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STATE OF NEW YORK  
**Court of Appeals**

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KENNETH GORDON, JOHN MANLEY, MICHAEL EATON,  
MATTHEW BLACKWELL, SHAUN BABCOCK, RICHARD STOTZ,  
THOMAS CARLSEN, ROBERT HAMMOND, WILLIAM STORTZ,  
LEE STROCK, DAVID GEORGE, JOHN CONKLIN, DAVID YOUNG,  
AS TRUSTEES OF THE TRUSTEES OF PRESBYTERIAN SOCIETY OF  
CAYUGA CREEK d/b/a LANCASTER PRESBYTERIAN CHURCH and  
THE TRUSTEES OF THE PRESBYTERIAN  
SOCIETY OF CAYUGA CREEK,  
*Plaintiffs-Appellants,*

vs.

THE PRESBYTERY OF WESTERN NEW YORK  
and PRESBYTERIAN CHURCH (U.S.A), a Corporation,  
*Defendants-Respondents.*

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Appellate Division Docket Number: CA 09-00787.  
Erie County Index No.: I 2008-006996.

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**NOTICE OF MOTION FOR LEAVE TO APPEAL  
TO THE COURT OF APPEALS AND  
STATEMENT IN SUPPORT OF MOTION  
ON BEHALF OF PLAINTIFFS-APPELLANTS**

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THE PRESBYTERY OF WESTERN NEW YORK and  
PRESBYTERIAN CHURCH (U.S.A.), A CORPORATION,

Defendants/Respondents.

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**NOTICE OF MOTION**

Fourth Department  
Docket No. CA 09-00787

Erie County  
Index No.: I2008-006996

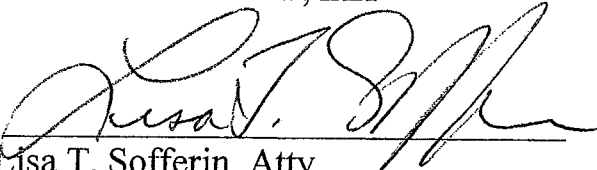
PLEASE TAKE NOTICE, that upon the annexed: 1) statement setting forth the procedural history of the case and timeliness of motion; 2) statement establishing this Court's jurisdiction over the proposed appeal and this motion; 3) statement of the questions presented for review; 4) argument showing why the questions presented merit review; 5) the briefs filed with the Appellate Division; (6) the record on appeal in the Appellate Division and exhibits hereto, Plaintiffs-Appellants will move the Court of Appeals, at Court of Appeals Hall, 20 Eagle Street, Albany, New York, on the 25th day of January, 2010, for leave to appeal from an Order of the

Appellate Division, Fourth Department, entered November 13, 2009 which affirmed an order of the Supreme Court, County of Erie, entered January 8, 2009, granting summary judgment in favor of Defendants-Respondents The Presbytery of Western New York and Presbyterian Church (U.S.A.). The Fourth Department denied Plaintiffs/Appellants motion for leave to appeal to this Court in an Order granted December 30, 2009.

Pursuant to 22 NYCRR 500.21 (a), oral argument on the return date is not permitted, and no appearance is necessary or allowed.

DATE: January 12, 2010

BROWN & KELLY, LLP

By: 

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## STATEMENT OF PROCEDURAL HISTORY AND TIMELINESS OF MOTION

This is an action by Plaintiffs/Appellants Lancaster Presbyterian Church and its Trustees (hereinafter collectively "LPC") to quiet title to real and personal property. LPC filed its Complaint on June 16, 2008 seeking a declaration that LPC holds title to all of its real and personal property free from any trust, estate or other interest of Defendants/Respondents Presbyterian Church U.S.A. ("PCUSA") or The Presbytery of Western New York ("the Presbytery") (R.69). Upon the application of LPC, the court below granted a Restraining Order on June 17, 2008 pending disposition of an Order to Show Cause pursuant to which LPC sought an injunction against Respondents' interference with LPC's right to exclusive ownership and control of its real and personal property (R.27). The Restraining Order was extended upon the stipulation of the parties, following which all parties served Motions for Summary Judgment seeking a declaration as to whether LPC held its property in trust in favor of the PCUSA (R.20, 31, 33, 37, 251, 329).

After the Motions for Summary Judgment were argued on August 14, 2008, and submitted, this Court issued its Decision in Episcopal Diocese of Rochester v. Harnish, 11 N.Y.3d 340, 870 N.Y.S.2d 814 (2008) ("Harnish"). The court below heard further argument on the Motions on December 4, 2008 and then announced its prepared decision on the record on that same date (R.7 and Exhibit "A", hereto). The

court below, by the Honorable John M. Curran, determined that under Harnish, both an express and implied trust existed in LPC's property in favor of the PCUSA, thereby denying the Motion of LPC and granting the Motions of the PCUSA and Presbytery (R. 7). In its Oral Decision, as reflected in the December 4, 2008 Transcript, the court below determined that, *inter alia*, Religious Corporations Law Section 24 was irrelevant to the disposition of LPC's property contrary to the clear and unambiguous language of the statute and the Decision of this Court in First Presbyterian Church of Schenectady v. United Presbyterian Church of the United States, 62 N.Y.2d 110, 476 N.Y.S.2d 86 (1984) ("Schenectady") which held that the failure to comply with the statutory requirements of RCL Section 24 is, at the very least, evidence of a lack of intent to form a trust, which alone should have defeated the Motions of the PCUSA and Presbytery.

The Order below was granted on December 18, 2008 and entered in the Erie County Clerk's Office on January 8, 2009 (R. 4 and Exhibit "B", hereto). A timely Notice of Appeal to the Fourth Department was filed by LPC on February 3, 2009 (R. 2 and Exhibit "C", hereto). The Appellate Division, by Order granted on November 13, 2009, affirmed the Order and Decision of Justice Curran for the reasons stated in his Decision (Exhibit "D", hereto). Notice of Entry was provided by the Presbytery on November 16, 2009 (Exhibit "E", hereto). LPC filed a Motion in the Fourth Department for permission to appeal to this Court, which Motion was denied by the

Fourth Department by Order dated December 30, 2009 (Exhibit "F", hereto). Notice of Entry of such Order was provided by the Presbytery on January 5, 2010 (Exhibit "G", hereto).

### **STATEMENT OF JURISDICTION**

The Court of Appeals has jurisdiction of the proposed Appeal in that pursuant to Civil Practice Law and Rules LR §5602(a)(1)(I), the order or judgment sought to be appealed is from an action originating in the Supreme Court and from an Order of the Appellate Division which finally determined the action and which is not appealable as of right.

### **CORPORATE DISCLOSURE STATEMENT**

Lancaster Presbyterian Church is now affiliated with the Evangelical Presbyterian Church. Lancaster Presbyterian Church has not issued any public shares, and has no parent company, subsidiaries or affiliates which have issued public shares nor does any publicly held company own 10% or more of its stock.

## STATEMENT OF QUESTIONS FOR REVIEW

The following questions will be presented on the proposed Appeal:

1. Can an express or implied trust be imposed upon the property of a church incorporated prior to 1828 where the church fails to bring itself within the property provisions of the constitution of the denomination by failing to comply with the statutory conditions precedent of Religious Corporations Law Section 24?
2. What constitutes assent in a "legally cognizable form" to a trust clause unilaterally adopted by a denomination where the church became a member of the denomination prior to adoption of the trust clause, acquired its property prior to adoption of the trust clause and was not required to sign a document accepting the denomination constitution or trust clause as a condition to continued membership in the denomination?
3. Has the First Amendment and rules applicable to summary adjudication of claims been compromised by the property, contract and trust law principles which have been adopted for church property cases in this State?
4. Did the courts below err, as a matter of law, when each declared that the LPC holds all real and personal property in trust for Respondents?

## FACTS

LPC was incorporated as a Presbyterian church by a Certificate of Incorporation dated December 29, 1821, and filed in 1822, pursuant to "an ACT to provide for the Incorporation of Religious Societies", passed by the New York State Legislature on or about April 5, 1813 (R. 111, 191, 200). Although LPC was incorporated under the name "The Trustees of the Presbyterian Society of Cayuga Creek" it assumed the name "Lancaster Presbyterian Church" by filing an assumed name certificate pursuant to Business Law §130 on February 12, 2003 (R. 89, 192, 203). LPC has never reincorporated (R.191, 248). LPC acquired the real property in issue in this action during the course of several real estate transactions, dating back to as early as 1832 (R. 192-196). The deeds to the real property give LPC full and unencumbered title to the real property parcels (R. 91-109, 208-09). The deeds lack any reference to PCUSA or the Presbytery, and fail to grant any interest to either (R. 91-109). The deeds lack any express trust clause which confers a trust to either the PCUSA or Presbytery (R. 91-109).

LPC executed mortgages on the real property in 1998 and 2002, respectively, in the collective sum of \$880,000.00 (R. 195-96, 210-236). In the mortgage agreements, LPC warranted that it had good and marketable title to the property, pledged the property to the mortgagees as security, and covenanted not to transfer or convey any interest in the property in favor of another (R.210, 230). The mortgage

agreements were approved by the Presbytery and do not mention the PCUSA or Presbytery as having any interest in the property (R. 210-236, 274) With the exception of granting the mortgagees security interests in the real property, LPC has not conveyed any estate, trust or other interest in the real property to any person or entity (R. 136).

LPC also owns a certain amount of personal property assets (R. 196-97, 237). These assets include, but are not limited to, bank accounts and investments held by or in the name of the LPC (R. 196-97, 237). LPC has not conveyed any estate, trust or other interest in the personal property to Respondents (R. 197). None of the personal property at issue herein is held in the name of Respondents or otherwise recognizes Respondents as having any interest (R. 197).

The PCUSA Constitution is comprised of, *inter alia*, the Book of Order (R. 258). On or about 1981, PCUSA unilaterally adopted the following provision as Section G8.0201 of the Book of Order (referred to herein as the "Trust Clause"):

"All property held by or for a particular church, 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.)(R. 32).

LPC was never asked by the PCUSA or Presbytery to sign a document by which it expressly accepted or agreed to be bound by the Trust Clause as a condition

of continued membership in the PCUSA . (R.128). The LPC did author a document in 1998 styled the "Lancaster Affirmation" (R. 271, 279-83). The stated purpose of the Lancaster Affirmation was to object to the direction of the National Church, and to state what LPC "believe[d] to be at stake in the Church" (R. 279). As is relevant to this Appeal, the Lancaster Affirmation includes the following two sentences affirming its continued loyalty to the denomination:

"We, the undersigned, do declare and affirm our loyalty and love for our denomination as it is constituted in the Book of Confessions and Book of Order. We receive and adopt its tenets and historical principles of church government . . ." (R. 280-283)

At all times, and more particularly during the period of 1981 to June 15, 2008, the LPC was a participating member church of the PCUSA. It participated in proceedings of the PCUSA, sought out the consent of the Presbytery for the mortgage commitments on the real property as mandated by Religious Corporations Law §12(5a), filed annual church reports, accepted money from the Presbytery, installed its officers in accordance with the PCUSA Constitution and utilized the PCUSA's policies and procedures to call a new pastor to lead its congregation (R. 272-75.) In connection with the LPC's search for a new pastor in 2005, the LPC completed a Church Information Form for the PCUSA which included information on the size of the congregation and demographics of its community. This Form also contains the same two sentences contained in the Lancaster Affirmation, cited above (R. 285-286).

Support Collections Unit v. Chamberlin, 99 N.Y.2d 328, 756 N.Y.S.2d 115 (2003) (motion for leave to appeal granted to resolve construction of Family Court Act §413-a); New York State Ass'n of Criminal Defense Lawyers v. Kaye, 96 N.Y.2d 512, 730 N.Y.S. 2d 477 (2001) (motion for leave to appeal granted to resolve of Judiciary Law §35-b); Council of City of N.Y. v. Gicbani, 93 N.Y.2d 60, 687 N.Y.S. 2d 609 (1999) (motion for leave to appeal to resolve construction of Health and Hospitals Corporation Act); Bryan v. New York City Health and Hosp. Corp., 93 N.Y. 2d 592, 695 N.Y.S.2d 39 (1999) (motion for leave to appeal granted to resolve meaning of CPLR §§5031 and 5041); James v. Bd. of Ed. of City of N.Y., 42 N.Y.2d 357, 397 N.Y.S. 2d 934 (1977) (motion for leave to appeal granted to resolve construction of Education Law §2590). So important is the issue of proper statutory construction that this Court has refused to dismiss an appeal on the ground of mootness because the dispute over statutory construction is likely to recur. See, for example, Baumann & Sons Buses, Inc. V. Board of Ed. 46 N.Y.2d 1061, 416 N.Y.S. 2d 778 (1979); Le Drugstore Elat Unis, Inc. V. N.Y. State Bd. Of Pharmacy, 33 N.Y.2d 298, N.Y.S. 2d 188 (1973).

Religious Corporation Law Section 69.3 requires that a local Presbyterian church administer its property in accordance with the Constitution of the PCUSA but, pursuant to Religious Corporations Law §24, the provisions of Section 69.3:

**“shall not be deemed to apply to any church incorporated under any general or special law, prior to January first, eighteen hundred and twenty-eight, if such provision is inconsistent with or in derogation of any of the rights and privileges of such corporation as they existed under the law by or pursuant to which such corporation was formed, unless such corporation subsequent to such date, shall have lawfully reincorporated under a law enacted since the first day of January, eighteen hundred and twenty-eight, or unless the trustees of such corporation shall, by resolution, determine that the provisions of this chapter applying to churches of the same denomination and to the trustees thereof shall apply to such church, and unless such resolution shall be . . . ratified . . . and published once a week for two successive weeks . . . in a newspaper . . . [and] the trustees of such church shall cause a certificate . . . to be filed in the office of the clerk of the county [and the] county clerk shall cause such certificate to be recorded . . .” RCL § 24 (emphasis added).**

Thus, within RCL Section 24, the Legislature has set forth two specific inquiries which must be made by the courts in order to impose the property administration provisions (i.e., the Trust Clause) of the PCUSA Constitution on a pre-1828 member church: 1) is the Trust Clause less favorable than the property administration provisions of the Constitution when LPC was incorporated; and 2) if so, did the church opt-in to the Trust Clause by reincorporating or passing and filing the statutorily mandated resolution with the County Clerk.

To see that the Section 69.3 trust obligation is inconsistent with and/or in derogation of the historical property rights of the LPC, this Court need only look to its decision in Schenectady which also addressed a church incorporated prior to 1828.

This Court held that Section 69.3 of the RCL did not apply to the member church because it was inconsistent with the law in 1803. This Court cited to First Presbyterian Church of Buffalo, 106 N.Y. 251, 12 N.E. 626 (1887) which dealt with the change in the RCL after the legislature passed the Acts of 1875 and 1876. For the first time, those Acts imposed a requirement that the transfer of property of the member church be in accordance with the rules of the denomination, and also required approval of any land transfer by the presbytery itself. With regard to the changes in law resulting from the Acts of 1875 and 1876, this Court stated:

“Before those amendments were made, it had been settled that a religious corporation held its temporalities **wholly free from the domination of any ecclesiastical authority, and by a tenure so independent that it could change its creed and denominational character without losing its hold upon its property.** Doubtless, the acts 1875 and 1876 were intended to restrain in some degree that sort of diversion of church property from one sect to another, for the provision is that the trustees shall hold and administer it according to the rules and usages of the denomination to which the church members of the corporation belong, and shall not divert it to the support of some other disconnected institution.” Id. at 254, 12 N.E. at 627 (emphasis added)

In fact, this Court found that RCL §69.3 would work a trust in favor of the National Church even before the Trust Clause was incorporated into the PCUSA Constitution but for §24 of the RCL. At 62 N.Y. 2d, on pages 122-123, this Court stated in Schenectady that:

“... State law provides that property disputes involving the Presbyterian Church are controlled by subdivision 3 of §69 of the Religious Corporation Law. It requires that trustees of the local church govern the

property in accordance with the constitution of the UPUSA (citations omitted). However, these provisions of the Religious Corporations Law are not applicable to churches incorporated prior to 1828 if the statute is inconsistent with the law as it existed at the time of incorporation, unless the church reincorporates after 1828 or the trustees determine by resolution that the provisions of the Religious Corporation Law shall apply (Religious Corporations Law, §24). The exception governs this case inasmuch as the law in 1803, the date of incorporation, is inconsistent with section 69 (see *Matter of First Presbyt. Soc.*, 106 N.Y. 251, 254), there was no reincorporation by plaintiff church subsequent to 1828 and the trustees never resolved to make the statute applicable. “Indeed, the fact that the plaintiff church, acting through its trustees, chose not to bring itself within the scope of section 69, relying instead upon prior law giving it undisputed ownership, is evidence that ownership rests with plaintiffs”. (Emphasis added.)

At 62 N.Y.2d, page 125, this Court went on to state that “[T]he trustees of First Church failed to pass a resolution bringing the church within the statutory trust provision of Section 69 of the New York State Religious Corporation Law . . .” Thus, this Court found that RCL §69 was “a statutory trust provision” but that it was negated by §24 because of the failure of the local church to pass the appropriate resolution. This Court further found that these facts evidenced that the local church intended not to create a trust in favor of the national church. Schenectady at 124, 476 N.Y.S. 2d at 94.

Thus, Schenectady recognized that the duty on the trustees of the local church to administer property in accordance with the “laws of the denomination” did not arise until after the Acts of 1875 and 1876. *See also, Application of Presbytery of Albany*, 63 Misc.2d 791, 312 N.Y.S.2d 505 (3<sup>rd</sup> Dept. 1970) (“[i]t has been the law

of this State since 1875 that the temporalities of a religious corporation should be administered in accordance with the rules and usages of the denomination to which the church members of the corporation belong”). Nevertheless, Justice Curran and the Fourth Department each determined, based on this Court’s decision in Harnish, that the date of LPC’s incorporation and Section 24 were completely irrelevant to the disposition of LPC’s property.

In construing a statute, the courts are constrained to “give effect to the plain meaning of the words used” in the statute. Patrolmen’s Benev. Assoc. of City of New York v. City of New York. 41 N.Y.2d 205, 208, 391 N.Y.S. 2d 544, 546 [1976]. A court “should not ignore the words of a statute, clear on its face, to reach a different result through judicial interpretation.” Matter of Kleefeld’s Estate, 55 N.Y. 2d 253, 260, 448 N.Y.S.2d 456, 459 (1982). Where a statute restricts a court’s discretion by the use of mandatory limiting language, such as the word “shall”, the statutory language would be rendered meaningless if the court construed the statute to allow the parties to agree to conduct or procedures not contemplated by the statute. Where a statute describes the particular situations in which it is to apply, “an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.” Kirshtein v. Americu Credit Union 65A.D.2d 147, 151, 82 N.Y.S.2d 610,613 (4<sup>th</sup> Dept. 2009); Statutes §240. Thus, the omission of language in Section 24 which allows for judicial discretion or substitute conduct to impose a

trust is an “irrefutable inference” that a trust cannot be imposed on LPC’s property absent strict compliance with Section 24. Exceptions to strict compliance with statutory mandates cannot be implied. In re Hering, 133 A.D. 293, 294, 117 N.Y.S. 747,749 (2<sup>nd</sup> Dept 1909).

This Court has repeatedly reaffirmed that it is the duty of the court to interpret a statute in a way that implements the “will” of the Legislature. Bryant v. New York City Health., *supra*. The court is to look at the purpose of the statute and the objectives sought to be accomplished by the Legislature. Hernandez v. Barrios Paoli, 93 N.Y.2d 781, 698 N.Y.S.2d 590(1999). The objective of the statute reflects the history of rights of member churches in its property and provides for very specific acts by the member church in order to ensure that a conveyance of rights to the denomination is a knowing and deliberate conveyance of historical sole ownership rights. The language of this statute “leaves no room for the suggestion that it is directive; it is clearly mandatory.” Radimak v Nassar, 119 A.D.2d 978, 500 N.Y.S.2d 991 (4<sup>th</sup> Dept. 1986). Not only is the disposition of this case totally at odds with the meaning of §24, but neither of the courts below addressed the construction of the statute, although the issue was squarely before them.

That the law is unsettled as to the meaning and application of Section 24 was recognized by Justice Curran, stating that : “I know this is going to the Fourth Department. And, very honestly, I’m very interested to see what they will say about

it.” (R.9). That the issue is likely to recur is evident by the appeal which is now pending in the Second Department in the case of Presbytery of Hudson River v. Trustees of the First Presbyterian Church & Congregation of Ridgebury, 13 Misc. 3d 707 (S. Ct. Orange Co. 2006). (The Decision is contained in the Record at page 176.) In Ridgebury, the trial court concluded, as LPC argues here, that a church which does not opt-in to the property provisions of PCUSA Constitution in accordance with RCL Section 24 is not subject to the Trust Clause.

Further, the PCUSA and its regional presbyteries have taken inconsistent positions on the meaning and application of RCL§24. In First Presbyterian Church of Oakfield v. Presbytery of Genesee Valley, 56 A.D.3d 1188, 866 N.Y.S.2d 900 (4<sup>th</sup> Dept. 2008), *leave to appeal denied*, 12 N.Y.3d 710, (2009), the PCUSA’s regional presbytery asserted before this Court, in its Brief dated June 14, 2008, in Opposition to the Motion for Leave to Appeal, that a church incorporated prior to 1828 is protected from the imposition of the Trust Clause, expressly distinguishing Schenectady and Ridgebury from the Oakfield church on that precise ground. (Excerpts of the Brief of the regional presbytery, dated June 14, 2008, are contained in Addendum A to LPC’s Reply Brief for which judicial notice was sought below.) Yet, just days later, on June 17, 2008, in opposition to LPC’s Application for a Temporary Restraining Order, the Presbytery argued that Section 24 was not an impediment to the imposition of a trust.

So, too, has the Fourth Department issued inconsistent decisions on church property matters affected by RCL Section 24. In Oakfield, the Fourth Department affirmed the imposition of a trust on the property of the post-1828 church for the reasons stated by Justice Noonan at the trial court. Justice Noonan held that the incorporation of the local church after 1828 was a fact which distinguished the Oakfield church from the local church in Schenectady which was incorporated prior to 1828 and which was therefore subject to the provisions of RCL Section 24. (The Decision of Justice Noonan is found in the Record at page 181.) However, in the instant case, the Fourth Department ignored its decision in Oakfield, and determined that LPC's incorporation prior to 1828 and Section 24 were irrelevant to the disposition of its property, affirming the imposition of a trust.

LPC seeks to have this Court resolve the meaning and application of RCL Section 24, and to determine whether a trust can be imposed upon property of a church incorporated prior to 1828 which has not complied with the requirements of RCL §24, particularly in the content of a trust clause adopted by the denomination after the local church became a member church and after the affected property was acquired by the church. This legal issue was not addressed by this Court in Schenectady because the Presbyterian Church had not yet adopted the Trust Clause. This issue was not addressed by Harnish because Harnish did not involve a pre-1828

church subject to RCL §24. This Court has never addressed the relationship between RCL §§24 and 69.3 and a trust clause adopted by a denomination.

II. The Issues Raised by the Proposed Appeal are of Public Importance.

The applicability and effect of RCL §24 should be decided by this Court not only because of the conflict in the way that Section 24 has been construed and applied, but also because the issue is one of first impression and has great public importance.

A. The Issues Affect Numerous Denominations.

The statutory requirements of RCL Section 24 are not limited to the LPC. The statute applies to all pre-1828 Presbyterian churches as well as churches of other denominations. Worshipers at churches that were established prior to 1828 have relied upon, and should be entitled to rely upon, RCL §24 to protect the ownership and control of their property. They can no longer do so based upon the Decision in this case.

B. The Issues Affect the Rights of Persons Who Purchase or Finance Property Held by Churches.

The meaning and application of Section 24 affects persons other than the member church and the denomination. A purchaser of church property should be entitled to rely upon a title search and the warranty of the selling church that no other person or entity has an interest in the property. They cannot do so. The uncertainty

regarding the meaning and application of Section 24 has placed a cloud on the title of such properties. Further, those who provide mortgages to pre-1828 churches should be entitled to rely on the representations of ownership made by the church when passing upon mortgage applications. The security interest of the mortgagee is made illusory by the court below's application of Section 24.

C. First Amendment and Common Law Rights are Affected.

The proposed appeal is also of public importance because the body of law which has evolved in this state for church property infringes on the First Amendment and is contrary to well settled legal principles of trust, contract and property law. By ignoring Section 24, the courts below subordinated Section 24 to the denomination constitution. In Schenectady, this Court adopted the neutral principles approach to the resolution of church property disputes. But, the judicial enforcement of the Trust Clause in the face of Section 24 was anything but neutral in this case. True neutral principles would mean that Section 24 would have been enforced as it is written. In other words, the lack of compliance with Section 24 should have resulted in a grant of summary judgment in favor of the LPC.

The First Amendment is impacted by the departure from well settled principles of trust, contract and property law in church property cases. The statute of frauds, General Obligations Law §5-703 subd. 1, requires that any "interest in real property . . . or trust or power, over or concerning real property . . . cannot be created, granted,

assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person [to be charged ]. Despite the absence of a deed or conveyance subscribed by the LPC, the courts below imposed a trust.

While the United States Supreme Court did not define, in Jones v. Wolf, 443 U.S. 595, 99 S. Ct. 3020 (1979), what would constitute assent to a trust clause in a “legally cognizable form”, the documentary evidence upon which a manifestation of intent is found must be scrutinized in “purely secular terms and not to rely on religious precepts in determining whether the parties have intended to create a trust . . .”. Harnish at 351, 870 N.Y.S.2d at 818. The recognition of a religious property trust must be consistent with state law on creation of secular trusts. Schenectady at 125, 476 N.Y.S.2d at 94. Of course, to require anything less would favor religious property trusts over secular trusts in violation of the First Amendment. For a church incorporated in New York prior to 1828, the “legally cognizable form” required to impose a trust is reincorporation or a resolution of the local church which is adopted, ratified, published and filed in accordance with RCL Section 24.

Assuming, *arguendo*, there is loophole in Section 24 which allows for the creation of a trust absent compliance with the statutory mandates, then this Court should provide guidance as to what constitutes assent in a “legally cognizable form” where the local church is a member of the denomination prior to adoption of a trust

clause and never adopted a resolution or signed a document agreeing to be bound by the trust clause. These facts were not before this Court in Harnish. The member church in Harnish was incorporated well after 1828 and the resolution of the church was specifically prepared as a recitation of adoption of the constitution of the denomination as a *sine qua non* to admission as a parish.

Adoption of the PCUSA Constitution was never a condition of LPC's continued membership in the PCUSA. There was no requirement imposed upon LPC that it adopt the resolution required by RCL §24 and it did not. So adamant were the courts below to find the legal equivalent of the resolution executed by the church in Harnish that the courts below construed a document styled the "Lancaster Affirmation" as the equivalent and proof of LPC's manifestation of intent to be bound by the Trust Clause (R. 271, 278-283). At page 7-8 of the December 4, 2008 Transcript of Oral Decision (R. 13-14) Justice Curran found sufficient manifestation of assent by reason of the following two sentences contained within the Lancaster Affirmation:

"We, the undersigned, do declare and affirm our loyalty and love for our denomination as it is constituted in the Book of Confessions and Book of Order. We receive and adopt its tenets and historical principles of church government."

As established by LPC below, the Lancaster Affirmation is a religious document relating to ecclesiastical matters (R. 279-83). The expressed and sole purpose of the

Lancaster Affirmation was to make public the objections of the LPC to departures of the PCUSA from historical and traditional beliefs of the Presbyterian Church (R. 279-83). To “affirm our loyalty and love for [the Presbyterian] denomination” is an oath of loyalty to the Church and faith which this Court made clear, in Schenectady at page 125 of the Opinion, is an insufficient basis upon which to find the requisite manifestation of intent to create a trust. The next sentence of the cited text from the Lancaster Affirmation recites LPC’s adoption of two specific categories: “tenets” and “historical principles of church government”. To adopt the tenets and historical principles of church government is not akin to an expression of intent to be bound by the totality of the Book of Order, or Trust Clause specifically, so as to deprive LPC of its property. Tenets, by definition, are doctrines of belief which, of course, have absolutely nothing to do with property rights.

The reference to “historic principles of church government” is a reference to a very specific portion of the Book of Order, paragraph at G-1.0400 (R. 263). That paragraph, by its terms, has no relevance to property issues. That section shows no intent by LPC to adopt or affirm the Trust Clause contained therein. To accept this phrase as a manifestation of intent would be contrary to In re First Presbyterian Church of Buffalo, *supra*, 106 N.Y. 251, 12 N.E. 626 (1887) setting forth the historic principles of church government as they relate to property ownership by members of the Presbyterian Church, holding that prior to statutory amendments in 1875 “it had

been settled that a religious corporation held its temporalities wholly free from the denomination of any ecclesiastical authority and by a tenure so independent that it could change its creed and denominational character without losing its hold upon its property." 106 N.Y. at 254. As such, the second sentence, like the first sentence, of the cited text in the Lancaster Affirmation does not evidence any intent of LPC to be bound by the Trust Clause.

While the Harnish resolution had as its sole purpose the acceptance as a parish into the Episcopal Church, the Lancaster Affirmation was a voluntary writing objecting to doctrinal issues and, in a few words within the document, recites words expressing LPC's commitment to the Presbyterian faith. This document should not have been subject to any secular interpretation or application at all. This document was authored and published by the LPC in connection with an ecclesiastical dispute. By looking to this document for proof of intent the courts injected themselves in such religious dispute by pretending that the Lancaster Affirmation carried a neutral message and then punished the LPC for its disloyalty to the Church based on this document.

When a church decides to leave a denomination having never adopted a trust clause, the courts help establish religion and frustrate free exercise of religion when they do for the denomination what the denomination should have done for itself, *i.e.* create trusts by unambiguous trust instruments. This Court should accept this case for

review to clarify that a document which only contains an oath of loyalty to the denomination and prepared for reasons other than affiliation or continued affiliation with denomination cannot be construed consistent with neutral principles of law to form the basis of assent. This Court should accept this case for review to clarify what constitutes assent in a “legally cognizable form”.

D. The Courts Have Abandoned Summary Judgment Principles in Religious Property Cases.

So intent have the courts been to build a body of trust law for church property cases favoring the denomination that the courts have uniformly granted summary judgment despite the existence of disputed issues of fact that would preclude a grant of summary judgment were only secular parties and properties involved. This case presents a perfect example.

It is well settled law that where a claim turns on the meaning of a writing, it is the burden of the moving party to establish that the meaning which the moving party ascribes to the document is the only meaning that flows from the words used. Stone Travel Agency, Inc. v. Lambrou, 176 A.D.2d 1170, 1171, 575 N.Y.S.2d 609, 611 (3<sup>rd</sup> Dept. 1991). Where a writing is susceptible of more than one meaning, the meaning of the writing is not suitable for summary judgment. Jellinick v Joseph J. Naples & Assoc., 296 A.D. 75, 77, 744 N.Y.S.2d 610, 613-14 (4th Dept. 2002) (genuine issues of material fact as to the intent of the parties expressed in writing precluded grant of

summary judgment). The two sentences contained in the Lancaster Affirmation upon which the courts below relied to impose a trust fall far short of the proof necessary to grant summary judgment. At best for Respondents, the sentences are ambiguous.

The Respondents failed to come forward with any evidence that the phrase “to declare and affirm our loyalty and love for our denomination . . .” as included in the Lancaster Affirmation and 2005 Church Information Form were intended as an expression by LPC of assent to the Trust Clause. So, too, did the Respondents fail to come forward with any evidence that the phrase “adopt the tenets and historical principles of church government” was intended as an expression of assent by LPC to be bound by the Trust Clause and that such phrase is not susceptible of any other meaning. The term “tenets” is defined as “doctrines of belief” and therefore has no relevance to a manifestation of intent at all, and/or is susceptible of more than one meaning and cannot be construed, as a matter of law, as an objective manifestation of assent to the Trust Clause. Similarly, Respondents failed to come forward with any evidence that by LPC affirming the “historic principles of church government” LPC intended that phrase to mean it assented to the Trust Clause. This phrase, which is taken directly from the Book of Order and which has nothing to do with property rights in the Book of Order, cannot be deemed to be an objective manifestation of assent worthy of summary judgment in favor of Respondents in light of the historic principles of church government as they relate to property rights. That phrase is

susceptible of more than one meaning, including a meaning favorable to LPC, that being that it holds its property free and clear of any claim of the PCUSA in accordance with historic principles.

Not only did the Respondents fail to come forward with necessary proof but the courts below usurped the function of the jury by resolving conflicts over the meaning of the documents. Rather than holding that questions of fact exist as to the issue of intent, the courts below granted summary judgment in favor of the PCUSA and Presbytery based on writings that would clearly have not carried a defendant's burden had this been a secular property case.

Not only did the courts below usurp the function of the jury with respect to conflicting interpretations of the language of the Lancaster Affirmation and Church Information Form but the courts also ignored the relevance of the encumbrances on LPC's property in analyzing LPC's intent to form a trust. The courts should have deemed relevant that when LPC encumbered its real property with mortgages of \$880,000 that it warranted to the mortgagees, with the full knowledge and consent of Respondents, that no other person or entity had an interest in the property. Clearly, if LPC had intended to hold its property in trust for the PCUSA it could not have, and would not have, made such a representation. The conduct of LPC in encumbering its property with mortgages which it is obligated to satisfy from its assets, whether they be personal property or real property assets, is wholly inconsistent with an intent to

create a trust in favor of the PCUSA in those very same assets. So, too, is it inconsistent to impose a trust in the same property which is subject to a security interest which the mortgagee may foreclose upon if an interest in the LPC property is conveyed to the PCUSA by reason of the Order imposing a trust and/or when LPC ceases to service the mortgage debt because it has been stripped of its assets in accordance with such Order.

Finally, and perhaps most telling, is the rejection by the courts below of this Court's holding in Schenectady that the failure of the member church to comply with RCL Section 24 is itself evidence of a lack of intent to hold church property in trust. Such undisputed evidence alone should have defeated summary judgment in favor of Respondents. But, the courts below ignored this fact, favoring an outcome which imposed a trust on church property. At the very least, the issue of whether LPC had the requisite intent should have gone to the jury.

So insistent have the trial and appellate division courts of this State been to build a body of church property law favoring church property trusts, that these courts have consistently resolved church property disputes upon summary judgment in favor of the denomination. Indeed, in the Fourth Department, the last three church property cases have been affirmed upon the grant of summary judgment "for the reasons stated in the decision at Supreme Court" without analysis of the asserted errors in the application of substantive or procedural law. See, Episcopal Diocese of Rochester v.

Harnish, 43 A.D.3d 1406, 841 N.Y.S. 2d 816(4th Dept 2007); Presbytery of Genesee, *supra*, at 56 A.D.3d at 1188, 866 N.Y.S.2d at 900; and Lancaster Presbyterian Church at Exhibit "E" hereto. The law has developed into one of pro-denomination rules and principles. Regardless of disputed factual issues, the denomination always wins on summary judgment.

Accordingly, this Court should also accept this case for review to clarify that historical rules applicable to summary adjudication must not be abandoned in church property cases.

### CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant LPC permission to appeal the Order of the Fourth Department, granted December 30, 2009, which affirmed the Order imposing a trust on the real and personal property of the LPC.

DATE: January 12, 2010

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