

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE:

**MULTI-CIRCUIT EPISCOPAL
CHURCH PROPERTY LITIGATION**

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CL 2007-0248724

FILED IN: *The Protestant Episcopal Church in the Diocese of Virginia* [hereafter “*The Diocese*”] v. *Truro Church* (No. 2007-1236); *The Diocese v. Church of the Apostles* (No. 2007-1238); *The Diocese v. Church of the Epiphany, Herndon* (No. 2007-1235); *The Diocese v. Christ the Redeemer Church* (No. 2007-1237); *The Diocese v. St. Paul’s Church, Haymarket* (No. 2007-5683); *The Diocese v. St. Margaret’s Church* (No. 2007-5682); *The Diocese v. Church of the Word* (No. 2007-5684); *The Diocese v. Potomac Falls Church* (No. 2007-5362); *The Diocese v. Church of Our Saviour at Oatlands* (No. 2007-5364); *The Diocese v. The Church at The Falls – The Falls Church* (No. 2007-5250); *The Diocese v. St. Stephen’s Church* (No. 2007-5902); *The Episcopal Church v. Truro Church et al.* (No. 2007-1625); *Church of the Apostles v. The Episcopal Church, et al.* (No. 2006-15793); *Truro Church v. The Episcopal Church, et al.*, (No. 2006-15792); *Church of the Epiphany v. The Diocese, et al.*, (No. 2007-556); *In Re: The Church at the Falls - The Falls Church*, (No. 2007-5249); *In Re: The Church of our Saviour at Oatlands*, (No. 2007-5363); *In Re: St. Paul’s Church, Haymarket*, (No. 2007-5686); *In Re: St. Margaret’s Church*, (No. 2007-5685); *In Re: St. Stephen’s Church*, (No. 2007-5903); *In Re: Church of the Word* (Prince William No. CL76197).

**THE EPISCOPAL CHURCH’S REPLY MEMORANDUM REGARDING
THE SCOPE OF THE § 57-9 HEARING AND
THE APPLICATION OF VA. CODE § 57-9 TO THESE CASES**

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INTRODUCTION

This Court has asked the parties to submit briefing on the appropriate scope of the hearing scheduled for November 19, 2007. The opening briefs have already shown, and we believe the reply briefs will confirm, the central and controlling issue in these cases is the proper interpretation of § 57-9(A), a question of law, that, as it happens, the parties now have fully briefed. Thus, the Episcopal Church believes that the meaning of “division” under § 57-9(A) is ripe for consideration by the Court, and that a prompt decision by the Court on this issue would focus the Court and the parties on the appropriate scope of the remaining issues, if any, that need to be addressed at the November hearing, as we now show.

(1) For the reasons stated below, and in the Church’s and the Diocese’s joint Memorandum Regarding the Scope of the § 57-9 Hearing and the Application of Va. Code § 57-9 to These Cases (“Opening Brief”) and the Diocese’s Reply Memorandum filed today, the Episcopal Church and the Diocese contend that “division” under the statute requires a structural or organizational division by formal action of the “church or religious society” for the statute to apply. There is no dispute that the Episcopal Church and the Diocese were each a “church or religious society” to which the congregations were “attached” within the meaning of § 57-9(A). The parties also agree that no such structural or organizational division has occurred in either the Church or the Diocese. Accordingly, should the Court agree with the Church’s and the Diocese’s interpretation, § 57-9(A) could not apply to these cases, and few, if any, further matters would need to be heard at the November hearing.

(2) The congregations contend, on the other hand, that a theological dispute within a “church or religious society” empowers the local congregations of a hierarchical church or denomination to leave with their property and join another church or denomination, thereby

effecting a “division” within the Episcopal Church or the Diocese without any such structural or organizational division. Should the Court agree with the congregations’ interpretation of the statute, the November hearing could entail, consistent with constitutional limitations on judicial inquiry, such matters as (1) whether such a theological dispute amounting to a “division” exists, (2) whether the congregations have joined a “branch” of the Church or the Diocese, and (3) whether the congregations conducted their votes in compliance with § 57-9(A).¹

In these circumstances, a prompt resolution of the interpretation of § 57-9(A) by the Court (1) may obviate the need for the November hearing altogether or (2) will provide essential guidance to the parties on the arguments to be presented, as well, perhaps, as the evidence necessary to substantiate their positions, at the November hearing. Therefore, the Episcopal Church respectfully requests, that in the interests of efficiency and judicial economy, this Court decide on the extensive briefing at hand and the forthcoming oral arguments at the September 14, 2007 hearing the proper interpretation of § 57-9(A).

The Episcopal Church will now show that the briefing to date has indeed narrowed the issues to permit this Court to decide this central question of law in favor of the position of the Episcopal Church and the Diocese either, as we request, at the September 14 hearing or, in any event, at a subsequent hearing before November 19, 2007.

¹ The congregations also argue that the Anglican Communion is a “church or religious society” within the meaning of the statute. *See* CANA Congregations’ Memorandum of Law on Scope of Hearing on Congregational Determinations Pursuant to Va. Code § 57-9 (“Cong. Brief”) at 16-18. The import of this argument is not clear, because the congregations do not appear to rely on the Anglican Communion as the basis of their § 57-9 petitions. Indeed, for the reasons we discuss in Part II below, we do not believe the congregations could rely on a “division” within the Anglican Communion alone. Should the congregations be relying on this argument, however, the Court’s guidance on the proper interpretation of “division” would focus the issues here as well.

ARGUMENT

The overriding import of the congregations' opening brief addressing the scope of the hearing on Va. Code § 57-9 is that in adopting § 57-9 (or its predecessor statute) the Virginia legislature intended to turn hierarchical churches or denominations into congregational ones by giving *all* local churches in Virginia the ability unilaterally to divert their property to any other religious body by majority vote. As the Episcopal Church and the Diocese showed in their joint Opening Brief, any such intent would have been and would be contrary to well-settled rules of statutory construction, inconsistent with contemporaneous and subsequent case law addressing church property disputes in Virginia that distinguish hierarchical and congregational churches, and unconstitutional. Thus, § 57-9 simply cannot be interpreted and applied as the congregations contend.

I. There Has Been No “Division” In the Episcopal Church or the Diocese of Virginia.

The congregations concede that the Episcopal Church and the Diocese are a “church or religious society” to which each of them was attached for purposes of § 57-9, prior to their votes to disaffiliate. *See* Cong. Brief at 15-16. The congregations further agree that the General Convention has not formally divided either the Episcopal Church or the Diocese. *See* CANA Congregations' Responses to the Diocese of Virginia's and the Episcopal Church's First Requests for Admissions (“Congregations' Responses to Requests for Admissions”) Nos. 15-16, attached as Exhibit 3 to Opening Brief. The congregations, in a strained reading of § 57-9(A), nevertheless argue that the existence of a theological issue that has led some of the Church's members to leave the Church and join various other churches or denominations constitutes a “division” within the meaning of the statute. Their argument is based on an extended discussion of the supposedly plain meaning of the word “division” and a variety of tools of statutory

construction that, they say, compel the conclusion that the legislature must have intended to permit all local congregations in Virginia to control their own property (through a majority vote) in the event of a theological dispute within their denomination. Thus, in their view, the legislature thereby intended to enable persons and bodies to declare a “division” within a denomination, without regard to the denomination’s hierarchical rules or the lack of any such action by the denomination itself. The result demonstrates the fallacy – or the futility – of the congregations’ position.²

A. The Congregations Ascribe to the Legislature an Unconstitutional Intent.

As the Church and the Diocese showed in their opening brief, denominations have a constitutional right to determine their own structure and governance, and the government may not intrude on such matters – either through their legislatures or their courts. *See* Opening Brief at 19-22. The congregations ignore these constitutional limitations as well as the Constitutions, Canons, and polity of the Church and the Diocese (as described at pages 3 through 10 of the Opening Brief) that together show that only the General Convention may divide the Church or the Diocese. Episcopal parishes, which cannot unilaterally disaffiliate from the Church or the Diocese, are not empowered to declare or effect a division within the Episcopal Church or the Diocese, *see* Opening Brief at 7-10; yet, the congregations impermissibly interpret § 57-9(A) as giving them such a right.³ These considerations alone make clear that § 57-9(A) cannot be interpreted or applied as the congregations would have it.

² Moreover, as set forth in the Opening Brief, these and other traditional tools of statutory construction actually point in the opposite direction.

³ The error of the congregations’ position that § 57-9(A) gives a local church of a hierarchical denomination the power to effect a division and consequently vote to transfer its property to another denomination of its choosing is further highlighted by the fact that a local church may not transfer property without the consent of the proper hierarchical authorities. *See Norfolk* (footnote continued on following page)

B. The Congregations Ignore the Case Law Addressing Church “Divisions.”

As the Church and the Diocese also showed, prominent cases decided before the adoption of § 57-9 make clear that Virginia courts understood and respected this fundamental principle and recognized that in the absence of a formal structural “division” accomplished pursuant to that denominations’ rules and structure, the property held by a local congregation of a hierarchical church must remain with the denomination in the event of a dispute. *See, e.g., Brooke v. Shacklett*, 54 Va. 301, 324-25 (1856) (discussing and relying on *Smith v. Swarmstedt*, 57 U.S. 288 (1853) and *Gibson v. Armstrong*, 46 Ky. 481 (1847)).

As the congregations themselves have previously argued, “[w]hen the General Assembly acts in an area in which one of its appellate courts already has spoken, it is presumed to know the law as the court has stated it and to acquiesce therein, and if the legislature intends to countermand such appellate decision it must do so explicitly.” *Weathers v. Com.*, 262 Va. 803, 805 (2001). There is absolutely no indication, however, that when the General Assembly adopted the predecessor to § 57-9 in 1867 it intended to eviscerate the respect for hierarchical church structure established in Virginia law. To the contrary, § 57-9 recognized and perpetuated this respect, providing separately for divisions in churches “entirely independent in their organization of any other church or any general society” on the one hand, and those in “churches or religious societies to which . . . religious congregations have been attached” on the other. 1867 Va. Acts, Ch. 210 (pages 649-50). *See also Norfolk Presbytery v. Bollinger*, 214 Va. 500, 502-03, 201 S.E.2d 752, 755 (1974) (Va. Code § 57-9 “recognizes a distinction between an autonomous congregation and one which is part of a super-congregational or hierarchical

Presbytery v. Bollinger, 214 Va. 500, 502, 201 S.E.2d 752, 755 (1974); Va. Code § 57-15; Episcopal Church Canons I.7(3) and II.6(2).

denomination in providing for the determination of property rights upon a division of a church or congregation”).

This is confirmed by later case law and experience in Virginia. Over the 140 years since the adoption of § 57-9, Virginia has continued to reaffirm that a legally cognizable “division” must accord with the denomination’s rules and structure, and local congregations of hierarchical churches may not unilaterally decide the proper disposition of property in the event of theological or ecclesiastical disputes within the denomination. *Hoskinson v. Pusey*, 73 Va. 428 (1879); *Norfolk Presbytery, supra*, 214 Va. at 503, 201 S.E.2d at 755; *Green v. Lewis*, 221 Va. 547, 555, 272 S.E.2d 181, 186 (1980); *Diocese of Southwestern Virginia v. Buhrman*, 5 Va. Cir. 497, 502 (Clifton Forge Cir. Ct. 1977), *pet. refused*, Rec. No. 780347 (Va. June 15, 1978). *See also Reid v. Gholson*, 229 Va. 179, 188-89, 327 S.E.2d 107, 113 (1985) (“[o]ne who becomes a member of [a hierarchical] church, by subscribing to its discipline and beliefs, accepts its internal rules and the decision of its tribunals”).

The congregations cite to no case law to the contrary. Rather, they base their supposition as to the legislature’s intent on a contention that, in addition to divisions such as the formal, authorized one involving the Methodist Church that had actually led to litigation in Virginia, *see, e.g., Brooke v. Shacklett*, 54 Va. 301 (1856); *Hoskinson v. Pusey*, 73 Va. 428 (1879), “divisions” (in the colloquial sense) unauthorized by the applicable hierarchical church body had also occurred at the time of the Civil War. The facts concerning these other alleged divisions have not been fully identified; they are, in any event, irrelevant to the issue at hand. The important fact is that in the light of the then-existing *law*, which has been only reaffirmed and strengthened over the intervening decades, there is no reason to believe that the legislature

intended (unconstitutionally) to include any such unauthorized successions within the scope of § 57-9(A).⁴

II. There Has Been and Can Be No Relevant “Division” Within the Anglican Communion.

Although they claim that the Anglican Communion is a “church or religious society” within the meaning of § 57-9(A), the congregations do not appear to contend that a “division” in the Anglican Communion alone (without a division in the Episcopal Church or the Diocese) has triggered the application of the statute. *See* Cong. Br. at 15-16 (arguing that a “division” within the Episcopal Church or the Diocese is sufficient for § 57-9, but “it is also true that the broader Anglican Communion is a ‘church or religious society’”). We note, however, that there is (and could be) no relevant division in the Anglican Communion itself for at least three reasons.

First, as set forth in the Opening Brief and in the separate reply brief filed by the Diocese, regardless of whether the Anglican Communion is in some vague sense a “church or religious society,” it cannot be a “church or religious society” for purposes of § 57-9(A), because it is not a hierarchical organization. *See Baber v. Caldwell*, 207 Va. 694, 698, 152 S.E.2d 23, 26-27

⁴ The congregations’ reference to the *de facto* separation in the Episcopal Church during the Civil War is particularly unhelpful to their cause. The Episcopal dioceses in the Confederate states did not attend the General Convention of the Episcopal Church in 1862, held in New York City, which is hardly surprising given that a state of war then existed between the northern and southern states. The southern dioceses nevertheless retained their seats and right to representation in the Church’s General Convention, and after the war they simply returned with no procedure of readmittance. It is doubtful, on that state of facts, that any sort of structural “division” of the Episcopal Church could be said to have occurred. (Certainly one was threatened, however. Anglicanism has always held that denominational boundaries should be coterminous with sovereign nations, and if the South had prevailed in the Civil War, the Episcopal Church would no doubt have recognized the propriety of a parallel division of the Church.) In any event, however, the coordinated absence of a number of the Church’s dioceses, in anticipation and as a result of a partition of the United States itself which never came to pass, bears no resemblance to the disaffiliation of a scattered handful of congregations on theological grounds as has occurred here.

(1967) (Section 57-9(A) “relates to churches, such as Episcopal and Presbyterian churches, that are subject to control by super-congregational bodies.”).

Second, and similarly, the Anglican Communion is not a part of the Church’s – or any other province’s – governing structure. *See* Reports of Congregational Determination Pursuant to Va. Code § 57-9 at ¶¶ 5-9 (discussing organization and governance of the Episcopal Church and the Diocese);⁵ Congregations’ Responses to Requests for Admissions Nos. 3-8, 11; CANA Congregations’ Responses to Church’s and Diocese’s First Interrogatories (“Congregations’ Responses to Interrogatories”) Nos. 5.a & b, attached as Exhibit 2 to Opening Brief. Neither the Anglican Communion nor any of its provinces has any authority or claim over property held by a local congregation of a different province, and any one of the Anglican Communion’s member provinces is free to discontinue its participation in that fellowship at any time. At the present time none has done so, and as the congregations admit, there has been no structural division within the Anglican Communion. *See* Congregations’ Responses to Interrogatories, Nos. 5.c and d. Even if one or more of the Anglican Communion’s current members were to cease participation in some or all of the Anglican “instruments of communion” as a result of theological or ecclesiastical disagreements, that would not necessarily cause a “division” in the Communion itself, and for the reasons described above, it certainly would not give the Commonwealth of Virginia the right to declare that property held by the Episcopal Church or its constituent parts is forfeited, contrary to the Episcopal Church’s own structure and rules.⁶

⁵ Paragraph citations to Reports of Congregational Determination are to the Report filed in case number CL 2006-15793 (Church of the Apostles), which is cited as an example. Paragraph numbers in other petitions may vary to some extent, but the substance does not.

⁶ Indeed, it is questionable whether a structural “division” could occur within the Anglican Communion. The Anglican Communion is a loosely-knit fellowship of autonomous provinces, *see* Opening Brief at 6-7, and has no formal government or structure. Rather, the provinces
(footnote continued on following page)

Finally, the congregations cannot be “attached” to the Anglican Communion for purposes of § 57-9(A), because such an interpretation could permit a local Episcopal congregation to transfer parish property to another denomination when a “division” unrelated to the Church or the Diocese occurred somewhere else within the Anglican Communion. Even the congregations appear to concede that they are not “attached” to the Anglican Communion in the same way that they have been “attached” to the Episcopal Church and the Diocese, and that their connection with the Anglican Communion arose only through their affiliation with the Church and the Diocese. *See* Congregations’ Responses to Interrogatories, Nos. 3 (within the meaning of § 57-9, congregations “were attached to the Diocese and TEC, and *through them* the Anglican Communion”) and 4 (congregations “had *derivative membership* in the Anglican Communion by virtue of TEC’s membership in that body”) (emphases added). Clearly, there must be a “division” within the Episcopal Church or the Diocese – declared by the Church itself – for the statute to apply, and so any “division” within the Anglican Communion (which is neither sufficient nor necessary for the statute to apply) is irrelevant.

III. CANA Is Not a “Branch” of the Episcopal Church.

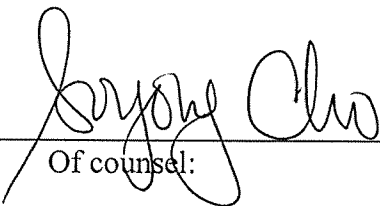
The congregations’ opening brief principally argues that CANA may be considered a “branch” of the Episcopal Church and the Diocese, because an organization need not remain under the jurisdiction of the parent denomination in order to qualify as a “branch” under the statute. We agree. This does not change the fact, however, that there has been no “division” here, and thus there can be no “branches” within the meaning of the statute. Moreover, the

participate in the life the Anglican Communion through the relational “instruments of communion.” Much in the same way, it is difficult to conceive of a “division” in Christianity in the United States within the meaning of § 57-9(A). *See* Cong. Brief at 20 (referring to “branches” of Christianity in the United States).

congregations' view that one denomination becomes a "branch" of another if some individuals decide to shift their allegiance in that direction makes no sense: A "branch" created by a "division" within the meaning of § 57-9(A) must logically be created by or a successor to the formerly undivided church or religious society. The most natural reading of the statute is of a "division" that organically splits one undivided church into two or more branches.⁷ CANA is a mission of a pre-existing denomination, the Church of Nigeria, and was in no way created or formed by the Episcopal Church. See Reports of Congregational Determination at ¶ 3 ("Ten of these 14 Virginia congregations have affiliated with the Church of Nigeria ... by joining [CANA] ... a missionary initiative of the Church of Nigeria"); Congregations' Responses to Requests for Admissions Nos. 17-20. It cannot, therefore, be considered a "branch" of the Episcopal Church.

Respectfully submitted,

THE EPISCOPAL CHURCH

By: 
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Dated: August 31, 2007

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⁷ See, e.g., *Smith v. Swormstedt*, 57 U.S. 288, 305 (1853) ("The division of the church, as originally constituted, thus became complete; and from this time two separate and distinct organizations have taken the place of the one previously existing."). In the same vein, it is illogical for a "division" of the Episcopal Church to result in and create a "branch" that is a subordinate religious body of another hierarchical denomination.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing THE EPISCOPAL CHURCH'S REPLY MEMORANDUM REGARDING THE SCOPE OF THE § 57-9 HEARING AND THE APPLICATION OF VA. CODE § 57-9 TO THESE CASES were sent by electronic mail to all counsel named below and by first-class mail to the lead counsel at each firm (indicated with an asterisk below), on this 31st day of August, 2007:

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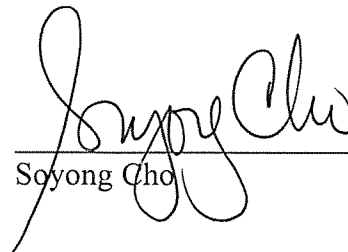
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