NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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December 19, 2008

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Re: *In Re: Multi-Circuit Episcopal Church Property Litigation* (CL 2007-0248724): Letter Opinion on Remaining 57-9 Issues

Dear Counsel:

This Letter Opinion resolves the eight remaining issues related to the section 57-9 petitions.[1] It will permit the Court to enter a Final Order

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[1] All other issues relating to 57-9, including the applicability and constitutionality of 57-9, have been addressed in the Court's prior letter opinions. See In re Multi-Circuit Episcopal Church Prop. Litig., CL 2007-0248724, 2008 Va. Cir. LEXIS 139 (Va. Cir. Ct. Oct. 17, 2008); In re Multi-Circuit Episcopal Church Prop. Litig., CL 2007-0248724, 2008 Va. Cir. LEXIS

resolving all the section 57-9 petitions and those Declaratory Judgment actions now rendered moot. Those Declaratory Judgment actions which have not been rendered moot have been stayed pending resolution of the appeals of the final order in the section 57-9 proceedings.

1. CANA CONGREGATIONS' MOTION TO STRIKE PRAECIPE FILED NOVEMBER 18, 2008

CANA's motion is **DENIED**. All that ECUSA and the Diocese have done is file copies of briefs filed with the Supreme Court of Virginia in connection with the Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc., 249 Va. 144, 452 S.E.2d 847 (1995). This Court finds no prejudice to CANA, or grounds for relief.

2. ECUSA'S AND THE DIOCESE'S MOTION TO RECONSIDER PART OF THE LETTER OPINION ON THE COURT'S FIVE QUESTIONS

ECUSA's and the Diocese's motion to reconsider is **DENIED**. In their pleadings, the parties argue about the scope and meaning of the Court's Five Question opinion. The opinion, however, speaks for itself, and this Court sees no basis to reconsider or revise its decision.

3. THE FALLS CHURCH'S MOTION TO STRIKE THE DIOCESE'S AND THE EPISCOPAL CHURCH'S *PROFFER OF EVIDENCE – THE FALLS CHURCH, EPISCOPAL "CONTINUING CONGREGATION."*

The Falls Church's Motion to Strike is **GRANTED.** Throughout this litigation, this Court has endeavored to accommodate counsel, both in connection with the scheduling of hearings and the setting of deadlines for the filing of pleadings. Indeed, to the extent possible, the Court has permitted counsel to consult with each other and come up with their own proposed deadlines, and then this Court has incorporated those agreed-upon deadlines into its scheduling orders. In turn, counsel for both parties, despite the

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102 (Va. Cir. Ct. Aug. 19, 2008); In re Multi-Circuit Episcopal Church Prop. Litig., CL 2007-0248724, 2008 Va. Cir. LEXIS 104 (Va. Cir. Ct. Aug. 19, 2008); In re Multi-Circuit Episcopal Church Prop. Litig., CL 2007-0248724, 2008 Va. Cir. LEXIS 76 (Va. Cir. Ct. July 16, 2008); In re Multi-Circuit Episcopal Church Prop. Litig., CL 2007-0248724, 2008 Va. Cir. LEXIS 85 (Va. Cir. Ct. June 27, 2008); In re Multi-Circuit Episcopal Church Prop. Litig., CL 2007-0248724, 2008 Va. Cir. LEXIS 74 (Va. Cir. Ct. June 27, 2008); In re Multi-Circuit Episcopal Church Prop. Litig., CL 2007-0248724, 2008 Va. Cir. LEXIS 134 (Va. Cir. Ct. June 6, 2008); In re Multi-Circuit Episcopal Church Prop. Litig., CL 2007-0248724, 2008 Va. Cir. LEXIS 49 (Va. Cir. Ct. May 12, 2008); In re Multi-Circuit Episcopal Church Prop. Litig., CL 2007-0248724, 2008 Va. Cir. LEXIS 22 (Va. Cir. Ct. April 3, 2008).

enormous pressures of trial preparation and the requirement of voluminous filings, have been respectful of the Court's orders and the deadlines contained therein. Where the parties have been unable to meet a deadline, and properly sought an extension, this Court has consistently accommodated counsel.

Nevertheless, the situation now confronting the Court requires it to grant The Falls Church's Motion to Strike. In order to allow the Diocese and ECUSA to make its record for appellate purposes, the Court permitted the filing of a proffer regarding evidence excluded by the Court. The Court set a firm deadline for the filing of the proffer and reiterated that deadline multiple times. The Diocese and ECUSA, however, did not file their proffer in a timely fashion. And, when they did file the proffer two weeks late, they provided no explanation for the late filing. Nor, significantly, did they seek leave from the Court for permission to make a late filing.[2]

This Court rejects the explanation now submitted by the Diocese and ECUSA that they did not seek leave of court because "Virginia law does not require leave of court to make a proffer. . . ." (Opp'n TFC's Mot. Strike & Mot. Extend Time 1). If that is the case, the Diocese and ECUSA should have advised the Court at the time it established the deadline that it needed no deadline because it could file its proffer when it saw fit to do so. The salient point is that this Court authorized a specific proffer with specific parameters[3] and with specific deadlines (for both the proffer and counter-proffer). The Diocese and ECUSA did not meet that deadline.

This Court also rejects the Diocese's and ECUSA's argument that The Falls Church is not prejudiced by the Diocese's and ECUSA's untimely filing, for the reasons stated at paragraph 10 of the Memorandum in Support of Falls Church's Motion to Strike. (See Mem. Supp. TFC's Mot. Strike ¶ 10).

Finally, this should be said: The Falls Church argues that ECUSA and the Diocese have acted in "willful disregard" of the Court's deadlines. (Mem. Supp. ¶ 9). The Court does not so find. Indeed, ECUSA's and the Diocese's explanation that it failed to make its filing in a timely fashion because it "slipped through the cracks amidst the flurry of post-trial filings," strikes the Court as credible. (See Opp'n ¶ 1). But the issue here is not one of good faith vs. bad faith. Rather, the issue here is that a party missed a material and specific deadline by two weeks, that it did not seek leave of the Court for

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[2] Only in response to the Motion to Strike does the Diocese and ECUSA now seek to extend the time for proffer. That Motion is itself untimely.

[3] Because this Court rejects the proffer on timeliness grounds, the Court does not reach The Falls Church's alternative argument that the Diocese and ECUSA have exceeded the parameters authorized for the proffer.

permission to late file its pleading, and that the opposing party has been prejudiced.

Therefore, The Falls Church's Motion to Strike is granted. However, because the granting of the Motion to Strike may itself be an appellate issue, the Court directs the Clerk of the Court to retain in the record the proffer filed by ECUSA and the Diocese, and the briefings filed by the parties on the Motion to Strike.

4. ECUSA'S AND THE DIOCESE'S MOTION TO RECONSIDER RULING FROM THE BENCH ON OCTOBER 8, 2008

On October 8, 2008, this Court held that it did not have jurisdiction to review Judge Keith's September 29, 2006 final order authorizing the transfer of the property of Christ the Redeemer Episcopal Church to Truro Church. ECUSA and the Diocese now seek reconsideration of that ruling. Their Motion to Reconsider is **DENIED**.

First, the Court finds that Rule 1:1 of the Supreme Court of Virginia is applicable to this situation. Rule 1:1 states that "[a]ll final judgments, orders and decrees ... shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." Va. Sup. Ct. R. 1:1. Here, well over 21 days elapsed before ECUSA and the Diocese challenged Judge Keith's Order, and thus, this Court has no jurisdiction to modify, vacate or suspend the Order. While ECUSA and the Diocese now argue that they are not directly attacking Judge Keith's Order and that the instant proceedings are separate and distinct, (Mot. Reconsider Ruling from Bench & Supporting Mem. ¶ 4), this Court finds, as Truro Church argues at page 6 of its brief, that ECUSA and the Diocese are making "a direct attack on the September 29, 2006 final Order" and that ECUSA and the Diocese are "specifically seek[ing] to have the order modified vacated or suspended – actions which are prohibited by Rule 1:1." (Truro Church's Opp'n Mot. Reconsider 6). Moreover, this Court does not find that the resolution of this matter is controlled by Niklason v. Ramsey, 233 Va. 161, 353 S.E.2d 783 (1987).

Second, the Court does not find at all persuasive the argument by ECUSA and the Diocese that what is at issue here is merely a "clerical error" subject to subsequent correction by this Court pursuant to section 8.01-428(B). Va. Code Ann. § 8.01-428(B) (2007); (see Mot. Reconsider ¶ 6). That term is defined narrowly because it has the potential to undermine finality of judgments. Thus, it typically applies to scrivener's errors and the like. It certainly does not apply to the instant situation, which is an attack on the substance of Judge Keith's Order.

Finally, although the Diocese and ECUSA allude to section 8.01-428(D) as a basis to re-open and set aside Judge Keith's Order, (see Mot. Reconsider ¶ 6), the Court does not have before it an "independent action" the purpose of which is "to set aside a judgment or decree for fraud upon the court." § 8.01-428(D).

Therefore, the Motion to Reconsider is denied.

5. THE ST. STEPHEN'S CHURCH 1874 DEED

The sole issue regarding St. Stephen's Church is whether the 1874 deed contains an enforceable restriction as to the use of the property that takes it beyond the reach of section 57-9(A). Va. Code Ann. § 57-9(A) (2007). The Court rules that the property conveyed pursuant to the 1874 deed is subject to section 57-9(A) and rejects the arguments asserted by ECUSA and the Diocese in this regard.

In large measure, this matter has already been decided by the Court. As this Court has stated on more than one occasion, section 57-9(A) covers property of a congregation held by trustees. The parties in this case do not dispute that the congregational property in question is held by trustees.[4] Therefore, unless section 57-9(A) raises a contracts clause issue in the context of this particular deed, the property is subject to section 57-9(A).

ECUSA and the Diocese argue, however, that there is language in the deed which restricts the assignment of this property pursuant to section 57-9(A) to an entity other than an Episcopal Church. They cite the following deed language:

> 'To have and to hold the said lot . . . [i]n trust nevertheless and for the sole use and benefit of the religious society and congregation known as the Protestant Episcopal church for the purpose of erecting a house for divine worship and such other houses as said congregation may need,' and further, provided that 'said church or house for divine worship when so built shall be used and enjoyed by said religious society or congregation according to the laws and canons of said church . . . .'[5]

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[4] The Stipulation provides that "[s]ince the date of the Deed, legal title has been vested in the trustees of St. Stephen's Church." (Stipulation Regarding St. Stephen's Church 1874 Deed ¶ 6).

[5] It should be noted that the parties disagree as to the meaning and significance of this language. ECUSA and the Diocese argue that the language constitutes "an intent to restrict the estate conveyed." (ECUSA/Diocese Responsive Br. Regarding St. Stephen's 1874 Deed 4). St. Stephen's Church

(ECUSA/Diocese Opening Br. Regarding St. Stephen's 1874 Deed 1-2 (emphasis omitted)).

This deed, however, was entered into after the passage of the predecessor statute to section 57-9(A) and is, therefore, subject to its terms.[6] While not necessary to the resolution of this matter, it is worth noting that the deed, itself, recognizes the preeminence of Virginia law, stating that "said church or house for divine worship 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. . . ." Id (emphasis added and omitted). One of those laws, of course, was the 1867 division statute, and this deed, to the extent that it involves property held in trust for a congregation, is subject to the division statute.

As to the Contracts Clause, as this Court stated in its August 19, 2008 Letter Opinion on the Contracts Clause, it "protects only contractual rights that existed prior to the effective date of the 1867 predecessor statute to 57-9. . . ." In re Multi-Circuit Episcopal Church Prop. Litig., CL 2007-0248724, 2008 Va. Cir. LEXIS 102, at *3 (Va. Cir. Ct. Aug. 19, 2008). Significantly, each of the cases relied upon by ECUSA and the Diocese – Finley v. Brent, 87 Va. 103, 12 S.E. 228 (1890), Brooke v. Shacklett, 54 Va. 301, 13 Gratt. 301 (1856), and Hoskinson v. Pusey, 73 Va. 428, 32 Gratt. 428 (1879) – involve deeds that *pre-dated* the predecessor statute to section 57-9. (Cf. ECUSA/ Diocese Opening Br. 4-8).

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argues that language "referring to the Protestant Episcopal Church is language of identification only, used but once in the deed" and that "this identifier should not be read permanently to restrict the use of the property solely to and by those affiliated with a particular denomination, for if it were so construed, it would defeat entirely the purpose of [section] 57-9(A)." St. Stephen's Church Opening Br. Re 1874 Deed 8-9). The Court does not resolve this dispute because under either interpretation, this is still "property held in trust for such congregation," which is the operative language of section 57-9(A). Va. Code Ann. § 57-9(A) (2007).

[6] Nor were the parties involved unaware of the portion of the Virginia Code containing the division statute. (See St. Stephen's Opening Br. 7 ("Indeed, not only does the 1874 Deed expressly state that the property is to be used in a manner 'not inconsistent with the laws and constitution of Virginia,' the 1874 Deed and the circuit court order authorizing the conveyance both expressly cited Chapter 76 of the 1873 Virginia Code – the very statute that authorized disaffiliation votes as a remedy for denominational divisions.")).

As to the assertion that parties are free to "order their affairs in a different manner" than contemplated by section 57-9(A), see id. at 9, this is a variant of the "contracting around" theory that this Court has already rejected as untimely and waived. See In Re Multi-Circuit Episcopal Church Prop. Litig., CL 2007-248724, 2008 Va. Cir. LEXIS 104, at *3-4 (Va. Cir. Ct. Aug. 19, 2008). More significantly, however, is the fact that there is no evidence of an effort to "contract around" or avoid the reach of section 57-9(A) in this Deed. To the contrary, the Deed expressly notes the preeminence of Virginia law, which would of course include the division statute.

Therefore, the Court finds for St. Stephen's Church.

6. CHURCH OF THE WORD PROPERTY DISPUTE

One issue remains related to the applicability of section 57-9(A) to the Church of the Word (hereafter "COTW"). That is whether the property in question – conveyed by deed dated December 3, 1993 from the Resolution Trust Corporation to "Bradfute W. Davenport, Jr., A.C. Epps and H. Merrill Pascoe, as Trustees for the Episcopal Church in the Diocese of Virginia, whose address is 8317 Centreville Road, Manassas, Virginia 22111, as Grantee" – is subject to COTW's section 57-9(A) petition. The Court finds that the property is subject to the petition.

COTW argues, and ECUSA and the Diocese concede, that this Court's June 27, 2008 *Five Questions* Opinion disposes of this matter. (COTW Opening Br. 12; ECUSA/ Diocese Opening Br. Regarding COTW 4-5). That opinion held, in part, that in Virginia "church property may be held by trustees for the local congregation, not for the general church." In re Multi-Circuit Episcopal Church Prop. Litig., CL 2007-0248724, 2008 Va. Cir. LEXIS 74, at *20 (Va. Cir. Ct. June 27, 2008) (footnote omitted). Therefore, if the property in question can only be held in trust for the local congregation, ECUSA's and the Diocese's argument that this particular property was held in trust for the Diocese cannot prevail. With that in mind, ECUSA and the Diocese seek reconsideration of that portion of the Court's *Five Questions* Opinion. (ECUSA/Diocese Opening Br. 4-6).

The parties make multiple additional arguments:

On the issue of who has made the biggest financial contributions to purchase and maintain the property, ECUSA and the Diocese argue that the Diocese and its member churches contributed far more than COTW. (ECUSA/Diocese Opening Br. 15). In contrast, COTW argues that it has contributed almost $1 million toward the purchase of the property and servicing the mortgage for the past 15 years. (COTW's Opp'n Br. 2-3, 5 n. 2).

On the issue of the significance of a September 2005 Circuit Court Order replacing the Diocesean trustees with trustees selected by COTW (see Stipulation Ex. 28), ECUSA and the Diocese argue that it is irrelevant because the Deed was unchanged and replacing one group of trustees with another has no effect on the beneficial owners of the property. (ECUSA/Diocese Responsive Br. Re COTW 7-9). COTW argues that replacing the Diocesean trustees with trustees selected by COTW establishes COTW's beneficial interest in the property. (COTW Opening Br. 9-10; COTW Opp'n Br. 4-7).

On the issue of the language of the Deed itself, ECUSA and the Diocese state that it unambiguously states that the beneficial owner is the Diocese. (ECUSA/ Diocese Opening Br. 11-12). COTW argues that by using a Manassas address in the Deed that is associated only with COTW, and not with the Diocese, the Deed makes clear that the beneficial owner is the congregation, not the Diocese. (COTW Opening Br. 7-8).

The Court need not resolve these issues because it declines to reconsider its *Five Questions* Opinion. Both parties recognize that this resolves the instant dispute. Section 57-9(A) covers "property held in trust for such congregation. . ." and covers those "congregation[s] whose property is held by trustees. . . ." Va. Code Ann. § 57-9(A) (2007). The property in question meets this criteria and is, therefore, subject to the disposition under section 57-9(A).

7. THE APPLICABILITY OF 57-9(A) TO THE FALLS CHURCH ENDOWMENT FUND

The sole question before the Court is whether The Falls Church ("TFC") at the time of the vote to disaffiliate had a personal property interest in The Falls Church Endowment Fund by virtue of its vestry's power to appoint the Directors of the Fund. If so, the Endowment Fund is subject to TFC's section 57-9(A) petition. If not, final disposition of the Endowment Fund – *i.e., Who owns the Endowment Fund*? -- will have to await the Declaratory Judgment trial. For the reasons stated below, the Court **GRANTS** ECUSA's and the Diocese's Motion for Partial Summary Judgment and finds that the Endowment Fund is not subject to TFC's section 57-9(A) petition. Disposition of the Endowment Fund is therefore reserved for resolution in the Declaratory Judgment action.

A. October 17, 2008 Letter Opinion

On October 17, 2008, this Court issued a Letter Opinion laying out the background of the instant dispute. The Court's Opinion read in part as follows:

> In large measure, the facts are not in dispute. The Endowment Fund is a non-profit corporation, organized in 1976,

whose "main purpose" is "to further the ministry and outreach of the Christian Church." (Articles of Incorporation of the Endowment Fund at Page 1.) The Articles provide that the membership of the Corporation is comprised of two classes. Class A members are individuals serving as the vestry of TFC. Class B members are members of the parish who are eligible to vote for the vestry at TFC's annual meeting. According to the Articles, Class A members – i.e., the vestry of TFC – have the duty of electing Directors of the Endowment Fund.

The Diocese and TEC argue that because the Endowment Fund is a corporation, because it is a distinct legal entity from TFC, because its Directors are appointed by the vestry of TFC rather than by its trustees, and because TFC cannot have a "personal property" interest in a charitable non-profit entity, there is no basis for a finding that its property is subject to TFC's 57-9(A) petition. TFC does not dispute a number of these assertions. It agrees that the Endowment Fund is a corporation, that it has a distinct legal existence, that its assets are not property held by TFC's trustees, that its directors are not elected by TFC's trustees, and that it is indeed a charitable non-profit entity. TFC asserts, however, that it does have a "personal property" interest in the Endowment Fund that brings the Endowment Fund within the scope of its 57-9(A) petition.

The resolution of this issue actually turns on the application of 57-10, rather than 57-9(A), as both parties recognize and concede. 57-10 states the following:

> 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.

Thus, 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 would therefore be subject to a 57-9(A) petition. In this case, TFC does not assert that its personal property interest arises out of some ownership interest it claims to have in the assets of the Endowment Fund. Rather, TFC asserts that its personal property interest is the power of the vestry to appoint the Endowment Fund's Directors. The Diocese and TEC

> argue that the right to appoint Directors to a non-profit corporation can never be a "personal property" interest and that, as a pure question of law, the Court should reject TFC's argument and grant the Diocese's and TEC's Motion for Partial Summary Judgment. TFC argues that there are factual matters relevant to the resolution of this issue and, on that basis, the Motion for Partial Summary Judgment, should be denied.
>
> The Court takes the Motion for Summary Judgment under advisement and will give both parties the opportunity to present such evidence as each party deems warranted on the question of whether TFC – at the time of the vote to disaffiliate – had a personal property interest in the Endowment Fund by virtue of its vestry's power to appoint the Directors of the Fund. While the Court is skeptical that there is a factual component to this question, and is inclined to believe that it is a pure question of law, the Court will give the parties the opportunity to put their facts before the Court.

In re Multi-Circuit Episcopal Church Prop. Litig., CL 2007-0248724, 2008 Va. Cir. LEXIS 139, at *2-*5 (Va. Cir. Ct. Oct. 17, 2008).

B. Discussion

Following issuance of the Court's Letter Opinion, the Court presided over the trial on issues related to the Endowment Fund. Having now heard this evidence, and reviewed the documentation offered by the parties in support of their respective positions, and having studied what little legal authority exists on the issue, the Court is convinced that, as it is suspected, this is a pure question of law.

The Court's opinion on this issue can be summarized in two words: *form matters*. Indeed, form matters so much that it is a principal reason the Court upheld the constitutionality of section 57-9(A). See In re Multi-Circuit Episcopal Church Prop. Litig. (Letter Opinion of June 27, 2008 on the Constitutionality of Va. Code Section 57-9(A)), CL 2007-0248724, 2008 Va. Cir. LEXIS 85 (Va. Cir. Ct. June 27, 2008). That ECUSA and the Diocese could have held the departing churches in a different form, e.g., in corporate form or in the name of the Bishop, and thus, placed the church properties beyond the reach of the Division Statute, is a critical reason for the Court's ultimate holding that the statute did not offend the Free Exercise Clause of the First Amendment. Id at *55-*61.

Here, the funds in question are held by a corporation, the Falls Church Endowment Fund. They are not held by the Diocese. They are not held by TFC. They are not held by its trustees. This form of corporate ownership

takes the Endowment Fund wholly beyond the reach of TFC's section 57-9(A) petition, except for the thinnest of reeds upon which TFC's entire argument is precariously premised. That reed is that the vestry's power to appoint the directors of the Endowment Fund constitutes "personal property" under section 57-10. (TFC's Opening Br. Regarding Endowment Fund 1). The Court disagrees.

There is no controlling case law in Virginia that defines the term "personal property" as it is used in section 57-10. Thus, the parties with the Court's encouragement have had to look elsewhere for authority as to whether the power to appoint directors to a charitable, non-stock, non-profit corporation constitutes a "personal property" interest.

The Court is persuaded by the cases cited by ECUSA and the Diocese that, as a matter of law, the power to appoint directors to a charitable, non-stock, non-profit corporation is not a "personal property" interest. See, e.g., In re Mount Sinai Hospital, 164 N.E. 871 (N.Y. 1928) ("[W]hen in the judgment of the Legislature the interests of a charitable corporation will be promoted by a change in the method of electing trustees, once intrusted to the members, whereby the members are disfranchised and the board is made self perpetuating, no one's property is taken. . . .") While TFC argues that this case, and other cases cited by ECUSA and the Diocese, principally involve issues of vested rights, (TFC's Opp'n Br. Concerning Endowment Fund 2-4), the Court finds that TFC reads these cases too narrowly. These cases, and other involving similar matters, see, e.g., Commonwealth of Virginia v. Joco Found., 263 Va. 151, 163, 558 S.E.2d 280, 286 (2002) (members of a charitable corporation acquire no property rights in the assets of the corporation), support the general proposition that an individual's or entity's control or influence over a non-stock, non-profit charitable corporation is not a "personal property" interest. See, e.g., 1 Marilyn E. Phelan, Nonprofit Enterprises: Corporations, Trusts, and Associations § 3.06 (2000), cited in (ECUSA's and Diocese's Renewed Mot. Strike & Opening Br. Regarding Endowment Fund 3) ("[T]he right of a member of a nonprofit corporation to vote is not constitutionally protected because a member of a nonprofit corporation does not have any interest in the property of the corporation.")

Therefore, this Court finds that section 57-10 and, hence, section 57-9, do not control the disposition of the Endowment Fund, and the matter is therefore reserved for the Declaratory Judgment action.[7]

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[7] Without expressing a view as to the merits, the Court would note that many of the factual arguments made by the parties regarding the Endowment Fund, while not relevant to the section 57-9(A) petition, might well be relevant to a declaratory judgment action.

8. THE FALLS CHURCH'S TWO-ACRE PARCEL

On March 20, 1746, John T. Trammole deeded to "the . . . Vestry of Truro parish and their Successors" a two-acre parcel, upon which the original Falls Church sanctuary was built. (Diocese Ex. 64, at 249.) The ultimate question before the Court today is whether the vestry of TFC is the legal successor to the vestry of Truro Parish as to this two-acre parcel. The Court finds for TFC on this matter and holds that the vestry of TFC is the legal successor to the vestry of Truro Parish as to this two-acre parcel.

The Court categorically rejects the claims of ECUSA and the Diocese that the true legal successor in connection with this two-acre parcel is Christ Church, Alexandria. (See ECUSA/Diocese Br. Supp. Mot. Strike Concerning Two+ Acres Parcel 9-14, 25.) TFC argues that ECUSA's and the Diocese's claims regarding Christ Church, Alexandria's ownership of this property is an 11th hour revision in theory made seventeen months into this litigation which was designed to fit within the narrowing window left by this Court's multiple letter opinions. (See TFC's Opp'n Br. Concerning 1746 Parcel 1). The Court does not need to adopt such a characterization to find that ECUSA's and the Diocese's claims regarding Christ Church, Alexandria's interest in this property are wholly at odds with the historical record, with numerous court orders and petitions over the past century and a half, with the land records of Fairfax and Arlington Counties, and with ECUSA's and the Diocese's own repeated assertions and admissions recognizing TFC as the legal owner of this two-acre parcel. Moreover, this Court rejects ECUSA's and the Diocese's argument that what is before the Court is really an adverse possession claim that TFC has failed properly to present or prosecute. (See ECUSA/Diocese Responsive Br. Regarding Two+ Acres Parcel 10-14). Suffice it to say, one need not claim adverse possession of that which one legally owns.

In sum, for the reasons stated below, the two-acre parcel is subject to TFC's 57-9(A) petition.

A. Discussion

There is actually little in factual dispute regarding the history of this matter, although the parties of course sharply contest the implications of those undisputed facts.

In 1765, by act of the General Assembly, Truro Parish was split into Fairfax Parish and Truro Parish. The two-acre parcel, at that point, became part of the new Fairfax parish. (See Test. Diocese's expert witness, Dr. Edward Lawrence Bond, Trial-Day 3 Tr. 49-51, Oct. 20, 2008). Eventually, the church at the Falls fell into disuse and disrepair. Id. at 98-99. In 1836, however, TFC petitioned the Diocesan convention, which admitted TFC "'as a separate and distinct church,'" pursuant to Canon XII. Id. at 88-89 (quoting Diocese Ex. 75

at 13).[8] According to Dr. Bond, after TFC was admitted to the Diocese, the vestry of TFC and the vestry of Christ Church, Alexandria operated independently. Id. at 107-108. Each elected its own vestry and took over the management of its own affairs. Id. at 106. Dr. Bond also testified that when a new parish was created, "[i]f the property was in the new parish, it stayed with the new parish." Id. at 54.

ECUSA and the Diocese argue that the admission of TFC as a separate and distinct church did not have the effect of making TFC the legal successor to the vestry of Truro parish in connection with the two-acre parcel.[9] The Court disagrees. Indeed, it would make little sense for TFC to even have come into existence "as a separate and distinct church from the Parish Church of Fairfax Parish," (see Diocese Ex. 75 at 13), with its own vestry, if it was not the legal successor to the property in question.[10]

Professor Bond, who was ECUSA's and the Diocese's own expert witness, testified that "you could not have two vestries in the same parish." (Trial-Day 3 Tr. 107). Yet, as TFC points out, if this Court accepts the arguments of ECUSA and the Diocese, this is precisely what the Court would be required to find existed from 1836 to the present, i.e. one vestry to manage and administer

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[8] ECUSA and the Diocese suggest that it is inconsistent with the positions taken by TFC and the other CANA congregations for TFC now to rely upon a Diocesan canon and the acts of the Diocese's Annual Convention, where in the past TFC has argued that the canons and actions of the convention did not create enforceable property rights. (See ECUSA/Diocese Responsive Br. 4-5 & n. 4.) TFC argues, and this Court is persuaded, that it is not taking inconsistent positions. (See TFC's Reply Br. Concerning 1746 Parcel 5 n. 3).

[9] ECUSA and the Diocese argue that TFC was admitted into the Diocese in 1836 "as a separate and distinct church," not a parish. (ECUSA/Diocese Responsive Br. 6 (quoting Trial-Day 3 Tr. 88-89)). But, as TFC notes in its Reply Brief, TFC was admitted pursuant to Canon XII, "For the Division of Parishes," pursuant to which a new entity was "received as a distinct Parish." (TFC's Reply Br. 1-2 (quoting Diocese Ex. 116 at 12-13)).

[10] The Court also finds persuasive TFC's additional argument that it is "the 'successor' to . . . Truro Parish under the 1746 deed [because its] vestry's function most closely parallels that of the Truro Parish vestry in colonial times," albeit it with only ecclesiastical powers, rather than the additional governmental powers that Truro Parish exercised. (TFC's Opening Br. 14). Thus, it is the TFC's vestry that for more than 150 years has governed the property in question, raised funds to upgrade the property, repaired the property, financed additions to the property and decided how the property was to be used.

the two-acre parcel (TFC) and another vestry actually to own it (Christ Church, Alexandria). (See TFC's Reply Br. 1). Once ECUSA and the Diocese concede, as they must, that TFC did in fact manage and administer the property for the past 150 years and more, it cannot escape the implications of its "two vestry" theory, not the least of which is that it is at odds with the testimony of their own expert.

This Court's conclusion that the vestry of the TFC is the legal successor of the vestry of Truro parish is dispositive of the question now before the Court. Having said that, the Court will note three other points in support of TFC's position.

First, there is a record of court orders, petitions, resolutions and related documentation demonstrating that for more than 150 years, the Circuit Courts of Fairfax and Arlington have clearly and explicitly understood the two-acre parcel to be the property of the vestry of TFC. (See TFC's Opening Br. 1).

Second, prior to the instant litigation, Christ Church, Alexandria never asserted a claim on this two-acre parcel, nor contributed to its development, maintenance, repairs, or improvements. (See ECUSA/Diocese Br. Supp. Mot. Strike 3 (citing Test.William E. Deiss, Trial-Day 2 Tr. 45-78, Oct. 15, 2008)).

Third, there is a clear record of admissions by ECUSA and the Diocese recognizing TFC's ownership of this property. While ECUSA and the Diocese seek to diminish the significance of these admissions, and argue that at most they constitute evidential admissions, this Court finds the admissions to be quite significant.[11] They establish in this Court's view that, until quite recently, even ECUSA and the Diocese understood that the vestry of TFC owned the two-acre parcel. TFC, in its Opening Brief, cites the following examples of ECUSA's and the Diocese's admissions: [12]

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[11] ECUSA and the Diocese argue that these admissions are of "limited probative value." (See, e.g. ECUSA/Diocese Br. Supp. Mot. Strike 21). Given the repeated and categorical nature of these admissions, the Court does not agree that they should only be assigned "limited probative value." See West v. Anderson, 186 Va. 554, 564 (1947) ("The admission of a party during the course of a judicial proceeding, relevant to an issue, is of the highest evidential value.") Nor does the Court find persuasive ECUSA's and the Diocese's argument, in connection with the Lis Pendens action, that the memorandum signed and filed by the Diocese's counsel should not be attributed to the Diocese itself. (ECUSA/Diocese Br. Supp. Mot. Strike 22).

[12] (TFC's Opening Br. 11-13).

* "[O]n February 5, 2007[,] . . . the Diocese brought a Lis Pendens action against TFC and its trustees in Arlington County Circuit Court. See TFC Exh. 61. That action sought 'to establish and confirm title' in [the Diocese's Bishop] to various parcels of property, including" the two-acres at issue here. "[T]he Diocese's suit . . . recognized the 'Record Owner[s]' of these parcels" as the trustees of TFC. (TFC's Opening Br. 11 (quoting TFC Ex. 61 at 1-2) (alteration in original)).

* ECUSA in its answer to TFC's 57-9 petition states that "[t]he Episcopal Church admits and avers that trustees for the Falls Church hold legal title to the real property currently possessed by The Falls Church for the congregation of The Falls Church, a parish or mission of the Episcopal Church, subject to the Constitution and Canons of the Episcopal Church and the Diocese of Virginia." Id. at 11-12 (quoting TFC Ex. 4, at ¶2) (citation omitted).

* "ECUSA's [Declaratory Judgment] complaint states "'[the Trustees] are named as defendants in this action because, on information and belief, they continue to hold legal title to some of the real property at issue in this case, which was deeded over the years to the "Vestry of Truro Parish. . . .""" Id. at 12 (quoting ECUSA Complaint ¶ 23). Similar language appears in the Diocese Complaint at Paragraph 5. Id.

* In response to a TFC request for admission that "'Falls Church real property is currently titled in the names of Trustees for Falls Church,'" id. at 12 (quoting TFC Ex. 9 at 3), the Diocese responded that "The deeds grant the subject property to trustees for the Falls Church, a subordinate, constituent part of the Diocese and the Episcopal Church ...." Id. (quoting TFC Ex. 10 at 5) (citing TFC Ex. 10 at 9). ECUSA made similar admissions. Id. at 12-13 (citing TFC Ex. 11 at 4). [13]

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[13] That the Diocese formally denied the Request for Admission does not take away from the significance of these admissions. Moreover, the claim of ECUSA and the Diocese that it "limit[ed]" its admission by noting that TFC held title as an Episcopal entity subject to the Constitutions and Canons of the Episcopal Church and the Diocese, (see ECUSA/Diocese Responsive Br. 4 n. 2), does not limit the admission at all. The significance of the admission is that ECUSA and the Diocese was not challenging that TFC held legal title to the property in question (at least not until well into the instant litigation.) The fact that ECUSA and the Diocese viewed TFC as subordinate to the Episcopal Church and the Diocese is a different matter, and one that does not help resolve the question of whether TFC was the lawful successor to Truro Parish's interest in the two-acre parcel.

These admissions provide compelling support for the conclusion that the two-acre parcel is owned by the vestry of TFC and not by any other entity, including Christ Church, Alexandria.[14]

B. ECUSA and the Diocese's Arguments

1. ECUSA's and the Diocese's Claim that Mason v. Muncaster, 22 U.S. 445 (1824) Controls the Outcome of this Controversy

In Mason v. Muncaster, the Supreme Court of the United States held that the "Vestry of the church in Alexandria [Christ Church] is, in succession, the regular Vestry of the parish of Fairfax." 22 U.S. 445, 469 (1824). Since it is undisputed that the "parish of Fairfax" was at that point in time the legal successor to Truro Parish, ECUSA and the Diocese argue that the vestry of Christ Church, Alexandria is, by dint of this Supreme Court opinion, the successor to Truro Parish's property interest in the two-acre parcel. (See TFC Opening Br. 13-18; ECUSA/Diocese Br. Supp. Mot Strike 12-14). While TFC makes a number of arguments to rebut the assertions of ECUSA and the Diocese, (e.g., that the Supreme Court was applying District of Columbia law, not Virginia law, and that there is language in the lower court's opinion, Mason v. Muncaster, 2 Cranch C.C. 274 (C.C. D.C. 1821), that supports TFC's contentions), their principal assertion - - which is one this Court adopts – is that there is nothing in either opinion to suggest or imply that its findings on succession are immutable and unchangeable over the course of time. In fact, Mason v. Muncaster, explicitly recognizes a procedure for the creation of new Episcopal entities. See 22 U.S. at 464 ("And yet it is not denied that, by the rules and customs of the sect, new Episcopal societies are not admitted to be formed within the bounds of existing parishes, without the consent of the proper ecclesiastical authority.") In 1836, as this Court has found, the vestry of TFC became the successor to the vestry of Truro Parish in connection with the two-acre parcel. (See TFC Opening Br. 13-18). Nothing in Mason v. Muncaster prohibited such an eventuality.[15]

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[14] The Court need not reach the question posed by ECUSA and the Diocese as to whether these are "judicial" admissions that bind a party or merely "evidential" admissions that a court may consider. (See ECUSA/Diocese Br. Supp. Mot. Strike 21-25). Under either characterization, the Court finds the admissions to be persuasive evidence in support of TFC's position that the legal holder of title to the two-acre parcel was TFC *and no one else.*

[15] This is especially the case given the fact, as TFC notes in its Opening Brief that at the time Mason was decided in 1824 there was "only one vestry for 'the whole parish.'" (TFC Opening Br. 17) When TFC was subsequently admitted to the Diocese in 1836 as a distinct and separate church, there then existed a distinct and separate vestry, as well. Id. at 17-18.

2. ECUSA's and the Diocese's Claim that No Deed Conveys the Property to TFC's Trustees

It is undisputed that no deed conveys the two-acre parcel to the vestry of TFC. If, however, the vestry of TFC is the legal successor to the vestry of Truro Parish, as this Court has concluded, no deed was required. ECUSA and the Diocese explicitly acknowledge this principle in their final brief. (See ECUSA/Diocese Reply Br. 5 ("[W]e have never argued that such a deed is required. We have merely pointed out that the Property is not subject to TFC's § 57-9 Petition because TFC has no deed to its trustees *and* has failed to prove that it is the legal successor to the entity named in the Deed.") In other words, ECUSA and the Diocese acknowledge that if TFC is the legal successor to Truro Parish as to the two-acre parcel, no deed was required.[16] Moreover, as TFC notes in its Opposition Brief , if it is necessary for a deed to have conveyed the two-acre parcel, that assertion would also negate Christ Church, Alexandria's claim on the property. (TFC Opp'n Br. 2).

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[16] It naturally follows from this acknowledgement that if no deed was required, section 55-2 of the Virginia Code would not compel a different result. The current version of the law reads as follows:

> No estate of inheritance or freehold or for a term of more than five years in lands shall be conveyed unless by deed or will, nor shall any voluntary partition of lands by coparceners, having such an estate therein, be made, except by deed; nor shall any right to a conveyance of any such estate or term in land accrue to the donee of the land or those claiming under him, under a gift or promise of gift of the same not in writing, although such gift or promise be followed by possession thereunder and improvement of the land by the donee or those claiming under him.

Va. Code Ann. § 55-2 (2007). TFC argues, first, that it is not clear that section 55-2 even applies to church property and, second, that the Virginia Supreme Court has recognized exceptions to section 55-2, as for example where there has been a long period of prior peaceful possession by one claiming to be a fee owner. TFC cites Prettyman v. M.J. Duer & Co., 189 Va. 122, 139 (1949), for the proposition that "'[i]t requires no stretch of the imagination to presume that a grantee has legal title to land which has been in the possession of himself and his predecessors in title for 190 years.'" (TFC Opp'n Br. 3-4 (quoting Prettyman v. M.J. Duer & Co., 189 Va. 122, 139, 52 S.E.2d 156, 164 (1949))). The Court does not need to resolve either of these arguments because both parties in the instant case agree that no deed to TFC was required if TFC was the legal successor to Truro Parish as to this two-acre parcel. (See TFC Opp'n Br. 2-6; ECUSA/Diocese Reply Br. 5).

3. ECUSA's and the Diocese's Claim that the Testimony of TFC's Expert on Land Records, Kenneth Schrantz, Does not Establish TFC's Ownership Claim

ECUSA and the Diocese argue that Kenneth Schrantz, who was TFC's expert title examiner, would go no farther than to tell the Court what the land records "indicate" regarding ownership of the two-acre parcel, rather than explicitly expressing an opinion on the issue of ownership. (ECUSA/Diocese Br. Supp. Mot. Strike 3-4). Given that Mr. Schrantz testified that "[t]he land records indicate the property is owned by the trustees of The Falls Church," and further testified that "[e]very indication would be that the trustees of The Falls Church as to this property are the successors to Truro, the Vestry of Truro Parish," (Trial-Day 2 Tr. 121-22, Oct. 15, 2008), the Court finds that Mr. Schrantz' testimony unequivocally supports TFC on this issue. ECUSA and the Diocese argue that the use of the word "indicate" is "manifestly insufficient," (ECUSA/Diocese Opening Br. Supp. Mot. Strike 4), to prove title. The Court disagrees that there is any material difference between the use of the term "indicate" and similar terminology to describe the title examiner's findings.

4. ECUSA's and the Diocese's Dismissal of the Significance of the Various Court Orders and Related Documents Confirming TFC as the Property Owner.

ECUSA and the Diocese argue that none of the court orders, resolutions, petitions, easements, encumbrances, deeds of trust, property exchange documents, and other documentation, prove anything other than that TFC was making the "bald allegation," of ownership of the two-acre parcel. Id at 5-8. The Court disagrees.

These documents go back to 1851 and demonstrate a consistent understanding on the part of both the Circuit Courts of Fairfax and Arlington that the property in question was owned by the vestry of TFC. These records and court orders encumbered property, granted easements over property, exchanged property, consolidated property and took numerous other actions regarding the two-acre parcel.[17] Some of these actions were taken with the knowledge of the Diocese, which interposed no objection. (See, e.g., TFC's Opening Br. 9 n. 5; TFC Exs. 20, 48, 55A, 57, 62). To dismiss more than 150 years of such documentation as some huge misunderstanding is just not persuasive.[18]

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[17] The implication of the position taken by ECUSA and the Diocese is that all of these court orders, and the actions taken pursuant to these orders, are invalid. ECUSA and the Diocese adopt this implication most explicitly when they argue that any claim of ownership based on multiple *ex parte* orders would be a "legal nullity." (ECUSA/Diocese Responsive Br. 1).

5. ECUSA's and the Diocese's Claim that Christ Church, Alexandria is the Legal Successor to the Vestry of Truro Parish as a Matter of "Historical Fact"

As stated above, the Court is not persuaded that Christ Church, Alexandria has any interest in the property in question. After 1836, for the reasons stated above, it was the vestry of TFC that succeeded to Truro Parish's interest in the property.

6. ECUSA's and the Diocese's Claim that TFC Never Pled Adverse Possession

This is, of course, true. It is equally true, however, that TFC was no more under an obligation to plead or establish adverse possession than any typical owner of a house or a commercial property is required to prove adverse possession of that which the owner actually owns.[19]

Therefore, for the foregoing reasons, the Court finds in TFC's favor and holds that the two-acre parcel is subject to TFC's 57-9 petition.

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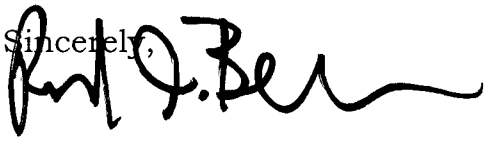
[18] ECUSA and the Diocese further argue that these orders were "not the product of adjudication designed to test evidence and reach the correct legal conclusion...." (ECUSA/Diocese Br. Supp. Mot. Strike 6). Even if correct, however, it does not alter the Court's view of the legal significance of these orders. Virtually every day this Court signs uncontested orders that, like the documents in question, are not the "product of adjudication." Nevertheless, such orders have the same force and effect as if they were the product of a hotly contested trial. ECUSA and the Diocese further argue that the orders were *ex parte*. See id. The fact that the orders were *ex parte,* however, does not undermine the Court's finding that they reflect a consistent understanding by the courts regarding ownership of the two-acre parcel.

[19] Because the Court finds no merit in the assertion that TFC had to plead adverse possession, this Court does not reach two questions contested by the parties: first, whether TFC properly pled an adverse possession claim and, second, whether TFC established the elements of adverse possession. (ECUSA/Diocese Responsive Br. 10-14) Similarly, the Court need not reach the question of laches, which has been raised in this litigation by TFC as part of its defense against the claims of Christ Church, Alexandria. (TFC Opening Br. 22-25).

CONCLUSION

The parties are to prepare an Order to be submitted to the Court by December 29, 2008, that reflects the decisions contained in this Letter Opinion and which constitutes a Final Order resolving all the 57-9 petitions and such Declaratory Judgment actions as have been rendered moot by the Court's prior orders.

Sincerely,



Randy I. Bellows