V I R G I N I A:

IN THE COURT OF APPEALS OF VIRGINIA

WESLEY SMITH,	)	
	)	
APPELLANT / Defendant, pro se	)	
	)	
v.	)	**Record No. 0272-05-4 (1-3-05 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/index.shtml

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NATURE OF THE CASE:

The Appellee Cheri Smith having committed acts of domestic abuse against the Appellant, exposing both him and our son to her repeated acts of "uncontrollable rage" and not wanting to stay home and care for the couples child, left the child at home in the care of the Appellant who was willing to care for the child. The Appellee took a full-time job, and then proceeded to have an illegal and immoral sexual relationship with a co-worker.

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. A Pendente Lite Order was entered Oct 2, 2003 setting various terms for visitation/custody and sale of the marital residence. The order stated that the Appellant would pick the child up at the start of visitation and the Appellee would pick the child up at the end of visitation. (Appendix pg 15)
2. There had been disputes about where exchanges would take place, and a hearing held on the matter with the result being that non-daycare/school exchanges always took place at the home of the person the child was with unless both parties agreed to another arrangement.
3. By the Summer of 2004 the Appellant due to attorney fees, child support payments, and payments to the GAL was in significant financial trouble and again requested that the Appellee work with him to resolve the situation in a more constructive and less expensive manner.
4. On September 29, 2004 Judge Alston entered "order for petition or affidavit for proceeding in civil case without payment of fees or costs" thus acknowledging the Appellants financial condition.
5. The Appellant requested the Appellee allow him to use some of the proceeds from the sale of the marital home in order to avoid being evicted. (appendix pg 3)
6. The Appellant gave the Appellee notice in writing of his moving (Sep 26, 2003 – exhibit #2 to OBJECTION TO EMERGENCY MOTION AND PROPOSED STATEMENT OF FACTS) (appendix pg 22)
7. The Appellant was unable to pay the rent and eviction started against him. The Appellant did notify the Appellee of the eviction proceedings, the first one in November failing to get signed with a signed eviction order on Dec 3rd 2004, and filed a motion for release of

funds to pay rent in an attempt to avoid eviction. A hearing was held, the Appellee objected to the release and the motion denied on Dec 10th 2004 by Judge Alston. (app p3)

8. The Appellee acknowledged that the Appellant would be moving out of the area. (app 11-12)
9. The Appellant wrote to the Appellee specifically pointing out that the court ordered exchange took place at his residence and that if evicted that would be inconvenient for the Appellee to come pick our son up at the end of visitation.
10. With no way to avoid eviction the Appellant packed up to move, the Appellee discussed this via e-mail (including but not limited to Dec 14th 2005, exhibit 3 to OBJECTION TO EMERGENCY MOTION AND PROPOSED STATEMENT OF FACTS) with the Appellant and saw this first-hand that the Appellant was moving out, even taking some items that the Appellant has set outside his front door while packing up. App pg 11-12,23
11. The Appellant did pick our son up per court order for Christmas visitation and took him to the Appellants new residence (appellants mothers home).
12. Our son enjoyed his trip to Michigan, spending Christmas at his grandmother's house with Aunts, Uncles, and Cousins.
13. The Appellee did not pick up our son at the end of visitation and did not arrive to pick him up until the afternoon of the next day.
14. New Years Eve, Friday, December 31, 2004 at 2:40 p.m the post office delivered to the Appellant the "EMERGENCY MOTION" to suspend visitation with a hearing set for January 3rd, 2005. (appendix pg 26, 4)
15. The Appellant was living in Michigan at the time as was not given sufficient notice to prepare and to travel to attend. (appendix pg 26, 9-11, 15-16)

16. The Appellant wrote to Judge Alston and requested a continuance and submitted e-mail to both show the statements made by the Appellee were false and that the proposed ruling would harm our son. (appendix pg 9-12)

ASSIGNMENT OF ERROR:

1. The court erred by scheduling the hearing without following the standard procedures for non-emergency hearings, which require one-week notice. The scheduling violated the Appellants **due process rights**, denying me a reasonable chance to prepare and travel to attend the hearing. (appendix pg 9-12, 15-16)
2. The court erred by not granting the Appellant a **continuance** as requested, when the Appellant wrote the Judge a letter (See Jan 2nd 2005 letter) indicating both the lack of time to prepare and evidence to show that the claims in the Appellee motion were false and the **relief requested would harm the child**. (appendix pg 9-12)
3. The court erred by imposing a penalty that is unconstitutional because it violates the **cruel and unusual punishment** provision. (appendix pg 9-12, 35)
4. 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). (appendix 9-10, 34-35)
5. 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 (appendix 33-25)

6. 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" (appendix pg 16)
7. 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. ap 34-35
8. The court abused its discretion because its decision is arbitrary, unreasonable, and without reference to guiding rules and principles. There is no reference to a single law or rule in his order and no indication he followed or considered any. (appendix 13)

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? (app. pg 10, 31-35)
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? (app.10, 34-35)
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"? (appendix pg 16)
4. Did the judge abuse his discretion by refusing to continue the case to allow the Appellant to attend? (appendix pg 11)
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"? (appendix pg 9-11)

6. Did the judge abuse his discretion, or constitutional rights by imposing a cruel and unusual punish for a minor technical violation when mothers get significantly less punishment, and even a father whose negligence resulted in the death of a child was given a lesser punishment by this judge (apparently due to the mother supports the father)? (appendix pg 9-12, 35)
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? (app pg 27-28)
8. Did the court abuse its discretion by imposing a significant punishment that causes both the Appellant and the child irreparable harm? (appendix 9, 11, 13, 29-30, 35)

ARGUMENT:

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 sent a reminder of the address of his mother on Dec 24th but sending a reminder of an address to make sure the Appellee knew which family members house in Michigan (all within about 10 miles) the Appellant would be staying at should not be construed as the Appellee not have been previously advised that the Appellant would be moving and the approximate date when.

The fact that the Appellee failed to check her messages for several days is not the fault of the Appellant. While the Appellant was a bit surprised the Appellee did not try to work out other exchange arrangements, he assumed it could be due to the Appellee spending Christmas with her brother in Ohio thus negating most of the drive and inconvenience.

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)

It should be noted that after I pointed out the difficulty with moving back in with my mother due to owning her money, the Appellee did authorize a release of funds to pay back some of the money I owned my mother with provisions that I could not use the funds to pay my rent, so it appeared to me that the Appellee wanted me evicted and to move in with my mother.

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 such a harsh punishment for following an order that he had ample opportunity to correct in advance.

Given that Judge Alston 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 his 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)

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."

Setting the hearing day without following the regular procedures, not giving me a

reasonable chance to prepare and attend, isn't fair and is certainly not "more than fair" nor "heightened protection". There is absolutely no reason why the court needed to hold the hearing so soon. There was no "emergency" and the next mid-week visitation required the Appellant to return the child to school, not have the Appellee pick up the child.

The punishment is also completely out of scale with and totally unrelated to the issue brought before the court. If Judge Alston 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 prepare and attend the hearing to defend himself and the punishment issued is totally inappropriate, unconstitutional and is causing both the Appellant and our son irreparable harm.

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 hold no more hearings without giving the Appellant 7 days written notice.

Respectfully submitted,
WESLEY C. SMITH

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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/index.shtml

CERTIFICATE OF SERVICE

I hereby certify that on May 23h 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

_____
Wesley C. Smith