

State of Kansas
House of Representatives

State Capitol
Topeka, Kansas 66612
(785) 296-7695
craig.mcpherson@house.ks.gov



11911 W. 143rd Terr
Olathe, Kansas 66062
(913) 735-6804

Craig A. McPherson
Representative, 8th District

To: Chairman Barker, Vice-Chairman Macheers, Ranking Minority Carmichael, and fellow House Judiciary Committee Members

Date: February 18, 2016

Re: Neutral Principles for Church Property Disputes

Thank you for the opportunity to testify regarding the need for clarifying legislation regarding the standard that will be applied in Kansas during the adjudication of a church property dispute. I testify today as a proponent of a "neutral principles" approach.

There is an Urgent Need for Legislation

As many of the committee may remember I brought this matter to your attention in previous years as House Substitute to SB 18. At that time, other conferees and I indicated that Kansas law was unsettled and did not have a lot of clear precedent, but likely leaned toward neutral principles. Since that time, Judge Moriarty, of the Johnson County District Court has heard a case on the subject and commented after releasing his opinion "We don't have the plethora of cases that other jurisdictions have. And there was some attempted legislation that would have made things a little bit easier." - Judge Moriarty, Johnson County District Court, *Heartland Presbytery v. The Presbyterian Church of Stanley, Inc.*, Transcript of Proceedings from 7/15/2015. The judge lamented that the legislature had not considered the issue and given him clear direction as to how the court should proceed in just such a case.

In his actual decision, Judge Moriarty specifically used our failure to act as a factor in his decision: "This court will utilize the 'hierarchical deference' approach in the second stage of its analysis. . . . This finding is supported by the fact that House Substitute for Sen. Bill No. 18, introduced by the Committee on Judiciary, was defeated in the 2013 Session. . . Through the defeat of this bill, the Kansas Legislature effectively referred this Court back to *The Church of God in Christ, Inc. v. Bd of Trustees of Emmanuel Church of God in Christ, Wichita, Kan.* for purposes of the second stage of the analysis." Judge Moriarty, Johnson County District Court, Memorandum Decision, *Heartland Presbytery v. The Presbyterian Church of Stanley, Inc.*, 7/15/2015.

In the year the judge references, 2013, the house substitute was made late in the session. We worked the bill in this committee and passed it out, but it was never brought above the line for floor debate. Instead it was sent back to committee to keep it alive for the following year. As you may recall, in 2014, H. Sub SB 18 passed out of this committee

with bi-partisan support. By the time it hit the floor; however, the legislature had recently been subject to a media frenzy over HB 2453, a bill protecting religious freedom regarding marriage, and many legislators were frustrated with leadership and uncomfortable with a bill that they perceived to again be dealing with a religious liberty issue. As such, it seems that the district judge was incorrect to infer any intent from legislative action in either year. Regardless, that seems from his decision to have been the main impetus for the ultimate outcome of the case.

Understanding the Problem

Different religious organizations have different structures. In some cases an individual neighborhood church is fully autonomous, while in others it is part of a larger denominational structure. The manner in which this organization takes place exists within the realm that is properly separated from government interest and varies greatly depending on the religion and the denomination.

In certain instances, however, these organizational structures come into conflict, and those conflicts spill into the secular court system. Today's discussion revolves around the question of how a secular court system should determine proper title in a dispute over property that is owned by a religious entity.

In the modern era, these disputes are most common when a local church congregation disagrees with the direction that the larger denomination may be going and believes that it must sever its ties with the parent organization.

Frequently, the local congregation has funded the purchase and/or construction and maintenance of the physical church building through its own member contributions. Upon making the determination to leave the denomination; however, the denomination will assert a claim of title to that underlying church. In PCUSA (Presbyterian Church USA) cases this claim is based upon the assertion that all local churches hold property in trust for the denomination.

Neutral Principles – What it Means and Why It is the Best Approach

A dispute over property is the type of dispute that a secular court system is very able to handle. In general, there is a large history within the law that concerns transfer of title, corporate structure, and trust formation, none of which revolves around questions of conscience or ecclesiastical process. In *Jones v. Wolf*, the United State Supreme Court noted that a "neutral principles" approach "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." 443 U.S. 595, 603 (1979).

Applying "neutral principles" is the only way to give certainty to all churches as to what steps they will need to take to protect their intent. Rather than placing these important and distinct systems of church polity into the arbitrary hands of a secular court system, a church under a "neutral principles" system is given the freedom to arrange its legal documents in a manner that reflect its wishes. Alternatively, a court that attempts to discern

the will of the church by evaluating intricate arguments about the internal organizational of the denomination necessarily places itself into making judgments about an ecclesiastical system, which steps outside of the purview of what normally is seen as the proper role of government, even possibly creating first amendment concerns.

Neutral Principles Promote Efficiency

One of the key reasons the legislature should adopt neutral principles is the potential clarity that it will bring to all interested parties in property debates. If the legal standard is unclear, then parties are encouraged to litigate their disputes. This is an inefficient use of court resources, as well as resources of the local congregations and the denominations. Furthermore, as the money spent on litigation will in most cases be money that is exempt from taxation due to its charitable purpose, it is of particular public interest that we do not encourage those funds to be wasted in litigation due to unclear legal rules.

Current Kansas Law

It is unclear what Kansas law ultimately is on this issue. As Judge Moriarty stated, there is limited case law, and this is a place where the legislature should really fill the gap. In my opinion the two stage analysis creates an absurd outcome. In the the *Presbyterian Church of Stanley* case, the court ultimately decided that PCOS owned the property under "neutral principles", but because there was a schism in the church the court then had to decide which group ran the non-profit corporation. Rather than looking to the corporate governing documents, as would normally occur in a secular dispute, they adopted a "hierarchical principles" approach, and found that the group that remained loyal to the Presbyterian Church of the United States America were the group that owned the corporation. Correspondingly, although only 21% of the congregation wished to remain in the denomination, and the corporate governing documents of the Presbyterian Church of Stanley specify a procedure for electing corporate officials through majority rule, the court turned control of the corporation over to a minority faction.

Legal Certainty for Third Parties

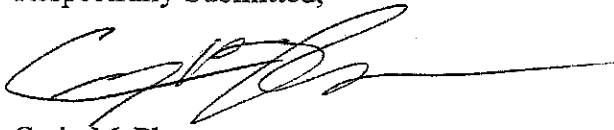
I urge you to think momentarily about what this does to the stability of the rule of law in the state of Kansas. PCOS, for example, had a mortgage on its property. Due to the court's decision, the mortgage holder was now left with a corporate body that could not have been ascertained through any of the normal governing documents of the corporation, and that was at best 21% of the size of the body that originally applied for the mortgage. If this is the law of Kansas, then no entity can reliably contract with any Kansas church that is part of a greater denomination, without assuming considerable risk moving forward.

Religious Freedom

A system that has such confused legal precedent undermines the freedom of religious bodies to make faith-based decisions regarding their denominational affiliation. A lack of legal clarity promotes instead stagnation and indecision, because the consequences of action are uncertain. Further, the current law makes litigation between disagreeing parties a near certainty, and thus introduces a barrier to the free exercise of religion by congregations who may feel convicted to leave their denomination.

For all of these reasons, the Kansas legislature should clarify existing law and introduce a statute that will require neutral principles of law to apply to church property disputes. Adjudicating disputes based upon known principles that apply to similar secular organizations supports religious freedom, promotes judicial efficiency, and maintains a proper first amendment government restraint.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Craig McPherson', followed by a long horizontal line extending to the right.

Craig McPherson
Representative, District 8