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In Re: Multi-Circuit Episcopal Church Property Litigation, (CL 2007-0248724)

Letter Opinion on the Court's Five Questions

June 27, 2008

Judge Randy I. Bellows

Fairfax County Circuit Court

LETTER OPINION

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Re: *In Re: Multi-Circuit Episcopal Church Property Litigation* (CL 2007-0248724)

Dear Counsel:

The Court has now received and reviewed the briefs filed by all parties in response to this Court's June 6, 2008 order. In that order, this Court posed 5 questions to the parties, each of which the Court today resolves as matters of law. Those questions, and this Court's decisions regarding those 5 questions, are as follows:

1.) Did the Supreme Court of Virginia, in Green v. Lewis, hold that a trial court presiding over a § 57-9(A) petition must consider the factors set out in Green v. Lewis, in addition to making the determinations actually set out in § 57-9(A)? Does the holding of Green v. Lewis apply only to proceedings brought under § 57-15, or does it apply to proceedings brought under § 57-9 as well?

Decision of the Court:

In this Court's April 3, 2008 Letter Opinion [hereinafter 57-9 Opinion], the Court found that "there is no controlling caselaw on point with the issues confronting this Court, and that "[i]ndeed, there is almost no caselaw that can even be characterized as bearing on the issues before this Court." 57-9 Opinion at 63. The Court's view of the matter has not changed. Green v. Lewis is not a case interpreting or applying §57-9(A). Green is a case interpreting and applying Va. Code §57-15. ECUSA/Diocese argue that Green began as a

57-9 case,[1] and that therefore, the holding of Green v. Lewis applies to any case brought under 57-9(A).[2] This is incorrect for two reasons:

1.) Although ECUSA/Diocese are correct that the initial petition filed by the Pastor of the departing congregation in Green, Wesley J. Green, mentioned "57-9," Pastor Green's invocation of this statutory section appears to be nothing more than "a basis for invoking the court's equitable jurisdiction."[3] Nowhere in the Chesterfield Circuit Court's eventual opinion or order does the trial court even cite 57-9.[4] Similarly, the briefs filed before the Supreme Court of Virginia in that case could not possibly lead a reader to believe that this was a 57-9(A) case.[5] And, finally, there is the Supreme Court of Virginia's decision in Green, which, in this Court's opinion, clearly establishes that the decision made by the Supreme Court of Virginia is under 57-15, not 57-9.

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[1] See ECUSA/Diocese Resp. Br. Pursuant to June 6, 2008 Order at 1 ("[T]hey [the CANA Congregations] do not and cannot deny that both parties' pleadings invoked section 57-9, there was a congregational vote, those materials were before the Court, and indeed the Court quoted the congregation's resolutions.").

[2] ECUSA/Diocese likewise argue that the case of Trustees of Cave Rock Brethren Church v. Church of the Brethren, No. 1802 (Va. Cir. Ct. June 20, 1976) (unpublished), a Botetourt County Circuit Court case, was "explicitly litigated under 57-9". (ECUSA/Diocese Opening Br. Pursuant to June 6, 2008 Order at 6). Cave Rock never reached any of the issues that this Court is faced with, however. Moreover, Cave Rock involved the withdrawal of a single congregation from a supercongregational church. Finally, the petitioners invoked the portion of 57-9 that applies to independent and autonomous congregations. (At the time Cave Rock was decided, 57-9 had not yet been divided into sections lettered A and B). Thus, Cave Rock is not helpful.

[3] (CANA Congregations' Opening Br. Pursuant to the Court's June 6, 2008 Order at 3.) The CANA Congregations correctly state in their brief that "[n]either petition [as originally filed with the circuit court that decided Green] contains any allegation (or denial) that (1) a "division" had occurred in the AME Zion Church with which the congregation was affiliated, or (2) the congregation voted to affiliate with a "branch" of the divided body." (CANA Congregations' Opening Br. Pursuant to the Court's June 6, 2008 Order at 3.)

[4] See CANA Congregations' Opening Br. Pursuant to the Court's June 6, 2008 Order, Exs. A & B.

[5] See CANA Congregations' Opening Br. Pursuant to the Court's June 6, 2008 Order, Exs. C & D.

2.) This conclusion is corroborated by the circumstances giving rise to the suit in Green. That is because Green involved the withdrawal of a single congregation from a hierarchical church. Moreover, there was no alleged "division" within the A.M.E. Zion Church, which was the church to which the departing congregation in Green was attached. In other words, there was not even a colorable claim of division which could give rise to invocation of 57-9(A).

ECUSA/Diocese further argue that, in addition to the holding of Green, the following language from Norfolk Presbytery, 214 Va. 500 (1974) suggests that this Court may not apply the plain language of 57-9(A) to the instant dispute: "[I]t is proper to resolve a dispute over church property by considering the statutes of Virginia, the express language in the deeds and the provisions of the constitution of the general church." Id. at 505. But Norfolk Presbytery—just like Green—did not involve invocation of 57-9(A).[6] And, while ECUSA/Diocese may argue that it ought not make a difference that 57-9 was not the subject of the opinion, this Court finds just to the contrary. 57-9(A) places a very substantial burden on the moving party, e.g., they must prove that there is a division, the requirements of attachment and branch must be met, and, of course, there is the requirement of a majority vote. Only if every criteria is met can 57-9(A) be properly invoked and church property disputes resolved in accordance with the statute. To argue, in effect, that there is no material or practical difference between 57-9 and 57-15 is to give neither statute its proper due and to give Norfolk Presbytery and similar cases an application and breadth for which there is no support in the law.

In sum, Green v. Lewis does not hold that a trial court presiding over a § 57-9(A) petition must consider the Green factors in addition to making the determinations actually required by 57-9(A), nor is that the import of the decision. Further, the holding of Green applies to § 57-15 proceedings, not § 57-9 proceedings.

2.) Has the Court in its April 3, 2008 opinion already resolved the issue described in Question 1 above, as asserted by the CANA Congregations?

Decision of the Court: Even if the Court did not squarely address Question #1 in its April 3, 2008 opinion, it does so now. See Answer to Question #1.

3.) What is the meaning of the phrase "if the determination be approved by the court" as that phrase is used in 57-9(A)? Specifically, once this

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[6] ECUSA/Diocese concede this point, stating that "[t]here are many Virginia Code sections under which a property dispute between congregations (or majority factions thereof) and a general church might begin. In Norfolk Presbytery, it was § 57-15." (ECUSA/Diocese Resp. Br. Pursuant to June 6, 2008 at 3, 3 n.3.)

court determines that 57-9(A) has been properly invoked, is the "approval" limited to a review of the vote taken or does it permit, or even require, as ECUSA and the Diocese assert, that the court examine various other considerations, including those set forth in Green v. Lewis?

Decision of the Court:

For the answer to the question as to the meaning of "if the determination be approved by the court," this Court first looks to the various orders that were entered pursuant to petitions filed under the predecessor statute to 57-9 in the time period directly following the passage of that original statute. These petitions were filed by congregations seeking to join one branch or the other of a hierarchical church that had divided. In looking at the language of the various orders entered by Virginia courts in response to such petitions, it becomes clear as to what the meaning of the phrase "if the determination be approved by the court" actually means.

For example, Plaintiffs' Ex. 96 contains an order from the Augusta County CL Order Book, entered on June 28, 1867, which reads as follows:

> A Religious Congregation of Methodists in the town of Staunton this day presented to the Court certain papers in which it is recited & claimed that "the Baltimore Conference of the Methodist Episcopal Church severed its connection with the General Conference of said Church, by resolution adopted during its [illegible] in Staunton, Va, in March, 1861 & in February, 1866 by a unanimous vote, formed a union with the Methodist Episcopal Church South"—which the said Congregation is one of the congregations of the said Baltimore Conference, known as Staunton Station, in Rockingham District, and which the said Congregation of Staunton Station having assembled at their Church on the [illegible] day of April, 1867, to determine to which division of the Church they should thereafter belong; and the question having been submitted to the communicants & pew holders & pew-owners of said congregation over twenty-one years of age—it was determined by vote of the majority of the whole number, that said congregation should thereafter belong to the Methodist Episcopal Church South; and it appearing to the Court from an inspection of the said papers that the vote of the said Congregation has been fairly taken, according to the provisions of the Act of Assembly in such cases made and provided, and that of 118 members of the said Congregation, entitled to vote [illegible] voted in accordance with the determination of the Congregation, and the remaining 17 either failed or refused to vote--the Court doth approve the proceedings of the said Congregation and their said determination, as having been taken and ascertained

according to law, and doth order that such approval be entered of record; and that the said papers be filed and preserved by the Clerk among the records of the Court.

(Pls.' Ex. 96, "Augusta County CL Order Book 6/28/1867.")

Similarly, Plaintiffs' Ex. 97, which is an order from the Augusta County CL Order Book, entered on November 20, 1867, states as follows:

> A Religious congregation of Presbyterians, worshipping at [illegible], in Augusta County, this day presented to the Court certain papers, in which it is recited and claimed, that "whereas the church to which this church congregation has been attached, has been divided, and now exists as two separate and distinct Presbyterian Churches, the one known as the "Presbyterian church in the United States of America," and the other as the "Presbyterian Church in the United States"—and that the said Congregation of [illegible] having assembled in their church on the [illegible] day of November, 1867, to determine to which branch of the said church they should thereafter belong, and the question having been submitted to the pew-holders and pew-owners of said congregation over twenty-one years of age—it was determined by vote of the majority of the whole number, that said congregation should thereafter belong to the Presbyterian Church in the United States, (South), and it appearing to the Court, from an inspection of the said papers that the vote of the said Congregation has been fairly taken according to the provisions of the Act of Assembly in such cases made and provided, and that of 163 members of said Congregation entitled to vote, 118 voted in accordance with the determination of the congregation, and the remaining 45 either failed or refused to vote—the Court doth approve the proceedings of said Congregation and their said determination, as having been taken and ascertained according to law, and doth order that such approval be entered of record; and that the said papers be filed and preserved by the Clerk among the records of the Court.

(Pls.' Ex. 97, "Augusta Co CL Order Book 11/12/1867.")[7]

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[7] See also, Pls.' Ex. 98, "Augusta Co. CL Order Book 11/20/1867, Pls.' Ex. 118, "Rockbridge Co. CL Order Book, 9/26/1867, and Pls.' Ex. 119, "Rockbridge Co. CL Order Book, 4/17/1869," which each contain similar language in regard to the particular court's consideration of the congregational vote.

In addition, relevant caselaw, which has previously been explicated in full within this Court's 57-9 Opinion, also supports the Court's holding as to the meaning of "if the determination be approved by the court." For example, in Hoskinson v. Pusey, 73 Va. 428 (1879), the Supreme Court of Virginia addresses the predecessor statute to 57-9. Its discussion of that statute is telling:

> It is also insisted that the action of the congregation of "Harmony" church, after the conference at Alexandria held in 1866, operated to transfer the title and control of the property to that portion of the congregation which adhered to the Methodist Episcopal Church South. That action has already been adverted to, and is claimed to have been had under an act of the general assembly, passed February 18th, 1867 (acts of 1866-7, ch. 210, pp. 649, 650; Code of 1873, ch. 76, § 9), which had the effect, as contended, to transfer the control and use of the property as aforesaid. It is not clear, from the evidence, whether this action of the congregation was had before or after the passage of the act referred to. I should rather infer that it was in 1866, before the act was passed. If that were so, of course there would be nothing in the point made by the appellants on the operation of the act. But suppose it was after the passage of the act. It is a sufficient answer to the claim of the appellants based on this statute, that it does not appear by the record that the provisions of the statute have been fully complied with. The portion bearing on this case reads as follows: "And whereas divisions have occurred in some churches or religious societies to which such religious congregations have been attached, and such divisions may hereafter occur, it shall, in any such case, be lawful for the communicants and pewholders over twenty-one years of age, by a vote of a majority of the whole number, as soon as practicable after the passage of this act, or whenever such division shall occur, to determine to which branch of the church or society such congregation shall thereafter belong; and which determination shall be reported to the said court, and, if approved, shall be so entered on the minutes, and shall be conclusive as to the title to and control of any property held in trust for such congregation, and shall be respected and enforced accordingly in all the courts of this commonwealth."
>
> A vote of the members of the congregation[8] was taken at some time, as already stated, but there is no evidence that the determination of the congregation manifested by the vote was

[8] Here the Hoskinson Court refers to the particular congregation seeking to invoke the statute in that case.

> reported to the circuit court of Loudoun county, approved by that court, and so entered on its minutes. Compliance with these requirements is essential to the effect given by the statutes.

Id. at 439-40.

Thus, the Hoskinson Court sets forth the "requirements" that are essential in order for the statute to have its effect: 1.) a determination of the congregation manifested by a vote; 2.) a report of that vote to the appropriate circuit court; and 3.) approval of that vote by the circuit court. Nowhere does Hoskinson suggest that the various "factors" similar to those set forth in Green v. Lewis must also be examined in order to give effect to the statute.

Likewise, in Finley v. Brent, 87 Va. 103 (1890), the Supreme Court of Virginia describes the lower court's finding regarding a petition that had been filed in the circuit court pursuant to the predecessor statute to 57-9 as follows:

> The circuit court of Northumberland county dismissed the bill of the plaintiffs, by virtue of the provisions of the act of the Legislature of 1867, (Sess. Acts, pp. 649-'50), providing that, in the contingency of a division of any religious society, it should be lawful for a majority to determine to which branch such congregation shall hereafter belong, which determination, duly reported to court, should conclude questions as to the property held in trust for such congregation.

Id. at 108. Although the Supreme Court in Finley held that the predecessor statute to 57-9, as applied, violated the Contracts Clause, and thus gave effect to the 1860 deed at issue, Finley's brief discussion of the "act of the Legislature of 1867" is telling. For, as in Hoskinson, nowhere in that brief discussion is found any reference to "factors" similar to those described in Green v. Lewis.

Thus, in light of the above orders and caselaw, the definition of "if the determination be approved by the court" becomes clear. That phrase in fact means that the Court must consider whether the congregational vote was "fairly taken,"[9] in accordance with the provisions of 57-9(A). Thus, the word "if" as used within 57-9(A) does not mean that this Court can or should consider the factors set forth in Green v. Lewis, a case that did not involve the application of 57-9(A).

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[9] See, supra, Pls.' Ex. 96 & 97.

4.) What is the meaning of the phrase "shall be conclusive as to the title to and control" of the property in question, as that phrase is used in 57-9(A)?

Decision of the Court:

Once the Circuit Court approves the determination of the congregation as to which branch of a church or society such congregation shall belong, the Court's approval under 57-9(A) "shall be conclusive as to the title to and control of any property held in trust for such congregation . . . ." There is nothing ambiguous or elusive in this language. Conclusive means final. In other words, if a trial court finds 57-9(A) to have been properly invoked (as this Court has done), and if a trial court finds 57-9(A) to be constitutional (which this Court does today, except in regard to the Contracts Clause issue which is not yet decided), and if the trial court approves the determination of the congregation regarding its majority vote as to its choice of branch, this then becomes a matter decided. In that event, and only as to those churches that filed 57-9(A) petitions, the declaratory judgment actions will have been rendered moot. If, on the other hand, the trial court ultimately rules that the Contracts Clause claim renders 57-9(A) unconstitutional as applied to one or more of the churches that have filed 57-9(A) petitions, the declaratory judgment actions regarding those churches must be heard and decided, because petitioners in that event will not be able to avail themselves of the division statute. In addition, if the Court does not approve the majority vote determination under 57-9(A) as to one or more churches, the declaratory judgment actions regarding those churches must be heard and decided.

5.) What is the meaning of the phrase "congregation whose property is held by trustees," as that phrase is used in 57-9(A)? Specifically, is Mr. Hurd correct when he asserted at oral argument on May 28th, 2008 that the phrase "congregation whose property is held by trustees" is not simply a reference to the property that is the subject of the 57-9(A) petition but, rather, requires the Court to make an initial determination, prior to the Court's consideration of the validity of the vote, as to "who" owns the property at issue?

Decision of the Court:

ECUSA/Diocese contended at the May 28th, 2008 hearing on the constitutional issues that the 2005 amendments to 57-9 were substantive, and constitute a change in the law. The Court does not find merit in this contention. This is confirmed by a reading of the legislative history surrounding the 2005 amendments, which confirms that the phrase "whose property is held by trustees" was also added to § 57-13, and § 57-14.

These changes were implemented by the legislature simultaneously with the addition of § 57-16.1. The purpose of 57-16.1, added in the wake of Falwell v. Miller, 203 F. Supp. 2d 624 (W.D. Va. 2002), was to allow churches in Virginia to incorporate.[10] Viewed in context, the phrase "whose property is held by trustees" was added in order to make clear that 57-9 can be invoked only in the event that property is held by trustees, and not when the property is held in other forms, such as corporate.

ECUSA/Diocese's argument that the phrase "whose property" should be read by this Court to mean that this Court is required to make a determination of ownership prior to determining whether a congregation has satisfied the requirements of 57-9(A) would, in fact, make 57-9(A) a nullity. This is because the purpose of 57-9(A) is to settle the question of ownership of property that is held by trustees in the event of a division. This Court will not interpret a statute so as to deprive it of its independent meaning. Rather,

> [t]he rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd. On the contrary, it is well established that every act of the legislature should be read so as to give reasonable effect to every word and to promote the ability of the enactment to remedy the mischief at which it is directed.

Jones v. Conwell, 227 Va. 176, 181 (1984).

Thus, the phrase "whose property is held by trustees" is simply a reference to the property at issue. These 6 words, added to 57-9(A) in 2005, do not change the substantive meaning of the statute.[11]

ECUSA/Diocese further argue that Va. Code § 57-7.1, enacted in 1993, requires this Court to make a preliminary determination of ownership before embarking on a 57-9 analysis. The Court finds no merit in this position,

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[10] See 2005 Va. ALS 772 (LexisNexis 2008) ("SYNOPSIS: An Act to amend and reenact Sections 57-7.1 through 57-11, 57-13, 57-14, 57-15, 57-16, 57-17, 57-21, and 57-32 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 57-16.1, relating to conversion of church entities and church property to corporate status.").

[11] The Court would also note that ECUSA/Diocese make a claim within their briefs which amounts to an argument that they should be allowed to prove that the CANA Congregations have waived the right to invoke 57-9(A). Because the issue of waiver was not posed to the parties within the Court's 5 questions, the Court does not address that issue within this opinion. Any party wishing to address the issue of waiver should file an appropriate motion.

because § 57-7.1 did not change long-established precedent in Virginia regarding trusts for general hierarchical churches. 57-7.1 states as follows:

> Every conveyance or transfer of real or personal property, whether inter vivos or by will, which is made to or for the benefit of any church, church diocese, religious congregation or religious society, whether by purchase or gift, shall be valid.
>
> Any such conveyance or transfer that fails to state a specific purpose shall be used for the religious and benevolent purposes of the church, church diocese, religious congregation or religious society as determined appropriate by the authorities which, under its rules or usages, have charge of the administration of the temporalities thereof.
>
> No such conveyance or transfer shall fail or be declared void for insufficient designation of the beneficiaries in any case where the church, church diocese, religious congregation or religious society has lawful trustees in existence, is capable of securing the appointment of lawful trustees upon application as prescribed in § 57-8, is incorporated, has created a corporation pursuant to § 57-16.1, or has ecclesiastical officers pursuant to the provisions of § 57-16.

Va. Code § 57-7.1 (2008).[12]

Since its original enactment in 1993, this code section has been interpreted to validate transfers of real property for the benefit of local congregations. See Trustees of Asbury United Methodits Church v. Taylor & Parrish, Inc., 244 Va. 144, 152 (1995) ("[A]cquisition and ownership of property by churches are matters governed by statute, in accordance with Article IV, § 14 of the Constitution of Virginia. Code § 57-7.1 validates transfers, including transfers of real property, for the benefit of local religious organizations.") (emphasis added) (citing Norfolk Presbytery v. Bollinger, 214 Va. 500, 506, 201 S.E.2d 752, 757 (1974)). The Attorney General has found likewise:

> The provisions of Article 2 relate to property held 'for the benefit of any *church*, church diocese, *religious congregation or religious society*." Section 57-7.1 (emphasis added). While these terms are not defined, the Supreme Court of Virginia has held that Article 2 encompasses property held for the benefit of a local congregation, as opposed to property held by a larger hierarchical body.

[12] Clause 3 of the 1993 Act which enacted this section states that it is "declaratory of existing law." 1993 Va. ALS 370 (LexisNexis 2008).

1996 Op. Att'y Gen. Va. 194 (April 4, 1996) (citation omitted). Thus, 57-7.1 did not change the policy in Virginia, which is that church property may be held by trustees for the local congregation, not for the general church.[13]

Sincerely,

Randy I. Bellows,
Circuit Court Judge

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[13] See, e.g., Reid v. Gholson, 229 Va. 179, 187 n.12 (1985) ("Because of this strong tradition, we have, for instance, refused to adopt the "implied trust" theory in favor of hierarchical churches, [Norfolk Presbytery v. Bollinger], 214 Va. 500, 201 S.E.2d 752 (1974), notwithstanding its acceptance by the federal courts and by the majority of our sister states, and we have refused to apply the traditional chancery doctrine of judicial cy-pres, in favor of religious trusts for indefinite beneficiaries. Gallego's Ex'ors. v. The Attorney General, 30 Va. (3 Leigh) 450, 24 Am. Dec. 650 (1832)); see also Norfolk Presbytery v. Bollinger, 214 Va. 500, 507 (1974) ("As express trusts for super-congregational churches are invalid under Virginia law no implied trusts for such denominations may be upheld."); Hoskinson v. Pusey, 73 Va. 428, 431 (1879) ("The deed is the same in substance as the deed in Brooke & others v. Shacklett, 13 Gratt. 301, and the construction must be the same. According to that construction, the conveyance is not for the use of the Methodist Episcopal Church in a general sense. Such a conveyance in this state would be void. But it is a conveyance for the use of a particular congregation of that church, in the limited and local sense of the term--that is, for the members, as such, of the congregation of the Methodist Episcopal Church, who, from their residence at or near the place of public worship, may be expected to use it for that purpose.").