V I R G I N I A:

IN THE COURT OF APPEALS OF VIRGINIA

WESLEY CLAY SMITH,	)	
	)	
APPELLANT / Defendant	)	
	)	
v.	)	**Record No. 2187-06-4**
	)	
CHERI SMITH,	)	
	)	
APPELLEE / Plaintiff	)	

From Prince William County Circuit Court, Cheri Smith v. Wesley C. Smith,
Chancery No. 53360 & Chancery No. 53810, Final Divorce Decree 06/09/2006

An electronic copy of this brief with related background info, motions, and orders is available at:
http://www.liamsdad.org/court_case/pwc_circuit/

APPELLANT'S OPENING BRIEF

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1. The Court erred by not granting the Defendant his Constitutional Right to a Jury Trial.

2. The Court erred by not providing an Attorney for the Defendant, or allowing him to use marital funds to hire an attorney, in spite of the Defendant being indigent.

3. The court erred in ruling on custody in Chancery No. 53360, when custody had already been heard in JD&R and appealed as Chancery No. 53810.

4. The court erred in proceeding without subject matter or personal jurisdiction.

5. The court erred by allowing testimony of a witness who was not previously disclosed to the Defendant.

6. The court erred in ruling a date of separation contrary to the undisputed evidence that the parties were still living together.

7. The court erred in ruling one-year separation as the grounds of divorce, when the parties were not separated for one year prior to the Plaintiff filing for divorce.

8. The court erred in ruling that adultery was not proven in spite of admitted photographic evidence and the Plaintiff testifying she engaged in sexual relations with Igor Bakhir.

9. The court ruling on custody violated the Defendant's constitutional rights as a parent, without showing a compelling state interest, and was not narrowly tailored.

10. The custody ruling was without the evidence to support it and made in a biased and unconstitutional manner that denied the Defendant Due Process and Equal Protection.

11. The Court ruling on "child support" violated the Defendant's constitutional rights, without showing a compelling state interest, and without the evidence to support it.

12. The court abuse its discretion by:

a. Refusing to strike the GAL's Report or Answer even when the GAL provided no expert credentials or qualifications, nor cited any other expert.

b. Denying multiple motions to remove the GAL due to failure to follow state guidelines.

c. Refusing to allow proper questioning of the GAL.

d. Encouraging the GAL to not stay for the trial and skip attending the testimony of his own "client".

e. Issuing an Unconstitutional prior restraint of free speed injunction and refusing to void it even after the Defendant submitted precedence to show the court had no authority to grant the injunction.

f. Holding an Ex Parte hearing to suspend visitation with no showing of harm or emergency.

g. Refusing to use the Defendant's properly submitted financial statements and instead using the Plaintiff's proven inaccurate versions that were not provided prior to trial.

h. Ruling and entering orders for Plaintiff's motions even when filed just the day before the hearing while refusing to timely rule on Defendant's motions and sometimes failing to enter orders when a ruling had been made.

i. Not entering an order to compel after a ruling to compel the Plaintiff had been made.

j. Refusing to let the Defendant make proffers at the trial.

k. Refusing to make a good faith effort to rule on the Defendant's proposed statement of facts.

l. Failing to recuse when the judge had the appearance of bias.

m. By not providing Equal Protection, in denying the Defendant the same ability to tape the hearings as is afforded members of the Virginia Bar Association.

n. In finding the Defendant in contempt, on a motion filed timely and without designating it as civil or criminal contempt, or providing a jury or court appointed attorney.

o. Refusing to take notice of Utah Law where the parties were married.

p. Refusing the Defendant's request for a 4 day trial – Bakhir 4 days

q. Improperly quashing subpoenas preventing the Defendant access to evidence.

CASE SUMMARY

This is a custody and divorce case that started in JD&R with the Plaintiff filing a unfounded preliminary protective order in Sept 2002, which was subsequently dismissed and expunged. The Plaintiff then filed for custody in JD&R in Oct 2002. The parties continued to live together in the marital home until June of 2003

when the Plaintiff moved out, without giving any advance notice, in violation of the custody order. The Plaintiff filed for divorce in June of 2003. A final order was entered in the custody case in August of 2003, which the Defendant appealed to Circuit Court. The day before the custody hearing in Circuit Court the Plaintiff had a hearing in the Divorce case about financial issues and the Judge decided to save time and awarded temp custody at that hearing effectively terminating the custody appeal.

The Defendant started the case with the highest respect for Judges and the Courts. Unfortunately the gross intentional misconduct by multiple judges in this case demand requires a change of view on both the Judges and the Courts. Perhaps the clearest example is when the Defendant pointed out to one judge that a order was Unconstitutional as it violated his first amendment right to free speech. The Judge replied to the effect "Yes it is Unconstitutional but if you don't follow it you will still be in jail". The actions of the Judges have made it crystal clear why organizations such as Jail4Judges exist and that MAJOR reform is needed here in Virginia.

During the three year history of this case in Circuit Court multiple Judges have engaged in improper conduct starting with issuing a surprise custody ruling in Sep 2003, acting without jurisdiction, improperly quashing the Defendant's subpoena's to collect evidence, refusing to order the Plaintiff to answer material questions, holding an illegal Ex Parte hearing and suspending visitation for 18 months without a finding of harm, refusing to enforce discovery, refusing to issue sanctions against the Plaintiff for violations and fraud, refusing to provide Equal Protection, for respecting the Plaintiff's "right" to commit adultery even though prohibited by law, allowing her to claim the 5th when clearly it does not apply, yet at the same time not recognizing the free speech or parental rights of the Defendant. There simply is not room in the 35 page limit to document the extent that the Trial court has abused its discretion in the pursuit of its personal or political agenda instead of performing its duty.

This case is important, as the Defendant is asking nothing short of having the entire set of custody and so called "child support" legislation in Virginia declared unconstitutional and for the Virginia Court Of Appeals and/or Supreme Court of Virginia to put an end to the barbaric (but profitable) practice of depriving children of access to both parents, and of depriving fit parents their Constitutional Rights as parents, to respect the

Constitution and to put the needs and rights of parents and children ahead of the desire for billable hours by members of the Virginia Bar Association.

It is too late for this court to prevent or to repair the harm that has been caused to both me and my son Liam, both of us will carry the scars of attorney greed and judicial misconduct for the rest of our lives, but this court could and should stop the trial court from inflicting further harm on us and guarantee us a father/son relationship for the future. How do you explain to a innocent young child with Down Syndrome that you can't see him, when he begs to see you, because attorneys want to make money, that Judges care more for politics than children, that the Courts no longer care about Rights or Justice? My son doesn't understand those types of issues, and even though I do understand the issues, what I can't understand is how people, especially Judges who should be pillars of our communities, can be so evil. Virginia took hundreds of years before finally abandoning the institution of slavery illegal, its time for Virginia to make the institution of sole custody illegal as well.

QUESTIONS PRESENTED

1. Did the Court violated the Defendant's Constitutional right to a jury trial. [Vol VIII pg 125]
2. Did the Court violate the Due Process Clause or abuse its discretion by denying the Defendant his right to counsel, and are the Rules and Statutes that prohibit unauthorized practice of law Unconstitutional? [Vol VIII pg 125]
3. Did the court lack jurisdiction to hear custody in Chancery No. 53360 or improperly merge it with Chancery No. 53810? [Vol VIII pg 123][Vol VI pg 238]
4. Did the Court ever acquire both subject matter and personal jurisdiction per VA code, and if so did it lose jurisdiction thru its misconduct? [Vol VIII pg 120-122, 125,128][pg 74]
5. The court erred by allowing testimony of a witness who was not previously disclosed to the Defendant? [Vol VIII pg 128]
6. Should the date of separation been June 2003 or later? Vol VIII pg 121]
7. Did the Defendant prove adultery by the Plaintiff? [Vol VIII pg 122-123]

8. Should the grounds of divorce have been adultery by the plaintiff instead of one-year separation? [Vol VIII pg 122]

9. Does the Defendant have Constitutional Rights as a parent and are Virginia's laws on custody Unconstitutional because they do not recognize Constitutional Parental Rights, are not based on a compelling state interest and result in rulings that are not narrowly tailored and allow arbitrary rulings? [Vol VIII pg 123, 128]

10. Was the custody ruling made in a biased manner without the evidence to support it and in an unconstitutional manner that denied the Defendant Due Process and Equal Protection? [Vol VIII pg 120-124, 128]

11. Did the Court ruling on "child support" violate the Defendant's constitutional rights, without showing a compelling state interest, and without the evidence to support it, and are the "child support" laws of Virginia Unconstitutional? [Vol VIII pg 128, 130-131] [72, 490-493]

12. Did the court abuse its discretion?

FACTS

1. The Plaintiff filed a Bill Of Complaint with the court on 06/11/03 and served it on J. Whitbeck, Jr. on 07/01/03. Mr. Whitbeck is an attorney who at the time was handling the JD&R custody case for Mr. Smith. The Plaintiff never served the Defendant with a copy of the Bill Of Complaint.

2. On Aug 8, 2003 the Defendant filed a Notice Of Appeal in the JD&R custody case to appeal the case to the Circuit Court and a hearing date set for September 11th, 2003. The appealed custody case was designated as Chancery 53810. On Sept 2, 2003 the clerk sent a notice of hearing to the Plaintiff for a hearing on Sep 11, 2003. On Sept 10, 2003, a CMS FLYSHEET for Chancery 53810 shows the trial date as Sep 11th.

3. The First hearing in Chancery 53360 was held on Sept 10, 2003 the day before the scheduled hearing in Chancery 53810. Both parties thought the Sept 10th hearing was only about the Motion For Pendente Lite Relief filed on Sept 2, 2003 which requested the house to be sold and did not ask for temporary custody.

Neither party expected to address custody at the Sept 10th hearing in Chancery 53360 but expected to address it the next day in Chancery 53810.

4. On Sept 10th, 2003 Judge Potter ruled verbally that he would merge the cases and awarding custody at this hearing. No order was ever entered merging the cases. The Defendant Objected to the surprise custody ruling, and case merging. Neither party presented any witnesses (other than the parties) at the Sep 10th hearing. Neither party presented any significant evidence relating to custody. The Plaintiff presenting only a Monthly Expenses statement, Statement Of Joint Expenses, and Psychological Eval that was not admitted. The Defendant entered no written evidence. Thus the clerk record shows no admitted evidence relating to custody.

5. Given the contested nature of this case both Mr. Whitbeck and Ms. Vardy would have to be completely incompetent and guilty of malpractice to show up at a custody hearing without witnesses/evidence relating to custody.

6. Judge Potter indicated his prejudice against fathers by making such statements as "if you don't shape up you won't get any visitation" (the JD&R rule the Defendant was an excellent father and would have joint custody except we can't work together) and "I gave you more visitation that I give most fathers". The ruling on custody on Sep 10th by Judge Potter was a significant change from the ruling by the JD&R court, with a significant reduction in visitation by the Defendant.

7. On Aug 17th 2004, the Court held a hearing during the Defendant's two-week visitation period, while he and his son were in Michigan visiting family in spite of the Defendant requesting a continuance and demonstrated bias against the Defendant by not only holding the ex parte hearing but in issuing an illegal unconstitutional order claiming to take away the Defendants First Amendment right to free speech. The Defendant has made repeated motions for the court to vacate or recognize as void the illegal order of Aug 17th 2004. The Court has denied all such requests. The Plaintiff has made repeated motions for the court to enforce the order of Aug 17th 2004. The court has denied all such requests and eventually told her to stop asking as trying to enforce the order would be "unproductive" – a tacit admission the order is null and void due to being unconstitutional.

8. On Dec 28, 2004 the Plaintiff filed Emergency Motion To Amend Visitation And Issue A Rule To Show Cause and scheduled it to be heard on Jan 3rd 2005. The Plaintiff claimed the Defendant had not notified her of his move in spite of his notify both the Court and the Plaintiff of his pending eviction. (see Motion For Use of Escrow Funds To Avoid Eviction).

9. Neither the Plaintiff nor the Court contacted the Defendant to schedule the hearing. Neither the Plaintiff nor the Court called the Defendant to let him know the hearing was scheduled. The Defendant has a cell phone with him and both the Plaintiff and Court were aware of the phone number. On Friday, December 31, 2004 at 2:40 p.m the Defendant received a copy of the Plaintiff's Emergency Motion To Amend Visitation And Issue A Rule To Show Cause which was scheduled for the following Monday. The Defendant wrote and faxed a letter to Judge Alston explaining that he was in Michigan and could not attend, and requested a continuance. The Defendant also provided copies of statements made by the Plaintiff of how much our son looked forward to spending time with his father and how cutting off visitation in the past had been hard for him.

10. On Jan 3, 2005, Judge Alston held the ex parte hearing and suspended visitation until a hearing set for the Jan 18th. The Jan 3rd 2005 order suspending visitation did not make any finding of harm or risk to our son. Judge Alston set the Jan 18th hearing date knowing that the GAL Ronald Fahy would not attend (see clerk notes).

11. On Jan 18th 2005, Ronald Fahy handed the Defendant a "report" before the hearing and did not attend the hearing. At the hearing, the Defendant attempted to present evidence that the Plaintiff had lied in her motion, had even lied about notifying the Defendant of the Jan 3rd hearing, and to present evidence that visitation was best for our son. Judge Millette threatened the Defendant with jail for his attempts to show that the Plaintiff had intentionally misled the court. Judge Millette stated Judge Alston had already made a ruling on the Plaintiff's claims. Judge Milette issued an order continuing to suspend visitation, again with no finding of harm or risk to our son.

12. The Defendant continued to have phone contact with our son per court order. Liam loves his father and desires to spend time with him. Our son would regularly ask the Defendant to come pick him up, or to

come visit him during the 17 months visitation was suspended. As a result of having been denied access to his father in the past Liam has become "clingy".

13. The Defendant has been ruled indigent and can't afford a court reporter at every hearing. The Defendant has made repeated request to record hearings, many of which have been denied.

14. The Court did not provide a Jury Trial which the Defendant had requested multiple times in writing.

15. The Court did not force the Plaintiff to comply with Discovery and went out of its way to prevent the Defendant from using Discovery to obtain proof of adultery by the Plaintiff.

16. At the final Trial the Plaintiff did admit to committing adultery with Igor Bakhir.

17. At the final trial on May 22, 23 2006, Judge Potter refused to let the Defendant make a Proffer for the Appeals court when he attempted to do so. Judge Potter cut off questioning of the GAL, and suggested the GAL not stay for the remainder of the trial. The GAL did not present any witnesses, did not cross examine any witnesses, did not present any evidence, and left early the first day and did not attend the second day of the trial. He did not present any credentials to show him an expert in any field relating to child custody, child care, parenting, etc. He was not present for the testimony of our son.

18. The Final Divorce Decree does not state that any of the grounds for divorce in the original Bill Of Complaint were proven but grants the divorce on grounds other than that filed in the original BOC.

19. Neither the Court nor the Plaintiff presented any compelling state interest to justify interfering with the Defendant's Constitutional Rights as a parent.

20. The Court routinely awards sole custody to women much more often than men. Favoring women more than 85% of the time.

ARGUMENT

I. The Court violated the Defendant's Constitutional Right to a Jury Trial

The Court violated the Defendant's Constitutional Right to a Jury Trial as guaranteed by both the Federal and Virginia Constitutions. The Defendant hereby incorporates by reference #31 - Defendant's Demand For A Jury Trial, #42 - Defendants Demand For A Virginia Constitution Article 1, Section 11, Jury Trial In A

Civil Case, and #59 - Defendants Motion For A Jury Trial.

The Virginia Constitution of 1971, ARTICLE I, Bill of Rights, Section 11: **Jury Trial in civil cases**: That in controversies respecting property, and in suits between man and man, **trial by jury is preferable to any other, and ought to be held sacred**.

The dictionary contains the following definition of the word sacred: “regarded as too important or valuable to be interfered with” thus making it clear the Constitution of Virginia considers a Jury Trial in a Civil case a right too important to be restricted or denied by the legislature or the courts.

This case is a civil suit, is a controversy respecting property, and between two people, thus this case is exactly the situation referred to above in the Constitution of Virginia. Its unambiguous language grants the Defendant the right to a jury trial that neither the legislature nor a court have any authority to make a law or ruling to the contrary.

"Therefore, we **must accept its plain meaning and not consider rules of statutory construction, legislative history, or extrinsic evidence**." Perez v. Capital One Bank, 258 Va. 612, 616, 522 S.E.2d 874, 876 (1999) (citation omitted).

"Courts must give effect to legislative intent, **which must be gathered from the words used**, unless a literal construction would involve a manifest absurdity." HCA Health Servs. of Virginia, Inc. v. Levin, 260 Va. 215, 220, 530 S.E.2d 417, 420 (2000).

§ 8.01-336 allows the court to have the case heard by a jury or an advisory jury. The Defendant submitted specific questions for the jury to answer in motion #59. The Trial Court had no jurisdiction to hear the case on terms contrary to that of the Virginia Constitution as the only authority the court has comes from the Virginia Constitution.

U.S. Constitution Seventh Amendment: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,…

The Plaintiff in addition to seeking some “Equitable” relief is also seeking to take away the Defendant’s Federally recognized rights as a parent and is also seeing well more than $20 from the Defendant, indeed seeking monthly payments over 40 times that amount, thus the Defendant also has a Federal Right to a Jury Trial. The Defendant would be granted a Jury Trial if the State was attempting to take away his parental rights due to misconduct, his right to a Jury Trial does not disappear because it is his wife who wants to take away his parental rights.

When a state court is enforcing a federally created right, of which the right to trial by jury is a substantial part, the States may not eliminate trial by jury as to one or more elements. Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952)

'The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.' Curtis v. Loether, 415 U.S. 189, 194 (1974)

Given the Defendant has exercised his Right to demand a Jury Trial per the Virginia and Federal Constitutions, any final order issued without a Jury Trial is null & void.

II. The Court denied the Defendant his right to counsel an error exacerbated by Unconstitutional Rules and Statutes that prohibit unauthorized practice of law.

The Court has recognized the indigent status of the Defendant and his inability to afford counsel with an Order To Proceed Without Fees Or Costs entered 9/29/2004 [Vol III pg 81].

The Court has issued orders that effectively terminated the Defendants parental rights. Under VA law a non-parent can petition and receive greater visitation with our son than the Defendant has now.

VA law requires the court to appoint an attorney for adults who may be subjected to loss of parental rights by court order - § 16.1-266 through 16.1-268 and 19.2-157 through 19.2-163 of the Code of Virginia. Clearly the Defendant may be, and has been, subjected to loss of parental rights by court order.

The Defendant has been diagnosed with ADD and this condition interferes with his presenting an organized coherent court case, in ensuring that the appropriate questions are asked and appropriate objections made. A typical court procedure requires this to be done at specific times, something that ADD makes difficult. The court has a Federal legal obligation, per the Americans with Disabilities Act (ADA), to make some reasonable accommodations due to the Defendants condition. The Defendant requested and the court refused to provide any accommodation for his disability, even going so far as refusing to let him recall witnesses. Gathering documentary evidence, presenting testimony, marshalling legal arguments, and articulating a defense are probably awesome and perhaps insuperable undertakings to the uninitiated layperson, this is even more difficult for the Defendant with ADD.

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one." See Powell v. Alabama, 287 U.S. 45, 69, 53 S. Ct. 55, 64, 77 L. Ed. 158, 170 (1932)

The Defendant made repeated motions, which were denied, to either allow him to use marital escrowed funds to pay for an attorney or for the court to appoint counsel for him [see #34 - Defendant's Motion For An Attorney, and #46 – Motion For Use Of Escrow Funds For An Attorney].

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1

It is well established that an indigent defendant subject to imprisonment in a state criminal case has a right to assigned counsel pursuant to the Sixth Amendment as applicable to the states through the Fourteenth Amendment's Due Process Clause. See Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

The right to assigned counsel, however, does not depend solely on whether a case is classified as criminal or civil. Lassiter v. Dep't of Soc. Servs., supra, 452 U.S. at 25, 101 S. Ct. at 2159, 68 L. Ed. 2d at 648 (citing In re Gault, 387 U.S. 1, 41, 87 S. Ct. 1428, 1451, 18 L. Ed. 2d 527, 554 (1967)) The United States Supreme Court has held that "due process" is nothing more than affording fundamental fairness to a litigant in a particular situation.

Unconstitutional Rules and Statues that prohibit unauthorized practice of law exacerbated the problem of the court denying the Defendant an attorney. These Rules and Statures prevented the Defendant from having the assistance from friends who would have assisted in writing motions and presenting evidence and arguments in court. These law deny the Defendant Equal Protection under the law requiring the Defendant to attend every hearing where the Plaintiff is able (and often did) just send someone else.

Legislators who pass laws do not have to be attorneys, nor do those who execute the law, i.e. Sheriffs, Governors, Presidents, etc. Even the Justices of the U.S. Supreme Court need not be licensed attorneys. To exclude the People from defending their "friends" in the Courts turns said Courts into a playground for the legal establishment, and is a blatant violation of the Defendant's fundamental Right to Counsel of choice, due process of law, and equal protection under the law. See United Mine Workers v. Illinois Bar Association, 389 U.S. 217, and NAACP v. Button, 371 U.S. 415, and also Brotherhood of Railhood Trainmen v. Virginia State Bar, 377 U.S. 1 (1964)

III. The court lack jurisdiction to hear custody in Chancery No. 53360 and did not properly merge it with Chancery No. 53810

The Plaintiff filed a custody case in JD&R, which entered a final order on 8/4/2003, which the Defendant

appealed on 8/8/2003 to the Circuit Court as Chancery No. 53810. On 9/2/2003 the clerk sent a Notice Of Hearing On A Civil Appeal stating a hearing would take place on 9/11/2003. On 9/10/2003 a CMS FFLYSHEET shows the hearing still scheduled for the next day, assigned to Judge HAW.

The Plaintiff filed for divorce on 6/11/03 as Chancery No. 53360 and waited until after the JD&R custody case was concluded then on 8/29/03 scheduled a two-hour, Pendente Lite hearing, the first hearing in the case, for 9/10/03 the day before the hearing for Chancery No. 53810. On 9/2/2003 the Plaintiff filed Motion For Pendente Lite Relief, in which she requested multiple financial items of relief but **did not ask for Pendente Lite custody**. The court is not allowed to grant relief that isn't requested.

Due to Custody having been handled in a JD&R case the Circuit Court had no jurisdiction to hear custody as part of the divorce case Chancery No. 53360 alone, any jurisdiction for the Circuit court to rule on custody must be found via Chancery No. 53810.

At the hearing on 9/10/2003 in Chancery No. 53810, Judge Potter surprised both parties by awarding temp custody and changed the visitation that had been granted under the JD&R order. The parties differ as to the remarks Judge Potter made, the Defendant states in #73 - Partial Statement Of Facts: "On Sept 10th, 2003 Judge Potter declared he didn't want to hold the custody hearing the next day and that he would save time by simply awarding custody at this hearing and merging the cases." [Fact #12] The Plaintiff did not object to the following facts in #73 - Partial Statement Of Facts:

11. Neither party expected to address custody at the Sept 10th hearing in Chancery 53360 but expected to address it the next day in Chancery 53810.
13. The Defendant Objected to the surprise custody ruling, and case merging.
14. Neither party presented any witnesses (other than the parties) at the Sep 10th hearing.
15. Neither party presented any significant evidence relating to custody. The Plaintiff presenting only a Monthly Expenses statement, Statement Of Joint Expenses, and Psychological Eval that was not admitted. The Defendant entered no written evidence. Thus the clerk record shows no admitted evidence relating to custody.
16. Given the contested nature of this case both Mr. Whitbeck and Ms. Vardy would have to be completely incompetent and guilty of malpractice to show up at a custody hearing without witnesses/evidence relating to custody.
18. Judge Potter indicated his prejudice against fathers by making such statements as "if you don't shape up you won't get any visitation" (the JD&R ruled the Defendant was an excellent father and would have joint custody except we can't work together) and "I gave you more visitation that I give most fathers".

There are many problems with how the court handled this hearing and the resulting order. The Defendant

incorporates by reference #60 - Defendants Motion To Disqualify/Recuse Judge Potter**.** There was no notice that the cases would be combined, or that temp custody would be decided at that particular hearing. The lack of notice is clearly a violation of Due Process. That lack of notice is clearly indicated in both the record index and in the clerk notes (CIVIL WORKSHEET) of the hearing, they indicate that there were only three exhibits offered, only one of which relating to custody and **it wasn't even admitted**. Thus there was no admitted evidence presented to the court about custody. The clerk notes confirm there were no other witnesses other than the parties themselves.

Given that the parties had just recently concluded a trial about custody in JD&R with other witnesses and with numerous evidence the lack of it at this hearing was due to the lack of notice rather than there being no relevant evidence or witnesses to present. The clerk notes indicate that both the Plaintiff and Defendant gave testimony regarding financial matters but does not indicate that either the Plaintiff or Defendant testified about custody related issues. This demonstrates that the surprise nature of the ruling on custody had a material impact on the evidence and testimony, or lack of, that was presented to the court in order for it to make its (un)informed ruling. We can debate if Judge Potter did it to "save time" or not but there can be no debate that it was a violation of Due Process.

The Defendant maintains that he objected to merging the cases and ruling on custody at that time. The Plaintiff disputes this but there is nothing in the record to support this. The order is clearly signed "Objected" by the Defendant's attorney. There is nothing in the record to indicate the Defendant agreed to merge the cases, or to hear custody on that date**. Indeed there is nothing in the record to indicate the two cases were ever officially merged**. Given that a court speaks only thru its written orders, the fact that there is no order merging the cases means the cases were never merged.

The order itself does not state the cases were merged or that Chancery No. 53810 played any part in giving it authority or jurisdiction to rule on custody, it only states:

"THIS MATTER came for hearing on September 10, 2003, upon the Cross Motions for *Pendente Lite Relief* filed by the Plaintiff, Cheri Smith, and Defendant, Wesley C. Smith. WHEREUPON…"

The court did not have jurisdiction to rule on custody as part of this case Chancery 53360, given the

court refused to properly hear the appeal in Chancery 53810, the custody ruling should be voided and the custody case remanded to the JD&R court.

IV. The court never had subject matter or personal jurisdiction, and would have lost jurisdiction due to its misconduct.

The Defendant was never served with the Bill Of Complaint as required by statue, thus the trial court did not have either personal nor subject-matter jurisdiction and its orders in this case are null and void.

The record indicates Proof Of Service On J. Whitbeck, Jr. but there is nothing in the record to indicate the Defendant was served with the Bill Of Complaint by **any means at any time**, let alone in the manner specified by and within the time required by law.

§ 20-99.2 - Service in divorce and annulment cases states: "A. In any suit for divorce or annulment or affirmation of a marriage, process may be served in any manner authorized under § 8.01-296." Service upon John Whitbeck, an attorney hired by the Defendant to handle a **different prior case**, is not one of the prescribed methods listed in § 8.01-296 for service on the Defendant. § 8.01-314 sets conditions allowing for service on an attorney only "…**after** entry of general appearance by such attorney". Given the service in question was to start the case it was impossible for Mr. Whitbeck to have entered a general appearance in this case until **after** the Plaintiff was required to serve process on the Defendant. Accordingly, the service on John Whitbeck did not comply with § 20-99.2.

The legislature made clear its intention that compliance with laws and rules relating to service of process are to be strictly followed in divorce cases and prohibits the court from waving the requirement if the Defendant received process in a way other than that prescribed by statue:

> § 8.01-288. Process received in time good though neither served nor accepted. **Except for process commencing actions for divorce** or annulment of marriage or other actions wherein **service of process is specifically prescribed by statute**, process which has reached the person to whom it is directed within the time prescribed by law, if any, shall be sufficient although not served or accepted as provided in this chapter.

Compliance with the Code sections at issue here, relating to procedures for instituting a divorce case, is mandatory and jurisdictional. The Plaintiff did not comply with them, therefore, this court did not acquire jurisdiction of any kind, neither personal nor subject-matter jurisdiction.

…**if a statute provides for constructive service, the terms of the statute authorizing it must be strictly followed or the service will be invalid**…" Khatchi v. Landmark Rest. Assoc., 237 Va. 139, 142, 375 S.E.2d 743, 745 (1989) (citations omitted).

"**A court acquires no jurisdiction over the person of a defendant until process is served in the manner provided by statute, and a judgment entered by a court which lacks jurisdiction over a defendant is void as against that defendant**." Slaughter v. Commonwealth, 222 Va. 787, 791, 284 S.E.2d 824, 826 (1981).

Although the court may have believed it acquired personal jurisdiction based on father's execution of the Consent to Adoption form, the **acquisition of personal jurisdiction is based on the receipt of notice which complies with the Due Process Clause**. See Price v. Price, 17 Va. App. 105, 112, 435 S.E.2d 652, 657 (1993) (citing Kulko v. Superior Ct., 436 U.S. 84, 91, 98 S. Ct. 1690, 1696, 56 L. Ed. 2d 132 (1978)).

The courts have in fact frowned upon any bypassing of the formal rules/laws of service.

The formality of process serves a legitimate purpose. Process is official notice which informs the opposing party of the litigation and instructs the party when and where it must respond. Without this official notice, the recipient knows neither if the action was filed nor when it was filed. The party would not know when critical time limits expire. **Without process a party would need to resort to other means to obtain essential information**. The practical solution is to telephone the clerk of court to ask if and when the action was filed. However**, a party relies on the informal information received over the telephone at its own risk**. If the information is incorrect, it acted at its own peril. "But one who takes the shortcut of asking the clerk's employees to examine the record for him relies on the response at his peril." School Bd. v. Caudill Rowlett Scott, Inc., 237 Va. 550, 556, 379 S.E.2d 319, 322 (1989).

It is not clear at what point the Defendant eventually received a copy of the Bill of Complaint, but what is clear is that at the 9/10/2003 hearing, the Defendant was not aware that temporary custody would be awarded, as confirmed by his not presenting any evidence at that hearing (see clerk notes and List Of Exhibits & Transcripts) when the Defendant had numerous documents to present as evidence, and that had been previously presented at the JD&R trial, the lack of presentation at this hearing being directly related to lack of notice.

Without proper legal service upon the Defendant the court does not have personal (in personam) jurisdiction over the Defendant and thus is without jurisdiction to proceed with the case.

An absence of personal jurisdiction may be said to destroy `all jurisdiction' because the requirements of subject matter and personal jurisdiction are conjunctional. Both must be met before a court has authority to adjudicate the rights of parties to a dispute. If a court lacks jurisdiction over a party, then it lacks `all jurisdiction' to adjudicate the party's rights, whether or not the subject matter is properly before it. See, e.g. Kulko v. Superior Court, 436 U.S. 84, 98 S.Ct. 1690, 1696 (1978)

§ 8.01-328.1 covers when personal jurisdiction over person may be exercised;

A. A court may exercise personal jurisdiction over a person… 9. Having maintained within this Commonwealth a matrimonial domicile at the time of separation of the parties upon which grounds for divorce or separate maintenance is based… Jurisdiction in subdivision 9 is valid **only upon proof of service of process pursuant to § 8.01-296**…

Subject-matter Jurisdiction in a divorce case is by statute, failure to comply with the statues results in a failure of subject-matter jurisdiction.

"**Jurisdiction in a divorce suit is purely statutory**, Watkins v. Watkins, 220 Va. 1051, 1054, 265 S.E.2d 750, 752 (1980), and does not encompass broad equitable powers not conferred by statute." 2 Va. App. at 19, 340 S.E.2d at 580.

When the circuit court's power to act is controlled by statute, the circuit court is governed by the rules of **limited jurisdiction** and must proceed within the statute's strictures. Any action taken by the circuit court that exceeds its jurisdiction is void and may be attacked at any time.

"Though a court be one of general jurisdiction, when its power to act on a particular matter is controlled by statute, the court is governed by the rules of limited jurisdiction."); In re M.M., 156 Ill.2d 53, 619 N.E.2d 702 (1993)

("Special statutory jurisdiction is limited to the language of the act conferring it, and the court has no powers from any other source. ... [T]he authority of the court to make any order must be found in the statute. Levy v. Industrial Comm'n (1931), 346 Ill. 49, 51, 178 N.E. 370, 371."); Skilling v. Skilling, 104 Ill.App.3d 213, 482 N.E.2d 881 (1st Dist. 1982)

"**When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way**." Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982). See also Commonwealth v. Brown, 259 Va. 697, 704-05, 529 S.E.2d 96, 100 (2000).

"the legislature prescribes that a court's jurisdiction to hear and determine controversies involving a statutory right is limited in that **certain facts must exist before a court can act in any particular case**."); Keal v. Rhydderick, 317 Ill. 231 (1925)

The many limitations, both in respect to jurisdiction and procedure, placed upon divorce suits by the statute, differentiate the divorce case from ordinary suits in equity and render it a chancery case sui generis.

"It is an undoubted general principle of the law of divorce in this country that the courts either of law or equity, possess no powers except such as are conferred by statute; and that, **to justify any act or proceeding in a case of divorce, whether it be such as pertains to the ground or cause of action itself, to the process, pleadings or practice in it, or to the mode of enforcing the judgment or decree, authority must be found in the statute, and cannot be looked for elsewhere,** or otherwise asserted or exercised." McCotter v. Carle, 149 Va. 584, 593-

94, 140 S.E. 670, 673-74 (1927) (citation omitted).

On 5/22/06 the Trial Court abused its discretion by starting the trial before ruling on #58 - Motion To Dismiss Due To Lack Of Service that had been filed 5/3/06. When the Trial Court finally got around to ruling on jurisdiction it again abused its discretion by claiming it had jurisdiction without showing where in the record jurisdiction was obtained.

The Supreme Court has ruled that "Because a court does not acquire jurisdiction by a mere recital contrary to what is shown in the record", the record of the case is the determinating factor as to whether a court has jurisdiction. State Bank of Lake Zurich v. Thill, 113 Ill.2d 294, 497 N.E.2d 1156 (1986).

A judge's allegation that he has subject-matter jurisdiction is only an allegation (Lombard v. Elmore, 134 Ill.App.3d 898, 480 N.E.2d 1329 (1st Dist. 1985); Hill v. Daily, 28 Ill.App.3d 202, 204, 328 N.E.2d 142 (1975)); **inspection of the record of the case has been ruled to be the controlling factor**. If the record of the case does not support subject-matter jurisdiction, then the judge has acted without subject-matter jurisdiction. The People v. Brewer, 328 Ill. 472, 483 (1928) ("If it could not legally hear the matter upon the jurisdictional paper presented, its finding that it had the power can add nothing to its authority, – it had no authority to make that finding.").

"The law presumes nothing in favor of the jurisdiction of a court exercising special statutory powers, such as those given by statute under which the court acted, (Chicago and Northwestern Railway Co. v. Galt, 133 Ill. 657), and the record must affirmatively show the facts necessary to give jurisdiction. **The record must show that the statute was complied with**"); In re Marriage of Stefiniw, 253 Ill.App.3d 196, 625 N.E.2d 358 (1st Dist. 1993)

"Whereas a court of general jurisdiction is presumed to have jurisdiction to render any judgment in a case arising under the common law, there is no such presumption of jurisdiction in cases arising under a specific statutory grant of authority. In the later cases the record must reveal the facts which authorize the court to act."); Zook v. Spannaus, 34 Ill.2d 612, 217 N.E.2d 789 (1966)

In a court of limited jurisdiction, whenever a party denies that the court has subject-matter jurisdiction, it becomes the duty and the burden of the party claiming that the court has subject-matter jurisdiction to provide evidence from the record of the case that the court holds subject-matter jurisdiction. Bindell v. City of Harvey, 212 Ill.App.3d 1042, 571 N.E.2d 1017 (1st Dist. 1991) ("the burden of proving jurisdiction rests upon the party asserting it."); Loos v. American Energy Savers, Inc., 168 Ill.App.3d 558, 522 N.E.2d 841 (1988) ("**Where jurisdiction is contested, the burden of establishing it rests upon the plaintiff.**").

As the record does not provide uncontroverted evidence of jurisdiction, the court has a duty to dismiss this case and recognize the previous orders in this case as null and void:

The judge has a duty to continually inspect the record of the case, and if subject-matter jurisdiction does not appear at any time from the record of the case, then he has the duty to dismiss the case as lacking subject-matter jurisdiction, U.S. v. Will, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980); Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404, 5 L.Ed 257 (1821), and without any judicial authority.

The Supreme Court of Virginia has held "it is essential to the validity of a judgment or decree, that the court rendering it shall have jurisdiction of both the subject matter and parties. Evans v. Smyth-Wythe Airport Commission, 255 Va. 69, 73, 495 S.E.2d 825, 828 (1998)

If by some wild (or willful) stretch of the imagination the Court is considered to have obtained both subject matter and personal jurisdiction, the court lost jurisdiction by its biased actions in the case and violations of Due Process, including but not limited to awarding temporary custody at a hearing not about custody, preventing the Defendant from properly presenting evidence and witnesses, by holding an illegal ex parte hearing, by knowingly issuing an illegal unconstitutional order purporting to restrict the Defendant's first amendment free speech rights, by refusing to vacate/void the illegal order, refusing to rule on each motion made by the Defendant, giving preferential scheduling to the Plaintiff's motions, refusing to enforce rules violated by the Plaintiff's attorney, refusing to make the Plaintiff comply with discovery or issue sanctions for the Plaintiff's failure to comply, etc.

V. The court erred by allowing testimony of a witness who was not previously disclosed to the Defendant

The Plaintiff called Heidi Thorpe to testify as to the separation, the Defendant objected to the witness who was not properly disclosed prior to trial [pg 194], which prevented the Defendant from properly preparing to question her. The Plaintiff had failed to disclose Ms. Thorpe or what she would testify to as required specifically in Interrogatories. The Plaintiff only notified the Defendant that she was subpoenaed the day before the trial (Sunday) and did not state what she would testify about.

VI. The court erred in determining the date of separation – impact on money…

The Plaintiff claimed the date of separation was 9/17/2002, as shown on page 25 of the transcript:

THE COURT: When did you and your husband separate as man and wife?
MS. SMITH: On or around September 17th, 2002.
THE COURT: And did you move out or did he
MS. SMITH: I moved out.

Ms. Thorpe stated that [pg 197] Mrs. Smith invited her to the Smith's house "around Christmas of 2002", "Ms. Smith told me he had moved back with his parents", and that she "assumed" Mrs. Smith "expected – or intended for the separation to be permanent". Ms. Thorpe also testified that she visited both of Mrs. Smith's apartments and saw no sign of Mr. Smith living there.

The testimony of Ms. Thorpe contradicts the testimony of the Plaintiff that she moved out on in September 2002. Ms. Thorpe confirms the Plaintiff was still living in the marital home in December of 2002. Her testimony also fails to provide specific evidence that Mrs. Smith intended the separation as permanent but only that she **assumed** Mrs. Smith expected or intended the separation would be permanent. The statements of Ms. Thorpe as to Mr. Smith not living in either of the Plaintiff's apartments, while correct, does not support a date of separation of 2002 as the Plaintiff did not move to a an apartment until June of 2003, and the second in July of 2004 [see change of address notifications vol I pg 19].

The testimony of Ms. Thorpe is also unreliable. Mr. Smith's father died in 1983 so obviously it was impossible for him to move to live with both his "parents" as she claimed. Ms. Thorpe claims she is a close enough friend of the Plaintiff to testify as to intention to separate and that the Plaintiff never resumed her relationship with Mr. Smith, while as the same time testifying she was completely unaware of the Plaintiff's adultery and relationship with Mr. Bakhir. Ms. Thorpe claims to have first heard of Igor Bakhir within the last couple months [implying sometime in 2006] [page 200], yet later admits to having met him the previous summer [of 2005]. She seems to be perjuring herself in order to help hide the Plaintiff's adultery – apparently unaware the Plaintiff herself would later admit to a relationship with Mr. Bakhir in 2002 and adultery with him in 2003 (two years before Ms. Thorpe admits to knowing anything about him). Ms. Thorpe was clearly either lying or so completely unaware of the significant facts of the Plaintiff's life as to be unable to comment on the intent of the Plaintiff for separation.

In 2002 the Plaintiff advised the Defendant in order to be considered legally separate that one of them would need to move out of the home or they would need to follow very specific rules to keep things separate while living together in the house. Yet the Plaintiff continued to live in the house with the Defendant until June 2003 and did not comply with the rules she herself had stated were necessary to be considered legally separate**,** thus **by her actions she demonstrated that she did not wish to separate at that time**. It wasn't until Mr. Bakhir's divorce became final that the Plaintiff moved out of the house.

Defendant's #55 – MOTION TO DECLARE THE DATE OF SEPARATION makes it clear that multiple cases have ruled that cohabitation does not require sexual relations. "Living separate and apart" as

set forth in Virginia Code means more than mere physical separation. Hooker v. Hooker, 215 Va. 415, 211 S.E.2d 34 (1975). Jacobi v. Jacobi, 56 Va. Cir. 164 (2001). Separation must be coupled with an intention on the part of at least one of the parties to live separate and apart permanently, and that this intention must be shown to have been present at the beginning of the uninterrupted separation period without any cohabitation. Id.

21. In general, matrimonial cohabitation" ... imports the continuing condition of living together and carrying out the mutual responsibilities of the marital relationship." Schweider v. Schweider, 243 Va. 245, 248; 415 S.E.2d 135 (1992). In Virginia, the two essential elements of cohabitation include (1) sharing of familial or financial responsibilities and (2) consortium. Rickman v. Commonwealth, 33 Va. App. 550, 557; 535 S.E.2d 187 (2000). Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Id. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations. Id.

22. In Ott v. Ott, the Court of Appeals held that a Husband and Wife did not live separate and apart in the same home where the husband moved out of the marital home and began living above the garage of the martial residence. 2001 Va. App. Lexis 10. The court found no intention to permanently separate existed, despite the husband's testimony to the contrary, as the parties continued to perform basic martial duties and responsibilities as husband and wife. Id.

23. In comparison, the court in Carter v. Carter held that the parties did not corroborate a divorce ground based on living separate and apart. 37 Va. Cir. 326. The court found that while the parties no longer slept in the same bedroom, they continued to raise their children together, they continued to share household chores, the wife continued to keep track of the household bills and expenses, and the husband continued to write checks for those bills and expenses when she requested. Id. at 328.

24. Besides sleeping in separate bedrooms of the residence, and not engaging in sexual relations, the Parties continued to cohabitate as husband and wife, i.e. maintaining the same lifestyle they had in the following ways:

1) payment of the family bills, including but not limited to the payment of credit cards, utilities, and other expenses in the names of both parties;
2) sharing of health insurance benefits;
3) filing joint tax return;
4) sharing a joint safe deposit box;
5) regular cooperation in many areas of the family responsibilities, including, but not limited to, child care, washing dishes, doing laundry, lawn mowing and home maintenance.

The court erred in ruling December 2002, as the date of separation, a date neither party claimed as the date of separation, and in spite the parities continuing to cohabitate, using the Virginia Court of Appeals definition of cohabitate, and live together in the same house until at least June 2003. There is no legal basis for a separation before the Plaintiff moved out on or about June 1, 2003, [see Notification Of Change Of Address For C. Smith on page 19 of record] although a good case could be made for a later date at least up to Dec 31, 2003. Indeed by her admissions in her EQUITABLE DISTRIBUTION WORKSHEET and PLAINTIFF'S PROPOSED DISTRIBUTION OF MARITAL PROPERTY the parties continued to share expenses until 12/31/2003.

Since the date of separation was used to divide the marital assets the error with the date affected the division of assets and assignment of debts as marital or non-marital.

VII. The Defendant proved adultery by the Plaintiff

The claim in the Amended Cross-Bill that the Plaintiff committed adultery was proven. The Defendant presented e-mail documenting their relationship, had previously submitted as evidence [Defense Exhibit #1 Admitted 7/12/2004] photos documenting Mr. Bakhir spending the night at the Plaintiff's apartment, and photos' documenting the Plaintiff spending the night at Mr. Bakhir's apartment. This is confirmed by the Plaintiff herself, admitting to sexual activity with Mr. Bakhir starting in September of 2003 [Transcript page 350]. Thus the ruling that adultery was not proven is in error and contradicted by the evidence and testimony.

VIII. The grounds of divorce should have been adultery by the plaintiff instead of one-year separation.

The Court could not grant divorce based on one-year separation when the parties had been separated only two weeks (or six months using the courts erroneous ruling) at the time the Bill Of Complaint was filed in June of 2003, as the Defendant noted in #62 - Motion To Strike Count III Of Amended Bill Of Complaint,

but grounds of one-year separation was not requested in the Bill Of Complaint or Cross-Bill.

On 1/23/2004 the Court "Ordered that the Complainant shall file her Amended Bill of Complaint with this Court and serve a copy thereof on Counsel for the Defendant no later than Feb 6th 2004;" As the Defendant noted in #61 – Motion To Strike Amended Bill Of Complaint The Plaintiff did not file her the Amended Bill Of Complaint by Feb 6 as required by the order, but about one month late. The late filing is documented by the index prepared by the clerk, which shows it was filed on 3/2/04, contained on pages 115-127 of Volume I. Thus when the Plaintiff finally did file her the Amended Bill Of Complaint she did so without leave of the court, and as a result the Amended Bill Of Complaint was not properly before the court. The trial court erred in not striking the Amended Bill Of Complaint as requested by the Defendant.

"For there to be an 'application' under this statute [Code 20-91(A)(9)(a)], the party applying must himself seek affirmative relief by way of divorce in his favor through an original divorce proceeding or through a cross-bill filed in a pending suit." Moore v. Moore, 218 Va. 790, 796, 240 S.E.2d 535, 539 (1978)

Not only was the Amended Bill Of Complaint not properly before the court, but the time from when the Plaintiff moved out in June 2003 until she filed the Amended Bill Of Complaint was only 9 months. See Jones v. Jones where although the grounds for divorce did not exist when the suit was filed, the parties had lived separate and apart continuously for one year at the date of the hearing, the Circuit Court granted divorce on one year separation and was reversed on appeal. Pretty much the same as this case.

In Jones v. Jones Record No. 2580-99-3 (2000) the Court Of Appeals Of Virginia stated:
Code 20-91 (A)(9)(a) provides, in part, that "[a] divorce from the bond of matrimony may be decreed . . . [o]n the application of either party if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for one year." "The act relied upon for divorce must be alleged and proved to have **occurred prior** to the bringing of the suit, not based upon some act or conduct alleged to have taken place during its pendency." Beckner v. Beckner, 204 Va. 580, 583, 132 S.E.2d 715, 717-18 (1963); see also Johnson v. Johnson, 213 Va. 204, 210, 191 S.E.2d 206, 210 (1972).

Code 20-91(A)(9)(a) provides that a "no-fault" divorce may be granted only after an application has been filed properly alleging that the parties have lived separate and apart for the requisite time. See Moore v. Moore, 218 Va. 790, 796, 240 S.E.2d 535, 538 (1978) (finding that an application under Code 20-91(A)(9)(a) refers to a bill of complaint or a cross-bill). The ground for divorce alleged is a statutory element and jurisdictional prerequisite to filing the suit for divorce under Code 20-91(A)(9)(a). The grounds must be properly alleged and proven.

Given the Plaintiff did not prove, nor even attempt to prove any grounds existing **prior to her bringing the suit**, the Court had no authority to grant a divorce on the grounds of one year separation. See also the

ruling in Harrell v. Harrell record No. 0395-05-2 (2005) in which the wife filed for divorce only 10 days early and the Virginia Court of Appeals ruled it was invalid due to being filed prematurely.

With adultery proven, and one-year separation unavailable, the Defendant should have been awarded a divorce on grounds of adultery.

In Harrell v. Harrell record No. 0395-05-2 (2005) the court ruled:

This is not a case in which "the relief sought in the cross-bill is defensive merely, and would be satisfied by the dismissal of the original bill." Equitable Life Assurance Soc. v. Wilson, 110 Va. 571, 573, 66 S.E. 836, 837 (1910). The husband's cross-bill alleged every fact necessary to give the circuit court jurisdiction to grant a divorce.

"The public policy of the Commonwealth is 'to foster and protect marriage, to encourage the parties to live together, and to prevent separation, marriage being the foundation of the family and of society, without which there would be neither civilization nor progress.'" McEwen v. McEwen, 60 Va. Cir. 401, 404 (2002)(quoting Shelton v. Stewart, 193 Va. 162, 166, 67 S.E.2d 841 (1951)). Because of this public policy, the Commonwealth provides for the regulation of marriage as a means for the dissolution of marriage, not to facilitate divorce. Id. at 405, see also Chattin v. Chattin, 245 Va. 302, 427 S.E.2d 347 (1993). The order and indeed the way the court has handled the entire case has been in violation of this state policy. Awarding sole custody to and "child support" payments to a parent to admitted to adultery, admitted to domestic violence, and admitting to interfering with the parent/child relationship of the Defendant is a clear and blatant effort to facilitate and encourage divorce and thus a violation of state policy.

IX. The Defendant has Constitutional Rights as a parent and Virginia's laws on custody Unconstitutional because they do not recognize Constitutional Parental Rights, are not based on a compelling state interest and result in rulings that are not narrowly tailored and allow arbitrary rulings.

Today in most family law cases attorneys are not raising a constitutional shield to protect their clients. See previous discussion of "unauthorized practice of law" rules and statutes for the reason why – Judges do not want parties to make this claim and if an attorney offends a judge, the judge can take away his ability to make charge victims $200/hour in a feeble attempt to retain their parental rights.

Even when blood relationships are strained, parents retain vital interest in preventing irretrievable destruction of their family life; if anything, persons faced with forced dissolution of their parental rights have more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. The Supreme Court noted its "historical recognition that freedom of personal choice in matters of

family life is a fundamental liberty interest protected by the Fourteenth Amendment." Santosky v. Kramer, 102 S.Ct. 1388; 455 U.S. 745, (1982).

In applying the protection of the Fourteenth Amendment, the United States Supreme Court has held that "[w]here certain fundamental rights are involved... regulation limiting these rights may be justified only by a 'compelling state interest' ...and ...legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. State interference with a fundamental right must by justified by a "compelling state interest." Roe v. Wade. 410 U.S. 113, 155 ; 93 S.Ct. 705; 35 L Ed 2d 147, (1973)

In addition to recognizing as a fundamental liberty interest the right of parents to raise their children, the Supreme Court has also established that the Constitution's guarantee to fundamental privacy rights also embodies a fundamental right to parental autonomy in child rearing. The Court acknowledged a "private realm of family life which the state cannot enter." Prince v. Massachusetts, 3210 U.S. 158, 166 (1944); Moore v. City of East Cleveland, 431-U.S. 494 (1977)

The Supreme Court has clearly established that to constitute a compelling interest, state interference with a parent's right to raise his or her child must be for the purpose of protecting the child's health or welfare. Wisconsin v. Yoder, 406 U.S. 205, 230 (1972)

Father enjoys the right to associate with his children which is guaranteed by this amendment (First) as incorporated in Amendment 14, or which is embodied in the concept of "liberty" as that word is used in the Due Process Clause of the 14th Amendment and Equal Protection Clause of the 14th Amendment. Mabra v. Schmidt, 356 F Supp 620: D.C., WI (1973)

The United States Supreme Court noted that a parent's right to "the companionship, care, custody and management of his or her children" is an interest "far more precious" than any property right. May v. Anderson, 345 U.S. 528, 533; 73 S.Ct. 840, 843, (1952).

Parent's rights have been recognized as being "essential to the orderly pursuit of happiness by free man." Meyer v. Nebraska, 92 S.Ct. 1208, (1972)

The U.S. Supreme Court implied that "a (once) married father who is separated or divorced from a mother and is no longer living with his child" could not constitutionally be treated differently from a currently married father living with his child. Quilloin v. Walcott, 98 S.Ct. 549; 434 U.S. 246, 255-56, (1978)

The rights of parents to the care, custody and nurture of their children is of such character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and such right is a fundamental right protected by First, Fifth, Ninth, and Fourteenth Amendments. Doe v. Irwin United States District Court of Michigan (1977)

A parent's constitutionally protected right to rear his or her children without state interference, has been recognized as a fundamental "liberty" interest protect by the Fourteenth Amendment and also as a fundamental right derived from the privacy rights inherent in the constitution. In re Smith Washington Supreme Court (1998)

The liberty interest at issue in this case - - the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court Troxel v. Granville United States Supreme Court (2000)

It is well-settled that parents have a liberty interest in the custody of their children. Hence, any

deprivation of that interest by the state must be accomplished by procedures meeting the requirements of due process." Hooks v. Hooks United States Court of Appeals (1985)

Indeed, the right to rear one's children is so firmly rooted in our culture that the United States Supreme Court has held it to be a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution. Hawk v. Hawk Tennessee Supreme Court (1993)

It is well settled that, quite apart from the guarantee of equal protection, if a law "impinges upon a fundamental right explicitly or implicitly secured by the Constitution it is presumptively unconstitutional." Harris v. McRae United States Supreme Court (1980)

The application of strict scrutiny is not flexible at all, and I can find no case in this state where application of this standard has resulted in upholding the challenged law. With the adoption of strict scrutiny, this Court has forced the State of Tennessee into an "all-or-nothing" scenario, where only the most impeccably drafted legislation withstands the slightest possibility of darkening the constitutional doorway. Planned Parenthood of Middle Tennessee v. Sundquist Tennessee Supreme Court (2000) Note: This citation goes beyond saying infringements on fundamental parental rights are presumptively unconstitutional, and clearly states essentially no legislative restrictions on parents will be upheld.

If the classification affects fundamental rights however, there is no presumption of constitutionality, and the classification will be sustained only if justified by a compelling state interest. Coles v. Ryan Illinois Appeals Court (1980)

Likewise, following the analysis of the Tennessee Supreme Court in interpreting its state statutes and constitutions, we find that implicit in Georgia cases, statutory and constitutional law is that state interference with parental rights to custody and control of children is permissible only where the health or welfare of a child is threatened. Brooks v. Parkerson Georgia Supreme Court (1995)

The proof in this case supports the trial court's finding that the father is not unfit to have custody, and that he has developed a substantial relationship with the child. It shows that the child is in no danger of substantial harm. The father, therefore, has a fundamental interest in parenting the child which precludes a "best interest" determination of custody. Petrosky v. Keene Tennessee Supreme Court (1995)

To satisfy strict scrutiny, the State must show that a statute furthers a compelling state interest by the least restrictive means practically available. Bernal v. Fainter United States Supreme Court (1984)

Requiring a State to demonstrate a compelling interest and show that it has adopted **the least restrictive means** of achieving that interest is the most demanding test known to constitutional law. City of Boerne v. Flores United States Supreme Court (1997)

Parent's interest in custody of her children is a liberty interest which has received considerable constitutional protection; a parent who is deprived of custody of his or her child, even though temporarily, suffers thereby grievous loss and such loss deserves extensive due process protection. In the Interest of Cooper, 621 P 2d 437: 5 Kansas App Div 2d 584, (1980)

A parent's right to the preservation of his relationship with his child derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his children. A child's corresponding right to protection from interference in the relationship derives from the psychic importance to him of being raised by a loving, responsible, reliable adult. Franz v. U.S., 707 F 2d 582, 58-95-599; U.S. Ct. App. (1983)

No bond is more precious and non should be more zealously protected by the law as the bond between parent and child. Carson v. Elrod, 411 F Supp 645, 649; DC E.D. VA (1976)

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969), Sherbert v. Verner, 374 U.S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. Griswold v. Connecticut, 381 U.S., at 485; Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307-308 (1940); see [410 U.S. 113, 156] Eisenstadt v. Baird, 405 U.S., at 460, 463-464

The Virginia state laws regarding custody, including but not limited to § 20-124.3, § 20-124.2, are unconstitutional as they claim to give the court the ability to restrict or violate the constitutional rights of parents without a showing that the parents are unfit. They are facially unconstitutional because no harm threshold is present, nor so they contain any requirement for narrow tailoring.

Law and court procedures that are "fair on their faces" but administered "with an evil eye or a heavy hand" was discriminatory and violates the equal protection clause of the Fourteenth Amendment. Yick Wo v. Hopkins, 118 U.S. 356, (1886)

The award of sole custody, especially when based on gender and given that the court and state do not enforce visitation in the same manner as ‘child support’, is unconstitutional by being cruel and unusual punishment, and violating the equal protection clause.

In addition the statutes are unconstitutional as applied as “Best Interests Of The Child” is so vague and subjective as to allow in practice for judges to award sole custody for any reason whatsoever and in general is applied in a gender and or politically biased way as to make it unconstitutional. There is ample evidence in this case (and others) to indicate bias and is also seen in the statistics on child support that indicate mothers being awarded custody over 85% of the time (See unopposed fact #68). Even more evidence is the fact that courts hand out standard visitation orders that have little or no variation based on the facts of the case. Its obvious the courts are not even attempting to use the unconstitutional (but well intended) “Best Interests Of The Child” standard and are in fact using a “Best Interests Of The Bar Association” standard. Respecting the Constitutional Rights of fit parents would significantly reduce the number and length of custody court cases with a corresponding reduction in billable hours for attorneys. The Court’s rulings are in violation of Virginia state law that prohibits use of gender as a factor for deciding custody. It’s widely accepted that gender is the

main (or only) criteria the Prince William County Circuit Court uses in making custody determinations.

X. The custody ruling made in a biased manner without the evidence to support it and in an Unconstitutional manner that denied the Defendant Due Process and Equal Protection.

The Defendant's Constitutional Rights as a parent were not based on being married to the Plaintiff and as such the fact that the Plaintiff decided to end her marriage with the Defendant and shack up with a co-worker does not give her or the state any authority or right to reduce, revoke, or restrict the parental rights of the Defendant.

The Court has violated the Defendant's constitutional rights as a parent without indicating any compelling state interest to justify interfering with his constitutional rights as a parent time (See unopposed fact #68).

All parties agree that our son, Liam, loves his father and wants to spend time with him (See unopposed fact #43). The Plaintiff herself testified on:

"Liam loves his father very much. He has positive associations with his father. He likes the time that he spends with him." [page 285] "And so if this child thinks he is going to see his father, he needs to see his father." [page 287]

The GAL has stated: "While the father is clearly capable of caring for Liam, and Liam is attached to his father…" [Memorandum pg 2] "Both parents are capable of assessing and meeting the emotional, intellectual and physical needs of their child…" [Answer pg 2] "The child has expressed love for and attachment to both parents."[Answer pg 4]

Neither the Plaintiff nor GAL have presented any evidence that the Defendant is unfit. The GAL stated: "There are no founded incidents of abuse." [Answer pg 4]

Thus clearly the court and state are without legal authority to deprive the Defendant of his parental rights or to give the Plaintiff greater parental rights than the Defendant.

Bias is clearly shown by both the court and the GAL. The Plaintiff admits and even submitted a copy of a preliminary protective order she filed requesting the court prevent contact between the Defendant and our son for two years. The Preliminary Protective Order was not only dismissed, which is EXTREAMELY rare,

but also expunged as it was completely without merit. The GAL stated, as that no abuse took place, but also admits the Plaintiff filed an unfounded abuse complaint with CPS. “I believe that the mother filed a compliant on at least one occasion.” [page 136]. The GAL goes on to describe the mother as “supportive” in spite of her repeated attempts to prevent the father and son from having a relationship, and then describes the Defendant as uncooperative because he is pursuing adultery as a ground of divorce, while expressing no concern over the Plaintiff exposing our son to adultery or her diagnosed ‘uncontrollable rage’, acts of violence, or depression. Clearly the GAL was biased and the Court went along with it.

The Court has erred by not making a ruling in the best interest of our son. Our son clearly desires and needs to be allowed to spend more than one weekend a month with his father. The result of previous depravations of visitation has resulted in him performing poorly in school and being diagnosed with depression. If the court had even any pretense at following “best interests of the child” it would have made a ruling that granted him frequent time with his father.

XI. The Court ruling on “child support” violates the Defendant’s Constitutional Rights, without showing a compelling state interest, and is without the evidence to support it, and the “child support” laws of Virginia are Unconstitutional.

The order of “child support” violates the constitutional rights of the Defendant. All the state/federal laws about child support without a showing of neglect are unconstitutional. Noting in the marriage contract, nor constitution gives the Plaintiff the right to deny the Defendant the ability to chose where to live, where to work, what career to pursue, how much money to earn or spend on his son. The fact that the Plaintiff slept around, in violation of our marriage contract, and chose to end the marriage does not give her extra rights. Indeed as the state has no requirement that ‘child support’ actually be spent on the child, it amounts to nothing more then discussed alimony or middle-class mother welfare.

The court also erred in determining an arrearage. As visitation is tied to child support, the court is unable to deny a fit parent visitation while still ordering ‘child support’. As the Defendant was denied visitation for 17 months he cannot be required to pay support for that time period. The court can’t deny a parent all meaningful parental rights and still require parental obligation, rights and obligations are tied together and can’t be separated by the court. When the court suspended visitation, it must suspend “child support”.

The duty to support children is based largely upon the right of a parent to their custody and control. Patron v. Patron, 40 Va. Cir. 379 (1996); Butler v. Commonwealth, 132 Va. 609, 614; 110 S.E. 868 (1922). A parent cannot be compelled to pay support unless he or she has refused or failed to provide for them where he or she lives. Butler, 132 Va. at 614.

There must be a reciprocal and corresponding right and duty. You cannot have one without the other. A "child's right to support and the parent's right to custody and services are reciprocal". RUBINO V. MORGAN, 638 N.Y.S.2d 524, 525, 224 A.D.2d 903 (3rd Dept. 1996). And BOWEN V. GILLIARD, 483 U.S. 587, 107 S. Ct. 3008, 97 L.Ed.2d 485 (1987).

No compelling state interest was demonstrated for requiring support. While the state may have an interest in keeping children from being a burden financially on the state, no evidence or claim was made that our son was not adequately provided for, thus any state intervention on the parental right to chose how/what to provide for a child is unconstitutional. It should be noted the award of "Child Support" does indeed further the interests of the Virginia State Bar and its members but that isn't a legal reason to restrict the parental rights of the parties.

Any claim of child support by the Plaintiff would be barred by the statue of limitations. The actions of the Defendant in helping her conceive took place in 1996 well over two years before she filed for custody in 2002. The act of conception also took place outside of the state of Virginia before the parties moved to Virginia. Virginia has no authority or jurisdiction to punish the Defendant for engaging in consensual sexual relations with his wife, especially when it did not take place in Virginia. Given the act of sex with his wife was not illegal nor punishable by a monthly fine at the time it is EX POST FACTO to now punish the Defendant for that act, as such an order of 'child support' is unconstitutional.

Given the time period and location, the only basis for the claim of support is that the Plaintiff decided to end the marriage. The state has no power to punish the Defendant for actions of the Plaintiff. If the Plaintiff had not chosen to file for custody/divorce everyone would recognize the state would have no business ordering support unless neglect became an issue. The actions of the Plaintiff cannot grant the state power to take away rights of the Defendant. The ability of the Defendant to choose how, when, where to work and how, when, how much to provide financially for his son should remain the same as before the Plaintiffs actions occurred.

An order of support with the coercive state laws also amounts to a bill of attainder, reducing the Defendant to indentured servant status or as an outlaw, given the state laws deny him the same legal due process rights as accused murderers. Bills of attainder, indentured servants and outlawry are all unconstitutional.

The only evidence as that at some point years ago the Defendant earned $85,000. That is logically equivalent to saying the Plaintiff and Defendant used to live together and raise their child together without the intervention of the court or court orders so none are needed now. The obligation is on the Plaintiff to provide evidence of potential earnings, which she did no do. She presented no evidence of the current earning potential of the Defendant in the area where he currently lives. Certainly rates, skill out of date, and the local job market all have changed since the stated income level, not to mention the Defendant being arrested and bankrupted as direct results of this case, both resulting in the lack of ability to hold a security clearance and subsequently lower earning potential. Given the Plaintiff didn't provide any evidence, income can't be imputed and must be set based on actual earnings.

XII. Did the court abuse its discretion by:

a. Refusing to strike the GAL's Report or Answer even when the GAL provided no expert credentials or qualifications, nor cited any other expert. See #64 - Motion To Strike GAL Report and [page 129-130]

b. Denying multiple motions to remove the GAL due to failure to follow state guidelines. See Motion To Appoint New Guardian Ad Litem and GAL STANDARDS. See pages 140-142 - that the GAL did not bother to get a copy of the psychologist diagnoses of our son, or mention it in his report

c. Refusing to allow proper questioning of the GAL. pages 154-155, 158:18, 159:17 refused to let me make a proffer about questions I was prevented from asking.

d. Encouraging the GAL to not stay for the trial, not even attending the testimony of his own "client". Page 159:19

e. Issuing an Unconstitutional prior restraint of free speed injunction and refusing to void it even after the Defendant submitted precedence to show the court had no authority to grant the injunction. #47 - Motion To Recognize Right Of Freedom Of Speech And To Vacate, Or Recognize As Void, All Orders That Deprive Defendant Of That Right

f. Holding an Ex Parte hearing to suspend visitation with no showing of harm or emergency. See APPELLANT'S OPENING BRIEF from the separate appeal of this issue for a complete discussion http://www.liamsdad.org/court_case/suspend_visitation/suspend_visitation.shtml

g. Refusing to use the Defendant's properly submitted financial statements and instead using the Plaintiff's proven inaccurate versions that were not provided prior to trial. See #56 - Notice Of Fraud By Loretta Vardy

h. Ruling and entering orders for Plaintiff's motions even when filed just the day before the hearing while refusing to timely rule on Defendant's motions and sometimes failing to enter orders when a ruling had been made. The Defendant hereby incorporates by reference: #56 - Notice Of Fraud By Loretta Vardy see [page 243]

i. Not entering an order to compel after a ruling to compel the Plaintiff had been made. Several motions were filed, a hearing held, a ruling made compelling the Plaintiff, the Plaintiff filed a draft order but, but the Court refused to enter it.

j. Refusing to let the Defendant make proffers at the trial. Due process – refused to let me make proffer [77:13] "I will make a proffer for the Appeals Court" [77:18] "No sir. There will be no proffer" [79:5] "I'm not going to let you make a proffer"

k. Refusing to make a good faith effort to rule on the Defendant's proposed statement of facts, including denying things like #22 The Defendant has made repeated motions for the court to vacate or recognize as void the illegal order of Aug 17th 2004- which is easily proven true.

l. Failing to recuse when the judge had the appearance of bias. #60 - Defendants Motion To Disqualify/Recuse Judge Potter

m. By not providing Equal Protection, in denying the Defendant the same ability to tape the hearings as is afforded members of the Virginia Bar Association.

n. In finding the Defendant in contempt, on a motion filed timely and without designating it as civil or criminal contempt, or providing a jury or court appointed attorney. [Page 600:12]

o. Refusing to take notice of Utah Law –see #69 – REQUEST FOR JUDICIAL NOTICE OF UTAH LAW. Utah being the state under whose laws we entered into the marriage contract.

p. Refusing the Defendant's request for a 4 day trial . The court did not provide adequate amount of time for trial, I had requested 4 days and the court only granted 2. By comparison, the Plaintiff's lover was

granted a 4 day divorce trial and his trial didn't even deal with custody. See #32 - Defendant's Motion For Trial Date And Sanctions

q. Improperly quashing subpoenas preventing the Defendant access to evidence. See complete brief on how the court improperly quashed a subpoena for records in violation of Rules - http://www.liamsdad.org/court_case/quash_saic/quash_saic.shtml

CONCLUSION

1. The Defendant requests that the court rule that the Virginia statutes for custody and "child support" are unconstitutional.
2. Remand the custody case back to the JD&R court with instructions to order equal physical and legal custody.
3. Rule that the Date Of Separation was June 2003 or Dec 2003.
4. Rule that the determination of marital/non-marital debts be recalculated based on that date or alternately to leave each party with the portion of debt they have been responsible for since 2002.
5. Rule that the escrow account should be dispersed per #57 – Defendant's Proposed Distribution Of Marital Property
6. Rule that Adultery was proven
7. Rule that the Defendant's amended cross bill be granted on grounds of the Plaintiff's adultery
8. Award Defendant costs in bringing the appeal and defending the suit.
9. Declare unauthorized practice laws unconstitutional

Respectfully submitted,
WESLEY C. SMITH, Appellant / Defendant, pro se

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CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing was mailed first-class to Fairfax to Loretta Vardy 12388 Silent Wolf Dr, Manassas VA 20112 and Ronald Fahy 9236 Mosby St # A, Manassas VA 20110 on October 16th, 2006.

Mr. Smith desires to present oral argument in this appeal.

Submitted By Appellant/Defendant: (no attorney)
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Wesley Smith