V I R G I N I A:

IN THE CIRCUIT COURT OF PULASKI COUNTY

DCSE,	)	
Plaintiff	)	
	)	
v.	)	**CL 07-114-00**
	)	**DCSE #: 0003051740**
WESLEY C. SMITH,	)	
Defendant	)	

#4 - MOTION TO DISMSS - LACK OF JURISDICTION

A pdf copy of this motion is available at: http://www.liamsdad.org/court/withhold

COMES NOW the Defendant, Wesley C. Smith, and makes this Motion To Dismiss due to lack of jurisdiction. In support the Defendant states as follows:

1. This Motion will only cover the lack of jurisdiction due to the **failure to serve process** and **lack of alleged and proven grounds for divorce**. Loss of jurisdiction, if it ever existed, due to **gross** judicial conduct, bias, and going beyond statutory authority will be covered in a later motion.

2. Note now that an objection has been made to jurisdiction the court may not move forward on any other issue until the Plaintiff can show, **by reference to the record**, that the Court has jurisdiction. A statement by the Court that it has jurisdiction is meaningless, Jurisdiction must be demonstrated by reference to the record. Without jurisdiction a judge has no authority to rule on jurisdiction.

The judge has a duty to continually i**nspect the record of the case, and if subject-matter jurisdiction does not appear at any time from the record of the case, then he has the duty to dismiss the case as lacking subject-matter jurisdiction.** Should a judge act in any case in which he does not have subject-matter jurisdiction, he is acting unlawfully, U.S. v. Will, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980); Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404, 5 L.Ed 257 (1821), and without any judicial authority.

Our Supreme Court has ruled that "Because a court does not acquire jurisdiction by a mere recital contrary to what is shown in the record", the record of the case is the determinating factor as to whether a court has jurisdiction. State Bank of Lake Zurich v. Thill, 113 Ill.2d 294, 497 N.E.2d 1156 (1986).

A judge's allegation that he has subject-matter jurisdiction is only an allegation (Lombard v. Elmore, 134 Ill.App.3d 898, 480 N.E.2d 1329 (1st Dist. 1985); Hill v. Daily, 28 Ill.App.3d 202, 204, 328 N.E.2d 142 (1975)); inspection of the record of the case has been ruled to be the controlling factor. If the record of the case does not support subject-matter jurisdiction, then the judge has acted without subject-matter jurisdiction. The People v. Brewer, 328 Ill. 472, 483 (1928) ("If it could not legally hear the matter upon the jurisdictional paper presented, its finding that it had the power can add nothing to its authority, – it had no authority to make that finding.").

3. DCSE has not alleged an administrative order of support on which to base the Order To Withhold

[indeed the JD&R Court vacated the Administrative Order], but bases it on the "Final Divorce Decree" paper issued by the Prince William County Circuit Court. Thus if the "order" by PWC is void, DCSE has no basis for its Order To Withhold, and this court has no jurisdiction to hear the case.

Failure To Serve PROCESS

4. In June of 2003 the Defendant's wife moved out of the couple's home. Two weeks later she filed for Divorce. The Defendant's wife NEVER served the Defendant with PROCESS.

5. Process is the **combination** of the Bill Of Complaint and the subpoena in chancery "**served as a single paper**". See Bendele v. Commonwealth, 29 Va. App. 395, 398, 512 S.E.2d 827, 829 (1999) and LIFESTAR v VEGOSEN, CAV Record No. 031376 (2004).

6. In LIFESTAR v VEGOSEN the Virginia Court Of Appeals **vacated the trial court's order on the grounds that "process" was never served** on Lifestar and thus Lifestar "… was not properly before the trial court." which deprived the court of jurisdiction. This is similar to the case here where the Mother filed for divorce in June of 2003 but did not serve the Father with 'process'. There is nothing at all in the record of the case to indicate the Father ever received 'process', before the June 2004 year limit (service must occur within 1 year of filing). Thus the issue is similar to LIFESTAR v VEGOSEN as in process **not being received rather than debating how it was served**. [note in a **divorce** case **HOW** process is served **IS** a requirement unlike many other types of cases such as Lifestar] Quotes from LIFESTAR v VEGOSEN:

(in equity, "process" is the "subpoena in chancery, which the clerk would have attached to a copy of the filing"). Rule 3:3(c) then underscores that **these two documents, "served as a single paper," constitute "process"** because "[n]o judgment shall be entered against a defendant who was served with process more than one year after who was served with process **more than one year after commencement of the action against him.**

It is the "process" which must reach the defendant to vest the court with jurisdiction**. Without service of the "process," the court acquires no jurisdiction.**

…Vegosen argues that the saving provision of Code 8.01-288 cures any defect of service so as to give the court jurisdiction. Again, we disagree.

… Code 8.01-288 states, in pertinent part, that "process which has reached the person to whom it is directed within the time prescribed by law, if any, shall be sufficient although not served or accepted as provided in this chapter." (Emphasis added). **By its plain language the statute applies only when "process" has reached "the person to whom it is directed**." Id. "Process" under Code 8.01-288 is the same "process" as defined under Rule 3:3(c). In the case at bar, **"process" never reached Lifestar because the papers served on it did not constitute a notice of motion for judgment under Rule 3:3**.

Under its clear terms, Code 8.01-288 is designed to cure defects in the manner in which "process" is served. **It**

cannot cure defects in the "process" itself. Since Lifestar never received "process," Code 8.01-288 does not apply. The trial court erred in concluding otherwise.

CONCLUSION Vegosen's failure to serve Lifestar with a notice of motion for judgment pursuant to Rule 3:3 meant Lifestar never received process and was not properly before the trial court. Since the process was defective, as distinguished from the manner of service, the savings provision of Code 8.01-288 does not apply. Because the trial court lacked jurisdiction over Lifestar, it erred in entering a default judgment. Since the default judgment is void for lack of jurisdiction, the trial court also erred in failing to grant Lifestar's motion to set that judgment aside under Code 8.01-428(A)(ii). We will therefore vacate the default judgment entered May 17, 2002, reverse the trial court's final judgment order entered June 10, 2002, and remand the case. **Reversed, vacated and remanded**.
LIFESTAR v VEGOSEN, CAV Record No. 031376 (2004).

In this class of cases, the question of the jurisdiction of the court usually resolves itself into one of whether or not there has been "due process," whether **the process has been served in the time and manner required by law**, or service has been waived. Of course, the defendant must be properly brought before the court, else there will be no jurisdiction over him and a judgment against him will be void. Shelton v. Sydnor, 126 Va. 625, 630, 102 S.E. 83, 85 (1920). Simply put, """One of the essentials of due process is notice."" Walt Robbins, Inc. v. Damon Corp., 232 Va. 43, 47, 348 S.E.2d 223, 226 (1986)

§ 8.01-288. Process received in time good though neither served nor accepted. **Except for process commencing actions for divorce** or annulment of marriage or other actions wherein **service of process is specifically prescribed by statute**, process which has reached the person to whom it is directed within the time prescribed by law, if any, shall be sufficient although not served or accepted as provided in this chapter.

Subject Matter Jurisdiction In Divorce

7. Subject-matter Jurisdiction in a divorce case is by statute, failure to comply with the statues results in a failure of subject-matter jurisdiction.

"**Jurisdiction in a divorce suit is purely statutory**, Watkins v. Watkins, 220 Va. 1051, 1054, 265 S.E.2d 750, 752 (1980), and does not encompass broad equitable powers not conferred by statute." 2 Va. App. at 19, 340 S.E.2d at 580.

8. When the circuit court's power to act is controlled by statute, the circuit court is governed by the rules of **limited jurisdiction** and must proceed within the statute's strictures. Any action taken by the circuit court that exceeds its jurisdiction is void and may be attacked at any time.

"Though a court be one of general jurisdiction, when its power to act on a particular matter is controlled by statute, the court is governed by the rules of limited jurisdiction."); In re M.M., 156 Ill.2d 53, 619 N.E.2d 702 (1993)

("Special statutory jurisdiction is limited to the language of the act conferring it, and the court has no powers from any other source. ... [T]he authority of the court to make any order must be found in the statute. Levy v. Industrial Comm'n (1931), 346 Ill. 49, 51, 178 N.E. 370, 371."); Skilling v. Skilling, 104 Ill.App.3d 213, 482 N.E.2d 881 (1st Dist. 1982)

"**When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way**." Grigg v. Commonwealth, 224 Va. 356, 364, 297

S.E.2d 799, 803 (1982). See also Commonwealth v. Brown, 259 Va. 697, 704-05, 529 S.E.2d 96, 100 (2000).

"the legislature prescribes that a court's jurisdiction to hear and determine controversies involving a statutory right is limited in that **certain facts must exist before a court can act in any particular case**."); Keal v. Rhydderick, 317 Ill. 231 (1925)

"It is an undoubted general principle of the law of divorce in this country that the courts either of law or equity, possess no powers except such as are conferred by statute; and that, **to justify any act or proceeding in a case of divorce, whether it be such as pertains to the ground or cause of action itself, to the process, pleadings or practice in it, or to the mode of enforcing the judgment or decree, authority must be found in the statute, and cannot be looked for elsewhere,** or otherwise asserted or exercised." McCotter v. Carle, 149 Va. 584, 593-94, 140 S.E. 670, 673-74 (1927) (citation omitted).

9. Compliance with the Code sections at issue here, relating to procedures for instituting a divorce case, is **mandatory and jurisdictional**. The Mother did not comply with them, therefore, this court did not acquire jurisdiction of any kind, neither personal nor **subject-matter jurisdiction**

…**if a statute provides for constructive service, the terms of the statute authorizing it must be strictly followed or the service will be invalid**…" Khatchi v. Landmark Rest. Assoc., 237 Va. 139, 142, 375 S.E.2d 743, 745 (1989) (citations omitted).

"**A court acquires no jurisdiction over the person of a defendant until process is served in the manner provided by statute, and a judgment entered by a court which lacks jurisdiction over a defendant is void as against that defendant**." Slaughter v. Commonwealth, 222 Va. 787, 791, 284 S.E.2d 824, 826 (1981).

Although the court may have believed it acquired personal jurisdiction **based on father's execution of the Consent to Adoption form**, the **acquisition of personal jurisdiction is based on the receipt of notice which complies with the Due Process Clause**. See Price v. Price, 17 Va. App. 105, 112, 435 S.E.2d 652, 657 (1993) (citing Kulko v. Superior Ct., 436 U.S. 84, 91, 98 S. Ct. 1690, 1696, 56 L. Ed. 2d 132 (1978)).

10. The courts have in fact frowned upon any bypassing of the formal rules/laws of service.

The formality of process serves a legitimate purpose. Process is official notice which informs the opposing party of the litigation and instructs the party when and where it must respond. Without this official notice, the recipient knows neither if the action was filed nor when it was filed. The party would not know when critical time limits expire. **Without process a party would need to resort to other means to obtain essential information**. The practical solution is to telephone the clerk of court to ask if and when the action was filed. However**, a party relies on the informal information received over the telephone at its own risk**. If the information is incorrect, it acted at its own peril. "But one who takes the shortcut of asking the clerk's employees to examine the record for him relies on the response at his peril." School Bd. v. Caudill Rowlett Scott, Inc., 237 Va. 550, 556, 379 S.E.2d 319, 322 (1989).

11. Without proper legal service upon the Defendant the court does not have personal (in personam) jurisdiction over the Defendant and thus is without jurisdiction to proceed with the case.

An absence of personal jurisdiction may be said to destroy `all jurisdiction' because the requirements of subject matter and personal jurisdiction are conjunctional. Both must be met before a court has authority to adjudicate the rights of parties to a dispute. If a court lacks jurisdiction over a party, then it lacks `all jurisdiction' to adjudicate the party's rights, whether or not the subject matter is properly before it. See, e.g. Kulko v. Superior Court, 436 U.S. 84, 98 S.Ct. 1690, 1696 (1978)

VA § 8.01-328.1 A. A court may exercise personal jurisdiction over a person… 9. Having maintained within this Commonwealth a matrimonial domicile at the time of separation of the parties upon which grounds for divorce or separate maintenance is based… Jurisdiction in subdivision 9 is **valid only upon proof of service of process pursuant to § 8.01-296**…

12. The Mother has argued since the Defendant knew about the suit the lack of process does not matter. That is untrue. Even if he wanted to the Defendant could not waive subject matter jurisdiction as it is not waivable.

However, the Commonwealth correctly explains, jurisdictional issues by definition cannot be waived, even with acquiescence. Nelson v. Warden of the Keen Mountain Corr. Ctr., 262 Va. 276, 281, 552 S.E.2d 73, 75 (2001) (noting jurisdictional issues cannot be waived).

see Owusu v. Commonwealth, 11 Va. App. 671, 672, 401 S.E.2d 431, 431 (1991), and Morrison v. Bestler, 239 Va. 166, 170, 387 S.E.2d 753, 756 (1990) **No party can "waive a subject matter jurisdictional requirement."**

No Grounds For Divorce Proven

13. Even if we ignore the lack of subject matter jurisdiction due to no service of PROCESS (something that can't be done) then the order is still void because the Court did not have the jurisdiction to make the order as it did not find any of the alleged grounds of divorce existed at the time the Mother filed for divorce as required by law.

14. In the "Final Divorce Decree" the Court set the date of separation as Dec 2002. The Court then ruled the grounds of divorce as one-year-separation. The problem with that is that the records of the case clearly show the Mother filed for divorce in June of 2003 only 6 months after the ruled "date of separation". The Virginia Court Of Appeals has been clear on the one year separation must exist prior to filing for divorce and has vacated divorces that were filed after 355 days instead of the 365 day requirement.

"The act relied upon for divorce must be alleged and **proved to have occurred prior to the bringing of the suit** . . . ." Beckner v. Beckner, 204 Va. 580, 583, 132 S.E.2d 715, 717-18 (1963). see also Johnson v. Johnson, 213 Va. 204, 210, 191 S.E.2d 206, 210 (1972).

15. That the year long separation must exist PRIOR to filing for divoce is amply demonstrated by JONES v JONES, MAY 30, 2000, Record No. 2580-99-3:

We hold that the court erred by entering the final divorce decree because the grounds for divorce alleged in the bill of complaint **did not exist when the bill was filed and, thus, the court lacked jurisdiction to entertain the suit at the time it was filed**.

…

The [trial] court ruled that although the grounds for divorce did not exist when the suit was filed, the parties had

lived separate and apart continuously for one year at the date of the hearing; thus, grounds for divorce did exist at the time of the hearing.
…
ANALYSIS
Code 20-91(A)(9)(a) provides, in part, that "[a] divorce from the bond of matrimony may be decreed . . . [o]n the application of either party if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for one year." "The act relied upon for divorce must be alleged and proved to have occurred prior to the bringing of the suit, not based upon some act or conduct alleged to have taken place during its pendency." Beckner v. Beckner, 204 Va. 580, 583, 132 S.E.2d 715, 717-18 (1963); see also Johnson v. Johnson, 213 Va. 204, 210, 191 S.E.2d 206, 210(1972).

We have consistently held that jurisdiction in a divorce suit is purely statutory. Although the court may have jurisdiction over both the subject matter and the parties, the court may nevertheless exceed its statutory authority if the character of the judgment was not such as the court had the power to render, or [if] the mode of procedure employed by the court was such as it might not lawfully adopt. Lowe v. Lowe, 233 Va. 431, 433, 357 S.E.2d 31, 33 (1987)(internal quotations and citations omitted.

The undisputed proof is that Geraldine Jones and Frank Jones had not lived separate and apart without cohabitation for the requisite one-year period before the suit was filed in July 1997.
…
Code 20-91(A)(9)(a) provides that a "no-fault" divorce may be granted only after an application has been filed properly alleging that the parties have lived separate and apart for the requisite time. See Moore v. Moore, 218 Va. 790, 796, 240 S.E.2d 535, 538 (1978) (finding that an application under Code 20-91(A)(9)(a) refers to a bill of complaint or a cross-bill). The ground for divorce alleged is a statutory element and jurisdictional prerequisite to filing the suit for divorce under Code 20-91(A)(9)(a). The grounds must be properly alleged and proven. Thus, the trial court erred in entertaining the bill of complaint for divorce and in entering the divorce decree therein for which the proof showed, and the parties conceded therein, the grounds alleged did not exist.
…
For the foregoing reasons, we reverse the trial court, vacate the divorce decree, and grant the wife's motion to dismiss the bill of complaint.
JONES v JONES, MAY 30, 2000, Record No. 2580-99-3

16. Code 20-91(A)(9)(a) provides that a "no-fault" divorce may be granted only after an application has been filed properly alleging that the parties have lived separate and apart for the requisite time. See Moore v. Moore, 218 Va. 790, 796, 240 S.E.2d 535, 538 (1978) The ground for divorce alleged is a **statutory element and jurisdictional prerequisite** to filing the suit for divorce under Code 20-91(A)(9)(a). The grounds must be properly alleged and proven

17. In order to have jurisdiction the court must find that either party had a clam according to ground under Code 20-91 at the time the Plaintiff filed the suit (June 2003). The Defendant did allege and did provide evidence including photos and e-mail to prove adultery by the mother and the **mother even admitted to her adultery** on the stand but Judge Potter was too busy denying the Defendant his constitutional rights to use adultery as the grounds for divorce even though it was the only one legally available.

Void Orders

18. A void order may be challenged **in any court, at any time**, and even by third parties. A void order has **no legal force or effect**. As one court stated, a void order is equivalent to a blank piece of paper.

"[a] judgment, decree or order entered by a court which lacks jurisdiction of the parties or of the subject matter . . . is void." Robertson v. Commonwealth, 181 Va. 520, 536, 25 S.E.2d 352, 358 (1943). **"[D]isobedience of, or resistance to a void order, judgment, or decree is not contempt. This is so because a void order, judgment, or decree is a nullity and may be attacked collaterally**." Id. (citations omitted).

The Supreme Court has also noted that [t]he distinction between an action of the court that is void ab initio rather than merely voidable is that the former involves the underlying authority of a court to act on a matter whereas the latter involves actions taken by a court which are in error. An order is void ab initio if entered by a court in the absence of jurisdiction of the subject matter or over the parties, if the character of the order is such that the court had no power to render it, or if the mode of procedure used by the court was one that the court could "not lawfully adopt." **The lack of jurisdiction to enter an order under any of these circumstances renders the order a complete nullity and it may be "impeached directly or collaterally by all persons, anywhere, at any time, or in any manner."**
Singh v. Mooney, 261 Va. 48, 51-52, 541 S.E.2d 549, 551 (2001) (citations omitted) (emphasis added).

This principle of law was stated by the U.S. Supreme Court as "Courts are constituted by authority and they cannot go beyond that power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply **VOID, AND THIS IS EVEN PRIOR TO REVERSAL**." [Emphasis added]. Vallely v. Northern Fire and Marine Ins. Co., 254 U.S. 348, 41 S. Ct. 116 (1920). See also Old Wayne Mut. I. Assoc. v. McDonough, 204 U.S. 8, 27 S.Ct. 236 (1907); Williamson v. Berry, 8 How. 495, 540, 12 L. Ed, 1170, 1189, (1850); Rose v. Himely, 4 Cranch 241, 269, 2 L.Ed. 608, 617 (1808).

A voidable order is an order that must be declared void by a judge to be void; a void order is an order issued without jurisdiction by a judge and is void ab initio and does not have to be declared void by a judge to be void. Only an inspection of the record of the case showing that the judge was without jurisdiction or **violated a person's due process rights**, or where fraud was involved in the attempted procurement of jurisdiction, is sufficient for an order to be void. Potenz Corp. v. Petrozzini, 170 Ill. App. 3d 617, 525 N.E. 2d 173, 175 (1988). In instances herein, the law has stated that the **orders are void ab initio and not voidable because they are already void.**

There is a misconception by some attorneys and judges that only a judge may declare an order void, but this is not the law: (1) there is no statute nor case law that supports this position, and (2) should there be any case law that allegedly supported this argument, that case would be directly contrary to the law established by the U.S. Supreme Court in Valley v. Northern Fire & Marine Ins. Co., 254 U.S. 348, 41 S. Ct. 116 (1920) as well as other state courts, e.g. by the Illinois Supreme Court in People v. Miller. Supra. A party may have **a court vacate a void order, but the void order is still void ab initio**, whether vacated or not; a piece of paper does not determine whether an order is void, it just memorializes it, makes it legally binding and voids out all previous orders returning the case to the date prior to action leading to void ab initio.

in 1991, the U.S. Supreme Court stated that, "Since such jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it. …[Would be an] unlawful action by the appellate court itself." Freytag v. Commissioner, 501 U.S. 868 (1991); Miller, supra. Following the same principle, **it would be an unlawful action for a court to rely on an order issued by a judge who did not have subject-matter jurisdiction and therefore the order he issued was Void ab initio**.

It is clear and well established law that a void order can be challenged in any court. Old Wayne Mut. L. Assoc. v. McDonough, 204 U.S. 8, 27 S.Ct. 236 (1907) ("jurisdiction of any court exercising authority over a subject `may be inquired into in every other court **when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings,**' and the rule prevails whether `the decree or judgment has been given, in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of states.'"); In re Marriage of Macino, 236 Ill.App.3d 886 (2nd Dist. 1992) ("if the order is void, it may be attacked at any time in any proceeding, "); Evans v. Corporate Services, 207 Ill.App.3d 297, 565 N.E.2d 724 (2nd Dist. 1990) ("a void judgment, order or decree may be attacked at any time or in any court, either directly or collaterally"); Oak Park Nat. Bank v. Peoples Gas Light & Coke Co., 46 Ill.App.2d 385, 197 N.E.2d 73, 77 (1st Dist. 1964) ("that judgment is void and may be attacked at any time in the same or any other court, by the parties or by any other person who is affected thereby."). [Emphasis added].

19. The state Supreme Courts have held that those who aid, abet, advise, act upon and execute the order of a judge who acts without jurisdiction are equally guilty. They are equally guilty of a crime against the U.S. Government.

Should the judge not have subject-matter jurisdiction, then the law states that the judge has not only violated the law, but is also a trespasser of the law. Von Kettler et.al. v. Johnson, 57 Ill. 109 (1870) ("if the magistrate has not such jurisdiction, then he and those who advise and act with him, or execute his process, are trespassers.");Elliott v. Peirsol, 1 Pet. 328, 340, 26 U.S. 328, 340 (1828) ("without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. **They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers.** This distinction runs through all the cases on the subject; and it proves, that the jurisdiction of any court exercising authority over a subject, may be inquired into in every court, when the proceedings of the former are relied on and brought before the latter, by the party claiming the benefit of such proceedings."); In re TIP-PA-HANS Enterprises, Inc., 27 B.R. 780, 783 (1983) (a judge "lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists") (when a judge acts "outside the limits of his jurisdiction, he becomes a trespasser ... ".) ("... courts have held that where courts of special or limited jurisdiction exceed their rightful powers, the whole proceeding is coram non judice ... ").

WHEREFORE as the Defendant has shown that the "Order" of the Prince William Circuit Court is null and void and unenforceable, the Defendant demands that this court dismiss the administrative withholding order with prejudice and recognize the "Final Divorce Decree" as void.

Respectfully Submitted,
Wesley C. Smith

_____

Wesley C. Smith, Defendant
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing motion was served to DCSE, this 4th day of May 2007.

_____
Wesley C. Smith