PARENS PATRIAE: THE PATERNALIST MODEL OF CHILDREN'S RIGHTS

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I herby certify that this material, which I now submit for assessment on the programme of study leading to the award of Ph.D. is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my own work.

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ABSTRACT

This study examines the role that paternalism plays in the exercise and vindication of the rights of the child.

This study demonstrates that paternalism plays a determining role in the exercise and vindication of the rights of the child. The study shows that this paternalism was originally inherent in judicial law-making, deployed as a consequence of the importance of parens patriae to the constitutional and administrative framework of the State.

The thesis analyses the judicial role in proceedings involving the rights of the child in Ireland, England, the United States and to a lesser extent Canada. The thesis demonstrates that the judicial role has a dual function. First, the judge must protect the integrity of the family unit to which a child is born. Second, the judge is the protector and vindicator of the child's rights.

Chapter 1 outlines the rights model and the concept of parens patriae. This chapter also constructs the welfare model regulating the relationships between the child, parents and the State. This chapter shows that the judiciary have developed the welfare model in which they are the dominant actors. In chapter 2 the relevant literature is discussed and analysed. Chapters 3, 4 and 5 prove that judicial paternalism plays a determining role in proceedings concerned with the exercise and vindication of the rights of the child in the health care, education and juvenile justice systems. Chapter 6 contains the conclusions to this study and provides suggestions for reform.

The main conclusion of the thesis is that an optimal model of child law must reiterate the concept of parens patriae shorn of its inappropriate paternalistic accretions.

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LIST OF ABBREVIATIONS

A.C.	Appeal Cases
A. & E.	Adolphus and Ellis
All E.R.	All England Law Reports
All E.R. Rep.	All England Law Reports Reprint
Amb.	Ambler
Art.	Article
B. & C.	Barnewall and Cresswell
Beav.	Beavan
Bk.	Book
Bligh N.S.	Bligh New Series
B.M.L.R.	Butterworths Medico-Legal Reports
c.	Chapter
C.B.	Common Bench
Ch.	Chancery Division
Ch. D.	Chancery Division
Cha.	Charles
Chap.	Chapter
Cl. & Fin.	Clark and Finnelly
Co. Rep.	Coke Reports
Cox	Cox's Equity
Cox C.C.	Cox's Criminal Cases
Cr. App. Rep.	Criminal Appeal Reports
Crim. L.R.	Criminal Law Review
D.L.R.	Dominion Law Reports
De G. & J.	De Gex and Jones
De G. & Sm.	De Gex and Smale
De G. M. & G.	De Gex, Macnaghten and Gordon

Dick.	Dickens
E.	East
Edw.	Edward
E.H.R.R.	European Human Rights Reports
El. & El.	Ellis and Ellis
Eliz.	Elizabeth
E.R.	English Reports
et al.	and others
et seq.	and following pages
F. & F.	Foster and Finlason
Fam.	Family Division
Fam. Law	Family Law
F.C.R.	Family Court Reporter
F.L.R.	Family Law Reports
Frewen	Judgments of the Irish Court of Criminal Appeal
Geo.	George
H. & C.	Hurlstone and Coltman
H.L. Cas.	House of Lords Cases
How. (U.S.)	Howard United States Reports
ibid.	the same place
I.L.R.M.	Irish Law Reports Monthly
I.L.T.	Irish Law Times
I.L.T.R.	Irish Law Times Reports
In Re	In the matter of
Inst.	Institutes
I.R.	Irish Reports
Ir. Ch.	Irish Reports Chancery

Ir. Eq.	Irish Reports Equity
J.P.	Justice of the Peace Reports
Jac.	Jacob's Chancery Reports
K.B.	King's Bench Division
L. Ed.	Lawyer's Edition
L.J. Ch.	Law Journal Reports Chancery
L.J. Ex.	Law Journal Reports Exchequer
L.R. Ch.	Law Reports Chancery Division
L.R. Ch. App.	Law Reports Chancery Appeal Cases
L.R. C.P.	Law Reports Courts of Common Pleas
L.R. Eq.	Law Reports Equity Cases
L.R. H.L.	Law Reports English and Irish Appeal Cases
L.R. Ir.	Law Reports Ireland
M. &. W.	Meeson and Welsby
Mod.	Modern Reports
Myl. & Cr.	Mylne and Craig
n.s.	New Series
No.	Number
p.	Page
P.	Probate
Ph.	Phillips
P.K.U.	Phenylketonuria
P. Wms.	Peere Williams
Q.B.	Queen's Bench Division
Q.B.D.	Queen's Bench Division
r.	Regulation
R.	Rettie

R.R.	Revised Reports
Russ.	Russell
s.	Section
S.C.R.	Canada Supreme Court Reports
S. Ct.	Supreme Court Reporter
S.I. No.	Statutory Instrument Number
S.L.R.	Scottish Law Reporter
T.L.R.	Times Law Reports
U.S.	United States Reports
Vern.	Vernon
Ves. Jun.	Vesey Junior
Vict.	Victoria
Vol.	Volume
Will.	William
W.L.R.	Weekly Law Reports
W.R.	Weekly Reporter
Y. & C.Ch.	Younge and Collyer Chancery

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CHAPTER ONE

INTRODUCTION, METHODOLOGY, DEFINITIONS, AND MODELS

1.0. Purpose and method of study

Evidence is presented in this study that the common law world formerly reflected society's view that children were property.[1] This view, the thesis argues, has been supplanted by a received paradigm of children as objects of concern, and more recently as rights holders.[2] Were this simplistic paradigm to be accepted, it might be expected that there is no room for paternalism in legal proceedings involving the rights of the child.

The study distinguishes between paternalism and the conscientious process of vindication of children's rights. The vindication of a child's rights requires a vindicator, be that the parents or the State in its guise as parens patriae.

The thesis commences with the rights model that requires safeguards to protect a child's rights when paternalism is introduced. This model views impartiality as fundamental to the exercise of judicial function. However, the function of a judge in proceedings involving

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[1] Ireland: In The People (Attorney General) v. Edge [1943] I.R. 115 at 147 per Black J. who held that early laws relating to children were concerned with feudal and proprietorial rights and very little about parents' feelings or children's welfare.

[2] Canada: In Racine v. Woods (1983) 1 D.L.R.(4th) 193 at 202, Wilson J. in the Supreme Court stated that the law no longer treats children as the property of parents. In P.(D.) v. S.(C.) (1993) 108 D.L.R.(4th) 287 at 298, L'Heureux Dube J. in the Supreme Court expressed similar sentiments.

the child's constitutional rights is to determine the child's best interests. The judge will ensure that the child's rights are exercised and vindicated accordingly. The danger is that this quasi-paternal role is performed in a way which interferes with a child's rights and ignores the child's principle of self-determination. This danger can be averted in three ways. First, the scope of best interests is curtailed with a greater understanding of children, child development and child-parent relationship. Second, the court must consider and give weight to the views of the child, depending on the child's understanding and competence. Third, the court cannot restrict or interfere with the exercise of the rights of a child who is competent to exercise his or her rights.

The study reveals that paternalism still plays the predominant role in the exercise and vindication of the rights of the child in Ireland and other common law jurisdictions. The study demonstrates that there are three reasons why paternalism plays such an important role.

First, judges do respect the integrity of the family units into which children are born. Judges uphold the parental right to raise and educate their children. The child's right to reach his or her potential and principle of self-determination is jeopardised by the judicial deference to parental decision making.

Second, judges act in a paternalistic manner, when

the judges exercises the parens patriae role of the State. The judges view themselves as protectors of the child's rights and as having a quasi-parental role.

Third, the judges are obliged to act in the child's best interests when protecting and vindicating the child's rights. The judges protect the child's welfare as distinct from respecting a competent child's exercise of rights.

The method employed in this thesis is to analyse judgments from Ireland, England, United States and, to a lesser extent, Canada.[3] This analysis demonstrates the employment of paternalism as a judicial technique in proceedings involving the child's rights. This approach is inimical to the concept of autonomous rights.

Chapter 1 commences with an outline of the welfare model, the rights model and the concept of parens patriae. This Chapter constructs the welfare model that regulates the relationships between the child, parents and the State. The Chapter describes the welfare model, emphasising the judiciary's dominant role in defining the actors and principles of this model. The relevant literature is discussed and analysed in Chapter 2. Chapters 3, 4 and 5 focus respectively on decisions of the courts affecting children in the health care, education and juvenile justice systems These decisions demonstrate the influential role that judicial

[3] The legal systems of the United States and Canada are federal. Therefore, I limited my research to decisions of the United States and Canadian Supreme Courts.

paternalism plays in contemporary proceedings involving the rights of the child. Chapter 6 contains suggestions for reform in the judicial approach in such cases in order to prevent paternalism.

1.1. Definitions

Society has seen radical changes in the concepts of the child, the parent and the State in the last two centuries.

1.1.0. Child

There are three features to the law's definition of a child. First, a child is a person who has yet to attain the chronological age of majority.[4] This is 18 in most common law jurisdictions and in all of the jurisdictions surveyed in this thesis.[5] Second, a child suffers from the legal disability of infancy. This prevents inter alia a child from exercising the rights, freedoms and privileges of adults.[6] Third, the relationship to a

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[4] A child can acquire the status of an adult prior to the age of majority on certain events, such as marriage, parenthood and enlisting in the armed forces. England: In R. v. The Inhabitants of Lytchet Matraverse (1827) 7 B. & C. 226, 108 E.R. 707 at 232, 710 Bayley J. held that a father's authority over his child usually exists until the child reaches 21. However, this will not occur when a child enlists in the armed forces. The effect of enlistment is that the child becomes bound to serve the State. Enlistment severs the child from his family and the child becomes subject to the paramount control of the State. Ireland: In G. v. An Bord Uchtala [1980] I.R. 32 at 70-71 per Walsh J. who held that a child may cease to become a member of a family when the child no longer lives with his or her family by reason of age or maturity or the child establishes a family of his or her own.

[5] Ireland: Age of Majority Act 1985, s. 2(2). England: Family Law Reform Act 1969, s. 1.

[6] Blackstone (1788) Bk. 1 Chap. 17 p. 464 where the disabilities of infancy were considered privileges as they prevented children from injuring themselves or their interests

child's carers must be considered.

These features do not encapsulate the concept of a child for the purpose of the rights model. There are three characteristics that define a child. First, a child is dependent on others for protection, food, shelter, education, and care. Second, a child is a person whose potential developing physical and intellectual capacities are required to be fostered and protected. Third, a child is a person whose intellectual competence to make decisions for himself or herself increases significantly during adolescence. Judicial paternalism results in undue weight being attached to the first two characteristics of a child and insufficient weight to the third.

1.1.1. Parent

The law defines a parent as the carer and guardian of a child. The word "parent" originates from the latin words "parens" and "parere", meaning to "bring forth". This definition identifies the relative recent function of parents: to raise and educate children. The twentieth century has seen radical changes that have altered society's view as to the people who may act as parents. Five factors can be identified.

First, the legal relationship between parent and child can be determined by the relationship between the child's parents. Historically, the common law wanted children to be cared for by parents who are married to

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by unwise acts or omissions.

each other.[7] The law imposed a number of legal disabilities on a child whose parents were not married to each other.[8] The Constitution of Ireland 1937 fosters the concept of the family based upon marriage by according it special status.[9] There has been an increase in the number of children born to parents who are not married to each other and one parent families.[10] The law has removed the

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[7] Blackstone (1788) Bk. 1 Chap. 16 p. 446 and p. 459; Bracton (1210-1268) Vol. 2 p. 31 and p. 187.

[8] A child who was born to parents who were not married to each other was considered filius nullius (the son of no one) or filius populi (the son of the people). Such a child suffered additional disadvantages to those of infancy. An illegitimate child could not be heir to anyone. An illegitimate child could only gain a surname by reputation and not by inheritance. England: In In Re Walker, Walker v. Lutyens [1897] 2 Ch. 238 at 241 per Romer J. explained that a parent has no legal rights or duty to support his or her illegitimate child. Hill v. Crook (1873) L.R. 6 H.L. 265 at 276 per Lord Chelmsford, at 280 per Lord Colonsay and at 282 per Lord Cairns; Dorin v. Dorin (1875) L.R. 7 H.L. 568 at 574 per Lord Hatherley, at 576 per Lord O'Hagan and at 577 per Lord Selborne; In Re Bolton, Brown v. Bolton (1886) 31 Ch. D. 542 at 547 per Kay J. and at 551 per Cotton L.J.; O'Loughlin v. Bellew [1906] 1 I.R. 487 at 491 per Walker L.C.. In Dickinson v. North-Eastern Railway Co. ((1863) 2 H. & C. 735 at 736 Pollock C.J. interpreted the term child in a statute as only applying to a legitimate child. However, in Woolwich Union v. Fulham Union [1906] 2 K.B. 240 at 246-247 Vaughan Williams L.J. held that the term can be interpreted as applying to an illegitimate child if this is more consistent with the purpose or object of the statute. Ireland: In Re M. (An Infant) [1946] I.R. 334 at 341-342 per Gavan Duffy P.; O'B. v. S. [1984] I.R. 316 at 321 per Darcy J..

[9] Ireland: Constitution of Ireland 1937, Art. 41.1.1. ; The State (Nicolaou) v. An Bord Uchtala [1966] I.R. 567 at 643 per Walsh J.; G. v. An Bord Uchtala [1980] I.R. 32 at 54-55 per O'Higgins C.J., at 70 per Walsh J. and at 86 per Henchy J.; The People (D.P.P.) v. J.T. (1988) 3 Frewen 141 at 157 per Walsh J..

[10] United States: In Troxel v. Granville, unreported, Supreme Court, 5 June, 2000 at 4-5 per O'Connor J. noting that 28% of children in the United States are being raised by a single parent. Ireland: Northern Ireland Statistics and Research Agency & Central Statistics Office (2000) Ireland: North and South: A

legal disabilities applying to children whose parents are not married to each other.[11]

Second, the law viewed the relationship of parent and child as one created by natural law.[12] Parents were responsible for the care and protection of children. Parents could not surrender the duties and rights conferred by nature.[13] However, biological parents may be

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Statistical Profile Chap. 2 at 21 between 1980 and 1998 the proportion of births outside marriage increased from 5% to 28% in the Republic of Ireland and from 6% to 28% in Northern Ireland.

[11] Ireland: Status of Children Act 1987.

[12] Blackstone (1788) Bk. 1 Chap. 16 p. 446; Ireland: Constitution of Ireland 1937, Art. 41.1.1. In The People (Attorney General) v. Edge [1943] I.R. 115 at 163 per Gavan Duffy J. who held that a father's authority has been described as a sacred thing and an authority to be sustained to the uttermost by human law. In North Western Health Board v. H.W. and C.W., unreported, High Court, McCracken J., 27 October, 2000, at 12-13 McCracken J. held that this constitutional provision was the nearest to accepting that there is a natural law in the theological sense. England: Ex Parte Hopkins (1732) 3 P. Wms. 152, 24 E.R. 1009 at 154, 1009; Ex Parte Pye (1811) 18 Ves. Jun. 140, 34 E.R. 271 at 153-154, 276 per Eldon L.C.; Hodgens v. Hodgens (1837) 4 Cl. & Fin. 323, 7 E.R. 124 at 375, 144 per Lord Wynford; In Re Meades, Minors (1870) 5 Ir. Eq. 98 at 103 per Lord O'Hagan L.C.; Bennet v. Bennet (1879) 10 Ch. D. 474 at 477-478 per Jessel M.R.; In Re Agar-Ellis, Agar-Ellis v. Lascelles (1883) 24 Ch. D. 317 at 326-329 per Brett M.R. and 334-336 per Bowen L.J.; R. v. Barnardo [1891] 1 Q.B. 194 at 207 per Lord Esher M.R.; In Re Newton (Infants) [1896] 1 Ch. 740 at 747-748 per Lindley L.J.; In Re J.M. Carroll (an infant) [1931] 1 K.B. 317 at 353-354 per Slesser L.J..

[13] Coke (1552-1634) 2 Inst. p. 97. England: Vansittart v. Vansittart (1858) 2 De G. & J. 249, 44 E.R. 984 at 256, 987 per Chelmsford L.C. and at 259, 988 per Turner L.J.; In Re Violet Nevin [1891] 2 Ch. 299 at 311-312 per Lindley L.J. and at 313 per Bowen L.J. who held that an antenuptial agreement as to children's religion was void; R. v. Barnardo [1891] 1 Q.B. 194 at 207 per Esher M.R.; In Re O'Hara [1900] 2 I.R. 232 at 241 per Fitzgibbon L.J. and at 253 per Holmes L.J.. In Humphrys v. Polak [1901] 2 K.B. 385 at 388-389 per Vaughan Williams L.J. and 389-390 per Stirling L.J. holding that an unmarried mother could not transfer her parental duty and rights to someone else by way of a private agreement; Besant v. Narayaniah (1914) 30 T.L.R. 560

unavailable, unwilling or unable to perform this role. Alternative carers are needed. The law permits the displacement of the concept that parenthood may only arise through nature by providing processes through which parental rights and duties are conferred on people who have no biological connection with the child.[14] This includes the appointment of testamentary guardians,[15] the concept of in loco parentis,[16] adoption,[17] fosterage,[18]

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at 562 per Lord Moulton; In Re J.M. Carroll (an infant) [1931] 1 K.B. 317 at 356 per Slesser L.J.. Ireland In Re M. (An Infant) [1946] I.R. 334 at 345 per Gavan Duffy P.. Canada: In Re Baby Duffell [1950] 4 D.L.R. 1 at 7-8 per Cartwright J.; In Re Agar [1958] 11 D.L.R.(2nd) 721 at 724 per Locke J..

[14] England: In In Re N. (Minors)(Parental Rights) [1974] 1 All E.R. 126 at 130, Ormrod J. held that a person who is not a biological parent can only acquire parental rights through a legal process such as adoption, care proceedings and wardship. A step parent has no parental rights as a matter of status nor by reason of accepting children as children of his or her family.

[15] England: Tenures Abolition Act 1660, s. 8 conferred upon the father for the first time a statutory right to appoint a testamentary guardian to his unmarried children. This testamentary guardian could take legal proceedings to recover custody of the child and for ravishment of the ward. Tenures Abolition Act 1660, s. 9 provided that the testamentary guardian was entitled to manage the child's property. An Act for taking away the Courts of Wards and Liveries, and Tenures in capite, and by Knights Service 1662, s. 6 allowed a father to appoint a guardian to children under the age of 21. This guardian could take legal proceedings to recover custody of the child and for ravishment of the ward. An Act for taking away the Courts of Wards and Liveries, and Tenures in capite, and by Knights Service 1662, s. 7 allows the guardian to take for the use of the children the profits of lands and management of the child's personal estate until the child reached the age of 21.

[16] Ireland: Waters v. Cruikshank [1967] I.R. 378 at 384-285 per Kingsmill-Moore J.; Hollywood v. Cork Harbour Commissioners [1992] 1 I.R. 457 at 465-466 per O'Hanlon J.. England: Ex Parte Pye (1811) 18 Ves. Jun. 140, 34 E.R. 271 at 153-154, 276 per Eldon L.C.; Powys v. Mansfield (1837) 3 Myl. & Cr. 359, 30 E.R. 964 at 367-368, 967-968 per Cottenham L.C.; Sayre v. Hughes

and surrogacy contracts.[19]

Third, an individual has a right to determine and control his or her procreation.[20] The State cannot dictate or prescribe the number of children a person might or should have.[21] This is seen as a matter outside the control of positive law.

Fourth, society is growing in its acceptance of same

(1868) L.R. 5 Eq. 376 at 380 Sir John Stuart V.C.; Bennet v. Bennet (1879) 10 Ch. D. 474 at 477 per Jessel M.R.; In Re Hamlet, Stephen v. Cunnigham (1888) 38 Ch. D. 183 at 190 per Kay J.. Canada: In Chartier v. Chartier [1999] 168 D.L.R.(4th) 540 at 552 and 555-557 per Bastarche J. held that the law precludes a person who is acting in loco parentis to a child from unilaterally withdrawing from such a relationship. The court held that a court should consider the views of the child when determining whether a person was in loco parentis to a child.

[17] Ireland: Adoption Act 1952, s. 24; England: Adoption of Children Act 1926, s. 5(1). These statutes provide that an adoption terminates the relationship between the biological parent and child, and substitutes this with a legal tie between the adoptive parent and child.

[18] Ireland: Child Care (Placement of Children in Foster Care) Regulations 1995, Art. 3; Education Act 1998, s. 2(1) defines a parent as including a child's biological parent, adoptive parent, a foster parent, a guardian, or person acting in loco parentis. United States: In Smith v. Organization of Foster Families 431 U.S. 816 (1977) at 842-847 per Brennan J. considered the legal status of foster parents under the Fourteenth Amendment of the Constitution of the United States of America. Brennan J. decided that it was not necessary to determine whether foster parents have a protected liberty interest under the Fourteenth Amendment.

[19] England: In A. v. C. (1978) 8 Fam. Law 170 at 170 per Comyn J. took no cognisance of a surrogacy agreement. Surrogacy Arrangements Act 1985 accords legal validity to surrogacy contracts in certain circumstances.

[20] Ireland: McGee v. Attorney General [1974] I.R. 284 at 313 per Walsh J..

[21] Ireland: In McGee v. Attorney General [1974] I.R. 284 at 313, Walsh J. held that the common good may require the maintenance or increase in the population. Walsh J. held that in such circumstances the State could take steps to hinder the use of birth control.

sex relationships and the law in some countries confers parental rights and duties on same sex couples.

Five, there has been substantial scientific progress in reproductive medicine. Such techniques may use donated genetic material and the child may have no genetic link to his or her parents.[22]

Thus, the concept of a parent has moved from biologically created dependency and ownership to relationships not necessarily based in biology but societal and personal choice. However, this does not alter the function of a parent: to raise and educate the child.

1.1.2. State

A state is a sovereign political power or community. Originally, the State was one person, the sovereign. This person retained all powers to govern the people and the State. The concept of the State changed when there was a devolvement of power from the sovereign to the organs of the State: the executive, the parliament and the judiciary. Parliament has delegated the State's responsibility for children to organisations, such as health boards, local authorities or schools. However, the thesis does not consider these organisations' actions. The thesis is restricted to considering the role of the judiciary in proceedings involving the rights of the child.

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[22] England: Human and Embryology Act 1990. s. 27, s. 28 and s. 29.

1.1.3. Right

A right is that to which a person has a lawful and just claim. Parents and children have rights in the welfare model and rights. However, the nature and purpose of the rights of parents and those of the children differ significantly.

1.1.4. Duty

A duty is an act that is due by a legal or moral obligation. The parents and the State have duties to children in the welfare model and the rights model.

1.1.5. Parens patriae[23]

One of the English sovereign's prerogatives was the responsibility of caring for those citizens unable to care for themselves - the parens patriae prerogative.[24] This prerogative was defined in Eyre v. Countess of Shaftesbury.[25]

> [T]he King is bound of common right, and by the laws to defend his subjects, their goods and chattels, lands and tenements, and by the law of this realm, every loyal subject is taken to be within the King's protection,

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[23] This translates as: parent of his country. United States: In Fontain v. Ravenel 17 How. (U.S.) 393 (1855) at 384-395 per McLean J., the Supreme Court held that the parens patriae concept is no longer vested in the English sovereign but is vested in the States of the Union. Canada: Hepton v. Maat [1957] 10 D.L.R.(2nd) 1 at 1-2 per Rand J.; (E.)(Mrs.) v. Eve [1986] 31 D.L.R.(4th) 1 at 16 per La Forest J.. Young v. Young [1993] 108 D.L.R.(4th) 193 at 210 per L'Heureux Dube J.; Winnipeg Child and Family Services (Northwest Area) v. D.F.G. [1997] 156 D.L.R.(4th) 193 at 218 per Major J.. See (E.)(Mrs.) v. Eve [1986] 31 D.L.R.(4th) 1 at 13-22 per La Forest J. for a discussion of the evolution of the parens patriae prerogative.

[24] Blackstone (1788) Bk. 1 Chap. 17 p. 464.

[25] England: (1722) 2 P. Wms. 103, 24 E.R. 659.

> for which reason it is, that idiots and lunatics, who are incapable to take care of themselves, are provided for by the King as pater patriae; and there is the same reason to extend this case to infants. Infants as well as idiots and lunatics, are said to be under the care and protection of the Crown, as persons equally unable to take care of themselves[26]

As this quotation demonstrates, this duty was owed primarily to persons of unsound mind[27] and children,[28] who could not take care of themselves.[29] The sovereign had a custodial jurisdiction over the child and in effect became the child's parent.[30] This prerogative has been supplemented by constitutional[31] and statutory intervention.[32]

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[26] England: ibid. at 118, 664.

[27] Blackstone (1788) Bk. 1 Chap. 8 p. 303. England: In Beverley's Case (1603) 4 Co. Rep. 123b, 76 E.R. 1118 the court discussed inter alia the responsibility of the sovereign to persons of unsound mind. Sheldon v. Fortescue Aland (1731) 3 P. Wms. 104, 24 E.R. 987 at 110-111, 989 per King L.C.; Oxenden v. Lord Compton (1793) 2 Ves. Jun. 69, 30 E.R. 527 at 70-72, 528 per Loughborough L.C..

[28] Ireland: In Re a Ward of Court (withholding medical treatment)(No.2) [1996] 2 I.R. 79 at 139-140 per Blayney J.. England: Cary (Lord Falkland) v. Bertie (1696) 2 Vern. 333, 23 E.R. 814 at 342, 818 per Lord Somers; Eyre v. Countess of Shaftesbury (1722) 2 P. Wms. 103, 24 E.R. 659 at 123-124, 666 per Gilbert L.C.; In Re Grimes (1877) 11 Ir. Eq. 465 at 470 per Lord Chancellor; In Re X. (A Minor)(Wardship: Restriction on Publication) [1975] Fam. 47 at 52 per Latey J.; In Re F. (Mental Patient: Sterilisation) [1990] 2 A.C. 1 at 57 per Lord Brandon.

[29] England: Wellesley v. Duke of Beaufort (1827) 2 Russ. 1, 38 E.R. 236 at 20, 243 per Eldon L.C..

[30] England: In Beall v. Smith (1873) L.R. 9 Ch. 85 at 92 per Sir James L.J., holding that the Court of Chancery is by law the child's guardian but not the guardian of the person of unsound mind.

[31] Ireland: Constitution of Ireland 1937, Art. 42.5.

The parens patriae prerogative may appear laudable and unselfish. However, the sovereign benefitted in three ways from this prerogative. First, the sovereign could manage the child's property. The sovereign used money raised from managing the property to care for the child[33] and retained some money for fulfilling the parens patriae prerogative. Second, the sovereign received loyalty and obedience from the citizens for performing this prerogative, in particular children whom the sovereign had protected.[34] Third, the parens patriae prerogative grants to the State the ability to protect and foster its children: the State's future taxpayers, voters and stakeholders.[35] It was to the advantage of the sovereign that children born in the sovereign's land should be cared for and educated.[36]

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[32] England: Poor Law Amendment Act 1868 allowed a child to be taken into care. F. v. Wirral Metropolitan Borough Council and another [1991] Fam. 69 at 87 per Purchas L.J.; Children Act 1989. Ireland: Child Care Act 1991.

[33] England: Prerogativa Regis 1324; Sheldon v. Fortescue Aland (1731) 3 P. Wms. 104, 24 E.R. 987 at 110-111, 989 per King L.C.; Oxenden v. Lord Compton (1793) 2 Ves. Jun. 69, 30 E.R. 527 at 70-72, 528 per Loughborough L.C..

[34] England: Calvin's Case (1603) 7 Co. Rep. 2a, 77 E.R. 379 at 4(b)-5(a), 382; Eyre v. Countess of Shaftesbury (1722) 2 P. Wms. 103, 24 E.R. 659 at 123-124, 666 per Gilbert L.C.

[35] England: In Re X. (A Minor)(Wardship: Restriction on Publication) [1975] Fam. 47 at 52 per Latey J.; In Re C. (A Minor)(Wardship: Medical Treatment)(No.2) [1990] Fam. 39 at 46 per Lord Donaldson M.R..

[36] England: Hope v. Hope (1854) 4 De G. M. & G. 328, 43 E.R. 534 at 344-345, 540-541 per Cranworth L.C.; J. v. C. [1970] A.C. 668 at 693 per Lord Guest. Canada: King v. Low [1985] 16 D.L.R.(4th) 576 at 582 per McIntyre J..

1.1.6. Paternalism

Paternalism is the exercise of overprotective authority over an individual's rights. Paternalism involves restricting a person's liberty when it is either for the promotion of the person's good or the prevention of harm to the person. Paternalism involves showing concern for the person and a presumption that one's judgment about what will promote the person's welfare is superior to that of the person concerned. The argument in favour of paternalism is that, if one can prevent people from harming themselves, there is no reason not to do so. An argument against paternalism is that it violates the right or principle of autonomy.[37]

1.2. Rights model

Rights have two functions. First, rights can protect individuals from the arbitrary use of State power, such as the rights to bodily integrity and liberty. The benefit of these rights is not dependent on the individual's intellectual competence. Paternalism involves care and protection. Paternalism may involve abrogating or denying an individual such a right in order to care for the individual.

Second, rights allow an individual to determine for himself or herself the person he or she wants to be. An inherent component of an individual right is the principle of autonomy: a competent adult can decide for himself or herself on the exercise of his or her rights,

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[37] Areneson (1998), Ten (1988) and Dworkin (1995).

provided that such an exercise does not interfere with the rights of others. The principle of autonomy precludes interference with the exercise of rights by a competent adult, even where the majority of people may consider such an exercise as unwise.[38] Paternalism involves care and protection. Paternalism restrains an unwise choice as to the exercise of rights. The concepts of autonomy and paternalism are incompatible.

The rights model must accommodate the fact that young children are by definition incompetent to exercise all or most of their rights.[39] Parents decide on the exercise of the child's rights where the child is incompetent. There is a need to protect children against bad decisions of parents. This is achieved by requiring parents to act in the child's best interests when deciding on the exercise of the child's rights. The State must assume the role of decision maker where parents do not act in the child's best interests. The court is the

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[38] Ireland: In Re a Ward of Court (withholding medical treatment)(No.2) [1996] 2 I.R. 79 at 124-125 per Hamilton C.J. and at 156 and 164 per Denham J.. England: In Re F. (Mental Patient: Sterilisation) [1990] 2 A.C. 1 at 55 per Lord Brandon and at 72-73 per Lord Goff; In Re T. (Adult: Refusal of Treatment) [1993] Fam. 95 at 102 per Lord Donaldson M.R., at 116 per Butler-Sloss L.J. and at 120 per Staughton L.J.; Airedale N.H.S. Trust v. Bland [1993] A.C. 789 at 857 per Lord Keith and at 864 per Lord Goff. United States: Cruzan v. Director Missouri Department of Health 497 U.S. 261 (1990) at 269-270 Rehnquist C.J. reviewed the common law relating to the principle of autonomy; Vacco v. Quill, unreported, Supreme Court, 26 June, 1997 at 10 per Rehnquist C.J.. Canada: R. v. Morgentaler [1988] 44 D.L.R.(4th) 385 at 484-487 per Wilson J..

[39] Canada: B.(R.) v. Children's Aid Society of Metropolitan Toronto [1995] 122 D.L.R.(4th) 1 at 42 per La Forest J..

State body that is commonly asked to intervene on the State's behalf. The court must also act in the child's best interests when deciding on the exercise of a child's rights.

A child acquires intellectual competence as the child grows older and is able to make decisions for himself or herself. Greater weight must be given to the child's wishes, when parents or the court decide on the exercise of the child's rights as the child's intellectual competence evolves. Parents or the court lose the ability to decide on the exercise of the child's rights where the child has acquired the intellectual competence to exercise his or her rights.

1.3. Welfare model

In this thesis, the legal and regulatory framework in which the relationships between the child, the parents and the State exist are referred to as the welfare model. This model comprises interconnected rights and duties. As will be shown, one of the main differences between the rights model and the welfare model is that the welfare model contains a greater degree of unsupervised paternalism. This will be evidenced in each successive chapter by detailed consideration of the law on each topic.

It is contended that the parens patriae prerogative underlies the State's duty to protect and provide for the child in the welfare model, and particularly in the health, education and juvenile justice systems.

1.3.0. Parens patriae jurisdiction of courts

The parens patriae prerogative, though inherent in the sovereign,[40] was from earliest times delegated to the Lord Chancellor[41].[42] The earliest Lord Chancellor was appointed by Edward the Confessor (1042-1066).[43] The Lord Chancellor was in himself a combination of three functions, judicial, executive and legislative.[44]

Originally, the Lord Chancellor was a judge who sat on his own in the Court of Chancery. The Lord Chancellor was said to be the keeper of the King's conscience and as such could exercise an influence over the course of the law by the issue from his Chancery of a writ designed to correct grievances of which the common law could take no cognisance. Therefore, the Lord Chancellor acquired a

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[40] England: In Re X. (A Minor) (Wardship: Restriction on Publication) [1975] Fam. 47 at 52 per Latey J..

[41] Heuston (1964) explains that the word "Chancellor" derives from "cancelli" or the lattice work screen behind which sat the clerks for the dispatch of clerical business in a court.

[42] England: Hope v. Hope (1854) 4 De G. M. & G. 328, 43 E.R. 534 at 344-345, 540-541 per Cranworth L.C.; In Re L. (An Infant) [1968] P. 119 at 156 per Lord Denning.

[43] Heuston (1964).

[44] Schuster (1949). Ireland had its own Lord Chancellor. The first Lord Chancellor of Ireland was appointed in 1219. See Smyth (1839). Irish Free State (Consequential Provisions) Act 1922, s. 2 abolished officers of State of the English administration, including Lord Chancellor of Ireland.

special relation inter alia to wards of court.[45]

In 1540, the parens patriae prerogative in respect of wards with property was transferred from the Lord Chancellor to the Courts of Wards and Liveries.[46] Wardship was the mechanism through which the parens patriae prerogative was exercised.[47] The Lord Chancellor retained jurisdiction for wards who were not profitable to the sovereign.[48] When the Court of Wards and Liveries were abolished in 1660,[49] the wardship jurisdiction should have disappeared.[50] However, the wardship jurisdiction was retained as part of the Chancery Court's jurisdiction. The Lord Chancellor was the judge responsible for managing the Chancery Courts.[51] The Chancery Courts justified the continued existence of the

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[45] Schuster (1949).

[46] England: Cary (Lord Falkland) v. Bertie (1696) 2 Vern. 333, 23 E.R. 814 at 342, 818; Morgan v. Dillon (1724) 9 Mod. 135, 88 E.R. 361 at 139, 364.

[47] England: In Re W. (Minors)(Wardship: Evidence) [1990] 1 F.L.R. 203 at 211-212 per Butler-Sloss L.J..

[48] England: Morgan v. Dillon (1724) 9 Mod. 135, 88 E.R. 361 at 139, 364 per West L.C..

[49] England: Tenures Abolition Act 1660, s. 1; An Act for taking away the Courts of Wards and Liveries, and Tenures in capite, and by Knights Service 1662, s. 1.

[50] England: Cary (Lord Falkland) v. Bertie (1696) 2 Vern. 333, 23 E.R. 814 at 342, 818.

[51] England: In Butler v. Freeman (1756) Amb. 301, 27 E.R. 204 at 302-305, 204-206 per Hardwicke L.C. explaining that the Chancery Court's wardship jurisdiction enabled it to intervene to protect and benefit those incapable of protecting themselves.

wardship jurisdiction as an aspect of the parens patriae prerogative.[52] However, the Chancery Courts could exercise the parens patriae prerogative without making the child a ward of court. The parens patriae prerogative was used to protect children because of the particular legal status attaching to childhood.[53] The Chancery Court's jurisdiction in relation to children owed its origins to the parens patriae prerogative of the sovereign to act as supreme parent and guardian of all children.[54]

The wardship jurisdiction was initially exercised by the Lord Chancellor and Vice-Chancellor, but was eventually delegated to all Chancery Court judges.[55] The wardship jurisdiction survived the merger of the Chancery

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[52] England: Cary (Lord Falkland) v. Bertie (1696) 2 Vern. 333, 23 E.R. 814 at 342, 818 per Jefferies L.C.; Morgan v. Dillon (1724) 9 Mod. 135, 88 E.R. 361 at 139, 364 per West L.C..

[53] England: In Re Spence (1847) 2 Ph. 247, 41 E.R. 937 at 252, 938 per Cottenham L.C.; Brown v. Collins (1883) 25 Ch. D. 56 at 60-61 per Kay J.; Barnardo v. McHugh [1891] A.C. 388 at 395 per Lord Halsbury; In Re Magees, Infants (1893) 31 L.R. Ir. 513 at 519 per Porter M.R.; In Re N. (Infants) [1967] 1 Ch. 512 at 530 per Stamp J.; In Re L. (An Infant) [1968] P. 119 at 156 per Lord Denning.

[54] England: In Re Naish (A Minor) [1895] 1 I.R. 266 at 269 per Porter M.R. explaining that the Lord Chancellor acted for the benefit of the child and the child alone.

[55] England: In Wellesley v. Wellesley (1828) 2 Bligh N.S. 124, 4 E.R. 1078 at 129-133, 1080-1081 Lord Redesdale holding that for a 150 years the Court of Chancery has assumed an authority with respect to the care of children. This derived from the parens patriae role of the sovereign. The court can apply the property of the children to maintain and educate the children during their minority.

and Common Law Courts.[56] The merger appointed the Lord Chancellor as President of the Chancery Division of the Irish High Court.[57] The President of the Chancery Division controlled the wardship jurisdiction and the protection of children's property.[58] The wardship jurisdiction survived the creation of the Irish Free State in 1922 and the 1937 Constitution,[59] though doubt persists as to its compatibility with the Constitution.[60] The President of the Irish High Court can direct that any judge of the High Court may exercise this jurisdiction.[61]

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[56] Ireland: Supreme Court of Judicature (Ireland) Act 1877, s. 21(1).

[57] Ireland: Supreme Court of Judicature (Ireland) Act 1877, s. 6 and s. 34(1).

[58] Ireland: Supreme Court of Judicature (Ireland) Act 1877, s. 36(5). England: In Re Cunninghams, Infants [1915] 1 I.R. 380 at 384 per Molony L.J..

[59] Ireland: In Re K. (A Ward of Court), unreported, Supreme Court, 31 July, 2000 at 3 per Keane C.J..

[60] Ireland: Constitution of Ireland 1937, Art. 5. In Byrne v. Ireland [1972] I.R. 241 at 274-275 per Walsh J. and Webb v. Ireland [1988] I.R. 353 at 382-384 per Finlay C.J. and at 387-388 per Walsh J. who held that royal prerogatives were inconsistent with a sovereign, independent and democratic republic where the powers of government, legislative, executive and judicial derive from the people. In Eastern Health Board v. M.K. and M.K. [1999] 2 I.R. 99 at 117 per Barrington J. holding that the wardship jurisdiction exists in the State to the extent that it is not inconsistent with the Constitution of Ireland 1937. Barrington J. held that the concept of the sovereign as parens patriae has no place in a modern democratic republic.

[61] Ireland: Courts (Supplemental Provisions) Act 1961, s. 9; In Re D. [1987] I.R. 449 at 452-453 per Finlay C.J. and In Re a Ward of Court (withholding medical treatment)(No.2) [1996] 2 I.R. 79 at 103 and 127 per Hamilton C.J..

The jurisdiction can only be exercised where it is demonstrated that the parents' conduct is such that it is not merely better but clearly right for the welfare of the child in some very serious and important respect to require suspension or supersession of the parent's rights.[62] The rights model requires the invocation of the court's jurisdiction where parents are not acting in the child's best interests. However, the welfare model requires parental misconduct before the State may intervene.[63]

The parens patriae jurisdiction is quasi-paternal.[64] The court acts in loco parentis as a wise and

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[62] Ireland: In Re Kindersley [1944] I.R. 111 at 130-131 per O'Byrne J.. England: In Re Fynn (1848) 2 De G. & Sm. 457, 64 E.R. 205 at 474-475, 212 per Knight-Bruce V.C.; R. v. Gyngall [1893] 2 Q.B. 232 at 242 per Lord Esher M.R.; In Re O'Hara [1900] 2 I.R. 232 at 239-241 per Fitzgibbon L.J.; In Re Cunninghams, Infants [1915] 1 I.R. 380 at 383 per Molony J.; In Re Story [1916] 2 I.R. 328 at 351-352 per Dodd J.; J. v. C. [1970] A.C. 668 at 694-697 per Lord Guest.

[63] England: In Re Magees, Infants (1893) 31 L.R. Ir. 513 at 523 per Porter M.R..

[64] Ireland: In Re K. (A Ward of Court), unreported, Supreme Court, 31 July, 2000 at 3 per Keane C.J.. England: In Re Gills, Minors (1891) 27 L.R. Ir. 129 at 135 per Ashbourne L.C.; R. v. Gyngall [1893] 2 Q.B. 232 at 241-242 per Lord Esher M.R. and at 248 per Kay L.J.; In Re Newton (Infants) [1896] 1 Ch. 740 at 745 per Kay L.J.; In Re E. (An Infant) [1956] Ch. 23 at 26 per Roxburgh J.; Andrew v. Andrews and Sullivan [1958] P. 217 at 220 per Wrangham J.; In Re A. (Wardship: Jurisdiction) [1995] 1 F.L.R. 767 at 768-769 per Hale J..

affectionate parent.[65] In In Re J. (A Minor)(Wardship: Medical Treatment)[66] Balcombe L.J. held that when a court is deciding what is in the ward's best interests :-

> the court adopts the same attitude as a responsible parent would do, in the case of his or her own child; the court exercising the duties of the [s]overeign as parens patriae is not expected to adopt any higher or different standards than that which, viewed objectively, a reasonable and responsible parent would do.[67]

The judge must sanction any important step in the child's life.[68] The court has power to deal with anything affecting the child's welfare including custody, care, control, protection of property, medical intervention, religious upbringing, education and protection against

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[65] England: R. v. Gyngall [1893] 2 Q.B. 232 at 241-242 per Lord Esher M.R. and at 248 per Kay L.J.; In Re Story [1916] 2 I.R. 328 at 339 per Gibson J..

[66] England: [1991] Fam. 33.

[67] England: ibid. at 50. Ireland: In In Re a Ward of Court (withholding medical treatment)(No.2) [1996] 2 I.R. 79 at 106 Hamilton C.J. approved of this approach.

[68] Ireland: The People (Attorney General) v. Edge [1943] I.R. 115 at 140 per Geoghegan J.; In Re a Ward of Court (withholding medical treatment)(No.2) [1996] 2 I.R. 79 at 106, 117-118 and 127 per Hamilton C.J., at 143 per Blayney J. and at 164 per Denham J.; Eastern Health Board v. M.K. and M.K. [1999] 2 I.R. 99 at 110 per Denham J.; Supreme Court of Judicature (Ireland) Act 1877, s. 28(10). England: In Re Grimes (1877) 11 Ir. Eq. 465 at 471 per Lord Chancellor; In Re Magees, Infants (1893) 31 L.R. Ir. 513 at 523 per Porter M.R.; In Re D. (A Minor)(Wardship: Sterilisation) [1976] Fam. 185 at 196 per Heilbron J.; In Re G.-U. (A Minor)(Wardship) [1984] F.L.R. 811 at 811-812 per Balcombe J.; In Re C. (A Minor)(Wardship: Medical Treatment) [1990] Fam. 26 at 32 per Lord Donaldson M.R. and at 38 per Balcombe L.J..

potentially harmful relationships.[69] The guiding principle for this jurisdiction was and is the welfare of the child.[70]

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[69] Ireland: medical treatment: In Re a Ward of Court (withholding medical treatment) (No.2) [1996] 2 I.R. 79; In Re Gills, Minors (1891) 27 L.R. Ir. 129 at 134-135 per Ashbourne L.C.; In Re S. (An Infant) [1967] 1 W.L.R. 396 at 407 per Cross J.; In Re Mohamed Arif (an infant) [1968] Ch. 643 at 662 per Russell L.J.; In Re X. (A Minor) (Wardship: Restriction on Publication) [1975] Fam. 47 at 50 per Latey J.; In Re D. (A Minor) (Wardship: Sterilisation) [1976] Fam. 185 at 196 per Heilbron J.; In Re B. (A Minor) (Wardship: Medical Treatment) [1981] 1 W.L.R. 1421 at 1424 per Templeman L.J. and Dunn L.J.; In Re C.B. (A Minor) (Wardship: Local Authority) [1981] 1 W.L.R. 379 at 387-388 per Ormrod L.J.; In Re S.W. (A Minor) (Wardship: Jurisdiction) [1986] 1 F.L.R. 24 at 27 per Sheldon J.; In Re P. (A Minor) [1986] 1 F.L.R. 272 at 276-279 per Butler-Sloss J.; In Re C. (A Minor) (Wardship: Medical Treatment) [1990] Fam. 26 at 32 per Lord Donaldson M.R. and at 38 per Balcombe L.J.; In Re J. (A Minor) (Wardship: Medical Treatment) [1991] Fam. 33 at 40 per Lord Donaldson M.R. and at 49 per Balcombe L.J.; In Re C. (a baby) (1996) 32 B.M.L.R. 44 at 45 per Sir Stephen Brown P..

[70] Ireland: Supreme Court of Judicature (Ireland) Act 1877, s. 28(10); In Re Kindersley [1944] I.R. 111 at 130-131 per O'Byrne J.; In Re a Ward of Court (withholding medical treatment) (No.2) [1996] 2 I.R. 79 at 106 and 127 per Hamilton C.J.; Eastern Health Board v. M.K. and M.K. [1999] 2 I.R. 99 at 110 per Denham J. and at 117 per Blayney J.. England: Supreme Court of Judicature 1873, s. 25(10). The rules of equity prevail where there was a conflict between equity and the common law. In Re McGrath [1893] 1 Ch. 143 at 148 per Lindley M.R.; R. v. Gyngall [1893] 2 Q.B. 232 at 242-243 per Lord Esher M.R. and at 248 per Kay L.J.; In Re O'Hara [1900] 2 I.R. 232 at 239-241 per Fitzgibbon L.J. and at 251 per Holmes L.J.; Ward v. Laverty [1925] A.C. 101 at 108 per Viscount Cave; In Re Thain [1926] Ch. 676 at 689 per Lord Haworth M.R., at 690-691 per Warrington L.J. and at 691 per Sargant L.J.; In Re R. (M.) (An Infant) [1966] 3 All E.R. 58 at 64-66 per Plowman J.; J. v. C. [1970] A.C. 668 at 697 per Lord Guest and at 720-721 per Lord Upjohn; In Re P. (A Minor) [1986] 1 F.L.R. 272 at 279 and 281 per Butler-Sloss J.. United States: Lehr v. Robertson 463 U.S. 248 (1983) at 257-262 per Stevens J. speaking for the majority.

The term "welfare" is interpreted broadly.[71] The child's welfare is not the first and paramount consideration, where there is a competing public interest such as the freedom of the press[72] or the administration of justice.[73] The child's welfare is the first and paramount consideration, but not the only consideration.[74] The court must consider the wishes of the parents[75] and the child,[76] where the child is of

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[71] England: In Re McGrath [1893] 1 Ch. 143 at 148 per Lindley M.R.; R. v. Gyngall [1893] 2 Q.B. 232 at 242-243 per Esher M.R. and at 248 per Kay L.J.; In Re O'Hara [1900] 2 I.R. 232 at 254 per Holmes L.J.. Canada: King v. Low [1985] 16 D.L.R.(4th) 576 at 581-582 and 587 per McIntyre J.; Young v. Young 108 D.L.R.(4th) 193 at 231-234 per L'Heureux Dube J..

[72] England: In Re X. (A Minor)(Wardship: Restriction on Publication) [1975] Fam. 47 at 61 per Sir John Pennycuick; In Re M. and N. (Minors)(Wardship: Publication of Information) [1990] Fam. 211 at 223-224 per Butler-Sloss L.J. and at 229 per Lord Donaldson M.R.; In Re W. (Wardship: Discharge: Publicity) [1995] 2 F.L.R. 466 at 473-474 per Balcombe L.J. and at 475-476 per Waite L.J.. In these cases, the courts held that the ward's welfare is not the paramount consideration when balancing the ward's interests with those of the press. United States: Reno v. Flores 507 U.S. 292 (1993) at 303-305 per Scalia J. speaking for the majority of the Supreme Court.

[73] England: In S. v. McC., W. v. W. [1972] A.C. 24 at 43-45 per Lord Reid holding that the child's welfare is not the paramount consideration when a court is deciding whether to order a blood test for a child to determine paternity. The competing public interest is that justice requires relevant evidence to be available to a court.

[74] Ireland: Eastern Health Board v. M.K. and M.K. [1999] 2 I.R. 99 at 117 per Blayney J..

[75] Ireland: In Re Westby Minors(No.2) [1934] I.R. 311 at 322 per O'Sullivan P., 324-326 per Fitzgibbon L.J. and at 331 per Murnaghan J.. England: In Re P. (A Minor) [1986] 1 F.L.R. 272 at 281 per Butler-Sloss J.; In Re J. (A Minor)(Wardship: Medical Treatment) [1991] Fam. 33 at 41 per Lord Donaldson M.R.. Canada: Hepton v. Maat [1957] 10 D.L.R.(2nd) 1 at 2 per Rand J..

sufficient age and understanding to express these. The court attaches weight to the child's wishes depending on the child's competence.[77] The greater the child's competence, the greater weight the court will attach to the child's own expression of his or her wishes.[78] The court is not bound to give effect to the wishes of the parents or the child. The court may override these wishes where the wishes conflict with the child's best interests.[79]

The parens patriae jurisdiction extends as far as is necessary to protect the child's welfare. The court may

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[76] England: In Re Grimes (1877) 11 Ir. Eq. 465 at 471-472 per Lord Chancellor; R. v. Gyngall [1893] 2 Q.B. 232 at 245 per Lord Esher M.R.; In Re Story [1916] 2 I.R. 328 at 344-45 per Gibson J.; In Re P. (A Minor) [1986] 1 F.L.R. 272 at 279 per Butler-Sloss J..

[77] Ireland: Child Care Act 1991, s. 3(2)(b)(ii) and s. 24(b) require the health boards and courts to give due consideration to the child's wishes, having regard to that child's age and understanding. England: Dawson v. Jay (1854) 3 De G. M. & G. 764, 43 E.R. 300 at 772, 304 per Cranworth L.C.; R. v. Gyngall [1893] 2 Q.B. 232 at 245-246 per Lord Esher M.R.; In Re S. (An Infant) [1967] 1 W.L.R. 396.

[78] England: In Re Manda [1993] Fam. 183 at 195 per Balcombe L.J.. Canada: Eaton v. Brant County Board of Education [1997] 142 D.L.R.(4th) 385 at 410 per Sopinka J..

[79] England: In Re P. (A Minor) [1986] 1 F.L.R. 272 at 279 per Butler-Sloss J.; In Re C. (A Minor)(Wardship: Medical Treatment) [1990] Fam. 39 at 46 per Lord Donaldson M.R.; In Re J. (A Minor)(Wardship: Medical Treatment) [1991] Fam. 33 at 41 per Lord Donaldson M.R.. Canada: B.(R.) v. Children's Aid Society of Metropolitan Toronto [1995] 122 D.L.R.(4th) 1 at 42 per La Forest J. and at 87 per Iaccobucci J., Cory J. and Major J.; Winnipeg Child and Family Services (Northwest Area) v. D.F.G. [1997] 152 D.L.R.(4th) 193 at 218 per Major J..

make orders against third parties,[80] including orders prohibiting the media publishing information about the child[81] or against a Minister of the Government to provide services necessary to vindicate the rights of a child with special needs.[82]

The welfare model ascribes to the jurisdiction unbounded limits.[83] Yet the rights model requires that the jurisdiction must be exercised carefully and within limits.[84] These limits are that a court should not cause

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[80] England: In Re C. (A Minor)(Wardship: Medical Treatment)(No.2) [1990] Fam. 39 at 46 per Lord Donaldson M.R. and at 51 per Balcombe L.J..

[81] England: In Re M. and N. (Minors)(Wardship: Publication of Information) [1990] Fam. 211 at 223-225 per Butler-Sloss L.J..

[82] Ireland: D.B. v. Minister for Justice [1999] 1 I.R. 29 at 40-43 per Kelly J.; T.D. v. Minister for Education and Ireland, unreported, High Court, at 1-2 per Kelly J., ex-tempore, 4 December, 1998; T.D. v. Minister for Education [2000] 2 I.L.R.M. 321 at 339-342 per Kelly J.; D.H. v. Ireland, unreported, High Court, at 9-11 per Kelly J., 23 May, 2000. In these cases, the High Court issued a mandatory injunction against the Minister requiring the Minister to provide facilities for children with special needs. These cases can be seen as a dispute between two organs of the State as to satisfying the parens patriae duty of the State.

[83] England: Wellesley v. Wellesley (1828) 2 Bligh N.S. 124, 4 E.R. 1078 at 136, 1083 Lord Redesdale holding that the jurisdiction extends to the case of a child as far as necessary for that child's protection and education; In Re X. (A Minor)(Wardship: Restriction on Publication) [1975] Fam. 47 at 50-51 per Latey J.; In Re J. (A Minor)(Child in Care: Medical Treatment) [1993] Fam. 15 at 29 per Balcombe L.J.. Canada: Winnipeg Child and Family Services (Northwest Area) v. D.F.G. [1997] 152 D.L.R.(4th) 193 at 218 per Major J..

[84] England: In Re X. (A Minor)(Wardship: Restriction on Publication) [1975] Fam. 47 at 58-59 per Lord Denning M.R., 60-61 per Roskill L.J. and at 61 per Sir John Pennycuick; In Re D. (A Minor)(Wardship: Sterilisation) [1976] Fam. 185 at 193-194 per Heilbron J.; In Re J. (A Minor)(Child in

irreversible or permanent damage to the rights of the child thereby denying the child the ability to exercise these rights as an adult. The court's guiding principle should be to prevent damage being done to the child's welfare and rights.[85] The court will choose the course that will best provide for healthy growth, development and education of the child so that the child will be equipped to face the problems of life as an adult.[86]

The purpose of the jurisdiction is to ascertain what is in the child's best interests. The court's special paternal jurisdiction is inquisitorial rather than adversarial.[87] These proceedings cannot be considered as the administration of justice as with a lis inter

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Care: Medical Treatment) [1993] Fam. 15 at 29 per Balcombe L.J.. Canada: (E.)(Mrs.) v. Eve [1986] 31 D.L.R.(4th) 1 at 29 per La Forest J..

[85] England: Wellesley v. Duke of Beaufort (1827) 2 Russ. 1, 38 E.R. 236 at 18, 242 per Eldon L.C. explaining that the court's guiding principle is to prevent damage being done to a child and avoid causing damage to a child that cannot be repaired. Canada: (E.)(Mrs.) v. Eve [1986] 31 D.L.R.(4th) 1 at 30 per La Forest J..

[86] Canada: King v. Low [1985] 16 D.L.R.(4th) 576 at 581-582 per McIntyre J..

[87] Ireland: In Re a Ward of Court (withholding medical treatment)(No.2) [1996] 2 I.R. 79 at 144-145 per Blayney J.; A. and B. v. Eastern Health Board [1998] 1 I.L.R.M. 460 at 471 per Geoghegan J.; In Re K. (A Ward of Court), unreported, Supreme Court, 31 July, 2000 at 3 per Keane C.J.. England: Scott v. Scott [1913] A.C. 417 at 482-483 per Lord Shaw of Dunfermline; In Re K. (Infants) [1965] A.C. 201 at 238-241 per Lord Devlin; In Re E. (S.A.)(A Minor)(Wardship: Court's Duty) [1984] 1 W.L.R. 156 at 158-159 per Lord Scarman.

partes.[88] The child's interests may not be served by relying on the submissions, evidence and course of action pleaded for by the parties to the proceedings.[89] The court may of its own motion, direct such inquiries and examinations as it might think fit.[90] The courts have modified the adversarial rules of evidence that may exclude relevant evidence as to the child's welfare, such as the rule against hearsay.[91] In addition, proceedings are heard in camera.[92] The court is inquiring into the life of the child and family. This task is better achieved where the proceedings are heard in private.[93]

This role is at odds with the common understanding

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[88] Ireland: In The State (D. and D.) v. Groarke [1990] 1 I.R. 305 at 319 Finlay C.J. held that an application relating to a child's welfare is not a lis inter partes; In Re a Ward of Court (withholding medical treatment) (No.2) [1996] 2 I.R. 79 at 144-145 per Blayney J.; In Re K. (A Ward of Court), unreported, Supreme Court, 31 July, 2000 at 3 per Keane C.J..

[89] England: In Re E. (S.A.) (A Minor) (Wardship: Court's Duty) [1984] 1 W.L.R. 156 at 158-159 per Lord Scarman.

[90] England: In Re Birch (1892) 29 L. R. Ir. 274 at 275 per Lord Ashbourne L.C.; In Re A. (Wardship: Jurisdiction) [1995] 1 F.L.R. 767 at 769 per Hale J..

[91] Ireland: Eastern Health Board v. M.K. and M.K. [1999] 2 I.R. 99 at 108-113 per Denham J.. These judicial modifications have been replaced by statutory modifications: Children Act 1997, s. 23, s. 24 and s. 25. England: In Re K. (Infants) [1965] A.C. 201 at 242 per Lord Devlin; In Re W. (Minors) (Wardship: Evidence) [1990] 1 F.L.R. 203 at 213 per Butler-Sloss L.J and at 227 per Neill L.J..

[92] Ireland: Courts (Supplemental Provisions) Act 1961, s. 45(1)(c). England: Scott v. Scott [1913] A.C. 417 at 482-483 per Lord Shaw of Dunfermline.

[93] England: R. (Mrs) v. Central Independent Television plc [1994] Fam. 192 at 207 per Waite L.J..

of an independent and impartial judge in adversarial proceedings who is disinterested with the outcome. The judge has an interest in proceedings relating to children. The judge has a proactive role in protecting and promoting the child's welfare. This role may explain why children are not afforded separate legal representation in proceedings.[94] The judge advocates for the rights and interests of the child. There is no need for another individual to perform this role. However, the special role of the judge does not relieve the judge of the responsibility to act in an independent and impartial manner.[95]

Although the parens patriae jurisdiction was exercised through wardship, it has been adopted in all proceedings involving the welfare and rights of a child.

1.3.1. Duties and rights of parents

Originally, parental rights rested with the father when the father was married to the child's mother. Under Roman law, a paterfamilias could kill his wife and

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[94] In M.F. v. Superintendent, Ballymun Garda Station, John Rynne and Eastern Health Board (Notice Parties) [1991] 1 I.R. 189 at 200 per O'Flaherty J. holding that proceedings concerned with the care and custody of children and the protection of their rights are in a special and, possibly, unique category. The proceedings are special because they concern children and are possibly unique in that the fundamental rights of persons are in issue in litigation in which they are not represented.

[95] England: R. v. Gyngall [1893] 2 Q.B. 232 at 242 per Lord Esher M.R. holding that a judge exercising the jurisdiction must act judicially. Scott v. Scott [1913] A.C. 417 at 437 per Viscount Haldane L.C.; In Re K. (Infants) [1965] A.C. 201 at 217-218 per Lord Evershed and at 238-241 per Lord Devlin.

children with impunity.[96] In England, though the common law penalised a parent who killed a child, the common law allowed a child to be treated as a source of labour. A father could sell the child's services by apprenticing the child.[97] The common law considered the relationship between a father and child as akin to that of master and servant. The father had a proprietorial right to the custody of his child which could be enforced by the writ "per quod servitium amisit".[98] The father had no right to enjoy the consortium of his child.[99] The common law conferred the father with the right to control the religious upbringing, apprenticing and training of his child.[100] The father's extensive control over his

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[96] Blackstone (1788) Bk. 1 Chap. 16 p. 453. Roman laws were amended to restrict somewhat this right: patria potestas in pietate debet, non in atrocitate, consistere (paternal power should consist in kindness, not in cruelty).

[97] Mason (1994).

[98] England: Hall v. Hollander (1825) 4 B. & C. 660, 107 E.R. 1206 at 663, 1027 per Abott C.J.; Evans v. Walton (1867) L.R. 2 C.P. 615 at 620-621 per Bovill C.J., at 622-623 per Willes J., and 623-624 per Montague-Smith J.. In Lough v. Ward [1945] 2 All E.R. 338 at 350 per Cassels J. holding that a girl had rendered services to her father. The defendant had enticed the girl away from her father. Cassels J. awarded the father £500. Ireland: The People (Attorney General) v. Edge [1943] I.R. 115 at 150 and 153 per Black J..

[99] England: Lough v. Ward [1945] 2 All E.R. 338 at 346-347 per Cassels J..

[100] England: Ex Parte Hopkins (1732) 3 P. Wms. 152, 24 E.R. 1009 at 154-155, 1010 per King L.C.. In R. v. De Manneville 5 E. 221, 102 E.R. 1054 at 223, 1055, per Lord Ellenborough C.J. who held that the common law provided that the father is the person entitled to the custody of his child.

children may be accounted for by the concept of patria potestas.[101] A father would forfeit his rights to the custody, control and education of his child when guilty of misconduct.[102] There was a radical shift from the rights of fathers to the welfare of children. Legislation was enacted punishing child neglect, restricting the employment of children, making education compulsory and granting equality to parents in guardianship and custody matters.

The Custody of Infants Act 1839 altered the father's position by allowing the Courts of Chancery to grant the mother custody of a child under the age of 7.[103] This was extended to children under the age of 16.[104] The purpose of this statutory intervention was to preclude fathers from using the custody of children to put pressure on the

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[101] Bracton (1210-1268) Vol. 2 p. 34.

[102] Ireland: In Re Kindersley [1944] I.R. 111 at 130 per O'Byrne J.. England: R. v. Greenhill (1836) 4 A. & E. 624, 43 R.R. 440 at 640, 449 per Lord Denman; R. v. Gyngall [1893] 2 Q.B. 232 at 239-240 per Lord Esher M.R.; In Re Story [1916] 2 I.R. 328 at 351-355 per Dodd J.; In Re O'Hara [1900] 2 I.R. 232 at 240 per Fitzgibbon L.J.; In Re J.M. Carroll [1931] 1 K.B. 317 at 333-335 per Scrutton L.J. and at 349 per Slesser L.J..

[103] England: Custody of Infants Act 1839, s. 1. In Warde v. Warde (1849) 2 Ph. 786, 41 E.R. 1147 at 789, 1149 Cottenham L.C. holding that children are by nature entitled to the care of both parents. In Re Taylor (1876) 4 Ch.D. 157 at 159-160 per Jessel M.R.; In Re Elderton (1883) 25 Ch.D. 220 at 230-231 per Pearson J..

[104] England: Custody of Infants Act 1873, s. 1.

wife to forego her legal remedies against him in cases of his misconduct, or where he wished to appropriate to himself property which by law was hers.

The child's welfare was placed as the guiding principle in guardianship and custody disputes when the Chancery and Common Law Courts merged.[105] However, the courts still vigorously enforced the rights of the father to control the religious education of a young child.[106] This led to a further statutory intervention guaranteeing an equal say to the father and mother in the upbringing of their children.[107] A mother was the child's sole guardian on the death of the father, unless the father had appointed a testamentary guardian.[108] The Custody of Children Act 1891 provided that a court is prohibited from giving a parent custody of a child where the parent

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[105] England: R. v. Gyngall [1893] 2 Q.B. 232 at 241-242 per Lord Esher M.R. explaining that the court could interfere with unwise parental decisions without having to show parental misconduct; In Re O'Hara [1900] 2 I.R. 232 at 239-241 per Fitzgibbon L.J.

[106] England: In Re Agar-Ellis, Agar-Ellis v. Lascelles (1878) 10 Ch. D. 49 at 56-57 per Mallins V.C.; In Re Agar-Ellis, Agar-Ellis v. Lascelles (1883) 24 Ch. D. 317 at 326-329 per Brett M.R. and at 334-336 per Bowen L.J..

[107] Ireland: In Re Kindersley [1944] I.R. 111 at 130 per O'Byrne J.. England: Guardianship of Infants Act 1886, s. 5; Smart v. Smart [1892] A.C. 425 at 431-436 per Lord Hobhouse; Custody of Children Act 1891, s. 4; In Re Story [1916] 2 I.R. 328 at 343-344 per Gibson J.; In Re J.M. Carroll [1931] 1 K.B. 317 at 333-335 per Scrutton L.J. and at 353 per Slesser L.J.; J. v. C. [1970] A.C. 668 at 721 per Lord Upjohn. Canada: King v. Low [1985] 16 D.L.R.(4th) 576 at 587-588 per McIntyre J.; Young v. Young [1993] 108 D.L.R.(4th) 193 at 209-211 per L'Heureux Dube J..

[108] England: Guardianship of Infants Act 1886, s. 2.

has deserted or abandoned that child, unless the parent can prove to the court that he or she is a fit person to have custody.[109]

Originally, the law did not view the father's duty to maintain and advance his children as a legal duty, but as merely a moral one.[110] This changed in two ways. First, these moral duties were recast as legal duties. Second, there was a shift in emphasis from the father's rights to his duties. The shift from rights to duties reflected the shift in society from the rights of parents to the welfare of children.[111] The conferring of rights was seen as necessary in order for parents to perform their parental duties and partly as recompense for the care and trouble in the faithful discharge of these duties.[112] The existence of the father's rights were in a

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[109] England: Custody of Children Act 1891, s. 1.

[110] England: Mortimore v. Wright (1840) 6 M. & W. 482, 151 E.R. 502 at 486, 504 per Lord Abinger C.B.; Shelton v. Springett (1851) 11 C.B. 452, 138 E.R. 549 at 455, 550 per Jervis C.J.; Sayre v. Hughes (1868) L.R. 5 Eq. 376 at 381 per Sir John Stuart V.C..

[111] Canada: In Frame v. Smith [1987] 42 D.L.R.(4th) 81 at 95-96 per Wilson J. explaining that the child's welfare increasingly became an important concern of the court and today is the paramount consideration. Wilson J. went on to say that the concept of parental rights has fallen into disfavour while the law has placed greater emphasis on parental responsibilities.

[112] Blackstone (1788) Bk. 1 Chap. 16 p. 452. Ireland: In The State (Williams) v. Markey [1940] I.R. 421 at 427 per Black J. who held that the parental duty is correlative to the parental right to custody. The High Court held that a court would refuse to enforce a parent's right to custody where the parent's conduct constituted a breach of the parental duty. In In Re J. An Infant [1966] I.R. 295 at 301 per Murnaghan J., at 304 per Teevan J. and at 307 per Henchy J.. The divisional High Court held that the parents

sense accorded on condition of performing the parental duties.[113]

A mother is vested with sole parental rights and duties, where the child's parents are not married to each other. The mother was given rights in respect of her child in order to discharge her duties which the law imposes on the mother for the child's benefit.[114] Statutory provision was made obliging the father to

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need custody of the child in order to perform the inalienable right and duty to provide for their child's religious, moral, intellectual, physical and social education. England: Vansittart v. Vansittart (1858) 2 De G. & J. 249, 44 E.R. 984 at 256, 987 per Chelmsford L.C. and at 259, 988 per Turner L.J.; Gillick v. West Norfolk and Wisbech Area Health Authority [1986] A.C. 112 at 170 per Lord Fraser and at 184-185 per Lord Scarman; In Re K.D. (A Minor) (Ward: Termination of Access) [1988] A.C. 806 at 825-827 per Lord Oliver discussing the difficulty of defining the rights of parents; In Re K. (A Minor) (Ward: Care and Control of Access) [1990] 1 W.L.R. 431 at 434 per Fox L.J.; F. v. Wirral Metropolitan Borough Council and another [1991] Fam. 69 at 92-96 per Purchas L.J..

[113] England: In Re Fynn (1848) 2 De G. & Sm. 457, 64 E.R. 205 at 474, 212 per Knight-Bruce V.C.; In Re Newton (Infants) [1896] 1 Ch. 740 at 750 per Kay L.J.; J. v. C. [1970] A.C. 668 at 692-693 per Lord Guest.

[114] Ireland: In Re M. (An Infant) [1946] I.R. 334 at 345 per Gavan Duffy P.; G. v. An Bord Uchtala [1980] I.R. 32 at 85-86 per Henchy J.. England: In Humphrys v. Polak [1901] 2 K.B. 385 at 388-389 per Vaughan Williams L.J. and 389-390 per Striling L.J. holding that an unmarried mother has a legal duty to maintain and protect her child with corresponding rights. One of this is the prima facie right to the custody. This duty was not created by the Poor Law Acts but merely recognised and defined this duty. Poor Law Amendment Act 1834, s. 71. In Humphrys v. Polak [1901] 2 K.B. 385 at 389 per Vaughan Williams L.J. held that the Poor Law Statutes placed a mother under an obligation to maintain her non-marital child. Canada: In Re Baby Duffell [1950] 4 D.L.R. 1 at 7 per Cartwright J.; In Re Agar [1958] 11 D.L.R.(2nd) 721 at 724 per Locke J..

maintain the child.[115] However, the father is restricted to a statutory right to apply to court to be appointed as a guardian to the child.[116]

The welfare model and the rights model recognise the existence of parental duties and parental rights.[117] There are three parental duties. These are the duties to maintain,[118] protect[119] and educate children [120].[121]

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[115] England: 1576, s. 2 imposed an obligation on both parents to maintain an illegitimate child; Poor Law Amendment Act 1834, s. 72 allowed the court to order the putative father to provide maintenance where the mother was unable to maintain the child. Ireland: In In Re M. (An Infant) [1946] I.R. 334 at 341 per Gavan Duffy P. who explained that neither parent was liable to maintain an illegitimate child under common law; Family Law (Maintenance of Spouses and Children) Act 1976, s. 5A(1), as amended by Status of Children Act 1987, s. 18.

[116] Ireland: Guardianship of Infants Act 1964, s. 6A as amended by Status of Children Act 1987, s. 12 and Children Act 1997, s. 6. J.K. v. V.W. [1990] 2 I.R. 437 at 446 per Finlay C.J.; P.O. v. C.L., unreported, Circuit Court, Sheridan J., 13 June, 1990; case note at [1990] I.L.T. 269 at 270; G.W. v. D.G., unreported, High Court, 1 May, 1992 at 3 per O'Hanlon J.; W.O'R. v. E.H. [1996] 2 I.R. 248 at 265-266 per Hamilton C.J..

[117] United States: Meyer v. State of Nebraska 262 U.S. 390 (1923) at 399 per McReynolds J.; Pierce v. Society of Sisters 268 U.S. 510 (1925) at 535 per McReynolds J.; Prince v. Massachusetts 321 U.S. 158 (1944) at 166 per Rutledge J.; Ginsberg v. New York 390 U.S. 629 (1968) at 389 per Brennan J.; Wisconsin v. Yoder 406 U.S. 205 (1972) at 214 per Burger C.J.; Parham v. J.R. 442 U.S. 584 (1979) at 602 per Burger C.J.; Bellotti v. Baird 443 U.S. 622 (1979) at 637-639 per Powell J.; H.L. v. Matheson 450 U.S. 398 (1981) at 410 per Burger C.J.; Lehr v. Robertson 463 U.S. 248 (1983) at 257-258 per Stevens J.; Hodgson v. Minnesota 497 U.S. 417 (1990) at 445-446 per Stevens J..

[118] Blackstone (1788) Bk. 1 Chap. 16 p. 447.

[119] Blackstone (1788) Bk. 1 Chap. 16 p. 450.

[120] Blackstone (1788) Bk. 1 Chap. 16 p. 451.

The first is the most important duty. This is the duty to maintain the child. Both the welfare model and the rights model hold that parents voluntarily enter into a duty to support and preserve the life that they are responsible for.[122] Mechanisms were established through which parents are obliged to fulfil this duty.[123] The second is the duty to protect and preserve the child's health and life.

The third is the duty to educate the child. This duty is derivative of the duty to maintain. In the same way that the parent cannot allow a child to perish, the parent cannot ignore his or her child's education. The rights model finds that the duty is fulfilled where parents provide an education within their means that qualifies a child for such reasonable standard of life as an adult as is clearly within the child's ability with appropriate education.[124] However, the welfare model only requires that a child is provided with a minimum education.

The welfare model accords greater consideration to the rights of parents than their duties. However, the rights model renders the rights of parents derivative

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[121] Stephen (1787-1864) Vol. 2 p. 508-510. Canada: In Racine v. Woods 1 D.L.R.(4th) 193 at 202 per Wilson J. holding that parents have important obligations to their child.

[122] United States: Parham v. J.R. 442 U.S. 584 (1979) at 602 per Burger C.J..

[123] Blackstone (1788) Bk. 1 Chap. 16 p. 449. England: Poor Relief Act 1601 and Poor Relief Act 1718.

[124] Ireland: Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 41 per Lynch J..

from their duties to the child. Parents are accorded rights in respect of their child in order to fulfil the parental duties.[125] The Constitution implicitly recognises the parents' right to custody and control of the child is necessary to satisfy the parental duties to the child's welfare.[126] This has been seen in cases involving medical intervention[127], education[128] and travel outside the State.[129]

The Constitution of Ireland 1937 may reflect this welfare model. The State acknowledges that the primary and natural educator of the child is the family based upon marriage. The Constitution protects this family unit from unjustified State interference.[130] The State must

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[125] Ireland: The People (D.P.P.) v. J.T. (1988) 3 Frewen 141 at 159 per Walsh J. who held that the Constitution gives special recognition, protection and rights to parents in relation to their children. However, Walsh J. held that it must follow that each and every right so given carries with it correlative duties.

[126] Ireland: Constitution of Ireland 1937, Art. 42.1 defines welfare as including the child's religious, moral, intellectual, physical and social welfare. In Re J. An Infant [1966] I.R. 295 at 308 per Henchy J.; G. v. An Bord Uchtala [1980] I.R. 32 at 85 per Henchy J. holding that it is necessary for parents to have custody in order to fulfil the parental role; In Re J.H. [1985] I.R. 375 at 394-395 per Finlay C.J..

[127] Ireland: North Western Health Board v. H.W. and C.W., unreported, High Court, Barr J., 27 October, 2000.

[128] Ireland: Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1.

[129] Ireland: The State (K.M. and R.D.) v. Minister for Foreign Affairs [1979] I.R. 73 at 81 per Finlay J..

[130] Ireland: Constitution of Ireland 1937, Art. 41.1.2.

protect the constitution and authority of the family based on marriage.[131] The provisions of Article 41 create not merely a State interest but a State obligation to protect the family.[132] The family is recognised as the natural primary and fundamental unit of society possessing inalienable and imprescriptible rights antecedent and superior to positive law.[133] Parents are invested with natural, constitutional and legal authority for the education, care and control of their child. The State guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.[134] The most important right of married parents is the right to raise and

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[131] Ireland: Constitution of Ireland 1937, Art. 41.1.2. In W.O'R. v. E.H. [1996] 2 I.R. 248 at 265 per Hamilton C.J. and at 272 per Denham J. holding that the family not based on marriage is not recognised by the Constitution and is not afforded any constitutional protection.

[132] Ireland: O'B. v. S. [1984] I.R. 316 at 333-334 per Walsh J..

[133] Ireland: Constitution of Ireland 1937, Art. 41.1.1; North Western Health Board v. H.W. and C.W., unreported, High Court, 27 October, 2000 at 12-13 per Barr J.. Canada: In B.(R.) v. Children's Aid Society of Metropolitan Toronto [1995] 122 D.L.R.(4th) 1 at 41-42 La Forest J. holding that the Canadian Charter of Rights protects individual rights, not the integrity of the family unit as such.

[134] Ireland: Constitution of Ireland 1937, Art. 42.1. In Re J.H. [1985] I.R. 375 at 394-396 per Finlay C.J..

educate their child.[135] Parents have the right to determine whether the child on or soon after birth is inducted into a religion, and the nature of the child's education. The right of parents to determine the child's education is detached from the parental duty, where the child is receiving the minimum education. Such parents have a scope of discretion over which the State cannot intervene.

The United States Supreme Court and the Canadian Supreme Court have each found that parents have an independent right to establish a home, raise children and control the education of their children, and make decisions for their children.[136] The United State Supreme

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[135] Ireland: Constitution of Ireland 1937, Art. 42.1, Art. 42.2, Art. 42.3.1, Art. 42.3.4, and Art. 44.2.4. In McGee v. Attorney General [1974] I.R. 284 at 311 per Walsh J. holding that Articles 41 and 42 recognise parents as the natural guardians of their children. The parents have authority for the family and have the right to determine how family life shall be conducted, having due regard to the rights of the children not merely as members of that family but as individuals. In Landers v. Attorney General (1972) 109 I.L.T.R. 1 at 5 per Finlay J. holding that Article 41 protected the privacy of the family and its constitution. Finlay J. held that parental decisions concerning a child's upbringing and education are protected by Article 41. A similar conclusion was reached in In Re J.H. [1985] I.R. 375 at 394 per Finlay C.J..

[136] United States: Meyer v. State of Nebraska 262 U.S. 390 (1923) at 399 per McReynolds J.; Prince v. Massachusetts 321 U.S. 158 (1944) at 166 per Rutledge J.; May v. Anderson 345 U.S. 528 (1953) at 533 per Burton J.; Stanley v. Illinois 405 U.S. 645 (1972) at 651 per White J.; Wisconsin v. Yoder 406 U.S. 205 (1972) at 213-214 per Burger C.J.; Moore v. East Cleveland 431 U.S. 494 (1977) at 499 per Powell J.; Quilloin v. Walcott 434 U.S. 246 (1978) at 255 per Marshall J.; Parham v. J.R. 442 U.S. 584 (1979) at 602 per Burger C.J.; H.L. v. Matheson 450 U.S. 398 (1981) at 410 per Burger C.J.; Lassiter v. Department of

Court has held that the State's laws should protect and assist the parent in exercising these rights.[137] The United States Supreme Court held that the constitutional protection was not limited to members of the nuclear family. Parental rights do not spring full-blown from the biological connection between parent and child.[138] However, the mere existence of a biological link does not merit equivalent constitutional protection.[139] The United States Supreme Court has favoured the unitary family over the position of the unmarried father.[140] The State has an interest in securing that a child should have secure,

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Social Services 452 U.S. 18 (1981) at 38-39 per Stewart J.; Santosky v. Kramer 455 U.S. 745 (1982) at 753-754 per Blackmun J.; Hodgson v. Minnesota 497 U.S. 417 (1990) at 445-446 per Stevens J.; M.L.B. v. S.L.J., individually and as next friend of the minor children, S.L.J. and M.L.J., unreported, Supreme Court, December 16, 1996 at 8-12 per Ginsburg J.; Troxel v. Granville, unreported, Supreme Court, 5 June, 2000 at 5-8 per O'Connor J.. Canada: R. v. Jones [1986] 31 D.L.R.(4th) 569 at 583 per Wilson J. and at 596 Dickson C.J., La Forest J., Beetz J., McIntyre J., Lamer J. and Le Dain J. were willing to assume that such a right exists; B.(R.) v. Children's Aid Society of Metropolitan Toronto [1995] 122 D.L.R.(4th) 1 at 40-42 per La Forest J.; New Brunswick (Minister of Health and Community Services) v. G.(J.) [1999] 177 D.L.R.(4th) 124 at 166-167 per L'Heureux Dube J..

[137] United States: In Ginsberg v. New York 390 U.S. 629 (1968), the United States Supreme Court upheld a statute that restricted the sale of pornographic magazines to children under 17.

[138] United States: Caban v. Mohammed 441 U.S. 380 (1979) at 397 per Powell J.; Lehr v. Robertson 463 U.S. 248 (1983) at 260-263 per Stevens J..

[139] United States: Moore v. East Cleveland 431 U.S. 494 (1977) at 503-505 per Powell J..

[140] United States: Michael H. v. Gerald D. 491 U.S. 110 (1989) at 124-127 per Scalia J..

stable, long-term, continuous relationships with his or her parents or guardians.[141]

The difficulty arises where courts are called on to decide whether parents are fulfilling their parental duties. The welfare model provides that the law can only interfere with families in exceptional circumstances.[142] The State has an obligation to preserve and defend the family group, and this has been interpreted as relating solely to the rights and duties of parents. The State cannot interfere because a better decision can be made in relation to the child.[143] To this end, the law presumes that it is in the child's best interests to be brought up in his or her natural family.[144] The law presumes that parents will act in the child's best interests when

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[141] United States: Lehman v. Lycoming County Children's Services 458 U.S. 502 (1982) at 513-514 per Powell J..

[142] Ireland: North Western Health Board v. H.W. and C.W., unreported, High Court, 27 October, 2000 at 11 and 14 per Barr J..

[143] United States: Troxel v. Granville, unreported, Supreme Court, 5 June, 2000 at 8-14 per O'Connor J..

[144] Ireland: In Re J.H. [1985] I.R. 375 at 394-395 per Finlay C.J.; Child Care Act 1991, s. 3(2)(c) requires the health board to have regard to the principle that generally it is in the child's best interests to be brought up in his or her own family. England: In In Re K.D. (A Minor)(Ward: Termination of Access) [1988] A.C. 806 at 812 per Lord Templeman and at 825 per Lord Oliver holding that the best person to bring up a child is the natural parent. The House of Lords held that a court should not make an order in opposition to a natural parent, unless satisfied that the child's welfare requires the suspension or suppression of parental rights. In Re K. (A Minor)(Ward: Care and Control of Access) [1990] 1 W.L.R. 431 at 434 per Fox L.J. and at 436-437 per Waite J.. Canada: Hepton v. Maat [1957] 102 D.L.R.(2nd) 1 at 1-2 per Rand J..

parents decide on the exercise of the child's rights.[145] Parents should act in the child's best interests because of their love and affection for the child.[146]

The United States Supreme Court has held that the parental interest in children is an interest far more precious than any property right.[139] The United States Supreme Court has allowed the imposition of the clear and convincing standard of proof in proceedings when the termination of parental rights is sought. This is an intermediate standard of proof that is greater than that of the balance of probabilities, but falls short of the criminal standard, beyond a reasonable doubt. Best interests is not the legal standard that governs interference with parents' or guardians' exercise of

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[145] England: Gillick v. West Norfolk and Wisbech Area Health Authority [1986] A.C. 112 at 173 per Lord Fraser holding that parents are the best judges of what is in their child's best interests in the majority of situations. United States: Parham v. J.R. 442 U.S. 584 (1979) at 602 per Burger C.J.; Troxel v. Granville, unreported, Supreme Court, 5 June, 2000 at 8-14 per O'Connor J.. Canada: Frame v. Smith [1987] 42 D.L.R.(4th) 81 at 104 per Wilson J.; M.(K.) v. M.(H.) [1992] 96 D.L.R.(4th) 289 at 323-328 per La Forest J. describing the child-parent relationship as fiduciary; B.(R.) v. Children's Aid Society of Metropolitan Toronto [1995] 122 D.L.R.(4th) 1 at 40 per La Forest J..

[146] Blackstone (1788) Bk. 1 Chap. 16 p. 447. United States: Parham v. J.R. 442 U.S. 584 (1979) at 602 per Burger C.J..

[139] United States: May v. Anderson 345 U.S. 528 (1953) at 553 per Burton J.; Stanley v. Illinois 405 U.S. 645 (1972) at 651 per White J.;Lassiter v. Department of Social Services 452 U.S. 18 (1981) at 18 per Blackmun J.; Santosky v. Kramer 455 U.S. 745 (1982) at 758-759 per Blackmun J..

custody.[140]

This approach is at variance with the rights model as the child's welfare and rights are imperilled by the paternalist attitude of protecting the family unit. This thesis suggests that the court should deny a parent's decision as to the exercise of the child's rights where this decision is not in the child's best interests.[141]

Paternalism is fostered by the best interests test as it is difficult to determine when a decision is or is not in the best interests of a child. Society's general understanding of children and parenting is very limited. It is very difficult to assess or adjudicate a parental decision as "good" or "bad", "reasonable" or "unreasonable" as the instinctual nature of parenting, and the acceptance by society of the very personal nature of parental decisions. There is a substantive discretion afforded to parents, in which their subjective decisions will be upheld, but there is a point, which denotes

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[140] United States: Quilloin v. Walcott 434 U.S. 246 (1978) at 255 per Marshall J.; Reno v. Flores 123 L. Ed. 2d. 1 (1993) at 18 per Scalia J..

[141] Ireland: The State (K.M. and R.D.) v. Minister for Foreign Affairs [1979] I.R. 73 at 81-82 per Finlay P.. In P.W. v. A.W., unreported, High Court, 21 April, 1980, at 70-72 per Ellis J. holding that G. v. An Bord Uchtala [1980] I.R. 32, must be interpreted as affording no constitutional primacy to parents' rights. Ellis J. opined that the child's rights were to be determined by reference to what was best for the child's welfare, even if the child's welfare was to be found in the custody of a stranger. Ellis J. held that it is in the child's best interests to be in the custody of a stranger because of parental misconduct, inadequacy, or indeed other causes such as the child's special needs. Canada: P.(D.) v. S.(C.) [1993] 108 D.L.R.(4th) 287 at 289 per L'Heureux Dube J..

decisions which no reasonable parent could subjectively make. However, society has increased understanding and knowledge of the best interests of children in the fields of medicine, education and to a lesser extent juvenile justice. This knowledge and understanding should inform parental decisions and reduce the risk of bad parental decisions.

1.3.2. Duty of State to protect and provide for child

The welfare model and the rights model both provide that the State may be obliged to protect and provide for the child.[142] Neither Canadian nor United States make provision for children a constitutional aim. The United States Supreme Court held that the State has an interest to protect the welfare of its youth.[143] It is submitted that it is the interest of youth and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free, independent

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[142] Canada: B.(R.) v. Children's Aid Society of Metropolitan Toronto [1995] 122 D.L.R.(4th) 1 at 43 per La Forest J.; Winnipeg Child and Family Services v. K.L.W. 191 D.L.R.(4th) 1 at 15 per Arbour J. and at 36-37 per L'Heureux Dube J..

[143] United States: Prince v. Massachusetts 321 U.S. 158 (1944) at 165 and 168 per Rutledge J.; Ginsberg v. New York 390 U.S. 629 (1968) at 639-641 per Brennan J.; Lassiter v. Department of Social Services 452 U.S. 18 (1981) at 27 per Stewart J.; Santosky v. Kramer 455 U.S. 745 (1982) at 766 per Blackmun J.; Reno v. Flores 123 L. Ed. 2d. 1 (1993) at 17 per Scalia J.. In DeShaney v. Winnebago County Department of Social Services 489 U.S. 189 (1989) at 196 per Rehnquist C.J. holding that the Due Process clause does not impose a duty on the State to provide members of public with adequate protective services.

and well-developed adults.[144] A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into maturity as citizens. This will arise where parents fail to fulfil their duties to maintain, protect and educate their children. The duty of the State will be to intervene to protect and provide for the child. This duty of the State derives from the parens patriae prerogative. The State as parens patriae may restrict parental rights by requiring school attendance and prohibiting the employment of children.[145] The court may act in the stead of a parent for the protection of a child.[146]

The rights model requires the State to assume this duty where parents do not act in the child's best interests. The welfare model obliges the State to defend the integrity of the family unit. This has been interpreted as requiring the State to protect and defend the rights and duties of parents.[147]

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[144] United States: Prince v. Massachusetts 321 U.S. 158 (1944) at 165 and 168 per Rutledge J..

[145] United States: Prince v. Massachusetts 321 U.S. 158 (1944) at 168-169 per Rutledge J..

[146] Canada: B.(R.) v. Children's Aid Society of Metropolitan Toronto [1995] 122 D.L.R.(4th) 1 at 43 per La Forest J.; Winnipeg Child and Family Services (Northwest Area) v. D.F.G. [1997] 152 D.L.R.(4th) 193 at 218-219 per Major J.; New Brunswick (Minister of Health and Community Services) v. G.(J.) [1999] 177 D.L.R.(4th) 124 at 150 per Lamer C.J.; Winnipeg Child and Family Services v. K.L.W. [2000] 191 D.L.R.(4th) 1 at 15 per Arbour J. and at 36-37 per L'Heureux-Dube J..

[147] United States: Prince v. Massachusetts 321 U.S. 158 (1944) at 166 per Rutledge J.; Bellotti v. Baird 443 U.S. 622 (1979) at 637-639 per Powell J..

The welfare model allows the State to assume the duty to protect and provide for the child where there are exceptional circumstances, where parents fail for physical or moral reasons.[148] This may arise where the child's physical or mental health is jeopardised.[149] This does not mean that the child becomes the child of the State, or can be disposed of as such.[150] The State must have due regard for the natural and imprescriptible rights of the child, when supplying the place of parents.[151] The Canadian Supreme Court has come to a similar conclusion, but does not require culpable parental failure before interfering with the decisions of parents.[152] The thesis submits that a child can suffer irredeemable damage before the exceptional circumstances justifying State intervention have arisen.

The United States Supreme Court sees the legitimate

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[148] Ireland: In Re Doyle, unreported, Supreme Court, 21 December, 1955 at 4-5 per Maguire C.J.. In In Re J.H. [1985] I.R. 375 at 395-396 per Finlay C.J. holding that Article 42.5 provides that the State could only deprive parents of the custody of their children, where there was culpable failure in their physical or moral duty to their children.

[149] United States: Prince v. Massachusetts 321 U.S. 158 (1944) at 168-170 per Rutledge J.; Parham v. J.R. 442 U.S. 584 (1979) at 603 per Burger C.J.; Wisconsin v. Yoder 406 U.S. 205 (1972) at 233-234 per Burger C.J..

[150] Ireland: In Re Article 26 and The Adoption (No.2) Bill 1987 [1989] I.R. 656 at 663 per Finlay C.J..

[151] Ireland: Constitution of Ireland 1937, Art. 42.5. G. v. An Bord Uchtala [1980] I.R. 32 at 79 per Walsh J. and at 86 per Henchy J..

[152] Canada: Hepton v. Maat [1957] 10 D.L.R.(2nd) 1 at 2 per Rand J..

State interest in protecting children not only from parents but from themselves. Children lack the maturity and experience to exercise their rights wisely. Therefore, the State has a greater ability to restrict the rights of children than that of adults.[153]

The State has a duty to provide a child with necessities of life where the parents are not making such provision.[154] The courts are called upon to protect and provide for the child. The courts are called upon to protect and provide for the child. In Ireland, the courts have required the State to provide facilities for children suffering from attention deficiency disorder and hyperkinetic conduct disorder.[155] In F.N. (a minor) v. Minister for Education[156] Geoghegan J. held the State was

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[153] United States: Prince v. Massachusetts 321 U.S. 158 (1944) at 165 and 168-170 per Rutledge J.; Ginsberg v. New York 390 U.S. 629 (1968) at 640-641 per Brennan J.; Carey v. Population Services International 431 U.S. 678 (1977) at 692 per Brennan J.; Hodgson v. Minnesota 497 U.S. 417 (1990) at 444-445 per Stevens J..

[154] Ireland: Constitution of Ireland 1937, Art. 40.3.1 and Art. 40.3.2; In Re Article 26 and The Adoption (No.2) Bill 1987 [1989] I.R. 656 at 663 per Finlay C.J.. England: Poor Relief Act 1601, s. 1 and s. 3. Church wardens of every parish, with the consent of the justices of the peace, could either put a child to work or bind the child into an apprenticeship, when parents were not maintaining the child. The Poor Relief Act 1601 made lawful would otherwise be an unlawful interference with the father's right in respect of his children's services. See also the Poor Relief Act 1718.

[155] Ireland: In P.S. (a minor) v. Eastern Health Board, unreported, High Court, 27 July, 1994 at 1-2 per Geoghegan J. holding that a health board was a creature of statute and could not be held responsible for any potential constitutional duty on the State to cater for the special needs of the child.

[156] Ireland: [1995] 1 I.R. 409 at 416.

under a constitutional duty to meet a child's special needs in order to vindicate the child's rights, where the parents cannot meet the child's special needs.[157] The court's jurisdiction extends to making whatever order is necessary for the child's welfare, including detaining the child.[158] This has extended to detaining a child in a prison.[159] The State's duty to a child with special need is not absolute. The High Court has yet to determine the limits on this duty.[160] The State is obliged to provide for free primary education.[161]

The welfare model provides that the State has a silent and implied right of control in relation to the child. This right is designed to influence the type of adult the child will become.

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[157] Ireland: Constitution of Ireland 1937, Art. 42.5; G. v. An Bord Uchtala [1980] I.R. 32 at 56 per O'Higgins C.J., at 79 per Walsh J. and at 85-86 per Henchy J.; M.F. v. Superintendent, Ballymun Garda Station, John Rynne and Eastern Health Board (Notice Parties) [1991] 1 I.R. 189 at 201 per O'Flaherty J.; In Re Article 26 and The Adoption (No.2) Bill 1987 [1989] I.R. 656 at 663 per Finlay C.J..

[158] Ireland: D.T. (a minor) v. Eastern Health Board and Ireland, unreported, High Court, Geoghegan J., 24 March, 1995 at 2-3; D.D. v. Eastern Health Board, Minister for Health, Minister for Education and Ireland, unreported, High Court, Costello P., 3 May, 1995 at 6-7; D.H. v. Ireland, unreported, High Court, Kelly J., 23 May, 2000 at 9-11. In D.G. (a minor) v. Eastern Health Board and Ireland [1997] 3 I.R. 511 at 532 per Denham J. and at 538-539 per Murphy J. assumed that the High Court has the jurisdiction to order the detention of a child.

[159] Ireland: D.G. (a minor) v. Eastern Health Board and Ireland [1997] 3 I.R. 511 at 522 per Hamilton C.J. and at 525 per O'Flaherty J..

[160] Ireland: F.N. (a minor) v. Minister for Education and Ireland [1995] 1 I.R. 409 at 416 per Geoghegan J..

[161] Ireland: Constitution of Ireland 1937, Art. 42.4.

1.3.3. Welfare rights of child

The recognition of a child's welfare rights is a recent development. This recognition comprises a more important role in the welfare model. It could be argued that there is no need to recognise such rights as the parental duties and the court's duty to act in the child's best interests achieves the same purpose: satisfying the child's needs and promoting the child's welfare.

The Constitution of Ireland 1937 states that a child has natural and imprescriptible rights[162] but does not describe these.[163] The Irish courts have enumerated constitutional rights for children, not found in the text of the Constitution.[164] The Constitution confers additional rights for their well being and protection during childhood.[165] In G. v. An Bord Uchtala[166], the

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[162] Ireland: Constitution of Ireland 1937, Art. 42.5.

[163] Ireland: In S.C. v. Minister for Education [1997] 2 I.L.R.M. 134 at 145, McGuinness J. pointed out that the extensive rights of parents and the family in respect of the child are expressly established in the Constitution, whereas those of the child in respect of his or her parents and family are not. This could result in greater weight being accorded to the express rights of parents than the implied rights of the child.

[164] Ireland: Ryan v. Attorney General [1965] I.R. 294 at 311 and 313 per Kenny J.; The State (K.M. and R.D.) v. Minister for Foreign Affairs [1979] I.R. 73 at 80-81 per Finlay P.; Norris v. Attorney General [1984] I.R. 36 at 100-101 per McCarthy J.; Kennedy and Arnold v. Ireland [1987] I.R. 587 at 590 per Hamilton P..

[165] Ireland: Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 41 per Lynch J..

[166] Ireland: [1980] I.R. 32.

Supreme Court enumerated the welfare rights of the child. In the Supreme Court, O'Higgins C.J. held that every child has the right to be fed, the right to be brought up, educated, and to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights derive from the child's right to life. The child has a right to maintain that life at a proper standard in matters of food, clothing, and habitation.[167] The Supreme Court found that the parents are charged primarily with the vindication of these rights. The parents have a duty not to injure or otherwise transgress these rights by interfering with the health or life of the child or by terminating the child's existence. The Supreme Court held that the State must step in where there has been parental failure. The rights and duties described in G. v. An Bord Uchtala[168] are designed to care and protect the child. It could be argued that the welfare rights of the child are a corollary of the parental duty to care and educate.[169]

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[167] Ireland: ibid. at 55-56 per O'Higgins C.J. and at 69 per Walsh J.. In D.G. (a minor) v. Eastern Health Board and Ireland [1997] 3 I.R. 511 at 523 per Hamilton C.J. and at 537 per Denham J. approving of the rights enumerated in G. v. An Bord Uchtala [1980] I.R. 32. In Eastern Health Board v. An Bord Uchtala [1994] 3 I.R. 207 at 230, O'Flaherty J. added the right to adequate medical care. O'Flaherty J. held that these constitute the universal rights of the child found in Article 25(1) of the Universal Declaration of Human Rights 1948.

[168] Ireland: [1980] I.R. 32.

[169] Ireland: G. v. An Bord Uchtala [1980] I.R. 32 at 79 per Walsh J.; Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 37-38 per Murphy J..

A child whose parents are married to each other has a constitutional right to belong to that family.[170] A child whose parents are not married to each other and has not been adopted has a right to know the identity of his or her mother.[171]

The Constitution expressly requires the State to provide for free primary education.[172] This has been interpreted as conferring a corresponding right on a child to receive free primary education.[173] This right entitles each child access to such advice, instruction and teaching as will enable that child to make the best possible use of his or her inherent and potential physical, mental and moral capacities, however limited these may be.[174]

1.3.4. Civil rights of child

The welfare model and the rights model both provide

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[170] Ireland: In Re J.H. [1985] I.R. 375 at 394 per Finlay C.J..

[171] Ireland: I. O'T. v. B. [1998] 1 I.R. 321 at 348 per Hamilton C.J..

[172] Ireland: Constitution of Ireland 1937, Art. 42.4. Constitution of the Irish Free State, Art. 10 conferred a right to free elementary education on all citizens.

[173] Ireland: Crowley v. Ireland [1980] I.R. 102 at 121-122 per O'Higgins C.J..

[174] Ireland: O'Donoghue (a minor) v. Minister for Health [1996] 2 I.R. 20 at 65 per O'Hanlon J.; Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 21 per Denham J. and at 41 per Lynch J..

that a child is entitled to civil rights.[175] These include the rights to bodily integrity,[176] liberty,[177] privacy,[178] travel[179] and a trial in due course of law in respect of a criminal charge.[180] The rights model requires that children have equal entitlement to civil rights. The rights model accommodates children's varying

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[175] Ireland: The State (K.M. and R.D.) v. Minister for Foreign Affairs [1979] I.R. 73 at 80-81 per Finlay P.; G. v. An Bord Uchtala [1980] I.R. 32 at 44 per Finlay P.; D.G. (a minor) v. Eastern Health Board and Ireland [1997] 3 I.R. 511 at 523 per Hamilton C.J. and at 533-534 per Denham J.. United States: In Re Gault 387 U.S. 1 (1967) at 27-30 per Fortas J.; Tinker v. Des Moines School District 393 U.S. 503 (1969) at 511-513 per Fortas J.; Goss v. Lopez 419 U.S. 565 (1975) at 581 per White J.; Breed v. Jones 421 U.S. 519 (1975) at 529-532 per Burger C.J.; Planned Parenthood of Central Missouri v. Danforth 428 U.S. 52 (1976) at 74-75 per Blackmun J. finding that rights do not generally mature on the age of majority; Carey v. Population Services International 431 U.S. 678 (1977) at 693 per Brennan J.; Bellotti v. Baird 443 U.S. 622 (1979) at 633-635 per Powell J.; Hodgson v. Minnesota 497 U.S. 417 (1990) at 434-435 per Stevens J..

[176] Ireland: The State (C.) v. Frawley [1976] I.R. 365 at 371 per Finlay P.; G. v. An Bord Uchtala [1980] I.R. 32 at 44 per Finlay P.; In Re a Ward of Court (withholding medical treatment)(No.2) [1996] 2 I.R. 79 at 124-125 per Hamilton C.J. and at 156 per Denham J.; D.G. (a minor) v. Eastern Health Board and Ireland [1997] 3 I.R. 511 at 535 per Denham J..

[177] Ireland: Constitution of Ireland 1937, Art. 40.4.1. D.G. (a minor) v. Eastern Health Board and Ireland [1997] 3 I.R. 511 at 523 per Hamilton C.J. and at 534 per Denham J.. United States: Parham v. J.R. 442 U.S. 584 (1979) at 600 per Burger C.J..

[178] Ireland: Kennedy and Arnold v. Ireland [1987] I.R. 587 at 592 per Hamilton P..

[179] Ireland: The State (K.M. and R.D.) v. Minister for Foreign Affairs [1979] I.R. 73 at 80-81 per Finlay P..

[180] Ireland: Constitution of Ireland 1937, Art. 38.1; Director of Public Prosecutions (Murphy) v. P.T. [1998] 1 I.L.R.M. 344 at 361 per McGuinness J..

capacities by allowing the State to impose greater restrictions on the rights of children than on the rights of adults.

The welfare model has developed a number of concepts that prevent children acquiring the same civil rights as adults. The welfare model views children as either being in parental or State custody.[181] The welfare model uses a child's lack of experience, perspective and judgment as an opportunity for the exercise of paternalism.[182]

The welfare model and the rights model allow for parents or the State to decide on the exercise of the child's rights where the child is incompetent to make decisions for himself or herself. In Bellotti v. Baird[183] Powell J. held that a child's rights differed from those of an adult for three reasons. First, children are peculiarly vulnerable. Secondly, children are unable to make critical decisions in an informed and mature manner. Children often lack experience, perspective and judgment. They may not recognise and avoid choices that would be to their detriment. Parents are presumed to possess what a

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[181] United States: In Re Gault 387 U.S. 1 (1967) at 17 per Fortas J.; Ginsberg v. New York 390 U.S. 629 (1968) at 640-643 per Brennan J.; Schall v. Martin 467 U.S. 253 (1984) at 265 per Rehnquist J.; Reno v. Flores 507 U.S. 292 (1993) at 302-303 per Scalia J. speaking for a majority of the court; Vernonia School District 47J v. Acton, unreported, Supreme Court, 26 June, 1995 at 8-10 Scalia J. speaking for a majority of the court.

[182] United States: Bellotti v. Baird 443 U.S. 622 (1979) at 635 per Powell J.; Eddings v. Oklahoma 455 U.S. 104 (1982) at 115-117 per Powell J..

[183] United States: 443 U.S. 622 (1979).

child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions.[184] Third, the parental role in child rearing must be respected. This role justifies the imposition of limitations on the rights of children. One of these limitations is the requirement that for important decisions, parental consent is a pre-requisite. This requirement acts as a protection for children from their own immaturity, and from adverse State action. Legal restrictions on children, specially those supportive of the parental role, may be important to the child for the full growth and maturity that may make eventual participation in society meaningful and rewarding. Parents and others responsible for children's well being are entitled to the support of the laws designed to enable them to discharge their duty.[185] This aspect of the welfare model reflects the need to support and respect parental autonomy. Parents should act in the child's best interests when deciding on the exercise of the child's civil rights.

1.3.5. Conflicting rights of child

A conflict may arise between the child's welfare and civil rights. For example, it maybe necessary to detain a child for medical treatment. There will then be a

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[184] United States: Parham v. J.R. 442 U.S. 584 (1979) at 602 per Burger C.J.; Troxel v. Granville, unreported, Supreme Court, 5 June, 2000 at 8-14 per O'Connor J..

[185] United States: 443 U.S. 622 (1979) at 634-639 per Powell J..

conflict with the child's right not to be deprived of liberty save in accordance with law[186] and the welfare rights of the child: the right to be born, the right to be fed and to live, to be reared and educated and to have the opportunity of working and of realising his or her full personality and dignity as a human being.[187]

It may not be possible to vindicate both civil and welfare rights. The parents or the State will have to accord supremacy either to the child's civil rights or welfare rights.[188] The welfare model accords supremacy to the child's welfare by subordinating the child's civil rights. The welfare model's approach flows from the requirement that the court must act in the child's best interests when exercising the child's rights.[189] In D.G.

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[186] Ireland: Constitution of Ireland 1937, Art. 40.4.1. In D.G. (a minor) v. Eastern Health Board and Ireland [1997] 2 I.R. 511 at 535 Denham J. held that a child's rights to equality under Art. 40.1. and good name under Art. 40.3.2 may be implicated when a child is detained.

[187] Ireland: G. v. An Bord Uchtala [1980] I.R. 32 at 55-56 per O'Higgins C.J.; D.G. (a minor) v. Eastern Health Board and Ireland [1997] 3 I.R. 511 at 523-524 per Hamilton C.J. and at 536 per Denham J..

[188] Ireland: Attorney General v. X. [1992] 1 I.R. 1 at 57-58 per Finlay C.J..

[189] Ireland: In Southern Health Board v. C.H. [1996] 1 I.R. 219 at 238, O'Flaherty J. in the Supreme Court held that judges must always harken to the constitutional command which mandates, as a prime consideration the interests of the child in any legal proceedings. O'Flaherty J. held that the paramountcy of the child's welfare was not only ordained by statute, but was inherent in the Constitution. Many statutes require the courts and/or responsible State bodies to regard the welfare of the child as the paramount consideration. Guardianship of Infants Act 1964, s. 3; Adoption Act 1974, s. 2; Child Care Act 1991, s. 3(2)(b)(i) and s. 24(a). England: See also In Re E. (S.A.)(A Minor)(Wardship: Court's Duty) [1984] 1 W.L.R. 156

(a minor) v. Eastern Health Board and Ireland[190] the Supreme Court accorded paramountcy to the child's welfare rights. These rights took precedence over the child's right to liberty.[191] The child's welfare required his detention. The rights model requires that such a solution must provide the least intrusive interference with the rights that are being subordinated and safeguards must be provided. This has not occurred in the cases where the detention of the child has been ordered. In D.G. (a minor) v. Eastern Health Board and Ireland[192] no appropriate unit existed and the child was detained in the only available facility, a prison. Hamilton C.J. held that a court can order the detention of a child in a prison where the court is satisfied that such detention is necessary for a short period, in the interests of the child's welfare, and where no facility is available that

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at 158-159 per Lord Scarman.

[190] Ireland: [1997] 3 I.R. 511.

[191] England: Children Act 1908, s. 24(1) allows a police officer to detain a child in a place of safety where that child is being assaulted or neglected. In M.F. v. Superintendent, Ballymun Garda Station, John Rynne and Eastern Health Board (Notice Parties) [1991] 1 I.R. 189 at 205-206 per O'Flaherty J. who held that the word "detention" must be interpreted by reference to preserving the life and health of a child or young person and for the purpose of vindicating his or her constitutional rights. O'Flaherty J. held that it was in no sense to be construed as meaning depriving the child of his or her liberty or of any other of the child's rights.

[192] Ireland: [1997] 3 I.R. 511.

meets the child's needs[193].[194]

Denham J., dissenting, decided that the High Court did not have jurisdiction to promote a child's welfare by imprisoning the child, where the child had neither been charged nor convicted of an offence. Denham J. drew a distinction between a court ordering the detention of a child in a child care facility and in a prison. In a child care facility, the child's educational, physical, moral and social welfare are accommodated. Denham J. held that in such a facility there was a harmonisation of the children's conflicting rights of welfare and liberty. Detention in a prison did not provide for the harmonisation of these rights.[195]

Denham J. found that by being detained in prison, the child's moral welfare was at risk. Denham J. stated that one of the functions of prison is to punish those convicted of a crime. Denham J. held that it was not possible to compare the detention of a child in prison, with keeping a child in an educational institution possessing appropriate facilities. A child's moral

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[193] Ireland: ibid. at 524.

[194] Ireland: In D.G. (a minor) v. Eastern Health Board and Ireland [1997] 3 I.R. 511 at 539 Murphy J. suggesting that on the review date, the High Court should make no order continuing the child's detention in the prison. In G.L. (a minor) v. Minister for Justice, Minister for Education, Minister for Health and Ireland, unreported, High Court, 24 March, 1995, at 3 Geoghegan J. pointed out that it was doubtful that a reformatory school could meet the needs of the very disturbed young boy. The boy would be mixing with those older than him who would be likely to be a bad influence.

[195] Ireland: ibid. at 536-538.

welfare is threatened where the child is placed in a prison, when the child has been neither charged nor convicted of a criminal offence. The State was attempting to inculcate in this child an autonomous sense of right and wrong, while at the same time detaining him in prison, when he had been neither charged with nor convicted of any criminal offence. Such detention was contrary to one of the basic principles of constitutional and natural justice.[196]

Denham J. considered the child's right to equality.[197] Denham J. noted that it is unconstitutional to detain an adult in a prison if that adult has not been charged with or convicted of a criminal offence. The child's right to equality was not breached merely because it is illegal to imprison an adult who has not been charged or convicted. The constitutional guarantee of equality permits people of different capacity to be treated differently. The reason for the child's deprivation of liberty was to promote his welfare. This could only be achieved by detention in an institution with the necessary facilities and services required to promote the child's welfare. A prison does not have the necessary facilities and services. The justification in treating a child differently from an adult was lost, since detaining him in a prison, of itself, did not advance his welfare. Therefore, it infringed his right to

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[196] Ireland: ibid. at 534-535.

[197] Ireland: ibid. at 535.

welfare.

Denham J. held that the child's detention in a prison when he has not been charged with nor convicted of a criminal offence, infringes his right to bodily integrity, his social welfare, his rights of "person" and his right to a good name.[198] Denham J. held that when the State is fulfilling its constitutional obligation to supply the place of parents, the State must pay regard to the child's rights. Denham J. queried whether a child from a different socio-economic background than the applicant in this case would have been imprisoned.[199]

Denham J. held that ordering the child's imprisonment infringed both the child's civil and welfare rights. Denham J. allowed the appeal.

The rights model advanced in this thesis endorses Denham J.'s approach. Detention of itself does not promote the child's welfare, nor afford the child the opportunity to reach his or her potential. These can only be brought about where the detained child is provided with an appropriate care and treatment regime in a proper setting or facility.

Deprivation of liberty constitutes a denial of human rights. Therefore, the rights model requires that such a denial must be circumscribed by a full panoply of rights, including automatic review and power to appeal against the decision permitting detention. The High Court has not

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[198] Ireland: ibid. at 538.

[199] Ireland: ibid. at 538.

put in place such safeguards. Many of the cases in which the High Court has ordered the detention of children have not expressly provided for a periodic review of the child's detention. The purpose of any review is to consider the availability of appropriate places or services for the child, rather than considering the appropriateness of continuing the child's detention.

1.3.6. Developing competence of child

The common law provided that a child on reaching the "age of discretion" was entitled to take decisions for himself or herself, such as marrying.[200] The age of discretion was determined on the basis of the child's chronological age and not on the basis of a child's developing competence.[201] The common law age of discretion was 14 for boys[202] and 16 for girls.[203] The common law age of discretion was replaced by the concept that a father had a right to the control and custody of his child until the child reaches his or her age of majority.[204]

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[200] Ireland: The People (Attorney General) v. Edge [1943] I.R. 115 at 163-165 per Gavan Duffy J..

[201] England: R. v. Howes (1860) 3 El. & El. 332, 121 E.R. 467 at 336-337, 468-469 per Cockburn C.J..

[202] Ireland: The People (Attorney General) v. Edge [1943] I.R. 115 at 139-140 per Geoghegan J. and at 166 per Gavan Duffy J..

[203] Ireland: The People (Attorney General) v. Edge [1943] I.R. 115 at 145 per O'Byrne J..

[204] Ireland: The People (Attorney General) v. Edge [1943] I.R. 115 at 145 per O'Byrne J.. In The People (Attorney General) v. Edge [1943] I.R. 115 at 149 per Black J. who stated obiter that perhaps the age of consent might

The welfare model provides that parents or the State decide on the exercise of the child's rights where the child is incompetent to make decisions for himself or herself. However, a child is a person with developing physical and intellectual capacities. The rights model provides that the parent or State's ability to exercise a particular right of a child is lost where a child is competent to make the decision for himself or herself.[205]

The rationale underlying this approach is equality. Children cannot be classified as one homogenous class. The Constitution of Ireland 1937 guarantees that all citizens are held equal before the law.[206] However, the law must take into account the differences of capacity that exist between children. The Constitution of Ireland 1937 does allow for differences of capacity, physical and moral, and of social function.[207] The constitutional guarantee of equality prohibits invidious

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be interpreted as meaning nothing more than that at that age there arises a rebuttable presumption that the child is fit to make a rational choice which the court would not override except in special circumstances.

[205] England: Gillick v. West Norfolk and Wisbech Area Health Authority [1986] A.C. 112 at 186 and 188-189 per Lord Scarman. United States: Bellotti v. Baird 443 U.S. 622 (1979) at 643-644 per Powell J.; Ohio v. Akron Center 497 U.S. 502 (1990) at 511 per Kennedy J. and at 524-542 per Blackmun J.; Planned Parenthood of Southeastern Pennsylvania v. Casey 505 U.S. 833 (1992) at 899-900 per O'Connor J..

[206] Ireland: Constitution of Ireland 1937, Art. 40.1.

[207] Ireland: Constitution of Ireland 1937, Art. 40.1.

discrimination.[208] It constitutes invidious discrimination to treat all children in the same way by denying competent children the right to make decisions for themselves.

The rights model requires that the child's voice must be considered even where the child does not have the intellectual capacity to make the decision for himself or herself. The weight to be attached to the child's wishes or views depends on the child's age and understanding.

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[208] Ireland: O'Brien v. Keogh [1972] I.R. 144 at 155-156 per O'Dalaigh C.J.; Landers v. Attorney General (1972) 109 I.L.T.R. 1 at 3-4 per Finlay J..

CHAPTER TWO

REVIEW OF THE LITERATURE

2.0. Introduction

This Chapter surveys the academic literature discussing the concepts discussed in this thesis. The chapter considers whether or not the literature supports the existence of the welfare model and rights model discussed by this thesis and whether the researcher's conclusions are supported by the literature.

2.1. Parens patriae

The thesis claims that the welfare model of children's rights owes its origin to the parens patriae role of the State that has been delegated to the courts.

Freeman (1983d) and Dingwall et al. (1983) claim that the parens patriae prerogative accords the State ultimate responsibility for its citizens who cannot care for and protect themselves, particularly children and the mentally ill. Mack (1910), Dobson (1970) and Yackle (1997) support this view, claiming that the parens patriae prerogative provides that the State is the ultimate guardian of the child. Coupet (2000) believes that the earliest development of the child welfare system was based on the parens patriae concept. This concept provides that the State can substitute and enforce its judgment about what it believes to be in the best interests of children. Kneeper (1994-95) adopted a similar view.

It can be argued that the parens patriae prerogative can exist in a medieval State with a monarch but not in a modern republic such as the United States of America or Ireland. However, Kleinfeld (1970c) claims that the theory of parens patriae has not changed a great deal during its passage through time. Both Mack (1910) and Kleinfeld (1970c) provide contemporary examples of the American courts invoking the parens patriae prerogative, and this supports the idea that the doctrine is compatible with contemporary democratic ideals.

The literature casts some doubt on the continuous basis of the court's wardship and parens patriae jurisdiction. Seymour (1994) finds that the courts cannot claim that the parens patriae jurisdiction has been continuous. Bradney (1988) explained that wardship's origins in the monarch's position as parens patriae may explain the jurisdiction but it does nothing to justify it. Freeman (1983d) claims legal-historical justification may have been nothing more than a cloak or a way of giving the juvenile court status. Eekelaar (1986a), Bradney (1988) and Foster and Freed (1972) do not attempt to trace the origins of the jurisdiction, but are content to describe the jurisdiction as being inherent.

The manner in which the judiciary have used the wardship and parens patriae prerogative has reflected society's changing view of childhood. Herr (1992) noted the Chancery Courts were more concerned with the child's property rather than the personal well-being of the

child. Brenner (1982-83) saw the move in the parens patriae jurisdiction away from property to issues of child welfare reflected society's changing view of childhood. Coupet (2000) found that the parens patriae prerogative provided a theoretical justification for intervention in the lives of children and families. Seymour (1994) was not surprised at this change of judicial attitude in the use of wardship. Seymour claims that this change reflected society's greater willingness to interfere with the family through statutes punishing child neglect, restricting the employment of children, making education compulsory and granting equality to parents in guardianship and custody matters. Seymour explained how the courts viewed their parens patriae jurisdiction as parental. Engum (1982) took a similar view describing how the State's parens patriae interest in children allowed a court to supersede parental autonomy where a parental decision threatened a child's health or welfare.

The welfare model assumes that the parens patriae jurisdiction has invested the courts with powers more extensive than parents.[1] Seymour (1994) is unable to locate the origin of these extensive powers. Seymour distinguishes between the situation where a court dons the mantle of a parent in order to do what that parent is competent to do, from the situation where a court exercises powers beyond those that are not possessed by a

[1] See Chapter 1 at p. 25-26.

parent. Seymour's comments must be viewed cautiously. A court will always have wider powers than a parent, for example ordering a Minister to provide appropriate facilities for a child. However, the rights model requires that the court's powers must be exercised within limits to avoid paternalism and arbitrariness.

The rights model holds that once a child is competent to make a decision for himself or herself, the parens patriae prerogative is extinguished. Anon (1980) and Pritz (1991) view the mature minor doctrine of the United States as a restraining influence on the State's parens patriae power. Pritz refers to three cases to prove this assertion. However, these cases demonstrate the existing influence of parens patriae even though in one case it was established that the child was competent. Eekelaar (1986a) has queried the basis on which the courts retain the parental jurisdiction when the parent loses it, not through deprivation, but due to the superior right of the child.

2.2. Duty and rights of parents

The welfare model was primarily concerned with the rights of parents until the mid-nineteenth century. Hafen (1976) explains that the common law parental rights to custody were seen as sacred and as a matter of natural law. These rights were seen as more important than property rights.

Bainham (1986) believes that the twentieth century has witnessed a substantial dilution of the doctrine of

parental rights. This dilution reflects a jurisprudential change. Dickens (1981) sees the shift from the rights of parents to their duties as a rejection of nature to a utilitarian base. Brenner (1982-83) offers a different perspective. Society viewed children as creatures who were dependent, incapable of caring for themselves, and dependence itself became idealised as carrying with it certain "moral" qualities, such as innocence. This had a significant effect upon the role of parents by placing more emphasis on the parental duties to protect and structure their children's development. Hall (1972) believes that the erosion of parental rights was driven by the increasing concern of society for the well-being and welfare of its youngest members.

The welfare model and rights model each accord parents both duties and rights. The principal focus of the rights model is on the performance of parental duties. Parental rights are to be exercised in order to perform parental duties. Cohen (1992) points out that Thomas Aquinas saw that parental rights over children were restrained by the parent's obligation to maintain the child and provide the child with physical, mental, moral and religious education. The welfare model places more emphasis on parental rights than on parental duties. Staines (1976), Osborough (1978), and Duncan (1978a); (1987); (1993) believe that the Irish courts have treated the "inalienable....rights" of parents as more important that the child's welfare. This is despite the fact that

the Constitution describes the rights of the child as "natural and imprescriptible." O'Reilly (1977) stresses the importance of the constitutional protection offered to the family in Ireland. Duncan (1987) identified cases where the welfare of the child was treated as paramount. However, the rights of parents have been upheld in other cases. Duncan concludes that the courts tend to favour parental rights by requiring compelling reasons before setting aside parental rights. Duncan (1978b) argues that the Constitution should redress the preeminence given to the rights of parents. This can be achieved in one of two ways. First, the judges should accord children implied rights by relying on the Constitution's description of the rights of the child as being natural and imprescriptible. Second, the courts could rely on the concept of best interests.

The academic literature may be taken to support both the welfare model and the rights model advanced in this thesis. Eekelaar (1973) noted that parental rights of custody, education and consent to medical intervention are related to the performance of parental duties. Katz et al. (1973) state that a parent in the United States has duties to a child's maintenance, health and education. Katz et al. claim that the parent is vested with the custody and control of the child in order to perform these obligations. Kleinfeld (1970b), Maidment (1981), Dickens (1981) and Seymour (1992) express similar views. Dickens (1981) believes that the focus is upon the

preservation of life and health, to enable the child to grow into maturity and consequent autonomy. Parental duties and rights exist to preserve and to prepare children for adulthood and emerging autonomy. Bainham (1986) argues that the conceptualisation of the parental position in terms of duties as opposed to rights demonstrating a movement in the court's view of looking at family relationships from the perspective of the child's welfare. Eekelaar (1993a) supports this view. Eekelaar believes that the parental duties are embedded in the conjunction of two sources. One is the a priori duty to promote human flourishing, which exists independently of the actual organisation of any society. That moral duty binds everyone and is not specifically directed towards parents. The duty falls primarily on parents for no other reason than their physical proximity to their children. The other source derives from the nature of society. Social practice determines the application of that duty within its structure. However, Dingwall et al. (1983) did not view the relationship between parents and children as one based on duties and rights. These authors preferred the trust analogy. The object of this trust is the promotion of the children's welfare and this restricts parental autonomy.

The shift from parental rights to duties should reflect a change with greater focus on the interests of children rather than that of parents. Eekelaar (1991) highlights the difficulty with this approach. Eekelaar

points out that parental duties are open to two interpretations. First, it can be interpreted as the requirement that parents must act dutifully to their children. Second, it can be interpreted as showing that responsibility for child care lies with the parents not the State. Respect for non state intervention in families may arise where undue emphasis is attributed to the second interpretation.

The welfare model and rights model both require parents to exercise the rights of an incompetent child. Steinberg (1995-96) supports this by pointing out that an incompetent child cannot be trusted to make important decisions on his or her own behalf.

The welfare model provides that parents are ex hypothesi presumed capable of performing these duties and exercising these rights. Inherent in this is the difficulty experienced when children themselves become parents. Richards (1980), Engum (1982), Baron (1983), Worrell (1986) and Parker (1993) identifies parents' motivation to do what is best for their child, love and affection as the sources of this presumption. Panneton (1977) found that it is a fundamental principle that a child's parents are best suited to speak for the child. The academic literature differs as to the strength of this presumption. Foster and Freed (1968) do not grant this presumption any special weight. However, Hafen (1976), Goldstein (1977) and Schoeman (1983) found that there is a strong rebuttable presumption in favour of

privacy in family affairs and parental authority. Hafen (1976) argues that this presumption owes its origins to the common law. These presumptions preclude what is seen as coercive State interference. The views of Goldstein (1977) and Schoeman (1983) are incompatible with the rights model. The views of both sacrifice the rights of the child in order to maintain parental autonomy. Hafen (1976) and Goldstein (1977) attempt to avoid such a conclusion by claiming that a child has a biological and psychological need for unthreatened and unbroken continuity to care by his or her natural parents. De Langen (1992) describes State interference in family life as a violation of the child's right to respect for his private and family life.

The welfare model harbours a strong bias towards preserving parental autonomy: it protects the rights of parents to make decisions touching on the welfare of their children. Hafen (1976) and Schoeman (1983) support this bias by suggesting that State intervention should only be permitted where the parents' acts or omissions pose an imminent danger to the child's health or safety. Richards (1980) and Dickens (1981) believe that the law accords so much respect to the parental role, that natural parents have an absolute right of custody. Anon (1980) recognised that the State cannot intervene unless parents are clearly and convincingly shown to be at fault. Worrell (1986) believes that this bias gives rise to a conflict of interest. The State must protect the

vulnerable child but at the same time respect and protect the family. Pound (1916) discussed the failure of the courts to enforce parental duties and limits on parental rights in favour of children. These, Pound argues, could be attributed partly to the judicial commitment to maintaining family unity, and partly to an historical quirk that family law became fixed relatively early, at a time when the law was more concerned with family than with individual interests. Freeman (1997) notes that the usage of the term "families", as in family autonomy, has too often come to be identified with "parents".

The rights model seeks to undermine this bias by underscoring the danger that family privacy and authority may be a cover for parental abuse. The bias is based on the presumption that parents invariably act in the child's best interests. Panneton (1977) adduces evidence to show that parents do not always act in the child's best interests.

The rights model requires intervention at an earlier stage than does the welfare model, as the child's developing capacities may be permanently damaged by failure to intervene promptly. However, Rodham (1973), Freeman (1983c) and Coons et al. (1991) find that it is difficult to define what parental conduct triggers the State's duty to intervene to protect the child. Therefore, parental autonomy is preferred. Freeman (1983a) believes that if the welfare model is to err it should be on the side of protecting the child.

Teitelbaum and Ellis (1978) have gone so far as to argue that the courts have granted recognition to an independent parental power over children that creates a sphere of personal domination which resembles the relationship of the early Roman father over his children. Richards (1980) reached a similar conclusion. Duncan (1993) believes that it is insufficient to describe the powers which parents exercise in respect of their children solely in terms of duties. The rights model views parental rights as deriving from parental duties.

2.3. Best interests

The welfare model and rights model require parents to perform these duties and rights in the child's best interests. Schoeman (1983) points out that those who exercise discretion on behalf of the child must do so with the child's best interests in mind. Bates (1980) and Maidment (1981) view this requirement as a move away from and a limitation on parental rights. However, Dickens (1981) is concerned that these duties and rights appear to be defined by reference not to the positive standard of achieving good for children, but by reference to the negative standard of protecting children from harm. This allows parents to control children for purposes not violating children's interests, but equally not advancing their welfare. Goldstein (1977) is of the opinion that parents must meet minimal standards of child care negatively set in neglect, abuse, and abandonment statutes and affirmatively set in provisions such as

those obligating parents to send their children to school and prevent them from taking employment. However, Baskin (1974) disagrees with the requirement of compelling reasons before State intervention is permissible. Baskin allows for State intervention when the child's personal interests are threatened. Steinberg (1995-96) goes further by allowing for State intervention where parents are not acting in the child's best interests. Duncan (1986) is concerned that the Irish courts accord too much weight to the rights of parents and find that welfare of the child is not the guiding factor when assessing parental actions.

The rights model is concerned at the vagueness of the best interest standard. This vagueness gives rise to a greater risk of judicial paternalism in protecting parental autonomy. This concern is shared by Wolf (1992) and Fitzgerald (1994). Wolfson (1992) notes that it is remarkable at the persistence of the best interests standard considering its complete lack of definite, or seemingly necessary, content. Freeman (1983e) however states that it has to be recognised that in many cases there is a band of reasonable parenting decisions. Rodham (1973) finds that this vagueness allows for best interests to become value-laden. Anon (1980) declares that there is no societal consensus as to the best way to raise children. Anon states that the State's parens patriae prerogative would still compel a presumption that parents are better qualified than the State to promote

the child's best interests.

The vagueness attaching to the best interests standard is less obvious when it comes to examination of parental decisions concerning medical intervention. Baron (1983) argues that in such cases, an objective cost-benefit analysis may make one of the choices seem overwhelmingly right and the other clearly wrong. The courts accord greater weight to parental discretion where the evidence indicates that the efficacy or safety of the proposed treatment is open to question. Kneeper (1994-95) explains that the court will intervene when the proposed treatment promises a clear medical benefit and the child's condition is life threatening. The court will not intervene with parental autonomy when the treatment has only marginal benefits and/or in which the child's condition is not life threatening. Fox and McHale (1997) came to a similar conclusion. Parents may legitimately object to proposed treatment where it is deemed "heroic" in nature and parental opposition is rooted in the experimental, invasive and/or prolonged nature of the procedure.

Despite the approach of Baron (1983), Kneeper (1994-95), and Fox and McHale (1997), Goldstein (1977) advocates an approach that strengthens the presumption of parental autonomy in cases concerned with medical intervention. Goldstein allows for State intervention only in life-or-death cases where (a) the clinical opinion is that the non-experimental medical treatment is

right for the child; (b) the expected outcome is what society agrees to be right for any child, a chance for normal healthy growth toward adulthood or a life worth living; and (c) that the expected outcome of denial of that treatment would mean for the child's death. Goldstein argues that there is no justification for State intrusion in life-or-death cases where (a) there is no proven medical procedure (b) parents are confronted with conflicting medical advice about which, if any treatment procedure to follow; or (c) even if the medical experts agree about treatment, there is less than a high probability that the non-experimental treatment will enable the child to pursue either a life worth living or a life of relatively normal healthy growth toward adulthood. Goldstein points out that there is little societal consensus as to what life is worth living. Sokolosky (1981-82) opposes the stance taken by Goldstein by finding ample expression of a public policy allowing State intervention in parent decisions concerning medical treatment even where no threat to the child's life exists. Engum (1982) believes that the parental right to determine medical intervention is accorded greater recognition that the parental duty to protect the child's health. Davies (1998) believes that the best interests of children in cases involving medical intervention can still lead to recognition of parental autonomy rather than the protection of the independent rights of the child. Bainham (1997) warned against the danger of the

court conflating the parental and child interests.

2.4. Duty of State to protect and provide for child

The welfare model and rights model both provide that the State may be obliged to protect and provide for the child. The source of this obligation is parens patriae. Rodham (1973) and Anon (1980) note that the parens patriae prerogative has long justified State interference with parental rights. Dobson (1970) views the parens patriae prerogative as not being entirely altruistic. There is significant emphasis on the correlation between the welfare of the child and of the State. To this end, the State has the right and duty to establish reasonable standards for a child's care.

The rights model permits the invocation of the parens patriae prerogative where parents seek to take actions inconsistent with the child's best interests. Duncan (1987) believes that the State has a right, if not a duty, to control any conduct or decision by a parent which threatens the child's constitutional rights such as the right to bodily integrity and right to life where a parent refuses to consent to medical intervention. However, Goldstein (1977) believes that the State exercising its parens patriae prerogative is too crude an instrument to become an adequate substitute for parents. The welfare model and rights model provide that when the State assumes the parental role it must act in the child's best interests. Bainham (1986) found that the best interests principle endows the courts with a broad

discretion to determine their own view of an individual child's best interests and to make appropriate orders. Kneeper (1994-95) believes that the best interests standard requires the judge to behave as a responsible and loving parent.

The rights model finds that the best interests is an inapplicable approach where the court is concerned with trying a child with a criminal offence. Mack (1910) Freeman (1983d) and Coupet (2000) explained that the parens patriae concept in the juvenile court system provides that the judge must act as a benevolent parent would act for his or her own child. This could not be achieved where the court had to comply with the same procedural rules as govern a criminal trial. Worrell (1986) explains that the juvenile court promises to act in the child's best interests rather than punishing the child in exchange for a relinquishment of a child's constitutional rights in the criminal process. Children were seen as being more amenable to rehabilitation than an adult criminal. The court focused on the child's welfare and character. The child was to receive the appropriate "treatment". Findlay (1979-80) found that Ireland shares the desires of many of other common law jurisdictions that social enquiry information should made be available to judges dealing with juvenile offenders. Smoot (1973) explained that the juvenile court afforded the juvenile fewer procedural rights than an adult accused. This renders the juvenile an easier target for

arbitrary action. However, Polier (1974) and Fox (1976) discuss the failings of the juvenile system including that judges were not provided with the appropriate personnel to assist them. Fortas (1967) concluded that the parens patriae jurisdiction of the juvenile courts in the United States denied children access to constitutional protection. Fortas is of the opinion that the effect of this was to treat juveniles as non-persons and thereby to discriminate against the child. The solution, according to Freeman (1983d), is a shift away from a welfare model to the system that includes the panoply of rights accorded to a person accused of a crime. Parker (1970) notes that a judge can prescribe a sentence that protects society while at the same time contains the best possible chance of rehabilitation for the offending child.

The rights model supports a shift away from State intervention based on parens patriae to that based on the police power. Anon (1980) identifies another source for State regulation of the family: the police power. This is the State's inherent plenary power both to prevent its citizens from harming one another and to promote all aspects of the public welfare, such as public morality, health and safety. Anon finds that the police power cannot be invoked to support parental authority over children that are competent.

The welfare model and the rights model oblige the State to provide services necessary for the child to

reach his or her potential. The performance of these duties may lead to greater interference with the rights of parents and children. Duncan (1987) believes that the State's increased responsibility for matters affecting children such as education and health results in increasing State involvement in the socialisation, education and protection of children. The fulfilment of these State duties have placed limitations on parental rights. Kleinfeld (1970b) states that the State's intervention in education restricts the rights of children.

The rights model allows for the evolution and development of the child's welfare rights. The academic literature focuses on the State's duty to educate children. The first issue for the welfare model and rights model is the definition of education. Both Osborough (1978) and Kelly (1990-1992) believe that education can be interpreted in a broader sense than that of purely scholastic education. It can mean the upbringing of children.

The second aspect is the State's interest in ensuring that a child receive a minimum education. The State has an interest in ensuring that the child on becoming an adult can function in society. Duncan (1987) explains that society has a legitimate interest in its children deriving from the need for them to become functioning members of society, and from their condition of vulnerability and consequent need for protection.

Fitzgerald (1994) claims that we view children as potential adults and childhood as the gradual preparation for adulthood. Our law concerns itself with utilitarian policies designed to raise children into better adults. Children are educated so that they become self-sufficient and join a responsible electorate as adults.

Kelly (1990-92) believes that this State interest in its children's education has evolved. Kelly argues that a State would have no interest in the education of its people in a simple and primitive society. However, the State's interest in the education of its people is different in a modern society. The complication of life on every front, along with the multiplicity of governmental activities, make an educated population an absolute necessity. Scarcely any economic, industrial or administrative task can be performed by a person who is illiterate and/or has no numeral skills. Kelly views this as a basis for the State's justification for compulsory education. The State can intervene to ensure that a child receives a certain minimum education in view of actual conditions. Kelly considered the Irish version of Article 42.3.2 of the Constitution and the phrase for "in view of actual conditions": toisc cor an lae. Kelly translated this phrase as "because of the turn that the world has taken". Therefore, the requirement of actual conditions provides the yardstick when determining the level of "the certain minimum education" that the State can compel. The minimum education today might seem, in view of the actual

conditions, quite inadequate twenty years from now. Walsh (1980); (1981) was of the view that what constitutes primary education evolves over time. Walsh stated that the basic requirements of primary education naturally become greater with the progress of society, increasing standards of living and improvements in the quality of life.

The effect of this approach is that the parental authority over the child's education is circumscribed by the State's duty to provide a child with minimum education. The nature of the minimum education may become so complex to curtail the parent's ability to educate a child at home. Therefore, whether an exercise of parental autonomy concerning education is or is not in the child's best interests is determined by society's evolving requirements of a minimum education. Whyte (1990-1992) notes that although the parents have a right to determine a child's education, the majority of parents avail of State education.

Kleinfeld (1970c) takes a different perspective. Kleinfeld establishes two possible theories for the State's ability to require that a child receive a minimum education. First, parents owe a duty to their child to educate the child, and the State as protector of the child's interests may compel parents to perform this duty. Second, parents owe a duty to the State to educate their children, which the State may compel parents to perform.

Gilles (1996) argues for broad parental autonomy in determining a child's education. Gilles bases this claim on unproven foundations: few parents in our society will choose to educate their children in ways that fail to satisfy the teaching of civic toleration, respect for law and acquiesce in our basic constitutional arrangements.

2.5. Welfare rights of child

It could be argued that there is no need to recognise welfare rights. Parental duties and the court's duty to act in the child's best interests achieves the same purpose. It satisfies the child's needs and promotes the child's welfare. Freeman (1994) noted that it had been assumed that the need for and development of child's rights was otiose, as parents were seen as the guardians of their children's welfare.

The development of rights for children depends on how society views children. Freeman (1983b), Roche (1988) and Freeman (1997) argue that childhood, like adulthood or old age, is to a large extent a social construct. Flekkoy (1992) highlights the different attitudes that adults can have of children. Adult perception of children and the child's perception of the adult is always to some extent influenced by personal needs and interests. Adults have imposed their conceptions of childishness on whom they consider to be children. There have been different conceptions of the nature of childhood at different periods of history. There has in the modern period been a tendency to associate children with all sorts of negative

qualities, weakness, irrationality, imbecility, pre-logicism and primitivism. Freeman (1983b) draws heavily from Aries (1960). Freeman (1997) concludes that children have become objects of social concern and intervention rather than persons in their own right. Roche (1988) finds that the law reflects society's perception through inter alia judicial decisions. This view of children allows the court to recognise the welfare rights of a child.

There is support in the academic literature for the recognition and nature of welfare rights. Wringe (1992) highlights the importance of welfare rights in the context of the inevitable dependency of children. Wald (1979) and Freeman (1983c) argue for the creation of welfare rights for children. Neither the United States Supreme Court nor the House of Lords has recognised welfare rights. The academic literature does contain calls for the recognition of such rights. Fitzgerald (1994) is critical of the United States Supreme Court's failure to recognise welfare rights in order to meet children's needs. Bitensky (1992) argues that the United States courts should afford recognition for a constitutionally grounded for a right to education through the due process, free speech and equal protection clauses. Pyfer (1972) makes a strong argument for a constitutional right of a child committed to juvenile facilities to receive treatment. Herr (1992) discuses how the equitable parens patriae jurisdiction could be used

to afford treatment and special services to children with disabilities. Foster and Freed (1972) argue for certain welfare rights for children including a right to education and medical care.

The academic literature does describe the nature of these rights. Wringe (1992) views a welfare right as entitling a dependent child to necessities to be provided by the community. Freeman (1983c) defines welfare rights as ensuring children are provided with facilities and services necessary for their normal development. This will include the child's right to nutrition, shelter, medical treatment and education. Eekelaar (1983); (1986a); (1992) defines welfare rights in a similar manner. Children should at the minimum be afforded general physical, emotional and intellectual care within the social capabilities of his or her immediate caregivers.

The academic commentators consider the detrimental effects of children where deprived of these rights. Wald (1979) points out that the denial of such rights may result in denial of opportunity in society. Eekelaar (1992) finds that these rights afford children an equal opportunity to maximise the resources available to them during their childhood (including their own inherent abilities) so as to minimise the degree to which they enter adult life affected by avoidable prejudices incurred during childhood. Children's capacities must be developed to their best advantage. Freeman (1983c) argues

that the denial of these rights prevents the child from acquiring rational autonomy.

The academic literature attempts to identify who is responsible for satisfying these welfare rights. Wald (1979), Freeman (1983c) and Eekelaar (1986a) state that it is the duty of society to vindicate the child's welfare rights. Wald (1979) explains that these rights benefit both children and society. Freeman (1983c) believes that it is difficult to define the content of these rights. Freeman believes that these rights protect the child's welfare. In addition, Freeman (1994) argues that these rights safeguard children's present and future autonomy.

The Irish courts have identified a number of welfare rights. Martin (2000a) comments on how the Irish superior courts have creatively interpreted the Constitution in order to "discover" unenumerated children's rights. Clarke (1982) views these welfare rights as independent of any rights of the parents. These rights are not parasitic on the duties of the parents. The child has rights, just like any other citizen, exclusively by virtue of his or her own human personality. Parents could also have duties to satisfy welfare rights of child. Duncan (1987) believes that according children welfare rights leads to a corresponding increase in State intervention into family affairs.

The recognition of welfare rights in Ireland has fallen upon the judiciary. Martin (2000b) states that the

Irish judiciary is prepared to take on the role of interventionist champion of children's rights if children have any legal disability within the legal system, such as their inability as children to assert their constitutional rights, in the absence of the State fulfilling its obligation to protect children. This role may result in a paternalistic approach when considering the argument that competent children have the ability to make decisions for themselves.

2.6. Civil rights of child

Worsfold (1974) describes that historically rights were ascribed only to adults. Children were treated paternalistically. The welfare model and the rights model both provide children with civil rights. Engum (1982) believes that it is clear that the State must provide children with the same rights and choices that it provides adults. Engum and Worrell (1986) warn that children may be deprived of civil rights because of the parens patriae prerogative that children require a greater degree of care and protection. The parens patriae prerogative is used as justification for treating children as having lesser rights.

There are a number of proponents in favour of children's civil rights within the established literature. These academic proponents may be placed on a spectrum. Freeman (1992b) argues that children should be afforded civil rights from a moral perspective. Freeman believes that rights are important because possession of

them is part of what is necessary to constitute personality. Those who lack rights are like slaves, means to others' ends, and never their own masters.

Holt (1974) and Farson (1974) are at one end of the spectrum. They believe children should enjoy the same rights as adults. They hold children are entitled to exercise these rights in the same manner as an adult. They argue children should be free to exercise their rights irrespective of their competence, and without any inhibition because of the adverse consequences that might flow from such an exercise of rights.

Worsfold's (1974) approach is less radical. Worsfold takes a utilitarian perspective. Worsfold assumes that once a child is held to be entitled to rights, he or she must be responsible for the consequences of his or her actions. Worsfold thus subscribes to Rawls's theory of the interconnection between rights and autonomy. Like Roche (1988), Worsfold would argue that the presumption should be that children should be deemed to be responsible for their actions unless the contrary is shown. Only where a child is shown to be under a particular disability should paternalistic intervention be permitted. Foster and Freed (1972) argue that a child has a right to be free of legal disabilities save where these are convincingly shown to be necessary as protective of the child's best interests.

Farson (1974) rejects the utilitarian perspective of Worsfold. Farson argues that children should be granted

greater freedoms not because it may make children better people, but because expanding the freedoms of children is itself worthwhile.

Minow (1995) points out that advocates for children's rights sometimes resolved the tension between protection and liberation through a conception of children as potential adults, deserving rights but needing care on the way to adulthood. Roche (1988) argues that children require some control but need simultaneously sufficient opportunities for growth and experimentation. Freeman (1983c); (1992a); (1992b); (1994) argues that there is a need to restrict the acts or omissions of children which would prevent them from reaching an independent adulthood, "liberal paternalism". This version of paternalism is a double-edged sword in that, since the goal is rational independence, those who exercise constraints must do so in such a way as to enable children to develop their full capacities. However, Hafen (1976) is concerned at any attempt to shift away from the legal presumption of parental autonomy to a legal presumption that children have rights and competent children may exercise these rights. Hafen argues that a legitimate shift in these presumptions can only occur after it has been conclusively shown that there is no longer any basis for the premise underlying the traditional view of children. Hafen stated that the development of the capacity to function as a mature independent member of society is essential to the

meaningful exercise of the full range of rights characteristic of the individual tradition. Children should enjoy some protection against their own immaturity. This will mean that children will optimise their opportunities for the development of mature capabilities that are in their best interests. Children will outgrow their restricted state, but the more important question is whether they will outgrow it with maximised capacities. O'Neill (1992) also opposes according children civil rights. O'Neill believes that children's fundamental rights are best grounded by embedding them in a wider account of fundamental obligations. Mature and maturing children who are restricted and damaged by civil disabilities and infantilising social practices can use the rhetoric of rights to help secure greater recognition and independence. There are good reasons to think that paternalism may be much of what is ethically needed in dealing with children even it is inadequate in dealings with mature and maturing children.

Some commentators argue that family privacy and autonomy are threatened by according children civil rights. Wald (1979) argues that opponents of children's rights such as Hafen do not explain how giving children some autonomy to make major decisions threatens family privacy. The child makes the decision and family privacy is not threatened. Wald accepts that according rights to children may lead to conflict and the breakdown of the

child-parental relationship. Wald identified the most legitimate concern as being that parents will be less willing to assume responsibility for children if they lose ultimate authority.

The effect of invoking the rights of children has been described by Duncan (1993) as a powerful antidote to the doctrine of family or parental autonomy. However, Duncan states that the doctrine of children's rights is not so much a recognition of children's autonomy as an expression of society's values about what is essential and what is impermissible in the rearing of children. Dickens (1981) came to a different conclusion finding that the rights of children are a limitation on the rights of parents.

There have been a number of cases in the United States concerning the civil rights of children.[2] These cases have been criticised as they have only accorded children procedural rights. Minow (1987) rejects this criticism. Minow is of the opinion that these cases have focused attention on to the children's needs and this at least holds the possibility of engaging society in a debate on the needs and rights of children.

Inherent in the rights model is the presumption that the State cannot unduly restrict the rights of children. Anon (1984) argues for restricting the effect that the parens patriae prerogative has on the rights of children.

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[2] United States: In Re Gault 387 U.S. 1 (1967); Goss v. Lopez 419 U.S. 565 (1975); Parham v. J.R. 442 U.S. 584 (1979).

Anon recognises that the State may have special interests in protecting and guiding children, but if the rights of children are to have any content, the State's power to override those by asserting special interests cannot be plenary. Rather, the State's special interests should extend only to a relatively narrow band of concerns that relate to the unique developmental and emotional vulnerabilities of children. Only if the courts require a strict correlation between the child's special needs and the actions of the State can the State's unique interests be served with minimal infringement of children's constitutional rights.

2.7. Conflicting rights of child

The welfare model and rights model both recognise the potential conflict between the child's welfare and civil rights. The welfare model accords supremacy to the child's welfare rights. Eekelaar (1986a); (1992) supports this view.

Harvie-Wilkinson III (1975) was critical of the United States Supreme Court in Goss v. Lopez[3] for its failure to afford sufficient procedural safeguards when depriving a child of the welfare right to education.

Sebba (1992) considers the possible conflict between civil and welfare rights in the juvenile justice system. Sebba does not believe that it is not simply a choice between a welfare or a justice model when determining how to run a juvenile justice system. There may rather be a

[3] United States: 419 U.S. 565 (1975).

continuum extending from extreme welfarism to extreme liberalism. However, Sebba makes no attempt to justify such an approach.

2.8. Developing competence of child

The rights model presupposes that children can acquire the intellectual competence to make decisions for themselves. The ability of parents or the courts to take decisions is lost, when children have the competence to make decisions for themselves. Montgomery (1988) argues that once a child has reached an age at which he or she is mature enough to become the judge of his or her own interests, the paternalistic arguments justifying the existence of parental rights crumble. Wald (1979), Freeman (1983c) and Mason (1993) believe that children should be entitled to exercise their rights when they are competent, and there is then no need to obtain consent for the exercise of these rights from anyone else. Hafen (1976) points out that Locke and Mill excluded children from their philosophical theories. However, Locke and Mill did not discriminate arbitrarily on the basis of a chronological age. The issue was one of capacity. Neither would have justified discrimination against children once capacity had been attained. Cretney (1989) was of the opinion that if the principle of competence is accepted, it would emancipate children from many of the legal disabilities of infancy.

Pritz (1991) defined a mature minor as a child possessing the requisite degree of maturity so that,

under certain circumstances, the courts may find that child legally competent, possessing those constitutional and common law rights due to adults. Steinberg (1995-96) argues that there is no justification for treating the rights of children and adults differently where a child can show that he or she is of sufficient maturity to make a conscious and intelligent choice. Duncan (1987); (1993) states that it may be possible that the Irish Constitution accords children a principle of limited self-determination for children. It is difficult to support Duncan's claim, considering the recent paternalistic attitude of the Irish Supreme Court in D.G. (a minor) v. Eastern Health Board and Ireland.[4]

The rights model requires the law to respect the competent child's decision. Eekelaar (1986a) believes that the effect of the decision in Gillick v. West Norfolk and Wisbech Area Health Authority[5] was to accord children the most dangerous but most precious rights: the right to make their own mistakes. Freeman (1992a) believes that the law should respect a child's autonomy even if this leads to deleterious effect on a child's life.

The welfare model has developed two methods deriving from parens patriae that prevent competent children from exercising their rights.

First, the courts have recognised that parents and

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[4] Ireland: [1997] 3 I.R. 511

[5] England: [1986] A.C. 112.

the State can override the decision of a competent child. The academic literature has been critical of this approach. Eekelaar (1986b) believed that neither the parent nor the court had the power to override the decision of a competent child. This was so, irrespective of whether or not the decision is in the child's best interests. Freeman (1992-93), Eekelaar (1993b), Murphy (1992a) and Edwards (1993) noted that the court's powers are wider than those of the parent and can include overriding a competent child's decision. Thornton (1992) could not understand why a parent or a court can override the decision of a competent child to refuse medical intervention. Masson (1991), Douglas (1992), Haughton-James (1992), Brennan (1993), Bridgeman (1993) and Nicholls (1994) have criticised such an approach as blatant paternalism. Huxtable (2000) believes that the court is focusing on beneficence, non-maleficence and paternalism. Parker and Dewar (1992) found that a cynical view is that the courts are only willing to allow children to say yes to those things where there are already good policy arguments in favour of saying yes. For example, a competent girl can consent to contraceptive treatment because the overall consequences such as avoiding pregnancy are more desirable that the consequences which might flow from allowing a parental veto. This smacks of handing over decision-making to a child only when it suits. Bainham (1992a) found that the court's paternalistic approach was based on what adult

decision-makers consider to be "good" for children. Bainham states that the temptation to deem the child incompetent must be almost irresistible where any adult decision-maker disagrees strongly with a child's decision. Smith (1997) puts forward another proposition. Smith believes that the court's approach may be explained by reference to the State's vested interest in ensuring that children grow up to become responsible citizens. Therefore, the problem does not lie with whether children of whatever age are competent. The resistance to change lies with a particular ideological approach to social regulation in general, and the way thus impacts upon children as an investment in society's continued well-being.

However, some academic commentators support the paternalistic judicial approach that allows parents or court to override the decision of a competent child. Bainham (1992b) finds that there is no inconsistency involved in recognising that parents or children may have rights contemporaneously. Lowe and Juss (1993) identify the rationale underpinning the paternalistic view: a court will not allow a child to refuse treatment that would cause the child irreparable harm. In the final analysis, a child is still a child. Brazier and Bridge (1996) believe that any philosophy of autonomy yields to the pragmatic consideration to preserve life and health. Brazier and Bridge point out that philosophers enjoy the luxury of propounding abstract theory. Responsibility for

the actual outcome of applying such theory rests with others, including judges, and of course, parents.

The second method is to determine that the child is incompetent. De Cruz (1999) believes that the courts consistently justify the enforcement of medical treatment on non-consenting teenagers by arguing that the children were not competent to make decisions in a rational way. De Langen (1992) claims that adolescents in general are not regarded as competent to assert their rights, even though they are recognised as being competent. Scott et al. (1995) were concerned at the court's use of the informed consent standard to assess adolescent's competence. Some adults may be unable to satisfy this standard. Fitzgerald (1994) is of the view that our search for maturity in children is a search for an adult perspective. A child has to mirror the decisions and choices of an adult. Scott et al. (1995) claim that there is insufficient scientific evidence to demonstrate that adolescents do not possess the competence to make decisions. This results in courts approaching problems on a case by case basis. Adolescents should not be treated as a homogenous group unless scientific evidence warrants such a conclusion. Variations existing within the adolescent group may exceed the differences between adolescents and adults.

Engum (1982) questioned the use of courts to determine whether a child is or is not competent to consent to or refuse treatment. Engum is of the view that

this does not emancipate the child but rather transfers to the State and the judiciary the parental control and responsibility for determining when to consult some psychological sage and when to abide by the child's choice. Bainham (1986) believes that the court in the Gillick decision is substituting one adult decision maker, the parent, for another, the clinician. The decision is entirely consistent with paternalistic and protectionist orientation of family law. The real decision-making control is in the adult applying the test. Goldstein (1977) raise similar concern of about body of wise persons deciding on a case by case basis that the particular child is competent. Huxtable (2000) is concerned that the court's finding of a power to override the wishes of a competent child affect the court's assessment of competence. Smith (1997) advocates separating the assessment of the child's competence from any assessment of the child's best interests.

The rights model presupposes that children can acquire the competence to make decisions for themselves. The academic literature contains evidence to support this argument. Batey (1982) found that the Anglo-American jurisprudential perspective that adolescents lack the capacity to make moral choices is incorrect. A number of studies demonstrate that most adolescents possess the moral reasoning skills of adults. Foster and Freed (1972), Rodham (1973); (1977), Batey (1982) and Murphy (1992b) argue for a rebuttable legal presumption: the

State can only defer the desires of an adolescent where it has been shown that the adolescent is not competent to make the decision. Woods (1980) argues that the rebuttable presumption should start at 14.

Batey (1982) argues that State intervention in the life of an adolescent solely because his parents disapprove of the adolescent's choices should be tolerated only if the adolescent is incompetent. Batey argues that adolescence marks the end of a child's transition to adulthood, to autonomous interaction in society. The law has largely ignored this transitional process, adhering instead to the concept that childhood is a legally disabling condition that vanishes completely on the attainment of a certain birthday.

The academic literature suggest different chronological ages at which children may be competent. Wald (1979) argues that children aged between 10 and 12 lack the cognitive abilities and judgmental skills necessary to make decisions about major events which could severely affect their lives. Freeman (1994) states that both in moral and cognitive development, many children reach adult levels between 12 and 14, though the ability to reason improves quite obviously through adolescence. Roche (1988) finds that the best contemporary evidence from social science indicates that moral and intellectual development does not change significantly after about the age of 14. However, Engum (1982) found that the child's right to self-

determination, embodied in "mature minor" statutes is typically recognised when the consenting child is at least 15 years of age. Batterman (1994) found that few courts have found a child below 16 as competent to make decisions for himself or herself.

Freeman (1992a); (1992b) suggests that paternalist intervention can only be justified in the case of an irrational decision. The concept of irrationality must be restricted. The subjective values of the would-be protector cannot be allowed to intrude. Freeman (1983c); (1992a); (1992b) believes that a child should mature to independent adulthood. Irrational decisions are decisions that preclude the achievement of this goal. Freeman calls this concept of "future-oriented consent". This paternalism is justified as to whether the child would appreciate and accept the reason for the restriction imposed upon the child, given what the former child now knows as a rationally autonomous and mature adult. Richards (1980) believes that irrational conduct of itself does not justify paternalism. It is only when this irrationality leads to serious harm or injury that paternalistic intervention is justified. However, Federle (1993) argues that the focus of the law should not be competence. Tying rights to capacity permits opponents of children's rights to claim that children, for their own protection, should not have political and legal rights. There is a need to acknowledge that rights have value because of their power to eliminate hierarchy and

exclusion. Minow (1986) believes that granting autonomy to an individual is a political or moral choice made by each society to fulfil its own purposes - not a rational decision gauged by assessing competence or incompetence. Both Federle (1993) and Minow (1986) believe that competence and incompetence are used as proxies to address a variety of concerns about what societal decision-makers think children may need, and about what they simultaneously think allows adults to choose for themselves.

Worrell (1986) points out that competence is not relevant in relation to the vindication of rights that are designed to protect the individual against governmental harm, such as the right not to be imprisoned or not to be subject to cruel or unusual punishment.

The rights model accepts that the nature of the competence required of the child depends on the nature of the decision to be made. Batterman (1994) believes that the nature of medical treatment affects the degree of competence required from a child. A child is competent to make a decision where the child can understand the condition, the nature and purpose of the proposed treatment, the risks and consequences of the proposed treatment, the probability that the proposed treatment will be successful and the feasible alternative options including no treatment at all. Devereux (1991) came to a similar conclusion. The empirical research of Grisso (1980) found that children under 15 failed to understand

the right to remain silent and right to a lawyer during interrogation established in Miranda v. Arizona.[6] The inescapable conclusion is that children under 15 require some form of assistance if they are to waive these rights.

Smith (1997) believes that the most effective way to redress the balance between rights and welfare is to persuade the judiciary that children are the most accurate arbiters of their own best interests. Smith argues that the judiciary are amenable to empirical evidence that children are capable of making informed choices and are as able as many adults to form a rational and balanced view about their own best interests. Wald (1979), Engum (1982) and Freeman (1983c) highlight the need for research into the children's developing capacities. Freeman (1983c) argues for a constant re-examination of age limits in light of such research.

Some academic commentators support the judiciary's view that adolescents cannot be competent. The research of Scherer (1991) suggests that 14 and 15 year old adolescents are less likely than young adults to make autonomous decisions involving medical treatment.

The rights model stresses that the court must consider the wishes of the child even where a child is determined to be incompetent. Melton and Limber (1992) highlight the need to consider the views of children when defining and implementing the rights of children. Evans

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[6] United States: 384 U.S. 436 (1966)

(1995) surveyed a limited number of cases involving the withdrawal of life saving treatment from children. Evans found that greater attention is given to the children's preferences. Melton and Limber (1992) highlight the need to consider the views of children when defining and implementing the rights of children.

CHAPTER THREE

CHILD AND HEALTH CARE SYSTEM

3.0. Introduction

The majority of parental decisions do not require the involvement of a third party. The consequence is that the State may never find out if and when parents fail in their duties to their child. Such a failure is perhaps most likely to be associated with the symptoms of physical and mental morbidity. In such a case, parents will need a clinician's advice and skill when their child displays symptoms or undergoes procedures requiring diagnosis or intervention.

This participation has five consequences. First, a clinician has a duty of care when treating a child.[1] This duty is subject to the qualification that a clinician must obtain the parent or court's consent before undertaking serious invasive treatment, except in emergencies where the child is unconscious. Diagnosis and treatment is determined by what is in the child's best interests and not necessarily what the parents may desire.

Second, clinicians must respect the rights of

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[1] England: In Re J. (A Minor)(Wardship: Medical Treatment) [1991] Fam. 33 at 41 per Lord Donaldson M.R.. In Thomson v. James and others (1997) 41 B.M.L.R. 144 at 151 Beldam L.J. explained that the duty can be satisfied by taking reasonable care to ensure that the child's parents are in a position to make an informed choice in the child's best interests.

parents to decide on medical intervention for the child.[2] The desirable result is that a treatment decision is to some degree a joint decision of parents and clinicians.[3]

Third, the participation of clinicians affords an opportunity to review parental decisions and decision-making.

Fourth, the State discovers situations in which its parens patriae duty to children must be invoked.

Fifth, a clinician may refuse to provide a course of treatment sought by a parent, a child or court where such treatment is contrary to clinical practice or is unethical.[4] This has the effect of indirectly inhibiting

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[2] Ireland: In In Re Article 26 and The Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995 [1995] 2 I.L.R.M. 81, it was argued that the Bill was unconstitutional as it allowed for children to receive information relating to abortion without the parents' knowledge or consent. The Supreme Court, at 114-115, held that those offering information, advice or counselling must have regard to the rights of persons likely to be affected by such information, counselling and advice. This would mean taking into account the rights of parents when offering information, counselling or advice to a child. The Supreme Court held that any departure from this constitutional obligation would be justiciable.

[3] England: In Re J. (A Minor)(Wardship: Medical Treatment) [1991] 2 Fam. 33 at 41 per Lord Donaldson M.R.; In Re J. (A Minor)(Child in Care: Medical Treatment) [1993] Fam. 15 at 27 per Lord Donaldson M.R. and at 29-30 per Balcombe L.J.; In Re C. (Medical Treatment) [1998] 1 F.L.R. 384 at 389 per Sir Stephen Brown P..

[4] Ireland: D.H. v. Ireland, unreported, High Court, 23 May, 2000 at 13-14 and 17-18 per Kelly J.. England: In Re J. (A Minor)(Wardship: Medical Treatment) [1991] Fam. 33 at 41 per Lord Donaldson M.R.; In Re R. (A Minor)(Wardship: Medical Treatment) [1992] Fam. 11 at 22-26 per Lord Donaldson M.R.; In Re J. (A Minor)(Child in Care: Medical Treatment) [1993] Fam. 15 at 26-27 per Lord Donaldson M.R. and 29-30 per Balcombe L.J.; In Re W. (A Minor)(Medical Treatment: Court's Jurisdiction) [1993] Fam. 64 at 81 per Lord Donaldson M.R.; In Re C. (a baby) (1996) 32 B.M.L.R. 44 at 46 per Sir Stephen Brown P.; In Re C. (Medical

the rights of parents and the wide ranging parens patriae powers of the courts.

Legal proceedings will arise where the clinicians disagree with the parents and/or child as to what is in the child patient's best interests. Many aspects of the welfare model and rights model have arisen in cases involving medical intervention and children.

3.1. Duties and rights of parents

The welfare model and rights model provide that parents have a duty to procure medical assistance for an ill child.[5] The parental right to consent or refuse medical treatment on the child's behalf derives from this duty.

The common law provides that parents have a duty to maintain a child. This duty is fulfilled by the provision of food, clothing, shelter and medical treatment. Parents' failure to procure necessary medical treatment for a child constitutes a breach of this duty. The Poor Law Amendment Act 1868 made it a criminal offence for a parent to neglect a child by failing to provide the child

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Treatment) [1998] 1 F.L.R. 384 at 389-390 per Sir Stephen Brown P.; A National Health Trust v. D. [2000] 2 F.L.R. 677 at 686 per Cazalet J..

[5] England: Gillick v. West Norfolk and Wisbech Area Health Authority [1986] A.C. 112 at 184 per Lord Scarman; In Re A. (Children) (Conjoined Twins: Surgical Separation) [2001] 2 W.L.R. 480 at 510 per Ward L.J.; United States: In Parham v. J.R. 442 U.S. 584 (1979) at 602 per Burger C.J. holding that the parental duty is to recognize symptoms of illness and to seek and follow medical advice.

with inter alia medical treatment.[6] This statutory provision imposes a duty on parents to procure necessary medical assistance for their child which outranks any common law parental discretion to consent to or refuse medical intervention on behalf of their child.

The Constitution of Ireland 1937 provides that parents are invested with natural, constitutional and legal authority to educate, care and control their child.[7] In Ryan v. Attorney General[8] the Irish Supreme Court rejected an argument that parents have a right to omit to provide for the health of their children. The Irish Supreme Court held that parents have a duty to ward off dangers to the health of their children. The Supreme Court found that there is nothing in the Constitution that recognises a parental right to refuse medical intervention on behalf of a child, when the medical intervention is not fraught with danger to the child and

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[6] England: Poor Law Amendment Act 1868, s. 37. In R. v. Senior [1899] 1 Q.B.D. 283 at 289 per Lord Russell C.J. it was held that this provision was enacted as the common law allowed parents to defend their failure to procure medical assistance by claiming that they acted in the child's best interests: See R. v. Wagstaffe (1868) 10 Cox C. C. 530 at 532-534 per Willes J.. The Poor Law Amendment Act 1868 was repealed and replaced by the Prevention of Cruelty to, and Protection of Children Act 1889, s. 1; Prevention of Cruelty to Children Act 1894; Prevention of Cruelty to Children Act 1904, s. 1(1). Ireland: Child Care Act 1991, s. 1(2) repealed the Prevention of Cruelty to Children Act 1904. There is currently no statutory offence in Irish law for parents who fail to provide necessary medical treatment for their child.

[7] Ireland: Constitution of Ireland 1937, Art. 42.1.

[8] Ireland: [1965] I.R. 294.

is within the parent's procurement.[9] The Supreme Court's approach accords with the rights model by subordinating the parental right to consent or refuse consent to medical treatment to the parental duty to procure medical assistance.[10]

Recently, the High Court in North Western Health Board v. H.W. and C.W.[11] cast doubt on the Supreme Court's approach in Ryan. There, McCracken J. held that the Constitution placed the rights of the parents in relation to their children high up in the hierarchy of constitutional rights.[12] McCracken J. considered that the court was being asked to balance the parental rights against the individual rights of the child. In this case, the parents refused to allow their new born baby to undergo a P.K.U. test.[13] The test involves a pin prick of the baby's heel. This test identifies four metabolic

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[9] Ireland: ibid. at 350 per O'Dalaigh C.J.. In In Re a Ward of Court (withholding medical treatment) (No.2) [1996] 2 I.R. 79 at 156, in the Supreme Court, Denham J. held that medical treatment could not be given to an individual without his or her consent. Denham J. stated obiter that if the patient is a child, then consent may be given on the child's behalf by parents or a guardian.

[10] Ireland: In The People (D.P.P.) v. J.T. (1988) 3 Frewen 141 at 159 Walsh J. approving of the approach of the Supreme Court in Ryan v. Attorney General.

[11] Ireland: Unreported, High Court, McCracken J., 27 October, 2000.

[12] Ireland: Constitution of Ireland 1937, Article 41.1.1.

[13] Ireland: Department of Health and Children records show that on average there are 6 cases every year in which parents refuse to consent to the P.K.U. test.

conditions and one endocrine condition in children. Some of these conditions are relatively common. The failure to diagnose and treat some of these conditions may result in severe mental handicap. McCracken J. agreed that it was in the child's best interests to undergo a P.K.U. test. The parents did not want the child to have the discomfort of a pinprick in his heel. The parents were prepared to take the risk that the child might suffer from any one of the conditions. McCracken J. pointed out that parents constantly make decisions where they subject children to risks which objectively may not be justified. McCracken distinguished Ryan v. Attorney General.[14] McCracken J. held that the parental refusal in this case did not constitute a parental failure in their duty to the child, even though the medical evidence was clear that the parent's decision was, objectively speaking, indefensible.[15]

McCracken J.'s approach is impossible to reconcile with the rights model. It accords with the welfare model, which attaches greater importance to parental rights rather than to parental duties and the individual rights of the child. McCracken J. treats the parental right to refuse medical intervention as more important than the

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[14] Ireland: [1965] I.R. 294. In Ryan, if the plaintiff's claim were successful, everyone would have been deprived of the benefit of fluoridation of water. However, the declaration sought in this case would not affect the availability of the P.K.U. test.

[15] Ireland: North Western Health Board v. H.W. and C.W., unreported, High Court, 27 October, 2000 at 13-15 per McCracken J..

child's right to a healthy future.

The House of Lords' approach in Gillick v. West Norfolk and Wisbech Area Health Authority[16] accords with the rights model. There, the House of Lords held that parents have a duty to obtain medical assistance for their child.[17] The right of parents to consent to medical treatment exists for the benefit of the child, not the parent. Parental rights exist to enable parents more effectively to perform their paramount parental duty. The United States Supreme Court took a similar approach in Parham v. J.R..[18] There, the United States Supreme Court held that the parent has an interest in and obligation to ensure the welfare and health of children. This obligation includes recognising symptoms of illness, seeking medical advice and following such advice.[19] The Canadian Supreme Court adopted a similar approach in B.(R.) v. Children's Aid Society of Metropolitan Toronto.[20] The majority of the Canadian Supreme Court held that parents have a right to consent to or refuse medical treatment on their child's behalf.[21] The purpose

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[16] England: [1986] A.C. 112.

[17] England: ibid. at 170-171 per Lord Fraser and at 185 per Lord Scarman. This approach was most recently endorsed in In Re A. (Children)(Conjoined Twins: Surgical Separation) [2001] 2 W.L.R. 480 at 510 per Ward L.J..

[18] United States: 442 U.S. 584 (1979).

[19] United States: ibid. at 602 per Burger C.J..

[20] Canada: [1995] 122 D.L.R.(4th) 1.

[21] Canada: ibid. at 41 per La Forest J. holding that there is a protected sphere of parental decision making.

of this right is to enable parents to discharge their obligations to their children. The minority held that parental liberty does not allow parents to refuse necessary medical treatment for their children.[22] Otherwise, there would be a reversion to the discredited concept that the child is the property of his or her parent.[23] Parents are free to make martyrs of themselves but are not entitled to make martyrs of their children before such children have reached the age of full and legal discretion.[24]

The rights model and welfare model both require parents to be guided by the child's best interests when deciding whether to consent to or refuse medical intervention for their child. In In Re J. (A Minor)(Wardship: Medical Treatment)[25] in the English Court of Appeal, Lord Donaldson M.R. held that parents owe the child a duty to give or withhold consent depending on what is in the child's best interests.[26] The welfare model presumes that parents act in the child's best interests when deciding on medical treatment for the

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[22] Canada: ibid. at 86 per Iacobucci, Major and Cory JJ. holding that parents can choose between equally effective medical treatments for their children.

[23] Canada: ibid. at 86-87 per Iacobucci, Major and Cory JJ..

[24] United States: Prince v. Massachusetts 321 U.S. 158 (1944) at 170 per Rutledge J. and at 166-167 per Rutledge J. holding that parents do not have a right to expose their children to ill-health or death. This was approved of in Parham v. J.R. 442 U.S. 584 (1979) at 630 per Brennan J..

[25] England: [1991] Fam. 33.

[26] England: ibid. at 41 per Lord Donaldson M.R..

child.[27] Parents are best suited to make such decisions because of their deep personal interest as parents in fostering the growth of their own children.[28] This presumption can be rebutted.[29]

It may be difficult in most cases to rebut such a presumption. For the most part, no received objective criteria exist which can be used to decide whether a particular parental decision in respect of a child is or is not in that child's best interests. However medical intervention provides an exception. Medicine is a scientific discipline, based on scientific evidence. In the light of medical knowledge, it could reasonably be said that to commence or continue treatment would or would not be in a child's best interests, and what type or form of treatment would be best.

3.2. Duty of State to protect and provide for child

The welfare model and rights model both provide that the parental right to consent or refuse medical treatment for a child is restricted by the State's duty to protect the child. This derives from the parens patriae

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[27] Canada: B.(R.) v. Children's Aid Society of Metropolitan Toronto [1995] 122 D.L.R.(4th) 1 at 41-42 per La Forest J. and at 87 per Cory, Iacobucci and Major JJ..

[28] England: In Re M.M. (Medical Treatment) [2000] 1 F.L.R. 224 at 234 per Black J. holding that parents are best placed to take decisions about their children.

[29] United States: Parham v. J.R. 442 U.S. 584 (1979) at 602 and 604 per Burger C.J. and at 624 per Stewart J..

concept.[30] However, the rights model permits interference where parents are not acting in the child's best interests when deciding on medical intervention. Where parents refuse to consent to medical treatment, clinicians or statutory bodies challenge the refusal by invoking the parens patriae jurisdiction of the courts.

The rights model provides that the court can exercise its parens patriae jurisdiction and assume the parental role, where a parental decision relating to medical intervention is not in the child's best interests.[31] However, the welfare model pre-eminently requires protection and preservation of the family integrity. This means that the State can only interfere with a parental decision in exceptional circumstances where a parent fails in his or her parental duty for physical or moral reasons. In North Western Health Board v. H.W. and C.W.[32] McCracken J. held that the State has a duty to protect, defend and vindicate the personal rights

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[30] England: In Re B. (A Minor)(Wardship: Medical Treatment) [1981] 1 W.L.R. 1421 at 1423-1424 per Templeman L.J. and at 1424 per Dunn L.J.; In Re A. (Children)(Conjoined Twins: Surgical Separation) [2001] 2 W.L.R. 480 at 511 per Ward L.J.. Canada: B.(R.) v. Children's Aid Society of Metropolitan Toronto [1995] 122 D.L.R.(4th) 1 at 43 per La Forest J. and at 87 per Iacobucci, Major, and Cory JJ..

[31] Canada: In Hepton v. Maat [1957] 10 D.L.R.(2nd) 1 at 2 per Rand J. holding that the parens patriae concept allows the State to displace parents and assume parental duties when through a failure, with or without parental fault, parents fail to protect the child and the child's welfare is threatened.

[32] Ireland: Unreported, High Court, McCracken J., 27 October, 2000.

of the citizen, including children.[33] However, the duty of the State is not absolute[34] and the State's duty to vindicate the rights of the child only arises where nobody else can do so.[35] McCracken J. held that where there is a conflict between the duties of the State to children and the rights of parents, the court will allow the State to intervene in exceptional cases where parents fail in their parental duty to the child for physical or moral reasons.[36] McCracken J. held that the parental refusal of the P.K.U. test did not constitute a failure in parental duty to the child for physical or moral reasons, even though medical opinion was unequivocal that the refusal was wrong and not in the child's best interests.[37] The United States Supreme Court expressed a similar view in Parham v. J.R..[38] There, Burger C.J. held

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[33] Ireland: ibid. at 10 per McCracken J.; Constitution of Ireland 1937, Art. 40.3.2.

[34] Ireland: Hanrahan v. Merck, Sharp and Dohme [1988] I.L.R.M. 629 at 629-636 per Henchy J..

[35] Ireland: F.N. (a minor) v. Minister for Education and Ireland [1995] 1 I.R. 409 at 415 per Geoghegan J.; D.G. (a minor) v. Eastern Health Board and Ireland [1997] 3 I.R. 511 at 522 per Hamilton C.J. stating that if the courts are under an obligation to defend and vindicate personal rights of citizens, it inevitably then follows that the courts have the jurisdiction to do all things necessary to vindicate such rights.

[36] Ireland: Constitution of Ireland 1937, Art. 42.5. In Re Article 26 and The Adoption (No.2) Bill 1987 [1989] I.R. 656 at 663 per Finlay C.J..

[37] Canada: In B.(R.) v. Children's Aid Society of Metropolitan Toronto [1995] 122 D.L.R.(4th) 1 at 42 per La Forest J. holding that the State will intervene to protect the child's rights only when the decision of the parent breaches the socially accepted threshold dictated by public policy.

[38] United States: 442 U.S. 584 (1979).

that the State is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardised. The State is not entitled to interfere because the decision of the parent is disagreeable to the child or because it involves risk.[39]

The welfare model and rights model both provide that the court will act in a quasi-parental role when interfering with a parental decision concerning medical intervention. The court decides whether it is in the child's best interests to commence or continue treatment, and if the child is to be treated what type or form of treatment the child shall receive.[40] The court's function

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[39] United States: ibid. at 603-604 per Burger C.J..

[40] England: In Re B. (A Minor)(Wardship: Sterilisation) [1988] A.C. 199 at 202 per Lord Hailsham L.C. and at 205-206 per Lord Templeman; In Re J. (A Minor)(Wardship: Medical Treatment) [1991] Fam. 33 at 40 per Lord Donaldson M.R. and at 49 per Balcombe L.J.; Devon County Council v. S. (1992) 11 B.M.L.R. 105 at 109 per Thorpe J.; In Re E. (A Minor)(Wardship: Medical Treatment) [1993] 1 F.L.R. 386 at 391-395 per Ward J.; In Re R. (A Minor)(Blood Transfusion) [1993] 2 F.L.R. 757 at 760-761 per Booth J.; In Re O. (A Minor)(Medical Treatment) [1993] 2 F.L.R. 149 at 152-153 per Johnson J.; South Glamorgan C.C. v. B. and W. [1993] 1 F.L.R. 574 at 585 per Douglas Brown J.; In Re C. (a baby) (1996) 32 B.M.L.R. 44 at 45 per Sir Stephen Brown P.; In Re T. (A Minor)(Wardship: Medical Treatment) [1997] 1 W.L.R. 242 at 250-252 per Butler-Sloss L.J.; In Re C. (Detention: Medical Treatment) [1997] 2 F.L.R. 180 at 188-189 per Wall J. authorising the doctors to treat the girl including detaining the girl and using reasonable force; In Re C. (Medical Treatment) [1998] 1 F.L.R. 384 at 813 per Sir Stephen Brown P.; In Re L. (Medical Treatment: Gillick Competency) [1998] 2 F.L.R. 810 at 813 per Sir Stephen Brown P.; In Re M.M. (Medical Treatment) [2000] 1 F.L.R. 224 at 234 per Black J.; Royal Wolverhampton Hospitals N.H.S. Trust v. B. [2000] 1 F.L.R. 953 at 955-956 per Bodey J.; In Re C. (A Child)(H.I.V. Testing) [2000] 2 W.L.R. 270 at 278 per Wilson J. authorising a blood transfusion for the child; A National Health Trust v. D. [2000] 2 F.L.R. 677 at 686 per Cazalet J. authorising doctors to treat without artificial ventilation unless such a course seemed inappropriate to the

is to act as the judicial reasonable parent.[41] The court is not expected to adopt any higher or different standard than that of a reasonable and responsible parent.[42]

The court, like parents, will seek assistance from the views of clinicians. However, the court determines the child's best interests by considering all aspects of the child's welfare. It will not restrict its considerations to the clinical perspective.[43] This may involve the court considering factors such as the sanctity of life, the legal presumption in favour of preserving life, the child's quality of life, the degree of pain and suffering inherent in the treatment, risks, choices and other circumstances, the views of the parents and the child's wishes.[44] The court considers all the

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doctor in charge; In Re A. (Children)(Conjoined Twins: Surgical Separation) [2001] 2 W.L.R. 480 at 512 per Ward L.J. authorising the separation of Siamese twins; Children Act 1989, s. 1.

[41] England: J. v. C. [1970] A.C. 668 at 723 per Lord Upjohn; In Re R. (A Minor)(Wardship: Medical Treatment) [1992] Fam. 11 at 25 per Lord Donaldson M.R.; In Re S. (A Minor)(Consent To Medical Treatment) [1994] 2 F.L.R. 1065 at 1069 per Johnson J..

[42] England: In Re J. (A Minor)(Wardship: Medical Treatment) [1991] Fam. 33 at 50 per Balcombe L.J.; In Re E. (A Minor)(Wardship: Medical Treatment) [1993] 1 F.L.R. 386 at 392-393 per Ward J.; In Re O. (A Minor)(Medical Treatment) [1993] 2 F.L.R. 149 at 153 per Johnson J..

[43] England: In Re T. (A Minor)(Wardship: Medical Treatment) [1997] 1 W.L.R. 242 at 249-251 per Butler-Sloss L.J.; In Re M.B. (Medical Treatment) [1997] 2 F.L.R. 426 at 439 per Butler-Sloss L.J.; In Re A. (Male Sterilisation) [2000] 1 F.L.R. 549 at 555 per Butler-Sloss L.J..

[44] England: In Re J. (A Minor)(Wardship: Medical Treatment) [1991] Fam. 33 at 46 per Lord Donaldson M.R., at 51 per Balcombe L.J. and at 55 per Taylor L.J.; Royal Wolverhampton Hospitals N.H.S. Trust v. B. [2000] 1 F.L.R. 953 at 956 per Bodey J.; A National Health Trust v. D. [2000] 2 F.L.R. 677 at 686 per Cazalet J.. In In Re A. (Children)(Conjoined Twins: Surgical

child's interests and needs. The court will weigh these, and then bring into balance the advantages against the disadvantages, the risks of harm against the hopes of benefit which flow from the course of medical intervention under consideration. Medical intervention is in the child's best interests if, but only if, if it is carried out in order to save the child's life or to ensure improvement or prevent deterioration in the child's physical or mental health.[45]

The courts have placed cases involving parental refusal to medical intervention on a scale.[46] At one end of the scale, there lies the case where parental opposition to medical intervention is prompted by scruple or dogma of a kind which is patently irreconcilable with principles of child health and welfare widely accepted by society. These are cases where the evidence is overwhelming that medical intervention is in the child's best interests.[47] At the other end of the scale, there

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Separation) [2001] 2 W.L.R. 480 at 512 per Ward L.J. holding that welfare encompasses medical, emotional and all other welfare issues.

[45] England: In Re A. (Children)(Conjoined Twins: Surgical Separation) [2001] 2 W.L.R. 480 at 516 per Ward L.J. relying upon In Re F. (Mental Patient: Sterilisation) [1990] 2 A.C. 1 at 55 per Lord Brandon.

[46] England: In Re T. (A Minor)(Wardship: Medical Treatment) [1997] 1 W.L.R. 242 at 254 per Waite L.J..

[47] England: Devon County Council v. S. (1992) 11 B.M.L.R. 105 at 109 per Thorpe J. holding that the court was being asked to choose between two medical procedures one with a prospect of success and one without any chance of success; In Re R. (A Minor)(Blood Transfusion) [1993] 2 F.L.R. 757 at 760 per Booth J.; In Re O. (A Minor)(Medical Treatment) [1993] 2 F.L.R. 149 at 152-153 per Johnson J..

are highly problematical cases where there is a genuine difference of view between the parent(s) and the court. The evidence will be more equivocal in such cases. Such cases involve the withdrawal or refusal of treatment that is invasive, painful, with no better than even odds and offering limited benefit to the child's quality of life.[48] In these cases, the court is influenced by the reflection, that in the last analysis, the best interests of every child include an expectation that difficult decisions affecting the length and quality of the child's life will be taken for the child by the parent to whom his care has been entrusted by nature.[49]

The court attaches significant weight to parental wishes.[50] The weight to be attached to the child's wishes depends to a great extent on the child's intellectual development. The court attaches more weight to the child's wishes, the closer the child is to adulthood.[51]

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[48] England: In Re T. (A Minor)(Wardship: Medical Treatment) [1997] 1 W.L.R. 242 at 255 per Waite L.J.; In Re C. (Medical Treatment) [1998] 1 F.L.R. 384 at 384 per Sir Stephen Brown P..

[49] England: In Re T. (A Minor)(Wardship: Medical Treatment) [1997] 1 W.L.R. 242 at 255 per Waite L.J.; In Re C. (A Child)(H.I.V. Testing) [2000] 2 W.L.R. 270 at 279 per Wilson J..

[50] England: In Re K.D. (A Minor)(Ward: Termination of Access) [1988] 1 A.C. 806 at 824-825 per Lord Oliver; In Re T. (A Minor)(Wardship: Medical Treatment) [1997] 1 W.L.R. 242 at 250 per Butler-Sloss L.J.; A National Health Trust v. D. [2000] 2 F.L.R. 677 at 686 per Cazalet J.; In Re A. (Children)(Conjoined Twins: Surgical Separation) [2001] 2 W.L.R. 480 at 525 per Ward L.J..

[51] England: B.R.B. v. J.B. [1968] P. 466 at 473-474 per Lord Denning M.R.. In In Re E. (A Minor)(Wardship: Medical Treatment) [1993] 1 F.L.R. 386 at 391-392 per Ward J. holding that a 15 year old Jehovah's Witness child suffering from leukaemia was

The judge should give effect to the child's wishes on the basis that prima facie this will be in the child's best interests.[52] However, the role of the court is to exercise an independent and objective judgment as to the child's welfare.[53] If that judgment is in accord with that of the parents and/or the child, well and good. If it is not, then it is the duty of the court, after giving due weight to the wishes of the parents and/or the child, to give effect to its own judgment. The court may of course be wrong. So may that of the parent or child. However, once the jurisdiction of the court is invoked the court's duty is to reach and express the best

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incompetent to refuse a blood transfusion necessary to save his life. Ward J. invoked the court's parens patriae jurisdiction. Ward J. held that the court has to take into account the boy's own wishes, considering his age and maturity. Ward J. questioned what weight he should place on the boy's rejection of treatment. Ward J. approached the case on the basis that freedom of adult choice is a human right, and the boy here was close to adulthood, and therefore a court should be slow to override his wishes. In In Re C. (Detention: Medical Treatment) [1997] 2 F.L.R. 180 at 195 per Wall J. holding that if a child is competent to give or refuse consent then the weight which should be given to the child's wishes increased. In In Re M. (Medical Treatment: Consent) [1999] 2 F.L.R. 1097 at 1099-1110 per Johnson J. who went to great lengths to ascertain the child's wishes, even though the child's condition was serious and time was of the essence.

[52] England: In Re W. (A Minor)(Medical Treatment: Court's Jurisdiction) [1993] Fam. 64 at 84 per Lord Donaldson M.R. and at 88 per Balcombe L.J..

[53] England: In Re Z. (A Minor)(Identification: Restrictions on Publication) [1997] Fam. 1 at 32-33 per Sir Thomas Bingham M.R.; In Re T. (Wardship: Medical Treatment) [1997] 1 W.L.R. 242 at 250 per Butler-Sloss L.J. at 254 per Waite L.J.; A National Health Trust v. D. [2000] 2 F.L.R. 677 at 686 per Cazalet J.; In Re A. (Children)(Conjoined Twins: Surgical Separation) [2001] 2 W.L.R. 480 at 527 per Ward L.J..

judgment it can.[54] A court may limit its intervention with the parental right to make decisions by requiring clinicians to consult with parents where treatment is ongoing and the parents' views do not pose a danger to the child's health.[55]

The second aspect of the State's parens patriae duty is that of providing necessary medical treatment for a child. This has been considered in a number of English cases. The English courts have curtailed this aspect of the parens patriae duty. The English courts consider that any order funding treatment violates the separation of powers in two ways. First, any court order will dictate to the executive how taxes should be spent. Second, the court would be interfering with parliament's delegation of responsibility to a statutory body.[56] There is

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[54] England: In Re Z. (A Minor) (Identification: Restriction on Publication) [1997] Fam. 1 at 32-33 per Sir Thomas Bingham M.R.; In Re T. (A Minor) (Wardship: Medical Treatment) [1997] 1 W.L.R. 242 at 250 per Butler-Sloss L.J.. In Re C. (A Child) (H.I.V. Testing) [2000] 2 W.L.R. 270 at 278-280 per Wilson J. holding that a court must be extremely cautious when it is asked to override the natural parent's wishes.

[55] England: In Re R. (A Minor) (Blood Transfusion) [1993] 2 F.L.R. 757 at 761 per Booth J.; In Re M.M. (Medical Treatment) [2000] 1 F.L.R. 224 at 234 per Black J..

[56] England: In Re J. (A Minor) (Wardship: Medical Treatment) [1991] Fam. 33 at 41-42 per Lord Donaldson M.R. holds that the court had no jurisdiction to determine the allocation of limited health care resources between patients; See also In Re J. (A Minor) (Child in Care: Medical Treatment) [1993] Fam. 15 at 29 per Lord Donaldson M.R.. In R. v. Cambridgeshire Health Authority, ex parte B.(a minor) [1995] 1 W.L.R. 898 at 906 per Sir Thomas Bingham M.R., there was a refusal to interfere with a local authority's decision not to fund medical treatment for a child, even though the consequence of this decision was the child's death. See also R. v. East Lancashire Authority, ex parte B., unreported, High Court, 27 February, 1997.

different balance in Ireland between the powers of the judiciary and those of the Oireachtas. The Irish courts are obliged to vindicate the constitutional rights of the individual.[57]

The welfare model and rights model both hold that children should be provided with medical care. The Irish courts have ordered the State to provide facilities for children suffering from hyperkinetic and attention deficiency disorders. These cases would form the basis for a claim that the State has a duty to provide a child with medical treatment.

3.3. Welfare rights of child

In G. v. An Bord Uchtala[58], the Supreme Court described the implied welfare rights of the child. The Supreme Court held that every child has the right to be fed, the right to be brought up, educated, and to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights derive from the child's right to life. The child's right to life means that a child has a right to maintain

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[57] Ireland: D.G. (a minor) v. Eastern Health Board and Ireland [1997] 3 I.R. 511 at 522 per Hamilton C.J.. However, in S.C. v. Minister for Education [1997] 2 I.L.R.M. 134 at 146 per McGuinness J., it was held that it was not the court's function to determine how the State's expenditure should be allocated between its different priorities, nor should the court suggest how expenditure should be limited. These decisions fell within the prerogative of the executive. A judicial readjustment of a Department's budget might result in the advantaging of one group of children at the expense of another. McGuinness J. held that the court should bear in mind these possible financial consequences of any order it might make.

[58] Ireland: [1980] I.R. 32.

that life at a proper standard in matters of food, clothing, and habitation.[59] In Eastern Health Board v. An Bord Uchtala[60] O'Flaherty J. stated obiter that parents and the State had a duty to provide inter alia medical care. O'Flaherty J. stated that the right to medical care was an unenumerated right of the child.[61]

3.4. Civil rights of child

A number of civil rights of a patient are involved in medical intervention. These may include the rights to bodily integrity,[62] privacy,[63] liberty,[64] and to exercise his or her religious faith.[65]

It is both a constitutional and common law principle that a clinician must obtain the patient's consent prior to medical intervention. Failure to obtain consent results in the clinician committing a criminal and

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[59] Ireland: ibid. at 55-56 per O'Higgins C.J. and at 69 per Walsh J.. See also D.G. (a minor) v. Eastern Health Board and Ireland [1997] 3 I.R. 511 at 523 per Hamilton C.J. and at 537 per Denham J. approving of the rights enumerated in G. v. An Bord Uchtala [1980] I.R. 32.

[60] Ireland: [1994] 3 I.R. 207.

[61] Ireland: ibid. at 230 per O'Flaherty J..

[62] Ireland: Ryan v. Attorney General [1965] I.R. 294 at 313 per Kenny J.; The State (C.) v. Frawley [1976] I.R. 365 at 372 per Finlay P.; In Re a Ward of Court (withholding medical treatment) (No.2) [1996] 2 I.R. 79 at 124 per Hamilton C.J. and 156 per Denham J..

[63] Ireland: Kennedy and Arnold v. Ireland [1987] I.R. 587 at 592 per Hamilton P..

[64] Ireland: Constitution of Ireland 1937, Art. 40.4.1.

[65] Ireland: Constitution of Ireland 1937, Art. 44.2.1.

tortious assault,[66] unless the patient has a communicable disease, or it is an emergency and the patient cannot communicate.[67] A competent adult has a right to refuse medical treatment for any reason, rational or irrational, or for no reason at all, even where that decision may lead to that patient's death.[68]

The law presumes that every adult is competent to consent to or to refuse medical treatment unless and until that presumption is rebutted.[69] The court cannot order a competent adult to undergo a medical procedure.[70] The reason for this is that law goes to great lengths to protect the personal liberty and autonomy of a competent adult from unwarrantable interference.

A child may not have the competence to consent to medical intervention. The welfare model and rights model

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[66] Ireland: In Re a Ward of Court (withholding medical treatment)(No.2) [1996] 2 I.R. 79 at 156 per Denham J.. England: In Re F. (Mental Patient: Sterilisation) [1990] 2 A.C. 1 at 73 per Lord Goff.

[67] Ireland: In Re a Ward of Court (withholding medical treatment)(No.2) [1996] 2 I.R. 79 at 156 per Denham J..

[68] Ireland: In Re a Ward of Court (withholding medical treatment)(No.2) [1996] 2 I.R. 79 at 159-160 per Denham J.. England: In Re T. (Adult: Refusal of Medical Treatment) [1993] Fam. 95 at 112 per Lord Donaldson M.R.; In Re M.B. (Medical Treatment) [1997] 2 F.L.R. 426 at 436 per Butler-Sloss L.J..

[69] England: In Re T. (Adult: Refusal of Medical Treatment) [1993] Fam. 95 at 112 per Lord Donaldson M.R.; In Re M.B. (Medical Treatment) [1997] 2 F.L.R. 426 at 436 per Butler-Sloss L.J..

[70] Ireland: In Re a Ward of Court (withholding medical treatment)(No.2) [1996] 2 I.R. 79 at 156 per Denham J.. England: In Re L. (An Infant) [1968] P. 119 at 159 per Lord Denning; S. v. McC., W. v. W. [1972] A.C. 24 at 43 per Lord Reid and at 57 per Lord Hodson.

both provide that in such circumstances the clinician will seek consent from the child's parents or the courts. In Parham v. J.R.[71] the United States Supreme Court explained that the law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.[72] It is not illegal for a parent or person authorised by the parent to constrain a young child provided what is done is neither cruel or excessive.[73] A parent does not commit an assault when he or she uses reasonable restraint to facilitate diagnosis and treatment.[74]

A court exercising its parens patriae jurisdiction can authorise a clinician to use reasonable force and/or a power of detention to treat a child who is not competent and where treatment is in the child's best interests for the purpose of imposing intrusive necessary medical treatment, where a life-threatening situation arises or where a serious deterioration to health may occur if appropriate treatment is not administered. The treating clinicians or statutory body are given a

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[71] United States: 442 U.S. 584 (1979).

[72] United States: ibid. at 600 per Burger C.J..

[73] England: S. v. McC., W. v. W. [1972] A.C. 24 at 43 per Lord Reid and at 57 per Lord Hodson.

[74] England: In S. v. McC., W. v. W. [1972] A.C. 24 at 43 per Lord Reid holding that there are differences of opinion as to the age beyond which it is unwise to use constraint but that does not apply to babies or very young children.

discretion to determine what treatment is necessary.[75]

3.5. Conflicting rights of child

There are two possible conflicts. First, there is the conflict between the civil and welfare rights of the child. For example, a child may refuse to consent to medical treatment even though this refusal endangers that child's health or right to life. The rights model stresses respect of the autonomous competent child's decision to refuse medical intervention.[76]

Second, a conflict arises between the civil rights of the child. For example, it may be necessary to deprive a child of liberty because the child suffers from a mental disorder. It is one of the principles of law that a deprivation of liberty may only occur following due

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[75] England: South Glamorgan C.C. v. B. and W. [1993] 1 F.L.R. 574 at 585 per Douglas Brown J.; In Re S. (A Minor) (Consent To Medical Treatment) [1994] 2 F.L.R. 1065 at 1076 per Johnson J.; A Metropolitan Borough Council v. D.B. [1997] 1 F.L.R. 767 at 777 per Cazalet J., authorising the use of reasonable force for the purpose of imposing intrusive necessary medical treatment on a girl where a life threatening situation arose or where a serious deterioration in her health might occur if appropriate medical treatment was not administered; In Re C. (Detention: Medical Treatment) [1997] 2 F.L.R. 180 at 200 per Wall J. authorising the girl's detention at a clinic for the purpose of such treatment as may in the opinion of the clinicians be necessary. The clinicians were give permission to use reasonable force to detain or return the girl to the clinic. The clinicians were given permission to provide such medical intervention necessary to ensure that the child suffers the least distress and retains the greatest dignity.

[76] England: Gillick v. West Norfolk and Wisbech Area Health Authority [1986] A.C. 112 at 169-170 per Lord Fraser, and at 185-186 and 189 per Lord Scarman. In In Re R. (A Minor) (Wardship: Medical Treatment) [1992] Fam. 11 at 24-25, and In Re W. (A Minor) (Medical Treatment: Court's Jurisdiction) [1993] Fam. 64 at 83-84 per Lord Donaldson M.R. according paramountcy to the child's welfare rights. United States: Bellotti v. Baird 443 U.S. 622 (1979) at 643 per Powell J..

process. In addition, there must be a periodic review of such detention.

This arose for consideration in the United States Supreme Court in Parham v. J.R..[77] A Georgia statute allowed parents to voluntarily commit their child to a mental institution. The statute had safeguards. Parents could seek the release of the child, and the person in charge of the facility was legally obliged to discharge a child when in-patient care was no longer necessary.

In the Supreme Court, Burger C.J., speaking for a majority of the Supreme Court, held that the child's liberty interest is inexorably linked with the parents' concerns, and the parent's duty to the child's health and welfare. The private interest at stake was a combination of the child and parents' concerns.[78]

Burger C.J. held that the child, like an adult, has a substantial liberty interest in not being confined unnecessarily for medical treatment. The State was involved in the committal procedure. This constituted the State involvement described in the Fourteenth Amendment. Psychiatric treatment may be taken by some as a social stigma, but not such a severe stigma as occurs when a person is labelled by the State as delinquent or criminal. Burger C.J. considered that the risk of social disapprobation was higher where a child in need of treatment remained untreated. It was imperative that a

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[77] United States: 442 U.S. 584 (1979).

[78] United States: ibid. at 600 per Burger C.J..

child should receive necessary diagnostic and therapeutic treatment. The child's protectable interest is not merely that of freedom from unnecessary bodily restraints, but in not being wrongly labelled by virtue of the hospital's improper decision.

Burger C.J. held that the law assumes that the role of parents is to take decisions for an incompetent child. Parents are motivated by natural bonds to take such decisions in the best interests of children, and not their own interests. However, Burger C.J. held that this was only a presumption. Parents may not act in the child's best interests.[79]

Burger C.J. said that even in adolescence, most children are unable to make mature decisions about their own medical care and treatment. Parents can and must make these decisions on the child's behalf.[80] Burger C.J. distinguished this legislation from that struck down in Planned Parenthood of Central Missouri v. Danforth.[81] In Danforth, the Supreme Court declared unconstitutional a statute which gave an absolute veto to the parents over their child's abortion. Burger C.J. pointed out that under the Georgia statute, parental discretion or authority to commit or detain a child could not be said to be absolute. It was subject to a clinician's

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[79] United States: ibid. at 601-602 per Burger C.J..

[80] United States: ibid. at 603 per Burger C.J..

[81] United States: 428 U.S. 52 (1976).

independent examination and judgment.[82]

Burger C.J. identified the various aspects of the State's interests. First, the State has an interest in ensuring that psychiatric resources are expended on people in need of treatment. The statute ensures that there is State control of this by according the clinician a discretion to admit persons in need of treatment and to discharge patients from hospitals when this is not necessary.

Second, the State should not place procedural obstacles in the way of parents invoking the parens patriae protection for the child. Parents of children in need of treatment may be discouraged from coming forward if formalistic rules were laid down, or an adversarial procedure like a trial was required.

Third, the State must accord priority to diagnosis and treatment. It is necessary that the time of psychiatrists and other carers should be concentrated on patient care, not in administrative procedures.[83] Burger C.J. said that if further constraints were put on clinicians, this would worsen the situation.[84]

Burger C.J. held that any such process must not unduly infringe parental authority, nor impede the

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[82] United States: 442 U.S. 584 (1979) at 604 per Burger C.J..

[83] United States: ibid. at 605 per Burger C.J.. In an amicus curiae brief, the American Psychiatric Association claimed that on average 47% of a psychiatrist's time was spent on direct patient therapy.

[84] United States: ibid. at 606 per Burger C.J..

legitimate interests of both the State and the patient in the existence of a system of voluntary psychiatric hospitalisation. Burger C.J. recognised that some form of broad-ranging enquiry was required, conducted by an impartial person, to prevent abuse of hospitalisation by parents. The enquiry would involve interviewing the child. Once detained, the child's condition must be periodically reviewed. Such procedures would satisfactorily protect the child against erroneous detention, and neither unduly burdened the State nor inhibited parental decisions to seek help. Burger C.J. held that the decision of the admitting clinician satisfied these requirements, provided the clinician were free to independently evaluate the child's mental and emotional condition, and need for treatment. There was no need for a quasi-judicial hearing, as these issues were essentially medical in character.[85]

Burger C.J. recognised that there was still a risk that a clinician would make the wrong decision, but this risk could not be averted by handing the decision over to someone else who was independent. Burger C.J. held that a fact-finding adversarial hearing would strain the parent-child relationship, and possibly prejudice the child's recovery.[86] However, the child could be sufficiently protected if an independent clinician were to consider the parental decision in the light of the child's best

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[85] United States: ibid. at 607-609 per Burger C.J..

[86] United States: ibid. at 610 per Burger C.J..

medical interests[87].[88]

Brennan J., dissenting, held that placing a child in a mental institution did not just interfere with the child's liberty, but also deprived the child of family, friends and community.[89] The consequences of erroneously detaining a child on the say-so of the parents are more serious than the consequences accruing to an adult who is involuntarily detained. There was evidence to show that children were confined for longer periods than adults. Moreover, detention of this nature occurs at a formative period of the child's life, and if improperly managed, may scar the child for life. This may result in permanent damage to the child's potential. Also, proper satisfactory institutional care requires a substantial financial investment that has too often not been made. The chances of an erroneous commitment of a child are higher than for an adult.[90]

Brennan J. held that the parental decision to commit a child for detention to a psychiatric facility is an atypical parental decision. Psychiatric hospitalisation

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[87] United States: ibid. at 613 per Burger C.J..

[88] United States: In Secretary of Public Welfare v. Institutionalized Juveniles 442 U.S. 640 (1979) a majority of the Supreme Court adopts the same approach as that used in Parham with some minor amendments. Burger C.J., at 649-650, held that the clinician's inquiry must carefully probe the child's background and include an interview with the child. The decision maker must have the authority to refuse to admit any child where it is not in the child's best interests. Finally, the child's continuing need for commitment must be reviewed periodically.

[89] United States: 442 U.S. 584 (1979) at 626 per Brennan J..

[90] United States: ibid. at 626-629 per Brennan J..

of children leads to the inevitable breakdown of family autonomy. Children who are detained in care, and who are thus removed from family protection require an independent advocate. The presumption that a parent would act in the best interests of the child does not apply here, as it falls outside the normal child-rearing decision. Even well-meaning parents lack the experience necessary to evaluate the advantages and disadvantages of in-patient as opposed to out-patient psychiatric treatment. Parents could not be said to be acting in the child's best interests, by waiving due process rights in the committal procedure.

Brennan J. considered what due process procedures had to be afforded to a child. The law provided that there must be a pre-confinement adversarial hearing for an adult.[91] Brennan J. cited three reasons as to why a child should not have a pre-confinement hearing. First, a pre-admission adversarial hearing might deter parents from seeking necessary medical care and treatment for the child. Second, the hearing itself may delay urgently needed treatment of the child, whose home life may become so impossible as to precipitate the need for involuntary detention. Third, adversarial hearings would involve challenges to parental authority, judgment or veracity, and this might result in setting parent against child. The return of the child to the home would be more fraught as a consequence. Brennan J. held that there would have

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[91] United States: ibid. at 631-632 per Brennan J..

to be a post-admission hearing. Brennan J. held that the existing procedures were inadequate and failed to afford due process. Post-admission decisions were made ex parte. A child was not informed of the reasons for detention. The child had no right to be present, afforded legal representation, heard, confront adverse witnesses, cross-examine, nor tender evidence. Brennan J. was unable to find any state or parental interest preventing the carrying out of an adversarial post-admission hearing, invested with these rights.[92]

Burger C.J.'s approach accords with the welfare model while that of Brennan J. is more consistent with the rights model. The rights model requires that a child should not be treated any different than an adult facing commitment to a psychiatric facility. Therefore, there must be a quasi-judicial hearing where it is proposed to detain a child because of a mental disorder or behaviourial problems. The rights model requires a periodic review of the child's detention.

The Irish High Court has ordered the detention of children with serious behaviourial problems in order to vindicate the child's welfare rights.[93] These cases are

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[92] United States: ibid. at 633-635 per Brennan J..

[93] Ireland: D.T. (a minor) v. Eastern Health Board and Ireland, unreported, High Court, 24 March, 1995 at 1-2 per Geoghegan J. who found that there was a danger that the girl would commit suicide and authorising the girl's detention; D.D. v. Eastern Health Board, Minister for Health, Minister for Education and Ireland, unreported, High Court, 3 May, 1995 at 10 per Costello P. authorising the detention of a girl; D.H. v. Ireland, unreported, High Court, 23 May, 2000 at 17-18 authorising the detention of a girl in a facility that met with

at odds with the rights model as there has been no provision for a periodic review of the child's detention. However, in an English case In Re C. (Detention: Medical Treatment)[94] Wall J. imposed safeguards when exercising the parens patriae jurisdiction. The court had ordered a child's detention in a facility not regulated by the English Children Act 1989. Wall J. held that the order detaining the child should have safeguards and applied the statutory criteria for detaining a child in secure accommodation under the Children Act 1989.[95] Wall J. allowed the treating psychiatrist to release the girl from the clinic prior to the review date in consultation with the other psychiatrist where they were of the opinion that the girl had made sufficient progress to make discharge appropriate.[96]

3.6. Developing competence of child

The welfare model holds that the ability of parents or court to exercise the rights of the child on that child's behalf arises because of the child's intellectual incompetence to make decisions for himself or herself. The rights model is slower to assume that the necessity to intervene is predicated on any deficiency on the child's behalf. It must be viewed as systemic rather, than as a consequence of any individual shortcomings.

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the approval of a child psychiatrist.

[94] England: [1997] 2 F.L.R. 180.

[95] England: ibid. at 197-198. Children Act 1989, s. 25.

[96] England: [1997] 2 F.L.R. 180 at 200 per Wall J..

The rights model provides that parents lose the ability to make decision for their children when their children have the intellectual competence to make the decision for themselves.[97]

In Bellotti v. Baird[98] a majority of the United States Supreme Court supported in general terms this aspect of the rights model.[99] In this case, a Massachusetts statute required parental consent before an abortion could be performed on an unmarried girl under the age of 18. A girl could apply to obtain the consent of the court where the child's parents refused consent. The court was obliged to give consent if "good cause" was shown.

In the Supreme Court, Powell J. held that the state statute was an attempt to reconcile two issues. First, the child's constitutional right, in consultation with the clinician, to decide whether or not to terminate her pregnancy.[100] The constitutional right to seek an abortion is very different from other decisions concerning a child. It may not be possible to postpone making such a decision until the child reaches her age of majority. A termination may have particularly serious detrimental affects on a pregnant child. Bearing a child

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[97] Canada: B.(R.) v. Children's Aid Society of Metropolitan Toronto [1995] 122 D.L.R.(4th) 1 at 88 per Iacobucci, Major and Cory JJ..

[98] United States: 443 U.S. 622 (1979).

[99] United States: ibid. at 639 et seq. per Powell J..

[100] United States: ibid. at 639 per Powell J..

brings with it adult responsibilities. Second, the State's interest in encouraging the child to seek the advice of her parents before making a decision about termination. Parental advice and counsel could obviously not be supplied in an abortion clinic or other termination situation.

Powell J. held that the statute failed to strike the proper balance between these competing interests. The statute was unconstitutional in that it required a child to tell her parents before applying to court for permission for an abortion. Parents who opposed terminations might obstruct the child from applying to court.[101]

Powell J. held that the court must be accessible to the girl without first having to consult her parents. The girl can make the decision for herself where the girl can satisfy the court that she is competent to make the decision. If the girl is unable to satisfy the court that she is competent, the girl must show to the court that an abortion in is her best interests. No parental consultation will be required in this situation. Powell J. held that there was still an important state interest in encouraging the resolution of this problem in the family rather than by a court. Parents are naturally concerned with the child's welfare in a loving family. These were factors which a court was entitled to take into account, particularly when considering the child's

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[101] United States: ibid. at 647 per Powell J..

best interests. Powell J. held a court could defer a decision until there is parental consultation, in which the court may participate. This was the full extent to which parental involvement may be required in such circumstances.[102]

Powell J. considered whether a court could prevent a termination, where a child is competent to make a decision to have an abortion. Powell J. reiterated that the State can require a child to wait until the child reaches 18 before being permitted to exercise her legal rights. However, the court was here concerned with the exercise of a constitutional right of a unique nature, if the child is able to demonstrate to the court that she is able to make an informed and reasonable decision, she is entitled to make that decision independently.[103] The rights model would support this approach but would not restrict the right of a competent child to make decisions to those which cannot be postponed until the child reaches the age of majority.

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[102] United States: ibid. at 648 per Powell J.. In H.L. v. Matheson 450 U.S. 398 (1981) at 409 per Burger C.J. and at 418-419 per Powell J. holding that a statute requiring parental notice does not violate constitutional rights of an immature dependent child. Hodgson v. Minnesota 497 U.S. 417 (1990) at 445 per Stevens J. speaking for a majority of the Supreme Court.

[103] United States: ibid. at 650 per Powell J.. In Carey v. Population Services International 431 U.S. 678 (1977) at 694 per Brennan J. holding that a child has a right to privacy in connection with decisions affecting procreation. The State may not impose a blanket prohibition, or even a blanket requirement of parental consent for a child to obtain contraceptives. In Planned Parenthood Association v. Ashcroft 462 U.S. 476 (1983) at 490-493 per Powell J. upholding a law requiring consent for the performance of an abortion on a girl from either the girl's parents or from the juvenile court.

The House of Lords took a similar approach in Gillick v. West Norfolk & Wisbech Area Health Authority.[104] There, Lord Fraser held that a child's consent to medical intervention is valid where a child has the intellectual competence to consent to or refuse medical intervention. Lord Fraser held that it was contrary to the ordinary experience of mankind, at least in Western Europe, to argue that a child remained under the control of his or her parents until he or she was aged 18. In practice, most wise parents relax their control gradually as the child approaches adulthood. The degree of parental control over a particular child will wane as the child's own understanding increases.[105] Lord Fraser referred to Lord Denning's remarks in Hewer v. Bryant.[106] There, Lord Denning M.R. said that the legal right to custody of a child ends at 18, but is a "dwindling" right. The older the child is, the greater the court's hesitation in enforcing a parental right or decision which is contrary to the child's wishes. The parental right starts as a right of control, and diminishes to the occasional opportunity to offer advice.[107] Lord Scarman accepted that there would be certainty in the law if the law fixed on a chronological age for determining when a child can consent to or refuse

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[104] England: [1986] A.C. 112.

[105] England: ibid. at 171-172 per Lord Fraser.

[106] England: [1969] 3 All E.R. 578.

[107] England: ibid. at 582.

medical treatment. However, the law would be inflexible and rigid. Lord Scarman held that the law relating to parent and child must take cognisance of the process of growth and maturity of the child. The law could not impose fixed limits on this continuing process. Such limits would impose an artificiality, a lack of realism. Lord Scarman held that judges should ensure that the law should maintain such flexibility as might enable them to cater for particular cases. Lord Scarman concluded that the parental right to decide for or against medical intervention for a child terminates when the child acquires the maturity to understand what is proposed. This is a question of fact.[108]

The issue in this case was the prescription of contraceptives. Lord Scarman held that a child was competent to consent to contraceptives where the child understood their prophylactic nature and purpose, their relationships with parents and others, pregnancy and its termination and awareness of the health issues involved in indiscriminate sex. These were problems which contraception might diminish but not eradicate. The clinician must ensure that the child understood all these factors before concluding that such a girl was competent.[109] Lord Templeman, dissenting, held that the non-medical implications of contraception or their assessment will necessarily require more extensive life

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[108] England: [1986] A.C. 112 at 186-189 per Lord Scarman.

[109] England: ibid. at 189 per Lord Scarman.

experience than can be normally possessed by children.[110]

After Gillick, there are several English courts considering the competence of particular adults to consent to or refuse medical intervention. These cases established three questions that must be considered when assessing a person's competence to consent to or refuse medical intervention. First, whether the person comprehends and retains information relating to the medical intervention. Second, whether the person is capable of believing this information. Third, whether the person can weigh the treatment information in the balance, to arrive at a choice especially as to the likely consequences of undergoing or refusing medical intervention.[111] The graver the consequences of consenting to or refusing medical intervention, the commensurately greater the level of competence is required to take the decision.[112] These three questions must be considered when assessing a child's competence to

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[110] England: ibid. at 201 per Lord Templeman. In In Re R. (A Minor) (Wardship: Medical Treatment) [1992] Fam. 11 Lord Donaldson M.R., at 25-26 held that Gillick competence is an assessment of mental and emotional age, as contrasted with chronological age. In the case of a child with a mental disability, that disability must also be taken into account, particularly where it is fluctuating in its effect.

[111] England: In Re C. (Adult: Refusal of Treatment) [1994] 1 W.L.R. 290 at 295 per Thorpe J.; In Re M.B. (Medical Treatment) [1997] 2 F.L.R. 426 at 433 per Butler-Sloss L.J..

[112] England: In Re T. (Adult: Refusal of Medical Treatment) [1993] Fam. 95 at 113 per Lord Donaldson M.R.; Gillick v. West Norfolk and Wisbech Area Health Authority [1986] A.C. 112 at 189 per Lord Scarman.

consent to or refuse medical intervention.[113] Children have difficulty in satisfying the third question.[114] This is because the reported cases involve issues such as abortion, contraception and end-of-life decisions.[115] Children may not have the extensive life experience necessary to assess the non-medical implications involved in such decisions. For example, in In Re E. (A Minor) (Wardship: Medical Treatment)[116] the court considered whether a 15 year old Jehovah's Witness suffering from leukaemia was competent to refuse a blood transfusion necessary to save his life. In the High Court, Ward J. held that the boy was of sufficient intelligence to take most decisions about his own well-being, but there were certain decisions, the implications and effects of which were beyond his current experience and ability. The boy was unable to appreciate the pain, suffering and distress he would have to endure were he to reject blood transfusion. Therefore, the boy was

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[113] England: In Re R. (A Minor) (Wardship: Medical Treatment) [1992] Fam. 11 at 26 per Lord Donaldson M.R.; A Metropolitan Borough Council v. D.B. [1997] 1 F.L.R. 767 at 773 per Cazalet J.; In Re C. (Detention: Medical Treatment) [1997] 2 F.L.R. 180 at 195 per Wall J..

[114] England: In Re S. (A Minor) (Consent To Medical Treatment) [1994] 2 F.L.R. 1065 at 1075-1076 per Johnson J..

[115] England: The court has considered the position of teenagers suffering from anorexia nervosa (In Re W. (A Minor) (Medical Treatment: Court's Jurisdiction) [1993] Fam. 64 and In Re C. (Detention: Medical Treatment) [1997] 2 F.L.R. 180), teenager in need of a heart transplant (In Re M. (Medical Treatment: Consent) [1999] 2 F.L.R. 1097) and a teenager who as a consequence of serious burns needed a blood transfusion (In Re L. (Medical Treatment: Gillick Competency) [1998] 2 F.L.R. 810).

[116] England: [1993] 1 F.L.R. 386.

incompetent. Ward J. invoked the court's parens patriae jurisdiction, holding that the best interests of the child dictated that he should undergo blood transfusion.[117] It is difficult to accuse Ward J. of acting in a paternalistic manner, since Ward J. accepts the principle that a child's refusal is acceptable if the child be competent.

However, there has been a retreat from the approach taken by the House of Lords in Gillick. There have been subsequent English cases where there has been a shift from the rights model back to the welfare model. This has seen unsupervised paternalism come to the fore. In In Re R. (A Minor)(Wardship: Medical Treatment)[118] in the Court of Appeal, Lord Donaldson M.R. held that a Gillick competent child can consent to treatment. However, Lord Donaldson M.R. held that there are concurrent powers of consent where a Gillick competent child refuses treatment. These concurrent powers of consent are held by those with parental rights or responsibilities, where the child refuses to consent to treatment. Lord Donaldson M.R. held that the parens patriae jurisdiction confers the court with greater authority than that possessed by parents. This is because the concept derives from the State's duty to care for those who needed care and protection, rather than from parenthood. A court

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[117] England: ibid. at 391-392 per Ward J.. On attaining his majority, E. rejected any further treatment and died.

[118] England: [1992] Fam. 11.

exercising its parens patriae jurisdiction can override the decision of a Gillick competent child as well as that of a child's parents.[119] In In Re W. (A Minor) (Medical Treatment: Court's Jurisdiction)[120] Nolan L.J. held that the court must ensure, as far as it can, that a child should attain the age of majority, after which the child acquires the absolute right to consent or refuse medical treatment. The court can override the wishes of the parents or the child.[121] Lord Donaldson M.R. held that a court could only allow a child to make an autonomous decision provided the decision does not carry disproportionate risks to the child or have irreparable consequences for him or her.[122]

These cases support the welfare model. They accord supremacy to the child's best interests rather than to the child's autonomy. A particular complexity of the

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[119] England: ibid. at 24 per Lord Donaldson M.R. and at 28 per Staughton L.J..

[120] England: [1993] Fam. 64.

[121] England: ibid. at 93-94 per Nolan L.J..

[122] England: ibid. at 81 per Lord Donaldson M.R.. See also: South Glamorgan C.C. v. B. and W. [1993] 1 F.L.R. 574 at 584-585 per Douglas Brown J.; In Re C. (Detention: Medical Treatment) [1997] 2 F.L.R. 180 at 188 per Wall J.; In Re L. (Medical Treatment: Gillick Competency) [1998] 2 F.L.R. 810 at 812-813 per Sir Stephen Brown P.; In Re M. (Medical Treatment: Consent) [1999] 2 F.L.R. 1097 at 1097-1098 per Johnson J.. In In Re S. (A Minor) (Consent To Medical Treatment) [1994] 2 F.L.R. 1065 at 1068-1071 per Johnson J. holding that the parens patriae jurisdiction allowed a court to prohibit treatment to which a Gillick competent child has consented. Canada: In B.(R.) v. Children's Aid Society of Metropolitan Toronto [1995] 122 D.L.R.(4th) 1 at 87 per Iacobucci, Major and Cory JJ. holding that the purpose of parens patriae intervention is to promote the child's welfare. This may involve overriding the parents' or child's wishes.

welfare model as opposed to the rights model is that the welfare model facilitates the taking of consent from a child but refuses to accept a child's refusal of treatment. Only in the rights model may parents or a court exercising its parens patriae jurisdiction be unable to consent to treatment which a Gillick competent child has refused. Parents or a court exercising its parens patriae jurisdiction can decide on the child's best interests only where the child is not competent to make that decision for himself or herself.

CHAPTER FOUR

CHILD AND EDUCATION SYSTEM

4.0. Introduction

The welfare model and the rights model provide that the third duty of parents is to provide for their child's education. The parens patriae duty of the State is to ensure that children receive a basic education. The State's duty is not driven solely by the altruistic motive that it is for the betterment of children that they are educated. A State derives substantial benefits from an educated population. In Director of Public Prosecutions v. Best[1] the Irish Supreme Court held that the Constitution envisages a population that is educated to a standard necessary to function in a civilised society. This involves the ability to communicate, record, organise and deal with ordinary social and business matters.[2] The common good also requires children to have a sense of responsibility and the capacity to live within a civilised society.[3] There, the United States Supreme Court had adopted a similar approach in

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[1] Ireland: [2000] 2 I.L.R.M. 1.

[2] Ireland: ibid. at 19 and 21 per Denham J. and at 40 per Murphy J..

[3] Canada: In R. v. Jones [1986] 31 D.L.R.(4th) 569 at 592 La Forest J. held that the State has an interest in ensuring that children receive education and at 597 La Forest J. held also that there is a compelling public interest in the quality of education received by children.

Brown v. Board of Education.[4] The United States Supreme Court held that education is necessary to perform the most basic responsibilities. Education is the very foundation of good citizenship. It is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[5] The Supreme Court doubted that any child may reasonably be expected to succeed in life if the child is denied education.[6] Public education was the inculcation of fundamental values necessary to the maintenance of a democratic political system.[7] Education prepares individuals to be self-reliant and self-sufficient participants in society.

4.1. Duties and rights of parents

The welfare model and the rights model both provide that one of the duties of parents is to educate their child. Both models assume that parents are conferred with rights in order to perform this duty. Both the common law

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[4] United States: 347 U.S. 483 (1954) at 493 Warren C.J. held that it is doubtful whether any child may reasonably be expected to succeed in society if denied the opportunity of education.

[5] United States: Meyer v. State of Nebraska 262 U.S. 390 (1923) at 400 per McReynolds J.; Wisconsin v. Yoder 406 U.S. 205 (1972) at 213 per Burger C.J. speaking for a majority of the Supreme Court.

[6] United States: San Antonio Independent School District et a.l v. Rodriquez 411 U.S. 1 (1973) at 29-30 per Powell J. speaking for a majority of the Supreme Court; Plyler v. Doe 457 U.S. 202 (1982) at 221-223 per Brennan J..

[7] United States: Bethel School District No.403 v. Fraser 478 U.S. 675 (1986) at 681 per Burger C.J. speaking for a majority of the Supreme Court.

and rules of equity provided that the father had authority to guide and determine the education of his child. This authority was said often to have been conferred by God and positive law had to support it.[8] The maintenance of this authority was seen as essential to ensure that the reciprocal relationship between the father and child is happy and virtuous. However, the law viewed this authority as a trust and not a power and could be restrained when abused.[9] The Guardianship of

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[8] Blackstone (1788) Bk. 1 Chap. 16 p. 446; Ireland: Constitution of Ireland 1937, Art. 41.1.1. In North Western Health Board v. H.W. and C.W., unreported, High Court, McCracken J., 27 October, 2000, at 12-13 McCracken J. held that this constitutional provision was the nearest to accepting that there is a natural law in the theological sense. England: Ex Parte Hopkins (1732) 3 P. Wms. 152, 24 E.R. 1009 at 154, 1009; Ex Parte Pye (1811) 18 Ves. Jun. 140, 34 E.R. 271 at 153-154, 276 per Eldon L.C.; Hodgens v. Hodgens (1837) 4 Cl. & Fin. 323, 7 E.R. 124 at 375, 144 per Lord Wynford; In Re Meades, Minors (1870) 5 Ir. Eq. 98 at 103 per Lord O'Hagan L.C.; Bennet v. Bennet (1879) 10 Ch. D. 474 at 477-478 per Jessel M.R.; In Re Agar-Ellis, Agar-Ellis v. Lascelles (1883) 24 Ch. D. 317 at 326-329 per Brett M.R. and 334-336 per Bowen L.J.; R. v. Barnardo [1891] 1 Q.B. 194 at 207 per Lord Esher M.R.; In Re Newton (Infants) [1896] 1 Ch. 740 at 747-748 per Lindley L.J.; In Re J.M. Carroll (an infant) [1931] 1 K.B. 317 at 353-354 per Slesser L.J..

[9] England: Creuze v. Hunter (1790) 2 Cox 242, 2 R.R. 38 at 243, 39 per Thurlow L.C.; Skinner v. Warner (1792) 2 Dick. 779, 21 E.R. 473 at 780, 474; Lyons v. Blenkin (1820) Jac. 245, 23 R.R. 38 at 255-257, 43 per Lord Eldon; Lord Talbot v. The Earl of Shrewsbury (1840) 4 Myl. & Cr. 672, 41 E.R. 259 at 686-688, 264 per Cottenham L.C.; In Re Browne, a minor (1852) 2 Ir. Ch. 151 at 159 per Smith M.R.; Stourton v. Stourton (1857) 8 De G. M. & G. 760, 44 E.R. 583 at 771-773, 588 per Turner L.J.; Davis v. Davis (1862) 10 W.R. 245, 125 R.R. 947 at 246, 949-950 per Woods V.C.; Hill v. Hill (1862) 31 L.J. Ch. 505, 133 R.R. 399 at 508, 403 per Woods V.C.; Austin v. Austin (1865) 34 Beav. 257, 55 E.R. 634 at 263, 636 per Romilly M.R.; In Re Meades, Minors (1870) 5 Ir. Eq. 98 at 103 per Lord O'Hagan L.C.; Hawksworth v. Hawksworth (1871) L.R. 6 Ch. App. 539 at 542 per James L.J. and at 544 per Mellish L.J.; Andrews v. Salt (1873) L.R. 8 Ch. App. 622 at 639 per Mellish L.J.; In Re Agar-Ellis, Agar-Ellis v. Lascelles (1878) 10 Ch. D. 49 at 56 per Mallins V.C. and at 71-72 and 75-76 per James L.J.; In Re Agar-Ellis, Agar-Ellis v. Lascelles (1883) 24 Ch. D. 317 at 329 per Brett M.R.; In Re

Infants Act 1886 did not alter this position.[10]

In Ireland, many of the protections formerly afforded by both equity and common law are now provided by the provisions of the Constitution, and have consequentially acquired an elevated juridical status. The Constitution recognises the family as having a special place in the education of a child. The family is responsible for both the physical and intellectual nurture of the child.[11] The Constitution confers on parents the duty and right to provide for the religious, moral, intellectual, physical and social education of their children.[12]

There are two aspects to the parental right of education. First, parents can require that the child's education accords with their conscience and lawful purpose.[13] Second, parents have a choice as to how and

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Scanlan (1888) 40 Ch. D. 200 at 207-210 per Stirling L.J.; In Re Magees, Infants (1893) 31 L.R. Ir. 513 at 523-525 per Porter M.R.; In Re Violet Nevin [1891] 2 Ch. 299 at 316 per Kay L.J.; In Re McGrath [1892] 2 Ch. 496 at 508 per North J.; In Re McGrath [1893] 1 Ch. 143 at 148-149 per Lindley L.J.; In Re Newton (Infants) [1896] 1 Ch. 740 at 747-748 per Lindley L.J..

[10] England: In Re Scanlan (1888) 40 Ch. D. 200 at 211-214 per Stirling J..

[11] Ireland: Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 19 per Denham J..

[12] Ireland: Constitution of Ireland 1937, Art. 42.1; Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 19 per Denham J., at 36-37 per Murphy J. and at 41 per Lynch J..

[13] Ireland: Constitution of Ireland 1937, Art. 42.3.1. Canada: In R. v. Jones [1986] 31 D.L.R.(4th) 569 at 583 per Wilson J. who held that parents have a similar right under the Canadian Charter of Rights and Freedoms and at 596 per La Forest J., speaking for a number of judges who were willing to assume such a right exists.

where their child shall receive education. Parents may educate their child at home, in private schools, or in schools recognised or established by the State.[14]

The duty of parents is to provide according to their means for the religious, moral, intellectual, physical and social education of their child[15] and the child's natural and imprescriptible rights.[16] The aim of this duty is to enhance and not suppress the child's potential so that the child is qualified for such reasonable standard of life as an adult that the child is capable of, given appropriate education. Parents cannot refuse to exercise the inalienable right to educate their child.[17] In Meyer v. State of Nebraska[18] the United States Supreme Court held that corresponding to the right of control, it is the natural duty of the parent to give his or her

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[14] Ireland: Constitution of Ireland 1937, Art. 42.2; In Re Doyle, unreported, Supreme Court, 21 December, 1955 at 3-5 per Maguire C.J..

[15] Ireland: Constitution of Ireland 1937, Art. 42.1; In Re Article 26 and The School Attendance Bill 1942 [1943] I.R. 334 at 344-345 per O'Sullivan C.J.; Campaign to Separate Church and State Ltd. v. Minister for Education [1998] 3 I.R. 321 at 340-341 per Costello P. and at 357 per Barrington J.; Director of Public Prosecutions v. Best [1998] 2 I.L.R.M. 549 at 559 per Geoghegan J.; Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 19-21 per Denham J., at 36-37 per Murphy J. and at 41 per Lynch J..

[16] Ireland: Constitution of Ireland 1937, Art. 42.5.

[17] Ireland: O'Shiel v. Minister for Education [1999] 2 I.R. 321 at 347 per Laffoy J..

[18] United States: 262 U.S 390 (1923).

children education suitable to their station in life.[19]

The welfare model and the rights model provide that parents must act in the child's best interests when performing their duty and rights in relation to their child's education. Society has a greater understanding of child development and education. This knowledge assists in determining whether parents are or are not acting in the child's best interests when deciding on the child's education.

4.2. Duty of State to protect and provide for child

The welfare model and the rights model both provide that the State must protect and provide for the child's education.[20] It is in the State's interest that a child should be brought up properly and educated.[21] This derives from the parens patriae concept.[22]

The protection of the child's education arises where the parents actions or omissions threaten the child's

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[19] United States: ibid. at 400 per McReynolds J.; Bartels v. State of Iowa 262 U.S. 404 (1923) at 409 per McReynolds J. following Meyer v. State of Nebraska.

[20] United States: Wisconsin v. Yoder 406 U.S. 205 (1972) at 213 per Burger C.J. speaking for a majority of the Supreme Court. Canada: R. v. Jones [1986] 31 D.L.R.(4th) 569 at 592 per La Forest J., who held that the eduction of the young is particularly important and at 597 where La Forest J. held that there is a compelling public interest in the quality of education provided to children.

[21] United States: Pierce v. Society of Sisters 268 U.S. 510 (1925) at 534-535 per McReynolds J..

[22] England: Wellesley v. Duke of Beaufort (1828) 2 Bligh N.S. 124, 4 E.R. 1078 at 130-132, 1081 per Lord Redesdale; Hope v. Hope (1854) 4 De G. M. & G. 328, 43 E.R. 534 at 344, 540 per Cranworth L.C.; In Re Grimes (1877) 11 Ir. Eq. 465 at 470 per Ball L.C..

right to education. The Court of Chancery's parens patriae jurisdiction allowed the court to interfere with a child's education where the parent's decision posed a danger to the child's interests and welfare.[23] This could occur where a father sought to deprive a child of education that the child was enjoying or to change the child's religious education where the child had accepted the tenets of a particular faith.[24] The court would interview older children and consider their views.[25]

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[23] England: Creuze v. Hunter (1790) 2 Cox 242, 2 R.R. 38 at 243, 39 per Thurlow L.C.; Skinner v. Warner (1792) 2 Dick. 779, 21 E.R. 473 at 780, 474; Lyons v. Blenkin (1820) Jac. 245, 23 R.R. 38 at 255-257, 43 per Lord Eldon; Lord Talbot v. The Earl of Shrewsbury (1840) 4 Myl. & Cr. 672, 41 E.R. 259 at 686-688, 264 per Cottenham L.C.; In Re Browne, a minor (1852) 2 Ir. Ch. 151 at 159 per Smith M.R.; Stourton v. Stourton (1857) 8 De G. M. & G. 760, 44 E.R. 583 at 771-773, 588 per Turner L.J.; Davis v. Davis (1862) 10 W.R. 245, 125 R.R. 947 at 246, 949-950 per Woods V.C.; Hill v. Hill (1862) 31 L.J. Ch. 505, 133 R.R. 399 at 508, 403 per Woods V.C.; Austin v. Austin (1865) 34 Beav. 257, 55 E.R. 634 at 263, 636 per Romilly M.R.; In Re Meades, Minors (1870) 5 Ir. Eq. 98 at 103 per Lord O'Hagan L.C.; Hawksworth v. Hawksworth (1871) L.R. 6 Ch. App. 539 at 542 per James L.J. and at 544 per Mellish L.J.; Andrews v. Salt (1873) L.R. 8 Ch. App. 622 at 639 per Mellish L.J.; In Re Agar-Ellis, Agar-Ellis v. Lascelles (1878) 10 Ch. D. 49 at 56 per Mallins V.C. and at 71-72 and 75-76 per James L.J.; In Re Agar-Ellis, Agar-Ellis v. Lascelles (1883) 24 Ch. D. 317 at 329 per Brett M.R.; In Re Scanlan (1888) 40 Ch. D. 200 at 207-210 per Stirling L.J.; In Re Magees, Infants (1893) 31 L.R. Ir. 513 at 523-525 per Porter M.R.; In Re Violet Nevin [1891] 2 Ch. 299 at 316 per Kay L.J.; In Re McGrath [1892] 2 Ch. 496 at 508 per North J.; In Re McGrath [1893] 1 Ch. 143 at 148-149 per Lindley L.J.; In Re Newton (Infants) [1896] 1 Ch. 740 at 747-748 per Lindley L.J..

[24] England: Lyons v. Blenkin (1820) Jac. 245, 23 R.R. 38 at 263, 46 per Lord Eldon; Stourton v. Stourton (1857) 8 De G. M. & G. 760, 44 E.R. 583 at 771-773, 588 per Turner L.J.; Hawksworth v. Hawksworth (1871) L.R. 6 Ch. App. 539 at 542 per James L.J. and at 544 per Mellish L.J.; In Re Agar-Ellis, Agar-Ellis v. Lascelles (1883) 24 Ch. D. 317 at 333-334 per Cotton L.J..

[25] England: Witty v. Marshall (1841) 1 Y. & C.Ch. 68, 62 E.R. 794 at 73, 796 per Knight Bruce V.C.; Davis v. Davis (1862) 10 W.R. 245, 125 R.R. 947 at 246, 950 per Woods V.C..

The State's duty to protect a child's education is fulfilled by making education compulsory.[26] The Education and Maintenance of Pauper Children 1862 allowed the guardians of every parish to send orphan and deserted children under 14 to school.[27] The 1862 Act provided that a child should not be send to a school of a religion to which the child did not belong, or to a school espousing a religion to which the parent objected.[28] The Elementary Education in England and Wales Act 1870 required that children aged between five and 13 had to attend a State funded school, unless parents had a reasonable excuse, including that the child was already receiving appropriate education.[29] The Elementary Education Act 1876 established that it was the duty of the parent of every child to cause such child to receive efficient elementary instruction in reading, writing and arithmetic.[30] Parents could be punished for failing in this duty[31] and a court could order a parent to require

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[26] United States: In Meyer v. State of Nebraska 262 U.S 390 (1923) at 400 per McReynolds J. noting that nearly all States had compulsory education laws. Canada; R. v. Jones [1986] 31 D.L.R.(4th) 569 at 592 and 594 per La Forest J. and at 597 per Dickson C.J., Beetz J., McIntyre J., Lamer J. and Le Dain J..

[27] England: Education and Maintenance of Pauper Children 1862, s. 1 and s. 6.

[28] England: Education and Maintenance of Pauper Children 1862, s. 7 and s. 9.

[29] England: Elementary Education in England and Wales Act 1870, s. 74.

[30] The standard of proficiency is the standard of reading writing and arithmetic fixed by the Code of 1876.

[31] England: Elementary Education Act 1876, s. 4.

their child to attend school.[32] The court could order the child to attend an industrial school where the parent disobeyed the order requiring a child to attend a school.[33] The 1876 Act precluded the employment of children, unless the child attended a certified school, or there was a certificate that the child was proficient in reading, writing and arithmetic.[34] The Irish Education Act 1892 imposed a similar duty on parents to send their child to school.[35] The School Attendance Act 1926 and Education (Welfare) Act 2000 impose similar duties on parents.

The Constitution of Ireland 1937 allows parents to educate their child at home, in private schools, or in schools recognised or established by the State.[36] However, the duty to educate the child is shared between the parents and the State.[37] In Pierce v. Society of Sisters[38] the United States Supreme Court held that the State does not have a general power to standardise its children by forcing them to accept instruction in State

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[32] England: Elementary Education Act 1876, s. 11.

[33] England: Elementary Education Act 1876, s. 12.

[34] England: Elementary Education Act 1876, s. 6.

[35] England: Irish Education Act 1892, s. 1(1).

[36] Ireland: Constitution of Ireland 1937, Art. 42.2. In Re Doyle, unreported, Supreme Court, 21 December, 1955 at 4-5 per Maguire C.J..

[37] Ireland: S.C. v. Minister for Education [1997] 2 I.L.R.M. 134 at 147 per McGuinness J.; O'Shiel v. Minister for Education [1999] 2 I.R. 321 at 345-346 per Laffoy J..

[38] United States: 268 U.S. 510 (1925).

schools.[39] Such a power would infringe the parental right to determine the child's education. The welfare model requires the State to protect the integrity of the family unit, and the duties and rights of parents.[40] The Irish Constitution provides that the family is the primary and natural educator of the child. The State guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious, moral, intellectual, physical and social education of their children.[41]

The Irish Constitution provides that the State as guardian of the common good shall require in view of actual conditions that the children receive a certain minimum education, moral, intellectual, and social.[42] The Constitution does not define what constitutes this minimum education. The Oireachtas is not obliged to define, what constitutes this minimum education but may do so. This is provided that the Oireachtas does not

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[39] United States: ibid. at 535 per McReynolds J. who held that there is a fundamental theory of liberty upon which all Governments in the Union repose excluding any general power of the State to standardise its children by forcing them to accept intrusions from public teachers only.

[40] Ireland: Constitution of Ireland 1937, Art. 41.1.1.

[41] Ireland: Constitution of Ireland 1937, Art. 42.1.

[42] Ireland: Constitution of Ireland 1937, Art. 42.3.2. In Re Article 26 and The School Attendance Bill 1942 [1943] I.R. 334 at 344-345 per O'Sullivan C.J.; Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 21 per Denham J., at 29-31 per Keane J. and 36, 38-39, 40 per Murphy J..

require more than the minimum education.[43] In In Re Article 26 and The School Attendance Bill 1942[44] the Supreme Court held that the Constitution does not allow the State to regulate how or where the minimum attainment should be met. Parents are entitled to decide on the manner in which the education is being given and received, provided the child receives education of at least the minimum standard.[45] In Director of Public Prosecutions v. Best[46] Keane J. in the Supreme Court found that this approach was unduly narrow and should not be followed because the child's right to education[47] would be seriously violated if the State could not intervene.[48]

The Irish courts have interpreted the "minimum education"[49] as a minimum standard of elementary

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[43] Ireland: In Re Article 26 and The School Attendance Bill 1942 [1943] I.R. 334 at 345 per O'Sullivan C.J..

[44] Ireland: [1943] I.R. 334.

[45] Ireland: ibid. at 346 per O'Sullivan C.J..

[46] Ireland: [2000] 2 I.L.R.M. 1.

[47] Ireland: G. v. An Bord Uchtala [1980] I.R. 32 at 44 per Finlay P., at 55-56 per O'Higgins C.J. and at 79 per Walsh J.; Crowley v. Ireland [1980] I.R. 102 at 122 per O'Higgins C.J. holding the right of the child to education was correlative to the State's duty to educate; O'Donoghue (a minor) v. Minister for Health [1996] 2 I.R. 20 at 65 per O'Hanlon J..

[48] Ireland: Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 33 per Keane J..

[49] Ireland: In D.P.P. v. Best [1998] 2 I.L.R.M. 549 at 558 per Geoghegan J. holding that the use of the word "minimum" does not mean some lowest common denominator, but imports the attainment of any reasonable standard of elementary education of general application.

education of a general character that would include a basic level of literacy and numeracy.[50] This supports the narrow view of education encapsulated in the welfare model, which essentially views a child as being skill trained and socialised by the educational process. The State sponsors a primary and secondary school system and determines the curriculum for this system.

However, the rights model commences with a consideration of the intellectual and other capacities of the individual child, and how they may best be fostered in order to allow the child to reach his or her full potential.[51] The minimum education, moral, intellectual and social is not necessarily equivalent to the primary school curriculum.

It is impossible to give a universal and uniform definition of minimum education that will apply to every

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[50] Ireland: Constitution of Ireland 1937, Art. 8.1 provides that Irish is the first national language. A question has been raised as to whether a child should be taught Irish in order to receive the minimum education. In O'Shiel v. Minister for Education [1999] 2 I.R. 321 at 361 per Laffoy J. it was held that the State's obligation to provide free primary education mandates the teaching of Irish. However, in Director of Public Prosecutions v. Best Geoghegan J. in the High Court ([1998] 2 I.L.R.M. 549 at 560) and Keane J. in the Supreme Court ([2000] 2 I.L.R.M. 1 at 31) held that the teaching of the Irish language was not essential to the constitutional minimum.

[51] Ireland: Ryan v. Attorney General [1965] I.R. 294 at 350 per O'Dalaigh C.J.; O'Donoghue (a minor) v. Minister for Health [1996] 2 I.R. 20 at 65 per O'Hanlon J.; F.N. (a minor) v. Minister for Education and Ireland [1995] 1 I.R. 409 at 415-416 per Geoghegan J.; S.C. v. Minister for Education [1997] 2 I.L.R.M. 134 at 143-144 per McGuinness J.; Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 20 per Denham J. and at 41 per Lynch J.. However, in Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 40 Murphy J. viewed the minimum education as a very basic standard indeed.

generation of children. I submit that there are four reasons for this.

First, the child's individual circumstances must be taken into account, such as the child's development, aptitudes and abilities with a view to a determination of the child's potential. The concept of education is broader than solely intellectual development but will involve social, moral and religious considerations. The minimum education must be conducive to the child achieving intellectual and social development and not such as to place the child in a discriminatory position.[52]

Second, actual conditions must be considered when defining the minimum education. "Actual conditions" means the conditions in the community, the community's scheme of education, the primary school curriculum, the family's circumstances, the rights of parents to educate their child, society's emphasis on academic success and the common good.[53]

Third, the Constitution is a living instrument and it must be construed as of now. What is considered minimum education changes with our better understanding of children's education potential[54] and society's

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[52] Ireland: Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 21 per Denham J..

[53] Ireland: Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 18 and 21 per Denham J. and at 46 per Barron J..

[54] Ireland: O'Donoghue (a minor) v. Minister for Health [1996] 2 I.R. 20 at 65 per O'Hanlon J. where he explained that the educational potential of children can vary from child to

demands, for example the need for computer literacy.[55]

Fourth, the Constitution requires the State to guarantee to respect the inalienable right and duty of parents to provide "according to their means" for the education of their children. However, the means of parents may vary from family to family. This is not the only consideration for the court. The court will consider the child's right including the right of the child to reach his or her potential. An education that hinders or restricts the child's potential may establish circumstances where the rights of the child and the interest of the common good outweigh considerations of the family and parental rights.

The State's obligation to ensure that a child receives a minimum education allows for laws requiring a child to attend a State recognised school, or for parents to establish that their child is receiving the minimum education. The State is the guardian of the common good and must protect the child's right to a certain minimum education. The burden of proof is on the parents to prove that the child is receiving a minimum education.[56] The

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child and at 69-70 per O'Hanlon J., who held that there was a continuous obligation on the State to modify teaching techniques in light of ongoing research.

[55] Ireland: Director of Public Prosecutions v. Best [1998] 2 I.L.R.M. 549 at 556 per Geoghegan J.; Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 18 per Denham J. and at 45-46 per Barron J.. In Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 40 per Murphy J. holding that the concept of what constitutes basic education changes very slowly.

[56] Ireland: School Attendance Act 1926, s. 18(2).

imposition of this burden of proof on the parents is appropriate. The matters which the parents must prove are within their knowledge as the child's parents.

In addition to this duty, the State may be obliged to supply the place of parents where the parents for physical or moral reasons fail in their duty towards their child but always with due regard for the natural and imprescriptible rights of the child.[57] A failure does not arise where it is due to the parents' financial circumstances or a difference of opinion as to what an appropriate method or standard of education might be. In Wisconsin v. Yoder[58] the United States Supreme Court held that there is no doubt as to the power of a State to impose reasonable regulations for the control and duration of basic education and funding of a public school system.[59] However the State's interest is not totally free from a balancing process when it impinges on

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[57] Ireland: Constitution of Ireland 1937, Art. 42.5. In Re Article 26 and The School Attendance Bill 1942 [1943] I.R. 334 at 344 O'Sullivan C.J.; G. v. An Bord Uchtala [1980] I.R. 32 at 56 per O'Higgins C.J.; O'Sheil v. Minister for Education [1999] 2 I.R. 321 at 345-346 per Laffoy J.; Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 38 per Murphy J.;

[58] United States: 406 U.S. 205 (1972) at 213-214 per Burger C.J. speaking for a majority of the Supreme Court.

[59] United States: Meyer v. State of Nebraska 262 U.S. 390 (1923) at 400-402 per McReynolds J.; Pierce v. Society of Sisters 268 U.S. 510 (1925) at 534-535 per McReynolds J.; Epperson v. Arkansas 393 U.S. 97 (1968) at 103-107 per Fortas J. who held that the right to prescribe the curriculum for public schools does not carry with it the right to prohibit the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment.

fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children. Parens patriae is not so wide as to interfere with religious freedoms and the role of parents in the upbringing of their children. The United States Constitution prohibits an established religion. The United States Supreme Court has struck down laws relating to schools and education that directly or indirectly support or oppose religious activities or institutions.[60]

The welfare model and the rights model each require the State to provide for children's education. However the welfare model and the rights model potentially diverge about the purpose of this education. Parents may be unable to fund the educational services necessary to develop the child's potential. The State is obliged to provide the necessary services considering the benefit that accrues to the State from a child who has the capacity to live in a civilised society.

The Constitution of Ireland 1937 provides that the

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[60] United States: In Everson v. Board of Education of Education of Ewing TP. et al. 330 U.S. 1 (1947), the Supreme Court found that the use of public money to pay bus fares for students attending parochial schools violated the prohibition of an established religion. McCollum v. Board of Education 333 U.S. 203 (1948). In Engel v. Vitale 370 U.S. 421 (1962), the Supreme Court held that a prayer composed by State officials to further religious beliefs breached the parental right to religious freedom.

State must provide for free primary education.[61] The State cannot insist that parents must avail of this education.[62] The United States Supreme Court held that the federal constitution does not confer on children a right to education. Nevertheless, the court held that children have a proprietary interest in education and was not like any other security benefit.[63]

Education may be interpreted in one of two ways, either narrowly, as scholastic education, or more broadly, as enabling the achievement of personal potential. In Ryan v. Attorney General[64] the High and Supreme Courts took the narrower approach. However, in the Supreme Court, O'Dalaigh C.J. adopted the wider definition. O'Dalaigh C.J. explained that education was the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral.[65] The High Court reconsidered

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[61] Ireland: Constitution of Ireland 1937, Art. 42.4.

[62] Ireland: Crowley v. Ireland [1980] I.R. 102 at 126 per Kenny J.; O'Shiel v. Minister for Education [1999] 2 I.R. 321 at 345-347 per Laffoy J.; Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 38 per Murphy J..

[63] United States: San Antonio Independent School District et al. v. Rodriquez 411 U.S. 1 (1973) at 35 per Powell J.; Plyler v. Doe 457 U.S. 202 (1982) at 221 per Brennan J. and at 230 per Marshall J. holding that a child's interest in education was fundamental.

[64] Ireland: [1965] I.R. 294.

[65] Ireland: Ryan v. Attorney General [1965] I.R. 294 at 310 per Kenny J. defined education as scholastic and at 350 per O'Dalaigh C.J. defined education as essentially the teaching and training of a child to make the best possible use of the child's inherent capacities. In Landers v. Attorney General (1972) 109

this issue in O'Donoghue (a minor) v. Minister for Health.[66] There, a mentally handicapped child claimed that the State was obliged to provide an educational regime that could not be described as scholastic.

In the High Court, O'Hanlon J. questioned whether the education sought for the plaintiff could be regarded as "primary education". O'Hanlon J. found that the dictionary definition of education as "the bringing up or training of a child". O'Hanlon J. considered the term "primary" and the Irish term "bun-oideachas".[67] This translates as "principal advice, instruction or teaching".[68] O'Hanlon J. adopted O'Dalaigh C.J.'s approach in Ryan.[69] O'Hanlon J. held that there is a constitutional obligation imposed on the State to give each child such advice, instruction and teaching as will enable that child to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these may be[70].[71] The

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I.L.T.R. 1 at 5 per Finlay J. held that there was no inconsistency between the definition of education adopted by Kenny J. and O'Dalaigh C.J..

[66] Ireland: [1996] 2 I.R. 20.

[67] Ireland: Constitution of Ireland 1937, Art. 25.5.4 provides that the Irish text of the Constitution is supreme where there is any conflict between the text of the Constitution in Irish and its English translation.

[68] Ireland: O'Donoghue (a minor) v. Minister for Health [1996] 2 I.R. 20 at 64 per O'Hanlon J..

[69] Ireland: [1965] I.R. 294 at 350 per O'Dalaigh C.J..

[70] Ireland: O'Donoghue (a minor) v. Minister for Health [1996] 2 I.R. 20 at 65 per O'Hanlon J..

curriculum advocated for schools for profoundly mentally handicapped children was directed towards the promotion of the child's physical, intellectual, emotional, social, moral and aesthetic development. The education of profoundly handicapped children could, accordingly correctly be described as "primary education" within the meaning of the Constitution.[72] The facilities which had been provided to the applicant in this cases were inadequate, having regard, inter alia, to the pupil/teacher ratio, the hours of instruction, the age of commencement, continuity and duration of education, and that the said facilities, could not, accordingly, be regarded as meeting the State's obligations to provide the applicant with free primary education. The High Court decided that in future the pupil/teacher ratio was to be 6:1 and two child care assistants per class. O'Hanlon J. held that the child's constitutional right to primary education necessitated the provision of full time continuous education. O'Hanlon J. held that there was an ongoing obligation to respond to research about new educational techniques, and modify its practices

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[71] Ireland: O'Hanlon J.'s definition has been adopted in subsequent High Court cases: F.N. (a minor) v. Minister for Health and Ireland [1995] 1 I.R. 409 at 415-416 per Geoghegan J.; G.L. v. (a minor) v. Minister for Justice, Minister for Education, Minister for Health and Ireland, unreported, High Court, 24 March, 1995 at 4 per Geoghegan J.; S.C. v. Minister for Education [1997] 2 I.L.R.M. 134 at 143-144 per McGuinness J.; Sinnott (A person of unsound mind) and Sinnott v. Minister for Education, Ireland and Attorney General, unreported, High Court, 5 October, 2000 at 33, 39 and 43 per Barr J..

[72] Ireland: O'Donoghue (a minor) v. Minister for Health [1996] 2 I.R. 20 at 66-67 per O'Hanlon J..

accordingly.[73] This definition highlights the paternalistic role of judges. It should be noted that this definition applies equally to children with special needs and those with gifts or talents. O'Hanlon J. did not place any limitations on the State's obligation.

In O'Shiel v. Minister for Education[74], Laffoy J. indirectly imposed limitations on the State's duty by holding that primary education meant the teaching and training of children aged from four or five to 12, 13, and 14.[75] However, in Sinnott (A person of unsound mind) and Sinnott v. Minister for Education, Ireland and Attorney General[76] Barr J. held that the definitions of education adopted in O'Donoghue (a minor) v. Minister for Health[77] and Ryan v. The Attorney General[78] did not import an age limitation.[79] Barr J. decided that the State's constitutional obligation to provide for primary education of the grievously disabled is "need" and not "age". The definition of primary education adopted in Ryan, O'Donoghue, and Sinnott highlights the caring

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[73] Ireland: ibid. at 69-70 per O'Hanlon J..

[74] Ireland: [1999] 2 I.R. 321.

[75] Ireland: [1999] 2 I.R. 321 at 327-328 per Laffoy J..

[76] Ireland: Unreported, High Court, Barr J., 5 October, 2000.

[77] Ireland: [1996] 2 I.R. 20 at 65 per O'Hanlon J..

[78] Ireland: [1965] I.R. 294 at 310 per Kenny J. and at 350 per O'Dalaigh C.J..

[79] Ireland: Sinnott (A person of unsound mind) and Sinnott v. Minister for Education, Ireland and Attorney General, unreported, High Court, 5 October, 2000 at 49-50 per Barr J..

paternalistic role of judges. O'Donoghue and Sinnott demonstrate the willingness of the courts to determine what is necessary to satisfy the parens patriae duty of the State to provide for children's education.

The State's duty to provide free primary education is discharged by giving support to schools or establishing and funding a primary school system.[80] There is no constitutional duty on the State to provide education directly. The State may give reasonable aid to private and corporate educational initiatives. This would include subsidisation in the erection and maintenance of school buildings, day-to-day costs in running school and, prescribing and enforcing standards through provision of a curriculum.[81] When the State relies on other bodies to provide the free primary education, the State retains primary responsibility for the nature and quality of the educational service which is provided on the State's behalf. If that were not so then the State could shelter behind third party incompetence and seek to avoid constitutional responsibility for not providing a citizen with appropriate primary education. The State can directly provide educational facilities or institutions, where the public good requires it.

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[80] Ireland: Constitution of Ireland 1937, Art. 42.4.

[81] Ireland: Crowley v. Ireland [1980] I.R. 102 at 122-123 per O'Higgins C.J. and at 126 per Kenny J.; O'Shiel v. Minister for Education [1999] 2 I.R. 321 at 347 per Laffoy J. approving of the Supreme Court's approach in Crowley v. Ireland.

In O'Shiel v. Minister for Education[82] in the High Court Laffoy J. held that the State's duty to provide for free primary education is not satisfied by funding a single system and offering it to parents on a "take it or leave it" basis.[83] The State must have regard to and accommodate the expression of conscientious choice and lawful parental preference. However, Laffoy J. held that the State does not have to accede to an application for financial aid from any group of parents united in their choice. Laffoy J. held that the State must balance its duty to provide free primary education and respect parental choice by establishing rational criteria for State funding. Laffoy J. held that the court was entitled to determine whether such criteria accorded with the State's constitutional duty to provide for free primary education.[84]

The State may not discriminate against schools of different denominations. The State cannot require parents to send their children to schools established or designated by the State in violation of those parents' conscience and lawful preference.[85] A school in receipt of public funds may not compel a pupil to receive

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[82] Ireland: [1999] 2 I.R. 321.

[83] Ireland: ibid. at 347 per Laffoy J..

[84] Ireland: ibid. at 348 per Laffoy J..

[85] Ireland: In Campaign to Separate Church and State Ltd. v. Minister for Education [1998] 3 I.R. 321 at 356 per Barrington J. holding that every child irrespective of his or her faith has an equal entitlement to attend a school receiving State funds.

religious instruction[86] at that school.[87]

4.3. Welfare rights of child

Like the other welfare rights of the child, the child's right to education is not expressly stated in the Constitution.[88] This right has been interpreted either as a correlation of the parental duty to provide for the child's education,[89] the State's duty to provide for free primary education[90] to which the family as a unit benefits[91], or, as an unenumerated right of the child

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[86] Ireland: In Campaign to Separate Church and State Ltd. v. Minister for Education [1998] 3 I.R. 321 at 357 per Barrington J., in the Supreme Court, holding that religious education had a wider meaning than that of religious instruction. Barrington J. believed that a child attending a school of a different denomination to his own will still be influenced by the religious ethos of the school, even though this child does not attend classes of religious instruction.

[87] Ireland: Constitution of Ireland 1937, Art. 44.2.4; Education Act 1998, s. 30(2)(e) provides that the Minister cannot require a student to attend instruction in any subject which is contrary to the conscience of the student's parents.

[88] Ireland: G. v. An Bord Uchtala [1980] I.R. 32 at 55-56 per O'Higgins C.J..

[89] Ireland: G. v. An Bord Uchtala [1980] I.R. 32 at 44 per Finlay P., at 55-56 per O'Higgins C.J. and at 79 per Walsh J.; Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 19 per Denham J. approving of O'Higgins C.J. in G. v. An Bord Uchtala, at 37 per Murphy J. approving of Walsh J. in G. v. An Bord Uchtala and at 41 per Lynch J..

[90] Ireland: Crowley v. Ireland [1980] I.R. 102 at 121-122 per O'Higgins C.J.; Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 20 per Denham J..

[91] Ireland: Sinnott (A person of unsound mind) and Sinnott v. Minister for Education, Ireland and Attorney General, unreported, High Court, 5 October, 2000 at 57 per Barr J..

independent of the parents or State's duty.[92] The rights model requires that the rights must be seen as an independent right of the child.

The child's right to free primary education allows each child to receive such advice, instruction and teaching as will enable the child to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be.[93] There is a potential conflict between the ability of the State to vindicate this right of the child and the constitutional limitation on the State to require that a child only receive a certain minimum education. Parents may provide this minimum education but be unwilling or unable to provide the education necessary for the child to reach his or her potential. Paternalism means that the courts protect the rights of the family at the expense of the child's potential. The rights model requires a resolution of this conflict by equating the minimum education with an education necessary for child to make the best possible use of his or her inherent and potential capacities. The child's education must be such that the child can develop his or her capabilities and skills to the maximum and hasten the process of social integration and individual

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[92] Ireland: Constitution of Ireland 1937, Art. 40.3.1; Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1 at 41 per Lynch J..

[93] Ireland: O'Donoghue (a minor) v. Minister for Health [1996] 2 I.R. 20 at 65 per O'Hanlon J..

development.[94]

4.4. Civil rights of child

The welfare model and the rights model provide that a child is entitled to civil constitutional rights such as the rights to bodily integrity, privacy, freedom of expression and association. A child does not shed his or her constitutional rights at the school gates.[95]

4.5. Conflicting rights of child

The welfare model and the rights model each recognise that there may be a conflict between the child's right to education and civil constitutional rights such as right to liberty, freedom of expression and fair procedures. Neither the welfare model nor the rights model can consider this conflict in isolation in schools where the rights of other children are involved.[96]

The resolution of these conflicts lies with school management who can discipline the child. The school's ability to discipline the child originated in the common

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[94] Ireland: O'Donoghue (a minor) v. Minister for Health [1996] 2 I.R. 20 at 65 per O'Hanlon J. approved of in Best v. D.P.P. [2000] 2 I.L.R.M. 1 at 41 per Lynch J..

[95] United States: Tinker v. Des Moines School District 393 U.S. 503 (1969) at 506 per Fortas J.; Goss v. Lopez 419 U.S. 565 (1975) at 574 per White J.; Board of Education v. Pico 457 U.S. 853 (1982) at 865 per Brennan J.; Bethel School District No.403 v. Fraser 478 U.S. 675 (1986) at 680 per Burger C.J.; Hazelwood School District v. Kuhlmeier 484 U.S. 260 (1988) at 266 per White J..

[96] United States: Bethel School District No.403 v. Fraser 478 U.S. 675 (1986) at 681 per Burger C.J. where a student had used a sexual metaphor during a speech to a school assembly.

law. The common law allows parents to inflict moderate and reasonable punishment on his or her child for the purpose of disciplining the child.[97] The common law allows parents to delegate this ability to the child's schoolmaster.[98] The law presumed that where a parent sent a child to a school, the parent gave to that school the authority to administer moderate and reasonable punishment.[99] The school's authority was the same as that of the parent, unless the parent expressly limited the school's ability to discipline the child.[100] The welfare

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[97] England: R. v. Hopley (1860) 2 F. & F. 202, 175 E.R. 1024 at 206, 1026 per Cockburn C.J.; Scorgie v. Lawrie (1883) 20 S.L.R. 397 at 399 per Lord Justice-Clerk and per Lord Young; Children Act 1908, s. 37 preserves the right of any parent to administer punishment on a child or young person.

[98] England: Blackstone (1788) Bk. 1 Chap. 16 p. 453 states that a father could delegate part of his parental authority during his lifetime to the tutor or schoolmaster of his child, who is then in loco parentis, and has such a portion of the power of the parent committed to his charge viz that of restraint and correction; R. v. The Inhabitants of Lytchet Matraverse (1827) 7 B. & C. 226, 108 E.R. 707 at 231-232, 709-710 Bayley J..; R. v. Hopley (1860) 2 F. & F. 202, 175 E.R. 1024 at 206, 1026 per Cockburn C.J.; Fitzgerald v. Northcote (1865) 4 F. & F. 656, 176 E.R. 734 at 689-690, 749 per Cockburn C.J.; Cleary v. Booth [1893] 1 Q.B. 465 at 468 per Collins J.. The schoolmaster's ability to discipline a student could be delegated to a teacher: Mansell v. Griffin [1908] 1 K.B. 160 at 166-167 per Phillimore J. and at 169 per Walton J. or a school prefect: In Re Basingstoke School (1877) 41 J.P. 118 at 119 per Mellor J.. Ireland: Murtagh v. St. Emer's National School [1991] I.L.R.M. 549 at 553 per Hederman J.; Student A. and Student B. v. Dublin Secondary School, unreported, High Court, 25 November, 1999 at 4 per Kearns J..

[99] England: Mansell v. Griffin [1908] 1 K.B. 160 at 169 per Walton J..

[100] England: In Hunter v. Johnson (1884) 13 Q.B.D. 225, a school detained a child for not doing his home work. The mother had informed the school that the child would not be doing homework. In the High Court, Matthew J. at 227 held that the facts made out a case of civil assault.

model provides that the school's ability to discipline children arises from parental delegation. However, the rights model views a school's ability to discipline a child arising from the child's right to education and to the State's duty to ensure that all children receive a minimum.[101] The rights model provides that the State and school officials have authority to prescribe and control conduct in the schools, consistent with fundamental constitutional safeguards.[102]

The courts sought to prevent abuse of such discipline powers by requiring that it may only be used if it was in the child's welfare, and that it must be moderate and reasonable.[103] Corporal punishment has fallen into desuetude, as a result of changing social, educational and legal norms.[104] This leaves suspension

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[101] United States: Ingraham v. Wright 430 U.S. 651 (1977) at 670 per Powell J. speaking for a majority of the Supreme Court; New Jersey v. T.L.O. 469 U.S. 325 (1985) at 339-340 per White J..

[102] United States: Meyer v. State of Nebraska 262 U.S. 390 (1923) at 402 per McReynolds J. holding that the State has the power to compel attendance at school and to make reasonable regulations for all schools including prescribing a curriculum; Bartels v. State of Iowa 262 U.S. 404 (1923) at 409 per McReynolds J.; Tinker v. Des Moines School District 393 U.S. 503 (1969) at 507 per Fortas J..

[103] England: R. v. Hopley (1860) 2 F. & F. 202, 175 E.R. 1024 at 206, 1026 per Cockburn C.J.; Fitzgerald v. Northcote (1865) 4 F. & F. 656, 176 E.R. 734 at 689-690, 749 per Cockburn C.J.; In Re Basingstoke School (1877) 41 J.P. 118 at 119 per Mellor J.; Cleary v. Booth [1893] 1 Q.B. 465 at 468 per Collins J..

[104] England: Children Act 1908, s. 37 preserves the right of a teacher to administer punishment on a child or young person. Ireland: Non-Fatal Offences against the Person Act 1997, s. 24 abolished the rule of law under which teachers are immune from criminal liability in respect of physical chastisement of pupils.

and expulsion as the most draconian penalties available to schools. However, discipline must be considered in light of the Constitution not the common law.

The rights model finds that school discipline may constitute interference with the child's right to education.[105] The interference with fundamental rights will only normally occur where the rights holder has been afforded fair procedures and due process. The parens patriae concept may result in a court discounting the significance to be attached to the interference with the child's right to education, fair procedures and due process. This occurred in Murtagh v. St. Emer's National School.[106] There, in the Supreme Court, Hederman J. held that a three day suspension was not a matter for judicial review. The suspension did not determine or adjudicate upon rights, or impose liabilities. It was the application of disciplinary procedures, inherent in school authorities, entrusted to them by the parents who had given them the custody of their children. It is no more reviewable than the imposition of detention on a child. Hederman J. held the manner in which discipline is

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This brings Irish law into conformity with the European Convention of Human Rights. In Campbell and Cosans v. The United Kingdom (1982) 4 E.H.R.R. 293 at 301-303, the European Court of Human Rights held that the use of corporal punishment in schools violates Art. 3 of the European Convention of Human Rights.

[105] Ireland: Education (Welfare) Act 2000, s. 24 requires a recognised school to contact a educational welfare officer before expelling a student. The educational welfare officer must make all reasonable efforts to ensure that such a child still receives the prescribed minimum education.

[106] Ireland: [1991] I.L.R.M. 549.

carried out may give rise to private law actions.[107] However, the Supreme Court's approach in Murtagh has been rejected in other cases which recognise that a child has a right to fair procedures that must be observed by a school when imposing school discipline.[108] The failure of a body to observe fair procedures is justiciable.

The concept of fair procedures in Irish law alters depending on the nature of the tribunal, the matter being considered and the consequence of an adverse decision on the person concerned.[109] There are a number of aspects to be considered: the school's disciplinary code, the investigation, hearing and sanctions.

The rights model requires that a school's disciplinary code should establish generally what conduct constitutes a breach of the code and what sanctions may be imposed for infractions of the code. However, the code does not have to be as detailed as a criminal statute.[110] Students should be made aware of the disciplinary rules

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[107] Ireland: ibid. at 553 per Hederman J..

[108] England: In Fitzgerald v. Northcote (1865) 4 F. & F. 656, 176 E.R. 734 at 690-691, 750 per Cockburn C.J. holding that a school's authority to discipline a student must not be exercised arbitrarily. Cockburn C.J. found that the school had acted arbitrarily by not carrying out an inquiry into the alleged incident before punishing the student.

[109] Ireland: Flanagan v. U.C.D. [1988] I.R. 724 at 730-731 per Barron J..

[110] United States: Bethel School District No.403 v. Fraser 478 U.S. 675 (1986) at 686 per Burger C.J. speaking for a majority of the court.

and policy.[111] The investigation may be informal and the school does not have to adopt the same procedures as a court of law.[112] The Irish courts are reluctant to interfere with the school authorities' investigation or hearing when the school has acted fairly.[113] A greater willingness of the court to interfere might damage the school's capacity to discipline its students. The Irish courts require the school to act in a quasi-judicial manner affording fair procedures where there is the possibility of suspension or expulsion,[114] particularly

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[111] Ireland: Student A. and Student B. v. Dublin Secondary School, unreported, High Court, 25 November, 1999 at 11 per Kearns J.; Education (Welfare) Act 2000, s. 23 requires the board of management of a school to draft a code of behaviour. This code must contains the behaviour expected of students, sanctions for breaches of the code, fair procedures and informing students and parents of this code. Education Act 1998, s. 15(2)(d) obliges the board of management to publish the school's policy in relation to the expulsion and suspension of students.

[112] Ireland: The State (Smullen) v. Duffy [1980] I.L.R.M. 46 at 51 per Finlay P.; Wright (a minor) v. The Board of Management of Gorey Community School, unreported, High Court, 28 March, 2000, at 10 and 11 per O'Sullivan J..

[113] Ireland: The State (Smullen) v. Duffy [1980] I.L.R.M. 46 at 51-52 per Finlay P.; Murtagh v. St. Emer's National School [1991] I.L.R.M. 549 at 553 per Hederman J. and at 555 per McCarthy J.; Student A. and Student B. v. Dublin Secondary School, unreported, High Court, 25 November, 1999 at 11 per Kearns J.; Wright (a minor) v. The Board of Management of Gorey Community School, unreported, High Court, 28 March, 2000 at 11 per O'Sullivan J..

[114] England: In Fitzgerald v. Northcote (1865) 4 F. & F. 656, 176 E.R. 734 at 676, 744 per Cockburn C.J. stating that there was an obvious distinction between the case of a school boy and that of a young man finishing his education in the position of a private pupil. The younger child may be subject to greater personal restraint and punishment than would be fit and proper for the young man. Ireland: Student A. and Student B. v. Dublin Secondary School, unreported, High Court, 25 November, 1999 at 15 per Kearns J.; Wright (a minor) v. The Board of Management of Gorey Community School, unreported, High Court, 28 March, 2000 at 11 and 15 per O'Sullivan J..

for a final year student undertaking public examinations. During an investigation or hearing, a student accused of wrongdoing should be given a reasonable opportunity to hear the allegations, an account of the evidence against him, to respond to the evidence with evidence of his own and address the deciding body. A student must be given notice of the charges and the gist of the evidence upon which they are based, so as to enable a considered response to be given, if necessary after taking legal advice.[115]

The courts recognise that a school has a duty to maintain discipline and safety within the school to protect other students' interests.[116] An immediate suspension without notice or fair procedures may be necessary where there is a danger to life and property or to maintain discipline within a school.[117]

Rules of natural justice require that a student or a student's parents must be given an opportunity as making submission as to penalty where a long term suspension or

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[115] Ireland: McAuley v. Commissioner of An Garda Siochana [1996] 3 I.R. 208 at 230-231 per Hamilton C.J.; Student A. and Student B. v. Dublin Secondary School, unreported, High Court, 25 November, 1999 at 12 per Kearns J.; Wright (a minor) v. The Board of Management of Gorey Community School, unreported, High Court, 28 March, 2000 at 11 per O'Sullivan J..

[116] Ireland: The State (Smullen) v. Duffy [1980] I.L.R.M. 46 at 51 per Finlay P.; Wright (a minor) v. The Board of Management of Gorey Community School, unreported, High Court, 28 March, 2000 at 10 per Wright J..

[117] Ireland: The State (Smullen) v. Duffy [1980] I.L.R.M. 46 at 51 per Finlay P.; Student A. and Student B. v. Dublin Secondary School, unreported, High Court, 25 November, 1999 at 8 and 15 per Kearns J..

expulsion of a pupil is being considered.[118] The penalty imposed on a student must be proportionate to the student's infraction of the school's disciplinary code, including considering how the student's actions impacted on the safety and welfare of other students.[119]

The United States Supreme Court has adopted a similar approach in a case involving a ten day suspension. In Goss v. Lopez[120] White J. held that public education cannot be withdrawn from students because of misconduct without an inquiry conducted in accordance with lawful procedures. The State's extensive power to prescribe and enforce standards of conduct in its schools must be exercised consistently and within constitutional safeguards. White J. held that a recorded suspension could seriously damage the student's standing with fellow students and teachers as well as later employment

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[118] Ireland: Student A. and Student B. v. Dublin Secondary School, unreported, High Court, 25 November, 1999 at 12 and 15 per Kearns J..

[119] Ireland: Student A. and Student B. v. Dublin Secondary School, unreported, High Court, 25 November, 1999 at 8 per Kearns J.. Education Act 1998, s. 28 allows the Minister of Education and Science the ability to prescribe procedures in relation to internal appeals against board of management's decisions, the procedures to be used in hearing grievances against such decisions and where necessary what appropriate remedial action can be taken. Education Act 1998, s. 29 grants a right of an appeal against the school's decision to expel or suspend a student to the Secretary General of the Department of Education and Science, provided that all internal appeal's procedures have been exhausted. The Minister of Education and Science may establish procedures to hear and determine such an appeal. The procedures are designed to ensure that the appeal does not become concerned with procedures, and to ensure that the appeal is promptly determined.

[120] United States: 419 U.S. 565 (1975) at 576-584 per White J. speaking for a majority of the Supreme Court.

opportunities.

White J. held that so long as there has been a property detriment which is not de minimis, its gravity is irrelevant to the question whether account must be taken of the due process clause. White J. held that a ten day suspension period from school was a serious event in the life of the child and is not de minimis. The suspension may not be imposed in disregard of procedural due process rights.[121]

White J. articulated the minimum due process rights to which a child is entitled prior to his or her suspension. White J. held that inflexible rules should not be applied in all circumstances.[122] The public school system should not be overburdened with judicial intervention. The bare minimum of due process procedure requires that there has to be prior notice and an opportunity to be heard, appropriate to the nature of the case. The timing and content of the notice and the nature of the hearing would depend on an appropriate accommodation of the nature of the interests. The court said that suspension was not only useful as a disciplinary tool but also as an educational tool.[123]

White J. held that a student should be given notice of the charges against him. If the student denies the charge, the school must give an indication of the

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[121] United States: ibid. at 576 per White J..

[122] United States: ibid. at 578 per White J..

[123] United States: ibid. at 579-580 per White J..

evidence upon which the school is relying and accord the student an opportunity to meet the charges against him. White J. held there did not have to be any delay in giving the notice; it may follow hard upon the alleged incident itself.[124]

White J. held that due process did not require an opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge or to call the child's own witnesses to verify his version of the event. White J. held that to afford in each case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalising the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

White J. held that a student may be removed without notice and a hearing where the student poses an imminent danger to life, person, property or to the academic progress of other students. Nevertheless, it would be necessary to give notice and conduct a hearing as soon as practicable after the hearing. The Supreme Court held that it was not advocating complex legal procedures but was requiring a school principal to do only more or less what any fair-minded school principal would do in the

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[124] United States: ibid. at 581-582 per White J..

same position.[125]

White J. held that where the sanction in question is more severe, then the formal requirements attendant on procedural due process would be concomitantly more elaborate[126].[127]

The United States Supreme Court has also considered the rights of students to freedom of speech and freedom from unlawful searches.

In New Jersey v. T.L.O.[128] White J. held that the Fourth Amendment was not limited to police officers but applies to a search by school officials.[129] The standard governing whether a search was lawful depends on circumstances of the search. It was a matter of balancing individual privacy against the State's interest of dealing with breaches of public order. The court held that a child and an adult have similar legitimate expectation of privacy in relation to bags and purses.[130]

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[125] United States: ibid. at 582-583 per White J..

[126] United States: ibid. at 584 per White J..

[127] United States: In Ingraham v. Wright 430 U.S. 651 (1977) at 676 Powell J. speaking for a majority of the Supreme Court held that the protection of life, liberty or property was affected where a school decides to punish a child for misconduct by restraining the child and inflicting appreciable physical pain. The child has a strong interest in procedural safeguards that minimise the risk of wrongful punishment and provide for the resolution of disputed questions of justification.

[128] United States: 469 U.S. 325 (1985).

[129] United States: ibid. at 336-337 per White J. speaking for a majority of the Supreme Court.

[130] United States: ibid. at 338 per White J. speaking for a majority of the Supreme Court.

The public interest lay in maintaining discipline in the school room and on school grounds, in order that education could take place.[131]

White J. held that the restrictions on public officials in relation to searches are eased for school officials.[132] The court eased the requirements of a search warrant and the probable cause requirement. The court held that the search of a student by a school official will be justified when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.[133] The search must be proportionate in light of the student's age, sex and the nature of the infraction.[134]

Students, like other citizens, are entitled to freedom of speech.[135] Rights of students in public

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[131] United States: ibid. at 339-340 per White J. speaking for a majority of the Supreme Court.

[132] United States: ibid. at 340 per White J. speaking for a majority of the Supreme Court.

[133] United States: ibid. at 342 per White J. speaking for a majority of the Supreme Court.

[134] United States: ibid. at 342 per White J. speaking for a majority of the court. In Vernonia School District 47J v. Acton, unreported, Supreme Court, 26 June, 1995 at 5-14 Scalia J., speaking for a majority of the Supreme Court, adopted the same approach to student athletes asked to undergo random drug tests. Canada: In R. v. M.(M.R.) [1998] 166 D.L.R.(4th) 261 at 276-287 per Cory J., delivering the opinion of the Supreme Court, adopted a similar approach to that of the United States Supreme Court in New Jersey v. T.L.O. 469 U.S. 325 (1985).

[135] United States: West Virginia State Board of Education v. Barnette 319 U.S. 624 (1943) at 637 per Jackson J.; Board of Education v. Pico 457 U.S. 853 (1982) at 864-865 per Brennan J.; Bethel School District No.403 v. Fraser 478 U.S. 675 (1986) at

schools are not automatically coextensive with the rights of adults in other settings. The State has a greater ability to interfere with the speech of students than that of adults. The State can interfere with freedom of speech that is inconsistent with educational mission or interferes with the rights of other students.[136]

In Board of Education v. Pico[137] the United States Supreme Court found that a school board's decision to remove certain books characterised as anti-American, anti-Christian, anti-Semitic and obscene from high and junior high schools as breaching students' rights to freedom of speech.

In the Supreme Court, Brennan J. held that a student's first amendment rights may be directly and sharply implicated by the removal of school books from the library. Brennan J. held that State cannot legitimately restrict availability of information. Students have a right to receive information and ideas. This right is important for libraries as these are places dedicated to knowledge. Libraries provide opportunities for self-education and individual enrichment that are

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680-681 per Burger C.J..

[136] United States: Tinker v. Des Moines School District 393 U.S. 503 (1969) at 514 per Fortas J.; Bethel School District No.403 v. Fraser 478 U.S. 675 (1986) at 681-686 per Burger C.J. holding that the freedom of expression of students is not as co-extensive as that of adults; Hazelwood School District v. Kuhlmeier 484 U.S. 260 (1988) at 266-267 per White J. speaking for a majority of the Supreme Court.

[137] United States: 457 U.S. 853 (1982).

wholly optional.[138]

Brennan J. held that the school has a discretion in relation to the contents of the library. This discretion is circumscribed, in that it cannot be used to deny access to ideas with which the Board disagrees. The Board was seeking to prescribe what shall be orthodox in politics, nationalism religion and other matters of opinion.[139]

The United States Supreme Court has emphasised the importance that a student's freedom of expression may have as part of a student's education.[140]

4.6. Developing competence of child

The welfare model and the rights model view the child as a person with developing intellectual capacities. The purpose of the child's right to education is to develop these capacities to their maximum. This may mean that the child has the competence to make decisions in respect of their constitutional rights, such as freedom of expression.[141]

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[138] United States: ibid. at 866-869 per Brennan J. speaking for a majority of the Supreme Court.

[139] United States: ibid. at 870-872 per Brennan J. speaking for a majority of the Supreme Court.

[140] United States: In Tinker v. Des Moines School District 393 U.S. 503 (1969) at 512-513 per Fortas J. upholding the right of students to wear black armbands in protest against the Vietnam war.

[141] Ireland: Education Act 1998, s. 6(a) requires as one of its objects that practical effect has to be given to the constitutional rights of children as they relate to education, including those children with special educational needs. This will include not only the child's right to an education but other rights such as freedom of expression, of association, of

The concept of education is broader than intellectual education. It encompasses the child's religious and moral, physical and social education. The purpose of education is to develop a sense of responsibility and the capacity to live within a civilised society. This will include the ability of the child as an adult to exercise his or her constitutional rights such as the freedoms of expression, association and religion.

The welfare model and the rights model require that children should be allowed some input into the decisions taken on their behalf; the closer the child to maturity, the greater the input. Allowing a child such input serves an additional function of providing the child with some examples of how decisions are made, which will provide that child with a model of behaviour for his or her maturity.[142] Students of a post-primary school may establish a student council[143] whose function is to promote the interests of the school and the involvement

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religion, fair procedures and principle of autonomy.

[142] Ireland: Education Act 1998, s. 27(1) provides that a school's board of management shall establish and maintain procedures for the purposes of informing students in a school of the activities of the school. Education Act 1998, s. 27(2) provides that these procedures shall facilitate the involvement of the students, having regard to the age and experience of the students, in association with their parents and teachers. Education Act 1998, s. 23(2)(d) provides that the principal shall consult the teachers, the parents and to the extent appropriate to their age and experience, students, in relation to the objectives for the school determined by the principal.

[143] Ireland: Education Act 1998, s. 27(3).

of the students in school affairs, in co-operation with the board, parents and teachers.[144]

[144] Ireland: Education Act 1998, s. 27(4).

CHAPTER FIVE

CHILD AND JUVENILE JUSTICE SYSTEM

5.0. Introduction

Society, for its own protection, is entitled to establish a criminal process that prosecutes and punishes those accused of infringing the criminal law.[1] However, the law recognises that there is a power imbalance between the State and a person accused of infringing the criminal law. The law attempts to redress the balance by affording rights to the person accused of crime and placing pre-eminence to these rights. The Irish courts have held that the accused's rights prevail over society's entitlement to require prosecution and punishment of crimes, where there is a real risk that the accused might not receive a fair trial.[2]

The chapter considers the constitutional rights of a child during the criminal process, namely investigation, trial and punishment of offences. The danger lies in the parens patriae concept obliging the State to act in the best interests of the child. This paternalism results in the child being deprived of the fundamental rights afforded during the criminal process.

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[1] Ireland: B. v. Director of Public Prosecutions [1997] 2 I.L.R.M. 118 at 127 per Denham J..

[2] Ireland: D. v. Director of Public Prosecutions [1994] 2 I.R. 465 at 474 per Denham J.; Z. v. Director of Public Prosecutions [1994] 2 I.R. 476 at 507 per Finlay C.J.; E.O'R. v. Director of Public Prosecutions [1996] 2 I.L.R.M. 128 at 136-137 per Keane J.; B. v. Director of Public Prosecutions [1997] 2 I.L.R.M. 118 at 127 per Denham J..

5.1. Duties and rights of parents

Parents have a duty to protect and promote the child's welfare and interests. This is so even where a child is suspected of breaching the criminal law.

Parents are accorded a right to make decisions for their incompetent child in the criminal process in order to fulfil their parental duty. There are a number of decisions that may have to be made affecting the child's civil rights in the criminal process including: right to legal advice during interrogation,[3] right to silence, right to trial by jury in non-minor offences[4] and pleading guilty. The rights model requires that a parent should be excluded from the decision making where that parent is complicit in the commission of the offence that is being investigated or prosecuted.[5]

These parental decisions may have serious

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[3] Ireland: In The People (Director of Public Prosecutions) v. Healy [1990] 2 I.R. 73 at 82-83 per Griffin J. holding that a family may obtain legal assistance for a detained member of the family.

[4] England: Summary Jurisdiction Over Children (Ireland) Act 1884, s. 4(1) provides that a child may be tried summarily for an indictable offence unless the parent or guardian objects. Summary Jurisdiction Over Children (Ireland) Act 1884, s. 9 defines a child as a person under the age of 12.

[5] United States: In Little v. Arkansas 435 U.S. 957 (1978), a 13 year old was suspected of murdering her father. The child had talked to her mother before waiving her right to remain silent and consult with an attorney. Marshall J., dissenting at 958-961, held that every child is entitled to competent advice from an adult before waiving his or her constitutional right to remain silent and consult with an attorney. Marshall J. held that the adult adviser must not have any conflict of interest that could affect the competency of the advice. Marshall J. found that there was a conflict of interest in this case as the police questioned the mother as a suspect for her husband's murder.

consequences for the child's rights to liberty, education, privacy and the consequences of a criminal conviction on a child's good name and character.[6]

Parents are required to make decisions in relation to a child in the criminal process on the basis of what is in the child's best interests. The difficulty is that it is unclear as to determining whether a decision in the criminal process is or is not in the child's best interests. Parents may not have an understanding of the criminal process. This further supports the rights model's need for a child's parents to be in receipt of legal advice.

5.2. Duty of State to protect and provide for child

The welfare model and rights model both provide that it is the duty of the State to protect and provide for the child. The welfare model and rights model have diametrically opposed views as to the manner of protection and provision for the child in the criminal process. The welfare model assumes that care and protection are the overriding considerations in the criminal process. The court acts in the child's best interests during the criminal process.[7] The effect of this approach is to deprive the child of the civil rights afforded to the accused in the criminal process.

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[6] Ireland: Constitution of Ireland 1937, Art. 40.3.2.

[7] England: In In Re A. (A Minor)(Wardship: Police Caution) [1989] Fam. 103 at 111 Cazalet J. considered the child's best interests, when determining whether a caution should be administered to a ward of court.

The rights model require that the child is afforded civil rights during the criminal process. These rights curtail paternalism. There are three elements to the nature of criminal sanctions: punishment, deterrence and rehabilitation. It is not at odds with the rights model to permit the rehabilitative element to be the dominating element when choosing the sanction to be imposed on a child convicted of an offence.

5.3. Welfare rights of child

The welfare model provides that every child has the right to be fed, the right to be brought up, educated, and to have the opportunity of working and of realising his or her full personality and dignity as a human being.[8] The welfare model attaches pre-eminence on the welfare rights rather than the civil rights of the child in the criminal process. The welfare model holds that the welfare rights of the child cannot be vindicated in the adversarial criminal process.

The rights model subordinates the welfare rights of the child to the civil rights of the accused child in the criminal process. This does not mean that the welfare rights of the child are ignored. The issue of the child's welfare rights may assume greater importance when the child has been convicted and the court must select the sanction to be imposed on the child.

5.4. Civil rights of child

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[8] Ireland: G. v. An Bord Uchtala [1980] I.R. 32 at 55-56 per O'Higgins C.J., at 69 per Walsh J., and at 91 per Henchy J..

The Constitution of Ireland provides that no person shall be tried on any criminal charge save in due course of law.[9] The Irish High and Supreme Courts have identified 13 rights within this concept of "due course of law". These rights are also found in the English, American and Canadian criminal legal systems.

A person charged with a criminal offence:-

(a) is presumed innocent of a criminal charge until the contrary is proven;[10]

(b) must be informed of the nature and cause of the charge promptly, in detail, and in a language which is understood;[11]

(c) must be tried without undue delay;[12]

(d) must be given a fair and public hearing by a competent, independent and impartial court established by

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[9] Ireland: Constitution of Ireland 1937, Art. 38.1.

[10] Ireland: O'Leary v. Attorney General [1995] 1 I.R. 254 at 263 per O'Flaherty J.; Director of Public Prosecutions (Murphy) v. P.T. [1999] 3 I.R. 254 at 270 per McGuinness J..

[11] Ireland: The State (Buchan) v. Coyne (1936) 70 I.L.T.R. 185 at 186 per O'Sullivan P.; In Re Haughey [1971] I.R. 217 at 262-264 per O'Dalaigh C.J.; The State (Healy) v. Donoghue [1976] I.R. 325 at 335 per Gannon J. and at 349-350 per O'Higgins C.J.; The People (Director of Public Prosecutions) v. Shaw [1982] I.R. 1 at 29 per Walsh J.; Director of Public Prosecutions v. Doyle [1994] 2 I.R. 286 at 302 per Denham J..

[12] Ireland: The State (Healy) v. Donoghue [1976] I.R. 325 at 335 per Gannon J. and at 349-350 per O'Higgins C.J.; Director of Public Prosecutions v. Byrne [1994] 2 I.R. 236 at 244-245 per Finlay C.J., at 253-254 per Blayney J. and at 257 per Denham J.; Cahalane v. Murphy [1994] 2 I.R. 262 at 283 per Finlay C.J.; Director of Public Prosecutions (Murphy) v. P.T. [1999] 3 I.R. 254 at 270 per McGuinness J..

law;[13]

(e) must be allowed to appear, defend himself or herself and be present throughout his or her trial;[14]

(f) must be given reasonable time and opportunity for the preparation of a defence;[15]

(g) must be given the assistance of an interpreter, where necessary;[16]

(h) is entitled to give evidence and to secure the attendance and examination of witnesses (including the ability to confront his or her accusers) and to present evidence in a manner prescribed by law;[17]

(i) cannot be compelled to incriminate himself or

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[13] Ireland: The People (Attorney General) v. Singer [1975] I.R. 408 at 414 per O'Dalaigh C.J.; The State (Healy) v. Donoghue [1976] I.R. 325 at 335-336 per Gannon J.; Eccles v. Ireland [1985] I.R. 545 at 549 per Finlay C.J.; The People (Director of Public Prosecutions) v. McGinley (1989) 3 Frewen 251 at 252 per Hederman J.; The People (Director of Public Prosecutions) v. W.M. [1995] 1 I.R. 226 at 230-232 per Carney J. discussing the general constitutional requirement that justice should be administered in public.

[14] Ireland: The People (Attorney General) v. Messitt [1972] I.R. 204 at 211-212 per Kenny J.; Lawlor v. Hogan [1993] I.L.R.M. 606 at 610 per Murphy J..

[15] Ireland: In Re Haughey [1971] I.R. 217 at 262-264 per O'Dalaigh C.J.; The State (Healy) v. Donoghue [1976] I.R. 325 at 335 per Gannon J.; O'Callaghan v. District Judge Clifford [1993] 3 I.R. 603 at 612 per Denham J..

[16] Ireland: The State (Buchan) v. Coyne (1936) 70 I.L.T.R. 185 at 186 per O'Sullivan P..

[17] Ireland: In Re Haughey [1971] I.R. 217 at 262-264 per O'Dalaigh C.J.; The State (Healy) v. Donoghue [1976] I.R. 325 at 335 per Gannon J.; White v. Ireland [1995] 2 I.R. 268 at 276 per Kinlen J..

herself;[18]

(j) is subject to basic or fundamental fair procedures during arrest, detention, charging, trial, appeal and sentence;[19]

(k) is allowed to appeal against conviction or sentence;[20] and,

(l) cannot be tried for a second time for the same offence following upon a conviction or acquittal.[21]

The thirteenth right is probably the most important. An accused must be legally represented and, if necessary, be assisted in securing such representation.[22] The remaining 12 rights encapsulated within the concept of "due course of law" might effectively and manifestly be

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[18] Ireland: Travers v. Ryan [1985] I.L.R.M. 343 at 347 per Finlay P. holding that any statement made by a child to the police must be voluntary; Heaney v. Ireland [1994] 3 I.R. 593 at 606 per Costello J.; Director of Public Prosecutions (Murphy) v. P.T. [1999] 3 I.R. 254 at 270 per McGuinness J.. United States: Miranda v. Arizona 384 U.S. 436 (1966) at 471-472 per Warren C.J..

[19] Ireland: The People (Director of Public Prosecutions) v. Shaw [1982] I.R. 1 at 61 per Griffin J.; The People (Director of Public Prosecutions) v. Healy [1990] 2 I.R. 73 at 83 per Griffin J. requiring basic or fundamental fairness of procedures.

[20] Ireland: The People (Attorney General) v. Conmey [1975] I.R. 341 at 354-356 per O'Higgins C.J. and at 363-365 per Walsh J..

[21] Ireland: The People (Director of Public Prosecutions) v. Quilligan (No.2) [1989] I.R. 45 at 57 per Henchy J.; McCarthy v. Garda Commissioner [1993] 1 I.R. 489 at 498 per Flood J..

[22] Ireland: The State (Healy) v. Donoghue [1976] I.R. 325 at 350 per O'Higgins C.J. and at 359 per Griffin J.; Byrne v. McDonnell [1996] 1 I.L.R.M. 543 at 554 per Keane J.; McSorley v. Governor of Mountjoy Prison [1996] 2 I.L.R.M. 331 at 338 per Barr J.; Director of Public Prosecutions (Murphy) v. P.T. [1999] 3 I.R. 254 at 270 per McGuinness J..

denied to an accused person if the accused does not have a lawyer.[23]

This right can be invoked during interrogation[24] and trial.[25] This right of access to a solicitor during a police interview is directed towards ensuring that the interviewee is aware of his or her rights. The interviewee must have access to independent advice so that he or she can reach a truly free decision as to his or her attitude to interview or the making of any statement, be in exculpatory or inculpatory.[26] The availability of advice from a lawyer is seen as a contribution, at least, towards some measure of equality between the accused and the police.[27] The absence of a

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[23] Ireland: The State (Healy) v. Donoghue [1976] I.R. 325 at 350 per O'Higgins C.J. and at 359 per Griffin J.

[24] Ireland: In Re Article 26 and The Emergency Powers Bill 1976 [1977] I.R. 159 at 173 per O'Higgins C.J.; The People (Director of Public Prosecutions) v. Madden [1977] I.R. 336 at 355-356 per O'Higgins C.J.; The People (Director of Public Prosecutions) v. Farrell [1978] I.R. 13 at 20 per O'Higgins C.J.; The People (Director of Public Prosecutions) v. Shaw [1982] I.R. 1 at 35 per Walsh J.; The People (Director of Public Prosecutions) v. Conroy [1986] I.R. 460 at 478-479 per Walsh J. and at 489 per Henchy J.; The People (Director of Public Prosecutions) v. Pringle (1981) 2 Frewen 57 at 96 per O'Higgins C.J.; The People (Director of Public Prosecutions) v. Healy [1990] 2 I.R. 73 at 78 and 81 per Finlay C.J., at 83-84 per Griffin J., and at 87 per McCarthy J..

[25] Ireland: The State (Healy) v. Donoghue [1976] I.R. 325 at 350 per O'Higgins C.J. and at 359 per Griffin J..

[26] Ireland: The People (Director of Public Prosecutions) v. Healy [1990] 2 I.R. 73 at 78 and 81 per Finlay C.J., at 83 per Griffin J. and at 87 per McCarthy J..

[27] Ireland: The People (The Director of Public Prosecutions) v. Connell [1995] 1 I.R. 244 at 251-252 per Egan J. approving of The People (Director of Public Prosecutions) v. Healy [1990] 2 I.R. 73 at 78 and 81 per Finlay C.J..

lawyer in court may deprive the accused of the constitutional rights to understand the charges and court procedures, to test the evidence and to speak on his or her own behalf.[28] The paternalistic attitude of the welfare model may allow the court to take it upon itself to act as adviser to the accused child. The rights model requires the accused child to be afforded the opportunity of accepting or, if competent, rejecting the assistance of a lawyer.

In the United States, an accused must be informed of his or her right to remain silent and his or her right to a lawyer during interrogation prior to the commencement of any questioning. An interrogation must cease if the accused indicates in any manner that he or she wishes to remain silent or to consult an attorney. A statement obtained in breach of these rights is inadmissible in any subsequent criminal trial.[29] In Fare v. Michael C.[30] the United States Supreme Court held that a probation officer was not in a position to offer the legal assistance that a lawyer can offer in order to protect the child's Fifth Amendment rights. The duty of the probation officer is not to represent the child. The probation officer's duty is to report and advise the child to co-operate with the

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[28] Ireland: The State (Healy) v. Donoghue [1976] I.R. 325 at 350 per O'Higgins C.J. and at 359 per Griffin J..

[29] United States: Miranda v. Arizona 384 U.S. 436 (1966) at 471-472 per Warren C.J..

[30] United States: 442 U.S. 707 (1979) at 719-723 per Blackmun J. speaking for a majority of the Supreme Court.

police.

The constitutional rights afforded to the accused during the criminal process are supplemented by the common law.

In England, the Judges' Rules were developed by the common law to prevent police officers from abusing their interview powers.[31] These rules are not rules of law but rules of practice drawn up for the guidance of police officers to encourage the observance of fair procedures when taking of statements. The failure to observe the Judges' Rules may mean that an accused's statement or admission is inadmissible during the criminal trial. The Judges' Rules are recognised in Ireland.[32] In Ireland, there are nine Judges' Rules:-

(a) when a police officer is investigating a crime, there is no objection to his putting questions to persons from whom he thinks useful information may be obtained;

(b) when a police officer has made up his mind to charge someone with a crime, that person should be cautioned before further questioning. The usual form of the caution is: "You are not obliged to say anything unless you wish to do so but anything you do say will be taken down in

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[31] England: R. v. Voisin [1918] 1 K.B. 531 at 539-546 per Lawrence J..

[32] Ireland: McCarrick v. Leavy [1964] I.R. 225 at 235-236 per Walsh J.; The People (Attorney General) v. Cummins [1972] I.R. 312 at 323 per Walsh J.; The People (Director of Public Prosecutions) v. Farrell [1978] I.R. 13 at 18 and 21 per O'Higgins C.J.; The People (Director of Public Prosecutions) v. Darcy, unreported, Court of Criminal Appeal, 27 July, 1997 at 21-24 per Keane J..

writing and may be given in evidence";

(c) persons in custody should not be questioned without the usual caution being administered;

(d) if a person wishes to volunteer a statement, the usual caution should be administered ending with the words "be given in evidence";

(e) the caution administered to a person who has been formally charged with an offence should be: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence". Care should be taken to avoid the suggestion that his answers can only be used in evidence against him as this may prevent an innocent person making an exculpatory statement;

(f) the absence of a caution before a statement does not automatically exclude that statement, but a caution should be given as soon as possible;

(g) if a voluntary statement has been made, further questioning should only be as to the details of the statement in order to clarify and remove any ambiguity;

(h) when two or more persons are charged with the same offence and their statements are taken separately, the police should not read these statements to the other persons charged, but each of such persons should be given by the police a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in

reply, the usual caution should be administered; and,

(i) any statement made in accordance with the rules, should whenever possible be recorded in writing and signed by the person making it after it has been read over to him and he has been invited to make any correction he may wish.

A statement in breach of the Judges' Rules does not automatically render it inadmissible. However, it is a mandatory requirement that any statement or admission made in custody is voluntary.[33] A statement is not voluntary where it was obtained either by a threat or inducement held out by a person in authority[34].[35] A statement is not voluntary where oppressive questioning occurs. This is questioning which by its nature, duration or other attendant circumstances (including the factor of custody) excites hopes (such as the hope of release) or fears or so affects the mind of the subject that his free will crumbles and he speaks when otherwise he would have stayed silent.[36]

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[33] Ireland: Attorney General v. McCabe [1927] I.R. 129 at 134 per Kennedy C.J.; McCarrick v. Leavy [1964] I.R. 225 at 236 and 238 per Walsh J.; The People (Attorney General) v. Cummins [1972] I.R. 312 at 323 per Walsh J..

[34] England: In R. v. McLintock [1962] Crim. L.R. 549 at 550, the Court of Criminal Appeal held that a head mistress of a school was a person in authority of a student.

[35] England: Ibrahim v. R. [1914] A.C. 599 at 609 per Lord Sumner.

[36] England: R. v. Priestly (1967) 51 Cr. App. Rep. 1 at 1 per Sachs J.; R. v. Prager [1972] 1 W.L.R. 260 at 266 per Edmund Davies L.J.; The People (Director of Public Prosecutions) v. Breathnach (1981) 2 Frewen 43 at 53-54 per Finlay P.; The People (Director of Public Prosecutions) v. Pringle (1981) 2 Frewen 57

The rights model requires that the Judges' Rules and the voluntary confession requirement may have to be altered to accommodate the greater vulnerability of children to succumb to stress that an adult can endure. A police interview may be an intimidating and stressful experience for an adult. It is more so for a child. A child may be overwhelmed by a police interview. The United States Supreme Court has held that greatest care must be taken to assure that a child's admission was voluntary and that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.[37] Confessions of children have been rendered inadmissible where the children were interviewed in the absence of a lawyer for protracted periods during the night.[38]

The rights model requires the presence of the child's parent, guardian, person in loco parentis or responsible adult during an interview. The absence of such a person should render the child's statement or admission inadmissible.[39] However, the court retains a

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at 80-81 per O'Higgins C.J..

[37] United States: In Re Gault 387 U.S. 1 (1967) at 44-55 per Fortas J..

[38] United States: Haley v. Ohio 332 U.S. 596 (1948) at 599-601 per Douglas J. speaking for a majority of the Supreme Court; Gallegos v. Colorado 370 U.S. 49 (1962) at 50-55 per Douglas J. speaking for a majority of the Supreme Court.

[39] Ireland: The People (Director of Public Prosecutions) v. Patterson (1979) 113 I.L.T.R. 6 at 8 per Finlay P.; The People (Director of Public Prosecutions) v. W.F. (1979) 114 I.L.T.R. 110 at 112 per Finlay P.; Travers v. Ryan [1985] I.L.R.M. 343 at 347 per Finlay P.; The People (Director of Public Prosecutions) v. Darcy, unreported, Court of Criminal Appeal, 27 July, 1997 at 25-

discretion to admit such a statement. The rights model allows a competent child to object to the presence of his or her parent or guardian, in which case a respecting of that objection and a failure to obtain the presence of the parent or guardian might be well justified.[40]

The Judges' Rules have been supplemented by the provisions of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987. These regulations accord to a large extent with the rights model. The regulations make provision for the involvement of parents or guardians where a detained person is under the age of 17. The Garda member in charge of the station must as soon as practicable inform a parent or guardian of the fact that the child is custody, the nature of the offence for which the child was arrested, and of the child's entitlement to consult a solicitor.[41] The member must request the parent or guardian to attend at the station without delay.[42] The member in charge may be unable to communicate with a parent or guardian. The member in charge must inform the child of this fact and of the child's entitlement to have notification of his being in custody in station sent to

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26 per Keane J..

[40] Ireland: Travers v. Ryan [1985] I.L.R.M. 343 at 347 per Finlay P..

[41] Ireland: Criminal Justice Act 1984, s. 5(2)(b).

[42] Ireland: Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987, r. 9(1)(a).

another person named by the child.[43]

The member in charge must inform a person under 17 without delay that he or she is entitled to consult a solicitor.[44] The member must cause the solicitor to be notified accordingly as soon as practicable. The child may nominate a solicitor. The member in charge is under a duty to notify the nominated solicitor accordingly as soon as practicable. The child can nominate another solicitor where the first solicitor is unavailable.[45] This also applies where the nomination is made by a child's parent or guardian.[46]

An arrested person under the age of 17 cannot in general be questioned in relation to an offence or asked to make a written statement unless a parent or guardian is present. The member in charge can permit a person under 17 to be interviewed in the absence of a parent or guardian in certain circumstances.[47] A member in charge may authorise the exclusion of a parent or guardian from an interview in three circumstances.

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[43] Ireland: Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987, r. 9(1)(b).

[44] Ireland: Criminal Justice Act 1984, s. 5(2)(a).

[45] Ireland: Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987, r. 9(2)(a).

[46] Ireland: Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987, r. 9(2)(b).

[47] Ireland: Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987, r. 13(1).

First, the parent or guardian is the victim of the offence being investigated.

Second, the parent or guardian has been arrested in respect of the offence being investigated.

Third, the member in charge has reasonable grounds for suspecting the parent or guardian of complicity in the offence, for believing that the parent or guardian would, if present during the questioning be likely to obstruct the course of justice, or while so present his conduct had been such as to amount to an obstruction of the course of justice.[48]

Where the interview is to take place in the absence of a parent or guardian, the member in charge must arrange for the presence during the questioning of the other parent or another guardian. The other parent or guardian may be unavailable or inappropriate. In these circumstances, the member in charge may allow the presence of an appropriate adult relative or other responsible adult.[49] A parent, guardian, adult relative or other adult may request the attendance of a solicitor on the child's behalf. Following such a request, a reasonable time must elapse before the child is asked to

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[48] Ireland: Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987, r. 13(1).

[49] Ireland: Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987, r. 13(2).

make a written statement.[50]

A failure on the part of any member of the Garda Siochana to observe any provision of the regulations shall not of itself affect the lawfulness of the custody of the detained person or render inadmissible any statement made by a detained person.[51]

5.5. Conflicting rights of child

A conflict may arise between the welfare and civil rights of the accused child. The rights model requires the conflict to be resolved by according supremacy to the civil rights of the accused child. The rights model precludes a judge acting paternalistic by performing an inquiry to determine what is in the child's best interests.

In Director of Public Prosecutions (Murphy) v. P.T.[52] a 15 year old youth who was in the care of a health board, was charged with an offence. The District Court conducted an inquiry into the child's fitness to plead. The same District Court found that the health board's assessment and care plan for the child was seriously deficient. The District Court judge ordered a secure residential assessment and care programme for the

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[50] Ireland: Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987, r. 13(3).

[51] Ireland: Criminal Justice Act 1984, s. 7(3); Director of Public Prosecutions v. Spratt [1995] 2 I.L.R.M. 117 at 122 per O'Hanlon J.; The People (Director of Public Prosecutions) v. Connell [1995] 1 I.R. 244 at 252 per Egan J..

[52] Ireland: [1999] 3 I.R. 254.

child. The health board challenged the District Court's ability to make such orders during a criminal prosecution.

In the High Court, McGuinness J. held that the District Court must accord paramountcy to the welfare of the child and vindicate the constitutional rights of the child when matters concerning the custody, guardianship of, or upbringing of the child are being considered.[53]

McGuinness J. questioned whether the welfare rights established in G. v. An Bord Uchtala[54] could be asserted so as to negative or interfere with the civil rights of the accused.[55] McGuinness J. held that the District Court has a general duty to consider and promote the welfare of a child who appears before it on a criminal charge. The duty will be most urgent and relevant when the court is pronouncing sentence if the accused child pleads guilty or is found guilty of the charges laid against him. However, this duty must be balanced and harmonised if possible with the civil rights designed to protect the accused.[56]

McGuinness J. held that an accused's right to a trial in due course of law entails the presumption of innocence, the privilege against self-incrimination, the

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[53] Ireland: ibid. at 267 per McGuinness J..

[54] Ireland: [1980] I.R. 32 at 55-56 per O'Higgins C.J..

[55] Ireland: Director of Public Prosecutions (Murphy) v. P.T. [1999] 3 I.R. 254 at 267-268 per McGuinness J..

[56] Ireland: ibid. at 269-270 per McGuinness J..

right to an expeditious trial and the right to legal aid.[57] McGuinness J. held that a court performing a well intentioned inquiry to the general welfare of the child accused of a crime may ignore or unjustly postpone the civil rights of an accused child. It may mean that evidence inadmissible at a criminal trial is admitted during the inquiry. The law does not allow a court to remand an accused adult in custody for a long period of time in order to perform a full inquiry into the accused's pattern of life and future prospects when determining whether the adult is fit to plead. McGuinness J. held that the constitutional duty to promote the welfare of the child did not permit a procedure that would be constitutionally impermissible in the case of an adult.[58]

McGuinness J. held that the civil rights of an accused were superior to the child's welfare rights. McGuinness J. held that the distinction between criminal and child care proceedings must be maintained.[59]

However, Smyth J. took a different approach in Director of Public Prosecutions (Stratford) v. O'Neill.[60] The Constitution of Ireland expressly allows courts of summary jurisdiction to try minor offences.[61] A person

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[57] Ireland: ibid. at 270 per McGuinness J..

[58] Ireland: ibid. at 270-271.

[59] Ireland: ibid. at 271 per McGuinness J..

[60] Ireland: [1998] 2 I.R. 383.

[61] Ireland: Constitution of Ireland 1937, Art. 38.2.

cannot be tried for a non-minor offence without a jury, unless the person's consent is obtained.[62] The Criminal Justice Act 1951 allowed an accused over 18 to waive this right.[63] The Summary Jurisdiction Over Children (Ireland) Act 1884 allowed an accused aged between 12 and 16 years to waive his or her right to trial by jury. However, the District Court could consider the child's character and antecedents.[64] In Director of Public Prosecutions (Stratford) v. O'Neill[65] the accused claimed that the District Court's ability to consider a juvenile's antecedents constituted invidious discrimination as the District Court could not consider an adult's character. The accused argued that such an inquiry might result in the District Court forming prejudicial views of the accused.

In the High Court, Smyth J. held that the 1884 Act allowed the District Court to assess the young person's capacity to give an informed waiver. This assessment was a preliminary investigation, not the trial of the offence.[66] Smyth J. held that this investigation did not infringe the principle of equality. The investigation demonstrates constitutional concern to ensure that due

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[62] Ireland: Constitution of Ireland 1937, Art. 38.5.

[63] Ireland: Criminal Justice Act 1951, s. 2(2)(a)(ii).

[64] England: Summary Jurisdiction Over Children (Ireland) Act 1884, s. 5(1) as amended by the Children Act 1908, s. 133(6).

[65] Ireland: [1998] 2 I.R. 383.

[66] Ireland: ibid. at 386 per Smyth J..

regard to differences of capacity are observed.

The reference to the child's character was not to the moral character but the degree of maturity and appreciation of correctness of choosing to proceed by way of summary trial or trial by jury. This evidence was to put the District Court in the position to assess the quality of the consent that might be forthcoming by the person of tender age.[67]

Smyth J. held that the oath of office requires a judge to act "without fear or malice or ill will towards anyone".[68] This oath will ensure that a judge approaches the application with an open mind, having learnt of the accused's legal character and antecedents. Smyth J. held that the District Court's consideration of the accused's previous criminal convictions did not affect the accused's right to be presumed innocent of the charge. The court has a discretion whether to embark on this enquiry. If the court does not think it is expedient to do so, then there is no necessity to embark on this enquiry. If the court thinks that it is expedient to do so, ultimately the accused is the one who decides as to whether the course to be adopted is one of summary trial or trial by jury.[69] Smyth J. held that the provisions of the 1884 Act did not infringe the constitutional rights

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[67] Ireland: ibid. at 387 per Smyth J..

[68] Ireland: Constitution of Ireland 1937, Art. 34.5.1.

[69] Ireland: Director of Public Prosecutions (Stratford) v. O'Neill [1998] 2 I.R. 383 at 387 per Smyth J..

of the accused. The approach adopted by McGuinness J. accords with the rights model whilst that of Smyth J. does not.

The United States Supreme Court has also considered the relationship between parens patriae and an accused child's civil rights. This arose from concern at the juvenile court process. These courts were created following State legislators' concern at children being tried for criminal offences in the same way as adults. Children were subject to adult procedures and penalties. Children could be given long prison sentences mixing with hardened adult criminals. The response was the establishment of the juvenile court in many States.[70] The aim of the court was to supervise, enlighten and cure, not to punish. The juvenile court was to be more like a clinic.[71] The court should be staffed by experts who would assist the court in its curative role.[72] The court was to stand in the shoes of the parent and guardian to the child. The State is parens patriae rather than prosecuting attorney and judge. The proceedings were not adversarial but inquisitorial. The court was to inquire into what is best for the child and attempt to stop the

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[70] United States: In In Re Gault 387 U.S. 1 (1967) at 14-19 per Fortas J. stated that the first juvenile court was established in Illinois in 1899 and that 40 other States had gone on to establish such courts.

[71] United States: In In Re Gault 387 U.S. 1 (1967) at 15-16 per Fortas J..

[72] United States: DeBacker v. Brainard 396 U.S. 28 (1969) at 35-37 per Douglas J..

child entering a downward spiral of crime. However, there was a devastating report on the juvenile court system in the President's Commission on Law Enforcement and Administration of Justice Task Force Report: Juvenile Delinquency and Youth Crime 7-9 (1967). This revealed the depth of disappointment in what the juvenile court had accomplished. Too often juvenile judges fell short of that stalwart, protective and communicating figure the system envisaged. In addition, the juvenile court system was underfunded.

The United States Supreme Court considered the compatibility of the parens patriae jurisdiction of the juvenile court with the fundamental rights afforded to an accused during the criminal process. In Kent v. United States[73] the Supreme Court considered the power of the juvenile to relinquish jurisdiction in respect of a child and allowing the child to be tried in an ordinary criminal court. In this case, the juvenile court relinquished jurisdiction. However there had been no consultation with the child's parents or counsel and they had not been given access to the court file. The State argued that the denial of these rights which were available to adults was explained by the State's parens patriae prerogative.

The Supreme Court held that the juvenile court's objective was laudable. The juvenile court's proceedings were interpreted as civil in nature and not criminal.

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[73] United States: 383 U.S. 541 (1966).

However, the Supreme Court held that the "parental" relationship between the court and the child is not an invitation to procedural arbitrariness. In addition, it was recognised that there were a lack of facilities and staff to fulfil the parens patriae function. Children were receiving the worst of both worlds. Children did not receive the benefit of care nor the protection of the rights of adults in the criminal process.[74]

The Supreme Court was not willing to go so far as to require that a child in juvenile court should obtain the full benefit of the rights of adults in the criminal process. The Supreme Court held that a juvenile court should have considerable latitude within which to determine whether it should retain jurisdiction over a child or waive jurisdiction. However, such latitude must comply with basic requirements of due process and fairness. The Supreme Court held that a child cannot be deprived of benefits without participation, representation, a hearing and a statement of reasons.

The Supreme Court held that a child should be given a statement of reasons motivating the juvenile court's waiver of jurisdiction. The child had a right to representation by counsel and access to reports. The court found that the child was not afforded due process rights in this case.[75]

The United States Supreme Court took a similar

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[74] United States: ibid. at 554-556 per Fortas J..

[75] United States: ibid. at 557-563 per Fortas J..

approach in In Re Gault.[76] In this case, a juvenile court determined that a child was a delinquent and was sent to an industrial school until the child's majority. The juvenile claimed that he had been denied due process rights. It was averred that the child was not given notice of the charges against him, the right to counsel, the right to confront and cross-examine his accusers, nor of the rights prohibiting self-incrimination during these proceedings. The United State Supreme Court examined the origins of the parens patriae jurisdiction.[77] The right of the State as parens patriae permitted the denial of the same rights to children as are allowed to adults, as unlike an adult, a child does not have the same right to liberty as an adult. For example, a child could be compelled to attend school.[78] The Supreme Court examined the consequences of being adjudged a delinquent. The Supreme Court found that nearly the same social stigma applies to being labelled delinquent as it does to the label of criminal.[79] The court could also order that a delinquent should be locked up in an institution and thereby deprived of rights. The Supreme Court decided that the delinquency proceedings were unconstitutional as they violated the due process clause of the United States

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[76] United States: 387 U.S. 1 (1967).

[77] United States: ibid. at 14-17 per Fortas J..

[78] United States: ibid. at 17 per Fortas J.; Schall v. Martin 467 U.S. 253 (1984) at 264-281 per Rehnquist J..

[79] United States: ibid. at 23 per Fortas J..

Constitution.[80] The Supreme Court held that these laws were such as could lead to wrong finding of facts and also to the imposition of regimes of punishment or correction which might be inappropriate or unwarranted. The Supreme Court held that truth would be more likely to emerge from adversarial conflict than from an inquiry.[81]

The Supreme Court held that the child must be provided with adequate notice of charges so that the child knows the case to be met.[82] The child has a right to counsel as the judge cannot represent the child. The child will be provided with counsel, where the child cannot afford counsel.[83] The court held that the child was entitled to the right to confront his or her accusers, the privilege against self incrimination and the right to cross-examination.[84] The court held that the focus is on the deprivation of liberty. It does not depend on whether the deprivation is termed civil or criminal. The court held that there may have to be modifications of these rights in relation to any waiver and the presence of parents[85].[86]

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[80] United States: ibid. at 31 per Fortas J..

[81] United States: ibid. at 19-21 per Fortas J..

[82] United States: ibid. at 31-34 per Fortas J..

[83] United States: ibid. at 34-42 per Fortas J..

[84] United States: ibid. at 42-57 per Fortas J..

[85] United States: The Supreme Court's approach in In Re Gault 387 U.S. 1 (1967) has been followed in: In Re Whittington 391 U.S. 341 (1968) at 344-345 per White J.; In Re Winship 397 U.S. 358 (1970) at 365-368 per Brennan J. speaking for a majority of the Supreme Court.

In In Re Winship[87] the United States Supreme Court held the standard of proof should be beyond a reasonable doubt in juvenile court proceedings. Such a standard of proof would not risk destroying the beneficial aspects of the juvenile process. There would be an opportunity during post-adjudicatory or dispositional hearing for a wide-ranging view of the child's social history and for this individualised treatment to remain unimpaired. The Supreme Court also applies the principle of double jeopardy to juvenile court proceedings.[88] However, the Supreme Court has held that juvenile delinquency proceedings do not require a jury trial[89] and pre-trial detention is permissible.[90]

The United States Supreme Court's approach to the juvenile courts is closer to the rights model than the welfare model. The disappointing aspect to the court's approach was the motivating factor: the lack of resources whereby children got the worst of both worlds. The

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[86] United States: In Bland v. U.S. 412 U.S. 909 (1973) at 910, the Supreme Court followed the approach taken in Kent and In Re Gault. The Supreme Court held that due process requires the juvenile court to have a hearing before waiving its jurisdiction and allowing a child to be tried in a criminal court.

[87] United States: 397 U.S. 358 (1970) at 361-368 per Brennan J..

[88] United States: Breed v. Jones 421 U.S. 519 (1975) at 528-533 per Burger C.J..

[89] United States: McKiever v. Pennsylvania 403 U.S. 528 (1971) at 545-547 per Blackmun J. speaking for a majority of the Supreme Court.

[90] United States: Schall v. Martin 467 U.S. 253 (1984) at 264-281 per Rehnquist J..

motivating factor should have been to accord children civil rights in the criminal process because it was the right thing to do.

A court must determine the sanction on conviction. The most draconian sanction is the loss of liberty. The Irish Constitution requires that only minor offences may be tried summarily. The most important element in determining whether an offence is minor or not is the length of detention. The Children Act 1908 allowed for the detention of children for a number of years in different types of institutions: industrial school, reformatory school and borstal. The imposition of a long period of detention may breach the constitutional right of a jury trial for non-minor offences. The Irish courts have focused on the purpose of the institution rather than the period of detention when determining whether the right to a jury trial has been infringed. This approach accords with the welfare model. However, the rights model is indifferent to the purpose of the institution and is more concerned with the deprivation of liberty and curtailment of other rights.

In The State (Sherrin) v. Kennedy[91] the Irish Supreme Court considered the power of the State to detain a child for three years in St. Patrick's Institution, a borstal institution.[92] In the Supreme Court, Walsh J. found that St. Patrick's Institution is primarily a place

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[91] Ireland: [1966] I.R. 379.

[92] England: Prevention of Crime Act 1908, s. 2.

of detention.[93] Inmates do receive useful instruction and are subject to discipline that may assist in the formation of good character and self-discipline.[94] Walsh J. held that the most important factor in determining whether or not an offence should be regarded as minor is the length and form of punishment it attracts.[95] A period of detention in St. Patrick's Institution must be regarded as a form of punishment, even though the punishment may produce more beneficial results by way of reform or rehabilitation in the offender that would be an equal period as an adult. The deprivation of liberty is the real punishment.[96] An offence was not minor where it carried with it the possibility of a maximum three year sentence. Therefore, the provision was unconstitutional.[97]

Industrial and reformatory schools provide industrial training for children or youthful offenders who are lodged, clothed, and fed, as well as taught at these schools.[98]

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[93] Ireland: ibid. at 392 per Walsh J..

[94] Ireland: ibid. at 393 per Walsh J..

[95] Ireland: Melling v. O'Mathghamhna [1962] I.R. 1 at 14 per Lavery J.; Conroy v. Attorney General [1965] I.R. 411 at 436 per Walsh J.; In Re Haughey [1971] I.R. 217 at 247 per O'Dalaigh C.J..

[96] Ireland: ibid. at 394 per Walsh J..

[97] Ireland: [1964] I.R. 73.

[98] England: Children Act 1908, s. 44(1).

In J. v. Delap[99] the court focused on the nature of the institution when determining whether a period of detention of three years on summary conviction deprived an accused child of his right to a trial by jury.[100]

In the High Court, Barr J. found that a reformatory school is under the aegis of, and managed by, the Department of Education. It is staffed by teachers, social workers and those in allied disciplines. The school has no connection whatever with the prison service or the Department of Justice. Its primary purpose is to provide long term training and educational facilities to assist young offenders in making a new start in life and to acquire a useful place in society. It is not intended as a place of punishment per se, far less is it geared for or intended to be a place of detention for short-term prisoners. The only characteristic which it has in common with a prison is that each inmate is obliged to remain in the custody of the school director for a specified period which may vary from not less than two years to not more than four years. Barr J. held that this factor did not imply that inmates are incarcerated for the period of their detention in a prison. An obligation to remain at a place for the education and training of young offenders did not convert a school into a penal institution analogous to a prison nor ought the period of education and training which a young offender spends there be

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[99] Ireland: [1989] I.R. 167.

[100] Ireland: Constitution of Ireland 1937, Art. 38.5.

regarded as a period of imprisonment in the penal sense of the term. Barr J. held that detention in a reformatory school does contain an element of punishment. However, its primary purpose is educational and, most importantly, the period of detention is in the main related to the function of the school as a place of instruction and correction. The duration of a prison sentence on the other hand is primarily related to the gravity of the offence which gave rise to it and the character of the accused. Barr J. dismissed the application.[101]

The imposition of a sentence of imprisonment on a young person is seen as a measure of last resort. It is an admission that the young person is beyond the help found in an industrial or reformatory school. The Children Act 1908 provides that a young person shall not be sentenced to imprisonment for an offence unless the court certifies that the young person is either unruly or depraved.[102] A consideration of either unruliness or depravity will involve an inquiry. The rights model views such considerations as requiring an adversarial hearing where the child is afforded the civil rights of an

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[101] Ireland: ibid. at 169-170 per Barr J.. In McM. v. Manager of Trinity House [1995] 2 I.L.R.M. 546 at 553 per Laffoy J. holding that the purpose of both industrial and reformatory schools is educational. Laffoy J. recognised that a detainee in a reformatory school is likely to be held in the company of older and more delinquent detainees than those found in an industrial school and is likely to be held under a stricter and more confined regimes. Laffoy J. was of the view that in essence detention in a reformatory school is similar to detention in an industrial school.

[102] England: Children Act 1908, s. 102(3).

accused. In The State (Donohue) v. District Justice Kennedy[103] in the High Court, Finlay P. held that the decision to certify a young offender as of unruly character is of the same status as any other decision in criminal adversarial proceedings. Therefore, the decision can only be reached by a court upon sworn evidence properly admissible before it.[104] The accused must have an opportunity to cross-examine the witnesses deposing to the facts concerned.[105]

The Children Act 1908 provided that no child or young person could be sentenced to death. The court could order that the child or young person should be detained during Her Majesty's pleasure.[106] In The State (O.) v. O'Brien[107] a majority of the Irish Supreme Court held that the selection of punishment and the determination of the length of a sentence were integral parts of the administration of justice in criminal trials. These powers could not be exercised by a member of the executive.[108] The effect of this decision was to allow the court to order detention for an indeterminate period which during its currency may be remitted by the

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[103] Ireland: [1979] I.L.R.M. 109.

[104] Ireland: ibid. at 112 per Finlay P..

[105] Ireland: Greene v. Governor of Mountjoy [1996] 2 I.L.R.M. 16 at 23 per Hamilton C.J..

[106] Ireland: Children Act 1908, s. 103.

[107] Ireland: [1973] I.R. 50.

[108] Ireland: ibid. at 61 per O'Dalaigh C.J. and at 70-72 per Walsh J..

President of Ireland.[109] The child's detention during the pleasure of the court and can be reviewed by the court at any time. This interpretation is consonant with the original spirit of the statutory provision which was one enacted in ease of young persons and juveniles. The court is entitled to retain seisin of the case, review and supervise matter or impose a determinate sentence. A review allows a court to decide whether the time had come when the particular child might be properly released and discharged from the place of detention in which he was being confined.[110] The nature of the court's power accords with the welfare model. However, it is a fundamental feature of a criminal sanction that it has a determinate length. The rights model requires that a court should determine a maximum period for which a child could be detained.

The United States Constitution permits the use of the death penalty, provided that there are individualised consideration of mitigating circumstances.[111] A child's minority must be taken into account as a mitigating

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[109] Ireland: Constitution of Ireland 1937, Art. 13.6.

[110] Ireland: The People (Director of Public Prosecutions) v. Sacco and Whelan, unreported, High Court, 23 March, 1998 at 2-3 per O'Donovan J.; The People (Director of Public Prosecutions) v. Whelan, unreported, Court of Criminal Appeal, ex-tempore, 13 July, 1998 at 2 per O'Flaherty J..

[111] United States: Lockett v. Ohio 438 U.S. 586 (1978) at 604-605 per Burger C.J. speaking for a majority of the Supreme Court.

factor.[112]

In Thompson v. Oklahoma[113] the defendant was convicted of murder and sentenced to death when the defendant was 15 years old. The child claimed that this constituted cruel and unusual punishment violating the Eighth Amendment.

In the Supreme Court, Stevens J. held that a child who commits a crime is less culpable than an adult who commits a similar crime. A child or teenager has less inexperience, education and intelligence. A child or teenager is less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. A child or teenager has a capacity for growth. Society has fiduciary obligations to its children. The court held that the retributive purpose underlying the death penalty is simply inapplicable to the execution of a 15 year old offender. The court held that the execution of a person for an offence committed when the child was 15 constitutes cruel and unusual punishment.[114] However, this does not apply to a child aged 16 or over.[115]

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[112] United States: Eddings v. Oklahoma 455 U.S. 104 (1982) at 112-117 per Powell J. speaking for a majority of the Supreme Court.

[113] United States: 487 U.S. 815 (1988).

[114] United States: ibid. at 823-831.

[115] United States: Stanford v. Kentucky 492 U.S. 361 (1989) at 370-383 per Scalia J. speaking for a majority of the Supreme Court.

5.6 Developing competence of child

The welfare model and rights model both provide that parents or the State decide on the exercise of the child's rights where the child is incompetent to make decisions for himself or herself. However, a child is a person with developing physical and intellectual capacities. The rights model provides that the parent or State's ability to exercise a particular right of a child is lost where a child is competent to make the decision for himself or herself.[116] Therefore, a child who has the competence can decide on the exercise of his or her civil rights in the criminal process.[117] In Fare v. Michael C.[118] the United States Supreme Court held that when considering whether a child had waived his rights to silence and to consult a lawyer it is necessary to consider the child's age, experience, education, background and intelligence, capacity to understand the warnings given him, the nature of his rights and the consequences of waiving those rights.

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[116] England: Gillick v. West Norfolk and Wisbech Area Health Authority [1986] A.C. 112 at 171-172 per Lord Fraser and at 186, 188-189 per Lord Scarman.

[117] It is suggested that a child's competence to exercise his or her rights in the criminal process will be assessed in the same manner when assessing a child's competence to consent to or refuse medical intervention.

[118] United States: 442 U.S. 707 (1979) at 725-725 per Blackmun J..

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.0. Conclusions

The most significant difference, it is submitted, between the welfare model and rights model relates to the role of paternalism. The welfare model allows paternalism to go unchecked. The rights model attempts to control paternalism.

The thesis commenced with a distinction between the parens patriae jurisdiction and paternalism. In each successive chapter, it became evident that the contemporary literature, the legislators and the courts are torn between the rival claims of child autonomy on the one hand and the assimilation of the child into social constructs such as the State, the family based on marriage, or more recently, the parent with custody on the other.

The main finding of this thesis is that the parens patriae jurisdiction has altered its form and has acquired a contemporary significance and urgency of its own in child law matters. The refinement of this jurisdiction, and its efficiency and effectiveness is tied in with an attempt to remove paternalism from the operation of the jurisdiction, giving a greater voice to the child's own autonomy.

The second conclusion is that the law has invented a panoply of regulation, very little of which is based on

significant empirical research on how adults and children actually behave. The researcher submits that the future direction of his research must lie in an attempt to rectify the dearth of empirical research into how parents and children actually behave within the legal matrix. It is significant that there is very little research into paediatric pharmacology, and only recently has the a priori assumption been shaken that dosage given to adults must be divided by two or more for children. Likewise, there is a great necessity for systematic, controlled, randomised double-blind research into the effects on children of the model so that it may be reconsidered and reformed for the new millennium.

6.1. Recommendations

The following recommendations should eliminate paternalism from the parens patriae prerogative and transform the model into the hypothesis.

6.1.0. Legal representation

Children must be guaranteed a right to separate legal representation in proceedings involving their rights.[1] The thesis demonstrates that judges view

[1] A child does not have an automatic right to separate legal representation in proceedings concerned with that child's welfare and rights. In M.F. v. Superintendent, Ballymun Garda Station, John Rynne and Eastern Health Board (Notice Parties) [1991] 1 I.R. 189 at 200 per O'Flaherty J. holding that proceedings concerned with the care and custody of children and the protection of their rights are in a special and, possibly, unique category. The proceedings are special because they concern children and are possibly unique in that the fundamental rights of persons are in issue in litigation in which they are not represented. Child Care Act 1991, s. 25(1) accords a court conducting care proceedings with a discretion to join the child who is the subject of the proceedings as a party. S. 25(2)

themselves as both protectors of the child's rights, decision makers, and child advocates. The judicial function is undermined by attempts to undertake such a variety of roles.

The academic literature advocates according children separate legal representation. Kleinfeld (1970a) believes that the failure to accord representation does not mean that rights are not vindicated but that rights are not, in fact, recognised. Panneton (1977) and Duncan (1987) argue that children's interests remain unprotected essentially because they lack impartial representation.

6.1.1. Duties and rights of parents

The legal relationship between the parents and the child must be reformulated in order to accord supremacy to the duties of parents. The rights of parents must expressly be categorized as ancillary to their duties to protect and vindicate the child's best interests.

6.1.2. Failure to act in child's best interests

The model permits State intervention with the decisions of parents where there are compelling reasons. The thesis argues that there is sufficient evidence to allow for State intervention where parents fail to act in the child's best interests.

6.1.3. Restricting exercise of rights

The law intervenes where an individual exercises his

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provides that the court may appoint a solicitor to represent the child who has been joined as a party or accorded such other rights of a party as the court may specify. The court may direct the solicitor as to the performance of his or her duties.

or her rights in a manner that breaches the rights of another. The hypothesis requires that the courts should adopt the same criterion when considering the conflicts between the claims of child and parent.

6.1.4. Reducing subjectivity of best interests

Both the welfare model and rights model provide that parents and the courts must act in the child's best interests when vindicating the child's rights. The best interests standard offers little guidance to parents and judges. Their decisions will reflect personal or, societal values and mores. Steps must be taken to ensure the objectivisation of the best interests criterion where this is possible. This is to minimize damage to the child in what parents and judges acting quasi-parentally, honestly but mistakenly assert are for the child's benefit, when in truth they are more concerned with the other issues such as the viability of the family as a whole.

6.1.5. Duty of the State to provide for the child

The State has obligations to provide for the child, particularly in the fields of education and health care. There has been a failure by the State to fulfil these obligations. The State must provide the necessary resources so that every child is given the opportunity to achieve his or her potential.

6.1.6. Evolving nature of welfare rights

The concept of the content of right is usually considered to be immutable. However, this does not apply

to the welfare rights of a child. Our understanding of children and child development is growing. The nature of the welfare rights evolve as our understanding of children and child development grows. Therefore, the State must take cognisance of this greater understanding when affording welfare rights to children.

6.1.7. Procedural rights of child

Children should be entitled to the same procedural rights as that afforded to adults, when there is interference with the child's welfare and/or civil rights.

6.1.8. Balancing child's welfare and civil rights

The thesis has demonstrated that judicial paternalism has resulted in undue weight being attached to the welfare rights of the child where there is a conflict between the child's welfare and civil rights. There is a need to accord greater weight to the child's civil rights, particularly for competent children.

6.1.9. Safeguards where interference with civil rights

The hypothesis accepts that there will be circumstances in which the appropriate balance requires that the child's welfare rights be placed above the child's civil rights. However, the law should ensure that there should be the least possible interference with these civil rights. The courts should monitor this interference on a periodic basis, where the interference is continuous.

6.1.10. Child's right to equality

There are three facets to the child's right to equality.

First, children are entitled to the same civil rights as adults. There is no justification for denying children the same civil rights as adults.

Second, every child is entitled to certain welfare rights. However, the nature of the resources vindicating a child's welfare rights depend on that child's particular needs.

Third, children and adolescents are not a homogenous group. There are sufficient differences between children and adolescents to warrant different treatment. However, the welfare model treats children and adolescents in the same way. Empirical research is needed to explain the differences between children and adolescents, and to indicate their significance.

6.1.11. Competence of children

There is a need for more rigorous empirical research about whether children have the competence to take decisions affecting their welfare, and about the range of decisions which children can take at certain ages or developmental stages. This research will form the basis for a statutory scheme. The effect of this will be to develop the law beyond the assessment of a case-by-case analysis, laden with the inherent prejudices of the decision maker.

6.1.12. Civil rights not dependent on competence

Certain civil rights offer protection against State

interference, such as the right not to be deprived of liberty. The benefit of these rights is not dependent on the competence of the rights holder. These rights have been formulated from the perspective of adults. There is a need to reformulate these rights in order to ensure the protection and vindication of the rights of children.