

FAMILY LAW ACT 1975

IN THE FAMILY COURT OF AUSTRALIA

AT ADELAIDE

No AD 4887 of 2002

**IN THE MATTER OF: K
 (Father)**

and

**H
 (Mother)**

CORAM: THE HONOURABLE JUSTICE STRICKLAND

DATE/S OF HEARING: 4th & 5th June 2003, 10th June 2003

DATE OF REASONS: 19th December 2003

JUDGMENT

**APPEARANCES: Mr Lindsay appeared as counsel (instructed by Jarell Legal)
 on behalf of the father**

**Ms Jefferies appeared as counsel (instructed by Southern
Community Justice Centre) on behalf of the mother**

CATCHWORDS

ORDERS – circumcision – father seeks that circumcision occur, mother opposes it – father is seeking a specific issues orders rather than seeking authorisation for a medical procedure under the general welfare jurisdiction of the Court – mother argues that there are risks associated with the procedure, there are no medical reasons for the procedure to take place and there is insufficient evidence regarding a religious or cultural reason – father argues that the risks associated with the procedure are negligible and cannot outweigh his religious and cultural beliefs and that there are significant medical benefits arising from the procedure – child resides in Adelaide, not in his father’s tribe in Tanzania – there is no basis that the child will follow his father’s religion – child’s exposure to the religion of his father and his father’s culture and traditions can continue unabated despite not being circumcised - child should not have to undergo a procedure that is not medically indicated – order: father is restrained from causing to permit the child to be circumcised.

Secretary, Department of Health and Community Services v JWB and SMB (1992) FLC 92-293

Family Law Act 1975 (Cth) s65E, s60 B, s61C, s 68F

Evidence Act 1995 (Cth) s79

Introduction

1. The issue here is whether I should authorise a circumcision procedure for the child of the relationship A born in January 2002. The father seeks that this occur but the mother opposes it.
2. Apart from dismissal of the father's application the mother sought either an order that the father not be authorised to consent to the circumcision of the child or an injunction restraining the father from permitting the child to be circumcised. However, by the end of the hearing it was my understanding that the mother was pursuing the injunction only.
3. The parties have been able to agree all other issues relating to the child. The child resides with the mother and the father has contact.

The factual background

4. The father was born in 1966 in Tanzania. He is aged 37 years.
5. The mother was born in 1981 and is aged 22 years.
6. The father completed primary and secondary school in Tanzania and then completed a Certificate in Accountancy. He worked for a year before coming to Australia. He came to Australia in March, 1988 on a student visa, selecting Adelaide as he had family and friends here. The father's brother resides with him in Adelaide in rented accommodation. The father's two sisters are resident in the United States and the remainder of his family resides in Tanzania. In June 2000 the father completed an advanced diploma in accountancy at TAFE.
7. The father's father is a Christian and his mother is of the Muslim faith. He was raised a Muslim and continues to follow that faith. Upon his arrival in Adelaide he joined the congregation at the Adelaide Mosque. His faith requires that he prays five times a day, the preferred place being the Mosque which the father generally attends. Each prayer session lasts about 5 minutes except Friday afternoon when prayers last about one hour.
8. The mother was born in Adelaide and was christened an Anglican.
9. In December 2000 the parties met.
10. The parties never co-habited. The mother would visit the father from time to time and stay with him up to a week at a time. The father says that the parties had a serious relationship with long term plans and that the pregnancy was planned. Prior

to the mother falling pregnant the father claims that they had discussed and agreed that they would soon live together, that they would ultimately marry by way of a civil service, that any children of their union would be raised in the Islamic faith and have the father's surname and that any male children would be circumcised. The mother denies any such discussion and agreement.

11. In September 2001 the relationship between the parties ceased.
12. In January 2002 the child A was born.
13. A week after the birth of their child, the father claims that he spoke to the mother at his home about the Islamic custom of circumcision which was to take place within 7 days of birth. The father had made an appointment with a General Practitioner for both of them so that arrangements for the circumcision could be made. He claims that the mother indicated that she wanted to discuss the matter with her own doctor first. The mother claims that this conversation about circumcision took place a few months after the child was born and that the mother told the father that before she could make a decision she would need to speak to a Midwife and she would do this at the child's appointment for his immunisation. Around this time contact arrangements were made providing for the father to see the child every Sunday.
14. The father claims that there was a further conversation with the mother on the issue of circumcision on the 27th January 2002 when the mother brought the child for contact. The mother indicated that she had not yet spoken to her doctor about the procedure. The father formed the view that the mother would be unlikely to agree to the circumcision. The father says that thereafter the mother only occasionally brought the child to see him on Sunday and that there would be periods of two weeks to a month that he would not see the child. The mother says that she had not yet made up her mind about the issue and although she had spoken to members of her family, including her father, she had not reached a conclusion either way.
15. In June 2002 the mother spoke to the Midwife about circumcision and formed the view that she did not want the child to be circumcised. She then informed the father of her decision.
16. In October 2002 the parties attended an appointment with a paediatric surgeon Dr F, to discuss the circumcision procedure. The mother also saw her general

practitioner Dr N. The mother stood firm in her view that the procedure was unnecessary and should not occur.

17. On the 4th December 2002 the father instituted proceedings in the Family Court.
18. On the 29th January 2003 an Order was made by Registrar Kelly that the father have contact with the child every Monday and Tuesday of each week from 9.30am to 12.30pm.
19. On the 6th March 2003 orders were made by consent granting residence to the mother, providing for joint responsibility for the long-term care, welfare and development of the child, restraining the father until further order from permitting or causing circumcision of the child, and providing for contact each Monday and Thursday for 3 hours and each alternate Sunday for 3 hours and for such other contact as may be agreed between the parties with the father at liberty to take all of his contact away from the mother's residence as and from 21st March 2003.
20. The father is presently undertaking a Degree at the University of South Australia, and next year he proposes to undertake a Masters Degree at the same University.
21. The father's student visa was renewable in August 2003 with the period dependent on the projected length of his studies. The father intends to apply for permanent residency at the end of this year and believes that upon completion of his studies he will have sufficient points to qualify for permanent residence. The father intends to make Australia his permanent home.
22. The father receives an allowance from his parents in Tanzania, and he works part-time as a taxi driver and a cleaner. He pays child support of \$108.00 per month.
23. The mother resides with her parents in the Adelaide Hills. She receives a parenting payment as well as a disability support pension. She cares full-time for the child.

The issues in dispute

24. The issue is simply stated, namely should an order be made permitting the child to be circumcised.
25. The parties agreed that this issue should be determined on the basis that the father is seeking a specific issues order rather than seeking authorisation for a medical procedure under the general welfare jurisdiction of the court. I accept that this is the correct approach. Circumcision is a procedure which parents are able to consent to as an aspect of their parental responsibility unlike, for example,

sterilisation for non-therapeutic purposes (SECRETARY, DEPARTMENT OF HEALTH AND COMMUNITY SERVICES v JWB and SMB (1992) FLC 92-293).

26. The child, of course, is too young to consent to the procedure and it involves an exercise of parental responsibility about which the parents cannot agree. The court must then make the decision.
27. There is also no dispute that Section 65E of the Family Law Act applies and in deciding whether to make this parenting order or not the court must regard the best interests of the child as the paramount consideration. However, it is in relation to the next step that the parties are at odds with each other. The mother says that it is not in the best interests of the child for the order to be made. She says that there are risks associated with the procedure, that there is no medical reason for the procedure to take place, that there is insufficient evidence that it is required for a religious or a cultural reason, that in any event it is too early to tell what religion the child will follow, and that because the child resides with her the child's exposure to the father's religion and culture will necessarily be limited.
28. The father says that no issue is raised by the mother about the best interests of the child which requires the court to regard the father's religious and cultural principles as subsidiary to the child's best interests. The mother does not put any religious or cultural opposition to the circumcision, and there is no conflict between the father's views and the child's best interests. He says that the risks associated with the procedure are negligible and cannot outweigh his beliefs. He also says that there are significant medical benefits arising from the procedure and they more than outweigh any risks.

The principles applicable to the matters before the court

29. In exercising its jurisdiction in relation to children, the Family Court is bound by the provisions of the Family Law Act. The object of those provisions of the Family Law Act relating to children is to ensure that children receive adequate and proper parenting to help them achieve their full potential and to ensure that parents fulfil their duties and meet their responsibilities concerning the care, welfare and development of their children (Section 60B).
30. The basic principles underlying those objects are that, except when it would be contrary to a child's best interests:

- (a) children have the right to know and be cared for by both parents;
- (b) children have a right of contact on a regular basis with both their parents and with other people significant to their care, welfare and development;
- (c) parents share duties and responsibilities concerning the care, welfare and development of their children;
- (d) parents should agree about the future parenting of their children.

(Section 60B(2))

31. Subject to any orders of this Court, each of the parents of a child has parental responsibility for that child (Section 61C).
32. Section 61B defines “parental responsibility” in relation to a child as meaning all the duties, powers, responsibilities and authority which by law parents have in relation to children.
33. Should parties be unable to agree about matters touching upon the welfare of a child and seek orders from the Court in relation to that child, the Court must, in determining whether it should make orders or in determining what orders should be made, regard the best interests of the child as the paramount consideration (Section 65E).
34. Under the provisions of Section 68F, in determining what is in the best interests of the child, the Court must consider the following matters so far as they might be relevant in each particular case, that is:
 - (i) any wishes expressed by the child and any factors (such as the child’s maturity or level of understanding) that the Court thinks are relevant to the weight it should give to the child’s wishes;
 - (i) the nature of the relationship of the child with each of the child’s parents and with other persons;
 - (i) the likely effect of any changes in the child’s circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (a) any other child, or other person, with whom he or she has been living;
 - (b) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child’s

right to maintain personal relations and direct contact with both parents on a regular basis;

- (c) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the Court thinks are relevant;
- (e) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
 - (f) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
 - (g) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (i) any family violence involving the child or a member of the child's family;
- (j) any family violence order that applies to the child or a member of the child's family;
- (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (l) any other fact or circumstance that the Court thinks is relevant.

The evidence

- 35. The father was represented by Mr Lindsay. He relied on his affidavit filed on the 30th May 2003. He gave evidence and was cross-examined.
- 36. The father called two witnesses, namely Mr Z the President of the African Heritage Association of South Australia and the Chairman of the Tanzanian Community of South Australia, and Mr Y a teacher at the Islamic College of South Australia and the Imam of the Adelaide Mosque. These witnesses filed affidavits on the 30th May 2003 and they each gave evidence and were cross-examined.
- 37. The mother was represented by Ms Jeffries. She relied on her affidavit filed on the 23rd May 2003. She gave evidence and was cross-examined. The mother called

one witness, namely Dr F, Paediatric Surgeon. Dr F gave evidence pursuant to a subpoena and he was cross-examined. A short report of his dated the 20th January 2003 was annexed to the mother's affidavit.

38. There were factual disputes arising from the affidavits of each party, and in particular whether there were discussions and even agreement about the issue of circumcision. Indeed, each party was cross-examined about these issues. However, these disputes can have no impact on the decision. Although one party was not telling me the truth about these matters, it serves no useful purpose to try and determine who that was. It does not matter what was discussed and/or agreed previously. The fact is that the mother is now opposed to the order sought by the father.
39. In cross-examination of the mother attempts were made to suggest that she had ulterior motives in taking the stand that she now does, but I do not accept that.
40. The mother accepts that the father is genuine about wanting his son to be circumcised, and, even if the father does not, I accept that the mother is genuine in her opposition to it. The mother struck me as a sensible and level-headed individual who had thought seriously about the issue, researched it and even went with the father to discuss the same with a specialist.
41. The father's two witnesses were generally impressive, and their evidence was very helpful. Indeed, Mr Y was quite candid in his responses, and some of what he said was not necessarily supportive of the father's case.
42. With Mr Z, he was presented as someone able to give expert evidence on the customs of the father's tribe in Tanzania and the cultural beliefs of the people of Tanzania. The mother's counsel challenged his expertise, but in my view he has undertaken sufficient training and study, and he has sufficient experience to have specialised knowledge on these subjects. Thus, his opinion based on that knowledge is admissible pursuant to Section 79 of the Evidence Act. It is another thing though as to what I do with that opinion, and the effect that it has in this case.
43. The mother's witness Dr F was certainly the most impressive of those who gave evidence before me. He is a highly qualified paediatric surgeon and his evidence was quite straight and to the point. I have no hesitation in accepting all that he said.

Section 68F(2) of the Family Law Act

44. On the facts of this case I am of the view that in determining what is in the best interests of the child I should have particular regard to sub-paragraphs (b), (f), (h), (k) and (l).

(b) The nature of the relationship with each of the child's parents and with other persons;

45. The child has a close and loving relationship with both parents. However, for the purposes of the issue at hand it is highly relevant that the child resides with the mother and has contact with the father. The child will grow up predominantly in the household of the mother which is an anglo-saxon environment. The mother was christened Anglican, but since she was a teenager she has been a member on an irregular basis of the congregation of the ... Assembly of God. Thus, this will be a religion that the child will be exposed to on occasions. His only exposure to Muslims and the Muslim faith will be through his father on contact, and this also will provide him with his only direct exposure to the Tanzanian beliefs and the customs of the father's tribe. This then leads into the next relevant sub-paragraph.

(f) The child's maturity, sex and background . . . and any other characteristics of the child that the court thinks are relevant;

46. The father puts great store in the requirements of the Muslim faith, the beliefs of the people of Tanzania and the customs of his tribe in seeking the order permitting the circumcision. He says in paragraph 28 of his affidavit that "his insistence upon circumcision is based on (his) religion and cultural background". He believes that "for his son not to be circumcised would exclude him from membership of the Muslim faith and community". He also says that "from a cultural perspective, male children in Tanzania are circumcised" and that the custom of his tribe "requires male circumcision whether you are a Muslim or Christian member".

47. As referred to above, the father called two witnesses to substantiate his beliefs in this regard.

48. Mr Y is the Imam of the Adelaide Mosque attended by the father. He says that "male circumcision is a fundamental requirement of the Islamic faith and is a commandment of God", and it is the father's "duty and obligation to the faith and to his son to ensure his son's circumcision".

49. Then there is Mr Z who tells me that “it is the custom of the majority of Tanzanian’s for male children to be circumcised”, and this is the custom of the father’s tribe in particular.
50. However, circumcision is not part of family life in the mother’s household, and it is not a requirement of the Anglican faith or the Assembly of God. It also may not be a requirement of some other religion that the child might follow. The child’s background, which is what this sub-paragraph refers to, will primarily be the mother’s background given that he resides with her. Now that is not to say that the child will not become more oriented towards his father’s religion and culture in the future, but that remains to be seen. Importantly, it is also the case that if he is not circumcised then he will still be able to attend the Mosque and pray. His father currently takes him there and Mr Y confirmed that the child can continue to attend and that he is quite happy to teach him. Although it is the obligation of the father to ensure his son is circumcised, the father still has to obey any order of this court, and if the order is that the child not be circumcised the Imam and the Muslim community will be satisfied that the father has made every effort to comply with his obligation and the father will be able to continue to practice his religion and expose the child to it.
51. Similarly, there will be no repercussions if the father does not do what “the majority” of the people of Tanzania do, or if the customs of the ... tribe are not carried out. Indeed, the evidence of Mr Z in cross-examination was that in the villages circumcision is normally carried out between the ages of 10 years and 15 years, although it is now starting to change to an earlier age. This flies in the face of the suggestion that the child must be circumcised now. Further, the fact of the matter is that living in a household in suburban Adelaide is a far cry from what might happen in a village in Tanzania. Many of the customs of the father’s tribe simply cannot be brought to bear in the situation that the child finds himself in in Australia.
52. Mr Lindsay argues that although the respective backgrounds of the parties have to be taken into account, with this one issue there is virtually no significance one way or the other in the mother’s background. Thus, given, as he put it, circumcision is of vital significance in the father’s background, the father’s view should prevail.

53. I do not accept this argument. It takes no account of the fact that the child will be living primarily in the mother's household and she is opposed to the procedure being undertaken. It is also incorrect to say that circumcision is a matter of insignificance in the mother's religious and cultural background. Certainly there is no absolute prohibition on circumcision, but that does not mean that it has no relevance.
- (h) *The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;*
54. I find that the mother has demonstrated a proper attitude to the child and to the responsibilities of parenthood in relation to the issue to be determined. Earlier in these reasons I said that I reject the attempts by the father's counsel in cross-examining the mother to suggest that she had ulterior motives in opposing the circumcision. To repeat, she has thought deeply about the issue, she has undertaken research and she has taken advice including with the father. She accepts that the father is genuine in wanting the circumcision and she has heeded his views, but she does not want to put the child through a procedure which has some risks when the procedure is not medically indicated and physically there is nothing wrong with him.
55. According to Dr F the risks are bleeding, infection, scarring, the need for follow up surgery, and risks associated with the anaesthetic. He says that it is virtually a pain free procedure and these risks are rare. Indeed he also identified a number of benefits that can result from the procedure. However, the mother says that any risk, no matter how small is one risk too many, and any potential benefits cannot outweigh these risks.
56. In relation to the religious aspect the mother's view is that the child should be able to keep his options open given that he does not yet have a religion. There is no guarantee that he will become a Muslim any more than he will become an Anglican. Thus, it would be inappropriate to circumcise the boy when the religion he ends up following may not require that to be done.
57. With the cultural issue, the mother says that the child will be raised in Australia and primarily in her household, and this dilutes the importance of following the customs

of the father's tribe in Tanzania. Further, she says that the medical risks of the procedure, minor as they may be, affect the importance of these customs.

58. However, the mother has no objection to the child being exposed to the father's religion, just as she will expose him to her religious views. She also has no objection of the child being exposed to the traditions and culture of Tanzania or more specifically of the father's tribe, and again just as she will expose the child to the culture and traditions of Australia and her anglo-saxon background.

59. The father also demonstrated a proper attitude to the child and to the responsibilities of parenthood, but I must say that unlike the mother he has not been able to look at both sides of the argument. He is fixed in his view that the child should be circumcised, and is genuine in his reasons for that view, but he overlooks firstly that the child is primarily resident in the mother's household and will be raised by her in an anglo-saxon environment, and secondly that there are other religions that the child may follow other than his own.

(k) Whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

60. The mother's case is that if anything this issue should be left until the child is old enough to make the decision for himself. The father says that the issue will not disappear unless the circumcision is permitted now. He says that not only is there the prospect of further proceedings but there is a real likelihood of the child being drawn into the conflict between his parents.

61. Obviously if the circumcision is permitted now then that will obviate the need for future litigation, but in my view that does not make that a preferable result. It is also too speculative to predict what position the child will take in any conflict between his parents. Thus, I do not consider that these issues require the circumcision to be carried out now.

(l) Any other fact of circumstance that the court thinks is relevant;

62. I have made the point already that the child is residing with the mother and the environment and the circles in which the child will be raised cannot be overlooked. In addition, the fact that it is his mother who cares for him on a daily basis who is opposed to the circumcision needs to be taken into account. As she sees it an otherwise healthy child should not have to undergo an unnecessary medical

procedure, and it would be a significant thing to impose that against her will. The child clearly relies on his mother to nurture and to care for him, and that relationship should not be compromised in any way.

Conclusion

63. Having regard to the evidence given in this matter, the submissions of each counsel, and the principles relevant to my determination I have concluded that it is in the best interests of the child that he should not be circumcised.
64. I do not agree with the father's submission that the mother has failed to raise any issue as to the child's best interests and that therefore the father's view should prevail. As I have demonstrated there are a number of issues about the child's best interests which are activated here and which conflict with the father's view and which therefore should be accorded paramountcy. Although the father's religious and cultural reasons for seeking circumcision are genuinely held by him, they cannot be described as "imperatives". In the context of where the child will be living and the environment in which he will be raised his predominant cultural connection will be with his mother and her background. Further, there is no basis yet for assuming that he will follow the Muslim faith rather than any other religion. And it is significant that his exposure to the religion of this father and to his father's culture and traditions can continue unabated despite not being circumcised.
65. In these circumstances there can be no doubt that the child should not have to undergo a procedure that is not medically indicated.
66. The mother of course has not only sought dismissal of the father's application, but she seeks an injunction restraining him from permitting or causing to permit the child to be circumcised. Given the finding that I have made about the circumcision, it seems to me that the evidence before me justifies the making the injunction sought. This is an important issue for all concerned, and given that the procedure is irreversible, appropriate orders should be made to ensure that the circumcision simply does not take place.

Orders

67. In the circumstances I propose to make the following orders:

- 67.1 That paragraph 4 of the father's Form 3 application filed on the 4th December 2002 be dismissed.
- 67.2 That the father be restrained and an injunction is hereby granted restraining him from permitting or causing to permit the child A born in January 2002 to be circumcised.

I certify that the preceding
67 numbered paragraphs
are a true copy of the reasons herein
of the Honourable Justice Strickland.
The 19th day of December 2003.

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Associate