

<b>El Paso</b> _____ <b>County, CO</b> <u>  X  </u> <b>District</b> _____ <b>County</b> Court address: <b>20 East Vermijo Ave.</b> <b>Colorado Springs, CO 80903</b> Phone Number: <b>(719) 448-7650</b>	<b>Court Use Only</b>
Plaintiff: GRACE CHURCH AND ST. STEPHEN'S V. Defendant: THE BISHOP AND DIOCESE OF COLORADO  And  Third Party Couterclaimants: THE DIOCESE OF COLORADO IN THE EPISCOPAL CHURCH, ET. AL. v. REV. DONALD ARMSTRONG, ET. AL.	
<b>COURT'S ORDER ON PROPERTY ISSUES</b>	

The trial of the various property issues in this case was brought before the Court beginning February 10<sup>th</sup> 2009. The issues were presented for trial to the Court alone, without a jury. The parties presented testimony for approximately 4 ½ weeks and submitted over 3,000 documents as exhibits. Final arguments were heard on March 11, 2009. Having reviewed all of the evidence and considered the arguments of counsel I hereby issue the following findings of fact, conclusions and Order:

**FINDINGS OF FACT:**

The Plaintiff Grace Church and St. Stephens is a Colorado nonprofit corporation that has been known as an Episcopal Church parish. It owns a church facility on North Tejon Street in Colorado Springs as well as a rectory and other real and personal property. The plaintiff is a parish of the Episcopal Church of the United States (ECUSA). ECUSA is a hierarchical religious denomination whose first level of governance below itself includes the Dioceses, one of which is the defendant Diocese of Colorado. The ecclesiastical and administrative head of the Colorado Diocese is the Bishop. The current Bishop of Colorado is the counterclaim defendant Rt. Rev. Robert O'Neill. The counterclaim

defendant Rev. Donald Armstrong is the current priest or rector of the plaintiff parish.

This law suit is a declaratory judgment action filed by the plaintiff parish seeking an order that it is the owner of all real and personal property that has been used by the parish in Colorado Springs, including the church, the "outbuildings", the land, the rectory and all personal property located in any of those facilities. The defendants ECUSA (sometimes referred to as the "general church") and Diocese of Colorado have counterclaimed, alleging ownership of the same disputed property. Those defendants have further filed individual counterclaims against the Rector Donald Armstrong and the last vestry (board of directors) of the plaintiff corporation, alleging theft, conversion, unjust enrichment, trespass, civil conspiracy, quiet title and accounting. The Plaintiff has amended its claims, alleging tortuous interference. I have bifurcated trial of these matters into two central issues: the quiet title and ownership issues as a court trial beginning on February 10 and a civil liability and damages trial against the individual counterclaim defendants, which is scheduled for jury trial in August, 2009. The plaintiff sought a jury trial on all issues. Over its objection, I previously concluded that this portion of the case is an equitable action in the nature of quiet title. I therefore concluded that property ownership would be resolved by me without a jury.

The dispute in this case arose as a result of a majority of the members of the plaintiff parish becoming disillusioned with doctrinal decisions being made by the national church and the Diocese. The specifics of the doctrinal disputes are not important to the analysis, other than to say that they involved the perception by the local parish that the national church had become too "liberal" and was violating the principles of the traditional Anglican faith. I allowed the parties to present limited testimony regarding the nature of these disputes in order to create a timeline for the dispute. However, the doctrinal issues themselves have been ignored, except to say that the doctrinal disagreement, coupled with other matters, created considerable resentment toward the Diocese and general church in the local parish. That resentment has resulted in a majority of the local members voting to leave the national church and Diocese. The local parish has now aligned itself with the Convocation of Anglicans of North America ("CANAm")

The members of the plaintiff parish voted to leave ECUSA on March 26, 2007. The plaintiff asserts that 90% of those who voted agreed to leave. Another faction of the parish remained loyal to the general church and continues to worship as Grace Church and St. Stephens in another location.

Both parties have engaged in some strategic "jockeying" which may add confusion to the record but which is of little consequence to my decision. The plaintiff parish amended its answer to identify itself as Grace Church & St

Stephens. The only change is from "and" to an ampersand "&". It has implied that when articles of incorporation were filed in 1973, it did so with a "&" and thus created a new corporation. The so-called loyal parish is holding itself out as the same Grace Church and St. Stephens. They argue that when the majority voted to withdraw, that the Bishop appointed a new vestry and that they are now Grace Church and St Stephens. The lawyer for the Diocese filed articles of "renewal" or "revival" with the Secretary of State in 2007 after this suit was filed. The Diocese asserts that such filing renewed the 1923 corporation and that a 1973 filing had no affect. I will discuss that issue further below. The Diocese appointed a new vestry in 1973 and maintains that it alone has the right to take action on behalf of Grace Church and St Stephens. As a result of these and other strategic actions, the list of parties and their identity has become convoluted. This order will clarify the proper parties going forward and their status.

Complex pleading decisions aside, the dispute in this case is fundamentally a church schism that arose in much the same manner as that found in the Bishop of Colorado v. Mote, 716 P.2d 85 (Colo. 1986). All parties recognize that the "neutral principles" analysis outlined in Mote must control my decision.

I find the following facts are significant in resolving this dispute:

1. The 1923 parish corporation Grace Church and St. Stephens resulted from the merger of two former Episcopal parishes, St. Stephens's parish and Grace Church parish. That merger occurred in 1923. Grace Church was originally formed in 1873 by application to the Bishop for membership. In 1874 it filed its certificate of incorporation in the records of El Paso County Colorado. (Def. ex. 17).
2. In 1894, a group of churchmen, who described themselves as "low churchmen" left Grace Church over the objection of the Bishop and moved to the present church location on North Tejon Street, where they established St. Stephen's Church. They filed a certificate of incorporation with El Paso County on March 31, 1894. (Def. Ex. 27). Though it's early history is not particularly clear, St Stephens remained in contact with the Bishop. While they sought approval of the Bishop for construction of their stone building on Tejon Street, they ignored the Bishop's criticism of its design and built it, incurring a substantial debt. Grace Church continued to worship at a separate location, and was considered to be more of a "high church", that is more aligned with Catholic tradition. Members of the "low church" St. Stephens considered themselves more aligned with Protestant ideology.
3. The two churches reunited in 1923 and formed Grace Church and St Stephens. The combined congregation built a larger church on Tejon Street.

It filed its Certificate of Incorporation on December 21, 1923 (Ex. 28). Debt was incurred to construct the new facility. That debt was paid off in 1929, at which point the church was "consecrated". As part of the consecration ceremony, the rectors, wardens and vestry of Grace Church and St Stephens signed the "Instrument of Donation" (Def. ex. 30.), the significance of which will be discussed in greater detail below.

4. Dr. Lindsay Patton was rector from approximately 1950 through 1962. During that time, the local parish built a number of mission churches. Dr. Patton exercised considerable control over the mission churches. Rector Patton was still loyal to the Diocese and obtained permission from the Diocese before building mission churches.

5. In 1963, the parish corporation adopted bylaws for its governance. (Ex. 31). Those bylaws refer to adherence to the Canons of the General Church and Diocese.

6. In 1967, the Colorado legislature adopted the Colorado Nonprofit Corporation Act. Becoming effective on January 1, 1968, the Act represented a significant departure from the prior law applicable to nonprofit corporations. The Act permitted existing nonprofit corporations to choose whether to be covered by its new provisions or not by filing a "Statement of Election to Accept" the new Act. The 1923 nonprofit Grace Church and St Stephens did not file a Statement of Election to Accept. The Act had further filing requirements with the Secretary of State, even for corporations that did *not* elect to accept. The parish did not file any of those documents either.

7. Because the parish failed to file the documents required by the new Act, it became "defunct" in 1972. Then in 1973 the parish filed with the Secretary of State "Articles of Incorporation". (Def. ex. 34) They were signed by three parish priests and the vestry of the parish. The articles were filed in the name of Grace Church "&" St Stevens and contained no reference to the Diocese, the canons or the general church. At the bottom of the document is a typed statement indicating that the corporation "had existed since at least 1929". I conclude that for the reasons stated below, the filing of the 1973 document was intended to "revive" or "reinstate" the 1923 corporation and that by substantially complying with the statutory requirements, that it did so.

8. In 1974, within 8 months of creating and recording the "Articles of Incorporation", the parish corporation created new bylaws.(Def. ex. 35) The 1974 bylaws restate what had been adopted in the 1963 bylaws (Def. ex. 31). Chapter 1 of the bylaws acknowledges that Grace Church and St Stephens had been in existence since 1923. The 1974 bylaws provide for

governance of the parish corporation "subject to the General Canons of the National Church, and the Canons of the Diocese of the State of Colorado".

9. Reviewing the minutes of the vestry leading up to the creation of the 1973 articles and thereafter, there is nothing contained in them to indicate that a new corporation was being formed or that the parish was intent on distancing itself from the Diocese and general church or changing the way in which it engaged in its business.

10. In 1979, the general church adopted the "Dennis Canon" which purports to create a trust relationship in all parish property in favor of the national church and Diocese. Grace Church and St. Stephens did not formally object to implementation of that canon and the time it was created nor did it take any steps at any time since its creation, until this dispute arose, to alter the canon's purported impact on their ownership and use of property.

11. On October 15, 1987, the current parish rector, Father Armstrong was inducted as rector of Grace Church.

12. At various times between 1973 and 2006, the national church and Colorado Diocese instituted changes in doctrine and personnel that some members of the parish found offensive. In 2003 and again in 2006, the national church appointed individuals as bishops that engendered considerable angst among some members of the local parish. As early as 2003, members begin talking about some form of separation from the national church. Those members believed that the national church was violating the tenets of traditional Anglicanism. In 2003, father Armstrong encouraged the parish to remain loyal to the national church and attempt to make changes from within.

13. Between 2003 and 2006 there were debates within the parish about what the national church was doing. In response however, the vestry minutes continue to reflect continued recognition and obedience to the Bishop. In 2003, even though Grace Church and St Stephens and other parishes throughout the country had opposed the actions of the General Convention of the national church, vestry minutes of Grace Church and St Stephens reflect that the parish and the other objecting parishes "will remain within ECUSA; they will not leave the church, but will reclaim the church for conservative orthodoxy". (Ex. 234) Again in September 2004, vestry minutes state that "Grace Church has remained within jurisdictional authority of Right Reverend Bishop Robert O'Neill". (Ex. 244). Likewise, in July 2006, vestry minutes confirmed that it was acting "according to the Canons and Constitution of ECUSA" (Ex 253).

14. In 2005, Bishop O'Neill became concerned about possible financial problems at the parish. He met with Rev. Armstrong to discuss problems with the clergy pension fund. He further discovered that Grace Church and St. Stephens had procured a \$1.8 million dollar loan made by the State Bank of Barclay, without first obtaining permission from the Diocese. In response to being questioned about the loan, Rev. Armstrong assured the Bishop that the loan had been "grandfathered" by the permission given for the loan in 1989 and thus didn't require additional consent. Rev. Armstrong indicated that the loan constituted the third phase of construction that had been previously approved by the Diocese. At some point Bishop O'Neill became concerned about the possibility of financial misconduct at Grace Church and St. Stephens. Accordingly, the Bishop retained an accountant and had an audit conducted during the summer of 2006.

15. Bishop O'Neill received the results of the audit during 2006. As a result of the audit, the Bishop concluded that Rev. Armstrong had engaged in financial misconduct with parish finances. The Bishop referred the matter to a Diocesan disciplinary hearing. Rev. Armstrong did not participate in the disciplinary hearing. As a result of that hearing, Rev. Armstrong was "inhibited", which meant he was prohibited from conducting further services at the parish, going to the parish or having any contact with the parish members. Rev. Armstrong was further "convicted" of not obtaining prior approval of the Diocese before selling or encumbering parish property on a number of occasions.

16. As a result of the "inhibition" of Father Armstrong, some members of the parish felt that Grace Church and St Stephens was under attack from the Bishop. They concluded that the parish was being punished for being conservative and resisting the decisions of the national church and Diocese. Ultimately, members of the vestry began meeting with Father Armstrong and discussing the possibility of departure from ECUSA.

17. Notice was subsequently sent to members of the parish asking them to vote on the issue of whether the parish should depart from ECUSA. In March 2007 the votes were tabulated. Over 90% of those who voted approved departing from ECUSA. Those that departed maintained the name of Grace Church and St Stephens and in this suit are asserting that they have the right to keep that name and all real and personal property of the parish. They have affiliated with the Congregation of Anglicans of North America ("CANA").

18. After Bishop O'Neill was notified of the parish action, he "fired" the existing vestry and appointed a new vestry from those parish members who had remained loyal to the Bishop.

19. All real and personal property being used by the parish is titled in the name of Grace Church and St Stephens. Over the years, the local parish has made substantial improvements and upgrades to the church facility, all at parish expense. Other than a \$500 contribution in the 1800's, the Diocese has never contributed financially to the purchase or maintenance of parish property.

#### DISCUSSION:

Resolution of these issues is governed by the decision in Bishop and Diocese of Colorado v. Mote, 716 P.2d 85 (Colo. 1986) and application of the "neutral principles of law" approach. In Mote the Colorado Supreme Court first decided to apply the neutral principles approach to resolve a property dispute between the Episcopal Diocese of Colorado and the parish known as St Mary's Church. There are some striking similarities between the facts found in Mote and those that exist in this case. The Defendants have argued that the cases are legally indistinguishable and that my analysis should be simple. On the contrary, I conclude that until a Colorado Appellate Court decides that canons alone can create a trust, the Mote decision requires a much broader analysis.

The Supreme Courts of several states have in the recent past dealt with these same issues and resolved the disputes mostly in favor of the various Dioceses. Indeed, California has essentially foreclosed most future church property disputes within its state by concluding in In Re the Episcopal Church Cases, 198 P.3d 66 (Ca. 2009) that "...the general church's canons (referring specifically to the "Dennis Canon"), not instruments of the local church, created the trust." 198 P.3 at 295. In California, adoption by PECUSA of the "Dennis Canon" has, for all intents and purposes, ended the inquiry.

The Defendants have argued that my analysis can be as simple as that engaged in by the California Supreme Court. They urge, in addition to other arguments, that since ECUSA has adopted the "Dennis Cannon", there is no need for further inquiry. The Plaintiffs argue, on the other hand, that the California and similar New York cases are of no guidance to this court and are wholly distinguishable because of the statutes specifically enacted in those states to deal with the question of whether a property trust has been created within religious organizations.

While I don't necessarily agree that cases from other states are of no guidance, I feel compelled to engage in the broader analysis that seems to be required by Mote. The Dennis Canon was enacted after the Mote schism arose. The Colorado Court knew that it existed because it was quoted in a footnote. In

spite of that knowledge, our Supreme Court did not say that the Dennis Canon would foreclose further inquiry. Rather, the Court noted only that the Dennis Canon merely confirmed "the relationships existing between PECUSA the diocese and the parish of St. Mary's". 716 P.2d at 105.

The Mote court did not go so far as to say that the Dennis Canon, or any other Canon, standing alone, created the trust relationship that was found in Mote. Rather, the Court went through a very careful analysis of all documents relating to the real estate, the history of the relationship of the parties, the relevant corporate documents, the Canons and the history of St. Mary's real estate transactions before arriving at it's conclusion that a "unity of purpose...reflecting the intent that property held by the parish would be dedicated to and utilized for the advancement of the work of PECUSA" 716 P.2d at 85.

Nor did the Mote court clearly define a minimum standard for determination of whether a trust exists or not. In this case there are several instances wherein parish real property was encumbered or sold without consent or knowledge of the diocese. Those transactions would clearly be contrary to Diocesan canons and were factual circumstances not found in Mote. On their surface, the real property transactions put in place without Diocesan consent are arguably contrary to a finding of "*unity of purpose*" and thus would seem to require a more thorough analysis. While "unity of purpose" does not appear to be the minimum standard for finding the existence of a trust, the lack of unity seems under Mote to mandate the broader analysis of all attributes of the relationship and nature of real estate transactions.

### **Trust and Property Law Considerations:**

Relying on Jones v. Wolf, the Mote court indicated that a court should rely on "established concepts of trust and property law" in determining whether a trust in favor of the "general church" exists. 716 P.2d at 100. The inquiry is not restricted to a search for explicit language of express trust. "Colorado recognizes that the *intent* to create a trust can be inferred from the nature of property transactions, the circumstances surrounding the holding of and transfer of property, the particular documents or language employed, and the conduct of the parties" *Id. at page 100*.

As the plaintiffs have continually urged, the Mote court further stated that "While such an inference is not to come easily - '*clear, explicit, definite, unequivocal and unambiguous language or conduct*', establishing the intent to create a trust is required...There is no need to restrict the inquiry...other principles from the common and statutory law of property, contract, corporation or voluntary associations might be the basis for a determination that a general

church has a right, title or interest in the church property, requiring a more extensive inquiry". *Id. at p 100 – 101.*

In applying these various principles, the Mote court considered the entire history of St. Mary's, starting with the original filing of the articles of incorporation. In our case, Grace Church was organized on October 14, 1873. The minutes that were signed by 14 formers of the organization contained the following language:

*...And we solemnly promise and declare that the said Parish shall forever be held and incorporated under the ecclesiastical authority of the Bishop of Colorado and his successors in office. The Constitution and Canons of the Protestant Episcopal Church in the United States of American and the Constitution and Canons of the Missionary jurisdiction of Colorado, the authority of which we do hereby recognize and whose Liturgy, Doctrine, Discipline and Usages we promise at all times for ourselves and successors corporate obedience and conformity.*

The Certificate of Incorporation of "Grace Episcopal Church of Colorado Springs" was recorded with the records of El Paso County on October 14, 1873. It contained language that indicated that ten trustees had been appointed to "manage the temporal offices of said Church" and that the trustees had been "elected according to the Constitution and Canons of the Protestant Episcopal Church to serve until such time as their successors should be elected..."

St Stephens Church was formed on November 31, 1894. The plaintiffs have characterized the church as a "low church", more aligned doctrinally with Protestantism than a "high church" which arguably was more associated with traditional Catholicism. The articles of its incorporation are silent as to the Episcopal Church and Diocese and indicate only that "*the Corporation secures and hereby reserves to itself the right to make and adopt such prudential by-laws as it deems necessary to provide for the election of Wardens and Vestrymen and other officers and for the property government and administration in all respects of such church.*"

The two churches merged in 1923, forming "Grace Church and St. Stephen's". The new church corporation built a large church on North Tejon Street that is one of the subjects of this suit. The Affidavit of Incorporation was filed on December 21, 1923 in the records of El Paso County. It contained the following "purposes" language:

*...to administer the temporalities of The Protestant Episcopal Church in the parish...and particularly to acquire, hold, use and enjoy all of the property now held for the members of said Church..., whether the title to the same*

*be held by the parish now known as Grace Church and Parish....or by that parish now known as St Stephen's Church and parish or by any other person or persons or corporation acting for or on behalf of the Protestant Episcopal Church in the city of Colorado Springs...*

*...the corporation hereby created does expressly accede to all provisions of the constitution and canons adopted by the General Convention of the Protestant Episcopal Church in the United States of America, and to all of the provisions of the Constitution and canons of the Diocese of Colorado.*

The parish corporation borrowed to build the church. The loan was repaid by 1929 and was thus eligible for consecration. As part of the consecration ceremony, the Rector, Wardens, and Vestry of Grace Church and St. Stephens signed a document generally referred to as the "Instrument of Donation" that described the signatories as being "*the corporation holding title to the realty of the Parish of Grace Church and St. Stephens in Colorado Springs as being in possession of a House of Prayer*". The document contains the final language:

***AND we do moreover hereby relinquish all claim to any right of disposing of the said building, without due consent given by the Ecclesiastical Authority of the Diocese, according to the Canons of the said Diocese, or allowing the use of it in any way inconsistent with the terms and true meaning of this Instrument of Donation, and with the Form of Consecration hereby requested of the Bishop.***

The Plaintiff's expert asserts that the Instrument of Donation was purely ceremonial and has no legal significance under Colorado Law. I am not convinced by that assessment. Testimony at trial indicated that the Document of Donation was widely used by the Episcopal Diocese at the time. It was created in large part in response various controversies between Episcopal Dioceses and their parishes throughout the country. As a result of those controversies, the Bishop of the national church feared that real property could be used without the consent of the local Bishop. Accordingly, the Document of Donation was created to assure the Bishop's consent was obtained before property could be sold. I conclude that the document means what it says: that Grace Church gave up any right to "dispose" of the building unless the Bishop first authorized that disposition.

There are substantial similarities between the clauses created by St Mary's in the Mote case and those found in the 1923 Grace Church articles and 1929 Instrument of Donation. Clause 1 in St Mary's articles referring to the "temporalities" of the church is word-for-word the same in the Grace 1923 articles. Clause 2 of the St Mary's articles has a provision that prohibits St Mary's from incurring "**indebtedness which may alienate or encumber church**

**property without the consent...of the Diocese".** That clause does not exist in Grace Church's 1923 articles. On the other hand, Grace Church signed and delivered the 1929 Instrument of Donation in which Grace Church relinquished any right to dispose of the property without consent of the Bishop. In terms of whether a trust relationship has been created, I find little legal distinction between the two clauses.

The Mote court concluded that clauses 1 and 2 of the St Mary's articles "*strongly indicate that the local church property was to be held for the benefit of the general church, and they show the extensive nature of the policy direction and property control to be exercised by the general church. There are no provisions in the articles implicitly or explicitly expressing an intent to the contrary*". *Id at p 104*. Likewise, in our case the 1923 articles devote the use of the church "temporalities" exclusively for religious and educational functions of the "Episcopal Church in the Parish". The Instrument of Donation clearly relinquishes the right to dispose of the property without Diocesan consent. And like Mote there is no language to the contrary expressing any other intent. It is inescapable therefore that since Mote controls, that I must also conclude that the combination of 1923 articles and 1929 Instrument of Donation establishes Grace Church's intent that the property was being held for the benefit of the Diocese of Colorado.

Looking to current trust law, the *Restatement of Trusts 3d*, section 22, indicates that in order to create a trust on real property there must be a writing that a) manifests the trust intention, b) reasonably identifies the trust property, c) reasonably identifies the beneficiaries and d) reasonably identifies the purpose of the trust. The 1923 articles of incorporation, 1929 Instrument of Donation and the conclusions reached in Mote support the finding that a trust for the benefit of the Diocese had been created. Ignoring in this portion of the analysis the impact of the Episcopal Canons, the trust thus created does not vest title in the Diocese upon the departure of Grace Church and St Stephens from the control of PECUSA. Rather, the trust gives the Diocese the right to first approve any property transfer made by Grace Church and St Stephens.

In August of 1963, the vestry amended the Parish Corporation's bylaws. The amended bylaws acknowledge the continuity between the 1874 corporate entity, the 1923 corporation and Grace Church and St Stephens in 1963. They further indicate that the By-Laws were being amended "*to provide for the proper government of the Church, subject to the General Canons of the National Church, and the Canons of the Diocese of the State of Colorado*."

In 1967, the Colorado legislature adopted the Colorado Nonprofit Corporation Act. Section 7-20-105 of that Act provided that any corporation formed before 1968 had to (1) file annual corporate reports with the Secretary of

State and designate a registered agent and (2) to file a copy of the "nonprofit corporation's articles, affidavit of incorporation or other basic corporate charter, by whatever name denominated" with the Secretary of State. Failure to comply would result in the Corporation becoming "defunct". Subsection 8 of that provision further provided that any corporation that became "defunct" for five years was "dissolved by operation of law". In such event, CRS 7-26-120(2) provides as follows:

*...after dissolution, title to any corporate property not distributed or disposed of in the dissolution shall remain in the corporation. The majority of the surviving members of the last acting board of directors as named in the files of the secretary of state pertaining to such corporation shall have full power and authority...to hold, convey, and transfer such corporate property, ...Final disposition of such property shall be made by the majority of the surviving directors in the manner provided in section 7-26-103.*

Grace Church and St Stephens did not file any documents with the Secretary of State until 1973. Thus, as of January 1<sup>st</sup> 1972, the nonprofit corporate entity Grace Church and St Stephens became "defunct". On June 13, 1973, Robert Gotchey, the business manager for Grace Church and St Stephens, had the Vestry of the church, the Rector and Wardens sign plaintiff's exhibit GCSS 0003 and then forwarded it for recording with the Colorado Secretary of State. It was recorded on June 25<sup>th</sup> 1973. It purported to be "Articles of Incorporation" of "Grace Church & St Stephens". It contained very little information regarding the entity's purpose, had no mention of the Episcopal Church of the United States or the Diocese and contained none of the language found in any of the prior articles of incorporation concerning adherence to church canons. At the bottom of the document is the written note that **"Grace Church & St Stephen's has been incorporated at least since 1929"**.

The intent and effect of the 1973 articles was the single most hotly contested issue of the trial. The Plaintiffs argue that it created a new corporation that did not "accede" to the canons of the Episcopal Church and Diocese and that likewise had no limitations regarding the disposition of the real property. The Defendants on the other hand argued that the 1973 articles merely revived or reinstated the 1923 corporation, or at worst, did nothing.

Because of the clear ambiguity created by the language that "Grace Church & St Stephens has been incorporated at least since 1929", I allowed parole evidence regarding the intent of the parties. One former vestry member, Dr. Jones indicated that he felt they were creating a new corporate entity and basically starting over. Father Hewitt, the parish Rector at the time, had no memory of any new corporation being formed. He indicated that no substantial changes to their church business or the manner in which they conducted it was being considered. He clearly indicated that nothing had changed in the

relationship between the parish and the Diocese. He and most of the other witnesses to the event had no clear memory of what the document meant, other than to say that a "problem" was being addressed by signing the document and that filing it would solve the problem. The document was not prepared by a church lawyer.

I am convinced that the signatories to the document felt they were merely curing a "problem" in the 1923 corporation. The "problem" being "fixed" by the 1973 articles was that the 1923 corporation had become defunct by not filing the information required by Colorado's new nonprofit corporation Act. The parties presented the minutes of vestry meetings that occurred before and after the preparation of the 1973 articles. There is nothing in those minutes that indicate that a new corporation was being formed or even considered. Nor was there any mention of any extraordinary dissatisfaction with the Diocese or a need to create some form of separation from the Episcopal Church and Diocese. In fact, no mention of the 1973 articles is mentioned at all. There is no evidence that any of the signers felt the need to start a new corporation, or if they did, that it would change anything about Grace Church and St. Stephens. On the contrary, in 1974, the Vestry adopted bylaws that were admitted as defense exhibit 35. Like the 1963 bylaws, the 1974 bylaws recited the following:

*Grace Church and St. Stephens became a body politic and corporate under date of December 19, 1923, pursuant to the provisions of what is now Article 21 of Chapter 31 of the Colorado Revised Statutes. Such incorporation was accomplished for the purpose, among other things, of merging the Parishes of Grace Church and St. Stephen's in the City of Colorado Springs. Prior to such consolidation, under date of May 27, 1874, the Parish incorporated as "Grace Church at Colorado Springs"...the following By-laws are adopted to provide for the proper government of the Church, **subject to the General Canons of the National Church, and the Canons of the Diocese of the State of Colorado.***

While the 1874 and 1923 corporations were clearly mentioned in these 1974 bylaws, there is no mention of a new corporation being formed in 1973. Likewise, there is no evidence that property of the 1923 corporation was transferred to a 1973 corporation or that such a necessity was ever discussed. Without some evidence of transfer, all corporate property would remain owned by the 1923 corporation.

I am convinced that the Vestry, Rector and Wardens in 1973 believed at the time that signing and recording the document would "revive" or "reinstate" the 1923 corporation and keep it from being "defunct". Absolutely nothing to the contrary was presented except the testimony of Dr. Jones. There are no vestry minutes to support a decision to form a new corporation, property transfers into

the 1973 corporate entity, or behavior that is consistent with the existence of a new, and according to the plaintiffs, more independent corporate entity that had shunned its former attachment and loyalty to PECUSA or the Diocese. Though intent is not usually the determinative factor in deciding whether a new corporate entity was formed, it must be given considerable weight in this case because of what transpired when the '73 articles were prepared and the parish's conduct thereafter. That evidence can only be seen as consistent with the belief that the nonprofit corporation Grace Church and St Stevens had remained active and unchanged.

I find the following evidence further supports this conclusion:

First, it is clear that the Vestry and Rectors were trying to "fix" a corporate problem with their existing 1923 corporation and not create a new entity. The reference at the bottom of the "Articles of Incorporation" to ***Grace Church and St Stephens has been incorporated since at least 1929*** recognizes the existence of the 1923 corporation and supports the conclusion that the Vestry and Rectors wanted to keep that entity in existence. The minutes of vestry meetings and the use of corporate property thereafter all support the finding that the Parish felt that nothing had changed when the 1973 articles were filed.

Second, the 1923 Corporation was at all times the owner of the real and personal property. When Grace Church and St. Stevens was formed, it took title to all real property owned by the two then existing entities of Grace Church and St. Stevens church. No similar property transfers into 1973 corporation were ever documented. Had the Vestry of Grace Church and St Steven intended that a new corporation was being formed, it would have been a simple matter to quit claim the property into a 1973 corporation and reflect the same in its articles. Absent such a transfer, there is no legal mechanism by which property would have transferred into a new corporation.

The Plaintiff's expert, Mr. Fischer testified that the 1973 articles reflect the creation of a corporation that "replaced" the 1923 corporation and that the new corporation essentially took possession of the church property and then began to deal with it as its own. Thereafter, legal title passed over to the new corporation by adverse possession. There is no evidence to support that theory. To obtain title by adverse possession, a party must establish that his possession was actual, adverse, hostile, under claim of right, exclusive and uninterrupted. Smith v. Hayden, 772 P.2d 47 (Colo. 1979). To merit the presumption, the use must be sufficiently open and obvious to apprise the true owner, in the exercise of reasonable diligence, of an intention to claim adversely. Hodge v. Terrill, 228 P.2d 984,988 (Colo. 1951).

When the Vestry filed the 1973 Articles of Incorporation, they did not believe they were creating a new corporation. Therefore, the 1973 "corporation" could not have been using the property in an open manner, hostile to the ownership of the 1923 corporation. It is clear that the Vestry and Rectors felt in 1973 that nothing had changed. The evidence established that Grace Church and St Stevens went about its business in exactly the same manner that it always had. Therefore, vestry member would have no reason to know that the property was being encumbered or alienated out of the 1973 corporation, rather than the 1923 corporation, who still maintained ownership. Thus, there could be no transfer of title by adverse possession.

Likewise, Mr. Fischer opined that transfer from the 1923 corporation to the 1973 corporation occurred as an exception to the Statute of Frauds. CRS 38-10-108. His opinion was that there was "part performance" of a contract that excluded it from coverage of the Statute of Frauds. Absent some actual agreement to transfer the property, however, there could be no part performance under CRS 38-10-110. Brown v. Johanson, 194 P. 943 (Colo. 1920). No evidence was presented to prove that the Vestry of the 1923 corporation had agreed to transfer the property from the 1923 corporation to the 1973 corporation. Therefore, there could be no "part performance" that would take a property transfer out of the Statute of Frauds. Since there is no evidence of a transfer or of any intent to engage in a transfer, there could have been no transfer of corporate property from the 1923 corporation to the 1973 corporation. Thus, any purported transfer of real property is void as a violation of the Statute of Frauds.

Third, even if there had been some form of transfer of property from the 1923 corporation to the 1973 corporation, the property would still be subject to the trust interest created for the benefit of the Diocese. Merely transferring property subject to a trust does not change the nature of the trust. The new trustee would take the property subject to the same conditions as those imposed upon the original trustee. Nor do I find, as the plaintiffs argue, that creating a new corporation would constitute a repudiation of the trust. In order for a trustee to repudiate a trust, the trustee must, by word or action, show an intention to abandon, renounce or refuse to perform under the trust. First National Bank of Denver v. Rabb Foundation, 479 P.2d 986 (Colo. App. 1970). Repudiation of a trust must be sufficient to put the beneficiary on notice of the repudiation. 54 ALR 2d 28, cited in Hodny v. Hoyt, 243 NW 2d 350 ( N.D. 1976). There must be a showing of plain, strong and unequivocal renunciation of the purposes of the trust. 76 Am. Jur. 2d Trusts, p 798.

In light of the fact that Grace Church and St Stephens continued to go about its business in the same manner as before the 1973 Articles were recorded, one cannot conclude that filing those articles renounced the trust

relationship with the Diocese. Accordingly, for all of the above reasons, I conclude that filing the 1973 articles merely "revived" or "reinstated" the 1923 corporation Grace Church and St Stephens. Therefore, any trust relationship that existed for property held by the 1923 corporation continued past 1973.

### **Affect of Canon Law:**

From the beginning of its existence, and up until the time that this dispute took shape, the nonprofit corporation Grace Church and St Steven has in numerous ways acknowledged that it was bound and governed by Canon law. Its founding articles of incorporation recite its relationship to the constitution and canons of PECUSA and the canons of the Diocese of Colorado. The bylaws adopted during various times throughout its existence all recite that the corporation was bound by Canon law. In 1974 the corporate bylaws stated that that its rules were being adopted to "provide for the proper government of the Church, **subject to the General Canons of the National Church, and the Canons of the Diocese of the State of Colorado.**"

Application of Canon law has always been difficult for secular courts. For one thing, it appears to be rare that parish members, including members of the governing Vestry, know anything about the details of Canon law. In fact, Bishop O'Neil testified that no one expects church members to know much about the Canons. That testimony is consistent with what was testified to by lay members of the parish; all of whom said they knew little or nothing about the canons. Thus, when the parish executes a document that pledges fidelity to canon law, it does so without members of the parish having actual knowledge or understanding of what it is that is being adopted.

For another, canons are essentially created and imposed unilaterally. They appear always to have been adopted at the National Convention. Once they are adopted, they are imposed on all parishes through publication in the Episcopal Book of Canons. Even though the board that recommends changes to canons is made up of representatives from individual parishes, the canons are still ultimately imposed upon individual parishes from the hierarchy of bishops. Application of canon law is based ore upon membership in the Episcopal Church than it is upon adoption through a democratic process where all individual church members participate.

The perceptual legal problem with this procedure is the one argued by these Plaintiffs and those in other schism cases: that under a "neutral principles" analysis, it is difficult to understand how unilaterally imposed canons can create a legal trust relationship. While the canons form the basis for governance within the Episcopal religion, they are usually unknown to all but the clergy and they don't create a trust relationship in the manner one normally comes to expect.

Unlike the secular "norm", the canons purport to create a trust through a process that is the opposite of most estate situations. That is, the trust is created by the beneficiary of that trust and is imposed unilaterally on the settlor/trustee.

Having stated those secular reservations, it is clear from Mote and Wolf that the non-doctrinal sections of the canons are to be given close consideration under neutral principals. The opinions in both cases further support the proposition that the intent element of trust relationship can be established by the contents of canons.

It was the opinion of the plaintiffs' expert, Ms. McReynolds, that in order for a church canon to have legal impact on a property determination, it must either be clearly enunciated in the articles of incorporation or bylaws or be otherwise supported by a state statute that gives legal force to the canon's application to a property dispute. In stating that conclusion, Ms. McReynolds relied upon the decisions rendered by the California and New York Supreme Courts.

I am not convinced that the Mote opinion would justify giving such a restricted application to the impact of canon law in a neutral principles analysis. The United States Supreme Court in Jones v. Wolf, 443 U.S. 595 ( 1979) gave what appears to be a simple prescription under "neutral principles" to avoid protracted property litigation with the following language:

*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 deed or 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 is 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. 443 U.S. at 605***

The Wolf court did not require that the change to the constitution of the general church be supported by a statute. Nor did they preclude the possibility that such a change to the constitution could stand alone and create a trust. In fact, I found convincing the opinion testimony of the defendants' expert Mr. Chopko that the above language from Wolf was added as a response to criticism by the Court's dissenters. The dissenters argued that any change from the traditional "compulsory deference" approach taken by courts following Watson v. Jones would impose a considerable burden on existing churches to change their constitution, charter and deeds. The dissent maintained that churches would be required to add language of polity to foundational documents or instruments of

conveyance and further force the trial courts to decide matters of polity. On the contrary, Mr. Chopko testified that the Wolf majority was emphasizing how minimal the intrusion on church business the "neutral principles" approach would be.

Taken in the context in which the above quote was made, it is clear the language must be taken to mean just what it says: that by merely changing the general churches' constitution, an express trust in favor of the general church can thereby be created. The Wolf court did not define what it meant when they indicated that the trust language must be "embodied in some legally cognizable form". I conclude that what they meant was that the language cannot be hidden from church members or so intertwined with ecclesiastical matters as to force a court to be making doctrinal decisions. With that understanding of the definition I conclude that the canons of the Diocese and ECUSA are "legally cognizable". I further conclude that there is no condition precedent to enforcement that the trust created by a change to the constitution be supported by an enabling statute or otherwise contained in foundational documents.

PECUSA adopted Canon 1.7.4 as part of the "Constitution and Canons of the Episcopal Church" in 1979. It is commonly referred to as the "Dennis Canon" and it is the canon at the heart of this litigation. Testifying on behalf of the Diocese, Mr. Royce stated that he had been on the canons committee following the announcement of the decision in Jones v. Wolf. He stated that the Dennis Canon had been proposed by Walter Dennis, in direct response to the Wolf decision, as an easy way to simplify property disputes in the future. The Dennis Canon reads as follows:

*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. The existence of this trust 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.*

Further, Canon 1.7.3 provides:

*No Vestry, Trustee, or other Body, authorized by Civil or Canon law to hold, manage, or administer real property for any Parish, Mission, Congregation, or Institution, shall **encumber or alienate** the same or any part thereof without the written consent of the Bishop and Standing Committee...*

The California Supreme Court decision in In re the Episcopal Churches, supra, has simplified the analysis in their state to looking at the canons alone.

Unfortunately at the time Mote was decided, the Dennis Canon had not yet been adopted. The court acknowledged in foot note 15 of the opinion that the canon had been adopted by PECUSA, but found it inapplicable to the St Mary's case. The Mote court did not go so far as to say that the Dennis Canon, standing alone, would create a trust, but merely indicated that the canon "did nothing but confirm the relationships existing among PECUSA, the diocese and the parish of St Mary's" 716 P.2d at 105.

The Mote court recited other canons that are applicable in our case as well, including the above quoted Canon 1.7.3. Those other canons applicable in our case include canons 6, 12, 17, 18 and 21. Even with no Dennis Canon to rely upon for a trust, the Mote Court concluded that canons 6, 12, 17, 18 and 21 each constitute "another strong example of control over property ceded by the local church to the diocese and is further indicative of the intent of the local and the general church to maintain integrity in the ownership and use of property at the parish level for PECUSA purposes." 716 P.2d at 107

While the Mote court did not go so far as to say that adoption of the Dennis Canon would end the inquiry, it is clear that the Dennis Canon would add additional and considerable weight to the conclusion that a trust for the benefit of PECUSA and the Colorado Diocese had been established. Accordingly, I conclude that the canons impose a much broader trust in favor of the general Episcopal Church, and further they expand the one put in place by the 1923 corporation articles of incorporation and Instrument of Donation.

The canons prohibit Grace and St Stephens from disposing of any real or personal property belonging to it without the consent of the Diocese. The canons further impose an obligation on the parish to first obtain consent of the Diocese before "alienating or encumbering" any parish property. The fact that members of the parish Grace Church and St Stephens had no knowledge of the contents of the canons would apparently be of no import to either the Wolf court or the court in Mote. Accordingly, I further conclude that it is of no consequence in this case. One must assume that by becoming a member of a corporate nonprofit that has acceded to Episcopal canons, the member is subject to them all, whether they are known to the member or not. The law of "voluntary associations" would support such a conclusion. *See eg. Jorgensen Realty, inc., v Box*, 701 P.2d 1256, 1257 (Colo. App. 1985).

### **Property Transactions Inconsistent with Terms of Trust:**

The central theme of the plaintiff Grace Church and St Stephen's assertion that it owns all parish property is that the parish was historically independent of the Diocese, that it made its own decisions on virtually all issues and most importantly, that it didn't require the approval of the Diocese before it

encumbered or sold parish property. Thus, it argues alternatively that either no trust exists, or in the alternative, if a trust was found to exist, that in the words of Mr. Fischer, "the trust was revocable and it has been revoked".

The Mote decision mandates review of property transactions and the context in which they occurred to determine whether they are inconsistent with the existence of a trust relationship. The Court stated that "*an exercise of unbridled control over church property by the local church corporation would conflict with several provisions in the PECUSA and diocesan canons*". P105. While neither defining "unbridled control" nor indicating what impact a finding of something more than *no* control but less than "*unbridled*" might have on the analysis, it seems to be left to common sense and a totality of the circumstances determination.

Indeed, the history of property sales and encumbrances by Grace Church and St Stephens is anything but consistent as it relates to abiding by canon law. Prior to 1975, the parish complied with the requirement to first obtain Diocesan approval before selling or encumbering property. After 1975, the parish sought permission to borrow and encumber on some occasions, but did not in others. The parish bought and sold rectories on at least three occasions without permission of the Diocese. The parish sold Thunderbird Ranch in 1992 without permission, even though they sought and obtained permission to encumber (and perhaps to sell) the property on a prior occasion. On each occasion that they encumbered a "mission church", the parish first obtained consent of the Diocese.

Each party has submitted a summary of transactions and indications in each instance where consent was obtained or not. There is some factual disagreement in one or two of the instances. Exact resolution of that dispute is not necessary however. What is critical is that I don't find these transactions, whether approved or not, indicate "any intent to defy or disobey the Diocese" as the Mote court stated when it examined similar issues in the St Mary's case. 716 P.2d at 106.

I reach that conclusion because I find that members of the vestry, not knowing what the canons dictate, would not have known of any obligation to seek Diocesan approval. Virtually all lay persons who testified in this case, whether for the plaintiff or defendants, indicated that they didn't know the particulars of canon law. The Bishop testified that the members were not expected to know and understand the canons. Since no approval mandate was contained in the articles of incorporation or bylaws, I conclude that parish members would have no way of knowing about the canon requirements. Unless, that is, they were informed by a member of the clergy that permission was needed. It is of little surprise then that the members of the vestry would not seek Diocesan approval before selling or encumbering property. Moreover, in

each of those instances where Diocesan approval was not obtained, the Bishop indicated that the Diocese had no knowledge of the transaction. Thus, it cannot be successfully urged that the Bishop knowingly waived the benefit of the trust relationship.

If members of the vestry knew of the canon obligation to obtain Diocesan approval and were defying the Bishop, one would expect to find some reference to that defiance in some parish record. In each of the real estate transactions where permission was not obtained, there are no records to indicate that the vestry had decided that Diocesan consent was required. In fact there are no parish records indicating *any* discussion of consent, whether it was obtained or not.

There was one critical instance in which Diocesan approval was obtained that adds weight to my conclusion that vestry members just didn't know. That instance came about when the parish borrowed \$ 1.25 million in 1989 – 1992 to make renovations to the church building. Seeking permission from the Diocese would certainly be in conformity with the requirements of the canons. In addition to being in conformity with canon requirements, the act of requesting consent from the Diocese would also be contrary to the plaintiff's assertion that the parish had no obligation to obtain consent to sell or encumber property. It is also important to the outcome of my analysis because it involves a situation in which the question of how the parties mutually intended that control over the parishes' most significant real estate, the church, would be exercised. One can reasonably conclude from this instance alone that both parties understood that the parish would not encumber the church without Diocesan consent.

Rev. Armstrong testified that he did not initially obtain approval for the loan, because he didn't feel he needed permission from the Diocese. However, he was contacted by members of the Diocesan staff who indicated that it was required. He said that after receiving the call, he agreed to seek approval by having the parish apply for it. When he went to the senior warden, "Unk" McWilliams to have McWilliams sign a request for approval, he was angrily chastised by the warden. According to Rev. Armstrong, Mr. McWilliams criticized Rev. Armstrong for agreeing to seek approval. According to Rev. Armstrong, Mr. McWilliams indicated that the parish didn't need Diocesan approval before the parish improved or sold parish property because it was owned and controlled in all respects by the parish. He further stated that the construction was well under way anyway and that the Diocese failed to follow up with later oversight envisioned in the grant of approval.

I conclude that Rev. Armstrong's testimony regarding this incident is unconvincing. First, it is contrary to the testimony given by others that Mr. McWilliams was devoted to the Episcopal Church and Diocese and would always

follow the dictates of that hierarchy. Second, Mr. McWilliams has passed away and cannot speak for himself. Third, it is clearly self-serving and surrounds an instance which is critical in examination of who has ultimate control and ownership of the property. Fourth, if Grace and St Stephens parish was truly independent and felt that there was no obligation to obtain Diocesan approval for major encumbrances, it logically would have rejected the request for approval and been open about it. If Mr. McWilliams felt the Diocese had no right to expect the local parish would seek approval what better time would there have been to assert that independence than when the parishes' biggest asset is at issue? Mr. McWilliams was a bank trust officer who understood the legal significance of providing such consent. It would be logically inconsistent for a knowledgeable businessman and banker to believe the Diocese had no right to approve parish financing and yet to seek it none-the-less.

Obtaining consent for such an encumbrance, no matter what the circumstances, was an admission by Rev. Armstrong that he knew that consent was required at the time. Further, Rev. Armstrong's answers given in 1988 to written parish questions are also consistent with his knowledge that the Diocese controlled parish property. In response to those written questions, Rev. Armstrong informed the parish that the Diocese basically owned all of the parish property.

Last, Bishop O'Neil testified that he had confronted Rev Armstrong in 2005 about an encumbrance on the church that had been obtained without Diocesan consent. Rather than tell the Bishop that permission was not required, Rev. Armstrong told the Bishop that the encumbrance was part of the loan that had been approved by the Diocese in 1989. That was not true, but that is not the point. It demonstrates that Father Armstrong was aware of the canon obligation to obtain consent when selling or encumbering parish property.

The Diocese later accused Rev. Armstrong of not disclosing or seeking permission of the Diocese for a number of sales and encumbrances for Grace Church and St Stephens property.

Based upon a review of the testimony and various real estate transactions, I conclude that the vestry of Grace Church and St Stephens did know of the canon obligation to first seek approval before "alienating or encumbering" property. Likewise, the vestry undoubtedly knew little or nothing of the Dennis canon by which all parish property had been set aside in trust to the Diocese. Thus, I conclude that the parish real estate transactions were not an act of defiance or an indication of independence from the Diocese. Rather, the vestry apparently sought permission when a member of the clergy told them they needed it, but otherwise did not. The transactional history may demonstrate

Rev. Armstrong's defiance of the Bishop and canon law, but not defiance from the parish.

Even if the parish sold or encumbered parish property with knowledge that such conduct violated the canons, that defiance would not be enough to renounce the trust relationship. In order to repudiate a trust, the act of repudiation must be sufficient to put the beneficiary on notice of the repudiation. 54 ALR 2d 28 and Hodny v. Hoyt, *supra*. At a minimum, the Bishop would have to be made aware that the parish was violating the obligation to obtain consent. On the contrary, Bishop O'Neill indicated he was unaware of the unapproved real estate transactions. On the other hand, if "Unk" McWilliams had answered the Diocese's demand in 1988 that the parish submit a request for approval with "no, we don't need your consent", that could be viewed as a clear renunciation of the Diocese's belief that it had the right to approve of all real estate loans and sales.

Therefore, I conclude that the parish real estate transactions that went forward without Diocesan consent do not constitute renunciation of the trust for the benefit of the Diocese, nor do they constitute proof of any intent contrary to maintenance of a trust relationship.

#### **Church History Consistent with Trust Relationship:**

The Mote court recited the history of the relationship between St Mary's and the Diocese as additional evidence of the intent to devote all parish property to the ultimate control of the Bishop. In our case the plaintiffs have asserted that Grace Church and St Stephens was an independent parish that resisted control of the Bishop and treated parish property as its own, not subject to Bishop oversight. The totality of the evidence presented does not support that argument.

The 1873 foundational document recites that the original members pledge that they were "constitutionally attached to the Doctrine, Disciplines, and worship of the Protestant Episcopal Church in the United States and being earnestly desirous of establishing its authority..." They "promised" that the parish would "forever be held and incorporated under the ecclesiastical authority of the Bishop of Colorado and his successors". They further promised corporate obedience and conformity to the Constitutions and Canons of the Church, nationally and in the jurisdiction of Colorado.

In the 1923 articles of incorporation, the two churches Grace and St Stephens were united. As indicated in quotes above, the 1923 corporate church pledged loyalty and obedience to the national church and the Bishop of Colorado. It again recited its duty to obey the canons of the general church. As indicated above, the preparation and recording of the "1973 articles of incorporation" merely revived or reinstated the then-defunct 1923 nonprofit corporation Grace

Church and St Stephens. The 1974 and 1975 bylaws renew the pledge contained in the 1963 bylaws to be governed by the Constitution and Canons of the general church.

Historical documents of the church and evidence presented at trial are replete with examples of parish involvement in the activities of the Diocese. The Rector or Co-Rector attended the Annual Convocation, Council, or Convention of the Diocese of Colorado 87 times since its founding, including at least 14 times since 1973. The Parish sent delegates to the Annual Convocation, Council, or Convention of the Diocese of Colorado 94 times since its founding, including at least 25 times since 1973. Grace Church and St Stephens sent delegates to the Conventions of the Diocese almost every year from 1872 through at least 2006. Parish delegates went to the General Convention on 28 occasions. **Grace Church and St Stephens hosted Annual Conventions of the Episcopal Church during 1941, 1953, 1974 and 1994.** Members of the parish have joined Diocesan boards, have served on numerous Diocesan committees and held governing positions in the Diocese and national church. (See Woodward Affidavit and Summary, Def. ex. 5 and Bishop O'Neil Summary).

There is evidence that Bishops frequently visited the local parish. On each occasion that a new Rector was installed, the Bishop would preside over the formal ceremony of installation. When Father Armstrong was installed as the Rector, the Bishop presided over that installation before the entire congregation. Adherence to canon law was pledged during the installation. The Bishops made numerous visits to the local parish to oversee the running of the parish and to visit the various Rectors.

The parish pledged financial support to the Diocese. It appears that the parish has given money to the Diocese during each year of its existence.

When the various doctrinal disputes arose during Father Armstrong's tenure, there were various parish discussions about what the appropriate parish response should be. Separation from the national church was one of the alternatives discussed. In 2003 Father Armstrong urged the parish to "remain within ECUSA; they will not leave the church but will reclaim the church for conservative orthodoxy". (Ex. 234). Later he wrote to members, indicating that "I am bound to uphold these positions by the Constitution and Canons of our Church". (Ex. 238.) Those statements are clearly inconsistent with the assertion of parish independence of the Diocese.

The defendants called past rectors and church members to describe the conduct of the local parish and its relationship to the Diocese. Father Hewitt and Father Burton served as clergy during the 70's and 80's. They indicated that Grace Church and St Stephens had a close relationship with the national church

and Diocese; one that was no different than any other parish in which they had previously served. They saw no indication of defiance of the Bishop or of the local parish having any notable independence from the Diocese. Professor Timothy Fuller testified that he was a past vestry member and that he was never aware of the parish asserting any independence from the Diocese until the disputes in 2006 came to a crisis point. I find the testimony of these three witnesses most convincing as an indication of the loyalty of the parish to the Diocese until the disputes arose.

From the time of its formation, Grace Church and St Stephens has always held itself out as an Episcopal church and part of the greater national church and Diocese of Colorado. That statement of attachment can be found in its corporate documents, minutes of meetings, signage, letterhead and announcements. None of the evidence presented would support that it was independent of the ECUSA or the Diocese of Colorado. Nor is there any significant factual support for the plaintiff's assertion that the parish was a member of the general church and loyal to it in matters of faith, but not in temporal matters. Absent proof that the parish exercised "unbridled control" over their real property, or that the corporate and real property records reserved ultimate ownership and control over the property, no such partial membership can be found.

Before the dispute in this case came to a head in the time frame of 2005 – 2006, the history of Grace Church and St Stephens parish, is not substantially different than the history of the relationship between St Mary's and the Diocese in Mote. The Grace Church and St. Stephens parish has a 135 year relationship with the Diocese. It participated vigorously in all Diocesan activities. I find convincing the testimony of those witnesses that said the local parish had the same relationship with the national church and Diocese as all other Episcopal parishes. Doctrinal disagreements do not constitute independence or open defiance. Therefore I conclude that the history of the parish Grace Church and St Stephens supports that it was not independent of the Diocese but was as much involved as any other parish.

The history of Grace Church and St. Stephens is consistent with the founding documents, the Instrument of Donation and the canons that all parish property was held in trust for the benefit of the Diocese and general church.

**Summary:**

When property disputes arise out of church schisms, the courts must apply law that has been uniquely crafted to analyze the disposition of that property. In this case, I have closely considered the Plaintiff's evidence, indicating that the parish is the record owner of all parish property; that the parish has constructed substantial improvements, maintained and kept that

property in good repair at its own expense without any financial assistance from the Diocese for approximately 135 years; that the parish has contributed approximately \$770,000 to the Diocese over the years and that the parish has contributed loyalty, effort and assistance to the Diocese as long as the parish has been in existence. But the Wolf and Mote cases mandate that I look at the entire history of the relationship to determine whether the members of Grace Church and St. Stevens have demonstrated a "clear, explicit, definite, unequivocal and unambiguous" intent to give over control, and in certain circumstances, ownership of parish property. Indeed, the disposition of this parish property has been determined not by what has occurred in the parish and diocese in the last ten years, but what has been shown to be the general desires of all parish members since the time of the creation of this nonprofit church corporation.

I find and conclude that, like Mote, the founding documents, various bylaws, relevant canons of the general church and consistent parish loyalty to the Diocese over most of its 135 year existence demonstrate a **unity of purpose** on the part of the parish and of the general church that reflects the intent that all property held by the parish would be dedicated to and utilized for the advancement of the work of ECUSA. While freedom of religion recognizes the right of any faction within a church to leave that church whenever they choose, the trust that has been created through past generations of members of Grace Church and St. Stephens prohibits the departing parish members from taking the property with them.

I further conclude that appointment of rector, warden and vestry is a matter within the exclusive dominion of the Bishop. Accordingly, I must give deference to those appointments, except that as it relates to the use of the property in this dispute, that deference is accorded as of the date of this order.

**ORDER:**

1. Based upon the above analysis, I hereby order that the Defendants' request that title to all property owned or held under claim of ownership by the parish Grace Church and St. Stephens be quieted be granted. I hereby **order** that title and ownership of all said property is vested in the Episcopal Church of the United State and the Diocese of the State of Colorado. This order is effective as of today's date. I further **order** that the Bishop's appointment of new parties to govern the affairs of the parish Grace Church and St Stephens, as it relates to control of parish property, is likewise effective as of today's date.
2. The real property affected by this order is described in **Attachment 1** to this ORDER.

3. The disputed property includes all personal property of the Episcopal parish, Grace and St. Stephens's Episcopal Church, and of its parish corporation as of March 25, 2007 including, without limitation, all bank, savings and loan, credit union, brokerage, and other financial accounts as of that date.
4. The disputed property includes the website and domain name, <http://www.graceandststephens.org> and the employer identification number 84-0404258.
5. The disputed property also includes the common law trade names: Grace Episcopal Church, Grace Church, St. Stephen's Church, Grace and St. Stephen's Episcopal Church, and Grace and St. Stephen's Episcopal Parish and the versions of those names using an ampersand instead of "and".
6. The filing of the Articles of Incorporation in 1973 reinstated the 1923 nonprofit corporation effective June 23, 1973.
7. The plaintiffs shall immediately cease all use and relinquish all possession, control, and dominion over the disputed property. The Court shall issue a Writ of Restitution.
8. The plaintiffs shall within 30 days provide the defendants with all books, records, copies of checks, statements, invoices and any other documents belonging to or affecting the parish.

**SO ORDERED, THIS 24<sup>th</sup> DAY OF MARCH, 2009.**



**LARRY E. SCHWARTZ**  
**District Court Judge**

**Individual Counterclaim Defendants:**

There remain counter claims against individuals who formerly served as vestry, wardens and rectors of the parish. This quiet title order means that trial of those matters can conceivably go forward. However, in an effort to streamline the process before it becomes too involved, I suggest the parties discuss disposition of the remaining claims.

My concerns regarding the remaining claims are as follows: Claims of trespass, theft, conspiracy and the like all revolve around the notion that the offending party had no authority to use the property of another. For instance, to prove civil trespass, the Bishop would have to prove 1. property ownership by the Bishop and 2. intentional trespass. Permission or consent is an affirmative defense. Having now heard five weeks of testimony and reviewed in excess of 3,000 documents I am at somewhat of a loss to understand how those claims can be maintained. The parish held legal title to all of the property subject to the Bishop's "equitable" claim of trust. The counterclaim defendants represented the majority of the parish and had a reasonable basis to conclude that they had the absolute right to use the property. That reasonable belief extended up until I entered this order to the contrary.

Its clear that most of the documents relied upon by the defendants in their successful bid for quiet title were discovered only during the course of this litigation. The Instrument of Donation was apparently discovered well after the case was filed. The Bishop admitted that parish members are not expected to know what the canons say. In other words, members of the parish would have little or no reason to know that they didn't have legal authority to remain on the parish property.

I suggest the parties have serious discussion about resolution of the remaining claims. If they cannot be resolved they may file such motions as they deem necessary.

Done this 24 day of MAR, 2007

  
LARRY E. SCHWARTZ  
District Court Judge

cc:

counsel of record

**ATTACHMENT 1 TO PROPERTY ORDER:**

Real Property Subject to Order:

- a. Lots 1, 2 and N. 50 Feet Lot 3, Block, 22 Add. 1 to City of Colorado Springs, known commonly as 631 N. Tejon Street, Colorado Springs, CO 80903;
- b. S. Half of Lot 2, known commonly as 631 N. Tejon Street, Colorado Springs, CO 80903;
- c. N. Half of Lot 3, known commonly as 631 N. Tejon Street, Colorado Springs, CO 80903
- d. S. 50 Feet of Lot 3 and N. 10 Feet of Lot 4, Block 22, Add. 1 to the City of Colorado Springs, known commonly as 631 N. Tejon Street, Colorado Springs, CO 80903;
- e. W. 115 Feet of S. 90 Feet of Lot 4, Block 22, Add 1, to the City of Colorado Springs, known commonly as 601 N. Tejon Street, Colorado Springs, CO 80903;
- f. W. 50 Feet of Lot 8, Block 22, Add. 1 to City of Colorado Springs, known commonly as 117 E. Monument Street, Colorado Springs, CO 80903; and
- g. Lot 10 Skyway Northwest No. 3 Filing No. 4, known commonly as 3025 Electra Drive, Colorado Springs, CO, 80906.