

IN THE COURT OF COMMON PLEAS, SUMMIT COUNTY, OHIO

HUDSON PRESBYTERIAN CHURCH,	:	
Plaintiff,	:	
v.	:	Case No. 2006 09 6162
EASTMINSTER PRESBYTERY, et al.,	:	Judge Spicer
Defendants.	:	Magistrate Shoemaker

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RESPONSE OF STATE OF OHIO *ex rel.* MARC DANN, ATTORNEY GENERAL, TO  
PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

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Defendant State of Ohio *ex rel.* Marc Dann, Attorney General of Ohio (“the State”), pursuant to Ohio Civil Rule 56 submits his Response to Plaintiff Hudson Presbyterian Church’s (“HPC”) and Defendant Eastminster Presbytery’s (“Eastminster”) Respective Motions for Summary Judgment. The State hereby moves this Court to issue summary judgment and declare that: (1) HPC holds all church property and assets in charitable trust; (2) at least until the 2006 amendment to HPC’s Articles of Incorporation, the purpose of that trust, was to provide the public with a Presbyterian Church U.S.A. (“PCUSA”) congregational church with the attendant community benefits of such a church; and (3) HPC may not apply the corpus of that trust for a purpose that is inconsistent with the purpose of providing the public with a PCUSA church. To the

extent that HPC can no longer serve as trustee over that trust property, this Court should appoint a receiver to administer the charitable trust until a new trustee may be appointed. The grounds in support of this motion and Reply are more fully set forth in the following Memorandum in Support.

Respectfully submitted,

MARC DANN  
Attorney General

DANIEL W. FAUSEY (0079928)  
Assistant Attorney General  
Charitable Law Section  
150 East Gay Street, 23rd floor  
Columbus, Ohio 43215-3130  
(614) 466-3180  
(614) 466-9788 – facsimile  
dfausey@ag.state.oh.us

## **MEMORANDUM IN SUPPORT**

### **INTRODUCTION**

In this case, the State reserved the right to file a response to the parties' respective summary judgment motions, and offers this memorandum to brief the court on the issue of charitable trusts—an aspect lacking from the briefs of the other parties. The Attorney General of Ohio is charged, both at common law and by the Charitable Trust Act, R.C. 109.23 *et seq.*, with the enforcement of trusts and gifts for charitable purposes in the State of Ohio, in order that the interests of charitable beneficiaries may be protected and preserved.

The State asserts that the disputed property and assets are held by Hudson Presbyterian Church (“HPC”) as a charitable trust for the benefit of the public. Charitable trust property existed when HPC was created in 1982 and still exists today. Regardless of the source and nature of trust property—whether it be the real estate on which HPC’s building sits, or the accrued assets from financial support provided by various donors over time, or the seed funds provided by Eastminster Presbytery and others—all assets held by HPC must be used to serve the purposes for which HPC was organized at the time such donations were made. HPC’s governing body, as trustee, has a fiduciary relationship with the property and must ensure that the property is being applied only to those proper purposes.

The purpose of the trust is to provide, maintain, and support a congregation of the Presbyterian Church U.S.A. (“PCUSA”) which would answer to Eastminster Presbytery (“Eastminster”). That congregation would be subject to the principles and rules of the PCUSA. Individuals who participate in the activities of this congregation would receive the benefits associated with membership or involvement with PCUSA. The social benefits attendant to the church would extend not only to participants but to the community.

Property of any nature held by HPC is held subject to the restriction that it be used for the support and maintenance of a PCUSA church. This is so because, when Eastminster, PCUSA, the congregants, and other donors gave property to HPC, they did so with the intent that HPC use the property for its then-existing corporate purposes. Until recently, HPC's Articles of Incorporation and bylaws included the express corporate purpose that HPC would provide the public with a PCUSA church and the attendant community benefits of such a church. Now, apparently due to doctrinal differences between itself and PCUSA, HPC has decided to abandon this charitable purpose, and to terminate its affiliation with PCUSA.

Although the mandates of conscience may lead some congregants of HPC to the conclusion that they are morally unable to continue to belong to a PCUSA church, they may not apply property held in trust for purposes other than those upon which the charitable trust was founded. Specifically, HPC property was intended to be used to provide the public with a PCUSA church, and that same property may not be now used to fund some other style of church.

Changing the purposes of a charitable trust requires the application of some equitable savings device to the terms of the trust. HPC has not sought equitable modification of the terms of the trust, nor would such modifications be appropriate.

Therefore, the State asks this Court to issue summary judgment declaring that assets of HPC, accrued in the period from its inception up to the 2006 changes to the Articles, are held by HPC in charitable trust to be applied to the purposes stated in HPC's original Articles. To the extent that HPC can no longer serve as trustee over that trust property, this Court should appoint a receiver to administer the charitable trust until a new trustee may be appointed.

## STATEMENT OF FACTS

HPC was, from inception, a planned, “new church development” of PCUSA.<sup>1</sup> The new church development petitioned Eastminster to join the UPCUSA denomination (a predecessor to PCUSA), and Eastminster approved the organization of HPC on June 13, 1982.<sup>2</sup> This was followed less than three weeks later by the adoption of HPC’s original Articles of Incorporation. Exhibit 4.

The original Articles provided that HPC was organized to “voluntarily associate together for divine worship and godly living, agreeably to the Holy Scriptures, submitting to the authority and form of government as set forth in the Constitution (as amended) of the United Presbyterian Church in the United States of America [predecessor to PCUSA], and under the further authority of Eastminster Presbytery.” Exhibit 4. The articles go on to say that HPC would “adopt bylaws in conformity with the provisions of the Constitution [of the PCUSA], setting forth its organizational, ecclesiastical, and corporate structure and method of operation.” *Id.*

Several sources funded or provided assets over the years since the inception of HPC to fund the corporation’s religious purposes. HPC and Eastminster describe the initial sources of funding for HPC to include Eastminster, PCUSA’s General Assembly, Synod of the Covenant, individual donors, and HPC’s own membership. Since the founding, many of these same groups have also contributed to the operation and maintenance of HPC.<sup>3</sup> Additionally, Eastminster identifies John and Polly Wise, who “initiated and contributed to a library fund,” which they did not intend to benefit a church that disaffiliated from PCUSA.<sup>4</sup> HPC identifies an “endowment fund” of HPC which contains two annuities: one donated by HPC itself, and another donated by a John

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<sup>1</sup> Eastminster’s Motion for Summary Judgment at p. 9.

<sup>2</sup> *Id.*

<sup>3</sup> Eastminster’s Motion for Summary Judgment at p. 12; HPC’s Motion for Summary Judgment at p. 12.

<sup>4</sup> Eastminster’s Motion for Summary Judgment at p. 12.

R. Howe Memorial Fund/Charitable Gift Annuity.<sup>5</sup> Individual congregants undoubtedly offered individual financial support throughout HPC's existence.

Any financial support provided by congregants at inception and thereafter falls into the charitable trust. Similarly, all deeds to the land on which HPC sits, bank accounts held by HPC or Eastminster, endowments or annuities, and insurance policies are held in the charitable trust. Exhibits 1, 2, and 28. Regardless of amount or source, all assets provided to HPC were held as a charitable trust under the purposes for which HPC was organized.

### **LAW AND ARGUMENT**

When HPC received donations and income, it held that property as a charitable trust, and was obliged to use the property consistent with the HPC's charitable purposes. Various parties have contributed money to the organization, and by doing so, a fiduciary duty was imposed on HPC as trustees. Moreover, HPC, by virtue of being a charitable corporation, holds its property in trust and is charged with applying the property toward the purposes for which it was organized at the time that donations were made. The following sections expand upon these concepts in greater detail.

#### **1. The Disputed Property is Held in a Charitable Trust**

The definition of "charitable trust" in Ohio includes corporations that are charged with fiduciary duties to deal with property for charitable, religious, or educational purposes.

By statute, charitable trust is defined as "**any fiduciary relationship** with respect to property arising under the law of this state . . . **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 this state for any charitable, religious, or educational purpose." R.C.

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<sup>5</sup> HPC's Motion for Summary Judgment at p. 12.

109.23. That definition is substantially similar to the commonly-accepted definition of a charitable trust found in the Restatements of Trusts.<sup>6</sup>

In this case, that fiduciary relationship, along with the intent to create it, is manifested by the donations made to, and income received by, HPC. Property given to HPC came from many sources, including Eastminster, PCUSA, and private persons. Ohio law regards such donations to charitable corporations as evidence of intent to create a charitable trust, and subjects the corporation receiving the donation to the duty to deal with the property for the charitable purposes for which it was formed. See, R.C. 109.23(A)-(B), (D); and *Hunter v. St. Vincent Medical Ctr. (In re Parkview Hosp.)*, 211 B.R. 619, 632 (Bankr. D. Ohio 1997) (“[T]here are a number of cases in Ohio where a charitable trust has been found upon solicited donations for a charitable purpose.”)(citing *Brown v. Concerned Citizens for Sickle Cell Anemia*, 56 Ohio St. 2d 85, 382 N.E.2d 1155 (1978); *Amer.Diabetes Assoc., Inc. v. Diabetes Society of Clinton City*, 31 Ohio App. 3d 136, 509 N.E.2d 84 (1986); *Fenn College v. Nance*, 4 Ohio Misc. 183, 210 N.E.2d 418 (1965); *Brown v. Jackson*, 1986 WL 1054 (Ohio App); *Bell v. Straight, Inc.*, 707 F. Supp. 325, 327-8 (S.D Ohio 1989); *Brown v. Holloway*, 1981 Ohio App. LEXIS 13615, 1981 WL 2853 (Ohio App.)).

Moreover, in Ohio, the corporate entity of HPC is itself considered a charitable trust, and the governing body of HPC acts as trustee for the property it holds. *Wiswell v. First*

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<sup>6</sup> Second Restatement of the Law of Trusts, Section 348, provides:

A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.

Restatement of the Law 2d, Trusts (1959), Section 348. See *Brown v. Concerned Citizens for Sickle Cell Anemia* (1978), 56 Ohio St. 2d 85, 90, 382 N.E.2d 1155, 1158 (noting the similarity in the definitions of “charitable trusts” found in R.C. 109.23 and the Second Restatement of Trusts § 348).

*Congregational Church*, 14 Ohio St. 31, 46 (Ohio 1862); R.C. 109.23(A)-(B), (D)<sup>7</sup>. Because HPC is a charitable corporation, the simple gift of property to HPC imposes fiduciary duties upon that corporation to use the property for charitable purposes. The Restatement’s comment on charitable trust explains: “Property may be devoted to charitable purposes not only by transferring it to individual trustees to hold it for such purposes, but also by transferring it to a charitable corporation.” Restatement of the Law 2d, Trusts (1959), Section 348, comment f (emphasis added); accord *In re Parkview Hosp. v. St. Vincent Med. Ctr.* (N.D. Ohio 1997), 211 B.R. 619, 629-630.

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. *Wiswell v. First Congregational Church*, 14 Ohio St. 31, 46 (Ohio 1862) (“That the property acquired by this corporation, can not be converted to the private use of its members, **nor otherwise diverted from the uses expressed in the charter**, is a proposition too clear to need argument or illustration. But the question is, what are the uses allowed by the charter?”) *Id.* (emphasis supplied); *Keyser v. Stansifer*, 6 Ohio 363, 365 (Ohio 1834). The Restatement of Trusts takes a similar view: “Where property is given to a charitable corporation without restrictions as to the disposition of the property, the corporation is under a duty . . . not to divert the property to other purposes but to apply it to **one or more of the charitable purposes for which it is organized.**”

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<sup>7</sup> R.C. 109.23(A)-(B), (D)

“Charitable trust” includes the fiduciary relationship, the entity serving as trustee, the status as trustee, the corpus of such trust, or a combination of any or all of such meanings, regardless of the primary meaning of any use of the term, that is necessary in any circumstances to effect the purposes of such sections.

. . .

The fact that any person sought to be charged with fiduciary duties is a corporation, association, foundation, or any other type of organization that has, under judicial decisions or other statutes, been distinguished from a charitable trust does not provide a presumption against its being a charitable trust as defined in this section.

Restatement of the Law 2d, Trusts (1959), Section 348, Comment f (emphasis added).<sup>8</sup> Scott on Trusts similarly concludes: “A gift to a charitable corporation may be made without any restrictions, in which case it 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 (4th ed. 1989), § 348.1, p.8-9.

In 1982, HPC was formed and incorporated.<sup>9</sup> Since then, individual congregants, Eastminster, PCUSA, and others provided financial support for the creation and development of HPC. Those donations were presumptively made to further HPC’s stated purposes (as described above). HPC itself may also have generated income through activity or investment. Such property must also be applied toward the stated purposes of HPC. The statements of HPC’s organizational purposes can be found in its Articles and bylaws and will provide the terms of the charitable trust held by HPC.

## **2. Terms and Purposes of the HPC Charitable Trust**

Because HPC holds donated property in charitable trust, it is obliged to use the property consistent with the purposes for which HPC was organized. Thus, the question for this Court is: what are the purposes for which HPC was organized when the donations were made? The

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<sup>8</sup> Restatement of the Law 2d, Trusts (1959), Section 348, comment (f):

Ordinarily the principles and rules applicable to charitable trusts are applicable to charitable corporations. Where property is given to a charitable corporation without restrictions as to the disposition of the property, the corporation is under a duty . . . not to divert the property to other purposes but to apply it to one or more of the charitable purposes for which it is organized.

<sup>9</sup> HPC initially joined the Presbyterian Church in the United States (“PCUS”) which merged with the United Presbyterian Church in the United States of America (“UPCUSA”) to establish the Presbyterian Church (U.S.A.) (“PCUSA”).

answer may be found in HPC's original Articles and its bylaws, which demonstrate that HPC was organized to support a PCUSA congregation.<sup>10</sup>

As a charitable organization, HPC held its assets for the purposes described in its original Articles of Incorporation. Exhibit 4. Those articles, filed July 1, 1982, provided the following purposes:

2. To voluntarily associate together for divine worship and godly living, agreeably to the Holy Scriptures, submitting to the authority and form of government as set forth in the Constitution (as amended) of the United Presbyterian Church in the United States of America [predecessor to PCUSA], and under the further authority of Eastminster Presbytery.

...

4. To adopt bylaws in conformity with the provisions of the Constitution, setting forth its organizational, ecclesiastical, and corporate structure and method of operation.

See Articles of Incorporation at ¶¶ 2 and 4. Exhibit 4. These provisions of the original Articles demonstrate HPC's purpose of providing the public with a congregational church of the PCUSA, which would follow the strictures of PCUSA and Eastminster guidance and rules.

HPC argues that the terms of its initial Articles provide for the possibility of withdrawal or disassociation from PCUSA, because, according to HPC's reading of the Articles, the corporation's association with PCUSA is "voluntary."<sup>11</sup> However, HPC acknowledges that the jurisdiction of the Book of Order to exercise discipline and control over an entity is based on voluntary assent.<sup>12</sup> Following this line of reasoning, a congregation wishing to be within the PCUSA denomination *must* voluntarily assent to the governance of the PCUSA. Thus, when HPC's original Articles were in place, the corporation clearly had expressed the purpose of a "voluntarily association" with

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<sup>10</sup> It is appropriate to determine the purposes of a charitable organization by examining its Articles of Incorporation. See, e.g., *Keyser v. Stansifer*, 6 Ohio 363 (Ohio 1834); *Wiswell v. First Congregational Church*, 14 Ohio St. 31, 46-47 (Ohio 1862).

<sup>11</sup> HPC's Motion for Summary Judgment at p. 35.

<sup>12</sup> HPC's Motion for Summary Judgment at p. 19.

PCUSA, thereby expressing the intent to follow the Constitution of the PCUSA and the authority of Eastminster. These are the essential terms of the at-issue charitable trust of HPC. Thus, despite HPC's purported ability to disassociate or to change its Articles, HPC's attempt to disaffiliate from Eastminster and the PCUSA ultimately results in changes to the terms of the charitable trust.

Furthermore, HPC's purpose of providing a PCUSA church is bolstered when the bylaws of HPC, which are referenced in the Articles, are also considered. The bylaws, as amended in 2003 clearly demonstrate that HPC was to provide a PCUSA church:

1. The Hudson Presbyterian Church being a particular congregation of the Presbyterian Church (U.S.A.) recognizes that the Constitution of said Church, is in all its provisions, obligatory on it and its members.  
...
7. The members of the church shall be active members in good standing as defined by the usages and rules of the Presbyterian Church (U.S.A.), regardless of age.  
...
9. Meetings shall be conducted in accordance with the General rules for Judicatories adopted by the General Assembly of the Presbyterian Church (U.S.A.) . . . .  
...
16. The Unicameral Board shall organize itself in any manner it chooses to carry out the responsibilities ascribed by the constitution of the Presbyterian Church to Elders, Trustees, and Deacons.  
...
17. There shall be a Board of Deacons consisting of any number that the Session deems necessary to perform the ministry of Deacons in accordance with Book of Order G-6.0400. . . .  
...
18. These by-laws may be amended subject to the charter of the corporation, the laws if the State of Ohio, and the Constitution of the Presbyterian Church (U.S.A.) . . . .  
...
19. These by-laws or the charter of the corporation may not be amended contrary to or so as not to include the provisions of the Constitution of the Presbyterian Church (U.S.A.).

Exhibit 6.

In sum, these provisions of the Articles and bylaws demonstrate that when property was donated, HPC, Eastminster, individual congregants, and all other donors intended that HPC would function through its affiliation with Eastminster and the PCUSA, and that the public would benefit thereby. This tacit purpose, as demonstrated in the Articles and bylaws, creates the essential terms of the trust at issue. Thus, according to HPC's express corporate purpose, HPC is duty-bound to provide the public with a PCUSA church with the attendant community benefits of such a church.

### **3. HPC Seeks to Change the Terms of the Charitable Trust**

As a charitable corporation, receiving and holding assets and providing services for the general public, HPC exists as a charitable trust within the definition provided by R.C. 109.23. HPC, as trustee of a charitable trust, is charged with fiduciary duties in the use and maintenance of trust assets. HPC was required, at least until the adoption of the amended Articles, to apply those assets for the furtherance of the purposes of the organization. Those purposes include providing the public with a PCUSA church.

However, HPC seeks to change the terms of the trust by changing the denomination of the church that it supports, provides, and maintains. On January 8, 2006, HPC amended its articles of incorporation to allow for "voluntary associa[tion] with a denomination **such as** the Presbyterian Church (USA)," and to give the corporation the authority to modify its own bylaws without reference, as the prior articles included, to the Constitution of PCUSA. Exhibit 3. Also, conspicuously added to the new bylaws was language stating that the corporation held any trusts, if any, in revocable capacity, and that the corporation would have all the powers of a corporation of its class under state law. Exhibit 3. Such amendments are ineffective to change the charitable

purposes for assets in the possession owned prior to such amendments. These amendments allow for actions beyond the scope of the charitable purposes of HPC.

HPC asserts that it has independent authority to possess trust property and to alter its own corporate purposes. HPC claims that it may dispose of its assets in the regular course of corporate conduct, because those assets are held by the corporation free of restriction and in fee simple. A corporation may amend its articles and manage and dispose of its property, but a charitable corporation, operating as a charitable trust, may not take such actions in violation of the charitable purposes. To allow otherwise would permit charitable corporations to breach their fiduciary duties to the trust.

The rule is simple: although corporations can modify the purposes for which they are incorporated, charitable corporations may not defeat the charitable trust that they are duty-bound to uphold simply by amending their corporate purposes. The reason for this rule is apparent when one imagines what would happen if charitable corporations were allowed to change the purposes to which they can apply trust property, merely by amending their articles of incorporation.

In essence, what HPC seeks is a change in its charitable purpose from providing a PCUSA church to some other type of church. There are several devices in Ohio law that a court in equity may apply to alter the purpose or the administration of a charitable trust, such as *cy pres* or deviation, respectively. See, *Daloia v. Franciscan Health Sys.*, 79 Ohio St. 3d 98 (1997). However, no such relief was sought by HPC, nor is any such relief appropriate under the facts of this case. Under the Supreme Court's jurisprudence and the Ohio Trust Code, modification of the purpose of a trust must be accomplished through the application of *cy pres*. *Daloia v. Franciscan Health Sys.*, 79 Ohio St. 3d 98 (1997); R.C. 5804.13. In order to apply *cy pres* to

change the purpose of a charitable trust, that purpose must be shown to be failing—impossible, unlawful, or impracticable. If one of these can be shown, then the Court can reform the purpose and save the trust. *Id.* Here, there has been no showing that it is no longer possible to provide a PCUSA church for the community, or that such a purpose is impossible, unlawful, or impracticable. Thus, this Court should declare that HPC, as trustee cannot unilaterally change the charitable purposes of this trust.

### CONCLUSION

For the foregoing reasons, Defendant, State of Ohio *ex rel.* Marc Dann, Attorney General of Ohio (“the State”), respectfully requests that this Court issue summary judgment and declare that: (1) HPC holds all church property and assets in charitable trust; (2) the purpose of that trust, at least until the 2006 amendment to HPC’s Articles of Incorporation, is to provide the public with a PCUSA-style church with the attendant community benefits of such a church; and (3) HPC may not apply the corpus of that trust for a purpose that is inconsistent with the purpose of providing the public with a PCUSA-style church. To the extent that HPC can no longer serve as trustee over that trust property, this Court should appoint a receiver to administer the charitable trust until a new trustee may be appointed.

Respectfully submitted,

MARC DANN  
Attorney General

DANIEL W. FAUSEY (0079928)  
Assistant Attorney General  
Charitable Law Section  
150 East Gay Street, 23<sup>rd</sup> floor  
Columbus, Ohio 43215-3130  
(614) 466-3180  
(614) 466-9788 – facsimile  
dfausey@ag.state.oh.us

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing were forwarded this \_\_\_\_ day of May, 2007,

to the following:

**By fax, email and US mail:**

Forrest A. Norman, Esq.  
George H. Carr, Esq.  
GALLAGHER SHARP  
Bulkley Building, 6<sup>th</sup> Floor  
1501 Euclid Avenue  
Cleveland, Ohio 44115  
Fax: (216) 241-1608  
Email: fnorman@gallaghersharp.com;  
gcarr@gallaghersharp.com

*Counsel for Plaintiff Hudson Presbyterian Church*

**By US mail only:**

Lee C. Davies, Esq.  
LAMBERT & MACDONALD  
265 S. Main Street, Suite 103  
Akron, Ohio 44308

*Counsel for Defendant Eastminster Presbytery*

**By fax, email and US mail:**

Terrence L. Seeberger, Esq.  
T. Christopher O'Connell, Esq.  
STARK & KNOLL  
76 South Main Street, Suite 1512  
Akron, Ohio 44308  
Fax: (330) 376-6237  
Email: tseeberger@stark-knoll.com;  
coconnell@stark-knoll.com

*Counsel for Defendant Eastminster Presbytery*

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DANIEL W. FAUSEY (0079928)