

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IVY HILL CONGREGATION OF	:	
JEHOVAH’S WITNESSES,	:	
Petitioner	:	
	:	
v.	:	No. 316 MD 2020
	:	
DEP’T OF HUMAN SERVS.,	:	
Respondent	:	<i>Electronically Filed Document</i>

**RESPONDENT’S BRIEF IN OPPOSITION TO THE APPLICATION FOR
SUMMARY RELIEF**

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INTRODUCTION

Respondent, the Pennsylvania Department of Human Services (hereinafter “Department” or “Respondent”), through counsel, respectfully submits this Brief in Opposition to the Application for Summary Relief (hereinafter the “Application”) filed by Petitioner Ivy Hill Congregation of Jehovah’s Witnesses (hereinafter “Ivy Hill” or “Petitioner”). Respondent requests that the Application either be stayed pending resolution of pending objections or be dismissed in its entirety.

The Child Protective Services Law (hereinafter the “CPSL”), 23 Pa. C.S. §§ 6301, *et seq.*, was enacted to encourage a more complete reporting of suspected child abuse. Under the CPSL, various persons, such as members of the clergy, are identified as mandatory reporters of suspected child abuse. The only exception to mandatory reporting applicable for the purposes of this litigation is when the disclosure of suspected abuse occurs as part of a confidential communication.

Section 5943 of the Judicial Code provides that a member of the clergy shall not be compelled, without consent of the disclosing individual, to disclose information in any legal proceeding, trial or investigation that was obtained “in the course of his duties” . . . “secretly and in confidence[.]” *See* 42 Pa. C.S. § 5943 (hereinafter the “clergy-communicant privilege”).¹

Petitioner requests that the Court declare that its seven present elders are members of the clergy as described by the clergy-communicant privilege and are entitled to assert the evidentiary privilege when investigated by law enforcement. Or alternatively, if the Court does not declare the above, to deem the evidentiary privilege to be either facially unconstitutional or unconstitutional as applied to Jehovah's Witnesses (of which Petitioner is but one congregation), under both the State and Federal Constitutions for violations of the Establishment Clause and Equal Protection provisions and to sever the disclosure exemption from the CPSL.

But it is unclear to what end this declaration would provide actual relief. Declaratory relief is not appropriate to adjudicate the validity of a defense to a potential future lawsuit, which is precisely what Petitioner seeks when requesting entitlement to invoke an evidentiary privilege before an investigation or criminal proceeding is even initiated against it.

¹ 42 Pa. C.S. Section 5943 states in its entirety:

No clergyman, priest, rabbi or minister of the gospel of any regularly established church or religious organization, except clergymen or ministers, who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers, who while in the course of his duties has acquired information from any person secretly and in confidence shall be compelled, or allowed without consent of such person, to disclose that information in any legal proceeding, trial or investigation before any government unit.

In conjunction with this Application, pending before the Court are preliminary objections filed by the Respondent to the underlying Petition for Review (hereinafter the “Petition”). Respondent asserts in those objections that the Petition fails both procedurally and substantively and should be dismissed in its entirety. Since objections have been lodged against the Petition, this Application should be stayed pending their resolution.

Alternatively, assuming Petitioner overcomes the hurdles identified by the objections, this Application should still be denied because there are material issues of fact in dispute and providing a declaration as to the application of an evidentiary privilege is simply not appropriate when its application is done on a case-by-case basis. For these reasons, Respondent requests that this Honorable Court stay disposition of the Application for Summary Relief, or alternatively, deny it in its entirety.

QUESTIONS PRESENTED IN OPPOSITION

1. Should the Application be stayed pending resolution of Respondent’s preliminary objections because appropriate law enforcement officials were neither joined to the Petition for Count I nor was the Attorney General provided notice of a constitutionality challenge for Count II? Suggested Answer: Yes.

2. Alternatively, should the Application be denied because Petitioner’s right to a judgment against the Department is not clear and there are material issues of fact in dispute? Suggested Answer: Yes.

3. Additionally, in the alternative, should the Application be denied because providing a declaration as to the application of an evidentiary privilege is simply not appropriate declaratory relief? Suggested Answer: Yes.

RELEVANT ALLEGED FACTS²

Ivy Hill is an unincorporated religious body consisting of approximately 130 congregants who meet regularly and worship in accordance with the beliefs and practices of Jehovah's Witnesses. (Pet. ¶ 6) The Department is the Commonwealth agency charged with administering and overseeing the implementation of the CPSL. (*Id.* ¶ 7) Among other things, the Department is tasked with: (a.) promulgating regulations necessary to implement the CPSL (*see* 23 Pa. C.S. § 6306); (b.) maintaining a toll-free hotline for reporting abuses (*see id.* § 6332) and maintaining a statewide database of protective services (*see id.*); and, (c.) providing notice of reports of suspected child abuse to appropriate county agencies and law enforcement to conduct investigations and initiate enforcement actions (*see id.* § 6334). (*Id.* ¶ 8)

Jehovah's Witnesses are a regularly-established Christian church spread over 119,000 congregations around the world; in Pennsylvania, Ivy Hill Congregation is one of them. (*Id.* ¶ 9) At Ivy Hill, there are presently seven volunteers who serve as elders, taking the spiritual lead in the congregation as ordained ministers. (*Id.* ¶¶ 10-14) Elders are responsible for, *inter alia*: organizing

² Petitioner utilizes the heading "Statement of Undisputed Material Facts" in its Amended Brief in Support of Summary Relief. Because no discovery has occurred between the parties, Respondent does dispute the alleged facts presented by the Petitioner, but identifies them here as relevant for the purposes of responding to the Application for Summary Relief.

the regular meetings held; providing pastoral care for congregants; rendering spiritual assistance to congregants; officiating funerals; solemnizing marriages; and hearing confessions. (*Id.* ¶ 20)

Congregants at Ivy Hill are encouraged to seek spiritual counsel and assistance from the elders if they commit a serious transgression of God's laws. (*Id.* ¶ 22) According to the beliefs and practices of Jehovah's Witnesses, when a congregant in the Ivy Hill Congregation confesses a sin, or requests spiritual encouragement, counsel, and guidance, the communication with the elder is strictly confidential. (*Id.* ¶¶ 25-32) These communications generally occur under the aegis of religious and spiritual guidance, premised on the understanding and sincerely held belief that the communications will remain confidential. (*Id.* ¶ 45)

In an attempt to understand the interaction of the mandatory reporting provisions and their exemptions within the CPSL, counsel for the Jehovah's Witnesses sought a legal opinion from the State Attorney General in 1998. (*See id.* ¶ 43 and Ex. A) The application of the clergy-communicant privilege found in the CPSL has become a concern for Petitioner due to a recent criminal complaint filed in Lancaster County against a bishop in the Amish faith, alleging that his failure to report a confession of child abuse by a member of the Amish community constituted a violation of the CPSL. (*See id.* ¶ 47 and Pet. Ex. B & C)

Noted in the news article is the fact that investigators “were alerted [to this incident] after members of the Amish community had conversations with [the bishop] and other bishops about the child-sex abuse [in question] and were told to ‘let it go’ and that it had ‘been taken care of.’” (*See id.* Ex. B)

STANDARD OF REVIEW

Petitioner filed their Application pursuant to Rule 1532(b) of the Pennsylvania Rules of Appellate Procedure, which states that “[a]t any time after the filing of a petition for review in an appellate or original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear.” Pa. R.A.P. 1532(b). An application for summary relief is properly evaluated according to the standards for summary judgment. *Myers v. Commonwealth*, 128 A.3d 846 (Pa. Commw. Ct. 2015). The court may grant a motion for summary relief if a party’s right to judgment is clear and there are no material issues of fact in dispute. *Jubelirer v. Rendell*, 953 A.2d 514, 521 (Pa. 2008).

Courts shall have the power to declare the rights, status, and other legal relations of a party when sought. *See* 42 Pa. C.S. § 7532. Courts may refuse to render or enter a declaration where such judgment would not terminate the uncertainty or controversy giving rise to the proceeding. *See* 42 Pa. C.S. § 7537. When declaratory relief is sought, all persons shall be made parties who have or claim interest which would be affected by the declaration. *See* 42 Pa. C.S. § 7540.

Declaratory relief should be withheld when the request for relief is an attempt to adjudicate the validity of a defense to a potential future lawsuit. *Osram Sylvania Prods., Inc. v. Comsup Commodities, Inc.*, 845 A.2d 846 (Pa. Super. Ct. 2004). Further, a declaratory judgment will not be rendered to decide future rights in anticipation of an event which may never happen, and a petition for declaratory judgment is properly dismissed where proceeding may prove to be merely academic. *McCandless Twp. v. Wylie*, 100 A.2d 590 (Pa. 1953).

ARGUMENT

The Application should be stayed pending resolution of Respondent's preliminary objections, or, alternatively, should be denied because there are material issues of fact in dispute and providing a declaration as to the application of an evidentiary privilege before an investigation or legal proceeding is initiated is simply not appropriate as declaratory relief.

A. Disposition Should Be Stayed Pending Resolution of Respondent's Preliminary Objections and Notice to the Attorney General

Pennsylvania Rule of Appellate Procedure 1532(b) allows any party to apply for summary relief any time after a petition for review is filed. Pa. R.A.P. 1532(b). Respondent is aware that an application for summary relief may be granted prior to disposing of outstanding preliminary objections. *See e.g., Marshall v. Bd. of Prob. & Parole*, 638 A.2d 451 (Pa. Commw. Ct. 1994). However, because resolution of an application for summary relief results in a decision on the merits of the case,

and a principal objection presented by Respondent to the Petition is that of joinder, Respondent respectfully requests that disposition of Petitioner's Application be stayed pending the resolution of Respondent's preliminary objections.

The Department is tasked with receiving reports of suspected child abuse. *See* 23 Pa. C.S. § 6334(g). If the Department receives a report that a criminal offense has been committed against a child, the Department shall transmit a notice to the appropriate law enforcement official. *Id.* § 6334(c). The CPSL defines "law enforcement official" to include: the Attorney General; a Pennsylvania district attorney; a Pennsylvania state police officer; or a municipal police officer. *Id.* § 6303. While Respondent never argues that all law enforcement officials should be joined to the original Petition, Respondent notes that as of yet none have been joined or provided any notice of this proceeding.

Consequently, the Court should stay disposition of the Application where it seeks summary relief for Count I of the Petition. Placing a stay until the issue of joinder is resolved is necessary because whether a law enforcement official has the ability or right to pursue an investigation or criminal charge against one the seven elders at Ivy Hill is so connected with the claims of Petitioner that no relief can be granted without these officials joined to this action. *See Pa. State Educ. Ass'n. v. Pa. Dep't of Educ.*, 516 A.2d 1308 (Pa. Commw. Ct. 1986).

Further, because the Petition raises the question of constitutionality of the clergy-communicant privilege, Petitioner was required to give notice of this action to the Attorney General and file proof of such notice. *See* Pa. R.C.P. 235 and Pa. R.A.P. 521. This Court has the discretion to stay these proceedings pending proof of notice and a reasonable opportunity for the Attorney General to respond. *See id.* Additionally, precedent dictates that this Court should not consider a challenge to the constitutionality of a statute (Petition Count II) if notice had not been given to the Attorney General. *See Kepple v. Fairman Drilling Co.*, 615 A.2d 1298 (Pa. 1992); *In re Adoption of Christopher P.*, 389 A.2d 94 (Pa. 1978). *See also* *Petition of City of Clairton*, 590 A.2d 838 (Pa. Commw. Ct. 1991).

Because Petitioner has failed to join any law enforcement official or provide notice of its attack on the constitutionality of the clergy-communicant privilege, Respondent requests that this Court respectfully stay any resolution of the Application until such as been remedied.

B. Alternatively, The Application Should Be Denied Because There Are Issues of Material Fact

Assuming *arguendo* that Respondent's preliminary objections are overruled and the Court is in a position to respond to this Application, the Application should be denied. *See Jubelirer v. Rendell*, 953 A.2d 514, 521 (Pa. 2008). Petitioner requests that this Court enter an order declaring that the elders of Ivy Hill are entitled to invoke the clergy-communicant privilege because they are clergymen as

described by Section 5943 of the Judicial Code. (*See* Pet’s. Am. Br. at 68) The Petitioner, however, does not have a clear right to a judgment against the Department and there are material issues of fact in dispute.

1. The Department does not conduct criminal investigations and it is not clear that Petitioner has a right to judgment against it.

Petitioner makes a blanket averment that the Department is tasked with conducting investigations under the CPSL. (Pet. ¶ 8 *citing generally* 23 Pa. C.S. § 6334.1). The Department disputes such and asserts that Petitioner’s requested right to a judgment against it is not as clear as alleged.

The Department is the Commonwealth agency charged with administering and overseeing the implementation of the CPSL. (Pet. ¶ 7) More specifically, the Department is tasked with, among other things: (a.) promulgating regulations necessary to implement the CPSL (*see* 23 Pa. C.S. § 6306); (b.) maintaining a toll-free hotline for reporting abuses (*see id.* § 6332) and a statewide database of protective services (*see id.*); and, (c.) providing notice of reports of suspected child abuse to appropriate county agencies and law enforcement to conduct investigations and initiate enforcement actions (*see id.* § 6334).

Petitioner cites generally to Section 6334.1, entitled Responsibility for Investigation, to aver that the Department is tasked with “conducting investigations under the CPSL[.]” (Pet. ¶ 8(f)). This section of the CPSL, however, provides that the Department shall establish procedures regarding how it responds to reports of

suspected child abuse. 23 Pa. C.S. § 6334.1. Unambiguously, this section of the CPSL requires the Department to provide notice of the reported suspected abuse to appropriate county agencies and law enforcement officials to investigate. *Id.* The Department is effectively like a 911 call center that obtains necessary information to dispatch the right responders to investigate reports of suspected child abuse.

Nothing within the CPSL provides the Department the authority to investigate either a report of suspected child abuse or an occurrence of failing to report suspected child abuse. As such, Petitioner's right to a declaratory judgment against the Department is not clear and its Application for Summary Relief as to Count I of the Petition should be denied.

2. The role of elders is a genuine issue of material fact precluding the right to summary relief.

An application for summary relief is properly evaluated according to the standards for summary judgment. *Myers v. Commonwealth*, 128 A.3d 846 (Pa. Commw. Ct. 2015). A motion for summary judgment may be granted only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *See* Pa. R.C.P. 1035.2; *Strine v. Commonwealth*, 894 A.2d 733, 737 (Pa. 2006). A factual issue is considered "material" for summary judgment purposes if its resolution could affect the outcome of the case under the governing law. *Strine*, 894 A.2d at 738 *citing* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Petitioner spends a substantial amount of time explaining the role of the elders at Ivy Hill and their obligation to provide spiritual guidance and counseling to congregants. (*See* Pet. ¶¶ 10-14, 20, 22, 25-32, 45) Whether or not an elder is a member of the clergy entitled to invoke the clergy-communicant privilege is the primary issue presented in the Petition making its resolution material.

According to Petitioner, at Ivy Hill, there are presently seven volunteers who serve as elders, taking the spiritual lead in the congregation as ordained ministers who are allegedly responsible for, among other things, hearing confessions. (*Id.* ¶¶ 10-14, 20) But according to the Jehovah's Witnesses website, the role of the elder is to care for the congregation and watch over them. *See* How Do the Elders Serve the Congregation? <https://www.jw.org/en/library/books/jehovahs-will/congregation-elders/> (Last visited October 2, 2020). The elders do not dominate their people, but rather, they contribute to their well-being and joy. *See id.* Elders preside over the congregation meetings and take the lead in evangelizing activity. *See id.* The elders are also there to provide personal encouragement and may visit with congregants to offer help and comfort. *See id.*

Petitioner requests that this Court enter an order declaring that the elders of Ivy Hill are entitled to invoke the clergy-communicant privilege, but nothing publically available from the Jehovah's Witnesses' suggests that an elder hears confessions or has any individualized spiritual authority as suggested in the

Petition. The underlying role of an elder at Ivy Hill is a genuine issue of material fact that requires further discovery. Because there is a dispute between the publically available information presented by the Jehovah's Witnesses and the information contained within the Petition this Application as to Count I of the Petition should be denied.

C. Receiving the Imprimatur of this Court as Validation of a Defense to a Potential Future Lawsuit Is Not Appropriate Relief.

Finally, despite Petitioner's assertion that there is unclear application of Section 5943 of the Judicial Code as to the elders of Ivy Hill Congregation, the plain language of the statute and the Pennsylvania Supreme Court have provided guidance as to how courts should review this evidentiary privilege when asserted.

Petitioner is concerned that elders have to decide immediately whether their communication with a congregant triggers a duty to report suspected child abuse under the CPSL. (*See* Pet's. Am. Br. at 13-14) According to Petitioner, they are faced with a critical dilemma, because if an elder believes a communication is privileged, and law enforcement (not the Department) later disagrees, then they may become subject to criminal charges for failing to report the suspected abuse. (*Id.* at 14) For this reason, Petitioner requests that this Court declare that the elders of Ivy Hill are entitled to invoke the clergy-communicant privilege because they are clergymen as described by Section 5943 of the Judicial Code. (*Id.* at 68)

Declaratory relief should be withheld when the request for relief is an attempt to adjudicate the validity of a defense to a potential future lawsuit. *Osram Sylvania Prods., Inc. v. Comsup Commodities, Inc.*, 845 A.2d 846 (Pa. Super. Ct. 2004). The clergy-communicant privilege is an evidentiary privilege which provides that a member of the clergy shall not be compelled to disclose information in any legal proceeding, trial or investigation that was obtained “in the course of his duties” . . . “secretly and in confidence[.]” *See* 42 Pa. C.S. § 5943.

Respondent was unable to locate a single case where a Pennsylvania court established that a statutory evidentiary privilege, such as the clergy-communicant privilege, applied to an identified individual or entity in perpetuity. The Pennsylvania Supreme Court has articulated that the relevant question regarding the privilege is not based on the member of the clergy’s status, as overwhelmingly argued by Petitioner, but is based on the nature of the communication in question. *See Commonwealth v. Stewart*, 690 A.2d 195, 198 (Pa. 1997), *discussing Hutchison v. Luddy*, 606 A.2d 905 (Pa. Super. Ct. 1992).

In *Commonwealth v. Stewart*, the Pennsylvania Supreme Court identified that evidentiary privileges are reviewed on a case-by-case basis by courts who should accept testimonial privileges only to the very limited extent that permitting a refusal to testify has a public good. *Id.* at 197 *citing In re Grand Jury Investigation*, 918 F.2d 374, 383 (3d. Cir. 1990). Further, the Court expressed that

pursuant to Pennsylvania law³, “application of the clergy-communicant privilege is not based solely on the clergy’s status, but whether the communication was made in confidence in the context of a penitential or spiritual matter.” *Id.* at 200.

Nothing prevents the elders of Ivy Hill from invoking the clergy-communicant privilege. Any individual may invoke an evidentiary privilege. It is up to the courts, however, to determine on a case-by-case basis whether the individual who invoked the privilege shall be compelled to disclose information in any legal proceeding, trial or investigation that was obtained in confidence in the context of a penitential or spiritual matter. Clearly, therefore, providing a declaration that the elders are entitled to invoke the privilege is simply another way to attempt to adjudicate the validity of a defense to a potential future lawsuit.

Because it would not be proper for the Court to provide such relief, Respondent respectfully requests that this Honorable Court deny the Application for Summary Relief.

³ Law embodied in *Hutchison v. Luddy*, 606 A.2d 905 (Pa. Super. Ct. 1992), *Commonwealth v. Patterson*, 572 A.2d 1258 (Pa. Super. Ct. 1990), and *Fahlfeder v. Pa. Bd. of Probation & Parole*, 470 A.2d 1130 (Pa. Commw. Ct. 1984)

CONCLUSION

Respondent respectfully requests that this Honorable Court stay disposition of the Application for Summary Relief pending resolution of Respondent's Preliminary Objections, or alternatively, for the various reasons articulated above deny the Application in its entirety.

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CONFIDENTIAL INFORMATION CERTIFICATION

I certify that this filing complies with applicable state and local rules and the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts*, which require filing confidential information and documents differently than non-confidential information and documents.

s/ Nicole R. DiTomo
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CERTIFICATE OF SERVICE

I, Nicole R. DiTomo, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on October 2, 2020, I caused to be served a true and correct copy of the Respondent's Brief in Opposition to the Application for Summary Relief to the following:

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