

# FAX TRANSMISSION

**Hon. Ferris D. Lebous  
Justice, Supreme Court  
Broome County Courthouse  
P.O. Box 1766  
Binghamton, New York 13902  
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Date: April 23, 2009

Numbers of Pages: 16 (Including cover page)

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From: Sue Tripp  
Secretary to Hon. Ferris D. Lebous

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Re: The Diocese of Central New York and Church Church  
vs. The Rector, Church Wardens and Vestrymen of the Church  
of the Good Shepherd and Alliance Bank, N.A.

Decision & Order is faxed herewith.



*Supreme Court*  
*State of New York*

*Ferris D. Lebos*  
*Justice*

*Broome County Courthouse*  
*P.O. Box 1706*  
*Binghamton, N. Y. 13902*  
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April 23, 2009

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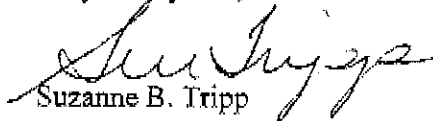
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**Re: The Diocese of Central New York and Christ Church vs. The Rector, Church  
Wardens and Vestrymen of the Church of the Good Shepherd and  
Alliance Bank, N.A.  
Broome County Index No. 2008-0980; RJI No. 2008-0637**

Counselors:

Enclosed herewith is a copy of the court's Decision and Order regarding the above matter. The original Decision and Order was filed with the Broome County Clerk's Office on April 23, 2009.

Very truly yours,

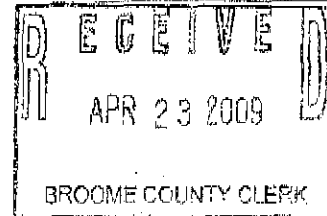
  
Suzanne B. Tripp  
Secretary to Hon. Ferris D. Lebos

enc.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, 92 Court Street, Binghamton, New York, on the 20<sup>th</sup> day of March, 2009.

PRESENT: HON. FERRIS D. LEBOUS  
Justice, Supreme Court.

STATE OF NEW YORK  
SUPREME COURT : : BROOME COUNTY



THE DIOCESE OF CENTRAL NEW YORK  
and CHRIST CHURCH,

Plaintiffs,

-vs-

THE RECTOR, CHURCH WARDENS,  
AND VESTRYMEN OF THE CHURCH  
OF THE GOOD SHEPHERD, and  
ALLIANCE BANK, N.A.,

Defendants.

DECISION AND ORDER

Index No. 2008-0980  
RJI No. 2008-0637-M

APPEARANCES:

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**FERRIS D. LEBOUS, J.S.C.**

Defendant The Rector, Church Wardens, and Vestrymen of the Church of the Good Shepherd moves for an order: (1) dismissing the fourth cause of action involving a trust created pursuant to the Last Will and Testament of Robert A. Branam (hereinafter "Branam Trust"); (2) transferring this case to surrogate's court; and (3) striking the note of issue, plus costs and disbursements on the motion. Plaintiffs The Diocese of Central New York (hereinafter the "Diocese") and Christ Church cross-move for an order granting summary judgment on the fourth cause of action. Additionally, defendant The Rector, Church Wardens, and Vestrymen of the Church of the Good Shepherd (hereinafter "The Church of the Good Shepherd") submits an accounting to which the Diocese submits objections. Defendant Alliance Bank takes no position on either application. The court heard oral argument from counsel on March 20, 2009.

**BACKGROUND**

The history of this matter need not be recited here, but is more fully set forth in the prior Decision & Order of this court dated January 8, 2009. Briefly, however, Good Shepherd existed as a parish church of the Diocese until 2007 when it chose to disaffiliate from the Protestant Episcopal Church in the United States of America (hereinafter "The Episcopal Church"). In this court's prior Decision & Order dated January 8, 2009, the court granted the Diocese's motion for summary judgment declaring it was entitled to immediate possession of all of Good Shepherd's real and personal property, as well as an accounting relating thereto and denied Good Shepherd's cross-motion for dismissal.

## DISCUSSION

### **I. PROCEDURAL ISSUES**

#### **A. Request for Transfer to Surrogate's Court**

Good Shepherd argues that since the sole remaining cause of action - the fourth - involves a will construction that this matter should be transferred to surrogate's court. Good Shepherd does not claim that supreme court lacks jurisdiction, only that practice dictates that a matter involving such a specialized area of the law be transferred to the court with the most experience in that area. As stated on the record during oral argument, this court finds that its extensive familiarity with this case overrides any other concerns and, as such, Good Shepherd's motion to transfer this matter to surrogate's court is denied.

#### **B. Attorney General Notification**

EPTL § 8-1.4(e)(1) states, in pertinent part, as follows:

[w]hensoever any trustee or other person, holding property or any income therefrom, which may be required at any time to be devoted to charitable purposes, shall file in any court in this state (A) any petition for instructions relating to the administration or use of such property or income, (B) any petition for the construction of the instrument under which such property or income is held, (C) any petition respecting the disposition or distribution of such property or income or (D) any accounting, due notice of the action or proceeding shall be served by the petitioner upon the attorney general together with a copy of any petition, accounting, will or trust instrument.

The parties disagree on whether EPTL § 8-1.4(e)(1) is applicable to the case at bar. It is noteworthy that the trustee here, defendant Alliance Bank, took the position during oral argument

that notification to the New York State Attorney General's Office under this provision is not warranted. The court finds that this provision does not apply since the action here was not filed by the "trustee or other person" and, as such, notice to the Attorney General is not required.<sup>1</sup>

**C. Multiple motions to dismiss**

CPLR § 3211 (e) states, in part, that "[a]ny time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted." The Diocese argues that Good Shepherd's instant motion violates the one motion rule under CPLR § 3211 (e).

Some review of the background in this matter is warranted. This action was commenced on April 15, 2008. The original complaint included a fourth cause of action regarding the Branan Trust. A verified answer was submitted by Good Shepherd on July 25, 2008. In December 2008, Good Shepherd filed a motion to dismiss addressing a variety of issues, including the Branan Trust. By Decision and Order dated January 8, 2009, this court did not address the merits of Good Shepherd's first motion to dismiss the fourth cause of action, but rather stated that "leave [was] granted to the Diocese to amend the complaint to add the Branan Trust trustees and Christ Church as necessary parties" (Decision & Order, p 8). On January 16, 2009, plaintiff filed an amended summons and amended complaint adding Christ Church as a plaintiff and the trustee, Alliance Bank, NA, as a defendant.

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<sup>1</sup>This court also notes that this argument was raised by Good Shepherd for the first time well after this matter had been pending for over one year.

In view of the fact that this court did not previously address the merits of defendant's prior (cross) motion to dismiss the fourth cause of action, the court finds that this second motion to dismiss does not violate the spirit of CPLR § 3211 (e).

**D. Discovery**

The court rejects Good Shepherd's argument that additional discovery is required with respect to the fourth cause of action. Lengthy depositions and paper discovery have been exchanged in this matter which included the subject of the fourth cause of action, namely the Branan Trust. No further discovery on these issues is warranted, with the exception of discovery by the Diocese on the accounting as permitted hereinbelow. Thus, Good Shepherd's motion to strike the note of issue is denied.

**II. SUBSTANTIVE ISSUES**

Plaintiffs' fourth cause of action seeks a declaration that by virtue of Good Shepherd's decision to disaffiliate from the Episcopal Church, Good Shepherd is no longer the beneficiary of the Branan Trust. Rather, plaintiffs contend that the beneficiary should be either Christ Church as the alternate beneficiary or, in the alternative, the Diocese as the judicially declared owner of all of Good Shepherd's property.

By way of this motion, Good Shepherd seeks to dismiss the fourth cause of action on the grounds that its continuing legal existence entitles it to remain as the primary beneficiary of the Branan Trust. Plaintiffs' cross-motion seeks summary judgment on said fourth cause of action.

In other words, both parties seek a determination of the construction and effect of Paragraph SEVENTH of the Last Will and Testament of Robert A. Branan who died on December 16, 1986 leaving a testamentary trust.

As with any construction proceeding, the first and foremost consideration of the court is to ascertain and to give effect to the testator's intentions (*Matter of Jones*, 38 NY2d 189 [1975]). Towards this end, a verbatim recitation of the key provisions of Mr. Branan's Last Will and Testament is warranted:

FIFTH: I give and bequeath to the RECTOR, WARDENS AND VESTRYMEN OF THE CHURCH OF THE GOOD SHEPHERD, of 74 Conklin Avenue, Binghamton, New York 13903, the sum of One Thousand Five Hundred Dollars (\$1,500.00), together with all my diamond, ruby and opal rings for the purpose of creating a chalice and paten with the heretofore mentioned jewels to be set into and become part of said chalice, which said chalice and paten shall be inscribed "To the Glory of God and In Memory of William and Alice Branan, Robert A. Branan, Grace Geckle Branan, Evelyn Nichols Branan." In the event that I am survived by a wife or that a wife of mine, who shall have predeceased me, and not hereinbefore named, her name shall likewise be inscribed on said chalice and paten.

SIXTH: All the rest, residue and remainder of my property wheresoever situate, to which I may be entitled or over which I may have any disposing power I give, devise and bequeath to my Trustee, hereinafter named, in trust, to invest and reinvest the same, to collect the income therefrom and to pay the annual income therefrom, in quarterly installments, as follows:

A. To THE ALL SAINTS MEMORIAL FUND OF THE CHURCH OF THE GOOD SHEPHERD 74 Conklin Avenue, Binghamton, New York 13903, Twenty-Five Percent (25%) thereof.

- B. To GRACE FELTER [address omitted], Forty-five Percent (45%) thereof.
- C. To EVA WINCEK [address omitted], Thirty Percent (30%) thereof.

Upon the death of either GRACE FELTER or EVA WINCEK the survivor of them shall during her lifetime be paid such deceased persons share of said income. Upon the death of the survivor of GRACE FELTER or EVA WINCEK, said trust shall terminate and I give, devise and bequeath the entire principal then remaining in said trust, and any accumulated and unpaid income, to the RECTOR, WARDENS AND VESTRYMEN OF THE CHURCH OF THE GOOD SHEPHERD to be held by them as a memorial fund in memory of the persons whose names are to be inscribed on the chalice and paten, to be known as the Branan Memorial Fund. Said Rector, Wardens and Vestrymen shall hold said fund in trust nevertheless to invest and reinvest the same, to collect the income therefrom and use the income for general church purposes.

SEVENTH: In the event The Church of the Good Shepherd shall cease to exist or shall merge with another church, the bequests set forth in paragraphs FIFTH and SIXTH shall be to the successor by merger church or in the event said church ceases to exist such bequests shall be to the RECTOR, WARDENS AND VESTRYMEN OF CHRIST EPISCOPAL CHURCH OF BINGHAMTON, by whatever name known.

(Last Will and Testament of Robert A. Branán, pp 4-6, emphasis added).

The parties' positions are relatively straightforward. The parties disagree as to the meaning of the phrase "shall cease to exist" as used in relation to Good Shepherd in the SEVENTH paragraph of Mr. Branán's Will. Good Shepherd argues it is still in existence and thus is entitled to remain as the beneficiary of the Branán Trust. The Diocese argues Good Shepherd no longer exists within the meaning of Branán Trust and that said trust monies should

go to Christ Church as the alternate beneficiary or, in the alternative, to the Diocese itself.

The question presented to this court is what was Mr. Branan's intent when he used the phrase "[i]n the event The Church of the Good Shepherd shall cease to exist"? Not surprisingly, Good Shepherd presents the technical legal argument, while the Diocese argues the ecclesiastical-based interpretation.

Good Shepherd argues that while it may have disaffiliated with The Episcopal Church such a disaffiliation does not equate to a legal dissolution. More specifically, Good Shepherd emphasizes that no formal dissolution proceedings have been initiated, let alone completed, for either a judicial or non-judicial dissolution under the Not-For-Profit Corporation Law or a dissolution under the Religious Corporation Law.

The Diocese contends that Good Shepherd no longer exists within the meaning of the Branan Trust. The Diocese asserts there can be little doubt that Mr. Branan intended to benefit an Episcopal Church based upon his choice of another Episcopal Church, Christ Church, as his alternate beneficiary.

In this court's view, Mr. Branan's Last Will and Testament provides the answer to the question presented. Mr. Branan named The Church of the Good Shepherd - an Episcopal Church - as his primary trust beneficiary. Mr. Branan named Christ Church - the oldest Episcopal Church in the City of Binghamton - as his alternate beneficiary. The court finds Mr. Branan's

choice of a second Episcopal Church as his alternate beneficiary most telling. Based upon this language alone, the court finds that Mr. Branan's intent was to benefit an Episcopal Church.

Additionally, however, this record reflects Mr. Branan's connection to the Episcopal faith and understanding of the relationship between a local parish and the Diocese by way of his involvement with Good Shepherd during his lifetime. Mr. Branan served as Clerk of the Vestry at Good Shepherd and, in that capacity, executed applications to supreme court to sell or mortgage real property which contained recitations of Good Shepherd's relationship with the Diocese, as well as having annexed thereto the consents of the Bishop for property transactions.

Although not pertinent to the issue of the testator's intent, the court finds instructive the actions and representations of Good Shepherd and/or its former Rector Matt Kennedy. It is undisputed that in July 2006, Good Shepherd adopted a Resolution declaring it intended to dissociate itself from The Episcopal Church and the Diocese. On November 8, 2007, Good Shepherd passed a resolution stating that they "[d]issociate and end our affiliation with The Episcopal Church in the United States of America and the Episcopal Diocese of Central New York and apply for membership within the jurisdiction of the Anglican Church of Kenya". Additionally, Matthew Kennedy renounced his ministry within the Diocese and The Episcopal Church. On December 9, 2008, The Church of the Good Shepherd filed a Certificate of Amendment, the sole purpose of which was to delete all references to The Episcopal Church and stated instead that it would be in communion with the Anglican Province of Kenya. Additionally, Mr. Kennedy's recent statements cannot be ignored including that "The Anglican



Church of the Good Shepherd was born last week" and that "seven of your fellow parishioners...signed the legal papers to establish a new church corporation called *The Anglican Church of the Good Shepherd*" (Affidavit of Jonathan B. Fellows, Esq. sworn to March 7, 2009, Exhibit D). Finally, it is also noteworthy that any revenue being collected during the pendency of this matter was not been funneled to the Church of the Good Shepherd, but rather a separate entity named St. Matthias Society, Ltd.

It should also go without saying that the Diocese and The Episcopal Church themselves no longer view Good Shepherd as an Episcopal parish. In fact, in November 2008, the Diocese's Annual Convention passed a resolution that Good Shepherd was no longer a parish in union with the Convention (Affidavit of Karen C. Lewis sworn to March 10, 2009, Exhibit A).

Based upon the foregoing, this court finds that The Church of the Good Shepherd no longer exists as an Episcopal church, no longer exists in name, and no longer exists within the meaning of the Branam Trust. While The Church of the Good Shepherd may well exist in the legal world as a shell corporation that formerly held its property, but not (yet) dissolved under the auspices of the Not-For-Profit Corporation Law and/or Religious Corporation law, applying such a technical argument to Mr. Branam's intent would violate the spirit of his bequest. Stated another way, while Good Shepherd may have abandoned the Episcopal faith, Mr. Branam never did, and his intent was clearly to benefit a local *Episcopal* Church. By all accounts, Mr. Branam was an active member of The Episcopal Church and there is simply no basis on which to find that Mr. Branam would want his money to go to those former members of The Church of the

Good Shepherd that abandoned the faith that he, apparently, held so dear.

In sum, this court finds that an examination of Mr. Branan's Will clearly leads to the conclusion that the intention of the testator was to benefit an Episcopal Church. Accordingly, defendant Good Shepherd's motion to dismiss the fourth cause of action is denied, and plaintiffs' cross-motion for summary judgment on the fourth cause of action is granted. The court finds that The Church of the Good Shepherd no longer exists within the meaning of the Branan Trust and, as such, Christ Church, as the alternative beneficiary is now the primary beneficiary under the terms of the Branan Trust.

### III. ACCOUNTING

The Church of the Good Shepherd has submitted an accounting identifying certain real and personal property including, but not limited to, real property located at 74 Conklin Avenue, Binghamton (the church building) and 78 Kendall Avenue, Binghamton (the rectory, single family), tangible personalty, various bank accounts held at M&T and Pennstar Bank, as well as an unidentified number of IBM shares located in the church safe.

The Diocese has submitted a variety of objections to the accounting, but primarily disputes the time span of the accounting and missing tangible personalty. With respect to the time span, the Diocese argues that the accounting starts too late in time and should have started in November 2007, the date on which the Vestry adopted a resolution ending its affiliation with The Episcopal Church. With respect to missing personalty, the Diocese notes that the IBM

shares have not been tendered nor were not located in the church safe as indicated.<sup>2</sup>

As indicated during oral argument, the court finds some of these allegations troubling. Good Shepherd's own counsel intimidated that parish members may have removed personal property to express their displeasure at this court's prior Decision & Order. Additionally, there is an obvious lack of income flowing into Good Shepherd after April 2008.<sup>3</sup> In other words, since April 2008, Good Shepherd was meeting, but no pledge and plate revenue is identified during that time. Rather, the Diocese alleges that Good Shepherd was spending down an endowment fund to pay for daily operations and diverting income elsewhere (Supplemental Affidavit of Jonathan B. Fellows, Esq. sworn to March 19, 2009).<sup>4</sup> Quite simply, the court finds this record disturbing. On its face, it appears that the parish was doing everything it could to spend down the assets, divert new income, and perhaps even actively interfere with the Diocese's right of ownership. The court finds that the Diocese has every right to conduct an investigation into the income and property of Good Shepherd and may start with, as requested, a deposition of the officials it deems proper, likely Mr. Kennedy and the treasurer as mentioned during oral argument. The court directs that Mr. Kennedy and the treasurer appear for depositions within 45

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<sup>2</sup>In a post-motion submission, Good Shepherd advised the court and counsel that it was able to locate some previously missing property, including the IBM stock.

<sup>3</sup>The court finds Good Shepherd's argument that the Diocese failed to properly raise this issue in the objections to accounting to be without merit. The court finds the Diocese's objections to be broad enough to include such allegation, particularly paragraph 3 of said objections.

<sup>4</sup> The role of the St. Matthias Society, LTD in this matter is unclear on this record with respect to potentially diverted funds.

days of the date of this Decision at a date, time, and location selected by plaintiffs' counsel.

Any and all other motions not specifically addressed are denied.

### CONCLUSION

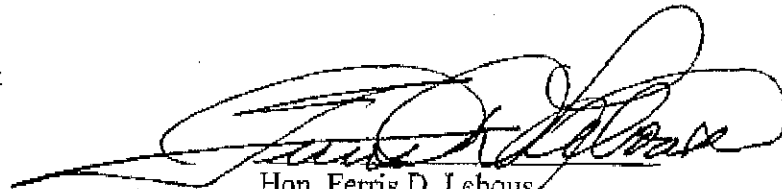
Based upon the foregoing, the court finds as follows:

- 1) Defendant Good Shepherd's motion to dismiss the fourth cause of action is DENIED in its entirety; and
- 2) Plaintiffs' cross-motion for summary judgment on the fourth cause of action is GRANTED, namely that The Church of the Good Shepherd no longer exists within the meaning of the Branan Trust and, as such, Christ Church, as the alternative beneficiary is now the primary beneficiary under the terms of the Branan Trust.

The foregoing constitutes an order of the court. Plaintiff is granted motion costs.

It is so ordered.

April 22, 2009  
Binghamton, New York



Hon. Ferris D. Lebus  
Justice, Supreme Court