

# The Difficulty in Waiving the Appellate Bond Requirement for Indigent Defendants Appealing from General District Court to Circuit Court Pursuant to Virginia Section 16.1-107

Steven A. Krieger\*

*In Virginia's two-tier trial court system, a losing defendant may appeal to the Circuit Court for a trial de novo to be heard by a judge or jury simply by paying the fees, costs, and an appeal bond usually equal to the judgment amount. However, an indigent defendant is only required to pay the appeal bond in very limited circumstances. Unfortunately for the indigent defendant, there is no clear way for the defendant to have the court make the necessary indigency determination, which undermines the entire purpose of the exemption for the indigent defendant. There are two possible solutions: either the courts should start applying a more flexible standard for when a motion to determine indigency should be heard as the General Assembly intended, or the General Assembly should amend Section 16.1-107 to clearly give the indigent defendant authority to bring such a motion in Circuit Court.*

I. INTRODUCTION .....	390
II. HISTORY OF THE INDIGENT IN VIRGINIA .....	391
A. Colonial and Post-Revolutionary Virginia .....	391
B. The Antebellum South and Post-Civil War Vagrancy Laws .....	393
C. The Jim Crow Era's Political and Educational Disenfranchisement of the Indigent, Both White and Black.....	394
D. Civil Rights Movement to Present Day.....	395
III. CONSTITUTIONAL RIGHT TO A JURY TRIAL .....	395
A. Virginia's Right to a Jury Trial in Civil Matters .....	396
B. Does the Bond Requirement Violate the Virginia Constitution? .....	397

---

\* Steven A. Krieger is the Managing Attorney of Steven Krieger Law, PLLC, a small Arlington, Virginia-based civil litigation law firm that practices mostly in Virginia state courts in matters related to contract disputes and misrepresentations. Mr. Krieger graduated from UCLA School of Law's Public Interest in Law and Policy program in 2011 and the University of Michigan in 2002. This Article would not have been possible without the truly excellent research assistance of Susann Narholm, Esq. and Andrew Salinas (J.D. expected 2020 Washington and Lee University School of Law), Victor M. Glasberg, Esq. for his insights and discussions on this topic, and the editors, including but not limited to Alexis Christensen and Hannah Henderson of the *Georgetown Journal on Poverty Law & Policy*, who believed this issue important enough to justify publication and whose comments and tireless editing greatly improved the article. © 2020, Steven A. Krieger.

IV. THE INDIGENCY DETERMINATION .....	397
A. <i>When Does the Indigency Determination Need to be Made?</i> .....	397
B. <i>How does Virginia Define an “Indigent” Defendant?</i> .....	401
V. CURRENT BEST PRACTICE FOR LITIGATORS: FILING A POST-JUDGMENT “MOTION TO DETERMINE INDIGENCY” IN GENERAL DISTRICT COURT .....	404
VI. ADDING NINE WORDS TO SECTION 16.1-107(B) WOULD ALLEVIATE THIS ISSUE FOR INDIGENT DEFENDANTS .....	407

## I. INTRODUCTION

One of the unique legal features in Virginia is the two-tier trial court system, which provides both parties with a right to a *de novo* appeal from General District Court to Circuit Court.<sup>1</sup> The *de novo* appeal allows an unsuccessful defendant to have the case litigated again in Circuit Court, as if the case never occurred in General District Court. Additionally, the *de novo* appeal allows the case to be heard before a judge or jury, as jury trials are not conducted in General District Court.<sup>2</sup> However, to discourage unsuccessful defendants from abusing the system, Virginia Code Section 16.1-107 requires the defendant to post a bond to perfect the appeal, as bonds are “designed to protect the judgment rights of successful litigants.”<sup>3</sup> In other words, this ensures that the plaintiff is able to collect upon a judgment should the plaintiff prevail again in Circuit Court.<sup>4</sup> But, what if the defendant is indigent and cannot afford the appeal bond? Are jury trials only for the defendants that have the financial resources to post the appeal bond?

If you are a litigator in Virginia, eventually you will be approached by a defendant who unsuccessfully represented himself in General District Court and wants to appeal to Circuit Court. The defendant may even have filed the notice of appeal before approaching you.<sup>5</sup> One of the first questions you may ask is: “Did you pay the appeal bond?”<sup>6</sup> However, if the defendant is indigent and cannot afford the appeal bond, which is why the defendant was *pro se* to begin with, and the defendant wants a jury trial in Circuit Court to hear the appeal, then the indigent defendant must have the court make an indigency determination to waive the bond requirement. Unfortunately, there is no clear explanation in the Virginia Code for how an indigent defendant obtains this determination.

1. See VA. CODE ANN. § 16.1-106 (2019).

2. *Id.* (“Such appeal shall be to a court of record having jurisdiction within the territory of the court from which the appeal is taken and shall be heard *de novo*.”).

3. Greer v. Dillard, 193 S.E.2d 668, 670 (Va. 1973).

4. Tauber v. Commonwealth *ex rel.* Kilgore, 562 S.E.2d 118, 132 (Va. 2002) (“The purpose of the statute is to secure payment of the full judgment amount . . . A lesser [bond] amount would undermine the security of the judgment to which a prevailing party is entitled in the event that an appellant does not succeed on appeal.”); Mahoney v. Mahoney, 537 S.E.2d 626, 628 (Va. 2000) (“An appeal bond provides assurances that any judgment that may be rendered on appeal, if perfected, will be satisfied.”).

5. See COMMONWEALTH OF VA., FORM DC-475 NOTICE OF APPEAL-CIVIL (2011).

6. See COMMONWEALTH OF VA., FORM DC-460 CIVIL APPEAL BOND (2011).

This is the exact situation in the Arlington Circuit Court case *M&R Taxi Co., Inc. v. Beniyam Yilma*, decided on April 24, 2019.<sup>7</sup> In *Yilma*, the defendant-taxicab driver was sued by a taxicab company to enforce a non-compete provision in an employment agreement because this individual defendant allegedly drove for another taxicab company. The defendant, unable to afford counsel or find *pro bono* representation, attempted to defend himself against plaintiff's experienced counsel. Not surprisingly, the trial in General District Court resulted in a judgment for plaintiff in the amount exceeding \$10,000, plus fees and costs for driving for another taxicab company. The defendant believed that he had meritorious defenses to the allegations, including (1) the non-compete provision was not part of the contract; (2) the non-compete provision as applied to a taxicab driver is an unenforceable penalty; (3) the non-compete provision as written is too broad and/or too restrictive in any capacity; and (4) the plaintiff has suffered no damages because the defendant returned to work for plaintiff's company. As such, the defendant proceeded to seek an appeal of right to the Circuit Court and obtain a trial by jury by paying the appellate fees and costs, but he could not afford the appeal bond. Plaintiff filed a motion to dismiss the appeal for lack of bond payment. Subsequently, Defendant found a lawyer<sup>8</sup> after the case was transferred to Circuit Court for the appeal to oppose plaintiff's motion to dismiss on the basis that the defendant was indigent such that the appeal bond was not a requirement for this defendant to appeal.

## II. HISTORY OF THE INDIGENT IN VIRGINIA

### A. Colonial and Post-Revolutionary Virginia

Virginia has a complicated history of providing aid for the indigent. A major driving force towards colonizing Virginia came from the growing population of indigent persons in England with no opportunities for employment.<sup>9</sup> Drawing from the practices of Elizabethan England, Colonial Virginia largely left the Anglican Church in charge of providing to indigent persons on a parish-wide basis.<sup>10</sup> The governing body of a parish, known as the vestry, was comprised of a group of twelve white men whose duty it was to collect tithes and administer to the poor<sup>11</sup> These vestrymen, among them individuals such as George Washington, would strive to protect the parish from bearing the costs of maintaining indigent persons by placing them in apprenticeships and other artisan-class trades.<sup>12</sup> In England, this

---

7. *M&R Taxi Co. v. Yilma*, No. CL 18-3329 (Arlington Cir. Ct. Apr. 24, 2019) (on file with author). The following information on *Yilma* is based on the author's personal knowledge of the case; there is no published opinion or order.

8. Steven Krieger Law, PLLC, of which the author is the Managing Attorney, represented the defendant.

9. See Marcus Wilson Jernegan, *The Development of Poor Relief in Colonial Virginia*, 3 SOC. SERV. REV. 1, 3-5 (1929) ("[England's] principal reason for colonizing these parts is to give outlet to so many idle, wretched people as they have in England, and thus to prevent the dangers that might be feared of them.").

10. See Howard Mackey, *The Operation of the English Old Poor Law in Colonial Virginia*, 73 VA. MAG. HIST. & BIOGRAPHY 29, 29-30 (1965).

11. Jernegan, *supra* note 9, at 6 (discussing the varied quality of vestrymen through Virginia).

12. See *id.*

“Speenhamland System” of indigent care drew eventual ire from English middle-class tithe-payers for engendering a perpetually welfare-dependent indigent population.<sup>13</sup> In Colonial Virginia, however, this system garnered little controversy, in part because slavery removed a large percentage of otherwise qualifying indigent populations from parish care to that of Virginian masters.<sup>14</sup> Indeed, a central group of the indigent population in Colonial Virginia was comprised of descendants of former white indentured servants, many of whom were born as destitute, “illegitimate” orphans.<sup>15</sup>

In the wake of the United States’ newly-won independence from England, many southern states took great efforts to care for the indigent through legislation<sup>16</sup> since in the largely agrarian states of Virginia and Maryland, over half of the white male population had no property (and little wealth) at the end of the Colonial period.<sup>17</sup> Leading up to the ratification of the U.S. Constitution and the growing emphasis on the separation between church and state,<sup>18</sup> church vestries were replaced with secular overseers of the poor who followed the authority of local city and rural county courts in Virginia, which had taken over the responsibility of administering welfare to indigent populations.<sup>19</sup> For example, in 1787, the Virginia General Assembly passed a statute empowering city courts to levy taxes and construct poor houses based solely upon judicial discretion and expanded these powers to rural county courts only five years later.<sup>20</sup> These courts, comprised of justices of the peace meeting monthly, played a vital role in Virginia’s social and legal culture in the eighteenth century, functioning as an “informal, discretionary agency for solving the problems of community affairs.”<sup>21</sup>

Despite the county courts’ community-centric focus, free Blacks faced numerous legal and economic restrictions that white indigent people did not in the South’s slave-dominant culture.<sup>22</sup> For instance, records show that in York County, Virginia, near the end of the eighteenth century, the county court overzealously conscripted young Black children into apprenticeships, in one recorded instance even removing children from the care of their parents.<sup>23</sup> Nevertheless, even free Blacks had access to Southern courts.<sup>24</sup> York County records reveal that in October of 1800, a lawsuit was filed on behalf of a free Black child apprentice against his

---

13. Mackey, *supra* note 10, at 30.

14. *See id.* at 30–31.

15. Jernegan, *supra* note 9, at 5.

16. James W. Ely Jr., *Poor Laws of the Post-Revolutionary South, 1776-1800*, 21 *TULSA L. REV.* 1, 2 (1985) (“Between 1776 and 1800 the legislatures of [Virginia, North Carolina, and South Carolina] passed at least fifty-two measures dealing with paupers and vagrants.”).

17. *See* Billy G. Smith, *Poverty and Economic Marginality in Eighteenth-Century America*, 132 *PROCEEDINGS AM. PHIL. SOC’Y* 85, 113 (1988).

18. *See* Ely Jr., *supra* note 16, at 4 (“The separation of church and state in the South, which rapidly followed the Declaration of Independence, caused legislators to alter this traditional scheme for handling poor assistance.”) (internal citations omitted).

19. Ely Jr., *supra* note 16, at 4–7; Mackey, *supra* note 10, at 34–45.

20. Ely Jr., *supra* note 16, at 10.

21. *Id.* at 13.

22. *See id.* at 13–16.

23. *Id.* at 15–16.

24. *See* TED MARIS-WOLF, *FAMILY BONDS: FREE BLACKS AND RE-ENSLAVEMENT LAW IN ANTEBELLUM VIRGINIA* 45–62 (2015).

employer who sought to take him out of the Commonwealth.<sup>25</sup> Not only did both parties have counsel present, a rarity for such a dispute, but the court actually ruled in favor of the free Black child over the white employer.<sup>26</sup> This was a rare instance of legal justice for Black Americans. Notwithstanding the local overseer system, both white and Black indigents were largely victims of Virginia’s vagrancy laws.

### *B. The Antebellum South and Post-Civil War Vagrancy Laws*

Since the Colonial and throughout the Antebellum eras, despite providing indigent persons with apprenticeship placements and modest welfare payments, southern legislatures made sure to distinguish between the indigent and the vagrant.<sup>27</sup> Vagrants were defined as persons “not betaking themselves to honest occupations” and described as “idle and disorderly,” and so were treated as public safety risks and ordered into labor if found.<sup>28</sup> Vagrancy laws in the South were used as a form of socioeconomic control against the indigent population by wealthier slaveholders, particularly to prevent poor whites from fraternizing with slaves or free Blacks.<sup>29</sup> This had the effect of criminalizing a person’s economic status rather than a person’s conduct, something that even contemporary English vagrancy laws had rejected by that time.<sup>30</sup>

Immediately after the Civil War, fearing what would happen with thousands of freed Black Americans roaming Virginia, the General Assembly passed the Act Providing for the Punishment of Vagrants (the Act) in early 1866.<sup>31</sup> Passing both houses of the legislature by oral vote, the Act charged the justices of the peace and overseers of the poor to arrest any vagrants and press them into employment for a period of three months; if someone should run away before their term expired, the punishment was an extra month of free labor while wearing a ball and chain.<sup>32</sup> Although the extent to which the Act itself was enforced is unknown, its passage sparked national outcry, and a short five months later Congress submitted the Fourteenth Amendment to the states for ratification, which required states to provide due process and equal protection rights for all people within their borders.<sup>33</sup> Although the Fourteenth Amendment was quickly adopted in 1868 and Virginia’s 1869 Reconstruction Constitution provided voting rights and free public schools for indigent persons,<sup>34</sup> the Act Providing for the Punishment of Vagrants remained law in Virginia for nearly forty years, until its repeal in 1904.<sup>35</sup>

25. Ely Jr., *supra* note 16, at 16.

26. *Id.*

27. Brent Tarter, *Vagrancy Act of 1866*, ENCYCLOPEDIA VA. (Aug. 25, 2015), [https://www.encyclopediavirginia.org/Vagrancy\\_Act\\_of\\_1866#start\\_entry](https://www.encyclopediavirginia.org/Vagrancy_Act_of_1866#start_entry).

28. *Id.*

29. KERI LEIGH MERRITT, *MASTERLESS MEN: POOR WHITES AND SLAVERY IN THE ANTEBELLUM SOUTH* 180–82, 186–87 (2017).

30. *Id.* at 181–82.

31. Tarter, *supra* note 27.

32. *Id.*

33. *Id.*

34. Brent Tarter & the Dictionary of Va. Biography, *John C. Underwood (1809-1873)*, ENCYCLOPEDIA VA. (Dec. 13, 2015), [https://www.encyclopediavirginia.org/Underwood\\_John\\_C\\_1809-1873](https://www.encyclopediavirginia.org/Underwood_John_C_1809-1873).

35. Tarter, *supra* note 27.

*C. The Jim Crow Era's Political and Educational Disenfranchisement of the Indigent, Both White and Black*

Despite Virginia's promising indigent reforms that provided voting rights and free public schools, this trend came to an abrupt stop in 1902, when the Virginia Constitution was rewritten for the Jim Crow era. Of particular interest to the Jim Crow reformers were the voting rights of Black Virginians and lower class whites.<sup>36</sup> Among other measures,<sup>37</sup> the convention ultimately concocted a poll-tax system, whereby men could only vote in an election if they paid a \$1.50 tax for each of the three years preceding an election.<sup>38</sup> Although \$1.50 a year, or \$44.99 in 2020 dollars,<sup>39</sup> may not seem like much today, this poll-tax immediately disenfranchised ninety percent of Black men and nearly half of white men from voting in Virginia elections.<sup>40</sup> Rather than turn the new constitution over to Virginians for ratification, the Supreme Court of Virginia ruled a year later that because the convention, comprised of duly-elected representatives, had ratified the constitution, "all the citizens of Virginia owe[d] their obedience and loyal allegiance" to it, despite the fact that it effectively disenfranchised a majority of the electorate.<sup>41</sup>

The other major reform from the Reconstruction Constitution to benefit indigent Virginians, free public school, also suffered from racial segregation and underfunding.<sup>42</sup> In 1951, a sixteen-year-old student named Barbara Rose Johns organized a student strike to protest the poor conditions in her all-Black high school in Farmville, Virginia.<sup>43</sup> This protest eventually garnered the attention of the National Association for the Advancement of Colored People, who filed suit against the school district to desegregate the school system.<sup>44</sup> While the Eastern District of Virginia unanimously dismissed Johns' claim,<sup>45</sup> on appeal it was consolidated with four other cases that comprised the famous U.S. Supreme Court

---

36. See Susan Breitzer, *Virginia Constitutional Convention (1901–1902)*, ENCYCLOPEDIA VA. (May 20, 2015), [https://www.encyclopediavirginia.org/Constitutional\\_Convention\\_Virginia\\_1901-1902](https://www.encyclopediavirginia.org/Constitutional_Convention_Virginia_1901-1902).

37. See *id.* (discussing the Convention's temporary adoption of the Understanding Clause, which would require men unable to pay the poll-tax "to give a 'reasonable' explanation of any section of the new state constitution at the demand of a registration board," comprised of white men whose broad discretion determined what constituted a reasonable explanation).

38. *Id.*

39. *\$1.50 in 1902 → 2019 | CPI Inflation Calculator, U.S. Official Inflation Data*, ALIOTH FINANCE, <https://www.officialdata.org/us/inflation/1902?amount=1.50> (last visited Apr. 7, 2020).

40. *Voting Requirements of the Constitution of Virginia, 1902*, LIBR. OF VA., [http://edu.lva.virginia.gov/online\\_classroom/shaping\\_the\\_constitution/doc/constitution\\_1902](http://edu.lva.virginia.gov/online_classroom/shaping_the_constitution/doc/constitution_1902) (last visited Apr. 7, 2020).

41. See *Taylor v. Commonwealth*, 44 S.E. 754, 755 (Va. 1903) (arising after the plaintiff in error was tried by a judge instead of by a jury in a criminal trial and thereafter argued that because the 1902 Convention lacked authority, the 1902 Virginia constitution was invalid, and therefore his lack of a jury trial violated the 1869 Virginia constitution).

42. Brian J. Daugherty, *Desegregation in Public Schools*, ENCYCLOPEDIA VA. (May 30, 2014), [https://www.encyclopediavirginia.org/desegregation\\_in\\_public\\_schools](https://www.encyclopediavirginia.org/desegregation_in_public_schools).

43. Ronald L. Heinemann, *Moton School Strike and Prince Edward County School Closings*, ENCYCLOPEDIA VA. (Jan. 21, 2014), [https://www.encyclopediavirginia.org/moton\\_school\\_strike\\_and\\_prince\\_edward\\_county\\_school\\_closings](https://www.encyclopediavirginia.org/moton_school_strike_and_prince_edward_county_school_closings)

44. *Id.*

45. See generally *Davis v. Cty. Sch. Bd. of Prince Edward Cty.*, 103 F. Supp. 337 (E.D. Va. 1952).

case *Brown v. Board of Education* that ended the “separate but equal” doctrine.<sup>46</sup> In the aftermath, white Virginians largely resisted integration in a period known as the Massive Resistance, which involved the closing of many public schools and the creation of private schools throughout the Commonwealth.<sup>47</sup>

#### D. Civil Rights Movement to Present Day

With the passage of the federal Civil Rights Act of 1964 and the Voting Rights Act of 1965, barriers to education and voting rights gradually, but not completely,<sup>48</sup> dissolved for the indigent in Virginia.<sup>49</sup> With the revision of the Virginia constitution again from 1969–71,<sup>50</sup> socioeconomic conditions improved for all Virginians.<sup>51</sup> In 2007, per legislative amendment from Virginia’s House signed by then Governor Tim Kaine,<sup>52</sup> the General Assembly amended Section 16.1-107 of the Virginia Code to remove the requirement of posting an appeal bond in a civil matter for indigent appellants, which removes a financial barrier for these indigent appellants. Unfortunately, as this Article discusses, the Virginia Code does not provide temporal or jurisdictional guidance to indigent appellants or courts as to when an indigency determination is to be made, which makes utilizing the benefits of this statute very difficult.<sup>53</sup>

### III. CONSTITUTIONAL RIGHT TO A JURY TRIAL

When we think of the right to a jury trial, many think of the right in the criminal context, which is clearly outlined in the U.S. Constitution. Article III, Section 2 states, “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury,”<sup>54</sup> and the Sixth Amendment states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”<sup>55</sup> Although the U.S. Constitution does not emphasize a right to jury trial in all civil cases, the Commonwealth of Virginia has steadfastly recognized a right to jury trial in civil cases since the founding of the nation.

46. See generally *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

47. Daugherty, *supra* note 42.

48. See generally Heather A. O’Connell, *The Impact of Slavery on Racial Inequality in Poverty in the Contemporary U.S. South*, 90 SOC. FORCES 713 (2012).

49. Daugherty, *supra* note 42; Susan Breitzer, *Civil Rights Act of 1964*, ENCYCLOPEDIA VA. (Jan. 21, 2012), [https://www.encyclopediavirginia.org/Civil\\_Rights\\_Act\\_of\\_1964](https://www.encyclopediavirginia.org/Civil_Rights_Act_of_1964).

50. See *Register of the Papers of A.E. Dick Howard for the Virginia Commission for Constitutional Revision 1969-71*, U. VA. L. LIBR., <https://web.archive.org/web/20060829212250/http://www.law.virginia.edu/lawweb/lawweb2.nsf/d463cf2036005b1a852566ac007a2601/21c74a5649a75f8c852567440050276c?OpenDocument> (last visited Apr. 7, 2020).

51. See, e.g., *Historical Income Tables: Households: Table H-8 Median Income by State*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html> (last visited Apr. 7, 2020) (tracking Virginia’s steady increase in the average median household income since 1984 to 2018).

52. *HB 2425 District Court; right to remove case to circuit court eliminated*, VA. LEGIS. INFO. SESS., <http://lis.virginia.gov/cgi-bin/legp604.exe?071+sum+HB2425S> (last visited Apr. 7, 2020).

53. See *infra* Section IV.

54. U.S. CONST. art. III, § 2.

55. *Id.* amend. VI.

*A. Virginia's Right to a Jury Trial in Civil Matters*

Article I, Section 11 of the Constitution of the Commonwealth of Virginia provides that “in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.”<sup>56</sup> This constitutional mandate was further underscored as a pillar of civil procedure when it was codified as Section 8.01-336 of the Code of Virginia, which states “The right of trial by jury as declared in Article I, Section 11 of the Constitution of Virginia and by statutes thereof shall be preserved inviolate to the parties.”<sup>57</sup> This essential aspect of justice has been noted by the Supreme Court of Virginia as well in *Bethel Inv. Co. v. City of Hampton*.<sup>58</sup> In 2006, the Supreme Court of Virginia noted that this provision of the Constitution’s Bill of Rights guarantees that “a jury will resolve disputed facts, and that has been the jury’s sole function from the adoption of the Constitution to the present time.”<sup>59</sup>

At the time *Bethel* was decided, there remained within the Virginia Code a means for a defendant in a General District Court case to remove the matter to the Circuit Court, and thus preserve the right to a jury trial.<sup>60</sup> However, in 2007, that provision of Virginia Code Section 16.1-92 was repealed without replacement.<sup>61</sup> As a consequence, the only means by which a civil defendant could secure a trial by jury was to proceed with an appeal to the Circuit Court following an adverse decision in the General District Court. This, however, was not intended to vitiate a defendant’s constitutional right to a trial by jury.

Indeed, in 2007, the General Assembly included an amendment to Section 16.1-107 of the Virginia Code that safeguarded indigent persons from the appellate bond requirement except in specific cases. The summary of H.B. 2425 as originally enacted states: “Indigent persons do not have to post an appeal bond except in cases of trespass, ejection, or any action involving the recovery of rents,”<sup>62</sup> which is similar to how the current version of Section 16.1-107 reads.<sup>63</sup> The enacted version of Section 16.1-107 also reflects the indigency exception for general appeals as stated in Section 8.01-676.1(N): “No person who is an indigent shall be required to post security for an appeal.”<sup>64</sup> In this way, the right of a person without means to obtain a trial by jury in Circuit Court was protected.

---

56. *Id.* art. I, § 1.

57. VA. CODE ANN. § 8.01-336 (2014).

58. *See, e.g.*, *Bethel Inv. Co. v. City of Hampton*, 636 S.E.2d 466, 469 (Va. 2006); *Speet v. Bacaj*, 377 S.E.2d 397, 400 (Va. 1989); *Stanardsville Vol. Fire Co. v. Berry*, 331 S.E.2d 466, 469 (Va. 1985).

59. *Bethel Inv. Co.*, 636 S.E.2d at 469.

60. VA. CODE ANN. § 16.1-92 (repealed 2007).

61. *Id.*

62. 2007 Session, *H.B. 2425 Summary As Enacted With Governor's Recommendation*, VA. LEGIS. INFO. SYS. (Apr. 4, 2007),

<https://lis.virginia.gov/cgi-bin/legp604.exe?071+sum+HB2425S&071+sum+HB2425S>.

63. The current version of Section 16.1-107 adds an additional category of defendant, the foreclosed homeowner, for whom an appeal bond is required even if the defendant is indigent: “In all civil cases, except trespass, ejection, *unlawful detainer against a former owner based upon a foreclosure against that owner*, or any action involving the recovering rents, no indigent person shall be required to post an appeal bond.” VA. CODE ANN. § 16.1-107 (2014) (emphasis added).

64. VA. CODE ANN. § 8.01-676.1(N) (2016).



*B. Does the Bond Requirement Violate the Virginia Constitution?*

Arguably, having a bond requirement for any defendant to obtain a civil jury trial, regardless of their indigency status, violates the Virginia Constitution. One Virginia court has considered the constitutionality of Section 16.1-107 in connection with a party's right to jury trial.<sup>65</sup> In *Elyazidi v. Barr*, the Court issued an opinion letter concerning the defendant-petitioner's constitutional challenge to Section 16.1-107, wherein defendant-petitioner argued that the requirement of a bond interfered with her right to a trial by jury.<sup>66</sup> The Court noted the holding of *Brooks v. Potomac*, a criminal matter in which the Supreme Court of Virginia set out the standard for determining whether a party's right to a jury is infringed when an initial trial is held in an "inferior" court sitting without a jury.<sup>67</sup> "The fact that the party is not able to obtain [a jury trial] in the inferior court," the Court held, "is not a deprivation of the right of trial by jury, if provision is made whereby it can be secured upon an appeal by a reasonable, procedure."<sup>68</sup> The Court reasoned that although the Supreme Court of Virginia had not considered whether Section 16.1-107 establishes a "reasonable, simple procedure," the potential for an unconstitutional deprivation of the right to a trial by jury by requiring an appeal bond is saved by virtue of the existing exception for indigent litigants.<sup>69</sup>

#### IV. THE INDIGENCY DETERMINATION

There is no simple process in Virginia for an indigent defendant to avail themselves of the bond waiver permissible under Section 16.1-107. Although the Virginia Code provides a guideline in the criminal context for how to define an indigent individual and provides some guidance in other limited circumstances,<sup>70</sup> there is no specific guideline for a civil court to make a general indigency determination. As such, how does that defendant get an indigency determination from the courts to allow the appeal to proceed without payment of the bond?

*A. When Does the Indigency Determination Need to be Made?*

Virginia, like many jurisdictions, has time limits and deadlines for many issues during the regular course of trial litigation, including responses to complaints,<sup>71</sup> filing counterclaims in General District Court<sup>72</sup> and Circuit Court,<sup>73</sup> joining a party,<sup>74</sup> adding a third party,<sup>75</sup> substitution of parties,<sup>76</sup> demanding a jury trial,<sup>77</sup>

---

65. *Elyazidi v. Barr*, 91 Va. Cir. 89, 91–93 (2015).

66. *Id.* at 90.

67. *Id.* at 91.

68. *Id.* at 91 (citing *Brooks v. Potomac*, 141 S.E. 249, 251 (Va. 1928)) (brackets in original).

69. *Id.* at 92–93.

70. See *infra* notes 116–22 and accompanying text.

71. VA. SUP. CT. R. 3:8.

72. VA. CODE ANN. § 16.1-88.01 (1998).

73. VA. SUP. CT. R. 3:9.

74. VA. SUP. CT. R. 3:12.

75. VA. SUP. CT. R. 3:13.

76. VA. SUP. CT. R. 3:17.

77. VA. SUP. CT. R. 3:21.

discovery,<sup>78</sup> and when a judgment becomes final and the court loses jurisdiction.<sup>79</sup> There is even a rule explaining how to calculate deadlines.<sup>80</sup> Naturally, there are also time limits for appeals.<sup>81</sup> Virginia has no fewer than eight deadlines when appealing from the trial court to the Supreme Court of Virginia, including filing the notice of appeal,<sup>82</sup> transcript,<sup>83</sup> notice of filing the transcript,<sup>84</sup> objections to the transcript,<sup>85</sup> petition to the Court for appeal,<sup>86</sup> brief in opposition to petition for appeal,<sup>87</sup> reply brief,<sup>88</sup> and petition for rehearing.<sup>89</sup> If the appeal is granted by the Supreme Court of Virginia, there are additional deadlines, including the agreed designation of appendix,<sup>90</sup> appellant's designation,<sup>91</sup> appellee's designation,<sup>92</sup> appellant's brief,<sup>93</sup> appendix,<sup>94</sup> appellee's brief,<sup>95</sup> reply brief,<sup>96</sup> notice of petition for rehearing,<sup>97</sup> petition for rehearing,<sup>98</sup> and motion for stay of mandate.<sup>99</sup>

While Virginia has deadlines when appealing from the General District Court to the Circuit Court, including when a notice of appeal must be filed<sup>100</sup> and when the bond must be paid,<sup>101</sup> it does not appear that any legal authority exists in Virginia dictating the time in which an indigent defendant must seek the status of an indigent party, whether in connection with a bond or otherwise. The lack of a deadline is both meaningful and sensible, as one can imagine a situation in which a party is gainfully employed at the beginning of a case but then finds themselves

---

78. *See generally* Va. SUP. CT. R. 4:1–4:15.

79. VA. SUP. CT. R. 1:1.

80. VA. SUP. CT. R. 1:7.

81. *See infra* notes 82–101 and accompanying text.

82. VA. SUP. CT. R. 5:9.

83. VA. SUP. CT. R. 5:11(b).

84. VA. SUP. CT. R. 5:11(c).

85. VA. SUP. CT. R. 5:11(g).

86. VA. SUP. CT. R. 5:17.

87. VA. SUP. CT. R. 5:18.

88. VA. SUP. CT. R. 5:19.

89. VA. SUP. CT. R. 5:20.

90. VA. SUP. CT. R. 5:32(b).

91. *Id.*

92. *Id.*

93. VA. SUP. CT. R. 5:27.

94. VA. SUP. CT. R. 5:32.

95. VA. SUP. CT. R. 5:28.

96. VA. SUP. CT. R. 5:29.

97. VA. SUP. CT. R. 5:37(b).

98. VA. SUP. CT. R. 5:37(c).

99. VA. SUP. CT. R. 5:39.

100. VA. CODE ANN. § 16.1-106 (“From any order entered or judgment rendered in a court not of record in a civil case in which the matter in controversy is of greater value than \$20, exclusive of interest, any attorney fees contracted for in the instrument, and costs, or when the case involves the constitutionality or validity of a statute of the Commonwealth . . . there shall be an appeal of right, if taken within 10 days after such order or judgment, to a court of record.”).

101. VA. CODE ANN. § 16.1-107 (“No appeal shall be allowed unless and until the party applying for the same or someone for him shall give bond, in an amount and with sufficient surety approved by the judge or by his clerk if there is one, or in an amount sufficient to satisfy the judgment of the court in which it was rendered. Either such amount shall include the award of attorney fees, if any. Such bond shall be posted within 30 days from the date of judgment, except for an appeal from the judgment of a general district court on an unlawful detainer pursuant to § 8.01-129.”).

without means and/or on public assistance and unable to pay the costs associated with their case or appeal.<sup>102</sup>

Suppose an individual defendant of modest means, but not indigent, has enough money to pay the fees and costs to notice the appeal prior to the ten-day deadline, and expects to pay the bond prior to the thirty-day deadline. However, the defendant's child has an expensive medical emergency and the funds set aside for the bond now must pay medical bills. In such a situation, surely the defendant should be able to file an indigency motion to get the bond waived even if the motion was not heard prior to the thirty-day deadline.<sup>103</sup>

Neither Section 16.1-107 as enacted nor its legislative history refer to a requirement that the defendant make an application for a waiver of the bond requirement within a specified time to obtain the protection of the exception to the bond requirement. The absence of such a requirement denotes legislative intent that the claim of indigency at any time is sufficient to avail the party of the exception allowing the matter to proceed without an appeal bond.<sup>104</sup> Appendix C of the General District Court Manual further supports this view, as the Comments state:

Once the appeal has been perfected by posting a required appeal bond or by payment of the costs, *or after ten days have elapsed since the entry of the judgment . . . when no appeal bond or costs are required to perfect the appeal*, any withdrawal of the appeal must occur in Circuit Court.<sup>105</sup>

Specifically, if a noticed indigency motion or application were a statutory and jurisdictional requirement for an indigent civil party to perfect an appeal, the aforementioned ten-day period would never be applicable.

However, establishing an arbitrary time period in which an indigent person is required to post a bond, when one's indigency status is not necessarily static, threatens the purpose behind the exception—removing the financial obligation of the bond requirement necessary to appeal to Circuit Court. But, the failure to include a deadline or provide instruction to an indigent defendant from which court, General District or Circuit, to seek the indigency determination as outlined in Section 16.1-107 creates even more trouble for the indigent defendant.<sup>106</sup>

While some indigent defendants may have pro bono legal counsel, many indigent defendants do not—if they could afford legal counsel, they would not be

102. Admittedly, the timing issue may be more relevant in a criminal context when court appointed counsel is required early in a case if a party is unable to secure counsel, but the concept applies equally in civil cases as well.

103. See VA. CODE ANN. § 16.1-107.

104. See *United States v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”); *Va. Soc’y for Human Life v. Caldwell*, 500 S.E.2d 814, 816 (Va. 1998) (“[A] statute will be construed in such a manner as to avoid a constitutional question wherever this is possible.” (citing *Eaton v. Davis*, 10 S.E.2d 893, 897 (Va. 1940))). In the matter at hand, the reasonable flexibility in application of the plain letter of the statute will avoid a constitutional inquiry as to whether or not the statute abridges the right of the indigent to a trial by jury.

105. DEP’T OF JUD. SERV., GENERAL DISTRICT COURT MANUAL: APPENDIX C, at 3–4 (2020), [http://www.courts.state.va.us/courts/gd/resources/manuals/gdman/appendix\\_c.pdf](http://www.courts.state.va.us/courts/gd/resources/manuals/gdman/appendix_c.pdf) (emphasis added).

106. See *infra* Section VI for a recommended solution.

indigent. As such, if an indigent defendant wants to appeal a judgment and learns of the bond waiver provision contained in Section 16.1-107, the defendant may not realize that an indigency determination is required. Defendants may believe that because of their financial circumstances they are indigent, and no further action is required. Or, perhaps the defendant has already received some type of indigency determination from a public assistance organization in Virginia and does not realize that the court may have to make a separate indigency determination.<sup>107</sup>

If the appealing indigent defendant does not post the bond, a plaintiff will almost certainly file a motion in Circuit Court to dismiss the appeal for failure to comply with the bond requirement and the court will have to decide whether the indigency determination can be made in Circuit Court.<sup>108</sup> In at least one Circuit Court case in Virginia, the court determined that it did not have subject-matter jurisdiction because the indigent defendant did not make the indigency determination in General District Court.<sup>109</sup> The court reasoned that the defendant should have filed for “*in forma pauperis* relief under Va. Code [Section] 16.1-69.48:4; 17.1-606 [which] may only be made to the general district court.”<sup>110</sup>

The full language of Section 16.1-69.48:4 states: “Costs generally. The provisions of Chapter 6 (§ 17.1-600 et seq.) of Title 17.1 shall apply, *mutatis mutandis*, to the laws of costs in the district courts.” The *in forma pauperis* application and the title and plain reading of this Code section make clear that this section only applies to costs, which are not equivalent to bonds and should not be treated synonymously. A cost is paid to the clerk to initiate an action by the court, like filing a complaint or noticing an appeal. While costs may be awarded in litigation, the clerk does not return the costs to the litigant. Costs are used by the court to fund its activities. A bond is paid to the clerk and held in escrow for the duration of the litigation and returned, usually to one of the parties or their counsel, at the conclusion of the litigation. Bonds are used to provide security and assurance of collecting on a judgment to the non-appealing party should the non-appealing party prevail again.

Assuming an indigent defendant, likely unrepresented by counsel, finds this court’s unpublished order, the defendant would only have twenty-one days from the judgment date in General District Court to file an *in forma pauperis* application or a motion to determine indigency before the General District Court loses jurisdiction.<sup>111</sup> The Court in *Yilma* may be suggesting that if an *in forma pauperis* application was granted in General District Court to waive costs associated with an appeal to Circuit Court, then such a finding is a sufficient indigency determination to also waive the bond requirement.<sup>112</sup> While this conclusion is logical, the requirement that the *in forma pauperis* determination may only be done in the General District Court is not found in the Virginia Code nor in any opinions

---

107. Some examples of programs in Virginia that have financial eligibility requirements include the Temporary Assistance for Needy Families (TANF), Supplemental Nutrition Assistance Program (SNAP), Electronic Benefit Transfer (EBT), and the Child Care Subsidy Program.

108. As discussed in the hypothetical from this section, a defendant could pay the appeal fees, but not the bond, which could result in the case being transferred to the Circuit Court.

109. *M&R Taxi Co. v. Yilma*, No. CL 18-3329 (Arlington Cir. Ct. Apr. 24, 2019) (on file with author).

110. *Id.*

111. Va. SUP. CT. R. 1:1(a).

112. *See Yilma*, No. CL18-3329.

from the Supreme Court of Virginia.<sup>113</sup> Certainly the Court has not suggested that costs may be waived for indigent defendants in General District Court cases but not Circuit Court cases, so why must an indigency determination be made by the General District Court if that is not required by the statute?<sup>114</sup> Further, what if the defendant, as discussed in Section I, can afford the appeal costs, but not the bond? In such a case, there is no reason to file an *in forma pauperis* application in General District Court prior to noticing an appeal to Circuit Court.<sup>115</sup>

There is no meaningful policy benefit to adding a time restriction by which an appealing defendant must obtain an indigency determination when such a restriction is not included in Section 16.1-107 and the time restriction would only serve to weaken the indigency protection explicitly included by the legislature.

### *B. How does Virginia Define an “Indigent” Defendant?*

The Virginia Code itself does not generally define indigent in the civil context nor specifically define “indigent” in the context of court jurisdiction. The definition of indigency seems to fluctuate depending on the statutory context. For example, Section 19.2-159 provides an extensive guideline for a court to determine a person’s indigent status for the purpose of appointment of counsel in criminal proceedings.<sup>116</sup> While several criminal law statutes<sup>117</sup> refer back to this statute for

---

113. A search for “*pauperis*” only yields four results in the Virginia Code and three related to the Virginia Prisoner Litigation Reform Act and one relates to filing a writ of habeas corpus. See VA. LAW LEGIS. INFO. SYS., [https://law.lis.virginia.gov/search\\_cov.html?query=pauperis](https://law.lis.virginia.gov/search_cov.html?query=pauperis) (last visited Apr. 7, 2020).

114. In fact, in criminal cases, Va. Code Section 19.2-159(B) titled “Determination of indigency; guidelines; statement of indigence; appointment of counsel” is applied in the General District Courts and Circuit Courts.

115. But even if a Circuit Court believed an indigency determination could only be made in General District Court, Va. Code Section 16.1-109(B) arguably requires the Circuit Court to return the case to the General District Court for the General District Court to order the appellant to either post bond or seek appropriate relief—like an indigency determination. The relevant language of Section 16.1-109(B) states:

When a bond or other security is required by law to be posted or given in connection with an appeal or removal from a district court, and there is either (i) a defect in such bond or other security as a result of an error of the district court, or (ii) the district court erroneously failed to require the bond or other security, and the defect or failure is discovered prior to sending the case to the circuit court, the district court shall order that the appellant or applicant for removal cure such defect or failure within a period not longer than the initial period of time for posting the bond or giving the security. If the error or failure is discovered after the case has been sent to the circuit court, the circuit court shall return the case to the district court for the district court to order the appellant or applicant for removal to cure the defect or post the required bond or give the required security within a period of time not longer than the initial period of time for posting the bond or giving the security for removal. Failure to comply with such order shall result in the disallowance of the appeal or denial of the application for removal.

VA. CODE ANN. § 16.1-109(B) (2007).

116. See VA. CODE ANN. § 19.2-159(B) (2008) (outlining factors a court may consider when determining indigency such as whether the person in question is on a state or federally funded public assistance program for the indigent or whether the combined income and assets of a person fall below 125% of the federal poverty income guidelines).

117. See *infra* notes 119–20 and accompanying text.

making indigency determinations,<sup>118</sup> these guidelines are also explicitly referenced in statutes governing family law<sup>119</sup> and court costs in certain civil contexts.<sup>120</sup> In contrast, Titles 32.1 and 37.2 of the Virginia Code, which govern health and health care costs respectively, provide four differing definitions of indigency.<sup>121</sup> Despite these multiple definitions, the vast majority of the Virginia Code either defers to a court to make an indigency determination without any mention to the aforementioned statutes<sup>122</sup> or is completely silent as to how to make an indigency determination.<sup>123</sup>

---

118. *See* VA. CODE ANN. §§ 19.2-321.2(C) (2017) (Motion in the Supreme Court for delayed appeal in criminal cases); 19.2-163.01(A) (2010) (Virginia Indigent Defense Commission established; powers and duties); 19.2-163 (2009) (Compensation of court-appointed counsel); 19.2-163.03 (2007) (Qualifications for court-appointed counsel); 19.2-163.7 (2004) (Counsel in capital cases); 19.2-163.8(A) (2004) (List of qualified attorneys); and 19.2-160 (1989) (Appointment of counsel or waiver of right).

119. *See* VA. CODE ANN. §§ 20-104 (2008) (citing to VA. CODE ANN. § 19.2-159 for when a court makes an indigency determination in a suit for annulment, divorce, or affirmance of a marriage for plaintiffs against nonresident defendants); and 16.1-266 (2005) (citing to § 19.2-159 when the court makes a determination as to whether an adult, guardian, or other adult is indigent in hearings for child abuse/neglect).

120. *Compare* VA. CODE ANN. §§ 17.1-258.3(1) (2015) (“Any clerk of circuit court with an electronic filing system established in accordance with the Rules of Supreme Court of Virginia may charge an additional \$5 fee for every civil case initially filed by paper, except that a person who is determined to be indigent pursuant to § 19.2-159 shall be exempt from the payment of such fee.”), *with* 17.1-606(B) (2019) (“In determining a person’s inability to pay fees or costs (in any civil action in Virginia) on account of his poverty, the court shall consider the factors set forth in subsection B of § 19.2-159 . . .”).

121. *Compare* VA. CODE ANN. §§ 32.1-102.1 (2017) (“‘Charity care’ means health care services delivered to a patient who has a family income at or below 200 percent of the federal poverty level and for which it was determined that no payment was expected . . . at some time following the time the service was provided because the patient met the facility’s criteria for the provision of care without charge due to the patient’s status as an indigent person.”), *and* 32.1-102.2 (2019) (“The Board shall also promulgate regulations authorizing the Commissioner to condition approval of a certificate on the agreement of the applicant to provide a level of charity care to indigent persons or accept patients requiring specialized care.”), *with* 32.1-11 (2008) (allowing the State Board of Health to define income limitations for determining medical indigency who are then entitled to state-provided medical care services free of charge), *with* 32.1-343 (1989) (“‘Indigent person’ means a person who is a bona fide resident of the county or city, whether gainfully employed or not and who, either by himself or by those upon whom he is dependent, is unable to pay for required hospitalization or treatment.”), *and* 32.1-345 (1996) (“The governing body of each city and county in the Commonwealth shall participate in the State/Local Hospitalization Program for indigent persons established in this chapter.”), *with* 37.2-720 (2012) (vaguely defining indigency in the context of being exempt from paying medical costs as when an “individual or person liable for his support is without financial means or that such payment would work a hardship on the individual or his family”).

122. *See* VA. CODE ANN. §§ 18.2-251 (2019) (Persons charged with first offense may be placed on probation; conditions; substance abuse screening, assessment treatment and education programs or services; drug tests; costs and fees; violations; discharge.); 63.2-1609 (2018) (Emergency order for adult protective services.); 18.2-258.1 (2014) (Obtaining drugs, procuring administration of controlled substances, etc., by fraud, deceit or forgery.); 18.2-271.1 (2013) (Probation, education, and rehabilitation of person charged or convicted; person convicted under law of another state or federal law.); 37.2-1101 (2012) (Judicial authorization of treatment.); 63.2-1203 (2012) (When consent is withheld or unobtainable.); 18.2-270.2 (2000) (Ignition interlock system; certification by Commission on VASAP; regulations; sale or lease; monitoring use; reports.); 20-49.3 (1997) (Admission of genetic tests.); and 19.2-326 (1984) (Payment of expenses of appeals of indigent defendants.).

123. *See, e.g.*, VA. CODE ANN. §§ 2.2-1124 (2019) (Disposition of surplus materials.); 19.2-152.4:3 (2019) (Duties and responsibilities of local pretrial services officers.); 2.2-4345 (2018) (Exemptions from competitive sealed bidding and competitive negotiation for certain transactions; limitations.); 51.1-309 (2018) (Appearance as counsel in certain forums prohibited.); 54.1-3301 (2018) (Exceptions.); 54.1-3411.1

Specifically, the Virginia Code merely states that a person who “on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs . . . and . . . all needful services and process, without any fees . . .”<sup>124</sup> These provisions, taken in their literal terms, not only protect impoverished individuals and their right to a jury trial, but also vest the court with broad discretion to permit a case to proceed without fees or costs and with all “needful process” on the basis of a party’s poverty:

When the language of a statute is unambiguous, we are bound by the plain meaning of that language. Furthermore, we must give effect to the legislature’s intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity. If a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute.<sup>125</sup>

The addition of the exception for indigency in the statute’s legislative history speaks volumes about the legislature’s intent to safeguard the Circuit Court appeal for the less-financially able among us. Moreover, the absence of a statement in the Virginia Code that mandates a showing of “good cause” or a determination “after hearing” is instructive. It shows that the legislature intended that the exception to the bond requirement be applied liberally and flexibly in favor of impoverished and indigent parties and in a manner consistent with Virginia’s constitutional right to a jury trial.<sup>126</sup>

---

(2018) (Prohibition on returns, exchanges, or re-dispensing of drugs; exceptions.); 54.1-2712 (2017) (Permissible practices.); 54.1-106 (2017) (Health care professionals rendering services to patients of certain clinics and administrators of such services exempt from liability.); 19.2-321.1 (2017) (Motion in the Court of Appeals for delayed appeal in criminal cases.); 23.1-1006 (2016) (Management agreement; contents and scope.); 23.1-2309 (2016) (Operations of Medical Center.); 23.1-2401 (2016) (Authority established; powers, purposes, and duties.); 23.1-2412 (2016) (Transfer of existing hospital facilities.); 23.1-2213 (2016) (Medical center management; capital projects; leases of property; procurement.); 23.1-2212 (2016) (Operations of Medical Center.); 23.1-2405 (2016) (Additional powers of the Authority; operation of projects.); 8.01-676.1 (2016) (Security for appeal.); 2.2-1120 (2015) (Direct purchases by using agencies and certain charitable corporations and private nonprofit institutions of higher education.); 19.2-264.3:1.3 (2010) (Expert assistance for indigent defendants in capital cases.); 19.2-163.01:1 (2010) (Supplementing compensation of public defender.); 19.2-183 (2010) (Examination of witnesses; assistance of counsel; evidentiary matters and remedies; power to adjourn case.); 17.1-278 (2008) (Additional fees in certain courts; use by Virginia State Bar.); 19.2-163.3 (2007) (Duties of public defenders.); 19.2-163.4:1 (2004) (Repayment of representation costs by convicted persons ); 19.2-401 (2003) (Cross appeal; when allowed; time for filing.); 17.1-607 (1998) (Security for costs upon suit by nonresident.); 53.1-40 (1997) (Appointment of counsel for indigent prisoners.); 32.1-344 (1989) (State/Local Hospitalization Program.); 32.1-348 (1989) (Applicability of chapter.); 32.1-64 (1979) (Duty of Board to provide for treatment.); 8.01-654.1 (1989) (Limitation on consideration of petition filed by prisoner sentenced to death.); and 32.1-327 (1984) (Claim against indigent's estate for payments made.).

124. VA. CODE ANN. § 17.1-606(A) (2019).

125. *Kozmina v. Commonwealth*, 706 S.E.2d 860, 862 (Va. 2011); *see also* *Harvey v. Hoffman*, 62 S.E. 371, 372 (Va. 1908) (where a statute is open to more than one construction, “it should be given that construction which will prevent absurdity, *hardship*, or *injustice*.”) (emphasis added).

126. A quick search of the Virginia Law Legislative Information System website for “good cause” produces over four hundred results in the Virginia Code, yet the legislature did not include a similar phrase related to an indigency determination to waive the appeal bond. *See* VA. LAW LEGIS. INFO. SYS., [https://law.lis.virginia.gov/search\\_cov.html?query=%22good%20cause%22](https://law.lis.virginia.gov/search_cov.html?query=%22good%20cause%22) (last visited Apr. 7, 2020).

A review of the court rules offers no additional enlightenment on the issue. Although the Circuit Court has established a form, CC-1414, for the use of parties who wish to move the court for an order waiving fees and costs,<sup>127</sup> the General District Court has no such form, and the General District Court's website links back to the Circuit Court's form for use for this purpose.<sup>128</sup> However, there is not an established form, nor does it appear that there is a clear procedure for determining the indigent status of a party for purposes of waiving the *bond* requirement in civil cases appealed to the Circuit Court, as fees and costs are not bonds (bonds are recoverable from the Clerk whereas fees and costs are not). Rather, it appears that such a determination has been left in the sound discretion of the court, as is common in situations where the statutes are silent on procedure.<sup>129</sup>

In fact, the closest statutory directive pertains to waiver of fees and costs in civil cases, as opposed to bonds. Section 17.1-606 of the Virginia Code notes that "Courts of Record" should look to the procedure set out in Section 19.2-159(B) in making its determination as to whether a party qualifies for a waiver of fees and costs in a given civil case.<sup>130</sup> Again, this only relates to fees and costs, but even so, Section 19.2-159(B) states only the factors the Court should take into consideration to determine eligibility.<sup>131</sup> It does not provide any guidance as to timing or means by which a party is required to raise the issue of indigency. In the criminal context, the lack of guidance regarding timing is less of an issue because there is a built-in opportunity at the arraignment hearing. Since there is a procedure for defendants to have an arraignment hearing, the courts will often make any necessary indigency determination at that hearing, but there is no equivalent civil hearing after a judgment has been entered and before the appeal deadlines for an indigency determination for a civil defendant seeking to appeal.

Finally, as mentioned in the initial hypothetical, what happens if the indigent defendant is able to scrape together enough money for the appeal fee and writ tax (the previously discussed fees and costs), but not the bond? Then, arguably Section 17.1-606 does not even apply, and there is no need to complete CC-1414 as it also only applies to fees and costs as stated in the title of the form itself, "Petition for Proceeding in Civil Case Without Payment of Fees or Costs."<sup>132</sup>

#### V. CURRENT BEST PRACTICE FOR LITIGATORS: FILING A POST-JUDGMENT "MOTION TO DETERMINE INDIGENCY" IN GENERAL DISTRICT COURT

As the Virginia Code is currently written, the best practice for litigators would be to file a post-judgment motion in General District Court and ask the Court to

---

127. Form CC-1414, *Petition for Proceeding in Civil Case Without Payment of Fees Or Costs*, VA.'S JUD. SYS., <http://www.courts.state.va.us/forms/circuit/cc1414.pdf> (last visited Apr. 7, 2020).

128. *General District Court Forms*, VA.'S JUD. SYS., <http://www.courts.state.va.us/forms/district/home.html> (last visited Apr. 7, 2020).

129. See, e.g., *Chappell v. Perkins*, 587 S.E.2d 584 (Va. 2003) (approving the trial court's discretionary determination of the party who bears the burden of proof in an elective share case where the statute was silent on the issue of proof); cf. *City of Newport News v. Warwick Cty.*, 61 S.E.2d 871, 874 (Va. 1950) (noting a statute "fully set forth the procedure for settling disputed boundary lines" requiring the court to approve recordation of a plat made in conformity with the statutory procedure).

130. VA. CODE ANN. § 17.1-606(B).

131. VA. CODE ANN. § 19.2-159(B).

132. See *General District Court Forms*, *supra* note 128.



make an indigency determination and to correspondingly waive the bond if the Court determines that the defendant is indigent. However, if the notice of appeal has already been filed and the fees and costs paid or the case was transferred to the Circuit Court without the bond payment, the only option will be to file a motion in the Circuit Court seeking an indigency determination, as the General District Court may no longer have jurisdiction.<sup>133</sup> However, filing such a motion in the Circuit Court could prove problematic if the court takes the position that it has no jurisdiction if the bond was not paid and therefore the appeal was not perfected. As discussed above, the bond is not a requirement for all appealing defendants, so the Circuit Court should be able to make this determination or remand the case to General District Court pursuant to Section 16.1-109(B) of the Virginia Code, but not all courts or judges will permit this. Because of this inconsistency in judicial practice, the best practice for litigators is to file the motion in General District Court if possible.<sup>134</sup>

There are only two Circuit Court cases that reference a request for waiver of a bond on grounds of indigency. First, is the previously discussed matter of *Elyazidi v. Barr*.<sup>135</sup> The Court noted that the defendant had made an indigency request after filing her notice of appeal to the Circuit Court, but that her request was declined on the basis that she did not qualify as indigent.<sup>136</sup> There was no discussion as to the timing of the defendant's request, when the motion was actually heard by the court, or the procedure used to make the determination.<sup>137</sup>

Second, in *Wallin v. Buzzell*, the Circuit Court acknowledged that there was no form or process to which a *pro se* litigant could refer to for a determination of indigency for appeal bond purposes.<sup>138</sup> In fact, the *Wallin* Court noted: “[T]he timely filing of an appeal bond is jurisdictional, such requirement . . . is obviated entirely under § 16.1-107 if the appellants are indigent.”<sup>139</sup> Thus, although a

133. Incidentally, for the first time since it was passed in 1956, enough cases were transferred from General District Court to Circuit Court without the bond paid and an indigency waiver obtained that 16.1-109 was amended in 2007 to allow the Circuit Court to remand the case back to the General District Court if the bond had not been paid. *See* H. 2073, 2007 Gen. Assemb., Reg. Sess. (Va. 2020).

134. The Code section states:

When a bond or other security is required by law to be posted or given in connection with an appeal or removal from a district court, and there is either (i) a defect in such bond or other security as a result of an error of the district court, or (ii) the district court erroneously failed to require the bond or other security, and the defect or failure is discovered prior to sending the case to the circuit court, the district court shall order that the appellant or applicant for removal cure such defect or failure within a period not longer than the initial period of time for posting the bond or giving the security. If the error or failure is discovered after the case has been sent to the circuit court, the circuit court shall return the case to the district court for the district court to order the appellant or applicant for removal to cure the defect or post the required bond or give the required security within a period of time not longer than the initial period of time for posting the bond or giving the security for removal. Failure to comply with such order shall result in the disallowance of the appeal or denial of the application for removal.

VA. CODE ANN. §16.1-109(B) (2007).

135. 91 Va. Cir. 89 (2015).

136. *Id.* at 89.

137. *Id.*

138. *Wallin v. Buzzell*, 96 Va. Cir. 430 (2010).

139. *Id.* at 433.

hearing on an indigency application may be heard after the time to post a bond had expired, “[i]t follows by necessity under the language of the statute that should the [defendants] be found to be indigent . . . they shall not be required to post an appeal bond.”<sup>140</sup> As a consequence, the *Wallin* Court determined that the Circuit Court was the proper venue to determine the defendants’ indigency.<sup>141</sup>

Therefore, as noted above, the most reasonable interpretation of the exception is to allow for a flexible standard that permits case-by-case evaluation. Flexibility in application is neither too vague nor unreasonable where the circumstances may differ from case-to-case. For example, in *Southern Railway Co. v. Commonwealth*, the Supreme Court of Virginia heard a challenge by the defendant rail company against Virginia Code Section 56-449, which provided that a rail company is obliged to keep its right of way clear of weeds, grass, and decayed timber.<sup>142</sup> The purpose of the requirement was to prevent sparks from passing trains igniting brush by the tracks and causing wildfires.<sup>143</sup> Southern Railway claimed that the statute was impermissibly vague because it did not provide a standard or radius of clearance for the company to follow, nor did it provide a specific date or range of dates for the clearance to occur.<sup>144</sup> The *Southern Railway Co.* Court upheld the statute, reasoning that it would have been impractical or well-nigh impossible for the legislature to specify the exact area to be cleared in every circumstance. By requiring that only such area be cleared as is necessary to abate the danger of spreading fire, the legislature provided a flexible, rather than vague standard designed to meet the exigencies of each situation.<sup>145</sup> In so doing, the legislature has equated the interests of the public and of the railroad companies and substantially related its action to the public safety.<sup>146</sup>

Similar reasoning could be applied by the Circuit Court when considering a motion to determine indigency. In enacting Section 16.1-107, and including the indigency exception, the legislature provided a mandate to the courts to ensure the access of the less-financially able to a jury trial in the Circuit Court. However, realizing that it would be impossible, or at a minimum, highly impractical to attempt to establish a flat timeline of when a determination of indigency must be made in every case, the General Assembly instead allowed for a flexible application of the exception to permit a party who is indigent or becomes indigent to avail himself or herself to the exception as the need to do so becomes apparent.

Because the need for an indigency determination may not arise until judgment is rendered in the General District Court, the simplest and most reasonable means to address the question would be for the Circuit Court to hear a defendant’s indigency motion and permit the submission of evidence on the issue of indigency if the court so requires.

Next time you are approached by an indigent defendant seeking an appeal to Circuit Court, the inability of the defendant to pay the appeal bond will hopefully be the least of the worries for you and your new client.

---

140. *Id.*

141. *Id.* at 434.

142. *S. Ry. Co. v. Commonwealth*, 135 S.E.2d 160 (Va. 1964).

143. *Id.*

144. *Id.* at 163.

145. *Id.* at 166.

146. *Id.* at 166.

## VI. ADDING NINE WORDS TO SECTION 16.1-107(B) WOULD ALLEVIATE THIS ISSUE FOR INDIGENT DEFENDANTS

To provide the most protection as possible to the indigent defendant, the Virginia General Assembly should amend Section 16.1-107 to make it clear that an indigency determination could be made at any time.<sup>147</sup>

In fact, the General Assembly need only add nine words to the current language of Section 16.1-107(B) by adding the emphasized text to the current statute:

In all civil cases, except trespass, ejectment, unlawful detainer against a former owner based upon a foreclosure against that owner, or any action involving the recovering rents, no indigent person, **as determined by any trial court at any time**, shall be required to post an appeal bond. In cases of unlawful detainer against a former owner based upon a foreclosure against that owner, a person who has been determined to be indigent pursuant to the guidelines set forth in § 19.2-159 shall post an appeal bond within 30 days from the date of judgment.<sup>148</sup>

By adding these nine words to Section 16.1-107(B), the General Assembly would provide much needed clarity to the statute by allowing an indigent defendant to obtain the indigency determination from the General District Court or the Circuit Court. As such, an indigent defendant could still file a motion with the General District Court to get the indigency determination post-trial,<sup>149</sup> but this language would also allow an indigent defendant to request an indigency determination from the Circuit Court, which would have been a game-changer for the *Yilma* case, because the Court could have made the indigency determination in Circuit Court, waived the bond requirement, and allowed the case to be heard on its merits.<sup>150</sup>

Although Virginia has a roller coaster history of helping and hampering indigents over many centuries,<sup>151</sup> the current statutes passed by the General Assembly that refer to indigents are arguably exclusively for the benefit of indigents in the Commonwealth.<sup>152</sup> As such, providing clarification about where and when a defendant is able to get an indigency determination from the Virginia trial courts is consistent with the intent and objective of the statute—allowing indigents in the Commonwealth of Virginia to obtain their constitutional right to a

147. While plaintiffs may balk at such a protection, it seems unlikely that a wealthy defendant or business entity would attempt to be ruled indigent, and even if that were the case, the plaintiff would likely be able to collect from such a wealthy defendant and business entities could be excluded if there is real concern that a business could be indigent (Technically, it cannot, as indigency is an individual protection.). But even if a particular defendant finds a way to “game the system,” and get an improper indigency determination, like any improper ruling, it would be subject to appeal. Ultimately, the protection for the indigent defendant seeking an appeal is simply more important.

148. VA. CODE ANN. § 16.1-107(B) (The nine emphasized words in bold are the proposed changes the General Assembly could make to alleviate this issue.).

149. *See supra* Section V.

150. *See supra* Section I.

151. *See supra* Section II.

152. *See supra* Section III.

jury trial or any other relief from the Circuit Court by appealing a negative decision from the General District Court without having to post an appeal bond.

This issue has not received much attention in the Circuit Courts or Supreme Court of Virginia since 2007 when Section 16.1-92 was repealed without replacement,<sup>153</sup> which is to be expected given that indigent defendants likely do not have the funds to hire an attorney or the capacity to pursue an appeal to the Supreme Court of Virginia *pro se*. Therefore, the most efficient and effective way to address this issue, especially given the existing Circuit Court decisions that seem reluctant to interpret Section 16.1-107(B) as intended to benefit indigent defendants, is for the General Assembly to make the proposed modest modification by adding the clause “as determined by any trial court at any time” to Section 16.1-107(B).<sup>154</sup>

---

153. *See supra* notes 60–61.

154. If the General Assembly is willing to more fully address the issue, it could spell out the test for indigency for a civil defendant seeking to waive the bond requirement. But given the existence of other indigency standards in the Code, even within Section 16.1-107(B) (though in a different context—that of an indigent foreclosed homeowner), the General Assembly may feel that further specification about the test for indigency is unnecessary. However, given that the statute is meant to protect indigents’ rights, additional clarification for the Courts and appealing defendants certainly would not hurt.