



Chur, October 08, 2013

ZK1 13 42

Served in writing on:
October 15, 2013

Judgment

Civil Division I

Presiding Judge Brunner

Judges Schlenker, Michael Dürst, Hubert and Pritzi

Actuary Thöny

In the civil law appeal

of X._____, Appellant, represented by lic. iur. Wilfried Caviezel, Attorney at Law,
Masanserstrasse 35, 7001 Chur,

versus

the Decision of the Children and Adult Protection Authority of Nordbünden
[Kindes- und Erwachsenenschutzbehörde Nordbünden, KESB] dated March 12,
2013, served on March 21, 2013, in the matter of A._____, Appellee, legally
represented by Y._____, in turn represented by lic. iur. et oec. Pius Fryberg,
Attorney at Law, Quaderstrasse 8, 7000 Chur, against the Appellant,

Regarding a prohibition on circumcision.

The result is as follows:

I. Statement of Facts

A. A._____, born on _____2009, is the son of Y._____ and X._____. The parents are unmarried. The mother Y._____ has sole parental control. The father X._____ acknowledged the child on November 16, 2009 prior to his birth.

B. By decision dated November 24, 2010 the Support and Care Agreement between X._____ and A._____ (represented by his mother) was approved by the Guardianship Authority [Vormundschaftsbehörde] of the District of Chur. Therein the parties agreed on the care and support of the child for the duration of their joint household, but also regulated parental control and support as well as visitation and vacation rights in the event that the joint household was dissolved.

C. After various differences, the relationship broke up, and on September 1, 2012, Y._____ and her son A._____ moved out of X._____’s property in Chur. Since there were disagreements regarding the exercise of visitation rights, X._____ contacted the Guardianship Authority of the District Chur on September 15, 2012. Subsequently, the parties attempted to conclude a written agreement with the assistance of the Guardianship Authority, governing visitation contacts as well as general matters relating to upbringing of the child and communication between the parents. However, no agreement was reached at that time.

D. On December 17, 2012, X._____ made a report to the Children and Adult Protection Authority [Kindes- und Erwachsenenschutzbehörde (KESB)] of Nordbünden, stating that he was extremely worried about the **conduct of the KESB Nordbünden** with respect to its assistance and the enforcement of his rights. Some of the information he provided was blatantly wrong and he stated that immediate action and intervention were necessary. The mother was said to have baptized A._____ with the Islamic name “B._____” “behind his back” and was also thinking of having the boy circumcised. The father wanted to defend himself against this with determination and vehemence. He asked the KESB Nordbünden to immediately take the necessary measures to ensure that A._____’s bodily integrity is maintained.

E. At the hearing, Y._____ stated that her son is Muslim and is registered as such with the Residence Registration Office. She is raising him in accordance with Muslim principles, as is done in her family.

She wishes to have A._____ circumcised based on her convictions and not to harm the father. She wishes to have the circumcision performed in Switzerland and not in Bosnia. Ultimately, the KESB Nordbünden informed her that circumcision of the child against the father's will could seriously aggravate parental conflicts and jeopardize the personal development of the child through constant conflicts of loyalty. Thereafter, Y._____ confirmed to KESB Nordbünden that she would postpone circumcision until the spring of 2013.

F. On January 3, 2013, X._____ filed an application for partial withdrawal of parental control with respect to the decision on circumcision and for an order of urgent precautionary measures and the establishment of guardianship for A._____. The parental guardian [Erziehungsbeistand] was to monitor the exercise of parental authority by Y._____ and ensure that she complied with the ordered measures.

G. After both parties were provided an opportunity to express themselves on the matter verbally and in writing, the KESB Nordbünden issued the following decision on March 12, 2013, which was served on March 21, 2013:

"1. The parents are instructed:

a. to participate in at least five mediation sessions (excluding the initial session) under the professional guidance of lic. iur. Patrizia Parolini, Attorney at Law (Mediator SVM/SDM, Chur) and lic. iur. Raymund Solèr (Mediator SDM, Chur) and to actively cooperate on jointly developing improvements in their parental communication and discussing the circumcision of A._____ and

b. to keep the appointments scheduled by the mediators.

2. The request to order provisional measures, dated January 3, 2013, is denied.

3. Guardianship shall be established for A._____.

4. As part of her guardianship, the guardian shall be assigned the following tasks and authorities in visitation matters (Art. 308 (2) of the Swiss Civil Code [ZGB]):

a. to provide appropriate counsel to the parents of A._____ with regard to visitation rights as well as active support, if necessary, in particular:

- to arrange for and monitor contacts between A._____ and the father, if necessary (advice, mediation, pre-care and follow-up care);

- to establish specific rules in the event of conflict;



- to develop extended written visitation rules with the parents and submit them to the Authority for approval. The KESB Nordbünden shall be requested to establish such rules if no mutually agreeable rules can be worked out;

b. to provide the father of A. _____ with information regarding his _____'s development, upon request;

c. to be available as a contact person for all those involved on matters relating to the child.

5. The guardian is requested:

a. to submit a written accountability report [Rechenschaftsbericht] to KESB Nordbünden every two years (statements regarding A. _____'s development and the performance of her guardianship duties);

b. if there are indications of significant changes in the living conditions of A. _____ during the reporting period, to inform the KESB Nordbünden of this in a report and request a suitable revision or cancellation of the measures, if necessary.

7. C. _____ (Berufsbeistandschaft Rhäzüns-Trins) is appointed as the guardian for A. _____.

8. The costs of the proceedings are set at Swiss Fr. 1'365.

9. One half of the costs of the proceedings that resulted in this decision (No. 8), with a total amount of Fr. 1'365, shall be imposed on each of the parents, i.e. (Y. _____: Swiss Fr. 682.50 and X. _____: Swiss Fr. 682.50).

10. Nos. 1 and 3 to 9 of this decision can be appealed to the Cantonal Court of Graubünden, Poststrasse 14, 7002 Chur, in writing and with substantiation, within 30 days of service (Art. 314 (1) in conjunction with Art. 450 et seqq. ZGB and Art. 60 (1) of the Introductory Law to the Swiss Civil Code [EGzZGB]). The appeal shall have suspensive effect (Art. 450c ZGB).

11. Number 2 of this decision can be appealed to the Cantonal Court of Graubünden, Poststrasse 14, 7002 Chur, in writing and with substantiation, within 10 days of service (Art. 314 (1) in conjunction with Art. 445 (3) in conjunction with Art. 450 et seqq. ZGB and Art. 60 (1) EGzZGB). The appeal shall have suspensive effect.

12. (Initiation).

13. (Service)."

H. X. _____ appealed the denial of his request to take provisional measures, dated January 3, 2013, in a submission to the Cantonal Court of Graubünden, dated April 2, 2013. However, the Presiding Judge of Civil Division I did not address the substance of the appeal in the decision dated April 9, 2013.

I. In a submission dated April 23, 2013, X._____ appealed the main action to the Cantonal Court of Graubünden in accordance with Art. 450 et seqq. ZGB. He made the following demands for relief:

- “1. Nos. 1.a and 2 of the dispositive section of the contested decision of the collegial body of the KESB Nordbünden shall be set aside and replaced with the following new provisions:
 - 1.1 The parents are instructed:
 - a. to participate in at least five mediation sessions (excluding the initial session) under the professional guidance of lic. iur. Patrizia Parolini, Attorney at Law (Mediator SVM/SDM, Chur) and lic. iur. Raymund Solèr (Mediator SDM, Chur) and to actively cooperate on jointly developing improvements in their parental communication.
 - 1.2 Parental control shall be partially withdrawn from Y._____, i.e. with respect to any decision to circumcise A._____.
 - 1.3 Y._____ shall be prohibited from circumcising her son A._____ under the threat of punishment formulated in Art. 292 of the Swiss Criminal Code [StGB], according to which a person who does not comply with an order issued to him by a competent authority or a competent official, containing notice of the threat of punishment in this Article, shall be punished with a fine.
2. Alternatively, No. 1.a of the dispositive section of the contested decision shall be set aside and replaced by the new provision set forth in No. 1.1 of the above demand for relief and, in other respects, the matter shall be remanded to the KESB Nordbünden with the instruction to adjudicate the Appellant's request for partial withdrawal of parental control dated January 3, 2013 and the Appellant's petition for a prohibition of circumcision dated March 12, 2013 and issue an appealable decision in this regard.
3. With an award of costs and attorney fees against the Appellee.”

J. In its statement dated May 23, 2013, the KESB Nordbünden petitioned the Court to dismiss the appeal, insofar as it could be addressed on the merits, and award costs and attorney fees in accordance with the law.

K. In her response to the appeal dated June 5, 2013, Y._____ demanded the following relief: that the appeal not be addressed on the merits and that costs and attorney fees be awarded; alternatively, that the appeal be dismissed.

Additional statements in the contested decision and in the written submissions will be dealt with, to the extent necessary, in the Considerations section, which follows.

II. Considerations

1. On January 1, 2013, the new Children and Adult Protection Act [Kindes- und Erwachsenenschutzrecht] took effect. Under Art. 14 (1) of the final section of the Swiss Civil Code [ZGB, SR 210], the new law applies as soon as it takes effect. In this matter, the Clarification Proceeding [Abklärungsverfahren] of the KESB Nordbünden regarding guardianship for the purpose of ordering precautionary measures and the establishment of guardianship was initiated by petition dated January 3, 2013. Therefore, the new Adult Protection Act applies.

2.a) Under Art. 450 (1) ZGB, the decisions of the Adult Protection Authority can be appealed to the competent court. Contrary to the language of the law, this provision applies, not only to proceedings before the Adult Protection Authority, but generally applies to child protection proceedings. This can be inferred from Art. 440 (3) ZGB, according to which the Adult Protection Authority also has the duties of the Children's Protectoin Authority (cf. Steck in: Handkommentar zum Schweizer Privatrecht, Personen- und Familienrecht, 2nd edition, Zürich/Basel/Geneva 2012, N. 6 to preliminary remark, ZGB 443 et seqq.). Under Art. 60 (1) of the Introductory Law to the Swiss Civil Code [EGzZGB, BR 210.100], the Cantonal Court of Graubünden is the only cantonal appellate body. With the term "appeal," legislators are making a link to the current guardianship appeal [Vormundschaftsbeschwerde] (Art. 420 aZGB; Bot-schaft Erwachsenenschutz, 7083). Under Art. 450 et seq. ZGB, the provisions of the Code of Civil Procedure [Zivilprozessordnung] apply by analogy; however, there is no direct correlation with an appeal under Art. 319 et seqq. ZPO. In addition to the parties to the proceedings, who are the persons directly affected by the KESB's order, persons closely related to them also have standing to file an appeal under Art. 450 (2) ZGB. The appeal period is 30 days from service of the KESB's decision under Art. 450b (1) ZGB. The appeal is must be submitted to the court in writing and with substantiation. Substantial formal requirements may not be imposed (Steck, loc. cit., N 42 to Art 450a ZGB).

b) By submission dated April 2, 2013, X._____ appealed the denial of the request to issue provisional measures (No. 2 of the dispositive section of the decision

Graubünden. However, the Presiding Judge of Civil Division I did not address the substance of the appeal in the decision dated April 9, 2013 (ZK1 13 38). His rationale was that the 10-day appeal period under Art. 445 (3) ZGB does not apply, since the KESB Nordbünden did not issue a decision regarding the precautionary measure. Rather, the decision clearly indicates that the KESB Nordbünden integrated the question of circumcision into the main proceeding and issued the main decision immediately after conducting the main hearing, which rendered the request to issue a (provisional) precautionary measure moot. However, in light of the KESB Nordbünden's considerations, it is not clear whether No. 2 of the dispositive section indicated that the petition to prohibit circumcision itself was denied, especially since no decision on this matter can be found in the dispositive section. Nevertheless, the usual 30-day appeal period would apply in contesting any such decision. The petition has no complaint seeking to provisionally prohibit Y._____ from circumcising her son, A._____, without a prior hearing, since the KESB Nordbünden's decision of March 12, 2013 expressly ordered that the appeal has suspensive effect in application of Art. 450c ZGB. Therefore, Y._____ is prohibited from having A._____ circumcised until she has obtained a legally binding decision. Therefore, a binding decision had already been issued that a 30-day appeal period also applies to No. 2 of the dispositive section – contrary to the statement of appeal rights in the contested decision (No. 11) – and that the appeal is entitled to suspensive effect. In this case, the deadline for appeals was met by X._____’s submission dated April 23, 2013. Since the other formal provisions were also complied with, the appeal must be addressed on the merits, in principle.

3. Under Art. 450a ZGB, the grounds for appeal are violation of law, an incorrect or incomplete determination of the legally relevant facts or the unsuitability of the decision (in addition to justice denied and justice delayed). Thereupon, the appeal has suspensive effect (Art. 450c ZGB). The inquisitorial principle applies to judicial proceedings (Art. 446 (1) ZGB). However, according to the practice of the Federal Supreme Court, this does not release the appellant from the obligation to show why the contested decision is erroneous (BGE 138 III 374, E. 4.3.1). The appellate court can decide the matter anew or remand the case to the lower adjudicatory body, if appropriate (Art. 450 et seq. ZGB in conjunction with Arts. 318 (1) and 327 (3) ZPO). As a rule, a new decision is to be rendered to the extent possible (Reetz/Hilber in: Kommentar zur Schweizerischen Zivilprozess-

ordnung, Sutter-Somm/Hasenböhler/Leuenberger [Publisher], 2010, N. 23 to Art. 318 and N. 11 et seq. to Art. 327).

4. The Appellant first argues that No. 2 of the contested dispositive section of the KESB Nordbünden's decision only indicates a rejection of his request for a measure, i.e. the Appellee's petition seeking to prohibit the son, A._____, from being circumcised – provisionally, as a precautionary measure and with the threat of punishment formulated in Art. 292 StGB. Likewise, the Considerations section of the decision indicates that this request was also rejected as a provisional measure. However, it is unclear whether the KESB Nordbünden wished to state that the request of January 3, 2013 for partial withdrawal of the mother's parental control and the petition of March 12, 2013 to prohibit circumcision itself were dismissed, especially since this is not sufficiently clear from the dispositive section of the contested decision.

a) As already stated in the decision to dismiss the petition without addressing its substance [Nichteintretensentscheid] dated April 9, 2013 (ZK1 13 38), the KESB Nordbünden's dispositive section contains no decision holding that the request to prohibit circumcision itself was dismissed. However, in light of the Considerations, it must be assumed – as the Appellant has rightfully recognized – that the father's petition to prohibit the mother from circumcising the son was rejected by the KESB Nordbünden. Thus, the KESB Nordbünden stated that the mother has sole parental control and there is no evidence to indicate Y._____ does not wish to have her son properly circumcised, i.e. under proper medical conditions. Consequently, she is, in principle, entitled to do so and a restriction of her parental control with regard to the circumcision of A._____ is not appropriate due to a lack of any limitation due to the welfare of the child. At the same time, the KESB Nordbünden – as a child protection measure – ordered five mediation sessions on the topic of circumcision, as indicated in No. 1 of the dispositive section of the contested decision.

b) In his appeal, X._____ petitions the Court to enforce a prohibition on circumcision in the sense of a partial restriction on the mother's parental control and under threat of the penal consequences set forth in Art. 292 StGB, on one hand, and to revise the content of the mediation sessions by excluding the topic of circumcision, on the other hand. Therefore, as a first step, it is necessary to examine whether the KESB Nordbünden's decision to leave the decision-making authority

regarding circumcision with the mother was reasonable or whether circumcision should be prohibited due to the risk to the child's welfare. A decision regarding the restriction of mediation topics will be made based on this outcome of this examination.

5. Unrestricted parental control is part of the parent/child relationship, which is a comprehensive real relationship [Realbeziehung]. The parents have a comprehensive obligation and right to make the necessary decisions for the minor child, to raise and represent him or her and manage his or her assets. It is in the nature of this obligation and right that it can only be exercised and performed if the holder has all the necessary information.

If the parents are not married, an adult mother generally has sole parental control (Art. 298 (1) ZGB). In general, this does not change if a relationship has been established between the child and the father (Hausheer/Geiser/Aebi-Müller, Das Familienrecht des Schweizerischen Zivilgesetzbuches, 4th edition, Bern 2010, N. 17.78 et seqq.). However, parental control does not always have to be comprehensive. It can be restricted. Such restrictions are imposed through selective child protection measures within the meaning of Art. 307 et seqq. ZGB based on the protection of the child (cf. FamPra.ch 1/2012, p. 3).

In this case, Y._____ has sole parental control over A._____. The father acknowledges this (cf. Doc. A.1, p. 10, No. 1.1). Therefore, the mother has sole decision-making authority. However, based on Art. 275a ZGB, the father has a right to be consulted before decisions are made that are important to the development of the child.

a) Under Art. 307 et seqq. ZGB, the prerequisite for the Child Protection Authority to intervene is a risk to the child's welfare, which is not being or cannot be eliminated by the parents. At the same time, the child's welfare is a guideline for choosing and implementing suitable measures. In child protection law, a risk to the child's welfare is assumed if, under the circumstances, a serious possibility of impairment of the physical or mental well-being of the child is foreseeable. The risk need not come from the parents themselves. It is sufficient if they are unable to adequately protect the child (Art. 307 (1) ZGB). Moreover, the parents need not be at fault.

b) Under Art. 301 (1) ZGB, the parents must guide the care and upbringing of the child with a view to the child's welfare and make the necessary decisions for the child, subject to his own legal capacity. "Necessary decisions" include, *inter alia*, decisions regarding interventions involving the child's physical integrity, particularly with respect to medical treatments. The parents represent their child in this regard (Art. 304 (1) ZGB). Under Art. 301 (1) ZGB, the parents' decisions with respect to physical interventions must be based on the child's welfare. This is also based on Art. 302 (1) ZGB, according to which the parents must raise the child in accordance with their circumstances and foster and protect his physical, mental and moral development (cf. Schwenzler in: Honsell/Vogt/Geiser [Publisher], Basler Kommentar Zivilgesetzbuch I, 4th edition, Basel 2010, N. 4 et seqq. to Art. 302). On the other hand, Art. 301 (1) ZGB provides that the child's own legal capacity is reserved. In general, minors lack legal capacity, which means that they lack the capacity to establish rights and obligations through their own actions. However, Art. 19 (2) ZGB grants them legal capacity in certain matters as an exception. Accordingly, minors with sound judgment may, *inter alia*, exercise rights to which they are entitled on the basis of their personality without the consent of their legal representatives. The civil law teaching in this context speaks of the child's "highly personal rights." This means, *inter alia*, the child's personal rights under Art. 28 ZGB, which include physical integrity. As soon as the child is capable of making judgments with respect to the decision in question relating to his own body, the child alone is responsible for the decision, and the parents need not consent. Moreover, the parents' consent is not legally valid. Therefore, the capacity to make judgments (Art. 16 ZGB) – and not majority status (Art. 14) ZGB) – is controlling for the question of whether the parents or the child himself must and may consent to a physical intervention. With respect to the parents' representation of a child lacking capacity to make judgments, a distinction is made between absolutely highly personal rights and relatively highly personal rights. Absolutely highly personal rights are not amenable to representation (Art. 19c (2) ZGB). Parents can represent a child with respect to relatively highly personal rights. Interventions with respect to a child's physical integrity, particularly medical interventions, are considered to be relatively highly personal rights. Therefore, representation by the child's parents, or the parent with parental control, is possible. The line of demarcation between the two types of highly personal rights is fuzzy (cf. Bigler-Eggenberger in: Honsell/Vogt/Geiser [Publisher.], loc. cit., N. 36 et seqq. to Art. 19).

c) Under Art. 303 (1) ZGB, the parents decide on the religious upbringing of the of the child. Religious upbringing initially encompasses determining the religion and denomination of the child and the entirety of the educational influence on the formation of the religious feelings and beliefs of the growing child. The general principles for the upbringing of a child in Art. 301 (1) and (2) and Art. 302 (1) ZGB – which are listed above – also apply to the religious upbringing of a child. Therefore, the child’s welfare may not be endangered by his religious upbringing (cf. Schwenger in: Honsell/Vogt/Geiser [Publisher], loc. cit., N. 2 et seqq. to Art. 303).

6. With the adoption of the new Art. 124 StGB, which relates to the genital mutilation of minor females, legislators have criminalized this practice based on a parliamentary initiative. Therefore, the parents generally cannot consent to this. In the course of this amendment of the law, the Commission for Legal Affairs of the Swiss National Council explicitly stated that the criminal provision does not extend to the circumcision of the male genitals, since this is not considered problematical and such a criminal offense would go far beyond the concerns of the parliamentary initiative (cf. Report of the Commission for Legal Affairs of the Swiss National Council dated April 30, 2010, p. 5668 et seq.). For its part, the Swiss Federal Council considered it “not entirely consistent” to create a special offense solely for injury to the female genitals but not to the male genitals. This unequal treatment can only be justified because the seriousness of the injury to female genitals exceeds that to male genitals in most cases. Moreover, international law is limited to the condemnation of injury to the female genitals. There are no international provisions regarding male circumcision (cf. Statement of the Swiss Federal Council regarding the April 30, 2010 Report of the Commission for Legal Affairs of the National Council, p. 5679). In summary, it can be inferred from this discussion that legislators deliberately declined to explicitly criminalize the circumcision of boys. However, it must be noted, that there was no real discussion of the question of male circumcision and its consequences within the context of the introduction of Art. 124 StGB. The legal situation is unclear, especially since there is no statutory provision or judicial ruling on the topic in Switzerland to this day. Therefore,

reliance must be placed on general (criminal and civil law) norms. In this context, it should be undisputed that performing a circumcision (at least) meets the objective elements of simple assault and battery under Art. 123 No. 1 StGB (cf. Swiss Center for Human Rights Studies [Schweizerische Kompetenzzentrum für Menschenrechte, SKMR] Framework Document, The Circumcision of Boys from a Legal Perspective, July 2013, p. 13; also: Beatrice Giger, Genital Mutilation - Prerequisites for and Limits of Consent, p. 29 et seq.). Therefore, an examination must be made of whether there is justification in the sense of legally adequate consent – by the person with parental control, in the case of a child who lacks the capacity to make judgments – and – from a civil law perspective – of the extent to which and the circumstances under which the parents can consent to such a physical intervention on a child who lacks the capacity to make judgments without a medical indication.

a) The endangerment of the child's welfare and respect for the personality of the child form the limits of the broad parental authority to represent the child in decision-making while the child lacks the capacity to make judgments. The criterion of the welfare of the child is the guiding principle of child law and applies to circumcision for any reason. Initially, examination must be made of whether circumcision without a medical indication constitutes endangerment of the child's welfare per se and the parents generally cannot consent to it – analogous to female genital mutilation. This is not the case in the opinion of the Cantonal Court of

Graubünden. Of course, the prerequisites are that the intervention is performed by medical specialists in accordance with the rules of medical practice and with the use of anesthesia. Under these conditions, the risk of complications is very low. As a rule, the wound heals without any problem and the mental effects on the child should not be serious. Therefore, it can be said that the performance of a circumcision does not pose a serious health risk to the boy, although the contrary opinion is occasionally expressed (cf., for example, Beatrice Giger, Genitalverstümmelung - Voraussetzungen und Grenzen der Einwilligung, p. 26). However, serious negative effects have not been clearly proven up to now. Thus, the injury is not so serious – in contrast to the mutilation of female genitals – that consent cannot be considered as justification in any case. Therefore, a general prohibition on circumcision is not justified in view of the current state of scientific knowledge. Therefore, the parents or the person with parental control should be able to consent even in cases

where there is no medical necessity. Nevertheless, there must always be a weighing of interests in the individual case (cf. Framework Document of the Swiss Center for Human Rights Studies, loc. cit., p. 17 et seq.).

b) In other respects, the opinion stated above also holds up against international case law and practice. Thus, the UN Committee on the Rights of the Child has never criticized male circumcision per se and has so far only shown concern that, at times, boys and young men are not circumcised under medically safe conditions in certain countries, and this can pose a health risk (Framework Document of the Swiss Center for Human Rights Studies, loc. cit., p. 18). Moreover, on December 28, 2012 a provision of law took effect in Germany (§ 1631d of the German Civil Code [BGB]), which – contrary to prior case law – explicitly enables parental consent to the circumcision of youth who lack the capacity to make judgments, in compliance with certain requirements (proper performance, effective pain relief, full explanation, and taking the child's wishes into account). The provision does not make distinctions based on the parent's motivation for making the intervention. Consequently, circumcision for cultural or religious reasons is permissible (Framework Document of the Swiss Center for Human Rights Studies, loc. cit., p. 7 et seq.). If circumcision would endanger the child's welfare, even considering its purpose, the intervention must not be made.

7. As stated, if the child's welfare is not endangered, circumcision is permissible. The consent of the parents enables a permissible intervention into the physical integrity of the child and prevents criminal liability for simple assault and battery. If the welfare of the child is endangered, there must be no intervention until the boy himself possesses the necessary capacity to make judgments and can give valid consent. When the limits of child endangerment have been reached is a question of discretion and evaluation. With respect to interventions into the physical integrity of the child, the principle is that parents can only consent to interventions on their children who lack capacity to make judgments if they are medically indicated. Nevertheless, the substantive reduction of the child's welfare to his "health welfare" would be too narrow: Under Swiss law, the child's welfare encompasses, not only the child's physical needs, but also his mental, social and cultural needs. Under the case law of the Swiss Federal Supreme Court, the principle of the child's welfare requires, in decision-making, to seek a solution that ensures "age-appropriate development possibilities for the

the child from a mental, psychological, physical and social perspective” (cf. BGE 129 III 250, E. 3.4.2, p. 255). Accordingly, physical interventions can, for example, be permissible for cultural, religious, or aesthetic reasons. However, the (at times threatened) medical risks, on one hand, and the emotional, psychological, and social needs of the child, on the other hand, must always be weighed. Despite all attempts at objectivity, the child’s welfare must always ultimately be defined on a case-by-case basis.

a) In this case, the mother partially justifies her wish to circumcise her son based on the hygienic aspects (cf. KESB files, Docs. 33 and 39). Without going into the details of the relevant studies, suffice it to say that the hygienic benefit of circumcision is not undisputed from a scientific standpoint. Regardless of this, the hygiene argument per se cannot justify consent to the bodily injury caused by the intervention, especially since regular physical hygiene is an equally productive method (cf. Beatrice Giger, loc. cit., pp. 28 and 36). In this respect, the Appellant’s view is to be followed.

b) The mother cites religious reasons as her main motive for circumcision. It must be examined below whether, in the case of A._____, the threatened religious and socio-cultural disadvantages can justify the intervention into his physical integrity, so that the child’s welfare is not endangered even if the intervention is made. In so doing, the Court, as a religiously neutral state body, must detach itself from the religious issue and decide, in accordance with other custody law criteria, whether the person with parental control may decide on certain individual questions in connection with the religious upbringing of the child. The relevant criteria for determining the child’s welfare here are primarily ensuring continuity in the child’s upbringing and embedding the child in the social environment (cf. also BGE 135 I 79, E. 4.4, p. 83.).

ba) First, the specific family relationships must be examined. A._____, born on _____2009, lived in his parents’ joint household until September 1, 2012. X._____ is a Catholic. Y._____ is a Muslim. According to the statement made _____ by Y._____, the question A._____’s religious affiliation was initially left open (KESB files, Doc. 33). It is true that the mother had sole parental control under the Care and Support Agreement dated November 24, 2010 (KESB files, Doc. 16) (No. 2.1.2 of the Care and Support Agreement). However, the parents had mutually agreed

to communicate regarding necessary decisions in everyday life (No. 2.1.4 of the Care and Support Agreement). Not until after the separation and in the course of developing an agreement on visitation rights did disagreements regarding this matter first arise. X._____ took the view that his son should be raised without a denomination, but that both parents should have an opportunity to convey the respective values of their religions to him. Then, at the proper time, the son himself should decide whether to accept a religion and, if so, which one (KESB files, Doc. 21). By contrast, Y._____ took the view that she wished to raise A._____ the same way as her future children and that he should speak her mother language and accept her religion (KESB files, Doc. 22). At the hearing on December 20, 2012 (KESB files, Doc. 33) Y._____ stated that she would make the decision on A._____’s religion following the separation. The son is now a Muslim and has been registered as such with the Residence Registration Office. She is raising A._____ in accordance with Muslim principles, as is done in her family. She maintained her position regarding circumcision. A._____ will be raised in the Muslim religion and no other. Circumcision will be nothing out of the ordinary for him. However, X._____ feared that it would not be conducive to the child’s welfare if A._____ was forced to switch from one world to another, depending on which parent he is currently staying with.

bb) In this case, the different religious affiliations of the parents were apparently not a serious problem at first. The situation did not intensify until after the separation when Y._____ decided to raise her son A._____ in the Muslim faith. There is basically nothing wrong with that, especially since she indisputably has sole parental control and therefore can decide on the religious upbringing of the child. The father is only entitled to a right to be consulted in this regard. However, it must be taken into account that X._____ had to be granted visitation and vacation rights, which he regularly exercises. As indicated by the record, A._____ currently spends every weekend with his father (cf. KESB files, Doc. 54). According to his own testimony, X._____ is willing to care for his son for half a week in each case when the child’s mother must again spend more time at work. In this case, care provided by the father is certainly preferable to care provided by third parties (day care). But even if the current visitation rules continue, it should be noted that A._____ spends two days per week with his father and is necessarily confronted with his father’s religion, since the latter is free to

practice his religion. The mother's objection that her son would know nothing other than the Muslim religion is therefore wrong. The social environment in which A._____ is growing up is influenced by both religions. That is unlikely to change in the future. Even if A._____ is brought up in the Muslim religion, the mother must always respect the religious consciousness of the child (cf. Breitschmid in: Handkommentar zum Schweizer Privatrecht, Personen- und Familienrecht, loc. cit., N. 4 to Art. 303). With parents who belong to different religious communities, this principle has increased significance, since the child gains insight into two different religions and will deal with the question of his own religious affiliation at an earlier stage. Under these conditions, it would be extremely problematic if the child would be irrevocably identified as belonging to one religion through a decision made by his mother before reaching religious majority [Religionsmündigkeit]. In addition, circumcision does not establish your religion under the rules of Judaism or Islam, but merely constitutes a sign of religious affiliation. In other words, a man need not be circumcised to be able to profess his religion and join Islam. The profession of faith is valid even without prior circumcision (cf. Beatrice Giger, loc. cit., p. 25 with reference to Putzke, Rechtliche Grenzen der Zirkumzision bei Minderjährigen, published in: MedR (2008), p. 271).

bc) Moreover, the argument regarding social acceptance in the child's environment, which is often made in connection with religious circumcisions, does not apply to this set of facts. It is undisputed that circumcision is important as a means of identification and remaining uncircumcised may have serious consequences for living with others in a religious community. In the specific case, the family of A._____ does not belong to only one religious community to the exclusion of any other. Since the father and his relatives are not of the Islamic faith, the failure to circumcise A._____ will have no negative consequences – to the extent that he stays with his father. According to her own statements, the mother is only a “moderate Muslim” and, for example, does not wear a head scarf (cf. KESB files, Doc. 33). This seems to be readily accepted in her personal milieu. At least the files do not indicate anything to the contrary. Thus, it is not evident to what extent failure to be circumcised, which – as already stated – like wearing a head scarf – is only a sign of religious affiliation, and not a prerequisite for a valid profession of faith, could socially disadvantage A._____.

Therefore, the intervention in this case cannot be justified by negative social and religious consequences.

bd) As already stated, the mother has sole parental control based on Art. 298 (1) ZGB. In this regard, it should be taken into account that the Federal Assembly adopted new rules for joint custody on June 21, 2013, which – if there is no referendum – are scheduled to take effect next year. Under the new provisions, minor children are generally under the joint custody of their mother and father. It is important for the harmonious development of a child that it can maintain a close relationship with both parents, to the extent possible. Therefore, joint parental custody will become the rule for divorced parents and parents who are not married to each other in the interests of the child's welfare. Only if the interests of the child must be protected can parental custody be awarded to one parent (cf. Botschaft zu einer Änderung des Schweizerischen Zivilgesetzbuches [Elterliche Sorge] dated November 16, 2011, pp. 9087 and 9102). For unmarried parents, joint parental custody will be based on a joint declaration by the parents following acknowledgment of the parental relationship (Art. 298a (1) E-ZGB). If one parent refuses to make a declaration with respect to joint parental custody, the other parent can call the Child Protection Authority where the child resides, which shall then decree joint parental custody, unless the sole parental custody of the mother is maintained or sole parental custody is transferred to the father to protect the child's welfare (cf. Art. 298b E-ZGB). Reasons for removing or reassigning parental custody include – by analogy to Art. 311 ZGB – inexperience, illness, physical infirmity, and absence from the location. In addition, the withdrawal of parental custody can be a response to the fact that the parents did not make a serious effort to care for the child (cf. Botschaft zu einer Änderung des Schweizerischen Zivilgesetzbuches [Elterliche Sorge] dated November 16, 2011, p. 9105). Under the transitional law, a parent who is not entitled to parental custody when the new provisions take effect can file a petition for a decree of joint parental custody with the competent authority within one year (Art. 12 (4) E final section). Based on what has been said, it can be assumed that X. _____ will receive the opportunity to apply for joint parental custody over his son, A. _____ in the near future. Based on his past statements, it must be assumed that he will make use of this opportunity (cf. KESB files, Docs. 12, 24 and 54). In this case, he will no longer merely

have a right to be consulted on the question of the child's religious affiliation but will have joint decision-making authority together with the mother. Also, with respect to the imminent revision of the law, it seems justified to refrain from inalterably identifying the child with a particular faith at the present time.

c) Finally, after what has been said, the Court finds no grounds that could justify the planned intervention into the physical integrity of A._____. Circumcision is not in the child's welfare at the present time. Therefore, it is best to wait until A._____ has the capacity to make judgments with respect to this matter and can make his own decision. On one hand, this is harmless from a medical perspective, since the intervention can also be performed on adults without increased risk. On the other hand, there is no problem from a religious perspective since circumcision is not a prerequisite for a valid profession of faith in Islam.

8. If the welfare of the child is endangered and the parents do not rectify this on their own initiative or if they are unable to do so, the Guardianship Authority will take suitable measures to protect the child (Art. 307 (1) ZGB). The mildest measures in the hierarchy of child protection measures include advising, warning or instructing the parents in accordance with Art. 307 (3) ZGB, which can cover all areas of parental activity and must comply with the maxims of subsidiarity, complementarity and proportionality. If advice, warnings and instructions do not suffice, guardianship can be ordered (Art. 308 et seq. ZGB). If this does not suffice, parental custody can be appropriately restricted based on Art. 308 (3) ZGB, parental custody can be suspended (Art. 310 ZGB) or as the *ultima ratio* – parental custody can be withdrawn (Art. 311 et seq. ZGB). Since the official maxims apply to children's issues,

the Guardianship Authority or the Court involved with children's issues can take measures within the meaning of Art. 307 et seqq. ZGB *sua sponte* (cf. Breitschmid in: Basler Kommentar Zivilgesetzbuch I, loc. cit., N. 2 to Art. 307; judgment of the Federal Supreme Court, 5D_171/2009, dated June 1, 2010, E. 3.3).

a) In this case, the Appellant, has petitioned the Court to partially withdraw Y._____’s parental control over her son A._____, i.e., with reference to any decision to have the child circumcised. The Appellee responds that a partial withdrawal of

parental control is not provided for by law and is therefore not possible. This is correct. The restriction of parental control is governed by Art. 308 (3) ZGB under the side note on guardianship. This is an independent measure, which, however, presupposes guardianship and is inseparably bound up with it. The restriction of parental control can relate to part or all of the tasks delegated to the guardian and is indicated where the parents are uncooperative and there is a risk they will undermine the orders of the guardian. The holder of parental control can generally remain in that position, but the legal authority to make decisions can be withdrawn with respect to a special matter. The withdrawal can take place when guardianship is ordered or at a later date. However, the restriction must correspond to the guardian's assignment (cf. with respect to all, Breitschmid, loc. cit., N. 20 to Art. 308; Biderbost in: Handkommentar zum Schweizer Privatrecht, Personen- und Familienrecht, loc. cit., 20 et seqq. to Art. 308). It is true that the KESB Nordbünden established guardianship here (No. 3 of the dispositive section of the contested decision); however, it is expressly limited to visitation rights matters (No. 4 of the dispositive section of the contested decision). The restriction of parental control with respect to the matter of circumcision, as requested by the Appellant, could only be effectuated in conjunction with the expansion of guardianship. However, an examination must be made of whether there are no milder measures available, which will also avert the endangerment of the child's welfare, but restrict parental control as little as possible but as much as necessary (cf. with respect to all, Hegnauer, Grundriss des Kindesrechts, 5th edition, Bern 1999, N. 27.09 et seqq.).

b) As the reply to the appeal dated June 5, 2013 indicates, Y._____ has thus far assumed that circumcision of her son would not endanger the child's welfare. To this extent, it cannot be assumed that she would oppose a court order to the contrary. Therefore, there is no evidence that an instruction within the meaning of Art. 307 (3) ZGB would not suffice in this case to prevent Y._____ from having the medical intervention performed on her son. Due to the principle of proportionality, which requires the adoption of the mildest measure likely to succeed in the individual case, ordering guardianship based on Art. 308 (2) ZGB and consequently the requested restriction on parental control under Art. 308 (3) ZGB cannot be considered. This count of X._____ 's appeal is dismissed.

Nevertheless, Y._____ shall be given a binding instruction under threat of punishment for contempt of court in accordance with Art. 292 StGB to refrain from circumcising her son A._____.

To this extent, Appellant's petition (No. 1.3) is sustained.

9. In addition, the Appellant petitions the Court to set aside the order to participate in mediation regarding the matter of circumcision. This petition is sustained. Based on the foregoing considerations, the child is not to be circumcised. Therefore, it is unnecessary to deal with this matter in mediation. The order issued by the KESB Nordbünden (No. 1.a of the dispositive section) shall be appropriately modified.

10. In summary, it is ruled that the appeal is sustained, in part, and the decision of the lower adjudicatory body is corrected to instruct Y._____, as an instruction in accordance with Art. 307 (3) ZGB and under threat of criminal penalties, that she is prohibited from having her son A._____ circumcised. Accordingly, the mediation sessions ordered by the KESB Graubünden shall be limited to the topic of improving parental communication. No. 1.a of the dispositive section of the contested decision shall be revised accordingly.

11. Since the provision on costs issued by the lower adjudicatory body was not contested, it is only necessary to decide below on the costs of the appellate proceedings.

a) As regards the principles for allocating costs in children and adult protection law appeal proceedings, Art. 450 et seq. ZGB refers in a subsidiary manner to the provisions of the Swiss Code of Civil Procedure [ZPO], unless the cantons provide otherwise. According to the ZPO, the litigation costs – consisting of court costs and attorney fees (Art. 95 (1) ZPO) – are imposed on the losing party. If neither party prevailed, the litigation costs are allocated based on the outcome of the proceedings (Art. 106 (1) and (2) ZPO). In these appellate proceedings, X._____ petitioned, on one hand, for restriction of Y._____’s parental control over her son A._____ in the matter of his circumcision and, on the other hand, for the issuance of a prohibition on circumcising the son and, linked to this, the exclusion of this topic from the officially ordered mediation sessions. He has prevailed in full on the second petition,

while the first petition was dismissed. Under these circumstances, it is justified to impose half of the costs of the appellate proceeding (Fr. 2'500) on each of the parties. Since each party prevailed in half of the case and lost the other half, attorney fees will not be awarded.

b) By decree of the Presiding Judge of Civil Division I dated May 28, 2013 (ERZ 13 169), Y._____ was awarded free legal assistance, and lic. iur. et oec. Pius Fryberg, Attorney at Law, was appointed as her legal representative. Accordingly, the costs of the appellate proceedings imposed on her will be paid by the Canton of Graubünden (Art. 122 (1) lit. b ZPO). The free legal counsel shall be appropriately compensated by the Canton (Art. 122 (1) lit. a ZPO). Since no fee invoice has been submitted, the attorney fees shall be determined within the discretion of the judge. In view of the questions of fact and law that were posed and the effort associated therewith, compensation in the amount of Swiss Fr. 1'500

(including cash expenditures and VAT) seems reasonable – in application of the hourly rate of Swiss Fr. 200. Therefore, the compensation for the legal counsel for Y._____ is set at Swiss Fr. 1'500.

III. Accordingly it is decreed:

1. The appeal is sustained, in part, and No. 1.a of the dispositive section of the contested decision is deleted and reformulated as follows:

“The parents are instructed:
 - a. to participate in at least five mediation sessions (excluding the initial session) under the professional guidance of lic. iur. Patrizia Parolini, Attorney at Law (Mediator SVM/SDM, Chur) and lic. iur. Raymund Solèr (Mediator SDM, Chur) and to actively cooperate on jointly developing improvements in their parental communication.”
2. Y._____ is prohibited as an instruction under Art. 307 (1) and (3) ZGB from having her son, A._____, circumcised.
3. The instruction in No. 2 of this decision is issued with express reference to Art. 292 StGB, according to which a person who does not comply with an order issued by a competent authority or a competent official, containing notice of the threat of punishment in this Article, shall be punished with a fine.
- 4.a) X._____ and Y._____ shall each bear half of the costs of the appellate proceedings (Swiss Fr. 2'500). The extra-judicial costs are **offset against each other**.
 - b) No attorney fees are awarded.
- 5.a) The court costs of Swiss Fr. 1'250 imposed on Y._____ and the costs of her legal representation shall be billed to the Canton of Graubünden with reservation of the right to reclaim them in accordance with Art. 123 (1) ZPO based on the relevant decree of the Presiding Judge of Civil Division I dated May 28, 2013 (ERZ 13 169) and shall be paid by the court cashier.
 - b) The compensation of the free legal representative for Y._____ is set at Swiss Fr. 1'500 (including cash expenditures and VAT).

6. In accordance with Art. 72 of the Federal Law on the Federal Supreme Court dated June 17, 2005 (Bundesgerichtsgesetz, BGG; SR 173.110), this decision as a civil matter can be appealed to the Swiss Federal Supreme Court, 1000 Lausanne 14. The appeal must be submitted to the Federal Supreme Court in writing within 30 days of receipt of a complete copy of the decision in the manner prescribed by Art. 42 et seq. BGG. Arts. 29 et seqq., 72 et seqq. and Art. 90 et seqq. BGG apply to the permissibility, standing to file an appeal, the other prerequisites, and the appeal procedure.

7. Service to: