

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

APPEAL FROM DORCHESTER COUNTY
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 St. Jude's Church of Walterboro; 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,

Appellants,

v.

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

Appellants.

REPLY TO RETURN TO PETITIONS FOR REHEARING

Appellants filed a Return to the Petitions for Rehearing on June 20, 2022, addressing two issues as directed by the Court. The first issue, revocation based on subsection 62-7-602(a) of the South Carolina Code (2022) is raised by The Church of the Good Shepherd, Charleston, SC (“Good Shepherd”)¹; The Church of The Holy Cross, Stateburg (“Holy Cross”); and The Vestries and Churchwardens of the Parish of St. Andrew (“Old St. Andrew’s”)². The second issue, that no trust was created because the language purporting to constitute accession existed in the bylaws or constitutions before 1979, is raised by The Vestry and Church Wardens of St. Jude’s Church of Walterboro (“St. Jude’s”); St. Luke’s Church, Hilton Head (“St. Luke’s”); and Trinity Church of Myrtle Beach (“Trinity”) (hereinafter, collectively with Good Shepherd, Holy Cross, and Old St. Andrew’s, “Petitioners”). The Petitioners hereby submit their 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) (“TEC”) and The Episcopal Church in South Carolina (“TECSC”) (collectively, “Appellants”).

¹ Appellants mistakenly included Good Shepherd in the group of parishes that raised a present intent argument with respect to accession language that existed in its governing documents prior to the promulgation of the Dennis Canon in 1979. To the extent the Court were to conclude that there are such governing documents that constitute accession to the Dennis Canon by Good Shepherd—a finding that would be directly contrary to the Court’s 2022 Opinion—Good Shepherd joins in the arguments raised by Old St. Andrew’s, St. Jude’s, St. Luke’s, and Trinity with respect to the present intent necessary to create a cognizable trust under South Carolina law.

² Old St. Andrew’s did not raise the second issue in its petition for rehearing, but the Appellants raised the present intent issue with respect to Old St. Andrew’s in their return for the first time and Old St. Andrew’s respectfully responds in this reply to that argument.

I. Good Shepherd, Holy Cross, and Old St. Andrew’s created a revocable trust in favor of the Appellants, and they each revoked that trust by removing accession to it from their governance documents.

Appellants make 5 arguments that the trusts created by Good Shepherd, Holy Cross and Old St. Andrew’s were irrevocable in spite of this Court’s finding that each trust was created after 2006³: (1) the law of the 2017 case is that they are irrevocable; (2) “evidence” of pre-2006 accession and therefore trust creation, makes them irrevocable; (3) a trust created after 2006 does not require written evidence of irrevocability and such “evidence” exists; (4) “adequate” action was not taken to revoke the trusts created after 2006; and (5) there was an “ecclesiastical” determination of irrevocability requiring deference by the Court.

A. The law of the case doctrine is inapplicable because the 2017 Court did not consider the revocability of trusts created after 2006.

Appellants argue that the Court’s 2017 Opinion established the law of the case with respect to the revocability of trusts created after 2006. This argument overlooks two self-defeating facts: (1) Appellants did not contend before this Court in 2017 that there were any post 2006 declarations that created trusts, R. p. 957 (“As the result of these writings having been made before January 1, 2006....”); and (2) Justice Hearn explicitly recognized that post-2006 trusts would be treated differently on the issue of their revocability. *See 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) (“I 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.”)⁴. This Court in its 2017

³ 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.”

⁴ As the title to the amendment effective January 1, 2006, to the trust code makes clear, “**FOR THE PRESUMED REVOCABILITY INSTEAD OF IRREVOCABILITY OF A TRUST**”,

Opinion did not consider post-January 1, 2006 writings in the respective Opinions because: (1) the Appellants did not previously contend that post-January 1, 2006 writings created a trust in their favor and (2) because the post-2006 findings of trust creation first arose in this Court’s 2022 Opinion. Therefore, there was no finding in the 2017 Opinion that established the law of the case as to the revocability of trusts created after January 1, 2006. *See also Protestant Episcopal Church in Diocese of S.C. v. Episcopal Church*, No. 2020-000986, 2022 WL 1161382, at *3 (S.C. Apr. 20, 2022) (“Op.”) (“The five opinions of the 2017 Court *left open* the question of what actions by the Parishes are necessary to constitute express accession to the Dennis Canon ...” (emphasis added)).

B. There is no record support for Appellants’ pre-2006 “evidence” of accession.

Appellants make strained arguments attempting to make trust creation by these three parishes a pre-2006 event to avoid the presumption of trust revocability. Ret. at 4-6. The evidence argued is either unsupported by the record and is based on counsel’s arguments that the facts are “reasonable inferable” (Ret. at 4) or it is contradicted by the record.

i. Good Shepherd

Recognizing that Good Shepherd’s 2001 corporate articles and 2004 Articles of Merger—the documents the National Church has all along contended were the only documents that created an irrevocable trust in its favor—are insufficient to create a cognizable trust under South Carolina law as expressed in the 2022 Opinion, Appellants resort to an inference about a 2004 Constitution that does not appear in the Record.⁵ As previously noted, n. 3 *supra*, this Court thoroughly

2005 South Carolina Laws Act 66 (S.B. 422).

⁵ On page 102 of the 2015 record on appeal, Appellants argued that only two Good Shepherd writings created a trust in their favor: (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

reviewed the record for “all the potential evidence of accession” and concluded that the only document that creates a cognizable trust under South Carolina law with respect to Good Shepherd is its 2006 Constitution. Appellants’ argument that it is “reasonably inferable that Good Shepherd’s accession predated 2006” and that “some version of the constitution existed before 2006” asks this Court to consider an “inferable” document that was not before Judge Goodstein, Judge Dickson and therefore, not in the record on appeal and which may not even exist. Appellants’ approach is directly contrary to SCACR 210(h), which states that this Court will not consider any fact which does not appear in the Record, subject only to limited exceptions not present here. There is simply no record support for the existence of a 2004 Constitution or any other document that pre-existed Good Shepherd’s 2006 Constitution—the lone document in the Record that this Court concluded was sufficient to create a trust in favor of Appellants.

ii. Holy Cross

Appellants state that the 2011 bylaws found by this Court to create accession must have contained accession language earlier than 2011 because the accession language was not amended making it a product of some earlier action. Ret. at 5. They then state “the identical language was contained within Holy Cross’s bylaws as early as 1980” citing to a record page “R. p. 8912”. But R. p. 8912 is simply a reference to Appellants’ attorneys’ own response to the second trial court’s request for specific citations in the trial record showing how each parish expressly acceded. It’s an attorney’s argument not evidentiary proof. Furthermore, the reference on that page to exhibit HCS-

subject to the Canons of the Protestant Episcopal Church in the Diocese of South Carolina” Just as the Court concluded with respect to the writings of St. Paul’s Episcopal Church of Bennettsville, and to other parishes “organized pursuant to and subject to” writings, these do not “expressly mention the Dennis canon” and do not create the necessary intent “to create a trust based on the Dennis Canon” Op. at *8.

11, is just a different reference to the 2011 bylaws already referenced in the Record beginning on p. 6446. This is not proof of a 1980 bylaw. It is a circular reference to Appellants' own claim that language existed in a document that is not in the record by citing to the same document found in two different portions of the Record. There is simply no record support for the existence of a 1980 bylaw or of any bylaw that preexisted 2011 which this Court concluded was the only "potential evidence of 'accession'".

iii. Old St. Andrew's

Appellants correctly state that Old St. Andrew's had an accession provision in its 1970 constitution and canons. Ret. at 6. Referencing the 2007 Constitution and canons, they note differences from the 1970 version "demonstrating it was amended after 1970" but "the exact date of the amendment is unclear." Therefore, they argue, "one can conclude the amendment occurred between 1970 and 1996". *Id.* As is argued in the section relating to present intent, this is not evidence that in 1970 Old St. Andrew's had the present intent and took present action to create a trust when the Dennis Canon was not yet in existence.

C. "Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust." S.C. Code Ann. § 62-7-602(a)

Following the effective date of the South Carolina Trust Code, "[u]nless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust." S.C. Code Ann. § 62-7-602(a) (emphasis added). Appellants argue the opposite. They argue the trust code does not require a "precise statement of revocability". Ret. at 7. To the contrary, the statute requires that irrevocability, if intended, must be express which Black's Law Dictionary defines as "clearly and unmistakably communicated". *Black's Law Dictionary*, 9th ed. (2004) at 651. Unless it is clearly and unmistakably communicated in the terms of the trust that the trust is irrevocable, the settlor may revoke or amend the trust.

The Dennis Canon does not do so. It is silent on the issue. As the reporter's comments state, the South Carolina Trust Code "presumes revocability when the instrument is silent" S.C. Code Ann. § 62-7-602 cmt. (2005). Moreover, the Dennis Canon is revocable by the terms of Appellant TEC's Canons.⁶ There is no dispute here about whether the instrument that created the trust at issue here expressly provided that the trust was irrevocable—it plainly did not. The South Carolina Trust Code's presumption of revocability applies to the trusts created by Good Shepherd, Holy Cross, and Old St. Andrew's after 2006 and the creating instruments' silence on their irrevocability requires that they be revocable.

D. Removal of the language that created the trusts is "clear and convincing evidence" of the parishes intent to revoke these same trusts.

In a remarkable volte-face argument, Appellants contend on the one hand that adding accession to the Dennis Canon language in the documents of Good Shepherd, Holy Cross and Old St. Andrew's creates a trust but removing the same language from the same documents does not revoke it. Ret. at 9-10. There can be no more clear and convincing evidence of the settlor's intent to revoke a trust than the removal of the same language that created the trust.

It is undisputed that each of the three parishes removed the accession language. Good Shepherd amended its constitution removing accession on February 23, 2012 following the unanimous consent and approval of its congregation. R. pp. 7140-42. Holy Cross revoked their accession by removing the accession language on January 6, 2013. R. pp. 6451-53.⁷ Old St. Andrew's revoked their accession by amending their Constitution and Canons on February 24,

⁶ The Dennis Canon is part of TEC's Canons (R. 8600) which can be "amended or repealed" by TEC's General Convention. R. 8740.

⁷ Appellants incorrectly argue that this amendment occurred after Holy Cross disassociated from Appellant TEC. Disassociation took place on January 11, 2013, 5 days after accession was revoked when Holy Cross resolved to "declare that we are no longer an Episcopal Church, nor are we in union with the Episcopal Church." R. pp. 6444-45 (Exhibit HCS-10).

2013 which was the same day they voted to remain affiliated with the Diocese of South Carolina.
R. pp. 6191, 6238-39.

E. Neutral principles of law apply to whether a trust is revocable or not pursuant to the South Carolina Trust Code.

The title of Appellants' argument is the only place in any record where revocability is a matter of "deference to ecclesiastical determination." Ret. at 10. It does not exist in law or in fact. *Jones v. Wolf*, 443 U.S. 505 (1979) itself makes this clear as does the 2022 Opinion. So too does this Court's 2017 Opinion.

The *Jones* majority did not create, nor did it expound on a doctrine of deference to religious authorities to resolve disputes over property, much less whether a trust created under state neutral principles of law could **not** be revoked using those same principles. It did exactly the opposite ruling that civil courts may resolve the dispute based on "neutral principles of law," and are not required to defer to the prior resolution of the issue by an authoritative tribunal of a national church.⁸ This Court's 2022 Opinion used neutral principles to determine if a trust was created by the three parishes and neutral principles equally determine if these trusts were revoked⁹.

⁸ The question for decision is whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of "neutral principles of law," or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church.

Jones, 443 U.S. at 597. In *Jones*, an "authoritative tribunal" had ruled. *Jones* held that despite that ruling, a civil court could nevertheless constitutionally apply neutral principles to resolve the property issues. Here, revocation was never an issue at trial and no evidence was offered about the issue one way or the other by Appellants. What Appellants argue here is simply the legal position of their counsel, not the record of any "ecclesiastical determination".

⁹ Justice Hearn used neutral principles, not deference, to determine the revocability of a pre 2006 trusts:

Respectfully, I disagree with my colleague and would apply the appropriate statute which resolves the issue: South Carolina Code Section 62-7-602(a) (Supp. 2016) (common law default rule of irrevocability applies to trusts created before the effective

II. Petitioners Lacked the Present Action Coupled with Present Intent to Create a Trust

Appellants argue that the actions of four parishes¹⁰, all of whom added accession language to their governing documents before the Dennis Canon was created in 1979 and none of whom acted with respect to that accession language after 1979, manifested the “requirements that the owner take present action coupled with present intent to create a trust for the beneficiary”. Op at *6.¹¹

This Court has already addressed the issue of documents that contemplate future action and their ability to create present action and present intent. A “pledge” of adherence to constitution

date of the statute [January 1, 2006]).

Protestant Episcopal Church in the Diocese of S.C., 421 S.C. at 241, 806 S.E.2d at 98.

¹⁰ Holy Comforter has filed its own reply, so this reply only references 4 rather than 5 parishes. Appellants reference three of these parishes – St. Jude’s, St. Luke’s, and Trinity Church. Good Shepherd did not raise the present intent argument. Appellants raise for the first time in their Return that Old St. Andrew’s created a trust with the inclusion of accession to the TEC Constitution and Canons in 1970. The accession language was in the parish’s Constitution and Canons almost a decade prior to TEC adding the Dennis Canon in its governing documents and 17 years before the Diocese added its real property canon. The Record is devoid of any evidence to show that Old St. Andrew’s took present action coupled with the present intent to create a trust for TEC or TECSC from 1970 until 2007. Argument of counsel is not evidence and should not be considered by this court as such.

¹¹ The amendments to the governing documents for the four parishes are as follows:

- In St. Luke’s 1973 Bylaws, Article II contained the words “...accedes to and adopts...” (R. pp. 8493-8497. Then in November, 2000, portions of the Bylaws were amended (the changes in the 2000 Bylaws are underlined- nothing in Article II was underlined) but no changes were made to the existing Article II, nor Article I. R. pp. 8493-96.
- St. Jude’s 1975 Constitution included accession language and the parish only amended its Canons in 1990, not its Constitution. R. pp. 5721, 5742-44.
- The language in the Trinity By-Laws relating to accession had remained unchanged since before 1972. The only action taken by Trinity was in a 1993 amendment to Trinity’s Bylaws and Constitution concerning term limits for delegates and wardens.
- Old St. Andrew’s Constitution and Canons included accession language in 1970, but this court found it did not have the preset action or present intent to create a valid trust in 1970. R. p. 6246. The parish removed the accession language in 2013 when it voted to remain affiliated with the Diocese of South Carolina.

and canons is a future action, Op. at *7; “organized” or “operating” contemplate future action...not the present action necessary to satisfy the first element mentioned above”, Op. at *8 ; “the language ‘subject to’ refers to future action – in this instance *future action of the drafters of the Canons*— not the present action of the property owner necessary to satisfy the first element discussed above.” Op. at *8 and note 10 (“*there must be a separate present act creating a trust.*”) (emphasis added); agreements “to be bound by” or “to conform to” “contemplate how a parish is going to operate in the future. They do not show a present action coupled with a present intent to create a trust based on the Dennis Canon.” Op. at *9; “‘shall conform to’ is an agreement to comply with some future requirement.... Future compliance with the canons is not present action and does not indicate the Parishes had the present intent necessary to create a trust based on the Dennis Canon.” *Id.*

Appellants argue that the latent declaration of trust existed for these parishes prior to 1979 and then sprang into creation after 1979 when the scrivener-beneficiary added it to its canons. The Parishes had to take no present action nor have any present intent because that was already accomplished by the latent declaration. Of course, there could be no intent before 1979 because the scrivener-beneficiary had not yet drafted the declaration. As determined by this Court, the beneficiary must establish that the settlor took “present action *coupled with* the present intent to create a trust for the beneficiary.” Op. at *6 (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 of its property. Appellants, who importantly bear the burden of showing this Court that an express trust exists, have failed to show how the parishes had the present intent to create an express trust when they amended their governing documents to address ministerial issues or did not amend the document containing the accession language. Respectfully,

this Court should hold that these parishes did not commit any action and did not have the necessary intent for a trust to arise in favor of Appellants.

Appellants attempt to flip the burden and argue that the parishes could have stated in the governing documents that they were expressly not adopting the Dennis Cannon and that a failure to do so “is direct evidence of a present action and intent to create a trust.” Ret. at 12. But the absence of an express disavowal of the Dennis Cannon does not equate to a present intent to adopt it. The thrust of Appellants’ argument is that by the “restatement” of accession language in the parishes governing documents for decades, coupled with the parishes alleged knowledge of the National and Diocesan Dennis Canons, was sufficient to create a trust. As detailed in the Petitions, the record for these parishes provides that the same accession language has been used prior to 1979 and in subsequent amendments for ministerial issues¹² or were not amended at all¹³.

Appellants conveniently ignore that *All Saints* properly articulated the law in South Carolina, and the parishes 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).

Stated differently, Appellants’ argument is that by doing nothing when they amended its governing documents after 1979, the parishes created an express trust in Appellants’ favor. This argument is rejected by *All Saints* and by this Court’s 2022 Opinion. Silence cannot be present action and present intent when express, written contemplation of future action is not.¹⁴ The burden

¹² St. Luke’s, Trinity

¹³ St. Jude’s (Canons only), Old St. Andrew’s (record is devoid of any amendments before 2007).

¹⁴ Cf., *H. A. Sack Co. v. Forest Beach Pub. Serv. Dist.*, 272 S.C. 235, 237, 250 S.E.2d 340, 341 (1978) (“Silence ordinarily does not constitute acceptance”).

of proof to show both the present intent and the present action to create a trust after 1979 and 1987 lies with the Appellants. The record is devoid of any evidence supporting the assertion that any parish had a present intent after 1979 to convey their property into a trust for the benefit of Appellants and this Court should grant the Petitioners requested relief.

III. The 1987 Diocese Dennis Canon was Revoked in 2010.

Important to the creation of a trust for TECSC is the fact that the Diocese, as beneficiary, revoked its trust in 2010 when it removed the 1987 property canon from its Constitution and Canons. *See* DSC-02 2010 (Convention Journal – Canon XXIX Section 5 is removed); 2015 ROA 1039, 1045; 2015 ROA 1175-6 (DSC-44 F); 2015 ROA p. 1035 (DSC-01 Canon XXX Section 5 in 2009). Therefore, there is no express trust for the benefit of TECSC in any of the parish's real property.

IV. Conclusion

More than 43 years ago, five parish churches adopted language in their governing documents acceding to Appellant TEC's constitution and canons which contained no canon declaring a trust for the benefit of the drafter – TEC. Obviously, none of these settlor – parishes acted or had the intention to create a trust because the beneficiary had not created it. This Court decided, in 5 differing factual settings, that actions by other Parishes in this case, all of which contemplated future events, did not create trusts because these actions were not present actions coupled with present intent – they were in the future. Appellants contend that the five petitioning parishes future silence about the presence of accession language in their corporate documents added years before there was a beneficiary created declaration is sufficient to constitute present action coupled with present intent. Respectfully, it is not if expressly contemplated, but future action, is not.

On the other end of the trust-life spectrum, three parish churches expressly revoked their accession to the beneficiary-created declaration of trust by removing the accession language that created the trusts. They unambiguously did so after January 1, 2006 making their revocation presumptively valid. As this Court has already found in its appendix, there is no record evidence of a present action coupled with a present intent to create these trusts before 2006. There is therefore no legal basis under the same neutral principles of state law which this Court found created these trusts to find they were not revoked: the issue of post-2006 revocation was not considered in 2017 because it was first found to exist in 2022, and the trusts were revoked by removing the language of their creation and that was done after January 1, 2006.

It is respectfully submitted that this Court should reconsider, and if necessary, rehear the issues raised by the Petition for Rehearing and grant the requested relief by clarifying that no trusts were created by Petitioners or if created, they were revoked.

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