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Commentary on *North Western Health Board v HW and CW* (the PKU case)

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Should the state administer a medical screening test on a child against the wishes of the family? The parents in this case refused to allow a test which would have involved taking a pinprick of blood from the child in order to test for certain metabolic disorders – phenylketonuria, homocystinuria, and hypothyroidism. The parents objected on religious grounds, that 'nobody is allowed to injure anyone else'.[1] Based on this conviction, they objected to pricking the skin of their child. The Supreme Court upheld the wishes of the family and refused to order the administration of the test.

The case raises certain questions which are not well addressed in the original judgments. For example, if the implications of the judgment are that a child is at risk of a potentially debilitating illness as a result of the parents' decision, should the parents' wishes be adhered to? If untreated, the conditions covered by the test in *North Western Health Board* can give rise, *inter alia*, to epilepsy, behavioural difficulties, learning disabilities, brain damage, liver dysfunction, and sepsis. If the outcome of adherence to familial wishes is to lead to a brain damaged child, is that a decision that can lawfully be made? This is an unspoken assumption of the majority judgments. Moreover without much considered discussion, the majority judgment reinforced the powers of parents within the marital family, relegating the consideration of the individual child's interest to extreme cases. It also elided the issues of mandatory medical services and a child's individual best interests. The legal background to both issues is discussed in turn before considering Maebh Harding's suggested approach in her feminist judgment to protecting individual rights within the constitutional family structure; as contrasted with the general propensity of the Supreme Court toward protecting the unit at all costs.

The Power Structures of the Irish Constitutional Family

Feminist legal theory has always confronted the embeddedness of power structures in society.[2] The feminist legal model – and feminism generally – is concerned not simply with relations between the State and women, but also the relationships *within* family models. As a matter of history, the locus has tended to be in areas of traditional male power-differentials, e.g. domestic violence and marital rape.[3]

In Ireland, the constitutional model that was ostensibly favoured by the superior courts was based on a theoretical equality between the sexes. One finds this in the early jurisprudence

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[1] *North Western Health Board v HW and CW* [2001] 3 IR 622, at 628.

[2] See, eg Margaret Davies, 'Feminism and the Idea of Law' (2011) 1(1) *Feminists@Law*. Available at: http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/9/66 (accessed 8 October 2015). Indeed, this focus has been directed against 'essentialism' in feminist legal theory itself; see Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581.

[3] See Jill Hasday, 'Contest and Consent: A Legal History of Marital Rape' (2000) 88 *California Law Review* 1373.

of the Supreme Court on the operation of Article 42.[4] In practice, this equality did not exist. The operation of social mores, and indeed law, dictated that equality was rarely possible within the family. Unmarried women and children were treated less favourably still. Moreover, the focus on the 'traditional' family meant that alternative views of familial arrangements were systematically disregarded.[5]

Moves towards equality in the family sphere have tended to obscure, at least in the minds of liberal commentators, the still-existing power differential within the family itself. The clearest example of this, and the one which this case confronts, is the case of the child within the family. The monolithic 'family' protected by the constitutional model in *North Western Health Board v HW and CW* admits of only limited possibilities whereby the law can intercede on the child's behalf. The issue which the majority opinion struggles with, is the failure to see children as possessors of equal rights within the family unit, and instead to prioritise the family unit.

The position of the family within the Constitution, and the relationship of the various parents, spouses, and children of the family to each other is a key question which Harding J. addresses in her dissenting feminist judgment.

Mandatory Medical Services?

The provision of compulsory medical treatment has been a perennial question involving ethics, the limits of State power, and the freedom of action of the individual. Contrary to the opinion of the majority of judges in the *North Western Health Board* case,[6] the mandatory provision of the PKU test is widespread. The first statute-based PKU test was pioneered in Massachusetts in 1963, with the vast majority of States in the USA dictating a mandatory test by the time of the *North Western Health Board* case.

However, even where a mandatory test was present, there was normally an exception for the religious belief of the parents. This was not universal, and in 7 States there was no exception to the test.[7] West Virginia appears to be alone in failing to provide an exception for religious belief of parents but still imposing a misdemeanour penalty on those who failed to comply with the test.[8]

The debate about the wisdom of compulsory vs mandatory screening was one which exercised a good deal of people in the medical community in the 1970s and 1980s.[9] At the time the focus was primarily on the ethical, rather than legal, importance of parental consent in such mandatory programmes. One might imagine that the debate broke down along libertarian/communitarian lines. However, one of the most powerful arguments in favour of the necessity for mandatory screening was explicitly based on John Stuart Mill's harm principle and concluded that there was no reasonable justification which overrode the risk of harm to the child.[10] It is important, however, to bear in mind that the scientific community were divided on the issue of mandatory screening.

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[4] *In the matter of Tilson, Infants* [1951] 1 IR 1 at 33-34, 37-38 (Black J dissenting).
[5] *Norris v Attorney General* [1984] 1 IR 36 at 58, 91.
[6] See, *North Western Health Board v HW and CW* [2001] 3 IR 622, at 717 (Denham J) and 742 (Hardiman J).
[7] See table 3.1 in *Genetic Screening: Programs, Principles and Research* (National Academy of Sciences, 1975).
[8] This penalty is now contained in s 16-22-4 of ch 16 of the West Virginia Code.
[9] See eg, Ruth Faden, Judith Chwalow, Neil Holtzman and Susan Horn, 'A Survey to Evaluate Parental Consent as Public Policy for Neonatal Screening' (1982) 72 *American Journal of Public Health* 1347; George J Annas, 'Mandatory PKU Screening: The Other Side of the Looking Glass' (1982) 72 *American Journal of Public Health* 1401.
[10] Faden *et al*, ibid.

It is also important to recognise the importance of value judgments in understanding and applying scientific findings.[11] Recently, the debate about the human-papillomavirus vaccine in the USA has demonstrated the situatedness of ostensibly value-free debates about science.[12] The question of how to interpret purportedly neutral 'facts' is therefore one which pre-eminently concerns feminist theory; as Hawkesworth states, 'epistemological assumptions have political implications'.[13] In this light, the question posed in the *North Western Health Board* case provides an excellent example for the implementation of feminist legal theory. It demonstrates how a change in positional perspective can lead to a different result. As Alcoff notes:

> This difference in positional perspective does not necessitate a change in what are taken to be facts, although new facts may come into view from the new position, but it does necessitate a political change in perspective since the point of departure, the point from which all things are measured, has changed.[14]

The majority in *North Western Health Board* were concerned with the provision of a mandatory test by the State which focusses on a nation-wide test. It is important to distinguish between this approach and that ultimately adopted by Harding J, which focusses on the individual case, and individual child, before the court. The question of the relationship between parental consent and State action in medical cases does, however, feature strongly in the feminist judgment.

The Judgment

Harding J concludes that there is a common law jurisdiction wielded by the courts which can be invoked in this case. This is based on the inherent jurisdiction of the court to protect the welfare of the child. The other potential statute-based mechanisms only apply where either the guardians of the child disagree as to the substance of a decision,[15] or where there is a more lasting substituted decision-maker, e.g. in relation to wardship. This inherent jurisdiction allows a third party with an appropriate personal connection, in this instance the North Western Health Board, to seek to review the decision.

The major point of divergence between the decision of Harding J and the other judges in the case relates to the correct test to be applied when the court is asked to intervene into the family unit on behalf of a child. The understanding of the family as the means by which the welfare of the child is secured, the test proposed by Harding J, re-directs the enquiry under the Constitution. In the view of the majority, the correct decision-maker in almost all circumstances is the family as a unit. However, a feminist approach to judgment means that the assumed institutional structures must be considered, as Harding J argues: 'Making the marital family unit an inviolable space until parents abandon their constitutional duties shields abuse within the family.'

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[11] See, eg Sharon Crasnow, 'Feminist Philosophy of Science: Values and Objectivity' (2013) 8 *Philosophy Compass* 413; Kristina Rolin, 'Standpoint theory as a methodology for the study of power relations' (2009) 24 *Hypatia: A Journal of Feminist Philosophy* 218.

[12] Dan Kahan, Donald Braman, Geoffrey Cohen, John Gastil and Paul Slovic, 'Who Fears the HPV Vaccine, Who Doesn't, and Why? An Experimental Study of the Mechanisms of Cultural Cognition' (2010) 34 *Law and Human Behavior* 501.

[13] Mary E Hawkesworth, 'Knowers, Knowing, Known: Feminist Theory and Claims of Truth' (1989) 14(3) *Signs* 533, at 534.

[14] Linda Alcoff, 'Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Thought' (1988) 13(3) *Signs* 405, at 434-435.

[15] See, eg, *C.O'S v Doyle* [2013] IESC 60.

Harding J's test is not an oppositional one whereby the welfare of the child must be weighed against the rights of the family – it is the outcome to be secured by the exercise of those rights. This allows Harding J to re-conceptualise the relationship between family members as secured by the Article 42.5. This shift in positional perspective may be seen clearly when Harding J notes: 'The Court has been wary to ensure that the state does not tread on the rights of parents but there has been less emphasis in case law that the overarching duty of realising children rights is satisfied.' The shift towards a purposive approach to Article 42.5 means that familial rights do not become an unsustainably high barrier to the vindication of the rights of the child. It is on the basis of this shift in positional perspective that the other judgments of the court are criticised. The disjunction between the institutional family approach of the majority, which does not account for the vulnerable members of the institution, and the purposive approach of Harding J, which does account for those members, exemplifies the feminist approach to power balances.

When applying the principles to the facts of the case, Harding J draws attention to the outcome of failing to treat the disease and the probabilities involved. The question of probability was the subject of a bizarre exchange in oral argument, where counsel for the defendants sought to argue that it was the severity of outcome alone, rather than the possibility of the risk which was important:

> *Murray J*: Is the level of risk of relevance?
> *Mr. O'Donnell SC*: I do not balance the medical risk.[16]

This argument is one which cannot be justified and is rightfully avoided in Harding J's opinion. Both the severity of outcome, and the possibility of that outcome occurring, must surely play a role in the determination of whether to intervene in a particular case. It is noteworthy in this regard that the probability of PKU in Ireland stands at 1/4500, while the probability in the USA (where mandatory screening exists in almost all States) is over three times lower, at approximately 1/15000. In the USA, this lower probability was sufficient to set in train a movement to screen children across the country. The higher probability in Ireland should therefore indicate that the outcome is more threatening still. If the judgement call is a difficult one, then the court will stand over the decision of the parents. If the call is not difficult, then the court will not stand over the decision, for this would conflict with the purposive rationale behind Harding J's interpretation of Article 42.5.

Moreover, Harding J draws attention to what is assumed *sotto voce* in the decision itself: the child in question would have already presented symptoms of several of the conditions before the case was completed if, in fact, they suffered from the disease. This is a particularly problematic form of abductive reasoning. It raises the question of whether the majority's reasoning would have been the same if, in fact, Paul had presented with brain damage. In that case, the individual consequences would be demonstrably, terribly obvious. Moreover, if the outcome would be different in such a case, it follows that the test to be deployed should be one which obviates the need for a child to present with such a disease. Therefore, the test which should be used is one which concentrates on the rights of an individual child, the child before the Court, rather than a general familial right. In the words of Harding J: 'To turn away from such a child would amount to state protection of objectively harmful decisions at the expense of that individual child in order to protect the principle that most parents do the right thing.'

Implications

[16] *North Western Health Board v HW and CW* [2001] 3 IR 622, at 653.

The decision of the Supreme Court was one of a series of cases in the early 2000s where the judiciary were unwilling to decide cases in which it was felt another institution was a more appropriate decision-maker [17] These decisions were based on an interpretation of the Constitution which strictly cabined the powers of the judiciary. The same judicial deference is evinced in *North Western Health Board*. Moreover, Paul Ward has drawn attention to the difference between the current case and the decision of the Supreme Court in *The Western Health Board v Karen M ,* where the wishes of a mother that her child not be placed for foster care outside the jurisdiction were overridden.[18] This was based on the fact that in *Karen M* there was a legislative basis for the order, and that the mother was not constitutionally protected to the same degree as she was not part of the marital family. In 2006, the Ombudsman for Children pointed out that this judicial reticence left a 'lacuna in the current legislative framework where children's rights are concerned.'[19]

It also shares with those other cases a certain tendency towards histrionics which undermines the quality of legal reasoning in the decision. For example, in *North Western Health Board*, the trial judge made reference to Aldous Huxley's novel *Brave New World* in the following manner:

> If the State were entitled to intervene in every case where professional opinion differed from that of the parents, or where the State considered that the parents were wrong in a decision, we would be rapidly stepping towards the 'Brave New World' in which the State always knows best. In my view that situation would be totally at variance with both the spirit and the word of the Constitution.[20]

The attempt by the judiciary to treat as equivalents the dystopian nightmare of Huxley's vision with a heel prick test, without which a child may suffer brain damage, is wildly overblown. Nonetheless, the equivalence is based on the positional perspective where any attempt to ameliorate parental control over individual children is on a spectrum with the very worst attempts to obliterate parental control. This does not sound judicial reasoning make. The test proposed by Harding J preserves the presumption that the best decision-makers are the child's parents, but allows for the presumption to be rebutted, where such is in the best interests of the child. The feminist approach does not automatically privilege the wishes of the familial unit, focussing instead on the best interests of the weakest member of that unit.

The question of the weight to be given to the parents' views is also one which feminist theory must give weight to. The debate about whether and how multiculturalism and feminism are compatible is an involved one.[21] This becomes more complicated when dealing with the rights of parents over the child's medical treatment.[22] Harding J deals with this issue by stressing that in most circumstances the decision of the parent will be determinative; it is only where they conflict with the best interests of the child that they will not be adhered to.

Moreover, later developments demonstrate a real failure by the judiciary to understand what the *North Western Health Board* case was about at a factual level. In *C.O'S v Doyle,*

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[17] See, eg, *TD v Minister for Education* [2001] 4 IR 259; *Sinnott v The Minister for Education* [2001] 2 IR 545.
[18] Paul Ward, 'The Child and the State' (2003) *International Survey of Family Law* 217, at 237.
[19] The All-Party Oireachtas Committee on the Constitution, *10th Progress Report: The Family* (Dublin, Stationery Office, 2006) at A215.
[20] This quotation was approved by Hardiman J in *North Western Health Board v HW and CW* [2001] 3 IR 622, at 757.
[21] See, eg, Oonagh Reitman, 'Multiculturalism and Feminism: Incompatibility, compatibility or synonymity?' (2005) 5(2) *Ethnicities* 216; Monica Mookherjee, 'Autonomy, Force and Cultural Plurality' (2008) 14 *Res Publica* 147.
[22] See Caroline Bridge, 'Religion, Culture and Conviction' (1999) 11 *Child and Family Law Quarterly* 1.

MacMenamin J presented the case as follows: 'both the parents objected to the State vaccination scheme.' [23] Of course, *North Western* was not a vaccination case; it was a diagnostics case. That is, the PKU test would only reveal whether or not the child had one of the conditions; it was not designed to prevent the child getting the disease. This is a very obvious scientific mistake, and leads to the suspicion that the courts are simply uncomfortable trying to understand the science underlying the decision. In light of such discomfiture, they defer to the parents' decision. This allows the judiciary to stand over a constitutional principle: judicial deference. Deference obscures the role that the judiciary should play: the vindication of the rights of the child. Harding J's opinion forces the judge to consider what is, as a matter of fact, in the child's best interest and refuses to rely on judicial deference. It requires the judge to perform an evaluative role.

The test proposed by Harding J may have obviated the need to re-state this test in the 31st Amendment to the Constitution.[24] The new Article 42A.2.1˚ states:

> 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.

The re-fashioning of the Constitution so that it protects the 'safety and welfare' of children as against parental failure was a recognition that the jurisprudence of the Irish courts meant that the welfare of the child was treated as being subsidiary to the integrity of the family unit, rather than the family unit being treated as the means by which the welfare of the child was to be accomplished. Furthermore, a failure to re-examine the judicial outlook underlying *North Western Health Board* presents a potential future difficulty in the development of constitutional law in this area. If the fundamental position is not considered anew, ideally on the basis of feminist jurisprudence, there exists the possibility that the interpretation of Article 42.A.2.1° will proceed from the same familial unit perspective, and repeat the errors of *North Western Health Board*.

[23] *C.O'S v Doyle* [2013] IESC 60 at [23].
[24] Thirty-First Amendment of the Constitution (Children) Act 2012.

The North Western Health Board, Plaintiff, v. **H.W. and C.W.,** Defendants [2000 No. 6348 P.; S.C. No. 321 of 2000]

High Court 27th October, 2000

Supreme Court 8th November, 2001

Harding J . 8th November, 2001

How far should the Irish state go to protect children from the damaging effects of poor parental choices? Failure by the court to take action leaves Paul, a vulnerable baby, at risk of developing life threatening metabolic conditions. The damage caused by these conditions cannot be reversed but can be easily prevented with timely, appropriate, medical treatment. What degree of freedom should Irish law give parents to make irrational decisions where the evidence before the court shows that the individual interests and rights of a particular child are being adversely affected?

Paul is 14 months old. He lives with his parents and his four brothers and sisters in Donegal. There is no question raised about Paul's parents' abilities to care for the children in the long term and it seems that their home is warm and loving.

The North Western Health Board provides a free screening programme for new-born children in the area to detect biochemical and metabolic disorders. This test, known as the PKU, or Guthrie test, detects the presence of five conditions; phenylketonuria, galactosaemia, homocystinuria, maple syrup urine disease and hypothyroidism. These conditions are detected by means of a 'heel prick' where blood is taken from the child's heel and sent to Dublin for analysis. All five conditions are caused by the body's inability to break down amino acids or produce essential hormones. Over time, the effects of these metabolic disorders cause mental disabilities and life threatening illness. All are treatable but any damage caused before treatment commences is irreversible.

Paul was born at home. Paul's parents have objected to the PKU test being carried out. The parents made similar objections to the testing of Paul's older sister, Mary. Mary had the PKU test several years ago against the wishes of her parents under the terms of an interim care order granted to the North Western Health Board by the District Court. Paul's parents feel that the PKU test is invasive and offends their religious belief that nobody is allowed to injure anyone else. Moreover, the parents assert that Mary became very unsettled for a long period after the test was carried out. On balance they have decided that it is not something that they want for their child. Should the court interfere with this decision?

This case raises three legal issues for the determination of the court. 1) In what circumstances does the court have the power to intervene in parental decision-making to uphold the individual rights of the child? 2) Is the exercise of the court's inherent jurisdiction appropriate where the child remains within the family or is intervention limited to existing statutory mechanisms? 3) Is the test for exercising inherent jurisdiction satisfied in Paul's case?

Protecting the Individual rights of the child

The individual rights of children are not given an adequate level of recognition in Irish constitutional law. Although the rights of children are recognised in the text of the Constitution itself, they are inevitably constructed in Irish jurisprudence as being consistent with the wishes and desires of their parents, except in the most extreme circumstances. This tendency is partially attributable to the structure of the constitutional protections that attach to the marital family and its members.

The personal rights of children are given the same protection under Article 40.3.1^0 as those of any other citizen although they may be differently realised (*State (Nicolau) v. An Bord Uchtála* [1966] I.R. 591). These rights include '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' (*G v. An Bord Uchtála* [1980] 1 I.R. 32, 56). In order to ensure that children reach their full potential as individuals, Article 42 expressly guarantees children a religious moral, intellectual, physical and social education and Article 42.4 obliges the state to provide children with free primary education.

Article 42 places a duty on parents to provide such an education according to their means but where they fail in their duties the onus falls on the State 'as guardian of the common good'.

Parents could not fulfil their duties towards their children without legal rights to make decisions about the upbringing of their children. Families are deeply personal, private places. Parents must have the freedom and authority to create their own family dynamic without undue outside interference. The Irish constitutional structure retains an outdated distinction between marital and non-marital families. Article 42 imposes an inalienable right and duty on married parents to provide for the religious and moral, intellectual, physical and social education of their children. The courts have additionally recognised several constitutional parental rights attaching to the mothers of non-marital children under Article 40.3 including the right of custody (*G v. An Bord Uchtála* [1980] 1 I.R. 32, 85). Such rights are accorded in so far as they are necessary for the parent to promote their children's constitutional rights. They are not standalone rights.

The message of the courts and the constitution is clear; parental rights are accorded to parents in order to allow them to fulfil their parental duties towards their children. Upholding parental rights to make decisions about their children's upbringing is not an inherent good in and of itself. Parental rights are instrumental to ensuring that children's rights are upheld. That is the reason for their existence. The rights of parents are inalienable only when being exercised within their protected scope - to fulfil that parent's constitutional duty towards their child. O'Higgins C.J. warns that the State may have an obligation to protect a child even against its mother, 'if her natural rights are used in such a way as to endanger the health or life of the child or to deprive him of his rights' (*G v. An Bord Uchtála* [1980] 1 I.R. 32, 56).

However, Irish constitutional protection of the family is more complicated than merely considering the conflicting personal rights of parents and children. Article 41 of the Irish constitution protects the institution of the marital family itself as the fundamental unit of Irish society. By making the marital family a specially protected space, both parents and children are accorded further rights as part of this collective family unit, such as the right to a family life together. However, family members must retain their individual rights within the confines of the marital family unit.

Sometimes vindicating the rights of the individuals within a marital family does not align with maintaining the integrity of the family unit itself. The court must grapple with the relative importance of preserving the structure of the marital family at the expense of its component parts. As a nation we have historically ignored the individual rights of family members in favour of the greater goal of preserving the family structure even where that structure is an empty shell. Let us not forget that the right to leave the structure of the marital family through divorce required a number of divisive constitutional referenda. The individual rights of the spouses for whom the reality of marriage was intolerable, such as victims of violent abuse, were secondary to preserving the ideal of the marital family. We must be cautious not to forge a similar approach to protecting the individual rights of children.

Parents are the decision makers of the marital family. An interference with their decisions not only interferes with their individual rights as parents but also interferes with the marital family as a protected and private space for child rearing. In general, parents are the best people

to care for their children and make all day to day decisions. The natural bonds of love and affection between parent and child mean that parents will usually want what is best for their child and often make considerable sacrifices to make this happen. Parents grapple with difficult and multifaceted decisions in the upbringing of the child. It is not easy to predict the future, to know, for example, what school would be best for a child or the consequences of a decision to let the child take up a potentially dangerous sporting activity. Short term detriment or discomfort must be balanced against the potential future benefits of any decision. Parents do their best; they know their children and they have to live with the consequences of their decisions. This is the reason why Irish law accords a general autonomy to parents in their decision making but this cannot always be guaranteed. Unfettered parental rights may be abused. If a society simply defers to parental care within individual families it must have a realistic mechanism for insuring that the child's need for safety and rights to realise his or her full potential are protected within the confines of the family; marital or otherwise.

My colleagues on the bench are unanimous in holding that parental rights are not absolute; that the state can intervene to protect children. The question is when it is appropriate to do so and whether any appropriate legal mechanism for doing so exists.

Article 42.5 places an express duty on the state 'to supply the place of the parents' in certain circumstances:-

> "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 duty placed on the state is to ensure that the rights of children are upheld. However, the state is not the primary body tasked with this duty; parents are. Within Article 42.5 is assumption that a life in state care or an adoptive family is second to life in a loving functional family. There a clear duty on the State to step in as a substitute permanent carer where the child has no parents and Article 42.5 has been invoked to justify state care in cases where no parent could be found to care for a child (*F.N. v. Minister for Education* [1995] 1 I.R. 409 and *D.G. v. Eastern Health Board* [1997] 3 I.R. 511).

The appropriate scope of the State's duty to step in where parents have *failed* in their constitutional duty toward the child is much more difficult. The issue has been scrutinised by this court in the context of involuntary adoption; the most permanent substitution of all. The state must use a liberal standard before removing a child from its birth family and replacing the parents with adoptive parents or other permanent care givers. Permanent intervention into the family unit is the most draconian form of state intervention and must be a proportionate response. This type of parental failure occurs only in exceptional cases. A child's right to be protected must be given due regard but their right to be part of an intact marital family must also be considered. The court must consider not only whether intervention is appropriate but also whether the proposed course of action of substitute care is one that will best realise the child's right to realise his or her full potential, in the circumstances of the case before them.

The Court has been wary to ensure that the state does not tread on the rights of parents. There has been less emphasis in case law in ensuring that the overarching duty of realising children rights is satisfied. In *Re Article 26 and the Adoption (No.2) Bill 1987* ([1989] 1 I.R. 656, 665-666) the court held that in order for adoption to be a proportionate interference with parental rights, *both* a failure in duty *and* clear abandonment of parental rights was required. In practice, we have seen that the twin criteria of failure and abandonment are very difficult to satisfy even where it is clear that the child's rights have been infringed and adoption seems to be the best solution.

In *Re J.H. v. An Bord Uchtála* ([1985] I.R. 375) this undue emphasis on the rights of parents when applying the Article 42.5 test, developed in the context of involuntary adoption, was

extended to the less interventionist issue of custody. In that case, unmarried parents had placed their daughter for adoption and later married. As a result of their marriage the adoption order was quashed and the parents then sought custody of their then two year old daughter child from the would-be adoptive parents. Expert evidence was submitted that the child would be at risk of long-term harm if custody was transferred to natural parents.

In the Supreme Court, Finlay C.J. was clear. The state cannot supplant the parents by making custody orders unless the Article 42.5 test is satisfied. When the case was returned to the High Court, Lynch J. ordered the transfer of custody with concern about the consequences for the child who had spent 3 years with her foster parents. He reasoned that the change would be no more traumatic than a parent dying which many children would unfortunately have to deal with. This approach, which prioritises parental rights as a goal in and of themselves, is hardly consistent with the court's overarching constitutional duty to uphold the child's right to self-realisation and dignity.

I have serious concerns about the extension of this interpretation of the Article 42.5 test to the issue of custody. A custody order is a much lesser interference with parental rights than an adoption order. In all cases prior to *Re J.H.,* the issue before the court had been a permanent end to the child's education by his or her parents. The parents had either died or permanently abandoned the exercise of their parental duties. On the facts of *Re J.H.,* a custody order would have meant an end to the meaningful exercise of the rights of the parents and could be distinguished on that basis. However, some of my fellow judges on the bench endorse the ruling and see fit to extend the same interpretation of the Article 42.5 test, developed in the context of involuntary adoption, to all situations where the court is asked to vindicate the individual rights of a child in defiance of parental wishes. The high standard that must be met before the court can order an involuntary adoption is not appropriate for cases such as Paul's case before us, where the ongoing exercise of parental rights is not in question and the proposed state intervention is not as extreme.

The structure of Articles 41 and 42 of the Constitution have led some of my colleagues to the rather lazy assumption that the individual rights of the child are inevitably best protected by upholding the integrity of the marital family unit. This approach, most expressly stated by my colleague, Hardiman J., (*North Western Health Board v. H.W. & C.W.* [2001] 3 I.R. 622, 765) replaces the overarching duty of the court to uphold the individual rights of the child with a duty to uphold parental rights and maintain the family unit, on the assumption that this will achieve the same end. Yet for many unfortunate children the marital family unit is the most dangerous place of all. To limit the court's ability to uphold the individual rights of the child to 'exceptional circumstances' narrowly defined, falls very short of the court's duty to uphold the rights of the child to realise full personality and dignity. My sister, Denham J., would limit questioning of parental decisions to surgical decisions in relation to an imminent threat to life or serious injury. My other colleagues make the duty even narrower, finding it difficult to come up with even one practical example of when such a duty would arise. Murray J. limits it to immediate and fundamental threats 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. With respect, these theoretical situations would surely satisfy the current test for involuntary adoption. A nearly irrebuttable presumption that the decisions of married parents always uphold the best interests of their children cannot be what was intended by the framers of the constitution and is inconsistent with the courts duty to uphold the personal rights of children as individuals under Article $40.3.1^0$.

Making the marital family unit an inviolable space until parents completely abandon their constitutional duties shields abuse within the family. In doing so the state abdicates responsibility for the welfare of children who do not live in a loving family. We ignore these vulnerable children for the sake of children living in the ideal marital family which must remain

unimpeachable. This 'all or nothing' approach to intervention allows more invasive types of intervention in the very worst situations but allows the state to do very little before the family reaches this stage. There is no scale for proportionate intervention. To limit the development of the law in this way turns our back on the children for whom the paradigm marital family is not a reality, ignoring their personal rights in the day to day reality of their lives.

I agreed with the concerns raised by Keane C.J. that such a parental-rights-focused interpretation of Article 42.5 extends a test, designed to justify the most permanent and invasive type of state intervention, to all types of cases which impact in any way on parental freedom to make decisions. This is disproportionate and would gravely endanger not only Paul but the interests of all children. There is a distinction to be made between the state's duty to take over from parents where they have failed and the state's duty to ensure that children's rights are preserved within their birth family. Adapting the metaphor used by my colleague, Hardiman J., the state should act, not a super-parent, but as a watchdog to vindicate children's rights.

A better approach is to distinguish between different levels of intervention and ask whether the intervention proposed can be justified in the circumstances to uphold the child's rights or to use the traditional words of statute; 'further the best interests or welfare of the child'. For example, in *P.W. v. A.W.*, (Unreported High Court Ellis J., 21 April 1979). Ellis J. held that the assumption of parental custody was only a pragmatic starting point. Under Article 42 a child's rights must be vindicated by leaving her in the custody of her aunt, the solution that furthered her best interests. Parental rights were respected as far as possible because her parents retained guardianship.

There is space for a purely child-centred jurisdiction within our constitutional rights framework when dealing with the ongoing exercise of parental authority. Most parental decisions are entirely unquestioned. Where an issue is brought to the attention of the court respect for the rights of parents is preserved within the structure of the legal system and the way in which evidence is assessed by the court. Parents can take legal action to uphold their own rights and they can respond to court proceedings. Children cannot. Irish law contains no statutory mechanism by which a child can directly seek the adjudication of the courts in a question relating to their own upbringing. Either their guardian or the Health Board must bring such proceedings on their behalf. The way in which evidence is assessed when a case comes to court is also deferential to parental decision making. Parents have ample opportunity to explain their decisions and their plans to further the long term interest of the child. The court must consider, not only the evidence that the child's rights are infringed but also evidence relating to the disadvantages of intervention and the need to promote the stability of a particular family unit. Where the evidence suggests that parents are making a difficult judgment call, with similar risks on both sides, the court will stand over such decisions.

As members of the judiciary we are under an obligation to ensure that the most vulnerable in our society receive the same protection as the strongest. This requires us to take the individual interests of children seriously, not merely agree with parents where serious questions are raised that their choice of action will have a long term detrimental impact on the child.

The Place of Inherent Jurisdiction

Different mechanisms exist in statute law to allow varying levels of intervention into the family. Historically the statutory test for balancing the interests of parents and children is the welfare principle. The principle is one which predates the 1937 Constitution and is commonly used in wardship proceedings. The duty on the court is the same as that imposed by Article 40.3.1.^{0} The court is asked to consider whether the intervention proposed can be justified in the circumstances to further the child's best interests; upholding the child's rights to realise their full personality and dignity as a human being.

There are three statutory mechanisms by which the court can question parental autonomy. This is the first case in which the court finds itself asked to overrule a single parental decision made jointly by two parents because its legitimacy has been questioned by a third party. The statutory mechanisms do not apply to this situation but they must be examined to see if they are sufficient to vindicate the rights of children or whether it is necessary for the court to invoke inherent jurisdiction to provide a suitable mechanism by which to fulfil its constitutional duty to uphold Paul's rights.

Under section 11 of the Guardianship of Infants Act 1964, the guardians of an infant may apply to the court for a direction on any question affecting the welfare of a child and the court may make such order as it thinks proper. This mechanism is only open to the guardians of children and is used when parents disagree. It provides no solution where the joint decision of both guardians is under scrutiny. The legitimacy of the court's decision where parents disagree comes from the fact that the parents have invited the court in. In such circumstances the welfare of the child is to be the court's *first and paramount concern* in matters relating to the upbringing of children (section 3 of The Guardianship of Infants Act 1964). The welfare test requires the court, when balancing all the competing interests, to choose the result which maximises the child's best interest. The maximisation of the child's welfare is not something that is balanced against interference with parental rights. It is what is achieved when competing interests are balanced correctly. Within the welfare test is the understanding that parental rights exist for the benefit of children and that the welfare of the child is factually linked to a continuing relationship with the child's parents. The wishes and interests of the parents are taken into account as a matter of evidence in establishing what is in the best interests of the child but are not weighed against the child's interest. The test places the responsibility on the court to find the best solution for the particular child in each individual case.

The statutory basis for formal state intervention into the family is the Child Care Act 1991. Section 3 places a duty on the Health Board to promote the welfare of children in their area. Section 15 of this Act places a duty on Health Boards to apply to the District Court for a care or supervision order if a child in their area requires care or protection which he is unlikely to receive without the making of the care order. A care order is a highly interventionist measure which hands over wholescale decision-making power to the Health Board for a limited period of time. The Health Board must have regard to the rights and duties of parents and the principle that it is generally in the best interest of a child to be brought up in his own family. The structure of the Act promotes the long-term upbringing of children within the family unit which is appropriate when considering this level of intervention.

Under s18(1) of the Child Care Act 1991, the court will not make a care order unless it is satisfied that :-

(a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or

(b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or

(c) the child's health, development or welfare is likely to be avoidably impaired or neglected,

and that the child requires care or protection which he is unlikely to receive unless the court makes an order under this section.

Once a child is the subject of a care order, parental objections to medical treatment can be overridden by the court (*A. and B. v Eastern Health Board* [1998] 1 I.R. 464). The question arises whether a care order can be made for the purpose of overriding parental objections to a diagnostic test where there are no other concerns about the parent's ability to care for the child. Under s18 (c) of the Child Care Act 1991 the District Court may make a care order where it considers the child's health, development and welfare likely to be 'avoidably impaired or neglected' and the child requires care which he is unlikely to receive unless the court makes an

order. Such an order was obtained from the District Court to ensure that Paul's sister, Mary received the PKU test. The District Court refused to make a similar order in this case. On appeal, the Circuit Court has suggested that, due to the emphasis in the Child Care Act 1991 on promoting the long-term upbringing of children within the family, care orders are appropriate only where the parents provide a generally inadequate level of care; they are not an appropriate mechanism for considering one decision in isolation. I do not wish to comment of whether a care order should have been used in this case. The Health Board has not appealed this decision but has sought to fulfil its statutory duty to promote Paul's welfare by other means. The assessment of whether or not section 18 is satisfied is a factual decision to be made by the District Court. Consistency can be difficult to achieve. However, the focus of section 18 of the Child Care Act 1991 is on the detriment to the child rather than the actions of the parents and this should not be forgotten when promoting long term care within the family.

The ward of court mechanism has previously been used by this court to protect children from the decisions of their parents. The origin of wardship lies in the idea that the Sovereign as *parens patriae* had a duty to protect his subjects, particularly children or those who were unable to protect themselves. This duty passed to the Lord Chancellor, the Court of Chancery and to the Lord Chief Justice of Ireland under the Government of Ireland Act 1920. The continuation of the duty is reflected today in the role imposed on the state by Article 42 as 'guardian of the common good'. Wardship now vests in the Irish High Court and has statutory basis under section 9 of the Courts (Supplemental Provisions) Act 1961 which reads – 'there shall be vested in the High court the jurisdiction in lunacy and minor matters which was formerly exercised by the Lord Chancellor of Ireland'.

The original function of wardship was to protect the property of a minor whose parents were dead or unavailable. A petition for the court to consider making an individual a ward of court can be made by any individual. When a child is made a ward of court both the ward's person and property are subject to the courts' control and parental rights of decision-making are superseded for all matters. Wardship continues until it is discharged. When deciding to exercise its wardship jurisdiction the High Court must be satisfied that a child is at serious risk *and* that it is appropriate that the child should be brought into wardship (*Eastern Health Board v. M.K. and M.K.* [1999] 1 J.I.C. 2902). Paul's circumstances may indeed warrant wardship but the powers of the court under wardship are broader than necessary to resolve the issue before the court.

As can be seen, the statutory mechanisms for questioning parental decision-making in Irish law are very limited. None are open to the child. Only guardians may ask for a determination on a particular question. All other mechanisms are for a short or long term substitution for all parental decision making.

Yet the formal wardship mechanism is only one part of the inherent jurisdiction of the High Court. The inherent jurisdiction of the High Court is a flexible protective jurisdiction based on a duty to protect vulnerable individuals, including children, from harm. It can be used for the narrower purpose of reviewing a single decision unless abrogated by statute or the constitution itself.

I agree with Keane J. that an inherent jurisdiction to examine parental decisions to protect the individual rights of the child still exists in Irish law. Children cannot easily bring actions to court to protect their own interests, they are not an active part of the legislature and they cannot advocate their own rights. A legal mechanism is required to protect their rights where they are threatened by the decisions of others. The need for such a jurisdiction was recognised at a point in history where individual rights were accorded less value than they are now. In the absence of a express statutory mechanism by which to review parental decisions made by an intact family unit the existence of such a jurisdiction to protect vulnerable children from harm caused

by decisions which may adversely impact the child's constitutional rights is surely constitutional mandated.

Inherent jurisdiction allows any third party with an appropriate personal connection to the child to invoke the jurisdiction of the High Court to protect that child's rights. Here the refusal of Paul's parents to allow the PKU test puts him at risk of potential harm. The Health Board has a statutory duty to provide for Paul's welfare. It has brought this matter to the High Court's attention for determination of what should happen to Paul. Statutory measures to deal with this type of situation have not been enacted. It has been determined by the District Court that a care order is not an appropriate way of considering the issue on the facts. Inherent jurisdiction is the only mechanism that exists for Paul's individual interests to be formally considered.

Without such a jurisdiction, potential violations of children's rights could only be challenged in the most extreme cases. This would ignore the entire tradition of wardship and inherent jurisdiction which recognised the vulnerability of individuals and sentence the most at risk children to invisibility in the eyes of the state. With no one but their parents to promote their interests they would simply never be heard.

Should the court override the decision of Paul's parents?

When making a decision under protective inherent jurisdiction the High Court must weigh up all the evidence available and make a decision that furthers the best interests of the child. It is important to assess the potential harm by looking at both the nature of the risk (high or low) and the remoteness of that harm (i.e. the likelihood of it happening). The court must also review the impact of the type of measure needed to obviate the risk when determining whether intervention is justified in the circumstances or to use the traditional language of inherent jurisdiction, furthers the best interests of the child in the particular circumstances.

The potential harm:-

1. Paul remains at risk of developing any one of three conditions; phenylketonuria, homocystinuria, and hypothyroidism. The risk posed by these conditions is substantial. The Health Board describe consequences of failing to treat these disorders as catastrophic.
2. Phenylketonuria is a genetic condition where the body is unable to break down a substance called phenylanine which builds up in the blood. High levels of phenylanine cause damage to the brain. Without early treatment children with this condition develop severe mental disabilities rendering the child unable to lead an independent life. It also heightens the risk of death by strokes or embolism. If a PKU test is not done, Phenylketonuria will not be detected until the child's brain damage exhibits in behaviour difficulties or epilepsy. By this time the damage is irreversible.
3. Homocystinuria is an inability to break down a different amino acid – homocysteine. This causes skeletal abnormalities, vision problems, brain damage and an increased risk of blood clots. Again the only diagnosis is the detection of the damage done: delayed development, mental disability and vision problems. It is treated by taking vitamin supplements.
4. Congenital hypothyroidism is caused by an undeveloped thyroid gland. Again it is easily treated with supplements but there is no way of reversing the serious disabilities a child will develop if they do not receive early treatment.
5. We are told that the rate of phenylketonuria in Ireland is 1 in 4,500 births. The risk of homocystinuria is 1 in 49,000. Congenital hypothyroidism is present in 1 in 3500 births. The risk is not highly probable, it is remote, but it remains a real possibility.

The risk of damage to Paul's health if he does have one of these metabolic disorders is great if it goes undetected but the probability of such a situation is remote. Is this a risk we are happy

to let a 1 year old take? Are we to hope that Paul is lucky? My fellow judges have declared the risk to Paul to be minimal, relying on the low level of probability. They agree that where the outcome of death or serious disability was a clear one, then the court could certainly exercise jurisdiction. If the probability of the damage was higher but the level of risk slightly lower they also admit that they may have felt otherwise. Where the level of risk is high but it is a real possibility the court should look in addition at the impact of intervention before deciding whether or not over-ruling parental decisions would be the best course of action to further the interests of the child.

Counsel argued that this case could be distinguished from situations in which there was an immediate threat to life but this is a false distinction which focuses on the immediacy of risk over the probability of harm and the level of harm. Paul is no longer at risk of developing galactosaemia or maple syrup urine disease as symptoms of these conditions would by now have presented. However, galactosaemia is a rapidly fatal disorder and maple syrup urine disease causes rapid brain damage and eventual death. The risk to Paul's life if he had had one of the metabolic disorders which are now ruled out would have been immediate. If Paul had had these conditions which had gone untreated, he would by now be dead or severely disabled. The question of whether or not a PKU test should be carried out may indeed involve an immediate threat to life.

The impact of intervention:-

1. Treatment for all three conditions is simple and relatively non–invasive. If phenylketonuria is detected the child will be put on a low-protein diet and will have to take an amino acid supplement. Similar preventive measures are taken with the other conditions. But what of the consequences of interference with the wishes of Paul's parents? How will this level of intervention impact on long term family life? What weight should be given to the desirability of upholding the wishes of Paul's parents?
2. In wardship cases where the goal of the court is to further the best interests of the child, parental rights are given evidential weight (*In Re A. Ward of Court* [1996] 1 2 I.R. 79. 117). This requires the court to listen to the parents' objections and understand why they are objecting. Here, the parent's objections to the test are based partially on a false understanding of the risks involved. None of Paul's four brothers and sisters had any of the conditions. However, four negative tests does not rule out the possibility that the parents are carriers. Paul's level of risk is not less than any of his older siblings. If both parents are carriers there is a risk of one in four that any child will inherit one of the conditions.
3. It was raised in the High Court that Pauls' parents are objecting to the test on the basis of religious belief. They stated 'It is our strong religious belief that nobody is allowed to injure anyone else.' The point was not taken any further and it is difficult to give weight to the right to religious freedom when it is not clear whether this is part of set of religious principles or merely a personal belief. If it is merely a personal belief, its rationality should be questioned. The injury caused to Paul by denying him the test and letting him run the risk of severe brain damage is far greater than the injury done to him by the heel prick. When refusal is based on adherence to a set of religious beliefs the court may balance the benefit of religious compliance against the risk to the physical wellbeing of the child when deciding what is in the child's best interest.
4. The only foreseeable detriment to Paul of having such a test would be the potential upheaval to the family unit. Paul will remain in the care of his parents and this is not questioned by either side but their relationship with Paul may be damaged by this court intervention. In contrast, failure to have the test carries a small but very serious risk of long term damage to Paul's health and quality of life.

5. The intervention amounts to a once off event, not a severance of parental authority but a temporary limitation. The stigma of the test will not affect the nature of Paul's upbringing in the same way that medical treatment in contravention of religious tenets might alienate a family from their religious community.
6. Counsel have argued that a decision to intervene in this case would have an impact, not only on Paul's family but on all families. They argued that if the PKU test is determined to be in Paul's best interests it would be rendered compulsory for all children in all circumstances. This black and white thinking ignores the adjudicative function of the court to ascertain when intervention is proportionate on the evidence presented to the court in any particular case. Here, the court must weigh up not only the medical evidence but Paul's particular circumstances and the evidence of the effect ordering such a test would have on the integrity of Paul's family. For another child, in slightly different circumstances the decision may be different. By refusing to question a decision because we cannot be certain it will be questionable for all families, we ignore children in cases where the evidence demonstrates that parents have made a decision that materially and detrimentally affects a child's rights. When making legislation, the Oireachtas balances public interest but cannot tailor to the reality of individual cases. This is why the welfare principle leaves space for the courts to make tailored decisions to promote the best outcome in the circumstances.
7. Some of my colleagues fear that making the declaration that the decision of Paul's parents can be overridden in these circumstances would have a potentially 'chilling effect' on parents everywhere, undermining the family and issuing in a 'brave new world' of state interference. I fear that declaring that a court has no power to interfere with parental decisions, however damaging, except in Article 42.5 circumstances has a rather bleaker chilling effect. It sends a message that no one can intervene. That there is no mechanism in Irish law for a third party to question parental autonomy. If we accept that the care and protection of children is the responsibility of society as a whole we cannot stand over this message. The health worker who inspected the family would have no basis on which to question parental decisions and probe further unless she felt there was reason to suspect that the Article 42.5 would be satisfied.

The constitution gives rights to the marital family as an entity to prevent unwarranted state interference because we as society believe in general that parents make the best decisions for children. Where we have evidence in an individual case that this assumption is patently untrue, why should the rights of the marital family, created to protect children *in general*, hamper the vindication of an individual child's rights? To turn away from such a child would amount to state protection of objectively harmful decisions at the expense of that individual child in order to protect the principle that most parents do the right thing.

Conclusion

On balance, the best interests of Paul and the court's constitutional duty to uphold his right to realise his full potential as a human being require a declaration for the test to be carried out. I would make a declaration to this effect.