

### *Section 2 – Property*

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This Section covers a wide variety of property matters in a general manner. It begins with a discussion of Presbyterian Church (U.S.A.) property provisions. These are found in Chapter **Four** of the *Book of Order*, The Church Civil Authority.

**Remember: Almost all property matters are governed by state law. An attorney familiar with your state’s property law should be consulted on property issues and matters.**

#### **A. The Presbyterian Church (U.S.A.) and Its Property**

The *Book of Order* Chapter Four is relatively brief, but it sets out very important provisions in the life of the Presbyterian Church (U.S.A.). These property provisions include:

- Property as a Tool for Mission G-4.0201
- Decisions Concerning Property G.4.0202
- Church Property Held in Trust G-4.0203
- Property Used Contrary to Constitution G-4.0204
- Property of a Dissolved or Extinct Congregation G-4.0205
- Selling, Encumbering or Leasing Church Property G-4.0206
- Property of a Congregation in Schism G-4.0207

Chapter Four sets forth the terms by which the church will act and be bound at some of the most challenging and demanding times. In addition to the discussion set out immediately below, there is an Advisory Opinion “The Trust Clause and Gracious Separation: Implemented the Trust Clause for the Unity of the Church,” which councils may want to review for further information (*See* Appendix A).

#### **1. Presbyterian Church (U.S.A.) Property Trust Clause (G-4.0203)**

**All property held by or for a congregation, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.), whether title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a congregation or of a higher council or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).**

This clause is central to Chapter **Four** and, in many respects, the life of the Presbyterian Church (U.S.A.). It establishes, as all Presbyterians know, that our church is not congregational in its structure. It is connectional. The governing bodies of the church interrelate with and depend on one another in many ways — defined and established by the Presbyterian Church (U.S.A.) Constitution. While the church does not describe itself as hierarchal, this is the term most civil courts use when ruling on Presbyterian Church property cases. In this context, the civil courts use hierarchal to distinguish our structure from the congregational form. As they view our structure in church property disputes, the civil courts correctly focus on the core principles of Presbyterian government, including F-3.0206: “A higher council shall have the right of review and control over a lower one and shall have power to determine matters of controversy upon reference, complaint, or appeal.” This and other *Book of Order* provisions cause the typical civil court to view the Presbyterian Church as hierarchal concerning church property.

**It is strongly advised that all written instruments of conveyance involving property acquired for use as a place of worship or other church activities should contain the following clause or language very similar:**

**The premises herein conveyed shall be used, kept, and maintained by the grantee for Divine Worship and other purposes of its ministry as a particular church belonging to the Presbytery of \_\_\_\_\_ (or its legal successors), subject to the provisions of the Constitution of the Presbyterian Church (U.S.A.). The grantee holds the property in trust pursuant to the provisions of the Constitution of the Presbyterian Church (U.S.A.).**

## **2. Absence of Trust Clause**

The absence of a trust clause in a conveyance instrument in no way mitigates or compromises the obligation of the particular church or other church agency to the presbytery, other governing body of jurisdiction, or denomination as a whole. Evidence that church property, which has no express trust in the deed, is intended to be used for denominational purposes includes the following:

- The property Trust Clause set out in the Constitution
- Prior conveyances in the chain of title to predecessor local churches or agencies within the Presbyterian Church (U.S.A.) or its predecessor denominations
- Use of the name, customs, or polity of the Presbyterian Church (U.S.A.) or its predecessor denominations in such a way that it becomes known by the community as part of the denomination
- Service by a minister member of presbytery of the Presbyterian Church (U.S.A.) or its predecessors
- Activity within the presbytery, including participation in presbytery meetings, committees, and functions by ministers and elders of the church
- Funding and development assistance from a presbytery or any other PC(USA) or predecessor governing bodies

Where such evidence is present, civil courts have upheld the right of denominational units to succeed to the title on the express or implied trust theories. It is extremely important to understand that, although title to the property may be held by a particular church subject to the provisions of the Constitution, the title is merely held in trust for the denomination by that entity. The title may be taken in the name of the corporation or certain trustees, but the Constitution clearly states that **all such properties are held in trust for the denomination, whether or not a trust clause is included in the instrument of conveyance.**

## **3. Property Used Contrary to the Constitution, Church in Schism, Church Dissolved**

As is evident from this discussion, most church property cases appear in civil court because of difficult and often wrenching disputes. When such disputes arise in a Presbyterian congregation, it is the presbytery that holds central responsibility and power to resolve the matter. If it cannot be successfully resolved, again the presbytery determines how the property will be handled.

G-4.0204 establishes the central principle that when the property of a particular church is not being used in accord with the Constitution, the presbytery shall determine how the property shall be held, used, applied, transferred, or sold. In a similar vein but more specifically, when a particular church is dissolved by the presbytery, the presbytery has all the same powers in regard to the property. G-4.0205. Finally, in a schism at a particular church, the presbytery again holds the central authority. As established by G-4.0207:

- Only the presbytery can sever the relationship with a particular church (G-3.0301 and G-3.0303).
- The presbytery is to effect a reconciliation of the membership or divide the church into two separate PC(USA) churches.
- If this is not possible, the presbytery determines which faction is entitled to the property because the presbytery identifies it as the true church within the PC(USA). This determination does not depend on the majority vote within that church.

These mandates, in conjunction with the property trust and other provisions of the Constitution (G-4.0202), establish a systematic process whereby the Presbyterian Church (U.S.A.) makes decisions about its property.

As noted above, most civil courts ruling on Presbyterian Church property disputes will recognize and enforce the property trust set forth in the Constitution. Others will look to the trust along with a combination of

- the core polity that a higher governing body has the right of review and control over a lower governing body;
- other constitutional provisions setting forth the authority of presbytery;
- the historic interrelationship, support, customs, and functions between a church and other governing bodies.

Courts that consider these factors rule in favor of the presbytery pursuant to the free exercise of religion found in the First Amendment. They respect the polity and structure the Presbyterian Church (U.S.A.) has determined for itself via its Constitution and polity. They do not transform the Presbyterian Church (U.S.A.) into a congregational polity it does not and never has embraced.

Unfortunately, some church property cases do not reflect the free exercise of religion by respecting the polity and structure a church has chosen for itself. Presbytery officials and their legal counsel must be wary of these rulings.

See the subsection below titled **E. Property of a Dissolved or Extinct Church** near the end of this Section. That discussion sets out helpful suggestions about the typical church dissolution, where members have moved away, died, or the like. A sample form is also provided there.

#### 4. Selling, Encumbering, and Leasing Church Property

The *Book of Order* Chapter Four also vests the presbytery with certain powers when the property of a particular church is being sold, mortgaged, encumbered, or leased:

- A particular church shall not sell, mortgage, or encumber its real estate without the written permission of its presbytery. G-4.0206.
- A particular church shall not lease its real estate used for worship or enter into a lease for more than five years on its other real estate without the permission of presbytery. G-4.0206.

Generally, these provisions ensure the presbytery will be involved when a congregation begins a significant real estate project. These may include land acquisition, building expansion, rehabs, sales, and relocations. Because of these provisions in Chapter Four, as well as other provisions vesting the presbytery with authority, most lenders require the presbytery to guarantee loans to the particular churches.

With the inclusion of Section G-4.0206 Selling, Encumbering, or Leasing Church Property, and Section G-4.0208 Exceptions, all of the churches in both former denominations entered the

Presbyterian Church (U.S.A.) in 1983 with the same constitutional provisions for holding, using, and disposing of church property.

The purpose of the requirement that presbytery approve selling, mortgaging, or leasing church property is to enable the presbytery to participate in planning an affordable project for the use of its property and to avoid legal pitfalls. The rules were adopted in 1935, 1941, and 1946 at a time when many churches were facing financial difficulties and have enabled presbyteries to assist congregations that were unaware of what a presbytery could offer.

## **5. Exceptions**

Section G-8.0700, the predecessor to Section G-4.0208, Exceptions, provided a window of opportunity for eight years after June 1983 during which congregations of the former Presbyterian Church in the United States might vote to excuse themselves from that provision of the chapter by which they had not been bound before reunion. Once this exception has been properly adopted and the presbytery notified it is legally binding and runs as long as the congregation or its legal successors exist, or until the congregation votes to accept section G-8.0500 (now G-4.0206). For this reason, to avoid future disputes, it is important that the session of an exempt congregation hold the record of this action with the deeds and other property records, and that presbyteries that have received notice of such actions also hold the record where it will be available when needed.

## **B. Information about Property Generally and Church Property**

### **1. Special Issues with the Leasing of Church Property**

From time to time, local churches and other church organizations will have the opportunity to rent church real property to another organization. There are legal, tax, zoning, and practical issues that should be considered before any leasing decisions are made.

The leasing of church property generally should not result in loss of the church's 501(c)(3) (federal tax-exempt) status. Unless rental activities unrelated to the congregation's exempt purpose (religion) become more than insubstantial, the federal tax exemption should not be affected. Although rentals of church property do potentially give rise to unrelated business income (UBI), Internal Revenue Code Section 513 specifically exempts most rental income from being taxable UBI. A tax professional should be consulted in advance of the lease to determine what income tax liability may be present at the federal and state level.

A more likely area of complication arises at the state and local tax exemption level. One area of concern relates to local real estate property tax exemptions for charitable and religious use property. Check state and local laws and regulations to determine whether there will be a loss of part, or all, of the property tax exemption enjoyed by the church based on its religious use of the property. Many states, counties, or municipalities have statutes that mandate "exclusive religious use" to maintain tax-exempt status for property. Governmental bodies also require periodic reporting and reaffirmation of the tax-exempt use of the property. Failure to report in time can lead to loss of the exemption. Churches are strongly advised to confer with legal counsel familiar with local property tax law regarding these pitfalls. Be sure to open and respond to mail from the county assessor's office as exemptions have been lost for failure to respond in a timely fashion.

Some churches may be in areas where there are zoning restrictions that prohibit rental of the property. For example, a church in a residential area may not be properly zoned to be used as a school or child-care facility. Before lease negotiations, check your property's zoning restrictions and, where desired, consider variances or zoning modifications. Some churches have successfully challenged zoning restrictions under the free exercise of religion. These challenges, however, involve lawsuits, are uncertain, and may take many years for a final decision.

In addition to the above concerns, there are other points that churches should consider when renting property. They are as follows:

- a. Obtaining presbytery's approval to enter into a lease. See G-4.0206.
- b. The renting/leasing group (tenant) should, if possible, be a not-for-profit organization.
- c. The tenant should further the cultural, civic, spiritual, or educational goals of the church and/or community.
- d. The tenant's activities should not supersede or interfere with the programs of the church.
- e. The tenant should submit a properly completed application form including an explanation of the structure of the tenant's organization and of the general uses that it intends for the rental including hours, access desired, and any special needs.
- f. The tenant should sign a lease spelling out the rights and liabilities of the parties.
  - i As part of that lease, there should be an indemnification and a hold harmless agreement in favor of the church. The church should carefully draft the lease in conjunction with its legal counsel so that the church requirements and needs become lease obligations of the tenant.
  - ii It would be wise to state in the lease that the tenant must also follow and comply with all policies of the congregation, including sexual misconduct and child and youth protection policies.
  - iii The term of an Agreement should be short enough (ex. 1 year) to allow periodic evaluation of the rental amount, conduct of the User, and other conditions of the relationship. There should also be provision for cancellation/termination of the Agreement, a list of grounds for cancellation/termination (ex. failure to comply with church policy, failure to timely pay rent), and notifications of intent to terminate the lease (ex. 30-day notice of termination). The Agreement should also describe the procedures Users must follow when vacating the property, including cleaning the premises, removing all of User's property, and restoring the premises to their original condition.
  - iv The Agreement should obligate the tenant to pay for any damage or disrepair its uses cause to your property and/or its contents. The Agreement should be as simple and clear as possible. The church should make best efforts to determine the appropriate security deposit and rent for the uses of the property if there is a lease. Issues such as increased utility bills, maintenance costs, and other new expenses such as possible property taxes, should be considered when setting the rent or terms of a lease. Language stating that the User accepts the rented property "as is" (except as otherwise expressed in the Agreement) is also recommended.
- g. The tenant should be required, prior to occupancy, to submit a current certificate of insurance from its liability insurer naming the church as an additional insured under that policy. A copy of this certificate should be sent to the church's insurance agent. If there is a multi-year lease, a new certificate should be submitted each year. The certificate of insurance should show General Liability and Property coverage for use of church space. If the tenant works with minors (ex. Boy Scouts, Girl Scouts, Indian Guides), the tenant's insurance coverage should include coverage for intentional acts and sexual misconduct. If the tenant is conducting a business such as a day care, the certificate should show Worker's Compensation Insurance for the employees. It should also show property insurance for the tenant's contents.

- If the tenant refuses to provide a certificate of insurance or if its coverages do not cover risks related to its use of your property (ex. no coverage for intentional acts or sexual misconduct), your session and your corporate board has a duty to consider whether this is a tenant who should use your property or buildings and the significant risk the tenant may create for your congregation. Having a tenant without insurance or whose insurance will not provide coverage for risks related to its use of your property and buildings potentially puts all your assets at risk. And do not take the tenant's word for it that its insurance is adequate. Send the tenant's certificate of insurance to your insurance agent and ask if it is adequate for coverage for the User's activities and your congregation's risk in hosting the tenant.
- h. Make a written inquiry to your liability insurer to make sure that company provides coverage for any liability resulting from the proposed use or rental and that there will be no premium increase or any exclusion due to the proposed use or rental. You may wish to review the adequacy of your own insurance policy limits considering the new activity. If supplemental or specialized coverages are needed, they should be obtained prior to signing a lease or covenant and occupancy. Ask the agent to send you a binder or endorsement showing coverage is in effect for the new User. The lease or covenant should not be signed until you receive written confirmation. If any insurance claim or lawsuit should arise due to conduct or activities of the User, give immediate written notice to your agent and the insurance company.
  - i. All legal documents should be reviewed and approved by a local attorney.
  - j. The church should review the state and local laws relating to zoning and property tax exemptions prior to executing a lease.
  - k. There should be an inquiry made in writing to the current church's liability insurer to make sure the insurance company provides coverage for any liability resulting from the proposed rental and that there will be no premium increase or any exclusion due to the proposed rental. Any increase that may be incurred can be offset by adjusting the terms of the lease or requiring the tenant to pay for the increase. The church also may wish to review the adequacy of its own insurance policy limits in light of the new activity. If supplemental or specialized coverages are needed, they should be obtained prior to lease execution and property occupancy. Ask the agent to send you a binder or endorsement showing coverage is in effect for the new occupancy. The lease should not be signed until you receive written confirmation. If any insurance claim or lawsuit should arise, give immediate written notice to your agent and the insurance company.
  - l. You may wish to consider adding a lease provision to protect the church in the event of a dispute and litigation. Such a provision may provide that in the event of a lawsuit, the prevailing party shall be entitled to attorney fees and costs.
  - m. The lease should obligate the tenant to pay for any damage or disrepair to the property and/or its contents.
  - n. Beware of any new obligations to comply with state or federal disability statutes because of this rental.
  - o. The lease should be as simple and clear as possible. The church should make best efforts to determine the appropriate rent for the uses of the property involved. Issues such as increased utility bills, maintenance costs, and other new expenses such as possible property taxes, should be considered when setting the rent or terms of the lease. The lease should spell out specifically the space covered by the lease and the uses that are permitted and the time the occupancy is allowed. The tenant should not be allowed to make changes in the building or improvements without the prior written consent of the church. Special zoning, safety, and

- licensing requirements may involve additional costs. The lease should cover the duty of the tenant to comply with zoning, make safety inspections, and obtain licenses and permits. The party required to pay for any improvements to the building should be spelled out in the lease. There should be a clear statement that such improvements become property of the church.
- p. When evaluating a potential tenant, the church should make sure that it is a legitimate organization that can fulfill its obligations under the lease. Special consideration should be given to security when outside individuals are to be given keys and access to the building. The responsibility for locking the building should be fully understood. Alternatively, the church may designate trustees or other persons to open and close the building.
  - q. Typically, the lease terms should be short enough to allow periodic evaluation of the rental amount and other terms. There should also be provision for cancellation of the lease and for prior notifications of intent to terminate the lease.
  - r. All leases and tenant records should be maintained in a separate file and kept locked so they can be quickly and easily accessed when needed.

After the lease is executed, the church must monitor and enforce it. It must be prepared to act appropriately if the tenant is violating the lease. It is unpleasant to evict a tenant but that is one of the negatives landlords should consider. Should problems arise with improper use, breaches of security, nonpayment of rent or other conflicts, it is always best to address them promptly. Written notice on the points of dispute and on the needed resolution of those points should be forwarded to the tenant so that all parties understand the relevant concerns and are aware of the consequences for failure to rectify them.

Through rental of church property, churches can generate additional income and increase their outreach into their communities. Persons involved with the renting organization may become interested enough in the church to become members. If all ramifications, legal and practical, are carefully considered and dealt with in advance, leases can be mutually beneficial.

## 2. Conveyances of Property

In the simplest terms, a conveyance is the process by which title to real or personal property is transferred from one party (grantor) to another party (grantee). Most conveyances are sales, but other instruments related to the creation of interest in real estate, or which affect the title to property, such as deeds, mortgages, assignments, trusts, and wills, could function as a conveyancing instrument.

Conveyancing is basically a two-step process. **First**, a **contract** for the conveyance is prepared and executed by the parties. This contract should include any particular provisions that either party desires to be part of the agreement. The contract will guide the parties through the conveyancing process. Preprinted form contracts are often used by buyers or sellers of real property. **Remember, the terms in such contracts are negotiable.** Local counsel should be consulted **before** executing a contract of purchase or sale rather than afterward because it is easier to negotiate for particular terms prior to execution of the contract. Indeed, some matters may prove to be nonnegotiable after the contract is executed.

The **second step** of the conveyancing process is the actual delivery of the conveyancing instrument (usually a **deed**) by the grantor and delivery by the grantee to the grantor of the consideration stated in the contract for the conveyance. The buyer must determine the capability and competence of the seller to transfer the property involved prior to paying over the consideration. A complete and thorough examination of the seller's title must be made. A title summary (abstract) may be prepared and examined either by the counsel for the buyer or by an abstract company specializing in title searches and title insurance. Local law may determine

whether an attorney or title company must be used. Title insurance should be considered and used in most cases. Title insurance protects the buyer against losses due to defects in the seller's title.

**a. Items of Concern When Property Is Being Conveyed**

Where real property is being conveyed to a local church, presbytery efforts should be made to take the property free of any encumbrances such as possibilities of reverter to the donor's heirs if the property is no longer used for church purposes. These steps should be taken because local churches may find it necessary in the future to relocate or to use the property for other purposes. Reverter or other restrictive use clauses could lead to the property reverting to the heirs of the donor with no compensation to the local church. Current deeds should be reviewed for potential restrictive clauses. An attorney familiar with real estate should be consulted about the best course of action if such clauses are included in the deeds to any church property. Some states have laws that extinguish reverter clauses after a certain number of years has passed. Other states enforce such clauses regardless of the elapsed time. Your attorney should check your state's law.

The name for the entity involved in a conveyance should be the legal name of the entity. For example, First Presbyterian Church is incorporated as First Presbyterian Church, Inc. The corporate legal name, First Presbyterian Church, Inc., should be used in the conveyance. See Section 3-Incorporation and Boards of Trustees, A. Requirements of the Presbyterian Church (U.S.A.) Constitution, footnote 1, if it is unclear as to the corporate name or if it is unclear as to whether a corporation has been formed.

**b. Contracts for Sale**

Contracts for the sale of land must be written and properly executed in order to ensure their enforceability. In the land sale contract, the buyer usually agrees to accept the deed of the grantor (seller) who will warrant the validity of the title. In their simplest form, such purchase agreements must contain the following provisions:

- i Names and addresses of the parties.
- ii An address and complete legal description of the property to be conveyed.
- iii Delivery by the grantor of title documentation. The documentation may take the form of abstracts and title insurance binders containing the agreement of a title insurance company to insure the buyer's interest against seller's defective title, or an attorney's title opinion letter prepared after her research into the state of the title.
- iv The time allowed the buyer to examine the seller's title and the date for the "closing," that is, final conveyance of the deed, and the date of possession.
- v The type of deed to be delivered.
- vi Apportionment of charges—specific clauses relating to the liability of the vendor and buyer to pay the costs incurred for title insurance, surveys, deed preparation, taxes, recording and filing of deed, surtaxes, mortgage costs, and attorney fees. These are often referred to as closing costs.

Implicit in all contracts for the sale of property is the grantor's obligation to convey a marketable title. A marketable title has been defined as one that is:

- i Free of encumbrances — mortgages, liens, easements, and so on.
- ii Free of defects in the chain of conveyances by which the grantor took title, for example, grants of all or part of the property to two different grantees by a previous owner,

creating more than one claim of title, which the buyer might have to litigate in order to establish as the rightful claim. All title should be in fee simple.

Exceptions to the marketability rule are found in cases of zoning restrictions and public rights-of-way or easements. The grantor's obligation to convey a marketable title does not require him or her to convey title free from these restrictions. Any exceptions to the grantor's duty to convey free of encumbrances must be *specifically* noted in the contract even if they are customary exceptions, such as special assessments related to incomplete improvements, installments of assessments not yet due, general taxes for the stated and subsequent years, or zoning and public easement restrictions. Leases and outstanding mortgages also may be included as exceptions. **Generally, a presbytery or church in the role of buyer should include a provision that, "The seller represents that there are no restrictions which would prevent the property from being used as a sanctuary for worship and house for residence."** The contract serves as a navigation chart for the conveyance procedure by stating the operative guidelines of the transaction and setting the stage for closing.

(a) **Purchase of Real Property**

Several practical concerns also will arise in purchases of real property. In the case of buildings, warranties should be obtained in the purchase contract as about soundness of structure, compliance with local building codes, and pest and termite infestations. A professional building inspector should be used to check for structural problems. Environmental issues such as the presence of underground storage tanks, asbestos, mold, and radon accumulations need to be addressed. An environmental audit of the property to be purchased should be obtained. At times, appropriate relief from the burdens of any potential cleanup can be placed in the purchase contract. The seller may be asked to warrant there are no environmental problems, and title insurance may be purchased to insure against any future discovery of problems. Specific provisions also should be made in the real estate contract for the disposition of any fixtures such as refrigerators, ranges, and other equipment. Insurance responsibilities of the seller prior to the closing should be spelled out. Many jurisdictions affix documentary stamps to title documents, and the seller generally assumes the cost of the stamps affixed to the deed. The buyer assumes those costs from the filing of mortgages requiring documentary stamps. Where construction is contemplated, the contract should permit testing to determine whether the prospective site is suitable for the planned building. Zoning requirements should be checked and time to obtain necessary zoning approvals may be provided in the contract as well.

The corporation of the particular church will adopt resolutions that direct and authorize the corporation's board of directors to execute the necessary papers, that is, contracts of sale, deeds, leases, bills of sale, mortgages, and so on. The corporation's board of directors also must adopt any resolutions as necessary or required by local law and the corporation's bylaws. Any written instruments, that is, contracts, deeds, bills of sale, mortgages, and so on, necessary to carry out the action as authorized are to be executed in the name of the corporation by its authorized officers. Upon execution, these instruments are binding and effective as the action of the corporation.

**Remember: The congregation must approve the purchase of real estate. G-1.0503. Also, the presbytery must approve if the property is subject to an encumbrance or condition. G-4.0206.**

(b) **Zoning**

Some churches may be in areas where there are **zoning restrictions** that would disallow the use of property for a church, school, or child-care facility. **Thus, prior to any purchase being made, zoning restrictions should be checked** and, where desired, variances or zoning modifications may be considered.

(c) **Option Agreements**

Option agreements, while not conveyance instruments, serve to reserve the rights of parties as to future purchases of property. An option is a continuing offer to buy property at a fixed price during a specified period. Other than the initial consideration paid for the option by the option buyer, neither buyer nor seller need make any additional payments over the term of the agreement.

c. **Deeds**

The second stage of the conveyance process requires the delivery of a properly prepared and executed deed from grantor to grantee and payment of any agreed upon consideration for the conveyance of the deed. A written instrument signed by the grantor or his or her duly authorized agent is required for the conveyance of any interest in real property. There are three types of deeds, and they vary as to the degree of protection given to the buyer by the seller:

- i. A "**General Warranty Deed**" contains a covenant of warranty under which the grantor is obligated to protect the property interest granted against lawful claims of ownership from any person whatsoever. This is the deed presbyteries and churches should obtain.
- ii. A "**Special Warranty Deed**" is more limited in that the grantor warrants against defects of the title arising subsequent to his ownership but does not warrant the grantee against claims of persons who acquired their title prior to the grantor's ownership.
- iii. A "**Quitclaim Deed**" is a deed in which the grantor warrants nothing. This deed passes any title, interest, or claim that the grantor may have in the premises but does not profess that the title is valid and does not warrant the grantee against claims of others to the same property.

All deeds conform to a certain pattern that includes the following component parts:

- i. **Names of Parties** — The grantee must be identified with reasonable certainty, or the deed is void. Where bona fide buyers or mortgagees are involved, the person to whom the deed is delivered may have express or implied authority to fill in the name of the grantee. Omission of grantor's name will not void the deed where grantor has signed and delivered the deed.
- ii. **Consideration** — The law does not require consideration for a valid deed and thus a grantor may be bound by a gift of land once a deed has been properly executed and delivered. However, it is the custom to specify at least nominal consideration (ten dollars and other good and valuable considerations) to protect the grantee from claims he or she is under a trust obligation to the grantor and to protect the grantee from adverse actions that allege that the grantee is not a bona fide buyer for value. No matter what consideration is recited, documentary stamps required by taxing authorities on the face of the deed are based on the actual consideration paid.
- iii. **Words of Conveyance** — Certain operative words of conveyance are often used in deeds. Phrases such as "convey and warrant," "grant, bargain, and sell," and "warrant and

defend the title" are common phrases in warranty deeds. "Conveys and quitclaims" and "quitclaims all interest" are normally used in quitclaim deeds. Any words that substantially indicate the intent of the grantor to transfer his or her estate to the grantee are usually deemed sufficient.

**iv. Description of Land Conveyed** — The primary requirement of such a description is that it be legally sufficient to permit identification of the property to be conveyed. A current survey (within six months) should be required of the seller by the buyer.

**v. Exceptions or Reservations** — In essence, a description of the property conveyed describes the grant: exceptions or reservations to grants immediately follow this description. Reservations imply retention of such rights as mineral rights in the grantor, or their assignment to the grantor's heirs and assigns.

**vi. Quantity of Estate Conveyed** — This clause defines the nature of the estate conveyed and the extent of the grantee's ownership of the estate, for example, "To have and to hold Blackacre (grantor's property) in fee simple absolute." By obtaining title in fee simple absolute, buyers gain total control over the property for an unlimited period with unconditional powers to dispose of the property during buyer's lifetime. Although zoning requirements and easements may restrict use of the property in some ways, obtaining title in fee simple gives the buyer maximum latitude in use of the property. **Churches should obtain title in fee simple absolute wherever possible.**

**vii. Covenants of Title** — These are the promises of the grantor about or her title in the land that guarantee the grantee undisturbed possession and the subsequent transferability of the property without adverse claims of right by third parties. These covenants indemnify the grantee in the event that the covenants are breached.

**viii. Execution** — The signature of the grantor and a seal of acknowledgment before a notary public generally conclude the execution of a deed. The significance of the seal has been diluted in some jurisdictions and has been replaced by the word "seal" or the initials "L.S." However, an acknowledgment is usually a prerequisite to recording a deed; in its absence a deed may not be effective against third parties. Local statutes cover the specific form of acknowledgment or notarization necessary.

The final act of conveyancing is the delivery of the deed. Physical delivery is the best evidence of intent of the grantor to divest herself of dominion and grant control to the grantee. A presumption that an effective delivery has occurred will arise from the grantee's possession of the deed. Also, if the grantor records the deed to the grantee, it is presumed that she or he made effective delivery of the deed to the grantee. The grantor's words and conduct are evidence of her intent to make a valid delivery. Escrow arrangements are often used whereby the grantor makes delivery to an "escrow grantee" who is bound to deliver the deed to the grantee upon the happening of a named event or upon the performance of stated conditions within a stated period. If the grantee does not perform or the event does not occur within the time stated, the deed is returned to the grantor.

#### **d. Adverse Possession**

Aside from the two-step conveyance process described above, title occasionally will pass because of adverse possession. At common law, if a person openly and continuously occupies or exerts dominion over the property of another for a period of twenty-years, the law provides that the occupying person shall gain title to the property that she has been occupying. Some states have statutes that shorten the period of continuous and open occupation. The possession must be continuous. Any act of dominion by the true owner during the twenty-year period will toll the period of adverse possession, that is, break the continuity of the

possession. If one purchases the property from an adverse possessor who has been in possession for seven years, the buyer may tack on those seven years to her or his own period of adverse possession in order to establish the required twenty-year period. Adverse possession is not valid against either federal or state government lands. For example, one who openly and notoriously lives on a corner of a U.S. military base for twenty-years cannot take the land he has lived on from the federal government by adverse possession. **Because adverse possession typically results in litigation about unclear ownership and title, presbyteries and churches should not purchase property acquired by adverse possession.**

e. **Recording**

**Deeds and transfers should be promptly recorded.** Unrecorded instruments are only valid between the immediate parties and those who know about the transfers. The bona fide buyer for value without notice is one who takes the property in good faith, for value, without notice, actual or constructive, of previous grants of the property. The burden of proof about the status of the bona fide buyer is on the buyer. Failure to record a deed properly opens the possibility of losing one's interest in real property to a subsequent bona fide buyer without notice. Legal counsel should be consulted for the recording of conveyancing instruments to avoid the consequences that can result from failure to record deeds, mortgages, and other instruments properly.

All conveyancing instruments should be recorded immediately upon delivery to the grantee. Recording will avoid the potential problems described above. It is the buyer's responsibility to make sure that the instrument is properly recorded in the recorder's office. The cost of recording is generally the obligation of the grantee (buyer). Recording systems vary from state to state. Recording statutes enable the owner to give **constructive notice** of her ownership to all other potential buyers of the estates or interest disclosed in the instrument recorded. Recording prevents a subsequent buyer or mortgagee of the same piece of real property from qualifying as a bona fide buyer without notice. Some state recording statutes protect the bona fide buyer and cut off the interest of another grantee with an unrecorded instrument whether the bona fide buyer recorded first or not. These are known as Notice Statutes. In other states, the first grantee to record the instrument in the recorder's office is protected, whether she had notice of the other grantee's existence or not. These statutes are known as Race Statutes because the person who wins the race to the courthouse to record her deed gets the property. A third type of recording statute is the Race-Notice Statute. In this system, a bona fide buyer is protected if she records before a prior grantee. As with the Race system, there is a premium on the race to the recorder's office between bona fide buyers of the property without notice. However, if the first to record in a Race-Notice state has actual notice of a prior grantee, she is not considered a bona fide buyer without notice and the first grantee will take the property. A fourth type of state statute is the Period of Grace Statute, which gives the prior grantee a period of grace in which to record and protect her interest against subsequent grantees. In these states, the bona fide buyer is protected if the prior grantee does not record in the time allowed to her or him by the statute.

f. **Ensuring Good Title**

Although most deeds contain covenants of warranty about the title, it is generally of little consolation to a buyer that she has a cause of action against the grantor for damages arising out of defects in the title. The buyer's title will remain clouded until an action to quiet title is brought to clear the cloud on the title, thereby subjecting the buyer to a period of uncertainty about the nature and marketability of her title. Several methods can be employed to ensure the title is clear prior to the sale of property. One is a written opinion from the buyer's attorney about the marketability of title based on an individual title search in the recorder's office. The more prevalent procedure is an abstract or insurance in which the preliminary

report of title is furnished by the title insurance company to the buyer's attorney to determine any title defects. The abstract or commitment for title insurance is then used to determine whether the title policy guarantee from the title insurance company is sufficient to protect the grantee from all defects and encumbrances on the title. Where available, the buyer should secure title insurance. The costs of the abstract or title insurance should be specifically assigned in the contract of sale and the method employed also should be indicated. Typically, the seller is obligated to pay for title insurance to guarantee good title.

**g. Mortgages and Deeds of Trust**

A mortgage takes the form of a lien on real property that secures the payment of money owed. The borrower is called the mortgagor, and the lender is the mortgagee. The mortgage represents security to the lender for the borrower's promise to pay. It is accompanied by a promissory note that is expressly secured by the mortgage from the buyer or borrower (mortgagor) to the seller or lender (mortgagee). In the event of a borrower's failure to pay on the note, the mortgagee can secure return of the loaned funds by foreclosing on the property, selling it, and taking its share of the sale proceeds. A first mortgage gives the lender (mortgagee) first priority on the proceeds of a foreclosure. A second mortgagee recovers proceeds only after satisfaction of the first mortgage. Some states require the use of a deed of trust. A deed of trust is the same as a mortgage except the legal title to the real property is placed in one or more trustees, to secure the sum of money or the performance of the conditions. Although it differs in format from a mortgage, it is still a security instrument. Both mortgages and deeds of trust are recorded in the county where the property is located and become public documents.

**h. Releases**

As indicated above, both mortgages and deeds of trust are recorded in the county where the property is located and upon recording become public documents. When a mortgage/deed of trust is paid in full, a release and/or satisfaction document will need to be prepared and recorded in the appropriate county to remove the document from the public records. Normally, when the debt that secures the mortgage/deed of trust is paid the holder of the mortgage/deed of trust sends the original document marked "paid" to the borrower to record in the appropriate county office. In most states, a separate Deed of Release or Release of Mortgage is also required to be filed. It is important to note the requirement concerning the release document varies from state to state. The appropriate release documents verify the original mortgage/deed of trust has been paid and authorizes the recording officer at the local county office to release the mortgage/deed of trust from the public records. A mortgage/deed of trust will remain on the public records until it is officially released. Therefore, it is important to have a release document prepared and filed whenever a mortgage/deed of trust is paid in full.

**i. Mechanic's Liens**

In most states, the law gives laborers or subcontractors who provide services connected with the construction, repair, or remodeling of a building a lien on the property, buildings, and improvements in order to secure their claims for payment for the materials and labor provided. Note that subcontractors who have not been paid by a general contractor may establish a mechanic's lien on the property although the general contractor has been paid in full. Lien waivers or releases must be obtained from contractors and subcontractors prior to payment for the work ordered. Once a mechanic's lien has been perfected, suit may be brought to collect the amount of the lien against property owner.

**Upon completion of a church building or remodeling project, releases or lien waivers should be obtained from the contractor and subcontractors on the job.** Title would be

clouded by the possibility of an outstanding mechanic's lien unless the releases are obtained. It may be advisable to use the services of a third party (such as a title company) to ensure that all the necessary waivers and releases have been obtained.

#### j. Surveys

A description of the land conveyed is contained in all deeds. Customary formal descriptions fall into three categories:

- (a) **Description by reference to monuments and courses** — Monuments may be either man-made reference points specifically placed for purposes of boundary identification, such as iron rods or concrete emplacements, or natural objects such as rocks or trees. Courses, on the other hand, are boundary lines sighted by direction in terms of the compass: such lines may be described as running a certain distance or between boundaries. In the case of a conflict between monuments and courses about the determination of a boundary line, monuments prevail in view of their permanency, as opposed to the personal judgment used to determine courses.
- (b) **The Rectangular Survey System** — Most states in the continental United States west of the Allegheny Mountains employ this system. The beginning points of this survey are lines that run parallel to longitudinal and latitudinal bases. Lines conforming to a parallel of latitude are called base lines. A series of lines running due north and south at right angles to the base lines are Principal Meridians. Township lines are those lines running at six-mile intervals on either side of the base line. Range lines are drawn at six-mile intervals parallel to the Principal Meridians. The six-mile strips in each case are numbered consecutively. Six-mile squares formed by the intersection of these lines are called townships, which are further divided into one-mile squares, called sections. Sections may be subdivided successively into 160-acre quarters and 40-acre tracts.
- (c) **Reference to a recorded plat** — This method involves the description of property in a deed by referencing a survey of a larger tract that includes the conveyed parcel. Great care needs to be exercised in the deed language to designate accurately property identified by this method of survey. **In all property transactions, a registered land surveyor should be employed to establish the physical location of buildings, to place appropriate markers, and to determine any encroachments.** The survey is needed to ensure the buyer's awareness of the extent and location of the property.

Descriptions of the property in question also will appear on the deed, mortgage, and title policy or abstract. **It is critical that these descriptions, including the description on the deed, be identical.** A new survey should always be compared with any previous surveys on hand in order to detect any discrepancies.

### 3. Property Used by Two Denominations

With the rise of agreements for sharing church buildings between separate congregations of differing denominations, it is advisable to enter into a written agreement to ensure fairness and orderly procedures in the evolution of such arrangements. The mutually agreed-upon written relationship should include a statement of purpose and a reference to the length of time the arrangement is expected to run. The development of such a document is to enable coordination of schedules and building use, to provide for cooperative building maintenance and to coordinate cooperative programs.

### 4. Historic Landmarking of Church Property

Church property often is a prime target for local community efforts to preserve historic sites. The preservation effort begins with the designation of a particular property — or an area of town — as

historic landmark. Landmark status sounds prestigious, but it can have serious drawbacks. Landmark status can give governmental entities the “right” to impose significant controls and financial burdens on the owners of landmarked property. For example, if a church decides it can no longer afford the upkeep of its old, expensive, stained-glass windows and wants to replace them with contemporary glass, the governmental unit may say no. If a church decides to build an addition onto an historic sanctuary, the governmental unit in charge of approving such an addition may say no — or may impose significant financial and other burdens on the church before approving the changes. If a church decides to tear down a deteriorated secondary building on its property, which is in a designated historic district of a community, the governmental unit in charge of approving such changes may say no. The designation also can affect changes to the heating or cooling of a large sanctuary. Likewise, attempts to make the church accessible to handicapped persons may be more complicated because of restrictions on changes to the structure.

In exchange for such limitations on the use of property, governmental bodies may compensate the property owner for such reduction in property value and limitations on development and use by allowing federal and state income tax credits against actual expenditures made for future rehabilitation work done to the property. Such income tax credits are, however, worthless to a church because a church does not pay such taxes.

In its seminal 1988 policy statement *God Alone Is Lord of the Conscience*, the General Assembly adopted the following statement about landmarking of church property:

**The government may not require a congregation to maintain a church structure because of its historical significance or subject it to proceedings in eminent domain in order to preserve a church structure. The church should make every effort to cooperate with efforts to preserve esthetic and architectural character but must finally itself be the judge of what religious life and mission require concerning property and its use.**

As this section reflects, landmarking can impose substantial limitations on church property. If it is decided to oppose landmarking status, the church should do so at every administrative and judicial level so that the church does not accidentally waive any of its rights.

### C. Loan Programs Offered by General Assembly Offices

The General Assembly of the Presbyterian Church (U.S.A.) has a loan program with two sources of funding. The purpose of the programs is to facilitate the mission of the Presbyterian Church by helping churches and governing bodies meet their needs to fund capital improvements. The Presbyterian Church (U.S.A.) Investment and Loan Program, Inc. (PILP) provides a coordinated loan program. PILP administers this coordinated loan program through two funding sources: endowed funds and the PILP Loan Program (investment funds).

#### 1. Endowment Funds

The sources of funds for these loans are endowments that have been left to the General Assembly for this purpose and mission funds that have been accumulated and set aside for this program. These funds make it possible to provide loans for a variety of purposes, at affordable rates for churches. **Contact Clare Lewis at (800) 903-7457 ((800) 903-PILP).**

#### 2. Presbyterian Church (U.S.A.) Investment and Loan Program, Inc.

The Presbyterian Church (U.S.A.) Investment and Loan Program, Inc. (<https://pilp.pcusa.org/>) sources funds for these loans from investments by individuals, congregations, governing bodies, and other related entities of the Presbyterian Church (U.S.A.). Individuals and congregations

purchase term notes paying competitive rates. All loans are made at affordable rates. **Contact Clare Lewis at (800) 903-7457 ((800) 903-PILP).**

#### **D. Property of a Dissolved or Extinct Church**

From time to time it becomes necessary for the presbytery to take formal action to dissolve a congregation, at the request of the members or on the initiative of the presbytery. Rarely, but sometimes, the presbytery learns that all of the members have moved away, died, or become unable to act. When one of these events happens, the remaining property, real estate, financial assets, and furnishings become the responsibility of the presbytery to use in the mission of the Presbyterian Church (U.S.A.). The committee on ministry and the presbytery trustees or strategic planning committee both have significant responsibilities and will need to work together. There are a number of legal requirements and procedures for the transfer and disposition of property in consultation with the session and trustees of the congregation. This includes considering their requests for the disposition of family memorials, furnishings, and the uses of financial assets.

When it is proposed to dissolve a congregation, representatives of the presbytery and the session should compile an inventory of all real and personal property. Parcels of real estate and the buildings on each should be separately identified, along with all bank accounts, investments, and the documentation of all endowments or other funds held for specific purposes. An attorney should be consulted to advise how to transfer ownership where legal requirements must be followed. Normally it is much simpler to complete this process before dissolution becomes final, so that appropriate documents can be executed by the congregation's corporate officers. Care should be taken to assure that any prospective gifts, known or unknown, will flow to the presbytery or, in the case of a merger, the successor Presbyterian Church (U.S.A.) church.

A title search of all real estate should be conducted to determine whether there are reversionary interests that may cause the property to pass out of the control of the church if the property ceases to be used for specified purposes. Also, if it is decided to transfer the property, this must be done properly to ensure good title. Consult legal counsel.

The presbytery's insurance agent should also be notified when ownership is transferred or the location is to be vacated. An unused or abandoned building may become an expensive risk. Special care should be taken to secure the building from trespassers and to inspect the building regularly. The owner of an unused building continues to be liable for any accident that may occur on the premises. Consult your agent to determine the particular provisions of your insurance policy regarding vacant property. Often a vacant building endorsement must be added.

When property is of minimum value and/or a buyer is difficult to find, it may be better to transfer the property for nominal consideration rather than having the responsibility to maintain and insure the property. One solution for a cemetery is to transfer the property to a local cemetery association composed of individuals with family buried there.

**The “Sample Form for the Property of a Dissolved Church” (see Appendix B), can serve as a guideline when the presbytery and a congregation are considering dissolution of a church.** As a sample, the form is simplified as though the property all moves in one piece. Actually, a task force representing the presbytery and representatives of the church often list and consider a large number of separate items.

*Updated October 2021*

## APPENDIX A

## ADVISORY OPINION

## THE TRUST CLAUSE AND GRACIOUS SEPARATION: IMPLEMENTING THE TRUST CLAUSE FOR THE UNITY OF THE CHURCH

**WHAT IS THE TRUST CLAUSE?**

G-4.0203 of the *Book of Order* states:

All property held by or for a particular church, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.), whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a particular church or of a more inclusive governing body or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.)<sup>1</sup>

Presbyterian congregations emerge from the collective gifts of God’s people and often include direct gifts from individuals, other congregations, presbyteries, synods, and the General Assembly. These gifts are not regarded as given for a single generation but are held in trust for this generation and for future generations to come. Indeed, “the Trust Clause reflects our understanding of the church as a communion of saints across time, with responsibilities both to those who came before and those who will follow. When a congregation seeks to leave the Presbyterian Church (U.S.A.), it is breaking what is often a significant historic relationship; it is also departing from a fellowship in which its officers have participated, by whose polity they have pledged to be governed, and with which many members may feel bonds of affection.”<sup>2</sup> Accordingly, the idea of holding property in trust has long been a part of the Presbyterian theology as well as a practice recognized by the U.S. Supreme Court (*Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872)).<sup>3</sup>

**HOW DOES CHURCH UNITY RELATE TO THE TRUST CLAUSE?**

***“There is one Church, for there is one Spirit, one hope, ‘one Lord, one faith, one baptism, one God and Father of all, who is above all and through all and in all’ (Eph. 4:5-6) (F-1.0302(a))***

Our polity reflects this theology of unity and oneness and the *Book of Order* reminds us that “unity is God’s gift to the Church in Jesus Christ” and “in Christ the Church is one, it strives to be one.”<sup>4</sup> Along these lines, the 217th General Assembly (2006) called upon “every member of the Presbyterian Church (U.S.A.) to witness to the church’s visible oneness, to avoid division into separate denominations that obscure our community in Christ, and to live in harmony with other members of this denomination, so that we may with one voice together glorify God in Jesus Christ, by the power of the Holy Spirit; and all sessions, congregations, presbyteries, and synods to renew and strengthen their covenanted partnership with one another and with the General Assembly.”<sup>5</sup>

Further, G-3.0101 reminds us, “the mutual interconnection of the church through its councils is a sign of the unity of the church. Congregations of the Presbyterian Church (U.S.A.), while possessing all the gifts necessary to be the church, are nonetheless not sufficient in themselves to be the church. Rather, they are called to share with others both within and beyond the congregation the task of bearing witness to the Lordship of Jesus Christ in the world. This call to bear witness is the work of all believers. The particular responsibility of the councils of the church is to nurture, guide, and govern those who witness as part of the Presbyterian Church (U.S.A.) to the end that such witness strengthens the whole church and gives glory to God.”<sup>6</sup> Furthermore, “the congregation is the basic form of the church, but it is not of itself a sufficient form of the church. Thus congregations are bound together in communion with one another, united in relationships of accountability and responsibility, contributing their strengths to the benefit of the whole, and are called, collectively, the church.”<sup>7</sup> Accordingly, the church is not a voluntary association of those who share the same opinions and experiences, but is an organic body reflecting unity in diversity and called into existence by God that celebrates and transmits through the ages the name and knowledge of Jesus Christ.<sup>8</sup> The constitutional provisions under which congregations hold property for

the benefit of the Presbyterian Church (U.S.A.) arise out of and reflect our theological conviction that this denomination constitutes one indivisible body, which itself is part of the body of Christ, and which encompasses not only the visible Church today but also the one, holy, catholic, and apostolic Church of our heirs and forbearers (F- 1.0302).

### **HOW DOES MISSION RELATE TO THE TRUST CLAUSE AND CHURCH PROPERTY?**

The *Book of Order* in G-4.0201 affirms, “the property of the Presbyterian Church (U.S.A.), of its councils and entities, and of its congregations, is a tool for the accomplishment of the mission of Jesus Christ in the world.”<sup>9</sup> Each local congregation “is the church engaged in the mission of God in its particular context” with a particular history.<sup>10</sup> For its members, the congregation is the site of baptisms, confirmations, marriages, and celebrations of the resurrection to join the communion of saints. Such significant personal experiences make the local congregation an indelible part of the lives of their members. These shared experiences are what most of us picture when we think of our home congregation.

Yet, we also affirm that the “congregation is the basic form of the church, but it is not of itself a sufficient form of the church” and our polity recognizes that purpose of the Trust Clause is not only to support the witness and mission of a particular congregation, but also to support the mission and witness of the whole Presbyterian Church (U.S.A.). Indeed, “the particular responsibility of the councils of the church is to nurture, guide, and govern those who witness as part of the Presbyterian Church (U.S.A.) to the end that such witness strengthens the whole church and gives glory to God.”<sup>11</sup> Along these lines, as a council of the church, the presbytery is responsible for developing “the strategy for the mission of the church in its district”<sup>12</sup> and has the responsibility and power to organize, receive, merge, dismiss and dissolve congregations in consultation with their members.<sup>13</sup> Further, the presbytery has the responsibility to assist congregations in developing mission and participating in the mission of the whole church.<sup>14</sup> Accordingly, it is important for the presbytery to prayerfully discern and consider the mission of the church in its district and of the whole church as it decides whether to dismiss or dissolve a congregation.

### **WHO HAS THE AUTHORITY TO DISMISS A CONGREGATION?**

Presbyteries are responsible for upholding the Trust Clause and congregations may only be dismissed upon the approval of their presbytery. In accordance with G-4.0207, “the relationship to the Presbyterian Church (U.S.A.) of a particular church can be severed only by constitutional action on the part of the presbytery.”<sup>15</sup> As noted above, the presbytery is responsible for the mission and government of the church throughout its geographical district and has the power to organize, receive merge, dismiss and dissolve congregations in consultation with their members.<sup>16</sup>

### **CAN A CONGREGATION VOTE TO SEEK DISMISSAL? DOES A CONGREGATION HAVE A UNILATERAL RIGHT TO DEPART FROM THE PC(USA)?**

No. There is not a unilateral right of a Presbyterian Church (U.S.A.) congregation to depart from the denomination or its presbytery of membership. Withdrawal from the Presbyterian Church (U.S.A.) is not a matter that can be considered at a congregational meeting.<sup>17</sup> No authority is given to a congregation or to session to vote to leave the denomination.<sup>18</sup> While a presbytery may consult with a congregation about dismissal in the form of listening sessions, hearings, or other consultations, these consultations are merely for the benefit of informing the presbytery as it considers a request for dismissal.<sup>19</sup> Along these lines, our church has long recognized that “by giving to presbytery rather than to session or congregation the power to dismiss a church, the constitution of this denomination guarantees a formal meeting of presbytery as the forum in which loyalist minorities of whatever size might press their claims that they were sufficient in numbers and dedication to continue a church in its connectional relationship within this denomination.”<sup>20</sup> Further, in seeking to negotiate with a congregation seeking dismissal, presbyteries have an obligation to see that secular litigation is used as a last resort.<sup>21</sup>

Here, it is also important to note that freedom of conscience is limited for teaching elders, ruling elders and deacons under G-2.0105 and does not encompass the calling of congregational meetings to seek dismissal, moving churches to seek dismissal from the denomination or obstructing constitutional

governance of the church.<sup>22</sup> There may not be any secret acts by the pastors and sessions diminishing a church's connection to the Presbyterian Church (U.S.A.).

Further, congregations that fail to abide by the principles of Gracious Separation "have breached important responsibilities and duties."<sup>23</sup>

### **DOES A CONGREGATION HAVE TO BE DISMISSED TO ANOTHER REFORMED BODY?**

Yes. Dismissal to another reformed body is a requirement through authoritative interpretations of PC(USA) constitutional provisions.<sup>24</sup> Through authoritative interpretation the General Assembly held:

Presbyteries may dismiss congregations to other ecclesiastical bodies of this denomination, and to denominations whose organization is conformed to the doctrines and order of the Presbyterian Church (U.S.A.). No congregation may be dismissed to independent status, or to the status of a nondenominational congregation.<sup>25</sup>

The requirement of dismissal to another reformed body goes back to historical reformed understandings of the importance and need to continue the reformed family as well as our reformed theology. Further, dismissal to "another Reformed body" was also the language used during reunion and is found in the *Book of Order* under the "Articles of Agreement."<sup>26</sup> Accordingly, if the presbytery discerns it should dismiss the congregation to another reformed body, then the Presbytery should dismiss "pending reception into another reformed denomination" so that the congregation does not end up in independent status if another reformed denomination refused to admit the congregation into the denomination.

### **WHO DETERMINES WHETHER THE RECEIVING BODY IS ANOTHER REFORMED BODY?**

"It is the responsibility of the dismissing presbytery to determine whether the receiving body meets these standards, and this responsibility cannot be delegated to any other entity within the presbytery (such as an administrative commission). Thus, the General Assembly may not determine in advance whether a particular denomination or its constituent bodies qualify under these standards."<sup>27</sup> In exploring this matter, presbyteries should consider such questions as whether the receiving body is:

- “1) doctrinally consistent with the essentials of Reformed theology as understood by the presbytery;
- 2) governed by a polity that is consistent in form and structure with that of the Presbyterian Church (U.S.A.); and
- 3) of sufficient permanence to offer reasonable assurance that the congregation is not being dismissed to de facto independence.”<sup>28</sup>

Further, "failure on the part of the presbytery thoroughly to explore and adequately to document its satisfaction in these matters may thus violate, however unintentionally, the spirit of the polity of the Presbyterian Church (U.S.A.)"<sup>29</sup>

### **MAY A PRESBYTERY DELEGATE ITS FINAL DECISION TO DISMISS A CONGREGATION TO AN ADMINISTRATIVE COMMISSION?**

While a presbytery could delegate dismissal of a congregation to an Administrative Commission, such a decision is of such missional importance to a presbytery that the entire presbytery would likely wish to discern such a matter together.<sup>30</sup>

### **CAN A PRESBYTERY DISMISS ITSELF OR ALL OF ITS CONGREGATIONS?**

No. A presbytery cannot release itself, or all of its congregations, for only the General Assembly and the synod working together can organize, divide, unite, or combine presbyteries or portions of a presbytery.<sup>31</sup>

### WHAT ARE GRACIOUS DISMISSAL POLICIES?

At the direction of the 219<sup>th</sup> General Assembly (2008), the Stated Clerk of the Presbyterian Church (U.S.A.) sent a resolution to the presbyteries, synods and sessions, “indicating the will of the assembly that presbyteries and synods develop and make available to lower governing bodies and local congregations a process that exercises the responsibility and power ‘to divide, dismiss, or dissolve churches in consultation with their members’ with consistency, pastoral responsibility, accountability, gracious witness, openness, and transparency.”<sup>32</sup> Accordingly, Gracious Dismissal Policies may be used by councils to offer clarity and guide their process when discerning whether and how a particular congregation could be dismissed from the PC(USA).

### HOW DO GRACIOUS DISMISSAL POLICIES RELATE TO THE TRUST CLAUSE (G-4.0203)?

In the recent General Assembly Permanent Judicial Commission (GAPJC) case, [Tom v. Pby of San Francisco](#), the GAPJC authoritatively interpreted how the Trust Clause found in the *Book of Order* at G-4.0203 interacts with Gracious Dismissal Policies.<sup>33</sup> The GAPJC held that while a presbytery has broad discretionary authority under the *Book of Order* to determine property rights [within the context of determining the mission of Jesus Christ in the world (G-4.0201) and in its district (G-3.0303a) to dismiss a particular congregation within its geographic region (G-3.0301a)], the presbytery must fulfill its fiduciary duty under the Trust Clause (G-4.0203) to consider the interest of the Presbyterian Church (U.S.A.) as a beneficiary of the property.

### WHAT MUST BE IN A GRACIOUS DISMISSAL POLICY?

A presbytery has broad discretionary authority to determine the mission of Jesus Christ in its district and may take into account many issues such as the spiritual needs of the congregation and community as well as the Marks, Notes and Great Ends of the Church.<sup>34</sup> The presbytery must also consider a congregation’s financial position and valuation of property and take into consideration the Presbyterian Church (U.S.A.)’s use and benefit of the property in every decision concerning disposition of property. Accordingly, the Gracious Dismissal Policy should include this duty among the procedures listed within the Policy.

### MUST A GRACIOUS DISMISSAL POLICY OR IMPLEMENTATION OF A GRACIOUS DISMISSAL POLICY INCLUDE CONSULTATION WITH ANY OF THE GENERAL ASSEMBLY ENTITIES?

No, a presbytery has discretionary authority to determine the mission of Jesus Christ in its district when deciding whether to organize, merge, dismiss or dissolve a congregation.<sup>35</sup> This discretionary authority includes the presbytery’s consideration of a congregation’s financial position and valuation of the property.

### MAY A GRACIOUS DISMISSAL POLICY (OR ANY BYLAW OR POLICY OF THE PRESBYTERY) DELINEATE THE CIRCUMSTANCES IN WHICH A PRESBYTERY WILL DISSOLVE, DISMISS OR MERGE A CONGREGATION?

No. Since the presbytery must determine its mission when discerning whether to dissolve, dismiss or merge a congregation, dismissal of a congregation requires that the presbytery make the decision about dismissal in each separate case after careful consideration of all the circumstances.<sup>36</sup> A presbytery may not discern ahead of time the circumstances in which a presbytery will dismiss a congregation. “Dismissal of a congregation now requires, as it always has with the single exception of Article 13, that the presbytery make the decision about dismissal in each separate case after careful consideration of all the circumstances.”<sup>37</sup>

### MAY A GRACIOUS DISMISSAL POLICY DESCRIBE HOW AND WHEN PROPERTY WILL BE USED AND/OR DISTRIBUTED AMONG CONGREGATIONAL ENTITIES?

No. A presbytery is required to determine its mission, including the use and distribution of real and personal property, after careful consideration of all the circumstances on a case-by-case basis.<sup>38</sup>

**HOW MUST A GRACIOUS DISMISSAL POLICY BE IMPLEMENTED?**

Even if the presbytery's Gracious Dismissal Policy does not include the fiduciary duty under the Trust Clause, the presbytery should ultimately exercise this fiduciary duty before making its decision about dismissal. In [Tom v. Pby of San Francisco](#), the GAPJC stated that this would include exercising due diligence regarding the value of the property of the congregation seeking dismissal which would include doing a financial analysis of the value of the property.<sup>39</sup> The presbytery must be informed of this financial analysis before it votes on a dismissal. Providing this information gives the presbytery and congregation the information needed to make an informed decision regarding dismissal of the congregation.

**WHAT TYPES OF GRACIOUS DISMISSAL POLICIES WOULD NOT BE CONSTITUTIONAL?**

Any Gracious Dismissal Policy that precludes a presbytery from taking into account the Trust Clause fiduciary duty before deciding whether to dismiss a congregation on a case-by-case basis would be unconstitutional. Possible examples of policies that would preclude this analysis on a case-by-case basis are:

1. Policies that only require a percentage vote from the congregation for the presbytery's approval of terms of dismissal including only taking into account the spiritual needs or desires of current membership and not the breaking of the historic relationship of the members who came before.
2. Policies that only require the consideration of per capita and/or mission financial obligations are not sufficient to meet the fiduciary duty under the Trust Clause to consider the interest of the Presbyterian Church (U.S.A.) as a beneficiary of property.
3. Policies that require the payment by the congregation of a set percentage of assets prior to approval for dismissal. This would serve to preclude a case-by-case analysis.

**WHAT IS THE PRESBYTERY'S ROLE REGARDING RECORDS OF A CONGREGATION SEEKING DISMISSAL?**

Presbyteries have a constitutional responsibility to safeguard the historic records of congregations that choose to leave the denomination. According to the *Book of Order*, G-3.0107, ownership of the records of dismissed or dissolved congregations passes to the presbytery, and clerks are charged with the safekeeping of records that must be maintained in perpetuity.<sup>40</sup> Depositing records with the Presbyterian Historical Society, the official archives of the Presbyterian Church (U.S.A.), is a recommended means of preservation. The Presbyterian Historical Society (PHS) offers stated clerks and administrative commissions several options that may help ease the conflict over records while ensuring that vital materials are preserved by the denomination. The desire of departing congregations to have continued access to records may be a point of contention. By choosing to microfilm the original records and digitize the microfilm, presbyteries, congregations and PHS will all have access to the materials.<sup>41</sup> In sum, PHS provides presbyteries with the capacity to: 1) Place original materials on deposit; 2) Place materials on deposit and microfilm them; 3) Deposit, microfilm and digitize records; or 4) microfilm, digitize and return the original records to the congregation.<sup>42</sup>

**IS A PRESBYTERY'S DECISION TO DISMISS A CONGREGATION SUBJECT TO REVIEW?**

Yes, a presbytery's decision to dismiss a congregation is subject to review and if a presbytery fails to carry out its constitutional responsibilities, the synod may be required to intervene by undertaking review of the presbytery's processes and decisions.<sup>43</sup> If the synod finds that the presbytery has not been faithful to its mission, the synod may direct the presbytery to appropriate action.<sup>44</sup> If a presbytery is unable or unwilling to carry out these constitutional responsibilities, the synod may assume jurisdiction over the presbytery's powers to divide, dismiss or dissolve congregations, identify true church, and hold property in trust for the use and benefit of the Presbyterian Church (U.S.A.).<sup>45</sup>

## WHAT ROLE DOES THE TRUST CLAUSE PLAY WITH REGARD TO CONGREGATIONAL LOANS?

The Trust Clause provides important support and safeguards for the low-cost loan programs for Presbyterian Church (U.S.A.) congregations provided by the Presbyterian Investment and Loan Program, Inc. (PILP) and the General Assembly Mission Council (GAMC). The PILP makes low-cost loans to Presbyterian Church (U.S.A.) congregations for new buildings and renovations and without the Trust Clause, presbyteries would be unlikely to guarantee loans and without guarantees PILP's ability to assist congregations would be significantly impaired.<sup>46</sup> Most church building projects cannot be financed by congregations from their current receipts and many congregations depend on loans from PILP, the GAMC's Church Loan Program, or commercial lenders to complete these projects. Generally, these loans are secured by first lien mortgages on the property of the borrowing congregation. The property of the congregation provides the collateral for these loans and is a potential source of repayment should the borrowing congregation not be able to repay the loan. In addition to being secured, these loans are guaranteed by the presbytery of jurisdiction of the borrowing congregation. This means the presbytery is responsible to pay back the loan should the borrowing congregation fail to pay. The presbyteries have confidence in guaranteeing these secured loans due in part to the fact that church property is held in trust under G-4.0203. Further, G-4.0204 states:

Whenever property of, or held for, a congregation of the Presbyterian Church (U.S.A.) ceases to be used by that congregation as a congregation of the Presbyterian Church (U.S.A.) in accordance with this Constitution, such property shall be held, used, applied, transferred, or sold as provided by the presbytery.

Under G-4.0204, when a congregation ceases to exist or leaves the denomination, the congregation's property (which includes, but is not limited to, its real property, building, and other assets such as investments) is subject to the control of the presbytery of jurisdiction. The presbytery continues to be responsible for mission of the Presbyterian Church (U.S.A.) in the area of the departing congregation, and the presbytery can use the property to implement that mission. If the departing congregation has a secured loan with PILP, guaranteed by the presbytery, the presbytery will have the ability to retain the property or the presbytery could use the property to raise funds to satisfy the presbytery's responsibility under the guaranty. As noted above, a presbytery may discern and give some or all of this property to a departing congregation, but this choice will not result in a release of the obligation to repay the secured loan and/or in the release of the guaranty.

If a congregation has a secured loan with PILP and/or the GAMC and chooses to leave the denomination or is dissolved by a presbytery, the terms of the loan provide that the loan is accelerated and becomes immediately due and payable. The guarantee of the presbytery is not satisfied until the loan is paid in full. Our connectional system and the fact that property owned and used by congregations is held in trust for the Presbyterian Church (U.S.A.) allows the denomination to assist local congregations by providing low interest mortgages through national entities such as PILP and the Church Loan Program. The assurances and protections given under the Trust Clause help enable these programs to make loans secured by mortgages of the underlying property which are more financially beneficial for the congregations than traditional loan sources.

In the current economy and in the aftermath of the banking crisis, it has become increasingly difficult for small and mid-size congregations to obtain financing for capital projects from banks.

It is often new, young, or struggling congregations that need the resources of the denomination the most and the PILP is able to meet these needs of these and other Presbyterian Church (U.S.A.) congregations. Without the current Trust Clause of the *Book of Order*, it is important to recognize that presbyteries would be unlikely to guarantee loans and without guarantees PILP's ability to assist congregations would be significantly impaired.

*Updated February 2014*

<sup>1</sup> G-4.0203

<sup>2</sup> PJC ([2012, 221-03 Tom et. al. vs. Pby of San Francisco](#))

<sup>3</sup> This necessity for adoption of G-4.0203 arose from court decisions that changed the permissible role of courts in determining disputes as to church property. Until a few years before the adoption of G-4.0203, courts determining property disputes sought to determine from the doctrinal documents of a denomination whether the property of local congregations was held in trust for the larger church (this was referred to as the “implied trust” analysis). However, in 1979, the United States Supreme Court found that this type of inquiry into the doctrine of a denomination was an improper intrusion into the First Amendment right to freedom of religion. Accordingly, the courts were required to determine property disputes without seeking to interpret a denomination’s doctrine (the so-called neutral principles of law analysis). For Presbyterians, this change in the legal framework the civil courts applied suggested specific reference in property matters in a denomination’s constitutional documents was prudent. Section G-4.0203 provides that explicit understanding of the long held Presbyterian understanding. As such, it was not a change in our Presbyterian polity, but rather an attempt to protect the denomination’s polity against changes in the permissible framework of legal analysis applied by the civil courts.

<sup>4</sup> In John 17:20-21, Jesus prayerfully desires unity in the Church saying: <sup>20</sup> “My prayer is not for them alone. I pray also for those who will believe in me through their message, <sup>21</sup> that all of them may be one, Father, just as you are in me, and I am in you. May they also be in us so that the world may believe that you have sent me. Paul picks up on this theme in Galatians and Ephesians: Galatians 3:28 says “There is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are all one in Christ Jesus.” Ephesians 4:3, “Make every effort to keep the unity of the Spirit through the bond of peace.” Along these same lines, F-1.0301 reminds us that our “church is called to be a community of love, where sin is forgiven, reconciliation is accomplished, and the dividing walls of hostility are torn down.”

<sup>5</sup> GA (2006), Report of the Task Force on Peace, Unity, and Purity, 06-01, Rec. 1, a-b.

<sup>6</sup> G-3.0101

<sup>7</sup> G-1.0101

<sup>8</sup> See F-1.02 “Jesus Christ is the Head of the Church;” see also F-1.0403

<sup>9</sup> G-4.0201

<sup>10</sup> G-1.0101

<sup>11</sup> G-3.0101

<sup>12</sup> G-3.0301; G-3.0303(a)

<sup>13</sup> G-3.0301(a)

<sup>14</sup> G-3.0301(c)

<sup>15</sup> G-4.0207

<sup>16</sup> See G-3.0301; G-3.0303(a)

<sup>17</sup> GA (218th, Item 4-20); see also PJC (*Sundquist v. Heartland*, [Remedial Case 219-03](#), 2008)

<sup>18</sup> See G-1.0503 and G-3.02

<sup>19</sup> *Sundquist v. Heartland*, [Remedial Case 219-03](#)

<sup>20</sup> See PCUS 1976, 92, *Strong v. Synod of Mid-South*.

<sup>21</sup> *Sundquist v. Heartland*, [Remedial Case 219-03](#)

<sup>22</sup> *Sundquist v. Heartland*, [Remedial Case 219-03](#)

<sup>23</sup> *Sundquist v. Heartland*, [Remedial Case 219-03](#)

<sup>24</sup> GA (2008, 14, 15 Item 07-13). For more information on authoritative interpretations see G-3.0501c and G-6.02

<sup>25</sup> GA (2008, 14, 15 Item 07-13). Along these lines, The General Assembly Permanent Judicial Commission has found that “[a]n ‘independent’ or ‘congregational’ Presbyterian church is an anomaly which runs counter to the notion that we are a ‘family’ of churches and dismissal must therefore be made to another church within the family group ...

... The ... presbytery had no constitutional right to dismiss ... the churches to independent status. ... The policy of not allowing members and ministers to be cut loose with no ties indicates the historic Presbyterian policy of ecclesiastical connectionalism. This policy likewise forbids ... dismissal to independency” (PCUS 1973, pp. 119- 121, *Anderson v. Synod of Florida*).

<sup>26</sup> See the *Book of Order* Appendix B, Article 13 (page B. 13). The “Articles of Agreement” are cited here for historical purposes and do not carry constitutional authority.

<sup>27</sup> GA (2008, 14, 15 Item 07-13).

<sup>28</sup> GA (2008, 14, 15 Item 07-13).

<sup>29</sup> GA (2008, 14, 15 Item 07-13).

<sup>30</sup> *Sundquist v. Heartland*, [Remedial Case 219-03](#); see also (PCUS 1976, 92, *Strong v. Synod of Mid-South*)

<sup>31</sup> G-3.0502(e)

<sup>32</sup> GA (2008, 49, 51, 284, Item 04-28) The 218<sup>th</sup> General Assembly (2008) of the Presbyterian Church (U.S.A.)

1. Directs the Stated Clerk to send this resolution to the presbyteries, synods, and sessions, indicating the will of the assembly that presbyteries and synods develop and make available to lower governing bodies and local congregations a process that exercises the responsibility and power "to divide, dismiss, or dissolve churches in consultation with their members" (Book of Order, G-11.0103i) with consistency, pastoral responsibility, accountability, gracious witness, openness, and transparency.

2. Believing that trying to exercise this responsibility and power through litigation is deadly to the cause of Christ, impacting the local church, other parts of the Body of Christ and ecumenical relationships, and our witness to Christ in the world around us, [the General Assembly] urges [congregations considering leaving the denomination,] presbyteries [,] and synods to implement a process using the following principles:

- Consistency: The local authority delegated to presbyteries is guided and shaped by our shared faith, service, and witness to Jesus Christ.
- Pastoral Responsibility: The requirement in G-11.0103i to consult with the members of a church seeking dismissal highlights the presbytery's pastoral responsibility, which must not be submerged beneath other responsibilities.
- Accountability: For a governing body, accountability rightly dictates fiduciary and connectional concerns, raising general issues of property (G-8.0000) and specific issues of schism within a congregation (G-8.0600). But full accountability also requires preeminent concern with "caring for the flock."
- Gracious Witness: It is our belief that Scripture and the Holy Spirit require a gracious witness from us rather than a harsh legalism.
- Openness and Transparency: Early, open communication and transparency about principles and process of dismissal necessarily serve truth, order, and goodness, and work against seeking civil litigation as a solution.

<sup>33</sup> PJC (2014, 221-03, [Tom et al v. Pby of San Francisco](#))

<sup>34</sup> See F-1.0302; F-1.0303; F-1.0304.

<sup>35</sup> However, in considering each congregation on a case-by-case basis, it is important to recognize that one of the entities of the General Assembly or a synod may have created with the congregation and the presbytery a direct financial interest in the property or assets and thus must be consulted by the presbytery. For example, The Presbyterian Church (U.S.A.) Investment and Loan Program (PILP) regularly extends loans to congregations which are secured by the property and/or guarantee of payment from a presbytery. A presbytery that is considering the dismissal or dissolution of a congregation with a secured or unsecured loan from PILP must, as a part of the presbytery's fiduciary interest under the Trust Clause, consult with the Presbytery Investment and Loan Program.

<sup>36</sup> GA (Minutes, 1991, Req. 91-24, Part I, p 396).

<sup>37</sup> GA (Minutes, 1991, Req. 91-24, Part I, p 396).

<sup>38</sup> GA (Minutes, 1991, Req. 91-24, Part I, p 396).

<sup>39</sup> PJC (2014, 221-03, [Tom et al v. Pby of San Francisco](#))

<sup>40</sup> G-3.0107 states, "each council shall keep a full and accurate record of its proceedings. Minutes and all other official records of councils are the property in perpetuity of said councils or their legal successors. When a council ceases to exist, its records shall become the property of the next higher council within whose bounds the lower council was prior to its cessation. The clerk of each council shall make recommendation to that body for the permanent safekeeping of the body's records with the Presbyterian Historical Society or in a temperature and humidity-controlled environment of a seminary of the Presbyterian Church (U.S.A.)."

<sup>41</sup> The PHS microfilming program creates archival-quality film at a reduced cost for PC(USA) entities, and if requested, PHS will arrange for the production of a digital edition of the microfilm in PDF or JPEG format at cost. Presbyteries may opt to pay for microfilming (and digitization) or ask the departing congregations to cover the costs. After the records are microfilmed, stated clerks may decide to place the original records on deposit at PHS or return them to the departing congregation as part of a gracious dismissal agreement.

<sup>42</sup> For more information about these processes, please contact: Presbyterian Historical Society, 425 Lombard Street, Philadelphia, PA 19147. Phone (215)-627-1852. Email: [refdesk@history.pcusa.org](mailto:refdesk@history.pcusa.org) or via the web at: [www.history.pcusa.org](http://www.history.pcusa.org)

<sup>43</sup> G-3.0108(a)&(b); *see also* F-3.0206

<sup>44</sup> G-3.0108(a)(b)&(c)

<sup>45</sup> *See* G-3.0401(c); G-3.0301(a); G-3.0303(b); G-4.0203 & G-4.0207.

<sup>46</sup> The funds for PILP loans are generated through the sale of Term Notes, which are debt securities to PC(USA) members and congregations and the sale of Denominational Account receipts (DARs) accounts to mid councils and PC(USA) agencies. The interest paid on these Term Notes and DARs and any redemptions are funded by the interest and principal repayment of the loans to congregations. The PILP relies on the congregation's repayment of principal and interest to be able to pay interest to investors and to repay principal to investors at maturity. The PILP administers the Church Loan Program for the GAMC. The Church Loan Program is a mission program under the responsibility of the GAMC and the principal corporation of the General Assembly, Presbyterian Church (U.S.A.), A Corporation, where endowment funds are also used to make low-cost loans to congregations.