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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable 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

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PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure, Respondent The Church of the Good Shepherd, Charleston, SC (“Good Shepherd”), through its undersigned counsel, respectfully petitions this Court for rehearing and reconsideration of the Court’s April 20, 2022 Opinion in *Protestant Episcopal Church in the Diocese of South Carolina v. Episcopal Church*, Op. No. 28095 (S.C. Sup. Ct. filed Apr. 20, 2022) (Howard Adv. Sh. No. 14 at 11) (hereinafter the “2022 Opinion”) based on facts, points, and arguments overlooked or misapprehended as set forth herein.

The 2022 Opinion has injected an entirely new issue into this litigation that was never previously raised by any party or ruled upon by any court. In short, and as explained more fully herein, the Court’s determination that Good Shepherd created an irrevocable trust in favor of the National Church¹ and the Lower Diocese by accession to the Dennis Canon pursuant to its December 13, 2006 Constitution overlooks the application of the South Carolina Trust Code to South Carolina trusts created **after** January 1, 2006 and specifically the presumption of revocability that applies to such trusts. Because of that presumption of revocability, the parties and each court that has previously heard this matter have focused exclusively on pre-January 1, 2006 writings. As a result, Section III(E) of the 2022 Opinion’s reliance upon three Justices’ opinions in 2017 with respect to revocation is misplaced because the 2017 Court did not address the revocability of trusts created by express accession to the Dennis Canon **after** January 1, 2006.

Neither Good Shepherd’s 2006 Constitution nor the Dennis Canon itself expressly provide that the trust created by the Dennis Canon in favor of the National Church and the Lower

1. For the avoidance of confusion, Good Shepherd uses the same defined terms employed by the Court in its 2022 Opinion.

Diocese is irrevocable. Accordingly, assuming that Good Shepherd validly created a trust in favor of the National Church and the Lower Diocese pursuant to the enactment of its 2006 Constitution, that trust was necessarily revocable based on the revocability presumption in the South Carolina Trust Code applicable to trusts created after January 1, 2006. Good Shepherd revoked that trust when it rescinded its adoption of the bylaws and canons of the National Church and the Lower Diocese pursuant to its February 23, 2012 amendment to its Constitution. Good Shepherd respectfully requests a rehearing on these issues.

ARGUMENTS AND AUTHORITIES

I. Pursuant to the South Carolina Trust Code, Good Shepherd’s 2006 Constitution created a revocable trust in favor of the National Church, not an irrevocable trust.

The General Assembly first enacted the South Carolina Trust Code in 2005 by Act No. 66, with an effective date of January 1, 2006. Uniform Trust Code, 2005 S.C. Acts 66 (codified at S.C. Code Ann. § 62-7-101 *et seq.*).² Prior to the enactment of the South Carolina Trust Code, “South Carolina law presumed a trust to be irrevocable unless the trust specifically indicated otherwise.” S. Alan Medlin, *The Impact of Significant Substantive Provisions of the South Carolina Trust Code*, 57 S.C. L. Rev. 137, 142 (2005). The South Carolina Trust Code “reverses this basic presumption” and “presumes that a settlor reserved the right to revoke or amend a trust unless the trust expressly provides that it is irrevocable.” *Id.*; *see also* S.C. Code Ann. § 62-7-

2. For completeness, Good Shepherd notes that the South Carolina Trust Code was later amended in 2013, with a new effective date of January 1, 2014. However, the section of the South Carolina Trust Code creating the presumption of revocability, Section 62-7-602(a), was unchanged in both versions of the South Carolina Trust Code. Furthermore, both the original and the amended version of the South Carolina Trust Code, as codified in S.C. Code Ann. § 62-7-1106(a)(5), provide that “[u]nless otherwise provided in this article, any right in a trust accrues in accordance with the law in effect on the date of the creation of a trust.” *See also* South Carolina Trust Code, 2013 S.C. Acts 100, Section 62-7-1106 cmt. (codified at S.C. Code Ann. § 62-7-1106).

602(a). Accordingly, any South Carolina trust formed after January 1, 2006 is presumed to be revocable unless the trust **expressly provides** that it is irrevocable.

Good Shepherd amended its Constitution on December 13, 2006, following a vestry vote on September 10, 2006, and a congregational meeting on October 22, 2006. R. at 7111–19. As recognized by Chief Justice Beatty in the 2017 Opinion and reiterated by the Court in the 2022 Opinion, the Dennis Canon has no effect until it is expressly acceded to in writing by the individual parishes. The 2022 Opinion’s determination that Good Shepherd did not expressly accede to the Dennis Canon until the adoption of its December 13, 2006 Constitution must result in the conclusion pursuant to Section 62-7-602 of the South Carolina Trust Code that Good Shepherd created a *revocable* trust in favor of the National Church because it was adopted after the effective date of the South Carolina Trust Code and neither Good Shepherd’s 2006 Constitution nor the Dennis Canon expressly provide that they are irrevocable.

II. The National Church and the 2017 Court recognized that the enactment of the South Carolina Trust Code changed the presumption of revocability and therefore did not address or rely upon post-January 1, 2006 writings to find the creation of irrevocable trusts.

The Court addressed revocability in Section III(E) of its 2022 Opinion and concluded that three Justices from the 2017 Court would have held that the trusts in this case created by express accession to the Dennis Canon were irrevocable. What the 2022 Opinion overlooks, however, is that the briefing and argument presented to the Court in 2017 were limited to writings enacted by the parishes **before** January 1, 2006. Indeed, the National Church—recognizing the revocability issue in light of the adoption of the South Carolina Trust Code—only presented pre-January 1, 2006 writings in support of its argument that the parishes had expressly acceded to the Dennis Canon and thereby created an irrevocable trust. Because the 2017 Court was not presented with

the issue of the revocability of post-January 1, 2006 writings, applying the 2017 Opinion with respect to revocability of such writings is inappropriate.

In pages 101 to 106 of the 2015 record on appeal, the National Church details all of the writings that it contended were sufficient on a parish-by-parish basis to create an express irrevocable trust in favor of the National Church. The National Church wrote in those pages and reaffirmed at oral argument in 2017 that “[a]s a result of these writings having been made **before January 1, 2006**, and because there has been no evidence showing that at the time the writings were made the parishes intended the trusts to be revocable, the trusts are irrevocable.” 2015 R. at 101 (emphasis added); *see also* South Carolina Judicial Branch Archive, <https://media.sccourts.org/videos/2015-000622.mp4> (Sept. 23, 2015) (last visited May 3, 2022), at 9:10–10:17. Until the 2022 Opinion, no court or party had ever contended that any parish’s post-January 1, 2006 writings created an irrevocable trust in favor of the National Church.

Significantly, Justice Hearn recognized the implications of the enactment of the South Carolina Trust Code in her 2017 opinion where she wrote that in analyzing the revocability question she would “look to [South Carolina’s] statutory code, which provides this simple answer to any question of revocability: the trust is irrevocable because it was created prior to the implementation of the South Carolina Trust Code.” *Protestant Episcopal Church in the Diocese of S.C. v. Episcopal Church*, 421 S.C. 211, 242, 806 S.E.2d 82, 98 (2017) (Hearn, J., concurring) (citing S.C. Code Ann. § 62-7-602(a)). That conclusion would not have held if the 2017 Court had been considering express trusts created on or after January 1, 2006. Justice Hearn and the other members of the 2017 Court did not address post-January 1, 2006 writings in their respective opinions because the National Church did not, and indeed could not, argue that such writings created an irrevocable trust.

III. Good Shepherd revoked the trust created in favor of the National Church by its 2006 Constitution on February 23, 2012, when it filed its revised Constitution with the South Carolina Secretary of State.

Good Shepherd revoked any trust created by its 2006 Constitution in favor of the National Church and the Lower Diocese when it again amended its Constitution on February 23, 2012 and removed the accession language contained its 2006 Constitution. *See* R. at 7140–42; *see also* S.C. Code Ann. § 62-7-602 cmt. (“Where the right to revoke [is] reserved and no particular mode [is] specified, any mode sufficiently showing an intention to revoke [is] effective.”); *Peoples Nat’l Bank of Greenville v. Peden*, 229 S.C. 167, 171, 92 S.E.2d 163, 165 (1956) (quoting *Broga v. Rome Tr. Co.*, 272 N.Y.S. 101, 106 (Sup. Ct. 1934)) (“If it is determined that a settlor retains the right to revoke a trust and the manner of revocation is not specified, the trust may be revoked “in any manner which shows a clear and definite purpose on the part of the settlor of the trust to revoke the same.”).

IV. The Court’s 2022 Opinion makes clear that Good Shepherd’s pre-January 1, 2006 writings are insufficient to create a trust as a matter of South Carolina law.

Finally, footnote 9 of the 2022 Opinion states that the Addendum to the 2022 Opinion “contains a summary of *all* the potential evidence of ‘accession’ for each Parish.” 2022 Opinion at 24 n.9. Accordingly, Good Shepherd interprets the 2022 Opinion to provide that its 2006 Constitution is the *only document* upon which the Court relied to conclude that Good Shepherd created an irrevocable trust in favor of the National Church. This leads to the natural implication that no other Good Shepherd documents created such a trust. Nevertheless, Good Shepherd also addresses its pre-January 1, 2006 writings cited by the National Church as express accessions to the Dennis Canon. Pursuant to the Court’s 2022 Opinion, those writings are insufficient to create an irrevocable trust under South Carolina law. On page 102 of the 2015 record on appeal, the National Church argues that only two Good Shepherd writings created a trust in favor of the

National Church: (1) its 2001 amended corporate articles, which describe Good Shepherd’s predecessor congregation as being “organized pursuant and subject to the Canons of the Protestant Episcopal Church in the Diocese of South Carolina;” and (2) its 2004 Articles of Merger describing its predecessor, St. Luke’s and St. Paul’s, as being “organized pursuant and subject to the Canons of the Protestant Episcopal Church in the Diocese of South Carolina”

These pre-January 1, 2006 writings are almost identical to the writings of St. Paul’s Episcopal Church of Bennettsville analyzed by the Court in Section III(C)(iv) of the 2022 Opinion, with the lone distinction that neither of Good Shepherd’s writings make reference to the Canons of the National Church. Instead, Good Shepherd’s writings refer exclusively to the Canons of the Lower Diocese. Just as the Court concluded with respect to the writings of St. Paul’s Episcopal Church of Bennettsville, Good Shepherd’s 2001 amended corporate articles and 2004 Articles of Merger refer to future action of the drafters of the Canons of the Lower Diocese, not the present action of the property owner that is necessary to create a trust under South Carolina law. Similar to St. Paul’s Episcopal Church of Bennettsville, neither Good Shepherd’s 2001 amended corporate articles nor its 2004 Articles of Merger make any explicit reference to the Dennis Canon. Accordingly, Good Shepherd’s 2001 amended corporate articles and 2004 Articles of Merger did not create an express irrevocable trust in favor of the National Church for precisely the same reasons that the Court concluded St. Paul’s Episcopal Church of Bennettsville did not create an express irrevocable trust under South Carolina trust law—they do not “adopt” or “accede” to the Canons of the National Church or the Lower Diocese and they lack the present action or present intent necessary to create a trust under South Carolina law.

CONCLUSION

For the foregoing reasons, Good Shepherd respectfully requests that the Court grant rehearing and reconsider its finding that Good Shepherd created an express irrevocable trust in favor of the National Church pursuant to its 2006 Constitution because the Court's finding is based on the irrevocability of a post-January 1, 2006 writing that was never previously analyzed by any court and is contrary to the revocability presumption established by the South Carolina Trust Code.

Respectfully submitted,

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