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PROPERTY AND CONTRACTS IN CHURCH LAW

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I. INTRODUCTION

In our contemporary society, lawyers and judges have been the subject of much criticism accompanied by barbs and jokes. On a recent trip to visit with our friars in Fort Worth, one of them saved an edition of the comic strip "Shoe" for me. It pictured a bird taking a test in school. It was a fill-in-the-blank test. The statements were "a group of fish is called a *school*," "a group of lions is called a *pride*," "a group of geese is called a *gaggle*," "a group of quail is called a *covey*," "a group of lawyers is called a (*pause*) *conspiracy*." To add insult to injury, during my stay there was a column in the local newspaper that featured stories about the legal profession. One was about a judge who confided to a friend that he had been secretly given $10,000.00 by the plaintiff and $15,000.00 by the defendant in a case he was to judge. "What will you do?" asked the friend. "Return $5,000.00 to the defendant," the judge replied, "and decide the case strictly on its merits."

This criticism of lawyers even seems to be present in the Scriptures when Jesus says, "[w]oe to you lawyers." This was always a hard word for me to hear as I prayed the Scriptures, and I could never understand why Jesus said such things about lawyers. Then as I searched the New Testament more diligently, I found some answers.

First, we must closely examine who Jesus was referring to when he said, "[w]oe to you lawyers." As biblical scholars tell us, the lawyers were the teachers and interpreters of the law of Israel. They were important because the law was the heart of the religion of Israel, and the lawyers taught and explained the law especially in regard to religious thought and practice. Instead of being lawyers as we know them today, the lawyers Jesus condemned were more closely related to those we know as "theologians." This will probably not make theologians happy, but it is nice to

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know Jesus was not talking about us.

Second is the discourse of Jesus at the Last Supper when he said, "[i]f you love me and obey the commands I give you, I will ask the Father and he will give you another Paraclete — to be with you always."[1] Again, biblical scholars tell us the term "Paraclete" is derived from Greek legal terminology and is used to refer to a defense attorney, spokesman, intercessor or advocate. From this passage it is quite clear that Jesus considered the Holy Spirit and himself as attorneys or advocates and obviously had a great love and respect for the legal profession. In addition, since so many passages refer to the Father as a judge, it seems we could say that according to the Scriptures all the persons of the Trinity are practically card-carrying members of the bench and bar.

II. FUNDAMENTAL CONCEPTS

Canon law asserts the right of the church to acquire and use property in pursuit of its proper ends, which are divine worship, support of the clergy and other ministers, apostolic works, and other works of charity.

Ecclesiastical goods or church property are defined by who owns the property, which according to canon 1257 Section 1 can be the universal church, the Apostolic See, or some other public juridic person within the church.

A juridic person has many similarities to a corporation. A corporation is described as an artificial being, created by law and endowed with certain powers. It exists in the eyes of the law as separate from the persons who own or operate it. There are many types of corporations; public or private, stock or non-stock, profit or non-profit, etc.

A juridic person is also an artificial being created by canon law, endowed with certain rights and responsibilities. A juridic person is not "owned" by anyone; however, there are different types of juridic persons.

A juridic person is an aggregate of persons or things that has a mission or work of the church as its purpose. It is created by the law itself or the decree of some competent authority.[2]

A public juridic person can be an aggregate of natural physical persons or an aggregate of things. If it is an aggregate of persons, it can be collegial or non-collegial. It is collegial if it consists of at least three (3) persons and its members participate in its decisions; otherwise, it is non-collegial. A religious institute is a collegial public juridic person since its members participate in the institute by means of electing superiors, chapter delegates and council members to direct the affairs of the institute. A diocese or parish is a non-collegial public juridic person since its members

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[1] *John* 14:15-16

[2] 1983 CODE c.116, § 2.

do not elect the bishop or pastor or guide its affairs as directly as members of a religious institute. Thus, collegiate public juridic persons are closer to stock corporations in which members have the right to vote for corporate officers and direct its affairs.

A public juridic person also consists of an aggregate of things, such as property or goods (spiritual or material), which are dedicated to a particular work of the church. An autonomous pious foundation which is composed of buildings, equipment, and investments operating as a shelter for the poor would be an example of such a public juridic person. This type of public juridic person employs an administrator along with other persons who perform the work of the foundation. However, the persons who administer the work do not constitute the juridic personality of the foundation.

A public juridic person is brought into existence by the law itself or by the decree of the competent church authority.[3] Most public juridic persons are created by law, such as a diocese, a parish or a religious institute. There are a few public juridic persons that are established by the decree of the competent authority, such as the Catholic University of America, which was established by a decree of the Holy See.

Since many church works are incorporated, it is helpful to understand the relationship between juridic persons and corporations. Many of the Church's works are incorporated; however, each corporation is not the civil law equivalent of some public juridic person. In most cases a corporation holds property, and by its operations fulfills a church mission. A public juridic person, such as a diocese or religious institute, is usually a corporation, while each of its works, such as schools, hospitals, or other religious or charitable enterprises, are separately incorporated. Thus, there may be a series of civil law corporations all stemming from the apostolates of one public juridic person.

Public juridic persons also follow lines of accountability. For example, the parish is accountable to the diocese and the diocese to the Holy See. Likewise, a canonically erected house of a pontifical religious institute is accountable to the province, the province to the generalate, and the generalate to the Holy See. This accountability is followed in obtaining the necessary permissions for the administration and alienation of property.

III. ACQUISITION AND USE OF GOODS

The church acquires goods in the same manner as any natural or legal person. It can purchase goods, or receive goods and bequests. In fact, the church receives most of its goods by donation from its members.

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[3] *Id.*

Church property is classified into categories that help determine whether the property is subject to certain processes or permissions described in canon law. Some of these categories have almost the same meaning as civil law terms used to describe property. The terminology used in describing church property is: 1) stable (fixed) patrimony or unstable (free); 2) moveable or immoveable. Only three of these terms are used in the canons, namely, stable patrimony, moveable property and immoveable property. The term unstable or free has been used by the commentators to distinguish such property from stable patrimony. None of the terms used in the canons (stable patrimony, moveable or immoveable property) are defined in church law. The determination of whether goods fall into a particular category finds its source in church usage and the works of commentators.

Stable or fixed patrimony refers to those goods which have a fixed or specific purpose as determined by the donor or the competent ecclesiastical authority, such as a bishop canonically setting aside money for a retirement fund. The mere establishment of a retirement fund without designating the fund as stable patrimony is not canonically effective. Sometimes fixing or stabilizing property is known as immobilizing it. Free or unstable patrimony is money, funds, or investments not restricted to any fixed purpose. These terms have no close equivalent in civil law.

Immoveable goods are those which cannot be moved, such as land, buildings, or fixtures that are part of the building. Moveable goods are those which can be moved from place to place, such as furniture, livestock, or grain. for the most part, the civil law concept of real property is close to the canonical idea of immoveable property. However, in civil law, personal property affixed to land or buildings is usually considered part of the real property. Canon law would not consider all personal property attached to real property as immoveable. If the property can be removed without damaging or substantially diminishing the value of the real property, canonically it is moveable. Thus, a furnace, an X-ray machine, a CAT scanner or other attached equipment that would need to be replaced on a regular basis would not be considered immoveable property. The distinction is important because moveable property is not subject to the canons governing alienation while immoveable property is.

The distinction between corporeal and incorporeal property came from canon 1497, section 1 of the 1917 Code. It is not a distinction used in the 1983 Code; however, commentators may use the term to distinguish between different types of moveable property.

IV. THE ADMINISTRATION OF GOODS

The supreme administrator and steward of all church property is the Holy Father. In fact, he does not personally administer all church prop-

erty. The primary administrators are diocesan bishops, major superiors, and those they appoint as administrators. The administrator has the responsibility to ensure church property is used in a manner that is consistent with the purpose and teachings of the church. All church institutions are expected to follow church teaching on social justice and employment. Some specialized areas, such as education and health care, are the subject of specific church teaching or norms. Such obligations are often described as the "faith responsibilities" of administrators.

Church law also contains specific norms directed to the care and use of property. Canon 1276, section 1 provides that ordinaries are to supervise the administration of the property which belongs to the public juridic persons subject to them. Most works of a diocese or a religious institute are operated canonically by the public juridic person of the diocese or institute. Therefore, the bishop or major superior is the administrator. If a work is created as a separate public juridic person, an administrator is appointed.[4] There is also accountability from lower to higher juridic persons; for example, a parish is a public juridic person, and the pastor as administrator is accountable to the bishop, the administrator of the diocese, or the next higher public juridic person. The bishop is then accountable to the Holy See. A canonically erected house of religious institute is a public juridic person. Thus, the superior of that house is accountable to the major superior, the major superior to the supreme moderator, and the supreme moderator to the diocesan bishop if the institute is of diocesan right, and to the Holy See if an institute is of pontifical right.

Church law divides administrative acts into those which are ordinary and those which are extraordinary. Acts of ordinary administration may be performed without the permission of higher authority while extraordinary acts require the written permission of a higher authority. The canons do not define the nature of extraordinary acts, nor does the law give a list of transactions to be considered extraordinary. Canon 1277 provides that the conference of bishops is to define what is meant by acts of extraordinary administration, and we can expect this action in the near future.

Ordinary acts which do not require the permission of higher authority are those necessary for the day-to-day operation of the juridic person or its works, such as payment of current bills (salaries, utilities), repair of buildings, replacement of machinery or equipment, collection of income, opening of checking accounts, accepting gifts or donations, making required sales and purchases, investing free capital, designating free capital as a reserved fund, and short-term lease or rental of property. Actions that take place at some fixed interval, such as monthly, quarterly, or an-

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[4] *Id.* at c.1279, § 2.

nually, are considered acts of ordinary administration. Any act that a president or chief executive officer would have the authority to do or to delegate without being required to seek permission from higher authority, such as a board of trustees, would normally be an ordinary administrative act.

Extraordinary administrative acts are those which because of the nature or importance of the act itself, or its financial value, require the permission of a higher authority. The act of establishing a hospital or university is an act by its nature that is so important in and of itself that it would usually require the permission of a higher authority. However, the majority of extraordinary acts are those which are both important and are in excess of a designated financial limit, such as all acts of alienation, acceptance or refusal of major bequests, purchase of land, construction of new buildings or extensive repair of buildings, or expenditures over a certain amount.

Transactions which are ordinary for one juridic person would not necessarily be ordinary for another juridic person, depending on the size and nature of the work or works of the juridic person. Except for acts of alienation and the norms to be provided by the conference of bishops, the designation of that which is ordinary and extraordinary will be designated by the statutes of the juridic person. In contrast with acts of alienation, there is no maximum financial limit for acts of extraordinary administration which requires the permission of the Holy See.

Administrators are required to take an oath that they will properly perform the obligations of their office.[5] The law uses the notion of a good householder to describe the standard of responsibility to which an administrator is to be held. It provides a list of specific duties for administrators. Some of the duties that have civil law implications are:

1. To take care that ownership of church property is safeguarded through civilly valid methods.[6] This would include proper registration of legal title to real or personal property, holding of securities directly or through an insured brother, and establishing civil structures (corporations) that insure the juridic person can meet its canonical responsibilities.
2. To observe the prescriptions of both canon and civil law, donors, and legitimate authority. There is warning to take care so that the church is not harmed through the non-observance of civil law.[7] This section recognizes that a variety of transactions will be subject to both canon and civil law, and administrators have the obligation to see that transactions meet the standards of both laws. Two important examples of the appli-

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[5] *Id.* at c.1283, § 1.
[6] *Id.* at c.1284, § 2(2).
[7] *Id.*

cation of this section would be the payment of taxes and complying with government regulations.

3. To observe meticulously the civil laws pertaining to labor and social policy according to church principles in the employment of workers.[8] This is an important canon that stresses church works are to operate in accord with the civil law in regard to employment, as well as meeting the standards of church teaching. This is an important canon for structuring pay scales, responding to employee desires to organize, and collective bargaining.

If an administrator does not observe the requirements of canon law, recourse may be sought against the administrator in a church tribunal.[9] However, such actions are rare, although if the canon law responsibilities are set out in civil law documents, recourse may be pursued in the civil courts.

V. ALIENATION OF CHURCH PROPERTY

Two separate canons (Canon 1291 and Canon 1295) describe transactions that are subject to certain processes and permissions in order to be valid. The canons are really complementary and refer to those transactions in which the stable patrimony of a juridic person is transferred, encumbered, restricted or endangered. The canons do not define or describe the transactions. Church experience and practice has led to an understanding of which transactions are considered an alienation and which are not.

Examples of transactions considered an alienation would be a sale or transfer of property, spending fixed or stable capital, leasing of property as determined by the conference of bishops, changing organizational structure so the juridic person can no longer exercise its canonical obligations, borrowing money, issuing bonds, or obtaining a mortgage when church property is used as security, and transfer of property from a diocese to a religious institute.

Transactions that are not considered an alienation would be spending free capital (funds not immobilized), separately incorporating or reincorporating within the same juridic person, receiving mortgaged property as a gift, sale of land and buildings and use of the proceeds for a similar purpose, use of free capital as loan collateral, and replacement of furniture or equipment.

Although some of the above transactions may not be an alienation, they may be an act of extraordinary administration requiring permission of a higher authority. The difference is that if the transaction is an alien-

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[8] *Id.* at c.1286.

[9] *Id.* at c.1281, § 3.

ation and at the present time is in excess of $1,000,000.00, it is subject to internal permission(s) within the diocese or religious institute plus the permission of the Holy See.

Within a diocese there are three levels of permission. For amounts below the minimum set by the conference of bishops for a diocesan juridic person such as a parish, the permission of the pastor is required since he is the canonical administrator of the juridic person of the parish. For amounts over the minimum but below the maximum set by the conference of bishops, the consent of the economic council and the permission of the bishop are required. Amounts over the maximum require the consent of the economic council, the permission of the bishop, and the permission of the Holy See.

For religious institutes and societies of apostolic life of pontifical right, if the amount is less than the maximum established by the Holy See, only the permission required by their own proper law applies. If the amount is in excess of the maximum, the written permission of the competent superior with the consent of the council and the permission of the Holy See are required.

An area in which attorneys may be called upon arises from Canon 1296 on alienations which are civilly valid but have not followed the requirements of alienation. The canon says the competent authority, usually the bishop or major superior, must consider whether to take action, and if so, to decide what type of action would be necessary to vindicate the rights of the church.

VI. CONTRACTS

Canon 1290 provides that the civil law regulations on contracts and payments for a given territory are to be observed in canon law law unless the civil law is contrary to divine law, canon law or Canon 1547. This canon is part of the article which deals primarily with the alienation of church property or only a certain class of contracts or agreements. All other regulations applying to church contracts, whether between public juridic persons or a public juridic person and another party, are governed by the civil law which is adopted by canon law. Thus the form of a contract, effects, etc., are all governed by the civil law.

The general section on church property and contracts does not specifically address the concept of authority to bind a public juridic person contractually. The administrator has, by office, the power to contract, and except for the extraordinary acts of administration and the alienation of property, which have special canonical regulations, the administrator or those the administrator delegated would have authority to make contracts. Canon 639 in the section on religious institutes is more specific, restricting authority to contract to those whom the superior delegates to

conduct the business of the institute, and further providing that a religious who has made a contract without the permission of the superior must answer for the action personally and not the religious institute (juridic person). There are traces of the law of agency in these canonical provisions, however, parties dealing with diocesan or religious organizations may be unaware of who has authority to contract. It would be helpful for attorneys to advise church clients to identify the individuals who have authority to contract to those whom they do business with so those who have the "appearance of authority" but in fact lack authority do not enter into unauthorized contracts and create a difficult situation. For example, some people out of respect or ignorance will contract with those who use the title "Father, Brother or Sister," or those who wear clerical apparel or a religious habit.

Diocese will be called upon to draft more contracts between a diocese and a religious institute in accord with Canon 681, section 2. Similar contracts between a diocese or parish and an individual religious, although not mandated by canon law, have been widely used and their use will probably grow.[10] *Reardon v. LeMoyne* is an example of an intra church contract dispute that can be litigated in civil court. The contract was drawn so that dismissals could be handled at the parish school board level, with appeal to the diocesan school board level. However, the diocesan school superintendent terminated the employment of the plaintiff sisters under a "non-renewal provision" of the contract. The court held that the plaintiff sisters had a right to pursue their action against the bishop, the diocesan superintendent of schools and the parish school board and overruled the first amendment and jurisdictional defense raised by the defendants.

There is a gospel mandate, as well as sound legal reasons, for the church to try to resolve internal disputes by means of church processes. Perhaps a clause prohibiting civil suits until all church remedies provided in the contract have been pursued would allow parties the opportunity to resolve disagreements before filing a civil law suit or administrative action. This means, of course, that a diocese is willing to provide processes in which a party believes they will receive equitable treatment. Otherwise, such clauses in contracts will be understood as a method of depriving a party of rights within the church, whereas in fact a church forum should provide solutions that are well known for their fairness.

The proposal allowing for the option of "administrative tribunals" was not included in the 1983 Code. The Canon Law Society of America approved a resolution at its 1983 meeting to investigate options for diocesan, regional, and national procedures for the protection of rights and

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[10] Reardon v. LeMoyne, 122 N.H. 1942, 454 A.2d 428 (1982).

persons in the Church. It will be interesting to see the scope of any proposed options coming from the Society's study and whether it will include contract or employment disputes at church-operated institutions. Such tribunals could be a helpful vehicle in resolving church disputes in this country.