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**Jun 27 2022**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

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Appellate Case No. 2020-000986

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The Protestant Episcopal Church in the Diocese of South Carolina; The Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body; All Saints Protestant Episcopal Church, Inc.; Christ St. Paul's Episcopal Church; Church Of The Cross, Inc. and Church Of The Cross Declaration Of Trust; Church Of The Holy Comforter; Church of the Redeemer; Holy Trinity Episcopal Church; Saint Luke's Church, Hilton Head; St. Bartholomew's Episcopal Church; St. David's Church; St. James; Church, James Island, S.C.; St. Paul's Episcopal Church of Bennettsville, Inc.; The Church Of St. Luke and St Paul, Radcliffeboro; The Church Of Our Saviour Of The Diocese of South Carolina; The Church Of The Epiphany (Episcopal); The Church Of The Good Shepherd, Charleston, SC; The Church Of The Holy Cross; The Church Of The Resurrection, Surfside; The Protestant Episcopal Church, Of The Parish Of Saint Philip, In Charleston, In The State Of South Carolina; The Protestant Episcopal Church, The Parish Of Saint Michael, In Charleston, In The State Of South Carolina and St. Michael's Church Declaration Of Trust; The Vestry And Church Wardens Of The Episcopal Church Of The Parish Of St. Helena and The Parish Church of St. Helena Trust; The Vestry and Church Wardens Of The Episcopal Church Of The Parish Of St. Matthew; The Vestry and Wardens Of St. Paul's Church, Summerville; Trinity Church of Myrtle Beach; Trinity Episcopal Church; Trinity Episcopal Church, Pinopolis; Vestry and Church Wardens Of The Episcopal Church Of The Parish Of Christ Church; Vestry and Church Wardens Of The Episcopal Church Of The Parish Of St. John's, Charleston County, The Vestries And Churchwardens Of The Parish Of St. Andrew,

Respondents,

v.

The Episcopal Church (a/k/a, The Protestant Episcopal Church in the United States of America); The Episcopal Church in South Carolina,

Appellants.

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**REPLY OF CHURCH OF THE HOLY COMFORTER**

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Pursuant to Rules 221(a) and 240 of the South Carolina Appellate Court Rules, Church of the Holy Comforter (“Holy Comforter”), hereby submits its reply to the Return to Petitions for Rehearing (“Return”) filed by The Episcopal Church (a/k/a, The Protestant Episcopal Church in the United States of America) (“The National Church”) and The Episcopal Church in South Carolina (collectively, “Appellants”).<sup>1</sup> Holy Comforter filed its petition for rehearing (“Petition”) on one ground: no trust was created because the language of accession to The National Church and its diocese existed in its constitution from 1968 – years before the creation of the Dennis Canon or the Diocesan Dennis Canon. Therefore, Holy Comforter contends that there was never a confluence of a declaration of trust and present intent to create a trust in any governing document of Holy Comforter.

In its attempt to address this argument, Appellants try to piecemeal argument (not evidence) to state an express trust arose in their favor because Holy Comforter continued to use accession language throughout the years, including amendments to the 1974 Constitution in 1989 that addressed the ministerial roles of vestry members. In other words, Appellants argue that the declaration of trust has existed for Holy Comforter since 1968 and then sprung into action in 1989 when it amended its Constitution to change the duties of the clerk and junior wardens of Holy Comforter’s vestry. This argument is misguided and is contrary to South Carolina law. As pronounced by this Court, it is axiomatic in South Carolina that the beneficiary must establish that the settlor took “present action *coupled with* the present intent to create a trust for the beneficiary.” (Opinion at 23-24 (emphasis added).) There must be a confluence of present action and present intent; otherwise, the stage is set for unintended consequences which deprive an unsuspecting owner

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<sup>1</sup> Holy Comforter also incorporates and adopts by reference the arguments regarding accession made by the other Petitioners in their Reply filed with this Court on June 27, 2022

of its property. Appellants, who importantly bear the burden of showing this Court that an express trust exists, have failed to show how Holy Comforter had the present intent to create an express trust when it amended its Constitution in 1989 to address two ministerial issues. Respectfully, this Court should hold that Holy Comforter did not commit any action and did not have the necessary intent for a trust to arise in favor of Appellants.

**I. South Carolina Law Requires a Present Intent to Create a Trust to Accompany a Present Action to Create a Trust.**

The thrust of Appellants' argument is that by the "restatement" of accession language in Holy Comforter's Constitution for decades, coupled with Holy Comforter's alleged knowledge of the National and Diocesan Dennis Canons, was sufficient to create a trust. Appellants try to counter Holy Comforter's argument by calling it "pedantic" and a "form-over-substance" argument. (Return at 12 & 15.) Holy Comforter's argument is anything but. Rather, it is an argument that is based on well-established South Carolina trust law that a trust can only be created when a settlor intends to create a trust.

As detailed in the Petition, the record for Holy Comforter provides that the same accession language has been used in the 1968 and 1974 Constitutions, along with the 1989 amendments to the Constitution that addressed the roles of the clerk and junior warden regarding the vestry. As evidenced by the four corners of the Constitution, as amended in 1989, the sole action and intent of Holy Comforter was to change the roles of the offices of the clerk and the junior warden. (See footnotes of R. 6730 & 6733 regarding amendments & R. 6727 regarding "REVISED JAN. 9, 1989.)

Appellants can point to no other evidence in the record to show that the intent was anything other than modifying these two offices. The only present action taken in 1989 was to amend the

Constitution to carry out the parish vote to change the roles of the clerk and the junior warden; and the only present intent was to change the roles of these two offices. Nothing more, nothing less.

## **II. Appellants' Arguments Turn South Carolina's Law on Its Head.**

Appellants want this Court to ignore that the present action and the present intent must occur at the same time. They argue that the repeated use of the accession language by Holy Comforter created a trust in 1989 when it amended its Constitution to make ministerial amendments because Holy Comforter purportedly had knowledge of the National and Diocesan Dennis Canons. They state that Holy Comforter should have affirmatively stated in its Constitution that it did not agree with the Dennis Canon when it made its ministerial amendments in 1989. (Return at 13.) They base this argument by relying on *Ahrens v. State*, which provides that “citizens are presumed to know the law and are charged with exercising reasonable care to protect their interests.” *Ahrens*, 392 S.C. 340, 355, 709 S.E.2d 54, 62 (2011). This statement of law is true. But what Appellants are forgetting is that *All Saints* properly articulated the law in South Carolina, and Holy Comforter had no affirmative duty to disavow certain canons to avoid being snapped up by Appellants through Appellants' *own* passage of the Dennis Canon. *See All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of S.C.*, 385 S.C. 428, 685 S.E.2d 163 (2009).<sup>2</sup>

In 1968 and 1974 when Holy Comforter acceded in its Constitution to the canons of the National Church and its diocese, there was no Dennis Canon. In 1979, when the Dennis Canon was created by the National Church, there was no South Carolina legal precedent for the creation

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<sup>2</sup> Appellants also forget that a Georgia case cannot trump controlling South Carolina law. *All Saints* is still good law in South Carolina, and Appellants' reliance on a Georgia case is misplaced.

of a trust via a declaration solely by a beneficiary who has no ownership in the property.<sup>3</sup> In 1989, when Holy Comforter amended certain specific provisions of its Constitution having nothing to do with the National Church or any diocese affiliation, there was no recognition in the legal or lay communities that title to real property could be alienated by acts of a stranger to the title. In fact, the Dennis Canon in South Carolina was not fully addressed until *All Saints* in 2009. *See All Saints*, 385 S.C. at 449, 685 S.E.2d at 174 (“[W]e hold that neither the 2000 Notice nor the Dennis Canon has any legal effect on title to the All Saints congregation’s property.”).

Stated differently, Appellants’ argument is that by doing nothing in 1989, Holy Comforter created an express trust in Appellants’ favor. Appellants look to Georgia’s Court of Appeals to support this position. (Return at 14 (citing *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Ga.*, 305 Ga. App. 87, 96, 699 S.E.2d 45, 53 (Ct. App. 2010)).) But the law in South Carolina, as articulated in *All Saints*, is contrary to the aforementioned Georgia *Christ Church* case. This is true even in light of this Court’s 2017 opinion in this matter, which was five years after Holy Comforter dissociated from the National Church. When Holy Comforter dissociated from the National Church, it had a right to rely on the *All Saints* opinion. After all, *All Saints* represented the law in South Carolina then as it relates to the effect of the Dennis Canon.

Importantly, the burden of proof to show both the present intent and the present action to create a trust lies with the National Church and its diocese. The record is devoid of any evidence supporting the assertion that Holy Comforter had a present intent in 1989 to convey its property into a trust for the benefit of Appellants.

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<sup>3</sup> It cannot be lost that the National Church (the beneficiary) is the entity which drafted and approved the Dennis Canon, which purports to create a trust over parish (*i.e.* settlor property), which is an anathema to South Carolina trust law.

Appellants' citing of the Petitioners' position before the Court in *Protestant Episcopal Church I* is not evidence of Holy Comforter's post Dennis Cannon accession. In point of fact, in 1989 it merely added two unrelated, ministerial or technical amendments to its 1974 Constitution which contained the accession language from 1974. Nothing in Holy Comforter's 1989 amendments to the 1974 Constitution constitutes evidence of accession.

**III. This Court's Analysis of Christ Church is Critical.**

Appellants try to distinguish this Court's analysis of Christ Church to avoid the conclusion that this Court reached – the 1980 amendments to its Bylaws did not create an express trust in favor of the National Church or its diocese because it was made seven years before the Diocesan Dennis Canon was enacted. (Op. at 32-33.) Thus, Christ Church's alleged intent to create a trust in 1980 was insufficient to create a trust. Similarly, the accession language used by Holy Comforter was insufficient to create a trust, as it was used years before the National or Diocesan Dennis Canons were enacted. Appellants' argument regarding Christ Church is no more than a distinction without a difference.

**CONCLUSION**

For the above-stated reasons, this Court respectfully should reconsider its Opinion with respect to Holy Comforter and hold that Holy Comforter did not create a trust in favor of the National Church or its diocese.

*[Signature page follows.]*

**SOWELL & DuRANT, LLC**

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