

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

| | | |
|---------------------------------------|---|----------------------------|
| In re: |) | |
| Multi-Circuit Episcopal Church |) | Civil Case Numbers: |
| Litigation |) | CL 2007-248724, |
| |) | CL 2006-15792, |
| |) | CL 2006-15793, |
| |) | CL 2007-556, |
| |) | CL 2007-1235, |
| |) | CL 2007-1236, |
| |) | CL 2007-1237, |
| |) | CL 2007-1238, |
| |) | CL 2007-1625, |
| |) | CL 2007-5249, |
| |) | CL 2007-5250, |
| |) | CL 2007-5362, |
| |) | CL 2007-5363, |
| |) | CL 2007-5364, |
| |) | CL 2007-5682, |
| |) | CL 2007-5683, |
| |) | CL 2007-5684, |
| |) | CL 2007-5685, |
| |) | CL 2007-5686, |
| |) | CL 2007-5902, |
| |) | CL 2007-5903, and |
| |) | CL 2007-11514 |

CHURCH OF THE WORD'S OPENING BRIEF

Church of the Word ("COTW"), by counsel, hereby files this opening brief on whether its property is covered by §57-9.

INTRODUCTION

On September 26, 2008, after briefing by the parties, this Court heard extensive argument concerning COTW's Petition and whether the property¹ referenced therein was covered by § 57-9. Both the Diocese and COTW were of the opinion that this Court's prior rulings had concluded that the Property was subject to §57-9. However, the parties arrived at this conclusion differ-

¹ For the purposes of this brief, the "Property" shall have the same meaning as that of the Stipulation at ¶8.

ently. The Court asked the parties to present evidence to aid in its decision on this matter. Attached hereto as Exhibit A are the relevant portions of the transcript.

On October 10, 2008, the parties submitted a stipulation and exhibits for the Court's consideration.² It remains COTW's position that §57-9 is designed to resolve competing property interest claims relating to church property that "is held by trustees." The mere fact that the Property was initially held by trustees appointed by the Diocese is of no consequence under the statute, and the Court need only resolve whether there is sufficient evidence to conclude that COTW is a beneficiary of the trust within which the Property is held. As evidenced in the Stipulation, and summarized below, there is an overwhelming amount of evidence that demonstrates that COTW is a beneficiary of the trust within which the Property is held. Given that the Diocese/ECUSA have stipulated to the COTW § 57-9 voting procedures and results, COTW properly invoked §57-9 and the Court should conclude that the Property referenced in its §57-9 Petition is properly subject thereto.

RELEVANT FACTS FROM STIPULATION

COTW was established in 1986. *Stip.* ¶1. Its founding church was Church of the Apostles, another party to this litigation. *Id.* In 1988, the COTW was granted church status by the Diocesan Annual Council. *Stip.* ¶3. On or about July 30, 1992, COTW petitioned the Circuit Court of Prince William County to appoint Congregational trustees, "as trustees to represent the congregation of Episcopal Church of the Word, Manassas, Virginia, and to hold title to real property." On August 18, 1992, the Circuit Court of Prince William County entered an order appointing Congregational trustees pursuant to Va. Code 57-8. *Stip. Ex. 4.*

² The Stipulation is hereinafter referred to as *Stip.* with *Ex. __* referring to a particular exhibit, *Ex. __, P. __* referring to a particular page in the exhibit and ¶ *__* referring to a particular paragraph in the Stipulation.

On December 17, 1992, COTW requested and received the consent of the Standing Committee of the Diocese to revert to “mission” status within the Diocese. Part of the reason for the change was Episcopal Church of the Word’s desire to access Diocesan funds, such as the New Mission Fund. *Stip.* ¶6.

In June of 1993, the duly appointed trustees of COTW entered into a Contract for the purchase of real property located at 14125 Lee Highway, Gainesville, Virginia. *Stip Ex.* 7. As a result of fundraising efforts, COTW had raised approximately \$230,000 for the purchase. \$25,000 came from the Diocese. The remaining \$205,000 raised by COTW came from sources other than the Diocese including church members and other churches both within and outside of Virginia. *Stip. Ex.* 10. A detailed history of these fundraising efforts and the purpose behind the purchase of the Property is contained within *Stip. Ex.* 8.

In order to obtain court approval of the purchase, a petition was filed on November 26, 1993 (*Stip. Ex.* 11) and a subsequent revised petition was filed on December 3, 1993. *Stip Ex.* 13. These petitions were filed in the Prince William County miscellaneous matter CH 44584 “IN RE Church of the Word” pursuant to Virginia Code §§57-8 and 57-15. *Id.* The purchase was specifically designated as being for the benefit of Church of the Word. *Stip. Ex.* 13 at p. 3 (48 of 158).³

On December 3, 1993, a special warranty deed was recorded transferring title to the Diocesan trustees for “the Protestant Episcopal church in the Diocese of Virginia, whose address is 8317 Centreville Road, Manassas, Virginia 22111”. *Stip. Ex.* 14. The address referenced in the Deed was COTW’s, not that of the Diocese. *Stip.* ¶17.

³ The Congregational trustees resigned and Diocesan trustees were appointed for the purpose of the purchase. This was done, in part, to allow COTW to avail itself of resources from the New Mission Fund. As indicated in the stipulation, these funds were used for operating expenses and mission expansion, not for the purchase of the Property. On the whole, over the history of COTW, the balance of funds from these sources closely approximates those that COTW voluntarily contributed to the Diocese. See *Stip.* ¶¶7, 23, 24 and 25.

Over the course of the next 15 years, COTW paid at least \$750,000 in mortgage payments toward ownership of the property. *Stip.* ¶18.

During this time period, the Diocese recognized the Property as being that of COTW. For example, in celebration of COTW's 10th anniversary, Bishop Jones on September 20, 1996 stated in a letter to COTW "When the opportunity presented itself for you to purchase a church home.... And now, you have a church building which visually projects your mission as a church..." *Stip. Ex. 16*. Additionally, in celebration of COTW's 10th anniversary, Bishop Mathews on September 20, 1996 stated in a letter to COTW "Working with you to acquire your current, permanent building." *Stip. Ex. 17*.

It was COTW, not the Diocese, that refinanced the mortgage on the Property in 1999 (*Stip. Ex. 18 and 19*) and again in 2003 (*Stip. Ex. 22 and 23*).

In late 2004, COTW returned to Church status and in July 2005 COTW requested that its property be held by local trustees. *Stip. Ex. 26*. On September 12, 2005, following the receipt of the communication from the Diocese contained in *Stip. Ex. 26*, COTW petitioned for and obtained court approval replacing the Diocesan trustees with local Congregational trustees. *Stip. Ex. 27 and 28*. This order was transmitted to the Diocese on September 13, 2005. *Stip. Ex. 30*. The Diocese received this order and its executive committee approved the replacement on September 29, 2005. *Stip. Ex. 32*. Despite this approval and demands by COTW, the Diocesan trustees have not been replaced on the Deed. *Stip.* ¶40.

SUMMARY OF ARGUMENT

It is undisputed that the property at issue is, in the words of § 57-9, “held by trustees.” And as this Court has recognized, a long line of Virginia precedent—beginning with *Brooke v. Shacklett*, 13 Gratt. 301 (1856), and continuing through *Norfolk Presbytery v. Bollinger*, 214 Va. 500 (1974), and *Green v. Lewis*, 221 Va. 547 (1980)—holds that church property in Virginia “may be held by trustees for the local congregation, not for the general church.” Letter Op. on Court’s Five Questions at 14. As these cases confirm, even if there is an ambiguity in a deed as to whether the property is held for the benefit of the denomination or diocese rather than the local congregation, the courts will read it to create a trust for the benefit of the congregation. *Id.*

To resolve this dispute, however, this Court does not need to address whether and how a diocese in Virginia may *ever* be a beneficiary of a trust interest in church property. Section §57-9 is designed to resolve the competing ownership claims of different potential groups of beneficiaries. Thus, provided there is sufficient evidence to support a factual finding that the congregation was *a* beneficiary of the trust at issue—that is, provided there is a meaningful factual nexus between the property at issue and the congregation—the property is held “in trust for such congregation” and § 57-9 provides a neutral means of adjudicating those competing claims.

Here, there is more than enough evidence for the Court to conclude that the property at issue is “held in trust for [the] congregation.” Indeed, it is undisputed that:

- The address of the Property at issue has always been the address of the COTW congregation, and never the address of any Diocesan entity or office;
- The address of the Grantee contained in the Deed at issue was the address of the COTW congregation, and never the address of any Diocesan entity or office;
- The COTW congregation raised more than \$200,000 to support the purchase of the Property;
- The COTW congregation has made more than \$750,000 in mortgage payments toward ownership of the property;

- The Diocese has admitted that the Property is COTW’s “church home” and its “permanent building.”
- At the Diocese’s request, COTW appointed trustees for the Property in 2005, and the Diocese agreed to replace the Diocesan trustees with the Congregational trustees but never made good on its promise.

In short, even apart from the longstanding prohibition on denominational trusts in Virginia, the record here provides more than sufficient evidence for the Court to conclude that the Diocesan trustees appointed pursuant to Va. Code §§57-8 and 57-15 held the Property at least partly “in trust for [the] congregation”—and thus that the Property is subject to §57-9(A)

ARGUMENT

No reported Virginia case directly addresses what steps the Court must take in order to determine whether a congregation seeking to invoke §57-9 has properly met §57-9(A)’s requirement that the property at issue be “held by trustees” or “held in trust for [the] congregation”. For most of the Property in this litigation, the Diocese/ECUSA have conceded this point. For COTW, however, the Diocese/ECUSA have taken the position that COTW has no interest in the Property, beneficial or otherwise, that would allow it to invoke §57-9(A), because the Property is held by trustees appointed by the Diocese. Diocese 9/5/08 Opening Brief at P. 6-8.

In its April 5, 2008 Letter Opinion, this Court conducted a detailed examination of §57-9 and the other Virginia church property disputes. Additionally, in its June 25, 2008 Letter Opinion, this Court examined the phrase “whose property is held by trustees,” concluding that it “is simply a reference to the Property at issue.” June 25, 2005 Letter Opinion at p. 12. In these opinions, the Court noted that this language was added to the statute in 2005—along with other changes reflecting the fact that congregations can now incorporate—and rejected the Diocese/ECUSA argument that the phrase “whose property” requires the Court to make a determination of ownership prior to determining whether a congregation has satisfied the requirements of

§57-9(A). The Court concluded that such an interpretation would render the statute a nullity. June 25, 2005 Letter Opinion at p. 12.

As the Court recognized in its Five Questions opinion (at 11-14), the statute does not require the Court to make a determination of ownership prior to determining whether a congregation has satisfied the requirements of §57-9(A). As explained in the following section, however, the evidence is more than sufficient to support a factual determination that the COTW congregation is a beneficiary of the property held by trustees within the meaning of §57-9(A). Such an inquiry need not go into all of the factors enumerated in *Green v. Lewis*, 221 Va. 547 (1980), a §57-15 case, because §57-9 does not have any reference to the governing authorities of the church.

I. The Facts Overwhelmingly Support the Conclusion That Church of the Word has a Beneficial Interest in the Property

The Diocese/ECUSA have taken the position that the Property is that of the Diocese and that COTW has no interest in the Property, beneficial or otherwise. This position is unsupported by the evidence. COTW, after years of renting space at a local school, identified and became the contract purchaser of the Property. In COTW's Chancery Matter No. 44854 "IN RE EPISCOPAL CHURCH OF THE WORD", COTW and the Diocese petitioned the Prince William County Circuit Court to purchase the Property pursuant to §57-8 and §57-15. *Stip. Ex. 13*. At the request of COTW and the Diocese, Diocesan trustees were appointed to hold property "for the benefit of Episcopal Church of the Word".⁴ *Stip Ex. 13*.

In addition, the Deed that was executed referenced the address of COTW, not the Diocese. *Stip. ¶17 and Ex. 14*. The court order approving the purchase approved the purchase pursu-

⁴ It is acknowledged that the Petition contains the additional language that the Property was additionally to be held in trust for the Diocese. This language in the Petition merely evidences conflicting trust claims that §57-9 is designed to reconcile in the event of a division.

ant to the terms of the purchase agreement in which only COTW was the contract purchaser. *Stip. Ex. 15.* The bulk of the funds used for the purchase were COTW funds, not Diocesan funds. *Stip. Ex. 10 and ¶11.* COTW paid at least \$750,000 in mortgage payments on the Property. *Stip. ¶18.* COTW refinanced the Property twice. *Stip. Ex. 18, 19, 23, and 24.* The Diocesan trustees were removed by court order and Congregational trustees were appointed. *Stip. Ex. 28.* Lastly, the Diocese, by resolution, approved of the transfer to the Trustees appointed by the Circuit Court of Prince William County for Episcopal Church of the Word. *Stip. Ex. 32.*

In these circumstances, it would defy logic to conclude that COTW did not have a beneficial interest in the Property. This interest is sufficient for COTW to invoke §57-9. COTW is not merely a renter or gratuitous user of the Property. Had the Diocese wanted to make COTW a mere tenant, the Petition for the Approval of the Purchase would not have had any reference to COTW. The Diocese would have simply taken the money for the purchase of the Property from COTW, obtained approval of the purchase solely for its benefit, and then leased the Property back to COTW. In order to avoid §57-9, the Diocese could have purchased the Property in the name of the bishop pursuant to §57-16. Neither of these actions were taken for the obvious reason that COTW would have most likely rejected the idea that the more than \$200,000 it raised for the purchase along with the mortgage payments and any improvements it made to the Property would be given over to the Diocese.

All of the foregoing facts support the conclusion that the Property in dispute meets the definition of a “the Property held in trust for such congregation,” and thus that COTW has a sufficient nexus with the Property and trust interest in the Property to invoke §57-9.

II. The Diocesan Trustees Have Been Removed By Court Order

While the Deed related to the Property still names Diocesan trustees—on account of the Diocese’s failure to make good on its promise to record a new deed—it is important for the Court to consider the fact that these Diocesan trustees have been removed by court order. In late 2004, COTW sought and received church status from the Diocese. As a result of this change in status, any necessity for Diocesan trustees was negated. On August 2, 2005, COTW sought guidance from the Diocese on the process to remove the Diocesan trustees and appoint Congregational trustees. As a result of this inquiry, COTW voted to appoint COTW members to “become Trustees for our current ECW property” and petitioned the Circuit Court, in the same Chancery Matter No. 44584 as the Diocesan trustees were appointed, for the appointment of the Congregational trustees. *Stip. Ex. 27*. This order was signed on September 12, 2005 and submitted to the Diocese on September 13, 2005. On September 29, 2005, with this order in hand, the Diocese executive committee consented to the transfer of title to be held in trust by trustees appointed by the Court for COTW.

The Diocesan trustees were appointed in the COTW Chancery Matter pursuant to §57-8 and §57-15. Pursuant to §57-8, the Prince William Circuit Court can “without notice to the trustee or trustees change those so appointed whenever it may seem to the court or judge proper to effect and promote the purpose and object of the conveyance, devise, or dedication, and the legal title to such land shall for that purpose and object be vested in the trustees for the time being and their successors.” §57-8 (emphasis added).

The Diocese has presented no evidence that it disagreed with the September 12, 2005 order. The Diocese did not appeal the Order, and in fact the Diocese relied upon the order to approve the transfer of title to the Congregational trustees. Accordingly, the September 12, 2005

order is a final order that this Court does not have the authority to alter or amend. The order is explicit that the Congregational trustees replace the Diocesan trustees as trustees for Episcopal Church of the Word. Insofar as the Diocesan trustees were appointed only for the purposes of holding title to the Property, their replacement necessitates the conclusion that the Congregational trustees hold title to the Property.

Accordingly, the COTW property is not held by Diocesan trustees. This fact negates any argument that the COTW property does not fall within the §57-9 language of “the Property held in trust for such congregation”.

III. The Diocese Canons And Constitutions Are Irrelevant

It is anticipated that the Diocese/ECUSA will make extensive references to their constitutions and canons as controlling the Property interests of COTW. This Court has previously analyzed this issue in the context of §57-9 and concluded that these governing authorities have no bearing. The Court’s analysis of *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 506 (1974) concluded that:

Norfolk demonstrates a key difference between 57-9 and 57-15: just as 57-9 requires only a majority approval of the congregation in order for the court to determine ownership of property upon a division, 57-15 also originally required only congregational approval for a conveyance of property. However, 57-15 was affirmatively amended to include the specific words: “constituted authorities,” and “governing body of any church diocese.” **In contrast, 57-9 contains absolutely no reference to the governing authorities of a church.**

April 3, 2008 Letter Opinion at p. 74 (emphasis added in bold).

Accordingly, the Exhibits in the Stipulation containing the constitutions and canons are simply irrelevant to the §57-9 analysis.

IV. The Fact That Diocesan Trustees Were Utilized is Irrelevant

As discussed above, the Diocese Canons and Constitutions are irrelevant to deciding this property dispute. Equally irrelevant is the fact that Diocesan trustees were named in the deed.

This Court has received numerous briefs in this litigation about the historical underpinnings related to the ownership of church property. Because churches up until the 2005 Amendments to the Virginia Code were not allowed to incorporate, they were required to hold property either by ecclesiastical officers pursuant to Va. Code § 57-16 or by Court appointed trustees pursuant to Va. Code §57-8. *See, e.g., Globe Furniture Co. v. Trustees of Jerusalem Baptist Church*, 103 Va. 559 (Va. 1905)

Churches in Virginia are not incorporated, and under the policy of our law cannot be. The Property they are permitted to hold and its use is fixed by statute. Church trustees are creatures of statute, and their powers are limited by the law that authorizes their appointment. These Trustees have mere legal title with no power to manage or control the Property.

Id. at 560.

The acquisition 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. *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144, 152 (Va. 1995) (*Citing Norfolk Presbytery v. Bollinger*, 214 Va. 500, 506, 201 S.E.2d 752, 757 (1974) (construing former §57-7).)

§57-9(A) only requires that the Property be held by trustees. The Diocesan trustees appointed pursuant to Court Order dated December 6, 1993 and pursuant to §§57-8 and 57-15 hold title for the benefit of the congregation of Church of the Word.⁵ Moreover, the Petition stated

⁵ These code sections are in stark contrast to §57-16 which provides for ecclesiastical officers to hold property for the benefit of the denomination.

that Diocesan Trustees were to be appointed in lieu of Trustees of the Church of the Word. As indicated in numerous opinions by the Va. Supreme Court the words “church”, “religious congregation” or “religious society”, as used in the statute, mean the local congregation, rather than a larger hierarchical body. *See e.g. Norfolk Presbytery v. Bollinger*, 214 Va. 500, 506 (1974). *See also*, Letter Opinion dated April 3, 2008 at p. 74; *accord* Letter Opinion dated June 27, 2008 at P. 11-14. The Diocesan trustees appointed pursuant to Va. Code §§57-8 and 57-15 hold the Property for the benefit of the local congregation of Church of the Word and §57-9(A) is applicable to such property.

Accordingly, the mere fact that Diocesan trustees were initially named under the Deed is not relevant to the issue at hand.

V. The Court Has Ruled That Denominational Trusts Are Not Allowed In Virginia

The Diocese/ECUSA conceded in their previous briefs that in order to prevail, this Court must change its June 27, 2008, opinion which determined that §57-9(A)'s reference to “whose property is held by trustees” is a reference to the local congregation. They stated that if the Court does not reconsider its June 27, 2008 opinion, it has two choices 1) award the Property to Church of the Word or 2) invalidate the Deed and determine that the original grantor, the Resolution Trust Corporation (RTC), remains the owner. This position is derived from the Court's upholding of the long standing Virginia law that denominational trusts are invalid.⁶

While the Diocese/ECUSA has challenged this ruling and asked the Court to reconsider this position, this Court need not resolve that question to resolve the issue of whether COTW has a trust interest in the Property sufficient to invoke §57-9: as explained above, §57-9 decides

⁶ The issues over denominational trusts were extensively briefed by the parties in the demurrer pleadings filed in this matter. *See* Reply Memorandum in Support of Demurrers and Pleas in Bar dated July 27, 2007 pages 1-5.

competing property claims, and the evidence clearly shows that COWT had a beneficial interest in the Property.

However, to the extent that the Court is not persuaded that all of the above arguments and facts lead to the conclusion that COTW has met its burden to show that the Property identified in its §57-9 Petition meets the requirement of “the property held in trust for such congregation”, it must conclude that the COTW was the beneficiary of the trust if it is going to remain consistent to its previous opinion that denominational trusts in Virginia remain invalid.

CONCLUSION

The evidence that COTW has a beneficial interest in the Property sufficient to invoke §57-9 is overwhelming. The Court should so conclude and based on the voting consent order and the previous orders of this Court, enter final judgment in favor of COTW and conclusively determine that the Property is that of COTW and not the Diocese or ECUSA.

Dated: October 29, 2008

Respectfully submitted,

WALSH, COLUCCI, LUBELEY,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2008 a copy of the foregoing Church of the Word's Opening Brief, was sent by electronic mail and first-class mail, postage prepaid, to:

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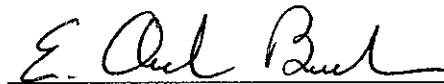
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HEARING IN RE: MULTI-CIRCUIT EPISCOPAL CHURCH LITIGATION
CONDUCTED ON FRIDAY, SEPTEMBER 26, 2008

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| <p>1 VIRGINIA: 2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY 3 -----X 4 In Re:) 5 Multi-Circuit) Consolidated Cases: 6 Episcopal Church) CL 2007-248724, et al. 7 Litigation) 8 -----X 9 Hearing 10 Before The Honorable Randy T. Bellows 11 Fairfax, Virginia 12 Friday, September 26, 2008 13 2:19 p.m. 14 15 Job No.: 1-137871 16 Pages: 1 - 88 17 Reported by: Theresa R. Hollister, CCR 18 19 20 21 22</p> | <p>1 APPEARANCES 2 ON BEHALF OF THE EPISCOPAL DIOCESE OF VIRGINIA: 3 JOSHUA D. HESLINGA, ESQUIRE 4 BRADFUTE W. DAVENPORT, JR., ESQUIRE 5 GEORGE A. SOMERVILLE, ESQUIRE 6 TROUTMAN SANDERS, LLP 7 1001 Haxall Point 8 P.O. Box 1122 9 Richmond, Virginia 23219 10 (804) 697-1200 11 12 MARY C. ZINSNER, ESQUIRE 13 TROUTMAN SANDERS, LLP 14 1660 International Drive 15 Suite 600 16 McLean, Virginia 22102 17 (703) 734-4363 18 19 20 21 22</p> |
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17
1 more extensive recitation of the facts. We've pared it
2 back to satisfy them, and now they say, well, we
3 prefer --
4 THE COURT: Let me make a suggestion. What
5 if we say -- I'm looking at you, but maybe Mr. Chud is
6 the better person to look at. What if we say that ECUSA
7 and the Diocese stipulate that the congregations in their
8 petitions make out a prima facie case that in accordance
9 with the 57-9 requirements and that the Court may accept
10 those reports as established evidence in this case and
11 will not, will not, will not contest the issue of
12 compliance of 57-9?
13 MR. COFFEE: That would be satisfactory from
14 my perspective, Your Honor.
15 THE COURT: Well, what about you Mr. Chud?
16 MR. CHUD: We would agree to that as well.
17 MR. DAVENPORT: So would the Diocese.
18 THE COURT: Okay. That's fine. Let's do
19 that. Because that I think will satisfy everybody.
20 So I want to sign an order so that the
21 parties don't have any residual anxiety when they leave
22 here. I want to sign an order on this today. So why

18
1 don't you interlineate a draft with the language that I
2 just said and you all sign off on it. Then I will sign
3 off on it.
4 Was there something you wanted to say,
5 Mr. Peterson?
6 MR. PETERSON: No. I wasn't exactly sure of
7 the particular language so I was looking to Mr. Johnson
8 for the particular language. He was looking at me for me
9 a recitation of the-
10 THE COURT: I'm sure Mr. Davenport has it
11 down, right? Ms. Zinsner has it down.
12 MR. DAVENPORT: Somebody over here has it.
13 THE COURT: Somebody has it. Then we can
14 fight about what I said. We do have a court reporter, of
15 course.
16 All right. So that takes care of all voting
17 issues.
18 MR. COFFEE: Will you excuse me if I retreat
19 to the hallway to work on the language with Mr. Chud?
20 THE COURT: Yes, why don't you do that. Then
21 you can bring it back to me. Bring me an endorsed order
22 that I can sign.

19
1 The next issue that I think we should talk
2 about is Church of the Word, although, I don't feel like
3 we have to do it in that order. But in my order, setting
4 this hearing, I think I said that Church of the Word was
5 the only -- other than the voting issues -- Church of the
6 Word was the only other issue I was going to resolve
7 today. But I noticed in the draft order I was sent this
8 morning that -- at least I got the impression, that
9 someone contemplates that there are other issues I'm
10 going to resolve today, including property disputes,
11 which I'm not going to resolve today. I'm not prepared
12 to resolve any issues as a matter of law today. So if
13 there is a belief on the part of the parties that there
14 are other issues that can be resolved as a matter of law,
15 those issues are going to have to be identified to me and
16 I'm going to have to figure out when I'll resolve that.
17 But do you all think I should deal with Church of the
18 Word next? All right. Go ahead.
19 MR. BURCHER: Good afternoon, Your Honor.
20 Andrew Burcher on behalf of Church of the Word.
21 Your Honor, it's Church of the Word's
22 position you've already concluded or ruled with respect

20
1 to this matter as it relates more the general scope but
2 how it applies to Church of the Word. In your letter
3 opinion on page 12, you conclude that the reference of
4 whose property is held by trustees is simply a reference
5 to the property at issue. In this case that's
6 essentially what we have. Church of the Word has filed a
7 57-9 petition and the reference there is to that
8 property.
9 The second component of why Church of the
10 Word considers that you've already ruled on this issue is
11 that notwithstanding that 57-9 ruling, you also ruled
12 that denominational trusts in Virginia are invalid. And
13 so I think property being held by Diocesan trustees would
14 be a denominational trust.
15 THE COURT: Let me ask you a question -- it
16 may be somewhere in the briefs, the voluminous briefs
17 that have been filed in this case, but didn't leap out at
18 me, you know I have cited in my various letter opinions
19 the fact that the, the Diocese holds 29 properties. It
20 owns properties or in its name, right? You know what I'm
21 referring to? I make various references to that. I
22 think I used the word 29.

21

1 MR. BURCHER: I do know what you are
2 referring to in terms that there was an exhibit that was
3 filed at some point during the November trial in which a
4 certain number of properties were held, some of which
5 were held specifically in the name of the Diocese. And
6 then there is a subcategory in which the Church of the
7 Word property was referenced, which it was held Diocesan
8 trustees. I don't know whether the 26 or 29 includes the
9 Diocesan trustees.

10 THE COURT: Well, that's exactly what I was
11 asking you because the various reference I made to the 29
12 was in connection with an assertion that the Episcopal
13 Church could have, if it wished, avoid 57-9 had it placed
14 the property in the Diocese instead of making it subject
15 to 57-9. And I'm not sure that statement is consistent
16 if I was to find -- if the Church of the Word is one of
17 those 29 properties, to then say, oh -- but even that
18 property is subject to 57-9. So I'd like the answer to
19 that question. I'll ask who is arguing this? Mr.
20 Heslinga?

21 MR. HESLINGA: I am, Your Honor.

22 THE COURT: What is the answer to that? Are

22

1 those 29 properties include Church of the Word or not?

2 MR. HESLINGA: I don't have the list or Your
3 Honor's opinion in front of me. What I recall is that
4 you are referring to properties held in the bishop's
5 name. And so...

6 THE COURT: I was. But not, not, not in a --
7 literally in a bishop's name, not in Mr. Davenport's name
8 as trustee.

9 MR. HESLINGA: That's what I recall Your
10 Honor to be referring to.

11 THE COURT: So it would not be inconsistent
12 in that scenario.

13 MR. BURCHER: That is my understanding.

14 THE COURT: Okay. So let me ask you another
15 question, Mr. Burcher. Is it fair to say that your
16 argument comes down to this: It doesn't matter who the
17 trustees are. It could be Mr. Davenport, it could be
18 anybody. It could be you. Doesn't matter who the
19 trustees are. If it's held in trust, it's subject to
20 57-9.

21 MR. BURCHER: If it is held in trust -- the
22 congregation, this property is held in.

23

1 THE COURT: If it's a congregation whose
2 property is held the trust, it doesn't matter who the
3 trustees are.

4 MR. BURCHER: Correct.

5 THE COURT: Because that's their argument,
6 right? Their argument is that the trustees in this case
7 are representatives of the bishop, of the Diocese.

8 MR. BURCHER: That's the whole point of 57-9,
9 Your Honor, is to decide these property disputes. And I
10 think that's what your holding in the letter opinion
11 essentially says.

12 THE COURT: And it doesn't turn, it doesn't
13 turn on who the trustees are ever. That's your view.

14 MR. BURCHER: Yes, sir.

15 THE COURT: I may need to hear from you
16 again, but let me hear from the Diocese or ECUSA and
17 we'll see where we're at.

18 MR. HESLINGA: I'm the only one arguing this
19 on our side, Your Honor.

20 I don't think there's any dispute with that
21 point, that the fact that these trustees are appointed by
22 the Diocese is not dispositive, it does not distinguish

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1 how the Church of the Word's property should be handled
2 with respect to 57-9. As Your Honor has decided that
3 57-9 is interpreted and, in particular, as Your Honor has
4 decided that 57-7.1 is interpreted, because Your Honor
5 has decided that 57-7.1 does not broaden at all the way
6 the law used to be under 57-7. And under 57-7 you have
7 Supreme Court of Virginia precedence that said that the
8 only religious entities that can have property held in
9 trust for them in Virginia are congregations. They did
10 that based on statutory language that isn't there
11 anymore. But Your Honor did address in your 5 questions
12 opinion 57-7.1 and concluded there had been no change.

13 We think there are a number of problems with
14 that which we try and outline in the briefing. But our
15 argument is not because the trustee is Mr. Davenport as
16 opposed to, you know, someone that Church of the Word
17 selected that this property is different. Our argument
18 is that the Diocese owns this property. The name on the
19 deed is the Diocese' name; it's not Church of the Word's
20 name. And by operation of Your Honor's 5 questions
21 opinion, we would agree that it's not possible for the
22 Diocese to be the beneficiary of the trust. So if that's

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1 going to remain the decision of the Court, then that
2 disposes of this. And that's why we spent --
3 THE COURT: How does it dispose of it?
4 MR. HESLINGA: Well, because then the only
5 way -- well, then there are two possible ways to read the
6 deed. One to read it in favor of Church of the Word
7 regardless of the fact it's in the Diocese' name. Or,
8 two, to hold that the deed is invalid because it was
9 conveyed to the Diocese and you can't do that. That was
10 the source of our suggestion that if the deed is invalid
11 and void then, you know, then the grantor would still be
12 the owner of record. But it's not -- from our
13 perspective, it's not about the trustees being
14 Mr. Davenport and company; it's about who's the entity
15 named in the deed. Who is the owner of this property,
16 the beneficiary of the trust that the trustees are
17 holding it for.
18 THE COURT: So your view is the Church of the
19 Word can't file a 57-9 petition because it doesn't own
20 property subject to 57-9.
21 MR. HESLINGA: Correct.
22 THE COURT: And your view is that the phrase

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1 in 57-9, "any such congregation's property is held by
2 trustees" doesn't apply to Church of the Word because the
3 congregation does not have property held by trustees.
4 The Diocese has property held by trustees.
5 MR. HESLINGA: That's basically correct,
6 although I would probably focus a little more on the two
7 later references in 57-9 which say that it applies to
8 property held in trust for a congregation. But it is the
9 same basic point that our argument is that this is the
10 Diocese' property not the congregation's property.
11 Congregation not being the owner, they don't have the
12 right to file a 57-9 petition and assume ownership that
13 way.
14 THE COURT: And how does this -- how does
15 Church of the Word's situation differ from the other
16 churches that have filed 57-9 petitions?
17 MR. HESLINGA: The way, the way we've been
18 dealing with this so far, Your Honor, is just to -- as
19 Your Honor is obviously aware our contention all along
20 has been that you determine the ownership of the property
21 through the Green v. Lewis matrix. But Your Honor said,
22 no, 57-9 preempts that. So all that is left to us is to

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1 say that under a few particular deeds and a few
2 particular circumstances the deed itself is sufficient to
3 take this out of 57-9. Church of the Word is one of
4 those cases.
5 THE COURT: Distinguish this deed from, say,
6 deeds that Truro or the Falls Church has.
7 MR. HESLINGA: Well, typically -- and leaving
8 aside the 1746 deeds that are the subject of dispute --
9 typically the deeds say to so-and-so trustees or trustees
10 of Truro Episcopal Church or The Falls Church Episcopal.
11 That's not what this deed says. This deed says that they
12 are trustees of the Episcopal Protestant Church and the
13 Diocese of Virginia. That's us. It's not Church of the
14 Word. Church of the Word has never been known by that
15 name.
16 There is an order 3 days later, after the
17 deed, that uses Church of the Word's proper name at the
18 time, Episcopal Church of the Word. The order recites
19 that it was upon motion of the executive board, which is
20 a Diocesan organization that the Court was approving
21 purchase. And the order actually says that it is the
22 Diocese that the Court was approving the purchase of.

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1 And, you know, both of us attached that order to our
2 briefs, that December 6, 1993 order.
3 So we feel it is clear enough from the name
4 of the deed. But if it wasn't, look to that order. And
5 it is crystal clear the Diocese is the purchaser; the
6 Diocese is the owner of that property. I'm referring to
7 pages 3 to 4 of our opposition brief regarding Church of
8 the Word, which discusses the December 6, 1993 order,
9 which Church of the Word attached to its opening brief as
10 Exhibit B. We attached it as part of our Exhibit D and
11 the order has the various features that I've just
12 described.
13 THE COURT: So are you saying the difference
14 between the deed in this case is that the deed in this
15 case is trustees for the Episcopal Protestant Church and
16 the Diocese of Virginia, and the other deeds that you are
17 conceding are subject to 57-9 petitions all name the
18 local congregation?
19 MR. HESLINGA: That's it, Your Honor. The
20 deed is the distinction here. And the reason that the
21 deed is the distinction is that the deed establishes the
22 properties held in trust for the Diocese and not Church

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1 of the Word. The problem then emerges with respect to
2 this Court's 5 questions opinion, which is the Court held
3 that the statute does not validate a trust for the
4 Diocese. So this trust is either the trust stated in the
5 deed as we see it is either completely invalid and the
6 deed fails --
7 THE COURT: Let's look at that scenario
8 first. What happens then?
9 MR. HESLINGA: Then there is no deed
10 effectively and the grantor, the grantor would remain the
11 titled owner --
12 THE COURT: The Resolution Trust Corporation?
13 Is that who it was?
14 MR. HESLINGA: Yes.
15 THE COURT: All right. They may be coming
16 back.
17 MR. HESLINGA: The other option is that the
18 Court, either by operation of its 5 questions opinion or
19 by if the Court feels that it should have a trial as to
20 the intent of the grantor because it sees that the deed
21 is ambiguous, you know, the Court could make some sort of
22 decision based on that. But the operation of the 5

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1 questions opinion is such that -- and we're being
2 completely up front about that and that's why we spent so
3 much time on that in the brief, is that it is not
4 possible regardless of how clear this deed is to us and
5 the accompanying order is extremely clear that it is us
6 who are the owner and the purchaser as opposed to Church
7 of the Word. Regardless of all that, the 5 questions
8 opinion wipes it out because it says in Virginia you are
9 just not allowed to hold property in trust if you are
10 anything other than a religious congregation.
11 THE COURT: So under that scenario, the deed
12 is wiped out. Under that scenario, does the Church of
13 the Word get to file a 57-9 petition?
14 MR. HESLINGA: Well, we think that 57-9
15 requires, as its language states, property be held in
16 trust for such congregation. So if there is no deed, I
17 suppose there could be some argument that somehow a trust
18 had arisen over the years in favor of Church of the Word.
19 You know, or that the Court, again, by operation of the 5
20 questions opinion says doesn't matter what the deed says;
21 it's a deed to Church of the Word. And that's the second
22 alternative to interpret it that way and then the deed is

31

1 no different than anything else by operation of the 5
2 questions opinion.
3 THE COURT: So are you saying then in light
4 of the 5 question opinion to be consistent with the 5
5 question opinion, I would have to invalidate this deed;
6 is that what you are saying?
7 MR. HESLINGA: You would have to hold that
8 regardless of this deed -- of the name in the deed,
9 regardless of the other evidence that both sides have
10 introduced, primarily that order, regardless of that, the
11 deed is to Church of the Word not the Diocese.
12 THE COURT: All right. Let me hear from
13 Mr. Burcher again.
14 MR. BURCHER: A couple of points, Your Honor.
15 First with reference to the order that authorizes the
16 purchase of this property, that was done in re Church of
17 the Word. So the context that this is not connoting
18 Church of the Word's property, the Diocese, had they
19 wanted to buy property outright, did not have to do
20 anything in terms of going to the Prince William County
21 Circuit Court and do this in the matter of Church of the
22 Word.

32

1 The second point that I'd like to make is
2 there is a little bit of a factual dispute. And I
3 thought we weren't going to get into facts in this
4 hearing, but with regard to the deed, the address
5 referenced in the deed is not an address for the Diocese.
6 It is Church of the Word's address. So in terms of
7 invalidating the deed and construing that the deed would
8 be invalid, I think that the Court would and could
9 construe the deed in favor of Church of the Word rather
10 than in favor of the Diocese.
11 THE COURT: On the theory that the address is
12 the Church of the Word's address.
13 MR. BURCHER: If there is an ambiguity in the
14 deed as to who the grantee in the deed is, then the Court
15 could hear evidence as to, you know, that and determine
16 who is the grantee. And like I said, it is the position
17 of Church of the Word that that address has meaning in
18 the deed. It is not there for, for no reason. And that
19 was Church of the Word's address at the time of the
20 purchase.
21 But other than that, I think those are the
22 two points that I think are --

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1 THE COURT: Let's just go through some of
2 your arguments again. What do you think of what
3 Mr. Heslinga said about the impact of my 5 questions
4 opinion? He's saying essentially that -- I think he's
5 saying it requires, to be consistent with the 5 question
6 opinion, I would invalidate the deed.

7 MR. BURCHER: No, I think that what he is
8 saying is is that if you were to rule that the deed was
9 in favor of the Diocese, that the 5 questions opinion
10 would invalidate the deed. I don't know if you've made
11 that determination yet.

12 THE COURT: Is that a factual determination
13 or a legal determination or a legal determination based
14 on facts that are not in dispute?

15 MR. BURCHER: In order to -- the deed is
16 prima facie evidence of the facts cited therein. And in
17 order to determine whether or not there is an ambiguity,
18 you can look at the deed and see whether or not there is
19 an ambiguity. So as far as it being a factual question,
20 my position would be is that if you hold that it is in
21 favor of the Diocese, that I'd like to present evidence
22 to show that it is -- the Church of the Word has an

34

1 interest in this property and that it is the Church of
2 the Word's property.

3 THE COURT: We would do that if I found what?

4 MR. BURCHER: If you were to rule that the
5 deed, based on looking at the deed that you -- based on
6 looking at the deed that the deed on its face looked like
7 it was in favor of the Diocese, I'd like to present
8 evidence that there would be an ambiguity and that I
9 would present evidence that it really intended to be
10 referenced Church of the Word's property.

11 THE COURT: See if I understand this. Your
12 first argument, your first argument and the easiest one
13 from your perspective is for me to find that the deed is
14 in favor of the Church of the Word not the Diocese.

15 MR. BURCHER: I think I would step back even
16 further and I would say that you have ruled that 57-9
17 just covers the property in dispute. I don't think you
18 need to get into interpreting the deed or interpreting
19 whether or not this is a denominational trust and it's
20 invalid. I think that you can simply say that your
21 ruling says that whose property is held in trust is
22 basically a reference to the local congregation's

35

1 property.

2 THE COURT: But there's -- you've got to
3 explain this to me. They are saying that -- they are
4 saying -- they are not saying these words, but that this
5 is the equivalent of a, say, a synagogue that uses a
6 church for Saturday morning services, it rents the
7 church, borrows the church, uses it free, and then files
8 a 57-9 petition that says since this is the property
9 we're using it's subject to a 57-9 petition. That's
10 essentially what they're saying, because they're saying
11 that this is property that Church of the Word is using.
12 But it's not their property; they don't own it.

13 MR. BURCHER: The problem with that analysis,
14 Your Honor, is that this property was purchased in the in
15 re Church of the Word miscellaneous matter within the
16 Prince William County Circuit Court. Taking your analogy
17 would not have a church coming in and petitioning for the
18 purchase of this property in their miscellaneous matter.
19 So I don't think that that is the same analogy. There
20 has to be some linkage I think between the church and
21 that property. I don't think an interloper could come
22 and just sit down, you know, in the -- in some other

36

1 church's property and say, oh, by the way it's ours and
2 file a 57-9 petition. The 57-9 petition filed in this
3 case was filed in re Church of the Word.

4 THE COURT: Can you show me the language that
5 you are relying upon in the 5 question opinion.

6 MR. BURCHER: Yes, Your Honor. It's at page
7 12.

8 THE COURT: Why don't you just hand it up.
9 (Pause.)

10 THE COURT: Let's say this was property owned
11 by the bishop that Church of the Word was using. Could
12 the Church of the Word file a 57-9 petition?

13 MR. BURCHER: No.

14 THE COURT: Because it's not in trust, right?

15 MR. BURCHER: (Indicating.)

16 THE COURT: So what if it is owned by the
17 Diocese and held in trust by individuals appointed by the
18 Diocese such as Mr. Davenport, do you then have to breach
19 the question of whether the Diocese can own churches,
20 church property?

21 MR. BURCHER: I do think that is one issue
22 that is presented by the 5 questions opinion. But I

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|---|--|
| <p>37</p> <p>1 think that it would be harder for a church under that 2 context where clearly the Diocese -- the church hasn't 3 filed a petition, isn't a part of a petition to purchase 4 the property, it is not in re the name of that church it 5 is simply the church established and is using the Diocese 6 property that it would -- I think it would be a more 7 difficult legal analysis for that church. But since 8 that's not the case in this situation, I don't want to 9 split those hairs.</p> <p>10 THE COURT: I'm wondering whether you are 11 giving this part of this opinion a broader reading than I 12 intended. Can you refresh me on the language that was at 13 issue, the property as held by trustees. The context in 14 which that occurred, wasn't ECUSA and the Diocese arguing 15 that I had to make findings of ownership even as to Truro 16 and Falls Church and every other church? I mean it 17 wasn't just Church of the Word that was at issue here; it 18 was all the churches.</p> <p>19 MR. BURCHER: But, Your Honor, Church of the 20 Word's property was one of the properties that was 21 referenced in this brief and cited in a footnote in the 22 brief in the June 6th -- I mean this was front and center</p> | <p>39</p> <p>1 from filing a 57-9 petition. What I'm saying right now 2 is that in terms of this particular piece of property, 3 the deed was issued in re Church of the Word, the 4 authorization for purchase of the property was in re 5 Church of the Word. The Diocesan trustees were appointed 6 in re Church of the Word. That's how they got their 7 power. And so, therefore, that's why I think that whose 8 property is in re Church of the Word's property. And 9 that's all -- that's why I'm referencing that part of 10 the -- your order to make that determination. And that's 11 why I don't even think you need to get into the issue of 12 denominational trust.</p> <p>13 THE COURT: Let's just run through your 14 arguments. Your first argument is that I've already 15 decided this in the 5 question opinion in my holding that 16 the language of 57-9 would apply to essentially the 17 property the church sits on and uses. Is that what you 18 are saying?</p> <p>19 MR. BURCHER: In which the petition then 20 the...</p> <p>21 THE COURT: So what if the church rented 22 property?</p> |
| <p>38</p> <p>1 in terms of the briefs leading up to this opinion.</p> <p>2 THE COURT: Let me ask you this? How are 3 you -- are you different in your view than Truro or The 4 Falls Church?</p> <p>5 MR. BURCHER: How so?</p> <p>6 THE COURT: Different in terms of the phrase 7 property held by trustees, whose property is held by 8 trustees? Are you any different than Truro, for example?</p> <p>9 MR. BURCHER: What do you mean by different? 10 Church or the Word is different in that it is Diocesan 11 trustees that are named in the deed.</p> <p>12 THE COURT: But your view is that it has no 13 legal significance in a 57-9 petition.</p> <p>14 MR. BURCHER: That's correct. Because it 15 is -- the Diocesan trustees were appointed in re Church 16 of the Word. Okay. Had Diocesan trustees been appointed 17 and Church of the Word -- it was not in Church of the 18 Word's petition, it didn't have anything to do with 19 Church of the Word the church that was at issue, I don't 20 see why that would have any -- 57-9 would be less 21 applicable. And I'm not going to go all the way to say 22 because I don't know whether that would prohibit a church</p> | <p>40</p> <p>1 MR. BURCHER: If -- that's a leasehold 2 interest.</p> <p>3 THE COURT: So you are saying it has to be 4 owned by, by an entity for the benefit of the church.</p> <p>5 MR. BURCHER: In some fashion.</p> <p>6 THE COURT: So that's your first argument. 7 What is your second argument?</p> <p>8 MR. BURCHER: The second argument, Your 9 Honor, is that you have ruled that denominational trusts 10 are invalid in Virginia and therefore --</p> <p>11 THE COURT: That's not really your second 12 argument, right? Isn't that your third argument. Isn't 13 you second argument, isn't your second argument that -- a 14 factual issue, whether --</p> <p>15 MR. BURCHER: I thought we were talking 16 purely legal issues. If we're talking factual points my 17 second argument would be that the deed is in favor of 18 Church of the Word. My third factual argument which we 19 have -- again, I thought we weren't going to get into 20 factual points here. There are a multitude of factual 21 points.</p> <p>22 THE COURT: Well, make your arguments just so</p> |

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|--|--|
| <p style="text-align: right;">41</p> <p>1 I can list them.</p> <p>2 MR. BURCHER: Okay. The Church or the Word</p> <p>3 petition which was filed for the purchase of this</p> <p>4 property specifically says that the purchase was -- that</p> <p>5 Church of the Word -- that the purchase was for the</p> <p>6 benefit of Church of the Word.</p> <p>7 THE COURT: Well, that's your second</p> <p>8 argument. The deed is in favor of the Church of the</p> <p>9 Word, not the Diocese.</p> <p>10 MR. BURCHER: That's the deed. I'm talking</p> <p>11 about the petition that actually approved the purchase.</p> <p>12 Third factual point, third or fourth, would</p> <p>13 be that Church of the Word was the contract purchaser.</p> <p>14 The fifth factual point is that Church of the Word has</p> <p>15 paid --</p> <p>16 THE COURT: Church of the Word was the</p> <p>17 contract purchaser?</p> <p>18 MR. BURCHER: That is right.</p> <p>19 THE COURT: All right.</p> <p>20 MR. BURCHER: The fifth factual point would</p> <p>21 be that Church of the Word has paid all the property,</p> <p>22 taxes, mortgage payments, all the sundry improvements for</p> | <p style="text-align: right;">43</p> <p>1 issue in a way that that's the only way the 5 question</p> <p>2 opinion can be read is to invalidate this deed.</p> <p>3 MR. BURCHER: I don't think that it is. I</p> <p>4 think that --</p> <p>5 THE COURT: I know. I know you don't think</p> <p>6 it is, but that would be the -- a very significant act,</p> <p>7 wouldn't it?</p> <p>8 MR. BURCHER: It would be. And I don't think</p> <p>9 that that would be justified given the amount that Church</p> <p>10 of the Word has paid for this property.</p> <p>11 THE COURT: Well, your second and third</p> <p>12 arguments, maybe a fourth argument and a fifth argument,</p> <p>13 they all say essentially this property is held -- this</p> <p>14 property does meet the criteria of 57-9 as property held</p> <p>15 in trust for the congregation.</p> <p>16 MR. BURCHER: Yes, Your Honor.</p> <p>17 THE COURT: Before you sit down Mr. Burcher,</p> <p>18 I want to go back to the first issue, which is that I've</p> <p>19 already decided this. And I'm still having a little</p> <p>20 difficulty wresting with how this is different, how</p> <p>21 Church of the Word is different than the other</p> <p>22 congregations for purposes of the language in this</p> |
| <p style="text-align: right;">42</p> <p>1 the entire ownership of the property.</p> <p>2 THE COURT: All right.</p> <p>3 MR. BURCHER: And then --</p> <p>4 THE COURT: The legal argument, I'll say</p> <p>5 argument six.</p> <p>6 MR. BURCHER: The legal argument with regard</p> <p>7 to the --</p> <p>8 THE COURT: Diocese.</p> <p>9 MR. BURCHER: -- Diocese, the denominational</p> <p>10 trust, you have ruled that denominational trusts are</p> <p>11 invalid in Virginia and so, therefore, it concludes that</p> <p>12 the property would be held for the benefit of the local</p> <p>13 congregation. I don't think that Your Honor would -- I</p> <p>14 think that to invalidate a deed would be a drastic, legal</p> <p>15 remedy. And I think if Your Honor would look towards all</p> <p>16 the factual points --</p> <p>17 THE COURT: Sounded to me that like</p> <p>18 Mr. Heslinga was inviting me to do that.</p> <p>19 MR. BURCHER: I'm sorry?</p> <p>20 THE COURT: It sounded to me like</p> <p>21 Mr. Heslinga was inviting me to do that, invalidate the</p> <p>22 deed as a -- had a little -- kind of like a poison pill</p> | <p style="text-align: right;">44</p> <p>1 opinion because the -- what I was ruling is that I do not</p> <p>2 have to determine ownership prior to determining whether</p> <p>3 the congregation has satisfied the requirements of</p> <p>4 57-9(A), right?</p> <p>5 MR. BURCHER: That's correct.</p> <p>6 THE COURT: Let me just ask -- where did</p> <p>7 Mr. Coffee go? All right, I'll ask you Mr. Peterson.</p> <p>8 That language in the 5 question opinion dealing with not</p> <p>9 requiring a determination of ownership doesn't it still</p> <p>10 require a nexus between the property and the</p> <p>11 congregation?</p> <p>12 MR. PETERSON: I think potentially it does</p> <p>13 with respect to the other congregations ever reach</p> <p>14 stipulations as to the wording of the deeds. So I think</p> <p>15 it does at least for a factual nexus.</p> <p>16 THE COURT: But the difference here for</p> <p>17 Church of the Word is that its deed says, its deed has</p> <p>18 language that the Diocese is asserting that says that</p> <p>19 they own the property. That's the difference in the</p> <p>20 language that you've got in your deeds.</p> <p>21 MR. PETERSON: I think that would be correct.</p> <p>22 Ours do not have that language.</p> |

45

1 THE COURT: Okay. Let me hear from
2 Mr. Heslinga again.
3 Explain to me why, first, Mr. Burcher is
4 wrong when he says I've already decided this in my 5
5 question opinion. I know you are suggesting that my 5
6 question opinion -- at least I'm hearing you to suggest
7 that my 5 question opinion requires me to invalidate the
8 deed. But I'm not sure that's correct. But
9 Mr. Burcher's first point is different, which is I've
10 already decided that you don't need to decide ownership
11 issues before you decide 57-9 issues. Although, perhaps
12 implied in that statement is that there has to be a nexus
13 between the church filing the petition and the property
14 at issue, for example the synagogue using the church
15 property couldn't file a 57-9 petition for that property.
16 MR. HESLINGA: Well, Your Honor, I'm not
17 going to disagree with Mr. Burcher that you've already
18 decided this. But I think where I can shed some light is
19 how we got to the decision.
20 THE COURT: So you are agreeing I already
21 decided this?
22 MR. HESLINGA: I'm agreeing that by operation

46

1 of your 5 questions opinion, if nothing has changed about
2 that opinion, then the Diocese can't be the owner. So
3 it's either Church of the Word or the Resolution Trust
4 Corporation.
5 THE COURT: You're talking about different
6 parts of the opinion, aren't you?
7 MR. HESLINGA: I am.
8 THE COURT: You're talking about the part of
9 the opinion that dealt with the Diocese -- dealing with
10 the denominational trust issue. But he's talking about a
11 different part of the opinion. He's talking about the
12 part of the opinion that deals with whether or not
13 ownership needed to be established before the 57-9
14 petition. And he is arguing that I've already decided it
15 there. You're arguing I already decided it in another
16 place. And I referred to it as a poison pill because
17 essentially you are saying that the impact of that
18 opinion is draconian, that's essentially what you are
19 arguing. But that's not what Mr. Burcher is arguing.
20 That is his last argument. That's argument number six
21 according to my records. He's got 5 arguments before he
22 gets there and maybe that's because he doesn't want me to

47

1 invalidate the deed because he thinks that would be a
2 decision that would be vulnerable. So he is asking me to
3 address this based on my first argument. So why don't
4 you talk about that first, that portion of the 5 question
5 opinion.
6 MR. HESLINGA: Absolutely. The Court held
7 you didn't have to determine ownership prior ruling on
8 57-9 petition. The Court will undoubtedly recall in the
9 May hearing that the way that came up was through a focus
10 on "whose property" language. In the briefing that
11 followed, though, what we tried to convey is that we
12 think that the whose property language just ties into two
13 other instances of 57-9 where 57-9 says that it is
14 conclusive as to property held in trust for such
15 congregation. And it's really that "held in trust for
16 such congregation" that's the key here, because you look
17 at this deed, there is no question that it is held in
18 trust. I mean there are trustees. And again, it doesn't
19 matter who the trustees are. It's held in trust. The
20 question is who is it held in trust for?
21 The Court held in its 5 questions opinion
22 that it didn't have to determine ownership based on the

48

1 language of 57-9, but the way that you get to
2 denominational trusts is that the denomination trusts
3 question is the rationale for why the Court doesn't have
4 to decide ownership. Because -- and I don't have rehash
5 the whole history, but, you know, it's been the rule in
6 Virginia for a long, long time that if you are an
7 unincorporated religious association, in order for you to
8 hold it in trust, the legislature has to validate that
9 trust. And so the question was always what's the scope
10 of 57-7, what trust does it validate? And so you get
11 that string of Supreme Court opinions over the years
12 looking at the language of that statute saying that
13 statute only validates trusts for religious
14 congregations. Then we contend that that changed pretty
15 significantly with 57-7.1.
16 But leaving that aside for the moment, the
17 Diocese holds some property in the name of the bishop and
18 it holds some property in the name of trustees. That's
19 the group of people, including Mr. Davenport. And it
20 believed, I think for good reason, that it was allowed to
21 do that under Virginia law. It was allowed to hold
22 property in trust under Virginia law. But by

49

1 interpreting 57-7.1 as no broader than the predecessor
2 statute, the Court says, no, you're still not allowed to
3 have property held in trust for the Diocese. So that's
4 why the Court doesn't have to determine ownership under
5 57-9 because there is no question who the property is
6 held in trust for. If it is held in trust it must be for
7 the congregation because it cannot be, by operation of
8 the law, for the Diocese or the Episcopal Church. And so
9 the Court, the Court has a couple of choices as to this
10 particular deed.
11 THE COURT: But I don't have to invalidate
12 the deed. Can't I just read it as, as, as reflecting
13 that this is property held in trust for Church of the
14 Word?
15 MR. HESLINGA: You could. I think to do that
16 you have to disregard language in the deed, you have to
17 disregard a lot of the surrounding circumstances,
18 including that order that both sides have handed to you.
19 THE COURT: Well, but they're arguing that
20 that order -- maybe the answer, Mr. Heslinga, to this
21 whole discussion is we're going to have to have a trial
22 on this and I'm going to have to decide whether this is a

50

1 deed -- whether this is property held by trustees for the
2 congregation. Maybe that is a factual issue.
3 MR. HESLINGA: It could be. To get there we
4 have to -- two things I think have to happen. One, it
5 has to be possible for the property to be held in trust
6 for the Diocese. That's the denominational trust issue.
7 And, two, the Court has to look at the deed and say the
8 deed is ambiguous. I do need facts to help me figure out
9 who this property is held in trust for.
10 THE COURT: Well, let's say I say the first
11 no. I mean my opinion says it couldn't be held by the
12 Diocese, right?
13 MR. HESLINGA: Right.
14 THE COURT: So if it can't be held by the
15 Diocese, does that naturally mean that it must be held
16 for the congregation? Or, in your view, does that
17 invalidate the trust and it goes back to whoever owned
18 the property before?
19 MR. HESLINGA: Well, it could be either.
20 THE COURT: But the latter would not make any
21 sense at all. To go back to whoever owned it before, I
22 mean consideration was paid. There was a transaction

51

1 that occurred.
2 MR. HESLINGA: I don't know if the
3 appropriate procedure at that point would be some sort of
4 reformation action or what, Your Honor, to fix that
5 problem. But you can look at this deed in the light of
6 the 5 questions opinion and say in light of the 5
7 questions opinion, this is a deed for Church of the Word.
8 And if Your Honor does that, then the end result is that
9 Mr. Davenport and company hold legal title, but they hold
10 it in trust for Church of the Word. I presume one of
11 Church of the Word's first steps would be to direct
12 Mr. Davenport and company to transfer it to somebody that
13 they are more familiar with, let's say.
14 THE COURT: They're familiar with
15 Mr. Davenport. They just don't know if they can order
16 him to do anything.
17 MR. HESLINGA: And that's the question. Who
18 is this property held in trust for? The 5 questions
19 opinion said it can't be the Diocese. As long as that
20 remains this Court's decision, then the Court has two
21 apparent choices. One is more drastic than the other,
22 certainly. And so I would certainly understand if Your

52

1 Honor chose the less drastic alternative.
2 THE COURT: Okay. Mr. Burcher, let me hear
3 from you again on this.
4 Do you agree those are my two choices? One
5 is to invalidate the deed and two is to recognize the
6 deed as the deed holding the property for Church of the
7 Word?
8 MR. BURCHER: I don't think those are your
9 only two choices, Your Honor. I think you can conclude,
10 without even getting into those issues, that 57-9 applies
11 in this case to this piece of property because it was --
12 Church of the Word has -- it was in Church of the Word's
13 miscellaneous matter. If it was -- that there is enough
14 of a nexus between Church of the Word and this piece of
15 property to conclude that 57-9 applies without having to
16 go down the road of, of dealing with the validation of
17 denominational trusts and those sort of things.
18 So if you don't go down that path, then you
19 are into Mr. Heslinga's analysis. But I think you have a
20 step to go through before you get to that analysis. And
21 so, therefore, the denominational trust issue is not
22 necessarily your first step.

53

1 THE COURT: So in other words not focusing on
2 the deed, but focusing on the petition and the contract.
3 MR. BURCHER: No.
4 THE COURT: Focusing on the petition -- not
5 your petition. The petition purchasing -- right?
6 MR. BURCHER: Yes, Your Honor. I mean this
7 whole property was purchased under the Church of the
8 Word's matter. There's enough of a nexus between Church
9 of the Word and this piece of property that 57-9, that
10 57-9 applies. And I don't think that you need to get
11 into the issue of invalidating denominational trusts to
12 make a decision on this. I think that you can find that
13 just from the face of the fact -- the fact that this was
14 a piece of property purchased as part of Church of the
15 Word's petition, that there's enough of a nexus between
16 Church of the Word and this piece of property to conclude
17 that 57-9, the division statute property, the property
18 that resolves church property disputes is sufficient.
19 And then as I mentioned before, you could go through
20 some -- if that wasn't sufficient, there is certainly
21 some additional factors that you can look at that would
22 then allow you to make that determination before you got

54

1 to the point of invalidating denominational,
2 denominational trust.
3 But if you were to get to the point of
4 invalidating denominational trust, I think that
5 Mr. Heslinga's analysis with respect to you having to
6 conclude that it is the congregation's, I think that all
7 of those previous factors that we just talked about would
8 lead you to conclude that, that rather than saying the
9 deed is invalid, you would rule that the deed is for the
10 benefit of Church of the Word.
11 THE COURT: Okay. Thank you.
12 Anything else, Mr. Heslinga, you want to say?
13 MR. HESLINGA: I would just say real briefly,
14 Your Honor, that I think -- I have a concern about the
15 sufficient nexus, because that seems inherently factual
16 and its incredibly undefined. So you would have to
17 develop a body of law as to how you determine a
18 sufficient nexus. Never heard of a case name being
19 dispositive, which appears to be something that
20 Mr. Burcher is emphasizing.
21 The way things went in May and June, Your
22 Honor, from our perspective is that the Court decided

55

1 that if the bishop owned the property, if it was in the
2 bishop's name, then it was denominational property. So
3 let's say you take this Church of the Word property and
4 instead of being to Mr. Davenport and company, it is to
5 the Right Reverend Peter James Lee, then the
6 congregations agree they don't have a 57-9 --
7 THE COURT: I don't think so. I think
8 Mr. Burcher would say that if instead of it being
9 Mr. Davenport, if it was Reverend Lee, it would be the
10 exact same result. I think -- is that right,
11 Mr. Burcher, as a trustee?
12 MR. BURCHER: No. It has to do with the
13 trust.
14 THE COURT: No. If he was the trustee.
15 MR. BURCHER: That's just a different name.
16 THE COURT: It's just a different name, so
17 no. But, Mr. Burcher, if the Diocese owned the property
18 the way these 29 churches are owned, then it wouldn't be
19 subject to 57-9 petition.
20 MR. HESLINGA: And, perhaps, I wasn't clear,
21 Your Honor. I wasn't suggesting again that the bishop
22 being the trustee was the difference. But the

56

1 congregations argued in May successfully that the way for
2 a denomination to escape 57-9 is to have it owned in the
3 bishop's name. The Diocese has some properties in the
4 bishop's name. The Diocese also has some properties in
5 the name of trustees, Mr. Davenport and company, who are
6 appointed by the Diocese and who the Diocese believes
7 hold the property in trust for the Diocese.
8 And the reason that you don't get into
9 ownership, the question of who the beneficiary is, who
10 the property is held in trust for, is by operation of the
11 opinion saying it can't be you. "You" being the Diocese.
12 So, you know, there's this -- you could have
13 the exact same situation -- in the congregation's view
14 you could have the exact same nexus situation, all the
15 factors whatever they going to a nexus still exist. But
16 instead of it saying Mr. Davenport and company in trust
17 for the Episcopal Protestant Church of the Diocese of
18 Virginia, it says to Bishop Lee. Period. In that
19 circumstance, regardless of the fact that all the same
20 nexus factors are there, the congregations say it is the
21 Diocese's property.
22 THE COURT: What about the fact that the deed

57

1 itself uses the -- doesn't use the address of the
2 Diocese; it uses the address of Church of the Word?
3 MR. HESLINGA: Well, Your Honor could look at
4 that and conclude this deed is ambiguous because the name
5 conflicts with the address. So I have to figure out who
6 is this deed to? And that would be a factual question.
7 But I would suggest that it is not inconsistent with
8 property being held in trust for the Diocese that Church
9 of the Word's address is there. That's why we, you know,
10 we admit that in the request for admission. The
11 Episcopal system, the Episcopal polity, is a shared
12 system where the Diocese has a role and the local
13 congregation has a role in dealing with property. And so
14 that's why you have these sorts of property disputes.
15 And 57-9 settles them under -- as this Court has
16 decided -- wherever property is held in trust. And that
17 was the significant distinction that sustained the
18 constitutionality of the statute is that it could use
19 some other method. You could put it in Bishop Lee's
20 name, not Bishop Lee as trustee, but just Bishop Lee.
21 And that got it out of 57-9, even in the congregation's
22 view.

58

1 But as long as it was held in trust in the
2 congregations' view, it is theirs, no matter what the
3 name on the deed says, no matter what the other evidence,
4 the order and so forth show. So that's -- you know, it
5 is that operation -- that's why I'm not disputing that
6 the Court decided it, is that operation of the 5
7 questions opinion, the fact that if it's held in trust
8 under Virginia law it can only be held in trust for the
9 congregation. That's how this is already signed.
10 THE COURT: Could you look at Exhibit D and
11 explain to me the significance of D? This is attachment
12 D to Church of the Word's opening brief.
13 MR. HESLINGA: Church of the Word brief.
14 This is the unrecorded deed.
15 This, Your Honor, is -- and arguably it
16 doesn't have any significance. And I actually do believe
17 that Church of the Word has effectively conceded that it
18 doesn't have any significance because in the briefing
19 they refer to this deed that wasn't recorded. And that's
20 what this letter and the pages that follow are.
21 But they also say that, that they wouldn't
22 have agreed to this deed anyway and that they didn't

59

1 agree with this deed because on page 2 of Exhibit D at
2 the end of the first recital paragraph, beginning with
3 "That for and in consideration," it says "unto the
4 grantee in trust for the Episcopal Church of the United
5 States of America and the Episcopal Diocese of Virginia."
6 They say it is a confusing and contradictory argument.
7 They say we didn't consent to this deed, we don't like
8 this deed. But at the same time somehow, because this
9 deed wasn't recorded, that works in their favor. I don't
10 get that. So I can't -- that's what Your Honor wants me
11 to explain and I'm not sure I can.
12 THE COURT: It is. Mr. Burcher -- you can
13 stay there, Mr. Heslinga -- can you explain it?
14 MR. BURCHER: Yes, Your Honor. The point of
15 this is that they in terms of this issue on September
16 12th of 2005, a Diocesan trustee had been replaced.
17 Okay. And the purpose of this exhibit is essentially to
18 show that there was a dispute over what the confirmatory
19 deed language would be in terms of what should be
20 recorded or what would be recorded. We get into a lot of
21 factual points here. I don't know how much you want me
22 to go into this.

60

1 THE COURT: Well, I'm just trying to
2 understand what -- you attached this to your pleading.
3 I'm trying to understand what legal significance you want
4 it to have with me.
5 MR. BURCHER: At this point it was to show --
6 again we were -- there are a lot of factual things that
7 were put in these briefs in addition to legal arguments.
8 This is way down on the hierarchy of factual issues. The
9 more important factual issue for me is Exhibit C,
10 which -- in which the Diocesan trustees were removed by
11 order of the Prince William County Circuit Court. And
12 all that Exhibit D was to show you is that the Diocesan
13 trustees refused to have a deed recorded in the name
14 or -- the issue is that the deed that should have been
15 recorded -- this we did not agree to because it had it
16 being in the name or for the benefit of the national
17 church and the Diocese.
18 THE COURT: So C, your view is C -- is it
19 your view that C kind of puts an exclamation mark behind
20 your argument that the congregation's property is held --
21 that this is property held for the congregation?
22 MR. BURCHER: Yes.

61

1 THE COURT: Because in this case this
2 Court -- and this is prior to the filing of the 57-9
3 petition of course; is that correct?
4 MR. BURCHER: That's correct.
5 THE COURT: So these are no longer Diocese
6 selected trustees; these are trustees selected by the
7 Episcopal Church of the Word. So they are trustees for
8 the Episcopal Church of the Word.
9 MR. BURCHER: No. They are just -- they are
10 people who come from the congregation, rather than from
11 the Diocese. That's my distinction between -- it's the
12 same as any of the other churches. And I do know that
13 the position of the Diocese on this particular order is
14 that they weren't a party to the order and so, therefore,
15 it doesn't apply. I factually contest that because it.
16 Was done at the request -- that this order
17 was done with the consent of the Diocese. And that's a
18 factual issue, quite honestly, Your Honor, we're getting
19 way down into the factual issues rather than legal
20 issues.
21 THE COURT: All right.
22 MR. HESLINGA: With clarification, Your

62

1 Honor, what I would just say now we're talking about
2 Exhibit C and D, Exhibit C is an ex parte, unilateral
3 effort of Church of the Word that the Diocese was not
4 involved in.
5 THE COURT: Mr. Burcher just said it is with
6 the consent of the trustees who were being replaced,
7 Mr. Davenport, et al.
8 MR. BURCHER: It was with the consent of the
9 Diocese. The Diocese was involved in this process.
10 That's why we put on factually -- factual testimony. In
11 fact the Diocese' executive committee approved this
12 process.
13 THE COURT: All right, sir.
14 MR. BURCHER: And this deed -- and this order
15 was sent to them on that same, the exact same time.
16 THE COURT: All right.
17 MR. HESLINGA: The other thing I'd say is
18 that these orders don't affect property, Your Honor. The
19 real question is who's the beneficial owner of this
20 property. Orders appointing trustees don't do that. The
21 Davis v. Mayo case the congregations were so keen on a
22 couple months ago --

63

1 THE COURT: But they could be very relevant
2 if I find the deed -- if the deed is ambiguous on the
3 fact that the address used is the Church of the Word
4 address not the Diocese' address, right?
5 MR. HESLINGA: If the deed is ambiguous such
6 that now we've started a broader search for intent and --
7 I think at that point the question would still be not
8 this broader question of who paid the mortgage and all
9 the rest of it. If the deed is ambiguous, then try to
10 figure out who is the deed supposed to be to? What was
11 the intent of the grantor.
12 THE COURT: All right. Well, I know what I'm
13 going to do, so I've heard enough. I am not going to
14 resolve any of the legal issues that are before me as to
15 whether the 5 question opinion resolves this dispute
16 either the portion of the 5 question opinion Mr. Burcher
17 is relying upon or the 5 question opinion Mr. Heslinga is
18 relying upon. I'm not going to resolve those legal
19 issues.
20 I am going to permit the parties to offer
21 whatever evidence they wish in support of the issues we
22 have discussed at the trial of this matter. And after

64

1 taking the evidence, I will decide it either on a factual
2 basis or as a matter of law. But it would seem to me the
3 better part of wisdom to take evidence on this matter,
4 even though, of course, I know that imposes obligations
5 on the parties and makes it less simple. But I also
6 think it also makes sense to me to take evidence without
7 deciding -- and I'm expressly not deciding today that I'm
8 unable to resolve this as a matter of law. I just want
9 to have all the facts in front of me. I don't want the
10 parties to say that's a factual issue. I want those
11 factual issues resolved or presented to me for
12 resolution.
13 So my decision is essentially a nondecision.
14 Other than to direct the parties that at the trial of
15 this matter each side will have the opportunity to offer
16 evidence on this issue. All right. Do you understand?
17 All right.
18 I know it's taken an extended discussion to
19 get to that nondecision, but I've heard enough to know
20 that that's the direction I want to take.
21 Now, where do we stand on the issue regarding
22 Christ the Redeemer Church?