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VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

CHERI SMITH, )

Complainant, )

v. )

WESLEY C. SMITH, )

Defendant. )

Chancery No. 53360

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

