

SHOW ME THE MONEY

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In November 2003, shortly after Gene Robinson was confirmed as the first openly gay bishop in the Episcopal Church, the conservative Anglican website Classical Anglican Net News ran an article by a sometime priest of the Diocese of Pittsburgh named Stephen Noll entitled “It’s the Property, Stupid!” Noll, Vice Chancellor of Uganda Christian University in Mukono, Uganda, argued that since many conservative Episcopal parishes had now been recognized by Anglican churches in other countries, the only major outstanding issue was how to retain their property when leaving the Episcopal Church.

Two months later, the *Washington Post*’s Alan Cooperman turned up the “Chapman Memo,” in which another Pittsburgh priest, Geoff Chapman, outlined a strategy for conservative withdrawal from and eventual replacement of the Episcopal Church. Chapman proposed, among other things, “negotiated property settlements affirming the retention of ownership in the local congregation.” While acknowledging that “recent litigation indicates that the local diocesan authorities hold almost all the cards in property disputes,” he contended that “the political realities are such that American revisionist bishops will be reticent to play ‘hardball’ for a while.”

Here and there, such reticence has been apparent.

In September of 2006, the conservative bishop of Dallas, James Stanton, agreed to sell the property of an ultra-conservative parish in Plano to its members for \$1.2 million. Similar arrangements have been made in the diocese of Rio Grande (for \$2 million) and a few other places.

But for the most part, Chapman’s assessment has proved to be wishful thinking. For example:

In early 2004, when a congregation on Pawley’s Island voted to leave the Episcopal Church and join the Anglican Church of Rwanda, the conservative bishop of South Carolina, Ed Salmon, filed an ultimately successful suit to stop it. Later that year, after three parishes in the diocese of Los Angeles broke away to join the Church in Uganda, Bishop Jon Bruno went to court to retain their property for the diocese.

In 2006, a New York state appellate court awarded the Diocese of Rochester the property of a parish in Irondequoit. In 2007, diocesan authorities in Colorado, Connecticut, and Georgia went to court to retain the property of departing parishes. Altogether there were, as of December, 55 property disputes in one state or another of resolution around the country.

Perhaps the most significant dispute over church property now taking place is in the diocese of Virginia, where 15 parishes voted in 2006 to leave the Episcopal Church and affiliate with the Anglican Church of Nigeria. With the backing of the national church, Virginia bishop Peter Lee has taken the departing congregations to court in order to deny their claim to take parish property with them.

Down the road, and of greatest consequence for the church as a whole, has been the withdrawal decision of the entire Diocese of San Joaquin, California—with the dioceses of Pittsburgh and Ft. Worth seemingly not far behind. Anticipating the move, the church’s presiding bishop, Katharine Jefferts

Schori, informed San Joaquin bishop David Schofield in November 2006 that all diocesan property belonged to the national church. “Our forebears did not build churches or give memorials with the intent that they be removed from” the national church, Schori wrote.

In response to the entire situation, the Episcopal House of Bishops established a “task force on property disputes” that in April 2007 issued a report declaring that the church was “dealing with a well-thought-out, well-organized, and well-funded strategy designed to enable and justify the removal of assets from use for the Church’s mission and ministry in the world.”

The opposition strategy, said the report, was to “create confusion as to the nature of the hierarchy of TEC [the Episcopal Church] by claiming that its authority is subservient to the Anglican Communion”—the association of national churches associated with the Church of England. If that were so, it would effectively overrule the General Convention, the organization of clergy and laity that by canon and constitution has been the Episcopal Church’s sole governing body.

Critical for addressing the current court cases is the Dennis Canon, a rule amended at the 1979 General Convention that states that “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.” Use of the property is in the hands of the parish but only “so long as [it] remains a part of, and subject to, this Church and its Constitution and Canons.”

The devil in property disputes lies in the detailed interpretation of exactly what it means to remain “a part of, and subject to” the Episcopal Church. If one can fault most of the news stories about property fights in the church, it is for failing to explore sufficiently the jurisprudence of ecclesiastical property issues that have come before state and federal courts.

One of the few reporters to delve into the legal niceties of Episcopal governance has been Elizabeth Austin, who in 2004 wrote a story for the now defunct magazine *Legal Affairs* on a conflict between Washington D.C. Bishop Jane Dixon and a priest whom she had removed from office for insubordination. Eventually, the courts decided that under church canons the bishop had every right to do what she did because of the church’s hierarchical structure of authority.

What secular courts generally do, Austin quipped, is ask the rebellious faction, “When you joined up, did you agree to honor and obey (if not always love) the church higher-ups?” The answer is generally yes—though no legal precedents exist for departing dioceses.

In the Los Angeles’ diocese case, AP state and local wires, as well as the *Long Beach Press Telegram* (in a very long and well informed story by Greg Mellen on September 13, 2004) did cover the legal aspects of the story fairly well. Mellen was one of the first newspaper reporters to signal the importance of the principle of deference to hierarchical authority—and the fact that California courts had not always ruled in accordance with it.

For example, in 1977, a California court granted a group of four churches opposing women’s ordination the right to keep their property. But that decision, it should be noted, predated the Dennis Canon.

In fact, legal opinion has been divided over whether to defer to higher ecclesiastical authority or to apply “neutral principles of law,” thereby passing over considerations of church organization and structure in

favor of simply examining the instruments by which title to the property in question was conveyed to the owner of record.

A particularly important source for sorting out the current state of the law is last June’s decision by a California state appeals court reversing a lower court ruling in favor of the property claims of the three parishes that sought to withdraw from the Los Angeles diocese. In a lengthy analysis of state and federal precedents, the Court of Appeal panel found that secular courts avoid basing their decisions on a determination of who is theologically correct in intra-church disputes. This finding effectively showed that conservatives could not expect to be awarded their property on the basis of an asserted fidelity to church doctrine.

The Court’s other important finding was that appeals to free speech rights generally have not been successful in disputes within churches that have an established polity and hierarchical authority structure.

Because of its prominence, the Virginia case, which was argued in mid-November before Circuit Court Judge Randy Bellows, will provide an important test of the relevant legal principles. Echoing Schori’s language in her letter to Bishop Schofield, the diocese argued (as reported in a story by Episcopal Life Online reporters Matthew Davies and Mary Frances Schjonberg) that it “must protect and preserve our heritage for future generations.”

As early as late 2006 Alan Cooperman and Michelle Boorstein of the *Washington Post* began filing reports covering the legal aspects of the case, linking it to splits in the Presbyterian Church in Virginia at the time of the Civil War, when “neutral principles” tended to guide court decisions.

Last May 21, Julia Duin of the *Washington Times* referred to the upcoming litigation in Virginia as the “mother of all lawsuits.” Duin failed, however, to acknowledge “deference to hierarchical authority” in identifying the legal principles that might be used in the Virginia case. Rather, she claimed that the case would be decided by a Virginia legal rule that says that in a diocese or denomination experiencing a “division,” a majority vote by the congregation will determine who gets the property (the neutral principle approach).

In the November 13 *Richmond-Times Dispatch*, Tina Eshleman offered a better informed story on the trial, calling attention to the issue of whether the departing churches belong to a church within the Anglican Communion, around which much of the trial would revolve.

At trial, the diocese argued that because the Episcopal Church is hierarchical, the departing members had not “divided” themselves from other members of the same church, but had in fact left the church in order to join another religious body. Eshleman’s November 13 story reported with a nice attention to legal detail that Judge Bellows framed the issue precisely, ruling that the trial would focus on “whether there has been a division within the Episcopal Church and the Diocese of Virginia, whether the Anglican Communion meets the law’s definition of a church or a religious society, whether there is a division in the Anglican Communion and whether the departing churches were attached to the Anglican Communion.”

The Episcopal Church’s argument was that historically and constitutionally the Anglican Communion is not a church but a federation of autonomous national churches (called provinces) linked together by a common descent from and affiliation with the See of Canterbury—and thus had no authority to dictate belief or practice for its autonomous members.

The present “division” was not, therefore, *within* the Episcopal Church but *between* it and those who departed from it. The other side, relying primarily on the testimony of historian Philip Jenkins, argued that the Anglican Communion is a world-wide body and that the position of the departing parishes is much closer to the majority position within the Communion than it is to the Episcopal Church. Judge Bellows, having heard the testimony, gave the parties until January 17 to present additional briefs.

Except for neglecting opportunities to develop the legal history of church property disputes, the press has until now done a creditable job of covering the “It’s the Property” stage of the ongoing Episcopal Church story. But because most of the stories themselves are confined to particular states and dioceses, they have not received as much attention as was lavished on Bishop Robinson’s election and its aftermath. The exception is the Virginia case, whose goodly share of media play may have something to do with the fact that the breakaway parishes boast among their membership leading figures in conservative circles in the nation’s capital.

How will the outstanding cases turn out? If history is any guide—and in legal cases it is sometimes a poor one—then the principle of deference to hierarchical authority will generally prevail over local deeds of trust, and most parish property will remain in the hands of the dioceses. Those interested in transferring their allegiance from the Episcopal Church to a diocese of some overseas Anglican province—or in constituting themselves as a new Anglican province of America—will simply have to buy themselves some new properties and build themselves some new places to worship.