CITATION: Justice for Children and Youth v. J.G., 2020 ONSC 4716
DIVISIONAL COURT FILE NO.: DC 1212/20
(Oshawa)
DATE: 20200818

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. CORBETT, DOYLE and FAVREAU JJ.

B E T W E E N:	)	
	)	
JUSTICE FOR CHILDREN AND YOUTH and A.G. (THE CHILD)	)	*Linda Rothstein, Mary Birdsell, Samira Ahmed and Charlotté Calon* for the Appellants
	)	
Appellants	)	
	)	
- and -	)	
	)	
J.G., L.L. and CHILDREN AND FAMILY SERVICES OF YORK REGION	)	*Martha McCarthy and Shannon Beddoe* for J.G.
	)	
	)	*Chris Rous* for Children and Family Services of York Region
Respondent	)	
	)	*David Miller* for L.L.
	)	
	)	**Heard by Videoconference:** July 9, 2020

REASONS FOR DECISION

<u>The Court:</u>

Introduction

[1] This case raises significant issues about the rights of a child to independent legal advice in the context of a high conflict dispute between his parents over custody and access.

[2] The motion judge made an interim interim order restraining the appellant Justice for Children and Youth ("JFCY") and one of its staff lawyers, Ms. Samira Ahmed, from representing or contacting their client, a 14-year-old boy.

[3] In our view, the motion judge erred in making this order. His order rested on a conflation of the issues of entitlement to standing in the family law proceedings and the right to seek independent legal advice. These are not the same. While there may be circumstances in which it is appropriate for a court to curtail the rights of a child to consult counsel, in this case the motion judge's order was tainted by this conflation and it was not justified.

[4] In the result, the order is set aside.

Factual Background

Family law proceedings up to December 2019

[5] The mother L.L. and father J.G. were married in 2000 and separated in 2010. They have two children, M.G. who is now 17 years old, and A.G., the subject of these proceedings, who turned 15 years old on August 10, 2020.

[6] On May 6, 2016, after a 12-day trial, Fryer J. made findings that the mother was interfering with the relationship between the father and the two children. In her decision, she outlined concerns regarding the mother's failure to promote a relationship between the father and the two children. Fryer J. ordered joint custody and that the children reside primarily with the mother. She also ordered access with the father and made an order for a therapeutic plan to reintegrate the children into the father's life.

[7] In November 2017, A.G. alleged that the father had engaged in inappropriate sexual conduct with him. The Children and Family Services of York Region (the "Society") commenced a child protection application under the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c.17, Sch. 1 (the "*CYFSA"*) and investigated the matter. The Society's investigation was inconclusive, but the Society nevertheless sought orders permitting it to supervise the children. The children were then placed in the temporary care and custody of the mother under the Society's supervision with a requirement that the father and the children engage in reunification therapy.

[8] Proceedings involving the parents and the Society continued in 2018 and 2019.

[9] In decisions dated February 7, 2019 and June 27, 2019, Bennett J. and MacPherson J., respectively, found that the mother was not cooperating with the access arrangements and was influencing the children against having a relationship with their father. In his June 27, 2019 decision, MacPherson J. ordered that A.G. was to have a transitional stay with his paternal aunt and uncle, after which he was to be placed in the temporary care of the father under the Society's supervision.

[10] Prior to December 2019, the Court below declined at least twice to appoint the Office of the Children's Lawyer (the "OCL") to represent A.G. On January 16, 2018 and October 18, 2018, MacPherson J. found that, as this was a case of parental alienation, appointing the OCL to represent A.G. would destabilize the reunification therapy and negatively empower A.G. Given that A.G. was aligned with his mother, his wishes and preferences were not truly independent, and appointing the OCL would perpetuate this dynamic.

Involvement of Justice for Youth and Children

[11] JFCY is a legal clinic whose objects include assisting children in crisis. Samira Ahmed is the lawyer at JFCY with whom A.G. has had primary contact. A.G. was familiar with JFCY because M.G., A.G.'s older brother, had previously had contact with JFCY in the context of the family law proceedings.

[12] In July 2019, A.G. ran away from the Society-supervised kinship placement. On July 31, 2019, A.G. contacted JFCY after having been missing for five days.

[13] On July 31, 2019, after A.G. contacted JFCY, Ms. Ahmed contacted the Society. After discussions with the Society, she arranged to bring A.G. back to his kinship placement. In that context, Ms. Ahmed had discussions with counsel for the father in which she declined to disclose A.G.'s location on the basis of solicitor-client privilege. The father's lawyer then advised Ms. Ahmed that the father did not consent to her communicating with A.G.

[14] In September 2019, the mother, the father and the Society entered into a consent order signed by McGee J. giving the father temporary sole custody of A.G. under the Society's supervision. The mother's access was to be at the Society's discretion.

[15] In October 2019, A.G. contacted Ms. Ahmed during a meeting with a Society worker. A.G. told Ms. Ahmed that he had been having thoughts of killing his father. Ms. Ahmed contacted the Society and advised that A.G. should be placed in a mental health facility. The father then arrived at the place of the meeting. A.G. was not taken to a hospital. The father's lawyer then wrote to Ms. Ahmed demanding that she have no further contact with A.G.

[16] On December 10, 2019, A.G. ran away from school and did not return to his father's home. A.G. contacted Ms. Ahmed on December 11, 2019. Ms. Ahmed then wrote to the father's lawyer and the Society, advising that she had been contacted by A.G. and that he did not wish to disclose his location or to speak to his father or the Society.

[17] On December 12, 2019, a warrant was issued for A.G.'s apprehension under the *CYFSA*. In correspondence with counsel for the father and the Society, Ms. Ahmed took the position that, despite the warrant, she could not disclose A.G.'s location without A.G.'s instructions.

[18] On December 17, 2019, the father brought an urgent motion returnable on December 18, 2019. The motion sought an order compelling JFCY to disclose A.G.'s whereabouts and restraining Ms. Ahmed and JFCY from acting for A.G. in the child protection proceedings or related proceedings and from having any further contact with A.G.

[19] The December 18, 2019 motion was brought before Jarvis J. (the "motion judge"). On that date, Ms. Ahmed requested an adjournment to prepare a response to the motion. The motion judge granted the adjournment, with an order that Ms. Ahmed facilitate contact between A.G. and the Society by the end of the day on December 19, 2019.

[20] On December 19, 2019, Ms. Ahmed arranged for A.G. to meet with Society workers. A.G. then agreed to be placed in a foster home.

December 20, 2019 hearing and order

[21] On December 20, 2019, the parties appeared again before the motion judge.

[22] Before the lunch break, the motion judge stated that he was "not going to make a finding" that Ms. Ahmed or JFCY "acted in some fashion inappropriately". He also indicated that Ms. Ahmed would be given an opportunity to cross-examine a Society worker who was to give *viva voce* evidence at the hearing.

[23] After the break, the motion judge indicated that he had reconsidered his earlier statements and that Ms. Ahmed would not be permitted to participate in the proceeding. The motion judge later denied Ms. Ahmed's request to provide a brief of authorities for the court's consideration.

[24] After the conclusion of the hearing, the motion judge gave oral reasons in which he made the following findings about the impact of the relationship between JFCY and A.G.:

> On December 10th, 2019, the child was missing from the father's residence. He had been in contact with Ms. Ahmed before then, a lawyer with the Canadian Foundation for Children, Youth and the Law. The father brought this motion now before the court as an emergency matter on short notice to the society, Ms. Ahmed and her organization (JCF). He seeks AG's return to his custody and an order restraining Ms. Ahmed and JCF from having any contact with the child. The society supports the father's position that AG be returned to his care return [sic] but worries about the child's willingness to return.
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> When this matter came before the court on 18th of December, Ms. Ahmed confirmed that she is in contact with the child. As a result of this court's direction, Ms. Ahmed facilitated a society worker's meeting with AG whom until yesterday refused to disclose his whereabouts. The worker met with AG, who later in the day was transported to a foster home.
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> The worker, Mr. Kendall, was sworn in and testified about his dealings with AG and most pertinent to today's proceedings, his involvement yesterday with AG, and his observations. His evidence was most helpful to the court in terms of describing his involvement with AG and his father, his overall impression of the child and his status. This evidence also involved collaterals (schools, Ms. Berkley, the therapist). Mr. Kendall's view was that given the alternatives, the best option however problematic, was for the child to be returned to his father's care.
>
> Mr. Kendall opined that AG was young for his age. The Respondent Mother admitted that AG was not stable. Mr. Kendall indicated that in an earlier telephone call with A.G., Ms. Ahmed was concerned about the child's mental health status.

> The father argues that Ms. Ahmed and Justice for Children and Youth have operated either unwittingly or purposefully, to empower AG and to undermine the efforts of the court to redress what is alleged to have been, and may continue to be, alienating behaviour by the Respondent Mother and the extended family. The evidence is that there was no support from the Respondent Mother to be supportive of A.G.'s relationship with the father and his extended family. On two prior occasions this court has declined to appoint OCL to act for AG. Ms. Ahmed and JCF reference a retainer by AG, the execution of which is in my view, problematic not only in light of those orders but the blank (illegible) of any steps being taken by JCF before the Respondent Father's motion to seek legal representation. I am of the view that while JCF provides valuable assistance to children and youth, it has to date, and **in this case**, has been operating outside of the court's purview and in a fashion that is undermining years of court intervention particularly where reunification is the goal.
>
> It is not for AG to dictate to the court the terms on which he will return to his father's care or where else he should reside. Mr. Kendall described the father's conduct as empathetic and responsive to AG's needs. He has no concerns about, and did not hear from AG, about fearing his father or any kind of abuse. AG's comments about assertions about "crazy" things between him and his father and not "taking it anymore" as reasons for leaving his father's residence give rise to impressions of a child impacted by alienating behaviour, reacting to discipline and expected behaviours that he does not accept and whose recourse is running away and contacting JCF. This is where, in my view, JCF is inappropriately empowering AG's recalcitrant behaviour.
>
> AG should be returned to the father's care but that should be deferred for a short while to permit the society to formulate a plan to effect that return. AG should be made aware by Mr. Kendall or the society that issues involving his representation by a lawyer and future contact with his mother and her extended family will be a direct function of his returning to his father's care and continuing to reside there until further order of this court. Any future contact with the maternal side of the family will be subject to therapeutic recommendation of Mr. Berkley. AG must understand that he must earn the confidence of the court in the decisions he is making.

[25] The motion judge went on to make an order that A.G. was to remain in foster care until December 27, 2019, after which he was to be returned to his father's care and control.

[26] He also made the following order restraining Ms. Ahmed and JFCY from having contact with A.G.:

> On an interim interim basis Ms. Samira Ahmed and Justice for Children and Youth shall not have any indirect or direct contact with the child, the respondent father through any means including in person, phone contact, emails, text messages, social

> media or contact through any devise [sic] other than for the purpose of assisting with the current and ongoing missing persons investigation and facilitating the child's safe return to the Respondent father's care.

[27] The motion judge specified that the "order with respect to Ms. Ahmed and Justice for Children and Youth is made without prejudice to their bringing a notice of motion with respect to whether an order should be made granting them standing in the proceeding representing AG".

[28] He went on to adjourn the matter to January 16, 2020.

Preliminary Issue Regarding whether the Order is Interlocutory or Final

[29] An appeal from a final order of a judge of the Unified Family Court lies to the Divisional Court, without leave.[1] An appeal of a temporary order also lies to the Divisional Court, however, leave is required.[2]

[30] JFCY commenced this appeal without first seeking leave of the Court. The father takes the position that the order is, at most, interlocutory, and therefore leave of the court is required before the appeal can proceed.

[31] We agree with JFCY that, in the unique circumstances of this case, the order is final. While the order was intended to have an interlocutory effect, it in fact has a final effect.

[32] In the normal course, an order is only final if it finally disposes of the issues in dispute between the parties. However, the case law has established that an order is also final if it disposes of the rights of a non-party.[3]

[33] In this case, neither A.G. nor JFCY are parties to the proceeding. While it appears that the motion judge intended his order to be interlocutory by allowing them to return to court, in our view it finally disposes of A.G.'s rights in two respects.

[34] First, as discussed below, the motion judge's error in this case was his conflation of the right to standing in the proceedings with the right to independent legal advice. The order is said to be "without prejudice" to A.G. and JFCY "bringing a notice of motion with respect to whether an order should be made granting them standing in the proceeding". On its face, the order therefore closes the door to the argument JFCY makes here which is that A.G. has a right to independent legal advice without seeking permission of the court, and that independent legal advice is different from standing in the child protection or family law proceedings.

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[1] *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 21.8, 21.9.1 [*CJA*]*; Christodoulou v. Christodoulou*, 2010 ONCA 93 at paras. 6-10.
[2] *CJA*, s. 19(1)(b).
[3] *Smerchanski v. Lewis*, 1980 CarswellOnt 410 (C.A.) at para. 18; *CC&L Dedicated Enterprise Fund (Trustee Of) v. Fisherman* (2001), 55 O.R. (3d) 794 (C.A.) at para. 12; *C-A Burdet Professional Corp. v. Gagnier*, 2016 ONCA 735 at para. 9.

[35] Second, on its face, the order makes it impossible for JFCY to consult with and get instructions from A.G. about how he wishes to proceed going forward.

[36] Counsel for the father argues that JFCY could have returned to the motion judge for the purpose of seeking clarification or a variation to address this second issue, or could have sought directions. However, while this was certainly an option, it is not sufficient to transform an order that has a final effect on its face into an interlocutory order. The order is not a dismissal of the child's request for representation. It is a restraining order against JFCY. On its face, it does not allow JFCY to seek to have this issue decided again on an interlocutory or permanent basis.

[37] In any event, if we had concluded that the order was interlocutory, we would have granted leave to appeal pursuant to the test in Rule 62.02(4)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. There is good reason to doubt the correctness of the order and the underlying issue – the right of a child to consult with counsel – is of general importance.[4] It is for this reason that we do not accept counsel for the father's argument that leave should not be granted given this Court's recent decision in *Lokhandwala v. Khan*.[5] In that case, this court stated:

> Under either branch of the test under R.60.02(04), the moving party must show an issue that rises beyond the interim interests of the particular litigants: for example, are there questions of broad significance or of general application that warrant resolution by a higher court because they affect the development of the law and the administration of justice: *Ash v. Lloyd's Corp.* (1992), 1992 CanLII 7652 (ON SC), 8 OR (3d) 282 (Gen. Div.); *Greslik v. Ontario Legal Aid Plan* (1988), 1988 CanLII 4842 (ON SC), 65 OR (2d) 110 (Div. Ct.). Further, even where there is an issue of "importance", leave will still not usually be granted where that issue will still be available for appellate adjudication after trial: *Silver v. Imax* (2011) ONSC 19035, paras. 46 and 55.

[38] The issue on this appeal is of broad significance in that it affects the administration of justice. Depriving a young person of the ability to seek and receive legal advice from a lawyer is a profound derogation from that young person's rights.

Standard of Review

[39] The standards of review in *Housen v. Nikolaisen*, 2002 SCC 33, apply to this appeal. The Court is to review questions of law on a standard of correctness and questions of fact on a standard of palpable and overriding error. Questions of mixed fact and law are to be reviewed on the

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[4] We do not accept counsel for the father's argument that there are two conjunctive tests for leave to appeal, both of which have conjunctive tests – that is, that a moving party must satisfy all four branches of the test for leave to appeal. The two tests are alternatives, each of which has two conjunctive components. See *Ash v. Lloyd's Corp.*, 1992 CarswellOnt 1099 (Div. Ct.) at paras. 2-3; *Comtrade Petroleum Inc. V. 490300 Ontario Ltd.*, 1992 CarswellOnt 429 (Div. Ct.) at paras. 6-7; *Bergen v. Sharpe,* 2011 ONSC 1930 (Div. Ct.) at para. 42.

[5] 2019 ONSC 6346 (Div. Ct.).

palpable and overriding error standard unless there is an extricable question of law which is to be reviewed on a correctness standard.

The Motion Judge Made a Legal Error in Restraining A.G. from Having Contact with his Lawyer

Introduction

[40] This was not a motion by A.G. to participate in the family law or child protection proceedings. This was a motion by the father for a restraining order against JFCY. In her arguments to the motion judge, Ms. Ahmed was clear that she was not asking the court to permit A.G. to participate in the proceedings.

[41] In our view, the motion judge made a legal error in restraining JFCY from having any contact with A.G. In doing so, he conflated a child's right to independent legal advice with a child's right to standing in a child protection or family law proceeding.

[42] In *Wood v. Schaeffer*, 2013 SCC 71, Binnie J. commented on the foundational principle that everyone is entitled to seek the advice of a lawyer:

> Everyone is entitled to seek the advice of a lawyer. This freedom also reflects the importance of the societal role of lawyers in a country governed by the rule of law. Lawyers represent people, communicate legal information and give advice. The execution of these functions contributes to the maintenance of the rule of law. Indeed, these functions are deemed so important that they are often protected by strong privileges of confidentiality that are linked to our basic values and constitutional rights. With this in mind, the freedom to consult with counsel should not be eliminated merely through a narrow reading of the regulation in the absence of clear legislative intent. This narrow interpretation also reflects an unjustified mistrust of lawyers. It cannot be assumed that lawyers will advise their clients to break the law and fail to discharge their duties to the public and to justice itself.

[43] Children are not exempted from this principle. There is no common law principle or legislative requirement that children are to obtain their parents' permission or an order of the court before they are entitled to obtain advice from a lawyer.

[44] The father's primary argument before the motion judge and before us is that, in the context of family law proceedings or child protection proceedings, children are entitled to the advice of counsel if they seek representation and standing. In other words, according to the father, there is no distinction between participatory rights in the proceeding and the ability to seek and obtain legal advice. The motion judge appears to have accepted this proposition. However, we see no legal support for it. While both the *Family Law Rules*, O. Reg. 114/99 and the *CYFSA* create mechanisms for children to apply for and be granted standing in family and protection proceedings, there is no statutory or common law principle that would preclude a child from seeking legal

advice. On the contrary, as set out below, the relevant provisions of the *CYFSA* support a child's entitlement to seek and obtain legal advice.

The rights of a child to representation and participation in family law and protection proceedings

[45] There is no doubt that, in the context of family law proceedings, the court acts as a gatekeeper in deciding whether a child should be entitled to separate legal representation and standing.

[46] Rule 4(7) of the *Family Law Rules* provides that "[i]n a case that involves a child who is not a party, the court may authorize a lawyer to represent the child, and then the child has the rights of a party, unless the court orders otherwise".

[47] In the context of child protection proceedings under the *CYFSA*, children are entitled to seek permission of the court for legal representation and standing:

> 78 (1) A child may have legal representation at any stage in a proceeding under this Part.
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> (2) Where a child does not have legal representation in a proceeding under this Part, the court,
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> (a) shall, as soon as practicable after the commencement of the proceeding; and
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> (b) may, at any later stage in the proceeding,
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> determine whether legal representation is desirable to protect the child's interests.

[48] In most cases where the court grants a motion for the legal representation and standing of a child, which generally occurs in the case of older children, the OCL is appointed. However, the court can also appoint an independent lawyer to represent the child.

[49] As was done in this case, it is certainly open to the court to deny legal representation and standing to a child in appropriate circumstances. In fact, as submitted by counsel for the father, in the context of cases of parental alienation, denying legal representation and standing may be an important part of a strategy to reunite alienated children with a parent. It is within a judge's discretion to determine whether legal representation and standing are appropriate in any given case.

[50] However, this determination is distinct from the issue of a child's entitlement to advice from legal counsel.

The rights of a child to legal advice

[51] As held by Binnie J. in *Wood*, access to legal advice is a fundamental right in Canada. There is nothing that limits this right to adults.

[52] As stated by the Court of Appeal in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559, childhood is not a "legal disability" disentitling children from the right to retain and instruct counsel. At paras. 71 and 72, the Court noted the right of children to speak to counsel in a private, confidential sphere so that their voices can be heard.

[53] Children consult and retain lawyers regularly across Ontario without prior permission from their parents or the court on topics as diverse as immigration, housing, education, criminal law, health law, and many other topics including family law. JFCY is a legal clinic that specializes in providing legal advice to young people. The argument that parental permission or court authorization is required before JFCY can give advice to children would undercut its ability to do its work. The position of the respondent father that his permission, as the court-ordered custodial parent, was required before his son can consult a lawyer, is, simply put, wrong.

[54] In fact, the *CYFSA* reinforces this view.

[55] The preamble to the *CYFSA* states that children are "individuals with rights to be respected".

[56] Section 10(1)(b) of the *CYFSA* provides that a child in care, which was A.G.'s status at the time the order in this case was made, is entitled to speak in private with and receive visits from a lawyer.

[57] Children over the age of seven have a right to independent legal advice in adoptions.

[58] The *CYFSA* also permits children of 12 years of age or over the right to seek to vary or terminate supervision, interim or extended custody orders (*CYFSA*, ss. 113(4)(a), 115(4)(a)), implying that they have a right to seek legal advice before doing so.

[59] A child also has a separate and distinct right to participate in *CYFSA* proceedings apart from direct representation. Section 79(4) states that a child 12 years of age or older is entitled to receive notice and be present at the hearing, unless the court is satisfied that their presence would cause the child emotional harm.

[60] The *CYFSA's* reference to international human rights instruments also reinforces the rights of children to obtain independent legal advice.

[61] The preamble to the *CYFSA* states "… the Government of Ontario acknowledges that the aim of the *Child, Youth and Family Services Act, 2017*, is to be consistent with and build upon the principles expressed in the United Nations Convention on the Rights of the Child".

[62] The United Nations Committee on the Rights of Children's *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14, recognizes at para. 4 that a child's right to legal services forms part of the protection of their best interests. *General Comment No. 12 (2009), The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, links the right to legal services with

the right of the child to understand their rights and the processes in which decisions are being made about them. Paragraph 16 states:

> The child, however, has the right not to exercise this right. Expressing views is a choice for the child, not an obligation. States parties have to ensure that the child receives all necessary information and advice to make a decision in favour of her or her best interests.

[63] Children are entitled to seek legal advice without permission from their parents or the court. No authority was cited to us to the contrary. Neither Rule 4(7) of the *Family Law Rules* nor s. 78 of the *CYFSA* speaks to this point. Indeed, by necessary implication, Rule 4(7) and s. 78 of the *CYFSA* must indicate the contrary: in order for a child to move under these provisions, the child will usually have to consult a lawyer before court permission to participate in the proceeding can be sought.

[64] While we agree that the court could intervene in a particular solicitor-client relationship between a lawyer and a child, we have difficulty imagining a case where the court would make an order that entirely precluded a child from seeking and obtaining legal advice from any lawyer. It certainly may be appropriate for the court to intervene in a parental alienation case where the lawyer is closely allied with one parent. However, in such cases, the court would ordinarily facilitate an arrangement for the child to obtain legal advice elsewhere, and certainly would not prohibit the child from getting legal advice altogether.

[65] Where a child wishes to receive legal advice, many factors can come into play in identifying and arranging for that counsel. We do not find it necessary to canvass the spectrum of approaches that are available. However, where, as here, a child has independently sought out the assistance of a legal clinic that specializes in dealing with children in crisis, it is hard to imagine that there would be many circumstances, if any, that would justify terminating that relationship.

Application of principles to this case

[66] The motion judge's reasons demonstrate that he did not consider the issues of the right to legal advice and standing were separate issues. This is evident in the reasons in a number of respects:

a. The motion judge reviewed the retainer agreement signed by A.G. and commented that it was problematic in part because of the prior orders denying standing to the OCL to represent A.G. in the proceedings.

b. The motion judge stated that JFCY was acting "outside the purview of the court", thereby suggesting that the court's permission is required for A.G. to retain and consult JFCY.

c. The motion judge suggested that contact with JFCY is a privilege that A.G. could earn if he complied with court orders, thereby suggesting that he did not view A.G. as having a fundamental right to advice from legal counsel.

d. Finally, as reviewed above, the motion judge's order was made without prejudice to the JFCY and A.G.'s ability to return to court at a later seeking standing.

[67] In our view these were serious legal errors. As discussed above, there may be circumstances in which it would be appropriate for a court to impose a restraining order preventing a child from communicating with a lawyer of his or her choice. But such an order has to be made on proper legal considerations, including the starting point that, as a matter of principle, every child has a right to seek the advice of a lawyer.

[68] Here, there was a general finding that the retainer of JFCY had served to undermine the efforts of the courts over a period of years with the child and his family. There was no evidence to support this finding. In his evidence, the father said that he believed that JFCY had "harboured" the child when he ran away. There was no evidence to support this belief. The father was clearly upset that JFCY would not disclose the child's whereabouts on the basis of solicitor-client privilege. With respect, this privilege claim was justified, and the father's upset – understandable of course – is based on a fundamental disrespect of his son's right to consult with a lawyer, and for his communications to be treated as confidential.[6] We have reviewed the record before the motion judge carefully. Obviously, this was a difficult situation for all concerned. But we see no basis to find any misconduct by JFCY in the way that it handled this matter – and certainly no conduct that would justify removing them as counsel for the child. This view was stated by the motion judge during oral argument – he said more than once that he was not going to criticize JFCY – and in his reasons he did not find fault with its response to the crisis.

[69] Counsel for the father argues that, in the context of parental alienation cases, the courts have recognized the dangers of granting legal representation and standing to a child who is under the influence of one parent. In such cases, the concern is that the child is already over-empowered, and legal representation and party status will have the effect further empowering an already over-empowered child.

[70] Again, this argument misses the distinction between the right to seek legal advice and the right to seek legal representation and standing in the proceedings.

[71] When the motion came before the motion judge, the child had run away from his placement, and a warrant had been issued for his apprehension. The child himself was an active antagonist in the process. "Empowering" him further by granting him legal representation and party status would run contrary to prior decisions in the case. It is no surprise that the motion judge, in the critical situation before the court, did not view it as desirable to give A.G. the impression he could further influence the case by getting involved in it with his own lawyer.

[72] But it is important not to confuse empowering individuals by giving them access to legal advice and over-empowering children in custody and access proceedings. Permitting children to consult with a lawyer and obtain legal advice is a way of empowering children. That is the point

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[6] Of course, there are circumstances in which it might be necessary for a lawyer to breach solicitor-client confidentiality with a child; for example, where doing so is necessary to protect the life or safety of the child.

of getting legal advice – to understand one's rights and obligations and to make decisions based on those rights and obligations. This is not the same as the concern about over-empowering children by giving them standing and separate representation in the proceedings.

[73] In oral argument, counsel for the father likened a child who has been alienated from a parent as similar to a drug addict – a person whose thinking is so disordered as a result of addiction that they are unable to make rational choices that are uninfluenced by the addiction. Counsel for the father was clear that it is an imperfect analogy, but it assists the court in explaining what was wrong with the order made in this case. It may be that an addict is suffering from a mental illness such that she cannot be represented in court without a litigation guardian or other representative. But she is still entitled to legal advice, even though her thinking may be "disordered". This is fundamental to our system of justice. Even someone who is diagnosed as suffering from a serious mental illness, to the point of being incarcerated in a secure facility, is entitled to seek and obtain legal advice. Indeed, apart from persons who are unable to function at a mental level sufficient to understand legal advice, it is hard to imagine a situation where anyone should be denied the right to seek and obtain legal advice.

[74] Over-empowering a child within child protection or custody and access proceedings by granting him or her party status may well be contrary to the child's best interests and may not assist the court to decide the case. There is a substantial body of statutory and common law in this area, and nothing we say in this decision qualifies that law. However, that was not the issue decided by the motion judge in this case.

[75] Empowering a child as an individual in a free and democratic society by according that child the right to consult with and obtain advice from a lawyer does not necessarily entail over-empowering that child in family law or protection proceedings. The effect could be quite the contrary: the child's lawyer may explain to the child the child's position, the respect that must be accorded to court orders, and the limited participation and rights that a child has in such cases. Of course, where a child is unhappy with a court's disposition in a custody and access or protection proceeding, the lawyer may well be asked to give the child advice about what the child can do about it. We do not see that sort of empowerment as contrary to the interests of a child, but rather, as consistent with the child's status as an individual with his or her own rights and freedoms.

Procedural Unfairness

[76] We have concluded that the order below should not have been made and we are setting it aside for that reason. On the basis of the materials put before the court on the father's motion, it should have been dismissed.

[77] If we had concluded otherwise, we would have sent this issue back for a re-hearing on the basis of procedural unfairness below. As reviewed briefly above and as set out in the record, Ms. Ahmed was deprived of the opportunity to make arguments against the proposed interim relief, relief that ultimately had the effect of closing off all communications between JFCY and A.G.

Closing Comments

[78] We acknowledge the difficult situation before the motion judge, a judge with well-recognized family law experience and expertise. When this case came before him, the family was, once again, in crisis. There had been real concerns for the safety and security of the child, who had disappeared for more than a week. The family had been in litigation for a decade, and the way forward, for the child and for the family, was not clear. In these exigent circumstances, the week before the Christmas break (always a busy time in the family law courts), in one of the busiest family law jurisdictions in Canada, the motion judge made extra time in his calendar on two days to give this case special care and attention, and on the second day – the last sitting day before the holiday break – stayed, with court staff, until 10:00 pm to complete the matter and issue a formal order. We have nothing but respect and admiration for the motion judge's handling of the case, in the circumstances before him, and only part company with him on this one issue – an issue in respect to which he expressed considerable uncertainty during his exchanges with counsel. Family law happens in real time and carries with it real consequences.

[79] Our respect for the experience, wisdom and commitment of the motion judge does not change the fact, however, that we conclude he got this one issue wrong. It is an important issue for young people generally, and for this child in particular. And so it is our duty to intervene.

Summary and Order

[80] The family has had a very difficult history. The child has been deprived of consulting with his counsel of choice for over six months now. We view that as a derogation from the child's fundamental rights. This derogation may well have caused the child real hardship – the child's distress was such that he ran away again for two months this spring, and he (and his entire family) might well have benefitted if he had been able to consult with Ms. Ahmed during this time. We will never know. But he should have had the right to consult with his lawyer during that time, and we wish to restore his ability to speak with counsel without delay.

[81] With respect, this was not a close call. The premise of the order sought by the father was wrong. In our view it has no support at all in the law. The child may seek and obtain legal advice. This does not mean he should participate in the ongoing legal proceedings – that issue was not before the motion judge.

[82] The appeal is granted. The impugned order is set aside. The Society is directed to provide a copy of this decision to A.G. and to explain to him that he may contact JFCY and Ms. Ahmed if he wishes to do so. The Society is to confirm to the parties that it has done so.

[83] No costs were requested and we agree that this is not a case for costs.

Favreau J
for D.L. CORBETT J.

Favreau J
for DOYLE J.

Favreau J
FAVREAU J.

Released: August 18, 2020

CITATION: Justice for Children and Youth v. J.G., 2020 ONSC 4716
DIVISIONAL COURT FILE NO.: DC 1212/20 (Oshawa)
DATE: 20200818

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. CORBETT, DOYLE and FAVREAU JJ.

BETWEEN:

JUSTICE FOR CHILDREN AND YOUTH
and A.G. (THE CHILD)

Appellants

- and -

J.G., L.L. and CHILDREN AND FAMILY SERVICES OF YORK REGION

Respondent

REASONS FOR JUDGMENT

THE COURT

Released: August 18, 2020