

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

<b>In re:</b>	)	<b>Case Nos.:</b>	CL 2007-248724,
<b>Multi-Circuit Episcopal Church Litigation</b>	)		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

**THE EPISCOPAL CHURCH'S AND  
THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF VIRGINIA'S  
OPENING POST-TRIAL BRIEF REGARDING CHURCH OF THE WORD**

Bradfute W. Davenport, Jr. (VSB # 12848)  
William H. Hurd (VSB # 16769)  
George A. Somerville (VSB # 22419)  
Joshua D. Heslinga (VSB # 73036)  
Troutman Sanders LLP  
Post Office Box 1122  
Richmond, Virginia 23218-1122  
Telephone: (804) 697-1200  
Facsimile: (804) 697-1339

Mary C. Zinsner (VSB # 31397)  
Elizabeth A. Billingsley (VSB # 70808)  
Troutman Sanders LLP  
1660 International Drive  
Suite 600  
McLean, Virginia 22102  
Telephone: (703) 734-4334  
Facsimile: (703) 734-4340

*Counsel for The Protestant Episcopal Church in the Diocese of Virginia*

Heather H. Anderson (VSB # 38093)  
Adam M. Chud (*pro hac vice*)  
Soyong Cho (VSB # 70896)  
Goodwin Procter LLP  
901 New York Avenue, N.W.  
Washington, D.C. 20001  
Telephone: (202) 346-4000  
Facsimile: (202) 346-4444

*Counsel for the Episcopal Church*

## **INTRODUCTION**

The 57-9 petition filed by Church of the Word (COTW) is not like the others. The real property that is the subject of Church of the Word's petition cannot be subject to Va. Code § 57-9 because the deed to that property unambiguously vests title in trustees for the Diocese. Section 57-9(A) applies only to property "held in trust for such congregation." The property is not held in trust for Church of the Word, and no amount of argument can transform the deed into something it clearly and unequivocally is not.

## **PROCEDURAL HISTORY**

In briefing in September 2008, the Episcopal Church, the Protestant Episcopal Church in the Diocese of Virginia (the "Diocese"), and Church of the Word agreed that the decisive issue regarding what property was subject to Church of the Word's 57-9 Petition was the meaning of the operative deed. At the September 26 hearing, the Court decided to allow the presentation of evidence before deciding whether the real property is subject to Church of the Word's 57-9 petition. *See* Tr. (Sept. 26, 2008) (Ex. A) at 63-64. At the pretrial hearing, the Court reiterated that it had not determined how the matter would be decided and that the Court would reach its decision after the submission of evidence and briefing. *See* Tr. (Oct. 8, 2008) (Ex. B) at 7-10. The parties reached a factual stipulation (the "Stipulation") (filed October 10, 2008).

## **STATEMENT OF FACTS**

The Episcopal Church of the Word was established in 1986 as a Church Under Supervision in the Diocese. Stipulation ¶ 1. Its founding church was Church of the Apostles. *Id.* In June 1993, the Episcopal Church of the Word entered into a Real Estate Sales Contract with the Resolution Trust Corporation for the purchase of real property known as 14209 Lee Highway, Gainesville, Virginia (the "Property"). Stipulation ¶ 8 & Ex. 7. At the time the

Episcopal Church of the Word entered into the Real Estate Sales Contract, it was a Mission of the Diocese. Stipulation ¶ 8. Although the funds for the purchase of the Property came from a variety of sources, the largest source of funding came from the Diocese and churches within the Diocese. Stipulation ¶ 11 & Ex. 10. Bishop Lee contributed \$25,000.00, Diocese Region 7 and its member churches contributed \$81,800.00, and other Diocesan churches contributed \$28,600.00. *Id.* Parishioners of Episcopal Church of the Word contributed only \$52,615.00. *Id.* As required by the Diocesan Canons, the Episcopal Church of the Word sought and received consent from the Standing Committee to incur indebtedness for the purchase of the Property. Stipulation ¶ 10.

The Petition for Court approval to purchase the Property, filed on November 29, 1993, was filed jointly by the Diocese and the Episcopal Church of the Word. Stipulation ¶ 12 & Ex. 11. The Petition requested that “the Diocesan Trustees be appointed trustees to hold title to the property ....” Stipulation Ex. 11. A revised Petition was filed on December 2, 1993, solely by counsel for the Diocese, which stated expressly that the Diocesan Trustees, and not Trustees for Episcopal Church of the Word, would hold title to the Property. Stipulation Ex. 13. The revised Petition further requested that “The Protestant Episcopal Church in the Diocese of Virginia be authorized, and granted leave pursuant to Sections 57-8 and 57-15 of the Code of Virginia ... to purchase the Property for the benefit of the Episcopal Church of the Word. The Property shall be held by the Diocesan Trustees in trust for the Diocese.” *Id.*

On December 6, 1993, the Circuit Court of Prince William County entered an Order appointing the Diocesan Trustees and granting authority to purchase the property. Stipulation ¶ 16 & Ex. 15. That Order states that “The Protestant Episcopal Church in the Diocese of Virginia is hereby authorized to purchase the Property” and confirms that the specified individuals are

“Diocesan Trustees.” *Id.* Ex. 15.

The deed to the single parcel of real property claimed by Church of the Word in its 57-9 action (the “Deed”), dated December 3, 1993, provides, in relevant part:

THIS SPECIAL WARRANTY DEED is made the 3rd day of December, 1993, by RESOLUTION TRUST CORPORATION, as CONSERVATOR OF LIBERTY FEDERAL SAVINGS BANK, whose address is 155 Broadview Avenue, Warrenton, Virginia 22186, as GRANTOR, to BRADFUTE W. DAVENPORT, JR., A. C. EPPS AND H. MERRILL PASCOE, as TRUSTEES for the Episcopal Protestant Church in the Diocese of Virginia, whose address is 8317 Centreville Road, Manassas, Virginia 22111, as GRANTEE.

Stipulation ¶ 15 & Ex. 14. At the time the deed was executed and title conveyed to the Diocesan Trustees, the Episcopal Church of the Word was a Mission in the Diocese. Stipulation ¶ 17.

In 2004, the Episcopal Church of the Word petitioned for, and following an open hearing and considerable debate, was granted “church” status within the Diocese. Stipulation ¶ 29 & Ex. 25. Thereafter, on July 28, 2005, the Rev. Robin Adams, Rector of the Episcopal Church of the Word, by email, requested information on the procedure for changing the names of the trustees of the Property. Stipulation ¶ 30 & Ex. 26. Patrick Getlein, Secretary of the Diocese, responded by providing information regarding how a congregation may have trustees appointed and what the Diocesan Canons required with respect to a transfer of title. *Id.* On August 18, 2005, the Episcopal Church of the Word filed a Petition for Change in Trustees in the Circuit Court of Prince William County. Stipulation ¶ 31 & Ex. 27. The Diocese never reviewed or approved the Petition for Change in Trustees before it was filed. Stipulation ¶ 33. On September 12, 2005, the Circuit Court of Prince William County entered an “Order Appointing Trustees for Church.” Stipulation ¶ 32 & Ex. 28. The Diocese never reviewed or approved the language of the Order before it was submitted to the Court. Stipulation ¶ 33. The Diocese was not present for the submission of the Order to the Court or a signatory to the Order; it was entered *ex parte*. *Id.*

On September 13, 2005, the Episcopal Church of the Word sent a letter to the Right Rev. Peter James Lee, Bishop of the Diocese, enclosing the “Order Appointing Trustees for Church” and requesting approval by the Executive Board for a transfer of title to Church of the Word trustees. Stipulation ¶ 35 & Ex. 30. On September 27, 2005, Bishop Lee received a letter from the Rev. John Yates, Rector of The Falls Church. Stipulation ¶ 36 & Ex. 31. The letter and its attachment indicated that the Episcopal Church of the Word was participating in efforts to depart the Episcopal Church. *Id.* On September 29, 2005, the Diocese’s Executive Board approved a Resolution for transfer of title. Stipulation ¶ 37 & Ex. 32. The Executive Board was not aware of the letter that Bishop Lee had received from Rev. Yates when it approved the Resolution. *Id.*

After the Yates letter, the Diocese was concerned that the Episcopal Church of the Word would depart the Episcopal Church and claim ownership of the Property. Stipulation ¶ 39. Because of this concern, the Diocese and the Episcopal Church of the Word were not able to agree on the language of a deed transferring the Property to the trustees named in the September 12, 2005, Order. Stipulation ¶ 40. The Diocese insisted on deed language that tracked canonical requirements, which was not acceptable to the Episcopal Church of the Word. *Id.* Because the parties could not reach agreement, no deed was ever recorded. *See id.*

## ARGUMENT

### **I. The Court’s Five Questions opinion holds that property cannot be held in trust for the Diocese.**

Both sides have argued that the Court’s prior rulings – specifically, its Letter Opinion on the Court’s Five Questions (June 27, 2008) (“Five Questions Opinion” or “Five Ques. Op.”) – already dictated a result as a matter of law in the dispute over what property is subject to COTW’s 57-9 petition. *See, e.g.,* Tr. (Sept. 26, 2008) (Ex. A) at 19-20 (COTW), 24-25 (Diocese). Indeed, the Episcopal Church’s and the Diocese’s prior briefing noted that

reconsideration of a portion of the Five Questions Opinion was necessary for the Court to find in our favor and explicitly asked the Court to reconsider. *See* TEC-Diocese Opening Brief Regarding Church of the Word (filed Sept. 5, 2008) at 8, 14. At oral argument, the parties disagreed, however, as to *how* the Court’s opinion dictated a result as a matter of law.

Church of the Word relies on the Court’s holding that “the phrase ‘whose property is held by trustees’ is simply a reference to the property at issue.” Five Ques. Op. at 12; *see* Tr. (Sept. 26, 2008) (Ex. A) at 36. It argues that the effect of the Court’s Opinion is that when “property is held by trustees” it is subject to § 57-9(A), but that § 57-9(A) does not apply “when the property is held in other forms, such as corporate.” Five Ques. Op. at 12. We agree, but that misses the point by ignoring both the essential rationale for that holding and the language of § 57-9(A).

The Five Questions Opinion ruled on the contention of the Episcopal Church and the Diocese that the Court was required to make a property ownership determination before it could approve the Congregations’ § 57-9 petitions. We argued that for two reasons.

First, we argued that case law – primarily *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974), and *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980) – requires courts to resolve church property disputes using the analysis of *Green*. *See, e.g.*, TEC-Diocese Opening Brief Pursuant to June 6, 2008, Order (filed June 16, 2008) at 1-6. The Court disagreed, holding that those cases do not apply to § 57-9(A) litigation. *See* Five Ques. Op. at 5-6.

Second, we argued that the language of § 57-9(A) itself requires an ownership determination. Section 57-9(A), by its express terms, applies only to property “held by trustees” and more specifically only to property “held in trust *for such congregation*” (emphasis added). Therefore, if Virginia law allows property to be held in trust for a hierarchical church, a court considering a § 57-9(A) petition would be required to determine the beneficial owner of the

property – who the property is “held in trust for.” Past Virginia Supreme Court decisions applied prior statutes to reach the conclusion that Virginia does not allow property to be held in trust for any religious entity other than a local congregation. Thus, under that interpretation of Virginia law, if it is church property and it is held in trust, it must be held in trust for the congregation.

We believe that the statutory interpretation adopted by such decisions is no longer tenable and that such a rule of law is unconstitutional. *See* §§ II & III, *infra*. This Court has held, however, that “57-7.1 did not change the policy in Virginia, which is that church property may be held by trustees for the local congregation, not for the general church.” Five Ques. Op. at 14.

The result of the Five Questions Opinion, therefore, is that if property is held in trust, it can only be – by operation of law – “held in trust for such congregation” and therefore subject to § 57-9(A). That holding, if not reconsidered, resolves this dispute over the Property as a matter of law. That is one reason that the stipulated facts beyond the Deed are irrelevant.

**II. The Court should hold that Virginia law allows trusts for non-local religious entities.**

The conclusion that “the policy in Virginia ... is that church property may be held by trustees for the local congregation, not for the general church” has been stated in a number of decisions – notably, *Norfolk Presbytery v. Bollinger*, 214 Va. at 507, 201 S.E.2d at 758. It is the result of the common law rule that “a trust for indefinite beneficiaries ... is invalid unless expressly validated by statute” and the construction of former Va. Code § 57-7 as a narrow validation of trusts only for local religious entities. *Id.* at 505, 506, 201 S.E.2d at 757.

Section 57-7 was repealed in 1993. 1993 Va. Acts 370. In its place, the General Assembly enacted Va. Code § 57-7.1, which states that “*Every conveyance or transfer of real or personal property, whether inter vivos or by will, which is made to or for the benefit of any church, church diocese, religious congregation or religious society, whether by purchase or gift,*

shall be valid” (emphases added). The terms of § 57-7.1 create no limit (either express or by implication) on the type of religious entity that may be the beneficiary of a trust. Instead, § 57-7.1 explicitly validates trusts for any “church diocese” and any “religious society.”<sup>1</sup>

Every basis upon which *Norfolk Presbytery* and its predecessors relied is gone.<sup>2</sup> First, the repeal of § 57-7 and enactment of § 57-7.1 radically altered the wording of the first part of the statute. Retaining the old interpretation would impermissibly ascribe no meaning to the changes in § 57-7.1. *See, e.g., Va.-Am. Water Co. v. Prince William County Serv. Auth.*, 246 Va. 509, 517, 436 S.E.2d 618, 623 (1993) (“we assume that the General Assembly’s amendments to the law are purposeful and not unnecessary or vain”). Second, § 57-7.1 does not refer to “local functionaries.” Instead, it states that property shall be used for the purposes “determined

---

<sup>1</sup> The term “religious society” in § 57-7.1 reveals an inconsistency between the Court’s Five Questions Opinion and its April 3, 2008, Letter Opinion. In the latter, the Court held that the term “religious society” in § 57-9(A) encompasses an entity as broad and in flux as the Anglican Communion. The Court’s Five Questions Opinion ascribes a different and far more limited meaning to the same term in § 57-7.1, by adopting a construction under which the term is synonymous with “religious congregation.” There is no basis to presume that the General Assembly meant the same term to have such different meanings in two closely related statutes. *See City of Virginia Beach v. Bd. of Supervisors*, 246 Va. 233, 236-37, 435 S.E.2d 382, 384 (1993) (an “important principle of statutory construction is that ‘words in a statute are to be construed according to their ordinary meaning, given the context in which they are used.’ The context may be examined by considering the other language used in the statute and the language of other statutes dealing with closely related subjects”). Nor should the other terms in § 57-7.1 be rendered meaningless by construction. *E.g., Monument Assocs. v. Arlington County Bd.*, 242 Va. 145, 149, 408 S.E.2d 889, 891 (1991) (it is “the settled rule of statutory construction that an enactment should be interpreted, if possible, in a manner which gives meaning to every word”).

<sup>2</sup> The four reasons to construe former Va. Code § 57-7 as validating only trusts for local congregations were: (1) amendments had not materially changed the first part of the statute; (2) the statute referred to trusts controlled by “local functionaries”; (3) the uses for which the statute allowed land to be held were local; and (4) the statutory limits on church property ownership were so small as to be inconsistent with an intent to allow non-local religious groups to be the beneficiaries of trusts. *Moore v. Perkins*, 169 Va. 175, 179-181, 192 S.E. 806, 808-09 (1937). *Norfolk Presbytery* also cited church property ownership limits as “evidence [of] this restrictive legislative intent.” 214 Va. at 506-07, 201 S.E.2d at 757-58.



appropriate by the authorities which, under its rules or usages, have charge of the administration of the temporalities thereof” – whoever the proper authorities under the rules of a church are.

Third, § 57-7.1 no longer limits the uses for which property may be placed in trust for religious groups. The statute now imposes no limits on use. Finally, Virginia’s limits on church property ownership (former Va. Code § 57-12) have been repealed. 2003 Va. Acts ch. 813.

What is left is a broad statute whose plain language validates “*Every conveyance ... made to or for the benefit of any church, church diocese, religious congregation or religious society ....*” Va. Code § 57-7.1 (emphases added). A court may not add language to reach a different meaning. *E.g., Woods v. Mendez*, 265 Va. 68, 75, 574 S.E.2d 263, 267 (2003) (“when the General Assembly has used words of a plain and definite import, courts cannot assign to them a construction that effectively would add words to the statute and vary the plain meaning of the language used”); *Halifax Corp. v. First Union Nat’l Bank*, 262 Va. 91, 99-100, 546 S.E.2d 696, 702 (2001) (“the intention of the legislature . . . must be gathered from the words used, unless a literal construction would involve a manifest absurdity”).

In its Five Questions Opinion, the Court relied on a post-1993 case and an Attorney General’s opinion. Those authorities do not interpret § 57-7.1. Counsel has reviewed all of the briefs filed in *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144, 452 S.E.2d 847 (1995). Not a single one cites either § 57-7.1 or *Norfolk Presbytery*. *Cf.* Five Ques. Op. at 5 (“the briefs filed before the Supreme Court of Virginia in [*Green v. Lewis*] could not possibly lead a reader to believe that this was a 57-9(A) case”). The single relevant sentence in the *Asbury* opinion simply states: “Code § 57-7.1 validates transfers, including transfers of real property, for the benefit of local religious organizations.” 249 Va. at 152, 452 S.E.2d at 851-52. That is accurate, of course; but it does not exclude the conclusion that § 57-7.1

validates transfers for the benefit of “any ... church diocese” as well – as it plainly says. Issues regarding the meaning, application, and constitutionality of § 57-7.1 were not before the Court in *Asbury*. Nor were they essential to the Court’s decision regarding “an arbitration award that required payment to a construction contractor, under the doctrine of quantum meruit, for work performed by the contractor under an invalid change order to a construction contract.” *Id.* at 146-47, 452 S.E.2d at 848. These facts compel the same conclusion with respect to *Asbury* that this Court reached with respect to *Green v. Lewis*: *Asbury* simply does not speak to this issue.

Nor is the 1996 Attorney General’s opinion of any help in determining whether *Norfolk Presbytery*’s statutory interpretation remains good law. The 1996 opinion concerned the application of other statutes (§§ 57-14 and -15) and did not analyze or interpret § 57-7.1 in any way.<sup>3</sup> *See* 1996 Op. Atty Gen. Va. 194. It simply pointed out that the Supreme Court had interpreted certain words in the statute in the past, an obvious and undisputed fact. The issue here is whether the same statutory interpretation is correct today. It is not.

Finally, in light of the constitutional questions below, as a matter of statutory construction, the rule of constitutional avoidance also dictates that § 57-7.1 be interpreted as a broad validation of trusts for any religious entity. *See, e.g., Yamaha Motor Corp. v. Quillian*, 264 Va. 656, 665, 571 S.E.2d 122, 126-27 (2002) (“a statute will be construed in such a manner as to avoid a constitutional question wherever this is possible”); *Va. Society for Human Life v. Caldwell*, 256 Va. 151, 157 & n.3, 500 S.E.2d 814, 816-17 & n.3 (1998). *See* § III, *infra*.

In sum, there is no basis in current Virginia statutes or case law to conclude that Virginia law does not recognize trusts for religious entities except those for local congregations.

---

<sup>3</sup> Even if it had, as the opinion itself notes, Attorney General opinions are not binding on any court. *E.g.*, 1996 Op. Atty. Gen. Va. 194 n.1.

**III. The United States and Virginia Constitutions require that Virginia allow trusts for any religious organization, not just local ones.**

The religious freedom provisions of the United States and Virginia Constitutions do not permit the rule endorsed in the Court’s Five Questions Opinion.

The Establishment Clauses of the First Amendment and Article I, § 16 of the Constitution of Virginia forbid laws that favor some religious groups over others. *E.g.*, *Everson v. Board of Education*, 330 U.S. 1, 15 (1947); *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005). The Virginia Constitution is clear and explicit in this regard, forbidding the General Assembly from “confer[ring] any peculiar privileges or advantages on any sect or denomination.” Construing Va. Code § 57-7.1 as a validation of trusts for local congregations, but not for other religious entities, would deny a legal status or benefit – the ability to be the beneficiary of a trust – to some religious groups while giving it to others. Such a construction also would prefer local religious organizations over regional or national ones, with the same constitutional infirmity.

Such a construction would also violate the Free Exercise Clauses of the First Amendment and of Article I, § 16 of the Constitution of Virginia. Section 57-7.1 lacks facial neutrality. Section 57-7.1 addresses only trusts that benefit religious groups; it “has no meaning within the secular context,” thus “distinguish[ing] churches and religious denominations from other groups in the broader context of Virginia law.” *Falwell v. Miller*, 203 F. Supp. 2d 624, 629-30 (W.D. Va. 2002); *accord*, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993) (“A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context”). Nor is § 57-7.1 generally applicable. *See Falwell*, 203 F. Supp. 2d at 630 (“In order to be valid, laws which impact religion must be generally applicable; *i.e.*, government may not ‘impose special disabilities on the basis of religious views or religious status’”) (quoting *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)). A state can

enact laws that deal specifically with religious organizations, but a state cannot disadvantage religious groups in such laws.<sup>4</sup> This Court has recognized that Virginia’s former “blanket ban” on incorporation by religious groups was unconstitutional. *See* Constitutionality Letter Opinion (June 27, 2008) at 26. A “blanket ban” on trusts for certain religious entities is equally unconstitutional. Virginia law does not restrict non-religious charitable trusts or trusts with a definite beneficiary to only local groups. To pass constitutional muster, § 57-7.1 must be interpreted not to discriminate between religious entities and to be consistent with the provisions applicable to secular organizations.<sup>5</sup>

**IV. The stipulated facts establish that title is in the name of trustees for the Diocese, so the property is not subject to the 57-9 petition.**

The Deed is unambiguous and reflects the intent of the grantor to convey title to Diocesan trustees. *See* Stipulation ¶ 15, Exhibit 14. The name of the “GRANTEE” in the deed is clearly the three named individuals “as TRUSTEES for the Episcopal Protestant Church in the Diocese of Virginia.” Thus, legal ownership of the Property was conveyed to such individuals as trustees for the Diocese and beneficial ownership vests in the Diocese.

---

<sup>4</sup> *E.g., Lukumi*, 508 U.S. at 542 (“The Free Exercise Clause ‘protect[s] religious observers against unequal treatment’ ...”); *Smith*, 494 U.S. at 877 (“The government may not ... impose special disabilities on the basis of religious views or religious status ...”).

<sup>5</sup> No one would suggest, for example, that under Virginia law a local chapter of the Red Cross or United Way could be the beneficiary of a trust but the national organization could not.

Virginia’s adoption of the Uniform Trust Code, effective July 1, 2006, *see* 2005 Va. Acts 935, makes the discrimination in this Court’s construction of § 57-7.1 all the more vivid. *See* Va. Code § 55-541.03; Va. Code § 55-544.05 (allowing charitable trusts for any purpose “the achievement of which is beneficial to the community,” including “the advancement of education or religion”); Va. Code § 55-541.10. Nothing in the UTC forbids recognition of trusts for non-local groups. If non-local religious entities cannot be beneficiaries of express trusts, unlike other charitable organizations, religious entities would be “render[ed] ... unequal to others on account of their religious *status*,” discrimination that “trigger[s] the protections of the Free Exercise Clause.” *Falwell*, 203 F. Supp. 2d at 631 & n.6.

COTW has contended, and presumably will assert again, that because the address listed in the deed was the address of the church property where its congregants worshipped, the name of the Grantee is irrelevant. COTW contends that because the property was used by COTW, and because the Diocese does not maintain a physical presence at the Property, COTW is the Grantee. That is nonsensical. The deed is not ambiguous, and it vests title in the Diocesan trustees. The trustees expressly were not trustees for the congregation; instead, the deed clearly states that the individuals were “TRUSTEES for the Episcopal Protestant Church in the Diocese of Virginia.” The Diocese did maintain a physical presence at the Property, in the form of its mission congregation. Concluding that the Deed is to COTW requires changing the language so that it refers to an unnamed “Episcopal church in the Diocese of Virginia” with the listed address. COTW’s interpretation simply cannot be reconciled with the language of the Deed, much less the contemporaneous Petitions and Order, which clearly demonstrate the parties’ understanding of the difference between their respective names. *See pp. 2-3, supra.*

Although COTW requested and was granted permission to convey title to trustees it selected, the transaction was never accomplished. That is because the Diocese learned that COTW intended to depart the Diocese. Accordingly, the Diocese insisted on deed language that tracked canonical requirements, but COTW would not agree to such a deed. It was COTW that needed a deed altering legal and beneficial ownership. The Diocese had no need for a new deed, since the December 3, 1993, Deed already was to Diocesan trustees as trustees for the Diocese.

**V. The relevant stipulated facts support the Diocese’s ownership and Church of the Word may not achieve ownership through some kind of unpled equitable use claim.**

If the Court ultimately does not rule as a matter of law – either for COTW based on the Five Questions Opinion, or for the Episcopal Church and the Diocese based on the Deed and current Virginia law – the relevant stipulated facts support the Diocese’s ownership.

To rule based on the facts, the Court must conclude that the Deed is ambiguous. *E.g.*, *Pyramid Dev., L.L.C. v. D&J Assocs.*, 262 Va. 750, 754, 553 S.E.2d 725, 728 (2001) (“when the language of a deed is ‘clear, unambiguous, and explicit,’ a court interpreting it ‘should look no further than the four corners of the instrument under review.’ Only when the language is ambiguous may a court look to parol evidence, or specifically, to the language employed ‘in light of the circumstances surrounding the parties and the land at the time the deed was executed’”) (citations omitted).<sup>6</sup> The only possible grounds for ambiguity is the listing of COTW’s address in the Deed. As stated above, the Court should conclude that the address listing does not create an ambiguity. If the Court finds that the Deed is ambiguous, however, it does not then embark on an uncharted excursion to find some nexus between COTW and the Property. Virginia law dictates that the Court review the language of the Deed “in light of the circumstances surrounding the parties and the land at the time the deed was executed.” *Id.*

In this case, the Petitions and the Court Order contemporaneous to the Deed clearly indicate that the Diocese was intended to be the owner of the Property. *See pp. 2-3, supra.* Moreover, the surrounding circumstances show that the listing of COTW’s address was not some strange, round-about way to show that COTW actually was the beneficial owner. Instead, it was a reflection of Episcopal doctrine, polity, and practice. Missions of the Diocese, which COTW was in December 1993, are part of the Diocese, different in a number of significant ways from

---

<sup>6</sup> *Accord, Va. Elec. & Power Co. v. N. Va. Reg’l Park Auth.*, 270 Va. 309, 316, 618 S.E.2d 323, 327 (2005) (“Where language is unambiguous, it is inappropriate to resort to extrinsic evidence; an unambiguous document should be given its plain meaning”) (quoting *Great Falls Hardware Co. of Reston v. South Lakes Village Center Assocs., L.P.*, 238 Va. 123, 125, 380 S.E.2d 642, 643 (1989)). “[T]he court is not at liberty to search for its meaning beyond the instrument itself.... because the writing is the repository of the final agreement of the parties.” *Id.* (quoting *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983)).

churches in the Diocese. Among other things, Missions are supervised and assisted by the Diocese to insure that they develop and grow to be firmly established. Diocesan Canon 10 § 1 sets forth five requirements for “church” status, *see, e.g.*, Stipulation Ex. 1 at 18, and 10 § 6 provides that a congregation that cannot meet them all may be a “Mission.” *Id.* at 18-19. Other differences include, but are not limited to, the following: (i) Missions typically receive direct Diocesan financial assistance, *see, e.g.*, Stipulation ¶¶ 7, 23, 24, and churches typically do not; (ii) under Diocesan Canon 10 § 2, alienation of property used by Missions requires the consent of the Bishop, Stipulation Ex. 1 at 18; and (iii) the local leadership is different in name, method of appointment, and authority. Missions have Vestry Committees and Vicars; churches have Vestries and Rectors. *See, e.g., id.* at 22-23 (Diocesan Canons 11 § 14 and 12 § 1). The above are some of the reasons that the Diocese – as a matter of doctrine, polity, and practice – has determined that Missions are a different kind of ecclesiastical entity than Churches, which affects how property is held and managed.<sup>7</sup>

Other than the address claim, all COTW can muster is some sort of unpled claim to ownership based on use of the Property. There is a way under Virginia law to establish ownership by use: adverse possession. COTW plainly could not prevail in an adverse possession action here. Nor may it assert an ill-defined and unpled equitable ownership claim

---

<sup>7</sup> The Episcopal Church and the Diocese have trust, contractual, and proprietary rights in property used by both churches and missions, as we would demonstrate in our declaratory judgment actions. Given Missions’ fledging status, however, the Diocese’s practice often has been to make its ownership rights explicit in the titling of real property, as the Deed here reflects.

The Episcopal Church and the Diocese object to the Court considering and ruling on the stipulated facts, for relevance reasons stated herein. Moreover, the stipulated facts are only some of the facts relevant to the declaratory judgment actions, and it would be inappropriate and inconsistent for the Court to rule that the analysis of *Green v. Lewis* does not apply but then base a ruling about whether the Property is subject to Church of the Word’s 57-9 petition on a limited subset of the facts relevant under a *Green v. Lewis* analysis.

(even if Virginia law recognized such a claim, which it does not). First, COTW cannot make such claims now. The issue at present is whether the Property is subject to its 57-9 action, based on the statute and the Court's rulings to date. Use claims would have to come later, in the declaratory judgment action. Second, the stipulated facts show that there is nothing inequitable about a finding that the Property is not subject to COTW's 57-9 petition. The Diocese and churches within the Diocese contributed over \$134,600.00 to COTW for the purchase of the Property, far more than the monies collected from the congregation for the purchase. Stipulation ¶ 11 & Ex. 10. Indeed, over the course of the Episcopal Church of the Word's twenty year history as a part of the Diocese, the Diocese and its member churches contributed \$264,600 to COTW. Stipulation ¶¶ 7, 10, 23, 24 & Exs. 6, 10, 20, 21. From 1987 to 2006, COTW contributed only \$95,086.41 to the Diocese. Stipulation ¶ 25.<sup>8</sup>

### CONCLUSION

The Court should reconsider its Five Questions Opinion in part and conclude, as a matter of law, that Virginia law does allow trusts for hierarchical churches and that the Property is held in trust for the Diocese, not for Church of the Word. If the Court refuses to reconsider, it must conclude as a matter of law that, notwithstanding the Deed, the Property is held in trust for Church of the Word and thus subject to its 57-9 petition. The stipulated facts are irrelevant, except to the extent that they confirm that the Property is held in trust for the Diocese.

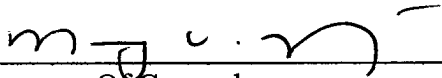
---

<sup>8</sup> Virginia law does not determine church property rights by measuring contributions. *See, e.g., Green v. Lewis*, 221 Va. at 551-52, 272 S.E.2d at 183-84 (recounting but dismissing monetary complaints because "it is not within the scope of this opinion to determine the validity of the grievances between the membership and the church"). We note merely that it is misleading to suggest that there is something inequitable about a ruling in our favor in this instance.



Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH  
IN THE DIOCESE OF VIRGINIA

By:   
Of Counsel

Bradfute W. Davenport, Jr. (VSB # 12848)  
William H. Hurd (VSB # 16769)  
George A. Somerville (VSB # 22419)  
Joshua D. Heslinga (VSB # 73036)  
Troutman Sanders LLP  
Post Office Box 1122  
Richmond, Virginia 23218-1122  
(804) 697-1200  
fax: (804) 697-1339

Mary C. Zinsner (VSB # 31397)  
Elizabeth A. Billingsley (VSB # 70808)  
Troutman Sanders LLP  
1660 International Drive  
Suite 600  
McLean, Virginia 22102  
Telephone: (703) 734-4334  
Facsimile: (703) 734-4340

*Counsel for the Protestant Episcopal Church in the Diocese of Virginia*

THE EPISCOPAL CHURCH

By: Heather H. Anderson/mcz  
Of Counsel

Heather H. Anderson (VSB # 38093)  
Adam M. Chud (*pro hac vice*)  
Soyong Cho (VSB # 70896)  
Goodwin Procter  
901 New York Avenue, N.W.  
Washington, D.C. 20001  
Telephone: (202) 346-4000  
Facsimile: (202) 346-4444

*Counsel for the Episcopal Church*

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were sent by electronic mail to all counsel named below and by first-class mail to the lead counsel at each firm (indicated with an asterisk below), on this 29th day of October, 2008:

\* Gordon A. Coffee, Esquire (gcoffee@winston.com)  
Gene C. Schaerr, Esquire (gschaerr@winston.com)  
Steffen N. Johnson, Esquire (sjohnson@winston.com)  
Andrew C. Nichols, Esquire (anichols@winston.com)  
Winston & Strawn LLP  
1700 K Street, N.W.  
Washington, D.C. 20006  
*Counsel for Truro Church, Church of the Epiphany,  
Church of the Apostles, The Church at The Falls – The Falls Church, and  
associated individuals*

\* George O. Peterson, Esquire (gpeter@sanderson.com)  
J. Jonathan Schraub, Esquire (jjschraub@sanderson.com)  
Heather A. Jones, Esquire (hjones@sanderson.com)  
Sands Anderson Marks & Miller, P.C.  
1497 Chain Bridge Road, Suite 202  
McLean, Virginia 22101  
*Counsel for Truro Church and certain associated individuals*

\* Mary A. McReynolds, Esquire (marymcreynolds@mac.com)  
Mary A. McReynolds, P.C.  
1050 Connecticut Avenue, N.W., 10th Floor  
Washington, D.C. 20036  
*Counsel for St. Margaret's Church, St. Paul's Church, Church of the Epiphany,  
Church of the Apostles, St. Stephen's Church, and associated individuals*

\* E. Andrew Burcher, Esquire (eaburcher@pw.thelandlawyers.com)  
Walsh, Colucci, Lubeley, Emrich & Walsh, P.C.  
4310 Prince William Parkway, Suite 300  
Prince William, Virginia 22192  
*Counsel for St. Margaret's Church, St. Paul's Church, and Church of the Word*

\* James E. Carr, Esquire (NorthVaJim@aol.com)  
Carr & Carr  
44135 Woodridge Parkway, Suite 260  
Leesburg, Virginia 20176  
*Counsel for the Church of Our Saviour at Oatlands and associated individuals*

\* R. Hunter Manson, Esquire (manson@kaballero.com)  
PO Box 539  
876 Main Street  
Reedville, Virginia 22539  
*Counsel for St. Stephen's Church and associated individuals*

\* Scott J. Ward, Esquire (sjw@gg-law.com)  
Timothy R. Obitts (tro@gg-law.com)  
Robert W. Malone (rwm@gg-law.com)  
Gammon & Grange, P.C.  
8280 Greensboro Drive  
Seventh Floor  
McLean, Virginia 22102  
*Counsel for The Church at The Falls – The Falls Church and certain associated individuals, Christ the Redeemer Church, and Potomac Falls Church*

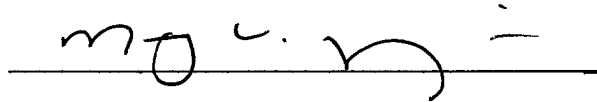
\* James A. Johnson, Esquire (jjohnson@semmes.com)  
Paul N. Farquharson, Esquire (pfarquharson@semmes.com)  
Scott H. Phillips, Esquire (sphillips@semmes.com)  
Semmes Bowen & Semmes, P.C.  
25 South Charles Street  
Suite 1400  
Baltimore, Maryland 21201  
*Counsel for The Church at The Falls – The Falls Church and certain associated individuals*

\* Edward H. Grove, III, Esquire (egrove@thebrautfirm.com)  
Brault Palmer Grove Steinhilber & Robbins LLP  
3554 Chain Bridge Road  
Suite 400  
Fairfax, VA 22030  
*Counsel for certain trustees of The Church at The Falls – The Falls Church (Episcopal)*

\* Robert C. Dunn, Esquire (rdunn@robdunnlaw.com)  
LAW OFFICE OF ROBERT C. DUNN  
707 Prince Street  
P. O. Box 117  
Alexandria, Virginia 22313-0117  
*Counsel for Marjorie Bell, trustee of Church of the Epiphany (Episcopal)*

\* William E. Thro, Esquire (WThro@oag.state.va.us)  
Stephen R. McCullough, Esquire (SMccullough@oag.state.va.us)  
Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219

*Counsel for the Commonwealth of Virginia ex. rel. Robert F. McDonnell, in his  
official capacity as Attorney General*

A handwritten signature in black ink, appearing to read "m. r. m.", is written above a solid horizontal line.

1778518.2

1 V I R G I N I A:

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

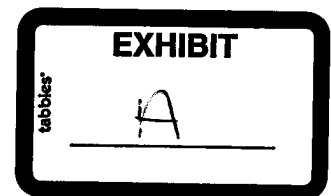
18

19

20

21

22



1                   Hearing held at:

2

3                   FAIRFAX COUNTY CIRCUIT COURT

4                   Courtroom 4J

5                   4110 Chain Bridge Road

6                   Fairfax, Virginia 22030

7                   (703) 691-7320

8

9                   Pursuant to agreement, before Theresa R.

10 Hollister, Certified Court Reporter and Notary Public for

11 the Commonwealth of Virginia.

12

13

14

15

16

17

18

19

20

21

22

A P P E A R A N C E S

ON BEHALF OF THE EPISCOPAL DIOCESE OF VIRGINIA:

JOSHUA D. HESLINGA, ESQUIRE

BRADFUTE W. DAVENPORT, JR., ESQUIRE

GEORGE A. SOMERVILLE, ESQUIRE

TROUTMAN SANDERS, LLP

1001 Haxall Point

P.O. Box 1122

Richmond, Virginia 23219

(804) 697-1200

MARY C. ZINSNER, ESQUIRE

TROUTMAN SANDERS, LLP

1660 International Drive

Suite 600

McLean, Virginia 22102

(703) 734-4363

1 A P P E A R A N C E S (cont.)

2 ON BEHALF OF THE NATIONAL EPISCOPAL CHURCH:

3 ADAM M. CHUD, ESQUIRE

4 GOODWIN PROCTER, LLP

5 901 New York Avenue, Northwest

6 Washington, D.C. 20001

7 (202) 346-4000

8

9 ON BEHALF OF TRURO CHURCH, THE CHURCH AT THE  
10 FALLS-THE FALLS CHURCH, CHURCH OF THE APOSTLES,  
11 CHURCH OF THE EPIPHANY AND ASSOCIATED INDIVIDUALS:

12 GORDON A. COFFEE, ESQUIRE

13 STEFFEN N. JOHNSON, ESQUIRE

14 WINSTON & STRAWN, LLP

15 1700 K Street, Northwest

16 Washington, D.C. 20006-3817

17 (202) 282-5100

18

19

20

21

22



1 A P P E A R A N C E S (cont.)

2 ON BEHALF OF TRURO CHURCH AND ASSOCIATED INDIVIDUALS:

3 GEORGE O. PETERSON, ESQUIRE

4 SANDS ANDERSON MARKS & MILLER

5 1497 Chain Bridge Road

6 Suite 202

7 McLean, Virginia 22101

8 (703) 893-3600

9

10 ON BEHALF OF ST. MARGARET'S CHURCH, ST. PAUL'S

11 CHURCH, AND CHURCH OF THE WORD:

12 E. ANDREW BURCHER, ESQUIRE

13 WALSH, COLUCCI, LUBELEY, EMRICH & WALSH

14 4310 Prince William Parkway

15 Glen Park 1, Suite 300

16 Woodbridge, Virginia 22192

17 (703) 680-4664

18

19

20

21

22

1 A P P E A R A N C E S (cont.)

2 ON BEHALF OF CHURCH OF OUR SAVIOUR AT OATLANDS AND  
3 ASSOCIATED INDIVIDUALS:

4 JAMES E. CARR, ESQUIRE

5 CARR & CARR

6 44135 Woodbridge Parkway

7 Suite 260

8 Leesburg, Virginia 20176

9 (703) 777-9150

10

11 ON BEHALF OF CHRIST THE REDEEMER CHURCH, POTOMAC  
12 FALLS CHURCH, THE CHURCH AT THE FALLS-THE FALLS  
13 CHURCH, AND ASSOCIATED INDIVIDUALS:

14 SCOTT J. WARD, ESQUIRE

15 GAMMON & GRANGE

16 8280 Greensboro Drive

17 Seventh Floor

18 McLean, Virginia 22102

19 (703) 761-5000

20

21

22

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

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.

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

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.

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

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



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

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

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.

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

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

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

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

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?



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

CERTIFICATE OF SHORTHAND REPORTER

I, T. R. Hollister, the court reporter before whom the foregoing hearing was taken, do hereby certify that the foregoing transcript is a true and correct record of the testimony given; that said testimony was taken by me stenographically and thereafter reduced to typewriting under my supervision; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

T. R. HOLLISTER  
Court Reporter

1 VIRGINIA:

2 IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

3 - - - - - x

4 IN RE: : Consolidated Cases:

5 MULTI-CIRCUIT EPISCOPAL : CL 2007-248724, et al.

6 CHURCH LITIGATION :

7 - - - - - x

8

9 TRANSCRIPT OF PRETRIAL MOTIONS

10 FAIRFAX COUNTY CIRCUIT COURT

11 4110 Chain Bridge Road

12 Courtroom 4G

13 Fairfax, Virginia 22030

14 Wednesday, October 8, 2008

15 10:00 a.m.

16

17

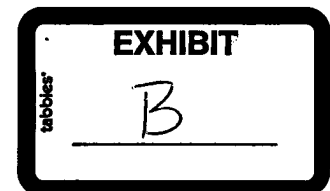
18 BEFORE: The Honorable Randy I. Bellows

19

20 Job No.: 139589

21 Pages: 1 through 168

22 Reported by: Sandria L. Cox



A P P E A R A N C E S

1  
2  
3 ON BEHALF OF TRURO CHURCH, THE CHURCH AT THE FALLS,  
4 THE FALLS CHURCH, CHURCH OF THE APOSTLES, CHURCH OF  
5 THE EPIPHANY AND CERTAIN ASSOCIATED INDIVIDUALS:

6 STEFFEN N. JOHNSON, ESQUIRE

7 GORDON A. COFFEE, ESQUIRE

8 Winston & Strawn, LLP

9 1700 K Street, Northwest

10 Washington, D.C. 20006-3817

11 202-282-5100

12  
13 ON BEHALF OF THE FALLS CHURCH:

14 PAUL N. FARQUHARSON, ESQUIRE

15 Semmes Bowen & Semmes

16 25 South Charles Street, Suite 1400

17 Baltimore, Maryland 21201

18 410-539-5040

19

20

21

22

1 A-P-P-E-A-R-A-N-C-E-S

2 ON BEHALF OF CHRIST THE REDEEMER CHURCH, POTOMAC  
3 FALLS CHURCH AND THE FALLS CHURCH:

4 SCOTT J. WARD, ESQUIRE

5 Gammon & Grange

6 Seventh Floor

7 8280 Greensboro Drive

8 McLean, Virginia 22102-3807

9 703-761-5000

10

11 ON BEHALF OF TRURO CHURCH AND ITS RELATED TRUSTEES:

12 GEORGE O. PETERSON, ESQUIRE

13 Sands Anderson Marks & Miller

14 Suite 202

15 1497 Chain Bridge Road

16 McLean, Virginia 22101-5728

17 703-893-3600

18

19

20

21

22

1 A-P-P-E-A-R-A-N-C-E-S

2 ON BEHALF OF THE EPISCOPAL DIOCESE OF VIRGINIA:

3 BRADFUTE W. DAVENPORT, ESQUIRE

4 JOSHUA D. HESLINGA, ESQUIRE

5 GEORGE A. SOMERVILLE, ESQUIRE

6 Troutman Sanders, LLP

7 P.O. Box 1122

8 1001 Haxall Point

9 Richmond, Virginia 23219

10 804-697-1200

11

12 ALSO ON BEHALF OF THE EPISCOPAL DIOCESE OF

13 VIRGINIA:

14 MARY C. ZINSNER, ESQUIRE

15 TROUTMAN SANDERS, LLP

16 1600 International Drive

17 Suite 600

18 McLean, Virginia 22102

19 703-734-4363

20

21

22

1 A-P-P-E-A-R-A-N-C-E-S

2 ON BEHALF OF CHURCH OF THE APOSTLES, CHURCH OF THE  
3 EPIPHANY, ST. MARGARET'S CHURCH, ST. PAUL'S CHURCH,  
4 and ST. STEPHEN'S CHURCH, AND ASSOCIATED TRUSTEES:

5 MARY A. McREYNOLDS, ESQUIRE

6 Mary A. McReynolds, PC

7 Tenth Floor

8 1050 Connecticut Avenue, Northwest

9 Washington, D.C. 20036

10 202-429-1770

11

12 ON BEHALF OF CHURCH OF THE WORD, ST. MARGARET'S  
13 CHURCH, AND ST. PAUL'S CHURCH:

14 E. ANDREW BURCHER, ESQUIRE

15 Walsh Colucci Lubeley Emrich & Walsh

16 Glen Park I

17 4310 Prince William Parkway

18 Suite 300

19 Woodbridge, Virginia 22192-5199

20 703-680-4664

21

22

1                   A-P-P-E-A-R-A-N-C-E-S

2       ON BEHALF OF THE TRUSTEES OF THE FALLS CHURCH:

3                   THOMAS C. PALMER, JR., ESQUIRE

4                   Brault, Palmer, Grove, White &

5                   Steinhilber, LLP

6                   10533 Main Street

7                   Fairfax, Virginia 22030

8                   703-273-6400

9

10

11

12

13

14

15

16

17

18

19

20

21

22

1 P-R-O-C-E-E-D-I-N-G-S

2 (The court reporter was sworn.)

3 THE COURT: Anybody have a suggestion  
4 about what we address first? Anybody have a  
5 suggestion about what is the easiest thing for us  
6 to resolve first?

7 MR. BURCHER: We just wanted to update  
8 you on the program Church of the Word.

9 Andrew Burcher on behalf of Church of  
10 the Word. Church of the Word will be the first  
11 presentation on Tuesday.

12 As of right now, we're very close to  
13 having a factual stipulation that will provide to  
14 Your Honor the documents that would present the  
15 evidentiary record that would be necessary, we  
16 think, for you to make a decision on the matters.

17 So, really, unless you have some  
18 specific questions, I think that that's going to be  
19 the way that we will probably end up approaching  
20 this matter.

21 And then what we would propose is have  
22 some sort of a briefing to point out the points in



1 the documents that we're going to present that --

2 THE COURT: Well, you anticipate that  
3 all of the evidence relating to Church of the Word  
4 will be presented in a factual stipulation?

5 MR. BURCHER: Yes, Your Honor.

6 THE COURT: And so you won't be putting  
7 on any testimony on the 14th?

8 MR. BURCHER: That's --.

9 We're very close. As long as we work it  
10 out, yes, that's where we're at now right now.

11 THE COURT: Okay. And if you do that,  
12 you want me to set a briefing schedule now so that  
13 I can resolve this issue once I see the factual  
14 stipulation?

15 MR. BURCHER: Yes, Your Honor. That  
16 will be fine. And I just have one other point that  
17 they'd like to raise on this matter, that I've been  
18 wanting to bring up.

19 MR. HESLINGA: And about the briefing  
20 schedule, I don't think it necessarily has to be  
21 set today. We could wait until the 14th to make  
22 sure that everything pans out as expected with the

1 stipulation.

2           What I wanted to say briefly though  
3 today was that, kind of to reiterate what our basic  
4 position is, which is that for a few different  
5 reasons there's no need for evidence, and so while  
6 we are going to -- if the Court determines that a  
7 trial will occur, as it did at the last hearing, if  
8 there's no change in that, then we will stipulate  
9 to the facts because they aren't really in  
10 dispute.

11           But we maintain that those facts aren't  
12 relevant, at least most of them aren't, and we also  
13 think that there are some consistency issues with  
14 taking this evidence when the Court has not taken  
15 the whole (word) picture and not taken any of the  
16 (word) with respect to the other churches.

17           THE COURT: You may be absolutely  
18 correct, and I want to be clear that I may very  
19 well resolve this as a matter of law, but I also  
20 believe, and Mr. Burcher has argued, that it can be  
21 resolved as a matter of fact as well.

22           And so I'm taking the evidence so that,

1 if I wish, I can address the issue both as a matter  
2 of law and as a matter of fact, because to me that  
3 makes sense.

4 But even after hearing the evidence, I  
5 may ultimately conclude, as Mr. Burcher argues, as  
6 a matter of law -- and as you have argued -- as a  
7 matter of law it ought to be resolved a certain  
8 way.

9 So I don't necessarily disagree with you  
10 that it can be resolved as a matter of law nor do I  
11 disagree with you that even after you put on  
12 evidence I may still conclude the issues that are  
13 resolved as a matter of law. But I may make  
14 alternative findings. I may resolve it as a matter  
15 of law and as a matter of fact.

16 And that's why I told you to go ahead  
17 and put on evidence.

18 So I understand your position. I don't  
19 necessarily disagree with it.

20 MR. HESLINGA: Okay. I wanted to make  
21 sure it was clear. Thank you.

22 THE COURT: All right. I'm going to

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

CERTIFICATE OF REPORTER

I, Sandria L. Cox, do hereby certify that the foregoing proceedings were taken by me in stenotype and thereafter reduced to transcript under my supervision; that said proceedings are a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

Given under my hand this 8th day of October, 2008.

---

Sandria L. Cox  
Court Reporter