

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

**In re:** )  
**Multi-Circuit Episcopal Church** ) **Civil Case Numbers:**  
**Litigation** ) CL 2007-248724,  
 ) CL 2007-1625, and  
 ) CL 2007-5250,

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

The Falls Church (“The Falls Church” or “TFC”), by counsel, hereby files its opening post-trial brief regarding The Falls Church Endowment Fund (the “Endowment Fund” or “Fund”). The issue to be adjudicated with regard to Endowment Fund is whether the vestry of The Falls Church or the vestry of the congregation established in late January 2007 and calling itself Falls Church (Episcopal) has the right to appoint the directors of the Fund.

**BACKGROUND**

**1. Establishment and Operation of the Fund.** In 1976, TFC was an unincorporated association operating under Virginia law. In that year, TFC’s vestry established the Endowment Fund 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 mission and outreach ministries of TFC and of the Christian Church in general, rather than for operational purposes of TFC. Tr. 2577:8-2578:19 (Deiss); Tr. 2877:21-2879:3 (Henneberg); DX-FALLS-0369.

From the Fund’s inception in 1976, TFC’s vestry has held the right to appoint the Fund’s directors. Article Fifth of the Fund’s Articles of Incorporation defines “Class A members” of the Fund as “those individuals who are members of the vestry of The Falls Church, Episcopal Church” and states that “Class A members shall have the duty of electing directors of the Corporation”. DX-FALLS-0367-000002; Tr. 2879:16-2881:3 (Henneberg). Similarly, the Fund’s “Class B members” have always been all “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.*

The first contributions used to establish the Fund in 1976 were bequests from people directly to TFC that were to be dedicated to mission work, not used as operating funds. Tr. 2577:20-2578:8 (Deiss). Thereafter, the Fund has been funded primarily by contributions from TFC and its congregants.<sup>1</sup> Tr. 2578:9-12 (Deiss); Tr. 2877:8-2877:16 (Henneberg). Contributors made donations to the Fund by sending their checks to the street address of The Falls Church (115 E Fairfax Street, Falls Church).<sup>2</sup> Tr. 2580:14-20 (Deiss).

Since inception, the Fund has consistently been described—to TFC’s congregants, to other potential contributors, in TFC’s audited financial statements, and in the Fund’s own annual tax returns (often signed by Robin Fetsch) — as one method of donating to The Falls Church or supporting the ministry of The Falls Church. Tr. 2579:7-2580:8 (Deiss). Most contributors found out about the Fund through materials placed by TFC in informational racks in the church, announcements made during TFC worship services, and statements in the annual reports of The Falls Church. Tr. 2579:7-2580:8 (Deiss). TFC’s Annual Reports have described the Fund, in articles signed by Robin Fetsch, as “formed in 1975 to administer bequests to The Falls Church” and as a way to contribute to The Falls Church.<sup>3</sup> 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. Those consolidated audited TFC financial statements treated the

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<sup>1</sup> In one case, a person who had participated in or benefited from the ministries of TFC but who was not a TFC congregant still contributed to the Fund: Cynthia Kuhn, who had been involved with the Fellows Program operated (both before and after the vote) by TFC, made a significant gift specifically designated to benefit The Falls Church Fellows Program. Tr. 2578:9-2579:6 (Deiss); Tr. 2890:17-2892:5 (Henneberg); 2893:15-2894:6 (Henneberg).

<sup>2</sup> TFC’s street address has been the Fund’s corporate address of record from 1976 until unilaterally changed by Ms. Fetsch in late 2007.

<sup>3</sup> DX-FALLS-0305-000032 (2003 Report); DX-FALLS-0306-000032 (2004 Report); DX-FALLS-0307-000044 (2005 Report).

Fund as a subsidiary and a ministry of The Falls Church and treated the assets of the Fund as assets of the consolidated operation.<sup>4</sup>

**2. Events in 2006.** At their regular meeting in November 2006, the five directors of the Fund (Steve Skancke, Dan Henneberg, Priscilla Reimers, Harrison Hutson, and Robin Fetsch) voted unanimously to recommend that the vestry of The Falls Church reappoint Mr. Skancke and Mr. Henneberg to additional five year terms. DX-FALLS-0373 (Nov. 1, 2006 minutes); Tr. 3874:22-2875:21 (Henneberg). At the time, the directors were all well aware of the imminent December 2006 congregational vote regarding disaffiliation from TEC and the Diocese of Virginia. Tr. 2876:6-2877:7 (Henneberg). Secretary Priscilla Reimers communicated the Board's recommendation to the TFC Vestry in a November 7, 2006 memorandum to Wardens Tom Wilson and Carol Jackson. Tr. 2875:22-2876:5 (Henneberg); DX-FALLS-0374.

In late 2006, the directors also reached a "gentleman's agreement" about what should be done with the Fund while there was a dispute between the Diocese and TFC. The directors, including Ms. Fetsch, agreed that until the dispute was resolved, the Fund would "just sit there" and none of the directors would take actions with regard to it. Tr. 2886:7-2887:7 (Henneberg).

In late December 2006 and early 2007, after the congregational vote, Ms. Fetsch corresponded with Cynthia Kuhn and Steve Skancke (with emails copied to TFC Parish Administrator Bill Deiss) about the Fund's Kuhn Memorial account. DX-FALLS-0375 (Dec. 29, 2006 emails); DX-FALLS-0376 (Feb. 29, 2007 letter). These exchanges show Ms. Fetsch interacting with Mr. Skancke in their respective capacities as Treasurer and President of the Fund. There is no suggestion that Mr. Skancke (or Mr. Henneberg or Ms. Reimers) were no longer directors because TFC was no longer an Episcopal church.

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<sup>4</sup> See, e.g., DX-FALLS-0107-000018 to 000019 (2006); DX-FALLS-0104-000017 to 000018 (2005); DX-FALLS-0101-000026 to 000027 (2004); Tr. 2580:2-8 (Deiss).

**3. Events in 2007 and Later.** At its regular June 2007 meeting, the TFC vestry reappointed both Skancke and Henneberg to the Board.<sup>5</sup> Tr. 2876:6-2877:7 (Henneberg). This action was consistent with the Board's November 2006 recommendation and with the directors' "gentlemen's agreement," as it preserved all directors in their existing positions.

Despite the "gentlemen's agreement," on December 3, 2007, Ms. Fetsch exchanged emails with the Diocesan Secretary discussing taking over control of the Fund. DX-FALLS-0392. Ms. Fetsch arranged for the vestry of the Fetsch congregation to purport to appoint three new directors (Robert McCan, Mike Snyder, and Ann Maier) (the "Fetsch Board"), even though the TFC Vestry had reappointed Skancke and Henneberg six months earlier. Without notice to Mr. Skancke, Mr. Henneberg, or even Ms. Reimers (whom Ms. Fetsch admitted in her Dec. 3 email "was still on the Board," DX-FALLS-0392-000001), the Fetsch Board met on December 20, 2007, and purported to authorize Ms. Fetsch to change the addresses and signature authority on all Fund accounts.<sup>6</sup> DX-FALLS-0377-000001 (Dec.20, 2007 minutes). After these changes had been made, Mr. McCan sent Mr. Skancke a letter dated January 20, 2008, asserting that Mr. Skancke, Mr. Henneberg, and Ms. Reimers had been replaced as directors of the Fund and representing that "no funds of the Endowment Fund shall be expended or transferred until the broader questions concerning The Falls Church have been resolved." DX-FALLS-0378-000001.

In July 2008, Ms. Fetsch exchanged emails with Diocesan Treasurer Mike Kerr, discussing the possible use of monies that the Fund had loaned to the Diocesan Missionary Society for the operational purposes of the Fetsch congregation. DX-FALLS-0391. The Fetsch Board ap-

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<sup>5</sup> At both times that the Vestry of The Falls Church appointed him as a director of the Fund in 2003 and again in 2007 after the congregational vote, Mr. Henneberg was serving on the Vestry of The Falls Church. Tr. 2876:6-2877:7 (Henneberg).

<sup>6</sup> At this meeting, Mr. Hutson resigned from the Fetsch Board because "he felt it was not taking the 'high road.'" DX-FALLS-0377-000002.

parently did not take any action regarding release of funds until January 2011, when it decided that it would begin making grants from the Fund, and made several grants. Tr. 1490:3-1491:18 (R. Fetsch). In June 2011, the Fetsch Board appointed by the Fetsch congregation and the Skancke Board appointed by the TFC Vestry entered into a standstill agreement requiring the consent of both boards for any release or transfer of funds held by the Fund.

### **ARGUMENT**

It is undisputed that, at all times prior to conclusion of the 2006 vote, the 1976 Articles and Bylaws of the Endowment Fund gave the vestry of the legal entity then known as The Falls Church the right to appoint the directors of the Fund, and the vestry of The Falls Church regularly exercised that right. What is now in dispute is whether that right to appoint directors was automatically terminated by TFC's December 2006 vote to disaffiliate from The Episcopal Church and was somehow thereby transferred to a new legal entity that did not exist prior to late January 2007. Review of the governing documents of the Fund and the past actions of the Fund, its directors, and The Falls Church, as well as consideration of the two congregations involved here, all demonstrate that the vestry of The Falls Church continues to hold this right to appoint directors of the Fund.

**1. The governing documents of the Fund.** The Articles and Bylaws of the Fund use several different names to refer to The Falls Church. There are three separate references to "The Falls Church" alone – in the name of the organization, in Article Fifth, ¶ B, and twice in Article Ninth. DX-FALLS-0367-000001, 000002, and 000003. There are two references to "The Falls Church, Episcopal Church" – in Article Fifth, ¶ A of the Articles and in Article I, Section 3 of the Bylaws. DX-FALLS-0367-000002. And there is one reference – in Bylaws Article 1, Section 2 – to "The Falls Church, Protestant Episcopal Church." DX-FALLS-0368-000001.

The Fetsch Board misunderstands the use of these terms. In essence, their position is that the use of the phrases “Episcopal Church” and “Protestant Episcopal Church” in the Articles and in the Bylaws establishes an express (and extensive) *restriction* that applies throughout the governing documents – i.e., that The Falls Church can only appoint (and its members can only serve as) directors so long as TFC is an “Episcopal Church.” But the text, context, and application of the Articles and Bylaws demonstrate that these terms are not a restriction but rather a *description*; that is, they identify the legal entity that was using the name “The Falls Church” in 1976. That legal entity was incorporated in July 2006 and is a defendant in this lawsuit.

If the incorporators of the Fund had intended to impose a requirement of continued affiliation with the Episcopal Church as a condition for the right to appoint directors, they could have done so unambiguously, by expressly stating in the Articles that The Falls Church must remain affiliated with the Episcopal Church or the Diocese. They did not. The Articles and Bylaws do not create any role for TEC or for the Diocese – they do not have a Board seat nor any involvement in selection of grantees, nor receive copies of Annual Reports or other information.

If the phrase “Episcopal Church” had been intended as a restriction requiring Episcopal affiliation into the future, it would have been used in other appropriate places in the governing documents. The clearest example is in Article Ninth of the Articles of Incorporation, the dissolution provision required by IRS regulations. A dissolution provision is, of necessity, the most future-oriented element of a nonprofit corporation’s organizing documents. The incorporators could have provided that the congregation’s disaffiliation from TEC or the Diocese or the congregation’s adoption of a different name would be events of dissolution that would require distribution of all remaining assets of the Fund to the Diocese. They did not. Further, Article Ninth provides that, upon dissolution of the Fund, its remaining assets are to be distributed to “The

Falls Church.” DX-FALLS-0367-000003. This specific dissolution clause is in marked contrast to the “generic” dissolution clause used in the articles of many nonprofits, which requires only that upon dissolution the assets be distributed to another qualified §501(c)(3) organization, without naming an intended recipient. Article Ninth *twice* uses the name “The Falls Church” but does not make any reference to “Episcopal Church.” If the intent of the incorporators in using “Episcopal Church” in Article Fifth had been to require continuing Episcopal affiliation, such intent would have also been reflected by using that term (and related language) in Article Ninth to ensure that the assets would be restricted in the same manner in the event of dissolution.

Finally, the only testimony at trial about the use of these terms was by Mr. Henneberg. He testified that the terms “The Falls Church,” “The Falls Church, Episcopal Church,” and “The Falls Church, Protestant Episcopal Church” all described the same entity – the congregation that established the Fund in 1976 and that Mr. Henneberg has continuously attended for the last 29 years – but did not require continuing Episcopal affiliation. Tr. 2879:16-2881:3 (Henneberg).

**2. Past practices of the Fund, its directors, and The Falls Church.** The past conduct of the directors and vestries here also reflects a consistent understanding that TFC holds the power to appoint directors. As discussed above, communications about the Fund since inception, including consolidated financial statements and IRS filings under penalty of perjury, describe the Fund as under the control of, and/or as a way of donating to or supporting the ministry of, a specific congregation – The Falls Church – without regard to its continuing Episcopal affiliation.

Further, all of the Fund directors, including even Ms. Fetsch, continued throughout 2006 and almost all of 2007 to act consistent with the understanding that the TFC vestry continued to hold the power to appoint directors. In November 2006, after The Falls Church had incorporated, and with full awareness of the impending congregational vote on disaffiliation, the direc-

tors of the Fund (including Ms. Fetsch) voted unanimously to ask the TFC Vestry to reappoint Mr. Skancke and Mr. Henneberg. DX-FALLS-0373; Tr. 2876:6-2877:7 (Henneberg). In December 2006 and February 2007, Ms. Fetsch corresponded with donor Cynthia Kuhn, Mr. Skancke, and Mr. Deiss in a manner that implicitly admitted that Mr. Skancke remained the President (and Ms. Fetsch the Treasurer) of the Fund.<sup>7</sup> DX-FALLS-0375; DX-FALLS-0376. All of these actions are inconsistent with the position the Fetsch Board is now taking that disaffiliation from TEC would end TFC's right to appoint directors. Indeed, it was only in December 2007, a year after the congregational vote, that Ms. Fetsch articulated her thoughts about bringing the Fund under the control of the Fetsch congregation in her email to Diocesan Secretary Patrick Getlein and commenced efforts to take over exclusive control. DX-FALLS-0392.

**3. Legal structures and status of the two congregations.** The Fetsch Board appears to claim that the vestry of the Fetsch congregation has somehow succeeded to or acquired the rights of the TFC vestry to appoint directors of the Fund. *See, e.g.*, DX-FALLS-0378-000001 (Jan. 20, 2008 letter from Robert McCan). But these claims are contradicted by the corporate and factual realities reflected in the evidence at trial.

The trial evidence showed that The Falls Church, not the new Fetsch congregation, was and continues to be the entity identified in the Fund's organizing documents. This fact was undisputed for thirty years from 1976 through December 2006. It remained undisputed both before

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<sup>7</sup> Further, the trial evidence demonstrated that the Fund holds donor-designated funds from Ms. Kuhn that are designated specifically for use with The Falls Church Fellows Program. Tr. 2578:9-2579:6 (Deiss); Tr. 2890:17-2892:5 (Henneberg); 2893:15-2894:6 (Henneberg). The evidence established that The Falls Church has continuously operated its Fellows Program, both before and after the December 2006 congregational vote. Tr. 2893:15-2894:16 (Henneberg). There was no evidence that the Fetsch congregation operates a Fellows Program.



and after The Falls Church incorporated under Virginia law in June 2006.<sup>8</sup> For example, the directors of the Fund (including Ms. Fetsch) reaffirmed this right to appoint six months after TFC's incorporation, by unanimously voting to request that the vestry of The Falls Church reappoint Mr. Skancke and Mr. Henneberg as directors of the Fund. DX-FALLS-0373 (Nov. 1, 2006 minutes). It was not until late in 2007 that the Fetsch Board first contested this fact.

In sharp contrast, the undisputed evidence at trial was that the Fetsch congregation, which refers to itself as the Falls Church (Episcopal), is a new entity that did not exist until mid or late January 2007. The Fetsch congregation first began getting together to worship in January 2007, about a month after TFC's congregational vote, with a small minority of about 30 former members of TFC.<sup>9</sup> Tr. 1468:14-1469:17 (Fetsch). The fact that the Fetsch congregation did not exist in 1976, when the Articles and Bylaws of the Fund articulated that The Falls Church would ap-

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<sup>8</sup> In fact, the details of the incorporation of The Falls Church in June 2006 strongly reinforce this proposition. Its Articles and Bylaws both expressly state that the church being incorporated is "**The Falls Church**, also known as **The Falls Church (Episcopal)**, which was established as a church in the Commonwealth of Virginia in A.D. 1732." DX-FALLS-00356C-00005 (Articles of Incorporation, Article 12); DX-FALLS-0362-000001 (2006 Bylaws, Section 1.1). The Articles and Bylaws also both expressly state that, following its incorporation, the Corporation will also continue to operate under and use the name "The Falls Church", as it has done since A.D. 1757. *Id.* See also Tr. 2953:3-2954:17 (Wilson); Tr. 2957:3-2959:5 (Wilson); Tr. 2961:17-2963:19 (Wilson). These documents make clear that the church that in 1976 was in the form of an unincorporated association has adopted a corporate form that is expressly a continuation of its longstanding existence, but now in a legal form that had previously been constitutionally foreclosed to it. Notably, in June 2006, while serving on TFC's vestry, Mr. Fetsch apparently agreed, as he voted in favor of the Incorporation Resolution, Articles of Incorporation, and Bylaws.

<sup>9</sup> Indeed, although the Fetsch congregation claims to be "The Falls Church" for purposes of attempting to exercise TFC's rights to appoint directors of the Fund and of asserting an interest in its property, the Fetsch congregation has never undertaken any of the pre-existing obligations of The Falls Church from prior to the 2006 vote, such as to pay vendors for pre-vote services and products, to obtain property, casualty or liability insurance on the property, to pay employees for pre-vote work, to either continue employees' employment or discharge them, and/or to issue COBRA notices to the pre-vote employees, all of whom continued their employment with The Falls Church post-vote. Tr. 1475:8-1479:6 (Fetsch). By contrast, TFC continued to fulfill all of these responsibilities. Tr. 2463:12-2468:6 (Deiss). It was TFC, not the new Falls Church (Episcopal) that provided tax statements of contributions to TFC for the entire year 2006.

point the Fund's directors and receive its assets in the event of dissolution, is sufficient evidence that the Fetsch congregation cannot be the church identified in those organizing documents. The fact that the Fetsch congregation chooses to call itself "Falls Church Episcopal" cannot alter these underlying historical, legal, and practical realities.

### CONCLUSION


At heart, the conflict here is over whether the purpose of the vestry of The Falls Church in establishing the Fund in 1976 was to ensure that the Fund supported and was controlled by a specific congregation – The Falls Church – or by any congregation (including one that did not yet exist at that time) so long as the congregation had a particular name and a particular affiliation. To adopt the second perspective would exalt semantics over substance and contravene the governing documents of the Fund and thirty years of actual practice by the Fund and The Falls Church. TFC respectfully submits that the first perspective correctly focuses on the continuity of the church – TFC is the same church that originally established the Fund in 1976 and must continue to exercise the same right to appoint directors that it exercised for more than thirty years.


Dated: August 5, 2011

Respectfully submitted,


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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5<sup>th</sup> day of August, 2011 a copy of the foregoing The Falls Church's Opening Post-Trial Brief Regarding The Falls Church Endowment Fund was sent by electronic mail to:

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