

TRIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY SUPERIOR COURT

RONALD GOLDMAN AND 27 OTHER TAXPAYERS, Plaintiffs v. SECRETARY OF THE EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES Respondent	Docket No. 2084CV01604
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AMICUS BRIEF OF ATTORNEYS FOR THE RIGHTS OF THE CHILD

Now comes the charitable organization Attorneys for the Rights of the Child, with leave of court and by its undersigned attorney, and respectfully files this Amicus Brief to assist the Court in deciding Petitioners’ (Plaintiffs’) and Respondent’s (Defendant’s) cross-motions. We support Plaintiffs’ request for a declaratory judgment and Motion for a Preliminary Injunction, and oppose Respondent’s Motion to Dismiss.

ABOUT OUR ORGANIZATION

Attorneys for the Rights of the Child (ARC) is a U.S. federal and state certified non-profit or charitable organization. It addresses legal and other aspects of male, female, and intersex genital cutting in the United States, with an emphasis on the widespread though declining American cultural practice of male circumcision. ARC’s Board of Directors and members include an international network of attorneys.

In 2001, ARC consulted about male circumcision with the Sub-Commission for the Protection and Development of Human Rights of the United Nations Commission on Human Rights. Its written submission became the first document ever accepted by the U.N. focusing on the subject. In 2012, ARC received the 2002 Human Rights Award from the International Symposium on Human Rights and Modern Society. In 2018, at the invitation of the United Nations’ Committee on the Rights of the Child, ARC submitted a “third party intervention”, akin to an amicus brief, to the international non-governmental organization Council on Genital Autonomy. ARC has twice presented by invitation to the International Society for Sexually Transmitted Diseases Research and at the last thirteen International Symposia on Genital Integrity. ARC has published articles about circumcision, and helped organize a special issue on the topic in the world’s top

ethical journal, the UK's Journal of Medical Ethics. Most recently, ARC published a 2017 article in the AMA Journal of Ethics.¹

J. STEVEN SVOBODA founded ARC in 1997 and is its founder and Executive Director. He graduated cum laude from Harvard Law school in 1991, where he was a Human Rights Fellow. Attorney Svoboda is an internationally recognized expert on circumcision, ethics, and the law. He has published more than 40 peer-reviewed articles about circumcision in medico-legal journals. He has published articles in eight books by Plenum Press and Springer Press by the *British Journal of Urology*. His work has been cited by the American Urological Association and the Royal Australasian College of Physicians. In 2013, he debated the ethics and legality of circumcision with the American Academy of Pediatrics' Michael Brady, M.D., at the Medical University of South Carolina.

I. NOT MEDICALLY NECESSARY AND DOES NOT CONFORM WITH PROFESSIONAL STANDARDS OF HEALTH CARE

Non-therapeutic circumcision (NTC) is, by definition, not therapy or needed to treat a medical condition, and hence it is not medically necessary. As Dr. Andrew L. Freedman of the 2012 AAP Task Force on Circumcision stated in 2016,² parents usually elect circumcision for aesthetic, cultural, and religious reasons and not for medical reasons.

The American Medical Association Code of Medical Ethics, Opinion 1.1.1 provides that, "A patient-physician relationship exists when a physician serves a patient's medical needs." The healthy boys who physicians circumcise do not meet the definition of a "patient".

Opinion 1.1.1 further provides, "The relationship between a patient and a physician is based on trust, which gives rise to physicians' ethical responsibility to place patients' welfare above the physician's own self-interest or obligations to others, to use sound medical judgment on patients' behalf, and to advocate for their patients' welfare." The American Academy of Pediatrics (AAP) has never recommended circumcision, and in its now expired 2012 guidelines the AAP stated that the, "health benefits are not great enough to recommend routine circumcision for all male newborns."³ Rather, the AAP asserts that it is up to parents to decide whether their son is circumcised or not, taking into consideration the parents' own preferences. "Parents ultimately should decide whether circumcision is in the best interests of their male child. They will need to weigh medical information in the context of their own religious, ethical, and cultural beliefs and practices." Physicians who follow the AAP guidelines thus do not use their independent medical judgment in deciding whether to circumcise healthy boys or not; they take orders from parents to do so.

¹ J. Steven Svoboda. *Nontherapeutic circumcision of minors as an ethically problematic form of iatrogenic injury* 19(8) AMA JOURNAL OF ETHICS 815-824 (2017).

² Andrew L. Freedman. *The circumcision debate: Beyond benefits and risks* 137(5) PEDIATRICS e20160594 (2016).

³ <<https://pediatrics.aappublications.org/content/130/3/585>>.

When physicians do have a patient suffering from a medical condition, AMA Code of Medical Ethics Opinion 1.1.3(b) provides that physicians must respect their patients' rights, including the right:

To receive information from their physicians and to have [the] opportunity to discuss the benefits, risks, and costs of appropriate treatment alternatives, including the risks, benefits and costs of forgoing treatment. Patients should be able to expect that their physicians will provide guidance about what they consider the optimal course of action for the patient based on the physician's objective professional judgment.

It is the norm in medicine to perform surgery, other than cosmetic surgery, only when a physician recommends it as medically necessary after considering more conservative treatment alternatives. Physicians in the U.S. do not do this. For these foregoing reasons, NTC does not conform to professional recognized standards of health care worldwide or in the U.S.

MassHealth advances other reasons in its Motion to Dismiss why NTC should be a covered Medicaid benefit -- such as that physicians' services are a covered benefit; that the American Academy of Pediatrics (AAP) condones it; that more states pay for it than do not, and so on. None of these arguments are persuasive: they cannot change the determinative fact that NTC is unnecessary.

Not a Covered Medical Benefit. We agree — as argued in a 2011 article in the *Journal of Law and Medicine*,⁴ in the Complaint, Parts I (A) and (B), and Plaintiffs' Memorandum of Law, Part I —that it violates federal and Massachusetts law for a state agency to use Medicaid to pay for unnecessary medical services, and hence NTC is not a covered benefit.

G.L. c. 29, Section 63,⁵ which Plaintiffs invoke in bringing this lawsuit, Complaint Para. 3, explicitly states that taxpayers have the right to petition the Court for relief from an abuse of power by MassHealth.

II. IT IS IN THE PUBLIC INTEREST TO END MEDICAID COVERAGE OF NTC AND IT IS CONTRARY TO THE PUBLIC INTEREST TO ALLOW IT

Since it is unlawful to use Medicaid to pay for NTC, we believe that the Court does not reach the question of whether it is in the public interest or good policy to end Medicaid coverage, but as Plaintiffs argue in their brief, Part III, it is.

First, it is in the public interest to enforce laws and it is against the public interest to allow a state agency to abuse the law.

Second, ending Medicaid coverage of male circumcision prevents wasting scarce health care resources, and makes money available for medical care that patients need.

Third, from the health perspective, it is good for the health of boys and men to leave them bodily and genitally intact. Most males who have ever lived have been genitally intact. The genitalia are

⁴ Peter W. Adler. *Is it lawful to Use Medicaid to pay for circumcision?* 19 J. L. MED. 335-53 (2011).

⁵ G.L. c. 29, § 63.

of obviously special psycho-sexual importance to adolescent boys and men, and the foreskin is the most sensitive part of the penis. It is not surprising therefore that even in the U.S., where circumcision is common, men rarely volunteer to be circumcised.

Conversely, it seems obvious that unnecessary male genital cutting, which many considered to be genital mutilation in ancient times, is bad and sometimes disastrous for the health of boys and men. ARC published an article showing that circumcision is a form of iatrogenic harm (a medical condition caused by medical intervention).⁶ It is one of the most painful procedures in neonatal medicine. Circumcision radically changes the appearance of the penis and removes the most sensitive parts of the penis, and the foreskin performs numerous valuable functions: among them, it is mobile and provides lubrication, which reduces friction during sexual intercourse. Thus, circumcision destroys the normal functioning of the penis. It carries a significant risk of many potential complications, can cause psychological complications, and on rare occasions it is fatal.

Our website contains a list of judgments and settlements reached to compensate plaintiffs for circumcisions that were “botched” and/or performed without proper fully informed parental permission.⁷ Among is a 2018 case where a Georgia jury awarded a boy \$31 million for a botched circumcision that severed part of his penis, causing pain, deformity, and a lifetime of anguish. There is no central registry for complications of circumcision, so no one knows how many boys and men suffer catastrophic injury because of it.

WHEREFORE, we urge the Court to: (1) grant the Plaintiffs request for a declaration that it is unlawful for MassHealth to use Medicaid to pay for non-therapeutic circumcision; (2) to enjoin MassHealth’s abuse of power; and (3) deny MassHealth’s Motion to Dismiss.

Respectfully submitted,

ATTORNEYS FOR THE RIGHTS OF THE CHILD

By J. Steven Svoboda, Esq., M.S., J.D., Its Executive Director



December 15, 2020

⁶ J. Steven Svoboda, Esq., MS, JD, *Nontherapeutic circumcision of minors as an ethically problematic form of iatrogenic injury* 19(8) AMA JOURNAL OF ETHICS 815-824(2017).

⁷ Attorneys for the Rights of the Child. Legal Victories. Available at <<https://www.arclaw.org/resources/legal-victories>>.

AND BY ITS ATTORNEY

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