

To be Argued by:
LISA T. SOFFERIN, ATTY.
Estimated Time for Argument:
(15 Minutes)

STATE OF NEW YORK

Supreme Court

APPELLATE DIVISION—FOURTH JUDICIAL DEPARTMENT

Appellate Division Docket Number: CA 09-00787.

— 0 —

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.

Erie County Index No.: I 2008-006996.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS In Response to Presbytery of Western New York

BROWN & KELLY, LLP
Attorneys for Plaintiffs-Appellants
1500 Liberty Building
Buffalo, New York 14202
Telephone: (716) 854-2620

LISA T. SOFFERIN, ATTY.
ANDREW D. MERRICK, ESQ.
Of Counsel

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. THE ARGUMENTS ADVANCED BY THE PRESBYTERY IGNORE THE PLAIN MEANING OF RCL §24	1
III. THE FACTS RELIED UPON BY THE PRESBYTERY FAIL TO ESTABLISH AN EXPRESS OR IMPLIED TRUST IN FAVOR OF THE PCUSA	4
IV. CONCLUSION	5

TABLE OF AUTHORITIES

Page(s)

CASES:

Episcopal Diocese v. Harnish,
11 N.Y.3d 340, 870 N.Y.S.2d 814 (2008) 3

First Presbyterian Church of Buffalo,
106 N.Y. 251, 254 12 N.E. 626, 627 (1887) 2

First Presbyterian Church of Oakfield v. Presbytery of Genesee Valley,
56 A.D.3d 1188, 866 N.Y.S.2d 900 (4th Dept. 2008),
leave to appeal denied, 59 A.D.3d 1108, 873 N.Y.S.2d (2009),
motion to Court of Appeals for leave to appeal pending,
___N.Y.3d___, 2009 WL 1260170 (2009) 3

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) 3

In re Hering,
133 A.D. 293, 294, 117 N.Y.S. 747, 749 (2nd Dept. 1909) 2

Jones v. Wolf,
443 U.S. 595, 99 S. Ct. 3020 (1979) 3

Kirshtein v. Americu Credit Union,
___A.D.2d ___, ___ N.Y.S.2d ___, 2009 WL 1652596 (4th Dept. 2009) 2

Matter of Kleefeld’s Estate,
55 N.Y.2d 253, 260, 448 N.Y.S.2d 456, 459 (1982) 2

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] 2

Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville,
250 A.D.2d 282, 288, 684 N.Y.S.2d 76, 81 (3rd Dept. 1999) 3-4

OTHER AUTHORITIES:

RCL §24 1,2,3,4

RCL §69.3 1

I.
INTRODUCTION

This Reply Brief is submitted by the Lancaster Presbyterian Church, *et. al.* (hereinafter collectively “the LPC”) in response to the Brief of Defendant/Respondent The Presbytery of Western New York (“the Presbytery”). The LPC filed a Reply Brief in response to the Brief of Defendant/Respondent Presbyterian Church (U.S.A.) (hereinafter “the PCUSA”) under separate cover on June 2, 2009. Inasmuch as much of what is argued in the Presbytery’s Brief was addressed by the LPC in its Reply to the PCUSA, those arguments will not be repeated here but are incorporated by reference.

II.
**THE ARGUMENTS ADVANCED BY THE PRESBYTERY
IGNORE THE PLAIN MEANING OF RCL §24**

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 RCL §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).

Like the PCUSA, the Presbytery completely ignores that, within RCL Section 24, the Legislature has set forth the specific and mandatory actions required in order to impose the Trust Clause of the PCUSA Constitution on a fully participating pre-1828 member of the National Church - a clause which is undeniably less favorable than the property administration provisions of the constitution when LPC was incorporated in 1822. See, First Presbyterian Church of Buffalo, 106 N.Y. 251, 254, 12 N.E. 626, 627 (1887) (recognizing that until 1875, a local Presbyterian church “could change its creed and denominational character **without losing its hold upon its property**” [emphasis added].)

This Court is 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 __ A.D.2d __, __ N.Y.S.2d __, 2009 WL 1652596 (4th Dept. 2009). Thus, the omission of any 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 (2nd Dept 1909).

That the analysis of the Court of Appeals 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”) included reference to the absence of a trust clause in the PCUSA-predecessor constitution does not translate into an inference that if a trust clause had existed, the Schenectady Court would have ignored Section 24 or that the outcome would have been any different. Rather, in citing to Jones v. Wolf, 443 U.S. 595, 99 S. Ct. 3020 (1979), the Schenectady Court stated that, under the neutral principles of law standard, courts are to look to four separate factors in analyzing the existence of a trust in favor of a National Church, one factor being the language of the constitution of the National Church. The Schenactady Court therefore included this factor in its four factor analysis. However, since there was no trust clause in the PCUSA-predecessor constitution at that time, it was a non-issue. The Schenactady Court did not address the effect that a hypothetical trust clause might have had. To have done so would have been an impermissible advisory opinion.

In Jones, *supra*, the Supreme Court declared that a trust clause in a National Church constitution could be imposed against the property of an existing member church if done in a “legally cognizable form”. For a Presbyterian church incorporated in New York prior to 1828, the “legally cognizable form” required to impose a trust is a resolution of the local church which is adopted, ratified, published and filed in accordance with RCL Section 24. Nothing in Episcopal Diocese of Rochester v. Harnish, 11 N.Y.3d 340, 870 N.Y.S.2d 814 (2008), First Presbyterian Church of Oakfield v. Presbytery of Genesee Valley, 56A.D.3d 1188, 866 N.Y.S.2d 900 (4th Dept. 2008), *leave to appeal denied*, 59 A.D. 3d 1108, 873 N.Y.S. 2d (2009), *motion to Court of Appeals for leave to appeal pending*, or Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville,

250 A.D.2d 282, 288, 684 N.Y.S.2d 76, 81 (3rd Dept. 1999) suggest, much less require, anything less for a pre-1828 Presbyterian church.

Finally, it should be noted that the Presbytery's reference on page 18 of its Brief to a single sentence in the Transcript at Record p. 18 regarding the statutory scheme being a neutral factor does not overcome the plain meaning of the statute. Further, it is obvious from the Record that Justice Curran either misunderstood the argument of counsel or counsel misunderstood a question of the Court. The LPC has consistently taken the position that Section 24 is dispositive and not neutral. See, for example, the Affidavit of Andrew D. Merrick, Esq. in support of LPC's Order to Show Cause dated June 16, 2008 at R. 60-22, paragraphs 81 to 94.

Section 24 simply does not leave any room to enforce the Trust Clause on LPC's property absent strict compliance, and this Court should so hold.

III.
**THE FACTS RELIED UPON BY THE PRESBYTERY
FAIL TO ESTABLISH AN EXPRESS OR IMPLIED TRUST
IN FAVOR OF THE PCUSA**

Even if this Court were to determine that a trust can be established by means other than strict compliance with Section 24, the Presbytery, like the PCUSA, relies upon facts which establish nothing more than the LPC was a fully participating member of the PCUSA, coupled with writings which are ecclesiastical in nature and otherwise ambiguous in intent. For the reasons previously stated in LPC's prior briefing, neither LPC's conduct or documents carry the day for the Presbytery or PCUSA. In an effort to overcome the shortcomings in The Lancaster Affirmation and the 2005 Church Information Form, the Presbytery resorts to claiming that the LPC failed to "explain away" these documents below. However, the Presbytery knows that the LPC addressed the insufficiency and ecclesiastical nature of these documents in the court below, in its Supplemental Memorandum

of Law dated December 1, 2008. The Supplemental Memorandum of Law will be made available to the Court upon request.

Putting aside that there is no merit to the claim that the LPC did not object to the insufficiency of the Lancaster Affirmation and the 2005 Church Information Form below, the purported failure of LPC to preserve any issue for appeal does not excuse the Presbytery from separately establishing its *prima facie* case for summary judgment in its favor. It did not. On the record which was made by the Presbytery below, it was error for the court below to grant summary judgment in its favor.

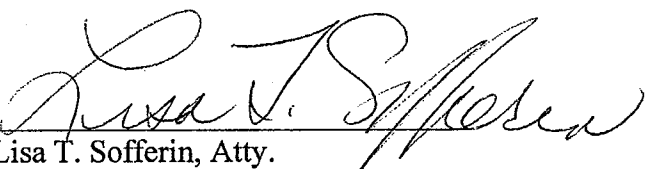
IV. CONCLUSION

For the foregoing reasons and for the reasons set forth in the LPC's original Brief and Reply Brief to the PCUSA, it is respectfully requested that this Court vacate the Order of the court below.

DATED: June 19, 2009

BROWN & KELLY, LLP

By:


Lisa T. Sofferin, Atty.
Andrew D. Merrick, Esq.
Attorneys for Plaintiffs/Appellants
Lancaster Presbyterian Church, *et. al.*
1500 Liberty Building
Buffalo, New York 14202
(716) 854-2620