

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

HUDSON PRESBYTERIAN CHURCH	)	CASE NO. 2006 09 6162
	)	
Plaintiff	)	JUDGE SPICER
	)	MAGISTRATE SHOEMAKER
vs.	)	
	)	
EASTMINSTER PRESBYTERY	)	<b><u>HUDSON PRESBYTERIAN CHURCH'S</u></b>
	)	<b><u>SEPARATE REPLY BRIEF TO THE</u></b>
Defendant	)	<b><u>RESPONSE OF OHIO ATTORNEY</u></b>
	)	<b><u>GENERAL MARC DANN</u></b>

I. INTRODUCTION

The Attorney General of Ohio is arguing a different case than the one presently before the Court.

HPC and Eastminster are disputing whether a trust exists, which designates HPC as trustee and PC(USA) as beneficiary. This is not an action in *cy pres* or for deviation from the purposes of an existing charitable trust, but a declaratory judgment case to determine property rights. Neither HPC nor Eastminster have suggested otherwise to the Court, as is clear from the Agreed Upon Statement of Issues submitted to the Court by the parties, and the briefs on the merits of HPC and Eastminster.

However, the Attorney General argues that people (whether congregants or community members) who donated funds to HPC for the specific purpose of supporting a local branch of the PC(USA) should be declared the beneficiaries of a constructive charitable trust. Thus the whole approach of the Attorney general to this dispute is incorrect, and has no bearing on the issues before the Court.

II. THERE IS NO EXPRESS CHARITABLE TRUST HERE

ORC §109.23 states:

“Charitable trust” means any fiduciary relationship with respect to property arising under the law of this state or of another jurisdiction as a result of a manifestation of intention to create it, and subjecting the person by whom the property is held to fiduciary duties to deal with the property within the state for any charitable, religious, or educational purpose.

There is no question that HPC is a nonprofit corporation that was formed for religious purposes, and that it has a duty to spend any donations it receives for religious purposes. But the articles of incorporation of a nonprofit organization do not, standing alone, create an express charitable trust. Instead, they create a nonprofit corporation.

Instructive in this regard is *University Hosps. of Cleveland v. Lynch* (2002), 96 Ohio St. 3d 118, 772 N.E.2d 105. In *Lynch*, one Dr. Bickers formed a corporation that he intended to operate in conjunction with his teaching of medicine at University Hospitals. When he left the faculty, he transferred the stock of the corporation to his successor, Dr. Lynch. But when Lynch later left the position of department chair, he declined to transfer the stock of the corporation to his successor and elected to retain independent control of it. After University Hospitals sued, the Attorney General moved to intervene, alleging that the corporation was a charitable trust. The Ohio Supreme Court held that the formation of the corporation did not, by itself, create a charitable trust: “[N]o instrument was executed creating a charitable trust in which [the corporation] or its assets constituted the trust res.” *Id.* at 125, 772 N.E.2d at 114.

Similarly, R.C. §5801.01 holds that a “‘charitable trust’ means a trust, or a portion of a trust, created for a charitable purpose ....” Therefore, not to be overly camp, but “a trust” is “a trust.” What was created here is a corporation. While corporations can be trusts, the mere fact that a corporation has been formed does not make it a trust. If it was intended to also function as a trust, or

in a trustee/beneficiary or other fiduciary relationship, that would be articulated in the documents. No trust is asserted in the Articles of Incorporation, By-laws, Deeds, or in any express trust document. Nothing in the Articles of Incorporation states that the purpose of HPC is to benefit Eastminster or the PC(USA).

Ohio cases uniformly confirm that an express charitable trust must be memorialized in a specific document that identifies the purposes and intended beneficiaries of the charitable trust. *See, e.g., State ex rel. Lee v. Montgomery* (2000), 88 Ohio St. 3d 233, 724 N.E.2d 1148 (express charitable trust formed by will). And the sole case cited by the Attorney General in support of his position, *Wiswell v. First Cong. Church* (1862), 14 Ohio St. 31, is inapplicable; that decision never discusses the existence of a charitable trust, and concerns itself instead with interpreting the church's articles of incorporation to determine whether they include the legal right to sell or transfer church property. HPC does not plan on selling or transferring property, but rather, retaining it, and defending it against the imposition of a trust.

Accordingly, the Attorney General is incorrect in his assertion that the articles of incorporation of HPC are sufficient to create an express charitable trust. No express charitable trust exists in this case.

### III. A CONSTRUCTIVE CHARITABLE TRUST MUST BE PROVEN

However, the absence of an express charitable trust does not prevent the Attorney General from protecting the interests of charitable beneficiaries. In *Brown v. Concerned Citizens for Sickle Cell Anemia, Inc.* (1978), 56 Ohio St. 2d 85, 382 N.E.2d 1155, 10 Ohio Op. 3d 220, the Ohio Supreme Court held that a corporation that advertised that proceeds of a bingo gaming operation would be used for charitable purposes could be subject to a constructive charitable trust. Because the general public reasonably expected the bingo proceeds to be used for charitable proceeds, a

fiduciary duty to the general public could be imposed on the corporation, and a constructive trust could be imposed on the funds collected from bingo, to insure their use for charitable purposes.

There is no dispute that HPC is using all of its donated funds, whether from churchgoers or any other source, for religious and charitable purposes. The Attorney General, however, alleges that everyone who has given money to HPC intended that such money would be used for a local church of the PC(USA). However, there is no evidence for this allegation. Without any such evidence, a constructive trust cannot be imposed.

The only evidence the Attorney General presents of a frustrated charitable donor is the affidavit of John and Polly Wise, who allege that when they donated to a children's library fund at HPC, they did not intend to benefit a non-PC(USA) church. AG's Response at 5. This affidavit, by itself, does not create sufficient evidence to justify the appointment of a receiver. The evidence of the Wises' donative intent as being PC(USA) exclusive is not reflected in any formative documents of the gift, 14 years ago.<sup>1</sup> Even if this Court accepts that the Wises wanted to place conditions on their donation relating to the denominational affiliation of HPC (even though they did not say so at the time of the donation), summary judgment cannot be granted in the Attorney General's favor where a genuine issue of material fact exists. Accordingly, no constructive trust can be imposed on HPC without a factual hearing.

Further, the Attorney General's position is inconsistent with common sense and the rights of HPC and other nonprofit corporations. Charitable donors simply do not have the right to micro-manage the expenditure of their donation, or impose additional conditions on their donation after the gift is complete. Adopting the Attorney General's position, that a constructive charitable trust should be imposed whenever a donor disagrees with the specific use of her donation, would have a

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<sup>1</sup>See Affidavit of Vera Rastetter, attached as Exhibit C to HPC's Reply to Eastminster.

radical effect on the operation of nonprofit charitable institutions, and would seriously impair the ability of nonprofit institutions to operate in Ohio.

IV. A CHARITABLE ORGANIZATION CAN USE ITS PROPERTY FOR ANY ONE OF ITS PURPOSES

The Attorney General argues that because voluntary association with the PC(USA) was among the stated purposes of HPC's original articles of incorporation, HPC cannot use its property for any other purpose. However, the Attorney General recognizes that "property of a charitable organization must be applied to one of the purposes for which that charitable organization is organized at the time the property was given." AG's Response at 8 (emphasis added). Likewise, the Attorney General notes that the *Restatement of Trusts* states that "[w]here property is given to a charitable corporation without restrictions as to the disposition of the property, the corporation is under a duty . . . to apply it to one or more of the charitable purposes for which it was organized." *Restatement of the Law 2d, Trusts* (1959) §348, comment (f) (emphasis added). The Attorney General also cites to *Scott on Trusts*, which concludes that "trust property may be used by the corporation in such manner as it sees fit for the accomplishment of any of the purposes for which it exists." 4A *Scott, Trusts* (4<sup>th</sup> ed. 1989), §348.1, pp. 8-9 (emphasis added).

The Attorney General's narrowminded focus on HPC's stated purpose to voluntarily associate with a denomination ignores the fact that HPC has many purposes. After going to great lengths to establish that the church must use its property for "one of the purposes", "one or more of the charitable purposes" or "any of the purposes for which it exists" the OAG then restricts its analysis to *only* that portion of the original articles which referenced the PC(USA), and ignores *all of the other purposes*.

The original articles of incorporation set forth five purpose paragraphs. The first states:

1. To enter the proclamation of the Gospel for the salvation of human kind; the shelter, nurture, and spiritual fellowship of the children of God; the maintenance of divine worship; the

preservation of the truth; the promotion of social righteousness; and the exhibition of the kingdom of heaven to the world.

None of these are PC(USA) specific purposes. HPC property is, has been, and will continue to be used for the proclamation of the Gospel for the salvation of humankind, the shelter, nurture, and spiritual fellowship of the children of God, for the maintenance of divine worship, and all of the other purposes stated in paragraph 1. There is no indication anywhere in the record that HPC is not fulfilling the charitable purposes set forth in paragraph 1 of its original articles of incorporation.

Likewise, paragraph 3 of the original articles of incorporation defines Hudson Presbyterian's purpose as including the following:

3. To carry out the ordinances established by Christ, the head of His church by prayer, singing praises, reading, expounding and preaching the Word of God, administering Baptism and the Lord's supper, thanksgiving, catechizing, making collections for the poor and other pious purposes, exercising discipline, and blessing the people.

Hudson Presbyterian continues to carry out the ordinances established by Christ, continues to pray, sing, read, expound and preach upon the Word of God, administer Baptism, and the Lord's supper, and all other purposes set forth in paragraph 3. There is nothing in the factual record of this case to suggest that HPC is not fulfilling the charitable purposes set forth in paragraph 3.

Paragraph 5 of the original articles of incorporation sets forth the purpose of "seek[ing] the regular ministration of the Word and Sacraments." HPC unquestionably still seeks the regular ministration of the Word and Sacraments. Nothing in the record suggests otherwise.

The insuperable problem with the Attorney General's position is that he selects one and only one of the original purposes of the church, and ignores the very law which it cites in support of its proposition that the church property may be applied to "*any of the purposes*" for which the church was organized. Not even Eastminster Presbytery claims that Hudson Presbyterian Church has ceased

to operate as a Christian house of worship. Therefore, it is beyond question that HPC continues to function as a charitable nonprofit corporation that fulfills both its original purposes and “amended” purposes.

It is beyond question that the same congregation is worshiping in the same manner in the same space supporting the same missions, utilizing the same staff as it was before disaffiliation. Hudson Presbyterian Church continues to preach the same message to the same community. For the Attorney General to argue that Hudson Presbyterian Church is not fulfilling its purposes as stated in its original articles of incorporation is unsupportable and ridiculous. In stark contrast to the facts of *Brown v. Concerned Citizens*, where bingo proceeds were suspected of being used for non-charitable purposes, there is no allegation or evidence in this case that HPC is using its resources for any non-religious or non-charitable purposes.

V. VOLUNTARY ASSOCIATION MEANS VOLUNTARY ASSOCIATION

Oddly, the Attorney General quotes from HPC’s original articles of incorporation, which expressly state that HPC intends to be in “voluntary associat[ion]” with the PC(USA). Then, in a rather Orwellian twist, the OAG asserts that the inclusion of the word *voluntary* means that HPC “*must* voluntarily assent to the governance of the PC(USA).” AG’s Response at 10. That interpretation negates the meaning of the word “voluntary.” The association between HPC and PC(USA) cannot be both “voluntary” and “involuntary” at the same time. The dictionary defines “voluntary” as: **1.** proceeding from the will or from one’s own choice or consent; **2.** unconstrained by interference; self determining; **3.** done by design or intention; intentional; **4.** of, relating to, subject to, or regulated by the will; **5.** having power of free choice; **6.** provided or supported by voluntary action; **7.** acting or done of one’s own free will without valuable consideration or legal obligation.” (Merriam Webster’s Collegiate Dictionary, 10<sup>th</sup> ed., 1996). Thus, if one of the *purposes* of the corporation was to be *voluntarily* associated with the PC(USA), and if “voluntary” means

anything, then the relationship is one of free choice, subject to severance or modification. If HPC's founders had intended to create an obligatory relationship, they would have used the word *obligatory*.

This is the fundamental problem with the Attorney General's interpretation of HPC's articles of incorporation. Where a church's founders intend to establish a church in voluntary association with a denomination, the Attorney General would interpret the voluntary association to mean involuntary association. That makes no sense.

VI. HPC'S AMENDED ARTICLES OF INCORPORATION DID NOT CHANGE HPC'S PURPOSES

Interestingly, the Attorney General recognizes the right of HPC to amend its articles of incorporation, something that Eastminster refuses to concede. However, the amended articles of incorporation also recognize the voluntary nature of the relationship between HPC and the PC(USA). Thus, nothing about HPC's founding intent to voluntarily associate with a denomination was changed by the amended articles of incorporation, and the OAG should not be heard to complain that the "charitable trust" was somehow modified. If HPC was voluntarily associated with a particular denomination at its founding, and voluntarily associated with a particular denomination after amendment, one must ask "how has it changed?" The simple fact is that HPC's amendments to its own articles of incorporation simply clarified its intentions, and did not modify them.

VII. THE ATTORNEY GENERAL IS VIOLATING THE SEPARATION OF CHURCH AND STATE

Applying R.C. §109.25 in this case leads to an unconstitutional entanglement of church and state. The purpose of the charitable trust laws set forth at ORC §109.23 through §109.33, as stated in the Ohio Administrative Code at 109:1-1-01(B) is to:

- (1) ensure that fiduciaries managing charitable trusts are maintaining the charitable purposes of said trusts;

- (2) ensure that fiduciaries of charitable trusts as defined in §109.23 of the Revised Code comply with their fiduciary obligations.

If this section is applied to churches, then the OAG effectively has oversight of the “fiduciary obligations” of the local church, which involve ecclesiastical functions.<sup>2</sup> That would give the Attorney General the power to assess the performance of the fiduciaries’ ecclesiastical functions. It is extremely unlikely that it was the legislative intent of ORC §109.23 *et seq.* to vest such oversight duties with the Attorney General.

Certainly there are situations where the Attorney General can protect the rights of charitable donors to have their donations used for charitable purposes, as in *Brown v. Concerned Citizens*, *supra*. HPC does not mean to suggest that the Attorney General can never investigate whether a nonprofit church is using its resources for non-charitable purposes. But where a church has multiple religious purposes and is unquestionably using its resources for charitable purposes, the state’s intervention becomes constitutionally inappropriate.

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<sup>2</sup>ORC §109.23 *et seq.* contemplates a trust which has been established pursuant to an instrument, or which at least was clearly intended to be so set up. If the “instrument” at issue is the articles of incorporation, then the “purposes clause” must be examined. All the purposes would need to be examined. Here, even under the original articles, the purposes are clearly ecclesiastical:

- The proclamation of the gospel for the salvation of humankind;
- the shelter, nurture, and spiritual fellowship of the children of God;
- the maintenance of divine worship;
- the preservation of the truth;
- the promotion of social righteousness;
- voluntary association with a denomination;
- the exhibition of the kingdom of Heaven to the world;
- carrying out the ordinances established by Christ;
- administering Baptism and the Lord’s Supper; and
- preaching the Word of God.

If the OAG begins “ensuring” that the “fiduciaries” are carrying out these duties, the constitutional line separating church and state has been crossed.

Here, it is beyond dispute that Hudson Presbyterian still functions as a Presbyterian church, still preaches the gospel, still uses the same pastor, still has worship services attended by the same people (including those who voted against disaffiliation), and still serves and financially supports the same missions it supported before disaffiliation.

On December 6, 2006, after the November 5<sup>th</sup> vote to disaffiliate, the congregation unanimously re-elected the same Session. In April 2007 the congregation voted 137-3 to ratify Pastor Bogue's independent ordination status. HPC still operates the same Early Childhood Center with the same staff, serving the same community. The same Sunday School programs are offered, taught by the same church members. By every measure, there is continuity of purpose at HPC and a total dedication to the use of its resources for charitable purposes. Therefore, the purposes for which the church was formed are being carried out and it would be gravely wrong to say that HPC has abandoned its charitable purposes and obligations such that a receiver should be appointed.

Once it is established (and here it is undisputed) that HPC is using its resources for charitable purposes, the Attorney General's oversight must stop. Permitting the Attorney General to opine on whether HPC's directors are complying with its articles of incorporation could quite easily lead down the slippery slope to supervision of whether HPC is adequately advancing its ecclesiastical purposes. The First Amendment to the United States Constitution clearly prohibits the state government from endorsing a particular religion. Permitting the Attorney General to divest HPC of its property, based on an allegation that HPC is not sufficiently advancing one of its many charitable purposes, would be a clear governmental endorsement of a particular denomination, and would be a clear violation of the First Amendment.

#### VIII. CONCLUSION

HPC and Eastminster are disputing whether HPC is the express or constructive trustee of a property trust. The Attorney General now alleges that HPC is the trustee of a constructive charitable

trust, under which HPC's donors somehow believed that HPC would always and forever remain associated with the PC(USA). Because HPC's articles of incorporation clearly state, at all times and in all versions, that its association with a denomination is voluntary, and because the Attorney General has offered no evidence demonstrating that HPC's donors believed that its affiliation could never end, this Court cannot conclude that a constructive charitable trust should be imposed. The Attorney General's position lacks any merit.

Respectfully submitted,

s/ Forrest A. Norman

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent by ordinary U.S. Mail, postage prepaid, this 14<sup>th</sup> day of May, 2007 to:

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