CHILDREN'S RIGHTS AND END OF LIFE DECISION-MAKING*: IN THE MATTER OF JJ*

Abstract: This article analyses the decision of the Supreme Court in In the Matter of JJ [2021] IESC 1. The article observes that this case differs from previous end-of-life cases in that it countenances a mixture of acts and omissions leading to the death of the patient. It outlines the legal and ethical issues with respect to acts and omissions in end-of-life decision-making and analyses how the Court engaged with those issues. The article also observes that the decision provides the most authoritative guidance yet as to the effect of the Children's Rights Referendum on children's rights and the threshold for State intervention for failure of parental duty. It notes that while previous commentary had suggested that Art. 42A of the Constitution would not have a significant impact on the threshold for State intervention, the decision in Re JJ clearly signals that the Referendum has effected a significant change in the law in this regard.

Author: Finn Keyes LL.B (Dubl), LL.M (UCL), Barrister-at-Law.

Introduction

Re JJ is a profoundly sad case that has required the Supreme Court ('the Court') to engage with some of the most weighty constitutional issues in our jurisprudence. The judgment is an intricate and measured examination of the rights of the family, the rights of the child, medical ethics, and the role of the State in providing for the welfare of incapacitated persons.[1] This article will outline and analyse the findings of the Court relating to end of life care, the boundary between euthanasia and lawful palliative care, and the threshold for State intervention in the healthcare of children in the aftermath of the Children's Rights Referendum. The article will confine itself primarily to the joint judgment of O'Donnell, Dunne, O'Malley, and Baker JJ ('the Principal Judgment'), but will not address in detail the discussion of the wards of court system in the concurring judgments of Baker J and McKechnie J.

Facts

In June 2020, a young boy (referred to as 'John' in the judgment) suffered catastrophic injuries in an accident, including a 'devastating' brain injury. His tragic condition was summarised by the Court:

> As a result of his injuries, John is currently fed by a nasogastric tube, has a long-term catheter to facilitate the delivery of medications… It is not expected that John will ever walk, talk, develop any meaningful awareness of his surroundings, be able to communicate or process information, nor will he ever be capable of performing any voluntary movements.[2]

As a result of his neurological injuries, John developed a condition known as 'dystonia'. Dystonia is a hyperkinetic movement disorder that sometimes arises out of brain injuries. The condition causes abnormal electrical signals to be sent to the muscles, which can result in painful and prolonged involuntary contractions of the muscles. The medical consensus

[1] *In the Matter of JJ* [2021] IESC 1.
[2] *Re JJ* (n 1) [4].

was that the dystonia suffered by John was of an extreme nature. One consultant described the severity of John's dystonia as 'unparalleled', bar one other case.[3] John suffered dystonic episodes that would last for several hours, and could be precipitated by anything that caused him discomfort, including noise or the delivery of his medications. John's dystonic episodes presented his medical team with a terrible quandary. In the event of a dystonic crisis, they wished to administer pain relief by way of injection. However, such relief would likely have the effect of repressing his respiratory functions, leaving him unable to clear his respiratory tract. This would in turn require physical intervention by the medical team to save his life, which intervention would, in turn, trigger a further dystonic crisis.

This quandary brought John's medical team and his parents into disagreement. John's parents argued that his preference would be to hold on to life by any means necessary, but his doctors disagreed, and were of the view that aggressive life-sustaining measures would not be in John's interests in the event of further dystonic crises. After witnessing John endure what they described as 'extreme and intolerable' pain for over a month, the medical team made an application to the High Court seeking to have John made a ward of court, and for further orders allowing the medical team to treat John in the manner it saw as in his best interests. In essence, the medical team sought the permission of the High Court to administer pain-killing medication in the knowledge that this could trigger respiratory failure, and further permission not to intervene to save John's life in the event of such failure. John's parents contested this view of the medical team and argued that John needed more time to prove his ability to recover from his injuries. As John's father said in evidence, 'Well, as his Mum said, he has the heart of a lion so I think [John] will keep fighting on as long as possible, you know, and that's what I want and I believe that's what [John] would want as well…'[4]

The Decision of the High Court

Giving judgment for the Court,[5] Irvine P. held that there is a presumption under the Constitution that the best interests of the child are found within the family, and by the autonomous decisions of that family unit. However, the presumption could be rebutted by clear and compelling evidence to the contrary. She held that on the facts of this case, having regard to medical consensus as to the hopelessness of John's condition and the significant pain he continued to endure, the presumption had been rebutted. She therefore granted the orders sought by the hospital. A leapfrog appeal to the Supreme Court was sought, and granted.[6]

Law, Ethics and End-of-Life Decision-Making

Counsel for the mother of John argued that the orders sought and granted by the High Court in this case were constitutionally impermissible, as they condoned positive acts to hasten death, and as such amounted to euthanasia and unlawful killing.

[3] *Re JJ* (n 1) at [6].
[4] Quoted in the judgment of the Supreme Court, (n 1) at [22].
[5] The rationale of the High Court is set out in detail at [36] *et seq* of the judgment of the Supreme Court (n 1).
[6] [2020] IESCDET 133.

Acts and Omissions

The Court suggested that the argument of counsel in this regard was at odds with much of the case law, perhaps most notably the decision in *Re a Ward of Court*.[7] In that case, the Supreme Court held that the withdrawal of artificial life-sustaining treatment from the ward would not amount to unlawful killing, partly on the basis that such withdrawal would not constitute a positive act but rather amounted to an omission to struggle.[8] In circumstances where continued life could be said to be not in the best interests of the patient, such an omission to struggle was legally and constitutionally permissible.[9] The Supreme Court in *Re JJ* quoted the conclusion of O'Flaherty J in *Re a Ward of Court*: 'This case is not about euthanasia; euthanasia in the strict and proper sense relates to the termination of life by a positive act. The declarations sought in this case concern the withdrawal of invasive medical treatment in order to allow nature to take its course.'[10] The rationale of *Re Ward of Court* therefore allows for a somewhat casuistic expansion of the criminal law concept of an omission in order to bring beyond the reach of the criminal law certain humane end-of-life practices. That is, the courts have been prepared to construe the concept of an omission broadly enough to allow, for instance, the withdrawal of ventilation and/or nasogastric feeding.[11] Characterising the act of withdrawing ongoing treatment or ongoing nourishment as an omission is certainly dubious,[12] but it appears to be tolerated as a necessary fiction in a manner similar to the doctrine of double effect,[13] discussed below.

The Doctrine of Double effect

The Court in *JJ* went on to reaffirm the position it outlined in *Fleming v Ireland*,[14] namely that a moral distinction could be drawn between assisted suicide and palliative care likely to hasten to death. The Court held that the distinction was one of intention. On this logic, the intent

[7] [1996] 2 IR 79.
[8] The Court did not use the expression 'omission to struggle', but it quoted at length from the decision in which that expression entered the lexicon, *Airedale NHS Trust v Bland* [1993] AC 789, and its decision largely follows the logic of the Law Lords in that decision. In *Bland*, Lord Keith quoted, at [23], Professor Glanville Williams in finding that: 'what the doctor does when he switches off a life support machine "is in substance not an act but an omission to struggle", and that "the omission is not a breach of duty by the doctor because he is not obliged to continue in a hopeless case"'.
[9] Significantly, the Court considered that the right to die a natural death was implicit in the right to life protected under the Constitution. As Hamilton CJ stated: 'As the process of dying is part, and an ultimate inevitable consequence, of life, the right to life necessarily implies the right to have nature take its course and to die a natural death and, unless the individual concerned so wishes, not to have life artificially maintained by the provision of nourishment by abnormal artificial means, which have no curative effect and which are intended merely to prolong life.' See *Re Ward of Court* (n 7) at 124.
[10] *Re Ward of Court* (n 7) at 130.
[11] See *Re Ward of Court* (n 7).
[12] Iglesias has argued more forcefully that: 'The intent in the deprivation of nourishment is to bring about death, which means to kill. I cannot interpret this but as euthanasia. The issue of whether this mode of death may be chosen by the person themselves, or by their legal representatives, does not alter the facts, nor the fundamental moral and legal question of the euthanasia intent manifested in those facts. And whether intentions to bring about the death of a patient are carried out in what is done (action), or in what is omitted (omission), does not make them less euthanasia intents.' Teresa Iglesias, 'Ethics, Brain-Death, and the Medical Concept of the Human Being' (1995) MLJI 51–57 at 57, quoted in Madden, *Medicine, Ethics and the Law* (3rd edn, Bloomsbury 2016) at [12 -74].
[13] See Michael S Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* (Oxford University Press 2010). Moore argues that anything that involves voluntarily caused bodily movements is a human action, and should not be capable of being characterised as an omission.
[14] [2013] IESC 19, [2013] 2 IR 417.

of the person administering palliative care is to alleviate suffering, albeit in the knowledge that death may be accelerated as a necessary secondary consequence.[15] This is often described as the doctrine of double effect, and has its origins in the philosophy of St. Thomas Aquinas.[16] The doctrine of double effect can be defined as the distinction between consequences that are intended, and consequences which are foreseen but not necessarily intended.[17] Its criteria have been stated as:[18]

> (i) The act itself must be morally good or at least indifferent.
>
> (ii) The agent may not positively will the bad effect but may merely permit it. If he could obtain the good effect without the bad effect, he should do so. The bad effect is sometimes said to be indirectly voluntary.
>
> (iii) [T]he good effect must be produced directly by the action, not by the bad effect. Otherwise, the agent would be using a bad means to a good end, which is never allowed.
>
> (iv) The good effect must be sufficiently desirable to compensate for the allowing of the bad effect.

In this context, the doctrine of double effect can justify the administering of palliative care that is likely to lead to death, if the primary motivating purpose of that treatment is to alleviate suffering and not to cause the death of the patient. The Supreme Court in *JJ* quoted the evidence of a consultant in paediatric palliative medicine in the case in this regard: 'The intent is never to shorten life. The goal of palliative care is to live well, but it also encompasses the potential to die well.'[19] Interestingly, the Court appeared to implicitly accept that the doctrine of double effect is a less than fully satisfactory basis for dividing the boundary between lawful and unlawful killing. The Court stated: 'It is possible to argue that the distinction is no longer feasible, or should no longer be maintained, but so long as the law retains an absolute prohibition on euthanasia, it remains a critical and valid distinction both for medicine and the law.'[20] Thus, the Court appeared to accept that the doctrine of double effect is philosophically questionable, but is nevertheless an essential fiction as long as the prohibition on euthanasia remains a legal reality. While the Supreme Court is by no means the first to question the philosophical validity of the doctrine of double effect, it is notable that it should so prominently undercut what has been described as 'an ethical cornerstone in the medical treatment of the terminally ill'.[21]

---

[15] *Re JJ* (n 1) at [72]. The Court relies on a decision of the Canadian Supreme Court in support of this distinction: *Rodriguez v. British Columbia AG* [1993] 3 S.C.R. 519.
[16] Aquinas argued that 'Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention … Accordingly, the act of self-defence may have two effects, one, the saving of one's life, the other is the slaying of the aggressor.' Thomas Aquinas, *Summa Theologica* (Fathers of the English Dominican Province tr, Benziger Brothers, 1947) (II-II, Qu. 64, Art.7).
[17] John Lombard, 'Sedation of the Terminally Ill Patient: The Role of the Doctrine of Double Effect' (2015) (21) 7 Medico-Legal Journal of Ireland 22.
[18] Donald B Marquis, 'Four Versions of Double Effect' (1991) 16 Journal of Medicine and Philosophy 515.
[19] *Re JJ* (n 1) at [72].
[20] ibid.
[21] Timothy E Quill, 'The Ambiguity of Clinical Intentions' (1993) 329 New England Journal of Medicine 1039 at 1039, quoted in Lombard, 'Sedation of the Terminally Ill Patient: The Role of the Doctrine of Double Effect' (2015) (21) 7 Medico-Legal Journal of Ireland 22.

The Ethical Question in Re JJ

The facts of this case were a somewhat difficult combination of act *and* omission, which, taken together, would lead to the death of John. In those circumstances, John's parents argued that the actions of the hospital would amount to euthanasia. Counsel for the parents argued that the case was unique insofar as the reliefs sought included permission to (a) administer pain-relief medication and sedation (even though such relief may have the secondary effect of seriously arresting John's respiratory function); and (b) to withhold life-prolonging treatment in the event that the treatment at (a) had the foreseen secondary effect. The conduct contemplated at (a) evidently amounts to a positive act, whereas the conduct contemplated at (b) constitutes an omission. The Supreme Court addressed these questions in reverse order. The Court framed the question as (b) whether the Hospital could legitimately refuse to administer life-sustaining treatment in the event of a dystonic crisis and, if so, (a) could the parents refuse to give consent to pain-relieving treatment in order to forestall the circumstances contemplated at (b)? The Court concluded that the Hospital was entitled to refuse the medical treatment contemplated at (b). The Court held that, on the facts of the case, it was entirely open to the medical team to determine that it would be inappropriate to deploy aggressive life-sustaining treatment as the burden of the treatment would be disproportionate to any benefit that John could obtain from it.[22] In reaching this conclusion, the Court quoted from the *Guide to Professional Conduct and Ethics for Registered Medical Practitioners in Ireland* produced by the Medical Council, which states:-

> Usually you will give treatment that is intended to prolong a patient's life. However, there is no obligation on you to start or continue treatment, including resuscitation … if you judge that the treatment:
>
> - Is unlikely to work; or
> - Might cause the patient more harm than benefit; or
> - Is likely to cause to the patient pain, discomfort, or distress that will outweigh the benefits it may bring.[23]

It is unusual and noteworthy to see a court rely on a non-legal authority in reaching a conclusion of such profound consequence. However, it is perhaps not surprising given the dearth of authoritative legal guidance in relation to end of life care. In this regard, Donnelly has observed: 'In such an uncertain legal context, ethical guidance assumes even greater significance. The guidance provided by the Irish Medical Council's *Guide to Professional Conduct and Ethics for Registered Medical Practitioners*, is, in many ways, more helpful than Irish law.'[24]

An important aspect of the conclusion of the Court in this regard is that a doctor's decision not to continue with life-sustaining treatment, where such treatment is not in the best interests of the patient, is not one that parents can give or withhold consent to – it is a matter for the treating medical practitioner. In circumstances involving the withholding of treatment, in accordance with the Guidelines, the legal issue is not whether the patient or the patient's family consents to the course proposed by the doctors, but rather whether it is

[22] *Re JJ* (n 1) at [163].
[23] Guide to Professional Conduct and Ethics for Registered Medical Practitioners in Ireland (Dublin: Medical Council, 8th edn, 2016).
[24] Mary Donnelly, 'Patient-centred dying: the role of law' in Mary Donnelly and Claire Murray (eds) *Ethical and Legal Debates in Irish Healthcare* (Manchester University Press 2016) 225.

lawful for the doctors to do so; i.e. whether the judgement is one to which they can properly come.[25] The Court further stated that it is not necessary for medical practitioners to seek the consent of a court before making a decision to withdraw medical treatment in the circumstances contemplated in the passage from the code of ethics quoted above, though the Court noted that in practice, medical practitioners might prefer to apply to a court in such circumstances, out of an abundance of caution. Having thus concluded that the medical practitioners would be entitled to withhold medical treatment in the event of respiratory distress, the Court turned to consider whether the parents could refuse to consent to the delivery of pain-relieving medication with a view to preventing respiratory distress, and therefore the death of John. In the determination of this question, the Court examined the constitutional jurisprudence relating to the autonomy of the family in the aftermath of the insertion of Article 42A into the Constitution.

The Rights of the Family and The Impact of the Children's Rights Referendum

In relation to the rights of the family, the Court framed the question to be decided as: 'whether the refusal of John's parents to consent to the treatment amounted to a failure of parental duties such that the State, through the court, was obliged to supply the place of the parents and provide such consent pursuant to Article 42A of the Constitution.'[26]

The Article 42.5 Case Law

The Court turned to consider the decisions of the courts under the old Article 42.5 (removed by the 2012 referendum) and what effect the insertion of Article 42A had on the effect of that body of precedent. In assessing the law as it stood under Article 42.5, the Court considered the judgment of the Supreme Court in *North Western Health Board v. HW & CW*,[27] (hereinafter '*NWHB*') and the judgment of the High Court (Hogan J) in *Re Baby AB: Children's University Hospital, Temple Street v. CD & EF* (hereinafter '*Re Baby AB*').[28] While the decision reached in each was very different, the Supreme Court observed that both judgments accepted as a matter of principle that there were circumstances in which otherwise conscientious and devoted parents could, in respect of a single decision, be found to have failed in their parental duties to such an extent to justify State intervention. These circumstances were found on the facts in *Re Baby AB*, but not in *NWHB*.

The Court noted the observations of Denham J (as she then was) in *NWHB* that there was a strong presumption that the best interests of the child were to be found within the autonomous decisions of the family unit, but this could be rebutted in exceptional circumstances, such as where there is an immediate risk to the life of the child. In *Re Baby AB*, the High Court (Hogan J) held that the refusal of parents to consent to the provision of a blood transfusion to their gravely ill child, on the basis of religious objection, amounted to a failure in their parental duty towards the child, though the judge did observe that 'failure'

[25] *Re JJ* (n 1) at [157].
[26] *Re JJ* (n 1) at [98].
[27] [2001] 3 I.R. 622.
[28] [2011] IEHC 1, [2011] 1 I.R. 665. For an excellent overview of these cases, see Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (2nd edn, Clarus Press 2019), 506 – 510.

was an unhappy expression in the context.[29] On the other hand, the Court noted the more restrictive interpretation placed on Article 42.5 by Hardiman J in *N v. HSE*,[30] known as the 'Baby Ann' case. Hardiman J there expressed very firmly the view that Article 42.5 only permitted the State to intervene in cases involving a true moral failure on the part of the parents. He observed:

> 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. A "failure in duty" is the condition precedent, in Article 42.5 of the Constitution, to the supplanting of parental function by the State. This supplanting cannot take place except for grave reason.[31]

This passage was relied on strongly by counsel for the parents of John.

Article 42A

The Court's analysis and conclusions with respect to the effect of the insertion of Article 42A are particularly noteworthy. The Court expressly rejected the analysis of the authors of *Kelly: The Irish Constitution* that the removal of the reference to 'physical or moral' failure has not altered the position established under the pre-existing case law as to the threshold for state intervention. [32] In reaching this conclusion, the Court adopted a purposive interpretation of Article 42A and the circumstances in which it was adopted:

> It is, in our view, important not to focus solely on the textual changes between Article 42.5 and Article 42A.2.1° in order to understand the scope and application of Article 42A.2.1°. It is necessary to place Article 42A.2.1° in the context of Article 42A generally… the text crystallises and endorses a developing trend in the case law. As Denham J. observed in *NWHB*: '[I]nitially cases were more protective of parental authority and the family in all but very exceptional cases. However, in recent times the child's rights have been acknowledged more fully.'[33]

In particular, the Court took the view that the express provision made for the rights of children included a duty on the parents to protect and vindicate those rights, and by implication, the State could intervene where they failed to do so.[34] The Court went on to note the express provision in the Article that the interests of the child be the court's paramount consideration, and that the views of the child be ascertained and given due weight, where possible. It was also noted that the amendment had not displaced the very deep-seated

---

[29] *Re Baby AB* (n 28) at [37].
[30] [2006] 4 IR 375.
[31] ibid at 501.
[32] Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) at para. 7.7.272-3.
[33] *Re JJ* (n 1) at [126].
[34] This echoes the approach taken by Hogan J in *Re Baby AB* [2011] 1 IR 665, decided under the old Article 42.5, who noted that the standard by which parental failure was judged was an objective one, and that the Court must have regard to the rights of the child under Article 40.3 in deciding whether it was breached. He stated at 675: 'Given that Art.40.3.2° commits the State to protecting by its laws as best it may the life and person of every citizen, it is incontestable but that this court is given a jurisdiction (and, indeed, a duty) to override the religious objections of the parents where adherence to these beliefs th[u]s would threaten the life and general welfare of their child.'

protection of the family unit contained in Article 41, affirming the family as the natural and primary educator of the child with imprescriptible and inalienable rights, and therefore Article 42A must be interpreted in that light. In this regard, the Court noted the inherent difficulties in interpreting a constitutional amendment and reconciling it to the existing *acquis constitutionnel*.[35] Commenting on the nature of the amendment, the Court said:

> [T]he objective of the Amendment was not a single clear-cut reversal of the direction of the law such as, for example, that achieved by the removal of the constitutional ban on divorce, but rather a more wide-ranging, though subtle, change to the posture of the Constitution in relation to child and family matters.[36]

The Court observed that while the amendment had not displaced the fundamental place of the family, it had increased the priority to be accorded to the individual rights of the child, and as such, the family must increasingly be recognised as a collective that is made up of individuals, and therefore the rights of the collective and the rights of the individual must be equally borne in mind.[37] The Court, in a key passage, concluded that the amendment had had the principal effect of altering the focus of an inquiry into parental failure, from cause to effect:

> The removal of the reference to failure for "physical or moral reasons", and the new requirement that such failure must be to such an extent as to prejudice the safety or welfare of the child, is a significant change of focus from the cause of parental failure to its effect. To that extent, we consider that the existing case law on parental failure decided by reference to Article 42.5 cannot be directly applied to the position under Article 42A. Indeed, to do so would ignore the fact of amendment. One example is that, given the shift of emphasis just noted, it can no longer be said that blameworthiness is an essential feature of the type of parental failure justifying State intervention.[38]

Therefore, the inquiry now to be conducted in these circumstances is, as per the revised constitutional text, whether the parents have failed in their duty 'to such extent that the safety or welfare of any of their children is likely to be prejudicially affected', and not an inquiry into the nature or cause of the parental failure.

---

[35] Writing before the passage of the amendment, Prof. Oran Doyle argued that the proposed amendment (as drafted by the Oireachtas Joint Committee) was inconsistent and difficult to reconcile in asserting the paramountcy of the child's best interests on the one hand, and the parent's role as natural and primary carers and educators on the other. See Oran Doyle, 'Family Autonomy and Children's Best Interests: Ireland, Bentham, and the Natural Law' (2010) 1 Intl J Jurisprudence Fam 55, 73.

[36] *Re JJ* (n 1) at [130].

[37] Prof. Oran Doyle has observed how in giving deference to the family as a collective single unit, in reality deference is given to the most powerful individuals of that collective unit to make decisions for the weaker members. See Oran Doyle, 'Family Autonomy and Children's Best Interests: Ireland, Bentham, and the Natural Law' (2010) 1 Intl J Jurisprudence Fam 55. Harding has similarly observed, writing in the context of reimagining a feminist version of the judgment in *NWHB*, that "…for many unfortunate children the marital family unit is the most dangerous place of all". Meabh Harding, 'Judgment in Northwestern Health Board v HW & CW (the PKU case)' in Mairead Enright, Julie McCandless and Aoife O'Donoghue (eds), *Northern/Irish Feminist Judgments: Judges' Troubles: The Gendered Politics of Identity* (Hart Publishing 2017) 402, 406.

[38] *Re JJ* (n 1) at [134].

Counsel for John's parents sought to argue that the test should include a further limb, namely that the case must be 'exceptional', as per the text of the Article.[39] The Court rejected this argument, stating that the word 'exceptional' in the Article is merely descriptive of the nature of the parental failure to be established, rather than constituting a separate test.[40] The Court also rejected the argument of the parents' that the Article only permitted for State intervention on foot of an empowering statute. This argument was based on the text of Article 42A, which provides that the State may intervene 'by proportionate means as provided by law'. It was argued that 'as provided by law' necessarily implied a statutory basis for intervention.[41] The Court disagreed and held that the phrase 'as provided by law' merely meant that the decision have a basis in law. In this regard, the Court drew a distinction between the text of Article 42A.2.1 and the three subsequent subsections:

> There is, we think, a clear difference between the language of Article 42A.2.1° ("as provided by law") and the language of the 3 following subsections ("provision shall be made by law"). The latter phrase seems to contemplate the future enactment of legislation, but the former phrase, and the one most relevant here, is capable of being satisfied by the existing law – it merely requires that the jurisdiction have a legal basis.[42]

On that basis, the Court came to the slightly sibylline conclusion that: 'Accordingly, the term "law" in the Constitution may have different meanings depending on the context in which it is found.'[43] The Court noted that, in any event, wardship jurisdiction was on a statutory footing by virtue of section 9 of the Courts (Supplemental Provisions) Act 1961, but appeared to suggest that 'as provided by law' could nonetheless encompass common law.

The Decision of the Supreme Court

Having thus set out its conclusions on the relevant legal principles, the Court applied them to the facts of the case. In light of the conclusions noted above in relation to the right of the medical team to refuse to administer treatment, the Court observed that 'the precise question' for the Court to determine was whether:

> if John suffered a severe dystonic crisis, the decision of the parents not to consent to pain-relieving treatment, including anaesthesia and sedation – because it might result in a suppression of respiratory function giving rise to the type of possible crisis that might lead to his death without aggressive life-sustaining measures – is a decision within a range of permissible parental decision-making, or, on the contrary, whether it is a decision prejudicial to

[39] Article 42A.2.1 provides "*In exceptional cases*, where the parents… fail in their duty towards their children to such an extent that the safety or welfare of any of their children is likely to be prejudicially affected…" [emphasis added].
[40] *Re JJ* (n 1) at [138].
[41] The authors of *Kelly: The Irish Constitution* (n 32) appear to share this view, noting, at para. 7.7.273, that: '… unlike Article 42.5, which was self-executing, Article 42A.2.1 states that the State shall supply the place of parents who have in their duty towards their child "by proportionate means as provided by law"'.
[42] *Re JJ* (n 1) at [141].
[43] ibid.

> John's welfare such that the court may override it and provide the necessary consent?[44]

The Court concluded that, having regard to the extreme and intolerable pain John would suffer due to the refusal to consent to pain-relief, the decision of John's parents not to consent to the Hospital's treatment plan could not be said to be in his best interests.[45] The Court held that the test to be applied in considering whether the decision could be said to be in the child's best interests was not a matter of substituting the Court own view as to what was in the child's best interests, but rather what the objective, reasonable, loving parent would do, having considered the views of the child:

> In our view, the test is to consider what a loving and considerate parent would do once apprised of all the relevant information. Such a parent would take into account the views of the child, if expressed, and the character of the child, and would make a decision as to the best interests of the child in that context.[46]

The Court concluded that the parents' refusal to consent to the pain-relieving medication would result in avoidable pain and suffering for John, and as such could not be described as in his best interests. The Court held that test to be applied in assessing whether the Court should intervene is that the Court must: '…be satisfied by clear and convincing evidence that the decision of the parents is one which prejudicially affects the health and welfare of the child to such an extent that the decision of the parents can properly be described as a failure of parental duty to the child in question.'[47] The Court concluded that this test was satisfied on the facts. The Court stated that '[i]t is obviously the duty of parents to seek to ward off such avoidable suffering from their children',[48] and that the parents' objective in continuing to countenance this suffering, namely the survival of John, was one that was 'not capable of achievement'.[49] Finally, it should be noted that the Court was at pains to pay tribute to the love and devotion of John's parents, and to insist that the conclusion it had reached was not any criticism of them as parents. Indeed, the Court observed that '[t]he care, concern, and love displayed by his family for John are exactly the values recognised by the philosophical approach embodied in Article 41'.[50]

Orders Made

The Court noted that the circumstances of the case had changed since the case was heard in the High Court, and that John's condition had measurably improved. In particular, his dystonia had, by the time the Court was giving judgment, come under some degree of control. However, the Court evinced a concern that the dystonia would re-emerge at some point in the future. The Court therefore decided to grant conditional orders in the case. The

[44] *Re JJ* (n 1) at [166].
[45] In reaching this conclusion, the Court observed: 'Perhaps of most importance is, however, that the reason why John's parents are not willing to consent to this treatment – namely, that they wish the Hospital to provide all life-sustaining treatments in the event that John has a crisis event – is one which is not capable of achievement. If the present position is maintained, then the refusal of consent will result in avoidable pain and suffering for John.' *Re JJ* (n 1) at [164].
[46] *Re JJ* (n 1) at [176].
[47] ibid.
[48] *Re JJ* (n 1) at [164].
[49] ibid.
[50] *Re JJ* (n 1) at [149]. See also statements of Irvine P. in her judgment in the High Court, '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.' At [129].

Court granted a declaration that the Hospital would not be acting unlawfully in refusing to administer aggressive life-sustaining measures. The Court stated that if the issue arose again, and John's parents refused to give consent to pain-relieving treatment, the Hospital could apply immediately to the President of the High Court for such refusal to be overridden.[51]

Conclusions

Conclusions on End-of-life Treatment

Re JJ must rank among the saddest cases to come before the Supreme Court. The measured, thoughtful and thoroughly humane approach of the judges to the task before them is therefore to be lauded. Not only were the facts of the case deeply upsetting, but the legal issues involved in end-of-life decision-making are profoundly challenging. The Court builds a persuasive case, step by step, for the conclusion it ultimately reaches. It accounts for the justification of the care plan designed to provide for and accommodate the death of John by first noting the distinction to be drawn between acts and omissions. It is an essential feature of the criminal law that, generally speaking, only a positive act can create criminal liability, subject to limited exceptions.[52] As noted above, the care plan of the Hospital in this case involved a mixture of acts and omissions, that together would likely result in death. It was therefore necessary for the Court to justify the act *and* the omission. The Court adopts separate justifications for each. The Court justifies the act, the administering of pain relief in the knowledge that it would lead to respiratory distress, by reference to the doctrine of double effect. The Court expresses dissatisfaction with the doctrine as a stable and philosophically sensible basis for delineating lawful and unlawful action. However, notwithstanding these misgivings, the Court asks the doctrine to do a lot of the normative work in justifying the act of administering the pain-relieving medication. It is perhaps surprising that the Supreme Court would undercut the philosophical validity of the doctrine, before swiftly moving to place significant reliance on it. It has been observed that the doctrine of double effect is more a matter of pragmatism than principle, and the decision of the Court certainly speaks to the truth of that observation. The Court deals entirely separately with the omission, namely the refusal to intervene in the event of respiratory distress caused by the pain-relieving medication. In this respect, the decision appears to further widen the already broad scope of what may be characterised as 'an omission to struggle'. In *Re Ward of Court*, the Supreme Court accepted that the unplugging of a life-support machine amounted to an omission,[53] a conclusion that appears to strain at the limits of what the concept of an omission can support.[54] The characterisation of the proposed course of action in this case appears, at first

51 *Re JJ* (n 1) at [170].

52 See *R v Evans (Gemma)* [2009] 1 WLR 1999; *Mitchell v Glasgow City Council* [2009] 2 WLR 481. The appropriateness of the use of act/omission distinction in end of life matters has been criticised. Hanafin has argued that '… the act-omission distinction is a shaky foundation on which to build a right-to-die jurisprudence. It could be argued that it is an outmoded legal tool unsuited to the exigencies of high-technology medicine.' Patrick Hanafin, *Last Rights: Death, Dying and the Law in Ireland* (Cork University Press 1997) 25.

53 Hamilton CJ commented that, when life-support was removed from the ward, '[t]he true cause of the ward's death will not be the withdrawal of such nourishment but the injuries which she sustained on the 26th April, 1972.' *Re Ward of Court* (n 7) at 128.

54 Commentators have questioned whether the distinction between killing and letting die is substantiable at any level. Rachels comments that 'The bare difference between killing and letting die does not, in itself, make a moral difference. If a doctor lets a patient die for humane reasons, he is in the same moral position as if he had given the patient a lethal injection for humane reasons. If his decision was wrong – if, for example, the patient's illness was in fact curable – the decision would be equally regrettable no matter which method was used to

blush, to be more aptly characterised as an omission insofar as it contemplates refusing to administer treatment, rather than removing ongoing treatment, as was the case in *Re Ward of Court*. However, in John's case, the circumstances of the omission are knowingly brought about by the positive act of the Hospital in administering the pain-relieving medication. If a positive act creates the circumstances in which a failure to act will lead to death, it is very difficult to justify the characterisation of the latter failure as a true omission.

This scenario puts one in mind of the Miller principle, articulated in *R v Miller*.[55] That case establishes that criminal liability can be imposed for a failure to act in circumstances where a duty to act arises from having created the danger in the first place. The facts of the case concerned a man who fell asleep with a lighted cigarette in hand who then awoke to a smouldering mattress and vacated the building. He was found guilty of arson. While the moral quality of the action in *Miller* is obviously of a totally different nature, it does perhaps illustrate the difficulty in the Court's insistence on addressing the act and omission entirely separately, and in the reverse order undertaken by the Court. The Court's decision to treat them so distinctly seems artificial, removed from the reality of the treatment contemplated, and in particular the order in which they were considered, first omission and then act, appears designed to make the Court's task easier in justifying the outcome it wants to achieve. That is, the Court addressed the omission first before moving to justify the act, therefore sidestepping the issue of the act creating the circumstances in which the omission could occur. However, it is entirely possible that the Court was fully aware of these inconsistencies but nonetheless proposed to navigate the law in this way in order to reach what it saw as the just result. As the Court itself observed,[56] for so long as euthanasia and assisted suicide remains legally proscribed, certain very fine distinctions must be drawn to accommodate humane end-of-life practices and to protect medical teams from criminal liability. These fine distinctions can and will be parsed by commentators, but they are likely to remain a feature of the law for as long as the prohibition on assisted dying persists.

Conclusions on Children's Rights and the Effect of Article 42A

The judgment is the most authoritative guide we have yet received from the Superior Courts as to the precise effect of the Children's Rights Referendum. Whether the insertion of Article 42A amounted to any significant change in the law, or was merely 'window dressing' has been much debated by commentators and critics.[57] Kenny and Doyle argued that:

> The Amendment that ultimately passed largely preserves the constitutional status quo. It retains the preference for parental authority in respect of children's rights. Although replacing Article 42.5, it makes only marginal changes to the threshold at which the state can intervene in families.[58]

carry it out.' James Rachels, 'Active and passive euthanasia' (1975) 292 New England Journal of Medicine, 78, quoted in Patrick Hanafin, *Last Rights: Death, Dying and the Law in Ireland* (Cork University Press 1997) 27.

[55] [1983] 2 AC 161.

[56] *Re JJ* (n 1) at [72].

[57] Professor Conor O'Mahony, the Special Rapporteur on Child Protection, was quoted describing Article 42A as 'mostly window dressing' in the Irish Examiner. See Conor O'Mahony, 'Opportunity Lost on Children's Rights' (*Irish Examiner* 29 October 2019). See generally Lydia Bracken, *Child Law in Ireland* (Clarus Press 2018) 35 – 44; and Geoffrey Shannon, *Child and Family Law* (3rd edn, Round Hall 2020) Ch. 1.

[58] Oran Doyle and David Kenny, 'Constitutional Change and Interest Group Politics: Ireland's Children's Rights Referendum' in Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Oxford: Hart Publishing 2017).

The decision in *JJ* clarifies that, at least in respect of the threshold for State intervention, a significant change in the law has in fact been effected. The Court finds that the removal of the phrase 'physical and moral' (as qualifying the nature of the parental failure that must be demonstrated) has changed the nature of the analysis to be performed by the courts. It has, for the Court, changed the focus from cause to effect, allowing the Court to supply the place of parents where the effect of the decision on the well-being of their child is sufficiently serious and prejudicial to justify State intervention.

As discussed previously, the case law under Article 42.5 was primarily concerned with the nature of the parental failure, with Hardiman J in the Baby Ann case suggesting that only a 'grave moral failing' on the part of the parents could justify intervention.[59] The Supreme Court in *JJ* clarifies that 'blameworthiness' can no longer be said to be an essential pre-condition to State intervention,[60] but rather the locus of scrutiny is now on the effect that parental failure has on the rights of the child. Commenting on the effect of the new Article 42A on the continuing authority of the Article 42.5 case law, the Court suggests that such decisions should be 'treated with caution',[61] while also suggesting that, of those cases, *Re Baby AB* would be the most likely to reflect the position under the new Article 42A.[62] The revised approach in *JJ* reflects the child-centred language of Article 42A and indeed reflects the purpose of the amendment. The Court expressly signals that it is taking a purposive approach to interpretation of the Article, seeking to further the reforming intent that motivated the people to ratifying the amendment.[63] While the Court does not express in it these terms, it seems clear that the replacement of Article 42.5 with Article 42A.2.1 has therefore lowered the bar for State intervention. However, it has not removed the bar, and the Court does note that the amendment must be interpreted against the backdrop of the primacy of the family, and the courts will therefore continue to have due regard to the presumption that the best interests of the child lie within the family unit. The decision in *JJ* is complex and multi-faceted, and will have important implications in multiple areas of Irish constitutional jurisprudence. It is hoped that this article will contribute to the discussion as to those implications.

---

59 *N v HSE* [2006] 4 IR 375, 501.
60 *Re JJ* (n 1) at [134].
61 *Re JJ* (n 1) at [137].
62 ibid.
63 It should be noted that some commentators have suggested that the reforming intent of the Amendment was not entirely clear, having regard to a 'confused and dispiriting referendum campaign'. See Oran Doyle and David Kenny (n 58). See also Conor O'Mahony, 'Falling short of expectations: the 2012 children amendment, from drafting to referendum' (2016) 31(2) Irish Political Studies, 252-281.