V I R G I N I A:

IN THE COURT OF APPEALS OF VIRGINIA

WESLEY SMITH,	)	
	)	
APPELLANT / Defendant, pro se	)	
	)	
v.	)	**Record No. 0916-05-4 (1-18-05 order)**
	)	
CHERI SMITH,	)	
	)	
APPELLEE / Plaintiff	)	

APPELLANT'S OPENING BRIEF

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

SUBJECT INDEX:

TABLE OF CITATIONS:

NATURE OF THE CASE:

The Appellee Cheri Smith having committed acts of domestic abuse against the Appellant, exposing both the Appellant and our son to her repeated acts of "uncontrollable rage" and did not seek appropriate treatment for her condition. She did not want to stay home and care for the couple's child and enrolled in a MBA program while pregnant leaving our son in daycare or the Appellant to care for him. After graduation she took a full-time job again sharing care of the child between the Appellant and daycare, then even removing our son from daycare and leaving him in the care of the Appellant who was willing and able to care for the child. The Appellee made repeated positive comments about the Appellants parenting ability including:

Nov 1, 2001 12:30:49 PM - "Thanks for breakfast - **it was nice to have Liam dressed** and coffee waiting when I came down. I'm so spoiled :-)"
Nov 30, 2001 12:00:27 PM - "Would you mind picking Liam up this evening? **He'd probably rather see you anyways, since I'm a Bad Mother**."

Dec 27, 2001 10:44:12 AM - "Liam liked seeing you this morning. When you were holding him, he. Watching you make coffee while holding him…"
Jan 2, 2002 11:26:03 AM - "Liam seemed to have a good morning - **he likes it when you get him up**."
Feb 19, 2002, 11:45 AM **- Thanks for spending time with him - I know he likes it. You're more fun than I am.**
Feb 20, 2002, 1:42 PM **- Thanks for taking him to the Dr.**
May 9, 2002, 7:56 AM "…took him potty twice, but he didn't do anything, so I guess you emptied him out."
May 22, 2002, 12:30 PM **- I was thinking in the car on the way to work that you would both be better off without me.** I used to not think that, but I do now.
Aug 7, 2002, 2:59 PM - "…since **you've always taken very good care of him**"
Sep 4, 2002, 10:14 AM **- I guess I forget that the two of you do fine without me there - just my controlling nature...**
Sep 11, 2002, 11:00 AM - **"I thought it was very nice that you would read to him. I think you are very good for him…"**
December 21, 2004 8:36:12 AM – "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."**

The Appellee proceeded to have an illegal and immoral sexual relationship with a co-worker and decided to divorce the Appellant. Instead of respecting the close relationship the Appellant had with our son and the fact the our son was used to the Appellant caring for him before/after school, the Appellee filed a completely unfounded claim for a protective order in September 2002. Her actions caused serious disruption to our child's life. The protective order was based on such obviously false claims that it was dismissed in Oct 2002 and later expunged.

Further indication of just how false the Appellees claims were, Judge Becker by court order removed our son from daycare and placed him back in the care of the Appellant, and granted him visitation time in addition to daycare time with our son. Thus Judge Becker recognized that the Appellant was a good father, had been actively involved in the care of our son, and had a close relationship with him.

Rather than accept the Appellants invitations to resolve the issues in a more constructive manner the Appellee filed for custody and divorce (on grounds), and since that time has been trying to prevent the Appellant from obtaining relevant evidence of her misconduct, refused to

comply with discovery requests, in an effort to prevent the Appellant from having a fair and equal chance to at trial to prove that he has been a faithful and loving husband and an excellent father and primary caretaker of their son, and that her having an affair is the real reason for her wanting a divorce. The Appellee seeks to have the courts reward and support her ongoing adulterous conduct by depriving the Appellant of his Constitutional rights to be a father for his son, and to deprive our son of his right to a relationship with his father.

Sadly the Prince William Circuit court has been pretty supportive of her notion that a mother doesn't have to comply with court rules or orders and she will still get custody and that a father no matter who good, loving, or obviously the better parent must "take it like a man" and not fight for his due process or constitutional rights, or the court will punish him with even less parenting time even when the lack of contact is detrimental to the child involved. The issue of suspending visitation seems to be an attempt by the Appellee and Judge Alston to coerce the Appellant into giving up his right to prove his case of grounds for divorce.

FACTS:

1. The facts of this case have been repeated several times in the Appellants Opening Brief for record #0272-05-4, The Appellants reply to the order of April 20th 2005 (both this case and record #0272-05-4), the Appellants "Objection to Emergency Motion and Proposed Statement Of Facts", "Petition For Rehearing On Rights Of Father-Son Visitation", and the Appellants Jan 2, 2005 Letter to Judge Alston. The Appellant incorporates all the facts stated in those without repeating most of them in order to save space.
2. New Years Eve, December 31, 2004, the Appellant received a motion to suspend visitation with a hearing set **on the very next business day**, Jan 3rd 2005.

3. The Appellant was living in Michigan, thus did not have sufficient time to prepare for the hearing and travel to attend the hearing. The Appellant wrote a letter to Judge Alston asking for the hearing to be rescheduled.
4. Jan 3rd 2005 Judge Alston, in a very questionable action, held the hearing without the Appellant, suspended the Appellants visitation until a hearing on January 18th 2005.
5. The Appellant learned of the hearing informally not via proper notice as required by rule, and in fact was not even provided with a copy of the Jan 3rd ruling until at the Jan 18 hearing.
6. Jan 18 2005, As the Appellant was walking into the courtroom, the GAL handed the Appellant a memo and stated he would not be attending. Thus preventing the Appellant from preparing a response to the memo or questioning the GAL about it in court.
7. Jan 18 2005, Judge Millette refused to let the Appellant present evidence that the claims made in the Appellee's motion were false, and threatened to put the Appellant in jail when he continued to state he had proof the claims were false.
8. Jan 18 2004, Judge Millette after refusing to hear or consider the evidence of fraud by the Appellee, and without any witness testimony, and without comment (or attendance) from the GAL suspended visitation of the Appellant.
9. The Appellant filed a motion for a rehearing which Judge Alston denied without allowing the Appellant to come to court and present his case.

ASSIGNMENT OF ERROR:

1. The court erred by violating the Appellants **due process rights**, denying me a reasonable chance to present evidence to prove the claims made by the Appellee were false.

2. The court erred by imposing a penalty that is unconstitutional because it violates the **cruel and unusual punishment** provision.
3. The court erred by holding a hearing without the presence of the GAL, and in scheduling the hearing when it knew the GAL would not be able to attend.
4. The court erred by punishing the Appellant for asserting his constitutional rights (that of defending himself in the divorce case and attempting to prove adultery), both the lack of respect for constitutional rights, and violation of state law which prohibits judges from punishing people for asserting their constitutional rights.
5. The court erred by not providing **equal protection** – a mother would not have been given anywhere near a harsh of punishment as that imposed here (actually any punishment at all for a mother is doubtful).
6. The judge abused his discretion by refusing to consider "all the facts" as required by § 20-124.2 and the factors set out in § 20-124.3 even though § 20-124.3 clearly states that "in determining best interests of a child for purposes of determining custody or visitation arrangements **including any pendente lite** orders pursuant to § 20-103, the court **shall** consider the following:…" Instead of the statutory factors the court seems to have only considered that the inconvenience of the Appellee
7. The judge abused his discretion by refusing to follow statutory requirement: § 20-124.2 "The court shall assure minor children of frequent and continuing contact with both parents"
8. The court erred because it did not have the jurisdiction conferred by statue to issue the "death penalty" in a parental rights case without a showing of parental unfitness and harm to the child. The court must have limited its actions to those conferred by statute.

9. The court abused its discretion because its decision is arbitrary, unreasonable, and without reference to guiding rules and principles. There was no reference to law in hi verbal ruling and the only reference to law in his written order was the pre-printed form. The only obvious basis for his ruling is the GAL memo and the prior order – its not clear he even read the Appellee's motion that was the basis for the action.

QUESTIONS PRESENTED

1. Does a father, as opposed to a mother, qualify for any constitutional protections, including, due process, right to present evidence, parental rights, etc?
2. Does granting the equivalent of the death penalty in a custody case without a showing of a parent being unfit, or even harm to the child violate constitutional rights?
3. Does that fact the opposing party is a woman give the judge the ability to ignore the constitution, due process, and state laws, including § 20-124.3 which states the standards that should be applied, and § 20-124.2 "frequent and continuing contact with **both** parents"?
4. Did the judge abuse his discretion by refusing to hear evidence that the Appellee had lied in her motion requesting visitation suspended?
5. Did the judge abuse his discretion by refusing to consider "all the facts" as required by § 20-124.2, including the fact that the mother herself wrote that it was hard for our son to be away from his father and that she "I don't want to ever have to see him go through that again"?
6. Did the judge abuse his discretion by holding a hearing without the GAL present, thus denying our son of any pretense of having representation at the hearing?

7. Did the court abuse its discretion by punishing the Appellant for fighting for his constitutional rights by trying to prove adultery as grounds for divorce?
8. Did the court abuse its discretion by imposing a significant punishment that causes both the Appellant and the child irreparable harm?

ARGUMENT:

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."

Due Process requires the court to allow the Appellant to provide evidence which the court did not (See affidavit of a witness in the courtroom that Judge Millette threatened the Appellant with jail for trying to prove the Appellee lied in her motion to suspend visitation), which would have discredited the very foundation of the Jan 3rd Order thus making the order null and void (and any subsequent extension of it).

A discretionary relic called the "Best Interest of the Child" that is inappropriate for such an important fundamental liberty interest. While it makes for a great "sound bite", this aspiration grants unbridled and often arbitrary and biased discretion to the Judge with little or no accountability for the most helpless of society --- our children. Further, there is no definitive standard, measure, criteria, or claims to assert as to whether or not the non-custodial parent can comply with the undefined "Best Interest of the Child" standard to reclaim the previously seized fundamental liberty interest.

Jurisdiction of the court to rule comes from statute and in order to maintain jurisdiction the court must follow the relevant statues. The court in this case did not follow the relevant statutes, including § 20-124.3 which states the standards that should be applied, and § 20-124.2

"frequent and continuing contact with **both** parents". The judge abused his discretion by refusing to consider "all the facts" as required by § 20-124.2, including the fact that the mother herself wrote that it was hard for our son to be away from his father and that she "I don't want to ever have to see him go through that again", that the father had a close relationship with the child. It would be hard to construe the judge as having considered the factors in § 20-124.3 given that no evidence was presented and no witnesses commented, and no attorney commented just about any of the factors stated. Had the judge considered the factors the ruling would have been significantly different as #1, the mental health of the mother is questionable, with her having admitted to having "uncontrollable rage", #3 the father having a close relationship with the child from birth and in fact held and named our son before the mother even saw him, and the mothers history of being unable to consistently assess and meet the emotional, intellectual and physical needs of our son. Even the GAL in his memo to deny visitation states "the father is clearly capable of caring for Liam and Liam is attached to his father" #4 The judge ignored the relationship with the Appellants family, particularly of cousins that is also denied in suspending visitation. #5 The judge did not consider the fact that the father had been involved in raising the child since birth, that the mother had willingly, intentionally, and made career and educational plans to place our son in the care of the Appellant as primary care giver and only changed her story after starting the court battle. #6 The judge did not consider the previous, and largely failed attempts, by the mother to sabotage the fathers right to a relationship with our son, her false protective order claims, false claims of abuse during exchanges, calling the police when the Appellant was spending time with our son per court order, as compared to the Appellant not wanting to prevent our son from spending time with his mother when he desires. #8 The judge seems to have completely overlooked the desires of the child to spend time with his father a fact

accepted and stated by the Appellee, her counsel, the GAL, Judge Becker and others. #9 The judge did not consider the Appellee's history of family abuse, even though it is documented by written apology, tape recordings, and statements by the Appellant. There seems to be no way any rational person would believe the judge properly considered these factors and reached the ruling he issued. Having failed to properly apply these factors in a gender neutral manner makes his order null and void and appropriate to reverse.

Had the judge allowed the Appellant to properly present evidence it would have been clear that the claims in the Appellee's motion were fraudulent, thus the original order was void and could not be extended. I will not repeat all the details of the fraud here (see Objection to Emergency Motion and Propposed Statement of Facts). Fraud is defined as "a knowing misrepresentation of truth or concealment of a material fact to induce another to act to his or her detriment," and is "usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime" (Garner, 1999, p. 670). The Appellee in her motion makes certain outright lies, such as the method of delivery of notice (overnight vs reality of two day), repeated phone calls, lack of notice, etc in an effort to paint the Appellant as having run off with the child and refused to return him hiding from the court the fact that both the court and Appellee were well aware the Appellant was being evicted, had kept them informed, that the Appellant had advised her in advance that he would still consider exchanges to take place at his new home and that it would be inconvenient for her unless they worked out alternate arrangements. The Appellee did not attempt to work out arrangements to prevent eviction or to change the exchange procedures. The Appellee committed fraud by trying to lead the court to believe she was not notified in advance of the Appellants move to MI and that she did in fact know where Liam was, that she in fact received a call from our son just minutes after she requested it, and BEFORE she sent the police

to harass the Appellant, and act she has done several times before no matter how closely the Appellant follows the court order, even when the Appellant relies on the Appellee's written statement of her interpretation of the court order. It would appear the whole "EMERGENCY" was more of a set-up in an attempt to keep custody rather than any real surprise or fear of where our son was.

It would appear from both his oral comments in court and his written ruling that in spite of statutes to the contrary the only basis for his ruling was that Judge Alston had already heard the relevant evidence and ruled and the GAL memo agreed with it. Such reasoning is flawed, Judge Alston did not hold the hearing in such a manner as to hear evidence from the Appellant and apparently did not want the order extended without giving the Appellant a chance to present evidence, otherwise what was the point in scheduling the Jan 18th hearing on the same motion? Also the judge should not have given much credence to the GAL memo, the GAL does not indicate any harm to the child from continued visitation but rather states the opposite that "the father is clearly capable of caring for Liam and Liam is attached to his father". That statement alone is enough to conclude that harm will come to Liam if visitation is suspended. From the memo and previous statements of the GAL it seems his biggest complaint with the father is that the father persists in pursuing grounds of adultery against the Appellee and expresses concern about what impact her rage and other mental health issues might have on our son, and wants to have the effects mitigated for Liam's benefit and in a manner to allow Liam to still have a relationship with his mother. The GAL as a officer of the court should be prohibited from taking a stand against the father on the basis of the father asserting his constitutional rights to defend himself the divorce case filed by the Appellee by pointing out her adultery, which is both illegal, grounds for divorce, and also harmful to our son. It is even more contrary to his stated purpose to

complain that the father has concerns about the mothers mental illness when by state law the court is required to consider her mental health and where there is ample evidence of a problem even if an exact diagnoses has not been made, such evidence including but not limited to her having threatened to kill our son, her written apology for committing domestic violence, her and her therapist both making statements that she has "uncontrollable rage" and that it takes very little to set her off. If the GAL was really representing our son instead of the mother, he would himself be very interested in taking steps to protect our son from uncontrollable rage and the immoral influences the mother has exposed our son to rather than punishing the father for simply trying to protect his son.

In Carlton v. Paxton, Va. App. , 415 S.E. 2d 600, the Court allowed an appeal to proceed without a transcript or written statement under Rule 5A:6 and 7 because the trial judge did exactly what counted for nothing. That is the case here; the judge refused to hear evidence but just made the previous ruling by a different judge permanent.

It is a basic principle of Due Process that an enactment is void if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application. Graynard v. City of Rockford, 408 U.S. 104, 108-109 (1972). The Appellant made a good faith effort to comply with the court order, and in

fact had much closer adherence to the order than the Appellee typically does. In effect the court held the Appellant in contempt of court and gave him a harsh sentence without first holding a formal contempt hearing, allowing him to present evidence or explain or providing an attorney to assist him. (see brief for record # 0272-05-4 for more detailed explanation of the Appellants efforts to comply with the order and the court knowing in advance of the move and not changing the terms of the exchanges). A defendant charged with out-of-court contempt must be given an opportunity to present evidence in his defense, including the right to call witnesses. The due process clause of the Fourteenth Amendment requires that alleged contemners have a reasonable opportunity to meet the charge of contempt by way of defense or explanation. This due process right includes the right to testify, to examine the opposing party, and to call witnesses in defense of the alleged contempt. Street v. Street, 24 Va. App. 14 (1997)

The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child… SANTOSKY v. KRAMER, 455 U.S. 745 (1982). Quilloin v. Walcott, 434 U.S. 246 (1978), recognized the due process right of natural fathers to maintain a parental relationship with their children absent a finding that they are unfit as parents. The court has not made any ruling that the Appellant is unfit, so far the only ruling on his parenting has been by Judge Becker who declared he was a good parent and would have been awarded joint custody except that the two parties did not get along.

Strict Judicial scrutiny has been found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications. If, as previous decisions have indicated, strict scrutiny means that the State's system is not entitled to

the usual presumption of validity, that the State rather than the complainants must carry a heavy burden of justification, that the State must demonstrate that its (system affecting fundamental liberties) has been structured with precision and is **tailored narrowly** to serve legitimate objectives and that it **has selected the least drastic means** for effectuating it's objectives.

The State also has a compelling interest in reducing or eliminating discrimination under the Equal Protection Clause. In Lehr v. Robertson, 463 U.S. 248, 265-266 (1983), the Supreme Court addressed a parental rights challenge to adoption proceedings and noted: The concept of equal justice under law requires the State to govern impartially. New York City Transit Authority v. Beazer, 440 U.S. 568, 587(1979). The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. Reed v. Reed, 404 U.S. 71, 76 (1971). Specifically, **it may not subject men and women to disparate treatment** when there is no substantial relation between the disparity and an important state purpose.

The Court then goes on to explain that parents who both accept responsibility for their children have equal rights to make decisions for those children. The equality of that right to decision making extends even to the point of granting either parent individual veto rights over the other's decision to place the child for adoption.

A Compelling State interest while applying strict scrutiny requires a vague statute, or a statute that infringes upon fundamental rights to fail. 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, 448 U.S. 297, 312 (1980). As applied VA § 20-124.3 and § 20-124.2 are unconstitutional.

While the Santosky decision is about the termination of parental rights, Troxel referenced this legal authority to demonstrate the Fourteenth Amendment Due Process requirement with parental rights (in a non-termination action). Routinely, Family Courts use an evidentiary standard for deciding custody, which was found to violate the Fourteenth Amendment. The fair preponderance of the evidence standard violates the Due Process Clause of the Fourteenth Amendment. A preponderance standard does not fairly allocate the risk of erroneous fact finding between the State and the natural parents. Santosky v. Kramer, 455 U.S. at 746.

In this case the due process violations are even more egregious because the Judge did not claim and the Appellee nor GAL claimed, nor presented credible evidence, nor real, truthful and substantive argument, to implicate the Appellant as either an unfit parent or as representing a risk of harm or danger to the child, or as having actually inflicted harm upon him or exposed him to danger, to support restricting the fathers constitutional parental rights. As it stands the ruling is a Deprivation of Rights Under Color of Law, Title 18, U.S.C., § 242

The motions and notices that were filed with the Circuit Court along with the evidence the Circuit Court refused to let the Appellant present at the Jan 18th hearing, including photo's of the child, http://www.liamsdad.org/liam/photos.shtml, enjoying his Christmas visit to Michigan, the very thing the father is punished for, along with affidavits of witnesses supporting the claim that the judge threatened the Appellant with jail for attempting to present evidence that the claims in the Appellee's motion were false, combined with the legal and due process errors in this and the Jan 3rd 2005 hearing which the Jan 18th 2005 hearing was based on, are sufficient to show that neither hearing/order complied with constitutional, statute, and rule requirements, and thus should be vacated or declared null and void.

Certainly it is obvious that regardless of what happened at the hearings that with the Appellant being only accused of a minor technical violation of the court order, having made a good faith effort to comply with the order, with no showing of harm to the child, and having been deemed a **loving father** by Judge Becker, and **fit to care for the child instead of the daycare** the mother wanted, with the GAL writing that that "**the father is clearly capable of caring for Liam and Liam is attached to his father**", the punishment imposed violates the 8th amendment by imposing a cruel and unusual punishment totally inappropriate for the situation, punishes our child for acts of a parent, and seems solely imposed due to gender bias thus violating the equal protection clause, and also violating both the Appellants and child's constitutional rights to a father/son relationship. The fact that the court chose this punishment, where greater violations by mothers are punished with warnings is a gross abuse of discretion that should not be tolerated.

Its not entirely clear what issue the Trial court claims to be addressing by terminating visitation but the trial court has multiple remedies available to it, short of termination of visitation, and should have picked a more appropriate remedy. If the concern is over adultery and mental illness, the solution is simple. The court can order the Appellee to both turn over all evidence of her adultery (5th amendment protections not extending to acts not typically prosecuted) and order her to stop engaging in adultery, stop exposing our son to it, then there would be little need for the issue to come up with him, and for mental illness it could order her to attend anger management counseling, order her to seek in depth diagnoses based on her symptoms and family history and come up with a plan to minimize the negative impacts of her condition on our son and to cooperate with the Appellant on a custody/visitation agreement that would give our son frequent access to both parents, designed to meet his needs not those of the

Appellee. The issues of Adultery and mental health are only significant parts of our sons life while the court is refusing to force the Appellee to correct her behavior and return her focus to the well-being of our son instead of trying to hide or justify her bad behavior. Wouldn't an order where our son stops being exposed to "uncontrollable rage", adultery, and war between two parents be more in his "best interests"?

Allowing the court to impose and enforce this order would be a great injustice. The very idea that a father should be deprived of spending time with a child, or a child of spending time with a loving father, thru no fault or breaking of law by himself but rather because the mother broke the law by committing adultery and finds it inconvenient to share the child with the father is a gross miscarriage of justice that cannot be tolerated by any court interested in justice.

The Appellant due to circumstances beyond his control was evicted and had to move in with his mother in Michigan. While it may have been inconvenient for the Appellee to come to Michigan to pick up our son, she both refused to work with the Appellant to avoid the need for him to move out of state, and also did not attempt to work out alternate arrangements for the exchange.

The Appellant made a good faith effort to comply with the court order in keeping the Appellee informed about the eviction process and its impact on exchanges. See e-mail exchanges of Appellant notifying, even going so far as to point out its impact on exchange:

"**Consider this my 30 days notice of moving**. Since I can't afford to pay rent I can't tell you when I will be evicted, nor can I tell you will I will go to since I can't afford to rent a new apt, and moving in with my mother isn't a real good option now that she will lose all her money…" (Sep 26th 2004 e-mail)

"Let me know if you are willing to release funds to keep me from being evicted" (Oct 19 2004 e-mail)

"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**" (Nov 10th 2004 e-mail)

"FYI I have an eviction hearing on dec 3. Let me know if you are willing to work out an arrangement to prevent me from being evicted. " (Nov 29th 2004 e-mail)

"Are you willing to work something out for me to avoid eviction? If not is there anything I have that you will object to my disposing of as I see fit?" (Dec 7th 2004 e-mail)

"I wouldn't have room for the ferns, mattresses and the wagon. I can store his bookshelves.," (Dec 14th 2004 e-mail from Appellee)

"Liam has asked to see you this weekend. Since I'm assuming **you are moving from the area soon**," (Dec 16th 2004 e-mail from Appellee)

The Appellee exchanged e-mail discussing my moving out of the area, knew the eviction order was signed on Dec 3rd, saw me packing up to leave, thus could have no reasonable expectation that I would still have been living in the apartment on Dec 25th 2004. Her claim to the contrary appears to based on sounding good in court rather than on any factual basis.

Judge Alston denied my motion for funds to avoid eviction on Dec 10th 2004, he also signed the order to show I was too poor to pay court costs. Thus on Dec 10th 2004 Judge Alston was aware that I was unable to avoid eviction, knew the eviction order was signed on Dec 3rd and thus reasonably should have concluded that I would leave the apartment before Christmas and stay with family. However Judge Alston did not change any of the terms of visitation or exchange in spite of the impending move. Thus it seems unfair for him to impose, and Judge Millette to continue, such a harsh punishment for following an order that the court had ample opportunity to correct in advance.

The harsh punishment is obviously out of proportion when the courts and Appeals courts have allowed visitation in cases where the court has found harm to the child from a party. Child abusers are even allowed supervised visitation, even prisoners have been allowed visitation. The very idea that abusive parents, incarcerated parents, murdering parents, drug using parents, etc have more rights to their children than a loving father who the Appellee herself trusted to care for our son instead of herself, is certainly anything but justice and makes clear that the issue

considered by the court wasn't the welfare of our child but rather some political or private bias of its own.

Given that the court at a previous hearing was made aware of the eviction/move, that our son likes to spend time with me, and that the Appellee stated that our son being away from me isn't good for him, "It was really hard for him while you were gone – I don't want to ever have to see him go through that again. " (July 11th 2003 e-mail from Appellee), its very hard to believe the Jan 3rd ruling was based on the best interests of our son, Virginia law, or constitutional law, especially when such a serious punishment is imposed without giving me a reasonable chance to attend court and to prove the Appellee's claims were false and to show how my son enjoyed his Christmas visit (http://www.liamsdad.org/liam/photos.shtml), and extension of a void order would also be void.

In Troxel v. Granville, 527 U.S. 1069 (1999) Justice O'Connor, speaking for the Court stated:

> "The Fourteenth Amendment provides that **no State shall 'deprive** any person of life, liberty, or property, without due process of the law. We have long recognized that the Amendment's Due Process Clause like its Fifth Amendment counterpart, 'guarantees more than fair process'. The Clause includes a substantive component that "**provides heightened protection against governmental interference** with certain fundamental rights and liberty interest" and "the **liberty interests of parents in the care, custody, and control of their children** – is perhaps the oldest of the fundamental liberty interest recognized by this Court."

The punishment is also completely out of scale with and totally unrelated to the issue brought before the court. If the court felt that the Appellee should not be required to travel to Michigan to pick our son up he could have modified the exchange portion of the order to require the Appellant to return the child at the end of visitation. When a significant Constitutional right such as parental rights, right to a relationship with your own children, the court has an obligation to interfere with that right as little as possible. Any solution to the distance problem should have been done with as little impact as possible on the Appellants parental rights and ability to have a

relationship with his son. Instead the court did exactly the opposite; it interfered to the maximum extent possible. It would appear the court had other motives for its ruling rather than the issue before the court.

Before the court punishes someone there should have been some way for the person to know that their actions were in violation of order or law so they could avoid punishment. In this case the move due to eviction was involuntary, moving out of state was not a violation of the order, and the Appellant complied with the exchange per the court order. Even the Appellee in her motion in item #12 states "While adhering to the letter of the exchange portion of the Pendente Lite Order…"

It certainly is not justice to punish someone for complying with a court order. Certainly compliance with a court order can't be termed an "emergency", especially when the Appellee has the child in her care and the Appellant is 630 miles away. Issuing the equivalent of the "Death Penalty" in a custody case because the Appellee is angry at the inconvenience is certainly not legal, not just, and not fair to our son.

CONCLUSION:

The Appellant made a good faith effort to comply with the court order, was denied his due process rights to defend himself (Due process means due process at EVERY stage of the proceeding, not just years from now when/if the Trial Court issues a "final order") and the punishment issued is totally inappropriate, unconstitutional and is causing both the Appellant and our son irreparable harm.) If the problem is not addressed now, it will render "the remedy by appeal… inadequate". Amongst such effects will be that our son will have aged and due parenting time to his father and to himself will have been lost forever. He will miss out on the many fun activities we enjoyed under the liberal visitation/daycare order of Judge Becker.

The ruling is plainly wrong and without evidence to support it, and is not only not supported by "the best interests of the child" but actually contrary to the best interests of our son.

The Appellant requests this court declare the trial court order null and void, and/or issue a new order granting visitation again to the Appellant, and/or reverse the order and remand back to the trial court with instructions to restore visitation and to issue such additional visitation as appropriate to help mitigate the harm caused by the forced separation of a loving father and his son, and/or order that the Trial Court shall grant him due process rights in all future hearings and shall start trying to protect our son instead of protecting the mother from the results of her illegal activities. The Appellant requests all available forms of declaratory, injunctive, retrospective and prospective relief that correspond to the various causes of action and prayers for relief herein.

Respectfully submitted,
WESLEY C. SMITH

_____
Wesley C. Smith - Appellant / Defendant, pro se
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An electronic copy of this brief with related documents, motions, and orders is available at:
http://www.liamsdad.org/court_case/suspend_visitation/

CERTIFICATE OF SERVICE

I hereby certify that on May 24h 2005 a true copy of the foregoing was mailed via first-class mail to:

Attorney for Plaintiff:	Loretta Vardy	12388 Silent Wolf Dr, Manassas VA 20112	(703) 919-1417
Guardian Ad Litem:	Ronald Fahy	9236 Mosby St # A, Manassas VA 20110	(703) 369-7991

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Wesley C. Smith

APPENDIX

An electronic copy of this appendix with related documents, motions, and orders is available at:
http://www.liamsdad.org/court_case/suspend_visitation/index.shtml

INDEX:

AFFIDAVIT

I, Ron Jagannathan state under penalty of perjury that I was present in the Honorable Court of Judge LeRoy F. Milette Jr. of Prince Williams County Circuit Court on January the 18th 2005.

The MATTER of Wesley Smith's Divorce and Custody Case came to be heard on that day.

During that hearing, I was a witness to Mr. Wesley Smith's statement to the court that the opponent sides represented by attorney Ms. Vardy were presenting lies and he called them liars, At which time Judge LeRoy Milette stated that he would not allow anyone in his court to be called liars and warned Mr. Smith if he wanted to go to jail that day.

Ms. Smith did not present any witnesses and the Guardian ad Litem for Liam Smith was not present in the court to the best of my knowledge.

RON JAGANNATHAN
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