IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO.: 4D14-1744

HEATHER HIRONIMUS,

Respondent/Appellant,

v.

DENNIS NEBUS,

Petitioner/Appellee.

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**CONSOLIDATED *AMICUS CURIAE* BRIEF OF THE NON-PROFIT CHILDREN'S RIGHTS' ORGANIZATIONS:**

**Doctors Opposing Circumcision ("DOC")**
**Attorneys For The Rights Of The Child ("ARC")**
**and Intact America ("IA")**

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**MAY IT PLEASE THE COURT,** the *Amici Curiae*, with gratitude for the opportunity to advise the Court, hereby submit our brief in the above cause.

## THE POTENTIAL VALUE OF AN *AMICUS CURIAE*

The *amicus curiae* tradition extends back to Roman times. An *Amicus* advises the Court on matters with broader consequences than those posed by the litigants, concerns potentially unfamiliar to the Court, and about which the *Amicus* has recognized expertise. An *amicus curiae*

brief is a way to explore those broader concerns, so the decision of the appellate court will not hinge solely on the needs or demands of one or the other litigant. The Amicus reflects broader ethical and societal concerns. In this particular case the safety, physical and mental health, of a child, is at stake.

We do not provide a procedural history here, and defer to the parties and this honorable Court in that regard. But there is, we note, no potential risk or loss to either litigant herein, financially or bodily in this case, no matter the outcome.

It is only the fate of this child, and the man he will one day become –but that concern should be adequate.

At no time, (as we read the transcripts of the two hearings of the Court below), were the child's rights as a separate person considered. There was much (erroneous) medical speculation in the first hearing of March 6, 2014, where there should have been expert testimony. In the second hearing of May 7, 2014, the testimony, under oath, of an invited medical expert (the only expert) appeared to be discounted outright in favor of folklore.

**PREAMBLE, AND PERSONHOOD OF THE CHILD**

It is astonishing to us, –lawyers, physicians, and bioethicists– that the child's body was the subject of casual negotiation in the original separation agreement, as if he were a used car or household goods to be divied up, the father bagging his own child's foreskin as part of his bargain. (This phenomenon has a name in the psychology; it is called '*adamant father syndrome*' a condition we discuss later herein.)

Where was a *guardian ad litem* or any advocate for the child's rights at the time the separation agreement was crafted? Why would a Court allow attorneys to propose a separation agreement negotiating a promise of merely cosmetic surgery, one risking the health, safety, and security of a minor child, without medical justification and proof thereof?

More to the point, how could a Court, using its contempt powers, be persuaded to enforce a merely contractual clause in a separation agreement as if it were a provision in a commercial contract, while ignoring the human rights and 'best interests' of the very object of the clause, the child himself?

Surely the Court below had the power *sua sponte* (and dare we say it, the responsibility in *parens patriae*) to void such a contractual provision as unenforceable, against public policy, or one lacking full consideration of the independent rights and security of the child, C.R.H., on the record.

Surely the prior contractual agreement of the parties should carry no worth or weight, being based solely on cosmetic concerns of the father, and it appears, prior acquiescence of the mother, which on further exploration she has come to regret.

NO Court is obliged to honor such a clause, where the child's rights to physical integrity loom paramount. The child's fundamental rights under Florida, federal and international law to security of his person surely trump the whims and caprices of an unmarried, only partially custodial, parent.

Children are not chattel; we hold them in trust until they can function independent of us. They are WE, –ourselves, us– less a decade or two; their lifetime preferences matter, as ours did for ourselves. We guide them for only a small (albeit critical) portion of their lives. For 60 or so years they will be independent of us, and grateful they were given the chance to make their own choices. The option of leaving this boy 'as-is' is entirely available to the parties here and to the Courts.

Even the medical expert in the second hearing of May 7, 2014, made that same point when questioned by Judge Gillen:

(This is at page 111 of the transcript of the second hearing of May 7, 2014, the telephonic testimony under oath, of a pediatric urologist, Dr. Flack, the only medical expert on the record, responding to Judge Gillen.):

Doctor, if [C.R.H.] were your son at three-and-a-half years of age, having been thus far uncircumcised, would you -- would you have the procedure done on him?
**THE WITNESS:** Well, I mean, that's, you know, a difficult question. Because obviously, I chose not to do it, if that was the case. And if I chose not to do it, I surely wouldn't do it at three-and-a-half because I don't want to put him to sleep to do it. If he's not having any problems, I wouldn't want to bear that burden if, God..

THE COURT:
Okay. All right. Thanks.

… forbid, something happened. You know, I mean, unless he was battling -- I made a choice not to do it, so there's nothing to compel me to do it at three-and-a-half now, so I would continue not to do it. And then if he, at 18, chose you know, if he were to marry and wanted him circumcised, you know, get it done. You know what I mean? But honestly, I would have made a choice not to do it.

This expert physician witness was clearly struggling with the fundamental issue of consent for a non-therapeutic cosmetic, amputation, surgery, one with known risks, one the patient might later regret.

The late social philosopher and ethicist, Joel Feinberg, framed such concerns exactly the same way, if more artfully. We owe our children an **'open future,'** he claimed, one with as few of *their* choices in life foreclosed by our adult whims and caprice as possible. Feinberg's 'open future' principle is never more important than when it involves a child's physical and mental self, the body he inhabits and must confront every day of his life thereafter.

**MEDICAL ISSUES, URINARY TRACT INFECTIONS AND THE LIKE**

The transcript of the first hearing on March 6, 2014, discusses the risk of urinary tract infection for an intact (not circumcised) boy, and speculation seemed to overly impress the presiding judge.

[find the section in the t-script and quote it.]

With due respect to Judge Gillen's right to a measure of judicial notice, (and some understandable folklore we all inherited unwittingly) this benefit, if any exists at all (and there are lots of critics of the notion), accrues only to those circumcised at birth. The expert witness. Dr. Flack, made that exact point, at the 5/7/2014 hearing at T-112:14

14 And the
15 greatest benefits are obtained during the
16 newborn period because one thing for sure is
17 that kids who are -- boys who are
18 uncircumcised have a ten times greater chance
19 of getting a urinary tract infection. And
20 that's only during the newborn period, up to,
21 like, six months of age.

But in this case, that window has closed since the child is now three and one-half years old, and he is beyond this concern as the expert noted in May, 2014. As European medical society experts have observed, the only remaining advantage of circumcision after the neonatal period, if any, are some minor protections against sexually transmitted diseases, for which there are other, easier, more effective and affordable prevention methods.

**PHYSIOLOGIC 'PHIMOSIS' OR A NON-RETRACTABLE FORESKIN, IS ENTIRELY NORMAL AT THIS CHILD'S AGE OF 3.5 YEARS AND NO CAUSE FOR ALARM OR INTERVENTION OF ANY KIND.**

Sometimes younger physicians, or those who have had minimal experience in attending uncircumcised boys, mistake the normal infant attachment of the foreskin to the glans penis as a 'phimosis' (trapping) of the glans penis. They recommend surgery or circumcision to repair this condition. This child is highly likely, in common with all those his age, to have a non-retractile foreskin, or incomplete separation of the glans from the foreskin. This is a completely normal

and expected condition at his age --and no cause for concern. The pediatric urologist expert, Dr. Flack, at the second hearing of May 7, 2014 recognized this. (T-106:17, 107:7)

17 Did the parties come to you with the concern -- or
18 did one of the parties come to you with the
19 concern that [C.R.H.] was suffering from phimosis?
20 A. Yes, as far as I recall. And I thought
21 it was okay. So that there was nothing that
22 needed to be done.
23 Q. Okay. So you didn't find any phimosis.
24 Did you find any issues with his area at all?
25 A. No. It seemed okay. I didn't recommend
p.107
1 any treatment at all.
2 Q. Okay. And so at this point, the
3 circumcision, if they elected to do the
4 circumcision, it would be for elective or cosmetic
5 purposes only. It's not medically necessary, in
6 your opinion?
7 A. No, it's not medically necessary.

Well-trained and honest physicians know that a newborn male's foreskin is naturally fused to the glans by an anatomically normal membrane, the *balano-preputial-lamina*, a natural structure than can take as many as 18 years to recede, though ten years is common, and any time in between is normal.[1] The mean age for full, natural retraction is 10.4 years according the best modern sources. Damaging this membrane by premature, non-therapeutic, forcible retraction is expressly forbidden by the American Academy of Pediatrics in unequivocal terms.[2]

Claiming this protective membrane is a birth defect or a developmental failure needing surgical lysing (forced separation) or circumcision for 'phimosis,' is dishonest and unethical medical advice. Even an accurate and careful diagnosis of true pathological 'phimosis' is certainly no cause for any surgical intervention when more conservative, topical, methods are available.

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[1] Øster J. Further fate of the foreskin; Incidence of preputial adhesions, phimosis, and smegma amongst Danish schoolboys.*Arch Dis Child* 1968; 43:200-3.

[2] ...foreskin retraction should NEVER be forced. Until separation occurs, do NOT try to pull the foreskin back — especially an infant's. Forcing the foreskin to retract before it is ready may severely harm the penis and cause pain, bleeding and tears in the skin. " American Academy of Pediatrics publication, "Care of the Uncircumcised Penis."

**EVEN IF THIS CHILD EXHIBITS TRUE 'PATHOLOGIC PHIMOSIS' (A SIGN, ALAS, OF PRIOR GENITAL 'TAMPERING'), THE PROPER TREATMENT IS NOT CIRCUMCISION, SINCE ALTERNATIVE, CONSERVATIVE TREATMENTS ARE READILY AVAILABLE.**

Rare but occasional true *pathologic phimosis* is always treated conservatively in adults, with semi-potent steroids and even mere stretching exercises to widen the foreskin opening. Since there is no need for this child to see his glans before puberty, those adult treatments are not necessary nor appropriate at this time. The appropriate care is 'watchful waiting' to see if the child can urinate without discomfort, and is otherwise developing normally.

Since proper and ethical medical care dictates conservative care must be tried before surgery, such care must be tried first, and only when this boy is much older.

**CIRCUMCISION IS <u>NOT</u> A BENIGN, SIMPLE, OR RISK-FREE PROCEDURE FOR A THEE AND ONE-HALF YEAR OLD.**

Circumcision, though simple to perform, is not a benign procedure for any child patient. It is significantly more challenging for toddlers and young boys, for a variety of reasons, clinical and psychological. It requires hospitalization and the use of general anesthesia, as the pediatric urologist expert testified. (Hearing of May 7, 2014, at T107:10-14).

10 Q. And if you could just educate us a little bit
11 A boy of [C. R. H.'s] age, being
12 three-and-a-half, would he have to undergo general
13 anesthesia for the circumcision?

14 A. Yes.

A substantial and credible body of medical evidence has developed detailing circumcision's risks,[3] [4] losses,[5] and pain.[6] [7] [8] At the same time, the historical rationale and justifications have

[3] Kaplan GW. Complications of circumcision. *Urol Clin N Amer* 1983;10:543-49.

[4] Williams N, Kapila L. Complications of circumcision. *Br J Surg* 1993; 80:1231-6.

[5] Taylor JR, Lockwood AP, Taylor AJ. The prepuce: specialized mucosa of the penis and its loss to circumcision. *Br J Urol* 1996;77:291-95.

[6] Talbert LM, Kraybill EN, and Potter HM. Adrenal cortical response to circumcision in the neonate. *Obstet Gynecol* 1976;46(2):208-210.

evaporated. NO medical benefit of any worth accrues that would counterbalance the proven risks to the child.[9] [10] [11] [12] [13] [14] [15] [16] [17] [18] [19] [20] [21] [22]

This is especially true for post-natal circumcisions, about which the American Academy of Pediatrics admits the rates of morbidity (AE, or adverse events). Is unknown.

Just this month of May, 2014, the Pediatrics section of the Journal of the American Medical Association published an article on the increased risks of AE (adverse events) for post-natal circumcision seen in a study that observed over xxxx patients over nine years. We quote the JAMA study here in relevant part:

## "Boys Circumcised after First Birthday 'Have Up to 20 Times Greater Risk of Side Effects'

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[7] Gunnar MR, Fisch RO, Korsvik S, Donhowe JM. The effects of circumcision on serum cortisol and behavior. *Psychoneuroendocrinology* 1981; 6(3)269-275.

[8] Williamson PS, Williamson ML. Physiologic stress reduction by a local anesthetic during newborn circumcision. *Pediatrics* 1983; 71(1):36-40.

[9] Gairdner D. The fate of the foreskin. *Br Med J* 1949; 2:1433-7.

[10] Wright JE. Non-therapeutic circumcision. *Med J Aust* 1967;1:1083-6.

[11] Leitch IOW. Circumcision - a continuing enigma. *Aust Paediatr J* 1970;6:59-65.

[12] American Academy of Pediatrics, Committee on Fetus and Newborn. *Standards and Recommendation for Hospital Care of Newborn infants*. 5th ed. Evanston, IL: American Academy of Pediatrics, 1971:110.

[13] Preston EN. Whither the foreskin. *JAMA* 1970; 213(11):1853-8.

[14] Foetus and Newborn Committee. FN 75-01 Circumcision in the Newborn Period. *CPS News Bull Suppl* 1975; 8(2):1-2.

[15] Thompson HC, King LR, Knox E, *et al.* Report of the ad hoc task force on circumcision. *Pediatrics* 1975;56(4):610-1.

[16] Grimes DA. Routine circumcision of the newborn: a reappraisal. *Am J Obstet Gynecol* 1978; 130(2): 125-9.

[17] Fetus and Newborn Committee. Benefits and risks of circumcision: another view. *Can Med Assoc J* 1982; 126:1399.

[18] Fetus and Newborn Committee, Canadian Paediatric Society. Neonatal circumcision revisited. (CPS) *Can Med Assoc J* 1996; 154(6): 769-780.

[19] American Academy of Pediatrics Task Force on Circumcision. Circumcision Policy Statement, *Pediatrics* 1999;103(3):686-93.

[20] Council on Scientific Affairs, American Medical Association. *Neonatal circumcision.* Chicago: American Medical Association, December 1999.

[21] AAFP Commission on Clinical Policies and Research. *Position Paper on Neonatal Circumcision*. Leawood, Kansas: American Academy of Family Physicians, 2002.

[22] Beasley S, Darlow B, Craig J, et al. *Position statement on circumcision*. Sydney: Royal Australasian College of Physicians, 2002.

> "The risk of side effects following male circumcision increase by up to 20 times if the procedure is carried out after the boy turns one year old, a new study suggests.
>
> Professor Charbel El Bcheraoui, author of the research published in the Jama Network Journals, found that the risk of side effects among babies less than a year old is 0.5%. However, the risk becomes ten to 20 times higher after this age.
>
> Side-effects of circumcision include pain, bruising and swelling of the skin around the penis, formation of abnormal scar tissue and damage [to the] urethra.
>
> Circumcision is also believed by some to have negative effects on sexual health."
>
> (El Bcheraoui C, Zhang X, Cooper CS, Rose CE, Kilmarx PH, Chen RT. **Rates of Adverse Events Associated With Male Circumcision in US Medical Settings, 2001 to 2010.** *JAMA Pediatr.* Published online May 12, 2014. doi:10.1001/jamapediatrics.2013.5414.)

In addition to the increased 'AE' (adverse events) of the post-natal period, circumcision amputates more than one-half of the skin, mucosal tissue, muscle, nerve, and vascular supply that covers the penis.[23] It is a non-reversible permanent alteration of the normal bodily configuration. That tissue is intensely innervated and vascularized and forms a plexus of highly erogenous tissue called the *ridged band*.[24] The foreskin also has a wide variety of protective (to protect the glans penis and urethra), immunological (to protect against infection from pathogens), and sexual functions.[25] [26]

Circumcision, therefore, is not benign, or to be countenanced lightly; it imposes a considerable lifelong burden. In addition, there are a wide variety of complications and risks associated with circumcision up to and including loss of the penis, and death from infection or hemorrhage.[27] [28]

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[23] Taylor JR, Lockwood AP, Taylor AJ. The prepuce: specialized mucosa of the penis and its loss to circumcision. *Br J Urol* 1996;77:291-5.
[24] Ibid.
[25] Fleiss P, Hodges F, Van Howe RS. Immunological functions of the human prepuce. *Sex Trans Inf* 1998;74(5):364-7.
[26] Cold CJ, Taylor JR. The prepuce. *BJU Int* 1999;83 Suppl. 1:34-44.
[27] Williams N, Kapila L. Complications of circumcision. *Br J Surg* 1993; 80:1231-36.
[28] Newell TEC. *Judgement of inquiry into the death of McWillis, Ryleigh Roman Brya*n. Burnaby, B.C.: British Columbia Coroner's Service, Monday, 19 January 2004.

Circumcision, therefore, permanently diminishes the penis and puts a child at risk without a commensurate benefit *to the child*. When circumcision is proposed to 'repair' the normal anatomy of youth, or provide 'hygiene,' that suggestion is entirely unethical and indefensible since the child's genitalia are entirely self-cleaning and self-defending until near puberty.

When circumcision is proposed merely for reasons of cosmetics, parental preference, or mere conformity, this is even *more* unethical and indefensible, as it involves the lifetime rights of a separate human being who might wish to remain intact –but is in no position to advocate for himself.

## CIRCUMCISION CANNOT BE MADE PAINLESS OR RISK-FREE

An infant analogue of Post Traumatic Stress Disorder (PTSD) has been detected as late as six months post-op in neonates who were circumcised.[29] [30] Although no meta-studies have been completed, it is safe to say that such PTSD would be more pronounced in a toddler, whose sense of his own existence and vulnerability is more finely tuned than that of an infant. That will be true even when the child has no later verbalized memory of the event. A recent and thoughtful book on the subject of circumcision trauma makes exactly this point. [31]

In any case, all anesthesia –general or local– is metabolized and wears off in hours. The child is then left with days of pain that cannot be easily, safely, or effectively assessed or addressed. The recovery period that Dr. Flack indicated at the May 29, 2014, hearing is around 14 days. (T-108:4).

Thus we believe the most prudent course with a non-therapeutic genital or indeed, any childhood surgery which is not urgent and does not address a specific diagnosed condition, is to defer it until the child can be consulted, counseled, reassured, and give an appropriate consent.

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[29] Taddio A, Goldbach M, Ipp E, et al. Effect of neonatal circumcision on pain responses during vaccination in boys. *Lancet* 1995;345:291-2.
[30] Taddio A, Katz J, Ilersich AL, Koren G. Effect of neonatal circumcision on pain response during subsequent routine vaccination. *Lancet* 1997;349(9052):599-603.
[31] Goldman, Ronald, PhD, "*Circumcision: The Hidden Trauma*," Vanguard Publications, Boston, p.139.

Optimally, as the expert witness Dr. Flack indicated, that should be when the child can legally do so with proper fully informed consent, at age 18 or older. Any earlier, and without demonstrated need, the clinician should suspect that the child has been unduly and inappropriately influenced or coerced by a parent with a suspicious agenda of his or her own.

**CIRCUMCISION PREVENTS NO CONDITION THAT MIGHT NOT BE PREVENTED BY SIMPLE HYGIENE**

We also believe that physicians have a responsibility to dispel the myth that circumcision prevents urinary tract infections (UTI) or any other diseases. If anything, circumcised males have higher levels of urethritis,[32] a common UTI infection. Girls have more urinary infections than boys[33] and we do not amputate their genital tissue to prevent infection. And the male is also more likely to contract breast cancer than penile cancer[34], another common myth.

In any case, this child is beyond the first year of life, a time when UTI's are thought to be a worry. Thus the benefit to him has, of course, passed.

The standard of care to prevent genital infections, male or female, is: 1.) better hygiene, and, among adults, 2.) better sexual hygiene, and for both children and adults: 3.) antibiotics when hygiene might fail.

Amputation is an ultimate solution reserved only for a diagnosed condition to address disease-damaged tissue that does not respond to simple hygiene or aggressive antibiotics.

## PSYCHOLOGICAL ISSUES

**CIRCUMCISION OF A YOUNG BOY POSES A PSYCHOLOGICAL RISK, UNIQUE TO BOYS OF THIS AGE, WHICH WOULD BE ESPECIALLY TRUE FOR A CHILD**

[32] Smith GL, Greenup R, Takafuji ET. Circumcision as a risk factor for urethritis in racial groups. *Am J Public Health* 1987; 77:452-454.
[33] Marild S, Jodal U. Incidence rate of first-time symptomatic urinary tract infection in children under 6 years of age. *Acta Paediatr* 1998;87(5):549-52.
[34] American Cancer Society statistics.

**WITH A HISTORY OF PRIOR PSYCHOLOGICAL STRESS FROM FAMILY DISRUPTION.**

Modern urologists recognize that genital surgeries are especially traumatic for toddlers and young boys.[35] As early as 1945, physicians took note of the psychological harms possible.[36] Even today the American Academy of Pediatrics still cites this 1945 study:

> **"In 1945, Levy published the first study to address specifically the question of the psychological effects of surgery on children. He noted that the highest incidence of postoperative emotional disturbance was seen in children between the ages of 1 and 3 years. Characteristic types of problems were prolonged night terrors (children between 1 and 2 years), negativism (children older than 4 years), and various fears (including phobias, hysterical reactions, and anxiety reactions) in all age groups. Levy reasoned that surgery represented a greater emotional hazard to the 1- to 3-year-olds because of their poorer comprehension, increased dependency on their mothers, decreased social contacts outside the home, and decreased facility to handle anxiety."**[37]

Researchers note that even with children as old as 4 years, a child may still be unable to rationalize why is he getting surgery and enduring pain he does not need. This is even more exaggerated of course, when the child is younger and has even less capacity to comprehend:

> **"A child who has attained the capacity for operational thought (7 years of age or older) will be able to understand causality in a more adult-like fashion but <u>still may unconsciously associate surgery with punishment.</u>"**[38]

Historically, practitioners subscribed to the notion that toddlers are within the 'phallic period,' a time when a child can become fixated on his genitalia and will develop castration anxiety about a surgical procedure even if the surgery is necessary.

(Indeed, the father testified in this case that the child is drawn to his penis. (Hearing of May 7, 2014, at T34:8-24.) Unfortunately the father does not know that this behavior is common and expected of all male toddlers. Why does a toddler fiddle with his penis? Because it is there and it

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[35] Section on Urology. Timing of Elective Surgery Genitalia of Males. *Pediatrics* 1996;97(4):590-4.
[36] Levy D. Psychic trauma of operations in children. *Am J Dis Child* 1945;69:7-25
[37] Section on Urology. Timing of Elective Surgery Genitalia of Males. *Pediatrics* 1996;97(4):590-4.
[38] Section on Urology. Timing of Elective Surgery Genitalia of Males. *Pediatrics* 1996;97(4):590-4.

feels good. If anything such toddler exploration is thought to help the *balano-preputial lamina*, the membrane that binds the glans and foreskin, to dissipate. Such 'fiddling' is no indication of pathology –but does suggest the child is well aware of his organ and its various features.)

There remains a significant concern the male child will be anxious about any proposed surgery to his genitals and may suffer long-term sequelae. A recent study found that significant castration anxiety is associated with the circumcision of boys in the phallic period.[39] The child may suffer from both worry before the operation, and the pain during and after, not to mention the complete, unexplained loss of an anatomical structure to which he has grown accustomed.

Cansever tested boys before and after circumcision and found that the trauma causes severe disturbance of normal function. Cansever reported:

> **The results obtained for the different psychological tests indicate that circumcision is perceived by the child as an aggressive attack on his body, which damaged, mutilated and in some cases totally destroyed him. The feeling of 'I am now castrated' seems to prevail in the psychic world of the child. As a result, he feels inadequate, helpless, and functions less efficiently.**
>
> **Following circumcision, the ego weakens under the impact of the experience, is unable to cope efficiently and adaptively to the trauma and the instinctual drives, as well as the anxieties initiated. The psychoanalytic hypothesis that circumcision will be perceived as castration, and specifically Anna Freud's hypothesis that operations in childhood render a feeling of reality to those anxieties are confirmed through this study.**
>
> **The main reaction to the operation is an increase in aggressive drives. Not only does the child feel attacked, but also, as a reaction strives to attack those who have mutilated him. The quality of the aggressive feelings is as archaic as the perception of the operation.**
>
> **In order to protect himself from the threats of the outside world and of the instinctual drives loosened by the operation the child's ego seems to find safety in withdrawal. As a defensive measure, the ego insulates itself from all stimuli and this is protected from external and internal dangers.[40]**

Thus even with appropriate counseling, effective anesthesia, and kindly pre-op preparation, the risk of psychological damage is ever present. The surgeon has no way to determine whether any

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[39] Yilmaz E. Batislam E, Basar MM, Basar H. Psychological trauma of circumcision in the phallic period could be avoided by using topical steroids. *Int J Urol* 2003;10(12):651-6.

[40] Cansever G. Psychological effects of circumcision. *Brit J Med Psychol* 1965;38:321-31.

particular boy, by reason of temperament, is at increased risk. Thus the wise and humane physician avoids any surgery to the genitals of a child that is not medically required and could be easily postponed.

## ETHICAL ISSUES IN MEDICINE AND LAW

## I.

## LINKING CUSTODY AND PROPERTY ISSUES WITH MEDICALLY UNNECESSARY SURGERY ENTANGLES THE CHILD CHASE'S INDEPENDENT RIGHT TO BODILY HEALTH AND SAFETY WITH THE SEPARATE ISSUE OF WHO IS HIS BETTER CUSTODIAN.

We understand that the Federal Parental Kidnapping Prevention Act, 28 USCA 1738, vests jurisdiction in the Courts of Florida.[41] But unfortunately the original decision of the trial court judge, which gives over-broad discretion to a parent, unnecessarily obscures the more fundamental rights of the child to an intact body free of unnecessary surgical risk.

It is important to note that even elective (i.e., non-emergency) surgery to a minor child must, under modern bioethics, be:

**1) wholly therapeutic;**

**2) medically necessary;**

**3) beneficial to the *child-patient* in proportion to its risks, pain, and loss; and,**

**4), intended solely for the physical benefit of the *child-patient* and for no other person or reason.**

[41] *Henry v Keppel,* 326 OR 166, 951 P.2d 135 (1997)

Parental authority to request or impose unnecessary elective surgery on children, (and the physician's duty to the child *qua* patient) cannot proceed without the strictest bioethical qualification and scrutiny.

Thus the Court below failed to address the child's independent rights to the security of his own body, and granted to the custodial father rights that an extended history of human rights law has long since carefully abridged in favor of the child. Perhaps that was due to a misconception of the trial Court that male circumcision is a simple, painless medical procedure, of proven worth, like an immunization.

The licensed physicians among us know more clearly than anyone that such an assumption is not true in the slightest, especially not for a toddler. Worldwide, most advanced cultures reject circumcision, of either gender, as risky, disfiguring, and medically unnecessary. England (1950) and New Zealand (mid-1960's) fully discarded male circumcision as a medically unnecessary, Anglophone, puritanical, pre-germ-theory invention. 'Medicalized' circumcision was never adopted by non-English-speaking peoples. It is in steep decline in Canada and Australia, and steady decline in the U.S.A. NO modern medical society in the world recommends male circumcision as necessary medical care, and many reject it outright as unethical. Claims for any benefit are hotly contested in the medical literature, and it survives mostly –and only– in the USA, where, with follow-up surgeries to repair botches and infection, (fully 20% of the working week of the typical pediatric urologist), it is a two-billion dollar industry.

## II.

## C.R.H. IS A PERSON, IN HIS OWN RIGHT, SEPARATE AND DISTINCT FROM HIS PARENTS, AND ENTITLED TO PROTECTION UNDER NATURAL, FLORIDA STATE, FEDERAL, AND INTERNATIONAL LAW.

C.R.H. is a minor who is legally incompetent. Nevertheless, he is a person with rights of his own. As a minor he deserves special protection under Florida,[42] and international law.[43] C.R.H. has an unalienable right to protection and security of his person,[44] and the Courts of the State of Florida have a corresponding obligation to protect his rights independent from, and even despite the wishes of a parent who might endanger the child unnecessarily.[45]

C.R.H's status as a minor does not deprive him of the general rights enjoyed by all. Among these is the right to bodily integrity derived from the common law of England.[46] According to Blackstone: "**The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."**[47]

The right to bodily integrity was affirmed by the U.S. Supreme Court in 1891,[48] and reaffirmed in 1992.[49] The right to bodily integrity is known as the right to 'security of the person' in international law and is guaranteed by Article 3 of the *Universal Declaration of Human Rights* (1948),[50] and Article 9 of the *International Convention*

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[42] SECTION 21. **Access to courts.**—The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

[43] UN *Universal Declaration of Human Rights,* art. 25 (1948). Available at: http://www.unhchr.ch/udhr/lang/eng.htm Accessed February 11, 2007; UN *Declaration of the Rights of the Child* (1959), principles 8-10 Available at: http://www.unhchr.ch/html/menu3/b/25.htm Accessed February 11, 2007; UN *Covenant on Civil and Political Rights* (1968), art 24, §1 Available at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm Accessed February 11, 2007; UN *Convention on the Rights of the Child* 1989, preamble. Available at: http://www.unhchr.ch/html/menu3/b/k2crc.htm Accessed February 11, 2007.

[44] *International Covenant on Civil and Political Rights* (1966) (hereinafter "ICCPR"), arts. 9 & 24.

[45] *Reno v. ACLU*, 521 U.S. 844 (1997); *Ginsberg v. New York*, 390 U.S. 629 (1968).

[46] Blackstone's *Commentaries on the Laws of England*, Book one, Chap. 1, Page 125 (1765-9).

[47] Sir William Blackstone. *Commentary on the Laws of England.* (1765-9).

[48] *Union Pacific Railway Company v. Botsford*, 141 U.S. 250 (1891).

[49] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). URL: http://laws.findlaw.com/us/505/833.html Accessed February 20, 2007.

[50] *Universal Declaration of Human Rights* (UDHR), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). URL: http://www.unhchr.ch/udhr/lang/eng.htm

*on Civil and Political Rights* (ICCPR).[51] As a resident of Florida, C.R.H. has a right or immunity against having his person disturbed or molested.[52]

C.R.H. also enjoys a right of privacy.[53] [54] The constitutional right of privacy is the right to be left alone; it inures to the individual and not to the family.[55] Thus C.R.H. enjoys a right even against unnecessary intrusions by his own family.

While his parents have certain rights over him, the rights of the parents, of ancient origin, derive from their obligations to the child, and are intended for the child's benefit and safety, and not to family whims and caprice. According to Blackstone, parental duties toward children:

> …principally consist in three particulars ; their maintenance, their protection, and their education.[56]

In a landmark British case, (no less compelling for its being British rather than American), Lord Scarman observed:

> The principle of the law … is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.[57]

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[51] General Assembly resolution 2200A (XXI) of 16 December 1966.

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[53] Ross Povenmire. *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue From Their Infant Children?: The Practice of Circumcision in the United States*. 7 Am Univ J Gend Soc Policy Law 87 (1998-1999). Available at: http://www.cirp.org/library/legal/povenmire/ Accessed February 10, 2007.

[54] ICCPR, art. 17.

[55] *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Available at; http://laws.findlaw.com/us/405/438.html Accessed February 10, 2007.

[56] Sir William Blackstone's *Commentary on the Laws of England*, Book 1, Chapter 16, p.434. (1765-1769). Available at: http://www.yale.edu/lawweb/avalon/blackstone/bk1ch16.htm

[57] Per Lord Scarman. *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 at 420, citing Blackstone's *Commentary*. Available at: http://www.swarb.co.uk/c/hl/1985gillick.shtml Accessed February 10, 2007.

(Or phrased another way, the parents' derivative rights vis-à-vis the child are forfeit the instant the child's best interests are no longer observed or parental protection of the child has been effectively abandoned.)[58]

C.R.H. should also enjoy the right to protection of his genital organs from non-therapeutic surgical alteration. Povenmire writes:

> "For female infants, the right to the integrity of the genital organs is protected against surgical "mutilation" by federal law and United Nations resolutions. Under the law, the right of bodily integrity is deemed so fundamental that it displaces any consideration of the parents' cultural or religious beliefs. Unfortunately, no similar recognition has been extended to male infants in the United States. The failure of the law to provide equal protection to males can find no "exceedingly persuasive" justification, and is unconstitutional."[59]

Parties who seek to defend gender-based distinctions must demonstrate an "exceedingly persuasive justification" for that action.[60] Courts must provide "heightened scrutiny" of gender-based discrimination.[61] C.R.H. is not disqualified from equal protection because of his male gender.[62] C.R.H. is a natural-born citizen of the United States and enjoys the privileges and immunities of citizens of the

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[58] Philosopher Joel Feinberg notes that children have an ethical right to an 'open future,' one whose options have not been foreclosed by parental choices that were unnecessary or harmful. *The Right to an Open Future*, (in *Whose Child? Children's Rights. Parental Authority and State Power*, Rowman and Littlefield, Totowa, New Jersey, 1980)

[59] Ross Povenmire. *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue From Their Infant Children?: The Practice of Circumcision in the United States*. 7 Am Univ J Gend Soc Policy Law 87 (1998-1999). Available at: **http://www.cirp.org/library/legal/povenmire/** Accessed February 10, 2007.

[60] *United States v. Virginia*, 518 U.S. 515 (1996). Available at: http://laws.findlaw.com/us/518/515.html Accessed February 14, 2007.

[61] *Reed v. Reed*, 404 U.S. 71 (1971). Available at: http://laws.findlaw.com/us/404/71.htm Accessed February 15, 2007.

[62] *Mississippi University for Women v Hogan*, 452 U.S. 718 (1982). Available at: http://laws.findlaw.com/us/458/718.html Accessed February 15, 2007.

United States, including the right to the equal protection of the law.[63] U.S. Federal law and Florida state law already protect the genital integrity of females.[64]

C.R.H. also has a right to equal protection under international instruments which also prohibit discrimination on the basis of gender.[65] C.R.H., therefore, has an equal right[66] to have his genital integrity protected by law.

Even the *slightest* non-therapeutic incision on the genitalia of a female, no matter how benign or symbolic or motivated by religious impulse, is now a federal and Florida state felony. Meanwhile, *all* non-therapeutic modifications upon the genitalia of a male child are tolerated, no matter how unnecessary, extensive, or mutilating. This legal disparity is manifestly a failure of equal protection, if not a failure of fundamental human rights.

Indeed, a movement has arisen among medical ethicists to expand the U.S. federal anti-FGC law to make it gender-neutral, thereby protecting all children, including boys, from non-therapeutic, genital modification practices.[67] Overseas, Finland and South Africa have already taken steps to do so.[68]

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[63] U.S. Const. amend. 14, §1; ICCPR, §26.

[64] (2) "A person who knowingly commits, or attempts to commit, female genital mutilation upon a female person younger than 18 years of age commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084."

[65]UN Universal Declaration of Human Rights 1948, art. 2; UN Declaration of the Rights of the Child (1959), Principle 1; UN Covenant on Civil and Political Rights (1966) art. 3; UN Convention on the Rights of the Child (1989), art. 2. (Hereinafter "UNCRC")

[66] OR Const. art. 1, §20 provides: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

[67] See website of MGM Bill.org at http://www.mgmbill.org/

[68] A Finnish court has determined that the circumcision of male infants is unlawful under the human rights provisions of the Finnish Constitution (2002). The Parliament of South Africa made the medically unnecessary circumcision of boys unlawful under the Children's Act 2005.

C.R.H. has various rights under the *UN Convention on the Rights of the Child* 1989 (UNCRC),[69] which is generally accepted international law, despite the lack of ratification by the United States,[70] including the right to freedom from "traditional practices prejudicial to the health of children,"[71] and the right to "freedom from torture or other cruel, inhuman or degrading treatment or punishment."[72]

C.R.H. has a right to express his views in matters affecting him.[73] C.R.H. is entitled to have his views considered in judicial proceedings regarding him.[74] C.R.H. has a right to recognition as a person before the law.[75] And C.R.H. has a right to have his best interests and welfare promoted in the proceedings of this honorable Court.[76]

Moreover, as physicians we know a major and ongoing tenet of pediatric bioethics is steadfast observance of the rights of the vulnerable pediatric patient to bodily integrity when parents request a medically unnecessary or contraindicated procedure.[77]

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[69]International law is not often cited in U.S. Courts. The United States has signed but Congress has taken no action either to ratify or reject the UNCCR The UNCCR is now generally accepted U.S. law as it has been adopted by all nations save two, one being Somalia, which is in anarchy and has no functioning government; and the other being the United States. The United States, however, has pledged itself to support "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" *Charter of the United Nations* (1945), art. 55. The United States, however, ratified the *International Covenant on Civil and Political Rights* (1966) in 1992. It is the "law of the land."

[70] J. Steven Svoboda. *Routine Infant Circumcision: Examining the Human Rights and Constitutional Issues*. In: George C. Denniston, Marilyn Fayre Milos, editors. *Sexual Mutilations: A Human Tragedy*. New York: Plenum Press, 1997: pp. 205-215.

[71]UNCRC, art. 24,§3

[72]UNCRC, art. 37, §1

[73]UNCRC, art. 12, §1

[74]UNCRC, art. 12, §2

[75] ICCPR, art. 16.

[76] ORS 109.175, UNCRC, Article 3, §1.

[77] American Academy of Pediatrics Committee on Bioethics. *Informed consent, parental permission, and assent in pediatric practice.* 95 Pediatrics 314 (1995); S. K. Hellsten. *Rationalising circumcision: from tradition to fashion, from public health to individual*

As we review this case, none of C.R.H.'s numerous human rights to bodily integrity —natural, bioethical, state, federal, or international— have yet been given adequate consideration, on the merits, accompanied by live medical testimony, in the Courts of Florida. [78]

**THE COURT SHOULD BE ESPECIALLY ALERT TO THE PRESENCE OF 'SPITE' MOTIVATION**

Unfortunately, physicians are often asked to perform a toddler circumcision as a way for one parent or guardian or family member to spite another. This occurs with some regularity in post-natal (beyond infancy) circumcision requests from estranged parents or guardians. Often this spite is masked as a disingenuous concern for health of the child, imaginary concern for the child's ability to relate to his peers or siblings, or bogus hygiene worries. Wise physicians require the signature of ***both*** guardians for any medical care where the parents disagree, as this insures that the child is not merely a pawn, and avoids later legal entanglements for the clinician.

Indeed, the expert witness in this case, Dr Flack, admitted the consent of BOTH parents was his preferred practice.

Both clinicians and courts should be alert to this concern, one that potentially ignores the true medical needs of the child, an independent person with independent rights and potentially, wishes at adulthood, that may be divergent from his or her guardians.

In this instance, the natural mother's instinct to protect this boy from an unnecessary and irrevocable surgery should be given careful consideration by this Honorable Court, as she has the better part of the argument.

**THE PHYSICIAN'S DUTY IS TO FOCUS SOLELY ON THE RIGHTS OF THE CHILD-PATIENT**

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*freedom—critical notes on cultural persistence of the practice of genital mutilation.* 2004 J Med Ethics 248 (2004); Marie Fox & Michael Thomson. *Short changed? The law and ethics of male circumcision.* 13 Int J Children's Rights 161 (2005).

[78] Some Shiite Muslim sects slash their children's foreheads on the anniversary ("*Ashura*") of the beheading, by rival Sunnis, of Imam Hussein, a Shiite martyr of the year 680. Theirs is a deeply held religious belief that their children must participate, annually, in the suffering of the martyred Hussein, by three cuts which cause blood to cascade down the child's face. Would Oregon law permit this practice as a protected exercise of religious belief, even if it was performed in a physician's office instead of at the child's home or at a mosque?

> We submit the physician has a non-transferable duty to the actual patient,[79] [80] [81] [82] [83] the child,[84] [85] and that no physician should rely solely on the request of the guardians, but must be guided by the medical needs of the patient.[86] [87] [88] If asked, we would testify that the patient's actual physical needs of the moment ought to be the primary, non-delegable, focus of the physician. What one guardian might wish (in the way of interventions) is medically irrelevant if it does not diagnose, treat, cure, or improve the health of the child-patient.

The Bioethics Committee of the American Academy of Pediatrics has said it best:

> **…[P]roviders have legal and ethical duties to their child patients to render competent medical care based on what the patient needs, not what someone else expresses. …The pediatrician's responsibilities to his or her patient exist independent of parental desires or proxy consent.[89]**

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[79] *Declaration of Geneva* (1948). Adopted by the General Assembly of World Medical Association at Geneva Switzerland, September 1948.
[80] World Medical Association. International code of medical ethics. *World Medical Association Bulletin* 1949;1(3): 109, 111.
[81] Australian Medical Association. *Code of Ethics*. Canberra: Australian Medical Association, 1996.
[82] Canadian Medical Association. Code of Ethics. *Can Med Assoc J* 1996;155:1176A-1176B.
[83] Council on Ethical and Judicial Affairs. *Principles of Medical Ethics*. Chicago: American Medical Association, 2001.
[84] American Academy of Pediatrics Committee on Bioethics. Informed consent, parental permission, and assent in pediatric practice. *Pediatrics* 1995;95(2):314-7.
[85] Committee on Medical Ethics. *The law & ethics of male circumcision - guidance for doctors*. London: British Medical Association. URL: http://www.bma.org.uk/ap.nsf/Content/malecircumcision2003
[86] Bioethics Committee. *Reference B86-01: Treatment Decisions for Infants and Children.* Ottawa: Canadian Paediatric Society, March 2000.
[87] American Academy of Pediatrics Committee on Bioethics. Informed consent, parental permission, and assent in pediatric practice. *Pediatrics* 1995;95(2):314-7.
[88] Wilks M. Parental wishes are not the determining factor. *BMA News Review*, London, 12 September 1998.
[89] American Academy of Pediatrics Committee on Bioethics. Informed consent, parental permission, and assent in pediatric practice. *Pediatrics* 1995;95(2):314-7.

Non-therapeutic circumcision, performed *mostly or merely* at a guardian's request,[90] is not part of the present standard of care for boys.[91] [92] Standard of care arguments cannot be used to support the non-therapeutic circumcision of older children in the absence of medical need.

**WE RESPECTFULLY BUT STRONGLY URGE THE COURT** to consider circumcision as an irrevocable, unnecessary, and permanent diminution of the body of this young boy, a diminution which provides NO therapeutic benefit worth the surgical risk, one with demonstrated, proven, psychological risks, and one which could easily wait for this child's own consent at majority.

As such, the ethical way is clear—the most conservative and prudent course is to perform this procedure only when it is medically necessary and urgent, or at a time when the child is at an age when he can freely consent.

If the child's integrity as a person is to be respected, ill-informed parental or guardian whims and dubious motives should be ignored in favor of ethical medicine and the protection of the human and civil rights of this vulnerable child.

It may be that the father is circumcised and the notion that his younger son must 'look like him' is a parallel or contributing motive. We at D.O.C. are familiar with the phenomenon —it is called 'adamant-father syndrome.'[93] Making sense of what

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[90] American Academy of Pediatrics, American College of Obstetricians and Gynecologists. *Guidelines for Perinatal Care*, Fifth Edition, November 2002: p.111.

[91] Fetus and Newborn Committee, Canadian Paediatric Society. Neonatal circumcision revisited. *Can Med Assoc J* 1996; 154(6):769-80.

[92] Beasley S, Darlow B, Craig J, *et al*. *Position statement on circumcision*. Sydney: Royal Australasian College of Physicians, 2002.

[93] Gregory J. Boyle, Ronald Goldman, J. Steven Svoboda & Ephrem Fernandez. *Male circumcision: pain, trauma and psychosexual sequelae*. 7 J Health Psychology 329-343 (2002). Available at: http://www.cirp.org/library/statements/cps2/ Accessed February 10, 2007.

happened to one as a child can take the form of insisting one's son undergo the same sacrifice. This is, alas, the same logic used by East African mothers to justify the circumcision of their daughters. It makes perfect psychological sense, even if it reflects dubious bioethics, and in the instance of an older child –in the absence of medical necessity– heartlessness bordering on cruelty.

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~~**CIRCUMCISION IS NOT AN ETHICAL SUBSTITUTE FOR SIMPLE HYGIENE.**~~

~~First of all, hygiene is no reason for a painful and permanent surgery, one that would ethically require counseling of the child, hospitalization, and general anesthesia, --all in the absence of a diagnosed medical problem. Male genital hygiene is simple even for a three and one-half-year-old boy.~~