

● Children's Aid Society of Toronto v. D.D.

Ontario Judgments

Ontario Superior Court of Justice

F. Kristjanson J.

Heard: August 2, 2018.

Judgment: August 17, 2018.

Court File No.: FS-18-2052

[2018] O.J. No. 4272 | 2018 ONSC 4743

Between Children's Aid Society of Toronto, Moving Party/Respondent to the Appeal, and D.D., Respondent/Appellant in the Appeal

(52 paras.)

Counsel

Nicole Horwitz and Linda Hofbauer, for the Moving Party/Respondent to the Appeal.

Mbong Elvira Akinyemi, for the Respondent/Appellant in the Appeal.

WARNING

The court hearing this matter directs that the following notice be attached to the file:

This is an appeal under the *Child and Family Services Act* and subject to a publication ban pursuant to subsections 87(8) and 87(9) of *Child, Youth and Family Services Act, 2017*. These subsections and subsection 142(3) of the *Child, Youth and Services Act, 2017* deal with the consequences of failure to comply with the statutory publication ban. Those sections provide:

87(8) Prohibition re identifying child -- No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

(9) Prohibition re identifying person charged -- The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.

142(3) Offences re publication -- A person who contravenes subsection 87(8) or 134(11) (publication of identifying information) or an order prohibiting publication made under clause 87(7)(c) or subsection 87(9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than three years, or to both.

REASONS FOR JUDGMENT

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Overview

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1 D.D. is the birth mother of S.S. In 2014, S.S. was made a Crown ward without access by order of the Ontario Court of Justice, and was placed in the care and custody of the Children's Aid Society of Toronto ("CAST"). The Crown wardship, no access order was confirmed by the Divisional Court and by the Court of Appeal. S.S. was adopted in 2017. In 2018, D.D. brought an application for an openness order. The application was dismissed by Justice C. Curtis (the "application judge") on the grounds that after adoption, the birth mother had no standing to seek an openness order under the governing statute, the *Child and Family Services Act*, R.S.O. 1990, c. C.11 ("CFSAs").

2 The birth mother appealed on a number of grounds that were not originally raised in the application below. CAST brought a motion to dismiss this appeal. I grant the motion and dismiss the appeal on the grounds that the application judge was correct in holding that the birth mother had no standing to bring an application for an openness order post-adoption, and the other issues raised for the first time on appeal are not properly before this court.

ISSUES

Issue # 1: Did the application judge err in law by finding that D.D. had no standing and could not bring an application for an openness order under the CFSAs?

Issue # 2: Can arguments that due process was not properly followed in an adoption be raised for the first time on appeal from a decision dismissing an application for an openness order?

STANDARD OF REVIEW

3 The issues raised involve extricable questions of law, and the standard of review is correctness. The Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, establishes that the appropriate standard of review for questions of law is a correctness standard (para. 8); and questions of fact are reviewed on a palpable and overriding error standard (para. 10). Questions of mixed fact and law fall on a spectrum: if the issues of fact and law cannot be separated, the palpable and overriding error standard applies. However, correctness applies if the question of law is extricable from the factual matrix (paras. 36-37).

BACKGROUND FACTS

4 By order of the Ontario Court of Justice dated December 17, 2014, S.S., the biological son of the appellant D.D., was made a ward of the Crown without access, and was placed in the care and custody of CAST. The Crown wardship, no access order was upheld by the Divisional Court on June 30, 2015, and by the Court of Appeal on December 21, 2015, with reasons reported at *D.D. v. Children's Aid Society of Toronto*, 2015 ONCA 903, 344 O.A.C. 89 (C.A.), leave to appeal refused, [2016] S.C.C.A. No. 61. At para. 41, Pardu J.A. for the Court of Appeal held:

Essentially the motion judge concluded that the mother did not have an ongoing relationship with the child and that access should not be granted on the basis of the future hope of a beneficial relationship. Given the child's unwillingness to have contact with his mother, the motion judge did not err in concluding that there was no triable issue as to whether ordering access to the mother would be "meaningful and beneficial" for the child.

5 The Court of Appeal dismissed the appeal from the refusal of the motion judge to grant access or order a trial of the issue of access.

6 On February 2, 2017, D.D.'s counsel was advised by CAST that S.S. had been placed for adoption. S.S. was the subject of an adoption order in August 2017.

7 D.D. commenced an application for an openness order by Form 34L in the Ontario Court of Justice in February 2018. D.D. asked the court "to grant her an openness order between the child, S.S., and his mother, D.D." That was

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the only relief sought in the Notice of Application. In the Notice of Application, D.D. set out reasons why she felt the openness order would permit the continuation of a relationship with her. D.D. submitted that the openness order would be beneficial and meaningful to the child, and was in the best interests of the child. D.D. specifically referred to the adoption in her Notice of Application, submitting that "I can provide moral support, love, [and] understanding to my son [S.S.], and be there for him as he reaches his full potential in school and in his adoptive home, cheering him every step of the way." (Emphasis added).

8 On March 26, 2018, the application judge dismissed D.D.'s application for an openness order. In her endorsement, the application judge referred to the Crown wardship, no access order and the subsequent appeals, all of which were dismissed. The application judge also noted that the child's adoption had been finalized in August 2017. The application judge dismissed the openness application because she found that there was no right for the birth mother to bring the application.

9 The transcript of proceedings before the application judge was filed on the motion. Duty counsel assisted the mother on the application. At the outset, CAST submitted that the application for openness had been filed in error since the child's adoption had been finalized, and CAST requested that the application be dismissed. The application judge spoke to the birth mother and informed her that there was no right to bring a request for openness given that the adoption had been finalized.

10 Duty counsel then stated:

Your Honour, I think what could help this client is just to get more information regarding adoptions ... so I think that's the thing she wants to know the adoption day, things like that.

11 The court quite clearly confirmed that the adoption had been finalized in August 2017, and confirmed to duty counsel that the mother was not entitled to records of a finalized adoption.

12 D.D. raised concerns that no adoption was registered with the Ministry of Community and Social Services in light of the letter she had received in August 2017, which indicated that the Ministry had no information on their files. The application judge considered the request and informed D.D. that there had been an adoption. The CAST lawyer had confirmed, on the record, that the child was adopted in August 2017. The Office of the Children's Lawyer ("OCL") counsel confirmed that they had also been involved in meeting with S.S. to obtain his consent to the adoption.

13 The application judge requested, but did not order, that CAST write a letter to the birth mother telling her the date the adoption was finalized.

14 The application judge refused to adjourn the matter since D.D. had brought an application for which she had no standing, and the application judge dismissed the application.

15 D.D. appealed from the application judge's decision by a Form 38 Notice of Appeal to the Superior Court of Justice on April 23, 2018. She raised three grounds in her notice of appeal:

- (1) The application judge erred in law in the openness application decision by not having received a response from CAST and OCL;
- (2) D.D. had not seen an adoption application filed with the court in Ontario, although her request had been made with CAST counsel March 26, 2018; and
- (3) CAST counsel had confirmed she would provide D.D. with a document as to the "supposed adoption" of S.S.

16 CAST then brought a motion to dismiss the appeal. D.D.'s counsel asserts that the Notice of Motion is deficient because it fails to set out the grounds for dismissing the appeal. CAST filed a factum in advance of the hearing, asserting that the application judge did not err in finding that the respondent had no right to bring an openness application by virtue of s. 145.1(1) of the CFSA, which specifically prohibits anyone from bringing an openness

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application once an adoption order has been made. I find that D.D. was aware well in advance of the hearing of the basis for CAST's motion to dismiss the appeal.

17 On May 22, Justice Stevenson set a schedule for the argument of the CAST motion to dismiss the appeal on the grounds of jurisdiction. D.D. did not comply with the schedule set by Justice Stevenson.

18 The parties appeared before me on the motion on June 21, 2018. At that appearance, D.D.'s counsel, who was retained two days earlier, requested an adjournment. I granted the adjournment peremptory to D.D. At the June 21 attendance I carefully reviewed the grounds of the motion with counsel. CAST counsel confirmed that they were taking the position that the appeal should be dismissed on the grounds that the application judge was correct in finding that there was no jurisdiction to make an openness order given the finalized adoption. I specifically noted that while D.D. raised a number of issues in her affidavit material, the only issue on the appeal was the jurisdiction to bring an openness application in the context of a finalized adoption, given ss. 145.1(1) and s. 145.1(2) of the CFSA.

19 On June 21, counsel for D.D. asserted that D.D. was contesting that there had been an adoption. Given that copies of the adoption order and the child's new name could not be provided to D.D., I reviewed the sealed adoption order with the consent of all counsel. I stated as follows:

I have reviewed an order, an adoption order and Form 25C signed by a judge that does confirm that your son's name [...] it's the name of your child, which is an unusual name, and I have read that this child has been adopted, it's a final order.

20 Because of the requirements of the CFSA, I declined to give the name of the judge, the location of the court, or the date. I did, however, confirm that the adoption was finalized in August 2017 in Ontario.

21 It was also agreed as a fact for the purposes of the appeal that the birth mother's consent to the adoption was never sought or obtained.

Issue # 1: No Standing to Bring Openness Application

22 The application judge found that S.S. was a Crown ward with no access, as of December 7, 2014, and that this order had been upheld by the Court of Appeal. The application judge found that since S.S. was the subject of a final adoption order in August 2017, D.D. had no standing to bring an application for an openness order. The application judge was correct, and her decision dismissing the application is upheld.

23 The application was heard under the CFSA. The statutory scheme is clear. "Openness order" is defined in s. 136(1) of the Act to include:

"openness order" means an order made by a court in accordance with this Act for the purposes of facilitating communication or maintaining a relationship between the child and,

(a) a birth parent, birth sibling or birth relative of the child, ...

24 As affirmed by the Court of Appeal in December, 2015, there was no access order in place allowing D.D. access to S.S. Accordingly, as the society with custody and care of S.S., CAST was the only possible party that could have applied to the court for an openness order. However, CAST only had standing to apply for such an order prior to S.S.'s adoption. This is pursuant to CFSA s. 145.1(1), which provides:

OPENNESS ORDERS

No access order in effect

Application for openness order

145.1 (1) If a child who is a Crown ward is the subject of a plan for adoption, and no access order is in effect under Part III, the society having care and custody of the child may apply to the court for an

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openness order in respect of the child at any time before an order for adoption of the child is made under section 146. (emphasis added)

25 Before or after adoption placement, where (1) the child is a Crown ward without access, and (2) is in the care and custody of a children's aid society, only that society may make an application for openness. Thus, the statutory scheme provides that:

- (a) If a birth parent does not have access and the child is a Crown ward who is the subject of an adoption plan, only a CAS can apply for an openness order, and such application can only be made before an adoption order is finalized.
- (b) If a birth parent does not have access and the child is a Crown ward who is the subject of an adoption plan, the birth parent is not able to apply for an openness order.
- (c) No party is able to apply for an openness order after an adoption is finalized.

26 The policy of the Act is to recognize that adoption creates a new family, and it does so by severing ties with the birth family. The society which had care and custody of the child before adoption is no longer responsible for the child. This is why no party is able to apply for an openness order after the adoption is finalized.

27 There is a provision in the CFSA governing openness agreements (s. 153.6(1)), which are not court orders, but rather agreements which are voluntarily entered into by the parties: *K.F. v. Children's Aid Society of Ottawa*, 2018 ONSC 364 at para 12. However, the birth mother has no right to apply to any court for an openness agreement after adoption, and that issue was not before the application judge.

28 As a result, I grant the motion of CAST to dismiss the appeal on the grounds of jurisdiction: D.D. had no statutory right to seek an openness order after the final adoption of S.S.

Issue # 2: New Issues Raised for First Time on Appeal

29 On the motion, D.D. sought to raise a number of issues in affidavits, her factum, and oral argument. These issues were not raised in the Notice of Application. These are not issues properly raised on the appeal, or on the motion to dismiss the appeal. New issues may not generally be raised for the first time on appeal; issues need to be raised by a litigant at the first opportunity in the litigation so that the issue can be dealt with in a timely manner and with a minimum of court proceedings: *Marshall v. Reid* 2018 ONSC 648, 289 A.C.W.S. (3d) 580, at para. 20.

30 One of the grounds of appeal is that the application judge erred in deciding the issue of standing and dismissing the application without receiving a response from CAST and the OCL to the application. The application judge was entitled to act decisively as she did to dismiss this unfounded application on jurisdictional grounds at an early stage in the proceeding. Acting quickly to limit proceedings where there is no jurisdiction is very important in the context of child protection litigation. The Ontario Court of Justice has limited resources and a heavy case load, and is dealing with some of the most vulnerable children in our society. Where it is clear that there is no statutory basis for an openness application, the court can and should deal with the matter quickly, conserving both court resources and the resources of the publicly funded societies responsible for a significant child protection mandate. This is also consistent with the *Family Law Rules*, which have as their primary objective to deal with cases justly. Dealing with cases justly includes ensuring a fair procedure, cost effectiveness, efficiency, proportionality, and appropriate use of the court's resources. That is exactly what the application judge did in the circumstances, dealing with a jurisdictional issue in a straight-forward and appropriate manner.

31 The mother had no standing on an openness application in 2018 to contest the validity of the 2017 adoption. She similarly has no right to appeal from the application to dismiss the openness order on the grounds that the adoption was invalid, as she sought to do on this appeal.

32 The validity of the adoption was not raised in the notice of application for openness order before the application judge. Indeed, D.D. specifically submitted in her notice of application that the openness order was in S.S.'s best

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interest since she could provide moral support and love "in his adoptive home." The date and details of the adoption were touched upon as a concern raised by the mother during the attendance, but the validity of the adoption was not properly part of the application, nor is it properly raised on the appeal. The application judge sought confirmation of the adoption to allay D.D.'s concerns, and the application judge requested (but did not order) CAST to provide a letter confirming the adoption. I reviewed the final adoption order and conveyed the information to the mother for the same reason -- to allay concerns.

33 D.D. alleges that the adoption is not valid because she did not consent, and because she was not given notice. D.D.'s consent to the adoption was not required pursuant to s. 137(2)(b) of the *CDSA*, which provides that where the child has been made a Crown ward under Part III of the *CDSA*, only the written consent of a Director of a Society is required, not that of the birth parents.

34 D.D. had no right to notice of the pending adoption, and no ability to participate in the adoption hearing. D.D. was the birth parent of a Crown ward at the time of the adoption. Section 146 of the *CDSA* governs orders for the adoption of children. Section 151(4)(c) of the *CDSA* provides that:

No right to notice

(4) No person, ...

(c) who is a parent of a Crown ward who is placed for adoption,

is entitled to receive notice of an application under section 146.

35 D.D. had no right to appeal or contest the adoption application. Section 156(1) provides that the proposed adoptive parents and the CAST Director or local director are the only parties with the ability to appeal an adoption order:

Appeal: adoption order

156 (1) An appeal from a court's order under section 146 may be made to the Superior Court of Justice by,

(a) the applicant for the adoption order; and

(b) the Director or local director who made the statement under subsection 149 (1).

36 D.D. sought to introduce voluminous material to contest the validity of the adoption on the motion/appeal. She submits that "due process" was not followed in the adoption of S.S., alleging in her factum and oral argument that:

- * S.S.'s consent was not valid as he did not receive independent legal advice;
- * D.D.'s consent as birth mother was required and it was not obtained;
- * The local director's consent was not obtained, as the person signing for the Society "misrepresented his capacity";
- * The particulars on the birth registration were missing;
- * There was no court order terminating D.D.'s access; and
- * S.S. was in extended care, and no status review had been conducted since March 2014.

37 The adoption order is final, and D.D. has no right to contest the validity of the adoption on this appeal both because none of these allegations were raised before the application judge, and also by virtue of s. 157(1) of the *CDSA* which provides:

Effect of Adoption Order

Order final

157 (1) An adoption order under section 146 is final and irrevocable, subject only to section 156 (appeals), and shall not be questioned or reviewed in any court by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, habeas corpus or application for judicial review.

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38 D.D. is no longer considered to be a parent of S.S. by operation of s. 157(2) of the *CDSA*, which provides:

- (2) For all purposes of law, as of the date of the making of an adoption order,
 - (a) the adopted child becomes the child of the adoptive parent and the adoptive parent becomes the parent of the adopted child; and
 - (b) the adopted child ceases to be the child of the person who was his or her parent before the adoption order was made and that person ceases to be the parent of the adopted child, except where the person is the spouse of the adoptive parent. [Emphasis added.]

39 Another ground of appeal was that D.D. had not seen an adoption application filed with a court in Ontario, and that CAST said they would provide documentation about the "supposed adoption" of S.S. Again, this was not part of the openness application, and is not properly part of this appeal. In order to allay D.D.'s concerns, and in response to the issue raised by D.D., CAST has provided proof of adoption in their motion materials. There are statutory privacy protections in the *CDSA* which prohibit the provision of identifying information and the adoption order to D.D.. CAST has, however, provided significant redacted disclosure which is sufficient to demonstrate that S.S. has been adopted. On March 1, 2018, CAST's Disclosure Services sent D.D. redacted documents including the following:

- (a) S.S.'s consent to adoption;
- (b) The Form 8D Application for Adoption;
- (c) Acknowledgment of Adoption Placement;
- (d) Form 34C Director's or Local Director's Statement on Adoption;
- (e) Form 34E Director's Consent to Adoption; and
- (f) Affidavit of Adoption Worker.

40 The affidavit of the adoption worker filed on the motion confirmed that the adoption was finalized in August 2017. The adoption order cannot be provided to D.D. as this would violate s. 48.2(1) of the *Vital Statistics Act*, R.S.O. 1990, c. V.4. Section 48.2 sets out a complex scheme governing access by a birth parent to information about a child. There is no possibility of disclosure of the registered adoption order until S.S. is at least 19 years of age, and it is subject to a disclosure veto which the child may register.

41 The appeal in this matter dealt with a very narrow issue: whether the birth mother may apply for an openness order. Given that S.S. had been a Crown ward without access, the birth mother was at no time after the Crown wardship order entitled to apply for an openness order. As a result, the application judge was correct in finding that D.D. lacked standing, and dismissing the application on that basis. The issues raised by D.D. on this appeal were not raised in the Notice of Application, and do not properly form part of this appeal.

COSTS:

42 CAST seeks costs in the amount of \$1,000.00, a very modest amount in light of the four hours spent in court arguing the motion both on June 21 and August 2, the amount of irrelevant material filed by D.D., and the amount of material filed by CAST on the motion to allay the mother's fears with respect to the adoption. CAST submits that it rarely, if ever, seeks costs in child protection litigation, but in this matter, felt that D.D. had crossed the line. In particular, the court had been very clear on June 21 that the only issue on the appeal was the right to bring the openness application and the other issues were not properly part of the appeal. Counsel for D.D. had been cautioned as to what was appropriately in issue.

43 The July 11 affidavit evidence filed by D.D. attempts to go behind the adoption order, and alleges that the local director lacked authority to sign the consent to adoption. There are numerous other examples of unfounded and speculative arguments. In her factum, for example, D.D. argues at para. 47:

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The Appellant further submits that if there is no adoption it would suggest that her son has disappeared through the cracks of the system without trace and the lack of transparency with which the Children's Aid Society of Toronto has handled this process seeks to deprive her of her only child. The Appellant only imagines the worst as a mother as she does not know whether her son has been trafficked, is being abused, being kidnapped after her concern is further raised by Article in Exhibit 10 called the Franklin Cover Up and says in Toronto several boys are sold and shipped to Las Vegas where they are abused and sexually assaulted.

44 There is no evidentiary basis for D.D. to raise such argument; this unsupported speculation. It has no role in this appeal, which only concerned the finding that D.D. lacked status to make an application for an openness order pursuant to s.145.1.1 of the CFSA.

45 CAST submits that D.D. misrepresented the effect of court decisions, filed voluminous materials which were irrelevant and "preposterous" given what was in issue on the appeal, failed to deal responsibly with the jurisdictional challenge, and acted unreasonably throughout this application, motion and appeal. CAST suggested that a payment schedule of \$100 per month for 10 months would be reasonable.

46 In response, counsel for D.D. argues that D.D. is essentially impecunious, since she receives income from the Ontario Disability Support Program of \$951 per month, from which she pays \$662 in rent, and \$250 for a special diet.

47 There is a presumption of costs payable to the CAST, as it has been wholly successful on this motion dismissing the appeal. In *Serra v. Serra*, 2009 ONCA 395, [2009] W.D.F.L. 2707, the Ontario Court of Appeal confirmed that costs rules are designed to foster three important principles:

- a. To partially indemnify successful litigants for the cost of litigation;
- b. To encourage settlement; and
- c. To discourage and sanction inappropriate behaviour by litigants.

48 The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances of the case, rather than an amount fixed by the actual costs incurred by the successful litigant. Costs must be proportional to the issues and amounts in question and the outcome of the case. I have considered factors enumerated in Rule 24 of the *Family Law Rules*, O. Reg. 114/99; pursuant to Rule 24(11)(b), this includes the reasonableness of each party's behaviour in the case. As Justice S.B. Sherr states in *Mohamed v. Mohamed*, 2018 ONCJ 530 at para. 91:

Modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. Costs can be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice. See: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, paragraph 25.

49 In this case, I find the mother's behaviour to be unreasonable. The mother had no standing to seek an openness order given the statutory scheme, and persisted in raising new issues on the motion/appeal, despite clear guidance by the court that these could not be raised for the first time on appeal. In paragraph 21 of her factum, D.D. argued that there was no court order terminating her access to her son and that at all times she understood her access was suspended and not terminated. It is unreasonable for D.D. to take this position in litigation in light of the OCJ court order, as well as the Court of Appeal's decision clearly confirming the Crown wardship without access by D.D. I am concerned that counsel advanced this position in light of the Court of Appeal's decision.

50 I have considered financial circumstances and ability to pay under Rule 24(11)(f), which directs the court to consider "any other relevant matter" when setting the amount of costs. As Justice S.B. Sherr held in *Mohamed v. Mohamed*, 2018 ONCJ 530 at para. 100:

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However, a party's limited financial circumstances will not be used as a shield against any liability for costs, but will be taken into account regarding the quantum of costs, particularly when they act unreasonably. See: *Snih v. Snih*, 2007 CanLii 20774 (Ont. SCJ pars. 7-13). In the case of *Takis v. Takis*, [2003] O.J. No. 4059 (S.C.J.), the court found that the respondent's lack of income and assets, though a relevant consideration, could not be used as a shield in unnecessary litigation.

51 Ability to pay does not allow a party to evade all costs consequences: *B.(R.) v. W.(J.)*, 2012 ONCJ 799, 25 R.F.L. (7th) 487 at para. 45, *Parsons v. Parsons* (2002), 31 R.F.L. (5th) 373 (Ont. S.C.J.) at para. 12. Family law litigants are responsible for and accountable for the positions they take in the litigation: *Heuss v. Surkos*, 2004 ONCJ 141. This extends to parties taking unreasonable positions on appeals and motions, particularly when there is a significant jurisdictional issue to be grappled with, and the party persists in raising arguments contradicted by Court orders and not properly in issue.

52 Having considered all the above, I order D.D. to pay costs of \$1000.00, which may be paid, at the option of D.D., in one lump sum within 30 days or on a monthly basis, at the rate of \$100 per month for ten months, commencing September 1, 2018.

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