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DIOCESAN REAL ESTATE TRANSACTIONS—CANON AND CIVIL LAW IMPLICATIONS

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The topic of this discussion is the "Corporate Structure of the Diocese and the Effect on Title." In this context, the term "title" refers to properties and real estate that is considered diocesan property, as contrasted with property that is owned by religious orders or charitable organizations within the Catholic Church. The official Catholic Directory lists all the organizations that are part of the Catholic Church. The properties of these organizations are not diocesan properties. Diocesan property is property, in whatever form, to which the Ordinary holds title, as Ordinary.

One helpful way to approach the question of how title should be held is to consider the historical perspective of the Church. By this is meant trying to see the Church as it sees itself in its relationship to property. At the time of Christ, the Church did not own anything. Jesus and his disciples walked from place to place and the only property they possessed was the contents of the purse that Judas carried. In the early Church, the disciples of Christ had few possessions which they owned as a church. It was an oppressed Church until about 324 A.D. when Constantine the Great decided that the Catholic Church was a very important part of his life. He issued the Edict of Constantine which had the effect of recognizing the Catholic Church, permitting it to own property. Before this the Church was prohibited from owning property. Church property could only be owned by individuals who held title in their own names for the benefit of the Church. With this history of oppression and complete frustration in the ownership of property, the leaders of the Church in Rome, when permitted to own property, created the concept that the Church is a separate moral person independent of the State.

When the Church became recognized, it adopted many of the Roman law concepts. Among these was the division of the geographic area of the Church into subdivisions called dioceses. In the hierarchy of the Church, the Pope was the supreme moral person having jurisdiction over all of the dioceses. Below him were the Ordinaries who were inferior moral persons with leadership limited to their dioceses, below them were the pastors of the parishes. The theory of Church ownership of property which developed was that the bishops, the Ordinaries of the dioceses, would hold title to the properties and would hold it completely independent of the State. Title would pass directly to their successors in office without having to be answerable in any way to the State.

The Reformation brought about great changes in the Church's ownership of real estate. Henry VIII and his government established legislation which provided that churches would no longer own property pursuant to a status independent of the sovereign. Formerly, the Catholic Church had looked only to Rome and to the ecclesiastical hierarchy for authority to buy and sell real estate or to pass title from an Ordinary to his successor. The tenure of real estate now had to be under the jurisdiction of the sovereign.

In order to deal with hierarchical churches in England after the Reformation, the corporation sole was developed. This was a civil corporation composed of a single individual who held the position as corporation sole. In this manner, the needs of the hierarchical churches were met by permitting a single person to act for the church. The needs of the King were also met since the churches remained under his jurisdiction.

While this change in tenure of Church property took place in England, it did not occur in countries like Spain which remained under the Roman law. As a result, when North America was colonized and the United States was formed, both systems were, to some extent, incorporated into various state laws. Our law is based largely upon the English law, with strong Roman law influences in states which were colonized by the Spanish or French.

In the area of tenure of Church property, several different concepts have developed. The ownership of real estate is an area of the law generally reserved to the states. Presently, in the United States there are five models of tenure of Catholic Church real estate. Four of these are the charitable corporation, the charitable trust, where the Ordinary is the trustee for the diocese, the statutorily formed corporation sole, and the situation in which the Ordinary holds property in his individual name to preserve his authority. This latter method usually is used when other methods have failed. The fifth method is where the Ordinary holds title by virtue of his office in a manner somewhat like a corporation sole but not in any corporate form. The Catholic Church in each state has had to work through the state government to develop a method of tenure which

is compatible with state law while preserving the hierarchical lines of authority upon which Church government is based.

Rather than describe in detail all of these methods of tenure of real estate, I will explain how title is held and passed in the Archdiocese of St. Louis. The St. Louis system may be of interest to other dioceses that do things differently.

In Missouri, there is no statutory provision for a corporation sole, nor is there any statutory or case law prohibiting any specific mode of tenure of Church property.¹ The dioceses are thus free to select whatever method they consider most suitable. For instance, the Diocese of Kansas City uses the form of a nonprofit corporation in which there are three directors, the Ordinary being the prime director with controlling authority over the actions of the corporation. The Ordinary's ultimate control is an important element in any situation where an aggregate corporation is to act for a diocese. To follow through with the Catholic Church concept of the Ordinary being a distinct moral person with authority over properties of a diocese, if there is an aggregate corporation, it must be set up in such a way that regardless of the number of directors, the Ordinary exercises ultimate authority. By way of contrast, the Archdiocese of St. Louis, which is within the same state jurisdiction, has elected to use another mode of tenure which does not involve the use of a civil corporation, but which has been equally acceptable in civil law.

There are two major areas of concern which must be considered in establishing the manner in which title to diocesan property is taken and held. One is succession and the other is sales to outside parties. In both instances, the basic problem is passing a marketable title. We have had quite a bit of experience in the last 2 years with the problem of succession in St. Louis, and, of course, every diocese is constantly faced with the need to give a clear, marketable title to property being sold. In 1979, Cardinal Carberry retired as Archbishop succeeding himself in the capacity of Apostolic Administrator, which position he held until March of 1980, when he was succeeded by Archbishop May as Ordinary of the Archdiocese.

While, as I have indicated, we have no statutory law regarding tenure of Church property in Missouri, we are fortunate to have case law which specifically permits the Catholic Church to follow Church law in this regard. In *Klix v. Polish Roman Catholic St. Stanislaus Parish*,² the court was concerned with the ownership of property of a Catholic parish in the City of St. Louis. The Missouri Court of Appeals held that churches may

¹ See generally Comment, *The Role of Courts in Church Property Disputes*, 38 Mo. L. REV. 625, 636-37 (1973) (describing Missouri's neutral position towards control of Church property).

² 137 Mo. App. 347, 118 S.W. 1171 (Ct. App. 1909).

hold property according to the church's peculiar form of government and economy.³ The holding of this case has not been altered by subsequent decisions and it presently can be relied upon without difficulty. This case law gives the Ordinary free reign to hold and sell property, and permits succession in complete accord with Church law, without the need for additional civil law strictures.

All deeds to diocesan properties are made to the archbishop as archbishop, always including as part of the title the name of the grantee. Additionally, in the deed forms we always delete the word "heirs" and replace it with the term "successors." The effect of this is that the Ordinary holds title to real estate by virtue of his office. The ownership is not in a corporation, corporation sole, or trust, nor is it held individually. Therefore, in passing title or succession, there is no responsibility to the secretary of state or the attorney general, nor is there any danger of claims by heirs at law of a deceased archbishop. To better clarify that point, there is a recitation in the will of the archbishops that they hold title to diocesan properties, not individually, but in their capacity as archbishops.

When Cardinal Carberry retired as Archbishop and succeeded himself as Apostolic Administrator, we prepared an affidavit, signed by the chancellor, in order to make the change one of public record. The affidavit stated that the chancellor was familiar with the laws of the Roman Catholic Church and that title to all diocesan property was vested in Cardinal Carberry as archbishop. Since he had retired from that position and succeeded himself as Apostolic Administrator, title to all diocesan property was then vested in him in his new capacity. This affidavit, recorded in the ten counties which comprise the Archdiocese, was accepted by the title companies and lawyers. A similar affidavit was prepared and recorded when Archbishop May succeeded Cardinal Carberry. We have experienced no difficulty in this regard and every time a title search is conducted, title properly is revealed to be vested in John L. May, Archbishop

³ *Id.* at 371, 118 S.W. at 1179. The defendants in *Klix* were the pastor and five lay members of the Polish Roman Catholic St. Stanislaus parish, the six trustees of the congregation. Other members of the congregation became dissatisfied with Church practices and sought to be declared members of the Church corporation in order to have a more direct say in forming Church policy. *Id.* at 354, 118 S.W. at 1173. The court noted that recent legislative changes, such as omitting the need to attach a list of Church members to the articles of incorporation, signaled a more liberal legislative attitude toward the formation and policies of Church corporations. *Id.* at 371-72, 118 S.W. at 1178. The court stated that the statutory changes permitted a Church to organize a corporation with the whole congregation as incorporators or with a select group of incorporators depending on the religion's individual type of economy. *Id.* 118 S.W. at 1178-79. It then proceeded to hold that since the character of the religious body was hierarchical rather than congregational, and because only six persons were listed in the articles of incorporation, only those six were incorporators and the other Church members were therefore not part of the corporation. *Id.* at 372, 118 S.W. at 1179.

of St. Louis.

With respect to selling real estate and passing title, no problem exists because the title companies and lawyers accept our mode of tenure and require a deed only from the archbishop. One thing we do is give a special warranty deed rather than a general warranty deed. Additionally, in order to ease matters for the archbishop, we employ the technique of preparing and recording a limited power of attorney whereby the archbishop appoints one of the auxiliary bishops his attorney-in-fact to convey and accept conveyance of real estate. This also has been accepted by the title companies and lawyers and greatly simplifies the day-to-day problems of getting documents signed for closing.