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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

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 OF CHURCH OF THE HOLY COMFORTER

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Church of the Holy Comforter (“Holy Comforter”), through its undersigned counsel, respectfully petitions this Court for a rehearing based on facts, points, and arguments overlooked or misapprehended as set forth herein.

This Court concluded that Holy Comforter created an express trust in favor of The Episcopal Church a/k/a The Protestant Episcopal Church in the United States of America (“National Church”) and its diocese because it “took sufficient actions indicating the necessary present intent” through its use of “adopt” and “accede to” the Canons of the National Church and the Diocese in its 1989 Constitution. *The Protestant Episcopal Church in the Diocese of South Carolina v. The Episcopal Church (a/k/a, The Protestant Episcopal Church in the United States of America)*, Op. No. 28095 (S.C. Sup. Ct. filed Apr. 20, 2022) (Howard Adv. Sh. No. 14 at 30 & 42) (hereinafter “Opinion”). More specifically, this Court concluded an express trust in favor of the National Church and its diocese arose out of Holy Comforter’s adoption of the following language in its 1989 Constitution:

We, the congregation of the Protestant Episcopal Church of the Holy Comforter, Sumter, South Carolina, County of Sumter, Diocese of South Carolina, as such do hereby acknowledge, accede to and adopt the doctrine, discipline and worship, the Constitution and Canons of the Protestant Episcopal Church in the United States of America and the Constitutions and Canons of the same Church in the Diocese of South Carolina.

Any provisions in this Constitution repugnant to or in conflict with any of the Canons of the Diocese of South Carolina or of the Protestant Episcopal Church in the United States shall be null and void.

(Op. at 42; *see also* R. 6728 & 6735.)

The first Constitution of Holy Comforter in this Court’s record is dated January 8, 1968. (R. 6743.) Additionally, the record contains the Constitution of Holy Comforter, dated May 30,

1974. (R. 6728.) In 1989, Holy Comforter’s Constitution carried forward the accession language from the 1968 and 1974 Constitutions and merely added two ministerial amendments that addressed the role of the clerk and junior warden. (*See* footnotes on R. 6730 & 6733 regarding amendments & R. 6727 regarding “REVISED JAN. 9, 1989”)

In its Opinion, this Court found that “[n]ine Parishes amended their constitution or bylaws after the National Church adopted the Dennis Canon in 1979 and after the Lower Diocese adopted the Diocesan Canon in 1987 to include phrases such as we ‘adopt’ or ‘accede to’ the Canons of the National Church and the Lower Diocese.” (Op. at 30.) This finding overlooks the fact that this language was adopted in versions of Holy Comforter’s Constitutions well before the enactment of the national or diocesan Dennis Canon, and therefore, the presence of this language in 1989 when Holy Comforter amended other provisions of the Constitution is not evidence of any present intent to create a trust in favor of the National Church or its diocese. This Court overlooked and misapprehended that 1989 was the year when the Constitution of Holy Comforter was amended to incorporate the accession language. This language has been in Holy Comforter’s Constitution since 1968, years prior to the Dennis Canon. (R. 6743.) Respectfully, Holy Comforter asks this Court to reconsider its holding that Holy Comforter had any intent, much less the “necessary present intent,” to subject its parish to the Dennis Canon, which did not exist when its Constitution was amended to include accession language.

I. South Carolina’s Requirement for Present Intent to Create a Trust.

As noted by this Court, South Carolina law requires the National Church to show two necessary elements: (1) that “the party creating the trust took present actions—in writing—documenting both the creation of a trust and the placing of specified property in it[]” and (2) that “the documents creating the trust indicate the owner had the present intent for the writing to create

a trust for the particular beneficiary.” (Op. at 23-24 (citing S.C. Code Ann. §§ 62-7-401(a)(1)(ii) & 62-7-402(a).) Stated differently by this Court, “we must evaluate the Parishes’ actions under South Carolina trust law, including the requirements that the owner take *present action* coupled with *the present intent* to create a trust for the beneficiary.” (*Id.* at 24 (emphasis added).) Importantly, this Court noted that the burden to prove the existence of a trust lies with the National Church. (*Id.* at 23 (stating that “this court must find the party claiming to benefit from the trust has proven several elements . . .”).)

“To create a valid trust, the settlor must indicate an intention to create a trust.” S.C. Code Ann. § 62-7-402 cmt (citing Restatement (Third) of Trusts § 13). Notably, the drafters of the South Carolina Trust Code rely heavily on the Restatement (Third) of Trusts in its reporter’s comments throughout the Trust Code. Regarding the manifestation of trust intention, the Restatement states that “[i]n interpreting the words and conduct of property owners, circumstances that shed light upon their intentions are relevant. . . . Acts or communications prior to and subsequent to, as well as those contemporaneous with, the transfer or other act that is claimed to create a trust may be relevant in determining whether a property owner had the requisite intent to create a trust.” Restatement (Third) of Trusts § 13 cmt b (2003). Importantly, the Restatement states “the manifestation of intent to create a trust *inter vivos* ordinarily requires that the intention be to create the trust *at that time*. Thus, an *intention to create a trust at some time in the future ordinarily does not create an express trust*.” *Id.* cmt a (emphasis added). In other words, there must be a confluence of (1) a declaration of trust and (2) a present intent to create the trust.

II. There Was No Confluence of a Declaration of Trust and Present Intent to Create a Trust in Any of Holy Comforter’s Constitutions, Including the 1989 Amendment to Its Constitution.

This Court concluded that Holy Comforter created an express trust through language appearing in its 1989 amendment to its Constitution. (Op. at 30 & 42.) But this 1989 amendment only added language regarding two ministerial issues – (1) removing the junior warden from having to serve as chairman of the buildings and properties committee and (2) stating whether the clerk is a member of the vestry. The 1968 and 1974 Constitutions (and the clerical amendments to the same in 1989) are not evidence of a “present action couple[d] with the present intent to create a trust” for the National Church or its diocese. (*See id.* at 24.) The action in 1989 served to amend language regarding the junior warden’s and clerk’s roles. This fact is evident in footnotes on pages 3 and 6 of Holy Comforter’s Constitution. (R. 6730 & 6733.)¹ Holy Comforter’s sole intent in 1989 when its Constitution was amended was to address the roles of the junior warden and clerk.

This Court noted that “[n]ine Parishes *amended their constitutions* or bylaws *after the National Church adopted the Dennis Canon in 1979 and after the Lower Diocese adopted the Diocesan Canon in 1987 to include phrases* such as we ‘adopt’ or ‘accede to’ the Canons of the National Church and the Lower Diocese.” (Op. at 30 (emphasis added).) To be clear, Holy Comforter did not amend its Constitution to include phrases such as adopt or accede after 1979 or 1987. Holy Comforter had this language in its Constitutions for years before the Dennis Canon was

¹ Specifically, the footnote regarding the junior warden states as follows: “A sentence requiring the Junior Warden to serve as Chairman of the Buildings and Properties Committee during his term of office was deleted by amendment, adopted at the annual meeting held Jan. 1988 and Jan. 1989.” (R. 6730.) The footnote regarding the clerk’s role states as follows: “Amendment approved at annual meeting January 1988 and January 1989 deleted phrase ‘from its own number’ modifying clerk.” (R. 6733.)

ever passed. Pre-Dennis Canon language cannot be evidence of intent to create a trust under the Dennis Canon.

More specifically, for decades before the passage of the diocesan Dennis Canon and many years before the passage of the national Dennis Canon, Holy Comforter included the language at issue in its Constitutions. Holy Comforter's 1968 and 1974² Constitutions both contain the accession and adoption language. (R. 6743-6748 & 6728-6735.) The national Dennis Canon was

² The language at issue appears in the 1974 Constitution of Holy Comforter and carried over when it amended its Constitution in 1989. (R. 6727-6735.) In 1989, Holy Comforter amended its Constitution addressing (1) Article II(5)(B) regarding the junior warden's role on the buildings and properties committee and (2) Article VI regarding the Clerk's role as a vestry member, as noted in the footnotes on pages 3 and 6 of the amended Constitution. (R. 6730 & 6733.) The fact that the language at issue was carried over from the 1968 and 1974 Constitutions and appears in the 1989 amendments to the Constitution was discussed and acknowledged during the trial. (R. 2842 – 2844.) The colloquy between opposing counsel and Holy Comforter's witness is as follows:

Q: And so the first page of that exhibit says at the top, index to constitution, correct?

A: Yes.

Q: And at the left it says, revised January 8, 1989, doesn't it?

A: That's correct.

Q: And then when you turn the page, the next page, which is numbered 1, says constitution, and it's dated May 30, 1974, correct, at the top of that page?

A: Yes.

Q: Okay. So we can assume that the constitution was adopted in May 1974 and then perhaps – well, and revised, strike the perhaps, on January 8, 1989, and that's the document we have, correct?

A: That's correct

(R. 2843.)

adopted by the National Church in 1979, and the Diocese adopted its version of the canon in 1987. (Op. 17 & 22.)

Holy Comforter carried over the same language from previous decades in amending its Constitution in 1989 to address the limited clerk and junior warden issues. There is no document in the record (or elsewhere) that exhibits both (1) a present action to create a trust and (2) a present intent to create a trust. There was no positive action taken by Holy Comforter with respect to the creation of a trust in its 1989 amendments to its Constitution.³ In fact, there has never been a positive act by Holy Comforter with respect to either the national Dennis Canon in 1979 or the diocesan Dennis Canon in 1987. Rather, Holy Comforter was maintaining the status quo with continued use of the accession language. It did not couple present action with a present intent to create a trust. Quite simply, the 1989 amendments to its Constitution do not “indicate [Holy Comforter] had the present intent for the writing to create a trust for [the National Church and its diocese].” (Op. at 24.)

Moreover, this Court discussed this issue in its Opinion with respect to Christ Church, Mount Pleasant.⁴ (*Id.* at 32-33.) In 1980, Christ Church, Mount Pleasant amended its Bylaws to

³ The law of South Carolina requires present intent to act. Holy Comforter’s repetition of the accession language from pre-Dennis Canon periods in 1989 when amendments to its Constitution were made does not constitute the present intention to create a trust. It is not a positive act, as required by this Court’s Opinion. (*See* Op. at 24.); *see also Cartee v. Lesley*, 290 S.C. 333, 336, 350 S.E.2d 388, 389 (1986) (drawing distinction between “positive act” as a power that is mandatory for a trustee versus a discretionary power “when the trustee may refrain from exercising it.”); *cf. Black’s Law Dictionary* 22 (8th ed. 2005) (defining “act” as “1. Something done or performed, esp. voluntarily. 2. The process of doing or performing; an occurrence that results from a person’s will being exerted on the external world – Also termed *positive act*; *act of commission*.”).

⁴ This Court also discussed this issue with respect to St. Helena’s 1987 Bylaws. (Op. at 27.) With respect to St. Helena’s, this Court noted that the parish’s use of the word “pledges” indicates a future action, not a present action, and therefore no express trust could arise. (*Id.*) There was no confluence of a declaration of trust and a present intent. (*Id.*) The same is true for

include the following: “In the event Christ Church, Mount Pleasant, S.C. should ever dissolve . . . , the Standing Committee of the [Lower Diocese] shall become the managing body of the corporation, with full power and authority without restriction, to sell or mortgage its property or any part thereof, to convey any or all of its property to the [Trustees].” (*Id.* at 32 (alterations in original).) This Court recognized this language created a beneficial interest in the Lower Diocese. (*Id.*) But importantly, this Court concluded that “[b]ecause this amendment was made seven years before the Lower Diocese adopted the Diocesan Canon, we cannot rely on Christ Church, Mount Pleasant’s participation in the Lower’s Diocese’s adoption of the Diocesan Canon as evidence of its intent to create a trust.” (*Id.*)

The same is true for Holy Comforter. For years prior to the enactment of both the national Dennis Canon and the diocesan Dennis Canon, Holy Comforter had accession language. The 1968 and 1974 Constitutions of Holy Comforter and their use of accession language is not evidence of a present intent to create a trust, like this Court found with respect to Christ Church, Mount Pleasant. Holy Comforter never had a present intent to create a trust in favor of the National Church or its diocese. And its continued use of accession language from 1968 and 1974 cannot be evidence of any present intent to create a trust, as pronounced by this Court in its analysis of Christ Church, Mount Pleasant.

the parishes that “operated” or were “organized” pursuant to the canons of the National Church and its diocese. (*Id.* at 27-28.) These parishes’ uses of “operating” a church contemplated a “future action” and “not the present action necessary to satisfy the first element” according to this Court. (*Id.* at 27.)

Throughout its Opinion, this Court repeats the need for a present action to accompany a present intent for an express trust to arise. (*See also* this Court’s discussion of parishes that “agreed to be bound by” or “agreed to conform to” the Canons of the National Church and its diocese. (Op. at 29-30.) There was no such marriage of a present action and a present intent regarding Holy Comforter. Holy Comforter had been using the language that purportedly represents a declaration of trust for years before the enactment of the national Dennis Canon and the diocesan Dennis Canon. There was no confluence of a declaration of trust and present intent for Holy Comforter.

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. Holy Comforter requests a rehearing on this issue.

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