

that they were well suited for marriage. The Session of First Presbyterian (Session) gave prior approval to the marriage.

The ceremony took place on March 1, 2008. The program for the wedding service was entitled "A Service of Christian Marriage and Worship" and the service followed the customary Presbyterian liturgy for marriage found in the Book of Common Worship. During the homily, Southard warned Herwig and Duhamel that "the majority of people out there may challenge you on the very fundamental fact of whether you are married at all." At the conclusion of the service, Southard proclaimed the two women to be "joined together in holy marriage" and stated that they might "seal the covenant of marriage with a wedding kiss."

At the time the events of this case occurred, the Commonwealth of Massachusetts recognized same-gender marriages conducted within its borders as legal marriages. On March 12, 2008, the Session added the marriage to its register of marriages. A certificate of the marriage of Duhamel and Herwig was signed by Southard as a member of the clergy and recorded in the town records on March 13, 2008.

This Commission's decision in *Spahr v. Presbytery of the Redwoods* (Minutes, 2008, p. 314), was rendered on April 28, 2008, after the marriage was conducted.

Procedural History

This is an appeal of a decision of the SPJC dated June 25, 2010, in which the SPJC reversed a decision of the Permanent Judicial Commission of the Presbytery (PPJC), rendered on August 22, 2009. The PPJC decision came as the result of a disciplinary complaint filed against Southard, which was tried by the PPJC on August 22, 2009. Presbytery's prosecuting committee initially promulgated five charges against Southard, but they were revised and consolidated such that two charges were actually tried by the PPJC. Neither charge was sustained by the PPJC.

The two charges were:

Charge 1: On 1 March 2008, in the sanctuary of the First Presbyterian Church of Waltham, Massachusetts, the Rev. Jean Southard as a minister of the Word and Sacrament violated the Constitution of the Presbyterian Church (U.S.A.) by participating in and directing a worship service publicly witnessed and acknowledged by the community of faith

- a) that appropriated the liturgical forms for Christian marriage to celebrate the marriage of two women sanctioned by civil law and purporting to be consistent with the Christian understanding of marriage under the Constitution of the Presbyterian Church (U.S.A.);

- b) where Rev. Southard declared that as a result of the marriage ceremony she performed, the two women were then joined in Christian marriage, declaring a new status that is reserved to the marriage of one man with one woman under the Constitution of the Presbyterian Church (U.S.A.);
- c) where Rev. Southard failed to differentiate between the marriage celebrated between the two women and a Christian marriage between one man and one woman, but rather directed the marriage worship service to be similar to the marriage service between one man and one woman under the Constitution of the Presbyterian Church (U.S.A.), by conducting the service in the sanctuary and by including in the worship service one or more of the following elements:
 - i) the two women declared their intention to enter into Christian marriage;
 - ii) the two women exchanged vows of love and faithfulness similar to the vows expressed by a man and a woman in a ceremony of Christian marriage;
 - iii) prayers were offered for the two women as a new couple in their new dimension as being married together;
 - iv) Rev. Southard declared that as a result of the marriage ceremony the two women were then joined in Christian marriage.

By so participating and directing the worship service, Rev. Southard disregarded the Directory for Worship W-4.9000, in particular W-4.9001, which expressly defines our biblical and constitutional understanding of Christian marriage.

Charge 2: On 1 March 2008, in the sanctuary of the First Presbyterian Church of Waltham, Massachusetts, the Rev. Jean Southard as a minister of the Word and Sacrament failed to fulfill her ordination vow to be governed by our church's polity (W-4.4003e) by participating in and directing the ceremony as set forth in Charge #1, purporting to perform a Christian marriage between two women.

"Will you be governed by our church's polity, and will you abide by its discipline?..." --W-4.4003e

On appeal to the SPJC by the Presbytery, the SPJC, on June 26, 2010, reversed the decision of the PPJC and remanded the case to the PPJC to determine the degree of censure, if any, to be imposed. Southard filed a Notice of Appeal to this Commission on August 13, 2010, which was received by this Commission on August 16, 2010. This Commission determined that it had jurisdiction, that Southard had standing to appeal the SPJC decision, that the Notice of Appeal was timely filed, and that the Notice of Appeal stated one or more of the grounds for appeal under D-13.0106.

A hearing on this Appeal was held by this Commission on February 4, 2011, in Louisville, Kentucky.

Specifications of Error

Specification of Error No. 1 (Appellant's 7 and 10): The SPJC erred in constitutional interpretation by determining that Southard committed an offense by participating in and directing a same-gender marriage ceremony as a Christian marriage.

This specification of error is sustained.

Specification of Error No. 2 (Appellant's 9): The SPJC erred in constitutional interpretation by determining that Southard violated her ordination vows by participating in and directing the same-gender marriage ceremony as a Christian marriage.

This specification of error is sustained.

Specification of Error No. 3 (Appellant's 5, 6, and 8): The SPJC erred in constitutional interpretation by determining that a minister of the Word and Sacrament who performs (participating in and directing) a same-gender marriage as a Christian marriage commits an offense prohibited by the Constitution of the Presbyterian Church (U.S.A.), Authoritative Interpretations and violates his or her ordination vows.

(Note: Specification of Error No. 3 is distinguished from Specifications of Error No. 1 and 2 because the first two specifications pertain to Southard specifically, who acted prior to Spahr, while Specification of Error No. 3 refers to ministers of the Word and Sacrament in general.)

This specification of error is not sustained.

Specification of Error No. 4 (Appellant's 1): The SPJC erred in constitutional interpretation by failing to distinguish the difference between same-sex ceremonies and same-gender marriages.

This specification of error is not sustained (see "II. Appellant's Characterization of SPJC Error" below).

Specification of Error No. 5 (Appellant's 2): The SPJC erred in constitutional interpretation in finding that the four statements contained in W-4.9001 constitute an exclusive definition of marriage in the Presbyterian Church (U.S.A.).

This specification of error is not sustained (see "II. Appellant's Characterization of SPJC Error" below).

Specification of Error No. 6 (Appellant's 3, 13, and 14): An error in the proceedings occurred when the SPJC reversed the not guilty verdict of the PPJC without providing Southard with certain

constitutionally required due process safeguards. This was contrary to D-11.0401 through 11.0403 and therefore constitutes an irregularity in the proceedings and an injustice in the process and the decision.

This specification of error is sustained.

Specification of Error No. 7 (Appellant's 4, 11, and 12): The SPJC erred when it reversed the decision of the PPJC by reinterpreting and rephrasing the original charges to determine Southard was guilty of "performing a same-gender marriage as a Christian marriage." This modification of the original charges constituted an irregularity in the proceedings and an injustice in the process and the decision.

This specification of error is sustained.

Decision

I. Constitutional Interpretation (GAPJC Specifications of Error No. 1-3)

In this case, this Commission considers whether a minister of the Word and Sacrament is permitted under the Constitution of the PCUSA to conduct a marriage of two persons of the same gender when such marriages are permitted under the laws of the state in which the marriage is performed.

The precedents governing this case begin in 1991, when the General Assembly stated, in an Authoritative Interpretation, (Minutes, 1991, Part I, pg.____) (1991 AI): "[S]ince a Christian marriage performed in accordance with the Directory for Worship can only involve a covenant between a woman and a man, it would not be proper for a minister of the Word and Sacrament to perform a same sex union ceremony that the minister determines to be the same as a marriage ceremony." In *Benton v. Presbytery of Hudson River* (Minutes, 2000, pp. 580-89), this Commission quoted and affirmed the language of the 1991 AI.

The 1991 AI, as well as *Benton* and *Spahr*, involved relationships that did not constitute legal marriages as defined by the applicable civil law. The question before this Commission, then, is whether the Massachusetts law defining this relationship as a legal marriage changes the impact of the definitions in *W-4.9001*. This Commission holds that it does not. While the PCUSA is free to amend its definition of marriage, a change in state law does not amend the Book of Order. It is the responsibility of the church, following the processes provided in the Constitution for amendment, to define what the PCUSA recognizes as a "Christian marriage." Consequently, *Spahr's* holding, "By the definition in *W-4.9001*, a same sex ceremony can never be a marriage," remains in effect.

This Commission further held in *Spahr*, for prospective application, "that the liturgy should be kept distinct for the two types of services." In light of the change in the laws of some states, this

Commission reiterates that officers of the PCUSA who are authorized to perform marriages, when performing a ceremony for a same-gender couple, shall not state, imply, or represent that the same-gender ceremony is an ecclesiastical marriage ceremony as defined by PCUSA polity, whether or not the civil jurisdiction allows same-gender civil marriages.

This Commission concluded in Spahr that prior authoritative interpretations lacked mandatory language. Southard conducted this ceremony two months prior to Spahr. Sensitive to the authoritative interpretation in Spahr, this Commission agrees with the SPJC that Spahr cannot be applied retroactively to the facts of this case. Therefore, Southard did not violate the Book of Order or her ordination vows by erring in her constitutional interpretation. She did not commit an offense because the applicable authoritative interpretation (Spahr) had not yet been promulgated.

II. Appellant's Characterization of SPJC Error (GAPJC Specifications of Error No. 4 and 5).

This Commission does not sustain these two Specifications of Error because they do not accurately reflect the holding of the SPJC as to the matters involved.

III. Due Process (GAPJC Specification of Error No. 6).

The SPJC reversed the PPJC, finding Southard guilty on both counts, and remanded the case to the PPJC for a determination of censure. This was error. When an appellate permanent judicial commission reverses a not guilty finding, it must remand the case for a new trial, rather than imposing its own guilty verdict. As this Commission held in Davis (cite), the finding of guilt can only be made by the trier of fact, which has an opportunity to hear and evaluate the evidence. If the appellate body finds that the trier of fact has made an error of law, the proper procedure is to identify that error and remand for a new trial.

In this case, there were disputed questions of fact, particularly around the issue of intent. The PPJC did not address these issues because it determined elsewhere that Southard's actions did not violate the Book of Order. It would have been necessary for the trier of fact to consider these issues in order to determine guilt.

IV. Charges (GAPJC Specification of Error No. 7).

In reversing the PPJC, the SPJC did not address the details of charge 1. By addressing charge 1 only in its generalities, the SPJC effectively amended the charge to remove the detailed references to specific actions previously required by the PPJC. Such a modification of charges is not appropriate on appeal.

Order

IT IS THEREFORE ORDERED that the Decision of the Synod of the Northeast is hereby reversed in part and affirmed in part.

IT IS FURTHER ORDERED that the judgment of the Synod of the Northeast finding Southard guilty on charges 1 and 2 is reversed, and the Presbytery of Boston's judgment of not guilty on charges 1 and 2 is reinstated.

IT IS FURTHER ORDERED that the Stated Clerk of the Presbytery of Boston report this decision to the Presbytery of Boston at its first meeting after receipt, that the Presbytery of Boston enter the full decision upon its minutes, and that an excerpt from those minutes showing entry of the decision be sent to the Stated Clerk of the General Assembly.

IT IS FURTHER ORDERED that the Stated Clerk of the Synod of the Northeast report this decision to the Synod of the Northeast at its first meeting after receipt, that the Synod of the Northeast enter the full decision upon its minutes, and that an excerpt from those minutes showing entry of the decision be sent to the Stated Clerk of the General Assembly.

Absences and Non-Appearances

Commissioner Margaret A. MacLeod did not participate in this case in accordance with (cite).

Certificate

We certify that the foregoing is a true and correct copy of the decision of the Permanent Judicial Commission of the General Assembly of the Presbyterian Church (U.S.A.) in Disciplinary Case 220-102, Jean K. Southard, Appellant (Accused), vs. The Presbyterian Church (U.S.A.) through the Presbytery of Boston, Appellee (Complainant), made and announced at Louisville, KY on February 7, 2011.

Dated this 7th of February, 2011.

Susan J. Cornman, Moderator
Permanent Judicial Commission of the General Assembly

Gregory A. Goodwiller, Clerk
Permanent Judicial Commission of the General Assembly

I certify that I did transmit a certified copy of the foregoing to the following persons by Fed Ex, Next Day Air, directing C. Laurie Griffith to deposit it with Fed Ex at Louisville, KY on February 7, 2011.

Sara Taylor, Counsel for Appellant
Jean K. Risley, Counsel for Appellee
Stated Clerk, Synod of the Northeast
Stated Clerk, Presbytery of Boston
General Assembly Permanent Judicial Commission

I further certify that I did transmit a certified copy of the foregoing to the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) by delivering it in person to C. Laurie Griffith, on February 7, 2011.

Gregory A. Goodwiller, Clerk
Permanent Judicial Commission of the General Assembly

I certify that I received a certified copy of the foregoing, that it is a full and correct copy of the decision of the Permanent Judicial Commission of the General Assembly of the Presbyterian Church (U.S.A.), sitting during an interval between meetings of the General Assembly, in Louisville, KY on August 8, 2010, in Disciplinary Case 220-102, Jean K. Southard, Appellant (Accused), v. Presbyterian Church (U.S.A.) through the Presbytery of Boston, Appellee (Complainant) and that it is the final judgment of the General Assembly of the Presbyterian Church (U.S.A.) in the case.

Dated at Louisville, KY on February 7, 2011.

C. Laurie Griffith
Manager of Judicial Process and Social Witness

Concurring Opinion

While we agree with the constitutional interpretation of the majority, we are intensely troubled by the underlying issue – the marginalization of gay, lesbian, and bisexual people by the constitution of the Presbyterian Church (PCUSA). This issue is larger than the PCUSA. It is a human rights issue.

The PCUSA is reformed and always being reformed. The constitution is contradictory in its language regarding the acceptance of our gay, lesbian, and bisexual brothers and sisters into the full fellowship of the church. See for example, G-4.0403; G-5.0103; G-5.0302; G-6.0106b; W-4.9000. We urge the General Assembly to amend the constitution to allow for the marriage of same sex couples in the PCUSA, and otherwise welcome gay, lesbian, and bisexual people into the full fellowship of the church.

Dated this 6th day of February, 2011

Jeana Lungwitz
Barbara Bundick
A. Bates Butler, III
Michael Lukens
Rebecca New

Concurring Opinion

We concur in this decision. We have, nonetheless, a continuing concern about a foundational assumption in this case as well as other recent cases dealing with the definition of Christian marriage. This assumption would ground the definitive interpretation of marriage in the provisions of W-4.9001. The concern is whether W-4.9001 provides an effective and unambiguous definition of Christian marriage.

First, W-4.9001 is an introductory narrative for the whole section on marriage, outlining its biblical and theological characteristics as background to provisions of pastoral practice and nurture. Its content serves to establish a progression of four theological claims (gift, civil contract, covenant, commitment) as a foundation for the church's general understanding of marriage.

In W-4.9001, there is have an overarching, schematic narrative that develops a biblical and theological progression. These elements are explicated as four simple but profound claims, each of which has theological bearing. Marriage is viewed within a progression of God's gift (general revelation in the created natural order), to civil order (part of universal civil order), to covenant (a distinctive mark of biblical people), and the characteristics of such covenant (promise, trust, and faithful commitment).

To claim that this paragraph is primarily and intentionally legal in nature places a strain upon its obvious narrative purpose. As a fourfold theological outline of Christian marriage in narrative form, it is arguable that it proposes either regulatory imperative or legal intention. Certainly, it does not have the kind of language or format that the church has come to expect in definitional statements, for the language in this paragraph is not obviously legislative, in the sense of providing regulatory lines that define boundaries or proscribe behavior.

Further, recent definitional arguments have revolved around ancillary elements in the text, which have taken priority over the primary focus of its sentences. The key sentence ("For Christians marriage is a covenant through which a man and a woman are called to live out together before God their lives of discipleship") has been treated as a consummate definition and legal regulation, based on one element in its secondary clause. The question may be raised whether a portion of a secondary clause, one part in a set that elaborates upon and describes the character of a covenantal relation, constitutes an absolute and exclusionary prescription. In fact, it can be argued that it is not immediately clear or textually obvious that any of the ancillary clauses in these four provisions rises to the level of legal intention or definitional weight.

Thus, W-4.9001 has become contested regarding whether it can bear the interpretive weight that judicial process and decision has put upon it. The church needs a sharper degree of clarification and guidance that precisely defines how it understands marriage, especially in light of the high financial and personal burden involved. Given the contention regarding the nature and practice of Christian marriage in our time, it would be important and valuable for the Church to state its definition in clearer and more precise legislation.

Dated this 6th day of February, 2011.

Michael B. Lukens
H. Clifford Looney
Jeana Lungwitz
A. Bates Butler III
Yun Jin Kim
Rebecca New

Concurring Opinion

We concur with the Decision of the Commission, and with the holding that *Spahr* is not applicable as precedent because the actions taken by Southard took place before the *Spahr* Decision was rendered. However, it is disingenuous of Southard to claim that no guidance was available from the larger church on the advisability of performing a same-gender marriage.

The very language quoted in the History of the Decision from the Authoritative Interpretation of 1991 and *Benton* provides considerable counsel.

If, as *Benton* states, it is not “proper” for a minister to perform a same-gender ceremony determined to be the same as a marriage ceremony, it would logically seem to be “improper” for a minister to perform a ceremony that was, in actuality, a legally-sanctioned marriage service. This is particularly true in this case since, as the Decision points out, there is a direct conflict between the definition of marriage under local state law and the definition stated in our polity. Similarly, *Benton* antedates *Spahr* in stating the impropriety of using liturgical elements from the marriage service, especially a pronouncement that a new status has been conferred, whether the ceremony was a marriage (which would be itself “improper”) or a blessing of a same-gender relationship.

Southard should have consulted not only the Session about the advisability of officiating at this ceremony, but should have considered the guidance already available through the larger Church. While Southard may be commended for her desire to provide compassionate pastoral care, a failure to seek out the guidance of the larger Church would raise a concern about Southard's willingness to “be governed by our church's polity, and to abide its discipline.”

Meta Shoup Cramer
Bradley C. Copeland
William Scheu