

2007 BOYD-GRAVES CONFERENCE

SUBCOMMITTEE REPORT

Whether 16.1-264(A) Regarding the Procedure in the Juvenile Domestic Relations Courts with Respect to Service of Summons Should be Amended to Provide that where Served by Certified Mail, Return Receipt Requested, the Return Should Show Proof of Receipt

Sandra L. Havrilak, Chair
Laurie E. Forbes
Reeves W. Mahoney
The Honorable Dennis J. Smith
The Honorable Winship C. Tower

Boyd-Graves Conference

August 31, 2007

REPORT OF COMMITTEE STUDYING WHETHER 16.1-264(A)
REGARDING THE PROCEDURE IN THE JUVENILE DOMESTIC RELATIONS
COURTS WITH RESPECT TO SERVICE OF SUMMONS SHOULD BE AMENDED TO
PROVIDE THAT WHERE SERVED BY CERTIFIED MAIL, RETURN RECEIPT
REQUESTED, THE RETURN SHOULD SHOW PROOF OF RECEIPT.

The Committee was composed of the following members:

Sandra L. Havrilak, Attorney at Law, Chair
The Honorable Dennis J. Smith
The Honorable Winship C. Tower
Laurie E. Forbes, Attorney at Law
Reeves W. Mahoney, Esquire

This letter comprises the report of the Committee following its consideration of §16.1-264(A) of the 1950 Code of Virginia, as amended, which allows service of summons upon a party residing outside the Commonwealth by mailing a copy of the summons by certified mail, return receipt requested. The issue arises because the statute does not require proof of receipt.

§ 16.1-264 (A) provides, in pertinent part:

If a party designated in § 16.1-264 (A) to be served with a summons can be found within the Commonwealth, the summons shall be served upon him in person or by substituted service as prescribed in subdivision 2 of § 8.01-296.

If a party designated to be served in § 16.1-264 (A) is without the Commonwealth but can be found or his address is known or can within reasonable diligence be ascertained, service of summons may be made either by delivering a copy to him personally or by mailing a copy thereof to him by certified mail, return receipt requested. (emphasis added)

If after reasonable effort a party other than the person who is the subject of the petition cannot be found or his post office address cannot be ascertained, whether he is within or without the Commonwealth, the court may order service of the summons upon him by publication in accordance with the provisions of § 8.01-316 and § 8.01-317. (See attached Exhibit "1" for complete statute).

§ 16.1-263 provides for the issuance of summonses which requires the party to appear before the court at the time fixed to answer or testify as to the allegations in the petition. (See attached Exhibit "2" for complete statute).

The Committee met via conference call to discuss amending the statute to require proof of receipt in order for notice to be good. A majority of the Committee members did not recommend amending the statute to require proof of receipt upon service of a summons. These members cited a number of statutes enacted by the General Assembly that similarly allow for service by certified mail, return receipt requested, without requiring actual proof of the returned receipt. Concern was also expressed as to the judicial backlog such a requirement might create and the potential amount of juvenile and domestic relations cases it could cause to be re-opened.

While the Committee discussed recommending a provision allowing the case to be re-opened for good cause shown, after discussion of the same, the majority of the Committee did not want to provide for this type of provision. The main concern appeared to be the impact it would have on the docket.

Also, since this statute only deals with notice, not jurisdiction, if person was served out of state in person or by certified mail, the court would only have *in personam* jurisdiction if there is a long arm basis pursuant to §8.01-328.1 or the person served appears in the proceedings. (See attached Exhibit "4" for the long arm statute).

The one dissenting member of the Committee expressed concern that the statute's lack of requiring proof of actual receipt raises important due process issues. The green card evidencing receipt of the notice is not even required to be attached to the return before the court acts on it. The purpose of §16.1-264 (A) is to provide notice to a defendant. Without the requirement of actual proof of the returned receipt, service by certified mail, return receipt requested, is simply evidence of a mailing, but no proof of return is required nor notice to the defendant. The apparent purpose of requiring certified mailing is that it enables the sender to have notice of actual receipt. Requiring actual proof of such receipt is consistent with the General Assembly's requirement that mailing of the summons under the statute be achieved via certified mailing, return receipt requested, not just regular mail.

The dissenting member of the Committee also points out that there are greater protections for defendants who fail to respond to service by publication under § 8.01-322 of the 1950 Code of Virginia, as amended, (See attached Exhibit "3" for complete statute). Pursuant to that statute, a defendant served by order of publication has up to two years to petition to have the case reheard or file an answer. No such recourse is available to defendants who are deemed to receive notice under §16.1-264(A) via certified mail, despite the lack of an actual receipt of the notice. This should raise concern as to the defendant's right to notice, a fundamental aspect of due process.

Despite these due process concerns, it is the majority view of the Committee that §16.1-264 (A) should not be amended, as to require proof of actual return receipt following service by certified mail. Therefore, I report to you that there is a consensus of the Committee that § 16.1-262 (A) not be amended.

§ 16.1-264. Service of summons; proof of service; penalty.

A. If a party designated in § 16.1-263 A to be served with a summons can be found within the Commonwealth, the summons shall be served upon him in person or by substituted service as prescribed in subdivision 2 of § 8.01-296.

If a party designated to be served in § 16.1-263 is without the Commonwealth but can be found or his address is known, or can with reasonable diligence be ascertained, service of summons may be made either by delivering a copy thereof to him personally or by mailing a copy thereof to him by certified mail return receipt requested.

If after reasonable effort a party other than the person who is the subject of the petition cannot be found or his post-office address cannot be ascertained, whether he is within or without the Commonwealth, the court may order service of the summons upon him by publication in accordance with the provisions of §§ 8.01-316 and 8.01-317.

B. Service of summons may be made under the direction of the court by sheriffs, their deputies and police officers in counties and cities or by any other suitable person designated by the court. However, in any case in which custody or visitation of a minor child or children is at issue and a summons is issued for the attendance and testimony of a teacher or other school personnel who is not a party to the proceeding, if such summons is served on school property, it shall be served only by a sheriff or his deputy.

C. Proof of service may be made by the affidavit of the person other than an officer designated in subsection B hereof who delivers a copy of the summons to the person summoned, but if served by a state, county or municipal officer his return shall be sufficient without oath.

D. The summons shall be considered a mandate of the court and willful failure to obey its requirements shall subject any person guilty thereof to liability for punishment as for contempt.

(Code 1950, §§ 16.1-167 to 16.1-170; 1956, c. 555; 1977, c. 559; 1984, c. 594; 1987, c. 632; 1991, c. 62; 2004, c. 588.)

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§ 16.1-263. Summonses.

A. After a petition has been filed, the court shall direct the issuance of summonses, one directed to the juvenile, if the juvenile is twelve or more years of age, and another to at least one parent, guardian, legal custodian or other person standing in loco parentis, and such other persons as appear to the court to be proper or necessary parties to the proceedings. The summons shall require them to appear personally before the court at the time fixed to answer or testify as to the allegations of the petition. Where the custodian is summoned and such person is not a parent of the juvenile in question, a parent shall also be served with a summons. The court may direct that other proper or necessary parties to the proceedings be notified of the pendency of the case, the charge and the time and place for the hearing.

Any such summons shall be deemed a mandate of the court, and willful failure to obey its requirements shall subject any person guilty thereof to liability for punishment for contempt. Upon the failure of any person to appear as ordered in the summons, the court shall immediately issue an order for such person to show cause why he should not be held in contempt.

B. The summons shall advise the parties of their right to counsel as provided in § 16.1-266. A copy of the petition shall accompany each summons for the initial proceedings. The summons shall include notice that in the event that the juvenile is committed to the Department or to a secure local facility, at least one parent or other person legally obligated to care for and support the juvenile may be required to pay a reasonable sum for support and treatment of the juvenile pursuant to § 16.1-290. Notice of subsequent proceedings shall be provided to all parties in interest. In all cases where a party is represented by counsel and counsel has been provided with a copy of the petition and due notice as to time, date and place of the hearing, such action shall be deemed due notice to such party, unless such counsel has notified the court that he no longer represents such party.

C. The judge may endorse upon the summons an order directing a parent or parents, guardian or other custodian having the custody or control of the juvenile to bring the juvenile to the hearing.

D. A party, other than the juvenile, may waive service of summons by written stipulation or by voluntary appearance at the hearing.

E. No such summons or notification shall be required if the judge shall certify on the record that (i) the identity of a parent or guardian is not reasonably ascertainable or (ii) in cases in which it is alleged that a juvenile has committed a delinquent act, crime, status offense or traffic infraction or is in need of services or supervision, the location, or in the case of a parent or guardian located outside of the Commonwealth the location or mailing address, of a parent or guardian is not reasonably ascertainable. An affidavit of the mother that the identity of the father is not reasonably ascertainable shall be sufficient evidence of this fact, provided there is no other evidence before the court which would refute such an affidavit. In cases referred to in clause (ii), an affidavit of a law-enforcement officer or juvenile probation officer that the location of a parent or guardian is not reasonably ascertainable shall be sufficient evidence of this fact, provided that there is no other evidence before the court which would refute the affidavit.

(Code 1950, §§ 16.1-166, 16.1-172; 1956, c. 555; 1974, c. 620; 1975, c. 128; 1977, c. 559; 1978, cc. 613, 740; 1996, cc. 755, 914; 1997, c. 441; 1999, c. 952; 2004, c. 573.)

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§ 8.01-322. Within what time case reheard on petition of party served by publication, and any injustice corrected.

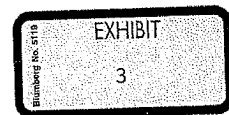
If a party against whom service by publication is had under this chapter did not appear before the date of judgment against him, then such party or his representative may petition to have the case reheard, may plead or answer, and may have any injustice in the proceeding corrected within the following time and not after:

1. Within two years after the rendition of such judgment, decree or order; but
2. If the party has been served with a copy of such judgment, decree, or order more than a year before the end of such two-year period, then within one year of such service.

For the purpose of subdivision 2 of this section, service may be made in any manner provided in this chapter except by order of publication, but including personal or substituted service on the party to be served, and personal service out of the Commonwealth by any person of eighteen years or older and who is not a party or otherwise interested in the subject matter in controversy.

(Code 1950, § 8-78; 1977, c. 617.)

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§ 8.01-328.1. When personal jurisdiction over person may be exercised.

A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:

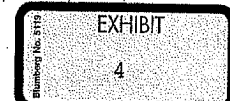
1. Transacting any business in this Commonwealth;
2. Contracting to supply services or things in this Commonwealth;
3. Causing tortious injury by an act or omission in this Commonwealth;
4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth;
5. Causing injury in this Commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this Commonwealth when he might reasonably have expected such person to use, consume, or be affected by the goods in this Commonwealth, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth;
6. Having an interest in, using, or possessing real property in this Commonwealth;
7. Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting;
8. Having (i) executed an agreement in this Commonwealth which obligates the person to pay spousal support or child support to a domiciliary of this Commonwealth, or to a person who has satisfied the residency requirements in suits for annulments or divorce for members of the armed forces pursuant to § 20-97 provided proof of service of process on a nonresident party is made by a law-enforcement officer or other person authorized to serve process in the jurisdiction where the nonresident party is located, (ii) been ordered to pay spousal support or child support pursuant to an order entered by any court of competent jurisdiction in this Commonwealth having in personam jurisdiction over such person, or (iii) shown by personal conduct in this Commonwealth, as alleged by affidavit, that the person conceived or fathered a child in this Commonwealth;
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, or at the time a cause of action arose for divorce or separate maintenance or at the time of commencement of such suit, if the other party to the matrimonial relationship resides herein; or
10. Having incurred a liability for taxes, fines, penalties, interest, or other charges to any political subdivision of the Commonwealth.

Jurisdiction in subdivision 9 is valid only upon proof of service of process pursuant to § 8.01-296 on the nonresident party by a person authorized under the provisions of § 8.01-320. Jurisdiction under subdivision 8 (iii) of this subsection is valid only upon proof of personal service on a nonresident pursuant to § 8.01-320.

B. Using a computer or computer network located in the Commonwealth shall constitute an act in the Commonwealth. For purposes of this subsection, "use" and "computer network" shall have the same meanings as those contained in § 18.2-152.2.

C. When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him; however, nothing contained in this chapter shall limit, restrict or otherwise affect the jurisdiction of any court of this Commonwealth over foreign corporations which are subject to service of process pursuant to the provisions of any other statute.

(Code 1950, § 8-81.2; 1964, c. 331; 1977, c. 617; 1978, c. 132; 1981, c. 6; 1982, c. 313; 1983, c. 428; 1984, c. 609; 1986, c. 275; 1987, c. 594; 1988, cc. 866, 878; 1992, c. 571; 1999, cc. 886, 904, 905; 2001, c. 221; 2007, c.



533.)

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Editor's Note:

A majority of the Committee recommended that no change be made to current law.
By consensus of the Conference no action was taken.