

COPY

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA  
CIVIL DIVISION-LAW

THE LEHIGH PRESBYTERY, et al., ) No. 2016-5537  
)  
Plaintiffs, )  
)  
v. )  
)  
FIRST PRESBYTERIAN CHURCH OF )  
BETHLEHEM, PENNSYLVANIA, )  
)  
Defendant. )

FIRST PRESBYTERIAN CHURCH OF ) No. 2016-5128  
BETHLEHEM, PENNSYLVANIA, )  
)  
Plaintiff, )  
)  
v. )  
)  
LEHIGH PRESBYTERY and )  
PRESBYTERIAN CHURCH (USA) )  
)  
Defendants. )

OPINION

The above captioned cases have been consolidated. The dispute results from a schism within the First Presbyterian Church of Bethlehem regarding its affiliation with competing Presbyterian denominations. In summary, following an internal vote in June 2016, the majority members of First Presbyterian Church of Bethlehem voted to disaffiliate from the Presbyterian Church (USA) ("PCUSA") and to affiliate with another Presbyterian denomination known as the Covenant Order of Evangelical Presbyterians ("ECO"). Although the schism was caused by an ecclesiastical dispute between two factions – self-described as the majority, conservative (traditional) faction versus the minority, progressive faction – the issues submitted for resolution to this Court ultimately involve who controls the property belonging to the First Presbyterian Church of Bethlehem. At the heart of these cases are two issues: (1) Does the majority faction of

First Presbyterian Church of Bethlehem have the authority to disaffiliate the church from PCUSA; and (2) Is the property owned by FPCB held in an irrevocable trust for the benefit of PCUSA?

### **I. The Parties**

The First Presbyterian Church of Bethlehem (also referred to as “FPCB”, and/or the “Church”) was originally founded on October 29, 1887, as a Pennsylvania corporation by the adoption of its Charter. The language with the 1887 Charter declared that FPCB was affiliated or associated with the General Assembly of the Presbyterian Church in the United States of America.

In 1952, the FPCB acquired the real property under dispute by quitclaim deed. Since then, the Church has apparently amassed other financial resources.

In 1983, the Presbyterian Church (USA) was formed and adopted its Constitution, which included a *Book of Confessions* and a *Book of Order*. PCUSA is also recognized as the successor church to the General Assembly of the Presbyterian Church United States of America. FPCB has been a member of PCUSA since its formation by merger.

The official description of the PCUSA is that it is a denomination of the Protestantism faith with its headquarters located in Louisville, Kentucky. PCUSA is not a recognized corporate or legal entity. In fact, the PCUSA defines itself as an unincorporated body of reformed Christians who have agreed to conduct their worship and other religious activities in conformity with the current version of the PCUSA Constitution and its corresponding *Book of Order*.

The Lehigh Presbytery is a Pennsylvania non-profit corporation whose registered office and principal business address is 710 North Cedar Crest Boulevard, Allentown, Pennsylvania. Under the Constitution of the PCUSA, the relationship between the FPCB with the national denomination, the PCUSA, is governed/supervised/administered through the local presbytery – the Lehigh Presbytery.

The Lehigh Presbytery asserts that the “true church” of FPCB is represented in this litigation by twenty-two (22) individual members who have now self-identified as members of the Lehigh Presbytery and have sought to participate in this litigation, referring to themselves as Presbyterians for Unity (PFU) members.<sup>1</sup> PFU distinguishes themselves from the majority congregants of FPCB who are seeking to separate from the Presbyterian Church USA and now claim affiliation with Covenant Order of Evangelical Presbyterians (“ECO”). PFU continues to affiliate with PCUSA.

## **II. Procedural History**

The first action, filed on June 10, 2016, *First Presbyterian Church of Bethlehem, Pennsylvania v. Lehigh Presbytery and Presbyterian Church (USA)*, Case No. C-48-CV-2016-5128, was a Complaint and Motion for Injunction in which FPCB seeks a declaratory judgment to quiet title to property located at 2344 Center Street, Bethlehem, Pennsylvania, which is titled in FPCB’s name.

In the interim, on June 18, 2016, the FPCB Session voted to disaffiliate from PCUSA and also gave notice of a congregational meeting to be held on June 26, 2016 to separate from PCUSA and vest all property in those voting for separation, with an allocation of some property to Lehigh Presbytery. On June 21, 2016, FPCB’s Board of Trustees voted to amend the 1955 Charter. On the same day, Lehigh Presbytery filed its Complaint and Motion for a Temporary Restraining Order (C-48-CV-2016-5537). On June 22, 2016, the amended articles were filed with the Pennsylvania Department of State. On June 26, 2016, the majority of the congregational members also voted in favor of disaffiliation from PCUSA.

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<sup>1</sup>According to the *Book of Order*, all congregants of FPCB are also members of the Lehigh Presbytery.

The second action, *The Lehigh Presbytery, et al. v. First Presbyterian Church of Bethlehem, Pennsylvania*, Case No. C48-CV-2016-5537, was filed on June 21, 2016. Twenty-two (22) individual plaintiffs, Presbyterians for Unity (“PFU”), also joined in the second matter, in which PFU and Lehigh Presbytery seek a declaratory judgment that: (1) the First Presbyterian Church of Bethlehem (“FPCB”) has no ability to separate from the PCUSA without the ecclesiastical consent of the Lehigh Presbytery; and (2) the FPCB has no ability or authority to vest, transfer, or otherwise change ownership or control of real estate of FPCB without approval of the Lehigh Presbytery.

Initially, Presbyterian Church (USA) was named as a party to this matter. However, PCUSA, as a hierarchal denomination, is an unincorporated entity. Therefore, PCUSA responded to the Complaint through its corporate embodiment, “Presbyterian Church (USA), A Corporation.” However, the “A Corporation” did not wish to actively participate in this litigation, taking the position that the Lehigh Presbytery was the proper party in interest. Although, the “A Corporation” has not been actively participating in this litigation, it has filed several responsive pleadings.<sup>2</sup>

Following extensive discovery, the parties filed cross motions for Summary Judgment. This Court denied all Motions for Summary Judgment on August 18, 2017. A bench trial was held on August 28, 29, and 30, 2017.

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<sup>2</sup> The majority faction for FPCB has requested that judgment be entered against the “A Corporation” and that the “A Corporation” be dismissed from this action. Lehigh Presbytery has opposed the dismissal. We surmise that Lehigh Presbytery was uncomfortable with allowing the A Corporation to be dismissed because Lehigh Presbytery continues to assert that PCUSA is a hierarchical denomination and that the trust provision in the *Book of Order* and all of FPCB’s corporate documents indicate that the property is to be held in trust for PCUSA. Our cursory review of the *Book of Order* indicates that the PCUSA General Assembly has delegated nearly all governance, supervisory, and/or administrative authority to the presbyteries as it relates to local churches within each presbytery’s geographical boundaries. As such, it is clear that Lehigh Presbytery is the proper party in interest seeking to enforce the PCUSA’s trust provision. Further, we did not find it necessary to dismiss the “A Corporation” as under the *Book of Order*, Lehigh Presbytery is the ostensible agent for PCUSA, fully authorized to conduct PCUSA business and to vindicate whatever rights that PCUSA may have in FPCB property.

The parties submitted Proposed Findings of Fact and Conclusions of Law on September 19, 2017.

### **III. The Testimonial Record**

#### **A. FPCB Corporate Governance**

The First Presbyterian Church of Bethlehem (“FPCB”) is a Pennsylvania non-profit religious corporation, and a duly incorporated legal entity that has been in existence continuously since October 29, 1877. FPCB has declared its association with the Presbyterian denomination since its incorporation in 1877 until its 2016 Charter amendment, as evidenced by the summary of relevant documents, discussed below. The 1877 Charter states, in relevant part:

The name of this corporation shall be “The First Presbyterian Church of Bethlehem, Pennsylvania” in connection with the “General Assembly of the Presbyterian Church in the United States of America.”

...

It may and shall be lawful for this Corporation also to ordain and establish and put in execution such Bylaws, Rules and Regulations as may be necessary and proper for the government of said corporation, not being inconsistent with this Charter, or the Constitution and Laws of the United States, or the Constitution and Laws of this Commonwealth, *or the Constitution and Laws of the Presbyterian Church and its General Assembly in the United States of America...*

In 1907, FPCB amended its Corporate Charter and Bylaws to add the following provision:

All property, real or personal, belonging to said corporation, or which shall hereafter be bequeathed, devised or conveyed to it, shall not otherwise be taken, held or to enure, than subject to the control and disposition of the lay members of such church or congregation...

FPCB again amended its Charter in 1955 by adding language to the “Powers” section to provide:

It may and shall be lawful for this Corporation also to ordain and establish and put in execution such Bylaws, Rules and Regulations as may be necessary and proper for the government of said corporation, not being inconsistent with this Charter, or the Constitution and Laws of the United States, or the Constitution and Laws of this Commonwealth, or the Constitution and Laws of the Presbyterian Church and its General Assembly in the United States of America *or its legal successors...*

The 1955 Charter also added a “Real Estate” provision:

The real estate which may at any time belong to this Corporation may be bargained, mortgaged, aliened, enfeoffed, and disposed of, provided that the same be done only by a direction of a majority of the members of the Corporation present at an annual meeting, or at a special meeting called for the purpose, and in all cases within the objects and limitations of this Charter.

On June 18, 2016, FPCB Session, through its majority faction, proposed an amendment to its Charter, which removed any association with the PCUSA in the “Name” and “Powers” section, and added an “Affiliation and Particular Powers” section. Session also voted to call a special Congregational meeting to vote on the proposed disaffiliation from PCUSA to be held on June 26, 2016. On June 21, 2016, the Board of Trustees voted to ratify the proposed amendments to the Charter which set forth in the Affiliation and Particular Powers section:

This Corporation is religious in nature, and Reformed in theology. To the extent that this Corporation and the church are connected with or affiliated with a denomination, the rights of conscience of the members of this corporation shall be the primary consideration of the officers in carrying out their fiduciary obligations. Denominational connections are ecclesiastical in nature and are therefore entirely voluntary. In times of cultural or religious turmoil and disagreement, which might at times place this church and Corporation at odds with a related ecclesial body, the fiduciaries of this Corporation are given particular charge and power and all related authority to act in the best interests of the members of this church corporation, first, and foremost. The Corporation expressly reserves the right to decide upon denominational affiliation. *The Corporation holds its property in its own right, and not in trust for any outside entity, reserving all property rights for the use and benefit of its members.*

On June 22, 2016, the Charter Amendment was filed with the Secretary of State for the Commonwealth of Pennsylvania. On June 26, 2016, a Congregational meeting was held in which the majority of the participants voted to disaffiliate with PCUSA and seek affiliation with ECO.

FPCB corporate governance also includes two sets of bylaws: the Corporation Bylaws and the Congregational Bylaws. The Congregational Bylaws, enacted in 1973, first amended in 1984 and amended several times thereafter, include a Preamble which states:

The First Presbyterian Church of Bethlehem, Pennsylvania, being a congregation of the Presbyterian Church (U.S.A.), hereinafter called "the church" and "PC(USA)" respectively, *recognizes that the Constitution of the PC(USA) is, in all of its provisions, obligatory upon it and its members, and is incorporated herein by reference.*

FPCB's Corporation Bylaws, which were amended in 1973, 1988, and 1991 state:

The Bylaws of the First Presbyterian Church of Bethlehem, Pennsylvania, as a Corporation, are and always shall be subject to the Constitution and Laws of the Commonwealth of Pennsylvania, and also *subject to the Constitution and Laws of the Presbyterian Church in the United States of America or its legal successors.*

Apparently, neither set of Bylaws have been amended to reflect the 2016 Charter change.

#### B. FPCB Deed

On December 15, 1952, Blanche R. More, conveyed to the First Presbyterian Church of Bethlehem, Pennsylvania, approximately 50 acres of land which abuts Center Street, Bethlehem, Pennsylvania, for \$80,000.00. There is no language in the 1952 Deed which states that this property was held in trust or language which referenced the Presbyterian Church in the United States of America, the denomination that the First Presbyterian Church of Bethlehem was affiliated with at the time the property was purchased.

#### C. PCUSA History, Hierarchy, and Constitution

As we understand the national Presbyterian Church, as far back as the 19<sup>th</sup> century, it has been divided into several separate and independent denominations. In 1958, the United Presbyterian Church of North America merged with the Presbyterian Church in the United States of America to form the United Presbyterian Church in the United States of America (also referred

to as UPCUSA). As we understand, the First Presbyterian Church of Bethlehem was a member of UPCUSA since its inception in 1958.

In 1983, after several years of negotiations, the UPCUSA formally merged with another denomination – the Presbyterian Church in the United States (PCUS).<sup>3</sup> The 1983 merger resulted in the formation of what is now known as the PCUSA. Ultimately, PCUSA is governed by an amalgamation of councils. The various councils are referred to in the *Book of Order* and include Session (the local church), Presbytery (a local geographical governing body comprising of the local Sessions), Synod (16 in total – large regional governing bodies consisting of multiple presbyteries), and the General Assembly (the national governing body). Under the *Book of Order*, these various councils are required to form corporations under civil law to conduct church business. In fact, the General Assembly of the PCUSA has been incorporated as the “A Corporation”.

PCUSA claims to be a hierarchal Presbyterian denomination composed of four levels of authority. The General Assembly is the head of the governing body. Subordinate to the General Assembly are regional synods, who in turn govern presbyteries. The Presbyteries are the governing bodies that oversee groups of local churches. Lehigh Presbytery is the governing body for FPCB. Finally, each local church is governed by its own session.

When PCUSA was formed in 1983, it enacted a Constitution which is composed of two parts: the *Book of Confessions* and the *Book of Order*. The *Book of Confessions* is an ecclesiastical text. The *Book of Order* addresses issues of polity and governance and contains a “Church Property” section which includes a trust clause that states in relevant part:<sup>4</sup>

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<sup>3</sup> PCUS is sometimes referred to as the Southern Presbyterian Church.

<sup>4</sup> PCUSA has enacted numerous revisions of its *Book of Order* over the recent years, which have each contained the trust clause in substantially the same form since 1983.



**All property held by or for a congregation,** a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.), whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a congregation or of a higher council or retained for the production of income, **is held in trust nevertheless for the use and benefit of the Presbyterian.**

(2015–2017 Book of Order, Section G-4.0203, emphasis added.)

The Church Property section also contains clauses which require a congregation to seek presbytery approval prior to the selling, encumbering, or leasing of church property:

a. A congregation shall not sell, mortgage, or otherwise encumber any of its real property and it shall not acquire real property subject to an encumbrance or condition without the written permission of the presbytery transmitted through the session of the congregation.

b. A congregation shall not lease its real property used for purposes of worship, or lease for more than five years any of its other real property, without the written permission of the presbytery transmitted through the session of the congregation.

(Id. at Section G-4.0206.)

The Book of Order also provides that:

Whenever property of, or held for, a congregation of the Presbyterian Church (U.S.A.) ceases to be used by that congregation as a congregation of the Presbyterian Church (U.S.A.) in accordance with this Constitution, such property shall be held, used, applied, transferred, or sold as provided by the presbytery.

(Id. at Section G-4.0204.)

#### D. History of FPCB and PCUSA Trust Clause

FPCB has been associated with Presbyterian denominations since its incorporation in 1877. As of 1980, FPCB was affiliated with the United Presbyterian Church in the United States of America (“UPCUSA”), PCUSA’s predecessor denomination. It was during this time that the trust clause at issue was first enacted into UPCUSA’s *Book of Order*.

During its merger negotiations with PCUS in 1980, the General Assembly of UPCUSA generated a list of “Overtures” which appear to be policy statements regarding contentious issues discussed during the merger negotiations. Each Overture contained proposed modifications and additions to the *Book of Order* which were to define denominational governance for what would eventually be known as PCUSA. The Overtures were sent to the UPCUSA presbyteries for consideration and comment, with the expectation of eventual adoption by the entire UPCUSA.

Apparently, the Lehigh Presbytery submitted the Overtures to FPCB for consideration. During a FPCB Session meeting of November 11, 1980, the minutes specifically referenced discussion about the “Summary of 1980 Overtures” of UPCUSA. In particular, Overture A, “On Property”, was discussed and the Session minutes specifically referenced the trust clause, stating: “New section states explicitly that all property held by or for a particular church, presbytery, synod, General Assembly or UPCUSA is held in trust for the use and benefit of UPCUSA.” (FPCB Exhibit No. 43, at 003472.) Thereafter, the minutes of the November 11, 1980 meeting indicate that FPCB Session discussed and understood the impact of the “Trust Clause” as it related to any future attempt to remove church property from control of UPCUSA should there be attempt to withdraw from membership in UPCUSA.

Specifically, the November 11, 1980 FPCB Session minutes state:

The desire to make explicit the line of responsibility and control over property and uses made of it stems from a Supreme Court decision of July 2, 1979 concerning disposition of property of a Georgia congregation which split, with the majority of members seeking to withdraw from membership in PCUS. The Supreme Court ruling left the property with the minority members remaining under PCUS membership, but included a strong recommendation to include a constitutional statement explicitly noting that all property of each church is held in trust for PCUS as a whole. The constitution of UPCUSA is similarly worded – hence the proposed modification in wording. Note also the prominent relocation of these provisions as a new chapter “Of Property” at the end of the Form of Government.

Comment: The highlighting of this change has resulted in considerable publicity (much of it adverse – e.g., Layman article). The basic responsibilities and line of authority remain as they long have been, and we practice those policies regularly under the existing form of government. The change proposed, while “legalistic,” makes no change in policy or in how we operate. The prime motivation stems from the Supreme Court ruling.

**The Church Relations Committee sees no basis for opposing the overture, but recommends that session members be prepared to address questions from the congregation on the reasons for this change.**

(FPCB Exhibit No. 43, at 003472-3473, emphasis added.)

It is apparent that FPCB discussed and reviewed the trust clause (Overture A) prior to accepting the UPCUSA 1981 *Book of Order* which specifically incorporated the trust clause at issue in this dispute. In the minutes of a March 16, 1981 regular meeting of FPCB Session, the Session voted to approve “some” of the 1980 Overtures and authorized the Clerk of Session to write a letter to the Lehigh Presbytery noting the same. (LP Exhibit No. 49.) In compliance with this directive, FPCB’s Clerk of Session, William H. Norton, sent a letter dated April 23, 1982, to the Lehigh Presbytery’s Clerk. In his letter, Mr. Norton noted: “The remarks [enclosed commentary] have been reviewed by our Session and endorsed as our response to the Presbytery.”

The attached Session commentary to Mr. Norton’s letter noted:

Our session is concerned with the trend evident in General Assembly actions and proposals toward establishing legalistic bounds for practices and understandings which are now implied in the conduct of our government. The 1980 overtures generally increase emphases on constitutional chain of authority among judiciaries, limit permitted activities at each level and impose constraints on membership on boards, committees and most other decision-making bodies. The escalated bureaucratic burden which would result from adoption of these proposals may foster contention and disharmony which would mute or become a barrier to the working of the Holy Spirit.

We are alarmed by the number of congregations which have withdrawn from the UPCUSA and by reports that others are considering such action, and sense that recent general assembly actions and proposals may be a significant factor in prompting these rifts....

## Overture A – On Property:

This restatement of existing implicit understanding and its relocation as a separate chapter in the Book of Order was motivated by the U.S. Supreme Court's decision to make an explicit provision in our government.

*We detect no significant change from past practices, but note unusually strong negative reactions in published articles and commentaries. If the Lehigh Presbytery recommends adoption of this overture, we suggest that a communication be prepared to explain to our congregation what changes, if any, will affect local properties.*

(FPCB Exhibit No. 44, at 003516–003517, emphasis added.)

In 1983, UPCUSA merged with PCUS to form PCUSA. However, prior to the merger, a “Plan for Reunion” was distributed to the presbyteries of each UPCUSA denomination for their approval, including FPCB. The Plan for Reunion contained a proposed *Book of Order* for PCUSA, including Chapter VIII, “The Church and its Property,” which contained a similar “trust clause”:

All property held by or for a particular church, a Presbytery, a Synod, the General Assembly or the Presbyterian Church (U.S.A.), whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a particular church or of a more inclusive governing body or retained for the production of income, *is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).*

Regarding the Plan for Reunion of UPCUSA and PCUS, the FPCB Committee on Church Union made a presentation to FPCB Session in April of 1982, in which the Committee on Church Reunion stated in its conclusory comment: “This committee urges endorsement [by FPCB Session] for Reunion...”. (LP Exhibit No. 54, at 003852–3853.)

On April 19, 1982, FPCB approved two (2) Session “Action Sheets.” The First noted:

The Session VOTED to (1) endorse the “Plan for Reunion” which provides for reuniting the PCUS and UPCUSA to form one body with common direction as set forth in the Plan booklet, and (2) through communication with the Lehigh Presbytery, Synod of the Trinity and General Assembly, advise concerning our endorsement of the Plan for Reunion.

(FPCB Exhibit No. 45, at 003606.)

The Second Action Sheet, also dated April 19, 1982, specifically discussed objections raised by the National Executive Committee of United Presbyterian Women ("UPW"), who were in favor of the Reunion (merger) but expressed displeasure with some of the concepts discussed in the Overtures. UPW Objection No. 3 was related to the property/trust clause. Specifically, the UPW took objection to the new PCUSA allowing an "exemption" to old PCUS congregations to "opt out" of trust provision. Specifically, the second Action Sheet referenced UPW Objection No. 3 and provided FPCB commentary:

3) Provisions related to church property are detailed in Chapter VIII and are in accord with the UPCUSA understandings. There is included an exception which would allow former PCUS congregations to be excused from the provisions of this Chapter for a period of up to 8 years after reunion. The exemption seems motivated by an intent to facilitate the transition process.

Comment: As in any marriage, time to grow and adapt to new ways of living together is needed. We believe that the exemption represents a reasonable accommodation.

(LP Exhibit No. 55, at 003855.)<sup>5</sup>

The FPCB Action Sheets of April 19, 1982 establish that FPCB was in full concurrence or support of the Plan for Reunion, including allowing the PCUS churches the ability to opt out of the Trust Clause during the exemption period.

Thereafter, on April 23, 1982, the then Clerk of FPCB Session, David Boltz, wrote a letter to the Lehigh Presbytery confirming that: "This is to advise you that on April 19, 1982, the Session of the First Presbyterian Church of Bethlehem voted unanimously to endorse the 'Plan for Reunion' of the PCUS and the UPC/USA." (LP Exhibit No. 57, at 003749.)

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<sup>5</sup> It is apparent that the provision granting PCUS congregations the ability to opt out of the trust provision during an eight (8) year window was a contentious debate within PCUSA.

On January 15, 1984, at the Annual Congregational Meeting, the congregation voted to approve the amendments to the Congregational Bylaws. The amendments included new language in the Preamble which now provided:

The First Presbyterian Church of Bethlehem, being a Congregation of the Presbyterian Church (U.S.A.), hereinafter called "the church" and "PC(USA)" respectively, recognizes that the Constitution of the PC(USA) is, in all of its provisions, obligatory upon it and its members, and is incorporated herein by reference.

Thus, by a majority vote of the congregation, the trust clause contained in the PCUSA Constitution through its *Book of Order* was made obligatory on the FPCB and its membership. (LP Exhibit No. 21; FPCB Exhibit Nos. 7, 82.) Since the 1983 Reunion, each PCUSA *Book of Order* has contained the same reiteration of the trust clause.

E. Historical Recognition of the Trust Clause by FPCB

The *Book of Order's* Church Property chapter requires Presbytery approval for the sale, purchase, lease, or encumbrance of property. During the trial, LP and PFU made a record of the property transactions involving FPCB since the adoption of the trust clause, in which FPCB recognized the need for Lehigh Presbytery approval prior to taking action regarding its property.

Several witnesses testified that FPCB always sought Lehigh Presbytery approval prior to engaging in several land transactions. (See e.g., Testimony of A. Terres; W. Ender; W. Marsh; J. Kelhart; G. Icenogle.) The first land transaction that was identified was a 1992 purchase of approximately 15.8 acres in Upper Saucon Township. The proposed purchase was first referenced at the FPCB annual meeting of the Corporation held on January 19, 1992, in which it was resolved "...to borrow funds to purchase, hold and manage the property in Trust for the Lehigh Presbytery...". (FPCB Exhibit No. 88.) Prior to purchasing the Saucon Valley property, FPCB sought the approval of Lehigh Presbytery to borrow the purchase money necessary by submitting

a form titled "Request to Mortgage, Indebt, Sell, Lease Church Property" on January 20, 1992. (LP Exhibit No. 68.)

On December 14, 1992, FPCB Sessions voted to seek approval of Lehigh Presbytery to sell a parcel of land to Presbyterian Homes Inc. (Kirkland Village) for the construction of an addition. (FPCB Exhibit No. 54, at 000622.)

On August 30, 1993, FPCB Session voted to approve \$4,783,000 for the construction of a Children's Center and other renovation work. (FPCB Exhibit No. 55, at 000635.) The next day, Susan Bailey, President of the FPCB Board of Trustees, submitted to Lehigh Presbytery a "Request to Mortgage, Indebt, Sell, Lease Church Property" to finance the amount of \$4,500,000 for the Children's center and other renovation work. (LP Exhibit No. 68.)

In a letter dated September 1, 1995, FPCB Business Administrator, David G. Boltz, wrote to the Lehigh Presbytery Board of Trustees and requested action by the Presbytery for approval of another land sale to Kirkland Village. Mr. Boltz's letter stated that "Presbytery approval of the sale must be secured as soon as possible following approval by the corporation." (LP Exhibit No. 69.)

Finally, during a June 2, 2003 FPCB Session meeting, Joanne Kelhart, President of the Board of Trustees, detailed a list of necessary repairs and maintenance for the FPCB church buildings and grounds exceeding \$600,000.00. In the Session minutes, it is noted that Pastor Gareth Icenogle "advised Joanne to inform the Presbytery of our planned work as soon as possible since they own the church's buildings and grounds." (LP Exhibit No. 60.)

Although testimony from the FPCB majority faction members asserted that the FPCB congregants never believed that FPCB needed Presbytery approval to engage in church property transactions, no FPCB majority faction witness was able to identify any significant property transaction in which FPCB did *not* seek Presbytery approval.

F. First Presbyterian Church of Bethlehem Schism – Vote to Disaffiliate

In 2015, the FPCB was experiencing internal turmoil between two factions. These factions would later become the majority faction of FPCB and the PFU. The Court has been informed that the dispute involved an ecclesiastic decision by the PCUSA. However, the underlying ecclesiastical dispute is not relevant to our analysis and we have not received any significant testimony regarding that dispute.

In the spring of 2015, FPCB began discussing the discernment process—a formal process by which a PCUSA church separates from PCUSA to affiliate with another denomination. Pursuant to the *Book of Order*, Section G-4.0207, disaffiliation requires action and/or participation by the Presbytery.

At that time, FPCB conducted an online survey (hereinafter “TAG Survey”) of FPCB church members, to determine interest in leaving the PCUSA over the ecclesiastic dispute. The results of that TAG Survey indicated that approximately sixty-three (63) percent of the survey participants favored leaving the PCUSA to affiliate with the Covenant Order of Evangelical Presbyterians. After the survey results were disclosed to Lehigh Presbytery, a second survey of FPCB congregants was conducted by Lehigh Presbytery in which fifty-seven (57) percent of those surveyed favored separation, and forty-three (43) percent favored remaining with the PCUSA.

In the time period during which disaffiliation was discussed, pieces of literature regarding the differences between PCUSA and ECO were disseminated to FPCB’s congregation. A notable distinction, and the most relevant to the matter before this Court, was the amount of control over FPCB’s property. (LP Exhibit No. 64.) The literature stated that affiliation with ECO would allow FPCB “full ownership” of its property, (LP Exhibit No. 65), and that the trust clause would no longer “encumber” FPCB’s property (LP Exhibit No. 66, at 3.)



Under the *Book of Order*, a Session may not simply leave the PCUSA. The *Book of Order* details a specific process for separation, referred to as a “process of discernment.” The discernment process allows the Presbytery to assess the status of a Session, and determine the proper path forward. As we understand, the options are twofold – either granting dismissal from the PCUSA or recommending reconciliation (refusing to allow disaffiliation).

Once the second poll had been conducted, on June 8, 2016, the Lehigh Presbytery announced that the Presbytery and First Presbyterian would need to proceed down a path toward reconciliation rather than disaffiliate from PCUSA, which apparently concluded the discernment process. The announcement by Lehigh Presbytery that FPCB would not be permitted to disaffiliate from PCUSA was not well received by the majority faction seeking to join ECO. As a result, this litigation was commenced on June 10, 2016.

Thereafter, on June 18, 2016, FPCB’s Session met and voted to amend FPCB’s Charter (Articles of Incorporation) to allow disaffiliation from PCUSA. The 2016 Charter amendment removed all references to PCUSA and its Constitution. On June 21, 2016, FPCB’s Board of Trustees voted to ratify the amendment. On June 22, 2016, the amended Charter was filed in the Office of the Secretary of State of the Commonwealth of Pennsylvania.

A congregational meeting was held on June 26, 2016. During the meeting, PFU member Joanne Kelhart raised an objection that the vote to disaffiliate and the purported 2016 Charter amendment were contrary to FPCB’s Charter and Bylaws and PCUSA’s Constitution. (See LP Exhibit No. 59, at 8.) Nevertheless, a vote was taken authorizing “withdrawal from PCUSA” and “that the real property of the church be vested with the majority of the congregation.” Seventy-six (76%) percent of the members who were present voted in favor of disaffiliation. In addition, the presiding officer informed the congregation that the 2016 Charter Amendment removed all

references to PCUSA and allowed the congregation to vote to disaffiliate from PCUSA and allow FPCB to affiliate with another denomination. (See LP Exhibit No. 59, at 8.)

#### **IV. Legal Standard**

Disputes between rival factions of a congregation with regard to control of church property has a rich history in the law, beginning with Watson v. Jones, 80 U.S. 679 (1871). In Watson v. Jones, a Presbyterian congregation in Kentucky split into two groups after a disagreement over the morality of slavery. Each group claimed to be the rightful owner of church property. At the time, the Kentucky church had been a member of the United Presbyterian Church in the United States of America (UPCUSA). After UPCUSA condemned the practice of slavery, the Kentucky congregation divided into anti-slavery and pro-slavery factions. In resolving the dispute of control of the Church property, the Supreme Court provided a roadmap for resolving such disputes.

First, Watson v. Jones held that the United States Constitution prohibited the Courts from deciding religious questions when resolving disputes within religious organizations. Secondly, Watson v. Jones held that where a Court is asked to resolve a Church property dispute, the Court should first examine the polity of the denomination in question. If the denomination in question is one with a congregational polity, then the local church independently governs its own affairs and the Court should treat the religious organization as it would any other civil, voluntary association. In other words, a court should allow the dispute to be resolved by a majority vote of the congregation's members, or according to any other procedure agreed to by the majority of the congregation. However, the Watson Court also held that where the church denomination has a hierarchical structure, then the Court should defer to the position taken by the denominations hierarchy and "accept such decisions as final." Id. at 727.

In Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, et al., 393 U.S. 440, 449 (1969), the Supreme Court held that the Georgia State Court improperly awarded property on the basis of the interpretation aspects of Presbyterian religious doctrine. The Court again clarified that courts are prohibited from deciding religious questions when resolving property disputes within religious organizations, declaring:

[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded. But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes, School District of Township of Abington, Pa. v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); the Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.

In 1979, the Supreme Court further refined the role of courts in the resolution of church property disputes in Jones v. Wolfe, 443 U.S. 595 (1979). Jones v. Wolfe also involved a dispute regarding the disintegration of a Presbyterian Congregation. In Jones, the Supreme Court held that courts may still decide disputes regarding church property by examining the denomination polity either by deferring to the denominational hierarchy or to the congregational polity. However, the Jones Court expanded the court's authority by noting that a court is always free to decide cases of church property using "neutral principles of law." In other words, using neutral principles of law, a court may resolve church property disputes if the court relies upon the type of evidence that

courts generally use in resolving disputes involving secular organizations – such as property deeds, articles of incorporation, or other legal documents – as long as the court does not need to interpret religious doctrine within those sources.

It was apparently in reaction to Jones v. Wolfe that gave rise to the property trust language in the PCUSA *Book of Order* which is now before this Court.

## **V. Discussion**

### **A. PCUSA is Not a Hierarchical Denomination**

Throughout this litigation, Lehigh Presbytery referenced PCUSA as a hierarchical denominational of churches governed in ascending order by sessions (the local churches), the Presbyteries (district governing bodies), Synods (regional governing bodies), and the General Assembly (the National Church). The Lehigh Presbytery has also asserted that hierarchical governance of PCUSA is also found in its constitution which is a combination of the *Book of Confessions* (addressing theological matters), and the *Book of Order* (addressing governance within the Presbyterian Church). The *Book of Confessions* establishes that the General Assembly is responsible for matters of common religious concern for the entire Presbyterian Church and for directing the theological doctrine for the entire Church.

During argument, Counsel for Lehigh Presbyterian noted that the Presbytery has made a declaration that the PFU (or the minority faction of FPCB) constitutes that “true church” and therefore, is in control of the First Presbyterian Church of Bethlehem.

We responded to this declaration by noting that we were not interested in determining religious doctrine or which faction is the “true church.” Perhaps, due to our declaration, Lehigh Presbytery did not reassert its claim that the Presbytery internally resolved this dispute by declaring the minority fact to be the “true church.” However, the Presbytery’s Brief does again assert that

“PCUSA is a hierarchical denomination of churches (congregations) governed in ascending order by sessions, presbyteries, synods and the General Assembly.” (See LP Findings of Fact, No. 4.)

After further review of the United States Supreme Court case law, arguably a court can defer to a hierarchical religious polity and its internal resolution of church disputes. Therefore, we feel constrained to address the claim by Lehigh Presbytery that PCUSA is a hierarchical religious denomination, because if it is correct, we should defer to the PCUSA to resolve this dispute as to which faction constitutes the true church for FPCB.

In response, the breakaway, majority faction who now identifies with ECO, argues that when they were affiliated with PCUSA, they were never members of a hierarchical denomination but rather a congregational polity and as such FPCB controlled its own affairs and property.

The issue of whether or not PCUSA is a hierarchical denomination presents an interesting question. After receiving the testimony and reviewing the *Book of Order*, the FPCB session minutes, and other Church documentation reflecting the Church’s self-governance, we find that PCUSA is not a strictly hierarchical denomination such as the Roman Catholic Church, but at the same time it is not a diffused congregational polity, such as the Baptist Church.

As a general rule, the ultimate power in a hierarchical institution to resolve its internal disputes rests at the top of the pyramid. Classic hierarchical institutions have near omnipotent leadership, such as a King, Queen, Dictator, or Pope. The record here contains no history of control by the PCUSA hierarchy – either the General Assembly or the “A Corporation” – other than declaring its overarching religious doctrine. Further, there is no record that the General Assembly, the “A Corporation,” or even the regional synod, has participated in any discussions, issued any directives, or taken a side with regard to the FPCB property dispute. The record suggests that the only institution who has or is permitted to exert control over FPCB is the Lehigh Presbytery.

In fact, when the PCUSA General Assembly was invited to participate in this property dispute, they declined and objected to being named as a party, taking the position that they should not have been joined as a defendant because the real party in interest with regard to the property dispute is the Lehigh Presbytery – the second rung on this supposed four level hierarchy. Thus, by its (PCUSA) own admission, there has been no determination by the hierarchical body with regard to this property dispute.

We were also struck by testimony which established that the decision to allow FPCB a “religious divorce” (disaffiliation) from PCUSA or requiring reconciliation with PCUSA rested solely with the local presbytery and not the General Assembly of PCUSA. Apparently, the right of a congregation to disaffiliate from PCUSA is not made by the alleged hierarchical body, but rather it is a discretionary decision made by the local presbytery.

Finally, the testimony and the FPCB corporate documentation suggest that throughout its entire corporate lifetime, FPCB has exercised a significant level of self-autonomy, subject only to the requirement to provide Lehigh Presbytery with notice of its intent. Any fair reading of the *Book of Order* suggests that the local churches have significant autonomy from PCUSA with regard to their internal governance and financial affairs. FPCB corporate documentation suggests that all historical decisions regarding property acquisition, sale or management were determined by FPCB Session, who then provided notice to the Presbytery. The only record of Lehigh Presbytery ever attempting to interfere or control internal FPCB business, occurred after FPCB announced that it intended to disaffiliate with PCUSA, resulting in this lawsuit. Thus, there was no record of PCUSA exerting any control or issuing any directives regarding FPCB governance.

While the PCUSA may view itself as a hierarchy, the record suggests that, at best, it is a loosely structured institution which, with the exception of PCUSA ecclesiastical doctrine, permits

significant self-governance/self-autonomy to the local churches. As such, the record does not support that PCUSA is a denominational hierarchy as referenced in Watson v. Jones, which would require this court to defer to the hierarchical decision regarding which faction is the true church and/or entitled to the property.

For the above reason, we shall evaluate this dispute based upon neutral principles of law.

B. Formation of a Trust

Similar disputes regarding the PCUSA trust clause have been before the Pennsylvania Appellate Courts. The most analogous case is Peters Creek United Presbyterian Church v. Washington Presbytery of Pennsylvania, 90 A.3d 95 (Pa. Commw. 2014). Peters Creek involved three parties: the Peters Creek Presbyterian Church or “majority faction”, “minority faction”, and the Washington Presbytery of Pennsylvania who was joined by the minority faction after the Presbytery declared the minority faction to be the “True Church” of the Peters Creek congregation. Id. at 101–02. The Washington Presbytery and the Peters Creek Church were both originally affiliated with the PCUSA. Id. at 102. In 2007, the majority faction voted to disaffiliate with the PCUSA and to affiliate with the Evangelical Presbyterian Church. Id. at 101. The majority faction then brought a quiet title action against the Presbytery regarding church property. The basis of that quiet title action was a dispute over the PCUSA trust clause found in the *Book of Order* – the same trust clause at issue in this case. The Presbytery responded with a counter suit seeking control of the property and alleging that the majority faction had committed improper corporate acts.

The trial court resolved cross motions for summary judgment in favor of the majority faction and held that the property was not held in trust for the Washington Presbytery or the PCUSA. They also held that the congregational vote to disaffiliate was proper and control of the Church property was vested in the majority faction.

The Presbytery appealed the suit to the Superior Court, who then transferred jurisdiction to the Commonwealth Court.<sup>6</sup> Peters Creek was argued before a panel of seven Judges. In the Majority Opinion authored by Judge Pellegrini, the Commonwealth Court found in favor of the Presbytery and the Minority Faction, reversing and remanding the trial court's summary judgment decision. The Commonwealth Court made the following determinations: (1) the amendments to the local church's corporate bylaws clearly and unequivocally indicated intent to hold church property in trust for the national denomination, (2) the conduct of the local church following its accession to the constitution of the national denomination clearly and unequivocally evidenced intent to hold property in trust for the national denomination, (3) corporate bylaw amendments in local church's governing documents satisfied statutory and common law requirements for the creation of the a trust, (4) the vote of the majority faction to disaffiliate violated both the church's charter as a non-profit corporation and state law, (5) non-profit corporation law permitted the church to delegate its authority to join or leave the national denomination to the national denomination, and finally (6) the enforcement of the provisions from the national association's governing documents did not violate the Establishment clause. Id. at 110, 111, 119, 120, 121, and 122 (respectively). The remand required the trial court to enter a final order consistent with the Commonwealth Court's holding.

A strong dissent was filed in Peters Creek, joined by two additional Commonwealth Court Judges.<sup>7</sup> We summarize the dissent as disagreeing with entry of summary judgment in Peters Creek as the record did not support such a holding. The dissent was [in our words] uncomfortable with the process by which the national denomination created the alleged trust - by unilaterally

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<sup>6</sup> This was done pursuant to Section 762(a)(5)(ii) of the Judicial Code which grants the Commonwealth Court jurisdiction over appeals regarding the corporate affairs of any corporation not-for-profit subject to Title 15. See Peters Creek, 90 A.3d at 102, n.3.

<sup>7</sup> Peters Creek was a 4-3 majority holding.



doing so within the language of the PCUSA national constitution and without record of an express intent of the local church, as there was “no trust document, contract, deed, will, or other document separately signed and agreed to by Peters Creek Church.” Peters Creek, 90 A.3d at 123–24 (McCullough, J., dissenting). Ultimately, the dissent argued that the holding of the Pennsylvania Supreme Court in Presbytery of Beaver-Butler of United Presbyterian Church in U.S. v. Middlesex Presbyterian Church, 489 A.2d 1317 (Pa. 2005) should control the Peters Creek outcome.

When deciding a similar dispute in Middlesex Presbyterian Church, the Supreme Court held that to find that a trust has been created there must exist in the record clear and unambiguous language or conduct evidencing the intent to create the trust. Thus, in determining whether a trust has been created, the primary focus must be on the intent of the settlor at the time of the creation of the alleged trust. Id. at 1324–25. Finally, the Supreme Court noted that “...reliance on selected passages from the Book of Order was misplaced in that .... [the Book of Order], which at most evidence the putative trustee's desired interpretation, are far from constituting the clear unequivocal evidence necessary to support a conclusion that a trust existed.” Id. at 1325.

Accordingly, the ultimate question for this Court to determine is whether or not the factual record establishes that a trust was created.

First, the FPCB majority faction has argued that because the deed in question contains no mention of a trust, no trust was created. This argument flies in the face of the Peters Creek holding:

The Majority stresses that title to Peters Creek Church property never changed hands and its deeds were never amended. Under Pennsylvania law, no transfer or amendment of title or deed is necessary to create a trust. In St. James the Less, 585 Pa. at 452, 888 A.2d at 810, our Supreme Court held that the local church had created a trust in favor of the Episcopal diocese, but reversed this Court's decision to change title to the property to effect that result, instead ordering that the local church was to retain legal title to its property and its members were required to act as trustees for the diocese. It is the very nature of a trust that the trustee, here, the non-profit corporation Peters Creek Church, will retain title to the subject property. Id.; Petition of Acchione, 425 Pa. 23, 29–30, 227 A.2d 816, 820 (1967) (“That the

municipality in this case would be both the settlor and the trustee of the trust presents no obstacle to the creation of a trust.”); In re Smith's Estate, 144 Pa. at 435, 22 A. at 917 (“[W]here the donor makes himself the trustee, no transfer of the subject-matter is necessary.... In such cases no assignment of the legal title is required, for the nature and effect of the transaction is that the legal title remains in the donor for the benefit of the donee.”); Restatement (Second) of Trusts § 17 (“A trust may be created by (a) a declaration by the owner of property that he holds as trustee for another person.”); Restatement (Second) of Trusts § 100 (“The settlor of a trust can be a trustee of the trust.”); 20 Pa.C.S. § 7731 cmt. (“A trust created by self-declaration is best created by reregistering each of the assets that comprise the trust into the settlor's name as trustee. However, such registration is not necessary to create a trust.”).

Id. at 113–14.

Instead of looking to the title itself, Peters Creek provides the following directive for determining the existence of a trust in this matter:

First, Section 7732(a)(2) of the Pennsylvania Uniform Trust Act (PAUTA), 20 Pa.C.S. § 7732(a)(2), requires a trust to be evidenced by a signed writing. However, it does not require a formal, signed trust instrument. Our law is clear that the settlor's intent does not hinge on the form of the writing or the use of the specific words “trust” or “trustee.” Beaver-Butler, 507 Pa. at 268–69, 489 A.2d at 1324–25; Smith's Estate, 144 Pa. at 435–36, 22 A. at 917; Conference of African Union First Colored Methodist Protestant Church v. Shell, 659 A.2d 77, 80 (Pa. Cmwlth.), appeal denied, 542 Pa. 676, 668 A.2d 1138 (1995) (“Middlesex does not stand for the proposition that the intent to create a trust must be manifested by express language of an instrument. In the case *sub judice*, however, there is express documentary evidence demonstrating [the local church]'s acceptance of the denomination's rules governing the use and disposition of real property.”). It is the settlor's intent derived from the writing that controls.

Id. at 113.

Following this rule, it is not the language of the PCUSA trust clause that determines the existence of the trust. The proper focus is the intent to create a trust by FPCB by either the incorporation of the clause into FPCB's corporate documents as part of a larger showing of the settlor's intent to create the trust on behalf of the PCUSA, or other express evidence demonstrating the intent to create the trust.

Pennsylvania's statutory law setting forth the requirements for creating a valid trust is found in the Pennsylvania Uniform Trust Act (PAUTA). See 20 Pa. C.S. § 7731, *et seq.* Under PAUTA, a trust may be created by:

- (1) transfer of property under a written instrument to another person as trustee during the settlor's lifetime or by will or other written disposition taking effect upon the settlor's death;
  - (2) written declaration, signed by or on behalf and at the direction of the owner of property as required by section 7732 (relating to requirements for creation - UTC 402), that the owner holds identifiable property as trustee; or**
  - (3) written exercise of a power of appointment in favor of a trustee.
- 20 Pa. C.S. § 7731 (emphasis added).

Section 7732 provides the requirements for a trust under this section:

- (a) Requirements.--A trust is created only if:
- (1) The settlor has capacity to create a trust;
  - (2) The settlor signs a writing that indicates an intention to create the trust and contains provisions of the trust;
  - (3) The trust has a definite beneficiary or is:
    - (i) A charitable trust;
    - (ii) A trust for the care of an animal, as provided in section 7738 (relating to trust for care of animal - UTC 408); or
    - (iii) A trust for a noncharitable purpose, as provided in section 7739 (relating to noncharitable trust without ascertainable beneficiary - UTC 409);
  - (4) The trustee has duties to perform; and
  - (5) The same person is not the sole trustee and sole beneficiary of the trust.

To comply with subsection (a)(2) of PAUTA, a formal, signed trust instrument is not required. Rather, "[i]t is the settlor's intent derived from the writing that controls." Peters Creek, 90 A.3d at 113. For example, the Court in Peters Creek found that the corporate bylaws, which incorporated PCUSA's *Book of Order* (and the trust clause) into its own governing documents, constituted a signed writing for this requirement. *Id.* at 113. The Supreme Court in Presbytery of Beaver-Butler of United Presbyterian Church in U.S. v. Middlesex Presbyterian Church, further

defines intent: “in order for a court to find that a trust has been created there must exist in the record clear and unambiguous language or conduct evidencing the intent to create the trust.” Id. at 1324. To create a trust, the words “trust” and “trustee” need not be used. However, the “lack of formality does not obviate the necessity for the appearance of all the elements of a completed trust.” Peters Creek, 90 A.3d at 110 (internal citations omitted).

Further, a beneficiary “may not unilaterally declare a trust.” Id. at 108. Indeed, “[t]he Supreme Court recognized in *Jones* that a denomination may require its members to hold property in trust for it, and that such requirement may be written into the denomination’s constitution or other governing document, [however] the denomination may not unilaterally impose the requirement on its members without the member’s consent.” Id. at 108–09 (citing *Jones v. Wolf*, 443 U.S. 595 (1979)). Therefore, any trust in favor of a denomination “must reflect the intent of both parties, the local church and the denomination, and it must be cognizable in a form already recognized by law.” Id. at 109.

Finally, regarding the settlor’s intent to create a trust, our Supreme Court has held:

No particular form of words or conduct is required to manifest the intention to create a trust. Such manifestation of intention may be written or spoken words or conduct indicating that settlor intended to create a trust. *Nevertheless, lack of formality does not obviate the necessity for the appearance of all the elements of a completed trust. Every trust symptom must be present, regardless of informality surrounding the inception of the relationship, or none exists. A trust must be created by clear and unambiguous language or conduct, it cannot arise from loose statements admitting possible inferences consistent with other relationships.*

Id. (internal citations omitted).

Thus, a court may only find that a trust exists “where there is clear and unambiguous language or conduct indicating that the settlor intended to create a trust.” Peters Creek, 90 A.3d at 110 (internal citations omitted). Intent may be shown by facts that occur after the time of the purported

trust's formation. Id. For example, the Court in Peters Creek found that the requirement that the settlor (the local church) intended to create a trust was satisfied by the local church's corporate bylaw amendments, which stated that the *Book of Order* (including the trust clause) was "obligatory" on its members, that "nothing in these bylaws shall prevail over the Constitution," and that the bylaws "shall be considered to include the mandatory provisions and requirements...". Id. at 111 (finding that the "express, written language is clear and unambiguous evidence of [the local church's] intent to be bound by the PCUSA Book of Order, including the provision that member churches hold their property in trust for the PCUSA.").

Finally, conduct may also be evidence regarding intent. In Peters Creek, the Court found that the local church's acts of seeking and receiving permission from the Presbytery to purchase and sell land was further evidence of its intent to be bound by the trust. Id. at 111–12 (noting that the conduct alone would be insufficient to find intent, but the conduct along with the corporate bylaw amendments was sufficient evidence to find the intent necessary for the formation of a trust).

### C. FPCB Corporate Action Supporting or Evidencing Formation of the Trust

The 1952 deed establishes that the First Presbyterian Church of Bethlehem took title to the Church property free and clear. The deed makes no mention of a trust. Further, it is also clear that the Presbyterian Church did not have a trust provision as part of its Constitution until the *Book of Order* was adopted by PCUSA in the early 1980's, long after FPCB purchased its property.

Therefore, we must now look to the corporate actions of FPCB to determine if FPCB affirmatively placed its property in trust for PCUSA.

Before we discuss the legal effect of the FPCB Charter and Congregational Bylaws, the FPCB majority has raised the argument that FPCB's Corporate Bylaws conflict with its Corporate Charter and therefore any inconsistent bylaw is invalid.

The 1877 Charter provided FPCB with the power to undertake any legal action so long as it is not inconsistent with “the Constitution and Laws of the Presbyterian Church and its General Assembly in the United States of America.” The 1907 Amendment to the Charter contained the same general powers, with the additional language that no action should be taken that is inconsistent with the Constitution and Laws of the Presbyterian Church and its General Assembly in the United States or its **legal successors** (emphasis added).

The 1955 Charter restates the same language in the Powers section as set forth in 1907 Charter. However, the 1955 Charter contained a new section entitled “Real Estate” which stated: “the real estate which may at any time belong to this corporation, may be bargained, mortgaged, aliened, enfeoffed, and disposed of... by direction of a majority of the members of the corporation... within the objects and limitations of this Charter.”

In 1984, FPCB amended its Congregational Bylaws to reflect its association with PCUSA following the 1983 merger. The amended Preamble recognized the authority of PCUSA and its Constitution (which includes the *Book of Order*’s trust clause). It is this portion of the Bylaws that the FPCB majority argues is inconsistent with the Charter, and therefore is a nullity.

As a general rule, bylaws are binding on a corporation and may contain “any provisions for managing the business and regulating the affairs of the corporation not inconsistent with law or the articles.” Peters Creek, 90 A.3d at 121 (citing 15 Pa.C.S. §§ 5504, 5505). However, “[i]t is axiomatic that a corporation’s bylaws cannot conflict with its charter.” Peters Creek, 90 A.3d at 119 (citing Lynn v. Freemansburg Bldg. & Loan Assoc., 117 Pa. 1, 12, 11 A. 537 (Pa. 1887); Se. Pennsylvania Synod of the Evangelical Lutheran Church in Am. v. Meena, 19 A.3d 1191, 1199–1200 (Pa. Commw. Ct. 2011) (Leavitt, J., dissenting) (noting that corporate charter would trump any inconsistent bylaw provisions)).

To support its argument, the FPCB majority points to the 1907 Charter which states that when FPCB holds real estate, it holds it subject to the power to control and the power to dispose of it as the lay members of the congregation determine. It is FPCB's contention that placing real estate in a trust for Lehigh Presbytery without a congregational vote would therefore violate the requirement articulated in the 1907 Charter. The FPCB majority also references the "Powers" section and "Real Estate" provision in the 1955 Charter which in essence state that real estate may not be leased, mortgaged, or otherwise disposed of or alienated in violation of the limitations and objects of the Charter.

In response, Lehigh Presbytery submits that the 1955 Charter, "Powers" Section allows FPCB "to ordain and establish and put in execution such Bylaws, Rules and Regulations... not being inconsistent with... the Constitution and Laws of the Presbyterian Church and its General Assembly in the United States of America, or its legal successors." Lehigh Presbytery argues that because PCUSA is the legal successor to the Presbyterian Church and the 1955 Charter recognizes and incorporates the PCUSA Constitution, therefore, the Bylaws do not conflict with the Charter, as both incorporate the Constitution of PCUSA.

The FPCB majority's argument ignores the fact that since FPCB's incorporation in 1877 and until the purported 2016 Charter Amendment, its Charter and Bylaws all explicitly adhered to the authority of the Presbyterian Church's governing documents or those of its "legal successors" (language that was added in the 1955 Charter).

Further, assuming *arguendo* that a majority vote of the congregation was necessary to create the trust in question, that requirement was satisfied at the January 15, 1984 annual congregational meeting wherein FPCB voted to amend the Preamble to the Bylaws, which specifically stated that it "recognizes that the Constitution of the PC(USA) is, in all of its

provisions, obligatory upon it and its members, and is incorporated herein by reference.” Again we note that in 1984, PCUSA’s Constitution contained the *Book of Order* with the trust clause at issue. Therefore, the enactment of the trust clause, via the Preamble, would not be inconsistent with the Charter.

While we agree with the FPCB majority that the 1955 Real Estate provision does not specifically grant the corporation the authority to place its property in trust, it certainly does not restrict the corporation from doing so. Clearly, the Real Estate section permits FPCB nearly unlimited authority to dispose of its property. As a result, we find that the Charter did not prohibit FPCB from placing (or gifting) its property in trust for the Presbyterian Church in the United States of America or its legal successors, consistent with the provisions of the Constitution of the Presbyterian Church. Therefore, we reject the majority faction’s contention that placing FPCB’s property in trust for PCUSA is a violation of the 1955 Charter.

Regarding the affirmative action undertaken by FPCB to place church property into trust for PCUSA, we note that the testimonial record established that the Presbytery first submitted “Overtures” which contained the trust clause to FPCB for consideration and ratification. This is evidenced by FPCB Session minutes beginning in November of 1980 and culminating with Session’s unanimous vote on April 19, 1982 to endorse the reunion (merger) creating the new Presbyterian denomination – PCUSA (with its new constitution and *Book of Order* containing the trust clause). In fact, over the three year period, it is clear that the trust clause was repeatedly discussed and accepted by the FPCB Session. In addition to the Session minutes, other corporate documentation including congregational minutes and correspondence with Lehigh Presbytery also confirmed that FPCB intended that its property was to be held in trust for PCUSA. Finally, the record also established that each time FPCB intended to take action regarding its real estate



(purchase, sale, finance or renovation), it notified and obtained Lehigh Presbytery's consent before doing so.

We find that there was clear and convincing evidence that throughout the period of 1980–1983, the FPCB Session endorsed and adopted the trust clause as part of the reunion process of PCUSA; that on January 15, 1984, the entire congregation voted to accept the PCUSA Constitution, making it obligatory on its membership; and, after the 1984 vote by the congregation to merge with PCUSA, FPCB continuously recognized its obligation under the trust clause to obtain Lehigh Presbytery's permission in order to buy, sell or otherwise encumber FPCB property. Therefore, we conclude on January 15, 1984, FPCB pledged to hold its church property in trust for PCUSA.

#### D. FPCB 2016 Charter Amendment

On June 21, 2016, the majority faction attempted to amend the FPCB Charter in 2016 to specifically remove any reference to PCUSA and to affirmatively declare that FPCB property *could not* be held in trust for any entity. The 2016 Charter Amendment was a declaration that FPCB was re-claiming ownership and control of FPCB property. The language of the 2016 Charter Amendment now permitted FPCB to disaffiliate from PCUSA and to repudiate or, if necessary to revoke the trust clause so that the majority faction would have control of all church property. We note that the attempt to amend the Charter, undertaken by the FPCB majority faction shortly after this litigation was commenced, seemingly erodes the majority faction's contention that it had always been under the belief that FPCB property was never held in trust for PCUSA.

In response to the 2016 purported Charter Amendment, Lehigh Presbytery raises two (2) important legal issues. First, Lehigh Presbytery alleges that the Charter action of 2016 was improper and illegal and, therefore, void and unenforceable; and second, Lehigh Presbytery claims

that, regardless, the trust created by the *Book of Order* was irrevocable, therefore the 2016 Charter Amendment, even if legally accomplished, cannot revoke or terminate the trust.

1. Legality of the 2016 Charter Amendment

Regarding their first argument, Lehigh Presbytery contends that the 2016 Charter amendment was invalid and therefore the 1955 Charter controls for purposes of this litigation. Specifically, Lehigh Presbytery argues that the procedure by which the Charter was amended violated Pennsylvania Non-Profit Corporation Law (“NPCL”) and therefore, said amendment was invalid. The NPCL provides, in relevant part:

(a) General rule.-- Unless a bylaw adopted by the members or a specific provision of this subpart requires a greater vote, *a proposed amendment of the articles of a nonprofit corporation shall be adopted upon receiving the affirmative vote of the members present entitled to cast at least a majority of the votes that all members present are entitled to cast thereon*, and if any class of members is entitled to vote thereon as a class, the affirmative vote of the members present of such class entitled to cast at least a majority of the votes that all members present of such class are entitled to cast thereon. Any number of amendments may be submitted to the members and voted upon by them at one meeting.

15 Pa.C.S.A. § 5914(a) (emphasis added).

Thus, NPCL requires a majority vote of a corporation’s members who are entitled to vote in order to validly amend a corporate charter. Pursuant to FPCB’s Corporate Bylaws, “[t]he membership of the Corporation shall consist of all members of the Church in good and regular standing.” (See FPCB Corporate Bylaws, Section III, Membership.) However, the 2016 Charter was purportedly amended following an affirmative vote by its Session on June 18, 2016 and by a subsequent vote by Board of Trustees on June 21, 2016. The Charter amendment was then filed with the Commonwealth on June 22, 2016. A Congregational meeting was not held until June 26, 2016, but that meeting merely considered one motion which placed two issues before the congregation - “withdrawal from PCUSA” and “that the real property of the church be vested with

the majority of the congregation.” Further, the congregation’s vote to withdraw from PCUSA and to vest the property with the majority faction occurred five (5) days of the Trustee vote and four (4) days after the Charter Amendment had already been filed with the Commonwealth. Thus, it is apparent that the congregation never voted *ex post facto* to amend the 1955 Charter or ratify the Board of Trustees’ vote to amend the Charter. It appears that the Amendment filed on June 22, 2016 was not properly enacted, as the congregation never voted to amend the Charter.

In response, the FPCB majority faction asserts that NPCL, 15 Pa.C.S.A. § 5914, allows a corporation to amend its charter without a majority vote of its members in certain circumstances:

(a.1) Adoption by board of directors or other body.--Unless otherwise restricted in the bylaws, an amendment of articles shall not require the approval of the members of the corporation if:

- (1) the amendment is to provide for perpetual existence;
- (2) to the extent the amendment has not been approved by the members, it restates without change all of the operative provisions of the articles as theretofore amended or as amended thereby; or
- (3) the amendment accomplishes any combination of purposes specified in this subsection.

Unsurprisingly, Lehigh Presbytery argues that 15 Pa.C.S.A. § 5914(a) is inapplicable because the 2016 Charter Amendment did, in fact, change the operative provisions of the Charter’s Articles. Lehigh Presbytery asserts that the removal of all references to PCUSA or its legal predecessors and adherence to the denomination’s governing documents constitutes a change to one of the most significant operative provisions in the Charter, continued affiliation with PCUSA. Lehigh Presbytery further submits that the other exception, 15 Pa.C.S.A. §5914(b), does not apply:

(b) Adoption in absence of voting members.--If the corporation has no members entitled to vote thereon, or no members entitled to vote thereon other than persons who also constitute the board of directors or other body, the amendment shall be deemed adopted by the corporation when it has been adopted by the board of directors or other body pursuant to section 5912 (relating to proposal of amendments).

For this subsection to apply, a corporation must have no members entitled to vote on the amendment. Generally, “every member of a nonprofit corporation shall be entitled to one vote” unless otherwise provided in a corporation’s bylaws. See 15 Pa.C.S.A. § 5758(a). Pursuant to FPCB’s Corporate Bylaws, all members of FPCB in good and regular standing constitute the membership of the corporation. (See FPCB Corporate Bylaws, Section III, Membership.) Because FPCB did have members entitled to vote, Lehigh Presbytery argues that neither exception cited by FPCB applies to excuse its failure to amend its Charter in conformity with 15 Pa.C.S.A. § 5914(a).

Finally, Lehigh Presbytery argues that even if the 2016 Charter Amendment was valid, the 1955 Charter controls as it was the version in effect on the date that litigation commenced. Regarding an amendment’s effective date, the NPCL provides:

(b) Effectiveness.--Upon the filing of the articles of amendment in the department or upon the effective date specified in the articles of amendment, whichever is later, the amendment shall become effective and the articles of incorporation shall be deemed to be amended accordingly. *An amendment shall not affect any existing cause of action in favor of or against the corporation, or any pending action or proceeding to which the corporation is a party, or the existing rights of persons other than members or, except as otherwise provided by order, if any, obtained pursuant to section 5547(b) (relating to nondiversion of certain property) divert any property subject to such section from the purpose or purposes to which it was committed. If the corporate name is changed by the amendment, an action brought by or against the corporation under its former name shall not be abated for that reason.*

15 Pa.C.S.A. § 5916(b) (emphasis added).

The initial action was filed by FPCB against PCUSA on June 10, 2016. However, FPCB’s Charter Amendment was not filed until June 22, 2016. Therefore, Lehigh Presbytery argues that the 1955 Charter in effect on the date that the initial Complaint was filed controls this action pursuant to §5916(b).

We agree that the Board of Trustees did not have the legal authority to amend the Corporate Charter without submitting the motion before the congregational membership. We also agree that regardless of the validity of the proposed Charter Amendment filed with the Commonwealth on June 22, 2016, under 15 Pa.C.S.A. § 5916(b), that Amendment change has no legal effect with regard to the legal dispute placed before the Court on June 10, 2016 by the FPCB majority faction seeking a declaratory judgment regarding the church property.

E. Revocability of FPCB/PCUSA Trust

A revocable trust “transfers an expectation to a future possessory interest... an irrevocable trust... transfers immediate and final transfer of ownership.” Miller v. Com., 18 A.3d 395, 400 (Pa. Commw. Ct. 2011), rev'd on other grounds, 84 A.3d 620 (Pa. 2013).

Under the Pennsylvania Uniform Trust Act (“PAUTA”), which became effective on November 6, 2006, a “settlor may revoke or amend a trust unless the trust instrument expressly provides that the trust is irrevocable.” 20 Pa. C.S. § 7752(a). However, this presumption of revocability applies only to trusts created on or after the effective date of the PAUTA. Indeed, the official comments to the statute state that subsection (a), regarding revocability, “reverses prior Pennsylvania law and presumes that a trust created after the effective date of this chapter is revocable unless” the trust instrument expressly provides otherwise. See 20 Pa. C.S. § 7752(a), Jt. St. Govt. Comm. Comment 2005; see also 1 Pa.C.S. § 1939 (noting that official comments may be used in determining the construction or applicability of a statute).

Prior to PAUTA, a trust executed without reservation of power by a settlor to revoke or reform the trust is irrevocable, unless it can be demonstrated that the trust was created through fraud, duress, undue influence, or mistake. See Harding v. Harding, 158 A. 253 (Pa. 1932); see also Rebidas v. Murasko, 677 A.2d 331, 333 (Pa. Super. 1996). Therefore, absent fraud, duress,

undue influence, or mistake, trusts created prior to the PAUTA's effective date are revocable "if and to the extent [the settlor] has reserved such power by the terms of the trust." In re Fellman, 604 A.2d 263, 264–65 (Pa. Super. 1992); see also Rebidas, 677 A.2d at 333 (noting that "a trust executed without reservation of power by a settlor to revoke or reform the trust is irrevocable"); In re C. D. Harader Tr. for Ben. of Harader, 449 A.2d 52, 53 (Pa. Super. 1982) ("If the declaration of trust shows an intent to create an irrevocable trust, then the settlor, generally speaking, has no power to alter the terms of the trust."). Here, we can find no fraud, duress, undue influence, or mistake.

The Supreme Court of Pennsylvania has defined the power of revocation as follows:

The power of revocation is a power that the settlor of the trust reserves. A settlor may revoke a trust, if and to the extent that power has been reserved in the trust instrument. A trustee does not decide whether or how the power of revocation will be exercised. *The settlor's intent as to the power of revocation is to be determined from all the language within the four corners of the trust instrument, the scheme of distribution, and the circumstances surrounding the execution of the instrument....* A trust instrument that is unambiguous on a matter may not be superseded by extrinsic evidence of the settlor's intent.

Scalfaro v. Rudloff, 934 A.2d 1254, 1257 (Pa. 2007) (internal citations omitted) (emphasis added).

In cases where a settlor has not expressly reserved the right to revoke, a court will look to whether the settlor expressed an intent to retain the power of revocation. For example, In re Estate of Devine, 910 A.2d 699 (Pa. Super. 2006), the Superior Court found that the trust in question was revocable despite settlor's failure to use the word "revoke." Id. at 703. The Court in Devine held that the settlor retained the power to revoke where the trust deed allowed the settlor to "maintain control over" the trust and "allowed unrestrained alienation and revocation of the trust corpus." Id. Therefore, a settlor need not use the word "revoke" in the trust instrument to retain this power, so long as the settlor's intent to retain the power of revocation is clear and unambiguous. Id.

Here, Lehigh Presbytery argues that FPCB held its property in trust for PCUSA. In response, the majority faction of FPCB argues that there is no trust agreement, and in the alternative, even if a trust was created by FPCB by its corporate action, it retained the authority to revoke the trust.

To determine whether FPCB, as settlor of this trust, intended to place its property into an irrevocable trust, we again look to the relevant documents, the surrounding circumstances, and FPCB's conduct regarding the property in question is necessary.

We note at the outset that the trust clause in the *Book of Order* does not contain any language indicating that local congregations retained any power of revocation regarding the local property held in trust for the PCUSA. While express language is not required, a settlor must show an intent to retain the power of revocation. FPCB's conduct evidences an intent that the trust was irrevocable through its various and constant references to be bound to the Constitution of PCUSA and its pattern of seeking Lehigh Presbytery approval before engaging in land transactions dealing with the property held in trust for PCUSA *and* its successors.

Indeed, FPCB's governing documents all express an intent to be bound by the Constitution of the PCUSA, which includes the trust clause at issue. Prior to the 2016 amendment which removed any and all reference to PCUSA, the 1955 version of FPCB's Corporate Charter and Bylaws stated:

It may and shall be lawful for this Corporation also to ordain and establish and put in execution such Bylaws, Rules and Regulations as may be necessary and proper for the government of said corporation, not being inconsistent with this Charter, or the Constitution and Laws of the United States, or the Constitution and Laws of this Commonwealth, or *the Constitution and Laws of the Presbyterian Church and its General Assembly in the United States of America or its legal successors...*

Moreover, FPCB's Congregational Bylaws and Corporate Bylaws both similarly evidence FPCB's intent to accede to PCUSA's Constitution, which includes the *Book of Order* and the trust

clause at issue. In particular, the Preamble to FPCB's Congregational Bylaws specifically recognizes PCUSA's Constitution and states that it is "obligatory upon it and its members, and is incorporated herein by reference." Additionally, FPCB's Corporate Bylaws state, in relevant part:

The Bylaws of the First Presbyterian Church of Bethlehem, Pennsylvania, as a Corporation, are and always shall be subject to the Constitution and Laws of the Commonwealth of Pennsylvania, and also subject to the Constitution and Laws of the Presbyterian Church in the United States of America *or its legal successors*.

In addition to these governing documents, FPCB's pattern of obtaining Presbytery approval before purchasing, selling, or mortgaging land further contradicts the notion that it intended to retain a power of revocation.

For example, when FPCB purchased the Saucon Valley property in 1992, FPCB meeting minutes involving the purchase of the property explicitly stated that FPCB intended to "transfer ownership of the property... to the denomination's Bicentennial Fund Campaign...". (FPCB Exhibit No. 88, at 2.) Additionally, when FPCB sold land to Kirkland Village in 1995 for the construction of an addition, FPCB Business Administrator, David G. Boltz, wrote to the Lehigh Presbytery Board of Trustees September 1, 1995 and explicitly requested action by the Presbytery for approval of the land sale to Kirkland Village. Indeed, Mr. Boltz's letter stated that "Presbytery approval of the sale must be secured as soon as possible following approval by the corporation." (LP Exhibit No. 69.) Moreover, minutes from a June 2, 2003 meeting of Session discussed needed maintenance and repairs detailed by the president, Joanne Kelhart, and noted that Pastor Gareth Icenogle "advised Joanne to inform the Presbytery of our planned work as soon as possible since they own the church's buildings and grounds." (LP Exhibit No. 60, at 5.)

Thus, FPCB's conduct regarding its property does not evidence an intent to retain the power of revocation. On the contrary, the evidence introduced at trial, as explained above, establishes that FPCB did not intend to retain a power of revocation regarding the trust property at



issue. FPCB's conduct does not establish that it intended to "maintain control over" the trust or allow "unrestrained alienation and revocation of the trust corpus." See In re Estate of Devine, 910 A.2d at 703. If FPCB believed it continued to control its property at will, Lehigh Presbytery approval would not be necessary. Indeed, FPCB did not act unilaterally in any of these land transactions as it consistently sought Lehigh Presbytery approval prior to selling, leasing, purchasing, or otherwise encumbering the property held in trust for PCUSA. FPCB's pattern of conduct coupled with the absence of any express language regarding the power of revocation in the trust clause which FPCB repeatedly reincorporated into its corporate documents and expressed intent to be bound by, establishes that FPCB never intended the trust in question to be revocable.

Therefore, based upon the corporate documents and action undertaken in 1980 and concluding on January 15, 1984, and under the applicable law (prior to PAUTA), as of January 15, 1984, settlor FPCB placed its property in an irrevocable trust for the benefit of PCUSA when it adopted the terms of the PCUSA Constitution.

As a final note, we feel compelled to emphasize that there is an issue of fairness to the corporate institution which has been in existence since 1877. Since its inception, the congregational generations of FPCB have consistently expressed allegiance, fidelity, and adherence to the national denomination now known as PCUSA. Apparently, a recent ecclesiastical directive offended a majority of the FPCB congregation such that they no longer wish to be affiliated with PCUSA. However, rather than leaving the Church to join a different religious denomination, the majority of the congregants wish to evict the national denomination from the church; thereby repudiating the intent of those who founded FPCB and extinguishing the sacrifices, contribution, and hard work of the many prior generations of congregants who built FPCB with the expectation that FPCB would remain affiliated with the national denomination of

Presbyterian Churches USA. Thus, although we have resolved this issue under neutral principles of law, we were also struck that to do otherwise, we would ignore the express intention of those who built this congregation with the expectation that those founding principles should forever direct its mission.

**WHEREFORE**, we enter the following Order:

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