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Standards: Art. 823, par. 1, BGB [German Civil Code], art. 1, par. 1, of the German Constitution [GG], art. 2, par. 2, of the German Constitution [GG], art. 253, par. 2, BGB, art. 114 ZPO [Code of Civil Procedure]

Compensation: Prospect of success for filing a lawsuit for compensation against a father who gave his consent to the circumcision of his child although the child is not in his custody.

Headnote

If a father although not having custody of his child consents to the circumcision of his child who is not capable of giving informed consent himself and does not first request the mother in whose custody the child is to give her consent, he is violating the personal right of the child, which in itself entitles the child to compensation based on the satisfaction function.

Inserting course of the procedure ...

Tenor

Based on the immediate complaint of the Claimant, the February 02, 2007 decision by the Hanau District Court has been changed and revised as follows:

The Claimant has been granted legal aid to be able to file a lawsuit against the Opponent under 2) requesting the payment of an appropriate compensation, together with interest. In order to be able to exercise his rights, the Claimant is assisted by Attorney X, ..., on the conditions of an attorney practicing in the district of the Hanau District Court.

Reasons

I.

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The Claimant, born on 1993, represented by his mother, requests to be granted legal aid to be able to file a lawsuit against the Opponent under 2), his father, who had him circumcised at the age of 12, in order to receive a compensation payment in the amount of EUR 10,000.

2

The Opponent under 2) is a devout Muslim and divorced from the mother of the Claimant. The Claimant lived with his mother who has been granted sole custody. The Claimant spent the fall vacation break of 2005 with the Opponent under 2).

3

Based on the diagnosis by the pediatrician Dr. A, according to which the Claimant suffered from a phimosis, the Opponent under 1) transferred on September 15, 2005 the Claimant to the outpatient surgery center O1. Since the Claimant has chronic epilepsy, the anesthesiologist there refused to put him under anesthesia at the outpatient center. As a result, the Opponent under 1) transferred the Claimant for further treatment to the clinic of the city O1. On September 28 or 29 of 2005, the Opponent under 2) visited together with the Claimant the clinic for the purpose of having the Claimant circumcised. On September 29, 2005, after examining the Claimant, the clinic sent a letter to the general health insurance (*Allgemeinen Ortskrankenkasse*), informing them that there was no medical necessity for the surgical procedure. However, the procedure of a medically not indicated circumcision could be performed if the procedure was paid privately. Consequently, the Opponent under 2) visited together with the Claimant a - not well-known - local physician who performed the circumcision sometime between October 17 and October 28, 2005 (fall vacation break)

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The Opponent under 2) asked the Claimant for his consent, which the Claimant gave "under the pressure" of the situation. The mother of the Claimant, who is not a Muslim, learned only afterwards of the circumcision. On several occasions, the mother and the Opponent under 2) had argued about the circumcision requested by the Opponent under 2), but the mother consistently refused to give her consent.

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Currently, the Claimant is in a psychiatric hospital for children because of an acute mental illness and cannot provide his mother with any details. It cannot be determined at this point when the Claimant will recover.

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The Claimant reported that he has not been educated in the Muslim faith and that he has not yet decided which religious teachings he wants to follow. He had been basically informed about the tradition of circumcision prevalent among Muslims. He is considered to be a very unstable child that is slow in his

development. Under these circumstances, he lacked the capacity for informed consent at the time.

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The Claimant reported that he would have to suffer his whole life from being different as a result of his circumcision. In particular, this would apply to the period of puberty where he had already enough problems in dealing with the changes of his body, and because he was afraid to be ridiculed by his peers.

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The Opponent under 2) did not comment on the petition for legal aid.

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For lack of reasonable prospects of success, the district court had rejected the petition for legal aid. The reasons for this rejection are explained in the February 02, 2007 decision.

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The Claimant refuses to accept this decision and decided to continue to pursue the lawsuit against the Opponent under 2).

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The district court did not remedy the complaint based on the reasoning that circumcision of boys is socially acceptable in the Muslim life and cultural environment, and that it is difficult to understand why the Claimant lacked the capacity for informed consent.

II.

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The admissible complaint, which in particular is submitted in due form and time, is factually substantiated, because there are reasonable prospects of success for the complaint filed by the Claimant against the Opponent under 2).

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1. According to the nature of the dispute, the Claimant is basically entitled to a compensation payment on the part of the Opponent under 2) because according to art. 823, par. 1, and art. 253, par. 2, BGB his personal rights have been violated. The Opponent under 2) violated the Claimant's personal right to

self-determination to the extent that he caused the Claimant, who was not capable of giving informed consent, to be circumcised, and that he consented to the surgical procedure although he had no custody of the Claimant.

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a) The Claimant is entitled to receive the legal aid, because it can be assumed that at the time of circumcision the Claimant did not have the required maturity for comprehending the importance of the surgical procedure and its consequences for his life.

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There is no defined age limit for determining whether a child has the capacity of giving informed consent to medical procedures. It is important that the child has the mental and moral maturity to assess the scope of the procedure (Gernhuber/Coester-Waltjen, Familienrecht, 5th edition, art. 57, marginal note 79; Palandt/Heinrichs, BGB, 66th edition, ÜbbI. Vor, art. 104, marginal note 8;). Accordingly, in a court ruling, the capacity of a 9-year-old of giving consent to his circumcision has been denied (LG [District Court] Frankenthal MedR 2005, 243). Without examining of the individual case, this cannot be assumed in such a general manner for a 12-year-old. Since it involves an issue associated with a religious-cultural area, it is important to use the age-limits of the Law on the Religious Education of Children (*Gesetz über die religiöse Kindererziehung*) in order to determine the shift that takes place in the course of becoming older between the parents' right of education according to art. 6, of the German Constitution [GG] and general personal rights according to art. 1 I, of the German Constitution [GG]. According to art. 5 of the Law on the Religious Education of Children [RelKEG], after completing his/her 12th year of life, a child can no longer be educated or coerced against his will into religious beliefs that differ from his/her previous beliefs. In the absence of any further indications, it could therefore be assumed that a 12-year-old has the capacity for such a decision. However, the Claimant presented circumstances that indicate that there are special reasons for a delay of his maturity, resulting in the fact that upon completing his 12th year of life he did not have the capacity for giving informed consent to a circumcision. Accordingly, the Claimant was a very unstable child that is slow in his development. Already back then he had epileptic seizures. This illness can lead to a delay in personality development. The Claimant is currently mentally ill. It can be assumed that the root causes for this illness were already present at that time. Intellectually, the Claimant may have been aware of the significance of circumcision, because he stated that he had been had been basically informed about the tradition of circumcision prevalent among Muslims. However, based on the circumstances described, he most likely did not have the maturity for making an independent decision on the matter (voluntary element).

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Since the Claimant could not explain effectively the consent to the surgical procedure, it is not necessary to determine whether the consent to circumcision was given „by force“ upon the request of the Opponent under 2), although there is no evidence that pressure or any other force on his will had really been exerted.

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b) By encouraging the Claimant who lacked the required capacity for giving informed consent to submit to circumcision without having the parental authority, the Opponent under 2) violated illegally the biological right to self-determination of the Claimant.

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At the same time, it is not necessary to determine whether it is part of the educational right of Muslim parents, or a Muslim father, to give consent to circumcision in general or up to a certain age. Because the Opponent under 2) did not have custody. Only the mother of the Claimant was and is entitled to custody. It is possible that the mother transferred parental authority to the Opponent under 2) for the period, in which the Claimant spent his vacation with the father (see Gernhuber/Coester-Waltjen, o.a.O., art. 57, marginal note 18). However, this transfer included only measures that were required in the context of caring for the child. The decision of having his son circumcised was not included in this measure of caring for the child. It rather involved a basic decision that was unrelated to the son's spending the vacation with his father.

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By encouraging the Claimant to be circumcised and by giving the physician his consent to circumcision, the Opponent under 2) violated the Claimant's right to self-determination as part of the general personal rights protected by art. 823, par. 1, BGB. Circumcision causes a physical change that cannot be reversed. Even if it does not result in disadvantages to one's health, it can be of great significance for the cultural-religious and physical self-conception of the individual concerned. Therefore, a decision on this matter comes under the principal right of a person to shape his own life. The violation of the Claimant's right to self-determination on the part of the Opponent under 2) is not affected by the fact that the Claimant at that time was not capable of exercising his right to self-determination due to a lack of maturity but that the decision fell into the area of competence of the mother. The personal protection of a child is not only implemented by the parental right of education described in art. 6, par. 1, of the German Constitution [GG]. It is based also on the personal right of the child to an unrestricted development of his personality in the sense of art. 2, par. 1, in conjunction with art. 1, par. 1, of the German Constitution [GG]. The

personal right also involves the possibility of making personal decisions or, if this is not yet possible, having the parents make such decisions (BVerfG [Federal Constitution] NJW 2003, 3262, 3263). Therefore, based on the presumption of custody on the part of the Opponent under 2), the Claimant's personal rights have been violated because he is also a legal entity.

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2. According to the present state, it is not possible to deny the prospect of success of the Claimant's action for awarding him compensation in the amount of EUR 10,000.

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a) Basically, to receive compensation does not require that the Claimant actually suffered or will suffer physical or emotional disadvantages. In the case of a serious violation of the general personal rights, the satisfaction function alone can justify the claim for compensation (basic information BGHZ [case law of the German Federal Supreme Court] 35, 363, 367 f.). Actually, this claim does not involve compensation for damages, but it involves a right which is based on the mandate of protection described in art. 1 and 2, par. 1 of the German Constitution [GG]. The grant of monetary compensation which, together with these instructions, is based on art. 823, par. 1, BGB, is based on the idea that without such a claim violations of the general personal rights often remain without sanction, resulting in the fact that the legal protection of one's personality deteriorates. Contrary to the claim for compensation, with the claim for monetary compensation the satisfaction of the victim takes priority because of a violation of the general personal rights; it also serves the purpose of prevention (in summary BGH NJW 1996, 985, 986 f.). In the case at hand, the requirement for such satisfaction and prevention is present, because the Opponent under 2) presumed custody in an area that would have permanent significance for the life of the Claimant, despite the fact that he knew that the mother of the Claimant had a different opinion. Therefore, this is a matter of serious infringement of the general personal rights.

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b) The court handling the main proceedings can in its own discretion determine an appropriate amount of compensation because it is familiar with the overall circumstances, especially the preceding discussions with the Claimant and the motives of the persons involved. It cannot be excluded that the district court will decide to pay the compensation in the amount of EUR 10.00 requested by the Claimant. In addition to a violation of the general personal rights, it also has to be taken into consideration that the Claimant raises a claim for illegal physical harm. The circumcision performed by a local physician represents physical harm even when it has not resulted in a disadvantageous change of

physical health, in which the Opponent under 2) was indirectly involved. Since the Opponent under 2) could not give effective consent for the surgical procedure because he was not entitled to custody, the action was unlawful. However, the physician based his action on the presumption that the Opponent under 2) was entitled to custody and therefore acted without intent in the sense of falsely assuming a legal basis for the action, which the Opponent under 2) exploited by an implied pretense of the non-existing custody. This circumstance has to be taken into consideration when assessing the amount of compensation. It has to be determined also whether and to what extent the Claimant suffers long-term physical or emotional disadvantages. However, based on the current report, this cannot be affirmed with a reasonable degree of certainty. Physical pain caused by the surgical procedure itself has not been addressed. Furthermore, the Claimant does not claim that his current mental illness is in any way related to the circumcision. The Claimant sees his immaterial losses only in the fact that he suffers from being different as a result of his circumcision and that he is afraid to be ridiculed by his peers.

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It cannot be excluded that on this basis the compensation will be increased. However, this requires a more detailed explanation of the personal circumstances of the Claimant. Contrary to the mutilation of the clitoris in female circumcision, male circumcision has no significant consequences for the sexuality of a man (Article „*Beschneidung des Mannes*“ [male circumcision], in: Brockhaus Lexikon 2002). Moreover, even though disputed, circumcision is considered to have hygienic advantages (in the place cited). Therefore, the Claimant would have to explain why for him, in particular, i.e., according to his desires, preferences and attitude toward life, the circumcision represents suffering. Also with regard to the Claimant's „fear“ that his being different would cause his peers to ridicule him, it cannot simply be assumed that this fear is substantiated without having a concrete basis that such a danger actually exists in society in general.

III.

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According to art. 115 ZPO, the personal and economic situation of the Claimant justify a grant for legal aid without deferred payment.

IV.

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The decision for the restricted assignment of attorney X is based on art. 121, par. 3, ZPO (subsequently on June 01, 2007). A decision regarding the

costs has not been made, because there will not be a reimbursement of the costs (art. 127, par. 4, ZPO).