

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

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

#60 - DEFENDANTS MOTION TO DISQUALIFY/RECUSE JUDGE POTTER

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

1. The Defendant incorporates by reference all statements in his motion: #54 – MOTION TO RECONSIDER/REHEAR MOTIONS #40 THRU #53
2. Judge Potter botched the September 2003 hearing when he decided to “save time” by awarding temp custody to the Plaintiff in a **hearing that was not about custody** and to a **Plaintiff who had not filed a motion for temp custody**, simply because he did not feel like taking the time to hold the hearing on custody that had been scheduled **IN A DIFFERENT CASE** (Chancery 53810).
3. The surprise ruling on temp custody by Judge Potter in September 2003 is readily apparent in the court record index of what was transmitted to Richmond for appeal. The index clearly shows no evidence whatsoever was admitted relating to custody (and only one offered). Both the attorney for the Plaintiff and the attorney for the Defendant would have to be completely incompetent to show up to a hearing on custody and not bring any evidence or witnesses. The clerk’s notes of the hearings also reflect the lack of any other witnesses or evidence. Surely such a surprise hearing on such a fundamental right is a violation of Due Process that this court continues to refuse to correct.
4. On February 15th Judge Potter, held a “hearing” on pre-trial motions, including Defendants motions #40 thru #53. The “hearing” was in fact nothing more than a sham, otherwise known as a Kangaroo Court, in which Judge Potter, simply denied most motions without allowing the Defendant to argue the merits of his motions, without allowing him to present evidence or call witnesses, and without

giving any legal justification or apparent thought for his rulings, even when his rulings are in direct violation of constitution, law and prior case law.

5. 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.

6. In almost every case Judge Potter from the bench, made no ruling and directed the entry of no order addressing the merits of the motion. The order itself contains no recitation suggesting a ruling on the merits of the motions presented, or any legal argument to support his ruling.

7. Judge Potter is well known for not providing Due Process or equal protection to fathers. Indeed attorney's consulted refer to Judge Potter in such derogatory language that even this vocal Defendant would not dare repeat the comments in court or on his website both for fear of being held in contempt but also for the statements being crude and vulgar (even if a spot on accurate description of his gender bias).

8. Judge Potter has refused to order the Plaintiff to stop breaking the law, allowing the Plaintiff to continue her illegal adulterous behavior with the courts protection, while at the same time improperly interfering with the Defendants proper subpoena of records related to her adultery. Judge Potter also refuses to order her to be supportive of the Defendant's role as the child's father. Judge Potter in this ruling effectively rules that a woman has a right to commit adultery and deprive a child of his father, clearly this is at odds with the statutory intent of the law making adultery a crime and the law requiring the judge to consider the wiliness of a parent to support the child's relationship with the other parent.

9. Judge Potter should be ashamed at showing more respect for the Plaintiff's "right" to commit adultery than our son's right to a father or the Defendant's right to be a father. Clearly the rights he violated are more protected by the Constitution then the "right" of adultery he does respect.

10. Judge Potter has refused to hold the Plaintiff accountable for her false statements to the court, in effect he has ruled that the Plaintiff can make whatever false claims she wants in court and that the court

will not consider holding her accountable. Its clear Judge Potter is willing to accept any “evidence” into his court that supports his bias even if known to be false and takes steps to exclude any accurate evidence that would tend to a ruling that goes against his bias.

11. Judge Potter has improperly quashed several relevant subpoenas issued by the Defendant in order to prevent the Defendant from obtaining evidence that would make it difficult for Judge Potter to issue a ruling for the Plaintiff.

12. Judge Potter ruled that there has been ample time to complete discovery but then instead of forcing the Plaintiff to comply with discovery or sanction her for not having complied given the ample time, Judge Potter goes on to absolve her of any responsibility to comply with the outstanding discovery requests made by the Defendant. This is a HUGE Due Process violation, preventing the Defendant from collecting relevant evidence to present at trial.

13. Judge Potter has even refused to order CPS to turn over records related to our son. He makes some pathetic and incorrect technical legal excuse about how the Defendant requested the records, instead of owning up to the responsibility of the court and/or GAL to obtain and provide this information even if the Defendant did nothing. What could be more central to a custody case then acts of abuse by one of the parents or a false report by one of the parents. Since the Defendant can prove he did not commit the abuse it appears Judge Potter wishes to protected the Plaintiff not only from taking responsibility for her adultery but also for making false claims with CPS.

14. Judge Potter denied the Defendant’s motion for a Jury Trial without giving any reason. Given that the Right to a Jury Trial is guaranteed by both the U.S. and Virginia Constitutions this is clearly in error. Judge Potter didn’t cite any law/rule to support his position not that it matters as no legislation, however salutary its purpose, can be so construed as to deprive a citizen of his Constitutional rights. It doesn’t matter that Judge Potter (or others) are in the habit of ignoring this Right, it is there in the Constitution and the court **has no authority to take any action in conflict with the Constitution**. The fact that Judge Potter is unwilling to comply with the constitution makes him unfit to be a judge in any capacity.

15. Judge Potter has refused to vacate or declare as void those court orders that deny me my Constitutional right to free speech. In fact he went farther and threatened me with contempt or other

sanction if I didn't follow those unconstitutional orders. Either Judge Potter is completely ignorant of the basics of court orders or he is intentionally attempting to force the Defendant to surrender his rights in deference to null and void court orders. In either case its clear that **Judge Potter is clearly unfit to be a Judge in any capacity** as he is either unable or unwilling to follow the constitution of the United States and the Constitution of Virginia the sources of all power the Judiciary may legally claim to have (even if in practice it's source of power is really based too closely on the same sources of power as the Mafia).

16. Judge Potter has also refused to make Ronald Fahy comply with states published STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIANS AD LITEM FOR CHILDREN,
http://www.courts.state.va.us/gal/gal_standards_children_080403.html

17. **Scheduling Of Hearings:** Judge Potter has refused to hold a hearing on the Defendant's Emergency Motion to change custody/visitation. It's clear that Judge Potter has abused his discretion in scheduling – especially when the existing orders were in violation of state law § 20-124.2.

18. Judge Potter routinely, as in this case, refuses to follow § 20-124.2, which requires "The court shall assure minor children of frequent and continuing contact with both parents..." His version of the law skips that statement as well as "encourage parents to share in the responsibilities of rearing their children" and "As between the parents, there shall be no presumption or inference of law in favor of either." Instead of following those provision for the benefit of children (and parents) he skips right to the part about support and follows that provision as it is the underserved and inappropriately applied "mother welfare" support payments that provides clients for his bar association members.

19. Judge Potter 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 Potter ignores laws, evidence, and procedures that if followed would require him change the situation.

20. The actions of Judge Potter 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**."

21. 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.

22. In this matter, Judge Potter 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.

23. The actions of Judge Potter **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.

24. If Judge Potter 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.

25. Given the appearance of bias in this case, and his reputation for gender bias in general (as described by attorneys that practice in his court), the Canons of Judicial Conduct require Judge Potter 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).

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

WHEREFORE the Defendant hereby moves that Judge Potter 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 Potter. It is also requested that the court forward the matter to the JIRC for action.

Respectfully Submitted,
Wesley C. Smith

Wesley C. Smith, Defendant
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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 U.S. mail, this 17th day of May 2006.

Wesley C. Smith