Superior Court [Obergericht] of the Canton of Zürich
Civil Division II

Reference No.: PQ190030-O/U

Heard before: Superior Court Judge lic. iur. P. Diggelmann, Presiding Judge, Superior Court Judge lic. iur. A. Katzenstein and Superior Court Judge lic. iur. E. Lichti Aschwanden with Court Reporter. iur. K. Houweling-Wili

Decision and Judgment of June 4, 2019

in the matter of

A.____,
Appellant,
represented by the attorney lic. iur. X.___,

versus

B.____,
Appellee

and

C.____,
Additional Party to the Proceedings
represented by the attorney lic. iur. Y.___,
regarding a ruling in accordance with Art. 307 (3)

Appeal of a judgment of Division I of the District Council [Bezirksrat, BR] of Zürich dated March 28, 2019; V0.2018.59 (Children and Adult Protection

Authority of the City of Zürich [Kindes- und Erwachsenenschutzbehörde Stadt Zürich, KESB])

Considerations:

I.

1. C.____, born on mm/dd/2009, (Appellee 2), is the son of A.____ (Appellant) and B ____ (Appellee 1), who are divorced. C.____ is under the sole parental control of the mother. By order of the Marriage Protection Court [Eheschutzgericht] dated October 12, 2013, the parties' children were placed in the care of the mother, and guardianship within the meaning of Art. 308 (1) and (2) of the Swiss Civil Code [ZGB] was established for the parties' children (KESB Doc. 13). By order of the Children and Adult Protection Authority of the City of Zürich dated July 11, 2014, the mother's right to determine the child's place of residence was revoked and C.____ was placed in the D.____ Children's Home as a provisional measure, based on Art. 310 ZGB (KESB Doc. 33). This measure was confirmed by the KESB's decision of October 3, 2014 (KESB Doc. 60). The KESB rejected a request for return placement in its decision dated November 28, 2017 (KESB Doc. 176).

2. On April 12, 2017, the Appellant notified the guardian that she planned to have C.____ circumcised during the 2017 summer vacation (KESB Doc.135). After obtaining an assessment from the care team at D.____, the E.____ Social Center petitioned to have the Appellant's parental control restricted under Art. 308 (3) ZGB, so that the mother would not be entitled to have her son circumcised (loc. cit.). The Appellant received a hearing on June 2, 2017 (KESB Doc. 140), where it was agreed, at the request of the Appellant, that Dr. G.____ should also be questioned, in addition to the attending pediatrician, Dr. F.____, since Dr. G.____ has known C.____ for a very long time, because he gives the child a heart check-up every year. Thereafter, a

list of questions was prepared for the physicians and revised with the Appellant's legal representative (KESB Docs. 143 et seqq.; KESB Docs. 149 and 150). On July 6, the care team at D.____ provided its advisory opinion (KESB Doc. 152). After receipt of the advisory opinions of the guardian and the Appellant on the matter (KESB Docs. 158 and 159), the KESB appointed a guardian-ad-litem for the child by order dated September 5, 2017 (KESB Doc. 165). By decision dated October 5, 2017, the guardian was replaced (KESB Doc. 170). On January 18, 2018, the child's representative issued a statement regarding the matter of circumcision (KESB Doc. 182), to which, in turn, the Appellant's legal representative issued a response (KESB Doc. 194). On May 18, 2018, the child's father commented (KESB Doc. 195). By Decision No. 3817, dated July 12, 2018, the KESB prohibited the mother from having her son C.____ circumcised, based on Art. 307 (3) ZGB (KESB Doc. 199 = BR Doc. 1/2).

3. The Appellant appealed this decision (BR Doc. 1).
In its submission, the KESB petitioned for dismissal of the appeal, to the extent this could be advocated, and referred to its decision as justification (BR Doc. 4). The child's representative also petitioned for dismissal of the appeal in its entirety (BR Doc. 6). Appellee 1 made no statement. On November 5, 2018, the Appellant replied to the child's representative's response to the appeal (BR Doc. 8). This submission was served on the Appellees (BR Doc. 9). The child's representative responded on January 11, 2019 (BR Doc. 10). By order of the District Council, the submission was served on the Appellant and Appellee 1 (BR Doc. 12). The final decision was issued on March 28, 2019 (BR Doc. 13 = Doc. 6) and served on the Appellant on April 1, 2019 (BR Doc. 15).

4. The Appellant filed an appeal on April 16, 2019, in which she made the following petitions (Doc. 2, p. 2):

"1. For the judgment of the District Council of Zürich of March 28, 2019 (VO.2019.59/3.02.02) to be set aside with an award of costs and attorney fees to be paid by the state treasury;

2. Alternatively, for the matter to be remanded for further clarification (medical specialist's opinion) and a new decision; and

3. For the Appellant to be provided with free legal assistance, and for free legal counsel to be appointed in the person of the undersigned."

The records of the District Council (Docs. 7/1 - 16) and the KESB (Doc. 8/1 - 203) were provided to the Court (Doc. 4). They were received on April 24, 2019. Additional statements [Weiterungen] within the meaning of §§ 66 and 68 of the Introductory Law to the Children and Adult Protection Act [Einführungsgesetz zum Kindes- und Erwachsenenschutzrecht [EG KESR])] are waived. The proceeding is ripe for decision.

II.

1. Proceedings in child and adult protection matters are governed by the provisions of the Swiss Civil Code [ZGB] and supplementary cantonal provisions (EG KESR and the Court Organization Act [Gerichtsorganisationsgesetz [GOG]]). In other respects, the provisions of the Swiss Code of Civil Procedure [Schweizerische Zivilprozessordnung (ZPO)] apply by analogy (Arts. 450 et seq. ZGB and § 40 EG KESR). After receipt of the appeal, the appeals court reviews *sua sponte* whether the prerequisites for appeal have been met. The Superior Court, with which the case has been filed, as the second judicial appellate body, generally has jurisdiction over appeals of decisions of the District Council (Art. 450 (1) ZGB in conjunction with § 64 EG KESR). The Appellant is affected by the order and has standing to file an appeal. The appeal was filed in writing, with demands for relief and substantiation, within the required period (Art. 450 (3) and Art. 445 (3) ZGB). Nothing stands in the way of its consideration.

2. An appeal can complain of a 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) (Art. 450a (1) ZGB). The appellate body has

comprehensive powers of review, of both legal and factual findings, including full discretionary review (Steck, FamKomm Erwachsenenschutz, Art. 450a ZGB, Nos. 3 and 10). In proceedings before the KESB and the judicial appeals courts, the facts are to be investigated *sua sponte* and the court is not bound by the parties' petitions (Art. 446 ZGB). The appellant must explain and demonstrate the extent to which the contested decision should be considered erroneous. It must deal with the facts on which the rationale for the contested decision is based and show the extent to which the lower adjudicatory body [Vorinstanz] erroneously applied the law or made incorrect findings of fact. This also applies to the area of the investigative system (Art. 446 ZGB, EG KESR §§ 65 and 67; BGE 141 III 576 E. 2.3.3 with reference to BGE 138 III 374 E. 4.3.1 and others). New evidence, which would have to be investigated *sua sponte* as part of the duty to investigate the facts, can be taken into account regardless of Art. 317 ZPO (cf. OGer ZH LY160019 dated July 21, 2016 E. 2.2.1.2 with additional references).

3. In the contested decision, the District Council concluded that the circumcision of C._____ is not medically indicated, contrary to the opinion of the Appellant but in agreement with the physicians and caretakers questioned. It is true that the Appellant, who exercises sole parental control, can make determinations regarding the religious upbringing of the child within the limits of the welfare of the child. Since there is sufficient evidence that C.____'s welfare would be jeopardized by circumcision and follow-up treatment at the present time, circumcision must be prohibited. Postponing circumcision would have no negative effect on the exercise of the child's religion and his religious upbringing, and no specific risk from postponement is evident on cultural grounds, especially since no specific evidence has been put forth that C.____ would be bullied by Muslim children (Doc. 8).

4. The Appellant argues that the District Council, like the KESB, did not adequately investigate the facts so as to have a solid basis for making a decision. In essence, the lower adjudicatory body merely balanced the probabilities, based on three medical reports (KESB Docs. 149, 150 and 153) and the findings of the caretakers at the

Children’s Home (KESB Docs. 135 and 152), and improperly determined the facts. Allegedly all three of the physicians questioned did not deny that there was a medical indication for circumcision. In addition, the statements of the caretakers with respect to C.____’s difficulty with urination were at odds with those of the Appellant. Under these circumstances, there was urgent reason to obtain further clarification. The clarifications made by the KESB were said to be unsatisfactory (Doc. 2, pp. 3 and 4). The Appellant further asserted that the report of Dr. H.____, stating that there is a specific risk of additional traumatization, is now two years old, and C.____ has continued to develop since then. Moreover, follow-up treatment could be reduced to a minimum. Furthermore, two physicians allegedly confirmed that the circumcision of C.____ would not present a risk to the child’s welfare, based on the clarifications made by the lower adjudicatory body.

In this second appellate proceeding (cf. BR Doc. 1, p. 5), the Appellant also argues that postponing the circumcision would have a counter-productive effect on C.____’s development. In particular, she argues that there is an increased risk of social-societal exclusion and bullying by other children. Since religious grounds are also asserted, the ruling also violates constitutional law and is discriminatory. Finally, it is not apparent why an expert opinion cannot answer the question of the reasonableness of circumcision, if the "medical" reasonableness of the intervention for C.____ is to be judged (Doc. 2, pp. 5 - 7).

5.1 In the contested decision, the District Council accurately set forth the relevant basis for making its decision. This is rightfully not questioned in the appeal. Parental decision-making authority, as described in Art. 301 (1) ZGB, is, on one hand, subject to the child’s legal capacity and, on the other hand, restricted by the welfare of the child and respect for the personality of the child (Schwenzer/Cottier, BSK ZGB I, 6. A., Nos. 2 and 3 to Art. 301 ZGB). The same applies to the religious upbringing of the child (Schwenzer/Cottier, loc. cit., Nos. 3 and 6 to Art. 303). The welfare of the child is the controlling criterion in child law, and the endangerment of the welfare of the child places a limit on the parent’s right to represent the child.

Both the District Council and the KESB made reference to the considerations set forth in a judgment of the Cantonal Court of Graubünden dated October 8, 2013 (ZK1 13 42 E. 6 et seqq.; available on swisslex) with respect to the legal basis for the male circumcision in question here. Referring to materials related to Art. 124 of the Swiss Criminal Code [StGB] (cf. BBl 2010 5651 - 5677), which has been in effect since July 1, 2012 and which explicitly criminalizes the mutilation of female genitals, the Cantonal Court ruled that legislators had explicitly declined to criminalize the circumcision of boys. The Court pointed out that there are no international standards in this regard. The legal situation is unclear, especially since there are no legal provisions or relevant court decisions on the matter in Switzerland. Therefore, reliance must be placed on general (criminal and civil law) standards.
Accordingly, the Court has followed the findings, which the Swiss Center for Human Rights Studies [Schweizerische Kompetenzzentrum für Menschenrechte (SKMR)] recorded in a framework document (cf. 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 seqq.). That document states that circumcision has the objective elements of simple assault and battery. However, it does not constitute child endangerment per se, even without a medical indication, and therefore parents can give their consent, provided that the intervention is performed by medical specialists in accordance with the rules of medical practice. This view can also stand up to international case law and practice. The Cantonal Court concluded that circumcision is permissible with the consent of the parents if it does not endanger the welfare of the child. If circumcision would endanger the welfare of the child, there must be no intervention until the boy himself has the necessary competence to make a judgment and give valid consent. Defining the limits of endangerment is a question of discretion and evaluation (ZK1 13 42 et seqq., E. 7). These convincing findings can readily be followed. Moreover, the Appellant has not countered them.

Moreover, in examining endangerment of the welfare of the child, it is correct and proper to start with a comprehensive concept of the welfare of the child. In general, the aim is age-appropriate development possibilities for the child from a mental, psychological, physical and social perspective. One must seek the best possible solution for the child, taking all the specific circumstances into account (loc. cit., with reference to BGE 129 III 250 et seqq; E. 3.4.2 and additional decisions mentioned therein). Social and cultural aspects must also be taken into account in this regard.

5.3 It is undisputed that C.____, who is currently not yet 10 years old, cannot be considered competent to make a decision with respect to his circumcision. Therefore, it is generally the responsibility of the Appellant, his mother with sole parental control, to decide. A medical intervention involves a relatively highly personal right, which can also be exercised by the legal representative (Fankhauser, BSK ZGB I, 6.A., Nos. 6 and 7 to Art. 19c). As we have seen, the Appellant basically decides on the religious upbringing of her children (Schwenzer/Cottier, loc. cit., No. 3 to Art. 303; BGE 129 III 689 et seqq.).

5.4 In her notice of April 12, 2017, the Appellant mentioned that she wished to have C.____ circumcised for religious reasons and, in addition, that C.____ has difficulty urinating (KESB Doc. 135). The latter was not discussed at the hearing on June 2, 2017 (KESB Doc. 140). In response to the petition seeking to restrict her parental control, the Appellant declared she understood that her son might be traumatized by the medical intervention and therefore wanted the circumcision to be performed under general anesthesia. However, she denied that C.____ had a panic reaction, even to normal medical check-ups. She wished to have the intervention performed for religious reasons and did not wish to wait any longer, especially since the trauma would not be overcome by waiting one or two years (loc. cit.). As already explained in the above description of the course of the proceedings (E. I. 2), the next steps were discussed and reports were obtained – not only from the pediatrician but also, at the request of the Appellant, from Dr. G.____, who was long acquainted with C.____. At the request of the legal representative, the list of questions was supplemented and provided to

both physicians (KESB Docs. 143 - 147). The pediatrician, Dr. I.____, answered “no” to all the questions posed to her, i.e., she denied that C.____ was traumatized by medical consultations and said “no” when asked whether the boy had a heightened perception of pain in her medical opinion. She denied that circumcision of C.____ with partial or general anesthesia constituted endangerment of the child’s welfare in her medical opinion. She also denied that it was necessary to perform the circumcision as soon as possible in her medical opinion (KESB Doc. 150). Dr. G.____ stated that he had been C.____’s attending pediatrician until 2013. [He said that] At times the child acted appropriately and at times he had great fear (of injections). Overall, the child surely suffered traumatic experiences. However, it is not appropriate for him to generalize them to medical consultations. He believed that the circumcision of C.____ was primarily for cultural reasons. There was no question of the child’s welfare being at risk. However, general anesthesia could be discussed if he had a great deal of fear. Dr. G.____ is currently not informed whether C.____ has difficulty urinating. A review of the child’s medical history revealed no such difficulties earlier (KESB Doc. 149). Dr. H.____, a child psychiatrist, submitted a report to KESB on his own initiative, in which he spoke of the intended circumcision: He stated he had treated C.___ with game-centered psychotherapy since May 2015 – in close collaboration with the D.____ Institution, as well as with the guardian and the child’s mother (with an escort) – and he declared that C.____ is a child who has experienced multiple traumas in his past. He exhibits very unusual behavior with respect to external control and medical interventions, especially in stressful situations. Dr. H.____ mentioned adjusting the child’s braces as an example. The child then completely loses his composure and has "drop-outs" with screaming, destruction of furniture, etc. There are clear indications of hypersensitivity to skin contact. Therefore, in his report of July 6, 2017, Dr. H.___ considered an unnecessary medical intervention to be an unreasonable burden on C.____, which he urged not be carried out (KESB Doc. 153).

Contrary to the opinion of the Appellant, it is not true that Dr. H.____ characterized the circumcision as an unnecessary intervention. The report states that he did not address this question, but unmistakably holds that the intervention is unreasonable for C.____,

in his opinion, if it is not medically necessary. This is not the same thing. Of course, Dr. H.____, as the treating child psychiatrist, was competent to address the question of the reasonableness of the intervention for C.____. The treating pediatrician – the primary medical contact person and specialist on the question of the medical indication for circumcision – clearly denied the medical necessity of circumcision for C.____. Dr. G.___ could not address the current situation and confirmed that he was not aware of any difficulties from the time when he was the treating pediatrician. All the statements in these reports are clear and convincing. The Appellant herself apparently saw no medical necessity, and only mentioned difficulty in urinating as an additional reason for her plan to have C.___ circumcised. She did not mention this at the hearing. The care team from D.____ Children's Home did not address the necessity of circumcision (KESB Doc. 152).

The clarifications made in coordination with the Appellant show that there is no evidence that her planned circumcision of C.___ was medically indicated, except for the Appellant's remark on April 12, 2017, which was not specific. The fact that blanket allegations of medical reasons for the circumcision were again made in the appeals does not change this (BR Docs. 1 and 8 and Doc. 2). Based on these facts, there was and still is no reason for further investigation in this regard. The accusation of erroneous and inadequate fact-finding is unsupported.

5.6 In addition to the treating child psychiatrist, Dr. H.____, J.____ from D.____ Children's Home told KESB that C.____ experienced multiple traumas, suffers from post-traumatic stress disorder and has a very violent, overexcited and even panicky reaction to all physical interventions. The application of braces with adhesive material in the school dental clinic had to be broken off after two attempts. A correction is not being attempted now, despite a clear indication, to avoid re-traumatization. She also stated that the medical follow-up care after circumcision, in particular, risks re-traumatization (KESB Doc. 152). The Appellant did not deny the traumatization itself or the difficulties that arose in connection with dental treatment. However, she relegates this traumatization and the risk of re-traumatization to the past and asserts in the

appeal that C.____ has progressed in processing and overcoming trauma over the last two years (Doc. 2, p. 5). She wishes to take these difficulties into account with a particularly gentle intervention (general anesthesia, no changing of bandages or application of salve during follow-up treatment) (loc. cit.). However, at the hearing of June 2, 2017, she stated that her son could not be expected to overcome his trauma in one or two years (KESB Doc. 140).

Based on the convincing assessments of the treating psychiatrist and the care team at the Children's Home, who supported the child's representative before the KESB (KESB Doc. 182), C.____'s traumatization can be regarded as a proven fact. The Appellant also does not deny this in principle. It can also be regarded as a proven fact that this traumatization is connected to physical interventions, in particular. To this extent, it must be assumed that circumcision, which is a physical intervention, affects the welfare of C.____ in this specific case, even if this intervention per se generally does not endanger the welfare of the child, and that there is a risk of re-traumatization. It appears that the performance of a circumcision would currently endanger the welfare of the child.

5.7 To the extent that the Appellant also asserts in the second appellate proceeding that postponement of the circumcision would endanger the welfare of the child and be counter-productive with respect to C.___'s development because the child could feel discriminated against or that he does not belong with the boys in his family and among his relatives, on one hand, and with Muslim children, on the other hand (Doc. 2, p. 5, Margin No. 9), due to the different appearance of his member or the lack of a religious ritual, the following findings are made: In this regard, the Appellant merely asserts possibilities – in these proceedings as she did before the lower adjudicatory body – without claiming specific evidence of an actual risk. In this regard, the lower adjudicatory body concluded that there was no specific evidence of bullying by Muslim children, and it was not plausible that this would become a problem in the near future, especially since not all boys are circumcised in Switzerland and, according to the child's father, there are cases where circumcision is postponed until the child has

capacity to make a decision (Doc. 8, p. 12 with reference to KESB Doc. 195). This must also be the case in the current proceedings. On this point, the Appellant has not met her obligation to give notice and object. In particular, her expressed fear of (possible) social-societal exclusion was insufficient to establish a (specific threat) of endangerment of the welfare of the child.

5.8 In summary, it can be found – with no need for further clarification – that there is currently no medical indication for the circumcision of C.___. Furthermore, in accordance with the state of the current discussion described above, the Court is of the opinion that male circumcision per se cannot be characterized as an endangerment to the welfare of a child. However, in the specific case of C.____, which is before the Court for decision, circumcision must be adjudged an endangerment of the welfare of the child at the present time because the child was traumatized by physical interventions during his earlier childhood. Moreover, there are no discernible socio-cultural disadvantages to postponement of the intervention.

If the circumcision of C.____ currently constitutes an endangerment of the welfare of the child, the contested decision, which prohibits the Appellant from circumcising her son at the present time, and prevents the circumcision of C.____ – contrary to the opinion of der Appellant (Doc. 2, pp. 5/6, Margin No. 10) – does not violate her rights with respect to the religious upbringing of the child under Art. 303 ZGB, because this right is subject to the welfare of the child.

The decision of the lower adjudicatory body is unobjectionable, and the dismissal of the appeal is sustained.

6. In addition, it should be noted that both the Appellant (BR Doc. 1, p. 5) and the child's father (Appellee 1) confirmed in the KESB proceedings (KESB Doc. 195) that postponement of the circumcision of C.____ will have no direct adverse impact on the exercise of his religion. Accordingly, the Appellant has not alleged violations of freedom of religion and freedom of conscience in these proceedings.

III.

1. If the appeal is dismissed, the Appellant is liable for costs and compensation (Art. 106 ZPO). She requests a grant of full free legal assistance for these proceedings, as she did from the lower adjudicatory bodies (Doc.2, p. 2). As justification, she points out that she has been on public welfare for several years, her arguments were not obviously without prospect for success from the outset and the involvement of an attorney is justified based on her knowledge and capabilities (Doc. 2, p. 6). There is no evidence that the financial condition of the Appellant, who receives financial support from Social Services according to the guardian's last financial report of October 31, 2016 (KESB Doc. 120), has changed. Therefore, the lower adjudicatory bodies granted the Appellant full free legal assistance (KESB Doc. 162 and Doc. 6, p. 16). Accordingly, it can be assumed that the Appellant is still indigent. Her petition did not appear to be without prospect for success from the outset and it can be assumed that she relied on legal assistance for this appeal. Therefore, the prerequisites for a grant of full free legal assistance have been met (Art. 117 and 118 ZPO). The Appellant shall be granted free legal assistance and her legal representative shall be appointed as free legal counsel. The legal representative's compensation is reserved for a separate decision.
The Appellant's obligation to make payment at a later date, as soon as she is able to do so, is reserved (Art. 123 ZPO).

2. No compensation shall be paid to the Appellees because they incurred no compensable expenses for the proceedings.

It is ordered:

1. The Appellant is granted free legal assistance for these second appellate proceedings, and her legal representative, Attorney lic. iur. X.____, is appointed as free legal counsel.

2. Written notice shall be given with the following information:

and decreed:

1. The appeal is dismissed, and the judgment of the District Council of Zürich, Division I, dated March 28, 2019, is sustained.

2. The decision fee is set at Swiss Fr. 1'500.

3. The court costs of the appeal procedure shall be borne by the Appellant. but shall be assumed by the Court for the time being due to the free legal assistance granted to her.
   The Appellant's obligation to make payment at a later date under Art. 123 ZPO is reserved.

4. The Appellees are awarded no compensation for these second appellate proceedings.

5. Compensation for the free legal representative is reserved for a separate decision.

6. Written notice shall be sent to the parties, the Children and Adult Protection Authority of the City of Zürich and – with return of the submitted files - to the District Council of Zürich, each with return receipt requested.

7. An appeal of this decision to the Federal Supreme Court must be submitted to the Swiss Federal Supreme Court, 1000 Lausanne 14, within 30 days of service. The permissibility and form of such an appeal are governed by Art. 72 et seqq. (appeal in civil matters) or Art. 113 et seqq. (subsidiary constitutional

appeal) in combination with Art. 42 of the Federal Law on the Federal Supreme Court [Bundesgesetz über das Bundesgericht (BGG)].

This is a final decision within the meaning of Art. 90 BGG.
This is a non-pecuniary matter.
An appeal to the Federal Supreme Court will have no suspensive effect.

Superior Court of the Canton of Zürich
Civil Division II
The Court Reporter:

lic. iur. K. Houweling-Wili

Sent on: