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)**
	)	**0916-05-4 (1-18-05 order)**
	)	
CHERI SMITH,	)	
	)	
APPELLEE / Plaintiff	)	

APPELLANT'S REPLY TO MOTION TO DISMISS AND MOTION TO SUSPEND ENFORCEMENT

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

1. The Appellant has a Constitutional Right to the care and companionship of his son, and had exercised those rights since the birth of our son, both developing and maintaining a close relationship with him and being actively involved in raising him.

> [Supreme] Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships. . . . In these cases the court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection. "[S]tate intervention to terminate [such a] relationship . . . must be accomplished by procedures meeting the requisites of the Due Process Clause."Id. at 256-58, 103 S. Ct. at 2991 (quoting Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394, 71 L. Ed. 2d 599 (1982)) (emphasis added) (other citations omitted).

2. The Appellant has not thru harm to the child or thru legal means waived his Constitutional Rights to the care and companionship of his son.

3. The Trial Court orders of 1-03-05 and 1-18-05 bar the Appellant from exercising his Constitutional Rights as a parent, and **are thus injunctions which are appealable** under VA 17.1-405.

4. The Appellant has a fundamental right not to have his relationship with his son terminated without due process - Lyle, 14 Va. App. at 876, 419 S.E.2d at 865 (absent a showing of unfitness, movant must show continued parent-child affiliation detrimental to child's welfare)

5. The Appellant, and his son, **both** have a right to **Due Process at EVERY stage** of a court case, not just years from now when our son is grown and the contents of a possible future "final" ruling no longer relevant.
6. The trial judge's ruling was **plainly wrong** and **without evidence** to support it, an obvious injustice, and the lack of Due Process in creating the order is a clear, substantial, and material error that needs correcting at this stage before a "final" order can be lawfully entered.
7. "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them" Miranda vs Arizona, 384 US 436 p. 491. Since the issues are Constitutional Rights, the **State of Virginia does not have any legal authority to pass a law or rule that would deprive the Appellant of his Constitutional Right to the care and companionship of his son, without a showing of harm,** and any law that purports to prevent the Appeals Court from protecting his Constitutional Rights is itself unconstitutional and thus cannot be used as grounds to dismiss the appeal, this includes but is not limited to any interpretation of 17.1-405 that would prevent an appeal. The Constitution does not make any exceptions to allow for "temporary" violations of its requirements. T**he Rights at issue are of a temporary nature**, for a child 18 years max, and the **Trial Court already has unjustly interfered with the Appellants rights for 2 years of the 13 potential years at issue**. No "reasonable person" considers two years out of a child's life temporary no matter what the Court may call it. Two years is a huge part of a child's life and the court can never in any "final" order give back to the Appellant or our son the experiences that they should have shared during those two years of his development. The **harm is irreparable** and deserves immediate action to stop further harm. From the view of our seven year old son, two years, or the six moths he has been deprived of visitation with his father is anything but "temporary", indeed to him it must seem both final and forever. The Trial Court should not be allowed to **pervert the ends of justice** by simply refusing to issue a "final" order. For the Court to be able to do so without recourse is itself a violation of

due process. In any event Rule 5A:18 allows the Appeals Court flexibility to reverse Trial Court rulings for "good cause" or to "attain the ends of justice". What could be a better cause then returning a loving father to a child who needs and desires his father, and given the a miscarriage of justice which has occurred this case requires intervention by the Appeals Court.

8. Because the limits to appeals in Code 17-1-405, and the ability of the Trial Court to set custody/visitation via 20.103, 20-124.2 , and 20-124.3 affect the Appellants fundamental Rights, **Strict Scrutiny** is required:

> …affected father's fundamental right to maintain that relationship with his son, we evaluate its constitutionality, as applied to the facts of this case, under the "strict scrutiny" test. See Hess, 240 Va. at 52-53, 392 S.E.2d at 820. The statute "significantly interferes with the exercise of a fundamental right," and "**it cannot be upheld** unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." Zablocki, 434 U.S. at 388, 98 S. Ct. at 682.

It is not clear what **if any state interest** the Judges had in mind with these orders but it is clear that they are very broad not narrowly tailored to fit whatever state interest they had in mind.

9. Even if considered and "interlocutory" orders instead of the more appropriate "injunctions", VA 17-405(3)-(4) still allows a review of this order since it "the rules or methods by which the rights of the parties are to be finally worked out have been so far determined that it is only necessary to apply those rules or methods to the facts of the case in order to ascertain the relative rights of the parties…" In this case the Appellant happens to be a man, and the Appellee a woman in a custody case. By reputation and action on past cases, it is clear that in the Prince William County Circuit court that the gender of the parties, combined with the lack of proof of serious physical child abuse, **are the only facts that will be considered** in a final ruling and that discussion of any other facts will not affect the outcome. As far as determining rights, a standard visitation order exists, is preprinted by the court and is used in almost all the cases. It is used for just about any father who does not stand up and fight for his rights, for a father who does want equal time with his children the court then changes to the other standard ruling, which is no visitation. The court simply does not hear the cases bases on the relative merits and fashion case-by-case rulings

as determined best for each child. Thus for all practical purposes, since the Prince William County Circuit court is obviously not following the statues to not give preference to one parent or the other and with neither party planning a gender change, this order does qualify via VA 17-405(4) and the final order, with respect to custody/visitation will not be noticeably different unless these orders are reversed by a higher court. In effect this order is a final appealable order, as it 'disposes of the whole subject, gives all the relief that is contemplated, and leaves nothing to be done by the court.'" Travis, 36 Va. App. at 196, 548 S.E.2d at 909 (quoting Erikson v. Erikson, 19 Va. App. 389, 390, 451 S.E.2d 711, 712 (1994)). After the court so blatantly has disposed on the Fathers right to the care and companionship of his son, no reasonable person expects that the court which imposed such an injustice for so little reason, will in fact issue a different ruling in this case without being forced to by a higher court. The order is in practice if not in title a final order, and was "final" as soon as the Appellee filed for divorce/custody.

10. The laws, if indeed any were actually applied, are both **arbitrary** and **discriminatory** as applied. Mothers/Women are awarded custody/control in an overwhelming percentage of cases for arbitrary reasons that if the same reasons favored the Father/Man, are now somehow no longer important but other factors are chosen to support the decision to award custody to the mother. If the legislature had wanted the court to awarded custody to the mother over 90% of the time it would have said something like "custody shall be awarded to the mother" with an exception clause to cover the remaining few cases where serious physical abuse by the mother is proved.
11. The Appellant regularly (almost every single time) took the advantage of visitation to spend time with his son, and his son was used to spending time with his father and both enjoyed it and anticipated it. The Appellee's refusal to allow visitation to continue is very disruptive to our son, and its support by the court without justification is a gross abuse of discretion that needs immediate correction.

"It is clearly not in the best interests of a child to spend a lengthy period of time waiting to find out when, or even if, a parent will be capable of resuming . . . responsibilities." Kaywood v. Halifax County Dep't of Soc. Servs., 10 Va. App. 535, 540, 394 S.E.2d 492, 495 (1990).

Thus the "Bests Interests" of our son demand that the Appeals Court not make my son wait another two years for the Circuit Court to decide if he can have visitation with his father again – The Trial Court is no closer to entering a final order than it was two years ago as it has failed to resolve a single issue, failed to force the Appellee to complete discovery, etc and leaves just as many issues to resolve before holding a final hearing as there were two years ago.

12. The orders requested for review by the Appellant are deemed **null and void**, thus not covered by the regular appeal procedures, and the reasons claimed by Mr. Fahy for dismissal do not apply.
13. Since the Jan 3rd order is null and void **it can't have been superceded by the Jan 18th order**, rather since the Jan 18th order is based on it with no evidence, or witness, or even a motion to support the decision, the fact that the Jan 3rd order is null must imply the Jan 18th order is null as well.
14. The Courts have an obligation to review and correct such an obvious miscarriage of justice that is causing irreparable harm both to the Appellant and the couple's child. The Appellee herself has written statements indicating harm to the child if deprived of time with his father, including a statement only one week before requesting termination of visitation where she stated: (December 21, 2004 8:36:12 AM EST)

"**if you miss visitation tonight, he will be extremely disappointed**. Especially right now, where the information about your imminent departure has signficantly 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**."

15. Although we "accord deference to the decision of the trial court," we "should **not simply rubber stamp** every discretionary decision of a trial court. To the contrary, we have an obligation to review the record and, upon doing so, to reverse the judgment of the trial court if we find a clear abuse of discretion." Walsh v. Bennett, 260 Va. 171, 175, 530 S.E.2d 904, 907 (2000). where the issues to be reviewed on appeal involve… the constitutionality of a statute, pure statutory interpretation, or the question of "whether an agency has . . . accorded **constitutional rights**, failed to comply with statutory authority, or failed to observe required procedures, **less deference**

is required and the reviewing courts should not abdicate their judicial function and merely rubber-stamp an agency determination." Kenley, 6 Va. App. at 243, 369 S.E.2d at 7-8.

16. The **prejudice** resulting from these orders prevents the Appellant from having a equal chance at trial thus reducing the likelihood the Trial Court would attempt to correct the injustice in a final order. The fact the Appellant has not seen his son since the order will be held against him and used as an excuse to continue to deny him reasonable parental time in the final order.
17. The prejudice resulting from these orders prevents Appellant from collecting evidence needed for the trial, such as statements from our son about what his mother does with him, including exposing her him to immoral influences, her hitting him, yelling at him and the Appellant would be prevented from taking photographs of our son to document physical abuse (such as the photos previously taken of bruising caused by the Appellee).
18. There can be no "fair" final order written until these orders are declared void or reversed, any other outcome will just make the final order (if one ever comes) void itself and meaningless, further disrupting our sons life for a longer period of time.

WHEREFORE, the Appellant requests that this court deny the motion to dismiss and that it suspend enforcement of the January 3rd and 18th orders, and take any other steps appropriate to help the Appellant maintain a relationship with his son, and to have the Trial Court show due respect for their Constitutional Right to have a father/son relationship.

Respectfully submitted,
WESLEY C. SMITH

_____
Wesley C. Smith - Appellant / Defendant, pro se
5347 Landrum Rd APT 1, Dublin, VA 24084 (no phone) liamsdad@liamsdad.org

CERTIFICATE OF SERVICE

I hereby certify that on June 17th 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