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August 2, 2018

Via Email
The Honorable Edgar W. Dickson
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Re: *The Protestant Episcopal Church in the Diocese of South Carolina et al. v. The Episcopal Church, et al.*
Case No. 2013-CP-18-00013

The Protestant Episcopal Church in the Diocese of South Carolina et al. v. The Episcopal Church, et al.
Case No. 2017-CP-18-1909

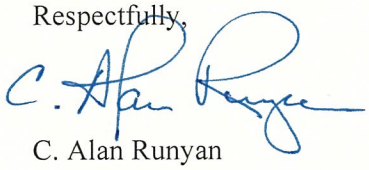
Dear Judge Dickson:

Enclosed is the list of issues (and why they are issues) requested by the Court at our status conference last Thursday. As requested, these issues only deal with the 5 separate opinions of the Supreme Court in the first referenced case. They do not deal with the Betterments action and its effect on the issues that may arise out of the Court's decision on the 3 pending motions in the first referenced case.

The Court asked that the issues list be "brief". We believe the 3 primary issues are brief. These are summarized on page 4. Fulfilling the "why" part of the Court's direction, because of the lack of agreement between the opinions, required more space.

We look forward to the Court's direction on hearing and resolving the remaining motions and issues in both cases.

Respectfully,



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CAR/jps
cc: All Counsel of Record

b. There was no agreement among the 5 opinions on the rationale and there was no agreement on the results among four opinions: Acting Justice Pleicones, Justice Hearn, Justice Kittridge and Acting Justice Toal.

1. Justice Hearn and Acting Justice Pleicones joined in each other's opinions. Both Justices used a *de novo* standard of review and made their own findings of fact. Both used the legal standard of deference to the decision of the highest body in a hierarchical church on corporate control and the existence of a trust. Justice Hearn also found a constructive trust was created by operation of law based on parish agreement to the "rules" of TEC by the plaintiffs in which Acting Justice Pleicones joined.
2. A majority (Beatty, Kittridge and Toal) agreed that the legal standard to be applied when resolving disputes between religious organizations over property and corporate control is neutral principles of state property and trust law. These three opinions did not agree on the result when this legal standard was applied to the facts.
    1. Justice Beatty and Justice Toal found that neutral principles were to be strictly applied as they would be to any non-religious organization as decided by *All Saints* which was decided consistently with the constitutional principles of *Jones v. Wolf.* Justice Toal found no express or constructive trusts were created by any parish. Justice Beatty's opinion on the result is discussed below.
    2. Justice Kittridge read *Jones v. Wolf* to constitutionally require

that a state's neutral principles of law, when applied to the creation of an express trust by a religious organization, must require no more than a "minimal burden" in its creation. If applied strictly, without a minimal burden, the idea that any express trust would be created on the facts was "laughable." Applying neutral principles minimally, express trusts were created by some parishes but they were revocable and they were revoked.

3. Justice Toal expressly rejected the concept of minimal burden and Justice Beatty impliedly rejected it because he required that neutral principles of state law be "strictly" applied.
4. The minimal burden issue was not presented to nor decided by the trial court. It was raised for the first time by defendants in Appellants' Brief. Any decision arising out of it was *sua sponte*.

c. There was apparent, partial agreement in a result between the opinions of Acting Justice Pleicones, Justice Hearn and Chief Justice Beatty. Necessarily the narrowest ground must be found in CJ Beatty's opinion.

1. Chief Justice Beatty's opinion states:

1. He does not agree with any of the analysis of the Pleicones and Hearn opinions and he did not agree with "much of the result."
2. *All Saints* and *Jones v. Wolf* control this dispute.
3. The Dennis Canon is not a legally cognizable form of trust required by *Jones*. Unequivocal intent expressed by the action

of *each settlor* (each parish church) is required to create a trust, *not* the intent of TEC, the beneficiary.

4. If a parish church agreed in a signed writing to the Dennis Canon then it would create a trust with TEC as its beneficiary.
5. Certain parishes, unnamed by Justice Beatty, did not do that and no trust was created.
6. Certain parishes, unnamed by Justice Beatty, "assuming they acceded in writing", created a trust.

2. An express trust is the only type of trust that could be created that would produce the narrowest agreement *in result* between the opinions of Beatty, Pleicones and Hearn.

    1. Judge Goodstein found that the only types of trust that could exist on these facts were an express trust and a constructive trust. Final Order at 34. That ruling was not appealed and no other types of trusts were discussed by the Collective Opinions.
    2. Justice Hearn (joined by Acting Justice Pleicones) found that a "constructive trust" was created by operation of law based on 36 parishes agreement to the "rules" of TEC. (However, a constructive trust is not based on intent but arises when "circumstances under which property was acquired make it inequitable that it should be retained by the one holding legal title." *Lollis v. Lollis*, 291 S.C. 525, 529, 354 S.E. 2d 559, 561 (1987).

3. CJ Beatty did not agree on the use of deference to determine the outcome of a dispute between religious organizations over property and corporate control, as did Pleicones and Hearn.
4. CJ Beatty required the following to create a trust: each parish, individually, had to agree in a signed writing to the Dennis Canon evidencing an unequivocal intent to create a trust. That is an express trust under neutral principles of South Carolina trust law. It is not a constructive trust because neither intent nor a specific writing are required to create a constructive trust.
5. CJ Beatty did not agree that any parish agreement to "rules" created an express trust.
    i. Promises of allegiance to TEC were not sufficient.
    ii. He disagreed with the analysis of Pleicones and Hearn.
    iii. He never mentioned agreement to "rules" but repeatedly required agreement to a specific document created by TEC, the Dennis Canon.

3. The record on appeal does not contain facts that establish as to each parish church an express agreement to the Dennis Canon in a signed writing.
    1. The defendants did not include the documents claimed to exist in their counsels' partial summary of the record which was included in the record on appeal. They included 5 pages from

their reconsideration memorandum to Judge Goodstein in the record on appeal.

2. Facts argued in the statements of counsel are not record facts which can be considered by an appellate court.
3. The defendant-appellants had the burden of presenting the appellate court with an adequate record on appeal. *Harkins v. Greenville County*, 340 S.C. 606, 616, 533 S.E. 2d 886, 891 (2000).
4. Justice Hearn (joined by Acting Justice Pleicones) found that… "this issue (of accession by the parish churches) is not properly before the Court…"
5. The 5-page summary of the parishes who allegedly created an express trust is factually inaccurate.[2]
    i. As an example only, with respect to St. Philip's Church, the only statement which is used to allege an express trust was created in favor of TEC is a portion of a sentence from 1987 corporate Articles of Restatement stating the parish purpose is to operate in accordance with "Articles of Religion." These religious precepts are not in any record and have nothing

[2] Justice Toal's Opinion states that the "…defendants contend that twenty-eight of the plaintiff parishes 'acceded' in some form or another…" and later refers to "alleged express promise" of the twenty-eight plaintiff parishes (emphasis added).

whatsoever to do with the Dennis canon or any other canon.

ii. TEC also does not believe it is accurate. The summary does not list "Old St. Andrews" as a parish that created an express trust in favor of TEC, yet TEC contends that Old St. Andrews created an express trust.

4. The statement by CJ Beatty that the "remaining parishes" expressly agreed to the Dennis Canon is not based on anything in the record and he did not identify which did and which did not. The interpretation of his opinion as advocated by the defendants would be clearly erroneous and a manifest injustice and could not be the law of the case.

    1. TEC admitted that 7 or 8 parishes did not expressly agree to the Dennis Canon. These parish churches are not before the court.
    2. No justice, including CJ Beatty, decided whether an express trust was created based on any record facts on a parish by parish basis as to any "remaining Parishes".
    3. CJ Beatty's opinion cannot be presumed to have violated the Supreme Court's rule by relying on the summary of counsel as record facts.
    4. If such an assumption were made, his opinion would be internally inconsistent.

        i. The summary of documents not in the record

does not reference facts that each parish expressly agreed in a signed writing to the Dennis Canon.

ii. To the extent that CJ Beatty's is interpreted to mean he relied on the factual findings of Hearn and Pleicones that would be inconsistent with the other parts of his opinion.

1. He disagreed with all their analysis and much of their result.
2. Hearn and Pleicones found a constructive trust was created by all 36 parishes by facts found *de novo*. Though not stating a standard of review, CJ Beatty could not be interpreted to agree with theirs because he expressly disagreed with their analysis.
3. Express trusts, though legally narrower than constructive trusts, are not a factual subset of constructive trusts.

d. If this Court finds that an express trust was created by any parish church, then next part of the first primary issue is whether that parish church irrevocably agreed to that express trust and if not, whether it was revoked.

C. Diocesan Beneficiary of Trustees Assets: The second primary issue is with respect to

the uncertainty about what decision was made with respect to who is the beneficiary of the assets of plaintiff, Trustees of the Protestant Episcopal Church in South Carolina (the "Trustees") held for the benefit of plaintiff, The Protestant Episcopal Church in the Diocese of South Carolina (the "Diocese"). A decision is required.

a. Acting Justice Toal and Justice Kittredge found the Trustees "diocesan" assets were held for the Diocese as the beneficiary.
b. Acting Justice Pleicones and Justice Hearn found the Trustees "diocesan" assets were held for the ECSC as the beneficiary.
c. Chief Justice Beatty found, according to Acting Justice Toal's summary in note 72, that only Camp St. Christopher was held by the Trustees for the benefit of the ECSC.
d. The defendants maintain that CJ Beatty's ruling is not limited just to the Camp.
e. Justice Beatty made only one reference to this issue in footnote 29. In that footnote, he states (1) title to the Camp should remain with the Trustees, (2) it was held for the welfare of the "Protestant Episcopal Diocese of South Carolina" and (3) the "disassociated diocese could not claim to be the successor to the "Protestant Episcopal Church in the Diocese of South Carolina." He stated no legal reason for that decision other than what he had just been discussing.
    1. To the extent that the decision is broader than Camp St. Christopher, as the defendants maintain, CJ Beatty did not give the reason and that would be a violation of a court rule which he should not be presumed to have done.
        1. All the justices agreed that the Diocese disassociated from TEC

in 2012. CJ Beatty disagreed with the analysis of Pleicones and Hearn which used the legal standard of deference to find that the ECSC was the proper beneficiary. There is no stated strictly applied neutral principle of law by CJ Beatty that would result in the Diocese not being who it is after its successful disassociation from TEC and that would be contrary to the factual findings of Judge Goodstein.

2. CJ Beatty cannot be presumed to be implicitly using a *de novo* review standard for making findings of fact using neutral principles of law because he would have violated Rule 220(b)(1), SCACR. *Dearybury v. Dearybury*, 351 S.C. 278, 283, 569 S.E. 2d 367, 369 (2002) ("when an appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and the reason for its decision.")

D. The last primary issue relates to the defenses raised by all the plaintiffs to TEC's and ECSC's counterclaims. These were not decided by the trial court, were not an issue on appeal and were not decided by the Collective Opinions. They remain to be heard and decided.

Respectfully submitted,

August 2, 2018

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