

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

In re:)
Multi-Circuit Episcopal Church) **Civil Case Numbers:**
Litigation) CL 2007-248724,
) 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

ST. STEPHEN'S CHURCH REPLY BRIEF RE 1874 DEED

St. Stephen's Church ("St. Stephen's"), by its counsel, respectfully submits this brief in reply to The Episcopal Church's and the Diocese's Responsive Brief Regarding Property Subject to the St. Stephen's 1874 Deed, filed November 4, 2008 ("Resp. Br.").

TEC/DVA's responsive brief is divided into two parts. The first comprises a laundry list of supposed factual "misstatements" by St. Stephen's (Resp. Br. at 1-2). The second comprises a tutorial on deeds (*id.* at 2-7), and various versions of the "contracting around" argument as to why the 1874 Deed and the property conveyed thereby is not subject §57-9(A) (*id.* at 7-8). As to each, we show that TEC/DVA's position lacks merit.

I. ST. STEPHEN'S CORRECTLY STATED FACTS AND THE COURT'S RULINGS

1. TEC/DVA incorrectly claimed that St. Stephen's statement, that legal title to the property has been vested in St. Stephen's trustees for the benefit of the congregation, is "false[]" and "blatantly misstates the stipulated facts" (*id.* at 2). The statute pursuant to which the 1874 Deed was made mandated that the congregation be the beneficiary.¹ The 1874 Deed refers three times to the congregation: (1) by empowering trustees to receive property for the "**benefit** of the . . . **congregation**"; (2) by conveying property "for the purpose of erecting a house for divine worship and such other houses as said **congregation** may need"; and (3) by specifying that "said . . . house for divine worship when so built shall be used and enjoyed by said . . . **congregation**").² This Court previously held that, in the era of the 1874 Deed, only congregations could own congregational property and could own only by deed.³

2. TEC/DVA asserted that St. Stephen's statement, that the local congregation envisioned by the 1874 Deed had yet to be formed, is "unsupported by the stipulated facts" (*id.* at 2). Even were TEC/DVA correct, it is difficult to understand what difference it would make to St. Stephen's legal position, for if the congregation already existed before the 1874 conveyance, the 1874 Deed would still be subject to §57-9. In any event, the 1874 Deed, together with the other facts and exhibits from the Stipulations, permit the inference that, in 1874, the congregation had yet to form,

¹ Section 9, Chapter 76 of the 1873 Virginia Code provided that "every conveyance shall be valid which hereafter shall be made of land for the use and benefit of any religious **congregation**, as a place for public worship . . . and the land shall be held **for such use or benefit, and for such purpose, and not otherwise.**" Appendix A to the St. Stephen's Church Opening Brief re 1874 Deed, filed October 28, 2008 ("Op. Br.")(emphasis added).

² Stipulations of Fact Regarding St. Stephen's Church 1874 Deed, dated October 3, 2008 ("Stipulations"), at ¶4, and Op. Br., Appendix B (emphasis added).

³ Letter Opinion Regarding ECUSA/Diocese's Assertion that 57-9 is Unconstitutional Because It Violates the Contracts Clause, dated August 19, 2008 ("Aug. 19 Contracts Clause Op."), at 12-16; Letter Opinion on the Court's Five Questions, dated June 27, 2008, at 14. *See Hoskinson v. Pusey*, 73 Va. 428, 431 (1879).

formed sometime after the 1874 conveyance, built the church, initially named it Emmanuel P.E. Church, and eventually changed its name to St. Stephen's Church.⁴

3. TEC/DVA asserted that St. Stephen's contention, that the Court's prior rulings are dispositive of the sole legal issue before the Court, is "flatly untrue" (Resp. Br. at 1). St. Stephen's remains of the view that the Court's determinations, that §57-9 is applicable and that the Contracts Clause can shield only pre-1867 deeds from the operation of §57-9, is dispositive of the question whether the 1874 Deed and the property conveyed thereby are subject to §57-9. *See* Letter Opinion on the Applicability of Va. Code §57-9(A), dated April 3, 2008 ("Apr. 3 Op."), at 67; Aug. 19 Contracts Clause Op. 12-16. *See also* Part II.4, *infra*.

⁴ We respectfully refer the Court to the Stipulations, *supra*, ¶¶1, 4 & 5, which state that the vestry authorized to receive the conveyance was a vestry for the Protestant Episcopal Church in Northumberland County, not the vestry of any particular church congregation, and that the "house for divine worship" referred to in the 1874 Deed was: " 'erect[ed]' during the approximate period of 1874-1876 (*see* Exhibit 2); was first named Emmanuel P.E. Church (*see* Exhibit 2); on April 30, 1881, was consecrated as St. Stephen's Church by the Rt. Rev. Francis M. Whittle, Bishop of the Diocese (*see* Exhibits 2 & 3)." When one adds to the foregoing the following material quoted from the excerpts from the *Journal of the Annual Council of the Episcopal Diocese of Virginia* for 1876, 1877, 1878 and 1881, collected in Stipulations Exhibit 2, one sees the reasonableness of St. Stephen's inference:

•1876 *Journal*, pp. 191-192: The Rev. H.H. Cole, Rector, Emmanuel Church, stated in his parochial report (for what appears to be Northumberland County; emphasis added) that "I have held services at Heathsville during the past year as heretofore. The corner-stone of the new church, conveniently situated near the Courthouse, has been laid, and I trust the building will be completed this fall. *Although there were three colonial churches in this county, there is not any at present.* The present opening seems, however, very promising."

•1877 *Journal*, pp. 197-198: The same Rev. H. H. Cole, Rector, Emmanuel Church, Heathsville, Northumberland County, makes his parochial report of baptisms, confirmations, total communicants, transfers in, removals, deaths, funerals, and contributions.

•1878 *Journal*, p. 214: The Rector's position of Emmanuel Church, Heathsville, Northumberland County, is reported to be "Vacant."

•1881 *Journal*, pp. 199-200: The Rev. Henry L. Derby, Rector of several Lancaster County churches, stated (emphasis added) that "I have preached several times during the past year at Heathsville, the county seat of Northumberland, in a neat Gothic church, *which has been consecrated St. Stephen's (April 30, 1881).*"

II. ST. STEPHEN'S 1874 DEED IS SUBJECT TO §57-9

4. While TEC/DVA's exposition on deeds (Resp. Br. at 2-7) is academically interesting,⁵ it is of no moment here, since: (a) Virginia courts have consistently held that "[t]o ascertain the intent of the grantors, the deed is to be examined as a whole and effect given to all of its terms and provisions," *Auerbach v. County of Hanover*, 252 Va. 410, 414 (1996);⁶ (b) the 1874 Deed clauses are not internally in conflict and, thus, no one clause can be read to override another; and (c) the grantor's intention to convey the property subject to the predecessor statute to §57-9 is apparent from the face of the deed. Nor can the 1874 Deed properly be read to have excluded the predecessor statute, since deeds are subject to and implicitly incorporate by reference the laws in effect at the time of their making, particularly where, as here, there is no deed language to suggest that the grantor intended to override that statute or exempt from the deed any portion thereof.⁷

5. TEC/DVA cited *Norfolk v. Norfolk Landmark Pub. Co.*, 95 Va. 564 (1898) for the

⁵ The origin of deed parts is feudal, historically encompassing such parts as the Premises, the Grant, the Reddendum, the Habendum, the Tenendum and Conclusion. 1 MICHIE'S JURISPRUDENCE OF VIRGINIA & WEST VIRGINIA, *Deeds*, §§19, 21 (2007). Early in Virginia jurisprudence, feudal notions lost sway in the interpretation of both deeds and wills. *Kennon v. McRoberts*, 1 Va. 96, 100-101 (1792) ("By the American Revolution, and some of our laws, we have happily got rid of the feudal system . . . but the intention of testators will become in reality the rule, which, though hitherto avowed to be such, hath been so refined away as in many instances to have been sacrificed to rigid technical terms."). See also *Morris v. Bernard*, 114 Va. 630, 636-638 (1913), and deed and will cases collected therein showing the identity of construction principles applicable to both types of instruments.

⁶ See also *Kennon v. McRoberts*, *supra*; *Hurt v. Brooks*, 89 Va. 496, 500 (1892); *Culpeper Nat'l Bank v. Wrenn*, 115 Va. 55, 57-58 (1913); *Morris v. Bernard*, *supra*; *Davis v. Henning*, 250 Va. 271, 274 (1995).

⁷ *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429-30 (1934) ("the laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it"); *Ogden v. Saunders*, 25 U.S. 213, 264, 265 (1827) ("[the] law . . . where the contract is made" is "incorporated with the contract," "constitutes the law of the contract so formed, and must govern it throughout" "whether [it] affects its validity, construction, or discharge"); *Buchanan v. Doe*, 246 Va. 67, 72 (1993). See 11 WILLISTON ON CONTRACTS §30.19 (4th ed.) ("laws existing at the time . . . enter into and form a part of the contract as . . . if expressly incorporated in the contract" and "contractual language must be interpreted in light of existing law, the provisions of which are regarded as implied terms of the contract, regardless of whether the agreement refers to the governing law").

proposition that the phrase “not inconsistent with the laws and constitution of Virginia” found in the 1874 Deed confers no rights on the congregation under §57-9 or its predecessor statute (Resp. Br. at 6). Reliance on *Norfolk* is misplaced for two reasons: (1) in interpreting the scope of the city’s power to tax, the *Norfolk* court held that the phrase in the Norfolk city charter (“in accordance with the constitution and laws of the State”) neither added to nor detracted from the city’s taxing power, which was independently derived from state law; and (2) even were *Norfolk* apposite, it would have to mean that the like phrase in the 1874 Deed adds or subtracts nothing from the congregation’s right to vote to leave the denomination with its property, a right derived from an external statutory source.

6. In arguing that three pre-1867 deed cases, *Brooke v. Shacklett*, 54 Va. 301 (1856); *Hoskinson v. Pusey*, 73 Va. 428 (1869); and *Finley v. Brent*, 87 Va. 103 (1890), require the Court to treat the identifier “Protestant Episcopal Church” as a perpetual use restriction for Episcopal congregations, TEC/DVA claim that the “year of recordation” of the 1874 Deed has no significance (Resp. Br. at 9). St. Stephen’s makes no claim regarding the year of recordation; St. Stephen’s claims that the 1874 date of the deed makes it subject to the division statute (Op. Br. *passim*). TEC/DVA further suggested that the *Brooke* court, which awarded the property to the majority that voted to leave the Methodist Episcopal Church despite deed language prescribing use by a Methodist Episcopal Church congregation, “actually upheld the deed’s terms” (*id.* at 10). No matter how TEC/DVA spin *Brooke*, the court there recognized the congregation’s right to change affiliation by majority vote and take its property, despite plain language in the deed. The *Brooke* vote right derived from a private plan of separation; here, it derived from a statute incorporated expressly or by implication in the deed. Regardless of the source of that right, the logical implication of *Brooke* is that the property follows the majority. TEC/DVA’s contrary reading would, in effect, yield the denominational trust interest prohibited in 1874 and frustrate the purpose of §57-9.

Dated: November 8, 2008

Respectfully submitted,

By: R. Hunter Manson/mmcr
R. Hunter Manson (VSB #05681)

P. O. Box 539
876 Main Street
Reedville, VA 22539
804-453-5600 (telephone)
804-453-7055 (facsimile)

MARY A. McREYNOLDS, P.C.

By: Mary A. McReynolds
Mary A. McReynolds (admitted *pro hac vice*)

1050 Connecticut Avenue, N.W.
Tenth Floor
Washington, D.C. 20036
(202) 426-1770 (telephone)
(202) 772-2358 (facsimile)

Counsel for St. Stephen's Church and Related Individuals

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of November, 2008, a copy of the foregoing St. Stephen's Church Reply Brief Re 1874 Deed was sent by electronic mail and first-class mail, postage prepaid, to:

Bradfute W. Davenport, Jr., Esquire
George A. Somerville, Esquire
Joshua D. Heslinga, Esquire
TROUTMAN SANDERS, LLP
P.O. Box 1122
Richmond, VA 23218

Heather H. Anderson, Esquire
Adam M. Chud, Esquire
Soyong Cho, Esquire
GOODWIN PROCTER, LLP
901 New York Ave., N.W.
Washington, D.C. 20001

Mary C. Zinsner, Esquire
TROUTMAN SANDERS, LLP
1660 International Drive, Suite 600
McLean, VA 22102

Robert C. Dunn, Esquire
Law Office of Robert C. Dunn
P.O. Box 117
Alexandria, VA 22313-0117

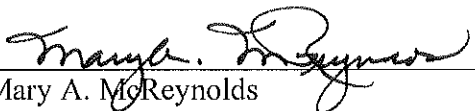
Edward H. Grove, III, Esquire
BRAULT PALMER GROVE
WHITE & STEINHILBER, LLP
3554 Chain Bridge Road, Suite 400
Fairfax, VA 22030

Stephen R. McCullough, Esquire
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

CANA Congregation counsel via e-mail only

With a courtesy copy by electronic mail and hand-delivered to:

Sara G. Silverman
Law Clerk to the Honorable Randy I. Bellows
4110 Chain Bridge Road
Fifth Floor Judges' Chambers
Fairfax, VA 22030



Mary A. McReynolds