PROFERRED TESTIMONY
TO THE KANSAS HOUSE JUDICIARY COMMITTEE

To: Chairman Kinzer, Ranking Minority Pauls, and Committee Members

From: Forrest A. Norman, Esq.
Chairman, Presbyterian Lay Committee[1]

Re: Church Property Dispute Resolution

It is a privilege to be able to offer written testimony to the Kansas State legislature on a topic which has both legal significance and deep emotional value to the faith community of the citizens of Kansas. I further applaud the Committee for addressing means by which to resolve church property disputes by giving guidance to the Kansas courts, and seeking to clarify a highly complex legal issue which all too often gets lost in the weeds which obscure the line of separation between church and state, ecclesiastical concerns and civil law.

A few predicate matters should be addressed to fully appreciate the subtleties of the issue at hand. First is the definition of "church." We have broadly termed the issue "church property disputes" but the term is not limited to "churches" and should be considered to include all faith based or spiritual based entities arguably covered under the First Amendment free exercise protections. As used here the term church includes synagogues, mosques, halls, temples, meeting houses, communes, and churches, along with any other property possessed by a religious organization.

Church property disputes are sometimes thought of as "intra-church" property disputes, as they generally pertain to questions of control of real property as between church organizations. As the word "church" is used to describe individual buildings, congregations, denominations, and faiths, it is important to keep track of which entity is being described. I will seek to use "local church" and "denomination" to differentiate.

[1] Mr. Norman is Chairman of the Presbyterian Lay Committee, a national organization dedicated to informing, equipping, and advocating on behalf of Presbyterians respecting their ecclesiastical, legal and religious rights. The PLC has filed amicus briefs on behalf of local churches in numerous State Courts and in the United States Supreme Court. In additional, Mr. Norman is an attorney in a private practice based out of Cleveland, Ohio, with a multi-jurisdictional practice representing churches across the United States in all manners of civil and ecclesiastical litigation. He has appeared before 6 state supreme courts and filed briefs with the United States Supreme Court, and lectures on church property rights. Mr. Norman is a contributing author to "*A Guide To Church Property Law*", Reformation Press 2010, Lunceford, General Editor.

Church property disputes have been occurring in the United States since the country's founding, (and long beforehand in the historical context). Currently the most common type of dispute arises when a local church decides to disaffiliate with a denomination over theological differences, membership differences, doctrine or polity. The substance of the disputes are of no interest to the courts or legislatures – and no one is asking the legislature here to become embroiled in such aspects of the dispute.

The United States Supreme Court has long recognized that state courts have jurisdiction to resolve church property disputes. Orderly dispute resolution is certainly within the area of responsibility and authority of both courts and legislatures.

Mindful of the need to keep church and state separate - to both protect free exercise and to avoid establishing one religion over another, and avoiding giving preference to religion or no religion, the U.S. Supreme Court has held that courts may rule on intra-church property disputes as long as the means of resolution do not turn on ecclesiastical principles. Two constitutionally permissible methodologies have been recognized as appropriate means for deciding these disputes. The earlier U.S. method is commonly referred to as "Hierarchical Deference" or "Denominational Deference." The more recently developed, or at least more recently named methodology is called "neutral principles of law."

It is important to note that these are U.S. legal methodologies developed to avoid an unconstitutional violation of the first amendment by the courts. From an historical perspective, non-U.S. courts looked to the intent of the original donor, whom it is presumed intended to perpetuate a particular doctrine, and seek to award the property to the party who adheres most closely to the doctrine espoused at the time of the donation. This is known as the "departure from doctrine" method. For obvious reasons, (not the least of which is multiple beneficiaries over time), this method invites an impermissible assessment of doctrine by the courts.

To avoid an impermissible inquiry into a litigant's religious beliefs the U.S. Supreme Court in the 1870s case of *Watson v Jones* articulated a means of deferring to a denomination for rulings on any matter which might be deemed of an ecclesiastical nature - if the church was a member of a hierarchical denomination. The court set forth a two-fold classification of churches into "hierarchical" and "congregational" based on a loosely defined set of parameters. Because there are varying degrees and blends of hierarchy, this does not always avoid constitutional entanglement. If the hierarchy is part of the ecclesiastical polity, interpreting the scope of authority may require an impermissible inquiry into the inner functioning of a church body, determining matters of faith and practice. Additionally: Is the polity hierarchical only for matters of faith, or does that extend to "temporal" matters of business management and property ownership? Is it reviewable internally only by a judicatory when a charge has been brought in ecclesiastical court, or may it be done *sua sponte*? How do you resolve a dispute about the scope of the structure of the denomination? What if the denomination has modified its internal polity since its inception? These and numerous other problems have been found to exist.

Just as importantly, observers noted that when courts defer to a denomination the denomination always wins. This result does not necessarily reflect the intent of the parties from the outset, and risks establishing a religious denomination's decisions as the rule of law, thereby giving judicial cover and sanction to a church, and thereby "establishing" that church. This is "establishment by deference."

"Neutral principles of law" were eventually recognized by the U.S. Supreme Court in the case of *Bull Hull Memorial Presbyterian Church v Presbytery*, [citation omitted]. While many state courts had been applying this method of legal analysis of property ownership dispute resolution in the church-based context, it was not until the 1960s that this other methodology was adopted by the U.S. Supreme Court and given the name of "Neutral Principles of Law. Under this doctrine courts resolve church property disputes by looking to the normal indicia of property ownership without respect to ecclesiastical status.

The neutral principles doctrine looks first to the property deed. Whose name is on it? That party enjoys a presumption of ownership, as it is deemed that when the property was deeded the intended recipient's name was listed as the grantee. Is there a reverter conditioned upon the happening of an event, such as "to First Presbyterian Church so long as it is a church; if it ceases to be a church, then to General Hospital." Reverters or restrictions of this nature can also limit ownership to a particular denominational affiliation. (e.g. "To Main Street Methodist Church so long as it is a member of the UMC, and if it ceases to be a UMC church, to Elm Street Methodist Church.")

What do the owning entity's Articles of Incorporation say about its rights? Are those restricted in any manner? Is there a trust in place whereby the owner expressly agreed to hold the property in trust for the use and benefit of another entity on some specified terms? Is an alleged implied trust sufficiently established to meet state standards for trust establishment (usually "by clear and convincing evidence").

Recognizing the inherent benefits and flexibility of neutral principles, the U.S. Supreme Court appears to have given this method favored status in the 1979 decision in *Jones v Wolf*, [citation omitted]. In *Jones*, the court stated:

> "The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all form 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. Furthermore, 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. 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 the dispute over the ownership of church property will be resolved in accord with the desires of the *members*."

Jones v Wolf, 443 U.S. 595 (1979) at 602. (*Italics* added).

While this would seem to have given sufficient clarity and guidance for future courts, it did not. It failed to do so primarily because of a discussion in the *dicta* of the decision, the language extrapolating options of what could happen in certain hypothetical situations. In assuring the dissent that religious rights would not be disregarded, the court postulated that:

> "The neutral principles approach cannot be said to "inhibit" the free exercise of religion and more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. 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."

Id. at 606.

Disputes have continued because many "general churches" or denominations went back and amended their constitutions to assert a trust over local church property without securing the express consent of the local churches which owned the property in the first place. Claiming a trust interest over property which one does not own does not constitute a "legally cognizable form" of trust creation. Confusion has abounded because many courts have interpreted *Jones v Wolf's* dicta to have established a new manner of trust creation. This is problematical because that would be a form of trust creation only available to certain denominations and not their secular charitable organizational counterparts, and would "establish by preference" the rights of a particular denomination claiming the right to impose a trust on local property, without civil court review being available.

Nevertheless, many states have avoided the establishment and entanglement entrapments by requiring church property disputes to be resolved under both a neutral principles approach and a strict title approach. This approach is advisable as it permits the parties to order their affairs as they intend and imposes minimal burden on any party, be it local or national in scope, and is no more burdensome on church entities than equivalent property owning secular entities. (Is it any more burdensome on a church to order its property

deed the way it wants than it is on a local fast food restaurant franchise to order its property deed properly?)

While many law review articles, case briefs, appellate briefs, and law school classes have addressed the subtleties of the constitutionality, and much more could be said here, today, it appears to be the simplest and fairest method to adopt a state statute directing that courts resolve intra-church property disputes pursuant to neutral principles of law doctrine, following standard title recording and trust creation principles applicable to all legal entities.

In this manner, a genuinely hierarchical religious entity (like the Catholic Church) can direct its local adherents to order their property affairs in accordance with the denominational tenets, and a less than fully hierarchical denominational entity (like the Presbyterian denominations) will not be able to improperly coerce local affiliates into giving up property rights the local owning entities do not wish to cede or burden with a trust. Courts will be given clear guidance on the legal methodology to apply and the manner in which to apply it (avoiding the pitfall of applying "neutral in name only", while inadvertently deferring to a denomination which did not have the power it claims), and lawyers will have predictability with which to advise their client churches and denominations on how to order their affairs in accordance with the intentions of the parties.

The Kansas legislature can serve its citizens by declaring and clarifying the legal method to be applied in church property dispute resolution for the courts, respecting the abilities and intentions of churches of all forms and structures to order their property affairs in accordance with their intentions. The law does not favor persons or institutions, just proper form, fair and equal to all.

Respectfully Submitted,

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