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NO. 371611

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

In re the marriage of:

MICHAEL Q. PORTER,

Respondent,

and

SARAH J. PORTER,

Appellant.

ON APPEAL FROM KITTITAS COUNTY SUPERIOR COURT
Cause No. 14-3-00109-2
Honorable L. Candace Hooper

BRIEF OF RESPONDENT

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I. INTRODUCTION

The hardest thing of all is to find a black cat in a dark room, especially if there is no cat.

- Confucius

Michael and Sarah Porter divorced in 2015. Because of certain actions Mr. Porter took prior to the divorce, the dissolution court placed primary custody of their two children in Ms. Porter, leaving Mr. Porter with no visitation rights “unless agreed to by the parties.” Being denied the right to have his children in his life was the wake-up call Mr. Porter needed. Accepting responsibility for his actions, Mr. Porter actively sought out and underwent mental health treatment (continuing to this day), and two years later, petitioned for and received a modified parenting plan that allowed him to re-enter his children’s lives.

Ms. Porter refused to accept this new plan or to allow Mr. Porter any access to their children. Multiple contempt orders, restraining orders, contacts with the police, or even her arrest and incarceration, could change Ms. Porter’s mind. Ms. Porter’s irrational refusal to accept the dissolution court’s orders caused the court to temporarily place primary custody of the children in Mr. Porter and to order Ms. Porter to undergo a mental health evaluation—an order Ms. Porter refused and refuses.

After a full trial on the merits, the dissolution court entered a new permanent parenting plan, placing full custody of the children in Mr. Porter and limiting Ms. Porter's contact with the children to letter writing, until she agrees to undergo a psychiatric evaluation. Ms. Porter steadfastly refuses to undertake the one, simple act that could allow her back into her children's lives. Instead, Ms. Porter continued and continues to have contacts with law enforcement and was recently convicted and sentenced to 33 months in prison for felony harassment of Mr. Porter.

This case is about taking responsibility for one's actions. Like Confucius with his cat, Ms. Porter searches for something that is not there: someone else to blame for why she has neither custody nor access to her children. In lieu of submitting to psychiatric treatment, Ms. Porter blames Mr. Porter, blames the GAL, blames the police, and now blames the dissolution court, appealing five evidentiary rulings that, even if erroneous, had no bearing on the dissolution court's order at issue. Ms. Porter's refusal to seek the mental health treatment she desperately needs predetermined the trial outcome.

Moreover, Ms. Porter, through counsel, manufactures her second assigned error by intentionally withholding testimony and record evidence from this Court to present the illusion of error, when both Ms. Porter and her counsel know that no such error exists. Stated plainly, Ms. Porter, through

counsel, makes demonstrably, knowingly false statements to this Court. Her appeal is not merely frivolous, twenty percent of it is false, subjecting her and her counsel to RAP 18.9 sanctions. The Court should dismiss the appeal, affirm the dissolution court, and award Mr. Porter his appellate fees and costs jointly and severally against Ms. Porter and her counsel.

II. RESTATEMENT OF ISSUES

1. Did the dissolution court exercise proper discretion when it entered its permanent parenting plan, placing custody of the Porter children entirely in Mr. Porter and ordering Ms. Porter to undergo psychiatric treatment, after performing a complete RCW 26.09.187(3) analysis based on the testimony and record before it?

2. Should this Court deny Ms. Porter's appeal in its entirety when based solely on five evidentiary arguments, four of which are either raised for the first time on appeal and/or contrary to black-letter Washington law, and the fifth is a knowingly false argument manufactured by Ms. Porter and her counsel by intentionally withholding testimony and records from this Court?

3. Should this Court order Ms. Porter and her counsel, jointly and severally, to pay Mr. Porter his attorney fees and costs on appeal when Ms. Porter's appeal is frivolous under RAP 18.9 and under RCW 26.09.140, which provides a statutory basis for the award?

III. RESTATEMENT OF THE CASE¹

A. The Porters' Divorce and Initial Parenting Plan.

Michael and Sarah Porter divorced in February of 2015. CP 210–213. Their final dissolution orders included a parenting plan for their two minor children. CP 229–234. Due to Mr. Porter's mental health issues at the time of the dissolution (RP 176), the parenting plan placed the Porters' children in the primary custody of Ms. Porter, providing Mr. Porter with no visitation rights “unless agreed to by the parties.” CP 229–234.

B. Mr. Porter Seeks Mental Health Treatment and Petitions for a Modification to the Parenting Plan.

Over the next two years, Mr. Porter underwent mental health treatment (RP 167, 305–306) and, in March of 2018, brought a petition for modification to the February 2015 parenting plan's residential schedule, proposing a 4-phase “gradual reintroduction” into his children's lives. CP 302–304; RP 167–168. The trial court granted Mr. Porter's petition in May of 2018 (the “May 2018 Plan”), adopting the 4-phase reintroduction. CP 341–351.

¹ The bulk of Ms. Porter's “Statement of the Case” cites to Mr. Porter's counsel's opening argument at trial. See App. Brief at 3–4 (citing to RP 1, 7–8, 14–18). RAP 10.3(a)(5) mandates that the Statement of the Case contain a “[r]eference to the record ... for each factual statement.” Attorney arguments are not facts. *State v. McKenzie*, 157 Wn.2d 44, 57 n. 3, 134 P.3d 221 (2006).

C. Ms. Porter Refuses to Comply with the Temporary Parenting Plan.

Ms. Porter refused to comply with the May 2018 Plan, steadfastly denying Mr. Porter any visitation with his children. Ms. Porter's flagrant violation of the court's order resulted in multiple findings of contempt, (CP 452–456; Supp. CP 1678), multiple restraining orders (CP 541–544, 559–562, 1274–1277, 1278–1281; Supp. CP 1679–82, 1683–86, 1687–90, 1700–03), multiple incidents involving law enforcement (*See* CP 1288–1290; RP 8, 12,) and, ultimately Ms. Porter's arrest, conviction, and incarceration (*see* RP 146, 175, 206). Despite the above, Ms. Porter continued to ignore the dissolution court's plan, denying Mr. Porter access to his children (RP 309 “she denied him having any role whatsoever”), threatening Mr. Porter, and verbally abusing him in front of the Porter children (RP 168–171).

D. Ms. Porter's Actions Cause the Court to Restrict Ms. Porter's Access to the Children and to Order Ms. Porter to Undergo a Mental Health Evaluation.

Mr. Porter petitioned for, and received, multiple modifications to the parenting plan, directly due to Ms. Porter's actions. In September of 2018, the court entered a temporary parenting plan, which placed primary custody of, and decision making for, the children in Mr. Porter. CP 457–465. The temporary plan provided limited, supervised visitation for Ms.

Porter and ordered Ms. Porter to “be evaluated for mental health,” “start (or continue) and comply with treatment as recommended by the evaluation,” and provide a copy of the evaluation and compliance reports to the Court and petitioners’ attorney.” CP 458–459 (bolding removed). After Ms. Porter refused to comply with this latest parenting plan, Mr. Porter picked the children up from school and took them to his home, where they have since resided. RP 171–172.

As Ms. Porter’s behavior became less rational, the court’s temporary parenting plans became more restrictive. The court’s December 2018 temporary parenting plan limited Ms. Porter’s contact with the children to “correspondence through U.S. Mail,” except for “a supervised Skype visit” on “Christmas Day from noon to 2 p.m.” Supp. CP 1692–93. The December 2018 plan again ordered Ms. Porter to undergo a mental health evaluation and comply with treatment as recommended. *Id.* at 2. Ms. Porter refused to undergo any mental health evaluation. RP 291–292.

E. The Dissolution Court sets a Date for Trial for a Permanent Parenting Plan and Orders a GAL Investigation.

Shortly after entry of the December 2018 plan, the court set trial for determination of a permanent plan, which, after several continuances, occurred on September 24 and 25, 2019. Supp. CP 1698–99; RP 1. As the

trial date approached, the court appointed a GAL (CP 1392–1396), empowering the GAL to investigate “all issues related to making a parenting plan” for the Porter children, including the mental health of Mr. and Mrs. Porter. CP 1393.

F. The GAL Offers Her Opinion at Trial: Ms. Porter Poses a Potential Risk of Harm to Her Children.

The GAL testified at trial, after reviewing the case file and personally interviewing Ms. Porter, that Ms. Porter “poses a potential risk of harm in her current state if she had access to the children.” RP 60. The GAL further opined that Ms. Porter’s “noncompliance” with the dissolution court’s orders “caused harm” to the children (RP 45), that Ms. Porter indicated “she would never comply with” the court’s orders (RP 51), that Ms. Porter was “resolute not to allow [Mr. Porter] contact” with his children (RP 52), and that Ms. Porter “just doesn’t believe in the mental health establishment or the treatment of mental health issues” (RP 59).

G. Ms. Porter Confirms that She Will Never Voluntarily Seek Mental Health Treatment. The Court Enters its Permanent Parenting Plan.

Ms. Porter appeared pro se at trial (RP 4) and testified that she will never voluntarily submit to a psychiatric evaluation or undergo treatment by a mental health professional:

Q: Ms. Porter, will you ever voluntarily submit to a psychiatric evaluation?

A: No.

Q: If you were diagnosed with a mental health condition, would you ever take medication as recommended by a treating physician[] or other medical professional?

A: No.

RP 291.

Ms. Porter also refused to agree to comply with any future court order that would provide Mr. Porter any access to the children:

Q: Will you ever comply with a court order that provides for visitation between your children and Michael Porter?

A: Well, I would like to not see that as any court order. That's how I'm going to answer that.

RP 291–292.

Based on Ms. Porter's irrational actions since the court's entry of the May 2018 Plan, as well as her above testimony, the court entered a finding that Ms. Porter has "significant mental health issues" that subject "the children to [a] negative environment":

A mental health professional needs to diagnose and treat Mrs. Porter, it is clear to me that she has significant mental health issues. And I will make that finding. And that they have unfortunately subjected the children to [a] negative environment.

RP 305.

After engaging in a full RCW 26.09.187(3) analysis (RP 302–315), the court placed custody of the Porter children in Mr. Porter (RP 307), acknowledging Mr. Porter’s hard work to “become a parent and stay a parent”:

You have to figure out a way to become a parent and stay a parent. He’s done that. I applaud him for that. That’s an excellent [thing] to do. He has tapped some inner resources and inner strength that he has been able to find and keep and maintain for the last year at least.

RP 313.

The court expressed its “hope” and “belief” that Ms. Porter could do the same” (RP 313), but acknowledged that that could occur “only if she can get her psychological makeup with the help of professionals or is some other way be able to convince the court that she can actually cooperate with what’s in the best interest of the child as found by the court” (RP 309).

The court then entered its Final Parenting Plan, which closely resembled its December 2018 temporary plan, limiting Ms. Porter’s contact with the children to “correspondence by U.S. Mail” and ordering Ms. Porter to “be evaluated for Mental health by a psychiatrist.” CP 1535.

H. Ms. Porter files a limited appeal.

Ms. Porter filed a Notice of Appeal, assigning error to the five orders entered at the conclusion of the September 2019 trial, including the

final parenting plan. CP 1556. Ms. Porter challenges none of the court’s earlier contempt orders, restraining orders, or temporary parenting plans, including those that ordered her to undergo mental health evaluations. *See id.* And her Opening Brief requests reversal of only “the parenting plan.” App. Brief at 11. In support of her request, Ms. Porter offers five purported bench trial evidentiary errors (App. Brief at 2); but her appeal is silent on how those evidentiary decisions, even if erroneous, would have caused the court to enter orders different from those to which she assigns error.

IV. STANDARD OF REVIEW

“A trial court’s ruling dealing with the placement of children is reviewed for abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds” or untenable reasons. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A decision is “manifestly unreasonable” if, based on the facts and the applicable legal standard, the decision is outside the range of acceptable choices. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). A decision is based on “untenable grounds” if the findings are not supported by the record. *Id.* Finally, a decision is based on “untenable reasons” if the court applies the wrong legal standard or the facts do not establish the legal requirements of the correct standard. *Id.*

“Because the trial court has the unique opportunity to observe the parties, appellate courts are extremely reluctant to disturb child placement dispositions. An appellate court may not substitute its findings for those of the trial court where there is ample evidence supporting the trial court’s determination.” *Matter of Marriage of Schneider*, 82 Wn. App. 471, 476, 918 P.2d 543 (1996), *overruled on other grounds by Littlefield*, 133 Wn.2d 39.

Here, the dissolution court’s decision to place primary custody of the Porter children in Mr. Porter, and to limit Ms. Porter’s access to the children to letter correspondence, was not an abuse of discretion; but rather manifestly reasonable and based on tenable grounds. The court (a) considered the testimony of Ms. Porter, Mr. Porter, and the GAL, (b) applied to that testimony the seven residential provision factors of RCW 26.09.187(3), and (c) concluded that the interests of the Porter children were best served by placing custody of the children in Mr. Porter and restricting Ms. Porter’s contact with the children until she agreed to undergo mental health treatment. Nothing more was required: “The best interests of the child control when determining who will parent a child daily.” *In re Parentage of J.H.*, 112 Wh. App. 486, 493, 49 P.3d 154 (2002). The Court should affirm the dissolution court’s orders.

V. ARGUMENT

A. **The dissolution court did not abuse its discretion. The court entered its parenting plan after proper consideration of the seven statutory residential provision factors of RCW 26.09.187(3).**

RCW 26.09.187(3) provides a list of seven factors to guide a court's discretion in determining custody and visitation privileges of a divorced couple's children: (i) The relative strength, nature, and stability of the child's relationship with each parent; (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily; (iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child; (iv) The emotional needs and developmental level of the child; (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities; (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules. Of these seven factors, Factor (i) is given "the greatest weight." *Id.*; RP 311.

Here, at the conclusion of the September 2019 trial, the court engaged in a comprehensive analysis of the seven statutory “residential provisions” factors, making “the findings necessary under [RCW] 26.09 to allow [Mr. Porter] to have custody of the children.” RP 307–311. With regard to the most heavily-weighted first factor, the Court found that although the children’s relationship with Ms. Porter was, at one time, “very strong,” that relationship “eroded” when Ms. Porter “began to act out on the problems that started to surface for her.” RP 307. Her relationship with the Porter children “crumble[d] still further” as Ms. Porter “decided she would not listen to the court and she was going to just keep the children from their father forever.” RP 308.

Mr. Porter’s relationship with children, in contrast, had “grown” and “appears to be strong,” making the “stability of their relationship being better with [Mr. Porter] than with [Ms. Porter].” RP 308.

Because the court based its parenting plan on the applicable legal standard applied to the facts before it, the court’s entry of the parenting plan was not “manifestly unreasonable.” *Littlefield*, 133 Wn.2d at 47. Because the court’s findings were amply supported by the record, including the testimony of Ms. Porter, the parenting plan was not based on “untenable grounds.” *Id.* And because the court applied the correct legal standard, RCW 26.09.187(3(a)(i)–(vii), and the facts before the court

established the legal requirements of that standard, the parenting plan was not based on “untenable grounds.” *Id.* The dissolution court therefore did not abuse its discretion in entering the final parenting plan.

B. The evidentiary rulings to which Ms. Porter assigns error were properly decided.

Ms. Porter challenges the dissolution court’s orders on evidentiary grounds, assigning error to five bench trial evidentiary rulings. App. Brief at 2. Ms. Porter’s challenges prove unavailing.

Evidentiary rulings at a bench trial rarely constitute error. *State v. Melton*, 63 Wn. App. 63, 68, 817 P.2d 413 (1991) (“A trial judge is presumed to be able to disregard inadmissible evidence, thus avoiding any prejudice to the defendant. In a bench trial, there is even a more liberal practice in the admission of evidence on the theory that the court will disregard inadmissible evidence”) (internal quotation omitted); *State v. L.J.M.*, 79 Wn. App. 133, 137, 900 P.2d 1119, 1122 (1995), *rev’d on other grounds*, 129 Wn.2d 386, 918 P.2d 898 (1996) (citing *Melton*) (“A trial court has substantial discretion in taking hearsay in bench proceedings because it is presumed the judge will disregard inadmissible testimony.”).

Even if a trial judge hears evidence that is inadmissible, an appellate court will presume that the judge did not consider inadmissible matters on the merits and was not influenced by them. *Wolfkill Feed and*

Fertilizer Corp. v. Martin, 103 Wn. App. 836, 841, 14 P.3d 877 (2000) (“unlike a jury trial, the court in a bench trial is presumed to base its decision solely on admissible evidence”); *State v. Majors*, 82 Wn. App. 843, 919 P.2d 1258 (1996) (“We do not find an abuse of discretion here, particularly because this was a bench trial in which the court is presumed to give evidence its proper weight.”).

Here, regardless of whether this matter was before a judge or jury, the evidentiary rulings to which Ms. Porter assigns error were properly decided. Because of the egregious and intentionally misleading nature of Ms. Porter’s and her counsel’s actions with regard to Ms. Porter’s second assigned error (admission of the GAL report), this Response addresses Ms. Porter’s second assigned error first.

1. Purported Error # 2: Guardian Ad Litem Report.

During the direct examination of the GAL, Mr. Porter offered into evidence a copy of the GAL’s signed report that the GAL “filed with the court and provided the parties a copy of.” RP 28. Ms. Porter objected, first claiming she did not receive a copy of the report and “was just now provided with this.” RP 29. She then corrected her objection, stating “I would object to it because I did respond to it and turn it in.” *Id.*² The court

² Ms. Porter, through counsel, omits this testimony from her opening brief (App. Brief at 7)—testimony located on the same transcript page as the testimony upon which Ms. Porter relies. RP 29.

then requested that Ms. Porter clarify her objection: “the question is whether it’s admissible or not. Do you have any objection on its admissibility?” *Id.* Ms. Porter offered no “specific objection” in accordance with ER 103(a)(1), and the Court admitted the report over Ms. Porter’s unspecified objection. RP 29–30.

Here Ms. Porter, through counsel, offers one reason that admission of the report was error: because she did not receive it and therefore its admission violated ER 904. App. Brief at 7. But the record and Ms. Porter’s own testimony demonstrate the knowing falsity of this claim.

First, Ms. Porter expressly testified that she did receive the report, ‘responded’ to it, and ‘turned it in’. RP 29. Second, and even more inculpatory, Ms. Porter’s ‘response’ to the GAL report is on file below, in the form of *a copy of the signed GAL report itself with Ms. Porter’s written comments on every page*. Supp. CP 1704–1724.

Despite this Court’s granting Ms. Porter extensions to file her Designation of Clerk’s Papers (*see* 11/17/19 Letter Ruling) and her Opening Brief (*see* 6/22/2020 Letter Ruling), and despite Ms. Porter and her counsel filing two Clerk’s Papers designations (*see* 1/28/1010 and 6/22/2020 filings), neither Ms. Porter nor her counsel included Ms. Porter’s filed response to the GAL report in the Clerk’s Papers submitted to this Court.

The assertion in Ms. Porter’s Opening Brief, signed by counsel, that Ms. Porter did not receive a copy of the GAL report is therefore demonstrably and knowingly false. With full knowledge of Ms. Porter’s receipt of the GAL report, and her written-on-the-GAL-report response on file with the dissolution court, Ms. Porter and her counsel intentionally (a) withheld disclosure of the written-on-the-GAL-report response from the Court, (b) stated falsely to this Court that Ms. Porter did not receive the report, and (c) argued that the Court should reverse and remand this case on the basis of this knowingly false statement. The Court should not permit such knowing disregard for the Rules of Appeal and Rules of Professional Conduct:³

Misleading the court is never justified.... Misconduct, once tolerated, will breed more misconduct.... Imposing sanctions upon an attorney is a difficult and disagreeable task,... but if sanctions are warranted, it is a necessary task if our system is to remain accessible and responsible.

Deutscher v. Gabel, 149 Wn. App. 119, 136, 202 P.3d 355 (2009)

(internal quotation omitted) (affirming trial court’s order for counsel to pay opposing party’s attorney fees for lack of candor to court).

The court should dismiss Ms. Porter’s appeal and sanction Ms. Porter and her counsel on this basis alone. Discussion of the remaining four evidentiary rulings to which Ms. Porter assigns error follows:

³ “A lawyer shall not knowingly make a false statement of fact or law to a tribunal.” RPC

2. Purported Error # 1: Incident Reports and Mental Health Care Provider-Prepared Materials.

At the beginning of trial, Mr. Porter moved to admit 18 documents under ER 904(c): Fifteen police incident reports memorializing contacts with Ms. Porter, and three documents prepared by a medical health care provider related to her interactions with Ms. Porter and the Porter children. RP 8. Mr. Porter notified Ms. Porter of his intent to offer these documents in late March of 2018, well before closing of the 30-day pre-trial window required by the Rule. ER 1287–1291; RP 8–9.

Consistent with ER 904, Ms. Porter had 14 days from the date of notice to object to the admissibility of these 18 documents, or else they “**shall be deemed** authentic without testimony or further identification.” ER 904(b) (emphasis added). Ms. Porter offered no objection until trial (RP 8), and then only to the documents’ relevance, not authenticity: “THE COURT: Okay, so your objection is not to whether they are authentic, but as to relevance, is that the answer? MS. PORTER: Yeah.” RP 9–10. Consistent with the Rule, the court deemed the documents authentic (*see* ER 904 “shall be deemed”) and informed Ms. Porter that she will be allowed to “renew your objection to relevancy when they come up in trial.” RP 12. Ms. Porter did not take the court up on its offer.

3.3(a)(1).

Ms. Porter therefore raises the issue of authenticity of the 18 documents for the first time on appeal. Absent a showing of a “manifest error affecting a constitutional right,” the Court of Appeals will refuse to review “any claim of error that was not raised in the trial court.” *In re Marriage of Olson*, 69 Wn. App. 621, 625, 850 P.2d 527 (1993). Here, Ms. Porter fails to adequately put forth an allegation that her constitutional rights have been infringed. The Court should therefore decline consideration of Ms. Porter’s authenticity objection for failure to raise the issue below. *Id.*

Ms. Porter argues in equity that she should be excused from the Rules of Evidence because she appeared pro se at trial. App. Brief at 6. Washington law holds expressly to the contrary:

We note the trial court was under no obligation to grant special favors to [appellant] as a pro se litigant, nor is this court. Understandably, as a pro se litigant, [appellant’s] representation of himself was unskilled. Undoubtedly, an attorney would have made different tactical decisions and more effective use of cross examination. Unfortunately for [appellant], the law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws.

Olson, 69 Wn. App. at 626 (internal quotation omitted); *In re Marriage of Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155 (1983) (“Unfortunately for her, the law does not distinguish between one who elects to conduct his or

her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws.”).

3. Purported Error # 3: GAL Opinion Testimony.

The GAL testified under direct examination as to her impression of Ms. Porter’s mental health. *E.g.*, RP 37–40, 46, 58, 59, 60 – 61, 79, 88 – 89. For example, the GAL testified that, based on Ms. Porter’s refusal to follow court orders, Ms. Porter’s mental health played a role in some of her irrational behaviors. RP 37–40. The GAL further testified that Ms. Porter’s mental health issues had a negative effect on the Porter children (RP 46), that Ms. Porter acts irrationally (RP 58–59), that her violent behavior poses a risk of harm to the Porter children (RP 60–61), that she had the potential to recover if she would accept mental health treatment (RP 79), and that trauma could be a causative factor in Ms. Porter’s mental health (RP 88–89).

Ms. Porter assigns error, generally, to this testimony, arguing it is inadmissible lay opinion. App. Brief 8–9. Ms. Porter’s argument fails first and foremost because Ms. Porter offered no objection to any of the GAL’s testimony at trial. *See* RP 37–40, 46, 58, 59, 60–61, 79, 88–89. Nor did Ms. Porter object to the appointment of the GAL, the scope of the GAL’s duties, or presentment of the GAL as an expert witness at trial. The Court should therefore decline to address her objections raised for the first time

to this Court. *Olson*, 69 Wn. App. at 625. Regardless, the GAL testimony Ms. Porter identifies was admissible expert opinion testimony.

The GAL testified that as part of her training and certification, she learned “identifiers of mental health issues” and utilizes that training in “discharging [her] duties as a guardian ad litem,” including in this case. RP 26–27. Further, the dissolution court’s GAL appointment order expressly ordered the GAL to “investigate and file a report” on “Mental health issues” of Ms. Porter. CP 1393. She was therefore qualified to offer the opinions to which Ms. Porter assigns error based on her training and the medical reports confirming her opinions. *L.M. by and through Dussault v. Hamilton*, 193 Wn.2d 113, 136–37, 426 P.2d 803 (2019) (“the evidence rules say that a witness may qualify as an expert ‘by knowledge, skill, experience, training, or education.’”) (quoting ER 702). The court did not err in allowing the GAL’s expert testimony.

4. Purported Errors # 4 and # 5: Mental Health Report Office Correspondence

During the GAL’s direct examination, Mr. Porter moved to admit exhibits 16 and 17: hearsay documents upon which the GAL relied in forming her opinions: “These were filed within the court file so I reviewed them.” RP 39–40. Ms. Porter objected on hearsay grounds. RP 40–41,

43–44. The court found both exhibits to be hearsay, but admissible “to discuss how they form the basis” of the GAL’s opinion:

I will admit them [Exhibit 16] as what she [the GAL] relied upon to make her recommendation.

RP 42

I will admit it [Exhibit 17] for a limited purpose, yes.

RP 44.

Ms. Porter assigns error to the dissolution court’s evidentiary rulings on both ER 904 and hearsay grounds. As discussed above, Ms. Porter’s ER 904 arguments are of no moment because Ms. Porter failed to timely object to Mr. Porter’s ER 904 Notice. ER 904 mandates the documents’ admissibility. ER 904 (b) (“**shall** be deemed authentic and admissible”) (emphasis added). Ms. Porter’s hearsay argument also fails because Washington law expressly authorizes a court to “allow the admission of otherwise hearsay evidence and inadmissible facts for the purpose of showing the basis of the expert’s opinion.” *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 579, 157 P.3d 406 (2007). The Court acted well within its discretion, and within the bounds of Washington law, when it admitted exhibits 16 and 17.

C. Even if evidentiary rulings Ms. Porter identifies in her appeal were error, such error was harmless.

“A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Here, the dissolution court based its parenting plan largely on Ms. Porter’s admitted refusal to seek mental health treatment, which posed a danger to the Porter children. *See* RP 302–315. Therefore, even if the evidentiary admissions Ms. Porter identifies were error, such error was harmless because they “in no way affected the final outcome of the case.” “The best interests and welfare of the children are paramount in custody matters. The trial court’s findings will not be disturbed if supported by substantial evidence.” *In re Marriage of Woffinden*, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982), *review denied*, 99 Wn.2d 1001 (1983) (internal citations omitted).

VI. RAP 18.1 FEE REQUEST

Mr. Porter requests an award of his fees and costs on appeal consistent with RCW 26.09.140 and RAP 18.9. RAP 18.1 provides for an award of attorney fees where a statute authorizes such an award. *Martinez v. City of Tacoma*, 81 Wn. App. 228, 245, 914 P.2d 86, *review denied*, 130 Wn.2d 1010 (1996). RCW 26.09.140 so authorizes: “Upon any appeal, the

appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.”

Further, an award of fees is proper when a party “files a frivolous appeal.” RAP 18.9(a). An appeal is “frivolous” when “there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal.” *Streater v. White*, 26 Wn. App. 430, 434–35, 613 P.2d 197 (1980).

Here, Ms. Porter’s appeal is “totally devoid of merit” and therefore frivolous. Ms. Porter or her counsel’s reasonable investigation would have revealed that Black-letter Washington law renders null four of Ms. Porter’s five evidentiary arguments. And Ms. Porter’s remaining assigned error is, in fact, no error, but rather an intentional attempt to deceive this Court through the knowing withholding of record evidence to create the illusion of error. No reasonable minds could differ.

The Court should award Mr. Porter his attorney fees on appeal jointly and severally against Ms. Porter and her counsel. “Courts may order parties and their attorneys to be jointly and severally liable for attorney fees.” *Wixom v. Wixom*, 190 Wn. App. 719, 728, 360 P.3d 960 (2015), *review denied*, 185 Wn.2d 1028 (2016) (citations omitted); RAP 18.9 (sanctions may be awarded against “party or counsel”). Moreover,

“sanctions may be imposed against the attorney alone.” *Id.* Multiple reasons support holding Ms. Porter’s attorney at least jointly and severally liable for Mr. Porter’s fees and costs.

First, “about half the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.” *Id.* (quoting *Watson v. Maier*, 64 Wn. App. 889, 891, 827 P.3d 311, *review denied*, 120 Wn.2d 1015 (1992)). Here, Ms. Porter’s counsel, instead of telling Ms. Porter to “stop” litigating against Mr. Porter, filed an 11-page opening brief with no chance of success—a brief that, due to counsel’s multiple extension requests, Mr. Porter had to spend considerable sums preparing to defend since October of last year.

Counsel’s actions are even more egregious when conflated with Ms. Porter’s current mental health issues. “Unlike a party, an attorney should be able to do the necessary research to evaluate properly the merits of a claim.” *McCandless v. Great Atlantic and Pac. Tea Co., Inc.*, 697 P.2d 198 (7th Cir. 1983) (quoted with approval by *Watson*, 64 Wn. App. at 891). A client like Ms. Porter, in need of psychiatric treatment, is even more reliant on sound counsel for legal advice than the average person.

Second, Ms. Porter is currently incarcerated and without a reliable source of income, rendering her judgment-proof such that any fee award

ordered against Ms. Porter alone would not be worth the paper it was printed on.

And third, it is Mr. Porter's hope that at some point, Ms. Porter will accept the psychiatric treatment she desperately needs, will be able to reestablish a relationship with the Porter children, and again become part of their lives:

That's what I want to do. That's what's best for the kids in my opinion. And if all these professionals involved that are trying to get her to that point, can get her to that point and let us know that it's time to reintegrate her back in, then I want every single possible way open for her to be reintegrated back into the kid's lives. And the most health and effective way there can be.

RP 197.

A fee award against Ms. Porter alone would hinder this process, as monies owed under the award would necessarily become monies Ms. Porter could not spend on the Porter children—a situation not in the children's best interest.

Ultimately, this appeal was brought on behalf of a mentally ill client by a lawyer “who does not know how to stop.” *Wixom*, 190 Wn. App. at 719. This Court's joint and several award of fees and costs against Ms. Porter's attorney will instruct counsel, as well as future counsel, that the point to “stop” litigating lies prior to bringing a frivolous and false

appeal before this Court. After crossing that threshold, attorneys are chasing non-existent black cats in dark rooms.

VII. CONCLUSION

The Court should affirm the dissolution court's orders and award Mr. Porter his attorney fees and costs on appeal jointly and severally against Ms. Porter and her counsel of record.

Respectfully submitted this 8th day of September, 2020.

JEFFERS, DANIELSON, SONN AND AYLWARD, P.S.

By  _____
H. Lee Lewis, WSBA No. 46478
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on September 8th, 2020, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Court’s Portal electronic filing System. Notice of this filing will be sent to the parties listed below by operation of the Court’s e-filing system. Parties may access this filing through the Court’s system.

Mr. Corey Evan Parker
1275 12th Ave NW, Suite 1B
Issaquah, WA 98027
Attorneys for Appellant, Sarah J. Porter

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

SIGNED and DATED at Wenatchee, Chelan County, Washington,
this 8th day of September, 2020.

/S/ Cami Lillquist
Cami Lillquist

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

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