

DISTRICT COURT, EL PASO COUNTY, COLORADO
Court Address: 270 S. Tejon (80903), P.O. Box 2980
Colorado Springs, CO 80901
Phone Number: (719) 448-7577

Plaintiff and Counterclaim Defendant:

GRACE CHURCH & ST. STEPHEN'S, a Colorado
nonprofit corporation,
v.

Defendants and Counterclaimants:

THE BISHOP AND DIOCESE OF COLORADO, a
Colorado nonprofit corporation; and THE EPISCOPAL
CHURCH,

and

Third Party Counterclaimants:

THE DIOCESE OF COLORADO IN THE EPISCOPAL
CHURCH; *et al.*
v.

Counterclaim Defendants:

REV. DONALD ARMSTRONG III; *et al.*,

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• COURT USE ONLY •

Case No. 2007CV1971

Div.: COM5

**EPISCOPAL CHURCH ENTITIES' SUPPLEMENT
TO THE MAY 2, 2008 ARGUMENT
(Commercial Docket)**

During the final May 2 rebuttal argument, when there was no opportunity for reply, counsel for the Individual Counterclaim Defendants argued at length that the alleged 1973 corporation "existed" because the state had issued a certificate of good standing.

This argument not only ignored that the legal effect of the 1973 filing was to reinstate a defunct 1923 corporation, it also ignored that the law distinguishes between corporate "existence" and corporate ability to act. The Episcopal Church Entities, therefore, attach a copy of pages 17 through 21 of their March 26, 2008 Joint Reply (Lexis/ Nexis transaction no. 19158507) where the legal authorities recognizing this distinction were explained.

For these additional reasons, the Court should find that the 1973 "corporation" is no more than a quasi-corporation; that it has no ability to act or manage its affairs; that the Secessionist Congregation is not the 1973 "corporation," and the Wroblewski Vestry is not its board of directors.

Respectfully submitted,

ROTHGERBER JOHNSON & LYONS LLP

/s/

L. Martin Nussbaum Atty. Reg. # 15370
Attorneys for the Episcopal Church Entities

CERTIFICATE OF SERVICE AND MAILING

On May 6, 2008, I served, via LexisNexis File & Serve, a copy of the foregoing to:

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On May 6, 2008, I mailed a copy of the foregoing to:

Chad Friese, Junior Warden
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/s/

_Karen Lutterschmidt

**EXCERPT FROM EPISCOPAL CHURCH ENTITIES'
JOINT REPLY OF MARCH 26, 2008 (Lexis/Nexis Transaction No. 19158507, pp. 17-21)**

**V.
THE COURT MUST DENY FATHER ARMSTRONG'S MOTION TO QUASH
AND ENTER PARTIAL SUMMARY JUDGMENT
DECLARING THAT THE SECESSIONIST CONGREGATION
IS AN UNINCORPORATED NONPROFIT ASSOCIATION.**

Father Armstrong's Motion to Quash Service of Process upon the Secessionist Congregation as an association was based on little more than his assertion that "[t]here is no legal entity that is an "unincorporated nonprofit association" known as Grace & St. Stephen's, nor as a matter of law, can there be this fictional entity," Quash Motion ¶ 1, and his similar affidavit.

The Joint Response takes a different tack. It abandons Father Armstrong's contention that associations are fictional. It does not doubt that associations exist under the common law. It does not disagree that, when "two or more members join[] by mutual consent for a common, lawful, nonprofit purpose" and do not incorporate, their common enterprise is performe an association under the Colorado Uniform Unincorporated Associations Act. Colo. Rev. Stat. § 7-30-101(2). And it does not contest that, most churches are, under civil law, unincorporated nonprofit associations as explained in ECE 2-27-08 Brief at 5-7.

Father Armstrong and the secessionists now oppose characterizing their congregation as an association by contending that it incorporated in 1973 and, as proof, invoke the certificate of incorporation issued by the Colorado Secretary of State. Response Brief at 5.

A. There Is a Difference Between Corporate "Existence" and Corporate Ability to Act. The secessionists' argument about the existence of the 1973 "corporation" is a "straw man," *see* Joint Response at 4, because the Episcopal Church Entities have previously allowed that the 1973 filing may have resulted in a *de jure* corporation, ECE 2-13-08 Brief at 20. The secessionists erect this straw man regarding the "existence" of the 1973 "corporation" hoping that it will distract the Court from inquiring whether the "corporation" could function, and, if so, whether it could do so through Father Armstrong and the Wroblewski Vestry.

Consider a scenario in which a person prepares articles of incorporation for “Wonderland, Inc.,” signs them for the incorporators as “M. Hare, W. Rabbit, and C. Cat;” files them; and the Secretary of State issues a certificate of incorporation. The 1973 Code appears to say that this results in a *de jure* corporation with existence. See Colo. Rev. Stat. § 7-21-103(1) (1973). But this mere existence is insufficient for the corporation to act and manage its affairs.

If the 1973 “articles” brought a new corporation into existence, those minimal form “articles” and the subsequent failures to adopt bylaws, keep minutes, and organize the corporation violated these 1973 Code requirements:

- ! § 7-22-103 (a corporation cannot take a “corporate name . . . the same as or deceptively similar to the name of any corporation”);
- ! § 7-23-102 (a corporation must adopt bylaws for “the regulation or management of the affairs of the corporation”);
- ! § 7-21-105(1) (a corporation must hold an organizational meeting “for the purpose of adopting bylaws [and] electing officers”);
- ! § 7-23-101(1) (“If the corporation has . . . members . . . , th emanner of election or appointment, and the qualifications and rights of members . . . shall be set forth in the articles . . . or the bylaws.”);¹
- ! § 7-20-101(9) (a corporation with members must provide for them in its articles or bylaws);
- ! § 7-23-104(1) (a corporation with members must adopt rules regarding annual membership meetings);
- ! § 7-24-101(3) (a corporation must define the method for appointing or electing successor directors in its articles or bylaws);
- ! § 7-24-107(3) (a corporation with nontraditional titles for officers--like rector, warden, and clerk--must provide for such titles in its articles or bylaws); and
- ! § 7-24-109 (a corporation must keep minutes of member, director, and committee meetings).

These deficiencies matter. They ensured, as a matter of law, that the 1973 “corporation,” had no members, Part II(A), *supra*; no successor directors, Part II(B), *supra*; no officers, Part

¹Because the Episcopal Church Entities cited this particular provision during the May 2 oral argument, they have added it to this list here.

II(C), *supra*; and no rector, wardens, or clerk, Part II(D), *supra*. Without such personnel, the “corporation” could not act. Burgess v. Federated Credit Service, Inc., 365 P.2d 264, 265 (Colo. 1961) (“a corporation cannot of itself perform any act except through authorized agents or officers elected by its directors”); Home Builders Co. v. Reddin, 48 P.2d 800, 802 (Colo. 1935) (corporation acts only through its lawfully authorized agents). This is why the secessionists claim that the 1973 “corporation” filed annual corporate reports is false because, as a matter of law, it had no personnel to act on its behalf.

The post-incorporation organizing of a corporation is indispensable for it to be able to manage its affairs and conduct business.² This is why corporation law distinguishes between existence and the ability to manage affairs and do business.

The time a corporation commences *to do business* does not necessarily mark the beginning of its corporate *existence*. So a corporation may acquire its corporate *existence* although it has not yet complied with conditions precedent to its right *to commence business or to exercise the powers conferred* (emphasis added).

8 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 4066 (2007).

The adoption of bylaws was critical for the 1973 “corporation” to organize itself. The by-laws of a corporation are the rule of its life. A corporation may begin to live the moment its charter issues, but it may not be able to act for the purposes of its creation until those to whom the franchises are given, and who make up its corporate existence, have agreed how it shall act, what it shall do, and who shall immediately direct its conduct. The agreement of the members of a corporation as to what shall be its mode of life is found in its by-laws, and their first and most important duty is to adopt them.

Bagley v. Reno Oil Co., 50 A. 760, 761 (Pa. 1902).

Unlike the 2008 Code, the 1973 Code mandated prompt adoption of bylaws. *See* Colo. Rev. Stat. §§ 7-23-102, 7-21-105(1)(1973); Colo. Rev. Stat. § 7-122-106 (2008). The likely reason for the difference is that, unlike the 1973 Code, the 2008 Code includes numerous default provisions that provide a governance structure if the directors fail to adopt bylaws.

²The organizing of a corporation including “the election of officers [and] the adoption of by-laws” is needed to endow an entity with ability “to transact the legitimate business.” Omaha Nat’l Bank v. Jensen, 58 N.W.2d 582, 584 (Neb. 1953) *quoting* 18 C.J.S. Corporations § 63; *see also* 8 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 3738 (2007); 18A Am. Jur. 2d Corporations § 184 (). “Without such organization, the corporation . . . can do no corporate act, can receive no corporate property, and can incur no corporate liability” 8 Fletcher, *supra*, § 3737.

Aspen Water & Light Co. v. City of Aspen, 37 P. 728 (Colo. App. 1894) is relevant. The City of Aspen awarded a contract to Aspen Water after it had incorporated but before it had organized itself by issuing stock, electing officers, and transferring assets to it. The city revoked the contract. Upholding the city's revocation, the Court of Appeals acknowledged that, upon issuance of the certificate of incorporation, "it may be true that *for some purposes* the corporation has an existence." Id. at 730 (emphasis added). It then reasoned:

It only remains to determine the legal consequences which flow from the failure to complete the organization In some states the general incorporation act provides that upon the filing of the certificate the persons who sign it, and their successors, shall become a body corporate, and be invested with certain powers. But even in a case like that the authorities hold that it only becomes a *quasi* corporation, invested possibly with certain power for certain limited purposes. **In reality it becomes a corporation only in name.** It is universally agreed that a corporation cannot exist without stockholders or members. As said by the learned Commissioner Pattison . . . , "without organization and members, and without officers and stockholders, a corporation is but a naked body."

Id. at 730-31 (emphasis added). The Court of Appeals then held that even though articles were properly filed, "[t]he entity never was born, and hence the grant never took place. . . . The company never had any legal president and never had any legal secretary, and consequently the so-called contract was never executed." Id. 731.

For these reasons and also by application of First Amendment principle described in Part I, *supra*, the Court should declare that the Secessionist Congregation is not the 1973 "corporation," and neither the Wroblewski Vestry, its successors, Father Armstrong, Ms. Schaeffer, Mr. Wroblewski, Mr. Friese, or Ms. Spencer serve as officers or directors of that "corporation."