

**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  
RESPONSIVE POST-TRIAL BRIEF REGARDING CHURCH OF THE WORD**

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**I. Church of the Word essentially ignores the Deed, which is expressly to Diocesan trustees in trust for the Diocese, and COTW's minimal references to the Deed are inconsistent with the stipulated facts.**

Throughout its Opening Brief, COTW fails to argue that the Deed – the governing conveyance and the document that creates the operative, express trust – is in its favor. That is for good reason. As stipulated, 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. COTW has never been known as “the Episcopal Protestant Church in the Diocese of Virginia” or by any similar name, as nearly every exhibit to the Stipulation shows. *See, e.g.*, Stip. Exs. 3, 4, 7, 8, 11, 13, 15, 18, 19. If there were any doubt that the Deed is to the Diocese, the related Petition (Stip. Ex. 13) and Order (Stip. Ex. 15) erase any doubt by showing that the parties understood and employed their different names in December 1993.

When COTW does refer to the Deed, it puts an inaccurate gloss on the stipulated facts and advances an argument that fails to show that the Deed is ambiguous. COTW argues that “[t]he address of the Property has always been the address of the COTW congregation, *and never the address of any Diocesan entity or office.*” COTW Opening Brief at 5 (emphasis added); *id.* (“The address of the Grantee contained in the Deed at issue was the address of the COTW congregation, and never the address of any Diocesan entity or office”). The parties have stipulated, however, that “[a]t the time of purchase of the Property” COTW “was a mission within the Diocese.” Stipulation ¶ 17. Missions are fledging congregations, as we explained in our Opening Brief at 13-14. Missions are part of the Diocese and different from churches in

ways that implicate property. *See generally id.*; Stip. Ex. 1 at 18-19. COTW’s overstated address contention fails to show ambiguity in the Deed.

Unless the Court holds that the Deed is ambiguous, it must apply the Deed according to its terms. *See* TEC-Diocese Opening Brief at 13 & n.6. Those terms grant the Property to Diocesan trustees “as TRUSTEES for the Episcopal Protestant Church in the Diocese of Virginia.” The Property is not “held in trust for” COTW and thus is not subject to § 57-9(A).

**II. Church of the Word’s “meaningful factual nexus” arguments do not belong in the 57-9 action, contradict Virginia law, and would set this Court adrift in waters for which its prior opinions provide no chart.**

COTW focuses on the argument that the Court “need only” conclude that “there is sufficient evidence to support a factual finding that the congregation was a beneficiary of the trust at issue – that is, provided there is a meaningful factual nexus between the property at issue and the congregation – the property is held ‘in trust for such congregation.’” COTW Opening Brief at 2, 5. COTW’s position has three fatal flaws.

**A. COTW’s factual arguments cannot be asserted now.**

COTW’s factual arguments must be asserted later, in the declaratory judgment action. In its 57-9 action, COTW has not pled any sort of use (or “nexus”) claim. Rather, COTW pled:

Pursuant to certain deeds, trustees for Church of the Word hold legal title to the real property currently possessed by Church of the Word, located at 14215 Lee Highway, Gainesville, VA 20155. According to the relevant deeds, these trustees hold title to this property in trust for the congregation of Church of the Word.

Petition for Approval of Report of Congregational Determination (filed in Prince William Case No. CL76197 on July 10, 2007) ¶ 2. The Deed is now before the Court, and it contradicts COTW’s pleading. COTW may not now advance another theory in an attempt to establish now what § 57-9(A) required to be true at the time of the Petition: that the Property be “held in trust

for” COTW. The Property was not so held, so the Property is not subject to § 57-9(A).<sup>1</sup>

**B. COTW’s factual claim to be “a beneficiary of the trust within which the Property is held” fails as a matter of law and based on the stipulated facts.**

It is undisputed that the Property is the subject of an express trust, found in the Deed. That trust states that the beneficiary is the Diocese, not COTW. *See* section I, *supra*. COTW is arguing that the Court may somehow imply that COTW is a beneficiary – based largely on two 1996 letters (COTW Opening Brief at 4, 6), and the fact that COTW contributed to the purchase of the Property and paid the mortgage (*id.* at 5, 8). Along the way, COTW distorts and overstates facts on which it relies. It is untrue that “[t]he bulk of the funds used for the purchase were COTW funds,” as COTW asserts in its Opening Brief at 8. Indeed, COTW has stipulated that “Exhibit 10 fairly represents the sources of funds used ... for the purchase of the Property” (Stipulation ¶ 12); and Exhibit 10 shows that only \$52,615 (out of the \$230,383 raised for the down payment and other items) came from COTW members, while at least \$135,400 came from other Episcopal entities, including the Diocese.<sup>2</sup> COTW’s treatment of the 1996 letters also is an overstatement. Neither contains trust language or establishes beneficial ownership. Rather, they are congratulatory missives that refer to property in plainly colloquial terms. *See* Stip. Exs. 16 & 17. COTW’s attempt to become a beneficiary of an implied trust must fail for other reasons too.

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<sup>1</sup> COTW has pled other claims in the declaratory judgment action. *See* COTW’s Answer, Grounds of Defense and Counterclaim (filed Sept. 17, 2007) (asserting unjust enrichment and constructive trust). We reiterate that it would be inappropriate, inconsistent, and unjust to allow COTW to assert non-57-9 claims in its 57-9 action when we have not been permitted to assert our claims. If § 57-9(A) is “conclusive,” standing on its own and mooting all other claims, as this Court has held, *see* Five Questions Letter Opinion (June 27, 2008) at 11, a litigant must satisfy all of the requirements of § 57-9(A) upon invoking the statute. That litigant cannot be permitted to bootstrap a lesser claim into the “conclusive” effect of § 57-9.

<sup>2</sup> COTW knows that, which may be why it says elsewhere only that the congregation “raised” the money. COTW Opening Brief at 5, 8. Even that goes beyond Exhibit 10, which says nothing about how the funds were raised.

**1. There can be no resulting trust.**

Most of COTW's facts seem designed to suggest that a trust has somehow arisen by virtue of COTW's contributions to the purchase and upkeep of the Property. That may be an appeal to the law of "resulting trusts," but if so, COTW's claim fails.<sup>3</sup> The existence of an express trust in the Deed precludes any resulting trust. *E.g., 1924 Leonard Rd., L.L.C. v. Van Roekel*, 272 Va. 543, 552, 636 S.E.2d 378, 383 (2006) (emphasis added, citations omitted):

A resulting trust is an indirect trust that arises from the parties' intent or from the nature of the transaction and does not require an express declaration of trust. For a resulting trust to arise, the alleged beneficiary must pay for the property, or assume payment of all or part of the purchase money before or at the time of purchase, and have legal title conveyed to another *without any mention of a trust in the conveyance*.

*Accord, e.g., Ogden v. Halliday*, 235 Va. 639, 642, 369 S.E.2d 417, 419 (1988) (a resulting trust requires "title conveyed to another *with no mention of a trust in the deed*") (emphasis added).

Nor does Virginia law permit a resulting trust to arise based on events after December 1993. *E.g., Van Roekel*, 272 Va. at 552, 636 S.E.2d at 383 ("A resulting trust can only arise from the parties' original transaction, at the time that transaction occurs, and at no other time"); *Ogden*, 235 Va. at 642, 369 S.E.2d at 419. In *Ogden*, the wife claimed a resulting trust because, three years after the conveyance, she signed a note and deed of trust for a construction loan. *See id.* at 641-42, 369 S.E.2d at 418-19. The trial court agreed and impressed a resulting trust, but the Supreme Court reversed. *Id.* COTW invites this Court to commit precisely the same error by relying on later facts like the mortgage payments, 1996 letters, and the two refinancings.<sup>4</sup>

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<sup>3</sup> Resulting trust, constructive trust, or other non-57-9 theories are not properly presented in this proceeding at all. *See* n.1, *supra*.

<sup>4</sup> Even if the law allowed what COTW attempts, COTW ignores that the refinancings show that the Diocese acted to direct the trustees' actions, and thus supports the Diocese's ownership. After reciting what action the congregation took, the 1999 Petition filed by COTW recites that

(footnote continued ...)

## 2. There can be no constructive trust.

COTW might instead be attempting to argue that the Court should impose a constructive trust in its favor. If that is the case, however, COTW has entirely failed to show a legal basis for imposition of a constructive trust. “Constructive trusts arise, *independently of the intention of the parties, by construction of law*; being fastened upon the conscience of him who has the legal estate, in order to prevent what otherwise *would be a fraud*.” *Richardson v. Richardson*, 242 Va. 242, 245, 409 S.E.2d 148, 150 (1991). They are imposed where either “it is contrary to the principles of equity that [the Property] should be retained” by a party or when “necessary to prevent a failure of justice.” *Id.* COTW has not pled or proven such circumstances.

Any constructive trust claim by COTW must also fail because constructive trust is a remedy, and Virginia law does not recognize prospective claims of unjust enrichment, the apparent underlying cause of action here.<sup>5</sup> To establish a cause of action for unjust enrichment, a litigant must plead “(1) a benefit *conferred on the defendant by the plaintiff*,” (2) the defendant’s knowledge of the conferring of the benefit; and (3) acceptance of the benefit in circumstances that render it inequitable for the defendant to retain it. *Nossen v. Hoy*, 750 F. Supp. 740, 744-45 (E.D. Va. 1990) (emphasis added); *see also Sevilla v. Del Castillo*, 28 Va. Cir. 164, 166 (Fairfax

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“By original letter of Bishop Peter James Lee ... the Diocese of Virginia gave permission to the Episcopal Church of The Word to refinance their existing real estate loan .... The said letter ... further authorized the Trustees of the Diocese to execute necessary documentation.” Stip. Ex. 18 at 2. Not only was Diocesan approval of the encumbrance required by canon law, but *the Diocese* needed to authorize the trustees to act. *See also* Stip. Ex. 22 at 2-3 (the 2003 Petition).

<sup>5</sup> *E.g.*, *Pair v. Rook*, 195 Va. 196, 213, 77 S.E.2d 395, 404 (1953); *see also Cooper v. Cooper*, 249 Va. 511, 517, 457 S.E.2d 88, 92 (1995); *Faulknier v. Shafer*, 264 Va. 210, 217, 563 S.E.2d 755, 759 (2002) (“A constructive trust is appropriately imposed to avoid unjust enrichment”); *New Amsterdam Cas. Co. v. Waller*, 301 F. 2d 839, 842 (4th Cir. 1962) (“A constructive trust is merely a procedural device by which a court of equity may rectify certain wrongs .... not a designation of the cause of action which justifies an exercise of the power”); RESTATEMENT OF RESTITUTION § 160 (1937).

County 1992). There has been no benefit conferred on the Diocese. If we prevail in the declaratory judgment action, the Court will make an adjudicated finding of our rights in the Property. COTW cannot assert unjust enrichment based on such a future finding. That would be to conclude that the Court itself has unjustly enriched a party, a contradiction and an absurdity.

Any claim for the remedy of a constructive trust to avoid unjust enrichment fails for a third reason too. The parties' rights and obligations are the subject of express contracts, and unjust enrichment is unavailable where an express contract exists.<sup>6</sup> Here, COTW may not contravene our express contractual rights by its implied trust allegations.

**3. COTW has not carried its burden for a resulting or constructive trust.**

Finally, COTW has failed to carry the heavy burden required for a resulting trust or constructive trust. *E.g.*, *Van Roekel*, 272 Va. at 552, 636 S.E.2d at 383 (“because a resulting trust generally contravenes the express language of a written document, a party seeking to establish such a trust must do so by clear and convincing evidence”); *Ogden*, 235 Va. at 643, 369 S.E.2d at 419 (“A constructive trust must be established by clear and convincing evidence”).

**C. Past opinions provide no support and guidance for a “nexus” approach.**

One searches the Five Questions Letter Opinion (June 27, 2008) – and all of this Court's opinions – in vain for the “meaningful factual nexus” approach that COTW advocates (or even the word “nexus”). To the contrary, that Opinion was as described in our Opening Brief at 4-6.

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<sup>6</sup> *See, e.g.*, *Webb v. Webb*, 37 Va. Cir. 274, 275 (Richmond City 1995) (“Unjust enrichment is a judicially-created rationale for implying a contract where no express contract exists”); *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”).

COTW also fails to provide any case law support or to define what constitutes such a nexus.

**III. Church of the Word's reliance on the September 12, 2005, Order is misplaced because that Order begs the ultimate question and does not bind the Episcopal Church, the Diocese, or this Court.**

COTW claims the Diocesan trustees were replaced by the September 12, 2005, Order, which it argues is binding. COTW Opening Brief at 2, 9-10. COTW's position has no merit.

First, the arguments based on the 2005 Order assume the ultimate issue. Such orders do not affect beneficial ownership and are effective only if sought by a party entitled to do so. *See Allen v. Paul*, 65 Va. 332, 343-44 (1874): an order appointing church trustees

does not vest in them the legal title to the property in controversy "for the time being," or for a single instant, unless the congregation which they represent are the owners of it. Only the legal title to the land owned by the congregation is vested in them by the terms of the order. The question, whether the property in controversy is owned by the said congregation, is not touched by the order.

*Accord, e.g., Davis v. Mayo*, 82 Va. 97, 103-04 (1886) ("if Mayo and his associates were not authorized to act for the beneficiaries in the deed ... no title to the property conveyed by that deed was acquired by the [trustee appointment] order ...."). Because COTW was not the beneficial owner, the 2005 Order is ineffective.

Second, this Court is not bound by the 2005 Order. Rule 1:1 applies only to "further proceedings within the very suit in which a final judgment has been entered." *Niklason v. Ramsey*, 233 Va. 161, 164, 353 S.E.2d 783, 785 (1987). If a new case arises, involving one or more different parties, Rule 1:1 does not apply, even if the later case directly implicates issues in the case where the final order was entered. *Id.*

Third, neither the Diocese nor the Episcopal Church was party to the action in which the 2005 Order was entered, so we are not bound by that Order. *See, e.g., id.; Unemployment Comp. Comm'n v. Harvey*, 179 Va. 202, 209-10, 18 S.E.2d 390, 393-94 (1942).

Fourth, COTW's claim at 6 that the 2005 Order was "[a]t the Diocese's request" is



simply wrong. It was COTW that sought to change the trustees. *See* Stip. Ex. 26. COTW did so at essentially the same time that it was planning to secede from the Diocese. *See* Stipulation ¶¶ 30-36. The Diocese initially treated COTW’s request routinely. The Diocese explained how a church could get trustees appointed (*not* how a church could purport to have an order entered “remov[ing] the Diocesan trustees,” as COTW asserts at 9). *See* Stipulation ¶ 30 & Ex. 26. The Diocese’s Executive Board voted to approve a request to transfer title to trustees appointed by COTW. Stipulation ¶ 37 & Ex. 32. Neither action was taken with knowledge of COTW’s intent to secede. Stipulation ¶¶ 37-38. When that intent came to light, the Diocese insisted that any new deed continue to identify the Diocese as beneficial owner, but that was unacceptable to COTW. *Id.* ¶¶ 39-40.<sup>7</sup> As the beneficial owner under the Deed, the Diocese did not need a new deed and was entirely free to refuse to enter into or to insist upon certain content in a new deed.

Fifth, COTW appears to claim that Va. Code § 57-8 allows ownership changes “without notice.” COTW Opening Brief at 9. That is wrong. Section 57-8 does not override the clear, repeated holdings of the Virginia Supreme Court with respect to the limited nature and effect of a trustee appointment order. *See* p.7, *supra*. COTW also fails to realize that the fact that trustee

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<sup>7</sup> COTW rejected such a deed even though it joined the Diocese knowing the rules regarding property. *See* Stipulation ¶¶ 1-2 & Ex. 1. The rules of a voluntary association are contractual. *See, e.g.,* *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856, 102 S.E.2d 345, 351 (1958) (“The constitution and by-laws adopted by a voluntary association constitute a contract between the members, which, if not immoral or contrary to public policy, or the law, will be enforced by the courts”); *Bradley v. Wilson*, 138 Va. 605, 612, 123 S.E. 273, 275 (1924). Those who become members of the Episcopal Church, like other hierarchical churches, agree to submit to its rules and government. *See, e.g.,* Stipulation Ex. 1 at 9 (Art. XVII); *Reid v. Gholson*, 229 Va. 179, 188-89, 327 S.E.2d 107, 113 (1985) (“One who becomes a member of [a hierarchical] church, by subscribing to its discipline and beliefs, accepts its internal rules and the decisions of its tribunals”); *Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301, 320 (1856) (“to constitute a member of any church, two points at least are essential ... a profession of its faith and a submission to its government”). *See also* *Amalgamated Clothing Workers v. Kiser*, 174 Va. 229, 236-37, 6 S.E.2d 562, 565 (1939); 6 AM. JUR. 2D, *Associations and Clubs* §§ 5, 7, 25 (2007).

orders are of a limited nature and do not affect ownership *is the very reason* that it is constitutional to enter them “without notice.” *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 377 78 (1971); *McManama v. Plunk*, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) (“Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person’s rights to liberty or property”).

**IV. The issue is beneficial ownership, not the identity of the trustees.**

COTW argues an undisputed point at 11-12: church property cases are not decided based on who selects the trustees. *See* Tr. (Sept. 26, 2008) at 23-29 (Ex. A to our Opening Brief):

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13 [MR. HESLINGA] .... 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 ....

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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? ....  
19 [MR. HESLINGA] .... 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

27

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 ....

The issue is beneficial ownership; and in COTW’s case, the Deed expressly states that the Diocese is the beneficial owner of the Property, not COTW.<sup>8</sup>

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<sup>8</sup> *See also* COTW Opening Brief at 6, which mischaracterizes our position as being that COTW has no beneficial or other interest in the Property “because the Property is held by trustees appointed by the Diocese.” Our position is that the Diocese is the beneficial owner – and not “partly” the beneficial owner, *see id.*), under the Deed. The Deed, and not the purchase contract or the Petition to the Prince William Circuit Court (*see id.* at 7 & n.4), governs. *E.g., Kemp v.*

*(footnote continued ...)*

**V. The Court should grant our pending request for reconsideration of part of its Five Questions Opinion and enforce the Deed by holding that the Property is held in trust for the Diocese, not COTW.**

Finally reaching the sole reason to rule in its favor (this Court’s holding that Virginia law does not permit the Diocese to be the beneficiary of a trust, *see* COTW Opening Brief at 12-13), COTW argues in a cursory way that § 57-7.1 does not mean what it says. *See id.* at 11-12. Both of the cases that it cites (*Norfolk Presbytery* and *Asbury*) are discussed in our Opening Brief, at 6-9. Asserting that “§ 57-9(A) only requires that the property be held by trustees” (COTW Opening Brief at 11) is incorrect, however. Section 57-9(A) twice explicitly references “property held in trust *for such congregation*” (emphasis added). By its terms, § 57-9(A) only applies to such property. It is true, however, that the Court has rendered “for such congregation” in § 57-9(A) superfluous and meaningless by holding that § 57-7.1 validates trusts only for local congregations. Thus, by operation of that opinion, if property is “held in trust,” it can only be “for such congregation.” *See* Five Questions Opinion at 13-14.<sup>9</sup>

The Court should give effect to the plain and unambiguous language of the Deed, which provides that the Diocese is the beneficial owner, and of Va. Code § 57-7.1, which provides that “[e]very conveyance or transfer of real or personal property ... to or for the benefit of *any church, church diocese, religious congregation or religious society ... shall be valid*” (emphases added). If the Court does not reconsider, however, then COTW prevails by operation of law.

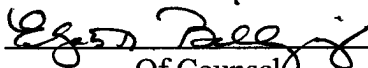
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*Miller*, 166 Va. 661, 677, 186 S.E. 99, 104 (1936) (when a deed has been delivered and accepted as performance of an antecedent contract to convey, the contract is merged in the deed).

<sup>9</sup> Church of the Word’s point about the “stark contrast” between holding property through trustees and holding property in the name of the Bishop, *see* COTW Opening Brief at 11 n.5, remains unclear. We agree that those are two different ways to hold property. We do not agree that the method by which property is held is dispositive as to the beneficial ownership of the property. Church of the Word cites no authority for that proposition, if that is its contention.

Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH  
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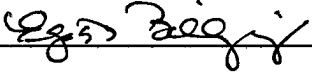
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