

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 AND THE DIOCESE OF VIRGINIA'S
RESPONSIVE BRIEF PURSUANT TO JUNE 6, 2008, ORDER**

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The Episcopal Church and the Diocese respectfully submit the following response to the Congregations' Opening Brief filed June 16, 2008 (Congregations' Brief).

- 1. Did the Supreme Court of Virginia, in *Green v. Lewis*, [221 Va. 547, 272 S.E.2d 181 (1980)] hold that a trial court presiding over a 57-9(A) petition must consider the factors set out in *Green v. Lewis*, in addition to making the determinations actually set out in 57-9(A)? Does the holding of *Green v. Lewis* apply only to proceedings under 57-15, or does it apply to proceedings brought under 57-9 as well?**

The Church and the Diocese explained in their June 16 brief why *Green v. Lewis* applies to church property disputes regardless of which, if any, Code section(s) may be invoked. The Congregations' Brief at 2-6, on the other hand, debates a different issue – whether § 57-9(A) should be interpreted to require a seceding congregation to satisfy § 57-15.

The indisputable fact is that *Green* was a case “brought under 57-9,” so its holding necessarily applies to 57-9 cases. The Court did not limit itself to discussing certain terms of § 57-9. It applied a “neutral principles” analysis to resolve the case before it: “a dispute between the congregation ... on the one part and the general church on the other.” 221 Va. at 548, 272 S.E.2d at 181. Whether “the general church had ... establish[ed] that it had a proprietary interest in the property” used by the congregation was a dispositive issue. *Id.* The same is true here.

The Congregations' focus on § 57-15, rather than *Green*, results from their assumption that *Green* was a § 57-15 case. They dispute whether *Green* was a § 57-9 case (Congregations' Brief at 2-3); but they do not and cannot deny that both parties' pleadings invoked § 57-9, there was a congregational vote, those materials were before the Court, and indeed the Court quoted the congregation's resolutions. 221 Va. at 550, 272 S.E.2d at 182-83. On the other hand, neither pleading invoked § 57-15 in any respect. Section 57-15 governs proceedings by church trustees to transfer or encumber land. In *Green*, there was no such transaction – just a congregation that

voted to disaffiliate from a hierarchical church and sought to take the property pursuant to that vote. Not surprisingly, then, *Green* did not apply or interpret § 57-15.¹

When congregations seek to deprive the general church of interests in property, there are three basic scenarios: First, congregations may seek to transfer the property to a third party, with or without claiming to join a “branch” of the denomination. That happened in *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974), and the Supreme Court held that the general church was entitled to show “whether it had a proprietary interest ... which could not be eliminated by unilateral action of the congregation.” *See* 214 Va. at 501, 507, 201 S.E.2d at 753-54, 758. Second, congregations may seek to take the property for their own. That happened in *Green*, and the Supreme Court ruled against the congregation and for the general church. *See* 221 Va. at 550, 556, 272 S.E.2d at 182-83, 186.

Third, as in the cases at bar, congregations (or majorities thereof) may seek to take the property for their own *and also* claim to have joined a “branch.” The Congregations say that in that event, a denomination – or, presumably, any other third party – may not even attempt to show that it has a contractual or proprietary interest that cannot be eliminated by the congregation’s unilateral action. They say the courts must ignore the factors identified by the Virginia Supreme Court to determine whose property is at issue and award property to local majority factions based solely on the outcome of a congregational vote. Such an arbitrary destruction of property rights would be both absurd and unconstitutional. If the analysis of *Norfolk Presbytery* and *Green v. Lewis* shows that the property belonged to the general church

¹ *Green* does mention and rely on *both* § 57-9 and § 57-15 in declaring that “it is the right of a majority of the members of a divided congregation to control the use of the church property *if the church, in its organization and government, is a church or society entirely independent of any other church or general society.*” 221 Va. at 552-53, 272 S.E.2d at 184 (emphasis added).

before the vote and new branch affiliation, then neither the vote nor the branch affiliation can take that property away. It is precisely this inquiry that § 57-9(A) requires – through the “whose property,” “if ... approved,” and “held in trust for such congregation” language.²

There are many Virginia Code sections under which a property dispute between congregations (or majority factions thereof) and a general church might begin.³ *Green* and the other cases discussed at pages 1-7 of the Church’s and the Diocese’s Opening Brief show that however such a property ownership dispute enters Virginia’s courts, it must leave them after due consideration of the Virginia Supreme Court’s four-factor “neutral principles” analysis.

2. Has the Court in its April 3, 2008, opinion already resolved the issue described in Question 1 above, as asserted by the CANA Congregations?

In Part 2, the Congregations continue to address the relationship between § 57-9(A) and § 57-15, which again fails to respond to the question posed by the Court. The Court in its April 3 Opinion did note differences in the language of §§ 57-9(A) and 57-15 in interpreting the word “division” in § 57-9(A). Nowhere, however, has this Court decided whether *Green* applies to proceedings brought under § 57-9.

Moving away from the Court’s second question entirely, the Congregations continue to argue that the Supreme Court in *Jones v. Wolf*, 443 U.S. 595 (1979), approved as constitutional not only the “neutral principles” approach actually under review in that case, but any and all

² The Congregations also distort the four *Green v. Lewis* factors, attempting to avoid the rules of the general church, and obfuscate both the facts that Virginia law considers more than deeds and that most deeds in this litigation support the Church and the Diocese. The proper interpretation of the four factors and the deeds is not an issue for this briefing, however.

³ In *Norfolk Presbytery*, it was § 57-15. In *Green*, it was § 57-9. Other possibilities include §§ 57-7.1 (religious trusts), 57-8 (appointment of trustees “on the application of the proper authorities”), 57-11 (suits by and against trustees), 57-13 (suits by members against trustees), 57-14 (suits by members to have land sold or mortgaged), and 57-16.1 (powers of church corporations limited by “the laws, rules, or ecclesiastic polity of the church or body”).

purportedly “neutral” rules for church property disputes that a state might adopt. It did not.

As noted on May 28, 2008 (*see* Tr. at 142-43, 190-91), and in our June 16 brief at 17 n.9, the term “neutral principles” is shorthand for the longer phrase “neutral principles of law, developed for use in *all* property disputes.” *Presbyterian Church in the United States v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969) (emphasis added). States may differ in the principles they use to adjudicate “all” property disputes, but in no State – and certainly not in Virginia – does the law rely solely on a majority vote of a local affiliate’s members to decide whether that affiliate will be able to take property interests of a secular state or national organization. In other words, because “majority rule” by one of the two parties to the dispute is not a principle that Virginia uses “in all property disputes,” it does not qualify as a “neutral principle” within the meaning of Supreme Court jurisprudence.⁴ Moreover, as *Jones* clearly states, a court applying “neutral principles” to disputes involving religious organizations must “completely” abstain from resolving “questions of religious ... *polity*” as well as doctrine. 443 U.S. at 603 (emphasis added). The particular “neutral principles” approach approved in *Jones* passed constitutional muster precisely because, among other things, it was “flexible enough to accommodate *all* forms of religious organization and polity.” Under this approach, one method by which a hierarchical church could ensure that its polity and structure would continue to be respected was by amendment of the general church’s governing documents “to recite an express

⁴ The Congregations selectively cite to White & Dykman’s *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church* as if it supports their reading of *Jones*. Congregations’ Brief at 8. It does not. The editors of the *Annotated Constitution and Canons* indeed commented that *in the absence of one of the actions recommended by the Supreme Court* – including an amendment of the Church’s governing documents to recite an express trust – the four factor “neutral principles” analysis approved in *Jones* would appear to “giv[e] great weight to controlling majorities.” As White & Dykman make clear, however, the Episcopal Church’s General Convention promptly adopted Canon I.7(4) precisely to foreclose that result, in accordance with the Supreme Court’s “invitation.” Ex. 1 at 301-02.

trust in favor of the denominational church.” *Id.* at 606.

3. What is the meaning of the phrase “if the determination be approved by the court” as that phrase is used in 57-9(A)? Specifically, once this court determines that 57-9(A) has been properly invoked, is the “approval” limited to a review of the vote taken or does it permit, or even require as ECUSA and the Diocese assert, that the Court examine various other considerations, including those set forth in *Green v. Lewis*?

The Congregations claim to rely on the “plain text” of § 57-9(A), but they resolutely ignore text that limits the reach of that statute as well as other elements of statutory and case law establishing that denominations may have contractual or proprietary interests that congregations cannot unilaterally eliminate. Among other things, the plain text of § 57-9(A) specifies that it may only be invoked by a “congregation *whose property* is held by trustees” and that it *applies only* to “property held in trust for such congregation.” Virtually every argument in Part 3 of the Congregations’ Brief depends on ignoring that limitation. Section 57-9(A) does not require the Court to determine “whether the property at issue is held by trustees.” Congregations’ Brief at 9. It requires that the Court determine whether the property is “held in trust *for such congregation*.”

The Congregations argue that § 57-9(A) “would be stripped of any independent meaning if the outcome were dependent on whether the denomination could establish a proprietary interest.” *Id.* Not so. In the event of a “division,” § 57-9(A) provides a mechanism for congregations to determine the disposition of *their own* property interests. It does not, however, permit them to seize and dispose of interests they did not hold in the first place. The Congregations’ assertion that “if it were settled that either the majority of the congregation or the group that remained affiliated with the denomination owned the property at issue, there would be no need for the statute” (Congregations’ Brief at 12) is peculiar. Property disputes between majority and minority factions of local congregations are common, as *Jones v. Wolf* and *Green v. Lewis* illustrate. It is these disputes, over the disposition of a congregation’s own property interests in the event of a denominational division, that the congregational voting procedures set

forth in § 57-9(A) may resolve. *See* Church’s and Diocese’s Opening Brief at 19-20.

4. What is the meaning of the phrase “shall be conclusive as to the title to and control” of the property in question, as that phrase is used in 57-9(A)?

The Church and the Diocese agree with the Congregations’ dictionary definitions of the word “conclusive.” The Congregations fail, however, to address the fact that it is the court’s “approval” and “entry” of a congregational determination – not the vote itself – that is “conclusive.” They also ignore the fact that the court’s approval affects only title to or control over “property held in trust for such congregation.” *See id.* at 14-15.

5. What is the meaning of the phrase “congregation whose property is held by trustees,” as that phrase is used in 57-9(A)? Specifically, is Mr. Hurd correct when he asserted at oral argument on May 28th, 2008 that the phrase “congregation whose property is held by trustees” is not simply a reference to the property that is the subject of the 57-9(A) petition but, rather, requires the Court to make an initial determination, prior to the Court’s consideration of the validity of the vote, as to “who” owns the property at issue?

A. The application of this statutory requirement has not been waived.

The Congregations first argue that the Court should not consider or apply this statutory requirement because, they say, the issue has been waived. Congregations’ Brief at 12. They are wrong. The pleadings in this case put property ownership at issue.⁵ The Court set a trial on certain specific statutory issues that the parties agreed (1) were distinct from the issues of property ownership raised by the declaratory judgment actions, and (2) that it thus made sense to adjudicate separately. *See* Tr. (Sept. 14, 2007) at 40-41, 114-15 (Ex. 2). Accordingly, the Court “ORDERED that the proceedings in November shall not involve presentation of evidence on the title of the ... property at issue, and ... *shall be limited to ... the issues outlined by the Court* at the

⁵ The Congregations alleged property ownership. *See, e.g.*, Church of the Apostles’ Petition (Fairfax No. CL2006 15793, filed Dec. 18, 2006) ¶ 10 (“None of Apostles Church’s deeds grant any of the Property at issue to trustees for TEC or the Diocese”). Those allegations were denied. *See* Diocese’s Answer (filed Jan. 30, 2007) ¶ 10; Church’s Answer (filed Jan. 31, 2007), ¶ 10.

Scope hearing.” Order (Oct. 26, 2007) (Ex. 3) (emphasis added).

The Church and the Diocese never said that the issues set for trial in November were the only issues relevant to the application of § 57-9(A). To the contrary, we have consistently stated that the 57-9 actions cannot be resolved in favor of the Congregations without adjudicating the declaratory judgment actions, in which property ownership is the central and overriding issue.⁶ The property ownership determination needed to resolve the 57-9 actions has not been waived.

B. The statute applies only to a congregation’s property interests.

Faced with § 57-9(A)’s three references to property ownership, the Congregations fall back on their argument that under Virginia law it is not possible for the property at issue to be held in trust for the Church or the Diocese, so the property must be presumed to be “held in trust for” them for purposes of § 57-9(A) without need for proof or opportunity for challenge. For reasons stated previously (*see* Brief in Opposition to Demurrers and Pleas in Bar (filed July 13, 2007) at 17-22) and herein, they are wrong.

First, regardless of its position on “trusts” in favor of denominations, Virginia law has always recognized that property may be restricted to use by persons adhering to a particular denomination. *See Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181; *Brooke v. Shacklett*, 54 Va.

⁶ Diocese’s and Church’s Response to August 31, 2007, Order (filed Sept. 10, 2007) at 2 (“If the Court were to rule that the statutory predicates of “division” and “branch” are present here, on the other hand, then the merits of the § 57-9 actions would be inextricably entwined with the merits of the Declaratory Judgment actions....”), 5 (“The Court cannot decide the 57-9 actions in favor of the congregations without considering the full range of evidence and law that will be applicable to the Declaratory Judgment actions”). *See also* Motion for Leave to Proceed (filed Nov. 30, 2007) at 3-4 (“the CANA congregations’ assertions regarding the impact of a ruling in their favor in the 57-9 actions are not and cannot be correct”); Renewed Motion to Proceed Supplemental/Reply Brief (filed April 22, 2008) at 1 ¶ 2; Church’s Supplemental Constitutional Brief (filed April 23, 2008) at 24-25 (“there is nothing in [§ 57-9] that is either inconsistent with or would appear to override the Virginia Supreme Court’s direction that to resolve a church property dispute, the Virginia courts are to consider” the *Green v. Lewis* factors); Church’s and Diocese’s Brief in Opposition (filed May 9, 2008) at 20-23.

(13 Gratt.) 301 (1856); *Hoskinson v. Pusey*, 73 Va. 151 (32 Gratt.) 428 (1879); *Diocese of Southwest Virginia v. Buhrman*, 5 Va. Cir. 497 (Clifton Forge 1977); *Trustees of Cave Rock Brethren Church v. Church of the Brethren*, No. 1802 (Botetourt Co. June 30, 1976) (Ex. 2 to Church's & Diocese's June 16 Opening Brief). As *Norfolk Presbytery* explains, even if denominational "trusts" were invalid, "this does not mean that our civil courts are powerless to prevent a hierarchical church from being deprived of contractual rights in church property held by trustees of a local congregation." 214 Va. at 507, 201 S.E.2d at 758.

Second, the First Amendment does not allow Virginia to recognize trusts only for local religious groups. States may not disfavor religion generally or discriminate among religions. The Congregations claim that non-local religious groups, unlike local religious groups and non-local secular groups, cannot be trust beneficiaries. This discrimination triggers strict scrutiny. See, e.g., *Larson v. Valente*, 456 U.S. 228, 246 (1982); *Falwell v. Miller*, 203 F. Supp. 2d 624, 631-32 (W.D. Va. 2002). Even if rational basis review applied, there is no legitimate state interest in prohibiting trusts for non-local religious entities.

Third, the Congregations cite *Norfolk Presbytery*, but more recent authorities make clear that trusts in favor of hierarchical churches are and must be possible. *Jones v. Wolf* invited churches to provide a clear rule to courts deciding property disputes by enacting trust provisions exactly like national Canon I.7(4) and Diocesan Canon 15.1. 443 U.S. at 606; accord, *id.* at 607-08. Nowhere did the majority contradict its approval of trust provisions in the governing documents of a hierarchical church or allow states to ignore the rules of a hierarchical church.

In addition, in accordance with the above requirements, Va. Code § 57-7.1 now validates trusts for *any* religious entity. It is indisputable that all of the reasons for the restrictive statutory interpretation in *Norfolk Presbytery* and its predecessors are gone, eliminated by the General

Assembly as a statutory matter in § 57-7.1 and by courts on constitutional grounds. *See* Ex. 4; Brief in Opposition to Demurrers and Pleas in Bar (filed July 13, 2007) at 17-22⁷

The Congregations' attempt to avoid the plain language of § 57-7.1 by relying on the presumption of legislative acquiescence must fail. First, the plain meaning of the statute controls. *E.g.*, *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 99-100, 546 S.E.2d 696, 702 (2001) (legislative intent "must be gathered from the words used, unless a literal construction would involve a manifest absurdity"). Section 57-7.1 validates all religious trusts, and the Court cannot construe its words to reach a different meaning. *See Woods v. Mendez*, 265 Va. 68, 75, 574 S.E.2d 263, 267 (2003). Second, the General Assembly's knowledge and presumed acquiescence includes changes in the law. *See Commonwealth v. Bruhn*, 264 Va. 597, 602, 570 S.E.2d 866, 869 (2002). "[F]ull knowledge of the law" regarding the religious trusts issue includes *Jones v. Wolf* and the significant developments in Establishment and Free Exercise jurisprudence. Finally, Virginia courts presume that all legislative enactments have meaning. *E.g.*, *Va.-Am. Water Co. v. Prince William County Serv. Auth.*, 246 Va. 509, 517, 436 S.E.2d 618, 623 (1993); *Williams v. Commonwealth*, 190 Va. 280, 293, 56 S.E.2d 537, 543 (1949). Construing § 57-7.1 to mean the same thing as *Norfolk Presbytery's* construction of the *repealed*

⁷ The authorities that the Congregations cite in footnote 9 of their brief are not to the contrary. Counsel has reviewed all 14 briefs in *Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144, 452 S.E.2d 847 (1995), which involved "an arbitration award that required payment to a construction contractor, under the doctrine of quantum meruit, for work performed ... under an invalid change order." *Id.* at 146-47, 452 S.E.2d at 848. Not one contains any citation of either § 57-7.1 or *Norfolk Presbytery*, and the Supreme Court's opinion in *Asbury* does not analyze the new statute, U.S. Supreme Court case law since *Norfolk Presbytery*, or the serious constitutional problems that would result from a restrictive interpretation of § 57-7.1. *Asbury* was not initiated under § 57-7.1. In short, the meaning and application of § 57-7.1 were not before the Court. The 1996 Attorney General's opinion, similarly, concerned the application of other statutes (§§ 57-14 & 57-15) and did not analyze or interpret § 57-7.1 in any way. In any event, as the opinion itself notes, Attorney General opinions are not binding on courts. *See* 1996 Va Op Atty Gen 194 n.1.

§ 57-7⁸ would ascribe no meaning to the significant textual differences between the two.

The Congregations' claim that § 57-7.1 applies only prospectively also is wrong.⁹ First, the express function of § 57-7.1 is to validate trusts, and validation often refers to acts that have already occurred. Section 57-7.1 does not alter past events or rights. It simply confirms the validity of religious trusts. No time limit is express or implied. Second, the Congregations are wrong about the legislative intent. Section 57-7 clearly applied to past and future trusts. The changes in § 57-7.1 do not show any legislative intent to make the validation more restrictive. The opposite is true – § 57-7.1 eliminated all limitations.¹⁰ Third, the First Amendment requires Virginia to allow trusts for super-congregational churches, and judicial decisions interpreting federal law (the First Amendment) operate retroactively. *See, e.g., Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 94-97 (1993) (reversing the Virginia Supreme Court's refusal to apply a constitutional rule regarding taxation of retirement benefits retroactively and stating that “[w]hatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law cannot extend to their interpretations of federal law”). If a federal constitutional rule requires Virginia to allow trusts for super-congregational churches, the rule applies to events prior to 1993, too. *See id.* at 97.

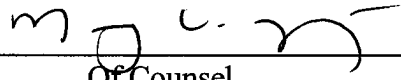
⁸ The Congregations claim that § 57-7 was “amended” and “recodified.” Congregations' Brief at 14. It was not. *See* 1993 Va. Acts 370 (§ 57-7.1 is “add[ed]” and “§ 57-7 ... is repealed”).

⁹ Even if the Court holds that § 57-7.1 applies only prospectively, seven of the nine petitioning Congregations use real property pursuant, at least in part, to deeds dated since § 57-7.1 took effect. *See* Praecipe Indexing Docs. (filed June 15, 2007); Church of the Word Petition Ex. 1.

¹⁰ The act repealing § 57-7 and adding § 57-7.1 was “declaratory of existing law.” 1993 Va. Acts 370, a phrase which shows that Virginia courts were incorrectly limiting the prior statute. *See, e.g., Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs.*, 268 Va. 187, 193, 597 S.E.2d 202, 206 (2004) (“Nothing in the 2003 amendment, such as the words ‘declaratory of existing law,’ indicates that the General Assembly enacted the amendment as a clarification of existing law”); BLACK'S LAW DICTIONARY 1448 (8th ed. 2004) (defining “declaratory statute” as “[a] law enacted to clarify prior law by reconciling conflicting judicial decisions or by explaining the meaning of a prior statute”) (emphasis added).

Respectfully submitted,

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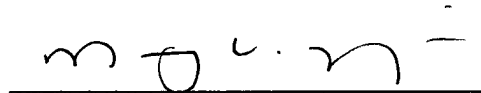
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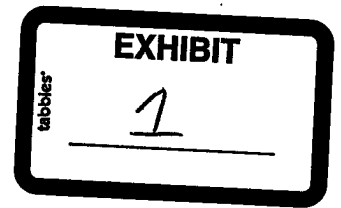
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**ANNOTATED
CONSTITUTION AND
CANONS**
for the Government of the
Protestant Episcopal Church
in the
United States of America
otherwise known as
The Episcopal Church

Adopted in General Conventions
1789-1979

Church Publishing Incorporated, New York

VOLUME I

BY EDWIN AUGUSTINE WHITE, D.D., D.C.L.

Second Edition, Revised, 1954
BY JACKSON A. DYKMAN, D.C.L.

1981 EDITION
Revised and Updated by the Standing Commission on
Constitution and Canons of the General Convention

In 1979, two developments made clear the need for action by the General Convention. First, following the 1976 adoption of the new (Proposed) Book of Common Prayer and the canonical changes permitting the ordination of women as priests, dissident groups in several parishes attempted, in effect, to secede from the Episcopal Church and take parish property with them.

Second, the United States Supreme Court in *Jones v. Wolf*, 443 U.S. 595, 61 L. Ed. 2d 775 (1979), decided in July, 1979, in a five to four decision, that states, consistent with the First and Fourteenth Amendments, could resolve disputes over the ownership of church property by adopting a "neutral principles of law" approach and are not required to adopt a rule of compulsory deference to religious authority in resolving such disputes where no issue of doctrinal controversy is involved.

This approach gives great weight to the actions of controlling majorities, and would appear to permit a majority faction in a parish to amend its parish charter to delete all references to the Episcopal Church, and thereafter to affiliate the parish — and its property — with a new ecclesiastical group.

Although considered by some to be declaratory of existing law, Sections 4 and 5 of this canon were adopted by General Convention in 1979 in response to the following invitation contained in the decision in *Jones v. Wolf*:

At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.* (Emphasis added.) 443 U.S. at 606.

In *Barker v. Protestant Episcopal Church in the Diocese of Los Angeles*, 171 Cal. Repr. 541 (2d DCA), *cert. denied*, 70 L.Ed 2d 163 (1981), the intermediate Court of Appeals in California permitted three

Supp. 162, 617 (D.Kan. 1976); *Paradise Hills Church, Inc. v. International Church of the Foursquare Gospel*, 467 F. Supp. 357, 360-61 (D. Ariz. 1979); *Colin v. Iancu*, 267 N.W.2d 438, 82 Mich. App. 521 (1978). See also *Diocese of Southwestern Virginia, etc., et al. v. Buhrman, et al.* (Clifton Forge, Virginia Court Case No. 1748, November 18, 1977, *aff'd*, June 15, 1978); *Bishop & Diocese of Colorado, et al. v. Mote, et al.* (Denver County, Colorado District Court Case No. C-75959, January 21, 1980); *Protestant Episcopal Church, etc. et al. v. Tea, et al.* (Clark County, Nevada District Court Case No. A165130, April 30, 1980).

seceding Episcopal Churches to take their property with them, finding no express trust which would bind the property to the diocese or national Church. The property of a fourth seceding church was held to revert to the diocese because of an express provision to that effect in its charter and in some recently adopted canons that were not applicable to the others. The records in all four cases were made before the 1979 amendments to this canon and the result might have been otherwise in the first three cases had these provisions been in effect before the dispute arose.

The California court in *Barker* rejected the "hierarchical theory" as a means in itself of resolving property disputes between a local congregation and its denomination. Other courts continue to apply that "hierarchical theory" to the Episcopal Church; see, for example, *Protestant Episcopal Church in the Diocese of New Jersey et al. v. Graves et al.*, Supreme Court of New Jersey, Union County, Chancery Division Docket No. C-422-77 (February 10, 1978), relying chiefly on *Kelly v. McIntire*, 123 N.J. Eq. 351. The Court in *Graves* ruled in favor of the diocese.

Recent cases influenced by *Jones v. Wolf*, *supra*, hold that a determination of hierarchical status is but the first step in the analysis and that, once that determination is made, one must move on to see if the dispute can be resolved by reference to "neutral principles of law" found in documents of independent legal significance such as deeds, charters, by-laws, canons, etc. This was the approach taken by the California court in *Barker* with respect to the one seceding church whose property was held to revert to the diocese because of specific language in its charter and in diocesan canons. The same approach was used in the Diocese of Southeast Florida in which the diocese also prevailed: *Rt. Rev. James L. Duncan v. Rev. Peter Watterson*, In the Circuit Court for the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, No. 77-3926 CA(L) 01 K (Feb. 1979). The 1979 amendments to this canon lend further support to that reasoning.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

----- X

IN RE: :

MULTI-CIRCUIT EPISCOPAL : OMNIBUS CASE NO.

CHURCH PROPERTY LITIGATION : CL2007-0248724

----- X

Fairfax, Virginia

Friday, September 14, 2007

The above-entitled matter came on for hearing before The Honorable Randy I. Bellows, Judge in and for the Circuit Court of Fairfax County, Virginia, 4110 Chain Bridge Road, Courtroom 4G, Fairfax, Virginia, beginning at approximately 2:04 p.m., before Maureen S. Bennie,

Verbatim Court Reporter, when were present on behalf of

the respective parties:

1 position of TEC and the Diocese that a branch has to be a
2 creature or divided from the -- in this case, the
3 Episcopal Church. So that is the question, essentially,
4 what the term branch means.

5 The sixth question is does the term religious
6 society as that term is used in 57-9 include a
7 non-hierarchical loose affiliation of religious entities?
8 Now, I understand that there is some difference of opinion
9 as to what the Anglican Communion is and where it fits on
10 the continuum between, on the one hand, a completely loose
11 affiliation and, on the other hand, a hierarchical church.
12 And that may require evidence, actually, but the question
13 really turns on what the meaning of religious society is
14 under the statute.

15 Okay. Now, the scope of the hearing. Again,
16 this is what the scope of the hearing would be if I don't
17 resolve any of the legal issues that have been put before
18 me at this time.

19 First, obviously, has there been a division
20 within the Episcopal Church and the Diocese?

21 Second, is the Anglican Communion a church or
22 religious society as that term is used in 57-9?

1 Third, were the departing churches attached to
2 the Anglican Communion?

3 Fourth, is there a division within the Anglican
4 Communion?

5 I would say before I continue that I do not list
6 as subjects for the hearing the question of whether the
7 Episcopal Church is a hierarchical church or whether the
8 individual churches were attached to the Episcopal Church,
9 because that issue does not appear to me to be in dispute.
10 Those issues do not appear to be in dispute. If they are,
11 then, obviously, you will tell me.

12 And then the last two questions is whether CANA
13 is a branch of the Episcopal Church and whether CANA is a
14 branch of the Anglican Communion. Now, you may note that
15 I do not list as a subject matter for the 57-9 hearing any
16 question related to the procedural issues associated with
17 the vote because, to me, it makes no sense at all to get
18 into several days of testimony as to the accuracy of the
19 voting and the procedures used for the voting until I have
20 resolved all these other issues because, depending upon
21 the resolution, we may or may not ever need to reach that
22 issue, nor is it clear to me that the Episcopal Church and

1 the hearing and before an -- at least one -- additional
2 round of briefing on these questions which would follow
3 the hearing.

4 In other words, I don't anticipate that in
5 November at the conclusion of the hearing I will give you
6 a decision. What I anticipate is that, having taken the
7 testimony, each party will have the opportunity to submit
8 briefs, and then I will give you a decision. I would
9 imagine it would be an opinion letter, but -- that remains
10 to be seen, but in some form, I will give you my decision.

11 What I would add to the scope of the hearing
12 that I have discussed before is the question that I had
13 put in, a question of law issue, I will put it in the
14 scope of the hearing only because Mr. Coffee has
15 represented that he believes there is evidence relevant to
16 these questions, and that is what is the meaning of the
17 term division, the term branch, the term church or
18 religious society and the term attached, those four terms
19 that appear in 57-9.

20 The other question I would add is the question
21 Mr. Coffee said is -- whether ADV is a branch of the
22 Diocese, which I assume, by asking the question,

1 Mr. Coffee believes and will advocate that ADV is a branch
2 of the Diocese.

3 I will not -- as I told you I was not inclined
4 to do, we will not at the November hearing address the
5 procedural regularities issues associated with the vote,
6 with the various votes, because I don't believe -- that is
7 something we will need to address -- if I ultimately
8 determine that there was a division under 57-9, then I
9 will have to address it, but I do not need to address it
10 now and we do not need to address it until the 57-9 -- the
11 other issues in 57-9 have been resolved.

12 Ms. Anderson and Mr. Davenport, is there
13 anything else that you wish to address at today's hearing?

14 MS. ANDERSON: I guess just one question, Your
15 Honor. Obviously, I heard it and understand what Your
16 Honor has just said. I do strongly believe that there are
17 important issues on which there is no disputed material
18 fact, and I wonder if the Court would entertain a motion
19 for summary judgment if it were on discrete issues if they
20 relate to -- you know, do it pursuant to the Rules and lay
21 out what the material issues of undisputed fact are and
22 give them --

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE:)
)
MULTI-CIRCUIT EPISCOPAL) CL-2007-0248724
CHURCH PROPERTY LITIGATION)

FILED IN 57-9 PROCEEDINGS: *In re: Truro Church* (No. CL 2006-15792); *In re: Church of the Apostles* (No. CL 2006-15793); *In re: Church of the Epiphany, Herndon* (No. CL 2007-556); *In Re: St. Paul's Church, Haymarket* (No. CL 2007-5686); *In re: St. Margaret's Church* (No. CL 2007-5685); *In re: Church of Our Saviour at Oatlands* (No. CL 2007-5363); *In re: The Church at the Falls – The Falls Church* (No. CL 2007-5249); *In re: St. Stephen's Church* (No. 2007-5903); *In Re: Church of the Word, Gainesville* (No. CL 2007-11514).

ORDER

THIS MATTER came before the Court on the request of the parties for clarification of whether the proceedings now scheduled for November 13 through November 21, 2007, shall include presentation of evidence on the title of the real and personal property at issue. It is hereby

ORDERED that the proceedings in November shall not involve presentation of evidence on the title of the real and personal property at issue, and the proceedings in November shall be limited to presentation of evidence on the issues outlined by the Court at the Scope hearing on September 14, 2007.

Entered this 26 day of October, 2007.



Circuit Court Judge Randy I. Bellows

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Virginia Religious Trusts Statutes and Case Law References

<p>Va. Code § 57-7, effective 1919-1993. Cases rely on language shown in double underline.</p>	<p>Selected case law references to § 57-7</p>	<p>Va. Code § 57-7.1, 1993-present Includes 2005 amendments (new text in italics; deletions in strike through).</p>
<p>§ 57-7. What transfers for religious purposes valid</p> <p>Every conveyance, devise, or dedication shall be valid which, since January 1, 1777, has been made, and every conveyance shall be valid which hereafter shall be made of land for the use or benefit of any religious congregation as a place for public worship, or as a burial place, or a residence for a minister, or for the use or benefit of any church diocese, church, or religious society, as a residence for a bishop or other minister or clergyman who, though not in special charge of a congregation, is yet an officer of such church diocese, church or religious society, and employed under its authority and about its business; and every conveyance shall be valid which may hereafter be made, or has heretofore been made, of land as a location for a parish house or house for the meeting of societies or committees of the church or others for the transaction of business connected with the church or of land as a place of residence for the sexton of a church, provided such land lies adjacent to or near by the lot or land on which is situated the church to which it is designed to be appurtenant; or for use in furtherance of the affairs of any church diocese, and the land shall be held for such uses or benefit and for such purposes, and not otherwise. And no gift, grant, or bequest hereafter made to such church diocese, church or religious congregation, or the trustees thereof, shall fail or be declared void for insufficient designation of the beneficiaries in, or</p>	<p>← Limited Uses - <i>Brooke v. Shacklett</i>, 54 Va. at 313 (“uses, which it is plain, from their very nature and the connection in which they are mentioned, must belong peculiarly to the local society”) - <i>Moore v. Perkins</i>, 169 Va. at 181 (“These restrictive provisions . . . clearly indicate that the words ‘church’ or ‘religious congregation’ are used in a local sense”) - <i>Norfolk Presbytery</i>, 214 Va. at 506-07</p>	<p>§ 57-7.1. What transfers for religious purposes valid</p> <p>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, subject to the provisions of § 57-12.</p> <p>Any such conveyance or transfer that fails to state a specific purpose shall be used for the religious and benevolent purposes of the church, church diocese, religious congregation or religious society as determined appropriate by the authorities which, under its rules or usages, have charge of the administration of the temporalities thereof.</p> <p>No such conveyance or transfer shall fail or be declared void for insufficient designation of the beneficiaries in any case where the church, church diocese, religious congregation or religious society has lawful trustees in existence, is capable of securing the appointment of lawful trustees upon application as prescribed in § 57-8, is incorporated, has created a corporation pursuant to § 57-16.1, or has ecclesiastical officers pursuant to the provisions of § 57-16.</p> <p>HISTORY: 1993, c. 370; 2005, c. 772.</p>

the objects of, any trust annexed to such gift, grant, or bequest in any case where lawful trustees of such church diocese, church or congregation are in existence, or the church diocese, or the congregation is capable of securing the appointment of such trustees upon application as prescribed in § 57-8; but such gift, grant, or bequest shall be valid, subject to the limitation of § 57-12; provided, that whenever the objects of any such trust shall be undefined or so uncertain as not to admit of specific enforcement by the chancery courts of the Commonwealth, then such gift, grant, or bequest shall inure and pass to the trustees of the beneficiary church diocese or congregation, to be by them held, managed, and the principal or income appropriated for the religious and benevolent uses of the church diocese or congregation, as such trustees may determine, by and with the approval of the vestry, board of deacons, board of stewards, or other authorities which, under the rules or usages of such church diocese, church or congregation, have charge of the administration of the temporalities thereof.

Provided that any devise of property after January 1, 1953, for the use or benefit of any religious congregation, wherein no specific use or purpose is specified shall be valid.

HISTORY: Code 1919, § 38; 1954, c. 268; 1956, c. 611; 1962, c. 516.

← Limitation on Property Ownership
- *Moore v. Perkins*, 169 Va. at 181
- *Norfolk Presbytery*, 214 Va. at 507

← Local Persons/Officials Mentioned
- *Moore v. Perkins*, 169 Va. at 180-81