

Record No. 120919

In the Supreme Court of Virginia

**The Falls Church (also known as The Church at the Falls –
The Falls Church), Defendant-Appellant and Cross-Appellee,**

v.

**The Protestant Episcopal Church in the United States of America
and The Protestant Episcopal Church in the Diocese of Virginia,
Plaintiffs-Appellees and Cross-Appellants.**

**BRIEF FOR APPELLEE-CROSS-APPELLANT
THE EPISCOPAL CHURCH**

David Booth Beers (*pro hac vice*)
dbeers@goodwinprocter.com
Adam M. Chud (*pro hac vice*)
achud@goodwinprocter.com
Goodwin Procter LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
202-346-4000 (telephone)
202-346-4444 (facsimile)

Mary E. Kostel (VSB #36944)
mkostel@goodwinprocter.com
The Episcopal Church
c/o Goodwin Procter LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
202-346-4000 (telephone)
202-346-4444 (facsimile)

Counsel for The Episcopal Church

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Protestant Episcopal Church in the United States of America (“The Episcopal Church” or the “Church”) agrees with and adopts all of the arguments set forth in the brief filed by the Protestant Episcopal Church in the Diocese of Virginia (the “Diocese”). The Church writes separately, however, in order to address several issues raised by Appellant The Falls Church (“TFC”) that are of particular concern to the Church, and that bear upon the larger state of the litigation nationwide concerning the rights to control local Episcopal church property. In particular, this brief will address the following points:

1. The Circuit Court’s ruling that the Church and the Diocese have a “contractual and proprietary interest” in the property held by TFC was consistent with the great majority of decisions from courts across the country which have barred individuals who left the Church from taking local Episcopal church property for use by a different religious denomination. Because those cases involved virtually identical facts and legal standards, they support the Circuit Court’s decision here.

2. TFC attempts to strip this case of the context in which it arises – that is, as an “intrachurch” dispute and not a dispute between independent secular entities operating at arms length. As the U.S.

Supreme Court has said, intrachurch disputes implicate the First Amendment in ways that ordinary, secular disputes do not. The approach set out by this Court in *Green v. Lewis*, 221 Va. 547 (1980), takes proper account of the First Amendment principles implicated in these disputes, and should not be abandoned here. TFC’s argument that the Circuit Court erred because it did not apply the legal rules that would govern disputes involving homeowners’ associations or other secular groups – rules that *Green* itself did not apply – should be rejected.

3. TFC claims that by finding that the Church and the Diocese had a “contractual and proprietary interest” in the property held by TFC, the Circuit Court threatened TFC’s “religious liberty.” But religious liberty is advanced by allowing individuals to devise their own forms of church governance and rules, and by civil courts upholding and enforcing those rules when they are called upon to do so. The religious liberty that TFC seeks to advance would protect the rights of independent, congregationalist churches, but limit the rights of hierarchical churches such as The Episcopal Church. That is contrary to the First Amendment.

4. The Circuit Court’s decision should be affirmed on the alternative ground that the Church and the Diocese’s express property trust rules are valid and dispositive of this dispute. The Circuit Court erred in

holding that Va. Code § 57-7.1 does not validate denominational property trust rules, such as those adopted by the Church and the Diocese, and by rejecting the Church and the Diocese's constitutional challenge to the refusal to enforce those rules. None of the justifications for Virginia's historical refusal to enforce denominational trusts applies any longer, given the passage of § 57-7.1. If the Court enforced the Church's and the Diocese's express property trust rules, those rules would provide an independent basis for finding that the disputed property must be used for the benefit of the Church and the Diocese, and may not be taken for use by another religious denomination.

ASSIGNMENT OF CROSS-ERROR

The Circuit Court erred by holding that Va. Code § 57-7.1 does not validate trusts for the benefit of hierarchical churches and by rejecting the Church's constitutional challenge to the Circuit Court's interpretation of that statute. This issue was preserved in the Post-Trial Response Brief for The Episcopal Church and the Episcopal Diocese of Virginia (filed Sept. 16, 2011) at 65-85, among other places.

STANDARD OF REVIEW

The standard of review applicable to TFC's assignments of error and to the Church's assignment of cross-error is *de novo* review, for legal error.

ARGUMENT

I. THE CIRCUIT COURT’S DECISION IS CONSISTENT WITH THE DECISIONS OF COURTS ACROSS THE COUNTRY IN CASES INVOLVING LOCAL EPISCOPAL CHURCH PROPERTY.

(Assignment of Error Nos. 1, 2, and 3)

A. Courts In Other States Have Overwhelmingly Found That Former Members Of Local Episcopal Churches May Not Take The Local Property And Use It For The Benefit Of A Different Denomination.

The Diocese’s brief details why the Circuit Court properly applied the relevant legal standards set forth in *Green, Norfolk Presbytery v. Bollinger*, 214 Va. 500 (1974), and *Diocese of Southwestern Virginia of the Protestant Episcopal Church v. Buhrman*, 5 Va. Cir. 497 (Clifton Forge 1977). It is notable, however, that during the past three decades, many courts across the country have considered whether former members of the Church may take local Episcopal church property and use it for the benefit of a different denomination. These decisions include several issued after the Circuit Court made its ruling in this case. Those courts have overwhelmingly found that the Constitutions and canons of the Church and the respective Church Dioceses are legally cognizable and enforceable, and concluded that former Episcopalians may not remove local church, or “parish,” property from the Church. Although these decisions do not bind this Court, as the Supreme Court of California stated, they are “persuasive, especially in the aggregate.” *Episcopal Church Cases*, 198 P.3d 66, 82 (Cal. 2009).

These decisions include the following:

- California: *Episcopal Church Cases*, 198 P.3d at 70, 84 (“on this record,” “when defendants disaffiliated from the Episcopal Church, the local church property reverted to the general church”); *Huber v. Jackson*, 96 Cal. Rptr. 3d 346, 356 (Cal. Ct. App. 2009) (parish holds property “in trust for the Episcopal Church and the Los Angeles Diocese, and by disaffiliating from the church defendants and their new parish under another church have no right in the property”); *New v. Kroeger*, 84 Cal. Rptr. 3d 464, 482, 486 (Cal. Ct. App. 2008) (“the Episcopal Church impressed a trust on local church property” and “[o]nce the defendants renounced their membership in the Episcopal Church, they could no longer serve as members of the vestry and directors of the Parish corporation”);
- Colorado: *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 108 (Colo. 1986) (enforcing “trust [that] has been imposed upon the real and personal property [of the parish] for the use of [The Episcopal Church]”); *Grace Church & St. Stephen’s v. Bishop & Diocese of Colo.*, No. 07 CV 1971, Order at 26 (Colo. Dist. Ct. Mar. 24, 2009) (“trust [in favor of The Episcopal Church] that has been created

through past generations of members of [the parish] prohibits the departing parish members from taking the property with them”¹;

- Connecticut: *Episcopal Church in the Diocese of Conn. v. Gauss*, 28 A.3d 302, 328 (Conn. 2011) (affirming grant of summary judgment against group seeking to leave the Church and take parish property with it because “there is an express trust interest in favor of the Episcopal Church and the Diocese”); *Rector, Wardens & Vestrymen of Trinity-St. Michael’s Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1292 (Conn. 1993) (enforcing “trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of [The Episcopal Church] in 1789”);
- Georgia: *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga., Inc.*, 718 S.E.2d 237, 254 (Ga. 2011) (former Episcopalians could not “take with them property that has for generations been accumulated and held by a constituent church of the Protestant Episcopal Church in the United States of America”);

¹ The Church is filing copies of the unpublished decisions cited in this brief with the Court this day.

- Massachusetts: *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916, 923 (Mass. App. Ct. 2003) (parish “holds its property in trust for the Diocese and [The Episcopal Church]”); *Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 688 N.E.2d 923, 933-34 (Mass. 1997) (dismissing complaint filed by representatives of disaffiliating parish seeking control of parish corporation);
- Michigan: *Bennison v. Sharp*, 329 N.W.2d 466, 474 (Mich. Ct. App. 1982) (“although the majority faction of a local congregation within a hierarchical church may secede, it may not take property with it”);
- Missouri: *Smith v. Church of the Good Shepherd*, No. 04CC-864, Judgment & Order at 4-5 (Mo. Cir. Ct. Oct. 12, 2004) (finding trust interest in favor of Church and Diocese in the light of anti-alienation and trust canons and local church charter acceding to the Church’s rules);
- Nebraska: *Diocese of Nebraska v. Scheiblhofer*, No. CI 10-9380050, Finding and Order (Neb. Dist. Ct. Douglas County Sept. 25, 2012) (where local church body ceases to be affiliated with larger church body, its property is “vested and transferred by operation of law to the Diocese”);

- New Jersey: *Protestant Episcopal Church in the Diocese of N.J. v Graves*, 417 A.2d 19, 24-25 (N.J. 1980) (parishioners “disaffiliated themselves” from the Church, which “automatically terminated their eligibility to hold office” as parish leaders in control of church property; “individual [parishioners] are free to disassociate themselves from [The Episcopal Church] and to affiliate themselves with another religious denomination The problem lies in [their] efforts to take the church property with them. This they may not do.”);
- New York: *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008) (The Episcopal Church’s rules “clearly establish an express trust in favor of the Rochester Diocese and the National Church”); *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 250 A.D.2d 282, 288 (N.Y. App. Div. 1999) (enforcing “trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the ... Episcopal Church”); *St. James Church, Elmhurst v. Episcopal Diocese of Long Island*, No. 22564/05, Mem. at 31 (N.Y. Sup. Ct. Mar. 12, 2008) (parish established in 1704, before the Church or the diocese; court found that “all real and personal property held by St.

James Church, Elmhurst is held in trust for the Episcopal Church and the Episcopal Diocese of Long Island”);

- Nevada: *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182, 184 (Nev. 1980) (enforcing “ecclesiastical authority’s decision as to identity of” the “loyal” congregation entitled to possess parish property);
- North Carolina: *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. Ct. App. 2003) (The Episcopal Church’s rules “precluded the seceding vestry from taking control of the [parish] property”);
- Ohio: *Episcopal Diocese of Ohio v. Anglican Church of the Transfiguration*, No. CV-08-654973, Omnibus Op. & Order at 15-16 (Ohio Ct. C.P. Cuyahoga Cnty. Apr. 15, 2011) (“The real and personal property at issue is impressed with a trust in favor of the [Church] and the Episcopal Diocese.”);
- Pennsylvania: *In re Church of St. James the Less*, 888 A.2d 795, 810 (Pa. 2005) (parish “is bound by the express trust language in [The Episcopal Church’s canons] and therefore, its vestry and members are required to use its property for the benefit of the Diocese”);

- Tennessee: *Convention of the Protestant Episcopal Church in the Diocese of Tenn. v. Rector, Wardens, & Vestrymen of St. Andrew's Parish*, 2012 Tenn. App. LEXIS 274, at *62-63 (Tenn. Ct. App. Apr. 25, 2012) (“St. Andrew’s holds the Property in trust for the Diocese, and the disassociating members of St. Andrew’s are not entitled to claim any ownership interest in the Property.”);
- Texas: *Masterson v. Diocese of Nw. Tex.*, 335 S.W.3d 880, 892 (Tex. Ct. App. 2011) (“the vote to disaffiliate was effective only as to those members who sought to withdraw from the Episcopal Church; it did not have the effect of withdrawing Good Shepherd itself from its union with the Episcopal Church, as the Former Parish Leaders presume”); *St. Francis on the Hill Church v. Episcopal Church*, No. 2008-4075, Final Summ. J. Order at 3 (Tex. Dist. Ct. Dec. 16, 2010) (parish’s real and personal property “is held and may be used only for the ministry and work of the Church and the Diocese”);
- Wisconsin: *Episcopal Diocese of Milwaukee, Inc. v. Ohlgart*, No. 09-CV-635, Order Granting Motions for Partial Summ. J. at 2 (Wisc. Cir. Ct. Waukesha Cnty. Apr. 3, 2012) (“Defendants had no authority to control, remove, take, or keep the real and personal property of [the parish] for uses inconsistent with or in violation of the Canons and

Constitutions of the Diocese and Episcopal Church and its Doctrine, Discipline, and Worship.”).

Most of these courts used a four-factor “neutral principles” analysis that is similar to Virginia’s “contractual” approach. Although many of these courts concluded that the Church and/or one of its dioceses had a “trust” interest in local church property, none applied private trust law principles (there was no mention of “settlers,” for example). Rather, much like Virginia’s approach, these courts looked for evidence showing the relationship between the local churches and the larger church bodies, including, in particular, evidence of the historical commitment by the parish to be a part of the Church and the Diocese. For example:

(a) In *Bishop & Diocese of Colorado*, the Supreme Court of Colorado adopted a “neutral principles” approach requiring consideration of the deeds, the governing documents of the local and the general church, and the relationship between the local and the general church. 716 P. 2d at 96, 104-07. (There were no state statutes relevant to the case. *Id.* at 107-08). In that case, sometime in 1976 (and before the Church adopted its 1979 trust canon (canon I.7(4))), a majority of the congregation of a local Episcopal church left the Church and purported to take the church and its property with them. *Id.* at 87, 105. The “relevant deeds simply name[d] the

grantee as St. Mary's Church," with "no reference ... to [the Church] or its Colorado diocese." *Id.* at 104.

That court analyzed the dispute much like this Court did in *Norfolk Presbytery and Green*, stating that, in the light of the deeds, the Church and the Diocese had the "burden of presenting other evidence to establish that effective control over these properties is not reposed in the legal title holder, but rather that the local church property has been dedicated to the use and control of the general church." *Id.* The local church's articles of incorporation described the church's corporate purpose as the administration of "the temporalities of the Protestant Episcopal Church in the Parish," and acceded to the Church's and the Diocese's Constitutions and canons, including canons restricting (i) the alienation of church property and (ii) the incurring of debt. *Id.* Those "two clauses" in the local church's governing documents alone "strongly indicate[d] that the local church property was to be held for the benefit of the general church" and "show[e]d the extensive nature of the policy direction and property control to be exercised by the general church." *Id.* In addition, the Church's anti-alienation canon (canon I.7(3)), its canons requiring that all local church buildings and their contents "be adequately insured" (canon I.7(1)(h)), and its canon forbidding the disposal of consecrated property without diocesan

consent (canon II.6(3)) “show[ed] the measure of control over local church property that is intended to be exercised by the general church.” *Id.* at 105.

The court’s construction of those documents was “reinforced by the conduct of the relevant officials of the local and general church,” *id.* at 104, which included evidence that (1) the rector and vestry of the local church had “acknowledged their status as a local unit within the Episcopal Church and have accepted the benefits of that affiliation for more than 40 years,” *id.*; (2) the rector and members of the local church had “assumed an active role in diocesan affairs, particularly by sending representatives to the annual conventions of the diocese and by accepting appointments to various permanent bodies and positions within the diocese,” *id.* at 104-05; (3) the local church submitted required reports to the diocese, *id.* at 105; and (4) the local church officials “sought the permission of the diocese before attempting to encumber parish property.”

On the basis of these facts, the court concluded that “a trust has been imposed upon the real and personal property of [the parish] for the use of the general church,” and, accordingly, “the possibility of the withdrawal of property from the parish simply because a majority of the members of the parish decide to end their association with [the Church]” was “foreclose[d].” *Id.* at 108.

(b) In *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish*, a local Episcopal parish purported to withdraw from the Church and its Diocese of Connecticut and take the parish property for use by another denomination. 620 A.2d at 1281. The Supreme Court of Connecticut described its analysis as a “contractual approach” and stated that courts must “determine whether members of a parish within a hierarchical church organization have agreed to be bound by the higher ecclesiastical authority within the church” by examining “the polity of the church,” “its constitution and canons,” and “the historical ... relationship between the local church and the general church.” *Id.* at 1284-85. (It cited no applicable statute.)

The court examined the Constitutions and canons of the Church and the Diocese, noting the general “hierarchical” nature of the Church and focusing on the Church’s rules governing parishes’ business affairs (including the keeping of account records and the requirement of audits), requiring parochial reports, and requiring diocesan consent for the alienation or encumbrance of real property, and concluded that these documents “strongly reflect the polity of the church as one in which the parish is the local manifestation of [the Church] to be used for its ministry and mission.” *Id.* at 1286 & n.13. The parish’s articles of incorporation “identified it with the Episcopal Church” and described the parish’s purpose

as “supporting the worship of God according to the doctrine and discipline of [the Church].” *Id.* at 1289. The parish also had buildings consecrated over the years, and complied with canons requiring diocesan consent for relocation of the church and for alienation of property. *Id.* at 1289-90, 1292. Further, the parish “ha[d] acknowledged its role in [the Church] and the Diocese in numerous other ways,” including by presenting annual reports to the Diocese, sending representatives to the annual Diocesan Convention, and contributing financially to the Diocese. *Id.* at 1292.

On the basis of these facts, the court concluded that the local church “had agreed, as a condition to their formation as [an] ecclesiastical organization[] affiliated with the Diocese and [the Church], to use and hold [its] property only for the greater purposes of the church.” *Id.* Accordingly, the court refused to permit the departing parish members to take the parish property with them when they left the Church. *Id.* at 1293.

(c) In *Rector, Wardens & Vestrymen of Christ Church in Savannah*, the Supreme Court of Georgia applied the “neutral principles of law” approach “to determine whether the local congregation or the parent, or general, church in a hierarchical denomination like the Episcopal Church has the right to control local church property.” 718 S.E.2d at 241. The original parcel of land at issue had been given to Christ Church by the

colonial legislature in 1758, which predated the formation of The Episcopal Church and the Diocese of Georgia. *Id.* at 242.

Reviewing the Church’s historical property canons, the court noted that those rules reflect that “the parent church has always had control over local church property, with that control becoming more and more explicit in the ‘legally cognizable form’ of the Episcopal Church’s governing canons.” *Id.* at 246. Further, the court noted that “Christ Church repeatedly pledged its unequivocal adherence to the discipline of the parent church, including when it organized the Georgia Diocese of the Episcopal Church in 1823.” *Id.* at 247. And the court found it significant that “at all times during the 180 years before this dispute began, Christ Church acted consistently with the Episcopal Church’s canons regarding its property, demonstrating the local church’s understanding that it could not consecrate, alienate, or encumber – must less leave with – its property without the consent of the parent church.” *Id.* As a result, the court concluded that “neutral principles of law show that the property of Christ Church at issue is held in trust for the benefit of the Episcopal Church.” *Id.* at 240.²

² There are two outlier decisions. The first is *Bjorkman v. Protestant Episcopal Church in the U.S. of the Diocese of Lexington*, 759 S.W.2d 583 (Ky. 1988). That case is distinguishable because the court based its analysis in large part on its understanding that the Church “regarded [its anti-alienation canons] as insufficient to prevent alienation in the absence

This Court should find, as did these many courts from across the country, that former members of a local Episcopal church may not take the church's property with them into another denomination.

B. TFC Provides No Reason For The Court To Disregard This Wave Of Out-Of-State Authority.

Before the Circuit Court, TFC made several arguments in an attempt to distinguish this nationwide precedent, namely, that these courts did not apply "neutral principles" of law and that several of those states had statutes that Virginia does not have. TFC's opening brief before this Court

of some provision in civil law rendering it enforceable." *Id.* at 586. Given that the Church has now successfully relied on those very canons in church property litigation nationwide, that court's understanding was obviously mistaken. Further, in a later case involving another denomination, the Supreme Court of Kentucky, in finding that those remaining loyal to the hierarchical denomination were entitled to the local church property, distinguished *Bjorkman* because it involved no denominational trust provision. See *Cumberland Presbytery of the Synod of the Mid-West of Cumberland Presbyterian Church v. Branstetter*, 824 S.W.2d 417, 422 (Ky. 1992). It is abundantly clear that since the adoption of canon I.7(4) in 1979 (App. 5693), that is no longer the case within the Episcopal Church. See *Episcopal Church Cases*, 198 P.3d at 82 (refusing to follow *Bjorkman*).

The other decision is *All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of S.C.*, 685 S.E.2d 163 (S.C. 2009), where the court did not apply a four-factor neutral principles test like that used in Virginia or elsewhere. *Id.* at 171. Unlike here, there was no record evidence in *All Saints* showing that the parish submitted itself to the Church's governance after 1979. And no Episcopal parish property case decided after *All Saints* has found in favor of the withdrawing congregation, with at least two courts expressly declining to follow *All Saints*. See *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 718 S.E.2d at 255 & n.18; *Episcopal Church in the Diocese of Conn.*, 28 A.3d at 325-26.

makes several additional arguments in an effort to overcome this precedent, including that the absence of the word “Episcopal” in some of the TFC deeds is significant; that the Church and the Diocese’s Constitution and canons are not “legally cognizable”; and that a scholarly work purports to limit the application of the Church’s rules. We address these points below.

1. The courts in other states applied neutral principles of law.

Before the Circuit Court, TFC attempted to distinguish a few of these out-of-state cases by asserting that the courts did not conduct a “neutral principles” analysis. Because we assume TFC will do so again on Reply, we will briefly address the issue now.

Generally, as stated above, each court applied neutral principles of law to resolve the disputes, most of them doing so explicitly.³ Some of the courts initially applied a “hierarchical” or “deference” approach, but also ruled in favor of the Church or the Diocese based on neutral principles as well. *E.g.*, *Protestant Episcopal Church in the Diocese of N.J.*, 417 A.2d at 24 (“[E]ven using the neutral principles of law approach, we reach the same result.”); *Masterson*, 335 S.W.3d at 889-92; *Bennison*, 329 N.W.2d at 475.

³ *E.g.*, *Episcopal Church Cases*, 198 P.3d at 79; *Episcopal Diocese of Rochester*, 899 N.E.2d at 923-24; *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 718 S.E.2d at 241.

Some applied neutral principles without saying they were doing so. *E.g.*, *Tea*, 610 P.2d at 183-84 (considering state statutes, Church property rules, and the local church's accession to the Church's rules); *Daniel*, 580 S.E.2d at 718. And some deferred to the diocese's determination of ecclesiastical issues, but applied neutral principles to resolve property disputes. *E.g.*, *Episcopal Diocese of Mass.*, 797 N.E.2d at 921 n.13, 923-24.

These examples, which are cases that TFC attempted to distinguish below, undermine any potential argument by TFC that the Court should ignore the wave of nationwide authority because those courts used a method of analysis that is different than Virginia courts apply to intrachurch property disputes.

2. The decisions did not turn on unique state statutes.

TFC also argued before the Circuit Court that the decisions from California, Georgia, and New York were dictated by state statutes that Virginia does not have. If TFC were to reprise this argument on Reply, it too would continue to have no merit.

In *Episcopal Church Cases*, the California Supreme Court reached its conclusion that the parish property was held for the benefit of the Church on the basis of the long-term relationship between the parish and the larger Church and the Church's "governing documents." 198 P.3d at 70-71. Only

after reaching this conclusion did the court mention the California statute, which it said “also supports the conclusion that the property now belongs to the general church.” *Id.* at 81. That decision did not depend on the California statute. Moreover, the California statute (Cal. Corp. Code § 9142) merely said that a church’s “governing instruments” could restrict the “assets of a religious corporation.” That statute is similar to Sections 57-7.1 and 57-15 of the Code of Virginia, which also recognize that hierarchical churches may have enforceable interests in local church property, subject to the establishment of such an interest in the church’s governing documents.

In *Rector, Wardens & Vestrymen of Christ Church in Savannah* – which was decided by the Georgia Supreme Court *after* the Circuit Court issued its ruling in this case – the court did not find that any statute dictated the outcome, but instead found that state statutes “express[ed] [Georgia’s] policy of looking to ‘the mode of church government or rules of discipline’ in resolving church property disputes.” 718 S.E.2d at 243. That case was decided only on the basis of the Church’s governing structure and rules.

Finally, in *Episcopal Diocese of Rochester*, the court made clear that no New York statute dictated the result when it stated: “[n]or does any provision of the Religious Corporations Law conclusively establish a trust in

favor of the Rochester Diocese or National Church.” 899 N.E.2d at 924-25. The Church’s canons were dispositive in that case.

3. Title was not dispositive in the out-of-state cases.

TFC greatly overstates the significance of the deeds to the TFC property. It argues that if title is not held by the Church or the Diocese, or the deeds do not use the word “Episcopal,” then the local congregation is free to leave the Church and take the local church’s property with it. See, e.g., TFC Brief at 8, 16-20. But TFC cites no Virginia authority stating that the local congregation is free to leave and remove local church property from the denomination unless the deeds to local church property reference the denomination. Indeed, there is no such rule.

Moreover, the Episcopal church property decisions from other states make clear that deeds need not use the word “Episcopal” or refer to the Church or a Diocese in order for the local property to be restricted for use by those who remain part of the Church. In *Gauss*, for example, the deeds were in the name of the local church (“Bishop Seabury Parish”), and made no reference to the Church or the Diocese. See 28 A.2d at 318. In *Episcopal Church Cases*, although the parish held record title to the property, the court nonetheless found that the property was irrevocably dedicated for the use of the Church because, among other reasons, the

parish had “promised to be bound by the constitution and canons of the Episcopal Church.” 198 P.3d at 79-82. In *Bishop & Diocese of Colorado*, the deeds “name[d] the grantee as St. Mary’s Church” and made “no reference ... to [the Church] or its Colorado diocese.” 716 P.2d at 104. In *Rector, Wardens & Vestrymen of Christ Church in Savannah*, the deeds were in the name of the parish and did not use the word “Episcopal” or mention the Church or the Diocese. 718 S.E.2d at 242. This fact did not end the court’s inquiry, but instead caused it to conclude that the deeds “have a limited role in the neutral principles analysis in this case,” and led it to “turn to consideration of other neutral principles.” *Id.*

Although these are but a few examples, they demonstrate that in deciding whether local Episcopal church property can be removed from the Church, the absence of restrictive language or the word “Episcopal” in the deed is of little significance.

4. The decisions held that the Church’s and the Dioceses’ Constitutions and canons are “legally cognizable.”

TFC argues (at 12) that the trial court erred in analyzing the effect of the Church’s canons on the relationship between TFC and the Church – including canons limiting the debt that parishes may incur and requiring Diocesan consent before consecrated parish property may be sold –

because the canons are not “embodied in a legally cognizable form” in that “they are neither set forth in a writing signed by TFC nor recorded in the land records or TFC’s deeds.” But TFC provides no authority providing that church rules are not cognizable under Virginia law. Nor does TFC provide any authority that the Church’s canons would be legally cognizable only if TFC signed them and they were recorded in the land records.

In fact, TFC’s argument is contrary to all of the relevant Virginia authority. In *Green v. Lewis*, for example, this Court said that “the constitution of the general church” is to be considered in determining whether the general church has a “proprietary interest” in the local church property, and relied on a specific rule of the general church’s Discipline requiring that the Bishop approve property transfers to support its finding that such an interest existed. 221 Va. at 555-56. The Court did not require that those rules be signed by the local church or recorded in the land records in order to be legally cognizable. *See also Norfolk Presbytery*, 214 Va. at 507 (in order to determine whether “proprietary interest” exists, court must consider “the constitution of the general church”); *Buhrman*, 5 Va. Cir. at 505 (“the contractual rights of the Diocese in the subject property are implicit in the Constitution and Canons of The Episcopal Church and in the Constitution and Canons of the Diocese”).

TFC's argument is also contrary to all of the out-of-state decisions cited above, where courts found, explicitly or implicitly, that the Church's canons are legally cognizable by civil courts because those courts in fact applied the canons in finding that parish property could not be taken out of the Church. See, e.g., *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 718 S.E.2d at 246 ("the parent church has always had control over local church property, with that control becoming more and more explicit in the 'legally cognizable form' of the Episcopal Church's governing canons"); *Bishop & Diocese of Colo.*, 716 P.2d at 105 (finding parish property restricted because of the Church's anti-alienation canons and property insurance requirements, as well as various Diocesan canons).

The Court should therefore reject TFC's argument that the Church's rules are irrelevant because they are not legally cognizable.

5. TFC's reliance on White & Dykman is misplaced.

TFC cites a treatise written by scholars Edwin White and, later, Jackson Dykman concerning the Church's canons, to support TFC's argument that the canons do not restrict the use of parish property or prevent departing church members from taking Episcopal parish property for use by another denomination. See TFC Brief at 13 n.6, 34, 38-39 (citing

App. 2195, 2212-13, 2216, 2222, 2347). Those books do not advance TFC's position, however, for three reasons.

First, the Church's governing body (its General Convention) has never adopted the statements in the treatise as its own. App. 7776-77. The fact that the General Convention authorized the treatise to be drafted does not mean that the authors were acting as the Church's agents when they did their work, that the Church agrees with everything they wrote, or that the authors had "authority to make such statements on behalf of the principal." See Charles E. Friend, *The Law of Evidence in Virginia* § 18-41 at 871 (6th ed. 2003). Thus, the treatise does not bind the Church.

Second, even if the authors were writing as agents of the Church, their words would not bind the Church because the excerpts that TFC cites are just the authors' opinions about the legal effect of the Church's canons, and not statements of fact. Under Virginia law, however, "[a] party can concede the facts but cannot concede the law." *Cofield v. Nuckles*, 239 Va. 186, 194 (1990). White & Dykman's treatise therefore adds nothing to this Court's consideration of the legal effect of Church canons.

Finally, it cannot be ignored that the authors' predictions about the legal effect of Church canons were *wrong*. As the many cases cited above make clear, courts across the country have found the Church's canons to

be legally enforceable and have relied on those canons in holding that departing congregations may not take Episcopal parish property for use by a different denomination. This Court should therefore reject TFC's attempt to rely on the opinions expressed by White & Dykman.

II. THIS IS AN INTRACHURCH DISPUTE, NOT A DISPUTE INVOLVING SECULAR ENTITIES. (Assignment of Error Nos. 2 and 3)

TFC's position is that this case is the same as a garden-variety dispute involving secular entities. This is why, for example, TFC analogizes this case to an action involving a homeowners' association (TFC Brief at 34), relies on secular contract law principles (*id.*), inflates the importance of record title to the neutral principles analysis (*id.* at 16), and contends that the Church and Diocese do not have "dominion" over TFC's property because TFC paid for it and occupies it on a daily basis (*id.* at 20).

Where TFC's approach goes off track is that it ignores that this is an intrachurch dispute, which involves unique considerations and sensitivities. It is undisputed that if a third party were to claim an interest in local Episcopal church property – such as a contractor enforcing a lien, a neighbor enforcing an easement, or a third party claiming to have been given a trust interest in the property – those claims would be governed by generally applicable principles of Virginia law. But this case does not

involve a dispute between a church and a secular entity. Instead, it involves the top two levels of a hierarchical church on the one hand, and, on the other, an entity that indisputably was a constituent part of that church for well over 150 years but now claims to have left it.

Accordingly, this case presents what Justice Rehnquist characterized as an “intrachurch” dispute. In *General Council on Finance & Administration of the United Methodist Church v. Superior Court of California, County of San Diego*, 439 U.S. 1355 (1978), Justice Rehnquist, in a solo decision considering the United Methodist Church’s application for a stay of state court proceedings, rejected that church’s claim that the First Amendment protected it from claims of fraud and breach of contract brought by third parties. In so doing, he distinguished between courts’ treatment of “intrachurch” disputes and disputes between churches and independent third parties:

“There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating *intrachurch disputes*. See *Serbian Eastern Orthodox Diocese v. Milivojevich*. But this Court never has suggested that those constraints similarly apply outside the context of such *intraorganization disputes*. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by [the United Methodist Church] are not in point. Those cases are premised on a perceived danger that in resolving *intrachurch disputes* the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing

particular doctrinal beliefs. 426 U.S., at 709-710, 96 S.Ct., at 2380-2381. Such considerations are not applicable to *purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization*, in which fraud, breach of contract, and statutory violations are alleged.” 439 U.S. at 1372-73 (emphasis added).

See also *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (argument that religious organizations have the same rights as “a labor union, or a social club” “is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations”). Thus, because this is an “intrachurch” dispute, it implicates the First Amendment in ways that disputes between churches and independent third parties simply do not – even when the disputes involve property. See *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (“the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes”) (internal quotations omitted).

TFC’s position is also contrary to the way this Court resolved the intrachurch property dispute in *Green*. There, the Court did not make a rigid analysis under contract and real property principles to decide whether the general church had a proprietary interest in the local church property. Rather, it considered neutral principles factors including statutes, deeds, “the constitution of the general church, and ... the dealings between the parties.” 221 Va. at 555. It found that the hierarchical church had a

“proprietary interest” in local church property because of, among other reasons, “the relationship which had existed between the central church and the congregation over a long period of years.” *Id.* at 556.

This Court’s recognition in *Green* that hierarchical churches can have proprietary interests in local church property that arise out of the local church’s historical subordination to the larger church demonstrates that in Virginia, intrachurch disputes are not resolved based on the legal principles used to resolved other types of disputes. TFC ignores this distinction completely.

III. THE CIRCUIT COURT’S RULING DOES NOT INFRINGE UPON RELIGIOUS LIBERTY. (Assignment of Error No. 2)

TFC argues (at 39-40) that the Circuit Court’s decision threatens “religious liberty” because it allows hierarchical churches to control the property of local church units. In fact, TFC’s position has the First Amendment backwards. TFC contends that the freedom of religion should be limited to the freedom to enact a congregationalist form of church governance, where local churches are never bound by their historical commitments to become constituent units of hierarchical churches and follow the rules of those churches as they develop over time. But true religious freedom is the freedom to create churches with whatever governing structures the members want, and for civil courts to enforce

those commitments when a group of individuals seek to violate them. See *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 711 (1976) (“The right to organize voluntary religious associations” which establish “ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.”) (quoting *Watson v. Jones*, 80 U.S. 679, 728-29 (1872)).

This is why *Green* distinguished between property disputes involving congregational churches that are “independent of any other church or general society” (where the views of the majority of the local congregation prevail), and disputes involving a local church “which is part of a supercongregational or hierarchical denomination,” which “requires a showing that the property conveyance is the wish of the constituted authorities of the general church.” 221 Va. at 553 (citation omitted). *Green* thus recognized that churches have the freedom to create their own forms of governance, and that civil courts must recognize and give effect to these governing structures in resolving church property disputes.

TFC’s freedom-of-religion argument is also undercut by *Jones*, where the U.S. Supreme Court made clear that a hierarchical church can obtain or

confirm an interest in local church property by amending its governing documents, which bind its subordinate units in a manner that is enforceable in civil courts. In *Jones*, Justice Powell, writing in dissent and joined by Chief Justice Burger and Justices Stewart and White, expressed the concern that application of Georgia’s “neutral principles” approach could violate the First Amendment rights of individuals “who have formed the [hierarchical church] and submitted themselves to its authority” by depriving them of access to church property. 443 U.S. at 618 (Powell, J., dissenting); *see also id.* at 613 n.2 (expressing concern that the “neutral principles” approach could unconstitutionally “impose a form of church government and a doctrinal resolution at odds with that reached by the church’s own authority”) (Powell, J., dissenting).

In response, the Court’s majority noted that the “neutral principles” approach would protect such rights because

“[a]t any time before [a] dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.* The burden involved in taking such steps will be minimal. *And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.*” *Jones*, 443 U.S. at 606 (emphasis added).

Thus, according to *Jones*, the “neutral principles” approach complies with the First Amendment in part because, under that approach, inclusion of a trust provision in a hierarchical church’s governing documents will “ensure ... that the faction loyal to the hierarchical church will retain the church property.” *Id.*

TFC’s argument that the Circuit Court’s decision bestows excess power on hierarchical denominations misses the point: By definition, a hierarchical church *already has* that kind of power. See, e.g., *Watson*, 80 U.S. at 722-23 (hierarchical church has “*general and ultimate power of control more or less complete ... over the whole membership of that general organization*”) (emphasis added); *id.* at 726-27 (local unit of hierarchical church “is itself but a member of a much larger and more important religious organization, *and is under its government and control, and is bound by its orders and judgments*”) (emphasis added); *Reid v. Gholson*, 229 Va. 179, 188-89 (1985) (“Hierarchical churches may, and customarily do, establish their own rules for discipline and internal government. ... One who becomes a member of such a church, by subscribing to its discipline and beliefs, accepts its internal rules and the decisions of its tribunals.”). *Jones* merely ensures that a hierarchical church’s authority within the denomination is not undermined by secular

courts; indeed, the U.S. Supreme Court's recent decision in *Hosanna-Tabor* echoes the same concern that courts not undermine the internal decisions of religious organizations. *Hosanna-Tabor*, 132 S. Ct. at 707 (expressing doubt about constitutionality of "government interference with an internal church decision that affects the faith and mission of the church itself"). Put another way, *Jones* requires courts to enforce a hierarchical church's internal rules in order to protect the First Amendment rights of persons to join, organize, and maintain hierarchical denominations.

IV. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S FINDING THAT THE CHURCH'S AND THE DIOCESE'S EXPRESS TRUST RULES ARE UNENFORCEABLE. (Assignment of Cross-Error)

If the Court disagrees with the Circuit Court's ruling that, even without considering the Church and the Diocese's express trust rules, the neutral principles factors favor a finding that "[the Church] and the Diocese have a contractual and proprietary interest in" property held by TFC (App. 59), then it should nonetheless rule in favor of the Church and the Diocese and find that the express trust provisions are enforceable and dispositive.

The Church adopted its express trust canon (canon (I.7(4))) in 1979. App. 5693. The rule states that "[a]ll real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or

Congregation is located.” Likewise, in 1983, the Diocese adopted a canon stating that “[a]ll real and personal property held by or for the benefit of any Church or Mission within this Diocese is held in trust for The Episcopal Church and the Diocese of Virginia.” App. 5852.

The Circuit Court refused to enforce these rules. It held that Va. Code § 57-7.1 does not validate these kinds of express trust provisions in the rules of hierarchical churches. See App. 93, 128 n.68 (holding that Church and Diocese rules requiring local church property to be held “in trust” for the larger Church were not “effective in validating denominational trusts” because “the policy in Virginia ... is that church property may be held by trustees for the local congregation, not for the general church,” and § 57-7.1 “did not change that policy”). The Circuit Court also declined to address the Church and the Diocese’s arguments that the court’s construction of § 57-7.1 violates the Virginia and U.S. Constitutions. See App. 94.

In *Jones*, the U.S. Supreme Court addressed the question of how, consistent with the First Amendment, a religious denomination could guarantee that property of its local units would remain in the denomination when a faction within a local church becomes disaffected with the denomination. The Court held that a religious denomination could, among

other options, make its governing documents “recite an express trust in favor of the denominational church,” and that “civil courts will be bound to give effect” to such provisions. *Id.* at 606. The Episcopal Church responded to that invitation by adopting a provision expressly stating that all local church property “is held in trust for this Church and the Diocese thereof” in which the local church is located. *See, e.g., Episcopal Diocese of Mass.*, 797 N.E.2d at 923 n.20; *Episcopal Diocese of Rochester*, 899 N.E.2d at 924. The Diocese adopted a similar canon in 1983.

This Court has nonetheless held that “express trusts for super-congregational churches are invalid” in this State and therefore “no implied trusts for such denominations may be upheld.” *Norfolk Presbytery*, 214 Va. at 507. But that statement was based on Virginia’s historical (now antiquated) antipathy to hierarchal churches. The court below relied on that statement from *Norfolk Presbytery* when it declined to rule that current Virginia law recognizes trusts for denominations and their dioceses. App. 93. For the following reasons, however, Circuit Court was wrong on this issue.

Since *Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301 (1856), this Court has declined to construe predecessor statutes to § 57-7.1 as validating denominational trusts. In *Moore v. Perkins*, 169 Va. 175, 179-81 (1937),

the Court gave four reasons for maintaining that view: (1) amendments after the *Brooke* decision had not materially changed the first part of the statute; (2) the statute referred to trusts controlled by “local functionaries”; (3) the uses for which the statute allowed land to be held were local; and (4) the statutory limits on church property ownership were so restrictive as to be inconsistent with an intent to allow non-local religious groups to be the beneficiaries of trusts. *Norfolk Presbytery* added a fifth rationale: that Virginia’s Constitution did not allow churches or religious denominations to incorporate. 214 Va. at 505.

By subsequent legislation, the General Assembly eliminated every basis upon which *Norfolk Presbytery* and its predecessors relied. In 1993, the General Assembly repealed § 57-7 and enacted § 57-7.1. Section 57-7.1 now provides, in pertinent part:

Every conveyance or transfer of real or personal property, whether inter vivos or by will, which is made to or for the benefit of any church, church diocese, religious congregation or religious society, whether by purchase or gift, shall be valid.

Any such conveyance or transfer that fails to state a specific purpose shall be used for the religious and benevolent purposes of the church, church diocese, religious congregation or religious society as determined appropriate by the authorities which, under its rules or usages, have charge of the administration of the temporalities thereof [Emphasis added.]

As a result of this new statute, all of the rationales for refusing to

enforce denominational trusts identified in *Moore* have now been eliminated. First, the first part of the statute is radically different. Section 57-7 validated conveyances only for a detailed list of “uses, which ... from their very nature and the connection in which they are mentioned, must belong peculiarly to the local society.” *Brooke*, 54 Va. at 313. But § 57-7.1 validates “[e]very conveyance or transfer of *real or personal property* ... which is made to or *for the benefit of any church [or] church diocese.*”

Second, § 57-7.1 eliminates any reference to “local functionaries,” thus removing any suggestion that the authorities controlling church property must be local.

Third, § 57-7.1 does not limit the uses for which property may be placed in trust for religious groups. Dedications of real estate are no longer required to be made for use “as a place for public worship, or as a burial place, or a residence for a minister,” nor are gifts of “books and furniture” limited to those made “for the benefit of such congregation, to be used on the said land in the ceremonies of public worship, or at the residence of their minister.” *Brooke*, 54 Va. at 313. The statute now imposes no limits on use, but instead says that any use is permitted provided that the use is “determined appropriate by the authorities.”

Fourth, Virginia’s limits on church property ownership (former

§ 57-12) have been repealed. See 2003 Va. Acts ch. 813. What is left is a broad statute that validates “[e]very conveyance ... made to or for the benefit of any church, church diocese, religious congregation or religious society”

Fifth, after *Falwell v. Miller*, 203 F. Supp. 2d 624 (W.D. Va. 2002), found the prohibition on incorporation of churches and denominations to be unconstitutional, the General Assembly enacted Va. Code § 57-16.1, which allows churches to incorporate.

In addition to the fact that all of the original rationales for refusing to enforce denominational trusts have been eliminated over time, there are yet additional reasons for this Court to review this issue now and enforce the Church and the Diocese’s express trust rules. Initially, ascribing to the modern § 57-7.1 the old interpretation of § 57-7 would impermissibly give no meaning to the repeal of § 57-7 or the changes embodied in § 57-7.1. See, e.g., *Va.-Am. Water Co. v. Prince William County Serv. Auth.*, 246 Va. 509, 517 (1993) (“we assume that the General Assembly’s amendments to the law are purposeful and not unnecessary or vain”).

Moreover, as we explain below, judicial refusal to enforce the Church’s and the Diocese’s express trust rules is unconstitutional. This infirmity, however, would and should be avoided by interpreting § 57-7.1 as

validating such provisions. *See, e.g., Yamaha Motor Corp. v. Quillian*, 264 Va. 656, 665 (2002) (“a statute will be construed in such a manner as to avoid a constitutional question wherever this is possible”).

The Establishment Clauses of the First Amendment and Article I, § 16 of the Constitution of Virginia forbid laws that favor some religious groups over others. *E.g., McCreary County v. ACLU*, 545 U.S. 844, 860 (2005); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947); *Habel v. Indus. Dev. Auth.*, 241 Va. 96, 100-01 (1991) (looking to federal Establishment Clause cases in construing Article I, § 16). Construing § 57-7.1 as validating trusts for congregations but not for hierarchical churches grants a benefit – the ability to hold property in trust – to some religious groups but not others. It also recognizes and enforces the chosen property arrangements of congregational but not hierarchical churches, which improperly grants a religious preference to congregational churches. And it prefers local religious organizations over regional or national ones, with the same constitutional infirmity. Construing § 57-7.1 as the Circuit Court did violates the Constitution in the same ways by “‘impos[ing] special disabilities on the basis of religious views or religious status.’” *Falwell*, 203 F. Supp. 2d at 630 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)).

Thus, the Court should find that the Church's and the Diocese's express trust rules are enforceable, and that these rules – which explicitly state that Episcopal parish property is held in trust for the Church and the Diocese – are dispositive. *E.g.*, *Episcopal Diocese of Rochester*, 899 N.E.2d at 925 (Church's express trust canon is "dispositive" because it "clearly establish[es] an express trust in favor of the Rochester Diocese and the National Church"); *Gauss*, 28 A.3d at 307 ("the [express trust canon] applies and ... clearly establishes an express trust interest in the property in favor of the Episcopal Church and the Diocese").

CONCLUSION

This Court should affirm the Circuit Court's ruling in favor of the Church and the Diocese in their Declaratory Judgment actions. The Court should also affirm the Circuit Court's ruling on the alternative ground that the Church and the Diocese's express trust provisions are enforceable and dispositive of all claims in dispute.

Dated: January 22, 2013

Respectfully submitted,

The Episcopal Church

By: Mary E. Kostel

David Booth Beers (*pro hac vice*)
dbeers@goodwinprocter.com
Adam M. Chud (*pro hac vice*)
achud@goodwinprocter.com
Goodwin Procter LLP
901 New York Ave., N.W.
Washington, D.C. 20001
202-346-4000 (telephone)
202-346-4444 (facsimile)

Mary E. Kostel (VSB #36944)
mkostel@goodwinprocter.com
The Episcopal Church
c/o Goodwin Procter LLP
901 New York Ave., N.W.
Washington, D.C. 20001
202-346-4000 (telephone)
202-346-4444 (facsimile)

Counsel for The Episcopal Church

CERTIFICATE

I hereby certify that on January 22, 2013, pursuant to Va. S.Ct. Rule 5.17(i) and Va. Code § 1-210(B):

Electronic copies of this brief, in PDF format, are being transmitted to the Clerk of this Court, on CD-ROM, and served on counsel for appellant and *amici* at the email addresses stated below.

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Three copies of this brief are being sent by U.S. First Class mail to each of the following counsel for appellant and *amici*:

Scott J. Ward (sjw@gg-law.com)
Timothy R. Obitts (tro@gg-law.com)
Gammon & Grange, P.C.
8280 Greensboro Drive, Seventh Floor
McLean, Virginia 22102

Gordon A. Coffee (gcoffee@winston.com)
Gene C. Schaerr (gschaerr@winston.com)
Steffen N. Johnson (sjohnson@winston.com)
Andrew C. Nichols (anichols@winston.com)
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006

James A. Johnson (jjohnson@semmes.com)
Paul N. Farquharson (pfarquharson@semmes.com)
Tyler O. Prout (tprout@semmes.com)
Semmes Bowen & Semmes, P.C.
25 South Charles Street, Suite 1400
Baltimore, Maryland 21201

Counsel for Appellant

Kenneth T. Cuccinelli, II, Attorney General of Virginia
Patricia L. West, Chief Deputy Attorney General
E. Duncan Getchell, Jr. (dgetchell@oag.state.va.us)
Solicitor General of Virginia
Wesley G. Russell, Jr. (wrussell@oag.state.va.us)
Deputy Attorney General
Michael H. Brady (mbrady@oag.state.va.us)
Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Counsel for the Attorney General of Virginia, *Amicus Curiae*

E. Andrew Burcher (eaburcher@thelandlawyers.com)
Walsh, Colucci, Lubely, Emrlich & Walsh, P.C.
4310 Prince William Parkway, Suite 300
Prince William, Virginia 22192

Counsel for 516 Donors to The Falls Church, *Amici Curiae*

Michael W. McConnell (mcconnell@law.stanford.edu)
559 Nathan Abbott Way
Stanford, CA 94305-8610

Adèle A. Keim (akeim@becketfund.org)
Eric C. Rassbach (erassbach@becketfund.org)
Luke W. Goodrich (lgoodrich@becketfund.org)
3000 K Street, NW, Suite 220
Washington, D.C. 20007

Counsel for The Becket Fund for Religious Liberty, *Amicus Curiae*

Bradfute W. Davenport, Jr. (Brad.Davenport@troutmansanders.com)
George A. Somerville (George.Somerville@troutmansanders.com)
Troutman Sanders LLP
P.O. Box 1122
Richmond, Virginia 23218-1122

Mary C. Zinsner (Mary.Zinsner@troutmansanders.com)
Troutman Sanders LLP
1660 International Drive, Suite 600
McLean, Virginia 22102

Counsel for Appellee the Protestant Episcopal Church in the Diocese
of Virginia

A. E. Dick Howard (adh3m@virginia.edu)
627 Park Street
Charlottesville, Virginia 22902

Amicus Curiae

Thomas E. Starnes (thomas.starnes@dbr.com)
Brian A. Coleman (brian.coleman@dbr.com)
Drinker Biddle & Reath LLP
1500 K Street, N.W.
Washington, DC 20005

Counsel for the General Council on Finance and Administration of The
United Methodist Church, *et al.*, *Amici Curiae*

//s// Mary E. Kostel
Mary E. Kostel

Record No. 120919

In the Supreme Court of Virginia

**The Falls Church (also known as The Church at the Falls –
The Falls Church), Defendant-Appellant and Cross-Appellee,**

v.

**The Protestant Episcopal Church in the United States of America
and The Protestant Episcopal Church in the Diocese of Virginia,
Plaintiffs-Appellees and Cross-Appellants.**

**APPENDIX OF AUTHORITIES CITED IN
BRIEF FOR APPELLEE-CROSS-APPELLANT
THE EPISCOPAL CHURCH
PURSUANT TO RULE 5:1(f)**

David Booth Beers (*pro hac vice*)
dbeers@goodwinprocter.com
Adam M. Chud (*pro hac vice*)
achud@goodwinprocter.com
Goodwin Procter LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
202-346-4000 (telephone)
202-346-4444 (facsimile)

Mary E. Kostel (VSB #36944)
mkostel@goodwinprocter.com
The Episcopal Church
c/o Goodwin Procter LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
202-346-4000 (telephone)
202-346-4444 (facsimile)

Counsel for The Episcopal Church

APPENDIX

CASE:

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v. Rector, Wardens, & Vestrymen of St. Andrew's Parish,
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Analysis
As of: Jan 16, 2013

**THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH IN THE
DIOCESE OF TENNESSEE, ET AL. v. THE RECTOR, WARDENS, AND VES-
TRYMEN OF ST. ANDREW'S PARISH, A TENNESSEE CORPORATION**

No. M2010-01474-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, AT NASHVILLE

2012 Tenn. App. LEXIS 274

**March 24, 2011, Session
April 25, 2012, Filed**

SUBSEQUENT HISTORY: Rehearing denied by Convention of the Protestant Episcopal Church v. Rector, Wardens, & Vestrymen of St. Andrew's Parish, 2012 Tenn. App. LEXIS 350 (Tenn. Ct. App., May 23, 2012) Appeal denied by Convention of the Protestant Episcopal Church in the Diocese of Tenn. v. Rector, 2012 Tenn. LEXIS 709 (Tenn., Sept. 18, 2012)

PRIOR HISTORY: [*1]

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed. Appeal from the Chancery Court for Davidson County. No. 09-2092-II. Carol L. McCoy, Chancellor.

CASE SUMMARY:

OVERVIEW: In a church property dispute it was found that a local congregation held the subject property in trust for the diocese. The governing church documents, including constitutions and canons, were clear that the local congregation had held or controlled the property under an express trust in favor of the diocese and/or the national church. Disassociating members of the local congregation were not entitled to claim any ownership interest in the property.

OUTCOME: Judgment affirmed.

CORE TERMS: church, diocese, canon, congregation's, hierarchical, religious, church property, discipline, bishop, deed, ecclesiastical, ownership, charter, property dispute, worship, governance, principles of law, con-

veyed, real property, incorporation, grantor, general convention, rector, mission, express trust, warranty deed, religious organizations, intrachurch, accede, transferred

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Summary Judgment > Standards > Appropriateness

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN1]A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. The Court of Appeals of Tennessee reviews the summary judgment decision as a question of law. Accordingly, the Court must review the record de novo and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. Those requirements are that the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants

Civil Procedure > Summary Judgment > Evidence

[HN2]The moving party for summary judgment has the burden of demonstrating it is entitled to judgment as a matter of law and that there are no material facts in dispute. If the party seeking summary judgment makes a properly supported motion, the burden shifts to the non-moving party to set forth specific facts establishing the existence of a genuine issue of material fact.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Summary Judgment > Evidence Evidence > Inferences & Presumptions > Inferences

[HN3]In its review of a summary judgment decision, the Court of Appeals of Tennessee must consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party, and must afford that party all reasonable inferences.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN4]The ecclesiastical abstention doctrine establishes that courts have no ecclesiastic jurisdiction, and do not pass upon questions of faith, religion, or conscience. This doctrine, also known as the church autonomy doctrine, is rooted in the First Amendment to the United States Constitution, and its purpose is to prevent the civil courts from engaging in unwarranted interference with the practices, internal affairs, and management of religious organizations. Civil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Constitutional Law > Bill of Rights > State Application

[HN5]The First Amendment's free exercise guarantee and its prohibition against laws respecting the establishment of religion have been made wholly applicable to the states by the Fourteenth Amendment.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Constitutional Law > Bill of Rights > State Application

[HN6]Under most circumstances, the First and Fourteenth Amendments preclude civil courts from adjudicating church fights that require extensive inquiry into matters of ecclesiastical cognizance.

cating church fights that require extensive inquiry into matters of ecclesiastical cognizance.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN7]Civil courts must refrain from reviewing or interfering with decisions made by a religious body on matters of church discipline, faith, or practice. Whenever questions of discipline, or of faith, or ecclesiastical rule, or custom, or law have been decided by the highest of church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN8]Courts of Tennessee are without jurisdiction to inquire into or supervise the decisions of religious organizations. Tennessee courts have continued to refuse to hear disputes that are perceived to be purely ecclesiastical in nature.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN9]In Tennessee the ecclesiastical abstention doctrine has been applied to preclude judicial review of matters involving religious institutions that are ecclesiastical and internal in nature.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN10]Religious organizations may establish their own rules and regulations for internal discipline and government and create tribunals for adjudicating disputes over these matters. Decisions by the governing bodies of religious organizations on matters related to doctrine, faith, or church governance and discipline are not reviewable by civil courts. The ecclesiastical abstention doctrine prohibits secular courts from redetermining the correctness of a decision by a religious tribunal on issues of canon law, religious doctrine, or church governance.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN11]In the United States people have an unquestioned right to form voluntary religious associations and to organize the governance of their congregations in whatever way they deem appropriate. By joining such organizations, individuals consent to their governing structures and bind themselves to submit to the organization's rules.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN12]The ecclesiastical abstention doctrine applies only to issues that would require the courts to examine or determine questions of religious belief or practice. Not every civil court decision jeopardizes values protected by the First Amendment. Even where intrachurch disputes occur, courts still have jurisdiction to decide some issues, as long as that resolution will not require the court to engage in extensive inquiry into religious law or doctrine. For example, where resolution of an intrachurch property dispute does not risk the prohibited court entanglement, courts may decide such controversies. The United States Supreme Court has held that courts can decide church property disputes, without violating the First Amendment, by using one of several methods. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. The Court has noted that there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded. The Court has cautioned, however, against courts deciding ownership of property on the basis of resolution of controversies over religious doctrine and practice or church governance and discipline, such as where use of property is conditioned upon adherence to doctrine.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN13]A state may adopt any one of various approaches for settling church property disputes, as long as the court does not get entangled in doctrinal matters.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN14]If a religious document incorporates religious concepts in provisions relating to the ownership of property, and the court would be required to resolve a religious controversy in order to determine ownership, the court must defer to the appropriate ecclesiastical body.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN15]The application of the ecclesiastical abstention doctrine has not been extended to questions of property or personal rights, and Tennessee courts have permitted adjudications based upon neutral principles.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN16]The neutral principles approach has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be. Courts presiding over church disputes must be careful not to violate the protections of the First Amendment by deciding who prevails on the basis of resolution of the underlying controversy over religious doctrine and practice.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN17]The First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN18]Regarding church property questions, civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally recognizable form.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN19]Hierarchical churches may be defined as those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or

ecclesiastical head. The United States Supreme Court has explained that when dealing with hierarchical churches the courts are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN20]If a church is congregational and independent, its members constitute the highest authority on ecclesiastical matters, including church governance and discipline.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN21]The Texas Court of Appeals has set forth the following test to determine whether or not a church is hierarchical: (1) the affiliation of the local church with a parent church, (2) an ascending order of ecclesiastical judicatories in which the government of the local church is subject to review and control by higher authorities, (3) subjugation of the local church to the jurisdiction of a parent church or to a constitution and canons promulgated by the parent church, (4) a charter from the parent church governing the affairs of the local church and specifying ownership of local church property, (5) the repository of legal title, and (6) the licensing or ordination of local ministers by the parent church.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN22]When resolving disputes involving hierarchical churches, the courts will defer to the highest church authority on questions of church governance. In such situations, the courts are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments. That includes interpretation of church governing documents and interpretation of the basic organization of the church.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN23]Where resolution of an intrachurch property dispute does not risk the prohibited court entanglement and

involves only nondoctrinal matters, courts may decide such controversies. In doing so, they apply "neutral principles of law" developed for use in all property disputes.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Evidence > Documentary Evidence > General Overview

[HN24]Application of "neutral principles of law" in intrachurch property disputes includes consideration of church governing documents, not just the document transferring the property. Such documents are relevant to determining the context in which the transfer of the property took place as well as the intentions of the parties at the time of transfer.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN25]The "neutral principles of law" approach in intrachurch property disputes can involve examination of religious documents such as a church constitution, specifically looking for language of a trust in favor of the central church.

Estate, Gift & Trust Law > Trusts > Creation

[HN26]Generally, where there is a claim that property is held subject to a trust for the benefit of the grantor, the court's analysis focuses on the intent of the parties, particularly the grantor.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

[HN27]Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy.

COUNSEL: Blakeley Dossett Matthews, Benjamin M. Rose, James Matthew Blackburn, Nashville, Tennessee, for the appellants, The Rector, Wardens, and Vestrymen of St. Andrew's Parish, a Tennessee Corporation.

John Richard Lodge, Jr., Anthony Joel McFarland, Wendy M. Warren, Nashville, Tennessee, for the appellees, The Convention of the Protestant Episcopal Church in the Diocese of Tennessee d/b/a The Diocese of Ten-

nessee, a Tennessee Corporation and The Right Reverend John C. Bauerschmidt.

JUDGES: PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

OPINION BY: PATRICIA J. COTTRELL

OPINION

An Episcopal parish in Nashville asserted its intention to disassociate from The Diocese of Tennessee, causing the Diocese to file a declaratory judgment action to determine whether it or the local congregation owned and controlled the real and personal property where the local congregation worshiped. The trial court determined that The Episcopal Church is hierarchical, and based on the canons [*2] and constitutions of the Church and its Diocese, ruled that the local parish held the property in trust for the Diocese. The church appealed, and we affirm the trial court's judgment.

OPINION

This case concerns a dispute between the Convention of the Protestant Episcopal Church in the Diocese of Tennessee and Bishop John C. Bauerschmidt (the "Diocese of Tennessee" or the "Diocese"), on the one side, and the Rector, Wardens, and Vestrymen of St. Andrew's Parish ("St. Andrew's"), on the other, over real and personal property located at 3700 Woodmont Boulevard in Nashville, Tennessee (the "Property"), where St. Andrew's church has been located for more than fifty years. As the result of certain decisions made by The Protestant Episcopal Church in the United States of America ("The Episcopal Church") in 2003, St. Andrew's informed the Diocese of Tennessee in 2006 of its desire to join a different diocese, which was part of a different church. The Diocese tried to resolve St. Andrew's concerns over the next few years.

When reconciliation talks failed, individual members of St. Andrew's announced in April of 2009 their decision to disassociate from the Diocese and The Episcopal Church. In the [*3] fall of 2009, when it became clear St. Andrew's did not intend to remain a part of the Diocese, the Diocese filed a complaint for declaratory relief and an accounting of all property located on or associated with the Property. The Diocese asked the court to declare that the Property is impressed with a trust in favor of the Diocese and that, as a result of the trust, the Diocese has the sole right to occupy and use the Property. St. Andrew's contested the Diocese's claim, arguing the Property belongs to it by virtue of a negotiated warranty deed and that there is no trust because the general rules of the Episcopal Church and the Diocese

relating to property do not apply to St. Andrew's on account of its special relationship to the Diocese. The trial court, applying neutral principles of law, found that a trust existed in favor of the Diocese. Consequently, the trial court determined the property belonged to the Diocese. St. Andrew's appealed.

I. Factual Background

Following discovery, the Diocese moved for summary judgment. The trial court entered an order granting the Diocese's motion in which it set out its findings of fact and conclusions of law, including the following:

The Protestant [*4] Episcopal Church in the United States of America is a hierarchical religious body in structure and governance, composed of essentially three tiers, each being bound by the decisions of the higher tier, with the General Convention of the Protestant Episcopal Church exercising ultimate authority. The Plaintiff, The Convention of the Protestant Episcopal Church in the Diocese of Tennessee, d/b/a, The Diocese of Tennessee, operates at the second level and the Defendant, St. Andrew's, is found at the third tier which is composed of the individual churches, parishes and missions.

The Diocese has its own Constitution and Canons that supplement, and must not be inconsistent with, the Church's Constitution and Canons. Article II of the Constitution of the Diocese provides that the Diocese has acceded to and adopted the Constitution of the Protestant Episcopal Church in the United States of America. The Diocesan Constitution, adopted by the General Convention in 1789 has been revised throughout the years

...

In 1957, the Cheek family sold the real property located at 3700 Woodmont Boulevard, Nashville, Tennessee, and the subject of this motion, for \$50,000 to the Wardens and Vestrymen [*5] of the Church of the Advent, which, in 1966, conveyed the title and outstanding indebtedness to the Diocese by warranty deed.

The Defendant St. Andrew's parish was created as a mission by the Diocese in 1889 and granted permission by the

Diocese to organize as a parish in the Diocese in 1960. When the mission congregation applied for membership in the Diocese in 1960, the members of the mission executed Articles of Association and acknowledged in writing that they would "accede to the constitution, canons, doctrine, discipline and worship of the Episcopal Church in the Diocese of Tennessee."

[St. Andrew's moved to the Property in 1965.] In April, 1966, the parish incorporated as "The Rector, Wardens and Vestrymen of St. Andrew's Parish." At the time of incorporation, the parish incorporators again acknowledged and acceded in writing to the "constitution, canons, doctrine, discipline and worship of the Episcopal Church in the Diocese of Tennessee." Thereafter, St. Andrew's parish was made a constituent part of The Episcopal Church and the Diocese of Tennessee.

In November, 1966, the Diocese, through its Bishop at that time, executed a warranty deed, conveying title in the real property [*6] to "The Rector, Wardens and Vestrymen of St. Andrew's Parish."

In January, 1978, St. Andrew's amended its corporate charter to delete the provision which stated "This corporation acknowledges and accedes to the constitution, canons, doctrines and worship of the Episcopal Church in the Diocese of Tennessee."

On October 26, 2006, St. Andrew's Rector, James M. Guill, wrote the Bishop for the Diocese a letter, stating that the Vestry of St. Andrew's had "unanimously resolved to join the Diocese of Quincy [Illinois]" effective November 1, 2006.¹ The resolution states, in part, that the 2003 General Convention of The Episcopal Church (TEC) created a schism by electing a man to the episcopacy whose teachings and lifestyle are contrary to the Holy Scripture and Traditions of the Church, that the General Convention did not repent of its schismatic relations, and that the 2006 General Convention elected a person not qualified to be bishop. The document reflects St. Andrew's decision to disassociate and to separate itself from The Episcopal Church and the Diocese.

1 The letter itself did not state an intention to sever St. Andrew's relationship with the Diocese of Tennessee and did not state any [*7] intent to claim ownership and control of the property, including the church building. The Diocese asserts that the proposed change of affiliation of the parish with another diocese is void under the governing documents of The Episcopal Church.

Most of the findings set out above are undisputed. However, St. Andrew's disputes the trial court's finding or conclusion² that The Episcopal Church is a "hierarchical religious body in structure and governance," with regard to property ownership and to St. Andrew's in particular. That issue will be discussed fully later in this opinion.

2 It is subject to debate as to whether the determination regarding the structure of the Church is a finding of fact or a conclusion of law.

II. Governing Documents

Through its governing body, the General Convention, The Episcopal Church has adopted a Constitution and Canons that govern the Church, its dioceses, and its parishes. Each diocese has also adopted its own Constitution and Canons that supplement those of the Episcopal Church. Such diocesan governing documents cannot be inconsistent with those of the central church. Parishes, *i.e.*, the local congregations, are governed by the documents of both The Episcopal [*8] Church and the diocese in which the parish is located.

Several provisions of these governing documents relate to real property. In 1960 when St. Andrew's became a parish of the Diocese, and in 1966 when St. Andrew's incorporated and received the warranty deed to the Property, the governing documents of The Episcopal Church included several pertinent provisions, which the trial court recited in its opinion.

Two canons of The Episcopal Church, taken together, prohibited (and still prohibit) the encumbrance or alienation of any property belonging to a parish without consent of the Bishop, the head of a diocese.³ The Diocese's Canon 17 [*New Parishes*], which was in effect in 1960⁴, establishes requirements for new parishes, and such parishes are required to adopt Articles of Association that state, *inter alia*:

(2) The Parish acknowledges and accedes to the Constitution, Canons, Doc-

trine, Discipline and Worship of the Protestant Episcopal Church in the Diocese of Tennessee.

...
(6) The title to all real estate now owned or hereafter acquired by this Parish shall be vested in (a) the Convention of the Protestant Episcopal church in the Diocese of Tennessee, in trust for this Parish; or (b) the [*9] Rector, Wardens and Vestrymen of this Parish or © Trustees and their successors in trust for this Parish; or (d) a religious or general welfare corporation organized under the laws of the State of Tennessee.

(7) All real estate now owned or hereafter acquired by this Parish, title to which is vested in any manner as aforesaid, shall be held, sold, transferred, alienated, conveyed, mortgaged or encumbered, in whole or in part, only in conformity with the Constitution, Canons, Doctrine, Discipline, and Worship of The Protestant Episcopal Church in the Diocese of Tennessee.

3 Church Canon II.6.2, adopted in 1868, and remaining essentially unchanged, provides as follows:

It shall not be lawful for any Vestry, Trustees, or other body authorized by laws of any State or territory to hold property for any Diocese, Parish or Congregation, to encumber or alienate any dedicated or consecrated Church or Chapel, or any Church or Chapel which has been used solely for Divine Service, belonging to the Parish or Congregation which they represent, without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of the Diocese.

The Episcopal Church Canon 1.7, Section 3 [*10] [Canon 7: *Of Business Methods in Church Affairs*] was adopted in 1940, has

remained essentially unchanged, and provides as follows:

No Vestry, Trustee, or other Body, authorized by Civil or Canon law to hold, manage, or administer real property for any Parish, Mission, Congregation, or Institution, shall encumber or alienate the same or any part thereof without the written consent of the Bishop and Standing Committee of the Diocese of which the Parish, Mission, Congregation, or Institution is a part, except under such regulations as may be prescribed by Canon of the Diocese.

4 In 1960, the Canon was numbered 16(1).

The Articles of Association of St. Andrew's Parish contained the provision set out as paragraph (2), thereby acceding to the "Constitution, Canons, Doctrine, Discipline and Worship of the Protestant Episcopal Church in the Diocese of Tennessee." The Articles also stated that its members had associated together for the purpose of "organizing a Parish according to the Doctrine, Discipline, and Worship of the Protestant Episcopal Church in the Diocese of Tennessee." The Articles of Association included verbatim the language set out in paragraphs (6) and (7) above. Consequently, [*11] the Parish stated that any property titled to the Parish was held only in conformity with the governing documents of the Episcopal Church.

Canon 10 [*Of Real Estate and Other Property*] of the Diocese of Tennessee, specifically Canon 10, Section 3, *How Title to Real Property Shall be Vested*, states as follows:

(a) After the adoption of this Canon, title to all real property thereafter acquired shall be taken and vested as follows:

...
(2) If title is to be held by a Parish, or by any Organization or Institution, which is **incorporated** under the laws of this state, then title shall be conveyed to it in its corporate capacity, but with these words added, "to be held subject to the Charter, Constitution and Canons of The Convention of The Protestant Episcopal Church in the Diocese of Tennessee, a corporation." (Emphasis added).⁵

to be held in trust by the convention for such proper use.

5 The record reflects that this canon was in effect as of April 2006. The record does not indicate when this canon was actually adopted.

In 1966, St. Andrew's filed its Charter with the State of Tennessee, and in that Charter the parish, once again, "acknowledge[d] and accede[d] to the constitution, canons, doctrine, discipline, and worship of The Episcopal Church in [*12] the Diocese of Tennessee." Following its incorporation, St. Andrew's asked the Diocese to transfer the Property to it in the name of the incorporated parish. By warranty deed dated November 23, 1966, the Diocese transferred the Property to The Rectors, Wardens and Vestrymen of St. Andrew's Parish, a Tennessee Corporation.

The language in the warranty deed from the Diocese to St. Andrew's does not include express trust language and does not contain the provision explicitly stating that the property is held subject to the governing documents of The Episcopal Church or the Diocese. However, Canon 10, Section 1 [*Of The Use of Property*] of the Diocese of Tennessee states:

All property of every kind and character, whether held by the Convention, or by a Parish or Mission, or by an Organization or Institution of this Diocese, and regardless of the manner in which title is vested, is held in trust to be used for the glory of God and the spread of His kingdom, according to the Constitutions and Canons, and Doctrine, Discipline and Worship of the Protestant Episcopal Church in the United States of America and of this Diocese, and for the purposes and programs of said Church and Diocese.

Additionally, [*13] Canon 10, Section 7 provides:

If any property, real or personal, such as is referred to in Section 1 of this Canon be abandoned, or if it be devoted to uses not sanctioned by the Bishop as being in conformity with the Constitution and Canons and the Doctrine, Discipline, and Worship of the Protestant Episcopal Church in the United States of America or of this Diocese, and their purposes and programs, it shall be the duty of the Bishop, and of The Bishop and Council, to take possession of title to said property,

In 1978 St. Andrew's amended its corporate charter to delete the language, "This corporation acknowledges and accedes to the constitution, canons, doctrine, and worship of the Episcopal Church in the Diocese of Tennessee." There is no indication that the Diocese was made aware of this change in St. Andrew's corporate charter. In its brief, St. Andrew's states that this amendment was prompted by "national and local initiatives to impose trust-based obligations upon property owned by local parishes."

Indeed, in response to language in an opinion by the United States Supreme Court, as will be discussed more fully later in [*14] this opinion, The Episcopal Church adopted a canon in 1979 which The Episcopal Church refers to as its Trust Canon, and which is sometimes referred to as the Dennis Canon. That canon, Canon 1.7, Section 4, [*Canon 7: Of Business Methods in Church Affairs*], provides:

All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

The next section of Canon 1.7, *i.e.*, Section 5 [*Canon 7: Of Business Methods in Church Affairs*] provides as follows:

The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust.

III. Standard of Review

[HN1]A trial court's decision on a motion for summary judgment enjoys no presumption [*15] of correctness on appeal. Martin v. Norfolk Southern Railway Co., 271 S.W.3d 76, 84 (Tenn. 2008); Blair v. West Town Mall, 130 S.W.3d 761, 763 (Tenn. 2004). We review the summary judgment decision as a question of law. *Id.* Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. Eadie v. Complete Co., Inc., 142 S.W.3d 288, 291 (Tenn. 2004); Blair, 130 S.W.3d at 763. Those requirements are that the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; Blair, 130 S.W.3d at 764.

[HN2]The moving party has the burden of demonstrating it is entitled to judgment as a matter of law and that there are no material facts in dispute. Martin, 271 S.W.3d at 83; McCarley v. West Quality Food Service, 960 S.W.2d 585, 588 (Tenn. 1998). If the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of a genuine issue of material fact. Martin, 271 S.W.3d at 84; Hannan v. Alltel Publishing Co., 270 S.W.3d 1, 5 (Tenn. 2008); [*16] Staples v. CBL & Assocs., 15 S.W.3d 83, 86 (Tenn. 2000) (citing Byrd v. Hall, 847 S.W.2d 208, 215 (Tenn. 1993)).

[HN3]In our review, we must consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party, and we must afford that party all reasonable inferences. Doe v. IICA Health Servs., Inc., 46 S.W.3d 191, 196 (Tenn. 2001); Memphis Hous. Auth. v. Thompson, 38 S.W.3d 504, 507 (Tenn. 2001).

IV. Court Review of Church Disputes

Simply stated, [HN4]the ecclesiastical abstention doctrine establishes that "courts have no ecclesiastic jurisdiction, and do not pass upon questions of faith, religion, or conscience." Bentley v. Shanks, 48 Tenn. App. 512, 348 S.W.2d 900, 903 (Tenn. Ct. App. 1960); see also Nance v. Busby, 91 Tenn. 303, 18 S.W. 874, 879 (Tenn. 1891). This doctrine, also known as the church autonomy doctrine, is rooted in the First Amendment to the United States Constitution, and its purpose is to prevent the civil courts from engaging in unwarranted interference with the practices, internal affairs, and management of religious organizations.⁶ Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116, 73 S. Ct. 143, 97 L. Ed. 120 (1952); Murrell v. Bentley, 39 Tenn. App. 563, 286 S.W.2d 359, 365 (Tenn. Ct. App. 1954). Civil [*17] courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and prac-

lice. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-09, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976); Presbyterian Church v. Mary Elizabeth Hull Memorial Presbyterian Church, 393 U.S. 440, 446-47, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. at 116; Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16, 50 S. Ct. 5, 74 L. Ed. 131 (1929).

6 [HN5]The First Amendment's free exercise guarantee and its prohibition against laws respecting the establishment of religion have been made wholly applicable to the states by the Fourteenth Amendment. School District of Abington Township v. Schempp, 374 U.S. 203, 215-216, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). Courts have at times varied in their identification of the source of the ecclesiastical abstention doctrine as the Free Exercise Clause or the Establishment Clause, or both. See Rosati v. Toledo Catholic Diocese, 233 F. Supp. 2d 917, 920 (N.D. Ohio 2002) (stating that the majority hold that the doctrine is founded in the Free Exercise Clause).

Because our system of government is based on separation of church and state and freedom of religion, [HN6]under most circumstances, [*18] the First and Fourteenth Amendments preclude civil courts from adjudicating church fights "that require extensive inquiry into matters of 'ecclesiastical cognizance.'" Burgess v. Rock Creek Baptist Church, 734 F.Supp. 30, 31 (D.D.C. 1990) (citing Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. at 709-10). The United States Supreme Court has held that the underlying premise of the doctrine is that our system of government, through the First Amendment, "has secured religious liberty from the invasion of the civil authority." Watson v. Jones, 80 U.S. 679, 730, 20 L. Ed. 666 (1871).

[HN7]Civil courts must refrain from reviewing or interfering with decisions made by a religious body on matters of church discipline, faith, or practice. Lewis v. Seventh Day Adventists Lake Region Conference, 978 F.2d 940, 941-42 (6th Cir. 1992). Whenever "questions of discipline, or of faith, or ecclesiastical rule, or custom, or law have been decided by the highest of . . . church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." Watson v. Jones, 80 U.S. at 727.

The Tennessee Supreme Court [*19] similarly held long ago that [HN8]courts of this State are without jurisdiction to inquire into or supervise the decisions of religious organizations. Nance v. Busby, 18 S.W. at 881

(citing *Watson*, 80 U.S. at 727). Tennessee courts have continued to refuse to hear disputes that are perceived to be purely ecclesiastical in nature. *Travers v. Abbev*, 104 Tenn. 665, 58 S.W. 247, 247-48 (Tenn. 1900) (holding that dispute over removal of pastor did not involve property or personal rights, but instead related to governance of and discipline by church, and courts would not review the decisions of ecclesiastical judicatures); *Martin v. Lewis*, 688 S.W.2d 72, 73 (Tenn. Ct. App. 1985). The Court recently reaffirmed that,

Over the course of more than a century following the *Nance v. Busby* decision, Tennessee's courts have continued to recognize ecclesiastically required jurisdictional limitations on civil courts. Thus, [HN9]the ecclesiastical abstention doctrine has been applied to preclude judicial review of matters involving religious institutions that are ecclesiastical and internal in nature.

Redwing v. Catholic Bishop for the Diocese of Memphis, 363 S.W.3d 436, 2012 Tenn. LEXIS 143, 2012 WL 604481, at *8 (Tenn. Feb. 27, 2012).

[HN10]Religious organizations [*20] may establish their own rules and regulations for internal discipline and government and create tribunals for adjudicating disputes over these matters. *Milivojevich*, 426 U.S. at 724. Decisions by the governing bodies of religious organizations on matters related to doctrine, faith, or **church governance** and discipline are not reviewable by civil courts. *Mason v. Winstead*, 196 Tenn. 268, 265 S.W.2d 561, 563 (Tenn. 1954) (holding that in ecclesiastical matters, church tribunals have exclusive authority without interference from the civil courts.) The ecclesiastical abstention doctrine prohibits secular courts from redetermining the correctness of a decision by a religious tribunal on issues of canon law, religious doctrine, or **church governance**. *Milivojevich*, 426 U.S. at 710.⁷

7 Although the United States Supreme Court's statements regarding ecclesiastical abstention speak in terms of hierarchical church organizations, there is no reason to refuse to apply the First Amendment analysis to congregational churches or those religious organizations not hierarchical in structure. See *Callahan v. First Congregational Church of Haverhill*, 441 Mass. 699, 808 N.E.2d 301, 308 (Mass. 2004); *Heard v. Johnson*, 810 A.2d 871, 879 n.4 (D.C. Cir. 2002); [*21] *Burgess v. Rock Creek Baptist Church*, 734 F.Supp. at 31 n. 2; *Guinn v. The Church of Christ of Collinsville*, 1989 OK 8, 775

P.2d 766, 771 n.18 (Okla. 1989). Where, as in the case before us, the religious body has adopted a hierarchical polity, it is not necessary to examine the application of the doctrine in other types of organizations.

In explaining the judicial policy of non-intervention in intrachurch disputes, courts have often discussed the voluntary nature of membership in religious organizations. [HN11]In the United States people have an unquestioned right to form voluntary religious associations and to organize the governance of their congregations in whatever way they deem appropriate. *Watson*, 80 U.S. at 728-29. By joining such organizations, individuals consent to their governing structures and bind themselves to submit to the organization's rules. *Id.*

[HN12]The ecclesiastical abstention doctrine itself applies only to issues that would require the courts to examine or determine questions of religious belief or practice. "[N]ot every civil court decision . . . jeopardizes values protected by the First Amendment." *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. at 449. [*22] Even where intrachurch disputes occur, as in the case before us, courts still have jurisdiction to decide some issues, as long as that resolution will not require the court to engage in extensive inquiry into religious law or doctrine. *Burgess v. Rock Creek Baptist Church*, 734 F.Supp. at 32 (stating that courts can adjudicate church disputes "under narrow circumstances").

For example, where resolution of an intrachurch property dispute does not risk the prohibited court entanglement, courts may decide such controversies. The United States Supreme Court has held that courts can decide church property disputes, without violating the First Amendment, by using one of several methods. "Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property." *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. at 449. The Court noted that there are neutral principles of law, developed for use in all property disputes, which can be applied "without 'establishing' churches to which property is awarded." *Id.* The Court cautioned, however, against courts deciding ownership of property on the basis [*23] of resolution of controversies over religious doctrine and practice or church governance and discipline, such as where use of property is conditioned upon adherence to doctrine. *Id.*

In his concurring opinion in a later decision, Justice Brennan explained that a court could comply with *Hull* in a variety of ways. *Maryland and Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368, 90 S. Ct. 499, 24 L. Ed. 2d 582

(1970). First, he discussed the approach used in *Watson v. Jones*, 80 U.S. 679, 20 L. Ed. 666 (1872). Essentially, that approach required courts to follow the decision of the governing body of the entity involved: if a church of **congregational polity**, then the majority of its members or other local body created for ecclesiastical government; if a church of **hierarchical polity**, then the highest authority that has ruled on the dispute, absent "express terms" in the deed or other instrument to the contrary. *Sharpsburg*, 396 U.S. at 370.

Another approach discussed by Justice Brennan was the application of "neutral principles of law, developed for us in all property disputes" as described in *Hull, Id.* The Court later cited Justice Brennan's concurrence in *Sharpsburg*, 396 U.S. at 368, for the [*24] proposition that [HN13] a state may adopt any one of various approaches for settling church property disputes, as long as the court does not get entangled in doctrinal matters. *Jones v. Wolf*, 443 U.S. 595, 602, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979).

8 In the *per curiam* majority opinion in *Sharpsburg*, the Court affirmed the lower court's decision in a dispute over church property between the central church and secessionist congregations. The lower court had relied upon state statutory law, language in the deeds conveying the property, the charters of the religious corporations, and provisions in the constitution of the central church pertinent to the ownership and control of church property. 396 U.S. at 367-68.

In discussing the advantages of the "neutral principles of law" approach, the Court stated:

The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglements in questions of religious doctrine, polity, and practice. Furthermore, the neutral principles analysis shares the peculiar genius of private-law systems in general - flexibility in ordering private rights and obligations to reflect [*25] the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership

of church property will be resolved in accord with the desires of the members.

Jones v. Wolf, 443 U.S. at 603-04.

The Court recognized that the neutral principles approach might require a civil court to examine **religious documents such as a church constitution for language of a trust** in favor of the central church. *Jones v. Wolf*, 443 U.S. at 604.⁹ Additionally, the Court explained that under the neutral principles approach,

At any time before the dispute erupts, the parties can ensure, should they so desire, that the factions loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. . . . And the civil courts will be bound to give effect to the result indicated by the [*26] parties, provided it is embodied in some legally cognizable form.

Jones v. Wolf, 443 U.S. at 606 (footnote omitted).

9 [HN14] If a document "incorporates religious concepts in the provisions relating to the ownership of property," and the court would be required to resolve a religious controversy in order to determine ownership, the court must defer to the appropriate ecclesiastical body. *Id.*

The Episcopal Church followed the suggestion made by the Court in *Jones v. Wolf* and in 1979 adopted the canon called the "Dennis Canon" or the "Trust Canon."

Tennessee courts have exercised jurisdiction over actions arising from intrachurch disputes when property rights are involved. *Ward v. Crisp*, 189 Tenn. 513, 226 S.W.2d 273, 275 (Tenn. 1949) (involving construction of trust on church property); *Crenshaw v. Barbour*, 162 Tenn. 235, 36 S.W.2d 87, 90 (Tenn. 1931); *Rodgers v. Burnett*, 108 Tenn. 173, 65 S.W. 408, 410 (Tenn. 1901). Nonetheless, they have been careful in those cases to decide only the issues dealing with the civil or property right involved using neutral principles of law. *Landrith v. Hudgins*, 121 Tenn. 556, 120 S.W. 783, 807 (Tenn. 1908); *Nance v. Busby*, 18 S.W. at 879; *Fairmount Presbyterian Church, Inc. v. Presbytery of the Holston of the Presbyterian Church of the United States*, 531 S.W.2d 301, 306 (Tenn. Ct. App. 1975).

Thus, [*27] Tennessee has long used the neutral principles approach in determining disputes over owner-

ship of church property, where examination into church doctrine or practice is not required. [HN15]"[T]he application of the ecclesiastical abstention doctrine has not been extended to 'questions of property or personal rights,'" and Tennessee courts have permitted adjudications based upon neutral principles. *Redwing v. Catholic Bishop for the Diocese of Memphis*, 2012 Tenn. LEXIS 143, 2012 WL 604481, at *8. For example,

The only issue before the [trial] court was an interpretation of the two deeds to the church property. The civil courts have the power to make that decision and the courts have frequently exercised that power when a church division calls into question the rights to property.

Emmanuel Churches of Christ v. Foster, 2001 Tenn. App. LEXIS 223, 2001 WL 327910, at *2 (Tenn. Ct. App. Apr. 5, 2001) (citing *Fry v. Emmanuel Churches of Christ, Inc.*, 839 S.W.2d 406 (Tenn. Ct. App. 1992)).

In *Emmanuel Churches of Christ v. Foster*, the grantor of the property had specified in the deed that the property would remain under the control of the trustees of the local congregation to ensure that the local trustees would have the power to decide what to do [*28] with the property if there were a controversy within the larger church organization. 2001 Tenn. App. LEXIS 223, 2001 WL 327910, at *3. The court, applying rules applicable to all property questions in Tennessee, determined and enforced the grantor's intent as found in the language of the deed. *Id.*

Such intrachurch property disputes also arise in the context of the withdrawal of a local congregation from a central church or denomination.

While our courts have declined to adjudicate religious matters, they have held that they would intervene in genuine disputes regarding property rights when there has been a withdrawal by a local church. *Church of God in Christ, Inc. v. Middle City Church of God in Christ*, 774 S.W.2d 950, 952-53 (Tenn. App. 1989); *Padgett v. Verner*, 51 Tenn. App. 285, 366 S.W.2d 545, 549 (1969).

Fry v. Emmanuel Churches of Christ, Inc., 839 S.W.2d at 409.

In *The Cumberland Presbyterian Church v. North Red Bank Cumberland Presbyterian Church*, 58 Tenn. App. 424, 430 S.W.2d 879 (1968), this court considered

a dispute over church property between the central or national church and a local congregation that withdrew from the national church and asserted title to the property where the congregation worshiped. 58 Tenn. App. at 426. Based upon review [*29] of relevant church governing documents, the court determined that when a congregation agreed to withdraw from the central church, there was a dissolution of the congregation, "with the result that title to property of the local church passes to the parent organization for the advancement of the purposes of the trust" established by church governing documents. 58 Tenn. App. at 429.

Similarly, in *Fairmount Presbyterian Church, Inc., supra*, this court considered a dispute over church property between the national Presbyterian Church in the United States (a hierarchical church) and a local Presbyterian congregation that had voted to withdraw from the national Church. The Court of Appeals chose to apply neutral principles of law¹⁰ and examined the deeds and the church's charter. The court concluded that the church's charter clearly implied that the purpose of the corporation was to be a "local church of the Presbyterian Church in the United States" and that the purposes listed in local church's charter were modified by the language, "in accord with the Standards of the Presbyterian Church in the United States." Consequently, the court found that "upon property being conveyed to the corporation, [*30] an implied trust arose in favor of the general church." 531 S.W.2d at 305-06.

10 The *Fairmount* court discussed the approach previously used following *Watson v. Jones* and described the rule from *Watson* as "courts must accept the decision of the highest church authority to which a dispute has been appealed, even when the dispute involves church property." In *Fairmount*, an ecclesiastical body had decided the issue of church property ownership, and no appeal had been taken to a higher body within the Presbyterian Church. The Court of Appeals chose to apply the neutral principles of law approach set out in the later (*post-Watson*) opinion in *Mary Elizabeth Blue Hull Memorial Presbyterian Church*.

[HN16]The neutral principles approach "has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be." *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir.1986). Courts presiding over church disputes must be careful not to violate the protections of the First Amendment by deciding who prevails on the basis of resolution of the underlying controversy over religious doctrine and practice. *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393

U.S. at 449 [*31] (holding that if intrachurch property dispute required interpreting and weighing church doctrine, a court could not intervene; if, however, neutral principles of law could be applied without determining underlying question of religious doctrine and practice, a court could intervene).¹¹

11 For example, even disputes over church property between rival factions within a religious organization may create the danger that the State, through the court, will determine the rights to the property on the basis of the doctrinal beliefs or interpretations espoused by each party. See Milivojevich, 426 U.S. at 709. Even where property rights are involved, judicial intervention is still prohibited where courts would be called upon to resolve underlying disputes over religious doctrine or practice. Id. at 709-10 (holding that because rights to church property were tied to decisions over bishop defrocking, courts could not decide property rights without deciding the underlying religious disputes, which was prohibited); Natal v. Christian and Missionary Alliance, 878 F.2d 1575, 1577 (1st Cir. 1989); Hutchison v. Thomas, 789 F.2d at 396. See also Jones v. Wolf, 443 U.S. at 602 (1979) ([HN17]"the First Amendment [*32] prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice"). The First Amendment "commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine." Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church, 393 U.S. at 449.

In a case involving both ownership of church property and the excommunication of one faction of a church by another, the Tennessee Supreme Court explained the difficulties courts would confront if they were to deal with matters of religious doctrine or church governance in the name of deciding other rights:

. . . the whole subject of the doctrinal theology, the usages and customs, the written laws and fundamental organization of every religious denomination must be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their

own church laws . . . and would in effect, transfer to the civil courts, where property rights were concerned, the decision [*33] of all ecclesiastical questions.

Nance v. Busby, 18 S.W. at 880. While, as a practical matter, it can sometimes prove difficult to distinguish between disputes that can be resolved by neutral principles of law and those that may involve the court in "excessive entanglement" with matters of religious doctrine and organization, courts must make that distinction so as to avoid inquiry prohibited by the First Amendment.

V. Existence of a Trust

The trial court made the following conclusion of law:

Having considered these facts, the Court concludes as a matter of law that the real property and improvements located at 3700 Woodmont Boulevard, Nashville, Tennessee and the associated personal property are **impressed with a trust** in favor of the Diocese of Nashville.

In reaching this conclusion, the trial court recognized the limitations on court interference in church disputes, applied neutral principles of law, and carefully examined the relevant documents, including the deed, the Articles of Association, the charter and amendment, the constitution and canons of the Diocese, and the canons of The Episcopal Church. The court reasoned:

If this Court is to determine who owns the church property in question, [*34] both the real and personal property located at 3700 Woodmont Boulevard, an examination of the warranty deed using neutral principles of law is required. Such an examination reveals that the property was conveyed to "The Rector, Wardens and Vestrymen of St. Andrew's Parish, a Tennessee Corporation." To ascertain the owner(s) of the Corporation, the court examines the Articles of Incorporation, which reflects that the original incorporators who executed the Charter of Incorporation were Edwin L. Conley, W.R. Baker, H.L., Weatherby, Jr., Walter Sullivan and Lewis B. Hollabaugh, all of

whom acknowledged and acceded in writing to the constitution, canons, doctrine, discipline and worship of the Episcopal Church in the Diocese of Tennessee, a provision which is set out in the Charter of Incorporation.

In the present case, an examination of the deed, the Articles of Incorporation, the Articles of Association and the Constitution and Canons of The Episcopal Church and the Diocese reveals a trust imposed upon the property for the benefit of the Diocese and The Episcopal Church. Any further declaration would require the Court to resolve a religious controversy, which is forbidden by the First Amendment.

While [*35] the disassociating individuals have an unquestioned right to form another voluntary religious association and to organize the governance of a new organization in whatever way they deem appropriate, they no longer accede to the Constitution and Canons of The Episcopal Church and the Diocese and accordingly, they are not entitled to claim any ownership interest to any property held in trust for the Diocese by "The Rector, Wardens and Vestrymen of St. Andrew's Parish, a Tennessee Corporation."

Our review of the relevant documents reveals the following. When it was organized to become a parish, the founders of St. Andrew's stated in its Articles of Association that it "acknowledges and accedes to the Constitution, Canons, Doctrine, Discipline and Worship of the Protestant Episcopal Church in the Diocese of Tennessee;" and that all real estate St. Andrew's acquires "shall be held, sold, transferred, alienated, conveyed, mortgaged or encumbered, in whole or in part, only in conformity with the Constitution, Canons, Doctrine, Discipline, and Worship of the Protestant Episcopal Church in the Diocese of Tennessee."

Similarly, when certain individuals from St. Andrew's incorporated as The Rector, Wardens and Vestrymen of St. Andrew's Parish, the Articles of Incorporation [*36] stated that the corporation "acknowledge[d] and accede[d] to the constitution, canons, doctrine, discipline, and worship of the Episcopal Church in the Diocese of Tennessee."

Canon II.6(2) of The Episcopal Church's Constitution and Canons prohibits a parish such as St. Andrew's from encumbering or alienating real property that has been consecrated without the consent of the Bishop and the Diocese. Canon III.9.5(a) provides that the rector of each parish is entitled to control parish property "subject to the Rubrics of the Book of Common Prayer, the Constitution and Canons of this Church and the pastoral direction of the Bishop."

Canon 1.7, section 4, also referred to as the Dennis Canon or the Trust Canon, was adopted in 1979 by The Episcopal Church following the suggestion made by the United States Supreme Court in *Jones v. Wolf*. That suggestion was that churches could resolve property questions before a dispute erupts by modifying documents to include a trust.¹² [HN18]"[C]ivil courts will be **bound to give effect to the result indicated by the parties, provided it is embodied in some legally recognizable form.**" *Jones v. Wolf*, 443 U.S. at 606 (emphasis added).

12 The Court specifically referred [*37] to ensuring that "factions loyal to the hierarchical church will retain the church property" by trust or similar language. *Jones v. Wolf*, 443 U.S. at 606.

The Trust Canon clearly states that any property held by or for the benefit of any parish or congregation **"is held in trust for this Church and the Diocese thereof"** of which the congregation is a part. Set out fully above, the Canon also states the local congregation has authority over such property "so long as" the congregation remains **"a part of and subject to this Church and its Constitutions and Canons."**

This provision is unambiguous and needs no interpretation. It speaks for itself. See *The Episcopal Church in the Diocese of Connecticut v. Gauss*, 302 Conn. 408, 28 A.3d 302, 318 (Conn. 2011) (generally discussing the Dennis Canon and concluding "there is no genuine issue of material fact as to whether the Parish controls the disputed property . . . because the Dennis Canon expressly provides that all parish property is held in trust for the Episcopal Church and the diocese in which the parish is located").

While the Trust Canon, or Dennis Canon, was adopted after the Property was transferred to St. Andrew's, when the congregation decided to associate [*38] with The Episcopal Church and the Diocese in 1960, and when St. Andrew's filed their Articles of Incorporation in 1966, the parish agreed to be bound by the constitution and canons of The Episcopal Church and the Diocese. St. Andrew's remained a parish within The Episcopal Church and the Diocese long after the Dennis Canon was adopted by the Church's governing body.

The *Gauss* court considered and rejected the local parish's argument that the Dennis Canon should not apply to it because the canon was enacted by the General Convention of the Episcopal Church after the relevant real estate transaction took place, which is one argument made herein by St. Andrew's. 28 A.3d at 318. The *Gauss* court explained:

[I]n agreeing in 1956 [when the parish applied for admission to the general church as a parish] to abide by the constitution and canons of the Diocese, members of the congregation also agreed to abide by the constitution and canons of the Episcopal Church, including the subsequently enacted Dennis Canon. There is no provision in the constitution and canons of the Episcopal Church or the Diocese expressing an intent to the contrary or excusing a parish, either explicitly or implicitly, [*39] from complying with amendments or additions to the constitution and canons that might be enacted after a parish is accepted by the Diocese.

Id. at 320.

In addition to the Dennis Canon, the Diocese has adopted its own canons governing parish property. Diocesan Canon 9 provides that real estate belonging to a parish shall not be sold, transferred, alienated, conveyed, or encumbered without the consent of the General Convention or the Bishop and Council. Clearly, as the trial court held, the church governance documents leave no question that the Property was held subject to a trust in favor of the Diocese and The Episcopal Church.

The issue whether an Episcopalian congregation that decides to break away from The Episcopal Church is able to retain possession over the real property where its congregation worships has been litigated numerous times over the last thirty-five years. In addition to *Gauss*, a majority of courts in other states that have considered the same type of dispute between local former parishes and The Episcopal Church and its dioceses have reached the same conclusion that we do; *i.e.*, the church governing documents clearly create a trust in favor of the central church and/or [*40] its dioceses over any property held and used by a local parish, even when the record title to the property in question has been held in the name of the local parish since a time before the Dennis Canon was enacted. *See, e.g., Episcopal Church Cases*, 45 Cal. 4th 467, 87 Cal. Rptr. 3d 275, 198 P.3d 66, 79-82 (Cal. 2009) (holding that in consideration of Dennis Canon and parish's promise to be bound by constitution and

canons of general church in original application in 1947 to become parish and in articles of incorporation in 1949, parish held property in trust for general church and could use property only so long as parish remained part of general church), *cert. denied sub nom. Rector, Wardens & Vestrymen of Saint James Parish in Newport Beach, California v. Protestant Episcopal Church in the Diocese of Los Angeles*, 130 S. Ct. 179, 175 L.Ed.2d 41 (2009); *Episcopal Diocese of Rochester v. Harnish*, 11 N.Y.3d 340, 351-52, 899 N.E.2d 920, 922-25, 870 N.Y.S.2d 814 (N.Y. Ct. App. 2008) (holding that parish held real property in trust for general church based upon parish's agreement to abide by constitution and canons of general church upon incorporation in 1927 or upon recognition as parish in 1947 together with language of Dennis Canon establishing [*41] express trust in favor of general church); *In re Church of St. James the Less*, 585 Pa. 428, 888 A.2d 795, 807-09 (Pa. 2005) (holding parish held property in trust for benefit of general church because (1) parish agreed in its charter to "always accede to the authority of the National Episcopal Church and the Diocese" and (2) the Dennis Canon created an express trust in favor of the Church); *see also Masterson v. Diocese of Northwest Texas*, 335 S.W.3d 880, 891 (Tex. Ct. App. 2011) (despite property's title held by parish, governing documents of national Episcopal Church show parish holds property in trust for national Church).

We conclude that the documents are clear and that St. Andrew's has held or controlled the Property under an express trust in favor of the Diocese and/or The Episcopal Church. Despite the language of the documents involved, St. Andrew's argues that it did not hold the Property in trust asserting that the language in the church's governing documents regarding real property should not be applied to St. Andrew's.

VI. Whether The Episcopal Church is Hierarchical for All Purposes

St. Andrew's asserts that no matter how clear the church governance documents may be regarding establishment [*42] of a trust, those documents do not create a trust in this instance because they simply do not apply to St. Andrew's. This argument is based upon St. Andrew's assertion that The Episcopal Church is not hierarchical for all purposes and, in particular, with regard to property ownership and control.

[HN19]"Hierarchical churches may be defined as those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 110, 73 S. Ct. 143, 97 L. Ed. 120 (1952). The United States Supreme Court has explained that when dealing with hierarchical churches the courts

"are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments." Watson v. Jones, 80 U.S. 679, 726-27, 20 L. Ed. 666 (1871).

St. Andrew's argues that if it is determined that The Episcopal Church is not hierarchical for purposes of property disputes, the Church's canons and constitutions cited above are not determinative of whether it or the Diocese owns the Property. Instead, [*43] according to St. Andrew's, the language of the warranty deed, which does not include any trust language, along with the parties' negotiations when the Property was transferred evidence that it, not the Diocese, is the rightful owner of the Property.

Tennessee courts, as well as courts of other states, have distinguished between hierarchical churches and congregational churches for limited purposes. [HN20] If a church is congregational and independent, its members constitute the highest authority on ecclesiastical matters, including church governance and discipline. Nance v. Busby, 18 S.W. at 881.

In Cannon v. Hickman, 4 Tenn. App. 588 (Tenn. Ct. App. 1927), the court described the church whose property was in dispute as "purely congregational" with no federal head of an organization of churches of the same denomination with authority over actions of the local church. 4 Tenn. App. at 590. In that situation, "[e]ach congregation is an ecclesiastical sovereignty within itself," and "each church society manages absolutely its affairs, temporal, spiritual and doctrinal." *Id.* at 590-91. Such congregations are considered ecclesiastical sovereignties and democracies, governed by the majority of its [*44] members. *Id.* As another example, in an intra-church dispute, this court observed that "[i]n matters of government churches of Christ are all congregationally autonomous." Royal Heights Church of Christ v. Williams, 1987 Tenn. App. LEXIS 2995, 1987 WL 18670, at *3 (Tenn. Ct. App. Oct. 21, 1987).

On the other hand, our courts have concluded some churches are hierarchical in their organization. In Fairmount Presbyterian Church, Inc. v. Presbytery of Holston of the Presbyterian Church of the United States, *supra*, this court stated that the central church in the lawsuit was a hierarchical church and described the components of its organization:

The Presbyterian Church in the United States is a connectional or hierarchical church, as distinguished from a congregational one. Each local congregation is governed by a group of elders known as

the Session. The local churches are grouped into Presbyteries These are grouped into Synods . . . which are presided over by the General Assembly of the church. These governing bodies all have both legislative and judicial functions.

531 S.W.2d at 302 n.1.

[HN21] The Texas Court of Appeals has set forth the following test to determine whether or not a church is hierarchical:

(1) the affiliation of [*45] the local church with a parent church, (2) an ascending order of ecclesiastical jurisdictions in which the government of the local church is subject to review and control by higher authorities, (3) subjugation of the local church to the jurisdiction of a parent church or to a constitution and canons promulgated by the parent church, (4) a charter from the parent church governing the affairs of the local church and specifying ownership of local church property, (5) the repository of legal title, and (6) the licensing or ordination of local ministers by the parent church.

Masterson v. Diocese of Northwest Texas, 335 S.W.3d 880, 890 (Tex. Ct. App. 2011) (citing Templo Ebenezer, Inc. v. Evangelical Assemblies, Inc., 752 S.W.2d 197, 198-99 (Tex. App. 1988); Schismatic & Purported Casa Linda Presbyterian Church v. Grace Union Presbyterian, 710 S.W.2d 700, 702 (Tex. App. 1986); Browning v. Burton, 273 S.W.2d 131, 133-34 (Tex. Civ. App. 1954)).

The trial court described the organization of The Episcopal Church, including its three tiers and the governance of the general or central church, its dioceses, and its parishes. Those facts establish that The Episcopal Church is a hierarchical church, [*46] using the test set out above and the tests applied in Tennessee and other courts.

As stated earlier, property disputes arising when an Episcopalian congregation decides to break away from The Episcopal Church have been before the courts in a number of states. In all of the opinions we have reviewed, either the parties agreed, or the courts concluded, that The Episcopal Church is hierarchical. *See, e.g., Daniel v. Wray*, 158 N.C. App. 161, 580 S.E.2d 711, 717-18 (N.C. App. Ct. 2003) (holding The Episcopal Church and its congregations are part of a hierarchical

organization in which the constitutions and canons of The Episcopal Church and of the diocese govern the congregations and their role within the organization).

St. Andrew's has cited no case in which a court has concluded The Episcopal Church is not hierarchical, for property matters or otherwise. The Georgia Court of Appeals recently considered whether a local parish that sought to disaffiliate from the national church could retain control over the church property in *The Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Georgia*, 305 Ga. App. 87, 699 S.E.2d 45 (Ga. Ct. App. 2010), *aff'd* 290 Ga. 95, 718 S.E.2d 237 (Ga. 2011). The appellate [*47] court determined that "even though the parish owns its own real estate, the discipline, canons, and constitutions of the National Episcopal Church and the Diocese of Georgia established an implied and express trust over the property for the use of the National Episcopal Church." *Id.* at 47. The court also examined the same issue raised herein by St. Andrew's.

In determining that The Episcopal Church was hierarchical for all purposes, including the resolution of property disputes,¹³ the *Christ Church in Savannah* court wrote:

Here, careful consideration of the National Episcopal Church's structure and history persuades us that the National Episcopal Church is hierarchical. The church organization has three tiers: (1) the National Episcopal Church, (2) geographically-defined dioceses that belong to, are subordinate to, and are under the jurisdiction of the National Episcopal Church, and (3) local parishes that belong to, are subordinate to, and are under the jurisdiction of the National Episcopal Church and the individual diocese in which the parish is located. At the present time, the National Episcopal Church is comprised of 111 dioceses and thousands of individual churches, each of which [*48] must be affiliated with a diocese. The National Episcopal Church is governed by a general convention composed of bishops and deputies. The dioceses are governed by bishops and an annual convention. Each parish is governed by a vestry, which is akin to a board of directors. The vestry of each church sends delegates to its diocesan convention, and each diocese sends delegates to the general convention. There are governing documents at each level of the church.

The National Episcopal Church has a constitution and canons, which are similar to bylaws. The dioceses also have constitutions and canons, but these are subordinate to the governing documents of the National Episcopal Church. The individual parishes are controlled by the terms of their charters and bylaws, which are in turn subordinate to the constitutions and canons of both the diocese and the National Episcopal Church. In addition, the dioceses and parishes are subject to the doctrine, discipline, and worship of the National Episcopal Church generally.

Id. at 48.

13 When this case was before the Supreme Court of Georgia, there was no longer any dispute that The Episcopal Church was hierarchical. *The Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Georgia*, 718 S.E.2d at 240-41.

Other [*49] courts have reached the same conclusion. See *Masterson v. Diocese of Northwest Texas*, 335 S.W.3d at 890 (holding Episcopal Church is hierarchical for all purposes, including the resolution of property disputes); *Episcopal Diocese v. DeVine*, 59 Mass. App. Ct. 722, 797 N.E.2d 916, 921-24 (Mass. App. Ct. 2003) (holding Episcopal Church is hierarchical for all purposes, including determining property disputes); *Daniel v. Wray*, 580 S.E.2d at 717 (Episcopal Church is hierarchical church for purposes of determining property disputes); *Rector, Wardens, and Vestrymen of Trinity-St. Michael's Parish v. The Episcopal Church in the Diocese of Connecticut*, 224 Conn. 797, 620 A.2d 1280, 1286 (Conn. 1993) (rejecting local church's argument that canons of The Episcopal Church are of moral value only, concluding hierarchical relationship governs all matters, including property dispute between local church and diocese); *Protestant Episcopal Church in the Diocese of New Jersey v. Graves*, 83 N.J. 572, 417 A.2d 19, 24 (N.J. 1980) (holding Episcopal Church is hierarchically structured and hierarchical nature of relationship determines control over property when local church disassociates); see also *Protestant Episcopal Church in Diocese of Virginia v. Truro Church*, 280 Va. 6, 694 S.E.2d 555, 558 (Va. 2010) [*50] (holding Episcopal churches are hierarchical).

There is nothing in the language of the relevant documents to indicate that the hierarchical organization of the church is not applicable to the control and ownership of real property. To the contrary, specific language

regarding property, quoted earlier in this opinion, clearly establishes that the central church and dioceses have authority to control the use and disposition of property, separate and apart from the trust language. Based on the language of the Canons and Constitutions of The Episcopal Church and of the Diocese, we join the majority of jurisdictions in holding that The Episcopal Church is a hierarchical organization for all purposes, including ownership and control of real and personal property.

St. Andrew's contends that it created a genuine issue of material fact concerning whether The Episcopal Church is hierarchical for temporal matters, including property disputes. St. Andrew's submitted an affidavit by a former bishop of a diocese in Illinois, an affidavit by a board member of a diocese in Florida, and a document entitled Bishops' Statement on the Polity of The Episcopal Church (the "Bishops' Statement"). The former [*51] bishop stated that The Episcopal Church is not hierarchical for any purpose. The board member opined that The Episcopal Church is not hierarchical for "the issues in this dispute." The Bishops' Statement is dated April 18, 2009, and appears to be authored by fifteen or so bishops and former bishops, but does not appear to be sanctioned by The Episcopal Church or the General Convention. The Bishops' Statement suggests, *inter alia*, that The Episcopal Church is a voluntary association of equal dioceses.

The affidavits St. Andrew's offered do not create a disputed issue of material fact because the affiants were simply offering their opinions and interpretations of the constitutions and canons, not facts. The constitutions and canons, as well as St. Andrew's filings and Articles of Association, speak for themselves and are determinative of the issue. As discussed earlier in this opinion, [HN22]when resolving disputes involving hierarchical churches, the courts will defer to the highest church authority on questions of church governance. In such situations, the courts "are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religions [*52] organization, and is under its government and control, and is bound by its orders and judgments." Watson v. Jones, 80 U.S. at 726-27. We think that includes interpretation of church governing documents and interpretation of the basic organization of the church. Consequently, we cannot conclude that there is a factual question regarding the organization and governance of The Episcopal Church and will not inquire into it.

VII. Neutral Principles Approach

As explained earlier, [HN23]"where resolution of an intrachurch property dispute does not risk the prohibited court entanglement and involves only nondoctrinal matters, courts may decide such controversies. In doing so,

they apply 'neutral principles of law' developed for use in all property disputes." Anderson v. Watchtower Bible and Tract Soc. of New York, 2007 Tenn. App. LEXIS 29, 2007 WL 161035, at *7 (Tenn. Ct. App. Jan. 19, 2007) (citing Jones v. Wolf, 443 U.S. 595, 604, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979)).

St. Andrew's asserts that the trial court herein did not actually, or properly, apply the "true" neutral principles approach. Essentially, St. Andrew's seems to argue that the court should only have looked at the warranty deed transferring the Property. The warranty deed does not include [*53] express trust language, and St. Andrew's relies heavily on the language conveying fee to the vestry. Of course, the governing documents of The Episcopal Church and the Diocese recognize that title may be held by the local congregation. The fact that a deed reflects the grantee to be the vestry of the local congregation does not contradict the existence of a trust. To the contrary, a finding that a local congregation (or any other grantee) holds real property subject to a trust for the benefit of the central church (or another person or grantor) would never arise if the property were titled to the central church (or other beneficiary of the trust).

St. Andrew's argument that courts must look only to the deed ignores the holdings of Tennessee and other courts that [HN24]application of neutral principles of law in intrachurch property disputes includes consideration of church governing documents, not just the document transferring the property. Such documents are certainly relevant to determining the context in which the transfer of the property took place as well as the intentions of the parties at the time of transfer.

For example, in Fairmount, supra, the court specifically stated it was applying [*54] neutral principles of law. The court examined the local church's charter and found that the purpose of the corporation was to be a local church of the Presbyterian Church in the United States and that the various activities listed in its corporate purpose were modified by the language, "in accord with the Standards of the Presbyterian Church in the United States." Fairmount Presbyterian Church, Inc. 531 S.W.2d at 302. Consequently, the court found any property conveyed to the corporation was subject to an implied trust in favor of the general church. Id. at 305-06.

In North Red Bank Cumberland Presbyterian Church, supra, this court considered a dispute over church property between the central or national church and a local congregation that withdrew from the national church and asserted title to the property where the congregation worshiped. 58 Tenn. App. at 426. The appellate court described the case as turning on "whether, in the absence of a controlling provision of the deed or church canon expressly forfeiting title upon withdrawal,

a local congregation can withdraw from the parent organization without losing title to the local church property." 58 Tenn. App. at 425.

The case had been [*55] appealed earlier, but had been remanded with instruction by the Supreme Court to admit into evidence any provision of the church's governing documents or law relevant to the issue. The Court of Appeals considered the minutes of the hierarchical church's General Assembly and the Digest, which was the governing document of The Cumberland Presbyterian Church. Based upon relevant documents, the court determined that when a congregation withdraws from the central church, there is a dissolution of the congregation, "with the result that title to property of the local church passes to the parent organization for the advancement of the purposes of the trust" established by church governing documents. 58 Tenn. App. at 429.

In explaining that the existence of the trust seems clearly indicated, the court stated that church members who contributed to the original purchase of the property and had it transferred to the local church as a Cumberland Presbyterian Church and those who contributed to improvements over the years "had every reason to expect their donations to remain under the government of the Cumberland Presbyterian Church." *Id.* The local congregation's withdrawal from the central church's [*56] governance was contrary to that expectation.

The United States Supreme Court has also recognized that [HN25]the neutral principles approach can involve examination of religious documents such as a church constitution, specifically looking for language of a trust in favor of the central church. Jones v. Wolf, 443 U.S. at 604. See also Maryland and Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. at 367-68 (affirming the lower court's decision in a dispute over church property between the central church and secessionist congregations where the court had relied upon, *inter alia*, language in the deeds conveying the property, the charters of the religious corporations, and provisions in the constitution of the central church pertinent to the ownership and control of church property).

St. Andrew's also contends that the absence of express trust language in the deed was the result of negotiations between the Diocese and the parish and is indicative of a "special relationship" between those entities. It also asserts that the trial court erred in its application of neutral principles of law because it did not acknowledge that St. Andrew's never agreed to a trust [*57] relationship with the Diocese or The Episcopal Church with regard to the Property.¹⁴ St. Andrew's argues that Tennessee courts have traditionally analyzed the attendant circumstances surrounding such property transfers or ac-

quisitions, citing some of the cases discussed above, and that the trial court did not consider the negotiations.

14 St. Andrew's argues that it never agreed to a trust relationship with the Diocese or The Episcopal Church with regard to the Property and should therefore be deemed the owner of the Property. First, evidence of St. Andrew's agreement is found in the church governing documents and in the fact that it remained a parish within the Diocese for many years after the Dennis Canon made the trust relationship abundantly and finally clear. St. Andrew's relies on two cases to support its argument All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina, 385 S.C. 428, 685 S.E.2d 163 (S.C. 2009), and Emmanuel Churches of Christ v. Foster, 2001 Tenn. App. LEXIS 223, 2001 Tenn. App. LEXIS 223, 2001 WL 327910 (Tenn. Ct. App. Apr. 5, 2001). We find the first case to be so different from the situation before us as to be inapposite. We have already discussed the *Foster* case, which involved determining [*58] the intent of the original grantor of the property with regard to a dispute between two churches. This case is distinguishable from *Emmanuel Churches of Christ* for many reasons, most importantly because the Diocese rather than an individual conveyed the Property to St. Andrew's, and the canons in effect when the Property was conveyed indicated that all property held by a parish was held in trust subject to the Constitution and Canons of the Diocese and of The Episcopal Church. While the grantor's intent in *Emmanuel Churches of Christ* was that the property conveyed stay with the trustees of the local church, the grantor's intent in this case was that the Property be held in trust for the Diocese.

We agree that attendant circumstances are to be considered, in the same way they are considered in all property disputes where the existence of a trust is claimed. The United States Supreme Court has said, "the neutral principles analysis shares the peculiar genius of private-law systems in general - flexibility in ordering private rights and obligations to reflect the intentions of the parties." Jones v. Wolf, 443 U.S. at 603-04. [HN26]Generally, where there is a claim that property is held subject [*59] to a trust for the benefit of the grantor, the court's analysis focuses on the intent of the parties, particularly the grantor. See, e.g., Emmanuel Churches of Christ v. Foster, 2001 Tenn. App. LEXIS 223, 2001 WL 327910, at *3 (interpreting the intent of the grantor). Here, the grantor was the Diocese.

In the case before us, the attendant circumstances include things like St. Andrew's Articles of Association and church governing documents. There is nothing in the deed herein that would distinguish it from similar deeds in countless other cases. And, the canons of The Episcopal Church and the Diocese recognize that property may be titled in the name of a local parish. In its Articles of Association and Articles of Incorporation and its membership as a parish within the Diocese and The Episcopal Church, St. Andrews explicitly acknowledged and acceded to the constitution and canons of The Episcopal Church and the Diocese of Tennessee before the Diocese transferred the Property to it. St. Andrew's unequivocally stated that title to all real estate "shall be vested" in The Episcopal Church and the Diocese, and that all real property St. Andrew's acquires "shall be held, sold, transferred, alienated, conveyed, mortgaged [*60] or encumbered . . . only in conformity with the Constitution, Canons, Doctrine, Discipline, and Worship of the Protestant Episcopal Church in the Diocese of Tennessee."

St. Andrew's would have us ignore the clear language of these and other documents described earlier in this opinion. This we will not do. As the Supreme Court has stated, [HN27]"Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. *Jones v. Wolf*, 443 U.S. at 603-04. Thus, the intent of the parties herein is established by the governing documents, not just the deed.¹⁵

15 St. Andrew's seems to believe that the absence of express trust language in the deed must be interpreted as an exception to the language in the governing documents that creates a trust over property held, used, or controlled by a parish. From the opposite view, one could argue that since church governing documents establish property ownership, any deviation from those governing principles would have to be explicit and in writing.

St. Andrew's [*61] also surmises that the trial court could have been persuaded by the Diocese's mischaracterization of the law regarding trusts on property in hierarchical churches. In fact, there are several cases in Tennessee that include language to the effect a trust exists in similar situations without express trust language. Such statements include, "property conveyed to a local church which is a part of a connectional¹⁶ church does not remain the property of the local church even when there is no trust language in the deed." *Church of God in Christ v. Middle City Church of God in Christ*, 774 S.W.2d 950,

952 (Tenn. App. Ct. 1989) (citing *Cumberland Presbyterian Church v. North Red Bank Cumberland Presbyterian Church*, 58 Tenn. App. 424, 430 S.W.2d 879 (Tenn. App. Ct. 1968) and *Hardin v. Starnes*, 32 Tenn. App. 66, 221 S.W.2d 824 (1949)). The *Church of God in Christ* court further wrote, "when a local church acquires real property by deed, it is held in trust for the parent church even in the absence of express trust language." 774 S.W.2d at 952; see *The Holston Presbytery of the Presbyterian Church (U.S.A.) v. Wingard*, 1985 Tenn. App. LEXIS 3384, at *4-17 (Tenn. Ct. App. Jan. 9, 1985) (in property dispute between local church and national [*62] church with hierarchical relationship, court held local church holds property in trust for national church even though deed was silent on existence of trust). Additionally, The *Emmanuel Churches of Christ* court explained that "[a]s a general proposition, when property is conveyed to a local church having a connectional relationship to a central organization, the property belongs to the central organization." 1985 Tenn. App. LEXIS 3384 at *2. However, the court explained, this general rule is subject to the "clear intent of the grantor in the deed manifesting a contrary purpose." 1985 Tenn. App. LEXIS 3384 at *3.

16 The courts in Tennessee have used the term "connectional" to mean the same thing as "hierarchical."

In any event, we have found clear language in the church's governing documents that establish the clear intent of the grantor, the Diocese. Also, the governing church documents are not silent on the issue of a trust in favor of the Diocese or The Episcopal Church. The relevant language clearly creates a trust. Therefore, we think the application of the cases cited in the preceding paragraph is unnecessary.

We conclude the trial court properly applied the neutral principles approach by considering the warranty deed, St. Andrew's Articles of Association, St. Andrew's Articles of Incorporation, and the Constitution and Canons of The Episcopal Church and the Diocese to [*63] determine whether St. Andrew's holds the Property in trust for the Diocese. For the reasons stated by the trial court as well as those stated herein, we hold St. Andrew's holds the Property in trust for the Diocese, and the disassociating members of St. Andrew's are not entitled to claim any ownership interest in the Property.

VIII. The Diocese's Action is Not Time-Barred

After the trial court issued its order granting the Diocese's motion for summary judgment, St. Andrew's filed a motion to alter or amend on the ground that the Diocese's cause of action is barred by the one-year statute of limitations set forth in the Tennessee Uniform Trust

Code. St. Andrew's argued that since the Diocese's claim to the Property was based upon a trust created by provisions of church governing documents, the Diocese was required to bring this action within one year of St. Andrew's declaring its withdrawal from the Diocese of Tennessee in 2006. The trial court denied St. Andrew's motion, holding that the statute of limitations relied upon by St. Andrews had no application to the causes of action brought by plaintiffs. We agree.

Tennessee Code Annotated § 35-15-1005 provides in pertinent part:

(a) A beneficiary [*64] may not commence a proceeding against a trustee for breach of trust more than one (1) year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust.

(b) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or the beneficiary's representative knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.

St. Andrew's argues that it announced its disaffiliation with the Diocese in 2006, and if the Diocese's posi-

tion is correct that St. Andrew's holds the Property in trust for the Diocese, the Diocese was required to file its action against St. Andrew's, as trustee, within the following year, as set forth in the statute.

Contrary to St. Andrew's argument, the instant lawsuit is not a breach of trust action. This is a declaratory judgment action brought to have the courts determine the rights and duties of the parties and, more specifically, to determine the ownership and control [*65] over the Property. The answer to those questions depended on whether or not a trust existed.

While The Episcopal Church and the Diocese took the position that a trust existed in their favor, St. Andrew's disagreed and never acknowledged that it held or used the Property as trustee. No "report" as envisioned by the statute was delivered; no allegation of breach of trust was made. Instead, the parties disagreed about the interpretation and application of various documents regarding the ownership of the Property.

Since this declaratory action was to determine whether or not a trust exists, the statute of limitations applicable to actions alleging a breach of trust does not bar the Diocese's action.

IX. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court in all respects. Court costs are taxed to The Rector, Wardens, and Vestrymen of St. Andrew's Parish, a Tennessee Corporation, for which execution shall issue if necessary.

PATRICIA J. COTTRELL, JUDGE

2



IN THE DISTRICT COURT OF DOUGLAS CO

THE DIOCESE OF NEBRASKA,)
)
 Plaintiff,)
)
 Vs.)
)
 ROBERT SCHEIBLHOFER, DAVID)
 SALYARDS, MATTHEW BURBACH,)
 DON EHRLICH, CINDY SALYARDS,)
 JACQUELINE QUIGLEY, WILLIAM)
 TEMPLIN, JOHN DOE, AND)
 JANE DOE,)
)
 Defendant,)
)
 And)
)
 THE EPISCOPAL CHURCH,)
)
 Plaintiff in Intervention.)

DOC. 1089 NO. 282
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FINDING AND ORDER

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CLERK DISTRICT COURT

THIS MATTER came before the Court on the 20th day of December, 2011 on Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment. Plaintiff was represented by D. C. Bradford and Justin Eichmann. Defendants were represented by John C. Chatelain and John J. Maynard. Plaintiff in Intervention was represented by David S. Houghton and Keith A. Harvat. After receiving exhibits into evidence and hearing arguments of counsel, the Court took the motions under advisement pending submission of responsive briefs. For purposes of this matter, Plaintiff Diocese and Plaintiff in Intervention Episcopal Church are referred to as "Plaintiffs".

According to the Affidavit of J. Scott Barker (Exhibit 19) on St. Barnabas Day, June 11, 1968, a small mission was created by a group of Episcopalians in Omaha, Nebraska. On May 4, 1969, St. Barnabas Parish was incorporated as a parish in the

Protestant Episcopal Church Diocese of Nebraska (Exhibit 1). Church Canon II.6(2) was adopted in 1868 prohibiting a parish from encumbering or alienating any real property that had been consecrated without the consent of the Diocese. Church Canon III.9(5)(a) enacted in 1904 provided that the rector of each parish is entitled to control parish property subject to church rule and the direction of the Bishop.

St. Barnabas was not required to file any corporate filings and remained in full corporate existence even though Nebraska Statutes were changed in 1911 by Chapter X, Sections 4201x1 to 4206x14. The change was special legislation passed specifically for the Protestant Episcopal Church.

In 1915 the current church real estate was vested in the Wardens and Vestry – Men of Saint Barnabas Church (Exhibit 3). Several mortgages were executed on the property by the Wardens and Vestrymen for construction purposes and were eventually released in 1936 and 1941 (Exhibit 3). Church Canon 1.7 (3), adopted in 1940 (as Canon 57) prevented unconsecrated property from being alienated or encumbered without the consent of the diocese.

Chapter X (subsequently Section 21-816 through Section 21-830, Reissue 1954) was repealed in 1967 and the Church Corporation, like all other Parishes of the Protestant Episcopal Church, had been regulated by the Nonprofit Corporation Act enacted in 1957 – that act did not govern existing corporations regulated by Section 21-816 et. seq. – now fell under Nebraska Revised Statute § 21-2801 et. seq. which set out what happens to real and personal property should a single church, parish or congregation (whether unincorporated or incorporated) cease to exist or maintain its organization.

In 1979 the "General Convention" adopted Canon 1.6(4) and (5) known as the Dennis Canon, which provided:

Section 4: All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church its Constitutions and Canons.

Section 5: The several diocese may at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust.

Canon 1.7 (4) and (5) state:

Sec. 4: All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission of Congregation is located. The existence of this trust, however shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains in part of, and subject to, this Church and its Constitution and Canons.

Sec.5: The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust.

In 2007 the members of St. Barnabas Parish, after several meetings (Exhibit 6), voted to remove themselves from the ecclesiastical authority of the Episcopal Church and the Nebraska Diocese and join the Anglican Church in Americas Mission Valley Diocese (Exhibit 7). According to Barker (Exhibit 19), for a year and half the Nebraska Diocese attempted to communicate with Defendant Robert Scheibelhofer, St. Barnabas'

Rector, to learn the intentions of the Defendants, to no avail. On January 26, 2009, Scheibhofer was released from his obligations of priest. The Diocese and the Bishop demanded that the members of the Congregation led by the Defendants that had placed themselves under the jurisdiction of the Anglican Church relinquish possession and control of the real and personal property of St. Barnabas Church, claiming that all parish property, real and personal that remained with the Wardens and Vestryman. The Defendants have failed to do so and the Plaintiffs have brought this action against the Rector, former Wardens and members of the Vestry. St. Barnabas Parish, the Corporation, was not named as a Defendant. Plaintiff-in-Intervention named the Rector, the above Vestry members and the Nebraska Attorney General as Defendants.

I.

The Defendants argue that the named Defendants should not have been sued because their actions were the corporate actions of the members of St. Barnabas Parish: Scheibhofer was Rector; David Salyards was Senior Warden prior to 2007 vote; Matthew Burbach was a member prior to 2007 vote; Don Ehrlich, Cindy Salyards, Jacqueline Quigley and William Templin were members of the Vestry prior to the 2007 vote. Defendants further argue that these Defendants did not have the official capacity to act as Plaintiff has alleged, that only the Warden and Vestryman who actually hold title to the property and its current individual members should be the named Defendants as well as the corporation. Because the necessary parties are absent, Defendants argue that the Court has no jurisdiction to determine the controversy pursuant to Neb. Rev. Stat. § 25-323 (Reissue 2008), Shepoka Vs. Knopik, 197 Neb. 651, 250 N.W.2d 619 (1977) as the named Defendants, not being current Wardens and Vestryman

cannot address Plaintiff's Complaint.

Plaintiff argues there is no fatal defect in named parties because the law concerning official capacity suits as the Defendants are former Wardens and members of the Vestry of St. Barnabas Parish and the corporation received notice and was given an opportunity to respond, This suit is against the entity and not the individuals. Holmstedt Vs. York County Jail Supervisor, 15 Neb. App. 893, 739 N.W.2d 449 (2007).

II.

Defendants argue that St. Barnabas had the right to withdraw from the Diocese per the First Amendment saying the parish never promised to remain in the Diocese forever and the parish and its members had the right to withdraw and worship at an association of their choice, citing Guinn Vs. Church of Christ of Collinsville, 775 P2d 766 (Okla. 1989).

III.

The Defendants next argue that the real and personal property of St. Barnabas Church has not vested in the Diocese by operation of Neb. Rev. Stat. § 21-2801 through 2803. Defendants point out that St. Barnabas acquired and titled its property without any help from Plaintiff and any loans to the parish were after 1915 and have all been paid back. Defendants further argue that title (of the property) has always been with "The Wardens and Vestryman of Saint Barnabas Church" with no reference to the Episcopal Church and there has been no change in church membership as required by § 21-2803 to effect transfer by statute.

Defendants argue that the Nebraska legislature intended to settle these types of disputes by strict interpretation and the court need not look at case law prior to 1967

and should apply the neutral principles of law theory announced in Watson Vs. Jones, 80 U.X. 670 (1871), and Presbyterian Church Vs. Hull Church, 393 U.S. 440 (1969) and Jones Vs. Wolf, 443 U.S. 595 (1979). Defendants argue that no express trust has been created via documents (St. Barnabas Article of Incorporation or Bylaw) to the Diocese or the Episcopalian Church, nor was a constructive trust created because St. Barnabas has at all times been in control of its affairs. See Bjorkwen Vs. The Protestant Episcopal Church in the United States of America of the Diocese of Lex, 759 S.W.2d 583 (1988); Southern Ohio State Exec. Offices of Church of God Vs. Fairborn Church of God, 573 N.E.2d 172 (1989). The Defendants further argue that by not placing the trust declared by the "Dennis Canon" in a legally cognizable form as presented by Jones Vs. Wolf, 443 U.S. at 606, 99 Ct. at 3027, there is no trust created on behalf of Plaintiffs.

Jones states:

... the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

Defendants argue that none of the canons cited by Plaintiff (Church Canon II.6(e) and (3), Canon 1.7 (1)(b) & (h), Canon 1.7 (3) to name a few) specifically create trusts as Plaintiffs claim. Defendants further argue that Neb. Rev. Stat. § 21-2801 (3) is inapplicable and does not create a trust in favor of Plaintiffs. Defendants further argue that no trust was created via St. Barnabas' voluntary association with the Church since it was voluntary, the members should be able to end the relationship and the Church's rules no longer apply. Defendants' final argument is that because the property was a

gift to St. Barnabas' Wardens and Vestryman does not necessarily mean that it was donated to the Diocese and the Church.

Plaintiff also argues Jones Vs. Wolf, *supra*, applies in that the court should defer to a hierarchical church's ecclesiastical determination. Plaintiff argues that the Nebraska Legislature set public policy when it passed § 21-2801 et seq to resolve issues involving real and personal property and the court should rule the property at issue has been held in trust for the Diocese and the Church. Plaintiff argues Defendants: (1) have offered no evidence St. Barnabas was not subject to the authority of the Diocese and the Church; (2) even though the members of St. Barnabas still exist as a local religious association they have withdrawn and terminated their affiliation, thus, pursuant to statute (§ 21-2803) they "shall be deemed to have ceased to exist or sustain its organization within the meaning of section 21-2801"; and (3) public policy "defined" in § 21-2801 foregoes the need to undertake procedural steps set out in § 21-281.

Plaintiff further argues that under Nebraska case law and church canon the Diocese is entitled to the property as Defendant Scheibelhofer is no longer a priest nor the rector of St. Barnabas Church and the congregation cannot withdraw from the Diocese and the Church without the action of the Diocese. Church Canon 1.17(8) and Pounder Vs. Ashes, 44 Neb. 672, 63 N.W. 48 (1895). Plaintiff argues the hierarchical church followed Jones, *supra*, and effectuated a trust when it amended its governing documents – 1979 Trust Canon – thereby binding its subordinate parishes to hold real and personal property in trust for the Church and Diocese. Although Defendants claim they are not bound by the Canon because they did not vote for it or protest its adoption,

Plaintiff argues that the members of St. Barnabas remained a member of the Church and Diocese and accepted benefits as a result of the continued relationship. Plaintiff claims throughout its history St. Barnabas Church operated in conformity with the Church's Proper Book as required by the St. Barnabas Parish Constitution dating back to 1869, requesting the consent of Church and Diocese to alienate or encumber parish property on several occasions. Also § 21-281 et seq followed Pounder and Jones making it public policy that real property automatically vests in and transfers to the Diocese upon the Defendants disaffiliation. Plaintiff concludes as did Courts across the country which are enumerated in Plaintiff's reply brief.

Summary Judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. Bamford Vs. Bamford, Inc., 279 Neb. 259, ___ N.W.2d ___ (2010).

Having now fully reviewed the pleadings, the exhibits, arguments of counsel and the law, the Court finds that Plaintiff's Motion for Summary Judgment should be sustained and Defendant's Motion for Summary Judgment should be denied.

St. Barnabas Church was established by the Diocese and at almost the same time, the Diocese was approached by members of a mission to become a parish. St. Barnabas was incorporated on May 4, 1869 as a Parish in the Protestant Episcopal Church of Nebraska (Exhibit 1). Through time and changes in the Nebraska Statutes, St. Barnabas Church has continued its association with the Episcopal Church as a parish and its acknowledgement of and accession to the Constitution and Canons of the

General Convention and to the Constitution and Canons of the Diocese (Exhibit 19 with attachments M, N, O and P) whereby the Parish asked for approval from the Diocese for the sale or purchase of property, a mortgage and assessments.

Although Canon Law before 1979 did not relate to parish property should a parish disaffiliate itself from the Diocese and the Church, nowhere in the history of St. Barnabas Church did its members, Wardens, Vestrymen or Rectors create a trust placing real and personal property in said trust exclusively for the parish. The Court finds that the Diocese of Nebraska Canons set the rule for when a parish attempts to cease its affiliation with the Diocese, the Diocese may dissolve the parochial organization and the title to its real property shall be transferred and conveyed to the Bishop and Trustees as well as personal property. Nebraska Canons 12(1) and 12(2) (Exhibit F of Exhibit 19).

Nebraska Revised Statute § 21-2801 et seq acknowledged this as the public policy of the State that when a parish church that has been affiliated with the Church and Diocese terminates its affiliation with the Church and Diocese real and personal property of St. Barnabas Church was vested and transferred by operation of law to the Diocese. Even though the Defendants claim there is no change in membership and the members continue to worship and have not abandoned the property (Exhibits 8 and 9).

Section 21-2803 makes it clear that a local religious association upon withdrawal from and termination of its affiliation with the Diocese and the Church, such religious society shall be deemed to have ceased to exist or maintain its organization within the meaning of § 21-2801.

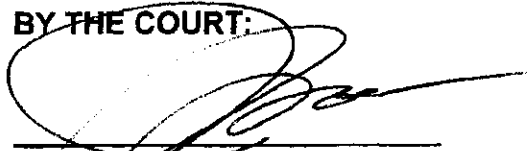
IT IS, THEREFORE, ORDERED that Plaintiff's Motion for Summary Judgment is sustained and a Declaratory Judgment is granted in their favor and Defendants Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that the real property and personal property of St. Barnabas is that of the Diocese of Nebraska and that the Defendants have no right, title or interest to occupy, use or possess said property.

IT IS FURTHER ORDERED that Plaintiff shall have possession of said property within thirty (30) days of the signing of this Order.

DATED this 24th day of **September, 2012.**

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Joseph B. Troia', written over a horizontal line.

Joseph B. Troia
District Judge

CC: D. C. Bradford
Justin Eichmann
John C. Chatelain
John J. Maynard
David Houghton
Keith Harvat

3

THE EPISCOPAL DIOCESE OF MILWAUKEE, INC.,

Plaintiff,

and

THE EPISCOPAL CHURCH,

Plaintiff-In-Intervention,

v.

MARSHA OHLGART, *ET AL.*,

Defendants,

Case No. 09-CV-00635

FILED
IN CIRCUIT COURT
APR 3 2012
WAUKESHA CO. WI
CIVIL DIVISION

2012 MAR 19 PM 12:17

CLERK OF CIRCUIT COURT
CIVIL DIVISION

**ORDER GRANTING MOTIONS FOR PARTIAL SUMMARY JUDGMENT OF THE
EPISCOPAL DIOCESE OF MILWAUKEE, INC. AND EPISCOPAL CHURCH AND
DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Having considered the documents in the record, the undisputed facts, the written submissions of the parties, the oral arguments presented, and the applicable law, the Court concludes and holds as follows:

1. In deciding this church property dispute, this Court follows the neutral principles of law approach set forth in *Jones v. Wolf*, 443 U.S. 595 (1979) and *Wisconsin Conference Bd. of Tr. of United Methodist Church, Inc. v. Culver*, 2001 WI 55, 243 Wis.2d 394, 627 N.W.2d 469.

2. There are no material issues of fact in dispute that prevent the Court from granting the motions for partial summary judgment of The Episcopal Diocese of Milwaukee, Inc. ("Diocese") and Episcopal Church.

3. The Episcopal Church is a hierarchical church.

4. The Diocese is a constituent part of, and diocese within, the Episcopal Church.

5. St. Edmund's Episcopal Church, Inc. in Elm Grove is a constituent part of, and parish within, the Diocese and Episcopal Church.

6. St. Edmund's Episcopal Church, Inc. voluntarily chose to become a part of the Diocese and Episcopal Church and, by doing so, became bound by their rules and usages, including, but not limited to, the Canons and Constitutions of the Diocese and Episcopal Church.

7. Accordingly, any attempts by the officers or agents of St. Edmund's Episcopal Church, Inc. to remove the corporation from the Diocese or the Episcopal Church were invalid, beyond their authority, and *ultra vires*.

8. Defendants also had no authority or lawful ability to amend the constitution of St. Edmund's Episcopal Church, Inc. in a manner that violated or abrogated the Canons and Constitutions of the Diocese and Episcopal Church and its Doctrine, Discipline, and Worship.

9. The attempted change of the name of St. Edmund's Episcopal Church, Inc. to St. Edmund's Anglican Church, Inc. is a nullity and, at all times material, St. Edmund's Episcopal Church, Inc. has continued to exist although not associated or affiliated in any way with St. Edmund's Anglican Church, Inc.

10. Defendants had no authority to control, remove, take, or keep the real and personal property of St. Edmund's Episcopal Church, Inc. for uses inconsistent with or in violation of the Canons and Constitutions of the Diocese and Episcopal Church and its Doctrine, Discipline, and Worship.

~~11. The real and personal property of St. Edmund's Episcopal Church, Inc. is held in trust by operation of law for the benefit of the Diocese and Episcopal Church for uses consistent with the Doctrine, Discipline, and Worship of the Episcopal Church.~~

~~12. All actions taken by Defendants or others in the name of St. Edmund's Anglican, Inc. are invalid, *ultra vires*, and *void ab initio*.~~

Consequently, the Court orders as follows:

A. The Diocese and Episcopal Church's motions for partial summary judgment that were filed with the Court on or about March 24 and 25, 2010, respectively, are granted for the reasons set forth herein and included in the record.

B. Defendants' motion for summary judgment that was filed with the Court on or about March 31, 2010, is denied.

C. Defendants shall provide the Plaintiffs with an accounting of all assets and property of St. Edmund's Episcopal Church, Inc. within their possession, custody, or control.

D. Defendants shall provide any and all real and personal property of St. Edmund's Episcopal Church, Inc. to the Diocese.

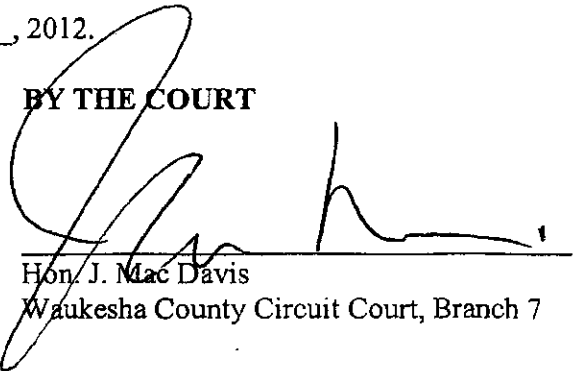
E. Defendants shall vacate and relinquish control over the property of St. Edmund's Episcopal Church, Inc.

F. Defendants are enjoined from holding themselves out as ^{representatives of or} ~~having any association~~ with, interest in, control over, or ownership of St. Edmund's Episcopal Church, Inc. ~~and its real and personal property.~~

G. St. Edmund's Anglican Church, Inc. shall not claim or assert in any manner whatsoever to be the successor to St. Edmund's Episcopal Church, Inc. or to have evolved or emerged from St. Edmund's Episcopal Church, Inc. ~~and shall correct any prior representations to the contrary.~~

Dated this 2 day of April, 2012.

BY THE COURT



Hon. J. Mac Davis
Waukesha County Circuit Court, Branch 7

4

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE EPISCOPAL DIOCESE OF
OHIO, et al.,

Plaintiffs,

v.

THE ANGLICAN CHURCH OF THE
TRANSFIGURATION, et al.,

Defendants.

: CASE NO. CV-08-654973

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Judge Deena R. Calabrese

OMNIBUS OPINION AND ORDER

I. INTRODUCTION

It is tempting to conflate a litigation file's size with its complexity. This case presents that enticement. Nevertheless, despite the sheer volume of submissions from the parties – dozens of pages of cross-motions for summary judgment and supplemental authority, and thousands of pages of appendices – this case is straightforward. For the reasons discussed below, the Court finds and concludes that Plaintiffs are entitled to partial summary judgment, and Defendants must therefore “surrender the church keys.”¹ The church property in question is held in trust for the benefit of Plaintiffs Episcopal Diocese of Ohio and The Protestant Episcopal Church in the United States of America.

II. PROCEDURAL HISTORY

This case centers on a church property dispute. The within litigation was initiated March 26, 2008, by Plaintiffs Episcopal Diocese of Ohio (the “Episcopal Diocese” or the “Diocese”), Trustees of the Diocese of Ohio (“Ohio Trustees”), The Parish of the Church of the

¹ Episcopal Diocese of Massachusetts v. Devine, 59 Mass. App. Ct. 722, 723, 797 N.E.2d 916, 918 (Mass. 2003).

Transfiguration (“Transfiguration”), St. Barnabas Protestant Episcopal Church (“St. Barnabas”), The Episcopal Church of the Holy Spirit (“Holy Spirit”), St. Anne’s in the Fields Episcopal Church (“St. Anne’s”), and St. Luke’s Episcopal Church (“St. Luke’s”). Intervening Plaintiff The Protestant Episcopal Church in the United States of America (the “Episcopal Church” or the “ECUSA”) later joined the roster of plaintiffs and filed its own complaint. The Defendants consist of seceding members of the above-referenced parishes, as well as the new church entities formed through amendments to the parishes’ articles of incorporation.

Plaintiffs have moved for partial summary judgment on the claims in their complaints, as well as on critical counts of Defendants’ counterclaims. Defendants have likewise filed cross-motions for summary judgment. The seven pending cross-motions for partial summary judgment are:

1. Plaintiffs’ and the Episcopal Church’s Motion for Partial Summary Judgment;
2. Defendant Attorney General of Ohio’s Motion for Partial Summary Judgment;²
3. Defendant St. Barnabas Anglican Church’s Motion for Partial Summary Judgment;
4. Defendant Church of the Holy Spirit’s Motion for Partial Summary Judgment;
5. Defendant St. Anne’s in the Fields Anglican Church’s Motion for Partial Summary Judgment;
6. Defendant St. Luke’s Anglican Church’s Motion for Partial Summary Judgment; and
7. Defendant The Anglican Church of the Transfiguration’s Motion for Summary Judgment

² The Attorney General is charged by common law and the Charitable Trust Act, O.R.C. § 109.23 et seq., with the enforcement of charitable trusts, and has appeared in this case to protect the interests of charitable beneficiaries.

Despite the *partial* nature of the motions for summary judgment, the collection of over 20 exemplary briefs presents a winner-take-all proposition: The subject property belongs either to Plaintiffs or to the various Defendants.

III. FACTUAL AND LEGAL BACKGROUND

A. The ECUSA, The Diocese Of Ohio, And The Five Parishes

The applicable legal framework is determined, in part, by whether the Episcopal Church is hierarchical or congregational. “A hierarchal or connectional church is one in which a local church is a subordinate member of a general church which has complete control over the entire membership of the general church.” African Methodist Episcopal Church, Inc. v. St. Johns African Methodist Episcopal Church of Uhrichsville, Ohio, 2009 WL 795264, 2009-Ohio-1394, ¶ 36 (Ohio App. 5th Dist. 2009) (citing Tibbs v. Kendrick, 93 Ohio App.3d 35, 637 N.E.2d 39 (Ohio App. 8th Dist. 1994)).³

If a church is hierarchical, the First Amendment requires courts to “defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.” Jones v. Wolf, 443 U.S. 595, 602 (1979). Critically, once “[h]aving found a hierarchical relationship,” courts are likewise “authorize[d] to look beyond deeds and articles of incorporation to church constitutions and similar documents.” Southern Ohio State Exec. Offices of Church of God v. Fairborn Church of God, 61 Ohio App.3d 526, 538, 573 N.E.2d 172, 180 (Ohio App. 2nd Dist. 1989). The Fairborn court further noted that while Ohio case law “restricts an Ohio court employing neutral principles of law in a property dispute case to those

³ “A congregational polity, on the other hand, exists when ‘a religious ... congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to a higher authority.’” Tibbs, supra (quoting State ex rel. Morrow v. Hill, 51 Ohio St.2d 74, 76, 364 N.E.2d 1156, 1158 (1977)).

documents that reflect the 'ordinary indicia of property rights[,] those indicia may be present in constitutional documents of the general denominational church." *Id.* (internal citations omitted) (emphasis added). Furthermore, "[t]hrough Ohio law does not support the theory of implied trust, underlying documents may show the existence of an express or constructive trust, or similar interest, which are recognized in Ohio." *Id.*

Plaintiffs, aided by a heavy load of internal church documents and relevant case law, have conclusively established that the Episcopal Church is hierarchical in nature. *See, e.g., Episcopal Diocese of Massachusetts v. Devine*, 59 Mass. App. Ct. 722, 727, 797 N.E.2d 916, 921 (Mass. 2003) ("the Episcopal Church is hierarchical"); *Protestant Episcopal Church in Diocese of New Jersey v. Graves*, 83 N.J. 572, 575, 417 A.2d 19, 21 (N.J. 1980) (same); *Daniel v. Wray*, 158 N.C.App. 161, 163, 580 S.E.2d 711, 714 (N.C. App. 2003) ("The Protestant Episcopal Church in the United States of America ... is a hierarchical or connectional church"). In *Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc.*, 305 Ga.App. 87, 699 S.E.2d 45 (Ga. App. 2010), the court painstakingly justified its conclusion that the ECUSA is hierarchical:

Here, careful consideration of the National Episcopal Church's structure and history persuades us that the National Episcopal Church is hierarchical. The church organization has three tiers: (1) the National Episcopal Church, (2) geographically-defined dioceses that belong to, are subordinate to, and are under the jurisdiction of the National Episcopal Church, and (3) local parishes that belong to, are subordinate to, and are under the jurisdiction of the National Episcopal Church and the individual diocese in which the parish is located. At the present time, the National Episcopal Church is comprised of 111 dioceses and thousands of individual churches, each of which must be affiliated with a diocese. The National Episcopal Church is governed by a general convention composed of bishops and deputies. The dioceses are governed by bishops and an annual convention. Each parish is governed by a vestry, which is akin to a board of directors. The vestry of each church sends delegates to its diocesan convention, and each diocese sends delegates to the general convention. There are governing documents at each level of the church. The National Episcopal Church has a constitution and canons, which are similar to bylaws. The dioceses also have

constitutions and canons, but these are subordinate to the governing documents of the National Episcopal Church. The individual parishes are controlled by the terms of their charters and bylaws, which are in turn subordinate to the constitutions and canons of both the diocese and the National Episcopal Church. In addition, the dioceses and parishes are subject to the doctrine, discipline, and worship of the National Episcopal Church generally.

Id., 699 S.E.2d at 48.

Defendants' argument to the contrary consists of footnotes in various briefs remarking that "Defendants do not concede in any way that the ECUSA is a hierarchical church." See, e.g., The Anglican Church of the Transfiguration's Combined Brief in Opposition to Motion for Summary Judgment of Plaintiff, Intervening Plaintiff, and the Ohio Attorney General at 4 n.14.⁴ The footnote cites, but does not discuss, the affidavit of one Mary McReynolds.⁵

Plaintiffs correctly note that in the summary judgment context, a party's mere statement that it does not concede a disputed point is arguably tantamount to doing precisely that. Once Plaintiffs demonstrated the lack of any fact issue regarding the Episcopal Church's hierarchical structure, it was Defendants' burden to present competent, admissible evidence to the contrary. Their one-sentence reference to an affidavit is not sufficient, particularly where Defendants have not produced a single court decision supporting their position on this issue. This Court finds and concludes that the Episcopal Church is hierarchical.

⁴ See also Brief of Church of The Holy Spirit, St. Anne's In The Fields Anglican Church, St. Barnabas Anglican Church, and St. Luke's Anglican Church in Opposition to Plaintiffs' and the Episcopal Church's Motion for Partial Summary Judgment at 2 n.4.

⁵ McReynolds' affidavit spans 128 paragraphs over the course of 63 pages, not counting exhibits. Defendants nevertheless neglect to offer any meaningful narrative development of her testimony in their various briefs, including testimony regarding whether the ECUSA is hierarchical. This might be taken as evidencing some lack of faith in McReynolds' claim that the Episcopal Church is not hierarchical. The "mere existence of a scintilla of evidence in support of the [parties'] position will be insufficient" to escape summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 252 (1986).

Crucially, however, Plaintiffs' evidence regarding the hierarchical structure of the ECUSA, and the place the relevant parishes occupied in that hierarchy, goes much further. Plaintiffs contend, and Defendants have not disputed, that congregations wishing to become parishes of the Episcopal Diocese of Ohio must, *inter alia*, pledge "conformity to the Constitution and Canons of The Episcopal Church and the Diocese of Ohio" and to "the doctrine, discipline, and worship of the National Constitution, the National Canons, and [the Diocesan] canons." Plaintiffs' Appendix 4 (Affidavit of the Rt. Rev. Mark Hollingsworth at ¶ 8).

Accordingly, Plaintiffs have submitted copious evidence of the five parishes' pledged and actual submission to the governance of the Episcopal Church. The unrefuted evidence shows that St. Barnabas, for example, promised in 1948 to conform to the church's doctrine and discipline, as well as the Constitution and Canons of both the General Convention and the Ohio Diocese. Its 1948 articles of incorporation laid out its purpose as, *inter alia*, worship according to the ECUSA's doctrine and discipline. When it petitioned in 1950 for status as a parish, St. Barnabas again submitted the above-referenced articles of incorporation. Later, St. Barnabas sought Diocese permission before alienating or encumbering real property. Six years after the General Convention adopted the 1979 Trust Canon (discussed below at page 9, and also known as the "Dennis Canon"), and again in 1993, St. Barnabas adopted by-laws stating, among other things, that it "adopted the Constitution and Canons of the Protestant Episcopal Church in the Diocese of Ohio." Pltf. Apx. 13 (Hollingsworth Aff. at ¶ 35).

Likewise, in 1966, St. Luke's was created as a mission after individuals filed a petition that promised conformity to church doctrines, discipline, liturgy, rites, and usages, along with accession to the governing church's constitutions and canons. St. Luke's articles of incorporation declared its purpose as worship "according to the doctrine, discipline and worship

of the Protestant Episcopal Church; also to acquire the land and build and operate a Protestant Episcopal Church thereon.” Pltf. Apx. 19 (Hollingsworth Aff. at ¶ 52). When St. Luke’s sought parish status in 1974, its petition stated its purpose as including worshipping in accordance with church doctrine, and further promised “conformity to the Constitution and Canons of the General Convention and the Diocese of Ohio.” Pltf. Apx. 20 (Hollingsworth Aff. at ¶ 56). On several occasions, St. Luke’s sought diocesan permission before alienating real property. On at least one occasion, a land purchase brought the 1979 Trust Canon into play: In 1996, St. Luke’s asked permission from the Diocese to purchase certain land in Fairlawn, Ohio. The Bishop consented, but only after informing St. Luke’s rector that “it is important that the Vestry understands that the parish is governed by [the Church’s 1979 Trust Canon].” Pltf. Apx. 24 (Hollingsworth Aff. at ¶ 72).

The Diocese established Holy Spirit as a mission in 1984, after passage of the Dennis Canon. The Diocese purchased real property in 1985 for construction of a church, and it is un rebutted that the Diocese currently holds title to the property. The church grounds were later declared “affiliated with the [the Episcopal Church] and subject to its Constitution and Canons.” Pltf. Apx. 32 (Hollingsworth Aff. at ¶ 92). Like the other parishes above, Holy Spirit’s articles of incorporation stated its purpose as worshipping according to Episcopal Church doctrine, and pledged “conformity to the Constitution and Canons of the General Convention and the Diocese of Ohio.” Pltf. Apx. 32-33 (Hollingsworth Aff. at ¶ 93). See also Pltf. Apx. 33 (Hollingsworth Aff. at ¶ 94) (virtually identical covenants upon admission as a parish) and Pltf. Apx. 36-37 (Hollingsworth Aff. at ¶ 107) (by-laws promising conformance to Constitution and Canons of Ohio Diocese and restating requirement that parish seek Diocesan consent before encumbering or alienating property).

Transfiguration, formed in 1990 via the merger of two parishes, similarly stated that its purpose was to worship in the tradition of the Protestant Episcopal Church, and likewise promised “conformity to the Constitution and Canons of the General Convention and the Diocese of Ohio.” Pltf. Apx. 45 (Hollingsworth Aff. at ¶ 131). Its articles of incorporation reference compliance with “the rules and discipline of the Protestant Episcopal Church of America.” Pltf. Apx. 44 (Hollingsworth Aff. at ¶ 129). There is no dispute that Transfiguration sought Diocesan consent before alienating certain real property.

Finally, St. Anne’s 1904 petition for mission status promised conformity with Church doctrines, liturgy, and the like, and further covenanted “conformity to the Constitution and Canons of the General Convention and the Diocese of Ohio.” Pltf. Apx. 53 (Hollingsworth Aff. at ¶ 155). The year 1957 brought a location change for St. Anne’s, which indisputably sought Diocesan permission for the move. St. Anne’s 1958 articles of incorporation followed the same pattern as the parishes above, namely, they provided that St. Anne’s purpose was to worship according to the doctrine and other traditions of the ECUSA, “and in conformity with the Constitution and Canons of the General Convention and the Diocese of Ohio.” Pltf. Apx. 55 (Hollingsworth Aff. at ¶ 161). In 1997, St. Anne’s petitioned for parish status. Once again, this petition pledged conformance to Church doctrine and adherence to the “Constitution and Canons of the General Convention and the Diocese of Ohio.” Pltf. Apx. 56 (Hollingsworth Aff. at ¶ 167). The petition also remarked: “We do further represent that said parish shall hold all of its property as a trustee for the Episcopal Church and the Diocese of Ohio.” Pltf. Apx. 56 (Hollingsworth Aff. at ¶ 167).

B. Control Of Church Property

Plaintiffs have submitted uncontested evidence regarding the ECUSA and Diocesan canons – stretching back to 1868 – that govern the handling of parish property. For example,

ECUSA Canons II.6(2) and I.7(3) prohibit alienation or encumbrance of real property, “consecrated” or otherwise, without Diocesan consent. Certain Diocesan canons contain similar prohibitions. Additional canons entitle the parish rector to control property subject, e.g., to church canons and the Bishop’s directives. Still others require parishes to maintain insurance. Diocesan Canon II.7.3, which was adopted in 1900, provides that the Convention may declare a parish “extinct” due to its failure to abide by Church “doctrine, discipline, and worship,” and that upon such declaration, “title to all the property [of the parish] shall at once vest in the Trustees of the Diocese.” Pltf. Apx. 6 (Hollingsworth Aff. at ¶ 13). Plaintiffs point out, and Defendants do not contest, that these canons were adopted before the five parishes at issue were formed.

Most crucial, however, is the ECUSA’s 1979 Trust Canon, adopted by the General Convention as Canon I.7(4)-(5), and also known as the “Dennis Canon.” It reads, in pertinent part, as follows:

Sec. 4 All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

Sec. 5 The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust.

See Episcopal Diocese of Rochester v. Harnish, 11 N.Y.3d 340, 352 n.5 (2008). As discussed in more detail below, there is no question that the ECUSA enacted the Dennis Canon in response to the Supreme Court’s landmark opinion in Jones, supra.⁶ Furthermore, Plaintiffs note that (a) the

⁶ The Diocese enacted an analogous provision, Diocesan Canon II.1.1, in 1999. In relevant part, it states that parishes “hold title to all real and other property in their care and custody in trust for the Diocese.” Pltf. Apx. 5 (Hollingsworth Aff. at ¶ 12).

Dennis Canon was enacted before the formation of three of the five parishes at issue in this litigation; (b) the remaining two parishes participated in its passage through democratic processes; and (c) none of the 5 parishes objected to the 1979 Trust Canon until the current dispute.

C. The Disaffiliation

In late 2005 and early 2006, Defendants purported to terminate their affiliation with the Episcopal Diocese and the ECUSA, without the benefit of following canonical processes, and most decidedly without the consent of the ECUSA or the Episcopal Diocese. It is undisputed that the Bishop declared the five parishes “imperiled” and authorized Parish Trustees to assume control of parish property. It is likewise undisputed that pursuant to Diocesan Canon II.6, said Trustees deeded each property to the Diocese. Despite these actions, Defendants have thereafter claimed ownership and control of real and personal parish property to the exclusion of the ECUSA and the Episcopal Diocese.

IV. ANALYSIS

A. Summary Judgment Standard

In order to withstand a motion for summary judgment, a party is required to establish, through competent, admissible evidence, the existence of genuine issues of material fact. Ohio R. Civ. P. 56(E). “Pursuant to Civ. R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party, said party being entitled to have the evidence construed most strongly in his favor.” Zivich v. Mentor Soccer Club, Inc., 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, 1998-Ohio-389 (1998). Once the moving party satisfies its burden, the burden shifts to the non-moving party, which “may not rest on mere allegations of denials of the party’s pleading,” but

instead must, “by affidavit or as otherwise provided in this rule ... set forth specific facts showing that there is a genuine issue for trial.” Ohio R. Civ. P. 56(E); Dresher v. Burt, 75 Ohio St.3d 280, 293, 662 N.E.2d 264, 273-274, 1996-Ohio-107 (1996).

B. The Neutral Principles Analysis

While the First Amendment prohibits civil courts from intruding into religious matters involving doctrine, polity, and practice, courts are nevertheless empowered to decide property disputes that have no relationship to religious doctrine. In an effort to avoid unconstitutional religious entanglements, the U.S. Supreme Court, in Jones, supra, “definitively approved the neutral principles approach” for the purpose of resolving church property disputes. In re Episcopal Church Cases, 45 Cal.4th 467, 481, 198 P.3d 66, 76, 87 Cal.Rptr.3d 275, 287 (Cal. 2009). The Supreme Court explained the advantages of this method:

The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.

Jones, supra, 443 U.S. at 603. Ohio and other jurisdictions have since adopted the neutral principles approach.

As discussed above, Courts draw a distinction between so-called “hierarchical” churches on the one hand and “congregational” churches on the other. In Jones, supra, the Supreme Court plainly stated that courts must defer to a hierarchical church’s determinations on issues of religious doctrine and polity: “[T]he [First] Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.” Jones, supra, 443 U.S. at 602. A court applying the neutral principles analysis to a church property dispute may examine “the language of the deeds, the terms of the local church

charters, the state statutes governing the holding of church property, *and the provisions in the constitution of the general church concerning the ownership and control of church property.*”

Jones, supra, 443 U.S. at 603 (emphasis added).

As stated above, Ohio subscribes to the neutral principles analysis. See, e.g., African Methodist Episcopal Church, Inc. v. St. Johns African Methodist Episcopal Church of Uhrichsville, Ohio, 2009 WL 795264, 2009-Ohio-1394 (Ohio App. 5th Dist. 2009). Indeed, Ohio courts have relied on the neutral principles analysis since well before Jones. See Serbian Orthodox Church Congregation of St. Demetrius of Akron v. Kelemen, 21 Ohio St.2d 154, 157-159, 256 N.E.2d 212, 215-216 (1970). Plaintiffs also correctly point out that Ohio courts have long held that application of the neutral principles analysis may lead to considering a hierarchical church’s constitution and canons. Matz v. Salem Church, 1986 WL 10932 (Ohio App. 4th Dist. 1986); Fostoria Bible Holiness Church, Inc. v. The Calvary Wesleyan Church, 1977 WL 199328 (Ohio App. 3rd Dist. 1977).

Plaintiffs have established, and the weight of authority is clear, that the ECUSA is a hierarchical church. The dispositive question then becomes whether the ECUSA and/or the Diocese have effectively created a trust such that, upon the disaffiliation of the five parishes, the property in dispute reverted to ownership by the mother church. At the center of the legal battle is this passage from Jones, particularly the final six words:

Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.* The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is *embodied in some legally cognizable form.*

Jones, 443 U.S. at 606 (emphasis added). Plaintiffs argue that the Dennis Canon (along with certain canons of the local Diocese), when considered in light of each parish's unequivocally-stated intent to submit to the governance of the general church, creates exactly the type of enforceable express trust contemplated by the U.S. Supreme Court. Indeed, it could not be more plain than that Jones invited churches to incorporate such trust language into their constitutions precisely to ward off property disputes like the one before this Court.

Defendants view Jones differently. In essence, they contend that by requiring something "embodied in some legally cognizable form," id., the Jones Court contemplated an express trust only where the trust is established in the same manner as any commonplace secular trust, using "objective, well-established concepts of trust and property law familiar to lawyers and judges." Id., 443 U.S. at 604. According to Defendants' view, for an express trust to exist in the present case, it must have been created in the same fashion, for example, as a trust regarding a coffee shop. Defendants would thus argue that because the mere amendment of a church constitution bears little resemblance to the trust and property principles "familiar to lawyers and judges" in Ohio, it cannot effect an express trust.

Plaintiffs' argument, however, is the sounder of the two, and has been adopted by appellate courts (including courts of last resort) across the country. This Court joins the majority of those jurisdictions holding that on almost precisely identical facts, the Court must examine and give effect to the hierarchical church's internal governing documents, and must accordingly find that the parishes hold property subject to an express trust in favor of the ECUSA and its local Diocese.

This Court agrees with the multiple tribunals that have applied the neutral principles analysis and held the Dennis Canon "dispositive." See, e.g., Episcopal Diocese of Rochester v.

Harnish, 11 N.Y.3d 340, 352 (2008). The Harnish court's succinct analysis is both persuasive and, as explained below, consistent with additional appellate authority:

The remaining factor for consideration under neutral principles, however, requires that we look to "the constitution of the general church concerning the ownership and control of church property." It is this factor that we find dispositive. We conclude that the Dennis Canons clearly establish an express trust in favor of the Rochester Diocese and the National Church and that All Saints agreed to abide by this express trust either upon incorporation in 1927 or upon recognition as a parish in spiritual union with the Rochester Diocese in 1947. We therefore need not consider the existence of an implied trust. In agreeing to abide by all 'canonical and legal enactments,' it is unlikely that the parties intended that the local parish could reserve a veto over every future change in the canons. We find it significant, moreover, that All Saints never objected to the applicability or attempted to remove itself from the reach of the Dennis Canons in the more than 20 years since the National Church adopted the express trust provision.

Id. at 352 (internal citations omitted).

As noted above, a multitude of appellate tribunals have likewise given effect to the Dennis Canon. See Masterson v. Diocese of Northwest Texas, 2011 WL 1005382 (Texas Ct. App. March 16, 2011) (parish agreed to be bound by Episcopal Church's governing documents, and "[t]hese governing documents make clear that church property is held in trust for the Episcopal Church and may be subject to Good Shepherd's authority only so long as Good Shepherd remains a part of and subject to the Episcopal Church and its Constitution and Canons"); Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc., 305 Ga.App. 87, 96, 699 S.E.2d 45, 52 (Ga. App. 2010) (Dennis Canon was promulgated in response to Jones, and "courts across the country have recognized that the Dennis Canon effectuates an express trust regarding parish property"); In re Episcopal Church Cases, 45 Cal.4th 467, 490, 198 P.3d 66, 87 Cal.Rptr.3d 275 (Cal. 2009) (enforcing express trust based on Dennis Canon); Rector, Wardens and Vestrymen of Trinity-Saint Michael's Parish, Inc. v. Episcopal Church in Diocese of Connecticut, 224 Conn. 797, 821-823, 620 A.2d 1280 (Conn. 1993) (same); Protestant Episcopal Church in Diocese of New Jersey v. Graves, 83 N.J. 572,

581-582, 417 A.2d 19 (N.J. 1980) (Dennis Canon functions as express trust provision); Daniel v. Wray, 158 N.C.App. 161, 171, 580 S.E.2d 711 (N.C. App. 2003) (same); In re Church Of St. James The Less, 585 Pa. 428, 452, 888 A.2d 795 (Pa. 2005) (enforcing express trust based on Dennis Canon).⁷

Notably, in African Methodist Episcopal Church, Inc. v. St. Johns African Methodist Episcopal Church of Uhrichsville, Ohio, 2009 WL 795264, 2009-Ohio-1394 (Ohio App. 5th Dist. 2009), the court quoted the Jones language regarding the “legally cognizable form” requirement, followed that up with a rather general summary regarding Ohio trust law, id. at ¶¶ 39-42, and then promptly proceeded to consider *church documents* analogous to the Dennis Canon. The court ultimately held that “[i]t is the act of affiliation with AMEC that creates the transfer of property from St. Johns AME. Because St. Johns AME is both the settlor and trustee, no additional transfer was necessary to create the express trust.” Id. at ¶ 61.⁸

For the reasons expressed in Harnish and its sister courts across the nation, this Court finds and concludes that the Dennis Canon governs the outcome of this litigation. Indeed, as reflected above, St. Barnabas and St. Luke’s did not take issue with the applicability of the Dennis Canon for more than twenty years after its enactment.⁹ The remaining three

⁷ See also African Methodist Episcopal Church, Inc. v. St. Johns African Methodist Episcopal Church of Uhrichsville, Ohio, 2009 WL 795264, 2009-Ohio-1394 (Ohio App. 5th Dist. 2009) (finding that Jones sanctioned use of express trust in church constitution as means of securing property ownership, and enforcing express trust provision in church *Doctrine and Discipline*).

⁸ See also In re Episcopal Church Cases, 45 Cal.4th 467, 493, 198 P.3d 66, 84, 87 Cal.Rptr.3d 275, 297 (Cal. 2009) (“The only intent a secular court can effectively discern is that expressed in legally cognizable documents. In this case, those documents show that the local church agreed and intended to be part of a larger entity and to be bound by the rules and governing documents of that greater entity.”)

⁹ To the extent Defendants now argue that the Dennis Canon was improperly adopted, see, e.g., St Barnabas Anglican Church’s Motion for Partial Summary Judgment at 13 n.5, the Court
(continued...)

congregations – Holy Spirit, Transfiguration, and St. Anne’s – applied for admission as parishes *after* the enactment of the Dennis Canon, and pledged to be bound by this and all other ECUSA and Diocesan canons. St. Anne’s pledge actually included an express statement that it would hold all of its property as a trustee for the ECUSA and the Diocese.

Like the Court of Appeals of New York in Harnish, this Court finds the existence of an express trust dispositive of this matter. The real and personal property at issue is impressed with a trust in favor of the ECUSA and the Episcopal Diocese.¹⁰ There is no need to consider the alternative existence of a constructive trust, any other form of implied trust, or a charitable trust. See, e.g., Harnish, *supra*, 11 N.Y.3d at 352.

C. Collateral Estoppel

In one of many submissions of supplemental authority, Defendants argue that All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of South Carolina, 385 S.C. 428, 685 S.E.2d 163 (S.C. 2009) has collateral estoppel effect with respect to application of the Dennis Canon. The ECUSA was a party in the Waccamaw case, where the court found the Dennis Canon ineffective to create an express trust. The Waccamaw court held, in pertinent part:

(...cont’d)

must step aside to avoid unconstitutionally entangling itself in a religious dispute. “[T]he First Amendment to the United States Constitution precludes this Court from questioning the validity of the process by which the church legislates.” Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc., 305 Ga.App. 87, 97, 699 S.E.2d 45, 53 (Ga. App. 2010) (citing Jones, *supra*, 443 U.S. at 602); see also Episcopal Church Cases, 45 Cal.4th 467, 492, 198 P.3d 66, 84, 87 Cal.Rptr.3d 275, 296.

¹⁰ It also appears clear that “the Dennis Canon ... merely codified in explicit terms a trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of PECUSA in 1789.” Rector, Wardens and Vestrymen of Trinity-Saint Michael’s Parish, Inc. v. Episcopal Church in Diocese of Connecticut, 224 Conn. 797, 821, 620 A.2d 1280, 1292 (Conn. 1993). This conclusion, however, is not required to support the Court’s ultimate holding.

[W]e hold that neither the 2000 Notice nor the Dennis Canon has any legal effect on title to the All Saints congregation's property. ... It is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another. The Diocese did not, at the time it recorded the 2000 Notice, have any interest in the congregation's property. Therefore, the recordation of the 2000 Notice could not have created a trust over the property.

Id., 685 S.E.2d at 174.¹¹ Defendants therefore argue that Waccamaw collaterally estops the ECUSA – and the local Diocese – from arguing to the contrary. The Court finds Defendants' arguments unpersuasive for several reasons.

The Ohio Supreme Court has defined the elements of collateral estoppel – or issue preclusion – as follows:

(1) The party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) there was a final judgment on the merits in the previous case after full and fair opportunity to litigate the issue; (3) the issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and (4) the issue must have been identical to the issue involved in the prior suit.

Monahan v. Eagle Picher Industries, Inc., 21 Ohio App.3d 179, 486 N.E.2d 1165, syllabus ¶ 1

(Ohio App. 1st Dist. 1984). While the doctrine technically requires mutuality of the parties, Ohio courts have long recognized exceptions. As one court summarized:

Ohio law has taken a broad and imprecise interpretation of the mutuality exception. Issue preclusion takes effect *unless the party lacked a full and fair opportunity to litigate or the circumstances justify relitigation*. Hicks v. De La Cruz (1977), 52 Ohio St.2d 71, 74, 369 N.E.2d 776. Interpreting its own ruling in Hicks, the Ohio Supreme Court stated, “ * * * this court has not, * * * abandoned the mutuality rule, but has only shown that it is willing to relax the rule where justice would reasonably require it.” Goodson, 2 Ohio St.3d at 199, 443 N.E.2d 978.

¹¹ This holding appears to be in tension with Jones, which plainly contemplates the creation of express trusts through amendments to church canons. Moreover, there is an argument that Waccamaw's interpretation of Jones is logically flawed. Specifically, if the diocese or general church already had title to the property in question, there would be no need for a trust, as the property would already be sufficiently protected. See Green v. Campbell (NO. 09-986), Petition for Writ of Certiorari at 20.

Young v. Gorski, 2004 WL 540944, 2004-Ohio-1325 at ¶ 9 (Ohio App. 6th Dist. 2004) (emphasis added). See also id. at ¶ 13 (“Ohio law has adopted an equitable interpretation with its exceptions to mutuality. Issue preclusion takes effect unless (1) the party lacked a full and fair opportunity to litigate or (2) the circumstances or justice requires relitigation.”); Marc Glassman, Inc. v. Fagan, 2006 WL 3028419, 2006-Ohio-5577 at ¶ 9 (Ohio App. 8th Dist. 2006).

The emphasized language in Young, supra, sets the stage in the present case. First, the Court finds and concludes that no matter the role of the ECUSA in the Waccamaw litigation, the Episcopal Diocese of Ohio was not in privity with any litigants in that case. Second, the Court finds collateral estoppel inappropriate due to the fact that the Waccamaw decision expressly turned on South Carolina trust principles rather than Ohio law. Third, it is inappropriate to grant the Waccamaw case collateral estoppel effect because it is contrary to the heavy weight of authority.

1. The Privity Issue

Even if the ECUSA is collaterally estopped from relying on the Dennis Canon for the creation of an express trust, the question remains whether the Episcopal Diocese of Ohio – which played no role in the South Carolina Waccamaw litigation – is likewise estopped. Defendants claim that the local Diocese is “obviously” in privity with the national church for collateral estoppel purposes. The Court disagrees.

“For a non-party to be considered in privity to a party in the first proceeding, the rights of the party in the pending action must have been presented and adjudicated in the first proceeding, or the non-party must have controlled or participated in the litigation in the first proceeding.” Naff v. Standard Oil Co., 527 F.Supp. 160, 164 (S.D. Ohio 1981) (citing 1B Moore’s Federal Practice P 0.411(1) (2d ed. 1980)). See also Cleveland v. Hogan, 92 Ohio Misc.2d 34, 42, 699 N.E.2d 1020, 1025 (Ohio Mun. 1998) (same). The Eighth District Court of

Appeals has likewise commented: "The main legal thread which runs throughout the determination of the applicability of res judicata, inclusive of the adjunct principle of collateral estoppel, is the necessity of a fair opportunity to fully litigate and to be 'heard' in the due process sense." Johnson v. City of Cleveland, 1988 WL 3749, 3 (Ohio App. 8th Dist. 1988). See also Goodson v. McDonough Power Equipment, Inc., 2 Ohio St.3d 193, 198, 443 N.E.2d 978, 983 ("collateral estoppel can only be applied against parties who have had a prior 'full and fair' opportunity to litigate their claims"); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 339 (5th Cir. 1982) (discussing relationships "sufficiently close" to justify preclusion, and indicating that the "rationale ... is obviously that in these instances the nonparty has in effect had his day in court").

There is no question that the Episcopal Diocese of Ohio was not a party to the Waccamaw litigation. Furthermore, Defendants have come forward with no evidence that the Episcopal Diocese of Ohio was in any position to control, direct, or otherwise influence the Waccamaw litigation, much less that it actually did so. The record reflects a complete absence of the type of privity required for collateral estoppel purposes. The Episcopal Diocese of Ohio has not had its day in Court. Thus, the Waccamaw litigation has absolutely no preclusive effect on the claims asserted by the Diocese. As a result, even if the Court were to find that Waccamaw had preclusive effect vis-à-vis the ECUSA, the practical outcome of this litigation would not change – the Court would find that a trust exists in favor of the Episcopal Diocese of Ohio. Even that alternative finding, however, is unnecessary for the reasons discussed below.

2. The Applicable Law Issue

More fundamentally, the Waccamaw court's decision regarding the effect of the Dennis Canon explicitly turned on South Carolina trust law. Throughout their briefs, Defendants have often urged this Court to keep in mind that this case must be decided by applying Ohio law,

including its law of trusts. Having found what appears to be the only recent appellate-level decision in the country to reject the proposition that the Dennis Canon created a valid express trust, Defendants may not ignore the fact that it explicitly flowed from the application of a different state's trust law. For this distinct reason, the Court rejects Defendants' collateral estoppel argument in its entirety.

3. **The Weight of Authority**

"The dangers of issue preclusion are as apparent as its virtues. The central danger lies in the simple but devastating fact that the first litigated determination of an issue may be wrong."

- 18 Wright, Miller & Cooper, Federal Practice & Procedure 142, Section 4416¹²

It is impossible for this Court to accept that despite prevailing on the Dennis Canon issue in New York, Texas, Georgia, California, Connecticut, New Jersey, North Carolina, and Pennsylvania, a single negative decision ends the ECUSA's winning streak for all time, and in all jurisdictions that have yet to address the issue. This is especially true here, where the Waccamaw opinion utterly ignored the weight of authority. As the Second Circuit phrased it: "Although collateral estoppel jurisprudence generally places termination of litigation ahead of a correct result, there are some circumstances that so undermine confidence in the validity of an original determination as to render application of the doctrine impermissibly 'unfair' to a defendant." S.E.C. v. Monarch Funding Corp., 192 F.3d 295, 304 (2d Cir. 1999).

Indeed, cases discussing the offensive use of collateral estoppel are instructive in this instance. Courts have held that the "inconsistency of opinions" presents "the exact instance where it would be unfair for the trial court to allow the use of offensive collateral estoppel."

¹² See also Goodson v. McDonough Power Equipment, Inc., 2 Ohio St.3d 193, 443 N.E.2d 978, 986 n.14 (1983) (quoting same).

Erbeck v. U.S., 533 F.Supp. 444, 447 (S.D. Ohio 1982). The court continued: “A decision by one court, therefore, should not bind this Court’s determination of the issue, *particularly when, as in this case the decision plaintiffs rely upon is against the weight of authority.*” Id. (emphasis added). See also Pacific Great Lakes Corp. v. Bessemer & Lake Erie R.R., 130 Ohio App.3d 477, 720 N.E.2d 551 (Ohio App. 8th Dist. 1998) (inconsistency of opinions can provide valid basis for rejecting offensive nonmutual collateral estoppel).

While the present case involves the application of *defensive* rather than offensive nonmutual collateral estoppel, the simple fact remains that Waccamaw is against the weight of authority regarding the enforceability of the Dennis Canon. This Ohio Court finds it would be unfair to Plaintiffs to give preclusive effect to a South Carolina decision, applying South Carolina law, in a manner that conflicts with the overwhelming weight of authority.

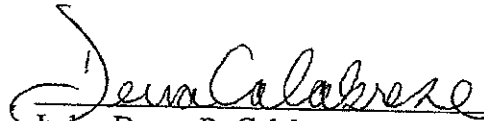
V. CONCLUSION

For all the foregoing reasons, the Court finds and concludes that Plaintiffs are entitled to partial summary judgment, that Defendants are not, and that the church property at issue, real and personal, is impressed with a trust in favor of the ECUSA and the Episcopal Diocese.

Specifically:

1. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to IV of Plaintiffs’ Complaint and on Counts I to V of ECUSA’s Complaint;
2. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to IV and VI of Defendant Church of the Holy Spirit’s amended counterclaims;
3. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to III of Defendant St. Anne’s in the Fields Anglican Church’s amended counterclaims;
4. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to III of Defendant St. Barnabas Anglican Church’s amended counterclaims;

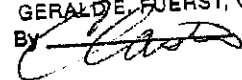
5. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to III of Defendant St. Luke's Anglican Church's amended counterclaims; and
6. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to V of Defendant The Anglican Church of the Transfiguration's counterclaims.


Judge Deena R. Calabrese

Date: 4-15-11

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El Paso _____ County, CO <input checked="" type="checkbox"/> District _____ County Court address: 20 East Vermijo Ave. Colorado Springs, CO 80903 Phone Number: (719) 448-7650	Court Use Only
Plaintiff: GRACE CHURCH AND ST. STEPHEN'S V. Defendant: THE BISHOP AND DIOCESE OF COLORADO And Third Party Couterclaimants: THE DIOCESE OF COLORADO IN THE EPISCOPAL CHURCH, ET. AL. v. REV. DONALD ARMSTRONG, ET. AL.	
	Case Number: 07 CV 1971 Division 5 Courtroom 501
COURT'S ORDER ON PROPERTY ISSUES	

The trial of the various property issues in this case was brought before the Court beginning February 10th 2009. The issues were presented for trial to the Court alone, without a jury. The parties presented testimony for approximately 4 ½ weeks and submitted over 3,000 documents as exhibits. Final arguments were heard on March 11, 2009. Having reviewed all of the evidence and considered the arguments of counsel I hereby issue the following findings of fact, conclusions and Order:

FINDINGS OF FACT:

The Plaintiff Grace Church and St. Stephens is a Colorado nonprofit corporation that has been known as an Episcopal Church parish. It owns a church facility on North Tejon Street in Colorado Springs as well as a rectory and other real and personal property. The plaintiff is a parish of the Episcopal Church of the United States (ECUSA). ECUSA is a hierarchical religious denomination whose first level of governance below itself includes the Dioceses, one of which is the defendant Diocese of Colorado. The ecclesiastical and administrative head of the Colorado Diocese is the Bishop. The current Bishop of Colorado is the counterclaim defendant Rt. Rev. Robert O'Neill. The counterclaim

defendant Rev. Donald Armstrong is the current priest or rector of the plaintiff parish.

This law suit is a declaratory judgment action filed by the plaintiff parish seeking an order that it is the owner of all real and personal property that has been used by the parish in Colorado Springs, including the church, the "outbuildings", the land, the rectory and all personal property located in any of those facilities. The defendants ECUSA (sometimes referred to as the "general church") and Diocese of Colorado have counterclaimed, alleging ownership of the same disputed property. Those defendants have further filed individual counterclaims against the Rector Donald Armstrong and the last vestry (board of directors) of the plaintiff corporation, alleging theft, conversion, unjust enrichment, trespass, civil conspiracy, quiet title and accounting. The Plaintiff has amended its claims, alleging tortuous interference. I have bifurcated trial of these matters into two central issues: the quiet title and ownership issues as a court trial beginning on February 10 and a civil liability and damages trial against the individual counterclaim defendants, which is scheduled for jury trial in August, 2009. The plaintiff sought a jury trial on all issues. Over its objection, I previously concluded that this portion of the case is an equitable action in the nature of quiet title. I therefore concluded that property ownership would be resolved by me without a jury.

The dispute in this case arose as a result of a majority of the members of the plaintiff parish becoming disillusioned with doctrinal decisions being made by the national church and the Diocese. The specifics of the doctrinal disputes are not important to the analysis, other than to say that they involved the perception by the local parish that the national church had become too "liberal" and was violating the principles of the traditional Anglican faith. I allowed the parties to present limited testimony regarding the nature of these disputes in order to create a timeline for the dispute. However, the doctrinal issues themselves have been ignored, except to say that the doctrinal disagreement, coupled with other matters, created considerable resentment toward the Diocese and general church in the local parish. That resentment has resulted in a majority of the local members voting to leave the national church and Diocese. The local parish has now aligned itself with the Convocation of Anglicans of North America ("CANAm")

The members of the plaintiff parish voted to leave ECUSA on March 26, 2007. The plaintiff asserts that 90% of those who voted agreed to leave. Another faction of the parish remained loyal to the general church and continues to worship as Grace Church and St. Stephens in another location.

Both parties have engaged in some strategic "jockeying" which may add confusion to the record but which is of little consequence to my decision. The plaintiff parish amended its answer to identify itself as Grace Church & St

Stephens. The only change is from "and" to an ampersand "&". It has implied that when articles of incorporation were filed in 1973, it did so with a "&" and thus created a new corporation. The so-called loyal parish is holding itself out as the same Grace Church and St. Stephens. They argue that when the majority voted to withdraw, that the Bishop appointed a new vestry and that they are now Grace Church and St Stephens. The lawyer for the Diocese filed articles of "renewal" or "revival" with the Secretary of State in 2007 after this suit was filed. The Diocese asserts that such filing renewed the 1923 corporation and that a 1973 filing had no affect. I will discuss that issue further below. The Diocese appointed a new vestry in 1973 and maintains that it alone has the right to take action on behalf of Grace Church and St Stephens. As a result of these and other strategic actions, the list of parties and their identity has become convoluted. This order will clarify the proper parties going forward and their status.

Complex pleading decisions aside, the dispute in this case is fundamentally a church schism that arose in much the same manner as that found in the Bishop of Colorado v. Mote, 716 P.2d 85 (Colo. 1986). All parties recognize that the "neutral principles" analysis outlined in Mote must control my decision.

I find the following facts are significant in resolving this dispute:

1. The 1923 parish corporation Grace Church and St. Stephens resulted from the merger of two former Episcopal parishes, St. Stephens's parish and Grace Church parish. That merger occurred in 1923. Grace Church was originally formed in 1873 by application to the Bishop for membership. In 1874 it filed its certificate of incorporation in the records of El Paso County Colorado. (Def. ex. 17).
2. In 1894, a group of churchmen, who described themselves as "low churchmen" left Grace Church over the objection of the Bishop and moved to the present church location on North Tejon Street, where they established St. Stephen's Church. They filed a certificate of incorporation with El Paso County on March 31, 1894. (Def. Ex. 27). Though it's early history is not particularly clear, St Stephens remained in contact with the Bishop. While they sought approval of the Bishop for construction of their stone building on Tejon Street, they ignored the Bishop's criticism of its design and built it, incurring a substantial debt. Grace Church continued to worship at a separate location, and was considered to be more of a "high church", that is more aligned with Catholic tradition. Members of the "low church" St. Stephens considered themselves more aligned with Protestant ideology.
3. The two churches reunited in 1923 and formed Grace Church and St Stephens. The combined congregation built a larger church on Tejon Street.

It filed its Certificate of Incorporation on December 21, 1923 (Ex. 28). Debt was incurred to construct the new facility. That debt was paid off in 1929, at which point the church was "consecrated". As part of the consecration ceremony, the rectors, wardens and vestry of Grace Church and St Stephens signed the "Instrument of Donation" (Def. ex. 30.), the significance of which will be discussed in greater detail below.

4. Dr. Lindsay Patton was rector from approximately 1950 through 1962. During that time, the local parish built a number of mission churches. Dr. Patton exercised considerable control over the mission churches. Rector Patton was still loyal to the Diocese and obtained permission from the Diocese before building mission churches.

5. In 1963, the parish corporation adopted bylaws for its governance. (Ex. 31). Those bylaws refer to adherence to the Canons of the General Church and Diocese.

6. In 1967, the Colorado legislature adopted the Colorado Nonprofit Corporation Act. Becoming effective on January 1, 1968, the Act represented a significant departure from the prior law applicable to nonprofit corporations. The Act permitted existing nonprofit corporations to choose whether to be covered by its new provisions or not by filing a "Statement of Election to Accept" the new Act. The 1923 nonprofit Grace Church and St Stephens did not file a Statement of Election to Accept. The Act had further filing requirements with the Secretary of State, even for corporations that did *not* elect to accept. The parish did not file any of those documents either.

7. Because the parish failed to file the documents required by the new Act, it became "defunct" in 1972. Then in 1973 the parish filed with the Secretary of State "Articles of Incorporation". (Def. ex. 34) They were signed by three parish priests and the vestry of the parish. The articles were filed in the name of Grace Church "&" St Stevens and contained no reference to the Diocese, the canons or the general church. At the bottom of the document is a typed statement indicating that the corporation "had existed since at least 1929". I conclude that for the reasons stated below, the filing of the 1973 document was intended to "revive" or "reinstate" the 1923 corporation and that by substantially complying with the statutory requirements, that it did so.

8. In 1974, within 8 months of creating and recording the "Articles of Incorporation", the parish corporation created new bylaws.(Def. ex. 35) The 1974 bylaws restate what had been adopted in the 1963 bylaws (Def. ex. 31). Chapter 1 of the bylaws acknowledges that Grace Church and St Stephens had been in existence since 1923. The 1974 bylaws provide for

governance of the parish corporation "subject to the General Canons of the National Church, and the Canons of the Diocese of the State of Colorado".

9. Reviewing the minutes of the vestry leading up to the creation of the 1973 articles and thereafter, there is nothing contained in them to indicate that a new corporation was being formed or that the parish was intent on distancing itself from the Diocese and general church or changing the way in which it engaged in its business.

10. In 1979, the general church adopted the "Dennis Canon" which purports to create a trust relationship in all parish property in favor of the national church and Diocese. Grace Church and St. Stephens did not formally object to implementation of that canon and the time it was created nor did it take any steps at any time since its creation, until this dispute arose, to alter the canon's purported impact on their ownership and use of property.

11. On October 15, 1987, the current parish rector, Father Armstrong was inducted as rector of Grace Church.

12. At various times between 1973 and 2006, the national church and Colorado Diocese instituted changes in doctrine and personnel that some members of the parish found offensive. In 2003 and again in 2006, the national church appointed individuals as bishops that engendered considerable angst among some members of the local parish. As early as 2003, members begin talking about some form of separation from the national church. Those members believed that the national church was violating the tenets of traditional Anglicanism. In 2003, father Armstrong encouraged the parish to remain loyal to the national church and attempt to make changes from within.

13. Between 2003 and 2006 there were debates within the parish about what the national church was doing. In response however, the vestry minutes continue to reflect continued recognition and obedience to the Bishop. In 2003, even though Grace Church and St Stephens and other parishes throughout the country had opposed the actions of the General Convention of the national church, vestry minutes of Grace Church and St Stephens reflect that the parish and the other objecting parishes "will remain within ECUSA; they will not leave the church, but will reclaim the church for conservative orthodoxy". (Ex. 234) Again in September 2004, vestry minutes state that "Grace Church has remained within jurisdictional authority of Right Reverend Bishop Robert O'Neill". (Ex. 244). Likewise, in July 2006, vestry minutes confirmed that it was acting "according to the Canons and Constitution of ECUSA" (Ex 253).

14. In 2005, Bishop O'Neill became concerned about possible financial problems at the parish. He met with Rev. Armstrong to discuss problems with the clergy pension fund. He further discovered that Grace Church and St. Stephens had procured a \$1.8 million dollar loan made by the State Bank of Barclay, without first obtaining permission from the Diocese. In response to being questioned about the loan, Rev. Armstrong assured the Bishop that the loan had been "grandfathered" by the permission given for the loan in 1989 and thus didn't require additional consent. Rev. Armstrong indicated that the loan constituted the third phase of construction that had been previously approved by the Diocese. At some point Bishop O'Neill became concerned about the possibility of financial misconduct at Grace Church and St. Stephens. Accordingly, the Bishop retained an accountant and had an audit conducted during the summer of 2006.

15. Bishop O'Neill received the results of the audit during 2006. As a result of the audit, the Bishop concluded that Rev. Armstrong had engaged in financial misconduct with parish finances. The Bishop referred the matter to a Diocesan disciplinary hearing. Rev. Armstrong did not participate in the disciplinary hearing. As a result of that hearing, Rev. Armstrong was "inhibited", which meant he was prohibited from conducting further services at the parish, going to the parish or having any contact with the parish members. Rev. Armstrong was further "convicted" of not obtaining prior approval of the Diocese before selling or encumbering parish property on a number of occasions.

16. As a result of the "inhibition" of Father Armstrong, some members of the parish felt that Grace Church and St Stephens was under attack from the Bishop. They concluded that the parish was being punished for being conservative and resisting the decisions of the national church and Diocese. Ultimately, members of the vestry began meeting with Father Armstrong and discussing the possibility of departure from ECUSA.

17. Notice was subsequently sent to members of the parish asking them to vote on the issue of whether the parish should depart from ECUSA. In March 2007 the votes were tabulated. Over 90% of those who voted approved departing from ECUSA. Those that departed maintained the name of Grace Church and St Stephens and in this suit are asserting that they have the right to keep that name and all real and personal property of the parish. They have affiliated with the Congregation of Anglicans of North America ("CANA").

18. After Bishop O'Neill was notified of the parish action, he "fired" the existing vestry and appointed a new vestry from those parish members who had remained loyal to the Bishop.

19. All real and personal property being used by the parish is titled in the name of Grace Church and St Stephens. Over the years, the local parish has made substantial improvements and upgrades to the church facility, all at parish expense. Other than a \$500 contribution in the 1800's, the Diocese has never contributed financially to the purchase or maintenance of parish property.

DISCUSSION:

Resolution of these issues is governed by the decision in Bishop and Diocese of Colorado v. Mote, 716 P.2d 85 (Colo. 1986) and application of the "neutral principles of law" approach. In Mote the Colorado Supreme Court first decided to apply the neutral principles approach to resolve a property dispute between the Episcopal Diocese of Colorado and the parish known as St Mary's Church. There are some striking similarities between the facts found in Mote and those that exist in this case. The Defendants have argued that the cases are legally indistinguishable and that my analysis should be simple. On the contrary, I conclude that until a Colorado Appellate Court decides that canons alone can create a trust, the Mote decision requires a much broader analysis.

The Supreme Courts of several states have in the recent past dealt with these same issues and resolved the disputes mostly in favor of the various Dioceses. Indeed, California has essentially foreclosed most future church property disputes within its state by concluding in In Re the Episcopal Church Cases, 198 P.3d 66 (Ca. 2009) that "...the general church's canons (referring specifically to the "Dennis Canon"), not instruments of the local church, created the trust." 198 P.3 at 295. In California, adoption by PECUSA of the "Dennis Canon" has, for all intents and purposes, ended the inquiry.

The Defendants have argued that my analysis can be as simple as that engaged in by the California Supreme Court. They urge, in addition to other arguments, that since ECUSA has adopted the "Dennis Cannon", there is no need for further inquiry. The Plaintiffs argue, on the other hand, that the California and similar New York cases are of no guidance to this court and are wholly distinguishable because of the statutes specifically enacted in those states to deal with the question of whether a property trust has been created within religious organizations.

While I don't necessarily agree that cases from other states are of no guidance, I feel compelled to engage in the broader analysis that seems to be required by Mote. The Dennis Canon was enacted after the Mote schism arose. The Colorado Court knew that it existed because it was quoted in a footnote. In

spite of that knowledge, our Supreme Court did not say that the Dennis Canon would foreclose further inquiry. Rather, the Court noted only that the Dennis Canon merely confirmed "the relationships existing between PECUSA the diocese and the parish of St. Mary's". 716 P.2d at 105.

The Mote court did not go so far as to say that the Dennis Canon, or any other Canon, standing alone, created the trust relationship that was found in Mote. Rather, the Court went through a very careful analysis of all documents relating to the real estate, the history of the relationship of the parties, the relevant corporate documents, the Canons and the history of St. Mary's real estate transactions before arriving at it's conclusion that a "unity of purpose...reflecting the intent that property held by the parish would be dedicated to and utilized for the advancement of the work of PECUSA" 716 P.2d at 85.

Nor did the Mote court clearly define a minimum standard for determination of whether a trust exists or not. In this case there are several instances wherein parish real property was encumbered or sold without consent or knowledge of the diocese. Those transactions would clearly be contrary to Diocesan canons and were factual circumstances not found in Mote. On their surface, the real property transactions put in place without Diocesan consent are arguably contrary to a finding of "*unity of purpose*" and thus would seem to require a more thorough analysis. While "unity of purpose" does not appear to be the minimum standard for finding the existence of a trust, the lack of unity seems under Mote to mandate the broader analysis of all attributes of the relationship and nature of real estate transactions.

Trust and Property Law Considerations:

Relying on Jones v. Wolf, the Mote court indicated that a court should rely on "established concepts of trust and property law" in determining whether a trust in favor of the "general church" exists. 716 P.2d at 100. The inquiry is not restricted to a search for explicit language of express trust. "Colorado recognizes that the *intent* to create a trust can be inferred from the nature of property transactions, the circumstances surrounding the holding of and transfer of property, the particular documents or language employed, and the conduct of the parties" *Id. at page 100*.

As the plaintiffs have continually urged, the Mote court further stated that "While such an inference is not to come easily - '*clear, explicit, definite, unequivocal and unambiguous language or conduct*', establishing the intent to create a trust is required...There is no need to restrict the inquiry...other principles from the common and statutory law of property, contract, corporation or voluntary associations might be the basis for a determination that a general

church has a right, title or interest in the church property, requiring a more extensive inquiry". *Id. at p 100 – 101..*

In applying these various principles, the Mote court considered the entire history of St. Mary's, starting with the original filing of the articles of incorporation. In our case, Grace Church was organized on October 14, 1873. The minutes that were signed by 14 formers of the organization contained the following language:

...And we solemnly promise and declare that the said Parish shall forever be held and incorporated under the ecclesiastical authority of the Bishop of Colorado and his successors in office. The Constitution and Canons of the Protestant Episcopal Church in the United States of American and the Constitution and Canons of the Missionary jurisdiction of Colorado, the authority of which we do hereby recognize and whose Liturgy, Doctrine, Discipline and Usages we promise at all times for ourselves and successors corporate obedience and conformity.

The Certificate of Incorporation of "Grace Episcopal Church of Colorado Springs" was recorded with the records of El Paso County on October 14, 1873. It contained language that indicated that ten trustees had been appointed to "manage the temporal offices of said Church" and that the trustees had been "elected according to the Constitution and Canons of the Protestant Episcopal Church to serve until such time as their successors should be elected..."

St Stephens Church was formed on November 31, 1894. The plaintiffs have characterized the church as a "low church", more aligned doctrinally with Protestantism than a "high church" which arguably was more associated with traditional Catholicism. The articles of its incorporation are silent as to the Episcopal Church and Diocese and indicate only that "*the Corporation secures and hereby reserves to itself the right to make and adopt such prudential by-laws as it deems necessary to provide for the election of Wardens and Vestrymen and other officers and for the property government and administration in all respects of such church.*"

The two churches merged in 1923, forming "Grace Church and St. Stephen's". The new church corporation built a large church on North Tejon Street that is one of the subjects of this suit. The Affidavit of Incorporation was filed on December 21, 1923 in the records of El Paso County. It contained the following "purposes" language:

...to administer the temporalities of The Protestant Episcopal Church in the parish...and particularly to acquire, hold, use and enjoy all of the property now held for the members of said Church..., whether the title to the same

be held by the parish now known as Grace Church and Parish....or by that parish now known as St Stephen's Church and parish or by any other person or persons or corporation acting for or on behalf of the Protestant Episcopal Church in the city of Colorado Springs...

...the corporation hereby created does expressly accede to all provisions of the constitution and canons adopted by the General Convention of the Protestant Episcopal Church in the United States of America, and to all of the provisions of the Constitution and canons of the Diocese of Colorado.

The parish corporation borrowed to build the church. The loan was repaid by 1929 and was thus eligible for consecration. As part of the consecration ceremony, the Rector, Wardens, and Vestry of Grace Church and St. Stephens signed a document generally referred to as the "Instrument of Donation" that described the signatories as being "*the corporation holding title to the realty of the Parish of Grace Church and St. Stephens in Colorado Springs as being in possession of a House of Prayer*". The document contains the final language:

AND we do moreover hereby relinquish all claim to any right of disposing of the said building, without due consent given by the Ecclesiastical Authority of the Diocese, according to the Canons of the said Diocese, or allowing the use of it in any way inconsistent with the terms and true meaning of this Instrument of Donation, and with the Form of Consecration hereby requested of the Bishop.

The Plaintiff's expert asserts that the Instrument of Donation was purely ceremonial and has no legal significance under Colorado Law. I am not convinced by that assessment. Testimony at trial indicated that the Document of Donation was widely used by the Episcopal Diocese at the time. It was created in large part in response various controversies between Episcopal Dioceses and their parishes throughout the country. As a result of those controversies, the Bishop of the national church feared that real property could be used without the consent of the local Bishop. Accordingly, the Document of Donation was created to assure the Bishop's consent was obtained before property could be sold. I conclude that the document means what it says: that Grace Church gave up any right to "dispose" of the building unless the Bishop first authorized that disposition.

There are substantial similarities between the clauses created by St Mary's in the Mote case and those found in the 1923 Grace Church articles and 1929 Instrument of Donation. Clause 1 in St Mary's articles referring to the "temporalities" of the church is word-for-word the same in the Grace 1923 articles. Clause 2 of the St Mary's articles has a provision that prohibits St Mary's from incurring "**indebtedness which may alienate or encumber church**

property without the consent...of the Diocese". That clause does not exist in Grace Church's 1923 articles. On the other hand, Grace Church signed and delivered the 1929 Instrument of Donation in which Grace Church relinquished any right to dispose of the property without consent of the Bishop. In terms of whether a trust relationship has been created, I find little legal distinction between the two clauses.

The Mote court concluded that clauses 1 and 2 of the St Mary's articles "*strongly indicate that the local church property was to be held for the benefit of the general church, and they show the extensive nature of the policy direction and property control to be exercised by the general church. There are no provisions in the articles implicitly or explicitly expressing an intent to the contrary*". *Id* at p 104. Likewise, in our case the 1923 articles devote the use of the church "temporalities" exclusively for religious and educational functions of the "Episcopal Church in the Parish". The Instrument of Donation clearly relinquishes the right to dispose of the property without Diocesan consent. And like Mote there is no language to the contrary expressing any other intent. It is inescapable therefore that since Mote controls, that I must also conclude that the combination of 1923 articles and 1929 Instrument of Donation establishes Grace Church's intent that the property was being held for the benefit of the Diocese of Colorado.

Looking to current trust law, the *Restatement of Trusts 3d*, section 22, indicates that in order to create a trust on real property there must be a writing that a) manifests the trust intention, b) reasonably identifies the trust property, c) reasonably identifies the beneficiaries and d) reasonably identifies the purpose of the trust. The 1923 articles of incorporation, 1929 Instrument of Donation and the conclusions reached in Mote support the finding that a trust for the benefit of the Diocese had been created. Ignoring in this portion of the analysis the impact of the Episcopal Canons, the trust thus created does not vest title in the Diocese upon the departure of Grace Church and St Stephens from the control of PECUSA. Rather, the trust gives the Diocese the right to first approve any property transfer made by Grace Church and St Stephens.

In August of 1963, the vestry amended the Parish Corporation's bylaws. The amended bylaws acknowledge the continuity between the 1874 corporate entity, the 1923 corporation and Grace Church and St Stephens in 1963. They further indicate that the By-Laws were being amended "*to provide for the proper government of the Church, subject to the General Canons of the National Church, and the Canons of the Diocese of the State of Colorado*."

In 1967, the Colorado legislature adopted the Colorado Nonprofit Corporation Act. Section 7-20-105 of that Act provided that any corporation formed before 1968 had to (1) file annual corporate reports with the Secretary of

State and designate a registered agent and (2) to file a copy of the "nonprofit corporation's articles, affidavit of incorporation or other basic corporate charter, by whatever name denominated" with the Secretary of State. Failure to comply would result in the Corporation becoming "defunct". Subsection 8 of that provision further provided that any corporation that became "defunct" for five years was "dissolved by operation of law". In such event, CRS 7-26-120(2) provides as follows:

...after dissolution, title to any corporate property not distributed or disposed of in the dissolution shall remain in the corporation. The majority of the surviving members of the last acting board of directors as named in the files of the secretary of state pertaining to such corporation shall have full power and authority...to hold, convey, and transfer such corporate property, ...Final disposition of such property shall be made by the majority of the surviving directors in the manner provided in section 7-26-103.

Grace Church and St Stephens did not file any documents with the Secretary of State until 1973. Thus, as of January 1st 1972, the nonprofit corporate entity Grace Church and St Stephens became "defunct". On June 13, 1973, Robert Gotchey, the business manager for Grace Church and St Stephens, had the Vestry of the church, the Rector and Wardens sign plaintiff's exhibit GCSS 0003 and then forwarded it for recording with the Colorado Secretary of State. It was recorded on June 25th 1973. It purported to be "Articles of Incorporation" of "Grace Church & St Stephens". It contained very little information regarding the entity's purpose, had no mention of the Episcopal Church of the United States or the Diocese and contained none of the language found in any of the prior articles of incorporation concerning adherence to church canons. At the bottom of the document is the written note that **"Grace Church & St Stephen's has been incorporated at least since 1929"**.

The intent and effect of the 1973 articles was the single most hotly contested issue of the trial. The Plaintiffs argue that it created a new corporation that did not "accede" to the canons of the Episcopal Church and Diocese and that likewise had no limitations regarding the disposition of the real property. The Defendants on the other hand argued that the 1973 articles merely revived or reinstated the 1923 corporation, or at worst, did nothing.

Because of the clear ambiguity created by the language that "Grace Church & St Stephens has been incorporated at least since 1929", I allowed parole evidence regarding the intent of the parties. One former vestry member, Dr. Jones indicated that he felt they were creating a new corporate entity and basically starting over. Father Hewitt, the parish Rector at the time, had no memory of any new corporation being formed. He indicated that no substantial changes to their church business or the manner in which they conducted it was being considered. He clearly indicated that nothing had changed in the

relationship between the parish and the Diocese. He and most of the other witnesses to the event had no clear memory of what the document meant, other than to say that a "problem" was being addressed by signing the document and that filing it would solve the problem. The document was not prepared by a church lawyer.

I am convinced that the signatories to the document felt they were merely curing a "problem" in the 1923 corporation. The "problem" being "fixed" by the 1973 articles was that the 1923 corporation had become defunct by not filing the information required by Colorado's new nonprofit corporation Act. The parties presented the minutes of vestry meetings that occurred before and after the preparation of the 1973 articles. There is nothing in those minutes that indicate that a new corporation was being formed or even considered. Nor was there any mention of any extraordinary dissatisfaction with the Diocese or a need to create some form of separation from the Episcopal Church and Diocese. In fact, no mention of the 1973 articles is mentioned at all. There is no evidence that any of the signers felt the need to start a new corporation, or if they did, that it would change anything about Grace Church and St. Stephens. On the contrary, in 1974, the Vestry adopted bylaws that were admitted as defense exhibit 35. Like the 1963 bylaws, the 1974 bylaws recited the following:

*Grace Church and St. Stephens became a body politic and corporate under date of December 19, 1923, pursuant to the provisions of what is now Article 21 of Chapter 31 of the Colorado Revised Statutes. Such incorporation was accomplished for the purpose, among other things, of merging the Parishes of Grace Church and St. Stephen's in the City of Colorado Springs. Prior to such consolidation, under date of May 27, 1874, the Parish incorporated as "Grace Church at Colorado Springs"...the following By-laws are adopted to provide for the proper government of the Church, **subject to the General Canons of the National Church, and the Canons of the Diocese of the State of Colorado.***

While the 1874 and 1923 corporations were clearly mentioned in these 1974 bylaws, there is no mention of a new corporation being formed in 1973. Likewise, there is no evidence that property of the 1923 corporation was transferred to a 1973 corporation or that such a necessity was ever discussed. Without some evidence of transfer, all corporate property would remain owned by the 1923 corporation.

I am convinced that the Vestry, Rector and Wardens in 1973 believed at the time that signing and recording the document would "revive" or "reinstate" the 1923 corporation and keep it from being "defunct". Absolutely nothing to the contrary was presented except the testimony of Dr. Jones. There are no vestry minutes to support a decision to form a new corporation, property transfers into

the 1973 corporate entity, or behavior that is consistent with the existence of a new, and according to the plaintiffs, more independent corporate entity that had shunned its former attachment and loyalty to PECUSA or the Diocese. Though intent is not usually the determinative factor in deciding whether a new corporate entity was formed, it must be given considerable weight in this case because of what transpired when the '73 articles were prepared and the parish's conduct thereafter. That evidence can only be seen as consistent with the belief that the nonprofit corporation Grace Church and St Stevens had remained active and unchanged.

I find the following evidence further supports this conclusion:

First, it is clear that the Vestry and Rectors were trying to "fix" a corporate problem with their existing 1923 corporation and not create a new entity. The reference at the bottom of the "Articles of Incorporation" to ***Grace Church and St Stephens has been incorporated since at least 1929*** recognizes the existence of the 1923 corporation and supports the conclusion that the Vestry and Rectors wanted to keep that entity in existence. The minutes of vestry meetings and the use of corporate property thereafter all support the finding that the Parish felt that nothing had changed when the 1973 articles were filed.

Second, the 1923 Corporation was at all times the owner of the real and personal property. When Grace Church and St. Stevens was formed, it took title to all real property owned by the two then existing entities of Grace Church and St. Stevens church. No similar property transfers into 1973 corporation were ever documented. Had the Vestry of Grace Church and St Steven intended that a new corporation was being formed, it would have been a simple matter to quit claim the property into a 1973 corporation and reflect the same in its articles. Absent such a transfer, there is no legal mechanism by which property would have transferred into a new corporation.

The Plaintiff's expert, Mr. Fischer testified that the 1973 articles reflect the creation of a corporation that "replaced" the 1923 corporation and that the new corporation essentially took possession of the church property and then began to deal with it as its own. Thereafter, legal title passed over to the new corporation by adverse possession. There is no evidence to support that theory. To obtain title by adverse possession, a party must establish that his possession was actual, adverse, hostile, under claim of right, exclusive and uninterrupted. Smith v. Hayden, 772 P.2d 47 (Colo. 1979). To merit the presumption, the use must be sufficiently open and obvious to apprise the true owner, in the exercise of reasonable diligence, of an intention to claim adversely. Hodge v. Terrill, 228 P.2d 984,988 (Colo. 1951).

When the Vestry filed the 1973 Articles of Incorporation, they did not believe they were creating a new corporation. Therefore, the 1973 "corporation" could not have been using the property in an open manner, hostile to the ownership of the 1923 corporation. It is clear that the Vestry and Rectors felt in 1973 that nothing had changed. The evidence established that Grace Church and St Stevens went about its business in exactly the same manner that it always had. Therefore, vestry member would have no reason to know that the property was being encumbered or alienated out of the 1973 corporation, rather than the 1923 corporation, who still maintained ownership. Thus, there could be no transfer of title by adverse possession.

Likewise, Mr. Fischer opined that transfer from the 1923 corporation to the 1973 corporation occurred as an exception to the Statute of Frauds. CRS 38-10-108. His opinion was that there was "part performance" of a contract that excluded it from coverage of the Statute of Frauds. Absent some actual agreement to transfer the property, however, there could be no part performance under CRS 38-10-110. Brown v. Johanson, 194 P. 943 (Colo. 1920). No evidence was presented to prove that the Vestry of the 1923 corporation had agreed to transfer the property from the 1923 corporation to the 1973 corporation. Therefore, there could be no "part performance" that would take a property transfer out of the Statute of Frauds. Since there is no evidence of a transfer or of any intent to engage in a transfer, there could have been no transfer of corporate property from the 1923 corporation to the 1973 corporation. Thus, any purported transfer of real property is void as a violation of the Statute of Frauds.

Third, even if there had been some form of transfer of property from the 1923 corporation to the 1973 corporation, the property would still be subject to the trust interest created for the benefit of the Diocese. Merely transferring property subject to a trust does not change the nature of the trust. The new trustee would take the property subject to the same conditions as those imposed upon the original trustee. Nor do I find, as the plaintiffs argue, that creating a new corporation would constitute a repudiation of the trust. In order for a trustee to repudiate a trust, the trustee must, by word or action, show an intention to abandon, renounce or refuse to perform under the trust. First National Bank of Denver v. Rabb Foundation, 479 P.2d 986 (Colo. App. 1970). Repudiation of a trust must be sufficient to put the beneficiary on notice of the repudiation. 54 ALR 2d 28, cited in Hodny v. Hoyt, 243 NW 2d 350 (N.D. 1976). There must be a showing of plain, strong and unequivocal renunciation of the purposes of the trust. 76 Am. Jur. 2d Trusts, p 798.

In light of the fact that Grace Church and St Stephens continued to go about its business in the same manner as before the 1973 Articles were recorded, one cannot conclude that filing those articles renounced the trust

relationship with the Diocese. Accordingly, for all of the above reasons, I conclude that filing the 1973 articles merely "revived" or "reinstated" the 1923 corporation Grace Church and St Stephens. Therefore, any trust relationship that existed for property held by the 1923 corporation continued past 1973.

Affect of Canon Law:

From the beginning of its existence, and up until the time that this dispute took shape, the nonprofit corporation Grace Church and St Steven has in numerous ways acknowledged that it was bound and governed by Canon law. Its founding articles of incorporation recite its relationship to the constitution and canons of PECUSA and the canons of the Diocese of Colorado. The bylaws adopted during various times throughout its existence all recite that the corporation was bound by Canon law. In 1974 the corporate bylaws stated that that its rules were being adopted to "provide for the proper government of the Church, **subject to the General Canons of the National Church, and the Canons of the Diocese of the State of Colorado.**"

Application of Canon law has always been difficult for secular courts. For one thing, it appears to be rare that parish members, including members of the governing Vestry, know anything about the details of Canon law. In fact, Bishop O'Neil testified that no one expects church members to know much about the Canons. That testimony is consistent with what was testified to by lay members of the parish; all of whom said they knew little or nothing about the canons. Thus, when the parish executes a document that pledges fidelity to canon law, it does so without members of the parish having actual knowledge or understanding of what it is that is being adopted.

For another, canons are essentially created and imposed unilaterally. They appear always to have been adopted at the National Convention. Once they are adopted, they are imposed on all parishes through publication in the Episcopal Book of Canons. Even though the board that recommends changes to canons is made up of representatives from individual parishes, the canons are still ultimately imposed upon individual parishes from the hierarchy of bishops. Application of canon law is based ore upon membership in the Episcopal Church than it is upon adoption through a democratic process where all individual church members participate.

The perceptual legal problem with this procedure is the one argued by these Plaintiffs and those in other schism cases: that under a "neutral principles" analysis, it is difficult to understand how unilaterally imposed canons can create a legal trust relationship. While the canons form the basis for governance within the Episcopal religion, they are usually unknown to all but the clergy and they don't create a trust relationship in the manner one normally comes to expect.

Unlike the secular "norm", the canons purport to create a trust through a process that is the opposite of most estate situations. That is, the trust is created by the beneficiary of that trust and is imposed unilaterally on the settlor/trustee.

Having stated those secular reservations, it is clear from Mote and Wolf that the non-doctrinal sections of the canons are to be given close consideration under neutral principals. The opinions in both cases further support the proposition that the intent element of trust relationship can be established by the contents of canons.

It was the opinion of the plaintiffs' expert, Ms. McReynolds, that in order for a church canon to have legal impact on a property determination, it must either be clearly enunciated in the articles of incorporation or bylaws or be otherwise supported by a state statute that gives legal force to the canon's application to a property dispute. In stating that conclusion, Ms. McReynolds relied upon the decisions rendered by the California and New York Supreme Courts.

I am not convinced that the Mote opinion would justify giving such a restricted application to the impact of canon law in a neutral principles analysis. The United States Supreme Court in Jones v. Wolf, 443 U.S. 595 (1979) gave what appears to be a simple prescription under "neutral principles" to avoid protracted property litigation with the following language:

*At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deed or corporate charter to include a right of reversion or trust in favor of the general church. **Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps is minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form. 443 U.S. at 605***

The Wolf court did not require that the change to the constitution of the general church be supported by a statute. Nor did they preclude the possibility that such a change to the constitution could stand alone and create a trust. In fact, I found convincing the opinion testimony of the defendants' expert Mr. Chopko that the above language from Wolf was added as a response to criticism by the Court's dissenters. The dissenters argued that any change from the traditional "compulsory deference" approach taken by courts following Watson v. Jones would impose a considerable burden on existing churches to change their constitution, charter and deeds. The dissent maintained that churches would be required to add language of polity to foundational documents or instruments of

conveyance and further force the trial courts to decide matters of polity. On the contrary, Mr. Chopko testified that the Wolf majority was emphasizing how minimal the intrusion on church business the "neutral principles" approach would be.

Taken in the context in which the above quote was made, it is clear the language must be taken to mean just what it says: that by merely changing the general churches' constitution, an express trust in favor of the general church can thereby be created. The Wolf court did not define what it meant when they indicated that the trust language must be "embodied in some legally cognizable form". I conclude that what they meant was that the language cannot be hidden from church members or so intertwined with ecclesiastical matters as to force a court to be making doctrinal decisions. With that understanding of the definition I conclude that the canons of the Diocese and ECUSA are "legally cognizable". I further conclude that there is no condition precedent to enforcement that the trust created by a change to the constitution be supported by an enabling statute or otherwise contained in foundational documents.

PECUSA adopted Canon 1.7.4 as part of the "Constitution and Canons of the Episcopal Church" In 1979. It is commonly referred to as the "Dennis Canon" and it is the canon at the heart of this litigation. Testifying on behalf of the Diocese, Mr. Royce stated that he had been on the canons committee following the announcement of the decision in Jones v. Wolf. He stated that the Dennis Canon had been proposed by Walter Dennis, in direct response to the Wolf decision, as an easy way to simplify property disputes in the future. The Dennis Canon reads as follows:

*All real and personal property held by or for the benefit of any Parish, Mission or Congregation is **held in trust** for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.*

Further, Canon 1.7.3 provides:

*No Vestry, Trustee, or other Body, authorized by Civil or Canon law to hold, manage, or administer real property for any Parish, Mission, Congregation, or Institution, shall **encumber or alienate** the same or any part thereof without the written consent of the Bishop and Standing Committee...*

The California Supreme Court decision in In re the Episcopal Churches, supra, has simplified the analysis in their state to looking at the canons alone.

Unfortunately at the time Mote was decided, the Dennis Canon had not yet been adopted. The court acknowledged in foot note 15 of the opinion that the canon had been adopted by PECUSA, but found it inapplicable to the St Mary's case. The Mote court did not go so far as to say that the Dennis Canon, standing alone, would create a trust, but merely indicated that the canon "did nothing but confirm the relationships existing among PECUSA, the diocese and the parish of St Mary's" 716 P.2d at 105.

The Mote court recited other canons that are applicable in our case as well, including the above quoted Canon 1.7.3. Those other canons applicable in our case include canons 6, 12, 17, 18 and 21. Even with no Dennis Canon to rely upon for a trust, the Mote Court concluded that canons 6, 12, 17, 18 and 21 each constitute "another strong example of control over property ceded by the local church to the diocese and is further indicative of the intent of the local and the general church to maintain integrity in the ownership and use of property at the parish level for PECUSA purposes." 716 P.2d at 107

While the Mote court did not go so far as to say that adoption of the Dennis Canon would end the inquiry, it is clear that the Dennis Canon would add additional and considerable weight to the conclusion that a trust for the benefit of PECUSA and the Colorado Diocese had been established. Accordingly, I conclude that the canons impose a much broader trust in favor of the general Episcopal Church, and further they expand the one put in place by the 1923 corporation articles of incorporation and Instrument of Donation.

The canons prohibit Grace and St Stephens from disposing of any real or personal property belonging to it without the consent of the Diocese. The canons further impose an obligation on the parish to first obtain consent of the Diocese before "alienating or encumbering" any parish property. The fact that members of the parish Grace Church and St Stephens had no knowledge of the contents of the canons would apparently be of no import to either the Wolf court or the court in Mote. Accordingly, I further conclude that it is of no consequence in this case. One must assume that by becoming a member of a corporate nonprofit that has acceded to Episcopal canons, the member is subject to them all, whether they are known to the member or not. The law of "voluntary associations" would support such a conclusion. *See eg. Jorgensen Realty, Inc., v Box*, 701 P.2d 1256, 1257 (Colo. App. 1985).

Property Transactions Inconsistent with Terms of Trust:

The central theme of the plaintiff Grace Church and St Stephen's assertion that it owns all parish property is that the parish was historically independent of the Diocese, that it made its own decisions on virtually all issues and most importantly, that it didn't require the approval of the Diocese before it

encumbered or sold parish property. Thus, it argues alternatively that either no trust exists, or in the alternative, if a trust was found to exist, that in the words of Mr. Fischer, "the trust was revocable and it has been revoked".

The Mote decision mandates review of property transactions and the context in which they occurred to determine whether they are inconsistent with the existence of a trust relationship. The Court stated that "*an exercise of unbridled control over church property by the local church corporation would conflict with several provisions in the PECUSA and diocesan canons*". P105. While neither defining "unbridled control" nor indicating what impact a finding of something more than *no* control but less than "*unbridled*" might have on the analysis, it seems to be left to common sense and a totality of the circumstances determination.

Indeed, the history of property sales and encumbrances by Grace Church and St Stephens is anything but consistent as it relates to abiding by canon law. Prior to 1975, the parish complied with the requirement to first obtain Diocesan approval before selling or encumbering property. After 1975, the parish sought permission to borrow and encumber on some occasions, but did not in others. The parish bought and sold rectories on at least three occasions without permission of the Diocese. The parish sold Thunderbird Ranch in 1992 without permission, even though they sought and obtained permission to encumber (and perhaps to sell) the property on a prior occasion. On each occasion that they encumbered a "mission church", the parish first obtained consent of the Diocese.

Each party has submitted a summary of transactions and indications in each instance where consent was obtained or not. There is some factual disagreement in one or two of the instances. Exact resolution of that dispute is not necessary however. What is critical is that I don't find these transactions, whether approved or not, indicate "any intent to defy or disobey the Diocese" as the Mote court stated when it examined similar issues in the St Mary's case. 716 P.2d at 106.

I reach that conclusion because I find that members of the vestry, not knowing what the canons dictate, would not have known of any obligation to seek Diocesan approval. Virtually all lay persons who testified in this case, whether for the plaintiff or defendants, indicated that they didn't know the particulars of canon law. The Bishop testified that the members were not expected to know and understand the canons. Since no approval mandate was contained in the articles of incorporation or bylaws, I conclude that parish members would have no way of knowing about the canon requirements. Unless, that is, they were informed by a member of the clergy that permission was needed. It is of little surprise then that the members of the vestry would not seek Diocesan approval before selling or encumbering property. Moreover, in

each of those instances where Diocesan approval was not obtained, the Bishop indicated that the Diocese had no knowledge of the transaction. Thus, it cannot be successfully urged that the Bishop knowingly waived the benefit of the trust relationship.

If members of the vestry knew of the canon obligation to obtain Diocesan approval and were defying the Bishop, one would expect to find some reference to that defiance in some parish record. In each of the real estate transactions where permission was not obtained, there are no records to indicate that the vestry had decided that Diocesan consent was required. In fact there are no parish records indicating *any* discussion of consent, whether it was obtained or not.

There was one critical instance in which Diocesan approval was obtained that adds weight to my conclusion that vestry members just didn't know. That instance came about when the parish borrowed \$ 1.25 million in 1989 – 1992 to make renovations to the church building. Seeking permission from the Diocese would certainly be in conformity with the requirements of the canons. In addition to being in conformity with canon requirements, the act of requesting consent from the Diocese would also be contrary to the plaintiff's assertion that the parish had no obligation to obtain consent to sell or encumber property. It is also important to the outcome of my analysis because it involves a situation in which the question of how the parties mutually intended that control over the parishes' most significant real estate, the church, would be exercised. One can reasonably conclude from this instance alone that both parties understood that the parish would not encumber the church without Diocesan consent.

Rev. Armstrong testified that he did not initially obtain approval for the loan, because he didn't feel he needed permission from the Diocese. However, he was contacted by members of the Diocesan staff who indicated that it was required. He said that after receiving the call, he agreed to seek approval by having the parish apply for it. When he went to the senior warden, "Unk" McWilliams to have McWilliams sign a request for approval, he was angrily chastised by the warden. According to Rev. Armstrong, Mr. McWilliams criticized Rev. Armstrong for agreeing to seek approval. According to Rev. Armstrong, Mr. McWilliams indicated that the parish didn't need Diocesan approval before the parish improved or sold parish property because it was owned and controlled in all respects by the parish. He further stated that the construction was well under way anyway and that the Diocese failed to follow up with later oversight envisioned in the grant of approval.

I conclude that Rev. Armstrong's testimony regarding this incident is unconvincing. First, it is contrary to the testimony given by others that Mr. McWilliams was devoted to the Episcopal Church and Diocese and would always

follow the dictates of that hierarchy. Second, Mr. McWilliams has passed away and cannot speak for himself. Third, it is clearly self-serving and surrounds an instance which is critical in examination of who has ultimate control and ownership of the property. Fourth, if Grace and St Stephens parish was truly independent and felt that there was no obligation to obtain Diocesan approval for major encumbrances, it logically would have rejected the request for approval and been open about it. If Mr. McWilliams felt the Diocese had no right to expect the local parish would seek approval what better time would there have been to assert that independence than when the parishes' biggest asset is at issue? Mr. McWilliams was a bank trust officer who understood the legal significance of providing such consent. It would be logically inconsistent for a knowledgeable businessman and banker to believe the Diocese had no right to approve parish financing and yet to seek it none-the-less.

Obtaining consent for such an encumbrance, no matter what the circumstances, was an admission by Rev. Armstrong that he knew that consent was required at the time. Further, Rev. Armstrong's answers given in 1988 to written parish questions are also consistent with his knowledge that the Diocese controlled parish property. In response to those written questions, Rev. Armstrong informed the parish that the Diocese basically owned all of the parish property.

Last, Bishop O'Neil testified that he had confronted Rev Armstrong in 2005 about an encumbrance on the church that had been obtained without Diocesan consent. Rather than tell the Bishop that permission was not required, Rev. Armstrong told the Bishop that the encumbrance was part of the loan that had been approved by the Diocese in 1989. That was not true, but that is not the point. It demonstrates that Father Armstrong was aware of the canon obligation to obtain consent when selling or encumbering parish property.

The Diocese later accused Rev. Armstrong of not disclosing or seeking permission of the Diocese for a number of sales and encumbrances for Grace Church and St Stephens property.

Based upon a review of the testimony and various real estate transactions, I conclude that the vestry of Grace Church and St Stephens did know of the canon obligation to first seek approval before "alienating or encumbering" property. Likewise, the vestry undoubtedly knew little or nothing of the Dennis canon by which all parish property had been set aside in trust to the Diocese. Thus, I conclude that the parish real estate transactions were not an act of defiance or an indication of independence from the Diocese. Rather, the vestry apparently sought permission when a member of the clergy told them they needed it, but otherwise did not. The transactional history may demonstrate

Rev. Armstrong's defiance of the Bishop and canon law, but not defiance from the parish.

Even if the parish sold or encumbered parish property with knowledge that such conduct violated the canons, that defiance would not be enough to renounce the trust relationship. In order to repudiate a trust, the act of repudiation must be sufficient to put the beneficiary on notice of the repudiation. 54 ALR 2d 28 and Hodny v. Hoyt, *supra*. At a minimum, the Bishop would have to be made aware that the parish was violating the obligation to obtain consent. On the contrary, Bishop O'Neill indicated he was unaware of the unapproved real estate transactions. On the other hand, if "Unk" McWilliams had answered the Diocese's demand in 1988 that the parish submit a request for approval with "no, we don't need your consent", that could be viewed as a clear renunciation of the Diocese's belief that it had the right to approve of all real estate loans and sales.

Therefore, I conclude that the parish real estate transactions that went forward without Diocesan consent do not constitute renunciation of the trust for the benefit of the Diocese, nor do they constitute proof of any intent contrary to maintenance of a trust relationship.

Church History Consistent with Trust Relationship:

The Mote court recited the history of the relationship between St Mary's and the Diocese as additional evidence of the intent to devote all parish property to the ultimate control of the Bishop. In our case the plaintiffs have asserted that Grace Church and St Stephens was an independent parish that resisted control of the Bishop and treated parish property as its own, not subject to Bishop oversight. The totality of the evidence presented does not support that argument.

The 1873 foundational document recites that the original members pledge that they were "constitutionally attached to the Doctrine, Disciplines, and worship of the Protestant Episcopal Church in the United States and being earnestly desirous of establishing its authority..." They "promised" that the parish would "forever be held and incorporated under the ecclesiastical authority of the Bishop of Colorado and his successors". They further promised corporate obedience and conformity to the Constitutions and Canons of the Church, nationally and in the jurisdiction of Colorado.

In the 1923 articles of incorporation, the two churches Grace and St Stephens were united. As indicated in quotes above, the 1923 corporate church pledged loyalty and obedience to the national church and the Bishop of Colorado. It again recited its duty to obey the canons of the general church. As indicated above, the preparation and recording of the "1973 articles of incorporation" merely revived or reinstated the then-defunct 1923 nonprofit corporation Grace

Church and St Stephens. The 1974 and 1975 bylaws renew the pledge contained in the 1963 bylaws to be governed by the Constitution and Canons of the general church.

Historical documents of the church and evidence presented at trial are replete with examples of parish involvement in the activities of the Diocese. The Rector or Co-Rector attended the Annual Convocation, Council, or Convention of the Diocese of Colorado 87 times since its founding, including at least 14 times since 1973. The Parish sent delegates to the Annual Convocation, Council, or Convention of the Diocese of Colorado 94 times since its founding, including at least 25 times since 1973. Grace Church and St Stephens sent delegates to the Conventions of the Diocese almost every year from 1872 through at least 2006. Parish delegates went to the General Convention on 28 occasions. **Grace Church and St Stephens hosted Annual Conventions of the Episcopal Church during 1941, 1953, 1974 and 1994.** Members of the parish have joined Diocesan boards, have served on numerous Diocesan committees and held governing positions in the Diocese and national church. (See Woodward Affidavit and Summary, Def. ex. 5 and Bishop O'Neil Summary).

There is evidence that Bishops frequently visited the local parish. On each occasion that a new Rector was installed, the Bishop would preside over the formal ceremony of installation. When Father Armstrong was installed as the Rector, the Bishop presided over that installation before the entire congregation. Adherence to canon law was pledged during the installation. The Bishops made numerous visits to the local parish to oversee the running of the parish and to visit the various Rectors.

The parish pledged financial support to the Diocese. It appears that the parish has given money to the Diocese during each year of its existence.

When the various doctrinal disputes arose during Father Armstrong's tenure, there were various parish discussions about what the appropriate parish response should be. Separation from the national church was one of the alternatives discussed. In 2003 Father Armstrong urged the parish to "remain within ECUSA; they will not leave the church but will reclaim the church for conservative orthodoxy". (Ex. 234). Later he wrote to members, indicating that "I am bound to uphold these positions by the Constitution and Canons of our Church". (Ex. 238.) Those statements are clearly inconsistent with the assertion of parish independence of the Diocese.

The defendants called past rectors and church members to describe the conduct of the local parish and its relationship to the Diocese. Father Hewitt and Father Burton served as clergy during the 70's and 80's. They indicated that Grace Church and St Stephens had a close relationship with the national church

and Diocese; one that was no different than any other parish in which they had previously served. They saw no indication of defiance of the Bishop or of the local parish having any notable independence from the Diocese. Professor Timothy Fuller testified that he was a past vestry member and that he was never aware of the parish asserting any independence from the Diocese until the disputes in 2006 came to a crisis point. I find the testimony of these three witnesses most convincing as an indication of the loyalty of the parish to the Diocese until the disputes arose.

From the time of its formation, Grace Church and St Stephens has always held itself out as an Episcopal church and part of the greater national church and Diocese of Colorado. That statement of attachment can be found in its corporate documents, minutes of meetings, signage, letterhead and announcements. None of the evidence presented would support that it was independent of the ECUSA or the Diocese of Colorado. Nor is there any significant factual support for the plaintiff's assertion that the parish was a member of the general church and loyal to it in matters of faith, but not in temporal matters. Absent proof that the parish exercised "unbridled control" over their real property, or that the corporate and real property records reserved ultimate ownership and control over the property, no such partial membership can be found.

Before the dispute in this case came to a head in the time frame of 2005 – 2006, the history of Grace Church and St Stephens parish, is not substantially different than the history of the relationship between St Mary's and the Diocese in Mote. The Grace Church and St. Stephens parish has a 135 year relationship with the Diocese. It participated vigorously in all Diocesan activities. I find convincing the testimony of those witnesses that said the local parish had the same relationship with the national church and Diocese as all other Episcopal parishes. Doctrinal disagreements do not constitute independence or open defiance. Therefore I conclude that the history of the parish Grace Church and St Stephens supports that it was not independent of the Diocese but was as much involved as any other parish.

The history of Grace Church and St. Stephens is consistent with the founding documents, the Instrument of Donation and the canons that all parish property was held in trust for the benefit of the Diocese and general church.

Summary:

When property disputes arise out of church schisms, the courts must apply law that has been uniquely crafted to analyze the disposition of that property. In this case, I have closely considered the Plaintiff's evidence, indicating that the parish is the record owner of all parish property; that the parish has constructed substantial improvements, maintained and kept that

property in good repair at its own expense without any financial assistance from the Diocese for approximately 135 years; that the parish has contributed approximately \$770,000 to the Diocese over the years and that the parish has contributed loyalty, effort and assistance to the Diocese as long as the parish has been in existence. But the Wolf and Mote cases mandate that I look at the entire history of the relationship to determine whether the members of Grace Church and St. Stevens have demonstrated a "clear, explicit, definite, unequivocal and unambiguous" intent to give over control, and in certain circumstances, ownership of parish property. Indeed, the disposition of this parish property has been determined not by what has occurred in the parish and diocese in the last ten years, but what has been shown to be the general desires of all parish members since the time of the creation of this nonprofit church corporation.

I find and conclude that, like Mote, the founding documents, various bylaws, relevant canons of the general church and consistent parish loyalty to the Diocese over most of its 135 year existence demonstrate a **unity of purpose** on the part of the parish and of the general church that reflects the intent that all property held by the parish would be dedicated to and utilized for the advancement of the work of ECUSA. While freedom of religion recognizes the right of any faction within a church to leave that church whenever they choose, the trust that has been created through past generations of members of Grace Church and St. Stephens prohibits the departing parish members from taking the property with them.

I further conclude that appointment of rector, warden and vestry is a matter within the exclusive dominion of the Bishop. Accordingly, I must give deference to those appointments, except that as it relates to the use of the property in this dispute, that deference is accorded as of the date of this order.

ORDER:

1. Based upon the above analysis, I hereby order that the Defendants' request that title to all property owned or held under claim of ownership by the parish Grace Church and St. Stephens be quieted be granted. I hereby **order** that title and ownership of all said property is vested in the Episcopal Church of the United State and the Diocese of the State of Colorado. This order is effective as of today's date. I further **order** that the Bishop's appointment of new parties to govern the affairs of the parish Grace Church and St Stephens, as it relates to control of parish property, is likewise effective as of today's date.
2. The real property affected by this order is described in **Attachment 1** to this ORDER.

3. The disputed property includes all personal property of the Episcopal parish, Grace and St. Stephens's Episcopal Church, and of its parish corporation as of March 25, 2007 including, without limitation, all bank, savings and loan, credit union, brokerage, and other financial accounts as of that date.
4. The disputed property includes the website and domain name, <http://www.graceandststephens.org> and the employer identification number 84-0404258.
5. The disputed property also includes the common law trade names: Grace Episcopal Church, Grace Church, St. Stephen's Church, Grace and St. Stephen's Episcopal Church, and Grace and St. Stephen's Episcopal Parish and the versions of those names using an ampersand instead of "and".
6. The filing of the Articles of Incorporation in 1973 reinstated the 1923 nonprofit corporation effective June 23, 1973.
7. The plaintiffs shall immediately cease all use and relinquish all possession, control, and dominion over the disputed property. The Court shall issue a Writ of Restitution.
8. The plaintiffs shall within 30 days provide the defendants with all books, records, copies of checks, statements, invoices and any other documents belonging to or affecting the parish.

SO ORDERED, THIS 24th DAY OF MARCH, 2009.


LARRY E. SCHWARTZ
District Court Judge

Individual Counterclaim Defendants:

There remain counter claims against individuals who formerly served as vestry, wardens and rectors of the parish. This quiet title order means that trial of those matters can conceivably go forward. However, in an effort to streamline the process before it becomes too involved, I suggest the parties discuss disposition of the remaining claims.

My concerns regarding the remaining claims are as follows: Claims of trespass, theft, conspiracy and the like all revolve around the notion that the offending party had no authority to use the property of another. For instance, to prove civil trespass, the Bishop would have to prove 1. property ownership by the Bishop and 2. intentional trespass. Permission or consent is an affirmative defense. Having now heard five weeks of testimony and reviewed in excess of 3,000 documents I am at somewhat of a loss to understand how those claims can be maintained. The parish held legal title to all of the property subject to the Bishop's "equitable" claim of trust. The counterclaim defendants represented the majority of the parish and had a reasonable basis to conclude that they had the absolute right to use the property. That reasonable belief extended up until I entered this order to the contrary.

Its clear that most of the documents relied upon by the defendants in their successful bid for quiet title were discovered only during the course of this litigation. The Instrument of Donation was apparently discovered well after the case was filed. The Bishop admitted that parish members are not expected to know what the canons say. In other words, members of the parish would have little or no reason to know that they didn't have legal authority to remain on the parish property.

I suggest the parties have serious discussion about resolution of the remaining claims. If they cannot be resolved they may file such motions as they deem necessary.

Done this 24 day of March, 2007



LARRY E. SCHWARTZ
District Court Judge

cc:

counsel of record

Grace Church and St. Stephens v. Bishop of Colorado
07 CV 1971

ATTACHMENT 1 TO PROPERTY ORDER:

Real Property Subject to Order:

- a. Lots 1, 2 and N. 50 Feet Lot 3, Block, 22 Add. 1 to City of Colorado Springs, known commonly as 631 N. Tejon Street, Colorado Springs, CO 80903;
- b. S. Half of Lot 2, known commonly as 631 N. Tejon Street, Colorado Springs, CO 80903;
- c. N. Half of Lot 3, known commonly as 631 N. Tejon Street, Colorado Springs, CO 80903
- d. S. 50 Feet of Lot 3 and N. 10 Feet of Lot 4, Block 22, Add. 1 to the City of Colorado Springs, known commonly as 631 N. Tejon Street, Colorado Springs, CO 80903;
- e. W. 115 Feet of S. 90 Feet of Lot 4, Block 22, Add 1, to the City of Colorado Springs, known commonly as 601 N. Tejon Street, Colorado Springs, CO 80903;
- f. W. 50 Feet of Lot 8, Block 22, Add. 1 to City of Colorado Springs, known commonly as 117 E. Monument Street, Colorado Springs, CO 80903; and
- g. Lot 10 Skyway Northwest No. 3 Filing No. 4, known commonly as 3025 Electra Drive, Colorado Springs, CO, 80906.

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IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
21st JUDICIAL CIRCUIT

GEORGE WAYNE SMITH, BISHOP OF)
THE DIOCESE OF MISSOURI OF THE)
PROTESTANT EPICOPAL CHURCH IN)
THE UNITED STATES OF AMERICA, et al.,)

Plaintiffs,)

vs)

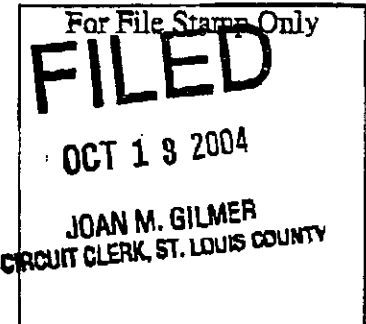
THE CHURCH OF THE GOOD SHEPHERD,)
et al.,)

Defendants.)

October 12, 2004

04CC-000864

Division 32



JUDGMENT AND ORDER

Plaintiffs brought this action for equitable relief, declaratory judgment and damages seeking a permanent injunction removing defendants from the control and use of the property of Good Shepherd Parish. Plaintiffs also sought damages for wrongful possession, their costs and attorneys' fees. Defendants claim ownership of the real property and tangible and intangible personalty free of any claim by plaintiffs. At the request of defendants, The Protestant Episcopal Church in the United States of America (PECUSA) was joined as a necessary party as the petition stated the property was held in trust for PECUSA. All parties filed Motions for Summary Judgment, Responses and Replies. The Court having read the motions, memorandums and exhibits enters the following order and judgment.

FINDINGS OF FACTS

The Church of the Good Shepard was incorporated in 1958 under Chapter 352 as a voluntary religious association. Pursuant to the Articles of Association filed with the St. Louis County Circuit Court at the time, the corporate name was "The Church of the Good Shepard, a Parish of the Protestant Episcopal Church in the United States of America in Union with the Diocesc of Missouri".¹ Article 3 of the document acknowledged the Parish's allegiance to PECUSA and the Diocese of Missouri, agreed to be bound by "the Canons, Doctrines, Discipline

¹ Defendants claim the same the same name but now distinguish themselves as also known as "The Anglican Church of the Good Shepherd". The Court uses the term Parish to refer to the original Church of the Good Shepherd.

and Form of Worship of that Church”, and acknowledged the authority of PECUSA and the Dioceses.

The real property purchased by the Parish was titled in its corporate name. Part of the funds to purchase the property came from PECUSA. The Parish fully participated in the polity of both the Diocese of Missouri and PECUSA. This hierarchical governing structure is composed of three tiers: the parish is governed by the vestry which consists of the rector and a group of lay members elected by the parish at their annual meeting. Each parish belongs to a regional body or a diocese which is governed by an annual Convention or Council made up of the diocesan bishop or other bishops elected by the Convention or Council, rectors and other clergy and lay delegates elected by parish members or vestries. Each diocese enacts a Constitution and canons to supplement the national Church’s Constitution and canons. All of the dioceses make up the national church. Governance at the national level is by the General Convention which adopts and maintains a national Constitution and canons. The General Convention and the Constitution and canons have formal authority over the affairs of the dioceses and parishes. Each tier is bound by, and may not take any actions in conflict with the decisions of a higher tier.

The Parish annually elected its vestry and wardens. It filed an annual status report with the national church and paid its annual assessment to the Diocese. The Parish sent delegates to the Diocese’s and PECUSA’s annual conventions. The Parish considered itself part of the Diocese and PECUSA since its inception.

During the 2003 American Episcopal General Convention, the delegates voted to elect and ordain an openly gay Bishop. The Convention also adopted a resolution authorizing the solemnization of same-sex civil unions. Several weeks after the General Convention, defendants held a Vestry Meeting at which the Vestry voted to send a resolution denouncing the actions taken by the General Convention.

From August through November of 2003 the parties met in an attempt to resolve their differences. During this period, defendants obtained the services of legal counsel and used Parish funds to pay a retainer of \$3,500.00. Defendants met on February 2, 2004 to authorize the amendment of the Articles of Association to disaffiliate itself from the national Church. Members of the Parish were not notified of the proposed amendments until after a petition to amend had been filed in the Circuit Court and approved. The petition purports to amend the April 2, 1958 decree. In fact, that decree was vacated because of a procedural error and another

decree was entered on May 20, 1958 and recorded. The Parish was operating under the May 20, 1958 decree.

The Articles of Association, as stated, incorporated the Constitution and Canons of the Episcopal Church. Canon IV.6 sets out the procedure each Parish must follow to amend its by-laws. Any amendment must be submitted in advance and approved by the Diocesan Standing Committee. The Canon further states "no bylaws or amendments shall become effective until the foregoing procedures have been complied with in full". Defendants admit they did not follow this procedure as they never submitted the amendment to the Standing Committee for review or approval.

The proposed amendment changed the legal name of the Parish to The Anglican Church of the Good Shepherd. It also removed the language of affiliation and allegiance with PECUSA or the Diocese of Missouri. Under the amendment the Parish became an independent Anglican Church. The amendment was submitted to a vote of Parish members after its approval by the Court. By majority vote it was approved.

Plaintiffs did not know of the amendment until February 24, 2004. A letter was sent to parishioners setting out the Diocese's position on the actions taken by defendants. Bishop Smith and the Standing Committee took the additional action of inhibiting Rev. Mr. Walter from performing his duties as an ordained priest of the national church. A similar notice was sent to the Wardens and Vestry removing them from office.

In a letter dated March 1, 2004 defendants notified the Diocese of their withdrawal from the national church and their affiliation with the Anglican Mission in America. Defendants claim the real and personal property of the Parish. Plaintiffs seek an injunction to prevent the removal of any of the property.

CONCLUSIONS OF LAW

Clearly, the underlying dispute is based on theological or ecclesiastical differences, however, the parties recognize the civil courts can only decide which organization owns the property. In Presbytery of Elijah Parish Lovejoy v. Jaeggi, 682 S.W.2d 465 (Mo. 1984) the Supreme Court adopted the "neutral principles of law" approach set out in Jones v. Wolf, 443 U.S. 595, 99S.Ct. 3020, 61 L.Ed.2d 775 (1979) as the exclusive method for the resolution of

church property disputes. This approach recognizes the State's interest in the peaceful resolution of property disputes but prohibits a resolution on the basis of religious doctrine. It requires a civil court to apply its own statutes and well established concepts of trust and property law rather than religious doctrine.

When the Parish chose to incorporate itself under Chapter 352 as a voluntary religious association it subjected itself to the jurisdiction of civil courts. Articles of Association were filed with the circuit court and approved. Section 352.110 RSMo requires every corporation created under this chapter to make bylaws for its government. As stated above, the Parish complied with the requirements of the statutes and voluntarily entered into the articles of association with the Dioceses and PECUSA.

Corporate articles and bylaws are to be construed according to the general rules governing contracts. Boatmen's First Nat. Bank of West Plains v. Southern Missouri Dist. Council of the Assemblies of God, 806 S.W.2d 706, 713 (Mo. App. S.D. 1991) The bylaws in the present case set out a clear procedure to be followed prior to amending the articles of association. The adopted bylaws are not inconsistent with State law or conflict with their own articles of association. Defendants do not attack the validity of the original organizational documents but instead, assert the articles and bylaws were properly amended allowing for the disaffiliation of the Parish from the Dioceses of Missouri and PECUSA. This argument fails for two reasons. Defendants are bound by their bylaws and must follow the procedure it sets out. Defendants concede they did not follow the procedure set out for amending the bylaws. Additionally, defendants failed to amend the proper Articles of Association. As noted, the April 2, 1958 decree had been vacated and was void. The Court lacked the jurisdiction to amend a void judgment. Rule 74.06 (b) (4)

Defendants also argue the failure to properly amend the articles of association is inconsequential since the majority of the membership approved the action. However, the vote of the membership cannot approve the amendment since there is no provision for amendments to be made by majority vote. The membership is also bound by their organization documents. Episcopal Diocese of Mass. V. DeVine, 797 N.E.2d 916 (Mass. App. Ct. 2003)

The Canons and constitution of both the Dioceses and PECUSA prohibit the transfer or encumbrance of property without the approval of the Bishop and Standing Committee. The Articles of Association states the real property was to be held for the purposes and to the use of those who are in communion with and under the authority of the Protestant Episcopal Church.

Defendants clearly no longer consider themselves in communion and under the authority of the Dioceses or PECUSA. Further, defendants no longer have an official capacity with the Dioceses or PECUSA and thus lack the authority to transfer the property.

Plaintiffs claim a beneficial interest in the property based on the Canons and constitution of the Dioceses and the national church. In 1979, PECUSA enacted Canons 1.7(4) and (5) in response to the Supreme Court's decision in Jones, to codify the policy of parish ownership subject to a beneficial interest of the national church and dioceses. These Canons were adopted at a national convention pursuant to PECUSA's procedure to amend its canons. The Dennis Canon, as these sections became known, was properly incorporated into the bylaws of the Parish. Pursuant to the Dennis Canon a trust relationship was established in the national Church. Plaintiffs continue to exercise control over the property unless they relinquish this right or the Articles of Association are properly amended to disaffiliate. See Bishop and Diocese of Colorado, 716 P.2d 85, 104 & 108 (Colo. 1986)

Plaintiffs also claim damages as the result of the actions taken by defendants and ask for attorneys fees. The Court fails to find defendants acted maliciously but does find Parish funds were used to pay the retainer of their counsel. The \$3,500.00 is to be returned to the Parish.

IT IS THEREFORE ORDERED AND ADJUDGED that Summary Judgment be award to plaintiffs on their motion. The amended Articles of Association and February 9, 2004 decree are vacated and held for naught. A permanent injunction is entered ordering defendants to vacate the premises and restore plaintiffs to its full use and enjoyment. Defendants must cease and desist from conducting any business of or acting on behalf of the Parish. It is further ordered, defendants must repay \$3,500.00 to plaintiffs. Court costs are taxed against the defendants.

SO ORDERED:

Mary B. Schep
Judge *10/12/04*

CC: Attorneys of Record

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FILED
 GILBERT SANCHEZ
 DISTRICT CLERK
 IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS
 210TH JUDICIAL DISTRICT
 2010 DEC 17 AM 10:12
 EL PASO COUNTY, TEXAS

ST. FRANCIS ON THE HILL CHURCH,)
 a Texas non-profit Corporation,)
 Formerly known as ST. FRANCIS ON THE)
 HILL EPISCOPAL CHURCH,)

Plaintiff,)

v.)

THE EPISCOPAL CHURCH, a Non-Profit)
 Unincorporated Association, THE DIOCESE OF)
 THE RIO GRANDE, a Non-Profit)
 Unincorporated Association, and THE TRUSTEES)
 OF PROPERTY OF THE EPISCOPAL CHURCH,)
 DIOCESE OF THE RIO GRANDE, IN TEXAS,)
 A Texas Non-Profit Corporation,)

Defendants.)

BY _____
 DEPUTY

Cause No. 2008-4075

FINAL SUMMARY JUDGMENT

The Court, having considered the pleadings, the parties' cross-motions for summary judgment and the responses thereto, the evidence on file, and the argument of counsel, denies Plaintiffs' Motion for Summary Judgment, grants Defendants' Motions for Summary Judgment, and renders Judgment for the Defendants.

The Court hereby issues a Declaratory Judgment, pursuant to Texas Civil Practices and Remedies Code §37.001:

1. that The Episcopal Church is a hierarchical church as a matter of law and that Plaintiff, prior to October 28, 2008 was a mission and later a parish member of said Church. Because the Episcopal Church is such, the Court follows the long-established Texas precedent governing hierarchical church property disputes,

which holds that in the event of a dispute among its members, a constituent part of a hierarchical church consists of those individuals remaining loyal to the hierarchical church body. *See, e.g., Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909); *Presbytery of the Covenant v. First Presbyterian Church*, 552 S.W.2d 865 (Tex. Civ. App.-Texarkana 1977, *no writ*). Under the law articulated by the Texas courts, those are the individuals who remain entitled to the use and control of the church property. *Id.* Plaintiff's arguments based on the Texas Corporations Code and trust law do not alter the result dictated by the Texas precedent specifically governing church property disputes;

2. that even if the Court applied neutral principles of law to resolve this church property dispute, the neutral principles considerations favor Defendants, because (a) the deeds provide that the property is to be held by "St. Francis on the Hill Episcopal Church"; (b) prior to plaintiff's attempt to leave the Church and the Diocese, the incorporated parish was known as "St. Francis on the Hill Episcopal Church," and the bylaws of the corporation acceded to the rules of the Church and the Diocese; (c) the Church's and the Diocese's longstanding canons provide that parish property is held in trust for the Church and the Diocese and confirm the interest of the Church and the Diocese in seeing to it that property held by Episcopal parishes be used solely for the mission of the Church and the Diocese; d) the Diocese's canons further set forth when, how and why a member parish may be allowed to incorporate; and (e) the Texas Non-Profit Corporations Act permits subordinate parts of hierarchical churches to incorporate, but such

corporations remain subject to the rules of the religious organizations that formed them and hold property for the benefit of and in trust for those organizations;

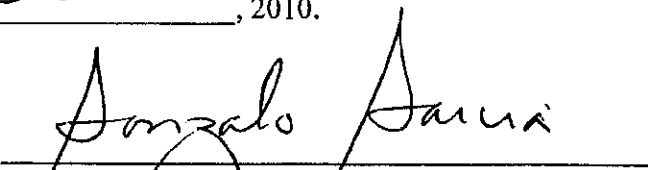
3. that the vestry and/or membership of Plaintiff may not unilaterally alter the status of St. Francis on the Hill Episcopal Church as a parish of the Church and the Diocese;
4. that the real and personal property held by St. Francis on the Hill Episcopal Church is held and may be used only for the ministry and work of the Church and the Diocese and may not be diverted, alienated, or used except as provided by the Constitution and canons of the Church and the Diocese;
5. that St. Francis on the Hill Episcopal Church is represented by those of its members who have remained part of The Episcopal Church, under the leadership of the clergy recognized by the Church and the Diocese;
6. that Plaintiff is enjoined from diverting, alienating, or using the real or personal property of St. Francis on the Hill Episcopal Church except as provided by the Constitution and canons of the Church and the Diocese; and
7. that possession and control of the property held by St. Francis on the Hill Episcopal Church is awarded to the continuing Episcopal congregation for use in furtherance of the parish/mission's ministry and mission pursuant to the Constitution and canons of the Church and the Diocese.

Based on the above, it is therefore ORDERED, ADJUDGED, AND DECREED:

1. that Plaintiff's motion for summary judgment is DENIED;
2. that Defendants' motions for summary judgment are GRANTED;

3. that within thirty (30) days of the signing of this judgment, Plaintiff shall relinquish control of all real and personal property of St. Francis on the Hill Episcopal Church and deliver said property to the Vestry/Bishop's Committee of St. Francis on the Hill Episcopal Church or the appropriate Diocesan agency;
4. that execution shall issue for this judgment;
5. that within sixty (60) days of the signing of this judgment, Plaintiff shall render an accounting to the Vestry/Bishop's Committee of St. Francis on the Hill Episcopal Church of the disposition of all property of St. Francis on the Hill Episcopal Church since October 20, 2008;
6. that within sixty (30) days of the signing of this judgment, Plaintiff shall permit members of the Diocesan archive access to the records of St. Francis on the Hill Episcopal Church for the purpose of obtaining copies of all documents related to St. Francis, the Diocese and/or the Episcopal Church;
7. that this judgment is final, disposes of all claims of the parties, and is appealable;
and
8. that all other relief not expressly granted herein is denied.

SIGNED this 16 day of December, 2010.



Gonzalo Garcia, Judge
210th Judicial District Court

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MEMORANDUM

SUPREME COURT: QUEENS COUNTY
IA PART 17

ST. JAMES CHURCH, ELMHURST

x

INDEX NO. 22564/05

MOTION DATE: JANUARY 2, 2008

- against -

MOTION CAL. NO. 24

MOTION SEQ. NO. 2

EPISCOPAL DIOCESE OF LONG ISLAND,
et al.

DATED: MARCH 12, 2008

- and -

CARLO J. SAAVEDRA, et al.

x

In this action for declaratory judgment, and for injunctive relief, defendants Episcopal Diocese of Long Island, Trustees of the Estate Belonging to the Diocese of Long Island, sued herein as Trustees of the Estate Belonging to the Diocese of Long Island, Inc., and the Right Reverend Orris G. Walker, Jr. seek an order granting summary judgment dismissing the complaint and granting summary judgment on their counterclaims and seek a declaration to the effect that all real and personal property held by St. James Church, Elmhurst is held in trust for the Episcopal Church and the Episcopal Diocese of Long Island, and that these defendants' interest in the proceeds of the sale of such property are superior to any interests that the plaintiff and individual additional defendants may have in said property and setting down for trial on the issue of damages resulting from the

plaintiff's wrongful possession of said property. Defendant Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America separately moves for an order granting summary judgment dismissing the complaint and granting summary judgment on its counterclaims and declaring that the vestry and/or membership of St. James Church, Elmhurst may not unilaterally alter the status of St. James Church as a parish of the Episcopal Church and Diocese of Long Island; that the real and personal property held by St. James Church, Elmhurst is held in trust for the Episcopal Church and the Diocese of Long Island; that the additional defendants to the counterclaim may not divert, alienate or use the real and personal property of St. James Church, Elmhurst except as provided by the Constitutions and canons of the Episcopal Church and the Diocese of Long Island; to enjoin the additional defendants from diverting, alienating or using the real or personal property of St. James Church, Elmhurst except as provided by the Constitutions and canons of the Episcopal Church and the Diocese of Long Island; and directing that possession and control of the property held by St. James Church, Elmhurst be given to the parish's current priest-on-charge, the Rev. William DeCharme, for use in furtherance of the parish's ministry and mission pursuant to the Constitutions and canons of the Episcopal Church and the Diocese of Long Island. Plaintiff St. James Church, Elmhurst and the additional counterclaim defendants Carlo J. Saavedra, Lorraine King and Does 1-11

cross-move for an order granting summary judgment in their favor, declaring that it holds unencumbered legal title to all property it presently holds and that the defendants have no right, interest or claim to said property; enjoining defendants from asserting any claim in or interest in any property that St. James now owns, holds or might acquire; and granting its claim to quiet title to any and all real property titled in its name, and dismissing the defendants' counterclaims.

This action was commenced on October 18, 2005, and arises out of a property dispute in Elmhurst, New York between a local parish, St. James Church, Elmhurst (St. James) on one side, and the diocese and a national church on the other. All of the defendants have served their answers and interposed counterclaims, and plaintiff and the additional defendants have served their replies to the counterclaims.

Defendant Diocese of Long Island (Diocese), is an unincorporated association that was formed in 1871, when Richmond County, Queens County and other counties on Long Island were carved out of Episcopal Diocese of New York. Defendant, the Right Reverend Orris G. Walker, Jr., is the Bishop of the Diocese of Long Island. Defendant Trustees of the Estate Belonging to the Diocese of Long Island (Trustees) was incorporated in 1871 under a special New York law for the express purpose of holding title to real and personal property for the Diocese of Long Island (Diocese). Defendant Domestic and Foreign Missionary Society

(DFMS) is a New York not-for-profit corporation, which is empowered, among other things, to hold title to real and personal property for the use of the Episcopal Church.

Additional defendants Carlo J. Saavedra and Lorraine King named in the counterclaims are wardens and vestry members of the plaintiff church.

Historical Background

St. James parish was first established in New Town (now Elmhurst, Queens, New York), in 1704, under the authority of the Church of England. However, it was not until 1761 that a corporate charter was granted to St. James parish by the colonial Lt. Governor of New York on behalf of King George III, which described the church as "forever hereafter a Body Corporate and Politic in Deed Fact and Name and by the Name and Stile (sic) of the Inhabitants of New Town in Queens County in Communion of the Church of England and by law established...". The charter gave said church, which became known as St. James, the authority to buy, hold and sell real and personal property.

After the Revolutionary War, members of the clergy, church officers and parishioners could no longer offer an oath of loyalty to the English Crown. Therefore, in 1785 the Protestant Episcopal Church in the United States of America, (Episcopal Church), was organized with the purpose, among other things, of retaining the theological doctrine and form of worship of the Church of England. The Episcopal Church adopted a

Constitution in 1789, and its governing body, the General Convention, has adopted and amended said Constitution, as well as Canons, for the governance of the church. The Episcopal Church is a member of the Anglican Communion, a group of churches that have their roots in the discipline, doctrine and worship of the Church of England's Book of Common Prayer. The Diocese, a member of the national Episcopal Church, is governed by the Annual Conventions or Councils and has adopted its own Diocesan Canons.

St. James, along with Grace Church in Jamaica and St. George's Church in Flushing, as former members of the Church of England and as members of the Episcopal Church, petitioned the New York State Legislature to permit these churches to exist in corporate form "in communion of the Protestant Episcopal Church in New York." On March 12, 1793, the New York State Legislature enacted Chapter 60 of the Laws of New York, entitled "An Act to alter the Stile (sic) of the respective Religious Corporations therein mentioned," which provided in pertinent part that:

"...whereas the corporation of St. James's Church in the town of Newtown, in Queens county, by letters patent under the great seal of the late colony, now State of New York, bearing date the ninth day of September, one thousand seven hundred and sixty-one, were enabled to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, by the name of, The inhabitants of the township of Newtown in Queen's county in communion with the Church of England, by law established. And be it further enacted That the said corporation of St. James church in the town of Newtown, in Queen's county shall and may, from and after the passing of this act, take and use the name of, The

Rector and Inhabitants of the town of Newtown, in Queens county in communion of the Protestant Episcopal church, in the State of New-York; and by the said several and respective names shall be capable, severally and respectively, to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in as full and ample manner, to all intents and purposes, as they were severally enabled to do, in and by the said several and respective letters patent herein before recited; and that all bonds, all bills, grants, contracts, deeds and conveyances, made to or by said corporations, between the dates of the said several letters patent and the passing of this act wherein they are named or mentioned by the stiles (sic) and names of their several letters patents, or any or either of them, or by any other name or names, shall be good, valid and effectual in law, in like manner as they would have been if the names or stiles of the said several and respective corporations, or any of them, had been named in manner as herein directed in such bonds, bills, grants, contracts, deeds and conveyances; any law usage or custom, to the contrary thereof, in any wise notwithstanding."

St. James' Real Property

On September 6, 1951, the Supreme Court, Queens County issued an order pursuant to Religious Corporations Law § 12(2), approving the sale of certain real property located in Queens County to a third party by the "Rector, Wardens and Vestrymen of St. James' Church, Elmhurst, New York (Protestant Episcopal Church), a religious corporation." Said order stated that the sale of the property had been consented to by the Bishop of Long Island, the Standing Committee of the Protestant Episcopal Church of Long Island, and by a resolution of the Rector, Wardens, Vestrymen, who constituted the trustees of the church. The Church's Rector, in his petition, listed the following properties which St. James would continue to hold title

to after the sale was completed: a church building at the corner of Corona Avenue and Broadway (Block 1582, Lot 9SE); the parish house at the corner of Broadway and St. James Avenue (Block 1582, Lot 9SE); a cemetery (Block 1582, Lot 20); the parish hall at the corner of Broadway and Maurice Avenue (51st Avenue) (Block 1549, Lot 1SW); and the rectory at 46-19 88th Street (Block 1584, Lot 7).

The Diocese and Trustee records, and documents supplied by the plaintiff establish that these five parcels were acquired as follows: Jacob Ogden, pursuant to a deed dated September 28, 1761, conveyed real property to the "Inhabitants of Town of New Town in Queens County in Communion of the Church of England"; on April 19, 1773, an unidentified grantor conveyed real property to the "people or society of ye Church of England"; John J. Moore, pursuant to a deed dated May 1, 1864, conveyed real property to "the Rector and Inhabitants of the Town of Newtown in Queens County in Communion of the Protestant Episcopal Church of the State of New York"; and Kate Louise Fineout, pursuant to a deed dated May 24, 1934, conveyed real property to the "Rector, Wardens and Vestrymen of St. James Protestant Episcopal Church of Elmhurst, Long Island, New York."

The original church was built in 1736, on the property that is the subject of the 1773 deed, and is presently used as the parish hall. The cemetery is still owned by St. James Church. A successor church edifice, located at the corner of Corona Avenue and Broadway, was constructed and dedicated in 1849, and was

destroyed by a fire in 1975. The present church edifice was constructed on said property. At the time the 1849 church was consecrated as an Episcopal church, St. James' representatives signed an Instrument of Donation in which they pledged that the building would be used solely for the purposes of conducting religious services "according to the provisions of the Protestant Episcopal Church in the United States of America" and further pledged that the property would not be put to any use inconsistent with the Instrument of Donation.

In 1964, an action was commenced in Supreme Court, New York County, by "The Rector, Wardens, Vestrymen of St. James Parish of Elmhurst, Diocese of Long Island." The petition therein stated that the religious corporation was incorporated in 1934 and that a certificate of incorporation was filed in the Office of the Clerk of the County of Queens on April 29, 1937. The petition stated that the religious corporation was the same church as "The Rector, Wardens, Vestrymen of St. James Church in the Town of Newtown, County of Queens, State of New York," and that title to the real property in question, known as 56 Reade Street, in New York County had been acquired by deed on April 18, 1810, that The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York was the owner of a reversionary interest in the property who had agreed, as regards the reversionary interest, to execute a quitclaim deed upon condition that the proceeds of the sale be held in trust for the benefit of Trinity Church. The

petition further stated that the "proceeds of sale would be placed with the trustee of the estate belonging to Diocese of Long Island for the benefit of St. James Parish of Elmhurst upon condition, however, that the principal shall revert to Trinity Church in the event said St. James Parish shall cease to be an Episcopal Church." The petition also stated that the sale of the premises had been approved by the Bishop of Long Island and the Standing Committee of the Diocese of Long Island, and by the Rector, Wardens, and Vestrymen of the Church, in compliance with Religious Corporations Law § 12.

At issue here is the following real property: the current church building constructed in the 1970s, at the corner of Corona Avenue and Broadway (Block 1582, Lot 9SE); the parish house at the corner of Broadway and St. James Avenue (Block 1582, Lot 9SE); a cemetery (Block 1582, Lot 20); and the original church, constructed in 1763 and presently used as the parish hall, at the corner of Broadway and Maurice Avenue (51st Avenue) (Block 1549, Lot 1SW). The real property improved by the rectory, known as 46-19 88th Street (Block 1584, Lot 7), was sold to a third party in September 2000. The net proceeds of that sale currently held by the plaintiff is also at issue here, as well as all personal property held by St. James.

The Present Controversy

In a letter dated December 18, 1987 the Diocesan Bishop formally approved the appointment of Father William Galer as the

Rector of St. James, and he assumed his duties on January 1, 1988. In a letter dated March 15, 1991, Father Galer informed Bishop Walker that at a vestry meeting it was decided that St. James would discontinue paying its Diocesan assessment as long as the Bishop maintained his "publically affirmed openness regarding the blessing of some (sic) sex relationships and gay unions." In 1992, St. James, however, agreed to pay the Diocesan assessment in full.

In September 2000, St. James, without notice to Bishop Walker, or the Standing Committee of the Diocese, and without obtaining the consent of the court, sold the real property which was improved by the rectory to a third party, and a new building was subsequently erected on that site. The net proceeds of the sale, after deducting brokerage expenses and title company charges were \$396,679.25, and are currently held by St. James in a segregated account at a financial institution, pursuant to a stipulation entered into by the parties. The Bishop, the Diocese, the Trustees, and DFMS apparently were unaware of the sale of the said real property until after the commencement of this action.

In a letter dated March 31, 2005, wardens and vestry members Carlo Saavedra and Lorraine King stated that on behalf of the Vestry and the people of St. James Church, at a special parish meeting the members of St. James had "voted overwhelmingly to approve a resolution to disassociate from the Diocese and the Episcopal Church in the United States of America (ECUSA) and to

affiliate with the Anglican Church of America, which is part of the Traditional Anglican Communion." The letter's authors further stated that "[w]e have sought counsel, and have been advised that our claim to ownership of our real and real and personal property is strong, canonical provisions purporting to establish a trust over that property notwithstanding." The resolution adopted at said parish meeting provided, among other things, "that the name of the church be changed effective April 1, 2005 to St. James Anglican Church."

Bishop Walker, in a letter dated April 22, 2005, advised the St. James parishioners, as follows: "You should know that all property in the Episcopal Church is held in trust for the ministry and the mission of this church. As bishop I am not in the position to give the assets of this church away. You should further know that when there is a proposal for the sale of Episcopal Church property, there are several authorities that must agree on the purpose of the sale and its effect on the ministry and mission of the church." The Bishop stated that while individuals were free to associate with any church that they chose, they are not entitled to take property that is held in trust, and requested that the parishioners respond to a questionnaire so that he could determine how many members of the parish wished to remain members of the Episcopal Church. He also stated that he was appointing a priest-in-charge to provide pastoral oversight as of May 1, 2005.

Bishop Walker, in letter addressed to Mr. Saavedra and dated May 9, 2005, stated in part that:

"I reject entirely your right to withdraw St. James Episcopal Church from this Diocese or to remove it from my jurisdiction. While I am sure that your position is genuinely felt, and while I do not deny your right individually to worship as you choose, I do deny your right to take St. James Episcopal Church with you".... As Diocesan Bishop, I have an obligation to all of people of this Diocese and of the National Church to resist your efforts to remove St. James Parish from the Episcopal Church."

On April 25, 2007 the Diocesan Council passed a resolution declaring St. James parish an "extinct" parish, pursuant to the Diocesan Canons and Religious Corporations Law § 16, as the parish had failed for two years "to maintain religious services according to the discipline, customs and usage of the Episcopal Church" and ceased for two years to have a sufficient number of persons qualified to elect and serve as wardens and members of its vestry.

Defendants Bishop Walker, the Diocese, Trustees' Motion

Defendants Diocese and the Right Reverend Walker now move for an order dismissing the complaint and granting summary judgment (1) on its first counterclaim declaring (a) that the vestry and/or membership of St. James Church, Elmhurst may not unilaterally alter the status of St. James Church, Elmhurst as a parish of the Episcopal Church and the Diocese of Long Island; (b) that the real and personal property held by St. James Church, Elmhurst is held in trust for the Episcopal Church and Diocese of Long Island; (c) that

the additional defendants Saavedra and King may not divert, alienate or use the real and personal property of St. James Church, Elmhurst except as provided by the Constitution and Canons of the Episcopal Church and Diocese; (d) that the defendants are entitled to the sums presently held by the plaintiff arising out of the September 2000 sale of the rectory; (2) on the second counterclaim granting possession and control of the property held by St. James Church, Elmhurst to the parish's current priest-in-charge, the Rev. William DeCharme for furtherance of parish's ministry and mission and enjoining the additional defendants from exercising any possession and control over that property; and (3) setting the matter down for a trial on the issue of damages arising out of the plaintiff's wrongful possession of said property.

Defendants assert that when New York's status changed from that of a British colony to a sovereign state, St. James Church became subject to New York's statutory law, and upon its adoption in 1909, the Religious Corporations Law. Defendants assert that the 1761 royal charter is an anachronistic document, as the Church of England no longer has any presence in this country, and that a specific statute was enacted by the state legislature in 1793 which incorporated the plaintiff and two other royal chartered Church of England parishes. It is further asserted that as the Religious Corporations Law § 2-a provides that it applies, among other things, to "every corporation formed under any other statute or special act of this state which would, if it were to be formed

currently under the laws of this state, be formed under this chapter," and as St. James was reincorporated in 1793 under a New York state statute or special law, and as it is a Protestant Episcopal Parish that would now be incorporated under Article 3 of the Religious Corporations Law, that statute is applicable to plaintiff.

Defendants further assert that until the September 2000 sale of the rectory property, St. James' rectors, vestrymen and parishioners recognized that the provisions of the Religious Corporations Law governed their actions concerning corporate actions. In support of this claim, defendants have submitted the 1951 and 1964 petitions by the then rector, which sought the court's permission for the sale of certain real property, in which it was specifically acknowledged that the sale was being made pursuant to Religious Corporations Law § 12, and that the petitioner's corporate name had been changed to "The Rector, Wardens and Vestrymen of St. James' Church, Elmhurst, New York." In addition, defendants have submitted certificates filed with the Queens County Clerk in 1941 and 1951, to increase the number of vestrymen, pursuant to the Not-For-Profit Corporation Law § 104 and Religious Corporations Law § 2-b(1)(d).

Defendants assert that the Trustees and the Diocese are trust beneficiaries of the real and personal property held in the name of the plaintiff. In support of this claim, defendants rely upon the affidavits of Dr. Robert Bruce Mullin, the

Rev. Dr. J. Robert Wright, and Robert Fardella, as well as a series of cases involving property disputes between the Episcopal Church and a local parish, which almost uniformly held in favor of the Episcopal Church, and found that even absent express statutory language, the real and personal property acquired by local parish corporations has always been acquired for the ultimate purposes of the Episcopal Church, and that the enactment of the Dennis Cannons in 1979 codified a trust relationship that had existed between the local parishes and their dioceses throughout the history of the Episcopal Church.¹

Defendants assert that once Mr. Saavedra and Ms. King advised Bishop Walker on March 30, 2005 that the vestry and "people of St. James Elmhurst" that they had voted to "disassociate" from the Diocese and the Episcopal Church, their association and

(See Trustees of the Diocese of Albany v Trinity Episcopal Church of Gloversville, 250 AD2d 282 [1999]; Episcopal Diocese of Rochester v Harnish, 2006 NY Misc LEXIS 9190 [2006], affd 43 AD3d 1406 [2007], motion to renew denied 17 Misc 3d 1105A [2007]; cf. Board of Managers of the Diocesan Missionary and Church Extension Society v Church of the Holy Comforter, 164 Misc 2d 661 [1993]; see also The Rector, Wardens and Vestrymen of Trinity-St. Michael's Parish, Inc. v The Episcopal Church in the Diocese of Connecticut, 224 Conn 797 [1993]; Matter of Church of St. James the Less, 585 Pa 428 [2005]; Protestant Episcopal Church in the Diocese of New Jersey v Graves, 83 NJ 572 [1980]; Episcopal Diocese of Massachusetts v DeVine, 59 Mass App Ct 722 [2003]; Bishop & Diocese of Colorado v Mote, 716 P2d 85 [Colo 1986], cert den 479 US 826 [1986]; Tea v Protestant Episcopal Church in the Diocese of Nevada, 610 P2d 182 [Nev 1980]; Daniel v Wray, 580 SE2d 711 [NC 2003]; Bennison v Sharp, 329 NW2d 466 [Mich 1982]; Church Cases, 2007 Cal App LEXIS 1041 [2007]; cf. Protestant Episcopal Church in Diocese of Los Angeles v Barker, 171 Cal Rptr 541 [1981], cert den 454 US 864 [1981]; Bjorkman v The Protestant Episcopal Church, 759 SW2d 583 [Ky 1988]).

communion with the Episcopal Church ended, and were no longer eligible to hold the corporate offices of wardens and vestry members in St. James Church, as St. James was incorporated in 1793 only for those "in communion of the Protestant-Episcopal Church, in the State of New York". It is, therefore, asserted that Mr. Saavedra and Ms. King no longer meet the definition of a Protestant Episcopal Church vestry member, as set forth in Religious Corporations Law § 43, and Canon I.14.1 of the National Canons of the Protestant Episcopal Church.

Defendants further assert that plaintiff's current effort to devote St. James' real and personal property to the use of a religious association not in communion with the Episcopal Church, is an ultra vires use of that property, and is inconsistent with St. James' corporate purposes. It is asserted that for over 250 years, generations of parishioners worshiped at and raised money for the corporate plaintiff, which as the colonial charter and later state statute recognized was organized for "the express purpose of the administration of the property and temporalities," dedicated by the parishioners to the denomination to which the parish was expressly "connected." It is asserted that the colonial charter demonstrates that the parish was "connected" to the Church of England and that the post War of Independence statute demonstrates that the parish was "connected" to the Episcopal Church. In both instances the corporation consisted of the New Town Rector and "Inhabitants" who were members of these

denominations. Defendants assert that while the parishioners are free to disassociate from St. James and the Episcopal Church, and are free to associate with other denominations, they have no right to transfer the real and personal property of St. James to another church not affiliated with the Episcopal Church.

Finally defendants assert that as an "extinct" church, St. James is subject to Religious Corporations Law § 16, which authorizes the Diocese and the Episcopal Church to take possession of and manage its real and personal property.

Defendant DMFS's Motion

Defendant DMFS separately moves for an order granting summary judgment dismissing the complaint and granting summary judgment (1) on its first counterclaim (a) declaring that the vestry and/or membership of St. James Church, Elmhurst may not unilaterally alter the status of St. James Church as a parish of the Episcopal Church and Diocese of Long Island; (b) that the real and personal property held by St. James Church, Elmhurst is held in trust for the Episcopal Church and the Diocese of Long Island; (c) that the additional defendants to the counterclaim may not divert, alienate or use the real and personal property of St. James Church, Elmhurst except as provided by the Constitutions and canons of the Episcopal Church and the Diocese of Long Island; and (2) on its second counterclaim to enjoin the additional defendants from diverting, alienating or using the real or personal property of St. James Church, Elmhurst except as provided by the Constitutions

and canons of the Episcopal Church and the Diocese of Long Island; and ordering that the possession and control of the property held by St. James Church, Elmhurst be given to the parish's current priest-on-charge, the Rev. William DeCharme, for use in furtherance of the parish's ministry and mission pursuant to the Constitutions and canons of the Episcopal Church and the Diocese of Long Island.

Defendant DFMS relies upon the church's Constitution and Canons and the affidavit Dr. Robert Bruce Mullin, and asserts that the Episcopal Church is a hierarchical religious denomination and that the Episcopal Church's and the Diocese's Canons are enforceable and preclude a majority of the current members of a local congregation from diverting property donated to further the mission of the Church to another purpose. It is further asserted that St. James has been a subordinate, constituent part of the Episcopal Church and its diocese since the church's founding, and has repeatedly and consistently acceded to the Episcopal Church and the Diocese's doctrines and discipline, including their Constitutions and Canons, and is bound by them. DFMS, in reliance upon the deeds to St. James' real property, the legislation of 1793, the applicable provisions of the Religious Corporations Law, and the applicable Canons of the Episcopal Church and the Diocese concerning church property, asserts that it holds St. James real and personal property in trust. Finally, DFMS asserts that New York law governing voluntary associations require that the

Constitution and Canons of the Episcopal Church and the Diocese be enforced against St. James and the additional defendants.

Plaintiff St. James' Cross Motion

Plaintiff St. James cross-moves in opposition and seeks an order dismissing the counterclaims and granting summary judgment (1) on its first cause of action for declaratory judgment to the effect that it holds unencumbered legal title to all property it presently holds and that the defendants have no right, interest or claim to said property; (2) on its second cause of action for a permanent injunction, enjoining defendants from asserting any claim in or interest in any property that St. James now owns, holds or might acquire; and (3) on its third cause of action to quiet title to any and all real property titled in its name.

Plaintiff St. James Church, Elmhurst states in its complaint that it is a corporation formed by a royal charter issued by King George III, and that it was never reincorporated although its corporate existence was ratified by an act of the state legislature after the Revolutionary War. Plaintiff states that on March 30, 2005, its vestry members and congregants expressly disaffiliated with the Diocese and the Episcopal Church. Plaintiff asserts that the Religious Corporations Law is inapplicable here, and that even if it were to apply, this is insufficient to establish a trust over St. James' real and personal property. Plaintiff next asserts that it was free to withdraw from the Episcopal Church and the Diocese, and to claim ownership of the

real and personal property, unless it had voluntarily ceded its property to the Episcopal Church and the Diocese. Plaintiff asserts that it never ceded its real and personal property to the Episcopal Church and Diocese; that the funds used to acquire the real property which is improved by the church came from sources other than the Episcopal Church and the Diocese which were not then in existence; that there is no evidence that these defendants made any contribution, financial or otherwise, to the construction or maintenance of a new church building erected in 1849, or to the present church building, erected in 1978; that St. James currently holds title to three parcels of real property, and none of these deeds contain any language which restricts the use of the property; and that there is no evidence that St. James ever consented to the imposition of a trust, whether implied or express, over any of its real or personal property, or that it conveyed an interest in said property to the Episcopal Church or the Diocese. Plaintiff, in support of its claims that the Episcopal Church is not a hierarchical church and that the Dennis Canons do not represent a codification of pre-existing Episcopal Church policy with regard to property ownership, rely upon an affidavit from the Reverend Charles Nalls. Plaintiff further asserts that parish churches are independent entities and, therefore, are free to withdraw from the national church and its diocese, if they so desire, and to depart with its real and personal property, and asserts that St. James, as a corporate entity, rather than as

individual parishioners, took the decision to withdraw from the Episcopal Church and Diocese. It is asserted that as the Episcopal Church and the Diocese are both unincorporated associations, plaintiff was free, as a matter of law, to terminate its membership in those associations. Finally, plaintiff asserts that the Diocese's declaration the St. James is an extinct parish, some two years after the March 30, 2005 withdrawal, is of no force and effect, as the Diocese is an unincorporated association and lacks the authority to make such a declaration.

Legal Analysis

It is well settled that the court may decide a property dispute between a local church and a national church (see Presbyterian Church in U.S. v Mary Elizabeth Blue Hull Mem. Presbyt. Church, 393 US 440, 449 [1969]; North Central New York Annual Conference v Felker, 28 AD3d 1130 [2006]; see also Jones v Wolf, 443 US 595, 602-604 [1979]; First Presbyt. Church of Schenectady v United Presbyt. Church in U.S., 62 NY2d 110, 120 [1984], rearg denied 63 NY2d 676 [1984], cert denied 469 US 1037 [1984]; The Episcopal Diocese of Rochester v Harnish, 17 Misc 3d 1105A [2006], affirmed 43 AD3d 1406 [2007]). States are free to adopt any approach to resolving church property disputes "so long as it involves no consideration of doctrinal matters" (Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville, 250 AD2d 282, 285 [1999], citing Jones v Wolf, supra, at 602).

"New York has adopted the neutral principles of law analysis, crafted by the United States Supreme Court, for use in resolving church property disputes" (Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville, *supra*, at 285-286, citing First Presbyt. Church of Schenectady v United Presbyt. Church in U.S., *supra*, at 120-121; see also Park Slope Jewish Ctr. v Congregation B'nai Jacob, 90 NY2d 517, 521 [1997]). "Under this analysis, courts should focus on the language of the deeds, the terms of the local church charter, the State statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property." (Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville, *supra*, at 286, quoting First Presbyt. Church of Schenectady v United Presbyt. Church in U.S., *supra*, at 122; see also Park Slope Jewish Ctr. v Congregation B'nai Jacob, *supra*, at 521-522). "The court must determine from them whether there is any basis for a trust or similar restriction in favor of the general church, taking special care to scrutinize the documents in purely secular terms and not to rely on religious precepts in determining whether they indicate that the parties have intended to create a trust or restriction" (First Presbyt. Church of Schenectady v United Presbyt. Church in U.S., *supra*, at 122).

"Courts, however, should also take special care not to become involved in internal religious disputes or implicate secular

interests in matters of purely ecclesiastical or religious concerns such as church governance or polity" (Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville, *supra*, at 286; see Presbyterian Church v Hull Church, *supra*, at 449; Archdiocese of Ethiopian Orthodox Church v Yesehaq, 232 AD2d 332, 333 [1996]; Upstate NY Synod of Evangelical Lutheran Church v Christ Evangelical Lutheran Church, 185 AD2d 693, 694 [1992]).

Whether the affairs of an incorporated church are controlled by the church itself or by a national organization depends on how the religious corporation is organized (St. Matthew Church of Christ v Creech, 196 Misc 2d 843, 851 [2003]). New York State recognizes two classes of organization which determine religious corporations' control over their affairs: congregational and hierarchical (see New York Dist. of Assemblies of God v Calvary Assembly of God, 64 AD2d 311, 313 [1978]). A hierarchical religious society is one which was organized "as a body" in conjunction with other churches of the same religion and which is directed by "'a common ruling convocation or ecclesiastic head'" (*id.* quoting Kedroff v St. Nicholas Cathedral, 344 US 94, 110 [1952]). Congregationally organized religious societies, however, are "independent," self-governing organizations controlled "'by a majority of its members or by other such local organism as it may have instituted for the purpose of ecclesiastical government'" (*id.* [citation omitted]). To determine the organization of a church, a court must examine any constitution or regulations of the

corporation as well as "the history of the relationship between the...church and its alleged overseer in the scheme of the protestant hierarchy" (id. at 313). Here, it is undisputed that St. James does not have its own constitution or canons, separate and apart from those of the Episcopal Church and the Diocese. The court has examined the affidavits and documentary evidence submitted by the parties, and finds defendants' claims regarding the hierarchical nature of the Episcopal Church to be persuasive. The court, thus, finds that the Episcopal Church has a hierarchical form of church government in which local parishes are subject to the constitution, canons, rules and decisions of their dioceses which, in turn, are presided over by a bishop who receives advice and counsel from a diocesan standing committee (see also Watson v Jones, 80 US 679 [1872]; Trustees of the Diocese of Albany v Trinity Episcopal Church of Gloversville, 250 AD2d 282 [1999]; Rector of Church of Holy Trinity v Melish, 4 AD2d 256, 261 [1957], affd 3 NY2d 476 [1957]; The Episcopal Diocese of Rochester v Harnish, 17 Misc 3d 1105A [2006], affd 841 NYS2d 817 [2007]). However, it is settled law that "even though members of a local [church] belong to a hierarchical church, they may withdraw from the church and claim title to real and personal property [held in the name of the local church], provided that they have not previously ceded the property to the denominational church" (First Presbyt. Church v United Presbyt. Church, supra, at 120; see The Episcopal Diocese of Rochester v Harnish, supra; Board of Mgrs.

of Diocesan Missionary & Church Extension Socy. v Church of Holy Comforter, 164 Misc 2d 661, 665 [1993]).

The Neutral Principal of Law Analysis

A. The relevant deeds and other documents

Defendants are unable to point to any language on the face of the deeds, or other documents pertaining to the four parcels of land at issue here, which indicates that St. James or its predecessors acquired the property with the intention to hold it in trust for defendants (see Trustees of the Diocese of Albany, et al., Respondents v Trinity Episcopal Church of Gloversville, 250 AD2d 282 [1999]; Board of Mgrs. of Diocesan Missionary & Church Extension Socy. v Church of Holy Comforter, supra, at 666). Moreover, none of the deeds involved includes a trust restriction or forfeiture clause in favor of the plaintiffs (see First Presbyt. Church v United Presbyt. Church, supra, at 122).

It is undisputed that at the time the 1849 church was consecrated as an Episcopal church on the property that was conveyed in 1761, St. James' representatives signed an Instrument of Donation in which they pledged that the building would be used solely for the purposes of conducting religious services "according to the provisions of the Protestant Episcopal Church in the United States of America" and further pledged that the property would not be put to any use inconsistent with the Instrument of Donation. The 1849 church was destroyed by a fire in 1979 and the

present church edifice stands on the same property. Therefore, although ownership of this property was not specifically ceded to the Episcopal Church or the Diocese, the use of this property as Anglican Church is clearly inconsistent with the Instrument of Donation.

In the 1964 proceeding, the petition stated that the petitioner "The Rector, Wardens, Vestrymen of St. James Parish of Elmhurst, Diocese of Long Island" was a religious corporation that was incorporated in 1934, and that a certificate of incorporation was filed in the Office of the Clerk of the County of Queens on April 29, 1937. The petition stated that the religious corporation was the same church as "The Rector, Wardens, Vestrymen of St. James Church in the Town of Newtown, County of Queens, State of New York," and that title to the real property in question, known as 56 Reade Street, in New York County, had been acquired by deed on April 18, 1810 and that The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York was the owner of a reversionary interest in the property. The petition recited that as regards the reversionary interest, Trinity Church had agreed to execute a quitclaim deed upon condition that the proceeds of the sale be held in trust for the benefit of Trinity Church. The petition further stated that the "proceeds of sale would be placed with the trustee of the estate belonging to Diocese of Long Island for the benefit of St. James Parish of Elmhurst upon condition, however, that the principal shall revert to Trinity Church in the

event said St. James Parish shall cease to be an Episcopal Church." Clearly, as St. James ceded these funds, held in trust to the Diocese, plaintiff has no claim to said funds.

B. The Royal Charter and St. James's Incorporation

The royal charter of 1761 expressly acknowledges that the church that later became known as St. James was affiliated with the Church of England, and authorized said "Church of England" to buy, hold and sell real and personal property. Contrary to plaintiff's claims, St. James' corporate existence pursuant to the royal charter has not been continuous, as its affiliation with the Church of England ended at the conclusion of the Revolutionary War, or shortly thereafter. Following the formation of the national Episcopal Church, St. James was expressly reincorporated, "in communion with the Protestant Episcopal Church," pursuant to a special act of the New York State legislature in 1793. The court further notes that both the 1951 and 1964 petitions for the sale of real property recite that the religious corporation known as "The Rector, Wardens and Vestry of St. James' Parish of Elmhurst, Diocese of Long Island" had changed its corporate name, or was incorporated in 1934, and that the certificate of a name change or incorporation was filed in the Office of the Clerk of the County of Queens on April 29, 1937. However, there is nothing in the 1793 act of reincorporation which indicates how the church's property is to be owned.

Religious Corporations Law § 2-a provides that the statute applies, among other things, to "every corporation formed under any other statute or special act of this state which would, if it were to be formed currently under the laws of this state, be formed under this chapter." Accordingly, as St. James was reincorporated in 1793 under a special act, or statute, of the legislature, and thereafter existed as a Protestant Episcopal Parish which would currently be incorporated under Article 3 of the Religious Corporations Law, the provisions of the Religious Corporations Law are applicable to St. James.

C. St. James' relationship with the Diocese

Additional defendant Carlo Saavedra asserts in his affidavit that St. James ceased being part of the polity of the Episcopal Church and Diocese as early as 1991, when it ceased paying an annual assessment. This claim, however, is refuted by the defendants' documentary evidence which establishes that St. James paid the full amount of the diocesan assessment in 1992; that St. James sent the Spring 1993 confirmation class offering to the Diocese; that on November 21, 1995, St. James' vestry agreed to remit half of an undisclosed sum to the Diocese; that St. James submitted parochial reports to the Diocese in 2000 and 2003; that St. James remained current in its payment to a medical trust maintained by the Diocese, which provides health benefits for parish clergy and employees, through at least July 2004; and that in September 2004 Father Galer and Bishop Walker exchanged letters

regarding an Eucharist Minister license for one of St. James' parishioners. In addition, Father Galer, at his deposition, stated that prior to March 2005, St. James parish was in communion with the Episcopal Church. The court, therefore, finds that up until the events of March 30, 2005, St. James remained an integral part of the Episcopal Church and the Diocese (see generally Board of Mgrs. of Diocesan Missionary & Church Extension Socy. v Church of Holy Comforter, supra, at 667).

D. Statutes Governing the Holding of Church Property

Article II of the Religious Corporations Law, entitled "General Provisions" applies to all religious denominations, including the Protestant Episcopal Church. Although certain provisions contained in Article II relate to church property, they are silent on the issue of whether the local church's property is held in trust for the national church or a diocese (see Religious Corporations Law §§ 5 and 12).

Religious Corporations Law § 12(2) requires approval by the bishop and standing committee of the diocese to which the local parish belongs before the trustees of a local Protestant Episcopal Church parish can sell, mortgage or lease its real property. It is undisputed that in 1951 and 1964, the rector, wardens and vestry members, obtained the permission of the Bishop, the Standing Committee and the court, prior to selling its real property, in conformity with Religious Corporations Law § 12(2), and that prior to the sale of real property in September 2000,

plaintiff did not inform the Diocese, the Standing Committee, Bishop Walker or the court of said sale. The evidence presented does not establish that at the time of the September 2000 conveyance, St. James, its wardens and vestry members deliberately failed to comply with the provisions of Religious Corporations Law § 12(2). Rather, the evidence establishes that Father Galer and Ms. King were unaware of the provisions of Religious Corporations Law § 12(2), and were also unaware of the fact that St. James had previously acted in compliance with this section in 1951 and 1964.

Article III of the Religious Corporations Law, entitled "Protestant Episcopal Parishes or Churches" applies only to Protestant Episcopal Churches. Section 42-a of Article III, enacted in 1991, sets forth the powers of the corporate trustees and vestry in administering the temporalities and real and personal property that belong to the corporation. It also acknowledges a trust relationship between the local church and the Diocese and National Church. It states:

"Notwithstanding and in addition to the provisions of section five of this chapter, and subject always to the trust in which all real and personal property is held for the Protestant Episcopal Church and the Diocese thereof in which the parish, mission or congregation is located, the vestry or trustees of any incorporated Protestant Episcopal parish or church, the trustees of every incorporated governing body of the Protestant Episcopal Church and each diocese are authorized to administer the temporalities and property, real and personal, belonging to the corporation, for the support and maintenance of the corporation and, provided it is in accordance with the discipline, rules and usages of the Protestant Episcopal Church and with the provisions of law relating thereto, for the support and

maintenance of other religious, charitable, benevolent or educational objects whether or not conducted by the corporation or in connection with it or with the Protestant Episcopal Church."

Section 42-a, however, does not conclusively establish the ownership of property as between the local church and its diocese and national church, and the remaining sections of Article III are silent on this matter.

E. The Episcopal Church's Constitution and Canons Regarding Church Property

In examining the constitution of the Episcopal Church concerning the ownership and control of church property, a "court may look only to provisions relating to property and it must interpret them in a secular light" (First Presbyt. Church v United Presbyt. Church, *supra*, at 122). Significantly, Title I, Canon 7 of the National Canons of the Protestant Episcopal Church, commonly known as the Dennis Canons, was amended in 1979 to reflect an express trust provision as follows:

"Sec. 4-All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

Sec. 5-The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust."

Dr. Robert Bruce Mullin, a historian and professor at the General Theological Seminary in New York City, (an accredited seminary of the Episcopal Church), and Rev. Dr. J. Robert Wright, a historian, Episcopal priest and professor at the General Theological Seminary in New York City each state in sworn affidavits, the Dennis Canons were adopted by the General Convention in 1979 in response to the U.S. Supreme Court's decision in Jones v Wolf (443 US 595 [1979]), [{"which held that the constitution of a hierarchical church can be crafted to recite an express trust in its favor concerning the ownership and control of local church property"}]; Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville, *supra*, at 285], that the essential purpose of the Dennis Canons was to impress an express trust in favor of the national Protestant Episcopal Church and the dioceses of which each local parish is a member. Both Dr. Mullin and Rev. Wright state that the intent and purpose of adopting this amendment to the Canons was to affirm and make clear existing canonical church law and not to effect a change in said law. In support of this claim, Dr. Mullin and Rev. Wright cite several other national Canons that pre-date the Dennis Canons, which govern a parish's use of property for the mission of the Episcopal Church, including Canon I.14(2) which provides that vestry members are to "be agents and legal representatives of the Parish in all matters concerning its corporate property and the relations of the Parish to its Clergy"; Canon III.9(5) (a) (2), adopted in 1904, which grants

the parish's rector the right to use and control parish building and furnishings in the aid of his or her ministry; Canon II.6 (sections 2 and 3 adopted in 1868, section 1 added in 1871) which provides that no parish may encumber, alienate or destroy any consecrated real property, without the consent of the leadership of the diocese, and further provides that such consecrated property must be "secured for ownership and use" by a parish or congregation "affiliated with the Episcopal Church and subject to its Constitution and Canons"; and Canon I.7 which similarly prohibits the encumbrance or alienation of all other (non-consecrated) parish property without the consent of the Bishop and Standing Committee of the Diocese (adopted in 1940 and modified in 1941).

Robert Fardella, the Chancellor of the Diocese, states in his affidavit that after the adoption of the Dennis Cannons, the Diocese confirmed the trust declared in the Dennis Canons, and enacted Title V, Canon 3, Section IV, which provides that: "All real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for the Church and this Diocese. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission, or Congregation otherwise existing over such property so long as the particular Parish, Mission, or Congregation remains a part of, and subject, to the Church, this Diocese, and their respective Constitution and Canons."

Plaintiff, in opposition, has submitted the affidavit of the Reverend Charles H. Nalls, an Anglican priest, military chaplain, and a member of the Standing Committee of the Diocese of the Eastern United States, Anglican Church of America. Reverend Nalls, a former member of the Protestant Episcopal Church, is also an attorney, but is not admitted to practice in New York State. Reverend Nalls rejects the defendants' claim that the Episcopal Church is a hierarchical church and argues that the Dennis Canons was a departure from, or at the very least an effort by one party within the Church to impose its will on all others. , He opines that until the attempted revisions represented in the Dennis Canons, church property was owned at the parish level and held solely for the benefit and mission of the parish church, free of any purported trust interest of the national church or the respective dioceses. He further opines that St. James is an independent corporate entity, that it is free to end its affiliation with the Episcopal Church and that its property continues to belong to the parish and its members.

The court notes that in the 26 years following the adoption of the Dennis Canons and the corresponding amendment of the Diocesan Canons, St. James raised no objections to these Canons, until after the March 30, 2005 schism. The court finds that although Reverend Nalls' discussion of the predecessors of the Episcopal Church and the circumstances of the adoption of the Dennis Canons may be of historical interest, his claims regarding

the Dennis Canons and the relationships between the Episcopal Church, its dioceses and parishes, including parish churches, are not persuasive. Notably, as regards the Canons of the Episcopal Church relating to property, plaintiff and Reverend Nalls rely heavily upon a 1954 edition of a commentary on the Canons, without providing the actual text, including later revisions, which pertain to the Dennis Canons.

Although the express trust provision was absent from the national canons at the time St. James acquired the subject real property, the court in Trustees of the Diocese of Albany v Trinity Episcopal Church of Gloversville (*supra*, at 288), determined that the "retroactive application of such trust provisions would not,....extinguish the real property rights of every local church or parish throughout New York, so long as a court finds that the trust provisions were declaratory of existing church policy." The evidence presented here "supports the conclusion that the 'Dennis Canon' amendment expressly codifies a trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the Protestant Episcopal Church" (The Episcopal Diocese of Rochester v Harnish, *supra*, quoting Trustees of the Diocese of Albany v Trinity Episcopal Church of Gloversville, *id.* at 288). The court further finds that there is sufficient evidence of an intent to create an implied trust to hold church property for the benefit of the Episcopal Church and Diocese, based on the St. James' actions,

in conformity with the tenets and canons of the Episcopal Church, and on the National Church's establishment of an express trust by way of the Dennis Canons (id. at 289-290). Accordingly, defendants have established that the real and personal property at issue here that is currently held by the plaintiff St. James, is held for the benefit of the Diocese and Episcopal Church.

The Effect of the March 30, 2005 Declaration

Plaintiff claims that as the Episcopal Church and the Diocese are unincorporated associations, it is free to withdraw from these associations, affiliate with another religious denomination, and retain the subject real and personal. Plaintiff, in support of this claim, relies upon Communications Workers v N.L.R.B., (215 F2d 835, 838 [1954]), in which the court held that a union member has a right to resign from a union, although the union constitution and bylaws may impose reasonable sanctions and limitations on this right. Such reliance is misplaced, as St. James was not incorporated by its individual members, and is not merely a voluntary member of an unincorporated association. Rather, St. James was incorporated by statute for the express purposes of being "in communion of the Protestant Episcopal Church, in the State of New York." This act of incorporation, as well as St. James' conduct and interaction with the Diocese and Episcopal Church until March 30, 2005, establishes the parish's membership in the Protestant Episcopal Church and its acceptance of the hierarchical church's principles and policies including its

Constitution, Canons, and Diocesan Canons. Absent a statutory amendment, the vestry members of St. James lack the authority to affiliate St. James Church, Elmhurst with any religious body, other than the Protestant Episcopal Church.

Although the individual members of St. James, including its vestry members, are free to disassociate themselves from St. James and the Protestant Episcopal Church and to affiliate with another religious denomination, they can neither remove St. James from the parish and Diocese, nor appropriate, nor take St. James' real and personal property with them. Mr. Saavedra and Ms. King, upon announcing their disaffiliation with the Episcopal Church, automatically terminated their eligibility to hold offices as Wardens and Vestry Members of St. James, and, therefore, lack authority to act on behalf of St. James and may not challenge, on behalf of St. James, defendants' assertion of control over the subject property (see Religious Corporations Law § 43).

Conclusion

The parties' requests for summary judgment on their respective cause of action and counterclaims for declaratory judgment are granted to the extent that it is the declaration of the court that St. James Church, Elmhurst, is an Episcopal church and a parish of the Diocese, and that the vestry and membership of St. James may not unilaterally alter the status of St. James as an Episcopal church and parish of the Diocese; that all real and personal property held by St. James Church, Elmhurst is held in

trust for the Episcopal Church and the Episcopal Diocese of Long Island, and that these defendants' interest in the proceeds of the sale of such property, including the net proceeds of the September 2000 sale of the real property improved by the rectory, are superior to any interests that the plaintiff and individual additional defendants may have in said property. The court further declares that the individual defendants Carlo Saavedra and Lorraine King may not divert, alienate or use the real and personal property of St. James Church, Elmhurst, except as provided by the Constitutions and Canons of the Episcopal Church and the Diocese.

Further, it is the declaration of the court that defendants Trustees and Diocese are entitled to the payment of the sums presently held by the plaintiff in an account or accounts, arising out the September 2000 sale of the real property improved by the rectory. Plaintiffs are directed to turn over all said sums to these defendants within 20 days of notice of entry and service of the order to be entered hereon.

Defendants Diocese and Trustees' request for summary judgment on their second counterclaim for a permanent injunction, and defendant DFMS' request for summary judgment on its second counterclaim for a permanent injunction is granted to the extent that plaintiff and the additional defendants Mr. Saavedra and Ms. King are enjoined from the continued use, control and diversion of said real and personal property for purposes other than the mission of the Episcopal Church and the Diocese.

Furthermore, as the additional defendants are no longer affiliated with the Episcopal Church, they may not serve as wardens, junior wardens or vestry members of St. James, Elmhurst, and are directed to turn over the control and possession of property held by St. James to the priest-in-charge, the Reverend William DeCharme, for use in furtherance of the parish's ministry and mission pursuant to the Constitution and Canons of the Episcopal Church and the Diocese, upon service of the order to be entered hereon with notice of entry.

Defendants Diocese and Trustees' request for summary judgment on their third counterclaim for trespass and to set the matter down for a trial as to damages is denied, and this counterclaim is dismissed. Trespass is an intentional entry onto the land of another without justification or permission (see Long Is. Gynecological Servs. v Murphy, 298 AD2d 504 [2002]). "Liability for civil trespass requires the factfinder to consider whether the person, without justification or permission, either intentionally entered upon another's property, or, if entry was permitted, that the person refused 'to leave after permission to remain ha[d] been withdrawn'" (298 AD2d 504, 504 [2002], quoting Rager v McCloskey, 305 NY 75, 79 [1953]). It is well settled that "[t]he essence of trespass is the invasion of a person's interest in the exclusive possession of the land," (Zimmerman v Carmack, 292 AD2d 601, 602 [2002]). Here, St. James is in possession of the real property on behalf of the Diocese and Episcopal Church, or

worship and other related uses by its parishioners. Since the parishioners all have access to the church and the other real property utilized by the church, possession can hardly be characterized as exclusive. The fact that the individual defendants and others have affiliated with the Anglican Church and wish to worship according to that discipline, does not constitute a trespass on the real property. Accordingly, due to the ambiguities surrounding the ownership and control of St. James and its property, defendants are unable to establish that plaintiff and the individual defendants are trespassers.

Defendants Diocese and Trustees' request for summary judgment on their fourth counterclaim to take possession and manage St. James' real and personal property, pursuant to the provisions of Religious Corporations Law § 16 is denied, and this counterclaim is dismissed. Religious Corporations Law § 16 only authorizes incorporated governing bodies to declare a church or parish over which it has ecclesiastical control extinct. Although the Diocese may declare St. James parish to be extinct pursuant to its Diocesan Canons, the provisions of Religious Corporations Law § 16 are inapplicable as it is undisputed that the Diocese is an unincorporated association and not an incorporated governing body.

Settle order.

J.S.C.