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Court of Appeals No. 37161-1-III

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION THREE**

MICHAEL Q. PORTER,

Respondent,

v.

SARAH J. PORTER,

Appellant.

APPELLANT'S OPENING BRIEF

Appeal From Kittitas County Superior Court No. 14-3-00109-2

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I. IDENTITY OF APPELLANT

The Appellant is Sarah J. Porter, the Respondent in Kittitas County Superior Court Case No. 14-3-00109-2. Ms. Porter is a loving daughter, friend, teacher, and, most importantly, the loving mother of her twin children, Tucker and Miley.

II. ASSIGNMENTS OF ERROR

- A. The Court erred in accepting law enforcement incident reports into evidence. RP 8.
- B. The Court erred in accepting the Guardian Ad Litem report into evidence. RP 8-9; RP 27-30.
- C. The Court erred in allowing the Guardian Ad Litem to provide an impermissible lay opinion as to Ms. Porter's mental health status. RP 37-40; 46; 58; 59; 60-61; 79; 88-89.
- D. The Court erred in admitting the mental health report written by Tawnya Wright. RP 40-42.
- E. The Court erred in admitting the correspondence from Tawnya Wright's office. RP 42-44.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. The Court erred in accepting law enforcement incident reports into evidence, in violation of ER 904.
- 2. The Court erred in accepting the Guardian Ad Litem report in violation of ER 904(a)(1).
- 3. The Court erred in allowing the Guardian Ad Litem to provide an impermissible lay opinion as to Ms. Porter's mental health status.
- 4. The Court erred in admitting the mental health report written by Tawnya Wright, in violation of ER 904.
- 5. The Court erred in admitting the correspondence from Tawnya Wright's office.

IV. STATEMENT OF THE CASE

This matter stems from a Dissolution of Marriage with Children case where both parties initially were represented by counsel, however on the date of the hearing in question, Ms. Porter appeared *pro se*. CP 2-5; RP 7-8. Sarah and Michel Porter were married on July 5, 2008, in Sisters, Oregon. CP 2. They have two minor children, Tucker and Miley. CP 4. That marriage ended in a dissolution of marriage entered on February 17, 2015. CP 210-213. At the same time, the court entered a parenting plan awarding sole custody to Ms. Porter, with no visitation for Michael. CP 229-233. Additionally, the parties have mutual restraining orders against each other, requiring they stay away from one another. CP 157-159; 362-365. Later, upon motion by Michael, on May 7, 2018, the court approved restricted supervised limited visitation between Michael and the children through phases. CP 341-351; RP 13. Additionally, the court appointed a Guardian Ad Litem for the children on May 29, 2018. CP 354-359.

Ms. Porter, who has been steadfast in her assertion that there was domestic violence in the marriage as well as her genuine concerns for the children's well-being, has objected to visitation with the children outside of her presence. RP 14. Ms. Porter, believing that she was acting in the

best interests of her children, refused to allow Michael visitation. RP 14-15.

Michael then moved for sole and full custody of the children, on August 9, 2018, with visitation. CP 366-395; RP 15. A temporary parenting plan was entered on September 17, 2018 CP 457-465. Upon receipt of that order, Michael picked up the children from their school in Moxee, Washington, and the children have been living with him ever since. RP 15. Supervised local visitation, supervised Skype visitation, and supervised telephonic visitation were attempted between Ms. Porter and the children, with varying results. RP 17. Additionally, Ms. Porter was required to submit to a mental health evaluation and comply with any treatment that it recommended. RP 16.

Michael alleged that Ms. Porter failed to comply with the court orders regarding the parenting plan and moved to modify the parenting plan, giving him sole physical custody of the children and only written communications through the U.S. mail between Ms. Porter and the children. RP 18. Ms. Porter objected to this modification and the case went to trial before The Honorable L. Candace Hooper in Kittitas County Superior Court on September 24 and 25, 2019. RP 1.

V. ARGUMENT

A. **The Court erred in accepting law enforcement incident reports into evidence.**

The Washington Rules of Evidence establish a procedure for introduction of documents in a civil case. ER 904. In relevant part, the following documents are admissible unless there is an objection as to authenticity or admissibility, Rule 904(c): medical records or bills; bills for medications and other medical appliances; bills or estimates for property damages; weather or traffic signal reports; and photographs, ex-rays, drawings, maps, or blueprints. Rule 904(a). Documents falling outside of this list will only be admissible when authenticated, either by a testifying witness or by a self-authenticating document. ER 901; ER 902.

In the instant case, Michael's attorney sought to admit 15 documents, which she stated were incident reports from law enforcement. RP 8. As the trial court correctly noted, these documents are not some of the documents envisioned by Rule 904(a)(1), RP 11, and therefore, should have only been admitted

if authenticated. In order to have the documents authenticated, Michael's attorney would have either had to have a records custodian from law enforcement testify as to their authenticity or establish in some way on the record that the records were self-authenticating documents. To establish self-authentication under ER 902, counsel would have had to establish that the documents were: 1) under seal; 2) if having no seal, signed by an individual in an official capacity with a certification that the signature is genuine; or 3) certified copies of public records. ER 902(a)(b)(d). No custodian of records testified in this matter and there was no discussion on the record about whether these documents were under seal or certified in any way.

Counsel will surely rely on the fact that Ms. Porter did not object to the introduction of the documents into evidence. However, Ms. Porter was proceeding *pro se* at this hearing. While a litigant appearing *pro se* is bound by the same rules of procedure and substantive law as an attorney, Patterson v. Superintendent of Pub. Instruction, 76 Wn. App. 666, 671, 887 P.2d 411 (1994), Opposing Counsel also cannot take advantage of the fact that Ms. Porter is not trained in the rules of evidence.

Because the court correctly noted the law enforcement records did not fall under the ER 904(a) rule for authenticity, the court erred in admitting them without either testimony from a custodian of records or evidence in the record that they were self-authenticating under ER 902.

B. The Court erred in accepting the Guardian Ad Litem report into evidence.

Similarly, the Court erred in accepting the Guardian Ad Litem report into evidence, over Ms. Porter's objection. Assuming, arguendo, that the Guardian Ad Litem report falls under the ER 904(a) rule for authenticity, in order to admit a document under this rule, the document must be served on all parties no less than 30 days before trial. ER 904(b). This was not done as to this document. When asked by the Court if she objected to the introduction of this report, Ms. Porter stated, "I would object, because I didn't have a copy of this. I was just now provided with this." RP 29, lines 5-7. Because the document was not provided to Ms. Porter in advance, as the rule requires, it was error for the Court to admit it into evidence.

C. The Court erred in allowing the Guardian Ad Litem to provide an impermissible lay opinion as to Ms. Porter’s mental health status.

The Guardian Ad Litem, throughout her testimony, gave her personal lay opinion regarding Ms. Porter’s mental health status. RP 37-40; 46; 58; 59; 60-61; 79; 88-89. This was allowed by the court even though she admitted that she is not an expert on mental health issues “at all”. RP 88, lines 18-19. While lay opinion may be admissible, it is only admissible when there is no specific scientific, technical, or other specialized knowledge required. Rule 701.

Prior to the admission of lay opinion testimony, the court must consider 1) the type of witness involved, 2) the specific nature of the testimony, 3) the nature of the charges, 4) the type of defense, and 5) the other evidence before the trier of fact. City of Seattle v. Levesque, 460 P.3d 205 (Wash. Ct. App. 2020); State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). In the instant case, the opinion testimony elicited was regarding Ms. Porter’s mental health status. This is clearly specific scientific, technical, or other specialized knowledge which requires an expert trained in psychology, psychiatry, or social

work. Rule 702. The Guardian Ad Litem admitted on the stand that she was not an expert in mental health issues. Therefore, there was not an adequate foundation for the opinion testimony, and it should have been excluded. See Johnston-Forbes v. Matsunaga, 181 Wn.2d 346, 333 P.3d 388 (2014).

D. The Court erred in admitting the mental health report written by Tawnya Wright.

As previously discussed, only certain types of documents are admissible under ER 904. Ms. Porter submits that the mental health report written by Ms. Wright does not fall under the admissibility exception under ER 904(a). Therefore, in order to admit Ms. Wright's report into evidence, even though it was not admitted as "direct evidence", opposing counsel would have had to have Ms. Wright testify, had a custodian of records testify, or established that the document was self-authenticating in order to make it admissible. As neither Ms. Wright testified nor a custodian of records, nor was there any discussion regarding items like certifications or seals that would have

made the document admissible, it is inadmissible hearsay and it was error to have admitted it, even “not as direct evidence.”

E. The Court erred in admitting the correspondence from Tawnya Wright’s office.

Further, the correspondence from Ms. Wright’s office regarding the visitation between Ms. Porter and her children is inadmissible hearsay. The Court correctly sustained the objection to hearsay but then allowed the document “to provide background and context for the guardian ad litem’s investigation and report as to whether or not the information she reviewed or obtained was consistent with her investigation and corroborated or supported her recommendations that will be forthcoming in this case.” RP 44, lines 6-12. While Ms. Porter lauds opposing counsel for this creative explanation for why she wished to introduce this document into evidence, this is not a valid exception to the hearsay rule. Inadmissible hearsay does not become admissible simply because it corroborates other testimony. See State v. Hudlow, 182 Wn. App. 266, 281, 331 P.3d 90 (2014). Further, as explained above, the documents do not

fall under the ER 904(a) authentication exception and were not properly authenticated through a custodian of records or evidence of self-authentication. Therefore, admission of the documents, even limited as they were, was improper.

VI. CONCLUSION

For the reasons stated herein, Ms. Porter respectfully requests that the Court reverse the trial court ruling regarding the parenting plan for her children Tucker and Miley. Ms. Porter wants nothing more than to be reunited with her children, therefore she respectfully requests this case be remanded for further proceedings.

Respectfully submitted this 6th day of August, 2020.

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CERTIFICATE OF SERVICE

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on August 6, 2020, I caused to be served the document to which this is attached to the party listed below in the manner shown next to their name:

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