

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2020-000986

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.

PETITION FOR REHEARING

RECEIVED

Sep 01, 2022

S.C. SUPREME COURT

Pursuant to Rules 221(a) and 240, SCACR, Appellants The Episcopal Church (“TEC”) and The Episcopal Church in South Carolina (“TECSC”) petition for rehearing of the Court’s decision in *Protestant Episcopal Church v. Episcopal Church*, Op. No. 28095 (S.C. Sup. Ct. re-filed August 17, 2022) (Howard Adv. Sh. No. 29 at 14) (“Re-filed *Protestant Episcopal Church II*”), as to section III.E. of the opinion regarding Respondents The Church of the Holy Cross, Stateburg (“Holy Cross”) and The Vestries and Church Wardens of the Parish of St. Andrew, Charleston (“Old St. Andrew’s”).

INTRODUCTION

In section III.E., the Court made a factual determination and issued a declaratory judgment as to whether Holy Cross and Old St. Andrews revoked the trusts that they expressly created. However, no court previously addressed whether these parish trusts were revocable or actually revoked based on post-2006 evidence. That is because it was not previously at issue in this case and, therefore, Appellants did not have a reason or opportunity to introduce evidence on the issue.

Judge Goodstein did not address the question of whether parish trusts were revocable or, if revocable, whether the trusts were revoked. Rather, she ruled the Dennis Canon did not create any trusts. In the first appeal, a majority of this Court held “the trusts in this case, based on express accession to the Dennis Canon, are irrevocable.” Re-filed *Protestant Episcopal Church II*, Howard Adv. Sh. No. 29 at 41 (citing *Protestant Episcopal Church in the Diocese of S.C. v. Episcopal Church*, 421 S.C. 211, 251, 806 S.E.2d 82, 103 (2017) [*Protestant Episcopal Church I*]).

The grounds for this petition are that the Court issued a declaratory judgment on an issue that was not before the lower court or this Court and the Court based its judgment on an incomplete factual record. Even the incomplete factual record shows that the Holy Cross and Old St. Andrew’s trusts were created before 2006 and are irrevocable. In the event the Court is unwilling to consider

this overlooked or misapprehended evidence and reverse its declaratory judgment as to Holy Cross and Old St. Andrew's, it should remand the case for additional fact-finding and a lower court determination of whether the express trusts that Holy Cross and Old St. Andrew's created are revocable and, if so, whether they legally revoked the express trusts. Alternatively, the Court should exercise its original jurisdiction to conduct similar fact-finding and resolution of these issues based upon a complete record.¹ Appellants request the following relief on rehearing:

1. Reversal of the Court's findings that Holy Cross and Old St. Andrew's express trusts are revocable and were revoked because the Court failed to consider evidence that the trusts were created before 2006 and, thus, were irrevocable.
2. Alternatively, vacate the Court's findings of revocability and revocation pending further fact-finding on these issues.

ARGUMENT

I. The Court overlooked or misapprehended evidence of Holy Cross' and St. Andrew's' pre-2006 creation of a trust in favor of Appellants.

In their return to the petitions for rehearing, Appellants cited to evidence that both Holy Cross and Old St. Andrew's created trusts by acceding to the Dennis Canon **before** 2006 and, therefore, that they created irrevocable trusts. Based on the evidence discussed below, the Court should reconsider its judgment as to Holy Cross and Old St. Andrew's, and find that they created pre-2006, irrevocable trusts.

Holy Cross.

To support its finding that Holy Cross acceded to the Canons, the Court cited to portions of Holy Cross' 2011 bylaws. Re-filed *Protestant Episcopal Church II*, Howard Adv. Sh. No. 29 at 38 (citing R. pp. 6446, 6448). While those bylaws were amended in 2011, the amendments were unrelated to the portions cited by the Court. (R. pp. 6446, 6457). This confirms that the

¹ Appellants simultaneously file a Motion for Relief from Judgment, with this Petition being the primary relief sought and the Motion filed as alternative relief.

accession language the Court relied upon predated 2011. In fact, the identical language was contained within Holy Cross' bylaws as early as 1980. (R. p. 8912). Therefore, Holy Cross did accede to TEC's and TECSC's canons before 2006 and, thus, created an irrevocable trust. However, the Court overlooked and failed to address this evidence in its Re-filed Opinion.

Old St. Andrew's.

To support its holding that Old St. Andrew's acceded to the Canons, the Court relied on Old St. Andrew's 2007 and 2010 constitution and canons. Re-filed *Protestant Episcopal Church II*, Howard Adv. Sh. No. 29 at 42, 51-52. However, the Court overlooked and failed to address that the Record shows that, not later than January 10, 1970, Old St. Andrew's had adopted a constitution and canons that not only "accede[d] to and adopt[ed]" the constitution and canons of TEC and TECSC (in Article I) but also stated, in Article II:

ANY FUTURE CHANGES IN THE CONSTITUTION AND CANONS OF THE EPISCOPAL CHURCH IN THE UNITED STATES AND THE DIOCESE OF SOUTH CAROLINA, WHICH MAY CONFLICT WITH ANY ARTICLE OF THIS PARISH CONSTITUTION OR CANONS, SAID PARISH ARTICLES SHALL AUTOMATICALLY BE CHANGED TO CONFORM. THE SECTION WHICH SHALL BE IN CONFLICT SHALL AUTOMATICALLY BE CHANGED TO CONFORM NATIONAL [sic] AND/OR DIOCESAN CONSTITUTION AND CANONS.

(R. p. 6246). The same Article I accession language was repeated in the undated version of the constitution and canons that was published in Old St. Andrew's' 2007 Vestry Book; but Article II was reworded to state:

[S]hould any future changes be made in the Constitution and Canons of the Episcopal Church in the United States or those of the Diocese of South Carolina which may then conflict with any article herein contained, this Constitution and these Canons shall be deemed automatically changed to conform with the national and diocesan constitution and canons.

(R. p. 6252). For reasons outlined in Appellants' Return to Petitions for Rehearing, these changes in the language of Article II must have occurred before 2006. The fact that Old St. Andrew's

reviewed Article II and consciously made changes in its syntax while retaining its effect plainly demonstrates that it intended, prior to 2006, to accede to the Dennis Canon and for any contrary parish provision to conform to TEC's and TECSC's canons. The Court did not address these facts in its Re-filed Opinion.

The Court also overlooked, misapprehended, and/or failed to address the effect of the fact that Old St. Andrew's had representatives attend and "apparently participate[] in the 1987 Diocesan Convention at which [TECSC] adopted the Diocesan Canon." Re-filed *Protestant Episcopal Church II*, at 29. This participation in the Convention, combined with the above-quoted canon in Article II that Old St. Andrew's adopted before 2006, is further evidence of its acceptance of and accession to the Dennis Canon well before 2006.

- II. Alternatively, the Court should allow additional evidence of Holy Cross' and Old St. Andrew's' pre-2006 creation of trusts because Appellants did not receive a full and fair opportunity to present evidence on this new issue.

During the *Protestant Episcopal Church I* appeal, the parties did not focus on the dates the trusts were created as potentially affecting revocability. TEC and TECSC argued in their Appellants' Brief that written evidence of accession in the governing documents of 29 parishes (including Holy Cross and Old St. Andrew's) was sufficient to create a trust via the Dennis Canon (R. pp. 1189-90) and noted "because these promises were made before January 1, 2006, they were presumptively irrevocable." (R. p. 1190). Holy Cross and Old St. Andrew's did not address the topic of revocability in the Respondents' Brief but instead argued they did not create trusts. The Court held in *Protestant Episcopal Church I*, as confirmed in its Re-Filed Opinion, that trusts created via accession to the Dennis Canon are irrevocable. (See Re-Filed Op. No. 28095, p. 28). In *Protestant Episcopal Church I*, the Court did not address whether creation of the trusts after January 1, 2006 could affect this holding (*id.*, pp. 28-29) – and for good reason: That issue was not before it, just as it had not been before Judge Goodstein at trial.

Similarly, that issue was not before Judge Dickson following remittitur, nor did he address it. He agreed the issue was not tried before Judge Goodstein but concluded – contrary to this Court’s holding – that it was not decided by this Court in its 2017 decision. (R. p. 26, n.28). Like Judge Goodstein, his ruling was predicated on the incorrect conclusion that Holy Cross and Old St. Andrew’s did not create trusts via the Dennis Canon. (R. pp. 24, 31).

Importantly, because the revocability-based on-date-of-accession issue was not tried before Judge Goodstein, specific evidence on this topic was not introduced or developed by the parties. In addition, because Respondents argued and Judge Dickson believed he could not entertain additional evidence beyond the previous trial record (R. pp. 4832, 4888, 4960, 4973-74, 4980), the parties did not offer specific evidence on the date-of-accession issue during proceedings on remittitur. In other words, this discrete topic was never tried at the Circuit Court level or addressed by this Court in the earlier appeal.

In fact, this Court did not address the revocability-based on-date-of-accession issue in its initial Opinion in the present appeal. Again, this was for good reason: Neither Appellants nor Respondents raised it in their briefs. Plus, in *Protestant Episcopal Church II*, this Court held its 2017 decision was dispositive on the issue of revocability.

In addressing revocation for the first time in this nine-year litigation, this Court acknowledged that the 2017 Court did not address the application of S.C. CODE ANN. § 62-7-602(a). Re-filed *Protestant Episcopal Church II*, Howard Adv. Sh. No. 29 at p. 41. Because the 2017 Court did not address it, then Judge Dickson necessarily did not address it on remittitur, and there is no revocability or revocation issue for this Court to decide on appeal. *Langley v. Boyter*, 284 S.C. 162, 181-82, 325 S.E.2d 550, 561 (Ct. App. 1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985) (“[A]ppellate courts in this state, like well-behaved children, do not

speaking unless spoken to and do not answer questions they are not asked. The question here before us has never been answered because it has never been asked.”).

Given that this Court’s ruling in the Re-filed Opinion makes the date of accession and revocability of an alleged post-2006 trust relevant for the first time, the proper procedure is to permit additional fact-finding on the issue. *See Bartley v. Allendale Cnty. Sch. Dist.*, 392 S.C. 300, 310, 709 S.E.2d 619, 624 (2011) (remanding a workers’ compensation case to allow the Commission “to make the necessarily factual findings and legal conclusions to resolve [plaintiff]’s claims” because “[i]t is not the province of this Court or the Court of Appeals to engage in fact-finding”).² This is necessary not only to comply with due process, as explained below, but also to take into account that an express statement of irrevocability is not always necessary to prove that a trust is irrevocable. *See* S.C. CODE ANN. § 62-7-415 and Reporter’s Notes (“The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor’s intention if it is proved by clear and convincing evidence what the settlor’s intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.”).

“Procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.” *Moore v. Moore*, 376 S.C. 467, 473, 657 S.E.2d 743, 746 (2008) (internal quotation and alteration marks omitted). The Court’s ruling on revocability as to Holy Cross and Old St.

² As noted above, as an alternative, the Court in its discretion has the power to exercise its original jurisdiction to address this question of declaratory relief, including establishing a process for receipt of evidence for purposes of fact-finding. *See, e.g., Doe v. Condon*, 341 S.C. 22, 532 S.E.2d 879 (2000) (appointing a special referee to conduct an evidentiary hearing and make proposed findings and recommendations regarding an action for declaratory judgment accepted in the Court’s original jurisdiction). The exercise of original jurisdiction may be both appropriate and desirable given the public interest involved, *see* Rule 245, SCACR, as well as the need for finality, which this Court has expressly recognized. Re-filed *Protestant Episcopal Church II*, Howard Adv. Sh. No. 29 at p. 6.

Andrew's deprives Appellants of a property interest without affording them procedural due process.

Holy Cross and Old St. Andrew's first raised the revocability-based-on-date-of-accession argument in their Petitions for Rehearing. In responding to those petitions, TEC and TECSC were necessarily limited to arguing the same evidence this Court considered in 2017 in finding the trusts were irrevocable.³ If the Court is both to affirm and to reconsider its 2017 holding as to irrevocability and then to consider this new argument at this late stage of the litigation, fairness and due process demand that the parties have an opportunity to offer additional evidence specific to the issue.⁴ *See* Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina* 14.II (3d ed. 2015) (stating an appellate court may "remand for the lower tribunal to make necessary findings of fact or conclusions of law" or "for a new trial on any or all of the issues").

Finally, Appellants are compelled to address the Court's contention that they "urged the 2017 Court not to consider the effect of subsection 62-7-602(a)." Re-filed *Protestant Episcopal Church II*, Howard Adv. Sh. No. 29 at p. 42. Appellants disagree with this contention. As is clear from Appellants' Brief in the earlier appeal (R. p. 1190), their reference to revocability was a passing comment on a subject that was not at issue at that stage of the litigation. Notably, Respondents did not address the issue in their Brief in that appeal, which demonstrates that revocability was not at issue. (R. p. 1203).

³ The evidence there included pre-2006 accession language of each parish that is identical to that which the Court concluded in its Re-Filed opinion was sufficient to create trusts via the Dennis Canon.

⁴ And there is good reason to believe there is additional relevant evidence that the parties did not need to introduce at the first trial but which could affect the disposition of the issue. (*See* Petitioners' Motion for Relief from Judgment filed herewith).

CONCLUSION

Appellants request the Court grant the petition for rehearing by either reversing the Court's substantive rulings on revocability and revocation or vacating those rulings and permitting the introduction of additional evidence before a ruling is made on revocability and revocation.

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Respectfully submitted,

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