

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re:	)	Case Nos.:	CL 2007-248724,
Multi-Circuit Episcopal Church Litigation	)		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
REPLY POST-TRIAL BRIEF REGARDING CHURCH OF THE WORD**

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I. Reply to factual errors and overstatements recycled in COTW’s Opposition Brief.

- It is simply false for COTW to say (at 3) that “[a]t the Diocese’s request, the Court replaced the Diocesan trustees with Congregational trustees ... in 2005.”¹ *COTW asked the Diocese* about “the normal procedure for any parish” to have trustees appointed to hold the property it uses. Stip. Ex. 26 at 1. The Diocese responded with routine information on trustee appointment, noting that transfer of title required Diocesan authorization. *Id.* *COTW went to Court*, asserting (without any factual or legal support) that the Diocesan trustees were trustees for COTW. *See* Stip. Ex. 27 at 1. The Court entered an *ex parte* Order appointing trustees based on the erroneous petition before it. *See* Stip. ¶¶ 32-33 & Ex. 28. The Diocese was not a party. Stip. ¶ 33. Notably, the Court’s Order contained only one finding: that the three proposed individuals were “fit and proper persons to serve as Trustees for the Episcopal Church of the Word.” Stip. Ex. 28 at 1. It is complete fiction for COTW to claim (at 7) that “the court that entered the order had to have made the determination that the replacement of the Diocesan trustees with the Congregational trustees was ‘proper to effect and promote the object of the conveyance.’” COTW’s counsel drafted the Order. *See* Stip. Ex. 28 at 1 (on “OURS & SILEK, PC” stationery). Such a finding is not in the Order. *See id.* And the Court could not have made such a finding *because the conveyance – the Deed – was not before the Court.* *See* Stip. Ex. 27.

- The claim that the Grantee’s address was “never the address of any Diocesan entity or office” (at 2, twice) ignores that COTW was a Diocesan mission, under the Diocese’s direct supervision and control and receiving its assistance. COTW vastly overstates what the address shows, and the Deed does not support COTW. *See* TEC-Diocese Opening Brief at 11-14.

¹ Parenthetical references – (at ___) – are to COTW’s Opposition Brief, unless otherwise stated.

(footnote continued ...)

- COTW's claim to have "raised more than \$200,000" (at 2) goes beyond the stipulated facts. It also ignores that COTW contributed only a fraction of that amount (\$52,615) and that COTW was in a position to receive most of that money only because COTW was part of the Diocese. Being part of the denomination led to direct financial support for COTW and also created relationships with other congregations and groups who could assist. *See* Stip. Ex. 10 (only \$10,150.00 received from foundations and churches outside the Diocese, but \$135,400.00 from the Diocese and other congregations in it).

- COTW protests (at 6) that a "possible intent' by the Rector ... does not amount to 'COTW intended to leave the Diocese.'" Leaving aside that COTW simply ignores ¶ 39 of the Stipulation and that events have proven the Diocese's concern correct, "possible intent" was an understatement. It is impossible to read Exhibit 31 as a hypothetical or as a missive related to theology and not property. The soon-to-be-secessionists stated that if the Episcopal Church did not "turn back" on "matters of sexual morality," then "we believe we will have to separate from ECUSA." Stip. Ex. 31 at 1 (EDV0007374), 3 (EDV0007376). They also stated that "[s]ome of our churches are ready to leave ECUSA now" and were interested only in discussing the method. *Id.* at 4 (EDV0007377). Finally, they explicitly raised property – stating "grav[e] concer[n] about issues of church property ownership" and that "[their] people are determined ECUSA must not 'own'" facilities. *Id.* They clearly fired a shot across the property bow.

- COTW continues to style the 1996 letters as significant admissions. They are not. They are brief "congratulations" letters with colloquial references to the Property that say nothing about ownership or title to the Property.

II. COTW fails to articulate any valid legal theory or to provide legal support.

We have tried to guess what legal theory COTW is asserting. *See* TEC-Diocese Responsive Brief at 3-6. We still do not know. There is not a single case citation anywhere in COTW's Opposition Brief, and in 22 pages of briefing COTW has utterly failed to articulate a legal theory cognizable under Virginia law. There are plenty of Virginia cases on trusts and how one "show[s] a beneficial trust interest," including the "level of evidence necessary." COTW Opposition at 3. COTW apparently is uninterested in generally applicable case law, however, claiming that it provides no direction. Instead, COTW seeks special treatment. It argues that a beneficial interest for purposes of § 57-9 is somehow different from beneficial ownership under any other trust, that an implied trust may arise in COTW's favor despite the express trust in the Deed,² and that a court should discern whether the requisite congregational trust exists for § 57-9 by a standard (the "meaningful factual nexus") that COTW has simply invented – without any basis in case law or this Court's decisions.

COTW claims a "sufficient beneficial interest" (at 8; *see id.* at 6, 9), without ever identifying the nature and extent of its interest or how that interest arose. COTW does assert (at 8) that its interest is "evidenced" by a *petition* asking that the Diocese be authorized "to purchase the Property for the benefit of the Episcopal Church of the Word." *See* Stip. Ex. 13 at 3. Leaving aside that a court petition does not establish *anything* (let alone property ownership), that the law does not permit such attempts to vary the express terms of a deed, and that the language COTW relies upon *was not even included in the Court's Order* (*see* Stip. Ex. 15 at

² *But see, e.g., Southern Biscuit Co., Inc. v. Lloyd*, 174 Va. 299, 311, 6 S.E.2d 601, 606 (1940) ("an express contract defining the rights of the parties necessarily precludes the existence of an implied contract of a different nature containing the same subject matter. The rights of the parties are to be determined by the provisions of the express contract, and the law will not imply an agreement in contravention thereof"); *Hitachi Sys. Corp. v. Webmethods, Inc.*, 60 Va. Cir. 79, 86 (Fairfax County 2002) (same).

1-2), COTW ignores the Petition’s next sentence, which states that “[t]he Property shall be held by Diocesan Trustees *in trust for the Diocese.*” Stip. Ex. 13 at 3 (emphasis added). COTW also ignores that the Petition stated the Diocesan trustees were acting “pursuant to Sections 1 and 5 of [Diocesan] Canon 15,” which was submitted as an exhibit. Stip. Ex. 13 at 1-2. Canon 15 § 1 provided that “[a]ll real and personal property held by or for the benefit of any Church or Mission within this Diocese is held in trust for The Episcopal Church and the Diocese.” Stip. Ex. 13 at Ex. E; *see also* Stip. Ex. 1 at internal p.26. Even if a petition could establish ownership, this one does not help COTW.³

We are at a loss to rebut COTW’s mysterious claim much further, but we note that:

- COTW denies that it is asserting a claim based on use (at 8), even as it trumpets its mortgage payments (at 3, 5 n.2).⁴
- While accusing us of ignoring the 2005 Order, COTW simply assumes that it was effective and binding, contrary to an array of case law. *See* TEC-Diocese Responsive Brief at 7.
- While purporting to seek “a reasoned inquiry” into “the facts and circumstances surrounding the parties at the time the deed was executed” (at 5, 6), COTW relies heavily on occurrences years later (*e.g.*, the mortgage payments and 1996 letters). Nor has COTW shown a basis for seeking intent beyond the Deed’s terms.⁵

³ Regarding the Petition, COTW also notes that it was named as the purchaser on the contract, ignoring clear Virginia law that the contract merges into the Deed, so the Deed governs. *E.g.*, *Kemp v. Miller*, 166 Va. 661, 677, 186 S.E. 99, 104 (1936). Nor would the purchase contract help COTW avoid other contractual commitments. *See* TEC-Diocese Responsive Brief at 8 n.7.

⁴ COTW has no valid claim based on money. *See* TEC-Diocese Opening Brief at 15 n.8; TEC-Diocese Responsive Brief at 4-6.

⁵ *E.g.*, *Va. Elec. & Power Co. v. N. Va. Reg’l Park Auth.*, 270 Va. 309, 316, 618 S.E.2d 323, 327 (2005) (“Where an agreement is complete on its face, is plain and unambiguous in its terms, the 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.... The pole star for the

(footnote continued ...)

- COTW continues to ascribe significance to the name of the proceeding that Stipulation Exhibit 11 initiated. *See* COTW Opposition Brief at 5 (“the purchase was authorized in the COTW Chancery Proceeding”). But COTW’s briefing makes clear that we have waited in vain for some legal support for its theory that a case name is evidence of anything, let alone that a case name may create a trust that varies from the express trust created in the Deed.

III. There is no procedural impediment to reconsideration.

The fault that COTW finds in our request for reconsideration, in part, of the Court’s Five Questions Opinion is the height of form over substance. Reconsideration must be sought in a writing filed in the clerk’s office and forwarded to the judge who made the ruling. *See* Fairfax County Circuit Court Practice Manual (2007 ed.) § (E)7.02 at E-19. We have done that and clearly stated the request and the consequences if the Court does not reconsider. COTW’s claim (at 8) that we “have not given proper notice to all litigants” and are “hid[ing] in a brief addressing issues specific to [COTW] a broader request ... affecting all of the litigants” is baseless. Each paper in which we have requested reconsideration has been served on all counsel. We also argued the matter at the September 26, 2008, hearing.⁶ Apparently COTW will not be satisfied unless there is a filing with the title “Motion.” With that in mind, we hereby file one.

construction of a contract is the intention of the contracting parties as expressed by them in the words they have used”) (citation and internal quotation marks omitted).

⁶ At that hearing, Messrs. Coffee, Johnson, Peterson, Carr, and Ward appeared, representing Truro Church, The Falls Church, Apostles, Epiphany, and the Church of Our Saviour at Oatlands. Counsel for COTW also appeared on behalf of St. Margaret’s Church and St. Paul’s Church. *See* Tr. (Sept. 26, 2008) (Ex. A to TEC-Diocese Opening Brief) at 4-6.

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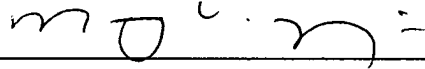
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