

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 FALLS CHURCH'S OPENING POST-TRIAL BRIEF
REGARDING THE FALLS CHURCH ENDOWMENT FUND**

Pursuant to the Court's direction at the October 20, 2008, Hearing, and in the Court's October 17, 2008 Letter Opinion, The Falls Church, by its counsel, hereby files this opening post trial brief regarding The Falls Church Endowment Fund.

INTRODUCTION

As the Court explained in its October 17, 2008 Letter Opinion, the narrow issue remaining to be adjudicated with regard to The Falls Church Endowment Fund (the “Endowment Fund” or “Fund”) is whether The Falls Church (“TFC”) has a personal property interest in the Fund within the meaning of Va. Code §57-10. Under §57-10, if personal property is “given or acquired for the benefit” of a church, it stands “vested in the trustees having the legal title to the land,” and is therefore subject to a 57-9(A) petition. Ltr. Op. at 4.¹

At the time of the 2006 votes, The Falls Church had a personal property interest in the Fund because the Articles of Incorporation and Bylaws of the Fund provide that the members of the TFC vestry are “Class A” members of the Fund with the right to appoint the directors of the Fund. As the Court has observed, limited legal authority directly addresses this issue. But the authority that exists supports TFC’s position that the membership interests of the TFC vestry members, and the corresponding right of the TFC vestry members to appoint the directors of the Fund, constitute a property interest within the meaning of § 57-10.

Most importantly, the Virginia Non-Stock Corporation Act (“Act”) provides that “[a] member of the corporation” has a “property right” in provisions of the non-stock corporation’s articles of incorporation “relating to management, control, capital structure, purpose, or duration of the corporation.” Va. Code § 13.1-884(B). To be sure, the same provision of the Act says that such property rights are not “vested.” But the fact that a property right is not “vested” does

¹ Va. Code § 57-10 states:

When personal property shall be given or acquired for the benefit of an unincorporated church or religious body, to be used for its religious purposes, the same shall stand vested in the trustees having the legal title to the land, to be held by them as the land is held, and upon the same trusts or, if the church has created a corporation pursuant to Section 57-16.1, to be held by it as its land is held, and for the same purposes.

not mean it is not property, any more than one lacks a property interest in his retirement benefits before those benefits vest. As of December 2006, therefore, the members of The Falls Church vestry had a non-vested property interest in the right to control the management, duration, etc., of the Endowment Fund.

This understanding of the law finds further support in the limited case law regarding non-profit corporations, and with the corresponding statutory and case law regarding for-profit corporations and limited liability companies. Moreover, this view is consistent with the evidence presented at the October trial and reflects the operative understandings of the relevant actors over the course of the Fund's existence and operation.

FACTUAL BACKGROUND

The evidence presented at trial establishes that the vestry of The Falls Church created the Endowment Fund in 1976 to provide a method for members of the TFC congregation to contribute to TFC, but to designate their contributions to be used to further the outreach ministries of TFC. Trial Transcript (Oct. 20, 2008) ("Tr.") at 141-143 (Deiss). The Fund's purpose was to attract funds to support the mission and outreach programs of TFC. Tr. 142:14-143:3 (Deiss).

As provided in the Articles of Incorporation and Bylaws of the Fund, at all times from the Fund's inception through the December 2006 TFC vote, the vestry of TFC has held the right to elect the Fund's directors. *See* Articles of Incorporation, ¶ Fifth (defining "Class A members" as "those individuals who are members of the vestry of The Falls Church, Episcopal Church" and stating that "Class A members shall have the duty of electing Directors of the Corporation") (TFC Exh. 27). Similarly, the Fund's "Class B members" have always been "members of the parish who are defined as eligible to vote for the vestry at each of the annual meetings of The Falls Church." *Id.* When the TFC vestry appointed directors of the Fund, it did so with the un-

derstanding that it was acting as the vestry of TFC, exercising its authority and duties as a vestry. Steve Skanke, Robin Fetsch, and the other directors of the Fund serving in 2006 had all been appointed by the TFC vestry, which was acting in the course of its regular vestry meetings and exercising its rights under the Articles to appoint directors of the Fund. *See* Tr. 186:5- 187:4 (Fetsch). In fact, the minutes of the Endowment Fund over the years repeatedly note that the directors were elected by the vestry of The Falls Church at regular vestry meetings. *See, e.g.*, TEC-DVA Exh. 91 (Nov. 1, 2006 Minutes) (“The Vestry will be notified and requested that they reappoint [Steve Skanke and Dan Henneberg] for another five-year term”); TEC-DVA Exh. 92 (Oct. 17, 1995 Minutes) (“These elections were made by the vestry at its September 18, 1995 meeting.”).

At all times from the inception of the Fund in 1976 to the December 2006 TFC vote, contributions to the fund were made primarily by the congregants of The Falls Church. Tr.158:19-159:2 (Deiss); Tr. 228:22-229:4; 231:10-232:19 (Fetsch). In several cases, persons who had participated in or benefited from the ministries of The Falls Church contributed to the Fund. Contributors made donations to the Fund by sending their checks to 115 E. Fairfax Street, Falls Church, Virginia — TFC’s address. Tr. 157:6-21 (Deiss). Sometimes TFC would receive a check payable to TFC with the notation to the Fund. In such cases, TFC would deposit the check into its designated funds account and write a check to the Fund. Tr. 157:22-158:18 (Deiss). At other times, TFC would receive a check made payable to the Fund. TFC would put this check in the Fund’s mailbox located in TFC’s offices for pickup by the treasurer of the Fund. *Id.*

Since its establishment in 1976, the Fund has consistently been described—to the congregants of The Falls Church, to other potential contributors, in the audited financial statements of TFC, and in the Fund’s own annual tax returns (signed by Diocesan witness Robin Fetsch)—

as one method of donating to The Falls Church or supporting the ministry of The Falls Church. *See, e.g.*, Tr.155:15-156:2; 157:1-12 (Deiss) Tr. 246:11-247:6 (Fetsch). Indeed, most contributors found out about the Fund through advertisements placed by TFC in informational racks in the church, announcements included in periodic “ministry minutes” presented during TFC services, and statements in the annual reports of The Falls Church. Tr. 143:4-144:9 (Deiss); Tr. 251:6-252:9 (Fetsch). For a number of years prior to the 2006 votes, the Annual Reports of The Falls Church, in articles written primarily by Robin Fetsch, described the Fund as having been “formed in 1975 to administer bequests to The Falls Church” and as a way to contribute to The Falls Church. *See* TFC Exh. 29 at p.30; *see also* Tr. 233:8-234:7 (Fetsch). The Fund’s audited annual financial statements for the years leading up to the 2006 vote were consolidated with the annual audited financial statements of The Falls Church. *See* Tr. 166:18-21 (Deiss). Those consolidated audited financial statements treated the Fund as a subsidiary of TFC and treated the assets of the Fund as assets of the consolidated operation. *See* Tr. 166:18-21 (Deiss).

ARGUMENT

This Court’s October 17 Letter Opinion provides that under Virginia §57-10, if personal property is “given or acquired for the benefit” of a church, it stands “vested in the trustees having the legal title to the land,” and therefore is subject to a 57-9(A) petition. The Letter Opinion concludes that the narrow issue remaining to be decided with regard to the Endowment Fund is whether The Falls Church (“TFC”) has a personal property interest in the Fund within the meaning of Va. Code §57-10.

It is undisputed that, at all times prior to conclusion of the 2006 vote, the Articles of Incorporation of the Endowment Fund gave the vestry members of The Falls Church the right to manage and control the Endowment Fund. Article Fifth expressly provided that the vestry mem-

bers of The Falls Church were “Class A members” of the Endowment Fund and that as such the vestry members had the right to appoint all directors of the Fund. See TFC Exh. 27, Article Fifth.²

Further, there is abundant evidence that at all times prior to the conclusion of the 2006 vote, the vestry of The Falls Church actually appointed all directors of the Endowment Fund. See, e.g., TEC-DVA Exh. 91 (Nov. 1, 2006 Minutes); TEC-DVA Exh. 92 (Oct. 17, 1995 Minutes). These voting rights gave the vestry of The Falls Church the power to control the management of the Fund by controlling the choice of directors to oversee the Fund and its operations.

The Virginia Nonstock Corporation Act deems such rights of the members of a nonstock corporation to control the management of the corporation to be *property* rights. As the Act states in § 13.1-884(B): “A member of the corporation does not have a *vested* property right resulting from any provision in the articles of incorporation, including provisions relating to management, control, capital structure, purpose, or duration of the corporation.” (Emphasis added.) Section 13.1-884(B) thus makes clear that this property right is a *contingent* property right—a property right that can be altered by amending the articles of incorporation—but it is nonetheless a property right. As such, it is within the scope of Code § 57-9 and § 57-10.

Not surprisingly, ECUSA/Diocese attempt to minimize the impact of § 13.1-884(B) by suggesting that the statute does not recognize *any* property rights. Pointing out that §13.1-884(B) (which applies to nonstock corporations), is based upon and parallels Code §13.1-705 (which applies to stock corporations), they argue that § 13.1-884(B) does nothing more than statutorily reject in the nonstock corporation context the “vested rights” doctrine discussed in the

² Under Virginia Code § 13.1-860(A), the vestry members also had the authority to remove the directors of the Fund, with or without cause.

stock corporation context in *O'Brien v. Socony Mobil Oil*, 207 Va. 707, 152 S.E.2d 278, *cert. denied*, 389 U.S. 285 (1967). *See* MSJ Reply Br. at 2. This argument fails for several reasons.

First, as a textual matter, ECUSA/Diocese's reading would render the term "vested" in § 13.1-884(B) complete surplusage. Under their reading, the statute should simply state that a member of a nonstock corporation does not have *any* property right resulting from any provision in the articles of incorporation. But "[i]t is one of the fundamental rules of construction of statutes that the intention of the legislature is to be gathered from a view of the whole and every part of the statute taken and compared together, giving to every word and every part of the statute, if possible, its due effect and meaning, and to the words used their ordinary and popular meaning, unless it plainly appears that they were used in some other sense." *Epps v. Commonwealth*, 47 Va.App. 687, 626 S.E.2d 912 (Va.App. 2006) (quoting *Posey v. Commonwealth*, 123 Va. 551, 553, 96 S.E. 771, 771 (1918)). Indeed, if ECUSA/Diocese's interpretation were correct, *all* of § 13.1-884(B) would be surplusage, as there is no need for a statute to state that property rights are not *vested* if those rights do not exist in the first place.

Second, the parallelism between Code §13.1-705, which applies to stock corporations, and § 13.1-884(B), which applies to nonstock corporations, actually supports TFC's reading of § 13.1-884(B). Both provisions address whether existing property rights *are vested*, such that they cannot be changed by amendment of the articles of incorporation. ECUSA/Diocese do not dispute that the property rights of shareholders recognized in § 13.1-705 exist, or that there was an existing property right at issue in the underlying *Socony Mobile* case. *See* 207 Va. at 715. But it is no different with regard to the property rights of members of a nonstock corporation recognized by § 13.1-884(B). Both statutes recognize that a property right exists, and both recognize that the right is not vested.

ECUSA/Diocese concede, as they must, that membership interests and voting rights in a *for-profit* stock corporation constitute the personal property of the member/shareholder. See ECUSA/Diocese MSJ Opening Br. at 3, citing *Willard v. Moneta Bldg. Supply, Inc.*, 262 Va. 473, 481, 551 S.E.2d 596, 600 (2001); *Carnegie Trust Co. v. Secuirty Life Ins. Co.*, 111 Va. 1, 27, 68 S.E.2d 412, 421 (1910). But ECUSA/Diocese contend, without supporting authority, that these rights are personal property “only because a shareholder in a for-profit corporation invests his money in the expectation of a financial return and submits his investment ... to the management of the corporate board.” ECUSA/Diocese MSJ Opening Br. at 3. Here, the evidence at trial demonstrated that the Endowment Fund was established by the vestry of The Falls Church, and that it has been funded primarily by contributions from The Falls Church and its congregants. Tr.157:6-159:2 (Deiss); Tr.228:22-229:4; 231-232 (Fetsch). The vestry of The Falls Church submitted this substantial investment by itself and its congregants to the management of the corporate board of the Fund. The vestry’s “right to control [this] property by selecting those who shall manage it” is not simply a valuable right; it is “a valuable *property* right in contemplation of law.” See *In re Mt. Sinai Hospital*, 219 N.Y.S. 505, 519 (1926) (*italics added*). As such, it falls with the purview of §57-9 and § 57-10.

Finally, the Nonstock Corporation Act gives the vestry members, as the voting members of the Fund, the ultimate authority to dissolve the Fund, but requires that dissolution be proposed to the members by the board of directors. See Va. Code § 13.1-902(A). The Fund’s Articles of Incorporation provide that, upon such dissolution of the Fund, all of its assets are to come back to The Falls Church. See TFC Exh.27, Article Ninth; Tr. 160:9-161:6. This specific dissolution clause stands in marked contrast to the ordinary dissolution clause used by many § 501(c)(3) organizations, which requires only that upon dissolution the assets of the nonprofit be distributed to

another qualified §501(c)(3) organization. The fact that the assets of the Fund revert to The Falls Church upon dissolution further demonstrates that the right of the vestry members to control the appointment of the directors of the Fund is a valuable property right, for it is a critical component of the vestry's control over the ultimate disposition of the investments entrusted to the Fund.

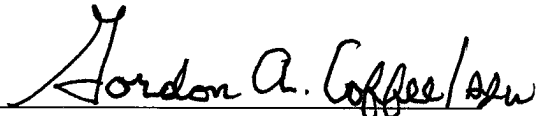
CONCLUSION

The evidence at trial clearly demonstrated that, at all times from the inception of the Fund through the December 2006 vote, the vestry of The Falls Church, as "Class A" members of the Fund, had the right to control the appointment and removal of the directors of the Fund. This right to control the management of the Fund and its assets is a valuable (if non-vested) property interest, as that term is used in the Virginia Non-Stock Corporation Act and relevant case law. As such, it is personal property within the meaning of Va. Code § 57-10, and, under the Court's Letter Opinion, is therefore within the purview of The Falls Church's § 57-9(A) petition.

Dated: October 31, 2008

Respectfully submitted,

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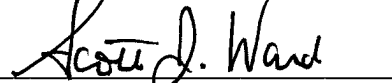
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 2008, a copy of the foregoing *The Falls Church's Opening Post-Trial Brief Regarding The Falls Church Endowment Fund* was delivered by first class mail and by electronic mail, to:

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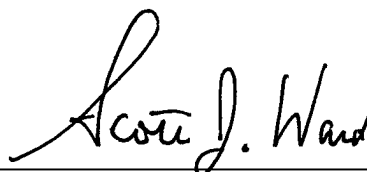
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