the jurisdiction of the Court without leave.

4. Subsequently, on 21 May 2012 the father filed an application against the mother asking for standard non-molestation and non-contact orders under the DVD. In the application, the child was included as the "protected person".

5. The allegation by the father was that the mother had committed the following violence on the child:

(i). The mother had created a facebook account for the child without his consent when she should have obtained his consent as he has the residence of the child. The picture of the child was changed twice and requests for friends sent to him and his friends;

(ii) On 21 December 2011, the mother made the child undergo circumcision without his consent. After the circumcision, the child's got infected and he was put on antibiotics for 3 weeks.

6. The matter was heard on affidavit and oral evidence. Both parties gave evidence in Court on the application.

#### Magistrates' Court's Findings and Orders

7. After hearing the evidence, the Court found that circumcision was accepted by both parties as a well - established customary practice in Fiji amongst the i-Taukei culture. The child underwent some infection and both parties blamed each other for the same.

8. The Court found that there was no medical evidence to make a concrete finding on the cause of the infection. It was found that circumcision was not conducted to cause intentional or deliberate harm to the child and therefore is not an act of domestic violence on the child.

9. On the issue of facebook account being created in the name of the child, the Court found that there was no evidence that the mother has created the account.

10. Having made the findings the Court issued standard non-molestation orders against the mother in favour of the father but refused the non-contact orders against the mother in favour of the child.

11. Since non-contact orders in favour of the child was declined, the mother, by the consent orders of 26 March 2010 still has contact of the child, although the father has not permitted the mother to have contact on the basis that he has appealed the orders.

#### Grounds of Appeal

12. Aggrieved at the decision of the Court, the father appealed asserting that he is entitled to non-contact orders because the mother circumcised the child without his consent.

13. He also raised his concern that the mother visited the child at school when she is not allowed to do so. She was also alleged to have breached the order of the Court by dropping the child at a place which was not designated by Court.

14. The father was also very concerned that his child had a facebook account without his consent. That, he alleges, was improper conduct on the part of the mother.

15. The father's concern also extended to allege that the Family Court Magistrate was bias as he did not record what he said in his evidence but only recorded what the mother said. He alleged that the judgment of the Magistrates' Court is basically a reflection of the submissions put forward by the mother's counsel. It was asserted that that act of the RM reflects bias on his part.

#### Submissions and Analysis

16. I think the most important exercise for me to first undertake is to look into the allegation of bias that has been leveled against the RM.

17. I have perused the original file in respect of the domestic violence proceedings in the Magistrates' Court. This was an exercise that I undertook despite the records of the proceedings being furnished to me.

18. The major reason why I had asked for the original file was because the court record only contained part of the evidence of the proceedings for domestic violence restraining orders. The part that was included in the record was the evidence of the mother only. Upon my perusal of the original file, I found that the notes of the evidence of the father was properly transcribed from audio recording and kept in the original file.

19. It may have been an inadvertent error that the notes did not form part of the compiled records. However the evidence was recorded by the RM and considered when the application was being determined. I therefore do not find that the father has been prejudiced in that his evidence was not recorded and considered in the judgment. His allegation of bias on this ground is unfounded.

20. The next aspect is the allegation that the RM only considered the submissions of the mother's counsel. There is no basis for that allegation as the judgment carefully reflects the issues raised by the father and his evidence as well. It was his application for a Domestic Violence Restraining Order

that was under consideration and in my analysis, the application was determined properly. Be that as it may, I will consider whether the findings of the Court were correct in light of the evidence before the Court.

21. I will first of all deal with the issue of circumcision. I have read the evidence of the parties and I find that the father agreed in his evidence that he would also have had the child circumcised but he was not happy with the way it was done without his consent and that the child received infections.

22. The evidence of the mother is not contradicted that it is a cultural practice to circumcise i-Taukei children and that she was under the belief that the father will not have objections to the same, as when they lived together, the father had agreed to circumcision.

23. The father's concern is getting the child circumcised without his consent. The mother, at all times was under the belief that she has had obtained the consent of the father in regards circumcising the child as that was the agreement when they lived together. She cannot be said to have carried out an intentional act to cause harm to the child by putting him through circumcision. She was merely following what she believed is the correct cultural practice which was also endorsed by the father at some point in time. The child was also happy to undergo the process and there is no evidence that he was mentally or physically traumatized before, during or after the process.

24. Moreover, the mother did everything on her part to ensure that the child is properly circumcised. She got the circumcision conducted under proper medical conditions by a doctor and she was also prepared to follow the doctor's instructions to take the child to the sea after 4 days for the stiches to heal.

25. When the process to take the child to the sea came, the father came and took the child away. Thereafter as per the evidence, he did not take him to the sea. The allegations thus were equally laid on him by the mother that having taken the child away, he failed in his duty to follow proper instructions of the doctor which caused the infection.

26. In most of his evidence the father was interested in mud-slinging instead of showing concern for the child. His half the frustration as the evidence shows is his inability to accept that the mother found another partner and has moved on in life. He has from the very beginning questioned her morality in Court and did so in the appeal proceedings as well.

27. No one could establish how the infection took place and who was to be blamed. Was it lack of proper care by the mother or compliance of the doctor's instructions by the father? Whatever caused the infection, the evidence does not show that the same was caused intentionally or due to recklessness on the part of the mother. On that basis the Court was correct in not issuing non-

contact orders against the mother. Given the evidence before the Court, it was not in the best interest of the child to deprive him of his rights to see his natural mother.

28. On the question of the face-book account, there was no evidence that the opening of the account was done to cause intentional mental or physical harm to the child. There is also no evidence that the child suffered any sort of violence or problem due to the opening of the account. The father could not establish that the mother's action was contrary to the interest of the child.

29. On the question of visiting the child at school, I find that although there are specific times for contact, there is no prohibition on the mother to visit the child at school. She can attend to her child's needs at school if it does not affect his welfare and interest. There was no evidence that the child's interest was compromised when the mother visited her at school. I find these allegations so petty which only reflect on how the child is being constantly used in the battle for the father to vent out his anger at the mother. I make similar observations regarding the mother returning the child at a place not designated by the Court. These are not matters that have affected the interest of the child in anyway but used for personal fight and grievance.

30. On the evidence before the Court, the issuance of the non-contact orders would have deprived the child by curbing his right to have contact orders with his mother. Any orders would have been prejudicial. There was no need to issue any orders for the protection of the child.

#### Other Matters

31. Having dealt with this file at various stages, I found that the father is very skeptical about the independence of every counsel that appears in this case and of the judicial officers as well. He has continued to accuse that he has not had a fair hearing and that his child's interest is at stake if he has contact with his mother.

32. There were many times when I have counselled the father not to get unnecessarily acrimonious and make unfounded personal attacks on counsel and the presiding officers. He kept asserting that no one is interested in his child's rights.

33. I then gave directions that in light of all the allegations, it is proper that the child is interviewed and his views obtained regarding having contact with his mother. The child was thus interviewed in chambers in presence of the Acting Court Officer Mr. Ali.

34. The child appeared a very intelligent and well-looked after. It did not appear that he was brain-washed by anyone. He was very clear and genuine in expressing his wishes. He very clearly indicated that he would like to visit his mother on Sundays from 10.00am to 3.00 pm and spend nights at his place, meaning, with his father.

35. I could notice the excitement and happiness when he realized that he will get an opportunity to see his mother and spend some time with her. His whole demeanor appeared to be grateful to the Court for discussing the issue with him and making an attempt to organize contact with his mother.

36. A contact for the child was organized on 11 November 2016 for one and half hours and the child was seen to have immense bonding with his mother. As soon as the child was sent to the mother, he cuddled her and cried. He showed to his mother, how much he missed her. The mother also expressed the same feelings. The clerks of the Court and I had supervised the contact to ensure that the child is not affected by any influence.

37. I find that if the contact orders are not put into effect or any form of contact granted, the child will be mentally affected. Since the child has currently expressed an interest for day contact, it is proper that the initial orders are suspended for a few months and the contact begins with day contact.

38. After a certain time the initial contact orders are to resume to ensure proper bonding with the mother and that the child is able to spend some quality time with her.

#### Final Orders

39. In the final analysis, I make the following orders:

1. The appeal by the father is dismissed.

2. The initial contact order granted by consent on 26 March 2010 is suspended until 31 January 2017.

3. In the interim, the child to have contact with his mother on every Sundays from 10.00 am to 3.00 pm. The father is to pick and drop the child from Nadi Police Station. This is necessary to ensure that there is no commotion during exchange.[I make this order after having recognized the father's vociferous personality].

4. In addition, the mother to have contact of the child during Christmas and Boxing Day. The father is to pick and drop the child at 10.00 on 24 December 2016 and to pick him up at 4.00pm on 27 December, 2016 from Nadi Police Station.

5. Any breaches of the orders can be subject to contempt proceedings in the lower Court.

6. After 31 January 2017, the orders of 26 March 2010 are to be fully reinstated and the mother is to exercise contact as per the original orders of the RM.

7. A copy of this order and/or judgment must be served on the Nadi Police Station to make the officers aware of the fact of exchange at the venue.

8. Each party to bear their own cost of the appeal proceedings.

Anjala Wati

Judge

15.11.2016

To:

1. Appellant in Person.
2. Lutumailagi & Associates for the Respondent.
3. File: Appeal 0008/14 (143 of 2012).