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Zoning Restrictions (Parochial Schools, Houses Occupied by Religious), Bequests for Masses, Religion and Adoption Laws

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RECENT DECISIONS

Zoning Restrictions

Parochial Schools

The constitutionality of zoning regulations which permit public schools in residential zones, but exclude private and parochial schools, has been examined recently by the courts of two states.

The Wisconsin Supreme Court, in *State ex rel. Wisconsin Lutheran High School Conference* v. *Sinar,* 267 Wis. 91, 65 N.W. 2d 43 (1954), upheld the constitutionality of such a zoning ordinance against the claim that it was unreasonable, arbitrary and discriminatory. The Lutheran High School Conference sought mandamus to compel the city building inspector to issue a permit for construction of a private high school within a zoning area permitting public high schools only. The Court found that for zoning purposes there was a reasonable and substantial distinction between a public and private high school, and consequently, the regulation was valid. The distinction which the Court held justified the restrictions in the zoning ordinance was that the public school serves the area without discrimination, whereas the parochial and private schools discriminate in selecting pupils who may attend.

A petition for certiorari to the United States Supreme Court has been filed by the Lutheran High School Conference [23 U. S. Law Week 3227 (1955)], and to date has not been determined. Petitioners in their applications contend that the ordinance permitting public schools, but prohibiting private and parochial schools, in a residential zone is repugnant to constitutional provisions on two theories: first, that the ordinance is arbitrary, unreasonable and discriminatory, and thus violates the "due process" clause of the Fourteenth Amendment to the United States Constitution; second, that such provisions are contrary to the "equal protection" clause in the Federal Constitution.

Although the Wisconsin Supreme Court drew a distinction between private and parochial schools on the one hand, and public schools on the other, the distinction does not relate to the public health, safety, morals or general welfare. In the absence of such a relationship, the zoning ordinance would seem invalid since it would be a denial of equal protection of the laws. In enacting zoning ordinances, the legislative body may classify where there is a reasonable basis for the classification. Since there is no reasonable basis in classifying schools into public schools and private and parochial schools for zoning purposes, equal protection of the laws is not accorded to the private and parochial schools.

The weight of authority indicates that regulations based on such distinctions are not valid. Recently, a similar factual pattern was presented to a California appellate court in *Roman Catholic Welfare Corporation of San Francisco* v. *City of Piedmont,* 278 P. 2d 943 (Cal. App. 1955). The Court there held the ordinance invalid since no reasonable ground was suggested for permitting public schools, but prohibiting all other schools teaching the same subjects to the same age groups, in the zoned area.

In *Roman Catholic Archbishop* v. *Baker,* 140 Ore. 600, 15 P. 2d 391 (1932), the validity of a zoning ordinance which permitted the City Council discretion to refuse permission to erect a parochial school was

attacked. The Court, in striking down the statute as arbitrary said, "The right to own carries with it the right to use that property in any manner that the owner may desire so long as such use will not impair the public health, peace, safety, or general welfare. The kind of school proposed to be erected will not interfere with the public health; it cannot affect the public peace; it surely will not endanger the public safety; and by all civilized peoples, an educational institution, whose curriculum complies with the state law, is considered an aid to the general welfare." [*Roman Catholic Archbishop* v. *Baker, supra* at 395].

Regulations permitting public schools but not private schools in a residential area have been held invalid. [*City of Miami Beach* v. *State ex rel. Lear,* 128 Fla. 750, 175 So. 537 (1937); *Catholic Bishop of Chicago* v. *Kingery,* 371 Ill. 257, 20 N.E. 2d 583 (1939); *Phillips* v. *City of Homewood,* 255 Ala. 180, 50 So. 2d 267 (1951)]. The Florida Supreme Court, in so holding, declared, "What objectionable characteristic touching the comfort or other general welfare of the surrounding community may obtain as to a private school which would not probably obtain in greater degree as to a public school has not been suggested, and, we think, for the very good reason that none exists." [*City of Miami Beach* v. *State ex rel. Lear, supra* at 539]. The Illinois Supreme Court cogently stated, "We fail to perceive to what degree a Catholic school of this type will be more detrimental or dangerous to the public health than a public school. It is not pointed out to us just how the pupils in attendance at the parochial school are more likely to jeopardize the public safety than the public school pupils. Nor can we arbitrarily conclude that the prospective students of the new school will seriously undermine the general welfare. As a matter of fact, such a school, conducted in accordance with the educational requirement established by State educational authorities, is promotive of the general welfare." [*Catholic Bishop of Chicago* v. *Kingery, supra* at 584].

An analogous situation is presented when the zoning ordinance permits public and parochial schools, but excludes private schools, in residential areas. The Minnesota Supreme Court found that the distinction is not based "upon alleged evils which it is claimed exist in the case of private and do not exist in the case of public or parochial schools, but is based solely on ownership." Since the distinction bears no relation to the purposes of the ordinance, the Court held the ordinance invalid. [*State* v. *Northwestern Preparatory School,* 228 Minn. 363, 37 N.W. 2d 370 (1949)]. However, the New Jersey Supreme Court found a similar ordinance valid. [*Yanow* v. *Seven Oaks Park, Inc.,* 11 N. J. 341, 94 A. 2d 482 (1953); *but cf. Lumpkin* v. *Township Committee of Bernards Tp.,* 134 N. J. L. 428, 48 A. 2d 798 (1946)]. The Court in the *Yanow* case, however, attempted to distinguish the case at bar from the situation where the zoning ordinance permitted only public schools in the zoned area, on the ground that the exclusion of parochial schools of like category was unreasonable.

It appears that all schools whether public, parochial or private should be treated the same and zoning distinctions drawn only with respect to the types of schools (*e.g.,* academic or correctional institutions.).

Houses Occupied by Religious

The definition of the term "family" contained in a zoning ordinance was the

question before the Supreme Court of Wisconsin in *Missionaries of Our Lady of La Salette* v. *Village of Whitefish Bay,* 66 N.W. 2d 627 (Wis. 1954). The village's zoning regulations restricted particular areas to single family dwellings. Within this restricted area, the Missionaries of Our Lady of La Salette maintained a residence for three priests and two lay brothers. The priests aided local pastors in Milwaukee, attended sick calls, and preached missions in the area. The village building inspector issued an order directing the discontinuance of the house for religious occupancy, holding that it was not being used as a single family dwelling. The Board of Appeals affirmed. The Wisconsin Supreme Court, however, held that the priests and brothers constituted a family within the meaning of the zoning ordinance, and therefore could maintain the dwelling in the restricted area.

There are several analogous cases which arrive at the same conclusion as the Wisconsin Court in holding that a family, for zoning purposes, is not restricted to those living together and who are related by blood or marriage. In *Robertson* v. *Western Baptist Hospital,* 267 S.W. 2d 395 (Ky. 1954), it was contended that a nurses' home in a residential area violated an ordinance which restricted the buildings in the area to family dwellings. The Court found that the nurses residing in the dwelling constituted a family within the statutory definition – "one or more persons living as a single housekeeping unit, as distinguished from a group occupying a hotel, club, fraternity or sorority house."

In *Boston-Edison Protective Association* v. *Paulist Fathers,* 306 Mich. 253, 10 N.W. 2d 847 (1943), the plaintiffs, a non-profit organization established to ensure enforcement of restrictive covenants included in deeds of land in a particular area, sought to enjoin use of property in the area by the Paulist Fathers. The deed to the property prohibited its use for purposes other than a single dwelling house. Plaintiffs contended that the covenant limited occupancy of the building to a "family," and since the priests living there were not related by blood or marriage, they were not a "family." In rejecting this literal interpretation of the covenant, the Court concluded that "it would not be reasonable to declare the rule to be that a restriction limiting the use of premises to a one-family dwelling means that the dwelling may be used only by those who are members of a single family related within the degrees of consanguinity or affinity." [*Boston-Edison Protective Association* v. *Paulist Fathers, supra* at 848].

Several decisions have also held that a restrictive covenant limiting use of the property to a single-family dwelling is not violated by using the dwelling as a convent [*Hunter Tract Improvement Co.* v. *Corporation of Catholic Bishop of Nisqually,* 98 Wash. 112, 167 Pac. 100 (1917); *Scott Co.* v. *Roman Catholic Archbishop, Diocese of Oregan,* 83 Ore. 97, 163 Pac. 88 (1917); *cf. Board of Zoning Appeals of City of Indianapolis* v. *Wheaton,* 118 Ind. App. 38, 76 N.E. 2d 597 (1948)].

No case has been found in which it was held that a group of priests living together did not constitute a "family" within the meaning of zoning ordinances. The decision of the Wisconsin Court, therefore, was in harmony with decisional law in other jurisdictions in refusing to limit the term "family" in the zoning ordinance to persons related by blood or marriage.

*Bequests for Masses**

An Alabama Court recently upheld the validity of a bequest for Masses in *Robertson Banking Co.* v. *Hallet* (Cir. Ct., Morengo Co., Equity No. 1188-A, 1954), refusing to follow a prior contrary ruling of the Alabama Courts. [*Festorazzi* v. *St. Joseph's Catholic Church,* 104 Ala. 327, 18 So. 394 (1894)]. Testatrix' will, which included bequests to the Little Sisters of the Poor and to the Bishop of Mobile to expend in renovating and beautifying St. Leo's Church, contained a provision which gave two hundred dollars to St. Leo's Catholic Church in Demopolis, Alabama, for solemn Masses for the repose of the soul of testatrix and her deceased husband. The Court sustained the validity of the bequest under two theories – that of charitable trust and that of private trust. A bequest for Masses for a particular person qualifies as a charitable trust since the Mass is said not only for the benefit of the particular person but for all mankind. The Court also sustained the bequest as a private trust for the benefit of such priest or priests as receive one or more stipends for celebrating Mass for the purpose expressed by the testatrix.

The Court is clearly correct in sustaining the bequest as a charitable trust. However, it is difficult to understand the holding that the bequest constituted a private trust. As such a trust, it would seem to be invalid since it is not measured by lives in being and 21 years as the time within which the property must vest as required by the Alabama rule against perpetuities. [Ala. Code tit. 47, §16; *Crawford* v. *Carlisle,* 206 Ala. 379, 89 So. 565 (1921)].

It has been said that a bequest "for pious use" means the same as a bequest for the saying of Mass and that such bequests are universally held to be, not individual bequests, but charitable trusts. [*Minturn* v. *Conception Abbey,* 227 Mo. App. 1179, 61 S.W. 2d 352, 361 (1933)].

A "charity" has been defined "as a gift to be applied, consistently with the existing law, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life or by creating and maintaining public buildings or works, or otherwise lessening the burden of the government." [*Webster* v. *Sughrow,* 69 N.H. 380, 45 Atl. 139, 140 (1898), citing *Jackson* v. *Phillips,* 96 Mass. (14 Allen) 539, 556 (1867)]. It has been held in *Lanza* v. *Di Franzo,* 92 N.E. 2d 299 (Ohio 1949), that a provision in a will bequeathing the residuary of testator's estate for Masses to be said for the repose of his and his wife's soul was a valid charitable trust or use; and further that it is well recognized, as a matter of judicial notice, that there is no difference between a Mass said for the repose of the soul of one deceased and any other type of Mass.

In *Delaware Trust Co.* v. *Fitzmaurice,* 27 Del. Ch. 101, 31 A. 2d 383 (1943), a bequest of $500 to the Catholic Bishop of the City of Wilmington, Delaware, to be distributed by him at his discretion, within one year after testator's death, among the priests of his diocese, to have Masses said for the decedent, was held valid as a charitable trust. This Court defined a charitable trust as one for the benefit of the public or some portion

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thereof and held the advancement of religion to be one of the objects of a charitable trust. [See also *Morris* v. *Edwards,* 277 N. Y. 141, 124 N.E. 724 (1918); *Rhymer's Appeal,* 93 Pa. 142 (1880)]. Again, in *Sedgwick* v. *National Savings Bank and Trust Co.,* 130 F. 2d 440 (D.C. Cir. 1951), where the decedent left all the rest, residue and remainder of his estate and property to the Holy Name Cathedral, State and Superior Streets, Chicago, Illinois, for Masses for the repose of his soul, the Court, in holding the bequest valid, observed that a trust for saying Masses for one's soul or the souls of others, if otherwise valid, is valid as a charitable trust.

The following testamentary provisions have been upheld as charitable trusts: the setting aside of a certain sum of money so that every year there may be celebrated two high Masses for the suffrage of the decedent's soul [*Matter of Semenza,* 159 Misc. 487, 288 N. Y. Supp. 556 (Surr. Ct. 1936)]; the application, after payment of funeral expenses, of the remainder to pay certain expenses and to have a Mass said annually for the souls of the decedent's deceased wife and sister and himself [*Webster* v. *Sughrow, supra*]; the devising of realty to a certain Church with authority to sell it and apply the proceeds of such sale for Masses for the repose of testator's soul, and the souls of his deceased wife, mother-in-law and brother-in-law. [*Hoeffer* v. *Clogan,* 171 Ill. 462, 49 N.E. 527 (1898)].

In a few jurisdictions, bequests for Masses have been upheld on the ground that they constitute a present absolute gift. Thus, it was held in *Matter of Lennon,* 152 Cal. 327, 92 Pac. 870 (1907), that a bequest of $3,500 to Bishop Conaty to have the same amount applied to the celebration of Masses as soon as possible, was not a charitable use in that it was not for the benefit of the public or any class or division of the public, it lacked the element of continuance in perpetuity which characterizes a charitable use, and it was not for the Bishop's benefit but for the benefit of the testator. But the Court held the testamentary provision valid as a gift which takes effect at once, like any other personal bequest for a legal object. [See also *Harrison* v. *Brophy,* 59 Kan. 7, 51 Pac. 883 (1898)]. Twelve years later, however, the California Court sustained a bequest to a Bishop for Masses on the theory of charitable trust. [*Matter of Hamilton,* 181 Cal. 758, 186 Pac. 587 (1919)]. The Court in the *Hamilton* case pointed out that the character of Masses, as shown by the evidence, being of benefit spiritually to all the members of the Catholic Church as well as those for whom it is said and those present, would warrant the conclusion, almost as a matter of course, that a bequest in trust for Masses is a trust for a charitable use.

In one of the leading cases holding a bequest for Masses valid as a charitable bequest, the Court stated [*Matter of Kavanaugh,* 143 Wis. 90, 126 N.W. 672, 675 (1910)]:

> ". . . the whole church profits by every mass, since the prayers of the mass include all of the faithful, living and dead. The sacrifice of the mass contemplates that all mankind shall participate in its benefits and fruit. 'The mass is the unbloody sacrifice of the cross and the object for which it is offered up is in the first place, to honor and glorify God; secondly, to thank Him for His favors; third, to ask His blessing; fourth, to

propitiate Him for the sins of all mankind. The individuals who participate in the fruits of this mass are the person or persons for whom the mass is offered, all of those who assist at the mass, the celebrant himself, and for all mankind, within or without the fold of the church.' So it seems clear upon reason and authority, under the doctrine of the Catholic Church as established by the evidence in this case, that a bequest for masses is a 'charitable bequest,' and valid as such, although the repose of the souls of particular persons be mentioned."

Religion and Adoption Laws

In *In re Duarte,* 122 N.E. 2d 890 (Mass. 1954), petitioners seeking adoption of a child were Seventh Day Adventists. They stated that they intended to raise the child in that faith despite the fact that he had been baptized a Roman Catholic. In reversing a dismissal of the petition, the Court stated: "The judge [in the lower court] judicially noticed that 'there are pending many applications for placements of children of the Catholic faith in homes that can supply both the necessary physical and spiritual requirements where this child can be placed for adoption.' Plainly these facts were not matters of common knowledge of which the court could take judicial notice and use as the basis of a conclusion that an adoption of the child by the petitioners, because of their different religion, was not 'practicable.' " [at page 891]. The Court distinguished the *Goldman* case, *supra,* in that the judge there made detailed findings on the issue of practicability as determined by the evidence of the case which included testimony of persons connected with Catholic institutions.

In *Ellis* v. *McCoy,* 124 N.E. 2d 266 (Mass. 1955), the question as to the practicability of permitting persons of a different faith to adopt a child arose on a motion of the mother of the child to withdraw her consent to the proceeding. The mother, who was unmarried, had signed the petition for the child's adoption without desiring to know the names of petitioners, and the prospective adoptive parents had paid the cost of her confinement. Soon after the mother discovered that petitioners were not of the Catholic faith, and that they had been previously divorced, she demanded the return of her child. The petitioners, however, refused, and declared their intention to raise the child in the Jewish faith, contrary to the mother's wishes. The mother, in opposition to the petition filed for adoption of the child, moved to withdraw her consent, and to appoint her or some other person as guardian of the child. The lower Court granted the mother's motion to withdraw her consent, and dismissed the petition for adoption. On appeal, the Supreme Judicial Court of Massachusetts affirmed the order of the lower Court, saying: "It is apparent from the findings that the judge allowed the motion to withdraw consent principally because of the difference between the religious faith of the mother and that of the petitioners. In disposing of the motion he must have realized that its allowance would require the dismissal of the petition for adoption. It cannot be held that there was error in law attaching to the religious factor the same importance which would be obliged to give it in passing upon the merits of the petition." [at pages 268-269].