

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

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

MOTION TO APPOINT NEW GUARDIAN AD LITEM

COMES NOW the Defendant, Wesley C. Smith, pro se, and moves this Court pursuant to Va. Code Ann. § 20-103, for entry of an Order granting him *pendente lite* relief as requested below.

In support of his MOTION the Defendant states as follows:

1. On or about Feb 5 2004 the Defendant filed a motion requesting a Guardian Ad Litem. One of the main reasons for the request was due to the differing communication skills of the parties and the Defendants belief that a third party without the time limits or procedures of a court hearing could get a more accurate understanding of the true history of the parties and thus recommend a better settlement for their son.

2. On March 19, 2004 a Pendente Lite Order was entered appointing Ronald Fahy as Guardian Ad Litem.

3. Va. Code § 8.01-9 states that "every guardian ad litem shall faithfully represent the estate of the person under a disability for whom he is appointed, and it shall be the duty of the court to see that the interest of such defendant is so represented and protected." The court may enforce this duty by removing the GAL and appointing another one. In regard to the obligations of the GAL, the Court of Appeals of Virginia has observed:

We note that the duties of a guardian ad litem when representing an infant are to defend a suit on behalf of the infant earnestly and vigorously and not merely in a perfunctory manner. He should fully protect the interest of the child by making a bona fide examination of the facts and if he does not faithfully represent the interest of the infant he may be removed

4. The Defendant understands there will be differences of opinion on both facts and conclusions and does not expect the GAL to agree with him but does expect that any good faith effort by a GAL would include investigation and discussion of the relevant issues before reaching a conclusion. The Defendant believes that Mr. Fahy has functioned in a passive role and that passive representation is materially deficient and fails to meet the standards set by law and the STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIANS AD LITEM FOR CHILDREN. Mr. Fahy is either unwilling or unable to zealously represent the child's best interests and should be replaced with a Guardian who will represent the interests of the parties son in a vigorous manner.

5. The Defendant is only aware of Mr. Fahy meeting briefly on two occasions with Liam and that Mr. Fahy was unable to understand most of his speech. The standards, item A, state that communication difficulties “do not abrogate the responsibility to meet face-to-face with the child” and that the guardian should “rely more heavily on observation” and to conduct meetings at the child’s home and other locations to observe the surroundings and his interactions well as to interview the child’s caretaker. As far as the Defendant is aware Mr. Fahy has made very little if any effort to follow this recommendation.

6. Mr. Fahy has not observed Liam at the Defendants residence and Mr. Fahy has not informed the defendant of any observations at any location other than his office. Certainly observations of Liam being excited when the Defendant picks him up for visitation, tells the Defendant he loves him, repeatedly asking to spend more time with the Defendant, is relevant

information that Mr. Fahy should have made the effort to obtain.

7. Had Mr. Fahy made the observations, he would likely have reached the conclusion that Liam wishes to spend more time with the Defendant than either the court order or the Plaintiff allow. Even without observations there is enough written and recorded statements made by the Plaintiff to have made Mr. Fahy aware that Liam desires to see the Defendant daily, at times according to the Plaintiff, even in preference to spending time with her. A recording was left with Mr. Fahy of Liam asking the Plaintiff to leave and to be locked out of the room so he could spend uninterrupted time with the Defendant. Even if Mr. Fahy can't understand Liam's speech, on the recording the Plaintiff states that she understands Liam wants her to leave. Mr. Fahy has been given access to multiple recordings of Liam asking to be left with or spend time with the Defendant and the Plaintiff acknowledging (and usually refusing) his request, so language difficulties are not an excuse for Mr. Fahy to be unaware of Liam's attachment to the Defendant and his desire to spend significant time with him daily.

8. The Defendant is not aware of Mr. Fahy making any effort whatsoever to help Liam spend more time with the Defendant or to inform the court that his assessment is contrary to the wishes of Liam, yet that is exactly what the guidelines require him to do. In Fact Mr. Fahy expressed no objection in court, nor asked questions about the Plaintiff moving and making it more difficult for Liam to spend time with the Defendant. He seemed to approve of the move because it would reduce commuting for the Plaintiff, unfortunately he isn't representing the Plaintiff and the move increased the amount of commuting done by the child he was supposed to represent.

9. The standards require a GAL to "B. Conduct and independent investigation in order to ascertain the facts of the case", This requirement summarizes one of the main reasons

the Defendant requested a guardian and the Defendant specifically requested Mr. Fahy to do so, as based on verbal communication skills, the Plaintiff is more likely to be believed than the Defendant by anyone who has not checked the facts and found that they match the Defendants statements MUCH more closely than that statements made by the Plaintiff. Yet in spite of this guideline, as far as the Defendant can tell, Mr. Fahy has shown much more interest in having the parties just put together summaries and motions and present them to him instead of searching out the facts himself.

10. The guidelines call for the Guardian to interview parties, review records, file motions and to independently evaluate all allegations of child abuse or neglect, of risk to the childs safety or welfare, including but not limited to physical abuse, mental abuse, lack of supervision, etc. The Defendant has no knowledge of Mr. Fahy making any credible attempt at performing most of these functions, in spite of both parties raising these issues. Mr. Fahy has not filed a single motion, has not asked a single question of a witness in court and gives the impression as long as the mother gets custody and the deadbeat dad gets screwed that he is content with the outcome and is not at all concerned about the impact any of these issues have on the child he is supposed to be representing.

11. The Defendant provided Mr. Fahy with audio recordings of the Plaintiff being told by a therapist that she had anger control problems and that she suffered from “uncontrollable rage” and the Plaintiff agreeing and adding that it took almost nothing to set her off, and the Plaintiff debating who it was she threatened to kill, along with a written apology by the Plaintiff for acts of “bodily harm”, behavior that count as Family Abuse as defined by § 16.1-228. Still Mr. Fahy seemed totally uninterested in investigating, exploring, and discussing the Plaintiffs behavior problems and their impact on Liam. Its hard to imagine anyone claiming to represent a

small child showing a lack of interest in rage and death threats by one caring for the child, especially when the Defendant is no longer around to protect Liam if Plaintiff has another episode.

12. It is not clear to the Defendant how a Guardian, the Plaintiff, the Courts, or anyone else can even pretend to be looking out for the “best interests of the child” without a serious investigation of a history of “uncontrollable rage” by the Plaintiff when it can be documented that the behavior occurred repeatedly, was serious enough to endanger the health of the Defendant, requiring police intervention, and where the Plaintiff has threatened to kill herself and Liam, with Liam hearing the remark, seeing the outbursts of rage. Clearly the guidelines call for the GAL to independently evaluate the problem not skip over it. The issue is serious enough that even were the Defendant to give up and agree to settle with the Plaintiff without addressing her behavior problems that the guidelines would require the Guardian to oppose the settlement, as it would be deleterious to Liam. The Defendant considers lack of action on this point an example of gross negligence on the part of the Mr. Fahy.

13. How can a Guardian possibly sweep “uncontrollable rage”, physical violence, and death threats by the Plaintiff under the rug then want to focus on a nick-name that both parties used (but only the Defendant has the guts – or is stupid enough to admit to)? Again Mr. Fahy falls short by making one irrelevant fact a litmus test without taking the time to find out the circumstances. Would the fact that the nick-name use was discussed prior to and agreed to by the Plaintiff have changed his view? That the Plaintiff also used it? That the Defendant used it while rocking the child to sleep and telling him that he loved him? That the Defendant helped Special Education students while he was in grade school, volunteered as a hugger for Special Olympics later, volunteered as a host for Special Olympics in college, that for over a decade his favorite

hat to wear advertised Special Olympics, all BEFORE he had a child with Down Syndrome. Would any of those facts have changed Mr. Fahy's views? We won't really know because Mr. Fahy didn't bother to ask. Anyone who thinks the Defendant was in any way ashamed of Liam or loved him any less due to his condition is either not at all acquainted with the facts of the case or desperately looking for an excuse to justify their own personal gender bias or dislike of the Defendant. Certainly Liam has never thought his father considered him anything but wonderful.

14. If Mr. Fahy had made the effort to "seek independent sources of information" and interview Liam's therapists he would know that the Defendant has been actively involved in taking Liam to speech therapy, both while living in the marital home and later driving from Lake Ridge to Manassas to take Liam to sessions. Had Mr. Fahy thought to ask, Mary Kay the speech therapist, could have provided him with some observations on how Liam and the Defendant interact including cooking him breakfast, dressing him, and that Liam often wanted comfort, hugs, kisses from the Defendant. Mr. Fahy could have interviewed Ronda Carver of Rainbow Therapeutic Riding. He could have gained information on how the Defendant was the one who signed Liam up for the program and initially was the one who took him every week. He would have learned that not only did the Defendant bring Liam to his sessions but as any other proud parent took many photo's of Liam riding the horses, that the Defendant received an award for volunteering his services and taking many photo's of other special needs children and making websites and prints for an awards ceremony. However if Mr. Fahy did interview Mary Kay or Ronda Carver he did not inform the Defendant. The same would apply to teachers, relatives, day care workers or anyone else who has knowledge about the case.

15. If Mr. Fahy unknown to the Defendant did interview the therapists then he failed to follow item F and vigorously represent the child's interest in court. Mr. Fahy has attended

court several times when the Plaintiff and her counsel made repeated claims that the Defendant was either uninvolved, unsupportive, or against Liam having therapy, Mr. Fahy never once asked a question, made a comment, or took any other action to inform the court that he was aware that Plaintiffs claim's were untrue, thus failing to make any attempt to make the truth known to the court that would be more likely to result in a ruling that would help Liam spend more time with the Defendant.

16. Standards Item D. "The GAL should take any action necessary to attempt to resolve the case in the least adversarial manner possible". Clearly one of the main points in this case is the Defendants belief that the Plaintiff has a mental health issue that has adverse effects on Liam, and his desire to see steps taken to mitigate its effect on Liam. Mr. Fahy has made no effort to resolve that issue. He has not filed a motion for a mental health examination, nor has he entered into any meaningful dialog with both parties about it. Instead he has simply repeated the Plaintiffs statements that she has been tested and is fine and ignored the problems with the so called "tests" which conflict with her own descriptions of her behavioral problems. Given that the Plaintiff has threatened to kill Liam, its very odd that Mr. Fahy should be spouting the rhetoric of the Plaintiff rather than trying to find out exactly why the Plaintiff should have acted in such a manner. Certainly a motion for a mental health evaluation would be more likely to be approved by the court and less objected to by the Plaintiff if it was made by the GAL instead of the Defendant. But instead of pursuing a course of action that would both help resolve the court case and protect the physical and emotional welfare of Liam, Mr. Fahy has instead insisted on taking quotes from a report to support the Plaintiff's position while refusing to discuss the fact that the report is based on an unscientific test and inadmissible as evidence and even then has significant contradictions to his position such as using terms like "excellent father" and "more

emotional warmth” when describing the Defendant and “harshness” and inappropriate discipline by the Plaintiff. Mr. Fahy is so uninterested in the truth or his client that he absolutely refused the Defendants request to look at a different report by the same psychologist, which is admissible as evidence, that states the Plaintiff’s claims of abuse by the Defendant are unfounded and gives a very positive review of the Defendants mental status. If Mr. Fahy is going to focus on only selected parts of a defective report and then ignore a admissible report by the same person then he clearly is representing his own interests or those of the Plaintiff rather than the child he is supposed to be representing.

17. Mr. Fahy has not encouraged Liam to attend court as suggested by the guidelines. While court attendance for Liam may or may not be appropriate, it should be noted that the Plaintiff chose to have Liam attended court before in JDR, that Liam has requested to attend again, and that his attendance in court very likely had a significant impact on the court removing him from daycare and placing him back in the Defendants care over the objections of the Plaintiff who had physical custody, and prohibiting her from restricting his access to the Defendant outside of visitation. That is quite a significant change given the Defendant started the case with a protective order prohibiting contact. If a Guardian isn’t going to vigorously represent Liam’s interest in court then Liam should definitely attend in person. Certainly the Plaintiff and her “witnesses” had a much more difficult time selling their testimony that Liam was scared of the Defendant and unwilling to go to him when Liam chose to spend the hearing sitting on the Defendants lap, snuggling up and almost going to sleep.

18. Item F requires the GAL to attend hearings with the intention of presenting a well-formulated position based on the facts. It states he should cross-examine witnesses, offer exhibits, and provide independent exhibits as necessary. So far he has done none of these.

19. Mr. Fahy has completely avoided any investigation of the impact the Plaintiff's adultery has had on Liam. He repeatedly has stated that the adultery only matters if the Defendant can show him how it has an impact on Liam. It should be obvious to anyone that divorce has an impact on children, that adultery appears to be the reason the Plaintiff filed for divorce thus all impacts of the separation, divorce and court case are caused by the adultery and attempts by the Plaintiff to avoid taking responsibility for it. Oddly enough Mr. Fahy still seems oblivious to the impacts the Plaintiffs adultery has had on Liam even though it has resulted in him losing his house, sandbox, hot-tub, being in daycare instead of with his father before/after school, being in unlicensed and unsafe daycare, more commuting, less quality time with parents, parents more stressed, parents not getting along, relationships disrupted or ended, repeated changes in housing, school districts, therapists, etc. Even with Liam emotionally upset and making statements about it being his fault, Mr. Fahy still states the Defendant has to prove impact before he will consider it. It would be difficult to find many areas of Liam's life that are not adversely impacted by the Plaintiffs adultery. Yet Mr. Fahy claims it has no effect and does not explore it. Not even when shown proof that the Plaintiff has a boyfriend spend the night in a one bedroom apartment, after being informed that Liam had to give up his bed and sleep on the couch. Mr. Fahy never even asked any follow-up questions in court about it. Even if Mr. Fahy isn't concerned about the adultery itself, how much time and what interaction Liam, has with her lover is certainly relevant. Still Mr. Fahy shows no interest in the topic and simply stated he "had no questions". That is contrary to the guidelines that state he should not "merely defer to or endorse the position of other parties"

20. Item J of the standards require the GAL to file appropriate petitions, motions, pleadings, briefs, appeals, etc. and that the "GAL should file a show cause against a party who is

not following a court order”. Yet when the Plaintiff made plans to violate the order by not allowing visitation on July 6th instead of notifying her that he would file a show cause he instead sided with her and suggested the Defendant was being unreasonable by wanting to spend time with his son – even when Mr. Fahy was advised of the Plaintiffs previous similar violation and the statements by Liam that he wanted to come home sooner to see his father, and previous rulings by the Judge that the Plaintiff should not make changes in visitation without the Defendants approval, and having been advised that two psychologists recommended that consistent visitation would be more comforting to Liam. Mr. Fahy seems to represent the Plaintiffs interest rather than Liam’s.

21. When the Plaintiff filed a motion for public exchange Mr. Fahy only showed interest until the Defendant proved to him that the Plaintiff’s claims were false, Mr. Fahy showed no interest in discussing the effect that the Plaintiffs false claims have on Liam or making the court aware that the Plaintiff was making false allegations.

22. The reasons a Guardian Ad Litem was requested and appointed still exist and if anything the need for a Guardian Ad Litem is greater than when the court appointed one.

WHEREFORE the Defendant requests the following relief *pendente lite*:

1. An order removing Mr. Fahy as Guardian Ad Litem.
2. An order appointing a new Guardian Ad Litem, one who has demonstrated prior vigorous representation of children, a willingness to examine evidence, interview witnesses, cross-examine, file motions, a demonstrated lack of gender bias, a demonstrated ability to make recommendations as to what would be best for a particular child not a generic one size fits all recommendation.
3. An Order that the new GAL be compensated by either monies from the escrow

account, the Plaintiff, the court, or to be determined after custody is settled.

4. An Order that Mr. Fahy return the funds paid by the Defendant and that the Defendant does not owe Mr. Fahy any money.

5. An order such further relief as the nature of the case or the goals of equity require.

**Respectfully submitted,
WESLEY C. SMITH
Defendant**

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this pleading was served via first-class mail, this ____ day of _____, 2004, to the Loretta Vardy, Esquire, 12388 Silent Wolf Drive, Manassas, Virginia 20112.

Wesley C. Smith.