

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

CHERI SMITH,)

Complainant/ Plaintiff,)

v.)

Chancery No. 53360

WESLEY C. SMITH,)

Defendant.)

DEFENDANTS MOTION #28 TO DISQUALIFY/RECUSE JUDGE ALSTON

A pdf copy of this motion is available at: http://www.liamsdad.org/court_case/

COMES NOW the Defendant, Wesley C. Smith, and respectfully moves that Judge Alston be disqualified and recused from further proceedings in this case for the following reasons:

1. By his scheduling of hearings, ex parte communications, illegal orders, unequal enforcement of rules, and disregard of Constitutional Rights, State Law, the Bests Interests of the Child and violations of the Canons of Judicial Conduct it does appear to a reasonable person that Judge Alston has a personal bias in this case.
2. Continued involvement of Judge Alston in this case could make any court order null and void, requiring appeals and a new trial, thus prolonging rather than resolving the issue before the court.
3. Given the appearance of bias the Canons of Judicial Conduct require Judge Alston to recuse himself even if he himself does not agree that he is biased in this case. The test is not whether actual bias and prejudice exist, but **whether a reasonable person would doubt the impartiality of the court.**

Canon 3 (E)(1)(a) “A judge shall disqualify himself or herself in a proceeding in which the judges’ **impartiality might reasonably be questioned**, including but not limited to

instances where: (a) The judge has a **personal bias** or prejudice concerning a party or a party's lawyer, ...

"Law requires not only impartial tribunal, but that tribunal **appears** to be impartial." 28 U.S.C.A. 455. In Re Tip-PaHands Enterprises, Inc., 27 B.R. 780 (U.S. Bankruptcy Ct.)

"a judge must diligently avoid not only impropriety but a reasonable **appearance** of impropriety as well." Davis v. Commonwealth, 21 Va. App. 587, 591, 466 S.E.2d 741, 743 (1996).

"In exercising such discretion, a judge must not only consider his or her true state of impartiality, but also the public's perception of his or her fairness, so that the public confidence in the integrity of the judicial system is maintained." Buchanan v. Buchanan, 14 Va. App. 53, 55, 415 S.E.2d 237, 238 (1992).

"Judges are presumed to be aware of the provisions of Canon 3" Davis, supra. When a motion to recuse is presented, a "judge must be guided not only by the true state of his impartiality, but also by the public perception of his fairness, in order that public confidence in the integrity of the judiciary may be maintained." Stamper v. Commonwealth, 228 Va. 707, 714, 324 S.E.2d 682, 686 (1985).

4. **Unequal Enforcement Of Rules:** Judge Alston has refused to enforce the rules when the Plaintiff violates them including discovery rules, one week notice rule, rules about frivolous motions etc. Has enforced the rules more strictly against the pro-se Defendant.
5. **Scheduling Of Hearings:** Judge Alston has knowingly scheduled a hearing for Jan 3 2005 knowing that one week notice was not provided to the Defendant per rule, and when he knew that the Defendant was not provided adequate time to prepare for or travel to the hearing from Michigan as required by law. He refused the Defendants request to continue the hearing. He then followed this up by knowingly scheduling a hearing for January 18th 2005 when he knew the GAL would not be able to attend. Clear he didn't intend for it to be an honest trial but rather just to inconvenience the Defendant requiring him to drive to/from Virginia for nothing. He also allowed the Plaintiff to file a motion on Oct 5 2004 for a hearing on Oct 8th 2005. According to the Plaintiff's Attorney, Judge Alston is now refusing to schedule and hold hearings as required of a judge. It's clear that Judge Alston

has abused his discretion in scheduling.

6. **Ex Parte Communications:** under Canon 3 (B7) “**A judge shall not initiate, permit, or consider ex parte communications...**” the above ex parte hearing of Jan 3rd 2005 between Judge Alston the Plaintiff and GAL, as well as the Judge Alston’s collection of documents/evidence constitutes ex parte communications and form a further basis upon which the Judge must recuse himself. Judge Alston also failed to comply with Canon 3 (B7aii) ”The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.” He did not provide the Defendant a transcript, recording or other documentation to indicate the content of the communications he had with the Plaintiff and GAL at the hearing.

7. **Illegal Orders:** Judge Alston has also issued illegal orders, demonstrating his blatant bias in favor of mothers and disregard of Constitutional Rights, State Law, and the Bests Interests of the Child and terminated almost all parental rights of the Defendant on Jan 3rd 2005, without due process, without a fair trial, without allowing the Defendant to attend to present rebuttal evidence, without allowing him to cross-examine his accusers. Rebuttal evidence would be crucial in a case that otherwise rested on the testimony of only one witness. Such action on the part of Judge Alston makes the order null and void and has added to the number of legal issues the parties must resolve.

“Parties whose rights are to be affected are entitled to be heard.” (**Baldwin v. Hale**, 68 U.S. (1 Wall.) 223, 233 (1863)); and the opportunity to be heard “must be granted at a meaningful time and in a meaningful manner.” (**Armstrong v. Manzo**, 380 U.S. 545, 552 (1965)).

8. The failure to provide a fundamentally fair hearing is a violation of procedural due process, a constitutionally protected right. Procedural due process requires that the party whose interest is threatened be provided with a meaningful opportunity to be heard.

Inherent in this right to be heard is a right to a fair proceeding; **the interjection of gender bias into a proceeding violates the requirement that the hearing be fair.**

Thus, judges who make custody determinations not on a record basis, but on the basis of gender bias, violate procedural due process.

9. A fundamentally unfair adjudicatory procedure is one that gives a party a significant advantage or places a party in a position of prejudice or allows a party to reap the benefit of his own behavior in placing his opponent at an unmerited and misleading disadvantage. The procedure employed in this case **placed the Defendant in an even more difficult position than a parent actually charged with abuse or neglect** and substantially prejudiced him in his efforts to obtain custody of his son. This was fundamentally unfair and amounted to a denial of due process.
10. Even if everything claimed by the Plaintiff in her motion for the Jan 3rd hearing was accepted as true, Judge Alston still did not have sufficient evidence to support the termination of the Defendants parental rights and visitation with his son. The circuit court's order terminating visitation did not referenced any specific evidence to support its decision, and given **the personal knowledge by Judge Alston that the claims were not all true**, that the Plaintiff herself had written the Defendant missing even one visitation period would be harmful, Judge Alston was completely lacking any legal basis for his order and knew it was contrary to the bests interests of our child.
11. Judge Alston was unwilling to correct his mistake when the Defendant submitted a petition for rehearing and also submitted to the court documents that show the ruling was based on intentionally misleading and fraudulent statements by the Plaintiff. In fact **Judge Alston himself would have been a witness** for the Defendant as the motion ruled

on by Judge Alston on Dec 10 2005 clearly pointed out that if escrow funds were not released immediately the Defendant would have to move out of state and that it would impact visitation Thus Judge Alston was himself aware that the Defendant did notify all parties, including the court, in advance of his move out of state, yet Judge Alston in spite of having ample opportunity to help avoid the move out of state or to modify the terms of visitation, did nothing at that time, but later punished the Defendant and his son severely for the resulting impact on visitation that Judge Alston knowingly did nothing to avoid.

12. Judge Alston has also issued highly questionable rulings on discovery and refusing to sign a proposed statement of facts. The Defendant has been prejudiced by the lack of discovery.

13. Judge Alston seems quite content to leave our son Liam in the sole care of a mother who has mood disorders including uncontrollable rage, and deny Liam access to his father whom he loves and who has always taken good care of Liam. Judge Alston ignores laws, evidence, and procedures that if followed would require him change the situation. The Defendant might as well be an African American trying to get justice with a member of the Ku Klux Klan as the judge.

14. The actions of Judge Alston are causing irreparable harm to the Defendant and our son

Liam. As Chief Justice Frank D. Celebrezze of the Ohio Supreme Court wrote:

“While statutes can be amended and case law can be distinguished or overruled, we take judicial notice of the fact that **children grow up only once**. When a mistake is made in a custody dispute, **the harmful effects are irrevocable.**”

15. The actions of Judge Alston are structural errors.

Structural errors, such as the deprivation of the right to counsel, **trial by a biased judge**, the unlawful exclusion of members of the defendant's race from a grand jury, and the denial of the right to a public trial. Fulminante, 499 U.S. at 309-10. Unlike trial errors, structural errors are not amenable to harmless error analysis because they **"infect the**

entire trial process." Tuggle, 79 F.3d at 1391 (quoting Brecht, 507 U.S. at 630).

16. The Code of Judicial Conduct, Canon 2 requires a Justice to comply with the law. When a Justice does not comply with the law, he/she violates the law and the Code of Judicial Conduct, and should be reported. Under certain circumstances, he loses subject-matter jurisdiction and has no lawful authority. In fact, **he has engaged in treason**. In the other circumstances, he/she acts as a criminal in violating the law. It is wrong for a Justice to act in either circumstance.

17. In this matter, Judge Alston has failed or refused to respect and comply with the law. Whichever the reason, the net effect is the same: Defendant's fundamental rights have been severely trampled, and this conduct evinces bias and prejudice or, at the very least, the blatant appearance of bias and prejudice.

18. The actions of this Court **manifest an ingrained bias and prejudice against the Defendant's fundamental Constitutional rights**, and the actions of this court self-evidently give the appearance of bias and prejudice.

19. If Judge Alston is not removed from the case, and his erroneous orders vacated or declared null/void, it is likely he will have an actual conflict of interest by becoming a party in a Federal Court case about his conduct. It is well settled that non-custodial fathers as well as mothers have a constitutionally protected liberty interest in their parent/child relationship and case law as well as statutory law has time and again upheld that right. Judges have complete knowledge of the right of children to have access to both parents during separation and after divorce. For a judge to discriminate on the basis of sex to deny the parent/child relationship **or severely limit** it without just cause/clear and convincing evidence causes that judge to **lose jurisdiction** and therefore **judicial**

immunity because of his discriminatory "ministerial" personal viewpoints.

20. Any opposition by plaintiff or GAL would indicate they agree Judge Alston is biased as if he wasn't biased and instead made rulings based on evidence and law the same result would be obtained with a different impartial judge thus making it unreasonable to object.

21. For such other and further reasons as may be advanced in open Court.

WHEREFORE the Defendant hereby moves that Judge Alston be recused and disqualified from this case and from any further proceedings connected to it and that a new hearing should be granted before an impartial judge to rule on all motions previously ruled on by Judge Alston.

**Respectfully Submitted,
WESLEY C. SMITH
Defendant**

Wesley C. Smith
5347 Landrum Rd APT 1, Dublin, VA 24084-5603, no phone
Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing motion was served to Loretta Vardy and Ronald Fahy (GAL) via first-class mail, this 16th day of August 2005.

Wesley C. Smith