

Episcopal Church Trust Litigation¹

Professor S. Alan Medlin
University of South Carolina School of Law
November 16, 2018

copyright 2018
all rights reserved

¹ Substantial portions of these materials are reprinted with permission from the PROBATE PRACTICE REPORTER.

Interneccine church disputes raise more than just theological issues. When a church or congregation wants to disassociate from a larger group, a primary concern involves which side of the congregation gets to control the church and — almost as importantly — the church property. One aspect of the resolution commonly involves whether a trust has been created, and for whose benefit. However, courts may not be allowed to use their regular processes to determine the trust question because of First Amendment concerns. The resulting analysis may involve looking at trusts from an atypical perspective.

Probate courts may well see the property disputes, especially since they seem to involve trust law as a determining factor.

The Episcopal Church has recently been involved in a number of disputes. The Episcopal Church is a hierarchical organization: the top, controlling tier is the “national church”; the middle tier consists of regional dioceses; and the lower tier is comprised of parishes. Disputes have arisen among and between each of these tiers.

Two Recent Examples

In *The Episcopal Church v. Salazar*, 547 S.W.3d 353 (2018) (“Salazar”), the national Episcopal Church (TEC) fought with disassociated members of the Fort Worth Diocese (FWD) over who had the right to control the diocese and who owned the real and personal property of the diocese. The dispute also involved the ownership of some real property by a parish in the diocese. Among the issues considered by the appellate court was how trust law impacted ownership of the property.

In *The Protestant Episcopal Church in the Diocese of South Carolina v. The Episcopal Church*, 806 S.E.2d 82 (S.C. 2017) (“South Carolina Diocese”), the state supreme court considered the ownership of church real and personal property as a consequence of the disassociation of the state diocese and 36 parishes from the national church. Demonstrating the importance and emotion involved with church disputes, each of the court’s five justices wrote separate and passionate opinions, often pointing out their disagreements with the other justices along with perceived flaws in the others’ opinions.

Although both opinions cover similar issues, the *Salazar* case provides an excellent example of the United States Supreme Court review of church disputes, while the *South Carolina Diocese* case shows how judges can take different views of the legal issues and pertinent facts.

Salazar

In 2006, when TEC elected a new Presiding Bishop, the Bishop and the standing committee of the FWD began to disengage the diocese from the national church. In 2008, the

majority members of the FWD voted to leave the TEC and affiliate with the Anglican Province of the Southern Cone. The TEC Presiding Bishop accepted the resignation of the FWD Bishop and removed him from the ministry of TEC. In 2009, the Presiding Bishop set about to elect a provisional bishop and standing committee for the remaining affiliated members of the FWD. The affiliated members of the FWD ratified TEC's actions, and eventually a permanent Bishop and standing committee (the TEC Parties) were put in place for the affiliated diocese.

Although, as the *Salazar* court described it, the case was highly complex, in essence TEC, the TEC Parties, and the disassociated members engaged in a vitriolic dispute over the control of the FWD, the corporation that had been formed to, inter alia, hold real and personal property, and the property ownership.

To resolve the dispute, the *Salazar* court had to examine the proper authority of a civil court as to religious matters and, to the extent that a civil court could apply secular civil law, the degree to which trust, property, and corporate law applied.

Supreme Court Evolution

The *Salazar* court offered an exegesis on the history of the Episcopal Church in Texas, as well as the evolution of United States Supreme Court and state precedent involving church disputes. The *Salazar* court cited precedent concluding that TEC was a hierarchical church, rather than a congregational church. As the *Salazar* court explained, the difference between the two types of churches was critical in its ability to determine ecclesiastical disputes. Precedent found that TEC was comprised of three hierarchical levels or tiers: the General Convention (the national level), the regional diocese, and the individual parishes within the dioceses. By contrast, a congregational church is an "independent, stand-alone" church.

The *Salazar* court cited *Watson v. Jones*, 80 U.S. (1871), for the origin of the "deference method of judicial review." When the members of a congregational church undergo a schism, a court must determine rights based on "the ordinary principles which govern voluntary associations." In such a case, if no trust existed for the property, the majority would keep the property, and the minority, having chosen to disagree with the majority, would have no rights in the property. When the members and the elements of a hierarchical church disagree, however, a court had to act differently. Rather than looking to the secular rules applying to voluntary associations, courts had to recognize that the local church was a member of a more important larger organization, and that the hierarchical church's government would determine such disputes according to ecclesiastical law.

The *Salazar* court observed that the deference method applied until the adoption of the neutral principles doctrine. The *Salazar* court described the opinion in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America* 344 U.S.94 (1952), as dealing with a dispute over the right to use a church building and concluding that the result had to rest strictly on the ecclesiastical determination of the power of the church to appoint the church's governance

— “the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America.”

In *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), the *Salazar* court read the Supreme Court’s opinion as formalizing the neutral principles doctrine as a method for resolving church disputes. In *Presbyterian Church*, two local churches withdrew from the national church and sought to reconstitute themselves as autonomous organizations. According to the *Salazar* court, the Supreme Court, while recognizing the First and Fourteenth Amendment restrictions on court review of ecclesiastical matters, noted that not all church disputes are solely religious. The Supreme Court observed that certain neutral principles — such as property, corporate, and trust law — could apply to church property disputes. “But to do this, religious organizations and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.”

The *Salazar* court then cited the Supreme Court’s decision in *Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevich*, 426 U.S. 696 (1976), as the next step in the progression. According to the *Salazar* court, “*Milivojevich* instructs us to confine our analysis to formal title, corporate bylaws, and other documents prevalent in the management of non-religious entities rather than to attempt to interpret internal church government — the core of which pertains not to business but rather to the mysteries of faith — and to avoid ecclesiastical determinations like any other proverbial plague.”

As described by the *Salazar* court, the neutral principles doctrine of the United States Supreme Court evolved to its position set out in *Jones v. Wolf*, 443 U.S. 595 (1979). The *Jones* Court examined a dispute within a local church that was part of a hierarchical church organization and reasoned that, although the First Amendment precluded a court from ruling on ecclesiastical issues, a court should properly consider non-doctrinal matters. *Jones* famously observed that, before any dispute erupts, “a religious group could determine its priorities as to the disposition of church property and enshrine those priorities under the applicable civil law, making it easy both on themselves and the court system.” The Supreme Court opined that, before any dispute, the parties loyal to the hierarchical church can ensure that church property will remain with their church. Methods suggested by the Supreme Court included modification of corporate charters or the church constitution to create a trust for the hierarchical church. The *Jones* opinion described the burden on the church to perform these actions as “minimal.”

Thus, as posited by the *Salazar* court, as court review of church disputes evolved through United States Supreme Court decisions, the current methodology of the neutral principles doctrine allowed a court to resolve church property disputes using state law provisions but not to “veer into constitutionally-prohibited territory” by interpreting religious matters.

Jones may at first blush seem to indicate that a court’s application of the neutral principles doctrine is a well-defined course, but state court cases such as *Salazar* show the

boundaries are not so clear in practice.

Salazar Neutral Principles

As noted, those neutral state principles in church property disputes include the examinations and construction of corporate documents, deeds, and trust instruments. In a number of cases, particularly those involving the Episcopal church, the creation of a trust for the hierarchical church, or in some instances, a diocese, is a compelling and not uncommonly a determinative factor. Peculiar to Episcopal church cases, however, is the Dennis Canon.

All real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for this Church [i.e., the Episcopal 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.

In a dispute over church property with a diocese or a parish, the hierarchical church would cite the Dennis Canon as doing what the *Jones* court suggested: create a trust for the benefit of the national church.

Applying the neutral principles doctrine, the *Salazar* court recognized that trust statutes supplement rather than replace the intent of the settlor. Thus, when construing a trust, a court looks to the language of the trust and then to the statute “to fill in any gaps.” Whether a trust is even created is, of course, a question of a settlor’s intent. Moreover, a trust requires a settlor, a beneficiary, and trust property. Obviously, a settlor can create a trust only with the settlor’s property; a settlor cannot create a trust of someone else’s property. Having cited those most basic of trust law principles, the *Salazar* court concluded that the Dennis Canon did not create a trust because the TEC did not own the property that the Dennis Canon attempted to submit to a trust. Rather, it would take some action by the property owner — in writing according to state law — to create a trust for the benefit of the TEC. Nor did the *Salazar* court accept the TEC parties argument that the determination of the application of the Dennis Canon was a matter of ecclesiastical law.

However, for purposes of the trust question, the *Salazar* court examined one deed in the record, and reserved judgment about 54 similar deeds not in the record. The *Salazar* court held that the deed in the record did create an express trust for the FWD. Moreover, the *Salazar* court concluded that state associations law provided that an entity is subject to the rules of any larger association to which it belongs and that therefore FWD was subject to the TEC hierarchical rules. When the FWD members disassociated from the larger organization, they lost any rights they had in the TEC. The disassociated members were entitled to worship however they pleased, but when they left the TEC, they lost any rights to the FWD property. The FWD consisted of those

members who remained affiliated with the TEC.

Consequently, the TEC parties were beneficiaries of the deed that was examined because the TEC hierarchical rules must be deferred to when determining who constitutes the FWD. The *Salazar* court remanded the issue of the similar deeds. If those deeds are indeed similar, then the likely outcome is that the TEC parties will be the beneficiaries of those trusts as well.

South Carolina Diocese

Factual History

A review of the history of the Episcopal Church from colonial times is helpful to fully understand the decision. Before the Revolutionary War, the state legislature created colonial parishes as part of the Church of England. These parishes had civil and ecclesiastical powers over land and citizens. The parish churches were locally funded and owned title to property in their names. The 1778 state constitution disestablished the Church of England as the state church and authorized parishes to ask the legislature for incorporation. The local churches disassociated from the Church of England and many sought this legislative incorporation. In 1785, the local churches formed an unincorporated association, and in 1786 twelve churches formed a state diocese. In 1789, the state diocese joined with six other state dioceses to form the national church. Other than an interruption caused by the Civil War, the state diocese continued its association with the national church until 2012. In 1923, the original state diocese divided into two dioceses; for purposes of this discussion, the diocese in this dispute is called the state diocese. The individual parishes associated with the state diocese and were therefore affiliated with the national church through their association with the state diocese. Throughout this relationship, the local parishes continued to own real and personal property in their names.

In 1973, the state diocese incorporated with the stated purpose of continuing the operation in accordance with the constitution and canons of the national church. Many of the individual parishes' governing documents contained similar provisions. In 1979, the national church issued the Dennis Canon, providing that all property owned by local parishes was held in trust for the national church. The state diocese adopted a similar canon in 1987, which included a provision that the property was held in trust for the national church and state diocese, and 28 of the 36 parishes acceded to either the state or national version. Both the state and national canons provided that the local parishes could continue to hold power over their property as long as they remained affiliated with the state diocese and national church.

In 2009, the state diocese and the national church began to differ over doctrines concerning marriage and the priesthood. Beginning in 2010, the state diocese and its parishes began to change governing documents to remove references and accessions to the national church's governance, including the Dennis Canon. These changes were made under the leadership of a bishop elected and empowered by the national church. During that time, the state diocese — now becoming the disassociated diocese — began issuing quitclaim deeds to the local

parishes. In 2012, the disaffiliated diocese formally ended its affiliation with the national church. Those parishioners remaining loyal to the national church — a distinct minority of members — created an associated diocese, which took steps attempting to undo the changes wrought by the disassociated diocese.

A dispute over ownership of church-related property ensued between the associated diocese along with the national church and the disassociated diocese and parishes. Apparently, the parishes held title to the local property. The ultimate issue was whether they held title in trust for the national church.

The Lead Majority Opinion

The lead opinion addressed the church's organization, finding that it was "three-tiered": the national church comprised of geographic dioceses in turn comprised of individual parishes, which thus constituted a "hierarchical church" as opposed to a "congregational church." Citing precedent, the lead opinion defined a hierarchical church as a group of like-minded churches organized as a body with an ecclesiastical head and a congregational church as an independent organization.

The lead opinion focused on the "neutral principles of law" doctrine espoused by the United States Supreme Court in *Jones v. Wolf*, 443 U.S. 595 (1979) and the state supreme court in *Pearson v. Church of God*, 478 S.E.2d 849 (S.C. 1996). According to the lead opinion, the neutral principles doctrine prohibited state courts from resolving the property dispute and that instead the church should handle its own internal dispute: the neutral principles doctrine, consistent with the First Amendment, prohibited civil courts from "resolving disputes as to religious law, principle, doctrine, discipline, custom, or administration" and that, when civil courts could act, they "must accept as final and binding the decision of the highest religious judicatories as to religious law, principle, doctrine, custom, and administration." In other words, if the dispute is ecclesiastical, the civil court must defer to the appropriate ecclesiastical authority. The lead opinion reasoned that the actual dispute involved the authority of the disassociated diocese to take its actions versus the associated diocese's renunciation of those actions and thus concluded that the court could not become "entangled in the questions of which competing claimant was the true successor of the [state] [d]iocese." The dispute was a matter of organizational validity determined as a part of church governance, to which the civil court must defer. Consequently, the church property belonged to the national church and the associated diocese.

Majority Concurrence

The concurring justice wrote a separate opinion "because of the magnitude of this case." She agreed that the dispute was an ecclesiastical doctrinal difference. For purposes of argument, however, she addressed the result even if the civil court would be allowed to make a decision based on non-religious factors. She cited the majority opinion in *Jones*, which provided that

factions loyal to the hierarchical church can ensure that the factions retain church property, using such methods as modifying deeds and corporate charters to include reversionary rights or trusts, or alternatively, to amend the general church's constitution to create an express trust for the denominational church. According to the *Jones* majority, "[t]he burden involved in taking such steps will be minimal." The concurrence found that, two months after the *Jones* decision, the national church accepted the *Jones* majority's invitation and issued the Dennis Canon, which she concluded created an express trust for the benefit of the denominational church. A related Canon stated that individual churches could accede to the trust created by the Dennis Canon but that no action was necessary for the trust to be valid. In 1987, the state diocese acceded to the Dennis Canon by adopting a "mirror image" of the Dennis Canon.

She also addressed the contention that, because no writing existed, no express trust was created by the eight parishes not adopting the Dennis Canon, which would fail the state trust code's requirement that a trust involving real estate requires a writing. Nevertheless, the concurring justice proposed that a constructive trust would be created because it would be inequitable to allow those parishes to feign adherence to the national church for 30 years after the Dennis Canon but then "pivot" and deny that relationship.

Majority Partial Concurrence

The justice writing the majority partial concurrence cast the deciding vote over property ownership, but used different reasoning than the lead opinion and the concurrence. He concluded that "distilled to its simplest form, this case involves a property dispute" for which the "legal issue is our sole concern." He offered a tiered analysis: (1) a determination of the effect of the Dennis Canon; (2) a consideration of whether accession to the Dennis Canon created a trust; and (3) an examination of an individual parish's decision not to accede to the Dennis Canon. In undergoing that analysis, the partial concurrence did not depend on whether the Dennis Canon was doctrinally valid or whether the church was hierarchical, but rather focused on whether the Dennis Canon created a valid express or constructive trust under state law.

The justice concluded that the Dennis Canon did not create a valid trust. He focused on the fact that the national church was not the settlor of the trust because it did not own the purported trust property at the time of the canon. Rather than being a settlor, the national church "was nothing more than a demanding scrivener." He recognized that the use of the term trust is not alone necessarily dispositive of any intent to create a trust or of its efficacy. However, he reasoned that the accession by the individual parishes created a trust. Thus, those who did accede established a trust for the benefit of the national church, and those eight that did not accede did not establish a trust and thus continued to own the local property. Those parishes that did not accede "merely promised [their] allegiance to the hierarchical national church," which alone did not create a property interest in the national church.

With this justice's decision, a majority of the Court reached a result creating a trust for the national church for those 28 parishes acceding to the Dennis Canon, and a majority of the

Court — considering the two dissents discussed below — concluded that the eight parishes that did not accede to the Dennis Canon continued to own their local property.

The First Dissent

The two dissents differed in their reasoning but held that all the local parishes continued to own their local property. The justice authoring the first dissent agreed that the national church could not unilaterally create a trust of the local property, but that the parishes' accession to the Dennis Canon did create a trust for the national church. He opined that the *Jones* mandate that a minimal burden be imposed on a religious organization set a lower state law hurdle for creating a trust than would otherwise be imposed for a trust not involving a religious organization. Consequently, accession by a parish sufficed to create a trust for the national church.

However, his analysis did not end there. He then addressed the revocability of any trust. He recognized that the default common law rule presumed that a trust was irrevocable, but that presumption was subject to be overcome by sufficient proof of a contrary intent. He found that contrary intent from several factors: that the local churches held title to the property for a long time, in some cases for centuries; that the impetus to create the trust came from the beneficiary national church, not from the settlor parishes; and that the Dennis Canon itself was subject to amendment. He found that an acceding parish could, and did, revoke the trust by withdrawing its accession to the Dennis Canon. He cited case precedent and a state trust code statute for the proposition that, if a specific method of revocation is not expressed in a trust, any act indicating an intent to revoke would suffice. He rejected any notion that the national church had to agree to any revocation of the trust because, if such an agreement was required, the national church would never consent, which would effectively render the trust irrevocable.

Thus, the first dissent held that the 28 acceding parishes, by their accession, created a revocable trust for the national church, but that they revoked any trust by their subsequent actions. He found that the eight non-acceding parishes never created a trust. And although he did not think the constructive trust issue was preserved, he agreed with the second dissent that no constructive trust was created.

In conclusion, he opined that the decision sent a clear message to other local churches affiliated with a national church, even if the local church has “never lifted a finger to transfer control or ownership of the property of [its] property — if you think your ownership control is secure, think again.”

The Second Dissent

The second dissent discussed the appropriate court standard of review for church disputes, observing that the United States Supreme Court had adopted two permissible standards of review for church disputes — either deference to the church or the neutral principles of law doctrine, which evolved as a First Amendment approach as church disputes continued. The

Jones case eventually offered the neutral principles doctrine as an alternative to deference. The second dissent stated that the state supreme court used the deference approach in ecclesiastical matters and the neutral principles approach for secular issues. The justice believed that the issue of determining whether a church is hierarchical or congregational is relevant only if the matter is ecclesiastical. In those cases, if the church is hierarchical, the governing body controlled the decision, and if the church is congregational, the decision of a majority of congregations would control. If, however, the issue sub judice is secular, then the question of hierarchical versus congregational should not even arise. She indicated that the lead opinion got this analysis backwards: by first determining that the church was hierarchical, the lead opinion implied that the national church's decision controlled. Rather, she believed that the Court should apply state law as part of a neutral principles doctrine approach, consistent with most states around the country.

The second dissent then explored the two ways to create a trust under state law — either an express trust or a constructive trust. She concluded that the Dennis Canon did not create a trust because the national church did not own the local property and thus could not act as settlor. She reasoned that the only way a trust could be created was for the local parish to sign a written statement dedicating the property in trust for the national church. She rejected the argument that the parishes' accession to the Dennis Canon created the signed written statements necessary for trust creation. She concluded that the parishes' accessions to the Dennis Canon did "not constitute clear and convincing evidence that they intended to place their property in trust (either revocable or irrevocable) for the national church.

She also found no fraud sufficient to establish a constructive trust remedy.

Conclusion

When church property disputes erupt, a court may cite *Jones* as a reason it cannot rule on what it considers to be an ecclesiastical dispute. However, if the court concludes that the *Jones* neutral principles doctrine allows it to apply state law, trust law may well be the primary issue. If so, the court may decide to apply a pure application of traditional trust law or, following the *Jones* court's minimal requirements language, perhaps create a lower hurdle for the creation of a trust.