2007 BOYD-GRAVES CONFERENCE

SUBCOMMITTEE REPORT

Endorsement of Orders on Behalf of All Counsel with Certification

Lisa A. Bertini, Chair
Thomas G. Bell, Jr.
Irvin V. Cantor
Bruce E. Titus
John R. Walk
The Honorable William H. Ledbetter, Jr.

MEMORANDUM

TO: Thomas L. Appler

FROM: Thomas G. Bell, Jr.
Irvin V. Cantor
The Honorable William H. Ledbetter, Jr.
Bruce E. Titus
John R. Walk
Lisa A. Bertini

DATE: June 30, 2007

RE: Boyd-Graves Study of Endorsement of Orders on Behalf of All Counsel with Certification

INTRODUCTION

The Steering Committee of the Boyd-Graves Conference has approved a 2007 study of the question of whether a rule should be enacted permitting an attorney to endorse an order on behalf of all counsel, and not requiring all signatures and circulation of an order, where certification provides that all parties approve the submission of the order, with a subsequent process and sanction in the event of a misrepresentation by that counsel.

ANALYSIS

A. What Rule(s) Is/Are Implicated?

Virginia Supreme Court Rule ("VSCR") 1:13 provides as follows:

> Vscr-1:13
>
> Endorsements.
>
> Drafts of orders and decrees shall be endorsed by counsel of record, or reasonable notice of the time and place of presenting such drafts together with copies thereof shall be served pursuant to Rule 1:12 [1]upon all counsel of record who have not endorsed them. Compliance with this Rule and with Rule 1:12 may be modified or dispensed with by the court in its discretion.

[1] VSCR 1:12 addresses service of papers after the initial process.

The purpose of this Rule was to protect parties without notice, and any failure to comply with the rule only affected the rights of parties without notice. The failure to comply with vscr 1:13 rendered the applicable order voidable, not void ab initio. Singh v. Mooney, 261 Va. 48, 541 S.E.2d 549, 2001 Va. LEXIS 2 (2001). However, where the notice requirement is complied with, the court may waive endorsement of counsel and enter the order or decree. See Francis v. Francis, 30 Va. App. 584, 518 S.E.2d 842 (1999). It is presumed that the court exercised discretion in dispensing with endorsement or notice under this rule. Edwards v. Commonwealth, No. 0469-00-1, 2001 Va. App. LEXIS 189 (ct. of Apps. Apr. 10, 2001); Gantt v. Gantt, No. 1973-02-3, 2003 Va. App. LEXIS 112 (Ct. of Appeals Mar. 4, 2003).

See Exhibit "A" for other background case law.

B. Arguments In Favor of Permitting Endorsements on Behalf of All Counsel with Certification

a. Efficiency / reduction of Delay in having order entered;

b. Certification of all parties' agreement to submission of the order implicates notice requirement in existing VSCR 1:13;

c. Existing VSCR 1:13 permits court to waive endorsement of counsel to an order or decree where notice requirement is followed;

   i. "The Supreme Court has explained that, under Rule 1:13, applied 'daily in civil and criminal cases,' notice or endorsement is unnecessary [where] counsel are present in court when the ruling is made orally and are fully aware of the court's decision; preparation and entry of an order in standard form is all that remains to be done to end the case in the trial court. Indeed, prompt disposition of the business of the trial courts would be jeopardized if Rule 1:13 were interpreted to require notice or endorsement under these circumstances; counsel of record have the duty and responsibility to examine the public record and to determine the date of entry of such orders." Smith v. Stanaway, 242 Va. 286, 289, 410 S.E.2d 610, 612 (1991); Davis v. Mullins, 251 Va. 141, 147-48, 466 S.E.2d 90, 93 (1996).

d. Eliminates court's exercise of discretion in waiving endorsement or notice under VSCR 1:13;

e. Effective deterrent = sanctions

C. Arguments Against Permitting Endorsements on Behalf of All Counsel with Certification

a. Increased delay in resolution of legal matter upon misrepresentation of counsel and seeking of sanctions/redress;

b. Due process concerns / compliance with notice requirements;

   i. "An elementary requirement of due process in any proceeding is 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' Such notice 'must afford a reasonable time for those 'interested to make their appearance.'" See Francis v. Francis, 30 Va. App. 584, 518 S.E.2d 842 (1999), citing Eddine v. Eddine, 12 Va. App. 760, 763, 406 S.E>2d 914, 916 (1991).

   ii. Issues primarily raised in cases involving entry of final decrees in family law cases and sentencing orders in criminal law cases.

   iii. Examples of family law cases:

      1. Francis v. Francis, 30 Va. App. 584, 518 S.E.2d 842 (1999).
         a. Wife terminated services of her attorney, and copied her termination letter to the Court. No evidence showed that wife copied those letters to husband's counsel. During the following months, wife's former counsel did not file a motion to withdraw. Husband's counsel filed notice of presentation of final decree to the court, with certification that the notice was mailed to wife's (former) counsel. Wife and Wife's (former) counsel failed to attend the hearing and presentation of the final decree. Court entered final decree in dissolution of marriage case, waiving endorsement of counsel and plaintiff pursuant to Rule 1:13.
         b. Court held that husband's counsel properly followed notice requirements of Rule 1:13. Trial court did not err in waiving endorsement.
      2. Gantt v. Gantt, No. 1973-02-3, 2003 Va. App. LEXIS 112 (Ct. of Appeals Mar. 4, 2003);
      3. Napert v. Napert, 261 Va. 45, 540 S.E.2d 882, 2001 Va. LEXIS 13 (2001);
      4. Whiting v. Whiting, 262 Va. 3, --- S.E.2d ---, 2001 Va. LEXIS 83 (2001) [*divorce decree without notice or endorsement to husband was void*];

iv. Examples of criminal law cases:
   1. Edwards v. Commonwealth, No. 0469-00-1, 2001 Va. App. LEXIS 189 (ct. of Apps. Apr. 10, 2001)
   2. Palmer v. Commonwealth, 2006 WL 2805066 (Va. App. 2006) [unpublished opinion]
   3. Smith v. Commonwealth, 32 Va. App. 755, 531 S.E.2d 11, 2000 Va. App. Lexis 499 (VACA 2000).
      a. Court upheld appellant's conviction, despite appellant's claim of lack of endorsements and no indication that the order was seen by counsel for either party, and no direction to the clerk to mail a copy to either party. A sentencing hearing was held January 1999, and an oral order pronounced by the Court, but no written order was entered at that time. Appellant appealed the sentence, and on February 24, 1999, trial court granted appellant's motion to suspend execution of the sentence and requested to modify his sentence. On March 15, 1999, Court entered the settlement order related to the January 1999 hearing, but did not mention the February 1999 order to suspend the sentence pending appellant's motion to modify the sentence pronounced at the January 1999 hearing.
      b. Court found that in appellant's case, the preparation of the order memorializing the hearing was all that remained to be done before appellant filed first a notice of appeal and then a motion to modify his sentence. When appellant's counsel filed notice of appeal, he did not check the trial court's record that the Court had already entered the final order memorializing its bench ruling, and that order was not entered until two months after the hearing. The March 15, 1999 order was held to be a final judgment, for which appellant failed to appeal during the 21 days after the entry of the order. Thereafter, the trial court lost jurisdiction of the matter. Appellant's appeal was dismissed; and his convictions were held to stand.

D. Is a Rule Change or Statute Necessary?

Our committee has come to the determination that this rule does not need to be changed in any way. The endorsement of orders has not been a problem for any of us in our practices both as private practioners or as member of the judiciary. In fact, VSCR 1:13 always allows a trial judge

to waive endorsement of an order. If some large, complex, litigation involving many practioners necessities special circumstances, there is no reason a standing order could not be entered on a case by case basis. This is a solution in search of a problem and it is our humble recommendation to not change anything.

EXHIBIT "A"

BACKGROUND CASE LAW

1. State Hwy. Comm'r v. Easley, 215 Va. 197, 207 S.E.2d 870 (1974).
    a. VSCR 1:13 is designed to protect parties without notice and failure to comply with the rule prejudices only the rights of such parties.
    b. A party whose counsel induced violation of VSCR 1:13 has no standing to assert that the order is void because of that violation, or that the trial court, in its discretion, could not properly have entered the order without requiring compliance with the rule.

2. Singh v. Mooney, 261 Va. 48, 541 S.E.2d 549, 2001 Va. LEXIS 2 (2001).
    a. The failure to comply with VSCR 1:13 renders an order voidable, not void ab initio.
    b. See also the following:
        i. Napert v. Napert, 261 Va. 45, 540 S.E.2d 882, 2001 Va. LEXIS 13 (2001);
        ii. Whiting v. Whiting, 262 Va. 3, --- S.E.2d ---, 2001 Va. LEXIS 83 (2001)
    c. But see the following:
        i. Francis v. Francis, 30 Va. App. 584, 518 S.E.2d 842 (1999).
            1. Where requirement of notice was complied with, and the notice included the time and place of presenting such drafts together with copes thereof, trial court did not err in waiving endorsement of wife's counsel of record and entering the decree.

3. Whiting v. Whiting, 262 Va. 3, --- S.E.2d ---, 2001 Va. LEXIS 83 (2001)
    a. A decree or order entered in violation of VSCR 1:13 is merely voidable, not void ab initio, and is not subject to collateral attack, but must be challenged within 21 days of its entry pursuant to Rule 1:1, by a bill of review within the time prescribed by §8.01-623, or by an independent action pursuant to §8.01-428.

4. Rosillo v. Winters, 235 Va. 268, 367 S.E.2d 717 (1988):
    a. Draft order for appointment of a receiver to take charge of partnership assets should not have been entered, where endorsement of defendant's counsel was not obtained nor was counsel furnished with reasonable notice of the time and place of presenting the draft for entry. The fact that the attorneys were at odds on the form of the order made the requirement of notice and an opportunity for a hearing all the more important in this case.

5. Edwards v. Commonwealth, No. 0469-00-1, 2001 Va. App. LEXIS 189 (ct. of Apps. Apr. 10, 2001)

a. When dispensing with endorsement or notice pursuant to VSCR 1:13, a better practice would be for trial court to include a statement reflecting its decision to exercise its discretion, but in the absence of such a statement, the court on appeal will presume that the trial court exercised its discretion.

6. Gantt v. Gantt, No. 1973-02-3, 2003 Va. App. LEXIS 112 (Ct. of Appeals Mar. 4, 2003):
   a. Courts are presumed to act in accordance with the law, so a claim that opposing counsel submitted the wrong last page of order, without any allegation of fraud, indicate that the court exercised its discretion in dispensing with the endorsement of the decree.

Editor's Note:

The Committee's recommendation that no change be made to current law was adopted by consensus.