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BEQUESTS AND GIFTS TO THE CHURCH UNDER THE CODE OF CANON LAW

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INTRODUCTION

When a person desires to give a bequest or gift to an ecclesiastical institution, various civil law concerns and formalities may be involved, especially when the bequest or gift is substantial. The attorney assisting the donor may have to deal with tax issues, trust fund requirements, and the specified purpose of the bequest or gift. Oftentimes these concerns relate to maximizing the benefit both for the donor and the beneficiary and assurance that the gift is used for the designated purpose.

The church is also concerned about bequests and gifts, especially from the viewpoint of the obligations undertaken by the ecclesiastical beneficiary. Therefore, the code of canon law contains a section in Book V entitled, "Pious Wills in General and Pious Foundations." These canons must be considered by the ecclesiastical institution when it accepts the bequest or gift. Further, if the donor takes into account these canons when creating the bequest or gift, conflict of law, vagueness, and lacunae issues may be avoided.

The purpose of this paper, therefore, is to describe the canonical requirements and to examine some areas of possible concern.

THE CANONICAL TERMINOLOGY

It is important to understand the canonical terminology since the terms are not part of the general American civil law parlance.

1. A *pious cause* is a donation given for purposes of religion and charity. Canon 114 Section 2 gives the purposes: works of piety, of the apostolate, or of charity, whether spiritual or temporal.

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2. A *pious foundation* is a specific form of a pious cause. A non-autonomous pious foundation "is a sum of money or its equivalent (goods which can be turned into money eventually), given in any way to a moral person, that is, a juridic person in the church, with the obligation *in perpetuum*, or at least for a long time, to use the income to have Masses said or for other well-defined ecclesiastical functions, or for the performance of certain works of piety and charity."¹ It would be similar to a trust fund. A pious foundation may also be autonomous, that is, a juridic person which is an independent foundation or charitable corporation.
3. A *trust* in canon law "is a transfer of ownership of property to one person for the benefit of another."²

The person transferred to, a trustee, may be a physical or juridic person. Further, the trust may be a pious cause in general or may be a pious foundation. It is important in ecclesiastical law to distinguish whether the trust is a pious foundation or not, since a pious foundation is governed by special rules.

A PIOUS CAUSE

If a person bequeaths goods to an ecclesiastical institution, the code of canon law has four requirements. First, the formalities of civil law are to be observed, if possible, and if such formalities are neglected, the heirs are to be advised that they still are bound to carry out the obligation of the deceased.³ Second, the intention of the deceased is to be fulfilled with the greatest diligence.⁴ Third, the ordinary is to be the executor of the will.⁵ Fourth, if a trust is established, the trustee must inform the ordinary of the trust.⁶

If a person makes a present or future gift to an ecclesiastical institution, the code has three requirements. First, the intention of the donor is to be carried out with "the utmost diligence."⁷ Second, a trustee for goods must inform the ordinary of the trust and its obligations.⁸ Third, the ordinary must exercise a watchful eye in the safeguarding and administration of the goods.⁹

The important canonical requirement, therefore, is the involvement

¹ T. LINCOLN BOUSCAREN, S.J., *CANON LAW, A TEST AND COMMENTARY* 821 (1966).

² *Id.* at 823.

³ 1983 CODE c.1299, § 2.

⁴ *Id.* at c.1300.

⁵ *Id.* at c.1301, § 1.

⁶ *Id.* at c.1302, § 1.

⁷ *Id.* at c.1300.

⁸ *Id.* at c.1302, § 1.

⁹ *Id.* at § 2.

of the ordinary, whether it is a bequest or a gift. In fact, if a will forbids this, the forbidding clause is to be disregarded,¹⁰ and if a trust prohibits involving the ordinary, the gift is not to be accepted.¹¹ The ordinary is the head of the diocese, if the disposition is to a diocese or institution subject thereto, or the head of a religious institute (order or congregation) if the disposition is to a religious institute or institution subject thereto.¹²

The seemingly problematic area is the requirement that the ordinary is the executor of all pious wills. "Executor" in the code is not the same as executor in the civil law. This is obvious from the canon, which recognizes other executors.¹³ Rather, executor is used to describe the ordinary's general duty: to ensure that the disposition is fulfilled. This is the general duty of the ordinary, whether the disposition is a bequest or a gift. The ordinary, therefore, has supervisory powers, such as seeking enforcement of the disposition in the civil courts since the ordinary is the principal representative of the recipient of the bequest or gift.

Administratively, a diocesan bishop or a religious superior must be aware of, keep records of, and monitor all bequests and gifts given to institutions under their supervision. For a diocesan bishop this will involve inclusion of bequests and gifts and any administration thereof in the annual report to the diocesan finance council, which is discussed below.

The general pious cause is the ordinary way bequests and gifts are given to ecclesiastical institutions. A person may give money or goods in general, or for a specific purpose; may give the disposition outright or establish a trust out of which money will be distributed. The disposition may even require obligations of the recipient. Nevertheless, in almost all instances, the bequest or gift merely will be a general pious cause, and will require nothing more than informing the proper ordinary and accounting to the ordinary. These canonical requirements should govern almost every bequest and gift to an ecclesiastical institution.

A PIOUS FOUNDATION

A pious foundation, which is a very specific type of a pious cause, is a bequest or gift which entails a long-term existence. There are two types: an autonomous pious foundation and a non-autonomous pious foundation. The first is an aggregate of things established as a juridic person by a competent ecclesiastical authority.¹⁴ In other words, it is the establish-

¹⁰ *Id.* at c.1301, § 3.

¹¹ *Id.* at c.1302, § 2.

¹² *Id.* at § 3.

¹³ *Id.* at § 2.

¹⁴ *Id.* at c.1303, § 1(1).

ment of a charitable foundation or corporation resulting from a bequest or gift, established for an indefinite period of time, under the auspices of the church. Such a pious foundation would be a rare happening in the everyday life of the church.

The non-autonomous pious foundation is "the temporal goods given in some manner to a public juridic person with the obligation for a long time, to be determined by particular law, to arrange for the annual income for the celebration of masses or other specified ecclesiastical functions or otherwise to pursue the purposes"¹⁵ of piety or the apostolate or charity. In practical terms, it would be a long-term trust fund, in the canonical sense, managed by an ecclesiastical institution such as a diocese, a monastery, or an institution of higher learning. It is not every ecclesiastical trust but only those which carry a long-term obligation. Under traditional canonical jurisprudence, "long-term" would be forty years.¹⁶ Under the new code, particular law must define "long-term," but if particular law would not so define, then it would seem that forty years would be the presumptive time period. The time period does not mean that the pious foundation actually would last the requisite time period, but that it be at least capable of lasting that period, which would be true if the pious foundation were established for an indefinite period. The code does assume that an endowment, such as an endowed chair at a University, would be a non-autonomous pious foundation since such a chair is established generally for an indefinite period of time.

If the pious foundation is autonomous, the law governing juridic persons must be followed. Inherent in the establishing of such a foundation, which must be done by written decree,¹⁷ is that the resources are sufficient to achieve the designated purpose.¹⁸ The basic principle to be followed is that the decree or the governing documents should contain all the operating provisions. If such is the case, then the code generally will recognize these provisions as controlling rather than the specific provisions of the code. Therefore, it is necessary to examine the canons on juridic persons,¹⁹ juridic acts,²⁰ and temporal goods²¹ prior to issuance of the decree or governing documents to insure that these documents contain the desired provisions which then generally may be permitted to supersede contrary or undesirable requirements of the code.

¹⁵ *Id.* at § 1(2).

¹⁶ S. WODWOOD, O.F.M., A PRACTICAL COMMENTARY ON THE CODE OF CANON LAW, II, 195 (1939).

¹⁷ 1983 CODE cc.114, 1306, § 1.

¹⁸ *Id.* at c.114, § 3.

¹⁹ *Id.* at cc.113-123.

²⁰ *Id.* at cc.124-128.

²¹ *Id.* at cc.1259-1298.

If the pious foundation is non-autonomous, it cannot be accepted by an ecclesiastical institution without the written permission of the proper ordinary.²² The permission cannot be granted until the ordinary ascertains that the institution can fulfill the obligations, and that there will be sufficient income to support the obligations. Particular law may set other conditions such as accounting procedures, investment requirements and administrative details. It is important to coordinate these particular law conditions with other universal law requirements governing financial accountability,²³ administration of goods,²⁴ and alienation of goods.²⁵

The terms of a non-autonomous pious foundation must be in writing, a copy of which is to be kept in the file of the ordinary and in the file of the particular institution to which the foundation pertains. This writing is necessary so that at a later date the institution can be certain as to its obligations, and, if permitted, to the reduction of the obligations. If investments are made, which generally will be the case, the investments are made at the direction of the ordinary, but only after the ordinary consults the interested parties and his or her finance council.

THE ADMINISTRATION OF GIFTS TO ECCLESIASTICAL INSTITUTIONS

Canon law, like civil law, obligates with special fiduciary obligations those given responsibilities for gifts. The code specifically obligates the administrator to such duties as accurate record keeping, arrangement of insurance, presentation of an annual report, proper fiscal responsibility, and the seeking of the consent of the ordinary for investment of surplus income.²⁶ The code specifically obligates the administrator to observe civil law. In addition, the code requires accounting to the ordinary,²⁷ to the diocesan finance council,²⁸ and to the faithful concerning gifts they have given to the church.²⁹ Since the fiduciary obligations under the code may be more specific or greater than under civil law, the ecclesiastical administrator may be exposed to greater liabilities under civil law since civil law would probably recognize the canonical obligations, at least as contractual elements of the administrator's duties.³⁰

²² *Id.* at c.1304, § 1.

²³ *Id.* at cc.492-494, 1287.

²⁴ *Id.* at cc.1273-1289.

²⁵ *Id.* at cc.1291-1298.

²⁶ *Id.* at c.1284.

²⁷ *Id.* at c.1287 for diocesan institutions; *Id.* at cc.636-37 for religious institutes.

²⁸ *Id.* at c.1287, § 1.

²⁹ *Id.* at § 2.

³⁰ *Cf.* Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich, 426 U.S. 696 (1976) and Order of St. Benedict v. Steinhauser, 234 U.S. 640 (1914).

A major problematic area in management of long-term gifts is what to do when the revenue is insufficient to support the obligation, or the obligation itself becomes impossible to carry out. Well-drawn documents should cover such circumstances. If this is done, the code recognizes the provisions of the documents as governing.³¹ However, if the documents do not provide for such circumstances, then the code establishes its own provisions similar to the civil concept of "cy-pres." The provisions are divided into those affecting mass obligations and those affecting other types of obligations.

A mass obligation, termed a mass foundation, is the establishment of an obligation of an institution to celebrate the mass for a particular intention over a long period of time. Generally, a mass foundation is established when a person bequeaths by will or gives by gift sums of money for the celebration of the mass *in perpetuum*. The difficulty with such a foundation is that the obligation is to be supported by the income from the bequest or gift, and the income has become negligible, or worse, there exists no separate account to determine the income or even the nature of the obligation. If such difficulties arise, the diocesan bishop or the head of the religious institution generally can reduce or transfer the obligation. To abolish totally the obligation is reserved to the Apostolic See.³² The attorney advising an ecclesiastical institution on the acceptance of a mass foundation should point out the necessity to separate the funds of each mass foundation and to document the obligation, its fulfillment, and its reduction and termination provisions.

Obligations, other than masses, arising from gifts can be reduced by the ordinary because of insufficient revenue or any other reason arising without fault on the part of the administrator, but only after he or she has consulted those concerned and the finance council.³³ The "cy-pres" principle of attempting to fulfill as much as possible the intent of the donor governs the canonical reduction. Therefore, when an ecclesiastical administrator petitions a civil court to reduce or change an obligation arising out of a bequest or gift, the institution should first fulfill the canonical requirements. To terminate a pious cause of any type prior to its self-governing termination requires the intervention of the Apostolic See.³⁴ If a non-autonomous foundation automatically terminates, the remaining principal is disposed of according to its terms. If no terms are stated and the institution administering the foundation is diocesan, then the principal must be added to the special diocesan fund for the support

³¹ 1983 CODE cc.1308, § 2 and 1310.

³² *Id.* at c.1308.

³³ *Id.* at c.1310, § 2.

³⁴ *Id.* at § 3.

of the clergy.³⁵ The diocese or institution is not free to use the principal as it sees fit. Both the donor and the institution should be advised of this fact. In non-diocesan institutions, the principal belongs to the institution to which the foundation was given, and the institution may use the principal in whatever way it deems appropriate.

A possible area of conflict in terminations which do not specify for what the principal is to be used, is when the institution is jointly sponsored or owned by a diocese and a religious institute. Care must be taken in both the governing documents of the institution and in the bequests and gifts to minimize conflict in this area, as well as other areas not the subject of this paper.

New financial requirements in the code are the diocesan finance council³⁶ and the financial consultors or finance council required of all juridic persons.³⁷ Each institution subject to the diocesan bishop must submit an annual report to the diocesan bishop, who, in turn, must submit the annual report to the diocesan finance council.³⁸ Practically speaking, therefore, gifts given to diocesan-subject institutions are supervised by a central board of the diocese through the annual report. Donors should be aware of this since it gives some assurance of fiscal responsibility.

The requirement that each institution have a finance council or at least two financial consultors provides some assurance for donors that the administration of bequests and gifts requires the involvement of more than one person. The administrator must consult, before acting, the council or consultors in a number of specified instances.³⁹

EXAMPLES

In order to be somewhat practical, let us examine a few instances of bequests and gifts to provide some clearer understanding of the operation of the canons.

1. *A Gift of Land To Be Used As A Cemetery*

If a person bequeaths or donates land for a cemetery, the following canonical requirements must be considered: (a) informing and obtaining written acceptance from the ordinary; (b) determining if the bequest or gift constitutes a pious cause or a pious foundation, and if the latter, whether, non-autonomous or autonomous; (c) establishing the governing

³⁵ *Id.* at c.1304, § 2.

³⁶ *Id.* at c.492.

³⁷ *Id.* at c.1280.

³⁸ *Id.* at cc.1287, § 1 and 577.

³⁹ *Cf. Id.* at c.1273(f).

provisions which must cover the issues surrounding termination. It would seem that in such an instance, the cemetery would be a foundation, and since it is meant to last an indefinite period of time, an income will be derived from the grave charges.

2. *A Chair At A Diocesan College*

As stated above, an endowment generally is considered a non-autonomous foundation since it is intended to last indefinitely. Therefore, an endowed chair at a diocesan college requires: (a) informing and obtaining written permission of acceptance from the diocesan bishop; (b) ascertaining that the requisite obligations can be fulfilled and that the revenue fully corresponds to the obligations; (c) detailing the provisions if revenue becomes insufficient; (d) providing for termination. In the instance of the diocesan college, if the chair fund were terminated and no provisions were established by the donor that the principal belongs to the college, under canon law the principal would have to be given to the clergy support fund, which may cause difficulties under civil law and be contrary to the supposed intent of the donor.

3. *A Bequest Of \$200,000 "For Masses"*

An issue which arises often in the bequest for masses is how many masses for how much money? In a recent will, a monastic community was left \$200,000 "for masses." At the particular diocesan stipend, this would total 40,000 masses. Therefore, since the code states:

If the sum of money is offered for the application of the masses without an indication of the number of masses to be celebrated, the number is to be computed in view of the offering established in the place where the donor resides unless the donor's intention must be lawfully presumed to have been different.⁴⁰

The community would have to send out the money to numerous other persons because the community could not reasonably fulfill the bequest itself. But then the community would not receive the actual benefit of the bequest. Perhaps the money could be established as a mass foundation, the income of which would be used for the celebration of masses each year. But this too may prove to be unrealistic because there would still be too many masses required each year.

In most instances as this, the presumed intent of the donor was to leave a large gift to the institution, which in turn would pray for the deceased. An exact *quid pro quo* would not have been intended. Thus, the presumption stated at the end of canon 950 may permit a different result

⁴⁰ *Id.* at c.950.

than the 40,000 masses in the problem. This would be consistent with the canons on pious causes which emphasize the donor's intention. But it is still difficult to ascertain the donor's intent and civil law may prohibit arriving at the reasonable solution of some masses in perpetual memory for the \$200,000.

This example, therefore, points to the need of attorneys drafting wills to have some knowledge of canon law to avoid absurd results, such as 40,000 masses.

4. *A Gift Of Money For A Specific Purpose*

If a person gives a gift for a specific purpose, it is to be used for that purpose. Generally, this should not prove difficult, unless the specific purpose will not occur until the future. For instance, suppose the donors give the money for a new cross in a church, but the cross is not acquired for ten years because the church administrators cannot decide on the cross. What must be done with the money? Canon law would require segregation of the money, investment with the interest applied to the principal. Unfortunately, often ecclesiastical administrators are unaware of this, and tend to commingle funds. At the end of the ten years, when a cross costs more and new donors are sought, the question is who gave the cross, *in memoriam* of whom?

5. *Confidential Gifts*

At times a donor may desire to remain anonymous. However, since the code requires informing the ordinary and in some instances reporting to a finance council, the attorney should advise all concerned that the donor's anonymity must be protected.

6. *Retirement Fund*

Certain questions occasionally have arisen on whether a retirement fund, separately incorporated, is a pious foundation, and therefore subject to the canons under discussion. A separately incorporated retirement fund would be a juridic person under canon law if established by decree of the ordinary, which should be done to protect the corporate veil in civil law. However, a pious foundation results from a bequest or gift, not merely from separate incorporation. Thus, a retirement fund would not be a pious foundation and would not be subject to the canons under discussion.

7. *Mass Obligation Reduction*

Generally, various institutions subject to the diocesan bishop or religious superior have accepted over the years mass obligations, that is to

celebrate a mass on a particular day for a particular intention *in perpetuum*. A sum of money was given, for instance \$25.00, in 1900. What should have happened was that the \$25.00 should have been put into a trust and invested, the annual income being used to pay the stipends. However, in many situations this was not done, nor even if it would have been would the interest necessarily pay the stipend. Further, the institution may have so many of such intentions scattered throughout the year that oftentimes they are forgotten or not able to be fulfilled on the specific day.

Canon law permits the ordinary to reduce the obligation if the income is insufficient and to transfer the obligation to another day. In the instant example, the obligation could be changed to only every so many years, perhaps even grouped with other intentions, and transferred to one single day or to a day in a period when other obligations are said.

The civil law issue arises, however, whether the church can do this on its own. It would seem that person intended to give and institutions intended to receive in accordance with the laws of the church. Thus, the powers of the ordinary could be presumed to be part of the donor's and donee's intentions.

CONCLUSION

In conclusion, it should be recognized that bequests and gifts to ecclesiastical institutions are governed both by civil and canon law. An attorney working with an ecclesiastical institution, therefore, is advised to have some working knowledge of canon law in order to do the utmost to fulfill the legal requirements of both laws and to avoid unnecessary conflicts.