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RELIGIOUS INSTITUTES— PROPERTY AND TAX ISSUES

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Religious Institutes—Structures Under Canon Law

I will be using the terms religious institute, religious order and religious congregation interchangeably. There is a canonical distinction between religious congregation and religious order; the former's members take simple vows, the latter's members take solemn vows, a distinction of importance in regard to the ownership of property which I will elaborate on shortly. Religious institute is the canonical term, religious order is favored in civil law and by the IRS, and religious congregation and religious community are the more popular terms.

A religious institute comes into existence when a group of Catholic Christians who choose to live a common life in service to God's people on behalf of the Church receive the Holy See's or a local bishop's approval. A religious institute is a voluntary association.

There are hundreds of religious institutes serving the Church in America. The majority of these were founded in Europe and followed the various immigrant groups here. Many religious communities still maintain strong European ties. However, most religious communities who serve in the United States maintain their mother houses here.

Most members of religious institutes take vows of poverty, chastity and obedience. Some institutes take additional vows; some only take one vow — obedience. In Canon Law, a religious institute is characterized as a public juridic person which may be under the direct authority of the Holy See in matters of internal governance and discipline, or a religious institute may have been given existence by a bishop, and its internal government remains subject to the bishop and the Holy See.

A religious institute of pontifical right is not directly under the authority of the local bishop as a religious congregation of diocesan right would be. Each institute has its own internal governing structure de-

scribed in its approved constitutions.

One might characterize the relationship of a pontifical religious institute with the local bishop as one of advise and consent. The religious congregation looks to the local bishop for either his passive or active approval for such actions as beginning a new apostolic work, constructing buildings, selling property, or terminating sponsorship of a school to cite a few examples. A religious institute is usually quite financially independent of both the local diocese and the Holy See. There is usually no interference from the Bishop unless there is a suspicion of negligence or fraud or possible scandal to the Church.

A religious institute as a voluntary association may or may not take civil form. However, most religious institutes have chosen to incorporate as tax-exempt section 501(c)(3) nonprofit corporations which hold property for charitable purposes and for the Church, and not for the private benefit of the members of that institute. For the most part, religious institutes have structured their apostolic works: colleges, schools and hospitals as 501(c)(3) membership corporations.

The religious institute as a canonical entity is not the same as the corporation it uses civilly. The members of the religious institute do not have comparable authority in the corporation as do members of other unincorporated associations or shareholders of corporations. The use of the nonprofit corporation by religious institutes is consistent with the canon law requirement that the church assets be protected by available civil law structures. The rationale behind the structuring of institute-sponsored works and institutions as nonprofit corporations is, of course, for ease of administration as well as limitation on liability, in effect, sheltering the religious institute's assets against any potential liability. For those of you that come into contact with religious institutes, especially those whose members are small in number, you will often find that they operate many of their apostolic works out of the congregation's corporation, which certainly opens them, especially if they operate child care institutions or schools or homes, to potential liability issues. It is certainly encouraged that any sponsored work that receives any type of governmental funding should be separately incorporated from the religious institute or religious congregation that sponsors it.

The duly-elected or appointed major superior and her council, because of their responsibility as canonical stewards of church assets, serve as the Board of Trustees of the institute corporation and as members of all the other sponsored corporations which are structured in a two-tiered fashion with members and trustees or in a Class A and Class B trustee model, requiring that final approval of certain acts of the Board of Trustees be reserved to the members of the corporation who are the major superior and her council. Such reserved powers include: final approval of changes in philosophy or mission of the corporation, merger or dissolution

of the corporation, amendments or repeal of the articles or bylaws, election or removal of the board of trustees and the CEO, and acts of alienation or the incurring of debt above a certain dollar amount.

The civilly incorporated apostolates remain canonically a part of the sponsoring institute. However, the leadership of the religious institute, through their reserved powers, fulfill their obligations as canonical stewards, and protect the rights of the church in the assets and activities of the sponsored works and institutions.

Property of the Institute - Under Canon Law

Under canon law, all property that belongs to a religious institute is, of course, considered church property and is regulated by the canons and the "proper law" of the religious institute. The term "proper law" refers to the approved constitutions of each institute, their operating document, their rules and regulations as it were. Institutes, as public juridic persons, are capable of acquiring, possessing, administering and alienating property unless the capacity to do so has been excluded or restricted in their constitutions.

Book V of the Code of Canon Law establishes procedures for the ordinary and extraordinary administration of church property which religious institutes must follow. The assets of the religious institutes, and their civil law corporations are considered, in canonical terms, as part of the patrimony of the religious institute.

The procedures for carrying out extraordinary acts of administration are set forth as well in the constitutions of the institute and in the canons, and also in the directives that are set out by the National Conference of Catholic Bishops. There are a series of permissions that need to be received before a religious institute or an institution sponsored by a institute can proceed with an act of alienation. Alienation is defined as a conveyance or encumbrance or placing in jeopardy of loss, any interest in the patrimony of the public juridic person. The length of the process or the complexity of the process depends upon the dollar amount of the alienation.

Because of the burden of providing for their elderly and ill members, and because of declining membership, many religious institutes have been involved in a great deal of alienation of property recently, as they are being forced to sell off large pieces of real estate and close many institutions in order to have the financial resources to respond to the needs of their congregations.

Tax Issues

Religious institutes and their incorporated, sponsored works and institutions are exempt from the payment of federal income tax under the

group ruling issued yearly by the Internal Revenue Service to the United States Catholic Conference. An *Official Catholic Directory* listing of a religious institute, and its sponsored works and institutions, qualifies them for tax deductible contributions.

Nonprofit corporations are the objects of close scrutiny of late, especially in the area of unrelated business income. One recent case, *St. Joseph's Farms of Indiana, the Brothers of the Congregation of Holy Cross v. Commissioner*,¹ is an example of such close scrutiny. In this case the IRS alleged that the Brothers of the Holy Cross owed approximately \$27,000.00 in tax on the income from their farming activity. The Brothers owned and staffed a sixteen-acre farm producing cattle and crops marketed commercially. The Tax Court held that farming was a trade or business not substantially related to the exempt purposes of the religious institute. However, because substantially all of the work performed by the Brothers was without compensation (they received a stipend from their Order for their living expenses as did all the Holy Cross Brothers), the activity fell within the exception to the definition of a trade or business in section 513(a)(1) of the Internal Revenue Code. In effect, the court of appeals essentially disregarded the Tax Court conclusions, and found that the proceeds from the farm activities were exempt from tax because the Brothers provided uncompensated services to the operation of the farm. It remains to be seen, however, how closely the IRS follows this decision, if any other challenges are made on a similar issue of unrelated business income.

Religious institutes may be exempt in some states from sales tax, but they are not exempt from excise taxes on such things as telephone service, air fare, and motor fuel. In most states, there is no property tax on real estate owned by the religious institutes and used for exempt purposes. However, assaults on this property tax exemption are also on the increase. A shrinking tax base is the obvious catalyst for these attacks. The general pattern regarding property tax disputes usually centers around the precise use of property owned by the religious institute, *i.e.* to what degree the property is actually being used for exempt purposes. Perhaps some of you are aware of pressure by municipalities on churches, hospitals, schools, etc., to make voluntary contributions for municipal services in lieu of property taxes. There are also some efforts in some states to reduce the property tax exemption to actual places of worship.

An Oregon case is an example of this type of challenge. Here the issue was whether the building owned by an incorporated religious order, the Good Shepherd Sisters, to house its members was exempt from real property taxes as property owned by a charitable institution actually and

¹ 85 T.C. 9 (1985).

exclusively occupied and used in the charitable work carried on by the institute, or as property used solely for charitable purposes by a religious organization. The appeals court overturned the Tax Court decision and held that the convent was exempt from real property tax. In the Tax Court, the Department of Revenue denied tax exemption on the grounds that the property itself was not used primarily for charitable purposes but as a residence for nuns. However, the Good Shepherd Sisters contended that the convent was used in the advancement of religion, an exempt purpose, arguing that the manner in which the nuns lived and the purposes for which they used the residence was in itself a religious objective, and that the support and propagation of religion was a charitable use and therefore the building should be exempt.

Members of Religious Institutes

With the remaining time, let me focus on the individual members of religious communities in the arena of tax issues and property ownership. As I mentioned before, membership in a religious institute and membership in the corporate entity of the religious institute are distinct. An individual's right to participate in the institute is based on one's membership in the institute, not on membership in the corporation created by the institute. The simple vows of poverty, chastity, and obedience are taken by members of most religious institutes. Simple vows do not take away the right to own property. However, the solemn vows taken by monastic orders, such as the Benedictines and the Cistercians, and mendicant orders such as the Dominicans, the Jesuits, and the Franciscans, do require the renunciation of the ability to own property.

Status Under Civil Law

An individual religious is an American citizen to whom all rights and responsibilities of American society apply. Membership in a religious institute and profession of vows is a constitutionally protected freedom found in the first amendment freedom of association. A religious is not more or less an American citizen for that choice. Nor does any civil reward accrue from that particular choice. Where civil law may play a part in the enforcing of vows is in the area of the ownership of property, because civil effect is given to some aspects of the vows which can amount to a contractual arrangement in regards to certain property rights, that is, the relationship between the religious and the congregation is founded on a mutual, valid and enforceable contract.

Individual religious are not tax exempt. However, because of a recognition of an agency relationship by the IRS, the principal, the religious institute, can receive tax-exempt income earned by the religious as agent. The law recognizes a per se agency relationship for the religious working

in Roman Catholic organizations listed in the Official Catholic Directory. The IRS refuses to find, however, and the courts concur, that an agency exists between the religious institute and a religious when the religious is ministering outside a Roman Catholic entity, with the possible exception when there is a contract between the religious institute and a third-party employer. This would be rare.

It would be an error for a religious to say that he or she is tax exempt, because his or her earnings are given to the religious institute. A taxpayer cannot escape tax by assigning or giving his/her income to another entity. What really happens is that the vow of poverty of religious is recognized as establishing an agency relationship with the religious institute for income tax purposes in defined circumstances, that is, where the religious is ministering in an entity listed in the *Official Catholic Directory*.

The premier case on the relationship of a vowed religious to his religious order is the *Order of St. Benedict of New Jersey v. Steinhauer*,² which the Supreme Court decided in 1914. In this case, a Benedictine priest, Father Augustin Wirth, had published several books, contracted with publishers and collected royalties during his lifetime. At his death he left an estate, and the case came down to a contest between the administrator of the estate and the Benedictine Order on the question of who was entitled to the assets under the estate, including royalties, copyrights, notes, and mortgages. The Benedictine Order sought to establish its ownership of the property left by its deceased member. The administrator argued that Father Wirth had permission to retain the assets as his own property and, more importantly, argued that the obligation of a religious to hand over anything he earned to his order was void as being against public policy, arguing in effect that the surrender symbolized by the vows is opposed to individual liberty and to the inherent right of every American citizen to acquire and hold property. The Supreme Court disagreed and held that where the assumption of the obligation of membership in a religious order was voluntary, and where withdrawal from the order is reserved to each member, an agreement between the order and the member that any acquisitions of the member are common property of the order is enforceable as to earnings and property acquired by the member. The court further held that the profession of vows was a condition of Father Wirth's admission to the Order. On admission, a binding and enforceable contract was created, and the Benedictine Order was the true owner of the assets of the estate. In effect, the Court agreed that the relationship of an individual religious to his order is founded on a mutually valid and enforceable contract.

² 234 U.S. 640 (1914).

Ownership of Property Under Canon Law

The property rights of religious under solemn and simple vows must be distinguished because of the canonical implications of the proper law of the institutes with respect to simple and solemn vows. Under the simple vow of poverty, a religious can retain ownership of already held property and acquire additional property through gift or bequest. A religious with a solemn vow of poverty may not acquire or own property by any means, except for the religious institute. If a religious under simple vows receives a gift or a bequest, whether in the form of real or personal property, or if there is any real or personal property which the religious brings to the institute upon entering, that property is referred to in canon law as patrimony. An individual religious under simple vows is required to transfer the management of her patrimony to another entity, for example, the religious institute itself. The transfer of administration, or cession, as it is called, does not transfer ownership. A religious is required to make this act of cession before final profession. In the act of cession the religious is free to dispose of the use of property and the revenues of the property in whatever way she sees fit. The intention of this canonical requirement is to convey the effect of the outright conveyance of title to the property in every respect short of loss of ownership.

If a religious chooses to separate from the religious institute, full control of the property is returned. If the religious dies, that property is disposed of according to her will. All religious are required under canon law to make a will recognized in civil law prior to final profession.

Even though many religious institutes choose to administer the patrimony of their members, there is no obligation for the institute to do so. If the congregation accepts this responsibility, it becomes the fiduciary, assuming the obligation to properly care for such property. The individual religious is free to renounce the patrimony either in favor of the institute or in favor of some other person or persons. Such renunciation must be carried out with proper formality so that no cloud of undue influence could settle on the act of renunciation in the future.

There are some tax implications on patrimony of a religious. The interest earned on the investment of patrimony is a taxable event to the individual religious and if the religious institute is administering the patrimony as the agent for the religious, it must report any interest income in excess of \$10 for each religious. Assignment of the income to the religious institute or to any other person does not affect the responsibility to pay those taxes.

Renunciation of Ownership of Property

It is also required by canon law that whatever an individual religious earns by way of salary or stipend or any other means is earned for the

benefit of the institute. Property acquired by one's own work or gained by gift because of membership in the institute is acquired for the institute. Each religious congregation requires that its members sign an agreement to preclude any later controversy or misunderstanding as to any claims the religious might have to anything earned in her capacity as a member of the religious institute, should she choose to separate herself from the institute. In return, the congregation is responsible for the total financial support of the individual religious.

Tax Issues - Individual Religion

There have been a number of battles fought with the Internal Revenue Service on the taxability of the individual religious.

Since 1979, the courts have issued over 100 rulings on the taxability of earnings of clergy and vow of poverty religious. Prior to 1977, the Internal Revenue Service attributed any compensation paid for work performed by a member of a religious institute with a vow of poverty to the religious institute, if the institute directed the religious to do the work or if the order retained control over the salary paid to the religious. It didn't matter what kind of work the member did or for whom the work was performed. The IRS deemed the religious an agent of the order with respect to the work performed, and therefore compensation belonged to the Order and the members had no tax liability. This was changed by Revenue Ruling 77-290 in August 1977. This ruling held that a member of a religious order under a vow of poverty who served as a lawyer with a law firm was taxable, but a religious who served as a secretary in a parish was not taxable.

The Leadership Conference of Women Religious and its counterpart for men religious challenged this ruling, claiming that religious were agents of an order via their vows of poverty and obedience, and were not taxable when their income was transferred in its entirety to the principal, the religious institute. The IRS disagreed and declared that only religious who serve with an entity listed in the *Official Catholic Directory* were not taxable.

The continued disagreement with the IRS' interpretation of the relationship between a vow of poverty religious and a religious institute produced several recent cases. Probably the most prominent of these was the *Fogarty v. United States*,³ which involved a Jesuit professor at the University of Virginia. Father Fogarty argued that his salary was not taxable because he was an agent of his religious order. The Court of Appeals for the Federal Circuit, however, held that he was taxable, but rejected the notion that a contract had to be in place between the order and the third-

³ 780 F.2d 1005 (Fed. Cir. 1986).

party employer for a religious not to be taxable. In general, the guideline that the Court gave was that all the facts and circumstances must be investigated to decide whether a religious is the agent of his order and therefore nontaxable, and that the existence of a contract between the order and the third-party employer was just one circumstance. In another recent case, *Schuster v. Commissioner*,⁴ the court declared that a religious nurse-midwife who worked in a federally-sponsored family health service center was also taxable, because no contract existed between the order and the government for her services. The Appeals Court used the *Fogarty* analysis that all the facts and circumstances must be taken into account to determine whether or not a religious is taxable, and using that kind of analysis, it seems to me that it would be very difficult to make the case that the religious was not taxable. It is still not clear whether a contract between the order and the third-party employer would create a situation that would enable the salary of the religious to be held nontaxable. Usually that type of contract implies that the religious order is going to guarantee that another religious will fill that position whether or not it is the person that is initially hired. Religious communities these days are very reluctant to enter into those type of contracts given the freedom of the religious in most institutes to have some input into the type of ministry that he or she chooses to carry out in the name of the Church.

As a result of these cases, however, and the clarification by additional revenue rulings, the Leadership Conferences of Men and Women Religious and the National Association of Treasurers of Religious Institutes are advocating the position that religious who work for an agency or institution listed in the *Official Catholic Directory* are considered agents of the religious institute, and are not required to pay federal or state income taxes. Religious who are employed by an agency or institution not listed in the *Official Catholic Directory* are required to pay income taxes. An individual religious who works for anyone else will not be considered an agent of the religious institute unless the institute has bound itself contractually to perform the services in question. The institute would be liable for income taxes if the services performed were not substantially related to the exempt purposes of the religious order.

Dowry

A word about dowries is appropriate. Dowry is a term that we don't hear often these days. Once upon a time, it was common practice, especially in communities of religious women, that a woman entering had to bring with her money, goods, or an estate defined as a dowry. In some instances it was set at a very low amount. I think when I entered, I had to

⁴ 84 T.C. 764 (1985).

bring a dowry of \$25.00, which certainly didn't go very far. Title to that dowry shifted to the religious institute, as a conditional gift. If the individual left the institute, then the dowry was returned to her. The investment income, however, was not taxable because it was given to the institute, which had an exempt status. Receiving or returning the dowry was not a taxable event for either the institute or the individual religious. Few religious orders require dowries today.

This has been a brief and incomplete explanation of a very large and involved topic. For more comprehensive treatment of any of the issues, I would point you to the items listed in the bibliography.

One final word before I open to questions. Persons in leadership positions in religious institutes, especially in religious institutes of women, do not work their way up the corporate ladder to gain administrative experience. They are chosen because they are perceived to have the qualities to provide moral and spiritual leadership for a religious congregation. The reality is that those elected to positions of leadership become immediately responsible, with little or no experience, for multimillion dollar corporations and multimillion dollar assets in property. If any of you, in your role as attorneys for the diocese, are ever in a position to counsel, advocate for, or educate these leaders of religious institutes, I hope you will see it as an opportunity to further the mission of the Church and give them whatever help you can. Now if there are any questions?

QUESTION: Sister, you spoke of property being returned if a nun leaves the order. How does that affect real estate titles?

SISTER CECILIA: Well ordinarily, the property is not real estate. I guess there could be some instances where an individual might hold title to a house. If he or she is a religious in simple vows, ownership is retained. Title stays with that individual.

QUESTION: It really is a conditional donation?

SISTER CECILIA: No, no, there is no conditional donation of what we call patrimony in the Church. Usually, the ownership is retained by the individual. Ownership could be given over to the religious institute. The administration may be given over to the religious institute or to anyone the religious chooses. She could ask her brother to be administrator of the property, she could ask a bank to be administrator of the property. She does not give up ownership. So, should she leave, there is not a question of the title being returned to her, because she never lost the title in the first place.

CHUCK REYNOLDS: Sister, two questions. First of all, can you describe a little bit about the process of suppression of a religious institute?

SISTER CECILIA: That's an area of canon law, and I don't hold myself out to be an expert in canon law.

CHUCK REYNOLDS: Let me go ahead with the other question then. These are two things that have just recently come up for me, and I have

not even yet had the opportunity to begin researching, so I thought I would take advantage of this. The issue is a member of a mendicant order, who has acquired assets contrary to the instructions of his order. Is it possible to compromise an estate controversy between the members of that person's family and the order, or is it an extremely important principle that has to be upheld as far as where those assets go upon the death of that individual?

SISTER CECILIA: Is this individual dead now?

CHUCK REYNOLDS: Yes.

SISTER CECILIA: It seems to me that is almost the same fact pattern as the Benedictine order case, and the court said then that because of the vow being a bona fide contract with the religious institute that those assets should go to the religious community. There was some question in that case, too, whether or not Father Wirth had permission to do what he was doing. He seemed to have traveled about a bit from one province to another, and the superiors were not keeping very good track of him evidently. He was not in close contact with his religious community, and they were not monitoring him as to what he was doing or the assets that he was acquiring.

CHUCK REYNOLDS: The community in my case, at least the person with whom I am dealing, is considering a compromise. Of course, I am going to follow whatever direction they give me, but right now they are entertaining the possibility of keeping some and letting the family have some.

SISTER CECILIA: You might suggest that they consult with some canon lawyers on that issue.

CHUCK REYNOLDS: OK. Now what about the suppression?

SISTER CECILIA: Brother Peter Campbell has more experience in this area.

BROTHER PETER CAMPBELL: This is a tricky one, in that there is no one process.

SISTER CECILIA: Maybe you could explain what suppression is.

BROTHER PETER CAMPBELL: OK, suppression would simply mean removal of recognition by the Church of an organization's status as a religious institute within the Church. This has happened in a variety of settings. Several instances of recent vintage exist within our American history. The problem in answering the question simply is that there is no one way to do it. The more common example probably is attributable to aging monastic communities that reduce in size so much that they are incapable of taking care of themselves. Some authority, either within that order or diocesan authority, tries to deal with how we take care of these people. And so, there have been a number of monastic groups in this country that have been suppressed, and their members have been moved to other facilities. There is one going on right now that I am aware of, and

I have participated in two or three of them, in an advisory capacity to deal with property questions.

The concept of property in relation to the Roman notions creates some problems with tax implications in the United States. In one opinion that came from Rome, we had to do some interpreting to balance the concept. Let's say there are six people dividing up the assets six ways, not a lot, just enough to take care of these six people in the sense a sixth would go to whatever monastery a person went to; if two went, two-sixths, and so on. Well, that implies private inurement relating to section 501(c)(3) organizations. What we finally worked out was making a distinction between that and a rough estimate sort of thing. There was nothing wrong with one charitable entity providing charity to another. And we finally came to a conclusion that we would develop the notion of charity, based on who went where and how many. So you didn't raise the inurement issue. So, there are a whole variety of issues that are just being considered.

Sometimes suppression is a disciplinary issue, and the community can have its approbation withdrawn for disciplinary reasons. That gets hairy because oftentimes what happens, is the group that departs gets nothing and then there are some real justice questions, especially if age is a factor. And that is an issue that is being debated even today among different religious communities on various issues relative to the Church. DAVID GARZA: Sister, I have recently used the concepts you mentioned, but I am not sure of the end result. I was satisfied with the end result and so was the client, and you are right that quite often the religious superiors are not familiar with all their rights. Well, we had a case, and I called USCC since I thought it was something that was very common. We had a case where a nun was killed in a car accident and several thousand dollars of both funeral expenses and medical bills were incurred. So we brought a claim against the other party and had to deal with our insurance company. Under Texas law, probably similar in most states, under the wrongful death statutes, usually the parents, the spouse or the children have a claim. I don't know if that applies here. The State may have a claim and in this case, the religious had done a will. So I pushed the issue that not only were we entitled to recover the funeral expenses and medical expenses, but the loss of the earnings for that member of the religious order into the future. We projected earnings into the future, social security into the future, and also they would have received some kind of pension into the future. We were successful convincing the insurance company to pay all those sums to the order.

SISTER CECILIA: Congratulations.

MR. GARZA: Keep that in mind if you have anybody who was injured, because I relied on all these concepts to reach what we thought was a very good settlement for the order. Not only the losses that they had sustained

in the actual burial and so forth, but also expenses into the future.

SISTER CECILIA: Thank you for that. There is also a case being fought out in Wisconsin. This was a religious who was working in a hospital, who had an on-the-job accident, from which she later died, and the attempt was made, under workman's compensation to have the award given to the religious community as the next of kin. There are also attempts to change the definition of family under Wisconsin law to some definition to accommodate that, but the civil law doesn't recognize any type of familial relationship between religious community and the individual religious. It makes it very difficult then to make those types of claims when the law says the awards go to the next of kin, and the next of kin is mother, father, sister, brother, nephew, niece, not the religious community which the individual has adopted as her family. The only language that I have seen in any court case that begins to recognize that a religious community has a family relationship to its members is the Brother Fox case, which was an issue of withdrawal of treatment. Two of the court opinions do begin to talk about the fact that the superior of Brother Fox's local house in Long Island did have standing to be a decision-maker in terms of Brother Fox's medical treatment. You don't see many of those discussions, and the fact that you were able to convince the insurance company that the religious community should be considered family in this situation and be awarded damages is certainly helpful.

MR. GARZA: In the future, this sister's earnings would have provided income not only for herself, but also for other members. We used that concept to convince them that the order not only had a claim for the damages, but all her lost and future earnings. We projected that over a 22-year period based on her life expectancy. We convinced them of this as it was a substantial settlement then. For whatever it was worth, I was surprised when I called Washington, and asked who could I talk to about this, and they said they don't have anything on this.

SISTER CECILIA: You're a trailblazer there.

GEORGE FORDE: Of course, you have to be lucky enough not to be killed instantly, because we had a sister who was killed years ago and that was the problem, even though we could show quite a bit of damages. Also, you have to be lucky enough to be in an apostolate where you are not getting a religious stipend, if you are going to survive.

SISTER CECILIA: That's so true, yes.

MR. FORDE: So long as you are getting into the family thing, the thing that has always bothered me and I would like you or anyone here to comment on it, is in the estates area where you have good Catholic families that want to cut sister or brother out because they are well enough taken care of, and even to the extent of great-grandchildren, but not the community, not the people that your child has decided to make her family. Would you or anybody here talk about that?

SISTER CECILIA: Well, I certainly would argue in my family that even though the gift can come to me and I hand it over to the religious community, that shouldn't eliminate the gift. There have been several cases that I cited in the outline that argued that the gifts were actually made to religious and they were trying to claim that they were then charitable gifts and tax-deductible, but of course the courts didn't agree with that. I don't know, I think that that is an individual family decision, and I don't know whether you argue that on justice terms or what, but maybe somebody else would like to get into this discussion.

MR. FORDE: That is another one where you can get a bonus. Of course, if you leave it to the religious, it is not exempt. But you can leave it to the religious, and if the religious is deceased, then to her community. You can also remind them this is an opportunity to file a disclaimer. Where you can disclaim, it is as if you were dead, so the gift goes to your community, if you have a qualified or appropriate disclaimer.

SISTER CECILIA: Well, if I read the court cases correctly, they are not accepting that argument. The gift has to be made to the Sisters of Mercy, because only the Sisters of Mercy are tax exempt.

GEORGE FORDE: Well it is, Sister. If I leave it to Sister, but if she doesn't survive me, to her religious community, then that gives Sister the option.

SISTER CECILIA: OK, if that is the language, then also the terms of her will may come into play there, if in her will she has specified that her estate, whatever it should be when she dies, goes to her community.

QUESTION: Let me ask one question about liability. In your opinion, do the vows, be they solemn or simple, in the relationship that then exists between the institute and the member, create any special or unique liability problems that perhaps we should be aware of?

SISTER CECILIA: You mean in terms of agency? Well, I guess you can certainly make that argument, but it depends upon the circumstances.

QUESTION: I know that is kind of outside of the scope, but when you mentioned all the right words that have special meaning to people who are in the defendant's bar . . . , I mean are we all in the defendant's bar here, or are some of us across the line?

SISTER CECILIA: Do you have something to contribute to that?

SISTER JUDY MURPHY: You know you can wear two hats on this. I think that the religious communities argue agency to the Internal Revenue.

SISTER CECILIA: That's right.

SISTER JUDY: But when the school principal or father out there does the molestation, then all of a sudden they are starting to argue employee, and the outside third parties which we are dealing with look for two deep pockets. So, I wonder how long, you brought up the workman's compensation, you argue that they are not an employee for that, and yet the state

laws throughout the country argue differently. So I don't know how long we are going to continue fiction and in what category.

JOE MCGOVERN: Sister, you referred to the Internal Revenue ruling that if the religious works in a Catholic Directory corporation that the salary paid for the religious is deemed to be paid to the community and that there is no income tax problem. Despite that ruling, would you recommend the former practice, or in many cases a continuing practice, of having an agreement between the operating agency and the community congregation to express the assignment of the religious to the operating agency (the hospital for example)? Would you recommend that that be done so that there is something in writing to show the IRS? Even if you don't think it is necessary, do you think it is advisable, to continue to have something in writing relating to the assignment of the religious to do the work within the congregation's mission?

SISTER CECILIA: I just can't see what useful purpose it would provide, because the tax exemption comes because of the religious working in an entity listed in the Catholic Directory. And I think the IRS is perfectly comfortable with that.

MR. MCGOVERN: But from the viewpoint of the employer, it might be very useful. If the hospital wants to have a director of nursing, for example, the hospital might be interested in getting Sr. Murray rather than Sr. Phillip, and from the employer's viewpoint, it would seek a commitment from the congregation to supply the person qualified for the position.

SISTER CECILIA: See, I think that is outside the tax issue.

MR. MCGOVERN: Even if it was not necessary, would it be advisable to have a one page agreement in letter form protecting both sides? I think it is necessary to protect both parties to the agreement.

SISTER CECILIA: Peter, do you want to comment?

BROTHER PETER: Just to comment on the prior discussion on this liability issue that Mark raises, it is not clear and I don't know if I have a final answer or anything like that, but based on the experience over a number of years, I think a couple of things must be pointed out. In dealing with tax law, you are dealing with statutory material. There is a great deal of fiction built into that, reflecting various political realities that have come out in the form of provisions of the Tax Code. For example, most of you categorize diocesan priests as independent contractors. If you apply the common law understandings of that, I doubt that you will have a bishop that would agree that his priests are independent contractors. That is a problem.

I think the same is true in relation to religious relative to work within the Church. But I do believe that in most settings where religious are working within the Church, they are also common law employees. We should not automatically take the notions from the tax side, relative to this very narrow agency issue on the compensation, and move it over to

all the other common law understandings relating to liability. There, I believe, the standard test should apply. The fact that I am a religious should not color the conclusion. So often, we have come to the conclusion that automatically liability exists because I am a religious.

I think we need to make some distinctions. We have the opportunity here to not fall into the trap of automatically concluding liability exists without testing and challenging when someone tries to take a series of things from tax law and apply them in other areas of law. It is tricky. It is not fully consistent. But we have fallen into the trap very often. In my opinion, and I have watched over ten years working for the Major Superiors Conferences, where we have concluded that the liability exists because it is a tax agency relationship, rather than raising all of the other defenses that are appropriate.

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