THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2015-000622

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; Christ the King, Waccamaw; 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. Matthews Church; St. Andrews Church-Mt. Pleasant Land Trust; St. Bartholomews Episcopal Church; St. David's Church; St. James' Church, James Island, S.C.; St. John's Episcopal Church of Florence, S.C.; St. Matthias Episcopal Church, Inc.; St. Paul's Episcopal Church of Bennettsville, Inc.; St. Paul's Episcopal Church of Conway; 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 St. Jude's Church of Walterboro; The Vestry and Church Wardens of The Episcopal Church of The Parish of Prince George Winyah; The Vestry and Church Wardens of The Church of The Parish of St. Helena and The Parish Church of St. Helena Trust; The Vestry and Church Wardens 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. Andrews,, ...

Respondents,

v.

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

PETITION FOR REHEARING AND RECONSIDERATION OF CHURCH OF THE GOOD SHEPHERD

Church of the Good Shepherd ("Good Shepherd") petitions for rehearing and reconsideration of this Court's opinion pursuant to South Carolina Rules of Appellate Procedure 221 and 240. Good Shepherd joins in, supports and adopts by reference the Petition for Rehearing of the Respondent, the Protestant Episcopal Church in the Diocese of South Carolina filed on September 1, 2017. Additionally, Good Shepherd avails itself of the opportunity to file this petition, raising additional grounds for rehearing and reconsideration based solely upon neutral principals of law. Good Shepherd aspires to provide the Court with a fresh perspective and additional argument from a congregation facing the imminent forfeiture of its house of worship and land as consequence of the sharply divided 2-1-2 plurality decision of this Court.

For purposes of the arguments raised in this petition, Good Shepherd concedes *arguendo* the existence of an express trust through implied accession to the "Dennis Canon" without

waiving its continuing litigation position that no such trust exists and insufficient evidence of accession exists, as explained in detail in the Respondent's Petition for Rehearing. However, even assuming the existence of such a trust, the decision of the Court must be amended and the case must be remanded because: 1) the three-judge plurality has misstated and misapplied the terms of the trust, 2) the three-judge plurality failed to apply proper equitable principals to the interpretation of the trust even though the Court professed to be sitting "in equity", and, 3) the Appellant, the Episcopal Church (the "National Church"), failed to properly join a necessary party when it sought to claim the existence of an express charitable trust over the assets of the individual churches.

I. Assuming *arguendo* the Dennis Cannon created a binding charitable trust over the property of the Individual Churches, the National Church has, at best, an undivided one-half equitable interest and the Individual Churches have full legal title and equitable title to the remaining undivided one-half equitable interest.

The express and clear language of the trust instrument in issue in this case designated two beneficiaries, the National Church and the local Diocese. The Trust provides:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. (emphasis added)

It is readily conceded that the Protestant Episcopal Church in the Diocese of South Carolina is a separate corporate entity from the National Church which is an unincorporated entity, having existed well-prior to the National Church, and having always maintained a separate corporate existence from the National Church. Similarly, the Diocese has a separate corporate existence from other local corporate Diocese entities in other states, and, in this state, from its neighbor,

the Upper Diocese of South Carolina. The drafter of the Dennis trust[1] could have designated the National Church as the single beneficiary of the Trust, but instead named two beneficiaries, thus conferring each with an undivided one-half equitable interest. In South Carolina, where two or more persons or entities are named as beneficiaries to a trust, it is not necessary to state the percentages or their respective interests, as the law presumes the intent to treat two or more beneficiaries to a trust equally. Johnson v. Thornton, 264 S.C. 252, 214 S.E. 2d 124 (1975) citing with approval Hughes v. Coffey, 222 Ark. 945, 263 S.W. 2d 689 and 89 Corpus Juris Secundum Trusts 45(d): "Respective interests need not be designated where there are several beneficiaries, as it is presumed they take in equal interests, so that the trust is not uncertain." There is no language in the Dennis trust which suggests any intent to create a single beneficiary trust, or treat the beneficiaries disparately as to their respective ownership interests.[2]

Other courts, in interpreting the Dennis Trust, have concluded that it is indeed a trust with two beneficiaries. "When the Dennis Canon is considered together with the application submitted by the members of the local congregation in 1956 for admission to the general church as a parish and with other church documents, it is clear that the disputed property in the present case is held in trust for the Episcopal Church and the Diocese." Episcopal Church in the Diocese of Connecticut v. Gauss, 302 Conn. 408, 28 A 3d 302, (2011). "Accordingly, plaintiffs have established that they are entitled to the real and personal property at issue in this case that is

[1] The "Drafter of the Dennis Trust" should not be confused with the Settlor or Trustor in this case because, under its peculiar and very odd facts, the beneficiary and its legal counsel drafted the ostensible Trust in the blind, on their own initiative, without any notice, consultation, or discussion with the individual Congregation-Settlors. See, for example, Record on Appeal, Volume I, p. 424. The ramifications of how this should affect the outcome of this case, as a matter equity, are discussed in greater detail in section II.

[2] The same argument and logic applies to the so called "trust" provisions of the Respondent Diocese: if it is a trust, there are clearly two named beneficiaries, each with an undivided one-half equitable interest.

currently held in trust by All Saints Anglican Church (formerly All Saints Protestant Episcopal Church, Inc.) for the benefit of the Diocese and the National Church. Episcopal Diocese of Rochester v. Harnish, 17 Misc. 3d 1105, 851 N.Y.S. 2d 57 (N.Y. 2006). See also Convention of the Protestant Episcopal Church in the Diocese of Tennessee v. St. Andrews Parish, 2012 Tenn. App. Lexis 274, 2012 WL 1454846 (2011).

Although the trust designates two beneficiaries, the Dennis Trust is not a "spendthrift trust", because it expressly delegates to a single beneficiary, the Diocese, the ability to alienate trust property.[3] Title I, Canon 6, section 3 of the Constitution and Canons of the National Church expressly permits the alienation of trust property with approval from the Bishop of the Diocese:

> No vestry, trustee or other body authorized by civil of canon law to hold, manage or administer real property for any Parish, Mission, Congregation or Institution shall encumber or alienate the same or any part thereof without the written consent of the Bishop and the Standing Committee of the Diocese. (Record, p. 1799)

Remarkably, this language immediately precedes the language of the Dennis Trust. This Court is bound by this language and must necessarily read the language of both provisions of the canons as a whole in order to determine the proper legal meaning of the trust because the National Church elected to create the trust through the vehicle of the canons. The language of the instrument creating the trust is critical in interpreting the purpose of the trust:

> In ascertaining the settlor's intent, a court must resort first to the language of the instrument, and if the language is perfectly plain and capable of legal construction, the language determines the form and effect of the instrument....in such circumstances the construction of the trust instrument is a question of law and the court should not resort to

[3] A trust creating an equitable interest which restricts the beneficiary from alienating his interest in the trust is a spendthrift trust. Germann v. New York Life Ins. Co., 286 S.C. 34, 331 S.E. 2d 385 (S.C. App., 1985).

extrinsic evidence to determine the purpose of the trust. Germann v. New York Life Ins. Co., 286 S.C. 34, 331 S.E. 2d 385 (S.C. App., 1985).

Though the language could have required the consent of both beneficiaries as a precondition to alienation, conveyance, or sale of trust property, the drafters of the instrument clearly declined to require the consent of the National Church as a precondition, instead making this the local responsibility of the duly elected bishop of the Diocese-Beneficiary. Similarly, the language could have tailored the express authority of the Diocese to approve the encumbrance or alienation of trust property to special or specific circumstances, instead of providing an effective general power of attorney to the Diocese. Limitations on the trust, must be clearly expressed at the time of the creation of the trust, and if the language of the trust is clear, the language determines the force and effect of the instrument. Chiles v. Chiles, 270 S.C. 379, 242 S.E. 2d 426 (1978). The National Church could have similarly authored a single-beneficiary trust and established the churches and the diocese as co-trustees, but it did not draft the trust in that manner.

Applying these neutral principals of trust law to the case at hand, it is manifest that the Dennis Trust named two beneficiaries, the National Church and the Diocese, each receiving an undivided one-half equitable interest with legal title remaining in the individual congregations, each congregation holding legal title as trustees. The Diocese and Bishop had the general authority and ability to consent to conveyance and alienation of the trust property pursuant to the express terms of the trust. South Carolina law recognizes the doctrine of equitable conversion and legal and equitable titles. See, for example, All Saints Parish Waccamaw v. Protestant Episcopal Church 385 S.C. 428, 685 S.E. 2d 163 (2009). Therefore, when Bishop Lawrence, as the duly authorized Bishop of the Diocese approved, and the Trustees of the Diocese, also duly authorized, conveyed the interest of the Diocese, by quitclaim deed to Good Shepherd, and the other similarly situated

churches, those churches received, at the very least, an undivided one-half equitable interest in their formerly-owned property. This is true regardless of whether or not the quitclaim deed purported to convey the undivided one-half equitable interest of the National Church by quitclaim deed because the deed was conveyed from the Diocese which quitclaimed its former trust interest. At a minimum, Bishop Lawrence had express, implied, and apparent authority to re-convey the one-half undivided equitable interest of the Diocese to the individual churches, thus merging the legal and equitable titles of an undivided one-half interest in the congregations themselves as a matter of law and neutral law interpretation of the Dennis Trust.[4]

There is no evidence in the record to show that the National Church had the right in their governing documents to reverse this action or to discipline the Diocese as it could not. Those documents expressly give all authority to the Ecclesiastical authority of the Diocese, the Bishop or the Standing Committee. Instead of deposing the bishop for signing some of the quit claim deeds, the National Church accepted Bishop Lawrence's renunciation of ministry. Therefore, there is no final decision of a judicatory body within the National Church that Bishop Lawrence lacked the authority together with the Standing Committee to issue those quitclaims deeds. Further, Bishop Lawrence was in good standing when those deeds were executed.

The only open question is how this conveyance may have affected the remaining half-interest of the National Church in the corpus of the trust. Yet perhaps because of the division on

[4] The execution and delivery of the quitclaim deeds back to the congregations distinguishes this case from other National Church litigation. It would not have mattered whether Good Shepherd declared itself Baptist, Methodist, Lutheran, Presbyterian, continuing Anglican, or Episcopalian after the receipt of the deed, as it would nonetheless hold, upon delivery of the deed, a one-half undivided equitable interest in the property by virtue of the alienation of the equitable interest of the Diocese. Indeed Bishop Lawrence and the Diocese have made no claim to more than 30 churches in the disassociating Diocese who elected to form a new Diocese, loyal to the National Church, subsequent to the delivery of the quitclaim deeds.

the court, the majority opinion completely overlooks the concept of equitable conversion of title when a trust is created, the effect of the designation of two joint beneficiaries in the trust, the express power in the trust delegated to the Diocese to approve and permit the conveyance and alienation of trust property, and the subsequent re-merger of title of at least a one-half undivided interest in the trust settlor congregations upon delivery of the quitclaim deeds.

Assuming arguendo, that this Court is now operating in equity, unconvinced by the findings of fact of the trial court and ranging freely through the record, this Court is nonetheless constrained by actual language of what it calls an express trust and the principal that equity abhors a forfeiture. Among the majority, only Justice Hearn partially addressed this issue by claiming Bishop Lawrence was acting ultra vires, and that the churches should nonetheless forfeit their property interest because of alleged and perceived misconduct of Bishop Lawrence.[5] We join in the astonishment over this punitive measure as being unrecognizable and utterly foreign to a court of equity. It is plain that the plurality holding renders forfeit the interest of the congregations in the property once held in fee simple, then unwittingly gifted without consideration to a trust which they did not write or sponsor, then re-conveyed to them by the quitclaim deeds, even though such conveyances were authorized by the National Church through a general power in the National Church's canon. Equity does not favor forfeitures or penalties

[5] Good Shepherd sharply disagrees with the ad hominem character attack on Bishop Lawrence espoused by Justice Hearn, but even if such characterizations were true, the National Church failed to inhibit Bishop Lawrence. Has this court forgotten the maxim in equity that were two innocent parties must suffer a loss based upon the purported misconduct of a third person, it is the party who put the person in the position of trust and who could have prevented the loss who must bear the risk? Can this Court not see the innocence of these congregations who have built, paid for, and cherished their houses of worship? Can this court not see that the genesis of the problem lies in National Church's poor drafting of its own canons which enabled this injustice? The National Church created this debacle through extraordinarily poor draftsmanship, failure to communicate with the congregations, and a lack of appropriate servant-leadership. Regardless of the outcome of this case, the Dennis Trust has and will cost members of the Anglican Communion in America millions of dollars in legal fees and property losses, on both sides of this dispute. It is extraordinary that Justices Hearn and Pleicones would lay the loss entirely at the feet of the congregations and call the decision "equity".

and will relieve against them when practical, and in the interest of justice. The court has the power in equity to deny forfeiture when fairness demands. Regions bank v. Wingard Properties, Inc. 394 S.C. 241, 715 S.E. 2d 348 (2011). See also Kriti Ripley LLC v. Emerald Invs. LLC., 404 S.C. 367, 746 S.E. 2d 26 (2013). Citing Black's Law Dictionary's definition of forfeiture as: 1) the divestiture of property without compensation, 2) the loss of right, privilege, or property because of a crime, breach of obligation or neglect of duty, 3) something lost or confiscated..." The effect of the decision is a forfeiture, and all the more drastic because the forfeiture occurred at the bitter end of an appeal and through the judicial imposition of a trust in an advance sheet, without any evidentiary hearing as to the intent of the settlors. For this reason, it occurred without due process of law based upon a cold consideration of the record in which these issues were not fully litigated.[6]

Relying upon Jones v. Wolfe, the plurality of this Court granted broad deference to the National Church, but more than that, the opinions of Justices Hearn and Pleicones actually use this deference and logic to re-write the terms of the Dennis Trust, and shore up the language of the trust to supply missing terms in the indenture which never existed in the first instance, based upon subsequent events in the gender and sexuality culture wars which they now call an "ecclesiastical dispute". Justices Hearn and Pleicones are more concerned with the assumed intentions of the National Church beneficiary of self-preservation in the midst of cultural turmoil than the minds of the congregation-settlors at the time of the putative trust, perhaps because the settlors were, at best, entirely passive participants in the creation, drafting, and implementation of the Dennis Trust. Justice Hearn goes even farther, suggesting that creating a proper

[6] The Congregation continues to maintain that its first amendment rights of free exercise and free association in addition to its procedural and substantive due process rights have been trammeled in the plurality decision.

conveyance through deeds and fully informed consent would violate the First Amendment protections of the National Church. Whether or not the National Church is "hierarchical", it is plain that the breadth and scope of First Amendment is not constrained by man's imposition of a "hierarchy". Certainly, religious freedom must apply equally and neutrally to the lowliest congregant-sinners in the pew as well as the grand bishops of the National Church. Why could it ever be considered burdensome (in the sense of the First Amendment) for the National Church to speak with perspicuity and properly obtain the fully informed consent of the congregations in accordance with the law before to taking their land, yet not be considered unduly burdensome (in the sense of the First Amendment) on the congregations to unknowingly forfeit their houses of worship by not immediately declaring independence from the National Church the Sunday morning following the adoption of the Dennis Trust, or otherwise proof reading the Canon of the National Church to find the "gotcha" clauses?

Yet, amongst the ruins of the fractured opinion of the Court, the law nonetheless requires this Court to make some attempt to ascertain the intentions of the settlor-congregations when the trust was created, not the future worries of the "demanding scrivener beneficiary" National Church. The cardinal rule of ascertaining intent is that the plain language of the instrument at the time of its creation must be evaluated and the interpretation not based on any secret wishes, desires or thoughts after that event. Chiles v. Chiles, 270 SC 379, 242 S.E. 2d 426 (1978). This is a neutral principal of law. Yet, two judges have entirely re-written the Dennis Trust to supply missing terms.

First, Justices Pleicones and Hearn attempt create a single beneficiary trust in the National Church only, contrary to the express and clear language of the instrument. Next, they bar the successor in title to one of the beneficiaries based upon their doctrine of forfeiture and

expansive view of dicta in Jones v. Wolfe as a National Church embalming preservative. But perhaps most egregiously, they judicially create a future interest in the Dennis Trust which does not exist, and indeed was expressly rejected in the deliberations of the National Church at the time of the creation of the trust. In doing so, they resurrect the ghost of Lawyer-Bishop Dennis and allow him to speak posthumously in this case through the initial, yet rejected, terms of proposal D-24.

The Dennis Canon, as originally proposed and drafted by Walter Dennis, a licensed lawyer clergyman, first included a clear and unambiguous express reversionary clause in favor of the National Church in the event of disaffiliation of a congregation. A copy of the original proposed language of legislation D-24 is attached at exhibit A to the supporting affidavit of George Conger. (D-24 is also admitted to be the initial proposal and authored by Walter Dennis Record, p. 1020). D-24 states:

> If, however, ,[sic] all or part of the membership of such Parish, Mission, Congregation, or Institution shall disaffiliate themselves from the Episcopal Church or of the Diocese, then, upon certification of such fact by the Bishop and the Standing Committee of the Diocese in which the Parish, Mission, Congregation, or Institution shall, by operation of the express trust in favor or the Episcopal Church and the Diocese, revert to the Diocese in which such Parish, Mission, Congregation or Institution is geographically present, or alternatively, shall remain in and revert to some body certified by the Bishop and Standing Committee of the Diocese as the proper representative of the members of the Parish, Mission, Congregation or Institution remaining loyal to he[sic] contitution[sic] and canons of the Episcopal Church and of the Diocese. (emphasis added)

The drafter of the trust apparently knew how to create a reversionary interest as a licensed lawyer and agent for the National Church (he served as the Chair of the National Church Committee on Canons), and the record indicates the concept was proposed and attempted, but nonetheless rejected at the time of its enactment. Furthermore, the feared contingency in the proposed reversionary clause merely addressed the potential disaffiliation of a single Parish,

Mission, Congregation or Institution. The National Church's scrivener-lawyer utterly failed to address the future circumstance or risk of the disassociation of an entire diocese which is precisely what occurred in this case. Even if one examines the evidence from the perspective of the drafting party as opposed to the settlor, the legislative history of the trust establishes that the National Church considered and rejected the inclusion of a specific reversionary clause in favor of the National Church or Diocese. Stated differently, the Dennis Trust, as adopted, was intentionally silent as to the disposition of the property in the event of a congregational disassociation and utterly vacuous as to the consequences of the disassociation of an entire diocese. Under these circumstances, the Court cannot, in good conscience, impose an undeclared intent on the settlors of this trust to create a future interest in favor of the National Church. In order to create a vested or contingent remainder in a trust, the terms of the remainder must be created clearly and expressly at the time the trust is created. Faber v. Police 10 S.C. 376 (1878). The judicially created trust now provides: "all property is held for the benefit of the Episcopal Church only and if any Parish or Diocese shall disaffiliate from the Episcopal Church, its property shall revert to the Episcopal Church or its designee".[7] Surely this is inappropriate when the terms of the Dennis Trust omitted any reversionary clause of this kind. Furthermore, because the disaffiliating congregations are locked in dispute over the language of a trust which they did not participate in drafting, should not the rule of contra- preferentum apply? It was the duty of the National Church, having elected to attempt the imposition of a trust on the congregations, to

[7] The abrupt, momentous, and astonishing sea change in the jurisprudence of this State on this subject creates an unfathomable randomness, capriciousness, arbitrariness, and lack of predictability in the law. Not only does the plurality opinion effectively reverse the unanimous opinion in All Saints Parish Waccamaw v. Protestant Episcopal Church 385 S.C. 428, 685 S.E. 2d 163 (2009), but it also effectively overrules 3 prior unpublished holdings concerning the disposition of various properties in the African Methodist Episcopal Church which held that trusts could not be created in the manner suggested by the plurality. See Glover v. Manning, S.C. App. Op. No. 2014-UP-256 (2014), McPherson v. Banks S.C. App. Opn. No. 2015-UP-355 (2015), and Glover v. Stevenson, S.C. App. Opn. No. 2014-UP-257 (2014).

speak clearly in such circumstances and the risks of incompletion and ambiguity must certainly fall on the drafting party. Is not the existence of five separate opinions from five well-meaning judges, prima facie evidence that the Dennis Trust is a thoroughly ambiguous work of legal obfuscation?

II. Assuming *arguendo* the Dennis Cannon created a charitable trust over the property of the individual churches, the churches have equitable defenses to the equitable claims of the National Church which have not, as of yet, been fully and fairly litigated, and confiscating the properties in favor of the National Church violates due process. Therefore, a remand of this case for a determination as to the ownership of the undivided one half equitable interest of the National Church is required.

The plurality opinion made findings of fact, based upon the record, sitting in its equity jurisdiction. However, the congregations have yet to be heard on their equitable defenses. As is mentioned in Section I, the congregations would enlist the admonition against forfeitures as a complete defense to the confiscation of their property; however, given the new findings of this Court, the congregations should also be allowed to assert and offer proof on equitable defenses to the claims, and, in particular, the defenses of unclean hands, unconscionability, and undue influence.

As indicated in the affidavit in support of this motion, the scrivener of the Trust was a lawyer-clergyman and the chair of a National Church committee. That he was a clergyman should not be a concern to this Court, that he was a lawyer; however, should be of grave concern to this Court. Drafting a will or trust is engaging in the practice of law. Franklin v. Chavis, 371 S.C. 527, 640 S.E. 2d 873 (2007) The actions of an attorney are binding on the client. Koutsogiannis v. BB&T, 365 S.C. 145, 616 S.E. 2d 425 (2005). The neglect of an attorney is the

neglect of the client. Rouvet v. Rouvet, 388 S.C. 301, 696 S.E. 2d 204 (Ct. App. 2010). In drafting this trust, lawyer Dennis did things which no lawyer should ever be allowed to do.

First and foremost, lawyer Dennis drafted a trust divesting churches and congregations of equitable title to their lands without notice or consultation to the putative Settlors. As a general matter, no lawyer should ever undertake to draw a trust or will for a testator or settlor without consultation and communication with the grantor. It seems obvious that lawyer Dennis was not representing the congregations when he drafted the Trust and the churches were unrepresented by legal counsel (Record, p. 424).

Secondly, any prudent lawyer attempting to assist a beneficiary of a trust in the creation of a trust would have and should have admonished the respective settlors to consult legal counsel before divesting themselves of equitable title to their lands.[8] The potential for a conflict of interest in the drafting of the trust was open and obvious. Had this occurred, we might have clear and unequivocal proof of settlor intent; however, the circumstances surrounding the creation of the Trust indicate that it was done hurriedly, unadvisedly, and without thoughtful reflection in creation or draftsmanship. A mere two months elapsed between the issuance of the decision in Jones and the 1979 General Convention. It is the National Church which must live with the consequences of its failure to follow proper conduct in the creation of the trusts, and the failure to consult the numerous settlors prior to the taking of their land.

Thirdly, a lawyer may not, in the ordinary case, ever draw a trust or will instrument naming himself or a member of his family as a beneficiary. In Re Rentiers 297 S.C. 33, 374 S.E.

[8] For example and by way of illustration, the Rules of Professional Conduct provide: "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client." (Rule 4.3 Rules of Professional Conduct).

2d 672 (1988) (Citing with approval former Disciplinary Rule 5-101(A) "Except with full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests".) By extension of this logic, would it be appropriate for a lawyer to draw a will or a trust naming his employer as a beneficiary without consultation with the settlor? Good Shepherd contends that this was inappropriate and improper. However, Lawyer Dennis apparently reads the Supreme Court Advance Sheets just as he writes with a sharpie permanent pen, snapping up the equitable titles of the congregations within eight weeks of the issuance of the Jones opinion. It is apparently of no consequence that the congregations never gave a fully informed consent to the land-grab, but constructively "acceded" by not objecting to the continuing effect of the organizational documents of the National Church and continuing to worship on Sunday mornings. No title checker worth his salt would think to look in the Canons of the National Church for a hidden land trust, but there it is, a latent, fine print, land mine with a long fuse, set for the naïve congregations. Three judges on this Court have said these circumstances are enough to create an express trust under circumstances which would make a "Philadelphia lawyer" blush.[9]

The reason such conduct should be prohibited is that it gives rise to an inference of undue influence by the drafter of the document as a consequence of the conflict of interest. See, generally, deFuria Testamentary Gifts from Client to the Attorney-Draftsman: From Probate

[9] Curiously, the Dennis Trust also states that no further local action or ratification by these churches were required to effect the validity of the trust. It is as if the intent was to keep the trust sub rosa. Further, if this is indeed the expressed condition of the trust, how could subsequent acts of accession ever cause the trust to suddenly spring into existence among the disassociating congregations?

Presumption to Ethical Prohibition. 66 Nebraska Law Review 1987. The same inference should arise in this case.

> The law is well settled that where a declaration of trust is procured by undue influence it is invalid and unenforceable, but the influence exerted must be undue and operate to such a degree as to amount to coercion. It is the kind of mental coercion which destroys the free agency of the creator of the trust and constrains him or her to do that which is against his or her will and what he or she would not have done if he or she had been left to his or her own judgment and volition. Alexander v. Walden, 287 S.C. 2d 241, 337 S.E. 241 (1985) (emphasis added).

Questions of Undue influence, unclean hands and unconscionability are issues of fact for trial. Byrd v. Byrd 279 S.C. 425, 308 S.E. 2d 788 (1983), Howard v. Nasser, 364 S.C. 279, 613 S.E. 2d 64 (S.C. App. 2004). The congregations have not had their day in court on these defenses to the counterclaim of the National Church. The effect of the holding in this case is to deprive Good Shepherd of its property without a meaningful opportunity to be heard, and the holding violates its substantive and procedural due process rights under the Fourteenth Amendment to the United States Constitution, thus requiring remand.

III. When the National Church asserted a counterclaim seeking to impose a South Carolina Charitable Trust over the real property of the individual churches, the National Church neglected to properly join the South Carolina Attorney General in accordance with South Carolina law and a remand is required to adequately protect the public interest in this contentious dispute.

The disaffiliating diocese and the congregations continue to maintain there never was a proper trust created in this case. Thus at the early pleading stage of the litigation Respondents never asserted that a charitable trust existed. However, when the National Church asserted the existence of a charitable trust, it was bound to assert such claims properly. Nonetheless, the National Church failed to join all necessary parties to this action which now requires the remand and joindure of the South Carolina Attorney General.

The failure to join an indispensable party may be raised on appeal Provident Tradesman Bank and Trust v. Patterson, 390 U.S. 102 (1968). The South Carolina Attorney General is clothed with special statutory duties in the administration of charitable trusts in this state. See S.C. Code Ann. §1-7-130 and §62-7-405. It is also the general law that in the matter of administering and enforcing charitable trusts, the Attorney General is the proper party to protect the interests of the members of the public at large. Furman University v. McLeod, 238 S.C. 475, 120 S.E. 2d 865 (1961). See also Epworth Children's Home v. Beasley, 365 S.C. 157, 616 S.E. 2d 710 (2005); Wilson v. Dallas, 403 S.C. 411 (2013); All Saints Parish Waccamaw v. Protestant Episcopal Church 385 S.C. 428, 685 S.E. 2d 163 (2009); Chiles v. Chiles, 270 SC 379, 242 S.E. 2d 426 (1978).

There is not a reported South Carolina case addressing the consequence of the failure to join the Attorney General in a charitable trust case, but it seems apparent that the Court has, thus far at least, been deprived of an advocate for the public interest in this case. However, other jurisdictions have held that the failure to join the Attorney General creates an impediment to further legal proceedings. In Texas, for example, the failure to join the Attorney General requires correction, even to the point of a remand for a new trial, rendering a prior judgment null and void. McAdams v. Glover 1983 Tex. App. Lexis 4638, Moore v. Allen 544 S.W. 2d 448, 1978 Tex. App. Lexis 3268. In Connecticut, the failure to join the Attorney General does not deprive the court of subject matter jurisdiction over a charitable trust, but the parties must nonetheless join the Attorney General upon discovery of the lapse so that the interest of the public is adequately protected. Late of Wethersfield v. Probate (In Re Estate of Banning), 2008 Conn. Super Lexis 3049; Carl J. Herzog Foundation v. University of Bridgeport, 243 Conn. 1, 699 A. 2d 995 (1997). This is especially true where, as in this case, there is no express provision in the

trust instrument for forfeiture or reverter. In Gilbert M. and Martha H Hitchcock Foundation v. Kountze, 272 Neb. 251, 720 N.W. 2d 31 (2006), the Nebraska Supreme Court held that it was reversible error to proceed to trial without proper notice to the Attorney General in order to protect the interest of the public.

There are several substantial policy considerations as to why it is appropriate to hear from the Attorney General. In the case of Good Shepherd, the congregation voted unanimously to disassociate from the National Church. There is no remaining, viable congregation at this address. Certainly the public has an interest in ensuring that public buildings are adequately and safely maintained. Moreover, to the extent the settlors had any intent in the creation of the Dennis Trust, it is arguable that the churches were intended to be used as places of Christian worship.

The prior position of the National Church through its former Presiding Bishop was that no disassociating congregation would ever be allowed to re-purchase or redeem its property even if such property was placed for sale[10]. It is unclear whether the current Presiding Bishop of the National Church will continue this national policy of retribution against its former laypersons, but an advocate's voice for the people of South Carolina should be allowed to speak on these issues. The members of Good Shepherd are South Carolinians and their voices have not been

[10] The position of the former Presiding Bishop of the National Church stands in rather stark contrast to the actions of Bishop Lawrence in this case. Through the execution and delivery of the quitclaim deeds to all congregations, including the those who disagreed with the Bishop, at least half of the equity of these churches were returned to their original owners, allowing all churches, both socially liberal and socially conservative, to thrive and flourish as the Body of Christ. Yet Bishop Lawrence is labelled an outlaw and reviled. The words of Woody Guthrie, American folk artist, do seem apt:

> Yes, as through this world I've wandered, I've seen lots of funny men;
> Some will rob you with a six-gun and some with a fountain pen.
>
> And as through life you travel, yes as your life you roam;
> You won't never see an outlaw, drive a family from their home.

heard; they serve other South Carolinians in ministry and love. This decision is quite a loss to the people of the Good Shepherd community.

Many of the divested churches are historic pre-revolutionary and antebellum architectural gems. If the National Church razes and commercially sells the structures without oversight, the interest of the public will be negatively affected. It has been the position of the disassociated diocese and the congregations that their houses of worship should remain houses of worship, and this serves the public interest by way of ministry to the sick, homeless and poor. The eviction of Good Shepherd's congregation from its home and forfeiture of its property to the National Church will affect the public in this state, and this court has heard nothing about the consequential impacts of that tragic determination. Remand is required.

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September 6, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2013-CP-18-00013
Appellate Case No. 2015-000622

The Protestant Episcopal Church
In the Diocese of South Carolina et, al. .....Respondents,

v.

The Episcopal Church (a/k/a/ The Protestant
Episcopal Church in the United States
Of America) and The Episcopal Church
in South Carolina .....Appellants.

PROOF OF SERVICE

I, Bridget S. Steele, an employee of Bruner Powell Wall & Mullins, LLC, attorneys for the Respondents, do hereby certify that I have served a copy of 1) Notice of Appearance 2) Petition for Rehearing, 3) Affidavit in Support of Petition and 4) Proof of Service, on this the 6th day of September, 2017, by mailing copies of the same to the attorneys identified below:

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