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Civil Resolution of Ecclesiastical Disputes

By Paul E. Salamanca

In our world of extraordinary religious plurality, schisms within denominations occur with great frequency, often bringing with them the fascinating legal problem of who keeps the bricks, mortar, records and savings of the institution. The problem can arise in virtually any denomination, from the most hierarchical to the most congregational. Here in Kentucky, for example, we have recently seen people in the Episcopalian tradition coming close to litigation after the consecration of V. Gene Robinson, an openly gay man, as Bishop of the Diocese of New Hampshire.1 On first impression, one might think that cases arising in this area involve only the laws of property, contracts, trusts and estates, but in fact such cases strongly implicate the First Amendment as well.2 First, lack of access to adequate, familiar facilities can affect free exercise, as can the exigencies of litigation itself, particularly discovery. Second, civil courts are understandably wary of being called upon to construe ecclesiastical terms, given the risk of establishment posed by such construction. In light of these concerns, a handful of somewhat specialized approaches to resolving ecclesiastical disputes over bricks and mortar have developed. The purpose of this essay is to describe three of the most historically prominent of these approaches, with specific reference to prevailing rules in Kentucky.

The Doctrine of Implied Trust

Until fairly recently, one of the most common methods of resolving such disputes, at least with regard to hierarchical denominations, was to apply the doctrine of implied trust. Under this doctrine, a grant of property to a local church was deemed to be “for the benefit of the general church [meaning the church’s hierarchy] on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local [church].”3 This doctrine reflected the fairly simple assumption that, when people gather together on a local basis, raise money, build a church, and affiliate themselves with a larger institution, they do so on the implied understanding that the latter will continue to espouse the basic theological doctrine that it holds forth at the time of affiliation. Courts maintained a similar doctrine for churches adopting a congregational polity.4

Needless to say, there are flaws in this theory. First, it depends on a supposition of the exact nature of the original grantors’ intent. Although many donors may be particular about doctrine, others may not. Others, in fact, might wish to facilitate theological innovation by worshipers to follow. A second, related problem arises from conflicting rights. That is, whose rights should control – those of the donors, who may be long deceased, or those of worshipers who prefer the innovation at issue, and who may be many in number? One might answer that a condition attached to a gratuitous grant should be respected out of deference to the rights of property, but of course the doctrine does not require the condition to be explicit. This tension is obviously most acute when the condition is explicit, that is, when the original donor does make his or her grant subject to an express religious use.5

But the formal demise of the doctrine of implied trust did not in fact arise from any of the foregoing concerns. Instead, it arose from the anxiety courts felt with distinguishing one theological concept from another. To illustrate, consider a grant to the hypothetical “First Church of Reincarnation,” subject to a condition that its clergy continue to espouse reincarnation as a theological concept. Assume that, well after the demise of the donor, a new minister took to the pulpit of the church and began to describe reincarnation as merely a metaphor for the fact that each day is a new day, wherein we can be new and better people. People of common sense might be able to formulate a reasonable opinion about whether the new minister’s theology is consistent with the intentions of the donor, but courts understandably are wary of the entanglement that might arise from making these kinds of determinations in a legally binding way. Thus, in Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Church, the Supreme Court of the United States held that the doctrine of implied trust could not be applied in a manner consistent with the First Amendment to the federal Constitution.6 As the Court noted in Hull, the “departure-from-doctrine element” of the theory “requires the civil court to determine matters at the very core of a religion – the interpretation of particular church doctrines and the importance of those doctrines to the religion.” “Plainly,” it went on to say, “the First Amendment forbids civil courts from playing such a role.”7 Ironically, this rationale would appear to apply just as forcefully to express trusts in favor of religious uses as to implied ones.

As of today, there are two approaches to resolving ecclesiastical disputes that have been held to comport with the First Amendment. The one with the longer historical pedigree is the so-called “rule of deference,” which actually arose from a dispute here in Kentucky. The other is the so-called “rule of neutral principles.” As we will see, the courts of the Commonwealth have not definitively embraced either of these rules to the exclusion of the other.
The Rule of Deference

The rule of deference is uniquely suited to a hierarchical church, although it has some application to a congregational polity as well. Under this rule, courts avoid enmeshing themselves in theological disputes by deferring to the highest authority within a particular religious structure as that structure presents itself to the civil world. As the Supreme Court of the United States explained in Watson v. Jones, the case in which it first applied the doctrine, when a dispute within a denomination has "been decided by the highest of [the ecclesiastical] 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 arose from a dispute within the Third or Walnut Street Presbyterian Church in Louisville in the aftermath of the Civil War. During the war, the church’s national body, the General Assembly, had supported the Union and opposed slavery. In the bitter ecclesiastical disputes that followed the war, it became apparent that a majority of the congregation had also opposed slavery. A majority of the local Session, however, had defended slavery, the Session being the primary governing body of the local institution. A dispute thus ensued as to whether the majority of the Session or a majority of the congregation, which itself aligned with the General Assembly, were the “true” representatives of the local church. The case originated in federal court on account of diversity, some of the congregants being from Indiana. The Court, adhering at that time to the doctrine of Swift v. Tyson, which permitted it to create federal common law, applied the rule of deference to resolve the case.

This rule has the obvious virtues of upholding the prerogatives of religious tribunals, of preserving lines of authority set up by a religious society, and of protecting civil courts from the potential hazards of resolving theological disputes. As two prominent commentators noted in a general article on the subject, the approach of Watson v. Jones “posed few difficulties”:

Once civil courts found implied consent on the part of a local church to be bound to a general church organization, the crucial determination then became the characterization of the church polity as either congregational or hierarchical. When a church’s organizational structure was ascertained to be hierarchical, the action or judgment of the highest church tribunal was conclusive on the civil court.

On the other hand, the rule of deference obviously prefers hierarchy and order to the wishes of dissenting members of such a society, who of course can be many in number, and who may have been much more responsible for building the local institution than the larger church. As noted above, however, there are rights on both sides of such disputes.
The Rule of Neutral Principles

The other constitutional option is for courts to resort to so-called “neutral principles of law.” Under this approach, courts apply the same principles of law to a dispute arising from a denominational schism as they would to a dispute arising from the fragmentation of a non-religious voluntary association. The Supreme Court of the United States give its first fulsome approval to this approach in *Jones v. Wolf*, another case involving the Presbyterian Church. In this case, the Supreme Court of Georgia had held in favor of the local congregation, applying neutral principles, and the Court upheld its decision to do so. Although the Court did not describe neutral principles as mandated by the First Amendment, it nevertheless saw them as permissible, and perhaps even preferred.

An obvious advantage of applying neutral principles is that it saves courts from having to choose between an ecclesiastical hierarchy (if there is one) and a dissenting congregation, unless the denomination has ordered its affairs in accordance with civil law to require preference of one over the other. As the Court maintained in *Jones v. Wolf*, the rule of neutral principles is both “ secular” and “flexible” in its operation. “Through appropriate reversionary clauses and trust provisions,” wrote Justice Blackmun in his opinion for the majority, “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.”

This approach is also not without its detractions, however. First, by emphasizing lawyerly examination of a church’s papers and records, the rule of neutral principles will inevitably compel religious organizations to become lawyerly in conducting their affairs. This can be a source of difficulty. Although many religious organizations are well-endowed with attorneys or funds with which to engage attorneys, others are not. Second, and as a related matter, ecclesiastical documents are not necessarily written with an eye toward civil litigation, nor perhaps should they be. When this occurs, courts will lack “neutral” language upon which to rely. Finally, as applied to grants executed in the past, strict adherence to neutral principles will not properly discern the original intent of the grantor if that individual simply assumed that his or her donation would remain with the larger ecclesiastical body. Nevertheless, the rule of neutral principles is consistent with familiar notions of private ordering. That is, if someone wants a donation to a local church in fact to adhere to the larger hierarchy, he or she can say so in the instrument of trust or conveyance.

Civil Resolution of Ecclesiastical Disputes in Kentucky

Over the last seventy years, Kentucky has seen both “deference” and “neutral principles” applied in its courts, often in the same case. In *Clay v. Crawford*, for example, the Commonwealth’s highest Court held in favor of the faction of a local church in the African Methodist Episcopal tradition that had remained loyal to the larger church, which took the form of an Annual Conference under the direction of a Bishop and a General Conference. To a substantial extent, the Court justified its decision in terms of deference, citing *Watson v. Jones*. “In an adjudication of rights,” the Court wrote, “the criterion is identity, not of individuals, but of organization. The question is which of the rival factions is the true representative and successor or continuation of that local society as it existed prior to the division. The answer is to be found by ascertaining which of them adheres to or is sanctioned by the governing or central body.” But the Court went on to examine the various instruments by which the church had acquired its property, concluding that the grants were subject to a trust in favor of the larger church. In doing this, the Court’s analysis sounded in neutral principles.

In *Pelfrey v. Cochran*, by contrast, the Court appeared to adopt a pure version of the rule of deference. This case involved a doctrinal schism within a church in the Baptist tradition, which generally contemplates a congregational polity. The majority of the congregation and the association with which the majority sought to affiliate adhered to one belief regarding the eligibility of people who have been divorced and remarried to become members, and the minority adhered to another. Pretermining the issue of the church’s exact polity, the Court adopted a position that sounds in deference, noting with approval that “the trial court merely recognized as church doctrine that which had been so declared by the church authorities vested with the power to declare it — either the association if the church was a part of its...
holds its property may appear to vest title in instruments by which a church takes and its senior officials. On the other hand, the The Episcopalian Church has a hierarchy might well have yielded different results.

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Branstetter, involving a blend of deference and neutral principles.

Bjorkman involved a schism within the Episcopal denomination. Specifically, an entire church within that denomination, without dissent, sought to dissociate itself from the larger structure, and litigation ensued as to whether the larger church or the local institution lay proper claim to the bricks and mortar.28 This was a case where neutral principles and deference might well have yielded different results. The Episcopalian Church has a hierarchical polity, with judiciary powers lying in its senior officials. On the other hand, the instruments by which a church takes and holds its property may appear to vest title in the local institution.

Citing Jones v. Wolf, the Court applied neutral principles and held in favor of the local church. “[T]his nation’s highest Court,” noted then-Justice Lambert for the majority, “has held this approach to be constitutional, preferable, and broadly applicable as a method of resolving church property disputes.” Therefore, he continued, “this Court is clearly empowered to adopt the neutral-principles approach if we so choose.” On the other hand, the Court noted, the justices were “reluctant . . . to overrule longstanding precedent.”29 The Court found an apparent escape from this dilemma, however, in the fact that none of its precedents had involved a local church that, without dissent, had sought to dissociate from a denominational hierarchy.30 In reaching this conclusion, the Court noted the harshness and rigidity of the rule of deference, at least from the point of view of a dissenting local faction. Although the Court acknowledged that neutral principles might not be a “panacea,” it nevertheless saw it as preferable to deference because, under the latter, “in every case, regardless of the facts, compulsory deference would result in the triumph of the hierarchical organization.”31 It then proceeded to examine the documents at issue in the case, concluding that, as a matter of neutral principles, the bricks and mortar lay in the local church.32

The Court’s observation in Bjorkman that deference (almost) invariably yields a victory to the ecclesiastical hierarchy is not only true, but essentially a restatement of the rule itself. That is, the rule by definition gives almost categorical preference to the decision of the church’s highest judicatory body. But this had been no less true when Clay v. Crawford and Pelphry v. Cochran were decided than when Bjorkman was decided. For the Court, however, the salient difference between the earlier cases and present case lay in the fact that in Bjorkman the free exercise of the entire local congregation was at stake. Although this was true, the Court’s analysis is still vulnerable to the modest criticism that it failed to take every actor’s rights into account. That is, although there were no dissenting members of the local church whose free exercise would suffer were the building to follow the schismatics, the officials of the diocese, other worshipers of the diocese, and the local church’s prior donors might also have had legitimate interests, sounding in free exercise or in rights of property, to have the local institution remain in the hierarchical fold. In other words, to distinguish a schism involving an entire congregation from one involving a mere faction puts strong and perhaps too much emphasis on the rights of the current local congregation.33

Cumberland Presbytery of the Synod
of the Mid-West of the Cumberland Presbyterian Church v. Branstetter involved a schism within a local church in the Presbyterian tradition, with the minority of the congregation adhering to the larger church and the majority seeking to break away. In the course of describing the facts, the Court, per Justice Spain, was careful to emphasize the “connectional or hierarchical” nature of the Presbyterian polity, as well as the various steps that judicatory bodies higher than the local church had taken. It then went into a lengthy discussion of Watson v. Jones, which had also involved the Presbyterian Church, noting the rule from that case and quoting from it quite substantially. Next, it took up Clay v. Crawford, which it described as “a scholarly opinion” and “[o]ne of the leading Kentucky cases applying the compulsory deference rule.” In light of this predicate, the Court had little difficulty holding in favor of the minority of the local institution that had remained faithful to the larger ecclesiastical hierarchy. “Application of the ‘compulsory deference rule’ to the . . . dispute before us,” wrote Justice Spain, “leads to the inescapable conclusion that the minority faction[,] which ‘adheres to’ and ‘is sanctioned by’ the central body, . . . must prevail.”

At this point, the Court took up neutral principles, discussing Jones v. Wolf and the demise of the doctrine of implied trust that had given rise to that approach. After a brief review of that case, the Branstetter Court noted that neutral principles does not yield a “foreordained” result (presumably in favor of a majority of the local congregation), but instead requires analysis of those principles, as they exist in the jurisdiction, as well as analysis of the documents in question. The Court then went on to observe that the larger church in the case before it had amended its Constitution in 1984, before the dispute had arisen, to provide that “all property held by or for a particular church . . . is held in trust nevertheless for the use and benefit of the [general church].” In other words, wrote Justice Spain, the general church had amended its organic document in response to Jones v. Wolf. The Court then proceeded to distinguish Bjorkman, noting first that the earlier case had involved a unanimous local congregation seeking to break away, and second that Bjorkman had not involved a denomination that had revised its organic documents to make the results under deference and neutral principles the same.

As the foregoing discussion suggests, much of the analysis in Branstetter sounded in the rule of deference, with substantial positive references to both Watson v. Jones and Clay v. Crawford. Nevertheless, the Court did not overrule Bjorkman, instead distinguishing it as a case involving a unanimous local departure. In addition, the Court was careful in Branstetter to emphasize that both neutral principles and deference would yield a decision in favor of the hierarchy in that case. Thus, Branstetter does not appear to stand firmly for either rule, and further litigation may be necessary to establish whether neutral principles will govern in all such cases in Kentucky, or only where the facts of Bjorkman arise again.
1. See Frank E. Lockwood, Now Anglican, Both Acquiring Buildings, LEXINGTON HERALD-LEADER (Dec. 16, 2006) (describing parishes that withdrew from the Episcopal Diocese of Lexington and affiliated themselves with the Anglican Church of Uganda.)

2. The First Amendment provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. 1.


4. See, e.g., Parker v. Harper, 295 Ky. 686, 175 S.W.2d 361, 363 (1943). Other decisions by the highest Court of Kentucky sounding in the area of implied trusts for religious purposes include Mullins v. Elswick, 438 S.W.2d 496, 497 (Ky. 1969), Fleming v. Rife, 328 S.W.2d 151, 152 (Ky. 1959), and Bunnell v. Creacy, 266 S.W.2d 98, 99 (Ky. 1954).

5. The Southwest Reporters contain quite a few decisions by the highest Court of Kentucky sounding in the area of express trusts for religious purposes. See, e.g., Cantrell v. Anderson, 390 S.W.2d 176, 177 (Ky. 1965); Luttrell v. Potts, 257 S.W.2d 542, 543 (Ky. 1953); Hall v. Deskins, 252 S.W.2d 417, 419 (Ky. 1952); Black v. Tackett, 237 S.W.2d 855, 855-56 (Ky. 1951); Martin v. Kentucky Christian Conference, 255 Ky. 322, 73 S.W.2d 849, 851 (1934). Cf. Rife v. Fleming, 339 S.W.2d 650, 652-53 (Ky. 1960) (express language deemed to be overcome by contemporaneous understandings and continuous practice). As noted below, the enforceability of such trusts is doubtful because of constitutional concerns.


7. Id. See also Pelphrey v. Cochran, 454 S.W.2d 675, 678 (Ky. 1970) (noting that the courts of Kentucky may not determine whether individuals have "departed from the fundamental doctrine" of a particular faith without violating Hull).


9. See Watson, 80 U.S. at 690-91.

10. See id. at 693.

11. See id. at 694.


13. Adams & Hanlon, supra note 8, at 1301 (footnote omitted).


15. See id. at 602-04.

16. Id. at 603.

17. Indeed, the Court in Jones v. Wolf was careful to note that, where documents allocate property according to "religious concepts" that are themselves in dispute, a court should defer to the resolution of that issue by the "authoritative ecclesiastical body." Id. at 604.

18. In Pelphrey v. Cochran, 454 S.W.2d 675, 678 (Ky. 1970), the Court appeared to recognize that the decision of the Supreme Court of the United States in Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969), precludes use of the doctrine of implied trust.


20. Id. at 800.

21. See id. at 803-04.

22. In Nolynn Association of Separate Baptists in Christ v. Oak Grove Separate Baptist Church, 457 S.W.2d 633, 634 (Ky. 1970), the Court recognized the abstract validity of the rule of deference, but went on to hold in favor of the local church on two grounds. First, the Court saw "substantial evidence" that the denomination in fact main-