**THE SUPREME COURT**

**S:AP:IE:2020:000131**

**S:AP:IE:2020:000132**

**O'Donnell J.**
**McKechnie J.**
**Dunne J.**
**O'Malley J.**
**Baker J.**

**IN THE MATTER OF J.J.**

**JUDGMENT of Mr. Justice William M. McKechnie delivered on the 22nd day of January, 2021**

## Introduction

**1.** This appeal raises important questions of law and principle at constitutional level concerning the circumstances in which the State may intervene to order certain medical treatments in respect of a child whose parents do not consent to those treatments. The actors in this case are the hospital/doctors (the applicants in the High Court, now the respondents on this appeal), the parents of the child in question (the respondents in the High Court, now appealing to this Court) and a guardian appointed in respect of the child; separately, the Irish Human Rights and Equality Commission was subsequently joined as *amicus curiae*, and the Attorney General participated in the appeal, given the nature of the issues raised. There is no doubt whatsoever but that all actors involved are motivated by what they consider to be the best interests of the child; however, for reasons that will be explained later in this judgment, a disagreement has arisen between the child's doctors and his parents as to "the treatment plan" that should be put in place going forward. For that reason, an originating summons was

issued seeking to have the child taken into wardship, which was immediately followed by a motion in which the doctors sought certain permissive orders to carry out only such treatment on the minor as they consider, in the exercise of their clinical judgment, to be appropriate and in the best health and welfare interests of the minor. Having acceded to the wardship application, the President of the High Court granted the reliefs sought. On an application for leave to appeal, this Court granted the parents leave to appeal to this Court by way of a leapfrog application.

**2.** The child in question is referred to as "John" in the judgment of the High Court in order to protect his anonymity, and I propose to call him by that name or "J.J.". John is eleven years old, the youngest of four children. John's parents are separated but it is abundantly clear that he is greatly loved and cared for by both. The High Court heard that John has an especially close bond with his mother and his second eldest brother. Like many young boys of his age, John greatly enjoys going to school and has many close friends there. The High Court heard evidence that John hopes to be a vet. He is a fervent Liverpool supporter and I have no doubt that he was overjoyed by their footballing successes in recent seasons. Amongst his other hobbies and interests, he counts professional wrestling and popular music.

**3.** In June 2020, John was involved in an accident, the details of which are not relevant to this case, with devastating, life-changing consequences, in which he suffered multiple fractures of various limbs, both upper and lower, lacerations to other parts of his body, pulmonary contusions and pulmonary haemorrhage, and maxillary fractures. Above all, however, was the ruinous neurological damage that he sustained. As the medical evidence pertaining to his present condition is set out in full detail below, it is sufficient at this point to say that he remains in a persistent state of disordered consciousness and has regained only a limited level of awareness. His prognosis, as agreed upon by his treating doctors, is that he will make no meaningful recovery from the neurological injuries. As a result of the traumatic injuries to his brain, he has developed dystonia, which is a neurological disorder causing episodes of sustained or intermittent muscle contractions which result in abnormal, often repetitive movement, postures or both. John's doctors believe these episodes cause him to be in significant pain. His dystonia worsened significantly at the end of August; the episodes became extremely severe, frequent and could last anywhere between minutes and hours. This would sometimes lead to a 'dystonic crisis', which could only be brought to end by administering sleep-inducing medicine. As a result of trialling various combinations of medicines, John's dystonia was then brought under control toward the end of September. The

regularity and severity of the episodes decreased and no longer interfered with daily activities in his life, such as being dressed or washed.

**4.** For the entire journey of this judgment, navigating as it must the most personal and painful events imaginable in respect of the parent-child and child-parent relationship, what must be stressed, and can never be overlooked, is the depth of love that John's parents have for him: no one can doubt the enormity of this and their desire in seeking to do what they think is best for their son. Legally and constitutionally, however, an application such as this is not determined solely by reference to what the child's parents believe to be in his or her best interests.

**The Constitutional Provisions**

**5.** The precise contours of the case law surrounding the questions of constitutional law at issue on this appeal are mapped out in detail later in this judgment. In the briefest of terms, and in the hope of not oversimplifying the situation, the Constitution recognises that decisions as to the health and welfare of the child are entrusted to the parents, but that there may be exceptional cases in which the State can intervene to override the parents' wishes. In line with the constitutional primacy of familial decision-making in such matters, such State intervention may occur only in accordance with the conditions prescribed by the Constitution. Precisely what this means is at the heart of this judgment. Before addressing these issues in depth, it may be helpful to set the scene by setting out the constitutional provisions at issue on this appeal.

**6.** This case raises important issues concerning the rights of the child, and also those of the parents; for that reason, reference should be made to the following provisions of the Constitution as they are directly in play on several of the more critical aspects of this case. These are as follows:

> "ARTICLE 40
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> 1 All citizens shall, as human persons, be held equal before the law.
>
> This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.
>
> …

3. 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

…

ARTICLE 41

1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

3. 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

…

ARTICLE 42

1 The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

…

3 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4 The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation."

Of significance to this appeal is the text of the old Article 42.5 of the Constitution, which was deleted from the Constitution by the Thirty-first Amendment. It provided as follows:

"5 In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

The vast majority of the case law concerning the issues presenting on this appeal arose in the context of the old Article 42.5. However, the test for State intervention in cases of this nature is now provided for by the new Article 42A.2.1°, inserted by the Thirty-first Amendment. It is worth setting out the provisions of the new Article in full:

"ARTICLE 42A

1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

2 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by

law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4 1° Provision shall be made by law that in the resolution of all proceedings—

i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

ii concerning the adoption, guardianship or custody of, or access to, any child,

the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."

**7.** The equality provision of Article 40.1 and the personal rights provisions of Article 40.3.1° and 40.3.2° apply equally to all persons. In the case of disability, or incapacity, arising either under law or by reason of physical or mental disability, illness, or other misfortune, it may have to be exercised on the subject's behalf by a third party. Such does not affect the existence of these rights or interfere with their ambit or reach. Article 41 is headed "THE FAMILY", which for constitutional purposes has been held to be "the family which is

founded on the institution of marriage and, in the context of [Article 41], marriage means valid marriage under the law for the time being in force in the State" (*The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567, at p. 643). On several subsequent occasions, the courts, including this Court as recently as 2009, have reaffirmed this view of what constituted a family for the purposes of Article 41. This is a point I will return to a little later. Another aspect of this provision is the State's recognition of the family and of its rights as a unit group, whether existing antecedent to the Constitution, or so conferred thereunder. Subsection 2 contains a guarantee, more specifically expressed, regarding the "constitution and authority" of the family, with subsection 3 pledging to guard "with special care" the institution of marriage "on which the Family is founded".

**8.** Article 42, headed "EDUCATION" acknowledges, in subsection 1, the family as the "primary and natural educator of the child" and immediately goes on to guarantee to respect the "inalienable right and duty of parents" to provide that education in all of its terms, including aspects specifically mentioned in that subsection. It will become necessary later in this judgment to more closely examine Articles 41 and 42 for the purposes of determining how, in what way, and to what extent their provisions apply to children of a non-marital union as described in the Constitution and/or to their natural parents.

**9.** Undoubtedly the central provision for the purposes of this case is Article 42A.2.1° of the Constitution, and indeed Article 42A more generally. Article 42A was inserted into the Constitution pursuant to the Thirty-first Amendment of the Constitution (Children) Act 2012, which was signed into law in April 2015 following a referendum in November 2012. The approach of the trial judge was that, notwithstanding the wardship of John, the issues in determination required a consideration of this provision and its application to the facts of this case. However, Article 42A.2.1° cannot be properly understood unless its constitutional forebear, namely, Article 42.5, is also considered in this immediate context. As will be seen, while there are similarities between the two provisions, there are also differences, and so a major question which arises on this appeal is as to whether the case law in respect of Article 42.5 continues to be relevant and applicable in respect of Article 42A.2.1°.

**Procedural History and Evidence**

**10.** The procedural history of the appeal can be succinctly stated. On the 28th August 2020, the hospital in question, which can be considered as including the principal decision-making doctors (all of whom will be collectively referred to "the hospital", unless otherwise

indicated), issued an originating summons pursuant to Order 65 of the Rules of the Superior Courts ("RSC") seeking to have John taken into wardship. On the same date it made an *ex parte* application before the President of the High Court seeking a variety of reliefs in relation to the child's treatment going forward. The named respondents to this application were John's mother and father. On that occasion, Irvine P. made two orders; first, she acceded to the hospital's request that Mr. Niall McGrath, solicitor, be appointed as John's Guardian *ad Litem* and, second, that the motion be listed on the 2nd September with a view to giving further directions as to its future course. On that date John's parents both appeared with individual representation. The relevant reliefs sought in relation to John's treatment are set out at para. 4 of the Notice of Motion, which reads as follows:

> "An Order permitting the Clinical Director … of [the hospital] to carry out such medical and nursing and ancillary treatment of the Minor in the exercise of their clinical judgment to be appropriate and in the best health and welfare interests of the Minor, including but not limited to:
>
> i. Permitting the administration of such medication, sedation or anaesthesia to the Minor by subcutaneous, buccal or enteral routes for the primary goal of treating severe breakthrough or neurological symptoms even though that [*sic*] the doses required to alleviate the Minor's suffering may have a secondary or terminating effect on the Minor's respiratory function.
>
> ii. permitting respiratory suctioning only when it is apparent to the treating nurses or clinicians that secretions are causing distress to the Minor;
>
> iii. permitting the insertion and re insertion of Nasogastric (NG) and/or Peripherally Inserted Central Catheter (PICC) and/or via Gastronomy (PEG) insertion for the delivery of feed or medications targeted at making the Minor comfortable and or alleviating distress to the Minor;
>
> iv. permitting the insertion and reinsertion of urinary catheter and ensuring urinary output;
>
> v. permitting the administration of such medication to alleviate the minor's constipation.
>
> vi. permitting the taking of swabs and the extraction of blood for testing;
>
> vii. permitting delivery of oxygen via nasal prongs, canula or mask targeted at making the Minor comfortable and or alleviating distress to the Minor;

viii. permitting the taking of necessary x-rays, scans ultrasound, CT, MRI or other radiological imaging though necessary and appropriate in the Minor's best medical and welfare interests.

ix. Withhold life-prolonging treatments or supports that are not considered to be in the best welfare and medical interests of the Minor including:

- The administration of hi-flow oxygen, continuous positive airway pressure or bi-phasic positive airway pressure supports;
- Rescue breaths delivered via bag or mask resuscitation;
- Intubation for the purpose of invasive mechanical ventilation;
- Mechanical ventilation;
- Inotropes for blood pressure instability;
- Cardiac compression for insufficient cardiac output or medical or electrical cardio diversion for cardiac arrhythmia;
- Invasive access including intraosseous and central venous access devices, or peripheral intravenous access save those permitted at (i) and (iii) above;
- Intravenous fluid replacement;
- The readmission of the Minor to an intensive care unit"

**11.** The matter came on for hearing on the 15th and 16th September 2020, when the court heard evidence from several medical experts and from John's parents. Legal submissions were made on the 22nd September. The President indicated that she would deliver judgment on the 9th October. On that date, however, the court was made aware of an improvement in John's dystonia. The hospital filed additional medical reports by way of update. Judgment was therefore deferred, and further medical evidence was heard on the 14th October, with supplemental legal submissions being made on the 21st October; this brought to a close the hearing before the High Court. The President delivered judgment on the 18th November, in which she indicated that she would grant all of the reliefs sought by the hospital.

**12.** The resulting orders dated the 20th November 2020 reflected this and were in the following terms:

"4. An order permitting [the hospital] to carry out such medical and nursing and ancillary treatment of the minor as they consider in the exercise of their clinical

judgment to be appropriate and in the best health and welfare interests of the minor, including but not limited to:

(i) permitting the administration of such medication, sedation or anaesthesia to the minor by subcutaneous, buccal or enteral routes for the primary goal of treating severe breakthrough or terminal neurological symptoms even though the doses required to alleviate the minor's suffering may have a secondary or terminating effect on the minor's respiratory function;

(ii) permitting respiratory suctioning only when it is apparent to the treating nurses or clinicians that secretions are causing distress to the minor;

(iii) permitting the insertion and reinsertion of nasogastric (NG) and/or peripherally inserted central catheter (PICC) and/or via gastrostomy (PEG) insertion for the delivery of feed or medications targeted at making the minor comfortable and/or alleviating distress to the minor;

(iv) permitting the insertion and reinsertion of urinary catheter and ensuring urinary output;

(v) permitting the administration of such medication to alleviate the minor's constipation;

(vi) permitting the taking of swabs and the extraction of blood for testing;

(vii) permitting delivery of oxygen via nasal prongs, cannula or mask targeted at making the minor more comfortable and/or alleviating distress to the minor;

(viii) permitting the taking of necessary x-rays, scans, ultrasound, CT, MRI or other radiological imaging thought necessary and appropriate in the minor's best medical and welfare interests;

(ix) withholding life-prolonging treatments or supports that are not considered to be in the best welfare or medical interests of the minor including:

- the administration of high-flow oxygen, continuous positive airway pressure or bi-phasic positive airway pressure supports;
- rescue breaths delivered via bag or mask resuscitation;
- intubation for the purpose of invasive mechanical ventilation;

- mechanical ventilation;
- inotropes for blood pressure instability;
- cardiac compression for insufficient cardiac output or medical or electrical cardio diversion for cardiac arrhythmia;
- invasive access including intraosseous and central venous access devices, or peripheral intravenous access save those permitted at (i) and (iii) above;
- intravenous fluid replacement;
- the readmission of the minor to an intensive care unit."

*The Medical Evidence: 26th June – 16th September 2020*

**13.** It is worth recounting the medical evidence as was adduced in the High Court. John's injuries came as a result of an accident he was in on the 26th June 2020. In its immediate aftermath he was unresponsive except for spontaneous breathing. He was brought to a regional hospital where he was reported as having a Glasgow Coma Scale ("GCS") of 3/15 and his pupils were fixed and dilated. A CT brain scan was performed which revealed extensive neurological injuries which had been suffered by him. A bolt was inserted to his head to monitor intercranial pressure. The extent of the injuries meant that neurosurgical intervention was not appropriate. A medical report prepared by Dr G, Consultant Paediatric Neurologist, on the 13th August 2020, details what was shown on the CT images:

i) An acute right cerebral convexity frontoparietal lobe and interhemispheric subdural haematoma;

ii) Significant brain swelling with abnormal cerebral hemisphere white-grey matter differentiation;

iii) Sulcal effacement and near complete right lateral ventricle effacement;

iv) Subfalcine and transtentorial herniation.

While John's neurological injuries are the cause of this matter coming before the Court, he also endured other significant injuries, including several fractures (to his left clavicle, right humerus, pubic rami, left orbital and multiple ribs), a splenic laceration, pulmonary contusions and haemorrhages. According to the medical affidavit of Dr F, Consultant Paediatric Intensivist and Director of the Department of Intensive Care at the Hospital, dated the 27th August, these physical injuries were stabilised and treated. Dr F is also the lead clinician on John's team of treating doctors at the Hospital. This Court has had the benefit of

several expert medical reports and affidavits, none of which are in any real conflict as to John's injuries, currents state or prognosis, save for some small differences.

**14.** The following is a list of the medical reports and affidavits relative to this, the first time period under consideration:

i) the affidavit of Dr G, Consultant Paediatric Neurologist at the Hospital, which exhibits her report of the 13th August 2020;

ii) the affidavit of Dr F., Consultant Paediatrician at the Hospital, which exhibits a report dated the 14th August 2020, signed by Dr F. and the five consultant paediatricians charged with John's care and the medical social work report of the 17th August 2020 expressing the concerns of John's medical social workers, A.C. and A.M.J.;

iii) the affidavit of Dr M., Consultant in Paediatric Palliative Medicine at the Hospital and her report of the 17th August 2020;

iv) the report of Dr W., Consultant Paediatric Intensivist at another hospital, dated the 27th August 2020, having been obtained by the hospital as an independent second opinion concerning the best interests of John;

v) the report of Dr L, Consultant Paediatrician/Paediatric Neurologist at another hospital, dated the 9th September, this report being commissioned by John's Guardian *ad Litem* again concerning his best interests;

vi) a nursing report from the ward at the Hospital in which John resides, dated the 10th September 2020, summarising John's daily needs.

**15.** John was transferred to the Paediatric Intensive Care Unit ("PICU") of the Hospital on the 27th June 2020. Dr G's report states that since his admission, John has had a persistently reduced GCS of 4/15. Dr F states in his affidavit that the transfer occurred in order to facilitate a neurosurgical review and neurocritical care with the likelihood of providing end-of-life care. On arrival to the PICU, John was haemodynamically stable, but his neurological review remained very concerning. An MRI of the brain was performed on the 30th June which, according to the report from Dr G, dated the 13th August, showed extensive T2 and FLAIR hyperintense signal intensity involving the bilateral frontal lobe, temporal lobe and parafalcine cortices, right caudate head, left lentiform nucleus and corpus callosum. It also showed focal areas of restricted diffusion in the left cerebral peduncle of the

midbrain, though it was noted that the brain stem and cerebellum had been spared. Evidence suggesting diffuse axonal injury appeared on some images. There was a mild reduction in the swelling as compared to the CT scan done on the 26th June. Dr G also noted that an EEG was done on the 29th June, which was abnormal, and which illustrated a lack of reactivity in multimodal stimuli.

**16.** According to the affidavit of Dr F, John suffered a change in his neurological state on the 2nd July, prompting a further CT brain scan, which revealed a new bleed into John's right frontal lobe with associated infarct (tissue death) and swelling. At this point, John's doctors felt that he would not benefit any further from surgical or medical interventions to reduce the swelling: his sedation was reduced incrementally with a view to further clinical assessment and possible extubation at a later date, if that was deemed appropriate. As the sedation was weaned, John breathed spontaneously with little support from a ventilator; this was in line with the MRI which had showed the brainstem as being still intact. John's family were informed of the likely devastating nature of his injuries, but no agreement could be reached regarding the discontinuation of intensive care.

**17.** So, at this juncture, Dr F states that John was systemically well but his neurological examination remained grave and there was no meaningful response to stimulation aside from abnormal extension movements in response to pain. The co-authored medical report of the 14th August records that John was displaying abnormal movements consistent with dystonia that were triggered by pain and discomfort. Dr G, in her report of the 14th August, describes dystonia as a hyperkinetic movement disorder characterised by sustained or intermittent muscle contractions causing abnormal, often repetitive movement, postures or both. Her examination of John on the 12th August revealed variability on the muscle tone of his left upper limb, in keeping with dystonia. She states that the dystonia developed by John was as a sequalae of his traumatic brain injuries and is generalised four-limb dystonia which is drug-resistant, meaning that despite multiple medications being administered to him, frequent dystonic episodes would be expected to continue. Drug-resistant dystonia is of such a nature that there is no cure and John would not be a candidate for surgical treatments to assist with the condition. His dystonia can be triggered by environmental stimuli including but not limited to noise, passing a bowel motion, suction, dressing or changing.

**18.** On the 7th July, John was extubated, but unfortunately he had to be reintubated after just 15 minutes. The report from Dr W, dated the 27th August states that this failure at coming off the ventilator was attributed predominantly to his inability to manage his own secretions and dystonia. Prior to this attempt, John's family had been warned of the significant risk that

he would not be able to breathe independently: while it was true that John was initiating breaths by himself, his cough, gag and respiratory muscles were weak, and all of those factors are necessary in order for independent and effective breathing.

**19.** Dr F's affidavit of the 27th August states that over the course of the next three weeks following this attempt at extubation, John's dystonia worsened to the degree that he was displaying severe dystonia spontaneously or at times in response to light touch. These dystonic episodes were so severe that there was significant contortion of his limbs. According to Dr G's report, he also suffered from what is termed a 'dystonic storm' or 'dystonic crisis', due to the increasingly frequent episodes. Episodes could last minutes or hours and throughout, John suffered tachycardia, meaning his heart rate exceeded 150 bpm.

**20.** In terms of medication, during this period his treating team initiated and trialled a variety of drugs/combinations of drugs. Many of these were titrated to the maximum possible dosages: if the doses were increased any further, Dr G was of the belief that they would compromise his respiratory response and could cause respiratory depression. Certain breakthrough or 'rescue' medications were given to him to terminate prolonged episodes, some which would induce sleep. These were: Clonidine, Buccal midazolam, chloral hydrate and levomepromazine.

**21.** His existing Clonidine therapy was increased to a continuous infusion which finally allowed the cycle of dystonic episodes to be broken. On this basis, John's team of treating doctors felt that another trial of extubating could be attempted. This was done with his family's agreement, only on the basis that it was agreed the tube would be reinserted if he should fail to breathe independently; this time, however, the extubating was in fact a success. Since the 29th July, John has continued to breathe independently, without the support of a ventilator.

**22.** Dr G's affidavit and report was based on her examination of the available radiology at the time of her report on the 13th August. Her opinion was that John's neurological injuries are permanent and irreversible, without prospect of recovery. The co-authored medical report dated the 14th August also gives a summary of John's neurological state at that point. He was described as being in a permanent state of disordered consciousness and did not respond to simple commands or have purposeful interactions. This prevents him from having any real interaction with his surroundings or from taking pleasure in any activities in his daily life. Tragically, his doctors stated that there was a substantial risk of overwhelming dystonia,

respiratory deterioration and hospital-acquired infection due to his prolonged period of immobility, and that he will not make any meaningful recovery.

**23.** He was on the maximum dose of four separate kind of medicines: sedatives, neuromodulators, analgesics and antispasmodics. Dr G's report states that while these medications are partially effective and have reduced the severity of the dystonia, they have not prevented breakthrough episodes, which result in severe muscle contraction and sometimes limb contortion, which cause John an unquantifiable amount of pain and suffering. His intense discomfort is easy to identify, by his elevated heartrate and his doctors' own experience of dystonia in patients who are awake and can express the pain which such episodes cause them. Laboratory analysis also confirmed that he had an elevated creatine kinase ("CK") which is a marker of a skeletal muscle injuring arising from dystonia. Dr W's report says that in fact this rise in CK level is an indication that his muscular cramping is so severe that it is causing muscle damage and breakdown. His doctors express their worry that while they may have managed to alleviate much of his suffering to date, he continues to display signs that it is not fully controlled. John's ability to cough and gag has improved intermittently since he was extubated. This is thought to be due to the removal of the tube in his airway, as opposed to any neurological improvement. Dr G stated, in relation to John's dystonia, that she was in full agreement as to the massively negative impact it was having on his quality of life.

**24.** John's heart, liver and kidneys were healthy, though he was entirely dependent on others for all daily needs and activities. The nursing report of the 10th September records that he is fed through a tube, is doubly incontinent and has had a urinary catheter since the time of his accident. It is noted in the co-authored medical report that this catheter poses a serious risk for infection the longer it remains inserted. Dr W also noted in her report that patients with John's injuries are extremely vulnerable to chest infections or pneumonia because all the mechanisms the body normally has to fight and protect against them are compromised. She expects that he will have repeated and significant respiratory events which will become more frequent and severe over time, thus causing progressive damage to his lungs. Such an infection or illness would also be compounded by a dystonic episode, making it very difficult to breathe.

**25.** As we are aware, the hospital made its *ex parte* application to the High Court on the 28th August 2020. In advance of this, a comprehensive treatment plan was drawn up by Dr M, Consultant in Paediatric Palliative Care at the Hospital. Both her report dated the 17th August, and her affidavit, dated the 27th August, represent the agreed upon and desired course for

John's care going forward, based upon his condition and prognosis as agreed upon by the authors of the co-authored medical report and his entire team of treating doctors. At its core, the opinion of all John's clinicians is that any attempt to prolong his life through the use of invasive interventions or therapies would be futile and would introduce more unnecessary pain and suffering. Dr W states that to employ such methods to prolong John's life would be cruel.

**26.** Dr M sets out the meaning and purpose of palliative care for children with life-limiting conditions at the beginning of her report: it is an active and holistic approach to care, embracing the physical, emotional, social and spiritual elements of the child's being, with a focus on the enhancement of quality of life for the child and the provision of support for their family. In John's case, Dr M envisioned that he would continue to receive his regular medications, including anti-dystonia and anti-seizure medication, as well as any other medication he may require in order to keep him comfortable and alleviate pain.

**27.** Crucially from the point of view of the hospital's application, interventions and procedures that the clinical team agrees are unhelpful and distressing for him would not be undertaken as they are no longer in his best interests medically. First, in relation to his resuscitation status, intubation and ventilation, hi-flow, BI-PAP and CPAP were all included in this, as was the undertaking of CPR if John's heart was to stop beating or his breathing became insufficient. His team agreed that it would be best that he not undergo an intravenous or intraosseous insertion. If John deteriorated slowly or developed an infection of some kind, the plan of Dr M states that he could receive treatments such as oxygen via nasal prongs or antibiotics, if this was likely to improve his comfort. If, however, he suffered deterioration despite these measures, and stopped breathing independently, he would be allowed a natural death without intervention by his clinicians. Dr M noted that it was possible that John could survive for some time; however, this would not change his care being focused on quality of life as opposed to life at all costs.

**28.** John was transferred out of the PICU and into a ward at the hospital on the 2nd September. A further medical report was prepared by Dr L, on the 9th September, at the request of John's Guardian *ad Litem.* She sought a further MRI of John's brain and an ophthalmology report and examined him on the 4th September. She states that the MRI, taken on the 8th September, emphasised the catastrophic nature of John's brain injuries and, rather than showing improvement, the changes caused by the injuries are now more pronounced on the right side. There was established damage to the right caudate, the right basal ganglia and the posterior limb of both internal capsules. Dr L stated that she was largely in agreement

with John's clinical team as to their assessment of him; however, since he was sedated (following a dystonic episode) at the time of her examination, she could not confirm whether he indeed had no awareness of his surroundings. In relation to his recovery prospects, her opinion was that the possibility of his becoming more alert was unclear; however, as with any brain injury, time would be very helpful in determining how much of a recovery he would make. She said it was unlikely that he would ever be able to sit normally, walk or stand again and that he was likely to remain doubly incontinent.

**29.** In regard to the proposed palliative care plan, Dr L went through each of the invasive treatments that would not be undertaken and detailed their potentially negative impact on John's overall condition and comfort level: it is her opinion that the palliative care plan would likely be positive for John's quality of life. She said that there may be a benefit in deferring a determination on the plan in order to allow John's family to come to terms with his situation and it may allow extra time to get John home, which is his mother's greatest desire for him. The ophthalmologist's report later supplemented Dr. L's report; Ms. C's findings were that John's eyes were unresponsive to bright light or faces.

**30.** To summarise the position of John's treating team, they wished to minimise his pain and discomfort, by treating his dystonia with escalated medical therapy which comes with the substantial risk that it would cause respiratory depression which could result in death. It is their belief that the introduction of invasive interventions to prolong his life would be futile and would introduce more pain and suffering. John's family, however, believe that he needs more time to recover and will certainly improve if given the chance.

*16th September – 14th December*

**31.** Judgment was due to be given by Irvine P. on the 9th October 2020. However, on that date, the President was informed by the Hospital that John's condition had changed since the end of the hearing in September: they exhibited three further medical reports detailing the updated situation. Each report is dated the 8th October 2020; one from Dr F, one from Dr G and one from Prof. D., paediatric intensivist and clinical lead of the PICU at the hospital.

**32.** Dr F's report describes that since the end of September, there had been marked improvement in John's dystonia, meaning the periods of dystonia had significantly reduced, with a corresponding decrease in the need to administer rescue medications. In the nine days before the 8th October, John had not required any Midazolam. At this point, he was on three medicines to manage the dystonia: Clonidine, Clonazepam and Pregabalin. John's GCS

remained 4/15 and his awareness was the same as at the time of the reports in August. The reports of Prof. D and Dr G echo what was said by Dr F.

**33.** Crucially, each report makes the explicit point that the improvement in John's dystonia is not and should not be interpreted as indicative of neurological recovery or potential for meaningful recovery from his brain injuries. Each doctor is of the belief that the improvement in the dystonia is simply as a result of the stopping and starting of different medicines, in particular the Clonazepam, which was started on the 7th September. So, while this represented a welcome change for John's comfort levels, each report is unequivocal that it is not evidence of recovery and, furthermore, it is unclear how long the dystonia would remain controlled. Their prognosis for John and their wishes for his treatment plan remained unchanged. Even though the risk of imminent cardiovascular or respiratory emergency was no longer as high as it had been before, it remained possible and likely that his dystonia could worsen again.

**34.** Mr. McGrath provided Dr L with a copy of these reports and John's medical records and thus she was able to provide another report, dated the 13th October 2020. Dr L was in full agreement with the conclusions reached by John's consultants as to the likely causes for the improvement in his dystonic episodes and the lack of significance this held for any overall recovery. Her opinion in relation to John's prognosis remained very guarded and in fact she stated that his last MRI was a strong indicator that he was unlikely to regain any further level of consciousness at this point. Her belief that the proposed palliative care plan was in John's best interests was unchanged. Finally, also unchanged since her report of the 9th September was her belief that the only possible benefit to a deferral of the court's determination on the plan would be to allow John's family to come to terms with his condition.

**35.** For the purposes of the appeal to this Court, there were two final medical reports provided, one from Dr F and another from Dr L, both dated the 14th December 2020. These represent the most current picture of John's health available to the Court. Dr F records that in the six weeks since John's dystonia began to improve, there has also been a noticeable increase in his level of wakefulness. As of the 10th December, John's GCS had improved from 4/15 to 6/15. However, there is still no meaningful response to auditory or visual stimuli and he remains entirely dependent on others for daily activities. Another notable difference, again due to the reduced severity and length of his dystonic episodes, is that he can now sit for periods of time in a specially designed wheelchair. Again, unfortunately, Dr F does not see these improvements as evidence of recovery and it does not change John's prognosis or his treating team's wishes for him going forward.

**36.** Dr L examined John again on the 9th December, in advance of preparing her final report. She notes many of the same improvements as Dr F, including John's increased muscle tone and level of alertness. In regard to the latter, Dr L qualifies her opinion by stating that at the time of her other visit with John, he was heavily sedated following a dystonic episode; therefore, it is difficult to assess his consciousness level on the basis of a single visit. John's mother showed her footage of him appearing to smile in response to his brother playing with him. She states that her overall impression is that his level of awareness has increased but is not at a normal level; there may be a role for further, multidisciplinary assessment of John's awareness. As this report was to update the Court on John's clinical condition, Dr L did not provide any further opinion in relation to John's treatment plan and prognosis.

**Judgment of the High Court**

**37.** Irvine P gave her judgment on the 18th November 2020 ([2021] IEHC 655). The learned President set out in detail the background to the proceedings, including John's injuries and the reliefs sought by the hospital. The evidence concerning John's dystonia is set out in detail at paras. 26-64 of the judgment; further evidence concerning John's condition and prognosis is detailed at paras. 65-72. Paragraphs 73 *et. seq.* address the nature of the interventions that John's clinicians were seeking permission to withhold.

**38.** The President of the High Court noted that there were a number of issues between the hospital and John's parents. The first concerned what is and is not in John's best interests. Further issues included John's mother's queries about whether the use of the wardship jurisdiction was compatible with her parental rights; her argument that what was sought by the hospital amounts to euthanasia; the submission that the hospital's application was premature having regard to how soon it was brought after John's accident and the alleged uncertainty in his prognosis; whether the "best interests" test was the appropriate test to apply; whether there was "clear and convincing evidence" to justify making the orders sought; and whether the orders sought by the hospital were legally unnecessary and should be withheld on that basis.

**39.** The Court first addressed whether its wardship jurisdiction could be exercised to override the wishes of the parents. Irvine P noted that ordinarily in a case such as this the child would be taken into wardship, in consultation with the child's parents and doctors, in order to determine what is in the child's best interests ("the best interest test"). Here, however, where the parents were objecting to John being taken into wardship, the question

arose as to whether the court was entitled to exercise its wardship jurisdiction given the interference that this would cause with the parental rights guaranteed to John's parents by the Constitution.

**40.** It should be noted at this stage that, although John's parents are not married, the High Court's assessment of the proposed interference with the parents' constitutional rights proceeded on the basis that the relevant rights were grounded primarily on Article 41 of the Constitution. No parties objected to this approach in the High Court. I will return to venture a few observations about the applicability of Article 41 in the circumstances of this case later in my judgment. At this juncture, it is safe to observe that as Irvine P was prepared to grant the orders sought even when assessing the parents' rights through the prism of Article 41 (in addition to whatever other sources of constitutional rights apply), it undoubtedly would have made no difference to the Order of the High Court had that constitutional analysis been carried out without regard to Article 41 rights. For the purposes of my summary of the learned President's judgment, I will simply refer to the "constitutional rights" or "parental rights" of the parents; the source thereof can be discussed later.

**41.** The learned President observed at para. 94 that while the State is under an obligation to respect the family, and by extension the decision of the parents, it is also obliged to protect and vindicate the constitutional rights of every person, including John. What is not clear is the point at which the court can interfere to resolve these competing constitutional rights. Irvine P noted that parental rights would be entirely undermined if the courts were to step in at every turn where it could be shown that the rights of the child were being, or might be, adversely affected. For this reason, the courts have developed a presumption that the rights of the child will be vindicated by the actions or inactions of their parents, unless that presumption can be rebutted (para. 96). Irvine P discussed a number of cases in which this presumption has been considered, including *In re J.H. (inf.)* [1985] I.R. 375, *North Western Health Board v. H.W.* [2001] 3 I.R. 622 ("*NWHB*") and *N. v. Health Service Executive* [2006] IEHC 278, [2006] IESC 60, [2006] 4 I.R. 374. From these cases the learned President derived the following general principles in relation to the presumption that the welfare of the child is to be found within the family:

> "First, in acknowledgement and in vindication of the constitutional rights of the parents, the court should presume that the best interests of the child are best served within the family and for that reason must not unduly interfere with the affairs of the family. Second, only where there are compelling reasons or where there is a

dereliction of duty on the part of the parents can the courts intervene with family matters. It should also be noted that, as is apparent from the *dictum* of Hardiman J in *North Western Health Board v.H.W.* [2001] 3 I.R. 622, this principle is based upon the analogous application of the provisions previously found in Article 42.5 of the Constitution to family rights derived elsewhere under the Constitution. Finally, in any balancing of the parental rights and the rights of the child, the best interests of the child are paramount." (para. 102)

**42.** Irvine P then turned to the question of whether the introduction of Article 42A of the Constitution and concurrent deletion of Article 42.5 may have altered this constitutional position. She noted that, regrettably, none of the four parties to the application had addressed this point. Nonetheless, she made a few general observations. As regards Article 42A.1, she noted that, on the one hand, it can be argued that the provision bolsters the proposition that children are now to receive greater immediate protection from the State, whereas, on the other hand, it could be said that it does no more than restate rights of the child which were already acknowledged to exist under Article 40 or 41. She observed that on a plain reading of Article 42A.2.1°, it would not be unreasonable to assume that it was primarily intended to provide the child with the right to demand that the State would interfere to protect its rights where its parents had failed in their duty, whereas Article 42.5 was focussed more on the right of parents to limit State interference. Ultimately, she took the view that, given the unaltered Article 41 and the small differences between Article 42.5 and Article 42A.2.1°, she felt bound by the decision in *NWHB* to construe Article 42A.2.1° as limiting State interference (para. 107).

**43.** The learned President next considered whether the decision concerning John's medical treatment was, in principle, a family matter and, if so, whether the presumption referred to above had been rebutted. By reference to *NWHB* and *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 I.R. 79, she stated that the authorities suggest that where the wardship jurisdiction is exercised, the matter is no longer a family matter and it falls to the court to determine the child's best interests (para. 110). However, she commented on a submission made by counsel for John's mother to the effect that there was no principled justification for treating the child differently depending on whether the orders were sought pursuant to the Court's inherent jurisdiction or whether, instead, the child was in wardship when the orders were sought. The learned President agreed that the differing approaches in the case law, depending on whether or not the wardship jurisdiction was

invoked, were difficult to reconcile (para. 111). She was satisfied, however, that John's parents were correct that the State could not simply have regard to the wardship jurisdiction in order to escape the limitations otherwise imposed by the Constitution, in particular the presumption that the welfare of the child is to be found within the family and the limitations on State interference in family matters.

**44.** In the President's view, *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 I.R. 79 could be distinguished as the child in that case was already a ward of court and the court clearly stood *in loco parentis* at the time that the dispute arose. Here, however, the dispute between the hospital and John's parents arose before he was made a ward of court and his parents had objected to that course being taken. Irvine P was therefore satisfied that the court could not really claim to be *in loco parentis* when the principal reason the court was asked to take John into wardship was to find a suitable forum to resolve the dispute with due expedition. She stated that:

> "It, therefore, follows that the reasoning in *North Western Health Board v. H.W.* [2001] 3 I.R. 622 applies with equal force in this case as it applied to the court's inherent jurisdiction. What this means is that, in principle, it is a matter for John's parents to make the decision concerning his medical treatment. The fact that the wardship jurisdiction has been invoked does not distract from their rights as parents to make such decisions without undue interference by the State." (para. 113)

In her view, the right to make the decision regarding John's medical treatment was, in principle, one for his parents to make (para. 114).

**45.** The next question, then, was whether the presumption in favour of protecting John's parents' parental right to make that decision had been rebutted: the State is permitted to interfere where it can no longer be presumed that the interests of the child are best served within the family. Irvine P stated that the State may interfere in family matters either where there are compelling reasons to do so *or* where it is established that the parents have failed in their duty (para. 116). Before intervention could be justified, it must be established that the rights of the child are so clearly and materially in jeopardy that the court must make sure that, whatever decision is made, it is the one that vindicates the child's constitutional rights (para. 117). She therefore framed the relevant test as being whether John's rights are so clearly and

materially in jeopardy that there are compelling reasons to conclude that the presumption is rebutted (para. 118).

**46.** In addressing this issue, Irvine P first observed that the "dereliction of duty" within Article 42.5 has been interpreted to be an objective standard (per the judgment of Hogan J in *Children's University Hospital Temple St. v. C.D.* [2011] IEHC 1, [2011] 1 I.R. 665). The question, therefore, was whether the position adopted by John's parents in relation to his medical care could objectively be classified as a failure in their duty as parents. Though stressing that she did not reach this conclusion lightly, Irvine P was satisfied that it could be so described (para. 120). Her reasons therefor are set out over the following paragraphs, with the following extracts capturing the essence of the President's reasoning:

> "121. First of all, it must be stated that the wishes of John's parents are undoubtedly born out of the extent and ferocity of their love for John. It is wholly understandable for any parent who loves their child as much as they do to be instinctively drawn to making decisions which will prolong their child's life. However, in this case, their love of John has, in my view, rendered them incapable of acknowledging the fundamental truth as to his condition and handicapped them in their capacity to vindicate his rights.
>
> 122. … John's parents simply refuse to accept that the invasive measures his clinicians want to withhold will not bridge John to a life with a better outlook but will only expose him to a life of further suffering and place him on a poorer health trajectory than that which he was on before those measures were deployed.
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> 123. Second, the only reasonable explanation for John's parents refusing to permit his clinicians to give him the subcutaneous medication he might need to bring his pain under control should he develop a dystonic crisis must be that their desire to extend his life has blinded them to the enormity of the pain that he has thus far suffered from his dystonia and will have to endure in the future in the event of a dystonic crisis … No reasonable parent understanding the consequences of their child experiencing a dystonic crisis of the type anticipated in this case could reasonably make such a decision.
>
> …

125. Regrettably, I have formed the view that the decisions that John's parents are making, objectively assessed, are based upon an entirely false premise as to what John has endured to date and what his prognosis in the future will be following either a dystonic crisis, which might require a subcutaneous infusion to alleviate his pain, or a crisis that would take him to the doors of the ICU where he would need invasive measures to survive. In their failure to acknowledge John's condition and likely prognosis in either situation, they are failing in their duty as parents to vindicate the rights which he, because of his age and injuries, cannot himself protect. John has a right, and his parents, the duty, to make a fully informed assessment of his circumstances, in particular where the effects of any decision that they make regarding either situation will be so grave and pressing for John.

…

128. … I reject the argument that John's prognosis is in any material respect unclear or uncertain. There is as much certainty as there can be with any medical diagnosis that John will not recover in any significant way from his injuries … [I]f for some reason John was to develop a dystonic crisis, the evidence as to the pain he would endure, absent subcutaneous infusion, is simply unimaginable and would never be accepted by any reasonable person capable of making decisions in respect of their own welfare.

129. In circumstances where John's rights are under such strain, the State cannot stand idly by. No constitutional right can be used to inflict such grievous suffering upon one person. This is not to say that John's parents do not deeply care for John. It could not be further from the truth to say so. Regrettably, I am satisfied that it is the extent of their devotion and love for John that has left them incapable of stepping in to vindicate his rights."

**47.** For these reasons, Irvine P was satisfied that the parental rights derived from the Constitution do not preclude State intervention in this case (para. 133). She made clear that the views of John's parents would be at the forefront of her mind in reaching the decision as to his medical treatment. She also addressed the potential "floodgates" argument concerning

State intervention in family affairs, pointing out that cases of this nature are extremely rare and that the safeguards in the Constitution are sufficient to guard against State overreach in respect of family matters.

**48.** Further, the President dismissed the argument that any State intervention must be by way of statute, reasoning that the *NWHB* case was very different to the within case in that to grant the orders sought in that case would have had the effect of rendering compulsory the screening test in question, a decision which should properly be for the Oireachtas to make rather than the courts, whereas granting the reliefs sought in respect of John would not transcend the boundaries of this case (para. 135). She also rejected John's mother's submission that to grant the orders sought would amount to accelerating John's death in a constitutionally impermissible manner: the intent of palliative care is not to shorten life, but rather to relieve suffering, and the evidence was that patients in palliative care are likely to live longer than they would have without such care. Thus, what the hospital was seeking was not to cut short John's life in anticipation of his eventual demise, but rather to give medication in response to enormous pain during a dystonic crisis, albeit that the medication may have the effect of terminating his life (paras. 136-143).

**49.** As regards the argument that the hospital's application was premature because John's diagnosis is not yet settled, and that the court could not therefore apply the usual test, Irvine P took the view that these submissions, too, must fail. Per *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 I.R. 79, the wardship jurisdiction exists to vindicate and protect the rights of the ward. A declaration of wardship never has the effect of depriving the ward of their rights: it is made in recognition of the fact that the ward can no longer exercise those rights, and as such rights would be inoperable and therefore lost in the hands of the ward, it falls to the organs of the State to protect and vindicate those rights. Thus wardship, as vested in the President of the High Court by s. 9 of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act"), exists not to take away rights, but to vindicate them.

**50.** Summarising the task for the court, Irvine P stated at para. 148 that "[i]n essence, the court must ask itself how best to vindicate and protect the ward's right to life, in circumstances where the court cannot ask the ward what his or her wishes would be and where he or she has given no explicit instructions". Given that the ward's right to life takes centre stage, the starting point for the court is the strong presumption in favour of life-sustaining or life-saving treatment (*Re S.R. (a Ward of Court)* [2012] IEHC 2, [2012] 1 I.R. 305; *H.S.E. v. J.M. (a Ward of Court)* [2017] IEHC 399, [2018] 1 I.R. 688). However, to vindicate the right to life does not equate to doing everything medically possible to sustain

life or to ensure survival at all costs: to vindicate the right to life may mean to choose dignity in life and dignity in death over survival (para. 150). It is for this reason that the presumption in favour of life-sustaining treatment is only a presumption, not a hard and fast rule. It may be rebutted where the court is satisfied that granting the relief sought is in the best interests of the ward. This requires a subjective assessment of what is in the best interests of the ward (para. 152). In other words, Irvine P stated that "I must ask myself what John would decide was in his best interests if he was able to view himself in the circumstances he is presently in and was able to make a reasoned and informed decision as to how he would like his condition to be managed" (para. 152). She continued:

> "154. The best interest test is to vindicate the ward's right to life as he would exercise it, not as the court would view it. The subjective character of the test is in acknowledgement of the fact that said right is the ward's right, which they may exercise in whatever way they deem fit. Abstaining from life-saving or life-sustaining treatment is only viewed as lawful vindication of a ward's right to life where the court is satisfied that the ward would choose such a course of action to be in her or her best interest."

**51.** In practical terms, per Irvine P, this entails the court consulting with the ward's family and doctors and, having heard the evidence, determining what the ward would view as being in their best interests. However, the subjective nature of the test does not mean that the court cannot assess the medical evidence soberly and realistically (para. 155). The court must squarely face the facts in the same way that the ward would, however unpleasant that may be, and in assessing the ward's best interests, the court will have regard to the peculiarities and characteristics of the ward. While the parents' evidence as to what the ward would want is material, the court must keep in mind that such evidence may be coloured by emotion as well as their own desire to keep their child alive (para. 157). Finally, the President stated that because of the subjective and fact-specific nature of the test it is difficult to look to past cases for a list of relevant considerations, but as there is a degree of similarity between cases, Irvine P identified the factors laid out by Denham J in her judgment in *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 I.R. 79 (at pp. 166-167 of the report) as the most extensive and detailed non-exhaustive list.

**52.** At para. 159, Irvine P confirmed, having regard to the foregoing, that the wardship jurisdiction was the appropriate forum for this dispute and that the existing case law applies

to the within proceedings. She stated that the strong presumption in favour of life, the subjective nature of the test, the care taken when determining John's wishes and the checks and balances of wardship applied on this application as they would any other. In her view, none of these protective measures is any less effective in the circumstances of this case. Accordingly, John's right to life would be adequately vindicated by the application of the best interests test. As regards the parents' rights, the learned President stated that once the hurdles of Articles 41 and 42A have been overcome, the parents' rights take a backseat: the application is determined by reference to how John would make the decision. It is a subjective best interests test, not a prudent and loving parent test. John's parents' views are material, but their rights as parents are secondary to John's interests.

**53.** As for the standard to be applied, Irvine P stated that when applying the best interests test, the court must be satisfied that there is clear and convincing evidence regarding the best interests of the ward to enable it to make a decision. She rejected John's mother's submission, which was based on John's updated medical reports, that there was any uncertainty as to John's prognosis or what is or is not in his best interests; although the new evidence established that John's present condition had changed, it had not altered his long-term outlook or the effect that ICU treatment would have upon him: his health trajectory will diminish with each admission to ICU and his dystonia is likely to become de-regulated when admitted to ICU. Moreover, the new evidence did not alter the fact that John will never recover significantly from his injuries: "ICU will not provide John with a bridge to recovery … Nothing in the new evidence changes that. ICU will however be a source of great distress to John and will catapult him into the cycle of pain, loss of dystonic control followed by a recovery to a lesser health trajectory than he enjoyed before the crisis, only so that the whole process can repeat until he finally succumbs" (para. 164). Moreover, the need for a future subcutaneous infusion was not changed by the supplemental evidence. It could not, therefore, be said that the evidence is not clear and convincing, as a change in present-day condition casts no doubt on whether or not, from a medical perspective, withholding ICU treatment or pain medication would be in John's best interests.

**54.** The learned President next rejected the submission made by John's father to the effect that John's doctors do not need any court order to withhold invasive measures which would not be in his best interests and, accordingly, that the court ought not to make the orders sought. Irvine P was satisfied that without a court order John's doctors would not be in a position to act in his interests (paras. 167-170).

**55.** Turning to the question of what John would want, Irvine P noted that there is nothing to suggest that John's experience of pain and his ability to tolerate pain should be much different to that of an adult faced with similar pain (para. 172). She stated that John has lived enough of life to know the difference between the life he would have lived if not for this terrible accident and the life he will face if he is to receive invasive measures in the event of a crisis (para. 173). Thus, bearing in mind the presumption in favour of life-sustaining treatment, she had to consider what John would want in respect of two questions: first, if his health declined to the point that his life could only be saved by taking invasive measures in ICU, would he want this, knowing the damage it would cause and the likely increase in pain that it would cause, or would be prefer to be kept pain-free and comfortable for as long as possible? Second, if his dystonia became symptomatic to the point of requiring a subcutaneous infusion, would he ask for that treatment knowing it might lead to respiratory compromise and the shortening of his life, or would be decline that treatment in favour of less effective pain control? (para. 174).

**56.** In answering these questions, Irvine P had regard to everything she had been told about John in terms of his character, his interests and his life, including his parents' view that he would want to fight on regardless of the difficulties facing him because he has "the heart of a lion" (paras. 175-176). She accepted that John's love for his family, and in particular his mother, is as strong any such relationship can be, and that he would probably therefore accept more pain than almost any other child in order to prolong his relationship with his parents and siblings (para. 178). However, she also had regard to what John might consider to be a worthwhile and meaningful life, such as the fact that he could have anticipated getting a good education and employment, pursuing his interests, enjoying the company of his family and friends, and finding a partner and perhaps having a family of his own (para. 177).

**57.** The learned President made clear that she must ground her decision in the real world and what she had heard of John's condition and pain (para. 179). She acknowledged that there are many people who are strong enough to put themselves through painful medical treatment or intervention. She stated that in her experience, however, this usually only happens where the treatment or intervention offers the patient a possibility of a cure or recovery (para. 181). Here, however, there was no hope of invasive measures improving John's condition or offering him even the remote possibility of any enjoyment of life. The sole objective would be to artificially extend his life, regardless of the consequences. The evidence was clear that John would be left in a physically worse state than before the

intervention and that he would suffer a significant amount of additional uncontrolled pain (para. 182). Irvine P continued:

> "183. In the course of my own relatively long life, I have met many people who have shown great strength and resilience in the face of adversity but I know none that if in John's shoes would choose treatment designed to prolong their life and escalate their pain rather than treatment that would make them comfortable for the rest of their life particularly in circumstances where the pain to be endured would reap nothing in terms of future happiness or joy.
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> 184. I do not believe it credible or even remotely possible that John, knowing that he will spend most of the rest of his life in a hospital bed and will never walk, never talk, never see, never go to school, never have new friends, never communicate, never feel love, happiness or pleasure, will be doubly incontinent and will if he survives invasive measures, endure significant periods of pain, would, if faced with a crisis of the type anticipated, instead of saying 'do everything you can to make sure I suffer as little pain as possible' say 'I would prefer you to take me to the ICU and do whatever is necessary to keep me alive' knowing that if he needed CPR, the measures taken would likely involve breaking his ribs and inflicting other damage only to return him to a health trajectory worse than that which he faced before his crisis. I am equally certain that, faced with a level of pain that could not be controlled other than by use of a subcutaneous infusion, John would want to receive that treatment even if it might lead to respiratory compromise.
>
> …
>
> 186. All I can say to John's parents is that I truly believe that if John could speak, knowing what was facing him in ICU and in terms of his life thereafter, he would plead with them to save him from the trauma and pain ahead when this present window of calm ends, as is an absolute certainty. I know John would not willingly consent to that treatment. He would want the alternative approach to be taken, namely that he would be kept as comfortable and safe as possible for as long as possible in the arms and care of those best equipped to mind him. And I believe that when faced with dystonic pain that was out of control, he would want his parents and doctors to give

> him the most effective treatment available to treat that pain even if it might shorten his life."

**58.** The President therefore concluded that it is in John's best interests and in accordance with what he would want that he should not be subjected to the invasive measures set out at para. 4(ix) of the Notice of Motion unless his clinicians consider them to be in his best interests and that his clinicians should be entitled to manage his care in accordance with the permissive orders sought at paras. 4(i)-(viii) of the Notice of Motion.

**Appeal to this Court**

**59.** By determination dated the 30th November 2020 ([2020] IESCDET 132), John's parents were granted leave to appeal directly to this Court from the judgment of the High Court.

**Submissions**

**60.** Given the nature of the issues arising in these proceedings, this Court determined that it would be prudent to put the Attorney General and the Irish Human Rights and Equality Commission ("IHREC" or "the Commission") on notice of the appeal and to give them an opportunity to make submissions. In all that meant that the court heard submissions from six legal teams on behalf of six parties: John's mother, John's father (together "the Appellants"), the hospital/doctors (hereafter "the Respondents"), the Guardian *ad Litem*, the Attorney General and IHREC. Because of the urgency of the appeal, the parties were given a greatly truncated timeframe within which to file their written submissions. The court is grateful to all of the lawyers involved for preparing their submissions, which were of great assistance to the court, at short notice. It would be to overburden the reader to set out in detail at this point all of the rival contentions in each of the six sets of submissions filed; instead, I have set out the core points articulated by each party, with the substance of the authorities relied upon being addressed in the "Discussion/Decision" section of this judgment, below.

*Submissions on behalf of John's Mother*

**61.** John's mother's position has always been that John has the heart of a lion, that he wants to fight for his life, and that it is too soon to administer treatment that may result in his death, as advocated by the Respondents. She points out that John has defied medical expectations ever since the accident, that his condition has improved and that more time is

needed before making a decision to withhold life-saving treatment or administer treatment resulting in respiratory termination. She submits that in the absence of a failure of parental duty or a recognised basis for invoking the wardship jurisdiction, this Court cannot intervene at the behest of the Respondents and says that the Respondents' application is not supported by authority or precedent. She submits that the orders sought are not permissible simply because they are described as "palliative" and says that it is impermissible and premature to take John's ultimate prognosis, as the Respondents see it, into account. She describes the first of the orders sought as "active treatment accelerating death", something which is impermissible as a matter of law and, if it were to be permitted, such a decision would be for the family to take, not the treating hospital. In essence, her fundamental position is that making the orders sought in this case was a constitutional overreach and that the evidence adduced did not provide a basis for effecting such a significant limitation of John's rights and those of his parents.

**62.** John's mother's written submissions are divided into three parts: constitutional issues, procedural issues and evidential issues. On the constitutional front, she submits that the exercise of the wardship jurisdiction in this case was unconstitutional. She submits that the application to admit into wardship and the treatment orders ultimately made both constitute an interference with constitutional rights and raise similar questions about when this is permissible. It is submitted that the High Court's reliance on *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 I.R. 79 was misplaced: while a "best interests" test is appropriate for adults who cannot themselves exercise their rights (as in that case), decisions for children are made by their parents and the courts can intervene only in exceptional cases where there has been a failure of parental duty. A pure "best interests" test is inappropriate in the case of a child as it does not afford sufficient weight to Article 41 and/or 42A rights. The latter Article does not set the child's rights against those of the family: it reinforces the primary protection of the child's rights within the family.

**63.** It is submitted that despite the emphasis on the fact that John will not make a "meaningful" recovery, his life is no less worthy of protection and equality of treatment than any other. The President's finding that he would not wish to live the diminished life now available to him is not supported by the evidence and falls short of the commitment to value the life of all persons equally.

**64.** John's mother submits that it may be inferred that the High Court considered that in seeking to continue life-prolonging treatment for their son, John's parents were infringing his right to die rather than suffer pain, but there is no such right. The right to die is confined to

the natural process of dying: accelerating death is not permitted. It is submitted that the relief sought at paragraph 4(i) of the Notice of Motion cannot be characterised other than as accelerating death. In *Children's University Hospital Temple St. v. C.D.* [2011] IEHC 1, [2011] 1 I.R. 665, where Hogan J overruled the decision of the parents to refuse life-saving treatment for their child, he did so where that decision placed the child's life at risk: this interference with the family vindicated the child's right to life but is not authority for the contrary proposition that the court may override parental wishes as regards the continuation of life-prolonging treatment. Like any other citizen, John has no right to die other than a natural death. The suggestion that he has a right to die rather than suffer pain was rejected in *Fleming v. Ireland* [2013] 2 I.R. 417.

**65.** Although John's parents are not married, his mother submits that Article 41 rights inhere in him and his family (relying on the judgment of O'Donnell J in *Gorry v. Minister for Justice and Equality* [2020] IESC 55). She further relies on that judgment for the proposition that a decision on a child's medical treatment is *prima facie* within the family's zone of authority as protected by Article 41. As for the test for State intervention under Article 42A, she submits that there has been no failure of parental duty and that there is no law providing authority for the administration of treatment that will result in respiratory termination; thus, the orders sought are not "provided by law". Referring to the judgments in *North Western Health Board v. H.M.* [2001] 3 I.R. 622 *("NWHB")*, she submits that State interference is warranted only where there is a parental failure of great magnitude, where there is an immediate and fundamental threat to the functioning of the child deriving from an exceptional dereliction of duty. However, that test was not applied by Irvine P, nor could it have been satisfied on the evidence in the case. Instead, the Court treated as a dereliction of duty his parents' failure to agree the treatment orders with the Respondents.

**66.** It is also submitted, in reliance on *NWHB*, that a legislative basis would be required in order to make the orders sought, *a fortiori* since Article 42.5 (as considered in that case) was self-executing whereas Article 42A.2.1° is not. John's mother submits that, in light of the wording of the new Article, the courts *may* retain jurisdiction to interfere absent legislation in order to *preserve* life (as happened in, for example, *Children's University Hospital Temple St. v. C.D.* [2011] IEHC 1, [2011] 1 I.R. 665), but that there is no basis for doing so where the orders sought by the hospital would have the opposite effect. The mere absence of legislation dealing with the matter does not vest jurisdiction in the court. Finally, on this issue, it is submitted that the High Court attached excessive weight to the views of the Respondents in relation to medical best interests, a test which is incapable of protecting John's wider rights

and interests. It is said that the application of the best interests test impermissibly diluted the applicable Article 41 rights; it is said that this was recognised by Hardiman J in *NWHB*, with the learned judge declining to apply that test because it failed to reflect the presumption in favour of family autonomy. While the High Court sees its exercise of the wardship jurisdiction as vindicating, not interfering with, the minor's rights, this ignores the fact that a central right of the minor is the right to have his parents make decisions in relation to his medical treatment. This is not vindicated through the application of the best interests test.

**67.** In terms of the procedural issues, John's mother submits that due process must be observed by the Court when exercising its wardship jurisdiction. She says that the necessary high degree of judicial scrutiny did not happen in this case. It is submitted that Irvine P took John into wardship over his parents' objections without hearing or permitting oral evidence from any party. Taking John into wardship was an interference with his parents' rights for which there was no justification under Article 42A.2.1°. No evidence was led as to whether John's parents' decision was considered by any witness to be a failure of duty. All of the evidence focussed solely on John's best interests, as though all that is required to intervene in family decision-making is a disagreement between the doctors and parents in relation to treatment. Even in submissions, no suggestion of parental failure was made. The case was never run on the basis of dereliction of parental duty and so it was not fair for the High Court to decide the case on that basis and the Court was constrained by the decision already made to take John into wardship. It is submitted that this decision to interfere with the family's rights at the outset of the hearing predetermined a jurisdiction to intervene without hearing evidence of a failure of duty and that this prejudgment satisfies the test for bias, as the decision to take John in wardship was inextricably linked with the subsequent treatment orders made by the Court.

**68.** Finally, as for the evidential issues, John's mother submits that the evidence was incapable of supporting a conclusion of dereliction of duty as this question was never canvassed with any witness. It is submitted that the 'inquisitorial' nature adopted by the President led to the Court misdirecting itself as to what was in issue and failing to ask itself the right question of law. It is submitted that there was a lack of rigour in examination and cross-examination and that while the President treated certain risks to John as "inevitable", the evidence was that there was no certainty. The President failed to engage with the equivocal aspects of the evidence. The Court was satisfied to accept opinion evidence as to John's mental condition despite there being uncontradicted evidence that no functional diagnostic test had been carried out. It is further said that imputing to John what the President

believed he would want, over the evidence of his parents as to what he would actually want, was impermissible. It is submitted that deciding the application by reference to how the Court considers the child would make the decision is a flawed approach: the child would always rely on his parents to make such a decision.

*Submissions on behalf of John's Father*

**69.** John's father makes it clear that he is not refusing consent to any aspect of John's treatment *per se*. He has a specific concern: that certain treatment to manage the pain and/or dystonia may foreseeably result in unavoidable side-effects which, if not managed by resuscitation or intensive care, would be fatal. John's father wishes such treatments to be provided and for his son to have the longest life that is possible for him, and the best opportunity for such recovery as may be possible, and a related wish that John be provided with resuscitation/intensive care if necessary, for the same reasons.

**70.** John's father objected to John being taken into wardship on the basis that this implied a failure of parental duty on his part and objected to the orders sought on the basis that they were not, in his view, in John's best interests. In his evidence he was clear that while he wanted to keep John's pain under control, at the same time he wanted to keep him alive. He hoped that John was still fighting for survival and gave evidence that John himself would not agree with the Respondents' plan. In the High Court, he argued that the orders sought were not necessary and, in the alternative, that the proper test to be applied was what John himself would choose if he were in a position to do so, something only his parents were in a position to give evidence of: he would choose to spend more time with his parents and family if he could, even if he knew he would not be aware of them. It was argued that the application was premature having regard to the improvement in John's position and that *bona fide* disagreement between the parents and doctors as to John's treatment could not constitute a "failure" of parental duty so as to justify State intervention.

**71.** On appeal, John's father makes three principal submissions: first, that the court below erred in finding that he had failed in his parental duty to such an extent as to justify court intervention; second, that the High Court erred in taking John into wardship at the start of the application; and, third, that the High Court erred in finding that without the orders sought, John's doctors would not be able to act in his best interests.

**72.** Anticipating a submission made by the Respondents, John's father submits that while there is a long line of authority reserving the protection of Articles 41 and 42 to families based on marriage, this Court has recently left open the possibility of revisiting the

issue of constitutional protection for non-marital families. He submits that it is clear in any event from the text of Article 42A that all children have a right to have decisions about their welfare made by their parents, and that it is of secondary importance whether the relevant constitutional rights of John and his parents derive from Article 41, Article 40.3 or Article 42A.1. He submits that the "compelling reasons" test did not survive the adoption of Article 42A and the High Court erred in concluding that there were compelling reasons justifying the Court displacing the authority of the parents.

**73.** He submits that the central issue is whether his *bona fide* disagreement with John's doctors about the provision of treatment is sufficient to conclude that he has failed in his duty to his son to such an extent that State intervention is required and/or to warrant the exercise of the wardship jurisdiction. He submits that the High Court erred in finding that there was failure in duty on his part; that it erred in applying a "compelling reasons" test and that it was wrong in finding, on the evidence, that there were compelling reasons that the presumption that John's best interests lie with his parents had been rebutted. It is submitted that the earlier case law on the meaning of "exceptional" in Article 42.5 remains applicable to the meaning of the same word in Article 42A.2.1°: he points, in particular, to the judgments in *NWHB*. He argues that *bona fide* disagreement with doctors is not so exceptional as to justify State intervention. As regards the concept of parental failure, he points to the judgment of Hardiman J in *N. v. Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 374, where it was stated at para. 170 that "[a] failure in duty to a child, for reasons other than illness or impossibility, is a grave moral failing which cannot be committed without personal fault". It is submitted that the language of failure of duty was retained in the new constitutional provision, and to that extent the old jurisprudence remains relevant. He stresses that the unanimous evidence of the medical practitioners in this case was that John's parents have always acted in what they believe to be his best interests, motivated entirely by their love for him. It is said that this is entirely at odds with the judgment of Hardiman J in *N. v. Health Service Executive*: there was no grave moral failing here.

**74.** Moreover, while Irvine P followed the approach of Hogan J in *Children's University Hospital Temple St. v. C.D.* [2011] IEHC 1, [2011] 1 I.R. 665 in adopting an objective approach to the question of parental failure of duty, John's father submits that the Supreme Court authorities (*NWHB*, *N. v. Health Service Executive*) contain stern warnings against this approach; instead, it is proper to ask whether the decision of the parents lies within the range of responsible decisions which, though exposing the child to risk, are open from the parents' point of view. The evidence does not suggest irresponsibility on John's

parents' part: their refusal to consent to the proposed treatment is within the range of decisions reserved to them under the Constitution.

**75.** John's father also makes submissions in respect of John's wardship. He submits that the High Court conflated and inverted two separate issues: (i) the decision to take John into wardship and (ii) the making of the consequential and ancillary orders sought. The extent of the wardship jurisdiction is limited by s. 9(1) of the 1961 Act, and can only be exercised insofar as it is not inconsistent with the Constitution. The decision to take a minor into wardship engages constitutional rights and so there is nothing "merely administrative" about it: fair procedures are required (see *A.C. v. Cork University Hospital* [2019] IESC 73, [2020] 2 I.R. 38). The decision to take John into wardship at the outset deprived his parents of the opportunity to address the threshold question concerning the necessity for the Court's intervention. This was compounded by the lack of clearly defined criteria justifying court intervention. John's father submits that the threshold test for admitting a child to wardship is a high one and falls to be applied in accordance with Article 42A, including, where there is parental objection to wardship, the concept of parental failure. The dispute between the parents and doctors, about which evidence had not yet been given when John was taken into wardship, could not justify the invocation of the wardship jurisdiction. As he puts it, "the Court was not entitled to interfere in John's parents' parental rights in order to determine whether their parental rights should be interfered in": the hearing began from a position where a grave interference with the parents' rights had already been found to be justified.

**76.** Finally, John's father reiterates a submission made in the High Court: that the orders sought are unnecessary. Referring to the Medical Council's *Guide to Professional Conduct and Ethics for Registered Medical Practitioners (Amended)* (8th ed., 2019), he submits that a doctor may "refuse specific treatments that you judge would not be effective, or that would be likely to be of more harm than benefit to the patient" (para. 39.1). Relying on *Re S.R. (a Ward of Court)* [2012] IEHC 2, [2012] 1 I.R. 305, he submits that as it would never be appropriate for a court to make an order that would clash with the primary duty of the medical practitioner to act in the best interests of their patient, there can never be a legal duty on a medical practitioner to so act. If a doctor concludes that a treatment sought is not clinically indicated, he is under no legal obligation to provide it to the patient. He submits that in previous cases where orders have been made permitting treatment to be withheld, the applications concerned profoundly disabled patients who, unlike John's position at the outset of this application, were already wards of court or in the care of the State. John's father states that there is no suggestion that the course of treatment proposed by the doctors could be

remotely considered unlawful. He submits that the High Court's conclusion that the clinicians could not be clear what treatment they should administer if John's condition deteriorates is inconsistent with the clinicians' clinical, legal and ethical obligations. It is said that the orders sought were redundant as, in the absence of any requirement of parental consent, there can be no requirement that the doctors obtain, in its place, the consent of the Court, before withholding treatments they deem not to be in John's best interests: his doctors are not precluded from following their own clinical judgement in the event of an acute deterioration and did not need permissive court orders to do so, as John was not a ward or in State care. By reference to the principle that the Court does not act in vain, he submits that the orders should be set aside.

*Submissions on behalf of the Respondents*

**77.** The hospital points out that it has consistently taken the position that, in circumstances where the purpose of admitting John to wardship was to have the issue of his medical treatment determined, the wardship procedure could not be used to circumvent the parental rights. The Respondents are clear that the Court cannot simply apply the best interests test that would be normal in wardship matters; it must first determine whether it is entitled to make orders that are contrary to the parents' wishes in a matter which the Respondents accept is within the zone of parental authority.

**78.** The Respondents point out that as John's parents are not married, Article 41 does not apply: the parental rights at issue derive from Articles 40.3 and 42, and possibly Article 42A. It is accepted that one of these rights is the right to make decisions in respect of medical treatment and that there is a presumption that the child's welfare is to be found within the family. However, the parental rights in issue are not absolute and the presumption may be rebutted: the core issue is as to the circumstances in which the court may intervene to make orders contrary to the parents' wishes. The Respondents submit that the President of the High Court applied the correct constitutional test, addressed the correct authorities, fully considered the rights at issue, applied the presumption and addressed whether the threshold had been met. In short, the Respondents submit that the Court may intervene to protect the child's welfare where there are compelling reasons to do so and/or where the parents have objectively failed or are failing in their duty towards the child to such extent that the "safety or welfare of any of their children is likely to be prejudicially affected".

**79.** The Respondents refer to the overlap between the old Article 42.5 and Article 42A.2.1°, submitting that the jurisprudence in respect of the former provision still provides

guidance as to the parameters for State intervention. They submit that the test for a failure in parental duty is objective in nature (per *Children's University Hospital Temple St. v. C.D.* [2011] IEHC 1, [2011] 1 I.R. 665). They further submit that Article 42A has lowered the threshold for State intervention, insofar as all that is required is a failure of duty that carries a likelihood of harm. The Respondents submit that Irvine P was correct to determine that the threshold for intervention has been reached: John's parents have failed in their duty to him (viewed objectively) and compelling reasons for intervention exist such that the presumption that his welfare is to be found with his parents has been rebutted. His parents' refusal to permit his doctors to withhold certain aggressive interventions, notwithstanding the overwhelming medical evidence as to the pain and suffering they will cause and the fact that meaningful recovery is not possible, constitute exceptional circumstances to satisfy the objective threshold requirements of Article 42A.2.1° of the Constitution. The High Court was entitled to make this finding, which is fully supported by the evidence. They submit that the learned President did not err in failing to give due weight to the Appellants' parental rights: the "best interests" test was the appropriate means by which to resolve the tension between John's rights and his parents' rights, and his parents' wishes were properly weighed within that exercise.

**80.** Moreover, the Respondents reject John's mother's argument that further legislation would be required before the court could intervene: the courts' entitlement to intervene arises from their role as guardian of the Constitution and is in any event provided for by law by s. 9 of the 1961 Act.

**81.** The Respondents distinguish *NWHB* on two bases: first, the medical intervention in question there was a routine screening process where there was no immediate threat to the life or health of the child; second, making the order sought in that case would have had the effect of establishing a compulsory screening service, thereby depriving all parents of the ability to withhold consent to the screening process. Any such decision would more properly have been a matter for the legislature, not the courts. Such considerations do not apply in this case.

**82.** The Respondents submit that the High Court did not err in its application of the best interests test. They argue that Irvine P correctly characterised it as subjective in nature and applied the proper standard of proof by requiring "clear and convincing" evidence. They say that whether the test is subjective, or objective with a subjective element, there is clear and convincing evidence that the orders sought were in John's best interests.

**83.** As for the issue concerning the use of wardship, the Respondents submit that the High Court can exercise jurisdiction in respect of a minor pursuant to either s. 9(1) of the 1961 Act or its inherent jurisdiction. They submit that the wardship jurisdiction is inquisitorial in nature: it is an inquiry as to what is best to be done for the child. The Respondents maintain that a finding of parental failure is not a prerequisite for admission of a minor into wardship: rather, the exercise of the wardship jurisdiction is to permit the High Court to undertake an inquiry into the child's best interests. Wardship provided the forum for considering all of the rights in issue – it was not used to circumvent the parents' constitutional rights. Thus, the decision to admit John into Wardship did not amount to a prejudgment of whether there had been a parental failure. The decision to admit him to wardship was done in accordance with fair procedures and constitutional justice: the application was made on notice, was supported by medical evidence on affidavit, cross-examination was permitted, a Guardian *ad Litem* was appointed, and submissions were made. The President did not determine to make the Treatment Orders sought until she was satisfied that the constitutional threshold for intervention was met. Furthermore, the Respondents rely on the decision of this Court in *A.C. v. Cork University Hospital* [2019] IESC 73, [2020] 2 I.R. 38 to argue that even if the High Court erred in admitting John to wardship, it would not necessarily follow that the Treatment Orders granted after a full and fair hearing are invalid.

**84.** Finally, the Respondents reject John's father's contention that the orders sought were unnecessary and strenuously reject his mother's characterisation of the Treatment Orders sought as amounting to euthanasia: the evidence was clear that the purpose of palliative care is to relieve pain, not accelerate death. They further submit that there is no absolute obligation on the Court to consent to medical treatment on behalf of a ward to prolong life if such treatment would not be in the ward's best interests having regard to all the circumstances of the case (per *H.S.E. v. J.M. (a Ward of Court)* [2017] IEHC 399, [2018] 1 I.R. 688). Irvine P was entitled to find that life-sustaining treatment at all costs was not in John's best interests.

*Submissions on behalf of the Guardian ad Litem*

**85.** A Guardian *ad Litem* was appointed by the President of the High Court to represent John's best interests. In short, the Guardian *ad Litem* is of the view that the learned President was correct in the orders that she made in this case.

**86.** The Guardian makes the point that the Appellants and John are not a "family" within the meaning of Articles 41 and 42 of the Constitution because John's parents are not

married. However, the Guardian submits that it would make no difference to the outcome of these appeals even if the Appellants were entitled to invoke Article 41 and 42 rights, and for that reason is prepared to address the issues on the assumption, *arguendo*, that the Appellants can invoke those provisions. The Guardian's position is that the High Court was so manifestly correct to grant the reliefs sought, given the evidence in the case, that it makes no difference to the outcome whether the Appellants and John are considered as a "Family" within the meaning of Article 41 or not. However, to the extent that this Court considers otherwise, the Guardian reiterates that John and his parents cannot be deemed a family for the purposes of those constitutional Articles.

**87.** The Guardian notes that the threshold for intervention has been reframed under Article 42A and is now more clearly child-centred. The focus under the new Article has shifted from the *reasons* for the parental failure of duty to the *effects* of the failure on the child. As regards whether there has been a failure on the part of the parents in the duties they owe to their child, it is submitted that the Appellants' refusal to consent to the treatment at issue, seen in light of the evidence in the case, is a failure in their duty to John. Moreover, it is submitted that this failure has been to such an extent that John's safety or welfare is "likely" to be prejudicially affected, in the sense that there is a real possibility that cannot sensibly be ignored having regard to the nature and gravity of the harm feared in this case.

**88.** However, it is submitted that even if the threshold for intervention was assessed according to the old test for interference under Article 42.5, that would make no difference to the outcome. The Guardian refers to the judgments of Denham J, Murphy J, Murray J and Hardiman J in *North Western Health Board v. H.M.* [2001] 3 I.R. 622 ("*NWHB*"), noting that they imposed a high threshold for State intervention under Article 42.5 and represent a substantial defence of parental autonomy. However, the Guardian submits that even if the ambit of Article 42A.2.1° is interpreted by reference to the narrow concept of "exceptional circumstances" posited by the majority in that case, this would have no impact on the outcome of this appeal: the facts of this case clearly fall within the "exceptional circumstances" discussed in each of the judgments in *NWHB*.

**89.** The Guardian accepts that the State can only interfere in exceptional circumstances and by proportionate means as provided by law. It is submitted that the latter requirement is satisfied in this case by s. 9 of the 1961 Act and that, on any objective assessment, the means of interference permitted were proportionate. It is submitted that on any assessment of the constitutional issues in light of the facts of this case, the threshold for State intervention was satisfied.

**90.** As for the issues concerning the use of the wardship jurisdiction, the Guardian submits that Irvine P correctly assessed John's best interests within the rubric of an inquiry. Bringing John into wardship did not deprive him of his rights; rather, it provided a mechanism to protect them. It is submitted that the High Court adhered to natural justice and applied fair procedures, including by deferring judgment in light of John's change in clinical condition and hearing further evidence after that point. It is submitted that the President was correct to leave over the question of prematurity until the conclusion of the evidence; this was not evidence of prejudgment, nor did she in any way attenuate her analysis of the ultimate issues having brought John into wardship on the 15th September. It is further submitted that taking John into wardship at that stage had no substantive consequences until the making of the Court's Order following judgment on the 18th November.

**91.** The Guardian observes that there is a divergence in the jurisprudence on the issue of whether or not proceedings of this nature should be treated as an inquiry or a *lis inter partes* and notes that the guidance of this Court would be of assistance in this regard. The Guardian is of the view that an inquiry, with due regard for fair procedures, is the appropriate mode of trial: adversarial proceedings are not an appropriate tool by which to establish a person's best interests and may lead to the exclusion of relevant evidence to which a judge sitting alone would be able to attribute appropriate weight. The Guardian further notes that there is a divergence in the authorities concerning the proper standard of proof but submits that it was appropriate for the Court to utilise the standard of "clear and convincing evidence".

**92.** Finally, the Guardian submits that the care plan which the hospital was seeking does not equate to an acceleration of John's death. According to the evidence, palliative care prolongs life. It is permissible to administer medication with potential side effects with the intention of palliating pain; what the law forbids is doing so with the intention of ending life. Moreover, the authorities make clear that the right to life does not translate to an obligation to maintain life at all costs. The presumption in favour of maintaining life can be rebutted. The Guardian submits that it would be helpful for this Court to clarify the position as to the legal obligations of the clinicians in the circumstances of this case.

*Submissions on behalf of the Attorney General*

**93.** The Attorney General does not advocate for or against a particular outcome on this appeal but submits that if this Court concludes that the reliefs sought by the Respondents do not constitute treatment that would terminate life or accelerate death then there is a constitutional basis on which to grant the reliefs sought by the Respondents.

**94.** The Attorney General submits that the Court's exercise of its wardship jurisdiction is subject only to the provisions of the Constitution and that its prime and paramount consideration must be the best interests of the ward. It is submitted that there are a number of factual similarities between this case and *H.S.E. v. J.M. (a Ward of Court)* [2017] IEHC 399, [2018] 1 I.R. 688, where Kelly P, in granting the relief sought to withhold certain medical treatment over the objections of the parents, held that the best interests test does not equate to a question of whether it would be in the best interests of a patient that he should or should not die.

**95.** The Attorney General submits that if this Court concludes that John is properly in wardship then there is jurisdiction to grant the reliefs sought on the basis of the best interests test; however, if the Court is of the view that he is not properly in wardship, a separate question arises as to the basis on which the Court can override the wishes of his parents. The Attorney General, in his written submissions, set out the different views of the majority in *NWHB* as to when it would be permissible for a court to intervene. He did not offer a definitive view on which position might be correct, but observed that even if Article 42A did not alter the test for intervention in any way, the test of Denham J in *NWHB*, if preferred by this Court, would appear to offer a basis on which the Court could override John's parents' wishes on the basis of an "immediate threat to the health" of John.

**96.** The Attorney notes that there has been relatively little judicial discussion of the nature of the rights conferred by Article 42A since that provision was adopted, but refers to the Article as "a constitutional recalibration to provide for a more child-orientated approach to matters of constitutional interpretation". He submits that the addition of the words "to such extent that the safety or welfare of any of their children is likely to be prejudicially affected" in Article 42A imports for the first time a constitutionally prescribed standard against which the parental failure of duty is to be assessed. The degree of failure required under Article 42.5 was very high, but that new Article changes the context through which parental failure is to be considered. The removal of the words "for physical or moral reasons" connotes a shift in direction from the concept of a parental "moral failing" to a more child-centric approach focussed on the welfare of the child and with the needs of the child at the forefront. The Attorney further raised the question of whether Article 42A.1 may provide an additional constitutional basis for State intervention in parental decision-making other than in the manner provided for by Article 42A.2.1°.

**97.** The Attorney General notes that the Respondents rely on s. 9 of the 1961 Act as satisfying the requirement that any intervention be "as provided by law", insofar as that

provision is the legislative basis for wardship. The Attorney raises the question of whether a separate legislative basis would be required to activate Article 42A.2.1° if this Court is not satisfied that John ought to have been admitted to wardship and suggests that resort to the Court's inherent jurisdiction may be necessary where fundamental constitutional rights are in issue and statute law does not provide a remedy.

**98.** The Attorney also made submissions in respect of which of John's rights are engaged and thereby justify State intervention, including, *inter alia*, his right to life, including the right to die a natural death; his right to suitable care and treatment; his rights to privacy and bodily integrity; his right to be treated with dignity and his right to refuse medical care or treatment. The Attorney points to *Re S.R. (a Ward of Court)* [2012] IEHC 2, [2012] 1 I.R. 305, where a risk of pain to the child ward was an important consideration in the High Court (Kearns P) making an order that the child should not be resuscitated in the event of an acute deterioration requiring invasive treatment where the medical advice was that such a course was in the best interests of the child; this judgment was approved by O'Malley J in *An Irish Hospital v R.F. (a minor)* [2015] IEHC 603, [2015] 2 I.R. 377 and pain was also an important consideration for Kelly P in *H.S.E. v. J.M. (a Ward of Court)* [2017] IEHC 399, [2018] 1 I.R. 688. Having regard to these and other authorities, the Attorney submits that the prospective pain which may be suffered by John is a most relevant consideration in balancing his rights with those of his parents.

*Submissions on behalf of IHREC*

**99.** The Commission did not take a view on what treatment John should or should not receive. It submits that his parents' right to make decisions for him, and his corresponding right that that is respected, should only be intruded on by the State in exceptional circumstances and that this should require very clear and compelling justification.

**100.** IHREC considers that the main issues in this appeal are (i) whether the exercise of wardship was a proportionate interference with John's parents' right to make decisions on his behalf and his corresponding right to have his parents make those decisions, and (ii) whether the High Court correctly applied Article 42A of the Constitution and the "best interests" test.

**101.** The Commission submitted that the decision in respect of John's treatment must be made in a manner which places his rights and those of his parents at the centre of the analysis. This analysis must apply a nuanced assessment of the specific constitutional rights involved and ensure that the proportionality standard in Article 42A.2.1° is complied with. The relevant rights of the child include his right to life, the right to the care and company of

his parents, the right to have his parents make decisions on his behalf, his right to protection of the person (including the rights to bodily integrity and freedom from inhuman treatment) and his right to privacy, including autonomy. These rights are underpinned by the constitutional value of dignity. Any intervention that overrides that parental decision-making capacity, so affecting their rights and that of the child, must be justified in terms of an identified, and prevailing, constitutional right of the child.

**102.** The Commission referred to the strong protection of parental decision-making provided by Article 42A.2.1° and noted that any interference therewith must be proportionate (per *Heaney v. Ireland* [1994] 3 I.R. 593). It notes that the threshold requirement of intervention only in "exceptional cases" remains the same in Article 42A as it did under the old Article 42.5, and to that extent the case law in respect of that phrase remains relevant. IHREC is of the view that it is best to conceptualise Article 42A.2.1° not as *lowering* the threshold for State intervention, but rather as *changing the approach*. However, the Commission does acknowledge an alteration insofar as the new Article 42A.2.1° dispenses with the qualifiers "physical and moral reasons" while retaining the reference to a "failure in duty". In its view, this indicates that the test for State intervention no longer requires any wrongdoing or culpability: fault is not the issue, rather the objective is fulfilment of the duty of protection. The Commission submits that the High Court was incorrect in trying to determine the best interests of the child subjectively: it says that the "bests interests" test must be applied objectively, albeit having regard to the child's likely wishes.

**103.** Much of the Commission's oral submissions focussed on the use of wardship in these proceedings. It observed that the legal criteria to be applied, and the procedures to be followed, before making a child a ward of court are unclear, which raises an issue as to whether they are "provided by law". It states that clarity is required as to how a child is admitted to wardship over parental objection. The Commission questions whether wardship was the least restrictive option available, as the High Court has jurisdiction to grant declaratory or positive orders to vindicate constitutional rights outside of wardship proceedings. The Commission also queries the proportionality of the order of the High Court, which it describes as being "in the widest terms".

**Discussion/Decision**

**104.** In broad terms, I propose to discuss the issues arising in the following sequence:

I. The wardship process

II. Article 41 rights and the non-marital family

III. The rights of a non-marital family
IV. Medical treatment – general comments: incapacity/disability
V. Medical treatment – incapacity/disability
VI. Threshold for State intervention
VII. The proper order
VIII. Conclusion

## I. *The Wardship Process*

*Origins and Source*

**105.** To trace the origins of wardship powers and the separate, yet related, jurisdiction of *parens patriae,* one can go back as far as the thirteenth century. The history of the *parens patriae* jurisdiction has been the subject of some debate; regrettably this is not the appropriate forum in which to explore the depths of the competing theories (see, for example, J Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origins' (1994) 14 *Oxford Journal of Legal Studies* 159). It will suffice to borrow the phrase used by Sir Henry Theobald (H.S. Theobald, *The Law Relating to Lunacy* (Stevens & Sons, 1924) at p. iii) that the origin of the Crown's *parens patriae* jurisdiction over the mentally incompetent "is lost in the mists of antiquity".

**106.** The jurisdiction was originally founded on and derived from the royal prerogatives. The basis of the Crown's intervention was that the monarch enjoyed a personal pre-eminence; perfection was ascribed to him or her as the case may, and one aspect of this was exercising special remedial justice where necessary. *Parens patriae* was seen as the monarch's 'parental duty' and responsibility over all who in his or her view required protection and care. It seems generally accepted that the earliest exercise of the jurisdiction was by the Lord Chancellor, to whom the ruling monarch would delegate the power, by way of Royal sign-manual, the essential terms of which are quoted in *In Re Birch* (1892) 29 L.R. Ir. 274 at p. 275. At that time the power was exercised over those who were seen as mentally incompetent or as part of the "afflicted class" (per Lord Ashbourne, at p.276), be they idiots or lunatics and whether so found by legal process or not. Needless to say, this terminology, and even the title of the report (In Re Birch (a Lunatic)), should be seen only as a reflection of its time and thankfully has long since fallen into disrepute and disuse. Halsbury's Laws of England tell us that there was always a special protection for infants under the same *parens patriae* power (Halsbury, 3rd ed, Vol. 21 p. 216).

**107.** A separate structure or arrangement for the wardship of children also existed in the feudal system of tenures. These powers were borne out of the king's ancient feudal rights, rather than any concern for vulnerable children. Income from the estates of infant heirs went to the monarch, until such time as the infant reached the age of majority. In 1540, Henry VIII established the Court of Wards; this then became the Court of Wards and Liveries in 1542. It was to become one of the House of Tudors' most lucrative ministries, which was the entire motivation for its involvement, a point underscored by the fact that the Lord Chancellor retained jurisdiction over wards who were not profitable to the sovereign. In 1646, when the abolition of feudal tenures occurred, the Court of Wards and Liveries became obsolete. It was not until 1660, however, that it was formally abolished.

**108.** Following this, the jurisdiction was transferred back to the Lord Chancellor in its entirety and the entanglement of wardship and *parens patriae* became embedded. Many commentators, including La Forest J. in *Re Eve* [1986] 2 S.C.R. 388, have said that, at that juncture, the concept of wardship should have disappeared entirely; however, it was retained as part of the Lord Chancellor's duties under *parens patriae*. In fact, La Forest J. cited an old Irish Chancery case as the basis for this point, *Morgan v. Dillon* (1724) 9 Mod. 135.

**109.** The following statement of Lord Somers LC is one of the earlier summaries of the journey which the jurisdiction took:

> "In this court there were several things that belonged to the King as *Pater patriae*, and fell under the care and direction of this court, as charities, infants, idiots, lunatics, etc., afterwards such of them as were of profit and advantage to the King were removed to the *Court of Wards* by the statute; but upon the dissolution of that court, came back again to the Chancery…" (*Falkland (Lord) v. Bertie* (1696) 23 E.R. 814)

*Scope and ambit of the jurisdiction*

**110.** The scope and ambit of the power is an entirely different matter from the legal foundation upon which it rests, a point which I will return to in a moment. It is perfectly legitimate and in fact, extremely instructive, to examine the jurisdiction as it has been exercised since its inception in order to define the broad parameters of that power. The breadth of the jurisdiction exercisable by the Lord Chancellor was significant. This fact has been observed several times in the course of judicial commentary. The jurisdiction was never curtailed by statute. In a passage which was quoted by Hamilton C.J. in the case of *In Re*

*Ward (withholding medical treatment) (No. 2)* [1996] 2 I.R. 79 at pp. 104-105, the words of Ashbourne LC appear again, this time from his decision *In re Godfrey* (1892) 29 L.R. Ir. 278 at p. 279:

> "The power given by the Queen's Sign-manual creates a high and responsible duty in the Lord Chancellor towards these afflicted persons, calling on him to act on their behalf whenever it may come to his notice that their liberty or happiness require his intervention, and this beneficent jurisdiction is not confined to those so found by process of law, or narrowed to any special class. The power and duty so given and created afford in this case an illustration of the most salutary and protective exercise of the prerogative of the Sovereign."

**111.** Judgment in that case was delivered shortly after the Lord Chancellor gave judgment *In re Birch* (1892) 29 L.R. Ir. 274, from which the following statement was endorsed *In re Godfrey*:

> "That high prerogative duty is delegated to the Lord Chancellor, and there is no statute which in the slightest degree lessens his duty or frees him from the responsibility of exercising that parental care and directing such inquires and examinations as justice to the idiots and lunatics may require. The Queen puts the care and commitment of the custody of idiots and lunatics before the care of their estates, thus showing with unmistakable clearness that the first and highest care of the Lord Chancellor should be given to the personal treatment of this afflicted class." (p. 276 of the report).

In fact, in the decades which followed this country's independence and continuing up to the substantive statutory interventions that came about via the Children Act 1989 and the Mental Capacity Act 2005, the courts of England and Wales never questioned this source of the court's jurisdiction.

*The wardship jurisdiction in Ireland*

**112.** In Ireland, the jurisdiction was likewise exercisable by the Lord Chancellor, that is the Lord High Chancellor of Ireland, who is described in s. 2 of the Lunacy (Regulation) Act 1871 ("the 1871 Act") as being he who "for the time being [is] intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind". A series of successive transfers of this power then commenced; however, the 1871 Act remained in force, conferring upon

whomever was discharging the power further statutory rights in relation to the administration of the estates of persons of unsound mind. By virtue of s. 4 of the Lunacy (Ireland) Act 1901, the power was made exercisable also by all the judges of the Supreme Court. Following the establishment of the Supreme Court of Judicature of Southern Ireland, the power was executed by the Lord Chief Justice of Ireland, by virtue of art. 5(2) of the Supreme Court of Judicature (Southern Ireland) Order 1921. Following the enactment of the 1922 Constitution, s. 19(1) of the Courts of Justice Act 1924 transferred the power to the Chief Justice of the Irish Free State. Section 9 of the Courts of Justice Act 1936 further "vested and transferred" the power to the President of the High Court or any judge of the High Court to whom it was assigned, before finally the power was vested in the President of the High Court by way of s. 9 of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act"). As can be seen the power transitioned from being "transferred" to being "vested and transferred", and ultimately being fully "vested" by the 1961 Act. There has been no further statutory intervention since then. Notwithstanding these provisions, the nature and extent of the jurisdiction remains the same as it has been since its inception. It should be noted that s. 9 does not make a distinction between adults who may be of unsound mind and minors and gives no statutory guidance on the manner in which the power is exercisable.

**113.** The 1871 Act remains in force, being now 150 years old. This Act has several limitations, due in large part to its antiquity. Its provisions are structured on the basis of admission to wardship in order to manage and safeguard the property that the ward has or may be entitled to. No reference to minors is made in the 1871 Act; thus, it must be assumed that it was not intended to apply to them, but only to idiots, lunatics and persons of unsound mind. Order 67 of the Rules of the Superior Courts ("RSC") complements this Act in terms of procedure for wardship proceedings other than those which relate to minors. Order 65 RSC is the procedural guide for the wardship of minors and is therefore the only specific statutory guidance available in respect of minors.

**114.** A good deal of comment, perhaps more than debate, has taken place as to the current basis of this jurisdiction, and in particular whether, in light of both the 1922 and 1937 Constitution, the royal prerogative can still be said to be its foundation. O'Neill doubts that it can, stating that the royal prerogative may have lapsed post-1922 (O'Neill, *Wards of Court in Ireland* (First Law, 2004), p. 7). In *Byrne v. Ireland* [1972] I.R 241, a different aspect of the royal prerogative came under discussion, specifically State immunity from suit in tort law. Walsh J was unequivocal in his view that since such prerogatives were based on the King as the personification of the State, they could not have survived the constitutional changes in

1922, as they were "based on concepts expressly repudiated by Article 2 of that Constitution" (p. 274), which was to the effect that all powers of government and all authority in Ireland derived from the People and that the same could only be exercised through the organisations established by or under and in accordance with that Constitution. The provisions of these Articles were, to the mind of the learned judge, an express rejection of the idea that any powers of government could derive from the King.

**115.** The high point of principle decided in *Byrne v. Ireland* was fully affirmed in *Webb v. Ireland* [1988] I.R. 353; however, Finlay C.J. gave a slightly different view about the possibility of upholding certain other prerogative rights, in particular the right of treasure trove. As part of a modern democratic State, there was a general ingredient of sovereignty in the State which meant that certain limited aspects of the old prerogatives needed to be upheld but on the basis that such should be regarded as an inherent attribute of the sovereignty of the State as reflected, in the context of that case, in Article 11 of the 1922 Constitution (and now as intrinsic to and derived from Article 5 of the 1937 Constitution). O'Neill suggests that the Chief Justice saw these aspects as being "reincarnated" by virtue of Article 11 of the Constitution of Saorstát Eireann (O'Neill, *Wards of Court in Ireland* (First Law, 2004). Even if this was so, it does not detract from his full agreement with the views expressed by Walsh J in *Byrne v. Ireland* about the survival of the prerogatives post-1922.

**116.** *Eastern Health Board v. M.K.* [1999] 2 I.R. 99 also touched on this discussion. Whilst the decision will be referred to in greater detail a little later, it is worth noting that on this point, Barrington J. had this to say:

> "The statement that the sovereign is '*parens patriae*' is probably a harmless piece of rhetoric and may describe the origins of the wardship jurisdiction in the royal prerogative. But it is a concept which has no place in a modern democratic republic."
> (p. 117)

I fully agree with the view expressed by the learned judge. As Ireland is a sovereign, independent, democratic State (Article 5 of the 1937 Constitution; similarly Article 2 of its predecessor), and since all powers of government derive from the people, *parens patriae* is a most inapt description of the role of the High Court in wardship matters. It would in fact perhaps be more appropriate to describe the jurisdiction as "the section 9 jurisdiction" or "the statutory wardship jurisdiction", or by other such similar name.

**117.** Accordingly, there can be no doubt but that the royal prerogative did not survive the 1922 Constitution and, evidently, did not survive the current Constitution. As a jurisdictional

foundation, the Crown has neither a legal nor constitutional position within this country: this is a certainty. Therefore, that historical basis upon which the *parens patriae* jurisdiction existed is no longer extant. Disregarding any constitutional input for a moment, it is clear from the legislative provisions above mentioned that s. 9 of the 1961 Act is now the foundation for this jurisdiction. Since this Act enjoys the presumption of constitutionality and has never been successfully challenged, I do not entertain any serious doubt as to its existence in this jurisdiction. Whilst it is obvious that its legal and constitutional basis has changed quite dramatically, nonetheless, it is equally clear that it has been legitimately carried forward through, and is now integrated in, legislation, enacted by the laws of this State.

**118.** The scope or extent of its jurisdiction is a point entirely separate from its existence. Both were aptly summarised by Finlay C.J. *In re D.* [1987] I.R. 449 ("*In re D.*"), where he said:

> "I am satisfied that this section must be construed as vesting a jurisdiction in the High Court, as both sub-sections 1 and 2 of it describe it as doing, the extent of which jurisdiction is described and identified by subclauses (a) and (b) by reference to jurisdictions formerly exercised, and by subclause (c) by reference to jurisdictions previously vested in the former High Court.
>
> It does not, as did s. 19 of the Act of 1924, transfer any jurisdiction but rather directly vests it." (p. 453)

This type of drafting is not uncommon: it is designed for economy of purpose. If, instead of adopting that approach, the Oireachtas had, at the time of drafting, painstakingly described the scope and ambit of the jurisdiction, rather than opting for a shorthand, before declaring it vested in the High Court, either within the section or as part of a schedule, could it seriously be suggested that such would not have the force of law in this jurisdiction and would continue to do so subject to any successful constitutional challenge? I think not. Finally, I do not accept that the description of the section "as a regulatory, jurisdictional, vesting provision" (*Health Service Executive v. A.M.* [2019] IESC 3, [2019] 2 I.R. 115 at p. 137: "*HSE v. A.M.*"), was in any way intended to affect the proposition as outlined, particularly as the judgment in *In re D.* is extensively quoted and relied upon in that case.

**119.** There is one final point to mention, arising from my decision in *O'Farrell v. Governor of Portlaoise Prison* [2016] IESC 37, [2016] 3 IR 619. At p. 709 I have referred to the decision of Murray C.J. in *N v. Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 374 in which he made a series of interim orders in respect of the custody of a child, which he considered necessary as part of the protection of the child's welfare. This child had been in the custody of prospective adoptive parents before her birth parents had made a successful *habeas corpus* application after withdrawing their consent to the adoption. In referring to this as a possible exercise of the *parens patriae*, I was doing so purely to explain how in the case of a child of very tender age, this Court, whilst agreeing that his or her detention was unlawful, did not order her immediate return as would be expected in a successful *habeas corpus* application; rather, it made provision for conditional reunification with the parents.

*Order 65 RSC: Procedures for wardship of minors*

**120.** As above mentioned, Order 67 and Order 65 (RSC) provide procedural guidance for the manner in which wardship proceedings are to be conducted. It must be said that the procedures contained in Order 67 are a good deal more informative than those of Order 65. Order 65, rule 1 simply states that proceedings to make a minor a ward of Court shall be commenced by originating summons. Rule 4 states that the affidavit grounding the summons shall state a number of basic pieces of information, including full particulars as to the proposals for the care, education and maintenance of the minor and whether there is a proposed testamentary guardian willing to act as such. Rule 7 dictates that upon turning 18, the minor shall apply for an order discharging them from wardship and for an inquiry as to the funds in Court or any property they may be entitled to. This is the bulk of specific procedural guidance available for wardship proceedings which relate to minors.

**121.** O'Neill notes that Order 65 does not set out any specific duties for the guardian of a minor (O'Neill, *Wards of Court in Ireland* (First Law, 2004) at p. 108). The Committee appointed in respect of an adult ward does not possess inherent decision-making powers. Their role is at all times under supervision of the High Court through the Registrar of the Wards of Court office. It can be assumed that, like the Committee, the appointed guardian of a minor has no independent power.

*Authorities dealing with Admission to Wardship*

**122.** The availability of modern case law from this jurisdiction which deals specifically with admission into wardship (as opposed to any decisions made thereafter once the subject person has been made a ward of court) is limited. This is particularly so with regard to minors.

**123.** To cast one's eye further back to much older authorities, *In re Meades, Minors* (1871) 5 I.R Eq. 98 was a decision of O'Hagan LC in which the petitioner was the maternal aunt of the children in question: she petitioned the court, seeking, first, to have them taken into wardship, and, second, seeking an order that would restrain their father from educating them in his own faith. Purely as an aside, Mr. Palles Q.C. is listed as representing the petitioner and I suspect this was in fact the great Chief Baron Palles himself. Their father was a Protestant and their mother, who had died, had been Roman Catholic. The analysis of the Lord Chancellor and the basis upon which the case was dealt with very much focused on the latter of the orders sought, namely, whether could you deprive a father of his right to educate the children as he so wished. He was entirely satisfied that the *parens patriae* power could justify the making of orders restricting parental authority. This he found, however, should not occur unless the most severe circumstances presented, for example, where the happiness and welfare of the child was at risk. He also stated that a father's authority was a trust, rather than a power. He continued at p. 103:

> "… if the interests of the child cannot be secured, consistently with its unfettered action, this Court will interfere to see that those interests are legitimately guarded, either by its absolute suspension, or the imposition of conditions on its exercise."

Ultimately, he dismissed the petition entirely, without making any order. The question of taking the children into wardship does not appear to have been seriously considered and the possibility of imposing conditions on their father's parental authority was entirely separate from the antecedent question.

**124.** There were other references made by O'Hagan LC to cases such as *Wellesley v. Duke of Beaufort* [1824-34] All E.R. Rep. 198 and *De Manneville v. De Manneville* (1804) 10 Ves. 52; however, while each of these contain some discussion by Lord Eldon as to the origins and nature of the *parens patriae* jurisdiction, both cases again concerned children who had already been taken into wardship and the orders which should be made post-admission. Finally, *In re Edwards* (1879) 10 Ch. D. 605 concerned an infant ward who was then alleged to have become of unsound mind. The question considered by the English Court of Appeal

was whether the court had jurisdiction to inquire whether he was in fact of unsound mind. It was concluded that any physical or mental disability would not alter the jurisdiction that the court held over the infant ward. All of these cases in my view concern questions that only arise once a minor has already been admitted to wardship and have limited relevance to the questions that arise before that point. Similarly so with *In re Westby Minors (No. 2)* [1934] I.R. 311, where the education of an infant ward was considered. The judgment of the former Supreme Court centres on questions arising after admission to wardship and thus I do not see it as being relevant to the situation at hand.

**125.** I have had the benefit of reading, in draft form, the supplemental judgment of Baker J which deals with wardship alone. In coming to the conclusion that an order admitting a minor to wardship could be made in a 'limited' fashion, confining the powers of the court to 'certain specified areas', she essentially so found on the basis that the wardship jurisdiction is equitable and discretionary.

**126.** Largely on account of the fact that prior to 1875 in England, and 1877 in Ireland, the wardship jurisdiction was exercised by the Court of Chancery, it is suggested that the equitable principles that ordained that court can at least to some extent be infused into this type of jurisdiction. In support, reference is made to *In re D.* [1987] I.R. 449, and also to *Health Service Executive. v. A.M.* [2019] IESC 3, [2019] 2 I.R. 115 (para. 30), where MacMenamin J. said that "[a]dmission to wardship is a discretionary order". I regret that this is a view which I cannot share on either suggested basis.

**127.** There is no doubt but that an essential feature of the Court of Chancery was its equitable jurisdiction, its flexibility and its ultimate command to do what is just and proper in the circumstances. To that extent, it was significantly different from the old Court of Kings Bench, and to a lesser extent, of Common Pleas, where, in the main, rules were rules which were applied in a rigid and dogmatic way. However, it is important to understand what this flexibility entailed. The multitude of case law and the numerous publications dealing with every aspect of this topic have exhaustively set out what the situation is. I entirely agree that a considerable amount of the Court's case law could be described as involving the making of "discretionary orders", but the nature of that needs to be understood. It did not involve an untrammelled recourse to whatever given judge felt was proper on the day: it was highly regulated in accordance with well-established rules and principles, even if those were applied in a merit-based way and to diverse and varying events. A simple example will demonstrate how this element of its jurisprudence worked. On an application for specific performance or an injunction, the courts had a discretion to refuse either order and in its place, if thought

appropriate, to make an award of damages. Likewise, it had some flexibility in dealing with cases such as rescission, restitution, or where broad estoppel principles were in play: even then, however, established rules had to apply. That versatility in its approach is not, in my view, in play in the wardship jurisdiction, and none of the authorities cited support such a proposition.

**128.** In the context under current discussion, I am not sure what the phrase "discretionary" means. I entirely accept that simply because an application is made, the court is not obliged to accede to it and admit the subject person into wardship. But simply to say that, on the hearing of such an application, the court has a broad discretion in its approach or in the structure of its order, is in my view both inaccurate and incorrect. In referring to "an order", I am specifically identifying "an admission order" and not subsequent orders that are made *intra* wardship. In my view, the correct meaning of, and the ambit of, that term can be found in a judgment of this Court itself in *In re D.* (para. 118 supra).

**129.** It will be recalled that the essential question in that case was whether a person who had no material assets could nonetheless be admitted into wardship. The court concluded, on the basis of *In Re Birch* (1892) 29 L.R. Ir. 274 and *In re Godfrey* (1892) 29 L.R. Ir. 278, that it had the power to so do. Having said that, it went on to state that the High Court's jurisdiction to take a person into wardship is, and must always, "remain a discretionary jurisdiction"; Finlay C.J., at p. 456 of the report, explained precisely what that meant:

> "Where a person has property it is, in my view, open to the President of the High Court, or to any judge exercising the jurisdiction on his designation, to conclude that wardship is not necessary in any given circumstances either for the protection of that property or of the person of the respondent. Similar considerations must apply to an application brought to admit to wardship a person with no property. One of the matters on which the High Court must then exercise its discretion is as to whether wardship is necessary for the protection of the person who is the respondent in such proceedings."

In my view, what the learned Chief Justice was attempting to convey was that if there was a different basis upon which the asserted concerns could be addressed, external to wardship, then that option would have to be considered by the court as an alternative to wardship. In essence, it was to remind the court that ultimately any order made should be that as being the most "appropriate and proper" to meet the presenting circumstances. I do not believe that any wider point was intended or can legitimately be taken from that decision.

**130.** In fact, an alternative choice did arise in *Health Service Executive v. A.M.* [2019] IESC 3, [2019] 2 I.R. 115. In that case the person in question had a condition that enabled the court to exercise its jurisdiction under the Mental Health Acts 1945-2001, but that condition also satisfied the requirements for wardship. A submission was strongly made on the respondent's behalf that the court in such circumstances was obliged to operate the former to the exclusion of the latter. It was in that context that the reference to admission to wardship being "discretionary" was made (para. 126 above). Indeed, from paras. 54, 58 and 60 of the judgment, it is strikingly clear that MacMenamin J. was endorsing *In re D.*, rather than enlarging or expanding the true meaning of that decision, which I have attempted to articulate. I do not believe, therefore, at the level of principle, that a wardship order can correctly be described as being "discretionary in nature". Neither do I agree that the old Irish and English authorities above described or that reliance upon equitable jurisdiction can support the making of any admission order other than one that has the full impact of seriously interfering with the rights and freedoms of the subject person, and those of his parents if the subject person is a minor.

**131.** The particular point discussed *In re D.* [1987] I.R. 449, whether to admit to wardship a person who had no property or entitlement to property, had been previously examined in a Circuit Court appeal by Keane J., as he then was, in respect of the jurisdiction of the Circuit Court as it related to minors (*State (Bruton) v. Fawsitt* (Unreported, High Court, Keane J., 31st July, 1984). In his concluding paragraph, the learned judge stated:

> "It is, accordingly, clear that the Circuit Court has jurisdiction to make an infant a Ward of Court in any case where it appears to be in the interests of the infant's welfare so to do, and that the exercise of this jurisdiction is not dependent on the possession of property by the infant."

In truth, the case did not dwell on the welfare aspect of the statement just quoted, as the issue arising was jurisdictional. The reference to the child's welfare came, according to Shatter on *Family Law* (2nd Ed, p. 243, fn 200) from a statement made by Finlay P. after giving his decision (*Re J.L. (A Minor)* (Unreported, High Court, March 1978), which is not contained in the written judgment itself. Nonetheless, as I will now set out, the child's welfare appears as the primary concern in the authorities which deal with admission of minors to wardship.

**132.** The decision in *Eastern Health Board v. M.K.* [1999] 2 I.R. 99, mentioned above (para. 116), is the other primary modern authority to which we have been referred on the

point of admitting minors to wardship. The appeal came before this Court in the following way: during proceedings seeking to have children taken into wardship, allegations of sexual abuse against their father were made, and the admissibility of hearsay evidence arose. The High Court ruled that the evidence was admissible, and the case was appealed. So, while this Court dealt with that net hearsay issue, important points were also made about the admission of minors into wardship.

**133.** First, once a person has been taken into wardship, the jurisdiction is generally administrative in nature and is not considered a *lis inter partes*. It is inquisitorial rather than adversarial, concerned with making decisions in the best interests of the ward. This reflects the remarks made by Blayney J at the conclusion of his judgment in *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 I.R. 79 wherein he described the specific position of the High Court in the exercise of its wardship jurisdiction (in the context of applications made after admission): it has the power to seek additional information, call additional witnesses and generally conduct any inquiry it deems necessary. However, Barrington J in *Eastern Health Board v. M.K.* [1999] 2 I.R. 99 stated that certain decisions, such as that to admit a person to wardship, which may affect the constitutional rights of others such as the parents of a child, could not be viewed in the same light, though the welfare of the child would retain its significance (p. 116-117). Such decisions, due to the balance of rights involved, would have the potential to change the nature of the proceedings. Denham J., in the same case, explained that regardless of the unique nature of the High Court's wardship powers, the laws of natural justice could never be excluded, particularly where numerous constitutional rights were engaged. She continued:

> "Where rights are in conflict they must be balanced appropriately. Due process must be observed by the court while exercising this unique jurisdiction. Consequently, if a legal right or a constitutional right is to be limited or taken away by a court this must be done with fair procedures. Fundamental principles such as those enunciated in *In re Haughey* [1971] I.R. 217 apply. There must be fair procedures." (p. 111)

**134.** The other noted point arising from *Eastern Health Board v. M.K.* [1999] 2 I.R. 99 was that Denham J., in the context of the case as had been heard initially by the High Court, stated that the issue for the court in exercising its wardship jurisdiction "was whether the children were at serious risk and should be brought into wardship" (p. 115).

**135.** As can therefore be deduced, there is a dearth of case law that guides us as to the necessary threshold or legal test, other than one of high generality, that may be applicable when admitting a minor to wardship. That the welfare of the child is of paramount importance cannot be doubted, but that must be read subject to and in consideration of the comments of Barrington and Denham JJ in *Eastern Health Board v. M.K.* [1999] 2 I.R. 99, as well as the decisions in *In re D*. [1987] I.R. 449 and *Health Service Executive v. A.M.* [2019] IESC 3, [2019] 2 I.R. 115.

**136.** There is one final case I should mention before moving to discuss the facts and submissions on this appeal, if only because it well illustrates the haphazard status of the procedures and the effect that a lack of proper statutory guidance has on the fairness of the process as it relates to adults or minors, particularly in emergency situations: (*J.M. v. St. Vincent's Hospital* [2003] 1 I.R. 321). The patient in *J.M.*, of African origin, required immediate blood transfusions and a liver transplant, which, if carried out, gave her a 60% chance of survival. She agreed to the transfusions but, ten minutes later, declined. Finnegan P heard the application a few hours later. As compliance with the 1871 Act was too cumbersome and in any event the urgency of the situation did not permit, its application was disregarded. Instead, he took the woman into wardship by exercising the s. 9 (of the 1961 Act) jurisdiction. The application, which covered both wardship and the treatment, was heard on foot of a draft plenary summons, with oral evidence being admitted. The plenary summons and the required affidavits were issued and filed only after the hearing had been completed and judgment delivered: at most, a highly unsatisfactory situation.

*The facts of this case*

**137.** With all of this in mind, I turn now to the facts of the instant case. The submissions made by the parties are summarised in full above. It must be reiterated at the outset, that the significance of a wardship order cannot be understated. This may especially be so in the case of a minor whose parents object. The consequence for such parents (or guardians) is to have their parental autonomy entirely displaced. I make this comment in contemplation of either a marital family or otherwise. It is an order of the utmost importance which engages a number of fundamental rights.

**138.** Secondly, it is, I think, evident from what has been outlined above that the status of the wardship process in respect of minors is quite unsatisfactory as it stands. In fact, the process appears equally deficient in respect of both minors and adults; however, I will limit

the scope of my comments to reflect the subject matter of this appeal. There are several issues that arise from the dearth of legislative provisions which regulate this area. In respect of minors, there is no precise or definitive criteria that dictate when admission to wardship is appropriate. There appears to be no statutory provision that allows anyone other than the ward him/herself to apply for a discharge. There is nothing in Order 65 RSC that illuminates, to any satisfactory level, what the situation is once a ward turns eighteen. Order 65 does not require that pleadings be filed in respect of a wardship application.

*Issue of Principle: the appropriateness of exercising the wardship jurisdiction*

**139.** The primary argument made was that wardship was inappropriate for the situation at hand. The IHREC have said that it was disproportionate in its effect and in the manner in which it encroached on the constitutional rights of John's parents. John's parents and the IHREC have also pointed out that the hospital's desired course of action for John's treatment could have been achieved through other means: namely, a series of declaratory orders, which the High Court would have had the jurisdiction to make.

**140.** As we are aware, the wardship order in this case was sought in very specific circumstances, following John's accident. It is also necessary to be mindful of the additional considerations that are at play, stemming from the fact that he is a child and part of a family. His rights under Article 42A must be considered. Crucially, the provision of Article 42A which provides for State intervention to protect the welfare of a child dictates that any such intervention must be proportionate (Article 42A.2.1°). The intervention of the President of the High Court in this case, through the use of s. 9 of the 1961 Act, was the taking of John into wardship and, thus, it falls to be considered through the prism of Article 42A.2.1°. The question therefore is whether the wardship order was a proportionate means of intervention.

**141.** The proportionality test outlined by Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593 is apt, and contains the following elements:

> "The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-
>
> > (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
> >
> > (b) impair the right as little as possible, and

(c) be such that their effects on rights are proportional to the objective: *Chaulk v. R.* [1990] 3 S.C.R. 1303 at pages 1335 and 1336." (p. 607)

The objective of Irvine P. was to determine, based on the evidence, what course of action John's treatment should take: evidently, therefore, it was of significant and pressing importance. Given the dispute that had arisen between the hospital and his parents, I accept that intervention through the use of s. 9 of the 1961 Act was rationally connected to the objective and was not arbitrary or unfair, or based on irrational considerations.

**142.** I would not accept, however, that the wardship order as made, impaired the rights of John's parents as little as possible. The severity of such an order has been outlined above and therefore is unnecessary to restate. Simply put, all independent decision-making power in respect of every aspect of his being was removed from his parents and put in the hands of the Court. The third element mentioned at subpara. (c) above asks whether the effect of the order on individual rights is proportionate to the objective. It has been fully accepted by all parties that the dispute between John's parents and the hospital is limited to disagreements about the course of future treatment relating to his brain injuries and neurological disorder: though of course the importance of this issue cannot be overstated, that is its extent. It does not spill over into other aspects of his welfare and life which would, if not for the wardship order, remain in the hands of his parents. The confined nature of the questions that needed to be determined by the President, coupled with the extreme encroachment into the constitutional rights of John's parents as a consequence of the order made, lead me to the conclusion that the chosen means of intervention could not be said to satisfy the proportionality requirement of Article 42A.2.1°. It is worth noting that post any decision to admit a person to wardship, it has always been the case that the exercise of the jurisdiction should be limited to the subject matter of that particular application. This is copper-fastened by the constitutional basis outlined in this judgment for limiting an admission order to what is necessary and essential.

**143.** In my view, a more appropriate order would be one admitting John to wardship for the sole purpose of determining questions about his medical treatment that arise due to his injuries and confining the power of the court as such. All other aspects should remain in the hands of his parents. I see this as a more proportionate response. Thus, I would set aside the order of the President in respect of wardship and substitute in its place an order confining the admission to wardship to issues of medical treatment consequent on John's injuries in June 2020.

*Fair Procedures*

**144.** Turning now to the next submission made by John's parents and the IHREC: that the manner in which the hearing transpired, wherein the President made the decision to take John into wardship before hearing any evidence, was in complete contravention of the rules of natural and constitutional justice.

**145.** The entitlement to fair procedures does not begin at hearing; depending on circumstances, there are several stages before that in which procedural fairness may have to be applied. These include such steps as receiving documentation with full details of the case being made by the moving party and obtaining or having the opportunity of obtaining representation. From John's parents' point of view, the preparatory stages of the wardship process did comply with natural justice in that they had the necessary documentation served on them and were both represented. However, the balance of the process, as it related to the decision to take John into wardship, was entirely insufficient from a fair procedures point of view.

**146.** The right to make submissions and the right of reply are equally, if not more critical, in a judicial process such as this, as compared to the earlier steps just mentioned. When left out of the process entirely, as happened, the result is that the essential tenets of fairness were not afforded to John's parents. In addition, however, the way in which the hearing proceeded and the manner in which Irvine P. dealt with the questions surrounding John's treatment plan are of interest and importance on this point.

**147.** It is clear from the undisputed evidence that the admission decision, once made, was never revisited and that the continuing relevance of 'wardship' was restricted to whether or not the Court should exercise only its *in loco parentis* jurisdiction or whether decisions about medical treatment would also have to be looked at through the prism of the relevant constitutional rights at play. The admission to wardship has such a dramatic effect on the individual's rights both as to his person and property (if any) that it is critical that the most fundamental elements of fair procedures should be applied. Those basic principles were not adhered to in this case.

**148.** However, and notwithstanding that, the real focus of the parents' argument is to suggest that the hospital's application should have been dealt with under the Court's declaratory jurisdiction, without admitting their son to wardship, and thus in that way would have been confined solely to the question of medical treatment and would not otherwise have impacted any wider on his person or property. So, notwithstanding the shortcomings in the

fairness of the procedures afforded, I am satisfied, given the manner in which I have dealt with the order as made (para. 143 above), that such an approach meets this objection of the parents.

*Conclusion on wardship*

**149.** Evidently, neither the Wards Office nor the General Solicitor can operate at a functional level if at all times they must treat the constitutional provisions as the primary source of guidance in the implementation of their responsibility. It was unfortunate that during the consultation and preparatory process leading up to the 2015 Act (para. 191 *infra*), the position of minors was not addressed, or at least that a blueprint for future progress was not outlined for this area. Such work did not necessarily have to be an essential part of that undertaking, but part of some enterprise was and remains acutely necessary: in fact, even more so today. Any haphazard and inchoate attempt to tap into the slender remnants of the old jurisdiction is almost certainly going to result in the situation becoming even more unregulated and unprincipled in approach. A new system is urgently called for so as to address the ever-increasing difficulties and anomalies.

## II. *Article 41 and the Non-Marital Family Unit*

**150.** John's parents are not married to each other; his father is a guardian within the meaning of s. 6(1)(a) of the Guardianship of Infants Act 1964, as amended. Their position was not averted to by the parties in the High Court, where Article 41 featured prominently. The point has, however, been taken on this appeal by the Respondents, the Guardian *ad Litem* and the Attorney General, all of whom argue that given the non-marital status of the parents, Article 41 is not in play. It is therefore said that any parental rights at issue derive from Articles 40.3 and 42 of the Constitution, and possibly indirectly from Article 42A, but not via Article 41. This is challenged by John's mother and to a lesser extent, by his father. Therefore, the issue has to be addressed.

**151.** On one approach, this argument can be sidestepped in short order. Article 42A.2.1° of the Constitution, which, as explored below, is the provision through which any State intervention in this case must be navigated, starts by stating that "[i]n exceptional cases, where the parents, *regardless of their marital status*, fail in their duty" (emphasis added). My colleagues, in their joint judgment make the point that the reference to "all children" (in Article 42A.1) and to parental failure regardless of marital status "makes it clear that, so far

as State intervention goes, the Constitution makes no distinction between marital and non-marital families" (para. 134 of the joint judgment of O'Donnell, Dunne, O'Malley and Baker JJ). In other words, I ask, can John's mother and father be considered and regarded as married parents for the purposes of this case?

**152.** Ignoring this question for a moment, I certainly agree, as its express terms so provide, that this is a correct reading of Article 42A.2.1°, which permits State intervention whether the parents are married or not. However, just because intervention is permissible in either circumstance does not mean that the marital status is of no relevance to the underlying rights at play; if my colleagues are taken to mean that marital status is wholly irrelevant both for the fact of permitting intervention and for the court's subsequent analysis in that respect, then I am much more at ease with the situation. However, I cannot be sure that this is what they intend and, even if it is, that a contrary meaning will not be argued for at some future time on the basis of the current prevailing constitutional position, which otherwise treats marital and non-marital families differently. Any intervention carries the potential to interfere with the constitutional rights of the parents. It cannot be presumed that, simply because of Article 42A, the rights of non-married parents are equivalent in scope, breadth and effect to the rights of married couples, in circumstances where the rights of the former may have to be sourced under constitutional provisions different from those contained in Article 41. The question therefore arises as to whether there is any continuing justification for the Constitution to make such a distinction between parents. This to me is an important point, as before any intervention is either sought or approved of, it ought to be possible to ascertain with precision the rights of the parents that are sought to be interfered with. I do not, therefore, consider that necessarily there is "no distinction" between married and non-married families for the purposes of Article 42A.2.1°: intervention is possible either way, but that does not necessarily mean that the marital status will have no bearing on the application.

**153.** Against this backdrop, I would therefore like to venture some views as to the constitutional basis for that distinction. The case law confining Article 41 to the marital family only is long established. In *The State (Nicolaou) v An Bord Uchtála* [1966] I.R. 567 ("*The State* (*Nicolaou)*"), the natural father of a child whose mother had given him up for adoption challenged the Adoption Act 1952, on Article 41 grounds, on the basis that the statute made no provision for consulting him. Henchy J, giving one of the judgments of the Divisional Court, was quite emphatic in rejecting this submission, and in confirming that its provisions applied only to a marriage valid in Irish law. He then continued at p. 622:

"If the solemn guarantees and rights which the Article gives to the family were held to be extended to units of people founded on extra-marital unions, such interpretation would be quite inconsistent with the letter and the spirit of the Article. It would be tantamount to recognition of such units 'as the necessary basis of social order and as indispensable to the welfare of the Nation and the State' (Article 41,1,2). For the State to award equal constitutional protection to the family founded on marriage and the 'family' founded on an extra-marital union would in effect be a disregard of the pledge which the State gives in Article 41,3,1, to guard with special care the institution of marriage." (See *Murray v. Ireland* [1985] I.R. 532 at p. 536, now read subject to Article 41.4)

In the Supreme Court Walsh J, in disposing of the argument, echoed much the same sentiments and went on to say at pp. 643-644 that:

"While it is quite true that unmarried persons cohabiting together and the children of their union may often be referred to as a family and have many, if not all, of the outward appearances of a family, and may indeed for the purposes of a particular law be regarded as such, nevertheless so far as Article 41 is concerned the guarantees therein contained are confined to families based upon marriage." (emphasis added)

See also *O'B. v. S.* [1984] I.R. 316: *J.K. v. V.W.* [1990] 2 I.R. 437: *N. v. Health Service Executive* [2006] IEHC 278, [2006] IESC 60, [2006] 4 I.R. 374, and *J.McD. v. P.L.* [2008 IEHC 96, [2009] IESC 81, [2010] 2 I.R. 199.

**154.** As is clear from the extracts just cited, the essential textual basis for limiting Article 41 rights to the marital family is based on the wording of Article 41.3.1°, which provides that "[t]he State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack". The Constitution does not expressly define the term "Family" but, by virtue of this provision, "the Family" referred to in sections 41.1.1° and 41.1.2° has consistently been interpreted to mean the Family founded on the institution of Marriage. In no other provision of the Article, however, is the same sort of wording found, which must be a fruitful source of further discussion and development in this area. In any event, in the more recent case of *J. McD. v. P.L.* [2009] IESC 81, [2010] 2 I.R. 199, this Court rejected the contention that Irish law recognised the concept of a *de facto* family, reaffirming its traditional view: see the judgments of Denham J (para. 146); Geoghegan J (para. 192) and Fennelly J (paras. 305-311). Non-marital families have therefore been excluded historically and even in the immediate past from the ambit of Article 41; what possible continuing justification can there be for this, I ask?

**155.** It may be said that the text of the Constitution permits of no other interpretation, although I am far from convinced that that is the case. In fact, I am quite satisfied that Article 41.3.1° of the Constitution, read in conjunction with the other relevant provisions, is well capable of a broader meaning and wider understanding if there was a judicial willingness to do so. To date, regrettably, that has not been the case. In any event, it is to point to the obvious that Irish society, and the multiplicity of family groupings within it, has changed radically in the past thirty years as compared to that which habitually prevailed in 1937, or indeed in 1966 when *The State* (*Nicolaou*) was decided. Indeed, it need scarcely be said that the institution of marriage itself, as constitutionally protected, looks markedly different now than it did as recently as 1995. As O'Malley J. has observed, the combined effect of the Amendments in respect of divorce and same-sex marriage has "resulted in a legal institution of marriage that cannot be described in terms of traditional Christian doctrine" (*H.A.H. v. S.A.A.* (Validity of marriage) [2017] IESC 40, [2017] 1 I.R. 372 at para. 128).

**156.** Marriage is a legal status with consequences across wide fields of activity; for tax and inheritance purposes, to name but two. Moreover, marriage, of course, remains an important, constitutionally protected institution and, for many people, continues as a fundamental component of the familial relationship. O'Malley J, said in *H.A.H. v. S.A.A.* in the paragraph immediately following the extract last quoted:

> "129. This does not mean that the concept of marriage no longer has a legal meaning, or that the legal meaning is a concept flexible enough to accommodate any variation no matter how different to the traditional model. Despite the factual reality that many couples do not choose to marry, marriage remains a central feature of Irish life for the majority. The constitutional pledge to guard the institution of marriage with special care remains in place and must be accorded full respect."

**157.** Notwithstanding these observations, made as recently as a few years ago, the fact remains that, whatever about when the Constitution was drafted, the supposition that getting "married" is the sole trigger for whether or not a unit grouping is recognised as a "Family", seems increasingly divorced from the social and cultural realities of a great many people in Ireland: a view shared even by many committed to marriage. There is now a great diversity of family structures, increasing in number, that fulfil the functions once thought to be reserved to the traditional marital model – the proliferation of unmarried cohabiting couples, same-sex couples (married or unmarried), separated and divorced couples, and couples each of whom were married previously, to name but a few, cannot have been envisaged by the drafters of

the Constitution – nor could they imagine that in accordance with the 2016 consensus, there was more than 150,000 cohabitating couples in Ireland, meaning two adults living in a long-term committed relationship, sharing expenses etc., and many with children. And whilst this increasing class, as such, have not hitherto found express protection within the four walls of the Constitution, one might wonder why, given that these groupings, which frequently constitute "*de facto*" families, fulfil the same societal functions as the marital family: therefore, why are they still considered any less worthy of the protections afforded by the "family rights" provisions of Article 41 than their counterparts?

**158.** I suspect that it would jar deeply with many people's understanding of what is meant by a "family" to suggest that, for example, a pair of long-term partners cohabiting with their children, but who, for whatever personal, religious, financial, cultural or other reason, have never married, are not considered a family, even though such a unit in a real sense approximates almost identically to a married family as traditionally understood: the only difference being that the parents in one couple are married and in the other they are not. How can it be said that the former is inimical to social order or that its existence and functioning does not advance the welfare of the nation? I am certainly of the view that such units are "a necessary basis of social order and [are] indispensable to the welfare of the national and the State". To reject that proposition, as Henchy J. did in *The State (Nicolau)*, is to deface reality. In truth, different people may have a different conception of what does or does not constitute a "family"; it is difficult to come up with a precise definition once the ambit is expanded beyond the marital family. I have no doubt, however, that there are a great many unmarried unit groups who would, nonetheless, be considered by the vast majority to be a "family", howsoever defined. Put another way, if the cohabiting couple mentioned at the start of this paragraph were to decide one day to get married, I doubt very much that many people would consider that they were suddenly a family as of the date of their wedding but that they had not been a family the day before.

**159.** Despite my obvious unease at the Article 41 situation, the position still remains that unmarried parents and their child do have significant constitutional rights, together with corresponding obligations, which derive protection from elsewhere in the Constitution, in particular Articles 40.3, 42, 42A, 43 and 44. Take Article 42 as an obvious example. It is difficult to see any logic or reasoned basis why sections 2, 3.1° and 3.2° of Article 42 should not be aligned to section 4 (the provision of free primary education) in the context of their equal application to such a child. Unless this is so, his or her parents do not have the freedom to make the educational choices as guaranteed in section 2 and would not have the safeguard

against State intervention forcing them, against their conscience and lawful preference, to send their children to certain schools or specified type of schools as designated by the State. Furthermore, it would seem an extraordinary dereliction of the State's ultimate responsibility if it could not insist upon the minimum requirements of education specified in Article 42.3 in respect of such children, whereas, subject to its terms, it could by enforceable means insist upon such standards relative to what were once termed "legitimate" children. I am therefore of the view that apart from Article 42.1°, which is the only section which specifically refers to the "Family", the remainder of that provision applies irrespective of parental status.

**160.** Notwithstanding this, it must still be asked whether there is any disadvantage to John's parents, or other similarly situated non-married parents, being deprived of Article 41 rights, which of course apply to both the institution and the individual members of the family. It must be, or at least it must be highly probable, that these particular rights of the family go beyond simply the rights which can be derived from other provisions of the Constitution: if not, its provisions would be either superfluous or redundant. An example might be the authority of each member to defend the institution against external interference. In any event, it seems to me to be clear that, whatever the precise contours of the distinction, the unmarried couple enjoys less constitutional protection than the married couple, by virtue of the prevailing interpretation of what is meant by "the Family" in Article 41. Finally, whilst in this Court's judgments in *Gorry v. Minister for Justice* [2020] IESC 55 there was a difference of views between the judgment of O'Donnell J and my judgment as to the scope and breadth of Article 41 rights, nevertheless, regardless of which view one takes, it is clear that State interference within the zone of familial authority under Article 41 will not lightly be permitted.

*Living Document*:

**161.** One of the techniques of constitutional interpretation is the "living document" approach, according to which the provisions of the Constitution may be given updated meanings in light of contemporary circumstances. This method is reflected clearly in the judgment of Walsh J in *McGee v. Attorney General* [1974] I.R. 284, where he said at p. 319 that "[t]he judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts." An illustration of this approach in the context of the issue of the constitutionality of legislation can be seen in the judgment of

Murray CJ in *A. v. Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88, where the learned Chief Justice stated at pp. 129-130:

> "84. There is another aspect of the Constitution and constitutional interpretation which highlights the amplitude of the issue raised in this case. In *Sinnott v. Minister for Education* [2001] 2 I.R. 545 I refer at p. 680 to the view that the Constitution may be viewed as a living document 'which falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores'. This was a reference to those provisions of the Constitution which might be said to have a dynamic quality of their own where they refer to concepts involving standards and values such as 'personal rights', 'the common good' and 'social justice'. I cited Walsh J. in *McGee v. Attorney General* … Similarly in *The State (Healy) v. Donoghue* [1976] I.R. 325, O'Higgins C.J. observed at p. 347 that '… rights given by the Constitution must be considered in accordance with the concepts of prudence, justice and charity which may gradually change or develop as society changes and develops, and which fall to be interpreted from time to time in accordance with prevailing ideas'. It is entirely conceivable therefore that an Act found to be unconstitutional in this, the 21st century might well have passed constitutional muster in the 1940s or 50s. It would be impossible and absurd for the court to inquire into and identify the point in time when society could have been deemed to have evolved so as to call in question the constitutionality of an Act. The court can decide the issue only on the basis of the facts as it finds them when a case is decided. It would be equally absurd to consider in such circumstances a constitutional invalidity referable to present day mores, irrespective of whether the Act was pre- or post-1937, that all cases finally decided pursuant to it were nothing and of no effect because of the statute being deemed void *ab initio*, when conceivably it might have been considered valid in the 1950s or later."

**162.** That is not to say, of course, that the Constitution must necessarily be divorced from its historical context: Murray J, as he then was, in *Sinnott v. Minister for Education* [2001] 2 I.R. 545 at p. 680 said the following: "Agreeing as I do with the view that the Constitution is a living document which falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores, this does not mean, and I do not think it has ever been so suggested, that it can be divorced from its historical context. Indeed, by definition that which is contemporary is determined by reference to its historical context. On p. 681, the learned judge observed as follows:

> "The late Professor John Kelly, writing in *The Constitution of Ireland 1937-1987* (Institute of Public Administration, 1988) suggested guidelines to achieve a balance as between possible competing claims of the historical approach to constitutional interpretation and the contemporary or 'present-tense' approach. The 'present-tense' or contemporary approach, he suggested is appropriate to standards and values. 'Thus elements like 'personal rights', 'common good', 'social justice', 'equality', and so on, can (indeed can only be) interpreted according to the lights of today as judges perceive and share them.' He felt that on the other hand the historical approach was appropriate 'where some law-based system is in issue, like jury trial, county councils, the census.' This he said was not to suggest that the 'shape of such systems is in every respect fixed in the permafrost of 1937. The courts ought to have some leeway for considering which dimensions of the system are secondary, and, which are so material to traditional constitutional values that a willingness to see them diluted or substantially abolished without a referendum could not be imputed to the enacting electorate'.
>
> There is undoubted value in such an approach which Professor Kelly clearly had in mind as a *guide to*, rather than formal canons of, interpretation." (Emphasis in original)

Certainly, I would agree that some terms, such as those suggested above ("common good", "personal rights" etc) must be understood and applied by reference to contemporary understandings. I would be reluctant to agree that there are many provisions of the Constitution which cannot be interpreted in such a way, save where the Constitution itself expressly and unambiguously assigns a definition. There have been, nonetheless, suggestions that there are limits to the "living document" approach, with Dunne J (then of the High Court) in *Zappone v. Revenue Commissioners* [2008] 2 I.R. 417 noting that such a method of interpretation may be appropriate in the context of ascertaining unenumerated rights but not appropriate if utilised for the purposes of "redefining a right which is implicit in the Constitution and which is clearly understood" (para. 239). If a heretofore unidentified right can be declared by this method of interpretation, it is difficult to see how an express right is immune from such analysis. Nonetheless it must be acknowledged that the boundaries of intervention are not clear cut, although in my view there is productive scope in this regard so

as to ensure that the needs of society, in its contemporary state, are not subordinated in the name of preserving the past.

*Conclusions in respect of family rights*

**163.** *The State (Nicolaou) v. An Bord Uchtála* must clearly be regarded as a product of its time. There is always the risk with any judgment that it will fail to stand up to the test of time as prevailing social mores, attitudes and conventions shift, but it is not unfair to say that certain commentary in that decision has aged particularly poorly. In particular, the comments of Walsh J, that great judge, at p. 641 would be considered quite offensive by a modern audience and surely do not accord with our contemporary understanding of relationship between unmarried fathers and their children. Barrington J in *W. O'R v E.H. (Guardianship)* [1996] 2 I.R. 248 expressed his criticism of the legal reasoning underlying the approach of Walsh J, noting that it amounted to a syllogism (pp. 279-280). Commenting on these observations, the authors of *Kelly: The Irish Constitution* (5th Ed., Bloomsbury Professional, Dublin, 2018) observe at para. 7.7.198 that "Barrington J's critique of the reasoning in *The State (Nicolaou)* which led to this result is compelling and the current constitutional position clearly reflects a stereotypical image of the natural father that does not accord with the reality in a growing number of cases." Similarly, the restriction of the protection of the Article 41 to marital families only has been subjected to much academic criticism over the years. One example will give a flavour:

> "Despite much adverse criticism of *The State (Nicolaou)*, and despite the obvious bias against members of the natural family and especially the natural father contained in the judgments, the cases since 1966 have almost unanimously accepted the *Nicolaou* definition of Family. …
>
> The Irish judiciary … by unnecessarily adopting a restrictive definition of family, have actively discriminated against unmarried fathers, unmarried mothers and illegitimate children. There are approximately 2,000 illegitimate children born each year in Ireland — the courts, however, have denied these children and their parents' rights under Articles 41 and 42. A number of couples, for their own reasons, have decided that they wish their relationship to be based on mutual love and trust rather than the formality of marriage. Their decision is not respected by the courts. Many others have found themselves parents of illegitimate children, and, instead of being offered help and understanding by the courts, have been relegated to the position of

> inferior citizens. They are regarded as being non-persons for the purposes of Articles 41 and 42. It could be argued that it is partly as a result of the courts' non-recognition of "natural" families that Irish people in general still manifest that "harsh and rejecting attitude towards the unmarried mother", so condemned by the Catholic Church. Mr. Justice Walsh, however, has written in Studies: 'The Judge in the administration of justice must take note of major changes in social values and in public attitudes to human feelings'. Yet this is one context where, hitherto, the judges surely appear to have paid insufficient attention to matters of human feeling. Instead, the interests of the 'natural' family have been sacrificed to bolster what can be regarded as old- fashioned prejudice. …" (Emphasis added)

What is most striking about the passage quoted is that it comes from an article written in 1976 (M Staines, "The Concept of 'The Family' under the Irish Constitution", *The Irish Jurist* 1976, 11(2), 223-243). In 2021, the constitutional interpretation of "the Family" as determined in *The State (Nicolaou)* regretfully continues to hold sway.

**164.** The traditional interpretation of Article 41 has long had consequences for unmarried parents; many of these consequences have been ameliorated by statute, but the fact remains that unmarried families are excluded from the fundamental constitutional protections afforded to the Family by Article 41. It is perhaps for this reason that there have been some apparent expressions of judicial disquiet with this situation in more recent years, a move long overdue but one which I strongly welcome. In my judgment in *G.T. v. K.A.O. (Child abduction)* [2007] IESC 55, [2008] 3 I.R. 567, I reviewed some of the earlier authorities in this area, including the judgments of this Court in *J.K. v. V.W.* [1990] 2 I.R. 437 and *W. O'R. v. E.H. (Guardianship)* [1996] 2 I.R. 248 and, focusing on one such parent, namely the natural but unmarried father, stated as follows (pp. 603-604 of the report):

> "50. For my part I am of course bound by the majority judgments of the Supreme Court in both of the above cases. Without in any way questioning that principle, I would like however to make some very brief observations, of my own, on the issue. The vast majority of people might readily agree that parenthood, by itself and no more, may give very little rights, if any, to an unmarried father. Examples of circumstances at this end of the spectrum are numerous and very definitely include, casual encounters, rape, incest, *etc*. But what about a person who fathers a child within an established relationship, and who from the moment of birth, nurtures,

protects and safeguards his child; sometimes to a standard which all too frequently married fathers fail to live up to. As Murphy J. said in *W.O'R. v. E.H. (Guardianship)* [1996] 2 I.R. 248 at p. 286:-

> 'For better or for worse, it is clearly the fact that long-term relationships having many of the characteristics of a family based on marriage have become commonplace. Relationships which would have been the cause of grave embarrassment a generation ago are now widely accepted.'

Indeed, could I say that even in the past decade, such relationships have multiplied and continued to so do. In any event, where the above described circumstances exist, could anyone possibly object to what Finlay C.J. said in *J.K. v. V.W.* [1990] 2 I.R. 437 at p. 447 where he described such a situation as 'bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed'? If, as I respectfully suggest, our society, which is governed by a Constitution which declares the principles of prudence, justice, charity and human dignity, might in its maturity so agree, should there not be a greater recognition of the type of father whom I mention? At a minimum should there not be a means readily available so that such a father, whose children had been removed without forewarning or knowledge, can assert and vindicate his rights? I strongly believe that there should be.

51. Even however within the existing structure, is it altogether accurate to say that a caring and devoted father has only, in respect of his child, a right to apply? Putting it in that way gives the impression that the court seised is the creator of whatever rights the father might ultimately obtain on an application under the Act of 1964. That, in my view, is not correct. Any rights which a father may have are founded upon, and evolve and develop by reason of, his relationship with his child and, if it exists, with the child's mother. Such rights are alive and present before any court hearing and do not merely spring into existence on the application date. In my view, what the court does is to declare such rights rather than even confirming them, much less creating them. It declares them essentially, or in substantial part, on evidence which is largely historical with of course a prospective and future element to govern an orderly and beneficial relationship into the future. Admittedly it is the declaration which presently

> renders such rights lawfully enforceable, but as a matter of fact their existence has been created prior to any court hearing. I therefore feel that a father fulfilling a parenting role of the type which I have described, should be recognised as having rights referable to his child, even if such rights are contingent on a declaratory order. Whether such rights may also be described as 'inchoate rights' is a matter of choice and is largely inconsequential unless put in context.
>
> Could I add that the institution of marriage may have little, if anything, to fear from this approach. In fact one might strongly argue that society, as a 'general rule' should encourage non-marital fathers to act responsibly towards their children and, of course, towards their children's mother. To acknowledge only a 'right to apply' could hardly be seen as dynamic in this regard."

See also the dissenting opinion of McCarthy J. in *J.K. v. V.W.*, and the separate opinion of Barrington J. in *W. O'R. v. E.H.*

**165.** The first and second applicants in *I.R.M. v Minister for Justice and Equality* [2016] IEHC 478 sought to rely on Article 41 rights, with the State responding, *inter alia*, that they enjoyed no rights under Article 41 because they were not married, part of a submission that Humphreys J in the High Court said, at para. 98, "would not have been out of place in the socially repressive Ireland of the 1950s". Referring to the above extract from *G.T. v. K.A.O. (Child abduction)* [2007] IESC 55, [2008] 3 I.R. 567, he stated that "[n]early 10 years on from the expression of that view, the State's submissions are still mired in the middle of the last century while its citizens are voting with their feet and continuing to engage in a much wider range of family relationships than the State is prepared to acknowledge as having constitutional rights" (para. 98). The learned judge continued:

> "99. Previous decisions on the lack of rights for the non-marital family are largely creatures of their time, and society has transformed beyond all recognition since that chain of authority was put in motion. More fundamentally, the constitutional framework within which such decisions were generated has been subjected to massive transformation. Even since the decision in *G.T. v. K.A.O. (Child abduction)* [2007] IESC 55, [2008] 3 I.R. 567, the Twenty-eighth Amendment has required (rather than, as previously phrased, permitted – a fundamental change in entrenchment of European values at constitutional level) a commitment to membership of the European Union, which necessarily involves recognition at constitutional level of the

> wider family rights recognised by arts. 7 and 33 of the EU Charter of Fundamental Rights, albeit in the context of the State's implementation of EU law. The Thirty-first Amendment recognises the natural rights of 'all' children, which in context must have particular reference to the enjoyment of those rights without regard to the marital status of their parents. The Thirty-fourth Amendment has extended the availability of marriage to a range of same-sex relationships in contexts that would have been unthinkable when the Constitution was adopted. To regard this as a mere technical extension of the category of persons who may marry, rather than a quantum leap in the extent to which the Constitution is oriented towards respect and protection for a diversity of private family relationships, is to artificially separate literal wording from history, culture and society. Any one of these developments, and certainly all of them taken together, as well as the fundamental shifts in society since the adoption of the Constitution, in my respectful view warrant a recognition that members of a non-marital relationship, and non-marital parents of both sexes in particular, enjoy acknowledgement of inherent constitutional rights in relation to their children and each other on a wider basis than has been recognised thus far."

I respectfully agree.

**166.** On appeal (*I.R.M. v Minister for Justice* [2018] IESC 14, [2018] 1 I.R. 417), this Court was not required to engage with the substance of this issue. The Court observed that the above comments were *obiter* and that they would be "better described as being general and observational in nature, but not intended to be of binding effect" (para. 235). Moreover, the Court observed that even if the trial judge's comments were intended to be read as other than *obiter dicta*, they could not have the force of precedent on this point in light of the consistent case law of this Court to the contrary stretching back decades and reaffirmed on several recent occasions (para. 239). Nonetheless, the Court, in a 'judgment of the Supreme Court' of which I was a member, did not foreclose on the possibility that this point may be revisited in the future:

> "[240] In dealing with this matter in the manner which it has, this court is not suggesting that if a definitive evidential framework was created within which issues of the type raised by the trial judge became central, the same would not have to be accorded due and proper respect. It cannot be doubted but that Irish society, in many fundamental ways, has changed quite dramatically in a relatively short period of time, with perhaps the greatest intensity in this regard occurring in the last 20 to 25 years or

so. The reasons for such change and their recognition by formal structures such as those referred to by the trial judge can be viewed in a wider context as reflecting the prevailing mores of the majority of its citizens. That being so, at some point in the future the question may arise as to whether the legal and constitutional position of unmarried parents, as between themselves and their children, should be afforded greater recognition than presently exists. In the particular context of immigration that might occur if an unmarried family was to be treated less favourably than a married family."

**167.** More recently still, O'Donnell J, in his judgment for the majority of this Court in *Gorry v. Minister for Justice and Equality* [2020] IESC 55 stated, *inter alia*, as follows at paras. 66-68 of his judgment:

"66. … There is a lawyer's tendency to attempt to reduce the law to clear-cut rules and shorthand phrases. In this field, one example is the development of the concept of the 'marital family' contrasted with the 'non-marital family'. The position is, however, at least in my view, less clear-cut. Other than in Article 41.3 itself, Articles 41 and 42, the two concerned with the treating of the Family, do not differentiate between the marital status of the couple involved or the families that are thereby created. To take one example, parents who are not married are, as I understand it, just as free to provide education in their homes or in private schools as married couples are and cannot be obliged by the State, in violation of their conscience, to send their children to schools established by the State or to any particular school designated by the State. Whatever else may be said about Article 41.2, it has not been suggested that the 'woman' and 'mother' contemplated in those provisions is limited to a married woman even if that was overwhelmingly the model in existence when the Constitution was drafted. It was recognised by Gavan Duffy P. as long ago as 1946 that children had the same rights under the Articles, whether marital or non-marital: *In re M. (an Infant)* [1946] I.R. 334.

67. It is not difficult to see that an intimate relationship of some permanence where the two people treat themselves, and are recognised by others, as a unit in addition to their standing as individuals is something of constitutional value. Such a unit may, if sufficiently durable, be capable of providing the basis of social order

indispensable to the welfare of the nation and the State. It would be wrong and inconsistent with the social order envisaged by the Constitution to disregard it or to treat that unit as being of no value because it was not founded on Marriage. The unfamiliar language of Articles 41 and 42 of the Constitution (and perhaps, as importantly, the somewhat fusty language with which they have become encrusted through repetition in judgments and textbooks over many years) should not distract us from the obvious fact that a basic part of the human personality that is at the core of the protection of the Constitution is the ability to associate with others to form relationships, and particularly close intimate relationships of mutual benefit and support, which, in turn, create stable units which provide a benefit to society.

68. It follows that decisions of the State having an impact on such relationships engage the Constitution. The length and durability of a relationship formed by persons (whether married or not) is something that must be valued and respected by a state which guarantees to protect individuals as human persons. It is not necessary for the exaltation of Marriage that other pair-bonding nurturing relationships be humbled, still less ignored. It is, however, unnecessary to discuss this matter in both the cases under appeal: the parties were married, and it is the fact of marriage which has been relied on in these proceedings."

**168.** Together, these decisions suggest a strong and growing judicial recognition of the wider changes at social and cultural level. It may be that marriage is still the preferred choice for the majority of citizens (O'Malley J. at para. 156 above), but the Constitution is not their preserve: it must be for everyone. Article 41.3.1° is not the sole constitutional provision involved: even though there are several other provisions in play, it is of striking concern that in none of the multiple judgments in this area has there been a serious attempt to harmonise these relevant provisions, or to apply the interpretive approach above mentioned (para. 161). However, the situation is as it is and accordingly, contrary to John's mother's submission, I do not consider that any of these judgments has yet sufficiently altered the historical and traditional position, even if rooted in norms which no longer hold exclusive sway over society, whereby the marital family hitherto recognised in Article 41 is the only type of family which can obtain protection thereunder. I do not believe that such a basic departure, in the face of the decided case law, could be inferred from these judgments, none of which concerned any true frontal attack on the established position. It could be said that the

signposts are pointing in that direction for sure, with the judgment of O'Donnell J in *Gorry* suggesting an alternative construction of Article 41 to that which has been favoured since *The State (Nicolaou).* However, those remarks were clearly *obiter* in the context of that case, where the couples in question were married. It may well be that an alternative interpretation of Article 41 is open to the Court and if it had been fully argued with focused submissions at a detailed textual level, the same would have warranted a serious reconsideration of the existing position, having regard to the decided cases and the circumstances in which this Court can depart from them. However, unsatisfactory though it may seem in some respects, I feel that I am confined to approaching the issues from the perspective that Article 41 rights apply to the marital family only.

**169.** It must be a difficult thing to explain to John's parents, at a human or a legal level, that because they are not married they do not have the same rights as other, married parents would in their situation. While unquestionably their constitutional rights under other Articles are engaged, it is hard to escape the conclusion, on the basis of the case law on the strength of the protections afforded by Article 41 and, in particular, the reduced scope for State interference therewith, that John's parents' position would be stronger, their rights somehow strengthened, if they were married; it would be convenient to treat their rights under Article 40.3, 42 and/or 42A as functionally identical to whatever rights and protections they cannot derive via Article 41, but any such approach would be difficult to reconcile with the text of the Constitution and the decided cases in respect of those provisions.

**170.** Notwithstanding the foregoing, and while I feel that I must approach the case on the basis that Article 41 does not apply, I have considered, as a hypothetical exercise, whether it would make any difference to the outcome of the case if it did. While it could only strengthen the Appellants' hand to have another source of constitutional rights to draw on, I am of the view, having regard to the totality of the circumstances of the case and the evidence before the Court, that even if Article 41 applied, it would have made no difference to the order I propose. Had I considered that this might be a case where the applicability of Article 41 would have been the difference between winning and losing, I would have considered asking the parties for supplemental submissions directed to this issue.

### III. *The Rights of a Non-Marital Family*

**171.** No authority is required for saying that no distinction could possibly exist between a child of a married union and a child of an unmarried union regarding the rights, both expressly mentioned in or derived from, *inter alia*, Article 40.3.1° and 40.3.2° of the

Constitution, which the State has guaranteed to respect and protect and to defend and vindicate as 'far as practicable' and 'as best it may'. Such rights have a vast expanse, as one would imagine, so that the State, in discharge of its constitutional obligations, is in a position to deal with the multiple variety of circumstances which society and its citizens inevitably give rise to. For the purposes of this particular case, those rights can be confined to the matters mentioned previously. There is, however, another source or basis for these rights as they attach to a child of a non-marital union.

**172.** As early as 1946, the High Court saw no reason why the provisions of, at least, Article 42.5 should not apply to a child of a non-married couple. In his judgment in *In re M. (an Infant)* [1946] I.R. 334, Gavin Duffy P. said:

> "Under Irish law, while I do not think that the constitutional guarantee for the family (Art. 41 of the Constitution) avails the mother of an illegitimate child, I regard the innocent little girl as having the same 'natural and imprescriptible rights' (under Art. 42) as a child born in wedlock to religious and moral, intellectual, physical and social education, and her care and upbringing during her coming, formative years must be the decisive consideration in our judgment." (emphasis added) (p. 344)

The emphasised words are clearly those previously found in Article 42.5, with the reference to "religious and moral, intellectual, physical and social education" being referable back to Article 42.1. One could not therefore regard the passage quoted as being exclusively based on Article 42.5, as the express incorporation of the Article 42.1 definition renders a broader application at least possible, if not probable. Whilst *In re Cullinane (an Infant)* [1954] I.R. 270 is sometimes cited in conjunction with the case mentioned, it is clearly and expressly confirmed in that case (p. 279) that neither Articles 41 nor 42 featured.

**173.** These important views of Gavin Duffy P. have not only been followed but have also been added to incrementally in several subsequent decisions of both the High Court and this Court. In *The State (Nicolaou)'s* case, Walsh J. had this to say at p. 642:

> "Article 42, section 5, of the Constitution, while dealing with the case of failure in duty on the part of parents towards the children, speaks of 'the natural and imprescriptible rights of the child.' Those 'natural and imprescriptible rights' cannot be said to be acknowledged by the Constitution as residing only in legitimate children any more than it can be said that the guarantee in section 4 of the Article as to the provision of free primary education excludes illegitimate children. While it is not necessary to explore the full extent of 'the natural and imprescriptible rights of the child' they include the right to 'religious and moral, intellectual, physical and social

education.' An illegitimate child has the same natural rights as a legitimate child though not necessarily the same legal rights."

**174.** In addition to *The State (Nicolaou)*, a flavour of some further endorsements of *In re M. (an Infant)* in subsequent cases can be seen as follows. O'Higgins CJ in *G. v. An Bord Uchtála* [1980] I.R. 32 stated at p. 56 that:

> "Having been born, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State."

Walsh J said much the same (pp. 67 and 68). Henchy J, in the same case, put the matter as follows at pp. 86-87:

> "… all children, whether legitimate or illegitimate, share the common characteristic that they enter life without any responsibility for their status and with an equal claim to what the Constitution expressly or impliedly postulates as the fundamental rights of children. Since Article 42 recognizes the children of a marriage as having a natural and imprescriptible right (as the correlative of their parents' duty) to the provision for them of religious and moral, intellectual, physical and social education, a like personal right should be held to be impliedly accorded to illegitimate children by s. 3 of Article 40. That was the conclusion reached (correctly, in my view) by Gavan Duffy P. in *In re M.*"

The learned judge further made it clear that "the relevant constitutional rights of children are available equally to legitimate and illegitimate children" (p. 87. See also *M. v. M.* (Unreported, High Court, Murphy J, 2nd December,1982) and *W.S. v. An Bord Uchtála* [2009] IEHC 429, [2010] 2 I.R. 530). In the case of *A.O. v. Minister for Justice, Equality and Law Reform (No. 2)* [2012] IEHC 79 ("*A.O.*"), Hogan J. stated:

> "34. It follows, therefore, that all children – irrespective of the marital status of their parents – have the same equal rights to that which the Constitution postulates as representing the fundamental rights of children in a family setting. Any other conclusion would be flagrantly inconsistent with the Constitution's command of equality before the law in Article 40.1 in light of the modern case law on this subject: see, e.g., *An Blascaod Mór Teo. v. Commissioners of Public Work (No. 3)* [2000] 1

> I.R. 6, p. 19, per Barrington J. It might equally be stated (as Henchy J. did in *G. v. An Bord Uchtála*) that this constitutional premise means that non-marital children must be deemed to have an unenumerated personal right by virtue of Article 40.3.1° to have the same rights as children whose parents are married. Therefore, at least insofar as such a child is concerned, it must be exceedingly doubtful if the rights which he or she has are any the less because of the status of his parents."

**175.** On what is above stated, one further observation should be noted: the particular reference in the quotation from Walsh J. (para. 173, above) to Article 42.5 was not directed as to the State's possible intervention, but rather as to *the*, or at least *a*, basis for the existence of the rights identified. To say that the State's duty to vindicate the child's right to education is found in Article 40.3 of the Constitution is not an answer to this substantive point.

**176.** Perhaps at one stage it was felt that since section 5 was part of Article 42, 'the natural and imprescriptible rights' of the child therein referred to were confined to the provision of education as described in Article 42.1. That was rejected by this Court in *The Adoption (No. 2) Bill, 1987* [1989] I.R. 656. At p. 633, the Court, *via* the judgment of Finlay C.J., said at p. 663:

> "Article 42, s. 5 of the Constitution should not, in the view of the Court, be construed as being confined, in its reference to the duty of parents towards their children, to the duty of providing education for them. In the exceptional cases envisaged by that section where a failure in duty has occurred, the State by appropriate means shall endeavour to supply the place of the parents. This must necessarily involve supplying not only the parental duty to educate but also the parental duty to cater for the other personal rights of the child."

Whilst the court went on to say that in any event such rights could also be embedded in Article 40.3, such an observation should not in any way take from this interpretation of Article 42.5.

**177.** Indeed, in several later cases, rights other than education, even in the broadest sense, were said to be captured by this provision. In *F.N. v. Minister for Education* [1995] 1 I.R. 409, where one parent was dead and the other unknown, the High Court held that there was a constitution obligation on the State pursuant to both Article 40.3 and Article 42.5 to provide accommodation in a secure unit for the child, wherein his behavioural issues could be dealt with. *D.T. v. Eastern Health Board* (Unreported, High Court, Geoghegan J, 24th March 1995) was similar in that secure confinement was necessary to prevent the child from taking his

own life. In *North Western Health Board v. H.W.* [2001] 3 I.R. 622, Murphy J, in endorsing *F.N. v. Minister for Education* at p. 730, referred to the health and safety of the child *vis-à-vis* the PKU test. In *N. v. Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 374, Geoghegan J at p. 543 dealt with the general welfare of a child on a day to day basis. Similarly, in *J.G. Staunton* [2013] IEHC 533, [2014] 1 I.R. 390, Hogan J. held that protection from any form of abuse was within the rubric of Article 42.5 (paras. 14 and 15). Consequently, there could be no doubting the breadth of the State's obligation under Article 42.5.

**178.** It follows from the above that several constitutional values emerge when discussing the position of a child and the interrelationship between him and his family. A child, whether of married parents or not, has the right to equality as a human person (Article 40.1); a child has personal rights under Article 40.3.1° and 40.3.2°, as well as the numerous other rights unenumerated in or deducible from the Constitution. Such rights by virtue of Article 42.5 must be regarded as imprescriptible in nature: there being no justification, in view of the case law, in regarding them as anything less. To proceed otherwise in the case of the child of unmarried parents "would be flagrantly inconsistent with the constitutional command of equality before the law in Article 40.1 in light of the modern case law on the topic" (per *A.O. v. Minister for Justice, Equality and Law Reform (No. 2)* [2012] IEHC 79, at para. 34). Whilst a child of a married couple can also call in aid Article 41, the non-applicability of that to John does not in any way limit, curtail or restrict the rights of which I speak, much less accord to them some diminished status on that account. These rights and their designation do not depend on invoking Article 41. Accordingly, a child, *inter alia*, has the right to be fed, cared for, reared and nurtured, given shelter and protection, to be educated, clothed, to have the integrity of his person secured, to have his needs, special or otherwise, looked after, and also to have whatever other rights various circumstances may call for safeguarded. Further, the provisions of Article 42, sections 2, 3.1 and 4 can be invoked by either parent of child.

**179.** Although Henchy J at p. 87 in *G. v. An Bord Uchtala* [1980] I.R. 32, when referring to the corresponding duties and responsibility of parents, was referring to married parents, I cannot accept that such a restriction continues to apply: in my view, those correlative responsibilities are on all parents who individually and/or collectively provide the framework by which both these rights and duties are safeguarded and nourished. This is entirely unsurprising because, even if Article 41 is not applicable, there will nonetheless exist, in the vast majority of cases, a family unit which externally portrays the same characteristics as that envisaged by Article 41. It is there where the child's rights and interests find a natural home.

As Keane J said in *North Western Health Board v. H.W.* [2001] 3 I.R. 622 at p. 687, the love of parents for their children is "the purest and most protective" of all: quite clearly, there is no other relationship where such love is as it is from parent to child, unconditional from birth to death. Although in the case of *N. v. Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 374, the parents were married, nonetheless what Hardiman J said must, for the reasons inherent in his statement, equally apply in the instant situation: "[b]oth according to the natural order, and according to the constitutional order, the rights and duties necessary for those purposes [to nurture and education] are vested in the child's parents … it is the experience of mankind over millennia that they are very generally found in natural parents … This bond is greatly valued by parents and children alike, and by natural siblings in respect of their shared parentage" (p. 502). In my view, that unit must be regarded as the most appropriate forum within which the relevant provisions of the Constitution can find expression. I am therefore entirely satisfied that the observations of Barrington J. in *Eastern Health Board v. M.K.* [1999] 2 I.R. 99 (at p. 117) are equally apt when he said that such a distinction is not "of any real importance in the circumstances of the present case and certainly the rights of the children are the same whether they arise under Article 40.3 or under Article 42 of the Constitution".

**180.** Even though I am satisfied that what I have stated has a constitutional basis, it may very well exist independently of that source. In the neighbouring jurisdiction, which evidently has no constitutional provisions such as those above mentioned, it is highly interesting to note the views of Lord Nicolls of Birkenhead:

> "In this case, as in all cases concerning the upbringing of children, the court seeks to identify the course which is in the best interests of the children. Their welfare is the court's paramount consideration. In reaching its decision the court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests, both in the short term and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this factor. A child should not be removed from the primary care of his or her biological parents without compelling reason. Where such a reason exists the judge should spell this out explicitly." (*In Re G (Children)* [2006] UKHL 43, [2006] 1 W.L.R. 2305, at p. 2307)

Again, whilst the relevant legislative provisions may differ from those in this jurisdiction, the point made is undoubtedly of general importance.

**181.** Such a family unit is therefore where parents exercise responsibility in respect of their children. That being the situation, I cannot identify any reason why the formulation set out by this Court *In re J.H (inf.)* [1985] I.R. 375, drawing on *In re J., an Infant* [1966] I.R. 295, should not form the essential framework within which the relevant constitutional principles should be both considered and applied.

**182.** This cross-fertilisation of rights and duties, arising within the umbrella of the relationship which exists between a child and parent, cannot be disturbed by a third party. including the State, "unless by clear and unquestionable authority of law…" (*Union Pacific Railway Co. v. Botsford* 141 U.S. 250 (1891), as approved by O'Flaherty J. in *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 I.R. 79 at p. 129). Such may be provided for by statute in whatever form that may exist, but would, of course, have to be constitutionally compliant. The same could also, as features significantly in this case, arise from the express provisions of the Constitution itself. These are matters which I will address later in this judgment.

**183.** Although the parents in *In re J.H (inf.)* [1985] I.R. 375 were married, it would constitute a great denial of the position of John, his siblings and their parents, if the "constitutional presumption" postulated in that case could not apply to his situation. I am entirely satisfied that it does. Accordingly, John's family unit has the primary responsibility for making decisions regarding, as in this case, the question of medical treatment. Finally, I have concerns about the existence of the "compelling reasons" test and its relationship to the default provision of Article 42.5, as now Article 42A.2.1°. This issue, I will address later in the judgment. Subject to what I say about "compelling reasons", it is absolutely clear that reliance upon such reasons or on the "default provisions" of Article 42.5 or, as of now, Article 42A.2.1°, can only take place where the child's best interests, previously his welfare, cannot be secured within his family unit. These rights are not of course absolute. They may have to yield, to a lesser or greater extent, in certain circumstances. These and other matters will be further addressed when the provisions of the Articles mentioned are discussed a little later in this judgment.

**184.** Before I leave this matter, the State, in furtherance of its constitutional responsibilities, has enacted several legislative provisions, on both the civil and criminal side, dealing with matters touching upon minors and people of tender age, as well as those afflicted with disability. In the present context, only two require a brief mention: the first is the Guardianship of Infants Act 1964, as amended by the Children and Family Relationships Act 2015: such applies where, *inter alia*, the custody, guardianship, access or upbringing of a

child is involved, in which the court must regard the best interests of the child as the paramount consideration, to be determined in accordance with the provisions of Part V of the 1964 Act (as inserted by ss. 45 to 63 of the 2015 Act).

**185.** The second is the Child Care Act 1991, which has several relevant provisions in this regard, where in the performance of its functions the health board, now the Child and Family Agency, shall:

> "(b) having regard to the rights and duties of parents, whether under the Constitution or otherwise—
>
> > (i) regard the welfare of the child as the first and paramount consideration, and
> >
> > (ii) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child; and
>
> (c) have regard to the principle that it is generally in the best interests of a child to be brought up in his own family."

This provision (s. 3(2)(b) and (c)) has some similarities to the provisions of Article 42A of the Constitution: however, these pieces of legislation are, at best, of only marginal interest to this case.

## IV. *Medical Treatment – General Comment*

**186.** Certain well-established rules exist in respect of the giving or withholding of medical treatment; notwithstanding this, their application, in particular the withholding aspect, has proved on occasion to be fraught with difficulty, which is perhaps not surprising given the variety of patients' circumstances, the multi-layered treatment potentially involved and the enormous consequences for those subject to it. With that *caveat* however, I venture the following general remarks:

(i) In a limited number of situations, such as medical or surgical emergencies, unconscious persons etc., it is acknowledged that consent cannot be sought: where such an emergency occurs, treatment may be given, but is limited to what is immediately necessary to save life or to avoid significant deterioration in the patient's health (Medical Council's *Guide to Professional Conduct and Ethics for Registered Medical Practitioners (Amended)* (8th ed., 2019)). In all other situations, consent to medical treatment must be obtained. That can be expressed by the signing of a consent form or inferred from conduct such as where the person puts his or her hand out for BP reading. In the absence of such consent, serious issues

arise under each tier of our legal system, at common law, at statute and at constitutional level. This principle of consent and voluntariness is, *inter alia*, a bedrock of the common law and has express statutory foundation in s. 4 of the Health Act 1953 (*In re a Ward of Court (withholding medical treatment) (No.2)* [1996] 2 I.R. 79 *("In re a Ward")*, per Denham J at p. 156.

(ii) To state the obvious, a competent adult can give consent, which is individual to the person and a matter of choice: as a corollary, he/she can likewise refuse such consent. So based, whether as an aspect of the right to life, the right to bodily integrity, to self-determination, to dignity and autonomy, to privacy or otherwise, such an adult is free, including from all restraints/interference from third parties, to refuse or forego medical treatment.

(iii) Such a right exists in respect of all forms of such treatment, from the most benign to the most far-reaching, and all in between: from simple ingested painkillers for a headache to treatment without which certain death will follow.

(iv) Such decision can made be for whatever reason, including religious beliefs or conscience convictions of the individual. Where in play, Article 44 guarantees these rights, subject to public order and morality. If such a decision had to be based on, or reflective of or responsive to the underlying medical condition or the proffered treatment, such would be an impermissible and unjustified interference with the rights identified.

(v) Such an adult is one whose capacity is not in question: but of course, unless such capacity generally exists, this right cannot be exercised by that patient/person. Even if such generally exists, it may be that for specific reasons, for transient purposes, for limited or temporary periods or otherwise, such capacity is not, at any given time, intrinsic to that person. This type of limitation, purely for convenience, may be described by common shorthand as "decisional incompetence". Care must be taken in distinguishing this from general incapacity and incompetence.

(vi) Even in the absence of any concerns about capacity, for there to be an informed and valid consent, the necessary information must be transmitted in understandable language, the patient should sufficiently understand that

information and should appreciate the choices within it and the consequences thereof, so that the resulting decision is truly a voluntary one.

(vii) Even with capacity and decisional competence, however, the rights of which I speak are not absolute. In certain limited circumstances they may have to yield to the common good or where the court is called upon to protect the rights of others, which are incapable of being properly vindicated without impacting on the patient's rights. This is a point I will return to later in the judgment.

(viii) It may not always be required to distinguish between the withdrawal of treatment and its administration. This is because where the former takes place, it will of necessity mean that intrinsic to the decision will be whether or not the existing treatment should continue. Denham J, in *In re Ward*, put it like this: "A decision has now to be made whether to continue the medical treatment or not. To continue the treatment is as much a decision as not to do so. If the decision is to continue medical treatment, a consent has to be given on behalf of the ward for the invasive medical treatment. If a decision is to cease the medical treatment, consent on behalf of the ward also has to be given" (p. 158).

(ix) Perhaps more accurately, a distinction may exist between both of those, on the one hand, and a situation where the initial administration of treatment is in issue.

**187.** Whilst it is not difficult to conceptualise or articulate these requirements, their implementation, if carried through, may be a source of considerable uncertainty or doubt in many situations. It is most unlikely that concerns in this regard will arise within a primary or secondary healthcare setting: such almost invariably occurs in a hospital context. The hospital, together with the frontline treating doctors and other staff members, may have quite an unenviable task in making a decision on capacity or competence, particularly where an unexpected emergency arises, which will often call for a final decision within hours or even earlier. Despite the understandable human desire on the judicial side to identify a basis upon which human life can be protected, nonetheless on occasions the legal and constitutional route to that end has often been highly dubious and seriously questionable; at times it has also

been enormously elaborate. One illustration will suffice, which has been referred to earlier (para. 136).

**188.** In *J.M. v. St. Vincent's Hospital* [2003] 1 I.R. 321, having changed her mind, the lady who had earlier given birth and who had suffered a massive post-partem haemorrhage resulting in cardiovascular collapse refused a blood transfusion, deemed necessary for survival, as she was a Jehovah's witness. On an *ex parte* basis, and it must be said in a heavily truncated manner, subsequently justified because of urgency, the hospital was granted permission to carry out the blood transfusion. She was never made a ward of court. Although recognising the competence of the lady in question, the court's justification was that her wishes should give way to the welfare of her child, which was the first and paramount consideration, which would evidently be much better served by survival rather than her death. That in fact was done and the report indicates that the lady made a complete recovery.

**189.** In a subsequent action, which lasted 37 days, and in which claims and counterclaims were made, several issues of major legal and constitutional significance were discussed, including the question of capacity/competence. It is sufficient to say, on the capacity question, that Laffoy J concluded on all of the evidence that the hospital was objectively justified in doubting whether her refusal could be considered to have been properly informed and thus whether a resulting decision was truly voluntary, in a pure sense: see *Fitzpatrick v. F.K.* [2008] IEHC 104, [2009] 2 I.R. 7.

**190.** Thankfully, such cases arise most infrequently, but, when they do, some means alternative to court resolution must be found, as what occurred in *Fitzpatrick v. F.K.* [2008] IEHC 104, [2009] 2 I.R. 7 is unsatisfactory from a patient's point of view, and certainly extremely difficult from a hospital's point of view in being forced to make that call. Even though the case was dismissed, it was purely on the judge's assessment of the evidence and the inferences that she drew therefrom. One could not say, however, that a contrary conclusion could not have been reached.

### V. *Medical Treatment – Incapacity/Disability*:

**191.** As has been pointed out in *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 I.R. 79 and other cases, a person suffering from incapacity or disability does not lose any rights that are constitutionally protected, certainly not by virtue of such misfortune or affliction. Such, however severe, cannot be a justification for the loss or curtailment of such rights. To hold otherwise would be to embrace invidious discrimination and would be to contravene the essence of Article 40.1 (O'Flaherty J at p. 130; Denham J at

p. 159). The reference to differences of capacity, physical or moral, and of social function, within that Article does not affect the existence of such rights. However, quite evidently, those rights cannot be exercised by such a person. In the case of a minor, the prevailing view is that such is entrusted to his parents or guardian. In terms of adult incapacity, the decision maker must be identified elsewhere, which most frequently remains within that person's family: sometimes recourse to the process of wardship becomes necessary. A further source of help is expected from the Assisted Decision-Making (Capacity) Act 2015, but its full terms have yet to be worked through.

## VI. *The Threshold for State Intervention*

*Article 42A.2.1° and Article 42.5 of the Constitution*

**192.** As part of the discussion on this issue, it would be helpful for comparative purposes, as suggested in the submissions, that Article 42A.2.1° and the old Article 42.5 should be tabulated against each other; the following format should assist in contrasting the old provision with the new.

| ***"Article 42.5*** | ***Article 42A.2.1°*** |
| --- | --- |
| *In exceptional cases,* | *In exceptional cases,* |
| *where the parents* | *where the parents,*<br>*regardless of their marital status,* |
| *for physical or moral reasons* | |
| *fail in their duty towards their children* | *fail in their duty towards their children*<br>*to such extent that the safety or welfare of any of their children is likely to be prejudicially affected,* |

| | |
|---|---|
| *the State as guardian of the common good* | *the State as guardian of the common good* |
| *by appropriate means shall* | *shall by proportionate means as provided by law,* |
| *endeavour to supply the place of the parents,* | *endeavour to supply the place of the parents,* |
| *but always with due regard for the natural and imprescriptible rights of the child* | *but always with due regard for the natural and imprescriptible rights of the child"* |

**193.** Although featuring much less than the provisions quoted, regard should also be had to the remainder of Article 42A, which is set out in full at para. 6, *supra*.

**194.** Even though a number of differences can be detected, it is striking how many similarities can immediately be seen between the original provision and its reformulation under Article 42A. These similarities and difference can briefly be set out:

*Similarities*

- Intervention is permitted in exceptional cases only;
- The default must be that of parents;
- Such default is in failing in their duty;
- Intervention is in the interests of the common good;
- The State's role is to supply the place of the parents; but
- Only with due regard to the natural and prescriptible rights of the child.

*Differences*

- The new provision expressly applies to all children;
- Equally so it expressly applies to all parents, married or not;
- The "physical and moral" element is removed;
- The focus of the failure is on the safety and welfare of the child;

- The failure must be “to such extent that the safety or welfare of any of their children is likely to be prejudicially affected”;
- Any intervention must be by “proportionate” means and not, as heretofore, by “appropriate” means;
- Under Article 42A, those means must be “provided by law”

This final point gives rise to the question of whether Article 42A.2.1° is self-executing like its predecessor Article 42.5: the authors of *Kelly: The Irish Constitution* (5th Ed., Bloomsbury Professional, Dublin, 2018) at [7.7.272] – [7.7.273] think not. This is a point I will return to later.

**195.** Notwithstanding such differences, the pre-existing case law continues to have relevance because of the similarities involved; I therefore wish to make some observations which apply at a general level to both provisions:

(i) Some debate was had and continues as to whether, first, there is one overall test for intervention with individual components or whether each component must be regarded as some form of test in itself. Secondly, in assessing the applicability of the provisions, there was discussion as to whether a sequence approach is required, or whether it is sufficient to adopt a general approach and, having had regard to each element of the provision, reach an overall conclusion.

(ii) Under both provisions, intervention can occur only in “exceptional cases”. Assuming the word “circumstance” might be more reflective of what was intended, it remains the situation that satisfying this is a requirement for intervention. It would be difficult, and most certainly unwise, to try and be prescriptive as to its meaning. Depending on where one pitches the phrase, it may mean “remarkable” or “extraordinary”: certainly, the provision cannot be used for typical or non-exceptional cases. Perhaps it has to be judged on a circumstance-by-circumstance basis, which, if correct, means that a comparative analysis with other cases, as determined by the courts, will help. Despite my dislike of the word “exceptionality”, for in a legal context it can never in itself be a test, nonetheless in the legal lexicon it is widely used.

(iii) The removal of “physical or moral” as grounding the reasons for the parents’ failure, is not, I think, greatly significant, given the likely reason

for their inclusion in the first instance: some, however, say that such makes it easier for State intervention. I doubt if such a deduction, in isolation, is justified as the other requirements of the provision, including parental "failure", must still be established.

(iv) The phrase "to such an extent" is capable of a restrictive meaning, in other words that intervention may be more difficult. I agree with Doyle and Feldman (in R. Byrne and W. Binchy (eds.), *Annual Review of Irish Law* 2012 (Dublin, Round Hall, 2012) that the better view, more consistent with the intention of the People, is that the same refers to the "type of conduct" that would justify a finding of failure, rather than elevating the threshold.

(v) The phrase "by proportionate means as provided by law" has two elements; the latter is dealt with later in this judgment. "Proportionality" must be viewed in light of existing case law (see *Heaney v. Ireland* [1994] 3 I.R. 593 at p. 607; [1996] 1 I.R. 580 and *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701). Therefore, intervention should occur only where alternative means of protecting the child are not available. Even then, such intervention must be limited to what is necessary and impair the related rights of parents and child as little as possible.

(vi) When intervention takes place, a child does not become a child of the State, and the State does not become the parents of the child. For the purposes involved it plays a role in substitution of what the law reasonably expects of a parent not in default.

(vii) The phrase "with due regard for the natural and imprescriptible rights of the child" is in identical language to that of its predecessor and, accordingly, it must be accorded the same meaning as previously determined by our courts under Article 42.5.

**196.** These are the express constitutional provisions for statutory intervention, being Article 42.5 up to the Referendum which led to the enactment of the Thirty-first Amendment of the Constitution (Children) Act 2012 on the 28th April 2015 and now solely Article 42A.2.1°: both are sometimes referred to as the "default" provision. As can immediately be seen, the Constitution does not postulate an intervention route alternative to that which it provides, but one has emerged, namely, the "compelling reasons test" which had its foundation in *In re J.H. (inf.)* [1985] I.R. 375, and later was accepted as part of the analysis in the judgment of Denham J in *North Western Health Board v. H.W.* [2001] 3 I.R. 622, and by

Hardiman J in *N. v. Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 374. In fact, the High Court also utilised that test in this case. It would therefore be useful to consider this test at this point.

***Article 42.5 – the "parental failure" and the "compelling reasons" tests:***

*In re J.H. (inf.)* [1985] I.R. 375

**197.** With the intention that her child should be adopted, the natural mother undertook various steps to that end, which included the child's placement into the care of putative adoptive parents. Subsequently, the given consent was withdrawn and, having married the natural father, both parents sought to re-register their child's birth under the Legitimacy Act 1931 and also sought custody of the child. The proposed adopters asked the court to dispense with the mother's consent under the Adoption Acts, and cross-claimed also for custody: both custody applications were moved under the Guardianship of Infants Act 1964, as amended, but in addition, the parents relied upon a number of constitutional provisions, including Article 41. Article 42.1 was also referred to, as was Article 42.5. On appeal from the High Court, which had held with the proposed adopters, Finlay C.J., in speaking for the Court, outlined, at p. 395, what the appropriate test should be:

> "I would, therefore, accept the contention that in this case s. 3 of the Act of 1964 must be construed as involving a constitutional presumption that the welfare of the child, which is defined in s. 2 of the Act in terms identical to those contained in Article 42, s. 1 is to be found within the family, unless the Court is satisfied on the evidence that there are compelling reason why this cannot be achieved, or unless the Court is satisfied that the evidence establishes an exceptional case where the parents have failed to provide education for their child and to continue to fail to provide education for the child for moral or physical reasons."

He cited in support the earlier decision *In re J., an Infant* [1966] I.R. 295 (Henchy J), and also the decision in *W. v. W.* (Unreported, High Court, Ellis J, 21st April 1980; his reference to this decision, as highlighted by the emphasis placed by the Chief Justice on a particular section of it, renders it entirely consistent with his judgment, although in subsequent cases the opposite has been held. If that is the correct reading of what Ellis J. said, his views cannot stand in light of the actual decision in *In re J.H.* itself.

**198.** In essence, the court held that, imputed into any relevant statutory provision was a constitutional presumption that the welfare of the child is found within the family, unless such welfare cannot be achieved in that setting (*N. v. Health Service Executive* [2006] IESC

60, [2006] 4 I.R. 374 at p. 513). To displace this presumption, one must rely on Article 42.5 or establish "compelling reasons". Whilst I appreciate that in *In Re J.H.,* there was a statutory context, namely, the welfare provision of s. 3 of the 1964 Act, nevertheless the constitutional presumption identified must have an equal and freestanding force in its own right.

*North Western Health Board v. H.W.* [2001] 3 I.R. 622 *("NWHB")*

**199.** As is apparent from what has previously been said, this case is of considerable significance in identifying what the test might be for State intervention; in particular because the constitutional test as the alternative basis, save for one passing reference, was not discussed, much less debated. The case must be seen in the context of what the Health Board was seeking to do, which was to carry out a PKU screening test on the infant child of the defendants notwithstanding the fact that these parents had refused to give their consent to such a test. Whilst the case, in several respects, is entirely different from the instant one, the approach outlined is of general importance, provided that the particular background is borne in mind. Murphy J said:

> "In my view the subsidiary and supplemental powers of the State in relation to the welfare of children arise only where either the general conduct or circumstances of the parents is such as to constitute a virtual abdication of their responsibilities or alternatively the disastrous consequences of a particular parental decision are so immediate and inevitable as to demand intervention and perhaps call into question either the basic competence or devotion of the parents." (p. 733)

Murray J (as he then was) said:

> "It seems however, to me, that there must be some immediate and fundamental threat to the capacity of the child to continue to function as a human person, physically, morally or socially, deriving from an exceptional dereliction of duty on the part of parents to justify such an intervention." (pp. 740-741)

Hardiman J. said:

> "The presumption to which I have referred is not, of course, a presumption that the parents are always correct in their decisions according to some objective criterion. It is a presumption that where the constitutional family exists and is discharging its functions as such and the parents have not for physical or moral reasons failed in their duty towards their children, their decisions should not be overridden by the State or in

> particular by the courts in the absence of a jurisdiction conferred by statute. Where there is at least a statutory jurisdiction, the presumption will colour its exercise and may preclude it.
>
> The presumption is not of course conclusive and might be open to displacement by countervailing constitutional considerations, as perhaps in the case of an immediate threat to life." (p. 755)

Whilst the presumption is not unassailable and does not mean that the parents' decision is always correct, nonetheless the default provision requires much more than establishing that a decision was incorrect or wrong: accordingly, in the court's view, it had not been shown that the decision of the parents should be supplanted by the State.

**200.** The final of the four judgments was given by Denham J, who referred to the appropriate test in various places (p. 722, 723, 725 and 726). It is I think a fair representation to say that in her view this was a constitutional test where the correct balance had to be achieved between the rights and duties of all involved, including both the child and the parents in the context of a family unit, having regard to his welfare. The relevant considerations included "the right of the child to his fundamental rights; the fact that the paramount consideration is the welfare of the child, which extends wider than the single medical issue; the rights of the child in and to his family; the rights and duties of the parents to make and bear responsible decisions and their liability thereto; the rights of all the individuals to their family in its strengths and weaknesses; and the duty of the health board under the Act of 1991 in relation to the child" (p. 726). A just and constitutional balance had to be sought on the backdrop of these rights. Of particular relevance is where the judge referred to intervention under the express terms of Article 42.5, which in her view required no legislation for the court to vindicate the constitutional rights of the child. She continued:

> "In assessing the balance to be achieved in this case it is relevant to consider the threshold which it would set for this and other medical tests and for matters such as inoculations. If the responsibility for making this decision is transferred from the parents to the State then it would herald in a new era where there would be considerably more State intervention and decision making for children than has occurred to date. Every day, all over the State, parents make decisions relating to the welfare, including physical welfare of their children. Having received information and advice they make a decision. It may not be the decision advised by the doctor (or teacher, or social worker, or psychologist, or priest or other expert) but it is the

> decision made, usually responsibly, by parents and is abided by as being in the child's best interest. Having been given the information and advice, responsibility remains with parents to make a decision for their child. The parents are responsible and liability rests with them as to the child's welfare." (p. 723)

She positioned intervention only in exceptional circumstances, such as where an immediate threat to the health or life of the child existed, or where there was an acute medical or surgical need. The following observation was then made:

> "Even if acute medical care is advised by some medical experts and the parents consider that the responsible decision may be to refuse such care it may be within the range of responsible decisions. This may occur where a child is suffering a terminal illness and parents may decide responsibly that he or she has suffered enough medical intervention and should receive only palliative care." (p. 723)

**201.** Finally, reference should be made at this point to *N. v. Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 374, though this is a case that I will return to later in a different context. Like *In re J., an Infant* [1984] 3 I.R. 375, this was a case where the child in question had been placed for adoption and had been with the adopting parents for some time but, before the process was finalised, the natural mother withdrew her consent and the natural parents married and sought to regain custody of the child. The judgments of this Court, and of MacMenamin J in the High Court, are elucidating insofar as they discuss the application of the constitutional test on the facts of that case, but really the legal point at issue concerned whether the voluntary placing for adoption of the child by the natural parents could constitute a "failure of duty" by them, with this Court concluding that it could not. While there are interesting restatements of the constitutional presumption that the welfare of the child is to be found within the natural family etc., the case did not add greatly in point of principle when it comes to identifying a precise test for intervention pursuant to Article 42.5.

<u>*Summary of the Test*</u>

**202.** It is a difficult task to identify a single test emerging from the case law as to when State intervention pursuant to Article 42.5 was permissible. What is clear is that the starting point was that, having regard to the position of the Family under Article 41 of the Constitution and the protection accorded to the authority of the family in making decisions regarding children, there existed a constitutional presumption that the welfare of the child

was to be found within the family, which, for the reasons above stated, include all families. *NWHB* and *Children's University Hospital Temple St. v. C.D.* [2011] IEHC 1, [2011] 1 I.R. 665 are perhaps the cases which most closely approximate the facts of this case, in that they were pure "State intervention" cases, as opposed to adoption cases. It is fair to say that there was a considerable divergence in reasoning between the judgments of the majority of this Court in *NWHB*.

**203.** It is difficult, therefore, to say that there was any definitive test under Article 42.5. Even within the individual judgments, different standards appear to be articulated at different times, to say nothing of the divergences between the different members of the Court. For my part, I would incline to the view that the judgment of Denham J, which would not permit of State interference provided that the decision of the parents was within the range of responsible decisions open to them but would allow intervention where the parents had exceeded those parameters, is perhaps the test that best reflects the competing constitutional considerations, even if it lacks the precision desirable. Of course, the test for intervention is now governed by the new Article 42A, which I will turn to momentarily, after a consideration of the "compelling reasons" test.

*"Compelling Reasons"*

**204.** As Irvine P. expressly applied the "compelling reasons" test (alongside the Article 42A.2.1° test), and having regard to the arguments which had been directed to it, it would seem remiss of me if I should not offer some further observations on it.

**205.** As can be seen from the clear text of both the old and new provisions, there is no reference to the existence of another basis, alternative to that which the Constitution expressly postulates, upon which the State could intervene. It is therefore perhaps surprising that the "compelling reasons" test seems to have crept into the case law and certainly gained serious traction in *N. v. Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 374. Therefore, before turning to the constitutional test for State intervention, I would like to venture some views on this issue which appears to have its origin in the judgment of Finlay CJ in *In re J.H. (inf.)* [1985] I.R. 375, the facts of which are set out at para. 197 above.

**206.** Having recited the submission of the natural parents that their child's welfare would be best served by their having custody, "unless … there were compelling reasons why its custody should be found elsewhere", Finlay CJ, in summarising the principles of law, said:

> "2. The state cannot supplant the role of the parents, in providing for the infant the rights to be educated conferred on it by Article 42, s. 1, except 'in exceptional cases' arising from a failure for moral or physical reasons on the part of the parents to provide that education (Article 42, s. 5)." (p. 394)

However, the learned Chief Justice then went on:

> "I would, therefore, accept the contention that in this case s. 3 of the Act of 1964 must be construed as involving a constitutional presumption that the welfare of the child, which is defined in s. 2 of the Act in terms identical to those contained in Article 42, s. 1, is to be found within the family, unless the Court is satisfied on the evidence that there are compelling reasons why this cannot be achieved, or unless the Court is satisfied that the evidence establishes an exceptional case where the parents have failed to provide education for the child and to continue to fail to provide education for the child for moral or physical reasons." (p. 395) (Emphasis added)

There was one further reference by the Chief Justice which did not add to the cited quotation.

**207.** McCarthy J. in his short concurring judgment discounted, on the facts of the case, the application of the parental failure test, with the key issue from his point of view being "whether the Court is satisfied on the evidence that there are compelling reasons why the welfare of the child, as defined, cannot be achieved within the family, in other words that there are compelling reasons why the child should be in custody other than that of her parents" (p. 397). It is clear that the latter expression is quite different from that first stated, and that any focus on why a child should *remain* with third parties, such as with adopting parents, would be to distort the test and impermissibly shift its focus. Such alternative phraseology has never gained traction and was expressly disavowed by Hardiman J. in *N. v. Health Service Executive* (p. 513).

**208.** Apart from the latter point, however, it is difficult to know precisely what was in the mind of the Chief Justice. In one section of the report (p. 395), the only route of intervention was via Article 42.5, whereas in the second passage above quoted the "compelling reasons" test is also mentioned. If matters had rested there, I would not at all have been convinced that his intention was to create a second or substitute option for the language of the "default" provision in the Constitution. It would at least be equally plausible to suggest that it was

simply another way of expressing what was contained in the text of the Constitution. In this context, it is unclear where McGuinness J. was positioning herself given her observations at para. 77, p. 496, of *N. v. Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 374. In any event, it is very difficult to understand how, in the face of an express provision such as Article 42.5, the same should be repackaged in a form of wording that subsequent decisions have shown as not in any way synonymous with the wording of the Constitution. However, matters have not remained there.

**209.** Apart from reciting counsel's submission that the learned trial judge was wrong in confining State intervention, in the zone of parental authority, to Article 42.5, and that the compelling reasons test could also apply (Keane C.J., p. 680), none of the judges in *NWHB* discussed, as such, or at all, this test as offering a freestanding basis for State intervention, with the only reference to it being that of Denham J. (p. 724), who, when confirming the constitutional presumption added "unless there are compelling reasons why that cannot be achieved or unless there are exceptional circumstances where parents have failed to provide education for the child: *In re J.H. (inf.)* [1985] I.R. 375". It must therefore be regarded as surprising that nothing further was said if the Court felt that such a test was truly an alternative to the default provision.

**210.** The situation was somewhat different in the case of *N. v. Health Service Executive* [2006] IEHC 278, [2006] IESC 60, [2006] 4 I.R. 374, a case not unlike *In re J.H. (inf.)* in many respects: the facts of *N. v. Health Service Executive* are set out para. 201 above. In the *habeas corpus* proceedings which the natural parents, then married, issued seeking custody of the child, MacMenamin J, in the High Court, took the view that the "compelling reasons" test and the "failure of duty" test were alternative tests (paras. 280-281) for rebutting the constitutional presumption. On the evidence, the learned judge was of the view that both tests were satisfied and that the child's best interests lay in remaining in the custody of the adopting parents (para. 338). In the successful appeal by the natural parents, it is clear from the judgments of this Court that the two tests were again treated separately and as alternatives. Whilst there is some explanation of the test in the judgments in *N. v. Health Service Executive*, those are more concerned with the application of the test rather than with its provenance or whether it is a proper basis for State intervention at all.

**211.** In this case, Irvine P rejected the submission by John's mother that Article 42.5 was the only intervention route, citing *In re J.H. (inf.)* and *NWHB* in support of the continuing existence of the compelling reasons test. She went on to say that:

> "Where it can be shown that the rights of the child are in serious jeopardy, it is no longer safe for the court or the State to rely upon the presumption that the child's imprescriptible rights will be vindicated by their parents. Where there are compelling reasons to believe that the child's imprescriptible rights will not be protected or vindicated by their parents, the State must intervene to fulfil its obligations towards the child. Were that not the case, the rights of the child could be set at nought." (para. 117)

The learned judge, in applying that test as well as the parental failure test, concluded, in both instances, that such reasons existed and that the requirements of the constitutional provision had been satisfied. She made the orders as previously referred to.

**212.** John's father submits that the High Court erred in adopting a "compelling reasons" test: he says that the absence of any reference to "compelling reasons" in the text of Article 42A.2.1° suggests that it did not survive its adoption. IHREC observes that the approach whereby *either* compelling reasons *or* failure of duty can justify State intervention may need to be recast under Article 42A. The Respondents stand over the High Court's adoption and application of the "compelling reasons" test but further take the view that the existence of such a test is not determinative in the case, as Irvine P found that there had been a dereliction of duty by John's parents in any event.

**213.** For my part, I have serious reservations about whether the "compelling reasons" test ever had a significant jurisprudential basis to it, though of course I do acknowledge the undoubted force of any judgment emanating from my distinguished colleagues. It is instructive to have regard to the origin of the test. As previously stated, it appears to have been mentioned first in the judgment of Finlay C.J. in *In re J.H (inf.)* [1985] I.R. 375. The concept originated in a submission made by the child's parents in that case (see p. 393 of the report). With great respect to the considered judgment of the learned Chief Justice, it is not immediately evident from his decision what constitutional basis was envisaged as supporting the existence of such a test. Whilst I agree with Casey that there is no constitutional basis for this exception, I cannot agree with the following statement: "[p]resumably it springs from an acceptance that a child has constitutional rights just as parents do … and that in case of conflict there is no rule giving parental rights primacy" (Casey, *Constitutional Law* (3rd ed., Sweet & Maxwell, 2000) at p. 632). At least on first reading, this seems to be a misplacement of one proposition with the other. Certainly, the test was not expressly rooted in the text of the Constitution, which by its terms at the time confined State intervention to circumstances where the conditions of Article 42.5 were satisfied. Although he did not expressly say so, it

may be that the learned Chief Justice grounded this approach in Article 40.3 of the Constitution and the requirement that the courts defend and vindicate the personal rights of the citizen. This certainly would appear to be the rationale offered by Irvine P at para. 117 of her judgment, albeit now framed through the perspective of Article 42A.1 and its reference "to the natural and imprescriptible rights of all children". In any event, I have serious reservations about the test having survived the insertion of the new Article 42A and whether it continues to exist as a separate, distinct basis for State intervention, outside the circumstances outlined in Article 42A.2.1°.

**214.** It is not necessary, for the purposes of this judgment, to definitively decide on whether the earlier authorities were correct in identifying a "compelling reasons" test as a basis for State intervention. What must be considered is whether such a test now exists as an alternative to the basis for State intervention provided for in Article 42A.2.1°. In my view, given the very limited circumstances in which State intervention is expressly provided for by that provision, it would be surprising if the People, in passing the Thirty-first Amendment, intended that an alternative test should sit side by side with it, one potentially broader than its abbreviated description might suggest. This test, the existence of which was well established by 2012, and widely known, is not mentioned in that constitutional amendment and its continuing existence may well undercut the high threshold for State intervention set out in Article 42A.2.1°. Accordingly, in my view, there can be no question of two alternative tests for such intervention: Article 42A expressly delineates the circumstances in which State intervention may be permitted and that, in my view, is the test that must be satisfied; I do not consider that the "compelling reasons" test continues to subsist as a separate basis for intervention. This conclusion does not in any sense mean that the rights of the child will not be adequately protected as required by the Constitution.

**215.** The Constitution presumes that the best interests and welfare of the child will be protected within the family. This must be regarded as applying to all family units in light of the existing case law and the discussion above. One of the rights of the child is the right to have its parents, or parent, as the case may be, not the State, make important decisions on its behalf. The exercise of this right cannot, however, be allowed to extinguish or usurp other fundamental rights of the child, which the State is under a positive duty to protect and vindicate. It is this duty which provides the basis for State intervention in the realm of 'authority' presumptively reserved to the family. The Constitution prescribes, in Article 42A.2.1°, the circumstances in which this may occur; this is the test through which the present application must be navigated.

**216.** This view does not impact upon the conclusion reached by the learned President as, in addition to applying the "compelling reasons" test, she went on to consider a "failure of duty" assessment pursuant to Article 42A.2.1° and was satisfied that the constitutional test for State intervention under that provision was established. Accordingly, the question is whether the learned President correctly applied the constitutional test.

**Article 42A.2.1° – the new test for State Intervention**

*Introduction – Article 42A in the Constitutional Scheme*

**217.** In *In re J.B. and K.B.* (minors) [2018] IESC 30, [2019] 1 I.R. 270, O'Donnell J discussed the background to the Thirty-first Amendment in a way which describes in basic terms what some had considered to be, as between child and parent, the asymmetrical application of constitutional principles. The learned judge, in the context of the introduction of Article 42A, said the following:

> "Article 42A.4.1° does not stand alone. It was introduced as part of an amendment designed to ensure that the Constitution was more clearly child-centred … As I understand it, the amendment as a whole was directed towards a perceived approach of statutory and constitutional interpretation as matter of history, which was considered to be unsatisfactory in principle, and to give rise to potentially unsatisfactory results. That is because it was considered that issues in relation to children could be skewed by the emphasis placed by the Constitution as originally enacted on the family as the natural and primary educator of children, and as a moral institution possessing rights anterior and superior to positive law, which might lead to cases being resolved in a way which subordinated the interests of the child to that of a family, and in effect, therefore, of parents ... Article 42A can therefore be seen as a restating of the balance, acknowledging in explicit terms the individual rights of children…" (p. 278)

To put this into its full context, he said that such occurred "most clearly" in the field of adoption, but undoubtedly the text also had a more general tone to it.

**218.** In support of such a viewpoint, some of the seminal case law in this area had been criticised on the grounds that it placed too much primacy on the rights of the parent, effectively relegating the rights of the child to second place. On the one hand, one might understand the basis of this criticism in respect of, for example, *In re J.H. (inf.), NHWB* and *N. v. Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 374, cases where the outcome

did not necessarily gel with what the objective observer would strictly consider to be in the best interests of the child. On the other hand, if one starts from the premise that there is a sound cultural, societal and biological basis for the presumption that the best interests of the child are generally best served by and with its natural parents, then it may be queried whether these cases truly depreciated the rights of the child: frankly, I have my doubts. *In re J.H. (inf.)* and *N. v. Health Service Executive* were adoption cases, where rather different considerations applied than in *NWHB* or the case at hand, which concern the circumstances in which the State can interfere with parental decision-making. If *NWHB* is understood as supporting the proposition that the best interests of a child are generally best served by protection against State overreach into the realm of decision-making by the parents, a position which most would consider to be uncontroversial up to a certain point, at least, then it is not clear to me that it is a case which should necessarily be described as one which improperly positioned the rights of the child *vis-à-vis* those of its parents.

**219.** It might be questioned whether the criticism offered (para. 217 above) was an altogether accurate reading of those authorities; certainly, Hardiman J in *N. v. Health Service Executive* was forthright in his rejection of the suggestion that the Constitution had any preference for the rights of the parent over those of the child:

> "97. I do not regard the constitutional provisions summarised above, or the jurisprudence to which they have given rise, as in any sense constituting an adult centred dispensation or as preferring the interests of marital parents to those of the child. In the case of a child of very tender years, as here, the decisions to be taken and the work to be done, daily and hourly, for the securing of her welfare through nurturing and education, must of necessity be taken and performed by a person or persons other than the child herself. Both according to the natural order, and according to the constitutional order, the rights and duties necessary for those purposes are vested in the child's parents. Though selflessness and devotion towards children may easily be found in other persons, it is the experience of mankind over millennia that they are very generally found in natural parents, in a form so disinterested that in the event of conflict the interest of the child will usually be preferred. …
>
> 103. There are certain misapprehensions on which repeated and unchallenged public airings have conferred undeserved currency. One of these relates to the position of children in the Constitution. It would be quite untrue to say that the

> Constitution puts the rights of parents first and those of children second. It fully acknowledges the 'natural and imprescriptible rights' and the human dignity, of children, but equally recognises the inescapable fact that a young child cannot exercise his or her own rights. The Constitution does not prefer parents to children. The preference the Constitution gives is this: it prefers parents to third parties, official or private, priest or social worker, as the enablers and guardians of the child's rights. This preference has its limitations: parents cannot, for example, ignore the responsibility of educating their child. More fundamentally, the Constitution provides for the wholly exceptional situation where, for physical or moral reasons, parents fail in their duty towards their child. Then, indeed, the State must intervene and endeavour to supply the place of the parents, always with due regard to the rights of the child."

Save perhaps for not contextualising the "wholly exceptional" reference, I find this impossible to disagree with; indeed, I fully concur in what is stated.

**220.** In any event, however, it is not necessary to consider at greater length whether these criticisms of the old cases were justified as the situation must now be approached in the light of the new Article 42A and, whatever about the old cases, there can be no question now of a court regarding the rights of the child as subservient or as some sort of afterthought. Let me immediately say that I fully welcome this provision in its entirety. However, it is, I think, as articulated by Hardiman J, harsh on the pre-existing situation to be overly critical of the individual case which might be seen as not addressing the *intra* family rights of both child and parents in a manner responsive to the child's needs. Whilst I will not repeat any of the above discussion, it is in my view absolutely clear that even though one may have had to link Article 40.3, Article 42.2-5 and perhaps also some aspects of Article 41, nonetheless these provisions cumulatively vested very considerable rights in the child. As with the new provision, those rights were described as "natural and imprescriptible" (Article 42.5), and likewise it was never doubted but that when called upon the State would have to protect and vindicate such rights (Article 40.3). It is true that Article 41.1 has constantly been held not to apply to children of a non-marital union, yet nonetheless as early as 1946 (para. 172 *supra*) the court decided that no distinction was permitted at constitutional level between such a child and his brother of a married union for this purpose. Equally so, if the child had such rights, it was always regarded that parents had a corresponding duty and obligation to look after those rights, whether married or not. So, in the pre-amendment era, the situation was not as inimical to children as some have suggested.

**221.** That is not to say, of course, that Article 42A is in any sense insignificant, far from it. At the most general level, it has accumulated, in a highly visible way, those rights in a single provision specific to a child. There is no doubt but that children are different to adults and have specific needs. Their vulnerability during their most tender years is self-evident but such, in the vast majority of cases, will be greatly looked after by their parents, married or unmarried. The fact that the new provision is discrete, that it is distinguished from the general and that it is more direct are all undoubtedly a good thing, but whether in reality it adds substantively to what previously existed may not altogether be that clear. It seems to me that when legislation has been enacted to give full effect to the remaining provisions of Article 42A, that undoubtedly will enhance the situation.

**222.** Even without such legislation, however, I readily acknowledge that the new provision has some immediate impact. To take but one illustration: the deletion of the 'reasons' for failure and its replacement with an emphasis on the impact or effect of that failure undoubtedly has shifted the focus onto the child's health and welfare. Secondly, section 2.1° is framed differently to the old 42.5. Many have read the former as making it easier for State intervention, but in saying so have aligned that phrase almost exclusively to operating the default provision. In my view, this is incorrect. The State's obligation, when Article 42A.1 is also considered, is much more expansive than that. It has a positive duty to support children, which, by obvious extension, must include the family as a unit. Whether on a legislative basis or otherwise, such support involves making it possible to continue the functionality of such families where, if left to their own devices, that may not be achievable. The mere reference to "proportionality" in the provision makes it clear that different levels of State intervention are contemplated, with the operation of the default provision being very much the last resort and remaining by far the exception rather than the routine. Of course, the previously voiced criticism of the suggested imbalance totally falls away in light of Article 42A, and could no longer represent a tenable appraisal of the new situation.

**223.** I think it is of the first importance to say that the vast majority of parents have nothing to fear from this new provision. Countless numbers of them throughout the breadth and width of this country look after their children, in a caring and devoted way, often in very trying social, economic and personal circumstances. Quite frequently, many such children are physically or mentally impaired, often gravely so. With only the very rare exception, where parents have recourse to a fund for assistance, many others have sacrificed their personal lives to provide what they can for their children. Of course, the State, with the enormity of its resources and services, may be able to provide better, in a material way for such children, but

never with the same undying love and devotion which their parents have for them. For those families, it is intervention of a different kind that I now believe the State is under an obligation to provide by virtue of the provisions in discussion. Those parents, to whom society owes a great debt, should not be in any way concerned with the operation of this new provision.

**224.** Can I also add that Article 42A does not have the effect of disregarding the rights of parents? It is not a case of bypassing the views of the parents whenever a disagreement arises as to what is best for the child, or how best to protect the child's rights. Article 42A must be read together with the other provisions of the Constitution and, in this respect, it is significant that, other than inserting Article 42A and removing Article 42.5, the Amendment did not effect change to any other provision. Thus, the recognised jurisprudence pertaining to those Articles continues to apply. There is therefore nothing in Article 42A, read together with these provisions, that displaces the presumption that decisions as to, for example, the medical treatment of a child, are within the authority of the family; although not within its exclusive preserve given Article 42A.2.1°. It seems to me, however, that the Constitution envisages that such circumstances will be rare and that it remains a relatively high threshold which must be navigated. Accordingly, while I unreservedly accept that Article 42A marks a shift in emphasis which more clearly puts the rights of the child centre stage, it would not be correct to say that the parents' rights are relegated to merely a minor, or supporting, role.

***"Where the parents … fail in their duty"***

Objective/Subjective

**225.** In the High Court, the learned President applied an objective approach to the "parental failure" aspect of Article 42A.2.1°. In that regard, she followed Hogan J. in *Children's University Hospital Temple St. v. C.D.* [2011] IEHC 1, [2011] 1 I.R. 665. John's father has submitted on appeal that this is an error and that, having regard to the Supreme Court authorities, the approach should be a subjective one, or else one that closely approximates to that. This, he says, emerges clearly from the decisions in *North Western Health Board v. H.W.* [2001] 3 I.R. 622. He points, in particular, to the following judgments: first, Murray J, who said at p. 741 of the report:

> "The defendants have made their own judgment (in refusing consent). It is a judgment for which they have not been able to articulate a rational basis that would satisfy the

objective observer as to its wisdom. From an objective point of view it is manifestly unwise." (emphasis added)

Murray J also stated at p. 740:

> "Decisions which are sometimes taken by parents concerning their children may be a source of discomfort or even distress to the rational and objective bystander [but something exceptional must exist for State intervention]."

In her judgment, Denham J (as she then was) held (at 723):

> "Every day, all over the State, parents make decisions relating to the welfare, including physical welfare of their children. It may not be the decision advised by the doctor (or teacher, or social worker, or psychologist, or priest or other expert) but it is the decision made, usually responsibly, by parents and is abided by as being in the child's best interest … The parents are responsible and liability rests with them as to the child's welfare."

Accordingly, whilst it is acknowledged that their approach may seem objectively unjustifiable to an external observer, nevertheless, as no irresponsibility had been assigned to them, it is said that they are subjectively entitled to make such a decision.

**226.** It would have quite extraordinary consequences if the issue of dereliction of duty should not be assessed from an objective perspective. If the question of failure of duty was not appraised in that way, then all it would take to supplant the State's power, and indeed duty, to intervene would be a *bona fide* belief on the part of the parents that they were acting in the child's best interests. It is clear, for example, that in *Children's University Hospital Temple St. v. C.D.* [2011] IEHC 1, [2011] 1 I.R. 665, Hogan J did not consider that there had been any parental failure by reference to the parents' own subjective religious views. Unless, therefore, the failure was judged objectively, no State intervention would be possible regardless of the circumstances. This clearly would be inconsistent with the duty of the State to protect and vindicate the rights of the child. Accordingly, I agree with what the learned judge said in *Children's University Hospital Temple St. v. C.D.* at para. 37:

> "The test of whether the parents have failed for the purposes of Article 42.5 is, however, an objective one judged by the secular standards of society in general and of

the Constitution in particular, irrespective of their own subjective religious views." (Emphasis added)

This approach is entirely reconcilable with the passages of *NWHB* as quoted above. Therefore, in my view the learned President was correct in applying that test.

**227.** This interpretation is bolstered by the removal of the reference to the parental failure being for "physical or moral reasons" in the new provision. As above stated, this appears to connote a shift in direction from the concept of reasons for the failure to the concept of the impact resulting from such failure. Accordingly, the application of an objective test is entirely consistent with this. Therefore, it is no longer necessary to consider the question of "blameworthiness" or a failure of moral duty, the analysis of which is perhaps most evident in the judgments of Hardiman J, Geoghegan J and Fennelly J in *N. v. Health Service Executive*. Indeed, the present type of situation was anticipated in *Children's University Hospital Temple St. v. C.D.* [2011] IEHC 1, [2011] 1 I.R. 665, where it would not necessarily be correct to characterise the parents' decision as one involving a grave moral failing, a view taken by Hogan J (see para. 37) and yet, there is little doubt but that, in the circumstances, the court quite appropriately determined that the threshold for intervention had been met. However, as stated, this requirement is of historical interest only, in that as Article 42A.2.1° has removed the reference to the parents' failure being for "physical or moral reasons", it is not necessary for present purposes to consider these comments in any further detail.

**228.** There is very little case law on the type of conduct, either positive or negative, which might constitute a failure for the purposes of this provision. Quite evidently, parental abuse of children, whether of a physical or sexual nature, or a failure to prevent it where a parent could and should have, is a model representation of such failure. A second example might involve conduct, again either way, which is systemically carried out by the parents. An isolated or single incident of such behaviour may not reach the threshold, but its regularity of repetition might. The third, however, might involve a single decision or incident, as in *Children's University Hospital Temple St. v. C.D.* [2011] IEHC 1, [2011] 1 I.R. 665, which was held to be sufficient to constitute a "failure" in this sense. In that case, although the parents, by reason of their deeply held religious views, behaved in an obviously conscientious fashion with regard to their child, nonetheless by objective standards their decision to refuse a blood transfusion was considered a failure of duty. That such an isolated decision may suffice is at least implicit in *NWHB*, as in no judgment was the application held to fail *in limine* by reason of the single decision involved. The test is what the Constitution says, namely that failure "to such extent that the safety or welfare of any their children is likely to be

prejudicially affected"; such may indeed on a great number of occasions relate to an ongoing or repeated course of conduct, but in my view that is not necessarily so and a single failure will suffice once that threshold is met.

**229.** It is important to clarify, however, that the State will not be entitled to override the parents' wishes on every occasion that they make a decision in respect of their child that the objective bystander would not agree with. That is neither the legal nor constitutional position. The circumstances must still be exceptional and the impact must reach the threshold provided. Accordingly, it is not simply a matter of identifying any failure in the sense of parents making a decision that, objectively, the reasonable observer (or parent, or doctor, or social worker, or judge) would consider to be unwise or imprudent: failure of duty is measured objectively, but it is only in exceptional cases that State intervention will be justified. By its nature, what is an "exceptional case" is difficult to define with precision in advance, without being overly prescriptive, though in my view it surely entails some assessment of the nature and extent of the risk to the child and perhaps of the likelihood of its reoccurrence.

***"By proportionate means as provided by law"***

**230.** It is submitted by John's mother that if there is to be any State interference with the parents' decision, the same can only be done pursuant to statute. She points, in this regard, to the wording of Article 42A.2.1°, which provides that "… the State … shall, <u>by proportionate means as provided by law</u>, endeavour to supply the place of the parents" (emphasis added). This reference to "proportionate means provided by law" is said to mean that in the absence of legislation regulating and permitting the intended intervention, such is not possible. In addition, the submission draws support from the judgment of Hardiman J in *NWHB.*, where at pp. 761-762 the learned judge stated as follows:

> "I would however, observe that in a case such as the present it is particularly desirable from every point of view that any initiative to compel parents to subject their children to a test such as P.K.U. be based on statute law and not on an application such as the present. I am expressing no view whatever as to whether such legislation would be desirable or otherwise. But if it were thought that a parent should be deprived of a right to refuse to consent to the P.K.U. test, or any test, inoculation, examination, or procedure, that would be a major departure in public policy. The legislature, and not the courts, are in the best position to judge whether such an innovation is necessary, proportionate or desirable, whether there are countervailing considerations of a social

> or medical nature or otherwise; whether there exists sufficient consensus in the community to make legislation feasible or desirable and many other relevant considerations. Compulsory medical diagnosis or treatment in any form is, for the reasons identified in the judgment of the learned Chief Justice, a topic regarded with some unease throughout the civilised world. The degree to which this unease should be recognised, whether precautions can be taken to allay legitimate fears, and the fundamental question of whether the imperative behind the P.K.U. test or any other test is sufficient to justify coercion, are all matters best addressed legislatively."

**231.** John's mother points out that these comments were made in the context of the test for State intervention pursuant to the old Article 42.5, which she describes as being "self-executing" in the sense that, unlike Article 42A.2.1°, there was no reference to any such intervention "as provided by law". On the other hand, she says, Article 42A.2.1° is not *ex facie* self-executing and therefore the provision can only be operated pursuant to legislation giving effect to it. The authors of *Kelly: The Irish Constitution* (5th Ed., Bloomsbury Professional, Dublin, 2018) in support of this argument cite (at para. 7.7.204) *Sivsivadze v. Minister for Justice* [2015] IESC 53, [2016] 2 I.R. 403 and *O'T. v. Child and Family Agency* [2016] IEHC 101, [2016] 2 I.R. 300, at para. 28.

**232.** In reply, the Guardian and the Respondents say, first, that s. 9(1) of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act") provides such a basis and, secondly, that in any event the court can invoke its inherent jurisdiction, having regard to its role as the guardian of the Constitution and its duty to protect and vindicate the rights of the child. Support for this proposition was drawn from *Health Service Executive v. A.M.* [2019] IESC 3, [2019] 2 I.R. 115, where, in furtherance of its duty, it was said that the court must have jurisdiction to defend and vindicate rights when called upon. Even where the subject matter of the asserted right is not "governed by the black letters of a statute", nonetheless in such a situation "it may be necessary to resort to inherent jurisdiction" (MacMenamin J at para. 105). The learned judge, however, tellingly referred to the courts' experience of dealing with minors at risk, which "in the last two decades illustrate that in a sense the 'exception' became the rule, and inherent jurisdiction became a first, rather than a last, resort" (para. 105).

**233.** It seems to me that there are three possibilities as to what "proportionate means as provided by law" means. The first is that legislation is required: the only provision relied upon is s. 9(1) of the 1961 Act. The second is that legislation is not required, in that recourse to the court's inherent jurisdiction, along the lines outlined in *Health Service Executive v. A.M.*, itself satisfies this requirement. The third is that legislation is required, that s. 9(1) of

the 1961 Act does not suffice, and that access *via* the courts' inherent jurisdiction is not appropriate: accordingly, in those circumstances no intervention is permissible.

**234.** I must declare that I do not consider any of these three possibilities to be free from difficulty. I should say first of all, that I agree with O'Donnell, Dunne, O'Malley and Baker JJ that the phrase "as provided by law" does not necessarily seem to require the future enactment of legislation: it is sufficient if the "proportionate means" of State intervention are grounded in the extant law of the State at the time that intervention is to take place. In this sense, "as provided by law" would appear to have a meaning distinct from "provision shall be made by law"; the latter formulation could well be argued as requiring new or at least amending legislation. I will park, for a moment, the question of whether the "law" referred to in Article 42A.2.1° might entail the common law or recourse to the inherent jurisdiction of the courts. First, I will focus on whether there is an existing statutory basis for the intervention in this case; if there is, that surely is sufficient to satisfy this requirement. It is of interest that the Respondents, the Guardian, the Attorney General and IHREC have identified s. 9(1) of the 1961 Act as the only statutory provision which may provide the legislative basis, if required, to trigger intervention in this case. Section 9(1) undoubtedly vests the High Court with jurisdiction in wardship matters, including those of minors. In that sense, the exercise of such jurisdiction is provided by law. As noted, the parties have not pointed to any other statutory provision which may apply. If this should be the sole subsisting basis to activate Article 42A.2.1°, the same would have some surprising implications. The natural consequence would seem to be that any intervention by the State in familial decision-making pursuant to Article 42A.2.1° would be required to be navigated through the High Court's wardship jurisdiction. Whatever about the facts of this case, to take a minor into wardship is a far-reaching step, so I would have grave reservations that this jurisdiction, with all that it entails, would be an appropriate vehicle for navigating through the default provision.

**235.** It is important to note that what must be provided by law is the means of State intervention, and such means must be proportionate. IHREC has observed in its written submissions that once John became a ward, the issue of whether or not any life-prolonging treatment should occur, along with every other matter regarding his welfare, becomes a question for the Court and not for John's parents. The Commission goes on to observe that while it may be that in John's case the issue of his medical treatment is the only welfare question that arises for decision, that will not be the case with all minor wards and so a degree of caution is necessary regarding the proportionality of using wardship in Article

42A.2.1° cases. I agree with this observation. It might very well be argued, as it was in this case, that wardship was not the least restrictive means of achieving the objective of vindicating John's rights; the same argument could apply, *a fortiori*, on other facts. For this reason, I am highly reluctant to conclude that the use of the wardship jurisdiction amounts to a "proportionate means as provided by law". In addition, note the discussion above on the appropriateness of the wardship order as made in this case (paras. 139-143).

**236.** The second possible route is that no legislation is required and reliance can be placed on the courts' inherent jurisdiction. The High Court has full original jurisdiction in and power to determine all matters and questions, whether of law or fact, civil or criminal. Moreover, the State, *via* its courts, is obliged to protect and vindicate the personal rights of the citizen: the right to have recourse to the High Court for this purpose has been recognised to be one of the personal rights under Article 40.3 (*Macauley v. Minister for Posts and Telegraphs* [1966] I.R. 345). There is no doubt but that the High Court has the power to do what is necessary to vindicate constitutional rights. The authors of *Kelly: The Irish Constitution* (5th Ed., Bloomsbury Professional, Dublin, 2018) note at para. 6.2.04 that "the full jurisdiction of the High Court has been seen as entailing its general capacity to afford a remedy where a right is breached, even though no action, or other remedy in statutory vesture, appropriate to the assertion of the right is immediately obvious." As stated by Gavan Duffy J,:

> "It would be deplorable to find that a citizen deprived of a right given to him by the Oireachtas was without redress under our polity; his obvious redress is a resort to the High Court." (*O'Doherty v. Attorney General and O'Donnell* [1941] I.R. 569 at p. 581)

**237.** In *R v. R* [1984] I.R. 296, Gannon J described the object and purpose of Article 34.3.1° as ensuring that there was in existence a court to which recourse "may be had in any event or upon any occasion and in any circumstances where there may exist a wrong for which in justice a remedy may be required" (p. 307). This may be considered as required, *inter alia*, by the right to an effective remedy. More recently, Hogan J stated in *I.S. (a minor) v. Minister for Justice, Equality and Law Reform* [2011] IEHC 31:

> "… the courts will ensure the remedies available to a litigant are effective to protect the rights at issue and that our procedural law (including all legislation restricting or regulating access to the courts) respects basic fairness of procedures and is neither

> arbitrary nor unfair. Article 34.3.1°, Article 40.3.1° and Article 40.3.2° thus reflect the same basic premise as that contained in Article 13 ECHR, i.e., the guarantee of an effective remedy. That, after all, is the central premise of what the express words of Article 40.3 – the vindication of rights in the case of injustice done – are all about." (para. 17)

**238.** That the High Court and both appellate courts have this jurisdiction seems clear. The point arising however, is whether, if the true meaning of "proportionate means as provided by law" is that such means must be set down in statute and that the 1961 Act is not sufficient in this regard, the court, on this scenario, can still intervene to protect the constitutional rights of the child in circumstances where the Constitution appears to require legislation in order to justify that intervention but no such legislation has been pointed to?

**239.** This in turn evidently raises the issue of whether the phrase does in fact necessarily entail that the means be provided for by statute. As pointed out by O'Donnell, Dunne, O'Malley and Baker JJ, the "law" of the State is not limited to statute law and so, in that sense, it is not necessarily the case that something must be provided for in legislation in order to be provided for "by law". This raises the possibility that State intervention pursuant to Article 42A.2.1° does not require a legislative basis at all. While I appreciate that this is a possible interpretation of the phrase "as provided by law", it is not, however, free from doubt when one looks at the full phrase "by proportionate means as provided by law". As in so many situations, a judge almost routinely will consider the proportionality of what is involved, such occurs on a daily basis and in multiple cases. Be that as it may, at least in the first instance, and without regard to any other constitutional provision, I would interpret the phrase in question to mean that a statutory basis is required before intervention can take place under Article 42A.2.1°. However, the Constitution must, of course, be interpreted harmoniously, and I do not foreclose at this stage on the possibility that the words "as provided by law" may carry a different meaning.

**240.** Assume for a moment that this suggested construction is correct, and that the 1961 Act is not what is intended, the question then is whether the Court may nonetheless intervene in order to exercise its constitutional duty to vindicate the rights of the child. While, in the ordinary way, recourse may be had to the High Court to protect such rights, even in the absence of a statutory context, the situation is arguably different where it is the Constitution itself, in Article 42A.2.1°, that requires legislation before any such intervention can take place.

**241.** We may, therefore, consider the third possibility: that legislation is required, is not in place and that the inherent jurisdiction process is inapplicable; as a result of which, it is argued that intervention to override the parents' wishes cannot occur. It is difficult to see how this construction would not frustrate the Court in pursuing its constitutional obligation to uphold the constitutional rights of the child (Article 40.3.2° and Article 42A.1). I consider it unlikely that this core constitutional function could, in effect, be stood down or rendered so contingent, otherwise than by the clearest of language in the Constitution itself; therefore, I would be reluctant to read the provision in such a manner unless there was no other alternative construction available. Such an interpretation would moreover be an unhappy fit with the perceived purpose of Article 42A in enhancing the rights of the child and, on one reading, lowering the threshold for State intervention: it would be a surprising outcome of the first application under the new provision if the Court was to determine that it had no jurisdiction to make the orders sought in the absence of legislation executing Article 42A.2.1°. As against this, however, to come to the contrary conclusion would require the Court to accept either that the wardship jurisdiction satisfies the requirement for legislation, which I very much doubt, or that the words "as provided by law" do not require legislation at all, which is perhaps not in keeping with the ostensible meaning of the phrase.

**242.** In my view, that leaves the courts' inherent jurisdiction; a process however which calls for the utmost caution as one should always strive to identify an express constitutional, statutory or other legal basis for the exercise of the power, whatever it might be. If the required jurisdiction can be established *via* one of those avenues, such would be the appropriate basis on which to proceed. It is ever so easy to resort to and lapse into the ill-defined and unregulated territory of inherent jurisdiction: the last observations of MacMenamin J. in *Health Service Executive v. A.M.* are very much to the point in this regard (para. 232, *supra)*. However, that is not to say that such jurisdiction has no useful function to offer; where, as here, no other route is open, and the basis for its exercise can be clearly identified and rationally explained, I consider that it is appropriate to proceed in that manner, even with the misgivings as expressed.

**243.** Finally, as above stated, the Constitution must be read harmoniously. I do not think that the phrase "proportionate means as provided by law" could be intended, in the absence of enacting legislation, to inhibit the jurisdiction, and indeed, duty, of the court to intervene, in exceptional cases, where the required threshold is otherwise satisfied and whether the rights of the child are in imminent and serious danger or not. In my view, the wording of Article 42A.2.1° would need to be explicit to achieve this end. Therefore, having regard to the other

obligations imposed on the Court by the Constitution, I am satisfied, even if reluctantly so, that its inherent jurisdiction can be resorted to, in this case, as satisfying the requirement that the means of intervention be "as provided by law".

*Article 42A.4.1*

**244.** It is clear from this provision and those in Article 42A.2.2°, 42A.3, and 42A.4.1 and 2°, that the phrase "provision shall be made by law", common to all, can only be interpreted as requiring legislation for their implementation. This means that by the express wording of those sections of Article 42A, their terms shall not operate in a legal sense under the umbrella of the Constitution until such time as the Oireachtas has intervened. I cannot therefore agree with my colleagues that it is proper to have regard to Article 42A.4.1° when analysing the phrase "by proportionate means as provided by law" as there is an express constitutional dictate which prevents its operation pending legislation.

*Has the Threshold for Intervention been Reached?*

**245.** The medical evidence available, which covers John from the date of the accident up to mid-December past, has been set out earlier in this judgment. That evidence was the central platform for the decision of the High Court and the resulting order which was made. (para. 13 above). What were sought in para. 4 of the notice of motion and granted were a series of orders, running from (i) to (ix), with the latter having several elements to it. All save (ix) can properly be described as permitting active treatment, whereas the single exception permits the withholding of life-prolonging treatments and supports. As I understand it, from their child's point of view, the parents do not have any objection whatsoever to the orders first mentioned. In fact, they are entirely satisfied that, where appropriate, such should be carried out. Their objection is that referable to the withholding of treatment. The major focus of the debate relates to John's dystonia condition, or more accurately to when that condition might again become uncontrollable as it was when the present application was initiated; as a result of the continuous intervention by the hospital and its doctors, it had been brought under control in or about September of last year. Though the most obvious, dystonia is not the only source of concern: infections and a decrease in cardiac respiratory reserves may also occur, which, if they do, would have a like effect on his condition, as would a resurgence of his dystonia.

**246.** According to the undisputed evidence, if any such event or other similar circumstance should occur, the same will involve the activation of one or more of the permissive orders

above mentioned. Such becomes essential to manage pain. However, it is equally the case that, to the level of probability, if not even to greater certainty, such would lead to respiratory distress which would require aggressive intervention to control it. It is this latter intervention which the doctors do not consider to be in the best interests of John, and which the withholding order is designed to cover.

**247.** John's parents' agreement with the opinion of his clinicians diverges at the point of the provision of ICU intervention. They firmly believe that John needs more time to recover and regain more awareness from the injuries suffered by him in the accident. Further, they believe that, from knowing his heart and what his wishes were for his future, he would want more time to fight. Both parents have emphasised that, thus far, John's progress has surpassed the expectations of his doctors, in particular that his awareness has increased. Both of John's parents are fully aware that he would require a lifetime of care as a result of his injuries and are accepting of this fact; however, they wish for him to be given every chance to relearn anything he possibly can and for the opportunity to help him with that process.

**248.** There is no doubt but that his prognosis for recovery from his brain injuries is very limited and his clinicians do not believe that he will regain any meaningful level of awareness. They are totally committed to minimising his suffering in every possible way, in particular by medication being administered to relieve the pain he will undoubtedly experience if any of these events should occur, and in particular if he further encounters another dystonic crisis. This medication carries the very substantial risk that it will cause respiratory depression, making John unable to cough or clear his throat. However, if this should occur, his doctors believe that performing invasive ICU intervention in an effort to prolong his life would be cruel. These interventions are of such an aggressive nature that they will cause him to be in more pain and even if the causative event should not be the onset of a dystonic episode, the pain and discomfort which he will suffer are most likely to cause an activation of that condition. It is the opinion of John's treating team that his recovery trajectory is such that even if they were to intervene, at some point he would suffer a dystonic crisis incapable of successful intervention due to his decreasing cardiac respiratory reserves. It is for all of these reasons that his doctors are in agreement that efforts to prolong his life are tragically futile and will cause him a significant amount of unnecessary pain and suffering.

**249.** From their personal point of view and their point of view as John's parents, I can totally understand their desire and the approach which underpins it. At such a level, I would not be in any way critical of it and while some parents may take the opposite view, that adopted by the Appellants would find support with many others. I would not have put the

matter as the President did at para. 123 of the judgment and at para. 157, where she said that they were "blinded by their love" and further, that no reasonable parent who understood the consequences of the kind of dystonic crises being suffered by John could have reasonably made the decision to refuse his doctors' permission not to intervene through invasive ICU therapies. Even though I fully understand that such was stated in the context of analysing the facts as against the intervention threshold, nonetheless some might see it as being an over-simplification of what is an extremely complex situation.

**250.** Certainly, there can be no dispute but that their devotion and love for their son has informed their views of his condition and it is also true that the love of a parent for their child is one of utmost intensity. They have acknowledged this. Unquestionably there is no doubting their devotion. However, notwithstanding this, I do not believe that they are in any way unmindful of the enormity of the burden that this unfortunate accident has inflicted on John, almost assuredly leading to his demise well before his time. Therefore, I see multiple facets to the decision that they have made in respect of John's treatment and would emphasise the obviousness of their great love for him, which is exemplified by their genuinely held views on the issue at stake.

**251.** The situation presenting is quite unlike that *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 I.R. 79: apart from the fact that the lady in question was in wardship, and was an adult, she had been in a near permanent vegetative state for almost two decades, with the application being moved by her mother, with full support from all her siblings. Further, of course, it was a request to have artificial nourishment and hydration withdrawn. True, there was an inevitability about that occurring, but the circumstances are totally unlike those in John's case.

**252.** Likewise, this case has no parallel to several of the English decisions which feature to a lesser or greater extent in the submissions: the sterilisation cases (*In re D. (A Minor)* [1976] 2 W.L.R. 279 and *In re B. (A Minor)* [1988] 1 A.C. 199; the HIV testing case (*In re C. (A Child)* (H.I.V. Testing) [2000] 2 W.L.R. 270; the blood transfusion cases (*Re E (A Minor)* [1993] 1 F.L.R. 386: the liver transplant cases (*In re T. (A Minor)* [1997] 1 W.L.R. 242 or the anorexia nervosa case (*Re W (a minor)* (medical treatment) [1992] 4 All E.R. 627). Several other such cases are identified by Healy (Healy, *Medical Malpractice* (Round Hall, 2009) at paras. 1408-1480). Therefore, I do not find much assistance from any of the factual examples that underlay these cases, or in truth from the legal analysis conducted. Certainly, if the parameters were found within the wardship jurisdiction, that would be different. That, however, is not the true test in this case.

**253.** I am not entirely easy in characterising the parents' response to what the hospital and doctors propose as constituting a "refusal" of consent to their son obtaining medical treatment. Quite evidently, they fully support what is outlined in para. 4(i) to (viii) of the order. What they object to is what they would consider a failure by the hospital to engage in life-saving treatment, which will become necessary to sustain his existence if his condition should deteriorate as predicted. It is thus not, in my view, simply nit-picking to take issue with the description as mentioned. Admittedly, by insisting upon this last-mentioned treatment, it could be said that they are objecting to the overall plan of the hospital. That, however, is a far cry from what we have seen in other cases, which is an out-and-out refusal to consent to medical treatment. I therefore think that such a description is somewhat inaccurate, and does not fully or sympathetically represent the stance taken by them. However, purely for shorthand, I will adopt the phrase which others have used in this case.

**254.** Ultimately, in assessing whether the court can intervene to supply the place of the parents and make the orders sought, it is necessary to navigate the test provided for in Article 42A.2.1°. There are a number of component parts to that provision, each of which I have endeavoured to address earlier. For the reasons set out above, I am satisfied that a single parental decision can give rise to a "failure of duty"; the question of whether there has been such a failure is judged objectively, by reference to whether the decision is likely to prejudicially affect the safety or welfare of the children. There is no requirement for parental blameworthiness or grave moral failing: even a good faith, conscientiously taken decision, objectively viewed, may be likely to prejudicially affect the safety or welfare of the child, and this may be sufficient to constitute a failure in duty in the sense provided for.

**255.** I agree with O'Donnell, Dunne, O'Malley and Baker JJ and also think it preferable that the reference to "exceptional cases" should not be read as an additional requirement to be satisfied, in that I do not understand it to impose an additional hurdle as such so that the Court may only intervene in unique or unusual circumstances. Those words must, however, be given meaning, and I interpret them as qualifying or describing the level of risk or harm to the safety or welfare of the child that will justify Court intervention. In other words, it is not the case that a court can override the parents' decision simply because the court, or a doctor, or a social worker, disagrees with it. The Constitution reserves a significant area of authority to the parents as regards making decisions on behalf of their children, and the test for State intervention must be considered against that backdrop.

**256.** So viewed, the question must still be answered whether John's parents' refusal to consent to the treatments sought to be administered amounts to a failure of parental duty that satisfies the constitutional threshold for intervention. At the outset, I must say that, from a constitutional perspective, I do not consider this as anything other than a difficult case to reach a conclusion on. I am of course full of admiration for John's parents and understand them to be acting solely in what they consider to be his best interests. I must, however, have regard to the medical evidence, which is set out in detail above. I do accept that the position regarding the likelihood of a further dystonic crisis has shifted since the application first came before the High Court. What has not altered, however, is the unanimity of the medical evidence regarding the severe pain and suffering that John will suffer if a further dystonic crisis is to occur. I do not consider that any reasonable parent, as understood in a constitutional setting, would refuse their consent to the administration of such medication even if a possible consequence of this may be a terminating effect on the child's respiratory function. To reach such a conclusion, however, from a personal perspective is undoubtedly extraordinarily difficult. Notwithstanding this, however, I do not consider that the parents' refusal to consider such painkilling medication can, objectively viewed, be described as being in John's best interests. From that objective perspective, I must regard that as a failure in their parental duty towards John.

**257.** There may, in a future case, be scope for much argument as to what precisely the word "likely" means in the Article 42A.2.1° context. Similarly, there may be much debate as to the point at which a decision may "prejudicially affect" the "safety or welfare" of a child. I have not, however, considered it necessary to explore such matters in great detail on this appeal. The reason for this is that it appears abundantly clear, on the evidence, that this threshold is satisfied on any available interpretation of these terms. John's dystonia was described as amongst the worst ever encountered by one of his experienced treating clinicians. The evidence as to the pain that he will endure did not leave room for ambiguity. I cannot conceive of any interpretation of "prejudicial affect" or "the safety or welfare of the child" that would not capture a decision to refuse painkilling medication in the face of such severe and (in the event of a dystonic crisis) certain pain. Accordingly, there can, in my view, be no question but that the decision in question is one that is likely prejudicially to affect John's safety or welfare, however one parses the precise contours of what those terms mean.

## VII. *Conclusion*

**258.** For the reasons above outlined, I have reached the following conclusions in respect of the issues:

i) An admission to wardship has such a profound effect on significant rights and freedoms of the subject person that no such order should be made until the basic tenets of fair procedures have been afforded; as is perhaps understandable, that did not occur in this case;

ii) In addition, the nature of the order was significantly more extensive than needed and in that respect it failed to meet the proportionality requirement of Article 42A.2.1°. On both of those grounds I would set aside the order made and, in its place, substitute an order admitting John to wardship but limiting the power of the Court to the area of medical treatment consequent on his accident.

iii) I am satisfied that the constitutional threshold of Article 42A.2.1° has been met, although the decision and views of John's parents have been conscientiously made and reflect the intense love and devotion that they have for him. Notwithstanding this, purely from a constitutional point of view, intervention is permitted and is proportionate in the circumstances;

iv) However, consistent with the substituted admission order to wardship, the nature of the intervention must have regard to both the rights of John and corresponding rights of his parents and therefore the impact must be limited to what is essential in satisfying the purpose of the order;

v) Accordingly, having conducted the required assessment of the balance of rights and interests mentioned, as well as the common good, I am satisfied to agree with the order proposed by my colleagues.

## VIII. *The Proposed Order*

**259.** I agree with the proposed terms of the orders as contained in the judgment of my colleagues. I would simply add that the time restriction of three months for the validity of the orders is a crucial consideration in this regard.