

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 DIOCESE'S REPLY BRIEF
REGARDING PROPERTY SUBJECT TO
THE ST. STEPHEN'S 1874 DEED**

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St. Stephen's Responsive Brief advances the same erroneous legal positions as it did in its Opening Brief. We summarize below, for the Court's convenience, where we have already refuted them. First, we reply to the obvious main thrust of St. Stephen's Responsive Brief – its repeated charges (at 2, 4, and 7) that we are merely “relitigat[ing]” issues already decided.¹

I. St. Stephen's characterization of the issue now before the Court as “relitigat[ion]” misstates the issue and is inconsistent with the Stipulation and the Court's Orders.

A. St. Stephen's misstates the issue.

The parties' Stipulation (¶ 8) provides that “[t]he issue presented to the Court is whether the Deed creates an enforceable restriction as to who may use the property conveyed thereby.” The stipulated issue has two aspects, and neither is a matter of “waiver” or “contracting around.”

First, the issue involves deed interpretation and enforcement. The Deed conveys the Property “In trust nevertheless and for the sole use and benefit of the religious society and congregation known as the Protestant Episcopal Church” and provides that the Property is “for the purpose of erecting a house for divine worship,” which “when so built shall be used and enjoyed by said religious society or congregation according to the laws and canons of said church not inconsistent with the laws and constitution of Virginia.” Stipulation ¶ 4. We contend that the Deed means and requires what it says; the Property may not be held and used except in accordance with the express trust and use restriction in the Deed. Our Responsive Brief (at 2-8) demonstrates the clear error in St. Stephen's claims about the intent and particular terms of the Deed. But all of St. Stephen's contentions about the Deed, whether tied to particular terms or not,

¹ In its Opening Brief (at 6 & 2 n.3), St. Stephen's argued that the Court's Contracts Clause Letter Opinion was “dispositive of the sole legal issue before the Court.” Our Responsive Brief (at 1-2) refuted that argument. St. Stephen's Responsive Brief reflects a search for another basis to avoid a decision – primarily claiming (at 2, 4) that we are recycling the “contracting around” argument – but the new attempt is equally meritless.

boil down to the assertion that even if we are correct about the meaning of the express terms of the Deed, § 57-9 is part of the Deed by incorporation or implication and preempts those terms. In sum, the issue calls for the Court to decide the enforceability of the Deed's plain and unambiguous trust and use restriction.

Second, the issue involves the scope of § 57-9. St. Stephen's has not argued that the Deed's trust and use restriction would be unenforceable had the Deed been recorded in 1866 rather than 1874. Nor would that position have any legal basis, in light of the Virginia case law we have discussed. Indeed, St. Stephen's expressly offers only one distinction from case law enforcing denominational restrictions: that this Deed post-dates the enactment of the division statute. *See* St. Stephen's Responsive Brief at 5-6 (reiterating its Opening Brief's distinction that each case "involved a deed that ante-dated the division statute"). St. Stephen's misinterprets the division statute. The statute does not refer (expressly or by implication) to deeds or deed interpretation, and it does not show a legislative intent to supersede the case law enforcing similar provisions in deeds as requiring that church property be held and used by members within a certain denomination. We have referred the Court to case law which recognizes that statutes need not and should not always be interpreted to override related case law and contractual provisions. In sum, the issue also calls for the Court to decide whether all property acquired after the division statute became effective in 1867 is subject to an action under § 57-9, *regardless* of what the deed to the property may provide.²

² Perhaps because it seeks to twist the issue, St. Stephen's Responsive Brief does not present any argument *at all* about why the proper interpretation of Va. Code § 57-9 is that it (i) trumps otherwise enforceable trusts and restrictions expressed in plain and unambiguous deed language and (ii) supersedes the cases enforcing such trusts and restrictions. Instead, St. Stephen's simply asserts (at 3) that "it is irrelevant whether the division statute mentions deeds."

B. St. Stephen's "relitigat[ion]" contention improperly attempts to circumvent the Stipulation and several Orders of the Court.

Prior to October 2008, this Court had not made any decisions about particular deeds. Nor has the Court ever determined what property was subject to the § 57-9 actions.

Just over a year ago, the Court responded to the concerns of both sides by ordering that "the proceedings in November [2007] shall not involve presentation of evidence on the title of the real and personal property at issue." Order (October 26, 2007).

When it issued two Letter Opinions on June 27, 2008, the Court ordered briefing on "[w]hat issues remain to be addressed by this Court." Order (June 27, 2008). The briefing led to the Court's July 16, 2008, Order. Paragraph 4(B) of that Order held that one of the issues remaining was "[t]he precise property subject to each 57-9 petition," and stated that "4(A) and 4(B) are matters that may require an evidentiary hearing and it is not the Court's present intention to resolve these questions prior to the October trial." Order (July 16, 2008) at 2, 3.

Following the Court's August Letter Opinions, the Court ordered, with both sides' agreement, stipulations identifying the property at issue and whether it was disputed that such property was subject to the 57-9 petitions. Order (September 3, 2008) at 2. The stipulation regarding St. Stephen's identified the property that was the subject of the 1874 Deed as disputed.

When the voting issues were resolved, the Court entered an Order stating that one of the "remaining issues to be adjudicated" was "the disputes regarding whether certain property is subject to and covered by the CANA Congregations' § 57-9 Petitions (as discussed at the August 22, 2008, hearing and now memorialized in the property stipulations ...)." Order (September 26, 2008) at 2. The parties to this dispute then stipulated to the relevant facts and the issue presented.

St. Stephen's Church has never moved for summary judgment or objected that there was no remaining issue to be adjudicated in its 57-9 action. To the contrary, *St. Stephen's stipulated*

to what the remaining issue in its action was, after the Court's Orders reserved and memorialized the issue for each action. St. Stephen's may now have realized the weakness of its position, but it may not undo the Court's Orders or the Stipulation by contending that no decision need be made because we have waived the issue.

II. St. Stephen's reliance on selected language from *Ogden* and *Blaisdell* is misplaced.

With respect to the issue presented (*see* § I.A., *supra*), St. Stephen's only case support for its position are two cases (*Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827), and *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934)) that are inapposite. *Blaisdell* is a Contracts Clause case. *E.g.*, 290 U.S. at 425. It addressed a Minnesota statute that gave "temporary relief" from mortgage foreclosures and execution sales "as an emergency measure" pursuant to "the police power of the State" during "the public economic emergency which the legislature had found to exist." 290 U.S. at 420-21.³ The Court held that there was no Contracts Clause violation because "[a]n emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community," that "the legislation was ... for the protection of a basic interest of society," and that the emergency relief was of appropriate character and on reasonable conditions, including that it was "temporary in operation" and "limited to the exigency which called it forth." *Id.* at 444-47.

In those cases, it was crystal clear that the mortgage relief law (*Blaisdell*) and the bankruptcy law (*Ogden*) changed obligations under certain kinds of contracts. Constitutionality was the issue, *not* whether the statutes overrode certain provisions and case law in the first place.

³ *Ogden* is also a Contracts Clause case. *E.g.*, 25 U.S. at 256, 264. *Ogden* concerned the same kind of emergency situation as in *Blaisdell*, as the Court in *Blaisdell* recognized in discussing it. *See, e.g., Blaisdell*, 290 U.S. at 428 (quoting *Ogden*, 25 U.S. at 354-55).

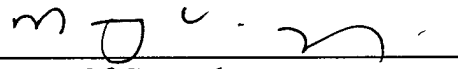
III. Summary of subjects recycled in St. Stephen’s Responsive Brief, with references to where those subjects are addressed in the Episcopal Church’s and the Diocese’s Opening and Responsive Briefs.

- The fact that the Deed’s terms contain an express trust and use restriction for an Episcopal congregation. *See* Opening Brief at 3-4; Responsive Brief at 4.
- The nature and effect of the Deed’s reference to “chapter LXXVI of the code of Va. 1873” and the habendum’s final words (“not inconsistent with the laws and constitution of Virginia”), and St. Stephen’s erroneous contention that the Deed shows an intent that the “conveyance be subject to the division statute.” *See* Responsive Brief at 5-8.
- St. Stephen’s ignorance or distortion of principles of deed interpretation and the operative Deed language as merely a “three-word identifier.” *See* Responsive Brief at 2-4.
- Cases enforcing deed provisions limiting property to members of a certain denomination, and why St. Stephen’s sole point of distinction from *Hoskinson* and *Finley* and its simplistic view of *Brooke* are unavailing. *See* Opening Brief at 4-8; Responsive Brief at 9-10.⁴
- Why § 57-9 should not be held to override otherwise enforceable trusts and restrictions expressed in plain and unambiguous deed language and to supersede the cases enforcing such trusts and restrictions. *See* Opening Brief at 8-10; Responsive Brief at 7-8.

⁴ Perhaps to buttress its “relitigat[ion]” thesis, St. Stephen’s (at 6) completely misdescribes our citation of *Green v. Lewis* and *Buhrman* as ignoring the Court’s Five Questions Letter Opinion. We cited them to show that Virginia has continued to recognize that deeds may require property to be held and used by members of a particular denomination, *not* because we are contending again that a court confronting a § 57-9 case must use the *Green v. Lewis* and *Buhrman* “neutral principles” analysis. When we want the Court to reconsider something, we say so, clearly and explicitly. Our pending requests regarding Church of the Word and Truro Church show that.

Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH
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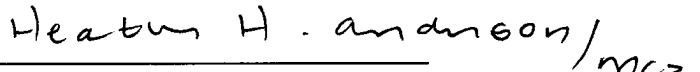
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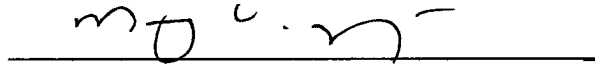
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A handwritten signature in black ink, appearing to read "R. F. McDonnell", is written above a solid horizontal line.

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