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CANON LAW AND WILLS†

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IN DRAWING UP A WILL any conscientious lawyer seeks to insure exact fulfillment of his client's intent. To do this he anticipates, to the extent that he can, all possible obstacles to achieving the testator's objective. This demands of him, of course, much more than preciseness of language.

In the case of bequests made to the Catholic Church, its subsidiary corporations, or its officials, or of bequests involving matters subject to its control, professional vigilance also demands that the legal counselor take cognizance of the requirements of canon law. The following discussion may help him avoid defeating his principal's purpose.

The "Religious"

A whole category of persons in the Catholic Church to whom special consideration must be given as beneficiaries are known canonically as "religious." These are men or women who join a religious institute or community; that is, an order, if its members take solemn vows; or a congregation, if they take simple vows.¹

One of the vows taken by all religious is that of poverty. In all cases, this excludes them from any independent use of real or personal property. Those with the simple vow of poverty may own property; their use of it, however, is restricted. Those with the solemn vow may not, under canon law, validly own property. All goods which would, in the usual case, come into their ownership, vest instead in the order to which they belong. Property coming into the possession of a religious with simple vows by reason of his own industry or with reference to his institute vests in his institute and not in himself.

Thus, the royalties from a literary work written by any religious, of simple or solemn vows, belong to his institute. A bequest made to any religious by reason of his function in his community — superior, treasurer, etc. — belongs to the institute. A bequest made for purely personal

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¹ Not every priest belongs to a religious institute and not every member of an institute is a priest.

reasons to a religious having only simple vows becomes his but his use of it is dependent upon his superiors. One made for any reason to a religious of solemn vows vests in the institute.

It should be noted that the above does not apply to priests who are not members of a community. These may own and use property without such restrictions.

A Difference in Tax

Doubts have arisen at times over bequests made to individual priests¹ or to religious communities when it seemed, yet was not clear, that the testator's intent was to assist a corporate body under the care of the priest or community — a college, hospital, parish, diocese. Again, a religious may have been named a legatee although the community was the intended beneficiary. If the religious were in solemn vows the community would still benefit. If, in simple vows, and the intent of the testator were not clear from other circumstances, a doubt may arise. Its avoidance would make a great difference financially, since an inheritance tax will be collected when the legacy goes to an individual and its purpose is not clearly determined.

Thus, a woman bequeathed \$80,000 to her daughter, the superior of an institute of women having solemn vows. The mother (but seemingly not her lawyer) was aware that by canon law the whole sum would go to the institute, not to her daughter. Knowing and intending this, she made no explicit reference to the ultimate disposal of the bequest, designating as beneficiary "my daughter, Sister _____, superior of St. _____ Convent." The civil law, however, regarded this as an estate left by a parent to her child and imposed an inheritance tax. Care in drawing up this will would have ex-

empted the estate from tax and would have completely achieved testatrix's purpose.

Other regrettable situations have resulted from similar conformance with canon law exclusively, while ignoring civil law. The former requires that funds assigned to the superior officer of an ecclesiastical corporation be presumed intended for the purposes of the corporation, unless the contrary is clearly indicated. In American law, a gift is not to be held charitable merely because of the professional character of the beneficiary. The funds must be assigned to the charitable corporation as such, or their use for charitable purposes expressed; otherwise, they vest in the individual named. This is of particular importance, of course, since bequests made for charitable and religious purposes are exempt from inheritance taxes.

Intent and Cy Pres

Specification of the use of a bequest does not always insure execution of testator's intent. Thus, a chalice is usually, though not always, a possession personal to a priest. On the contrary, a ciborium (another sacred vessel) almost invariably belongs to a church or institution. If money is left to "the pastor of St. James parish" for the purchase of either, the canonical interpretation would be that it goes to the parish church. If money were left to "Father X, pastor of St. James parish," for a ciborium the same interpretation would be made. But, if it were for a chalice for "Father X, pastor of St. James parish," the presumption under canon law would favor Father X as personally entitled to the bequest.

Often the carrying out of intention may depend on the consent of another party. If a bequest were made for the installation of

a marble altar in a certain church, its fulfillment would depend upon the pastor. He may not want a new altar, or at least, one of marble. There is the possibility that the church building has ceased to exist. Here there might be real conflict between decisions of civil and canon law based on the doctrine of *cy pres* which would interfere with attainment of the testator's objective. In canon law any reduction or change in the execution of a will is to be made by papal authority, unless the testator has explicitly granted such a right to the local bishop or archbishop, or unless fulfillment of the terms is clearly impossible. In this latter case, the local official would have the authority to change the will unless mass stipends were involved in which case a papal decision is necessary. The decision made by the ecclesiastical authority might differ from that arrived at by the civil authority.

Bequests for Masses

The form of bequest most commonly made by Catholics is for the offering of masses after their death. To understand how faults in the drawing up of such bequests can give rise to difficulties before the law, a knowledge of the nature and purpose of mass stipends is necessary.

The priest offering mass may include in this act an individual's intention. It is customary, though not compulsory, for the individual who submits the specific intention to offer a stipend in money. Originally, the purpose of the stipend was to provide support for the priest for one day, as determined by law or local practice. Church authority has been slow to increase the amount specified for mass stipends, despite rises in the cost of living.

The total stipend offered for a mass

must go to the priest who offers the mass. When the stipend is greater than the established amount and the excess is evidently intended for the priest to whom the stipend was first given, he may retain the excess. Only one stipend may be accepted for one mass. Normally, a priest may offer only one mass a day. However, with some exceptions, even when in certain circumstances and with proper permission he offers more, he may not accept more than one stipend. Because their community provides their daily support, priest members of a religious community must turn over to it all mass stipends.

If a sum of money is bequeathed as stipends with no indication of the number of masses desired, there must be as many masses offered as there are stipends in the total amount, based on the determined maximum stipend in the place in which the testator resided. Any exception to this must be based on presumptions legitimately established in canon law.

Conditional Bequests

Certain conditions can be established for the offering of a mass. These may concern place, time, and type of mass. Such conditions are binding on the priest who assumes the obligation to offer the mass. The obligation may not be deferred more than a year, unless the donor permits a longer delay.

An institution, including a diocese, parish, or mission is not a proper beneficiary for masses. The obligation to offer mass always devolves upon a physical person. If a bequest for masses is made in favor of a corporate person, it has only the right to determine which priest or priests will celebrate the masses. The celebrant, not the corporation, is entitled to the stipends.

Hence, if a testator desires to benefit an institution by a bequest he must do this independently of any bequest for masses.

For example, one bequest (of a type which arises quite frequently) assigned \$1,000 "for masses" to a home conducted by nuns for the aged poor. The sisters accepted the money but had to distribute the whole sum to various priests since its use as mass stipends was stipulated. Neither the sisters nor their aged charges derived direct monetary benefit from this legacy.

If the location for the offering of masses is stipulated — whether it be in testator's parish church or in any specified church — the bequest may fail because the clergy at the church are unable to assume the obligation due to commitments for nuptial and funeral masses, etc. Priests in other (e.g. mission) areas may be able to satisfy it.

Specification of the amount of money to be used as mass stipends without any indication of the number of masses to be offered may work against testator's purpose. If testator intends to benefit an individual priest by bequeathing to him a large sum of money and asking for masses without specifying the number, he is likely to defeat his own intent. Thus, \$5,000 may be left to a priest "for masses" on the assumption that this will benefit him personally. In actuality, he may have to turn most of it over to others to insure fulfillment of the obligation within a reasonable time. The remainder may vest in him only at the rate of one determined maximum stipend per day.

Foundations

Because of certain complications arising from the establishment of charitable trusts in civil law, one might expect that special care is needed when the provisions of canon

law must also be fulfilled. But this is not the case.

First, canon law requires that civil law be followed in establishing ecclesiastical foundations.² This eliminates most potential sources of conflict.

Secondly, a principal can establish a foundation for the benefit of the Church or some agency or activity within the Church independent of canon law. By canonical definition, an *ecclesiastical* foundation is capital given to a corporate *ecclesiastical* person with a perpetual, or long-term (ten years or more) obligation to carry out some activity connected with the Church (e.g. support of the poor, subsidy for education). The consent of the local bishop or archbishop must be given before the foundation may be accepted. Moreover, he has the right to demand an accounting of any foundation.

Yet, a foundation can be established and recognized as such by the Church for the benefit of an ecclesiastical corporation, or for some purpose pertaining to the Church's activities, without observance of these formalities. This result can be achieved by establishing a foundation simply in accord with civil law, the fruits of which are to be used for the above-mentioned purpose. This would not be an *ecclesiastical* foundation because the capital was not given to an *ecclesiastical* corporation and consequently would not come within the scope of canon law. Concomitantly, of course, no ecclesiastical person, physical or corporate, assumes the obligation of fulfilling the purpose of such a foundation.

Accordingly, if the interest from a trust fund is to be used as a stipend for an an-

² Catholic Church law pertaining to these is found in canons 1544-1551 of the Code of Canon Law.

nual mass in perpetuity, no priest is obliged to accept this stipend and the accompanying obligation. Had the same been established as an ecclesiastical foundation, the obligation would rest on the ecclesiastical corporation.

Suggestions

1. In assisting a testator who intends to make some Catholic institution, cleric or religious a beneficiary, the lawyer should first determine the precise object of the testator's charity, the capacity of the subject to benefit, and finally, pertinent legislation of both civil and canonical codes. The intended beneficiary — physical or corporate — should be consulted about capacity to accept a specific benefit and about the most effective means of fulfilling the bequest.

2. When the testator desires to help a special cause, care must be taken to eliminate as far as possible all ambiguity, distinguishing clearly, for example, between a college and the religious community which controls it, between a corporate body in the Church and an individual associated with it. When an ecclesiastical entity is an intended beneficiary but legal restrictions prevent its incorporation, the purpose of the bequest should be made quite explicit.

3. When a bequest is made to some church institution, determination of its use should be left, as much as possible, to the administrators of the institution. What was meant to be a generous benefaction often turns out to be a burdensome luxury, although some essential need remains unsatisfied. A bell-tower is not the most welcome gift to the college which has no library building. Or, if the testator is chiefly concerned with accomplishing a certain matter,

for example, the erection of an altar, he should grant a great deal of latitude, even as to the church in which it will be located, to his executor or to some ecclesiastical functionary.

4. Bequests for masses cannot serve directly to help an institution since the stipends necessarily go to persons. The testator who wants to benefit his parish, a school, a religious community, a mission, or the like, should provide explicitly for this. A bequest for masses should be completely disassociated from such a provision. The same is true if personal benefit is intended for an individual priest who is not a member of a community; or at least the mass stipends ought to be well above the ordinary amount.

5. Unless previous arrangements have been made with the priest in charge, it is unwise to make a bequest for masses to be celebrated in a specified church. It would be prudent, instead, to request that masses be said within a designated period of time. For this to be effective a stipend larger than the locally determined maximum amount should be provided, thus permitting transmittal of the mass intentions almost anywhere.

6. For the same reason a number of masses, not merely a sum of money, ought to be specified. -

Some of these matters may appear trivial to the uninitiated but the lawyer is all too frequently reminded of the disastrous results of oversights in preparing a testamentary document. In drafting the wills of those who want to include some entity or matter subject to Catholic Church law, he must be careful to observe both the civil and canonical systems of law. Only then can he rest assured that his clients' wishes will be exactly executed.