

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR FAIRFAX COUNTY**

**In re:  
Multi-Circuit Episcopal Church  
Litigation**

)  
) **Civil Case Numbers:**  
) 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

**ST. STEPHEN’S CHURCH RESPONSIVE BRIEF RE 1874 DEED**

St. Stephen’s Church (“St. Stephen’s”), by its counsel, respectfully submits this brief in response to The Episcopal Church’s and the Diocese’s Opening Brief Regarding Property Subject to the St. Stephen’s 1874 Deed, filed October 28, 2008 (“TEC/DVA Op. Br.”).

**OVERVIEW AND SUMMARY**

St. Stephen’s demonstrated in its opening brief that, even apart from the particular language of the 1874 Deed, as a matter of law, that deed is subject to the laws of Virginia as of the date of its execution (St. Stephen’s Opening Brief re 1874 Deed, filed October 28, 2008 (“St. Stephen’s Op. Br.”), at 2-4). St. Stephen’s also demonstrated that the 1874 Deed expressly both

incorporated provisions of the Virginia Code containing the version of the division statute in effect at the time and mandated use of the property “according to the laws and canons of said church not inconsistent with the laws and constitution of Virginia” (*id.* at 4-5).

In their opening brief, The Episcopal Church and the Diocese (“TEC/DVA”) advanced arguments that are nothing more than an attempt to relitigate the claim that St. Stephen’s “contracted around” the division statute – an argument this Court found waived by the failure to raise it at an earlier stage of the litigation. But even if the Court were to consider such arguments on the merits, the Court would find them unpersuasive, for they all ignore the fact that the 1874 Deed post-dates the enactment of the division statute and thus incorporates the terms of that statute as a matter of law. *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429-30 (1934) (“ ‘the laws which subsist at the time and place of the making of a contract’ ” merely “ ‘enter into and form a part of it’ ”); *Ogden v. Saunders*, 25 U.S. 213, 264, 265 (1827) (“[the] law of the [jurisdiction] where the contract is made” is “incorporated with the contract,” “constitutes the law of the contract so formed, and must govern it throughout”—“whether [that law] affects its validity, construction, or discharge”).

TEC/DVA’s position essentially reduces itself to a single argument: this Court should ignore §57-9 and follow Virginia Supreme Court precedent involving the interpretation of deed language that TEC/DVA claim requires the property to remain with an Episcopal congregation in Heathsville (TEC/DVA Op. Br. *passim*).<sup>1</sup> As we show below, TEC/DVA’s position lacks merit,

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<sup>1</sup> While asserting that “[c]ertain individual” members of the Heathsville Episcopal congregation “are before the Court in this consolidated litigation,” TEC/DVA admit that these individuals “are parties to the declaratory judgment action related to St. Stephen’s” (TEC/DVA Op. Br. at 2-3). It should be noted that these individuals are not parties to the St. Stephen’s §57-9 case.

[Footnote continued next page.]

for it asks the Court to ignore settled law, its prior rulings, and the language of the 1874 Deed itself.

**I. THE 1874 DEED IS SUBJECT TO §57-9**

TEC/DVA assert that §57-9 should not “trump” the so-called “trust and use restriction” language of the 1874 Deed (TEC/DVA Op. Br. at 8-9), claiming that, were the Court to “[h]old[] that §57-9(A) preempts such restrictions in deeds,” the Court would have to “ignore the rules of deed interpretation,” “override the parties’ expressed intent,” “do great violence to the language of the 1984 Deed,” and ignore “how statutory enactments are usually interpreted” (TEC/DVA Op. Br. at 9). TEC/DVA further asserted: “It strains credulity to argue that §57-9(A), which does not mention deeds at all, has ever been intended to overturn the church property deed interpretation law in *Brooke* and later cases” (TEC/DVA Op. Br. at 9).

By these hyperbolic claims, TEC/DVA have it exactly backwards: it is irrelevant whether or not the division statute mentions deeds. Here, as a matter of law, the deed in question is subject to the division statute, *Home Building & Loan Assn. v. Blaisdell, supra*; *Ogden v. Saunders, supra*, and, indeed, the deed expressly mentions the division statute.

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[Footnote continued from prior page.]

Moreover, as a means of resolving the St. Stephen’s joinder of the motion *in limine* to exclude evidence of the “continuing congregations” at the October trial on the grounds that such evidence post-dates the division statute vote, the parties entered into the Supplemental Stipulation Between St. Stephen’s Church and the Protestant Episcopal Church in the Diocese of Virginia and The Episcopal Church Regarding St. Stephen’s Church 1874 Deed, dated October 13, 2008. At ¶2, the parties stipulated that St. Stephen’s “does not concede that the facts” regarding the continuing Episcopal congregation “are relevant or legally significant in any way and expressly asserts that they are irrelevant and insignificant.” Thus, insofar as St. Stephen’s §57-9 case is concerned, the TEC/DVA assertion (TEC/DVA Op. Br. at 3) that “[t]here are members of two real congregations before the Court” is factually and legally irrelevant.

Perhaps recognizing that, in order for such arguments to succeed, the Court would need to ignore §57-9 altogether, TEC/DVA once again assert their “contracting-around” argument. Citing *Jampol v. Farmer*, 259 Va. 53 (2000), *Mahoney v. NationsBank of Va., N.A.*, 249 Va. 216 (1995), and *Board of Supervisors v. Sampson*, 235 Va. 516 (1988), TEC/DVA claim that “Virginia law confirms that even where legislative enactments touch upon a subject, the parties to a contract retain the freedom to order their affairs in a different manner” (TEC/DVA Op. Br. at 9-10). Such argument is nothing more than an attempted resurrection of the TEC/DVA waiver theory that the Court previously laid to rest. See Letter Opinion Regarding ECUSA/Diocese’s Assertion that the CANA Congregations Have Waived the Right to Invoke 57-9, dated August 19, 2008, at 5-8, 13-15. Nothing has changed since the issuance of that Opinion to justify TEC/DVA’s belated assertion that the St. Stephen’s congregation voluntarily relinquished their rights to invoke §57-9.

## **II. NOTHING IN THE 1874 DEED REVEALS THE CLAIMED RESTRICTION ON THE CONGREGATION’S USE**

Equally important, nothing in the deed language itself evinces an attempt by the grantor to limit the options available to the local congregation under §57-9 in the event of a division in the Episcopal Church. To the contrary, the grantor under the deed expressly referenced the predecessor section of the Virginia Code that contains the Division Statute -- Section 9, of Chapter 76 of the 1983 Virginia Code. While the reference to Section 9 is found in the part of the deed that refers to the appointment of trustees, there is no indication in the deed that the grantor intended that the rest of Section 9 would not be applicable. Indeed, elsewhere in the deed, the grantor specifically affirmed that use of the property was to be in a manner “not

inconsistent with the laws and constitution of Virginia.” Far from attempting to disclaim rights under §57-9, the deed reaffirms them.

Citing *Davis v. Hennings*, 250 Va. 271 (1995), and *Browning v. Blue Grass Hardware Co., Inc.*, 153 Va. 20 (1929), TEC/DVA contended that “well established principles of deed interpretation require a court to determine and enforce the intent of the parties as expressed in the instrument” (TEC/DVA Op. Br. at 3). Pointing to the three-word identifier “Protestant Episcopal Church,” TEC/DVA asserted that those same deed interpretation principles require the property in question be used in perpetuity by an Episcopal Church congregation (TEC/DVA Op. Br. at 3). The flaw in TEC/DVA’s argument is that it ignores other compelling general principles of deed interpretation, to wit: “ ‘[t]hat all parts of the deed must be considered’,” and “ ‘[t]hat it is the duty of the court to give the proper meaning to every word used in the instrument if possible’,” *Browning, supra*, 153 Va. at 26, quoting *Morris v. Bernard*, 114 Va. 630 (1913). Indeed, it is a fundamental tenet of Virginia law that courts look to the language within the four corners of a deed “as a whole” to interpret the grantor’s intentions. *Auerbach v. County of Hanover*, 252 Va. 410, 414, 478 S.E.2d 100, 102 (1996) (“To ascertain the intent of the grantors, the deed is to be examined as a whole and effect given to all of its terms and provisions not inconsistent with some principle of law or rule of property.”). Under all governing rules of deed interpretation and in consideration of all deed language, properly construed, the 1874 Deed incorporates and is subject to §57-9.

The tunnel vision that led TEC/DVA to rely on less than all of the language in the 1874 Deed must also have led TEC/DVA to a similarly unavailing reliance upon *Brooke v. Shacklett*, 54 Va. 301 (1856); *Hoskinson v. Pusey*, 73 Va. 428 (1869); and *Finley v. Brent*, 87 Va. 103 (1890). We respectfully refer the Court to our opening brief in which we distinguished these

cases on the principal grounds that each involved a deed that ante-dated the division statute (*see* St. Stephen's Op. Br. at 7-9). While we do not here repeat our arguments, we do note that the *Brooke* court awarded the property in question to the majority that voted in accordance with the plan of separation to leave the Methodist Episcopal Church denomination despite deed language conveying the property to trustees for the purpose of building thereon "a house . . . of worship for the use of the members of the Methodist Episcopal Church." *Brooke, supra*, 54 Va. at 327-328.

TEC/DVA contended that the language in the deeds involved in *Green v. Lewis*, 221 Va. 527 (1980), and *The Diocese of Southwestern Virginia of the Protestant Episcopal Church v. Buhrman*, 5 Va. Cir. 497, 1977 WL 191134 (Clifton Forge 1977), *pet. refused*, June 15, 1978 (Rec. No. 780347), require this Court to read §57-9 out of the 1874 Deed (TEC/DVA Op. Br. at 4). Such a suggestion overlooks this Court's prior ruling that *Green v. Lewis* is inapplicable in a §57-9(A) case (*see* Letter Opinion on the Court's Five Questions, dated June 17, 2008, at 4-5). The suggestion also ignores the obvious fact that, apart from ante-dating the U.S. Supreme Court's decision in *Jones v. Wolf*, 443 U.S. 595 (1979) and *Green, Buhrman* is wholly inapposite factually, since the language enforced in that case was from a contract signed by the church as a condition to admission into the Diocese.<sup>2</sup>

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<sup>2</sup> In *Buhrman*, as a condition of admission to the Diocese, "[i]n ... writing the members did 'solemnly engage and stipulate that all real estate consecrated as a church or chapel, of which the said Parish is or may become possessed, shall be secured against alienation from the Protestant Episcopal Church in the Diocese of Southwestern Virginia, unless such alienation is in conformity with its Canons' (1977 WL 191134 at \*2). Attached hereto as Appendix A is a copy of that petition, signed by what appears to be the entire congregation.

In summary, the TEC/DVA position is foreclosed by this Court's ruling that they waived their "contract around" arguments by failing to raise them at an earlier stage of the litigation. But even if that were not so, their arguments are without merit. The 1874 Deed post-dates the statute, and thus incorporates its terms as a matter of law. And finally, the 1874 Deed expressly states the parties' intention that their conveyance be subject to the division statute.

**CONCLUSION**

For the reasons set forth in its opening brief and above, St. Stephen's Church respectfully urges the Court to rule that the 1874 Deed parcel is covered by St. Stephen's Church §57-9 petition.

November 4, 2008

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 4<sup>th</sup> day of November, 2008, a copy of the foregoing St. Stephen's Church Responsive Brief Re 1874 Deed was sent by electronic mail and first-class mail, postage prepaid, to:

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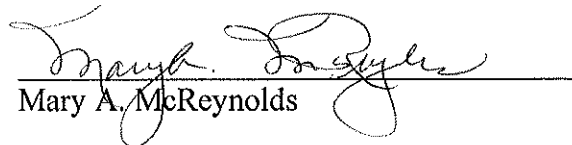
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## Appendix A

St. Andrew's Episcopal Church

EXHIBIT A

514 MCCORMICK BOULEVARD  
CLIFTON FORGE, VIRGINIA 24422

November 25, 1973

The Rt. Rev. William H. Larrison, D. D.  
Bishop of Southwestern Virginia  
Roanoke  
Virginia

Right Reverend Father in God:

We, whose names are hereunto signed, and who are members in good standing of Saint Andrew's Church, Clifton Forge, an Organized Mission, deeply sensible of the truth of the Christian Religion and conscientiously attached to the doctrine, discipline and worship of the Church, known as the Protestant Episcopal Church in the United States of America, and being earnestly desirous of further establishing its authority and securing its holy influences for ourselves, our families and neighbors and those who come after us, do hereby respectfully petition the Ecclesiastical Authority that said Organized Mission be advanced to the status of a Parish of the Church in the Diocese of Southwestern Virginia under the name and title of Saint Andrew's Church, and we do hereby solemnly promise and declare that the said Parish shall be forever held under the Ecclesiastical Authority of the Diocese of Southwestern Virginia and in conformity with the Constitution and Canons of the Diocese of Southwestern Virginia, the authority of which we do hereby recognize; and to the liturgy, doctrines, discipline, rites and usages of the Church we promise for ourselves and our successors corporate obedience and conformity at all times, so help us God. Furthermore, we solemnly engage and stipulate that all real estate consecrated as a church or chapel, of which the said Parish is or may become possessed, shall be secured against alienation from the Protestant Episcopal Church in the Diocese of Southwestern Virginia, unless such alienation is in conformity with its Canons.

And we do represent and declare unto the Ecclesiastical Authority that, since the last Annual Council, said Organized Mission has held regular services at least weekly, organized and operated a Church School, and paid a proportionate amount of its income annually for the support of the work of the Diocese and General Church.

And we do further represent and declare unto the Ecclesiastical Authority that said Organized Mission is able to pay its operating expenses as a Parish without outside aid; that it is able and willing to pay a reasonable salary to a Rector or Minister.

*W.B. Mason*  
*L. Gordon Chappelle*  
*Barbara Skelton*  
*Memorandum*  
*Rebecca Powell*  
*David Powell*  
*Joe Stunnett*

Respectfully submitted and signed by:  
*Marion B. Rudinell*  
*A. J. Stone*  
*Martha H. Stone*  
*Ernest S. Doherty, Jr.*  
*Rebecca H. Angler*  
*Joe Carpenter*

Continued on attached page two.

copy by 5/10/73

Don L. Maspin  
Edward M. Campbell, Jr.

*[Handwritten signature]*

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Mrs. Kerens J. Clemmer

Mrs. Emmett Rabler

Mrs. Medred W. Futherland

Amble G. Fulkland

Janice S. Witzel

Dixie Taylor

Kathy Gochenour

Virginia Lewis

Mrs. Maurice Shaw

Mrs. Charlie Wright

Mrs. J. H. Carpenter, III

Mrs. Madge N. Payne (C. H.)

Barbara R. Barnes

Medred Throckmold

Mrs. C. V. Lucas Jr.

*[Handwritten signature]*

Mrs. John Laslo

*[Handwritten signature]*

Lila Manner

Mary Caldwell

Betty C. Campbell

Clarence V. Lucas Jr.

*[Handwritten signature]*

*[Handwritten signature]*

London C. Porter

Keith A. Hase

Oliver M. East

Karen S. Bradley

Mrs. B. H. England

Margaret C. Keate

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Deborah K. Blackburn

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R. Maspin Barley

Betty R. Carpenter

Mrs. R. E. Robinson

Oliver L. Jones

Charles W. Kinice

Robert Hunt +

Approved. Robert Hunt, Vicar