

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

CHERI SMITH,)
Plaintiff)
)
v.) **Chancery No. 53360**
)
WESLEY C. SMITH,)
Defendant)

#41 - MOTION TO CHANGE CUSTODY / VISITATION

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

COMES NOW the Defendant, Wesley C. Smith, due to the Plaintiff having abused her role as the custodial parent and supported contact between our son and her lover(s) while at the same time impeding contact with his father, requests this Court modify its order of Oct 2, 2003 and grant him custody of the parties' minor child Liam Smith and such further relief as stated herein, and in support thereof states as follows:

1. This court, via Judge Potter, entered a pendente lite custody/visitation order on Oct 2, 2003, awarding sole custody to the Plaintiff and granting the Defendant overnight visitation on Tuesdays and every other weekend.
2. The Plaintiff has had difficulty in following the order and at intervals has taken steps to interfere with the Defendant spending time with his son, including but not limited to:
 - A. Refusing to follow the visitation order, keeping our son out of state and forcing him to miss visitation with his father in Dec 2003. The Court reminded her to follow the order.
 - B. Refusing to allow visitation on Fathers-Day 2004 per order unless the Defendant gave up other visitation time. The Court refused her request to force him to give up visitation.
 - C. In July 2004 the Plaintiff called the police when the Defendant exercised visitation even after the Plaintiff had previously put in writing that she agreed he had visitation that day.
 - D. Made false claims of badgering by the Defendant at exchanges. The Plaintiff dropped this when she found out the Defendant had audio recordings proving her claim false.
 - E. Trying to paint the Defendant as committing child abuse. The Plaintiff dropped this when she

found out that the Defendant had audio and photos to prove her claim false.

F. In August 2004, the Plaintiff scheduled a Court hearing during the Defendants two-week vacation visitation time with their son, when they would be out of state visiting family.

G. A complaint of child abuse was filed with CPS. The complaint was dropped because it occurred during a time that the Defendant did not have access to the child. Either the Plaintiff or her boyfriend abused the child or the Plaintiff didn't pay attention to the dates when filing a false report.

H. Not providing education materials as required per order, event notices, IEP meeting invitations, even **after** the court reminded her she needed to do so.

I. Asking the court to terminate visitation based on false claims and when its clear in her own words our son would be "extremely disappointed" to miss visitation with his father and that "He will be crushed if you don't come tonight." Exhibit #2

3. In Dec 2005, The Plaintiff intentionally mislead the court with claims that she was unaware of the Defendant's move to Michigan. This is shown false by her statements in e-mail: (see e-mail at end of

http://www.liamsdad.org/court_case/suspend_visitation/2005.01.02_Letter_miss_hearing.pdf)

Dec 14, 2004 – "Thank you for **telling him that you are going**. He is upset, but seems to be managing it. I have been reassuring him that you will miss him very much, and that your absence is not because of anything he's done."

Dec 14, 2004 – "I wouldn't have room for the ferns, mattresses and the wagon. I can store his bookshelves."

Dec 16, 2004 - "Liam has asked to see you this weekend. Since I'm assuming **you are moving from the area soon**, I'd like to give him as much time with you as possible."

Dec 21, 2004 - "your **imminent departure**"

4. The Defendant had notified the court and the Plaintiff about his eviction and asked both for help to avoid it, (see DEFENDANT'S MOTION FOR USE OF ESCROW FUNDS TO AVOID EVICTION)

clearly stating that without help he would be "**forced to move out of state**" and its impact on visitation:

Nov 10, 2005 – "You will also note that the court order states you are to pick him up at the end of my visitation, so eviction will likely mean a **much longer drive for you to pick him up**"

5. On Jan 3, 2005 Judge Alston, based on false and misleading claims of the Plaintiff, without allowing the Defendant to attend, and without any finding of harm, suspended visitation until Jan 18.

6. On Jan 18, 2005 Judge Millette, without the GAL in attendance, without Due Process, without allowing the Defendant to present evidence to prove the claims made by the Plaintiff were false, suspended visitation. Judge Millette **without any finding of harm** to our son, without finding the Defendant unfit, and **without any finding that continued visitation was contrary to the children's best interests**. In fact no evidence or testimony was presented to indicate harm to the child or that visitation was not in the child's best interest.

7. There is evidence in the record that the child would benefit from having contact with his father. The memo from the GAL stated "**...the father is clearly capable of caring for Liam, and Liam is attached to his father,...**", there are also written statements by the Plaintiff that our son was upset by the Defendant leaving and would miss him and that he looked forward to visitation with the Defendant.

8. The Parties and the Court were also aware of the Defendants website which has photos that show our son enjoying visitation with his father, participating in fun activities, visiting extended family, even participating in therapy. See <http://www.liamsdad.org/liam/2004/2004.shtml> for 55 photo albums of visitation the year before visitation was suspended.

9. A custody or visitation ruling is never final. It is always subject to review upon a showing of a material change of circumstances. Eichelberger v. Eichelberger, 2 Va. App. 409, 345 S.E.2d 10 (1986);

10. After the initial ruling on Oct 2, 2003 a material change in circumstances, pursuant to VA 20-108, has occurred including both the Plaintiff and Defendant moving, the Plaintiff changing school districts (twice), and the Plaintiff actions to interfere with our son's relationship with the Defendant.

11. After the suspension of visitation on Jan 18, 2005 a material change in circumstances, pursuant to VA 20-108, has occurred, including the Defendant moving back to Virginia, and the Plaintiff taking actions to deny the Defendant access to our son's school events, resulting in the Defendant being arrested for attending his son's class party and being held in jail for Fathers-Day weekend. (See http://www.liamsdad.org/hall_of_shame/fcps/roger_vanderhye.shtml)

12. Currently the Defendant is only allowed contact with our son via a weekly phone call. During these calls **our son repeatedly states he loves the Defendant, misses him, and alternately asks for the Defendant to come pick him up** or asks where the Defendant is and **states he will come see the**

Defendant immediately. In fact many of the calls are nothing more than our son asking where the Defendant is located and stating that he will come see him in 5 minutes and hanging up.

13. Our son has repeatedly left the phone to ask the Plaintiff to let him visit his father. The Plaintiff has always refused.

14. The Defendant has asked the Plaintiff to allow access to see our son as opposed to visitation, which is a temporary switch in custody. The Plaintiff has consistently refused and used the court ruling as an excuse **claiming she isn't allowed by the Court to let the Defendant see his son.** She refuses even when its pointed out that her boyfriend doesn't have court ordered visitation but she still allows her boyfriend access to our son, or that she could agree to modify the court order. See Exhibit #1

15. The refusal of the Plaintiff to allow our son to spend time with his father shows an **inability to ability to accurately assess and meet the emotional needs of our son** and that **the Plaintiff does not actively support the child's contact and relationship with the other parent.** § 20-124.3 requires the court to consider this specific negative conduct of the Plaintiff in determining custody.

16. The current situation is not in the best interests of our son and the Court has both a legal and moral obligation to correct the situation. Code 20-124.2(B) provides in part:

The **court shall assure** minor children of frequent and continuing **contact with both parents**, when appropriate, and **encourage parents to share** in the responsibilities of rearing their children. As between the parents, there shall be no presumption or inference of law in favor of either.

17. It is desirable for a child "to continue to receive the non-custodial parent's affection and nurture through the mechanism of visitation." M.E.D. v. J.P.M., 3 Va. App. 391, 397, 350 S.E.2d 215, 219 (1986) (citing Eichelberger v. Eichelberger, 2 Va. App. 409, 412, 345 S.E.2d 10, 12 (1986)).

[T]he interest of parents in a continuation of the family unit and the raising of their own children . . . cannot easily be overstated. Few consequences of judicial action are so grave as the severance of natural family ties. Even the convict committed to prison and thereby deprived of his physical liberty often retains the love and support of family members. "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that **'undeniably warrants deference and, absent a powerful countervailing interest, protection.'** Stanley v. Illinois, 405 U.S. 645, 651." Id. at 787 (quoting Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 27 (1981)).

18. The Defendant has been an excellent parent, has a history of being a primary caretaker, and has a close relationship with his son. There simply is no reasonable rational for the Court to deny our son and the Defendant of time together as required by law. The current situation appears to be based on nothing

more than the gender of the parties and as such is **unconstitutional** according to Article I, Section 11 of the Virginia Constitution: "...the right to be free from any governmental **discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged,**"

19. Starting at the birth of their son the Defendant was a primary caretaker for the child during his entire life and had a close relationship with him. Even when the child was an infant the Defendant played a primary role in his care including feeding, changing, etc. The Defendant was actively involved in Doctor visits, speech therapy and therapeutic riding. For the 6 months prior to the Plaintiff taking legal action, the Defendant by agreement with the Plaintiff, was **the primary caretaker** staying home and caring for the child while the Plaintiff worked. The Plaintiff wrote that he did a good job.

20. During the same period **the Plaintiff did not desire to be, and took specific actions to avoid being, the child's primary caretaker.** The Plaintiff took steps such as enrolling in graduate school and taking employment when there was no financial need, in order to avoid staying home and taking care of our son full-time.

21. The Defendant's role as a primary caretaker for the child continued until the Plaintiff initiated court action. Even then the Defendant continued to care for the child and have a relationship with him as much as the Court and Plaintiff allowed. The Defendant continued to take our son to speech and riding therapy, even shopping for items for our son as directed by the Plaintiff, has sought and consistently exercised visitation with our son.

22. The Plaintiff starting in Sep 2002 has periodically taken actions to interfere with the parent/child relationship the Defendant has with our son, apparently in an attempt to remove the Defendant from the child's life to make room for her boyfriend. These actions include but are not limited to:

- A. Filing, in bad faith, a Motion for a Protective Order alleging the Father has abused the Mother and the Child with full knowledge that no such actions have occurred;
- B. Placing the Child unnecessarily in daycare instead of letting the Defendant continue to care for him – while all three were still living in the same house;
- C. Contacting and instructing the Child's daycare and school that the Father is not allowed any contact with the Child;

D. Stating several times and taking actions to enforce a mandate that the Father is only allowed supervised visitation with the Child;

E. Relocating to an apartment and refusing to inform the Defendant of the address as required by court order.

F. Not properly informing the Defendant of IEP meetings with the school so the Defendant could attend.

23. The filing of a protective order was so totally unfounded that not only did the JD&R Court dismiss it, but also **this Court** had it expunged (see http://www.liamsdad.org/court_case/ppo/ppo.shtml).

24. The requests of the Plaintiff for the protective order and supervised visitation were so absurd that JD&R Judge Becker not only didn't support her position but ordered her to remove the child from daycare and place him back in the care of the Defendant while she was at work and granted the Defendant additional visitation several days a week including overnight visitation.

25. The Court in recognition of the close relationship of the Defendant and Child and the gross interference by the Plaintiff after granting the Defendant **visitation on 6 days a week** went the additional step of ordering the **Plaintiff "shall not deny Petitioner access to the Child during the days in which visitation is not scheduled and shall not prevent the Child from spending time with Petitioner if the Child so desires;"** (see http://www.liamsdad.org/court_case/jdr/2003_05_05_decree_notes.pdf)

26. As a result of the Plaintiffs actions and the Court suspending visitation, the Child's relationship with the Father has been severely undermined.

27. The Defendant is in a position to provide a better home life for our son than the Plaintiff. The Defendant currently resides with his brother Thaniel and his wife and two children. They live in a large two-story single family home with an empty guest room that Liam could use.

28. The home is in a rural area on a dead end road so there isn't much traffic or noise. The home is on a 5 acre lot with plenty of room for children to play, run, play tag, water fights, fly kites, blow bubbles, etc safe from cars, and has a trampoline, swing set etc. It is also a good place to see fireflies, rabbits, caterpillars / butterflies, deer, birds, etc.

29. Liam would enjoy living with and playing with his cousins, age 9 and 5. See pictures of Liam

playing with his cousins:

http://www.liamsdad.org/liam/2004/34_mi_mcdonalds_with_cousins/index.shtml

http://www.liamsdad.org/liam/2004/34_mi_water_and_sand/index.shtml

http://www.liamsdad.org/liam/2004/69_xmas_slot_cars_misc/index.shtml

30. Liam likes dogs, cats, and farm animals. His cousins have a cat and there are cows just across the road, with horses just down the road that we have walked to and fed apples and the neighbors have friendly dogs. The Plaintiff is not allowed pets in her apartment and lives in an urban area with few cows.

31. Liam likes camping and swimming. The house is about 2 miles from Claytor Lake State Park that has camping and swimming, and a park in town has a swimming pool with water slide etc.

32. Liam would be able to attend school with his cousins, riding to and from school with them. The school is better suited for him than Spring Hill, it is a MUCH smaller school, supporting small class sizes, as suggested in his IEP, yet got better scores from the state for special ed. The school would allow him to be mainstreamed, has only one class per grade thus allowing him to stay with the same classmates year after year. He would even be able see to his cousins in the hall and at lunch.

33. The Defendant would instruct the school to allow the Plaintiff access to our son's school events as opposed to the current situation where the Plaintiff has had Spring Hill Elementary serve the Defendant with a no-trespass letter and refuses to let her son have both parents at his school events.

34. Liam would not be in daycare before/or after school as is the case now. I could be with him before and after school. This would allow him more time home with family, and more time for me to help with homework.

35. Liam would also see an example of good family life with his Aunt and Uncle working to raise two good children instead of the example he sees now of his mother's adultery and lack of commitment to family life.

36. Unlike the Plaintiff, the Defendant believes our son deserves a close relationship with both of his parents and that our son shouldn't be punished by the loss of one parent or the other due to his parents' actions or deficiencies. While the Plaintiff does have some serious problems such as "uncontrollable rage", impulse control, and sexual misconduct the Defendant recognizes that our son has only one mother is focused on trying to allow our son access to both parents while only asking the court to help the

Plaintiff correct her deficiencies and minimize their negative impact on our son, rather than remove his mother from his life.

37. The Defendant has a record of supporting our son's relationship with the Plaintiff. The Defendant had hung pictures of the mother in the child's room, has corrected the child when the child has called his mother a bad person or said he didn't love her (apparently his mother encourages him to say this about his father).

38. The Plaintiff has abused her role as the custodial parent and supported contact between our son and her lover(s) while at the same time impeding contact with his father. The Court should fulfill its obligation to assure frequent and continuing contact with **both parents** by granting custody to the Defendant who will support frequent contact with the Plaintiff.

39. Pursuant to Virginia Code 20-124.3, the Child's best interests **require** a change of custody, both legal and physical, to the Defendant.

WHEREFORE the Defendant requests this Court to:

1. Grant him, *pendente lite*, custody, both legal and physical, or in the alternative, grant liberal visitation.
2. Allow our son to spend and Spring break with the Defendant;
3. Order such further relief as the nature of the case or the goals of equity require.

**Respectfully Submitted,
Wesley C. Smith**

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

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 e-mail and/or fax and/or website, this 13th day of February 2006.

Wesley C. Smith

From: cherismith_98@yahoo.com
Subject: Re: Summer
Date: July 17, 2005 10:41:02 AM EDT
To: smith_wesley@mac.com
Cc: lorvardy@aol.com

Wife,

I'm not your wife any more in any but the legal sense. I'm Cheri.

I will reiterate what my attorney has already told you many, many times: I will support visitation with Liam if ordered by the court after you meet its criteria for reinstating visitation. The fact that you haven't even attempted to meet such simple criteria speaks volumes about how important spending time with your son actually is to you.

Cheri

From: cherismith_98@yahoo.com
Subject: Re: See Liam
Date: August 5, 2005 7:26:29 AM EDT
To: liamsdad@liamsdad.org
Cc: lorvardy@aol.com

It isn't up to me. The current court order suspended visitation; I am bound to comply with it as much as you are. I do not have the option of granting you visitation.

Cheri

--- Liam's Dad <liamsdad@liamsdad.org> wrote:

Are you willing to let Liam see me when I'm in northern Virginia on Aug 8th?

Liam's Dad - Wesley Smith

From: cherismith_98@yahoo.com
Subject: Re: Liam
Date: November 17, 2005 4:02:53 PM EST
To: liamsdad@liamsdad.org
Cc: lorvardy@aol.com

My response of 5 Aug still holds: It isn't up to me. The current court order suspended visitation; I am bound to comply with it as much as you are. I do not have the option of granting you visitation.

Cheri

--- Liam's Dad <liamsdad@liamsdad.org> wrote:

Liam keeps asking to come see me when I call him. Are you going to let Liam see me for Thanksgiving or Christmas?

Liam's Dad - Wesley Smith

Exhibit #1

From: cherismith_98@yahoo.com
Subject: Re: Tuesday/Wednesday
Date: December 21, 2004 8:36:12 AM EST
To: smith_wesley@mac.com
Cc: lorvardy@aol.com

No, I don't think he should miss more school tomorrw. I was willing to do it last time because I felt the trade-off (ie more time with family) was worth it.

I can understand that you don't want to make the trip two days in a row. However, if you miss visitation tonight, he will be extremely disappointed. Especially right now, where the information about your imminent departure has significantly diminshed his self-esteem, he needs to know what to expect. He picked out your Christmas present last night, and is looking forward to giving it to you. It took me a while to coax him out of his coat and shoes last night after we got home, because he "wanted to be ready for my Dad." He will be crushed if you don't come tonight.

As a fair alternative, I thought I would propose the following:
I drop Liam off at your place after school today. (He would get more time with you, and could hopefully get to bed earlier than a 7:00 pickup time allows.) You bring him back to school, by 8:30, tomorrow morning. Then you can kick around for a few hours, until he is done with school at 12:15. As long as you comply with the school's request, I don't have a problem sending a transportation change request that lets you pick him up. He would be extremely pleased if you did. That way, you only have to make one trip, but he still gets to see you tonight.

Also, they sent a note home last night inviting parents to the school at 9:00 to help with making gingerbread houses.

I'll check my e-mail again at 3:30.

- Cheri

--- Liams Dad <LiamsDad@LiamsDad.org> wrote:

Let me know if you are willing to let Liam miss the partial day of school on Wednesday and let him start xmas vacation early with me, Tuesday night. If not then I will have to miss visitation on Tuesday night and will pick him up at SAC immediately after school on Wednesday.

Liam's Dad - Wesley Smith

Exhibit #2