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Bequests for Masses: Doctrine, History and Legal Status

*Nicolas P. Cafardi**

I. INTRODUCTION

The belief that prayers can effect the eternal happiness of the dead has an ancient history in Judaeo-Christian tradition.¹ The sacrifice of the Eucharist was always a part of the burial rite in the catacombs,² and Fathers of the early Catholic Church often referred in their writings to the idea that the living can help the dead through prayers and especially through the Mass.³ Prayers for the dead continue to hold significance in present-day Catholic

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1. See 2 *Maccabees* 12:45. The Second Book of Maccabees reports that when pagan magic charms were found on the bodies of dead Jewish soldiers after a battle with the Greeks, the commander of the Jewish forces took up a collection from among his troops to offer a sacrifice for the dead soldiers in order that God might forgive them their sin of superstition. The author of Maccabees said of the commander, "If he was looking to the splendid reward that is laid up for those who fall asleep in godliness, it was a holy and pious thought. Therefore he made atonement for the dead, that they might be delivered from this sin." *Id.*

2. 5 ENCYCLOPEDIA BRITANNICA, *Catacombs*, at 58 (12th ed. 1969).

3. See TEACHING OF CHRIST 528 n.9 (R. Lawler, D. Wuerly, & T. Lawler 1976) (citing St. Ephraem, *Testamentum* 72; St. Cyril of Jerusalem, *Catechesis* 23, reprinted in J. MIGNE, PATROLOGIAE CURSUS COMPLETUS, SERIES GRAECA 33.1116; St. Epiphanius, *Adversus Haeresis Panarium* 75.8, reprinted in J. MIGNE, *supra*, at 42.513; St. John Chrysostom, *In Epistulam Ad Philippenses Homilia* 3.4, reprinted in J. MIGNE, *supra*, at 62.203; St. Augustine, *Enchiridion* 110, reprinted in J. MIGNE, PATROLOGIAE CURSUS COMPLETUS, SERIES LATINA 40.283) [hereinafter cited as TEACHING OF CHRIST].

and Orthodox masses for the dead, in Protestant memorial and communion services, and in the Jewish practices of Yahrzeit and Kaddish.⁴ The practice of prayer is often reinforced by a decedent's testamentary gift to a religious agency, coupled with a request that religious services be performed on his or her behalf. Common law countries, largely because of particular historical phenomena, have taken conflicting positions on the legal issues posed by testamentary gifts for religious services.⁵

This article addresses the legal standing of one type of religious testamentary gift—a bequest for Roman Catholic Masses. Because many of the problems associated with bequests for Masses result from a misunderstanding of the religious concepts involved, the article begins with a brief examination of religious doctrine. This is followed by an examination of the common law history and current legal status of Mass bequests.

II. RELIGIOUS DOCTRINE

Although an analysis of the sectarian beliefs surrounding testamentary gifts for Masses has been avoided by many courts, some have found the subject matter appropriate for consideration. Consider, for example, the affidavit of Bishop Delaney of Cork, admitted into evidence in a 19th Century Irish case⁶ dealing with the legal validity of Mass bequests:

I am a priest in Holy Orders of the Roman Catholic Church, and have the degree of Doctor of Divinity, and am well acquainted with the doctrines, ritual, and observances of that Church. According to the doctrine of the Roman Catholic Church, the Mass is a true and real sacrifice offered to God by the priest, not in his own person only, but in the name of the Church whose minister he is. Every Mass, on whatever occasion said, is offered to God in the name of the Church to propitiate his anger, to return thanks for his benefits, and to bring down his blessings upon the whole world . . . [I]t is impossible, according to the doctrine of the Roman Catholic Church, that a Mass can be offered for the benefit of one or more individuals living or dead to the exclusion of the general objects intended by the church and before

4. Brennan, *Bequests for Religious Services*, 17 CLEV.-MAR. L. REV. 388, 397 (1968). See also Freehof, *Kaddish for the Martyrs*, in A TREASURY OF RESPONSA 84 (1962); THE JEWISH ALMANAC 595 (R. Siegel & C. Rinds 1980).

5. See *infra* text accompanying notes 12-48.

6. *Attorney-Gen. v. Delaney*, 10 Ir. R.-C.L. 104 (1875).

mentioned; over and above such general objects, a Mass may be offered up by a priest with the intention of obtaining from God some special favour, such as to obtain his mercy for the soul of an individual living or dead. When an *honorarium* is given to a priest for the purpose of saying a Mass for the departed soul of any person, he is bound to say Mass, or a certain number of Masses, with the intention of obtaining God's mercy for that soul; that obligation is discharged by a mental act of the priest intending to apply the Mass to that particular purpose Such *honoraria* for Masses form portion [sic] of the ordinary income and means of livelihood of priests, and are generally in Ireland distributed by those to whom the distribution is entrusted amongst priests whose circumstances are such that they stand in need of the assistance so offered.⁷

Hence, Roman Catholic doctrine holds that a Mass offered by a priest is offered for the benefit of all the world, even when the priest has the silent intention of benefiting one particular individual, living or dead.⁸ The honorarium or stipend given to the priest with the request that Mass be said for a special intention has recently been described in the following way:

It has been a strong tradition in the Church that the faithful, moved by a religious and ecclesiastical consciousness, should join in a kind of self-sacrifice of their own to the eucharistic sacrifice, so as to share in the latter more effectively, and should provide in this way for the needs of the Church, above all for the support of the Church's ministers.⁹

Thus, the Mass stipend is an individual sacrifice through which the donor joins in the greater sacrifice of the Mass and simultaneously contributes to the needs of the Church. The stipend is neither a payment for the Mass nor a payment for the priest's service in the performance of the Mass, but is a charitable gift on the part of the donor to allow the Church to support its priests. In fact, Church doctrine teaches that a payment, or an acceptance of payment, for spiritual favors such as the Mass comprises the serious sin of simony,¹⁰ named for Simon Magus,

7. *Id.* at 108-09.

8. TEACHING OF CHRIST, *supra* note 3, at 528 (compilation of Catholic theology published with ecclesiastical approval).

9. Instructional Letter from Paul VI, Faculties Concerning Mass Stipends (June 13, 1974). This was a *motu proprio*, an instructional letter written by Pope Paul VI. *Motu proprio* translates loosely from the Latin as "by his own motion," or "by his own hand."

10. T. Aquinas, *Ila/Ilae SUMMA THEOLOGIAE* art. 2, para. 2 at 100.

who attempted to purchase from the apostles the ability to perform miracles.¹¹ Thus, although the offering of Mass is the event which occasions the stipend, the stipend is not a *quid pro quo* by which the Mass or the offices of the priest are purchased.

III. THE LEGAL HISTORY OF BEQUESTS FOR MASSES

A. *England*

The Church's central position in the feudal structure of England insured the validity of pecuniary bequests for Masses at early common law.¹² Although the Mortmain Acts prohibited transfers of land to religious groups,¹³ there existed, through various exceptions to these acts,¹⁴ two types of tenure which bound tenants to offer spiritual services, typically Masses, for their enfeoffers. These were tenure in free alms (*frankalmoign*) and tenure in divine service.¹⁵

The Domesday Book contains many references to land given to religious groups and to lay persons in exchange for prayers and Masses for the donor's soul.¹⁶ A common method for accomplishing this purpose was the creation of an endowment, called a chantry, of land or the rent from land, for the purpose of having Masses said for the donor.¹⁷ Although Henry VIII limited the duration of a chantry to periods of no greater than 20 years,¹⁸ the validity of the device was unquestioned through the earliest days of the Reformation in England. In fact, Henry VIII, who re-

11. See *Acts of the Apostles* 8:9-24.

12. See 3 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 545 (3d ed. 1923).

13. *Id.* at 87.

14. One such exception was the grant of a mortmain license, obtained by payment of an indemnity to the Crown for the future loss of tax revenues. A. KREIDER, *ENGLISH CHANTRIES, THE ROAD TO DISSOLUTION* 72 (1979).

15. 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 240-51 (2d ed. 1898). The tenants were not always religious groups. *Id.*

16. See DOMESDAY BOOK i at 293, ii at 133, iv at 466 (1783-1816).

17. A chantry was "an ecclesiastical benefice which had been endowed with lands or rents by its founder, who hoped to be the beneficiary of the prayers and masses offered by an endless succession of chantry priests." KREIDER, *supra* note 14, at 5.

18. HOLDSWORTH, *supra* note 12, at 545-46. Henry's last Parliament passed a Chantries Act, which placed at the king's disposal all "colleges, free chapels, chantries hospitals, fraternities, brotherhoods, guilds and stipendiary priests." The act was never enforced. KREIDER, *supra* note 14, at 5.

jected the primacy of the Pope but had no doctrinal disputes with the Church, left a will which provided for "daily Masses perpetual so long as the world endure."¹⁹

Soon after Henry's reign, however, the Roman Catholic Mass became illegal in England and all testamentary bequests for Masses were voided by the courts as being superstitious.²⁰ The first act of the legislature under Edward VI, Henry's son and immediate successor, was an attempt to divest the Mass of various superstitions and to restore it to its "primitive" character.²¹ In 1549, the Act of Uniformity promulgated a Book of Common Prayer, including as the only legal form of religious celebration a modified version of the Mass in the English language.²² This was followed by a Second Prayer Book, promulgated by statute in 1552, which reduced the Mass to a communion service.²³ Included in the latter statute was a penal section which subjected persons who attended any other form of religious service to six months imprisonment in the first instance, to a year's imprisonment in the second, and to life imprisonment for a third violation. Arguably, the Roman Catholic Mass became illegal in England with the Book of Common Prayer; certainly, it was illegal by the time of the Second Prayer Book in 1552.

The Chantries Act was also passed during the reign of Edward VI.²⁴ This law seized for the King certain endowments of

19. J.A. FROUDE, *HISTORY OF ENGLAND* 527 (1891).

20. *See Adams v. Lambert*, 72 Eng. Rep. 815, 819 (K.B. 1602).

21. 1 Edw. 6, ch. 1.

22. 2 & 3 Edw. 6, ch. 1. At the time of the enactment of the Act of Uniformity no official version of the Mass existed; local variations were common. Not until the twenty-second session of the Council of Trent, on September 18, 1562, did the Roman Catholic Church authorize the use of a uniform version of the Mass, which was to be established by the Pope. By papal decree in 1570, the version previously used by the Roman Curia was made the uniform version for the Church. Exceptions, however, were still permitted in localities in which specific, local versions of the Mass had been used for 200 years or more.

The Book of Common Prayer's prescription of English as the language to be used in the Mass posed a substantial divergence from tradition. Latin had been the sole language used in the Mass since the late fourth century and was canonized as such by the twenty-second session of the Council of Trent, which prohibited the saying of Mass in common vernacular. Latin continued as the only valid language until Vatican Council II (1962-65). *See T. KLAUSER, A SHORT HISTORY OF THE WESTERN LITURGY* 117-19 (1979); *J. WATERFRONT, CANONS AND DECREES OF THE COUNCIL OF TRENT* 195 (London 1848).

23. 5 & 6 Edw. 6, ch. 1.

24. 1 Edw. 6, ch. 14.

real property left to dissolved religious foundations, such as chantries, colleges, or free chapels. Masses and bequests for Masses are not mentioned in the legally operative part of the statute, but in a broadly drafted preamble, the Mass is referred to as a superstition.²⁵ The Chantries Act subsequently became important in the disposition of Mass bequests at common law.²⁶

Edward was followed on the throne by his half-sister Mary, in 1553, who attempted to restore the former religion. One of her first acts was to repeal all of Edward's ventures into the proper forms of religious services.²⁷ This was followed by a law which forbade interference with the saying of Mass.²⁸ For the five-year period of Mary's reign, the legality of the Mass was restored.

In a continuation of this *cuius regio, eius religio* turnabout, Mary's successor, her half-sister Elizabeth, re-instituted Edward's reform statutes.²⁹ Elizabeth's statutes restored the communion service of the Book of Common Prayer as the only form of eucharistic worship permissible under law and penalized attendance at other services. Thus, after 1558, the Catholic Mass was again illegal in England. This illegality was reaffirmed in 1581 by a statute which made both saying and being present at a Mass a criminal offense punishable by imprisonment.³⁰ Bequests for Masses were thus void under the common law principle that bequests for an unlawful purpose are void.³¹

Elizabeth's penal statute remained in effect until 1791, when Parliament passed an act permitting Roman Catholics to conduct and attend religious services provided they swore an oath of allegiance to the Crown.³² The 1791 act, however, effectively pro-

25. *Id.* The operative words of the preamble are:

Considering that a great part of superstition and errors in Christian religion has been brought into the minds and estimations of men by reason of the ignorance of their true and perfect salvation through the death of Jesus Christ, and by devising and phantasying vain opinions of purgatory and Masses satisfactory, to be done for them which be departed; the which doctrine and vain opinion by nothing more is maintained and unholden than by the abuse of trentals, chantries and other provisions made for the continuance of the said blindness and ignorance.

Id.

26. See *infra* text accompanying notes 35-37.

27. 1 Mary 2, ch. 2.

28. 1 Mary 2, ch. 3.

29. 1 Eliz. ch. 1; 1 Eliz. ch. 2.

30. 23 Eliz. ch. 1, § 4.

31. See *Adams v. Lambert*, 72 Eng. Rep. 815, 819 (K.B. 1602).

32. 31 Geo. 3, ch. 32.

hibited bequests of real or personal property for Catholic religious purposes, including Mass bequests. The Catholic Relief Act of 1829³³ and the Roman Catholic Charities Act of 1832³⁴ finally restored to Catholics the rights enjoyed by nonanglican protestants, such as the right to bequeath money to build churches or the right to pay a minister to conduct religious services or the right to leave bequests for religious services.

The English courts, however, were slow to recognize the validity of Mass bequests. In the 1835 case of *West v. Shuttleworth*,³⁵ the central issue was the validity of a bequest for Masses. The court found that the recent Catholic rights acts validated only bequests for "schools, places of worship, educational or charitable purposes," and that Mass bequests fit into none of these categories.³⁶ The court concluded that the three-centuries-old Chantries Act³⁷ was controlling and that, although the Chantries Act did not specifically cover Mass bequests, it had established in its preamble the illegality of a bequest for Masses by terming it a "superstitious use."

Though legal scholars may challenge the judicial gymnastics applied in *West*, the English courts followed the holding for some eighty-four years.³⁸ It was not until 1919, in *Bourne v. Keane*,³⁹ that the House of Lords held that *West* was wrongly decided and that Mass bequests were not void as superstitious uses. Thus, for a period of at least 338 years, the English common law voided bequests for Masses. It was not until 1934 that English courts held Mass bequests to be charitable bequests for the advancement of religion.⁴⁰

The Irish courts, which were staffed by English judges during the years England ruled Ireland, actually held Mass bequests

33. 10 Geo. 4, ch. 7.

34. 2 & 3 Will. 4, ch. 115.

35. 39 Eng. Rep. 1106 (Ch. 1835).

36. *Id.* at 1111.

37. See *supra* notes 24-26 and accompanying text.

38. See *Attorney-Gen. v. Fishmonger's Co.*, 41 Eng. Rep. 276 (Ch. 1841); *Heath v. Chapman*, 61 Eng. Rep. 781 (V.C. 1854); *In re Michel's Trust*, 54 Eng. Rep. 280 (M.R. 1860); *In re Blundell's Trusts*, 54 Eng. Rep. 928 (M.R. 1861); *Yeap Cheah Neo v. Ony Chay Neo*, 6 L.R.-P.C. 382 (1875); *In re Fleetwood*, 15 Ch. D. 594 (1880); *Bowman v. Secular Soc'y, Ltd.*, 1917 A.C. 406 (H.L.).

40. See *In re Caus*, [1934] 1 Ch. 162, 169-70. *But see Gilmour v. Coats*, [1949] A.C. 426 (H.L.) (convent of nuns held to be noncharitable because the only public benefit cited, that of intercessory prayers by the nuns, is not susceptible of legal proof).

valid before English courts so held.⁴¹ A rule still exists in Northern Ireland, however, that a bequest will be considered charitable only if it specifies that the Masses are to be celebrated in public.⁴² The rationale is that a valid charitable bequest must work some public good. This reasoning ignores the Roman Catholic doctrine that Mass bequests are not payment for the Masses, but are contributions for the benefit of the Church and the support of its ministers, all of which inure to the public good through the general advancement of religion.

B. *The United States*

The characterization of Mass bequests as superstitious uses never received judicial acceptance in the United States.⁴³ American courts, however, found other problems with Mass bequests. Many early Mass bequests ran afoul of the common law rule prohibiting trusts in perpetuity (the Rule Against Perpetuities) and the rules invalidating trusts with indefinite beneficiaries.⁴⁴

Charitable trusts are not subject to invalidation for indefiniteness of beneficiaries, nor is their duration limited by the Rule Against Perpetuities.⁴⁵ But because early American courts were not well informed on the nature of the Roman Catholic Mass, they often had difficulty characterizing Mass bequests as charitable uses. Finding that a religious service offered for the soul of a named individual benefits that individual only, courts deemed a trust with such a private object to be noncharitable.⁴⁶ This is inconsistent with the Catholic doctrine that every Mass is offered for the benefit of the entire world, despite the silent intentions of the priest. In addition, because an honorarium attached to a Mass is not payment for the Mass, but a sacrifice by the faithful for the needs of the Church and her ministers, the

41. See *O'Hanlon v. Logue*, 1906 Ir. R. 247, 261.

42. *Id.*

43. See *Hoeffler v. Clogan*, 171 Ill. 462, 469, 49 N.E. 527, 529 (1898) ("The doctrine of superstitious uses arising from the statute 1 Edw. VI, chap. 14, under which devises for procuring masses were held to be void, is of no force in this State, and has never obtained in the United States").

44. 2 G. BOGERT, *TRUSTS AND TRUSTEES* § 164 (2d ed. 1964).

45. *RESTATEMENT (SECOND) OF TRUSTS* §§ 364, 365 (1959).

46. See, e.g., *Ackerman v. Fichter*, 179 Ind. 392, 101 N.E. 493 (1913).

honorarium qualifies as a gift for the advancement of religion.⁴⁷ Gifts for the advancement of religion have long been held to be charitable.⁴⁸

IV. CURRENT LEGAL STATUS OF BEQUESTS FOR MASSES IN THE UNITED STATES

A. *Legal Theories*

Professor John Curran has detailed, in two articles,⁴⁹ the history of judicial construction of Mass bequests in the United States. This history need not be repeated here. Suffice it to say that today, Mass bequests are generally upheld as charitable trusts for the advancement of religion. Appendix A to this article lists all cases reported after the 1956 publication date of Professor Curran's last article.

Three legal theories have been used most often to characterize Mass bequests in American courts. Mass bequests have been variously presented as establishing charitable trusts, or as creating powers of appointment, or as gifts to the Church. Most American jurisdictions today characterize bequests for Masses as establishing valid charitable trusts. Such an interpretation is supported by the treatises of Professors Bogert⁵⁰ and Scott,⁵¹ two

47. See generally *supra* notes 6-11 and accompanying text.

48. RESTATEMENT (SECOND) OF TRUSTS §§ 368, 371 (1959). See also *Commissioners for Special Purposes of Income Tax v. Pemsel*, 1891 A.C. 531, 583 (H.L.); 4 A. SCOTT, THE LAW OF TRUSTS § 368 (3d ed. 1967).

49. Curran, *Trusts for Masses*, 7 NOTRE DAME LAW. 42 (1931); Curran, *Charitable Trusts for Masses - 1931-1956*, 5 DE PAUL L. REV. 246 (1956).

50. 4 G. BOGERT, TRUSTS AND TRUSTEES § 376 (2d ed. 1964). The Bogert treatise explains:

In nearly all American states where the question has arisen a trust to spend capital or income for Masses for the soul of the testator, or his relatives, or the souls of other definite persons, or the souls of a class of deceased persons, or the souls of deceased persons indefinitely, no matter of what duration the trust may be, will undoubtedly be upheld as a charitable trust for religious uses.

Id.

51. 4 A. SCOTT, THE LAW OF TRUSTS § 371.5 (3d ed. 1967). The Scott treatise states:

[B]y the great weight of authority in the United States it is now held that a trust for Masses is a charitable trust. These cases seem clearly sound. Although the saying of a Mass may be for the particular benefit of a specific person who has died, the benefits are not confined to the par-

major authorities in American trust law. The recorded cases, however, reveal that trust language is seldom used by a decedent making a bequest for Masses.⁵² More often, the language approximates the following: "The balance of my estate to go for Masses for the repose of the souls of myself and my beloved wife . . .,"⁵³ or "To the Society for the Propagation of the Faith, the sum of \$2,000 for Masses for the repose of my soul."⁵⁴

In the 1940's, a series of articles written by Kenneth R. O'Brien and Daniel E. O'Brien argued that the trust theory was not accurate except in those instances where money was actually to be managed by a named trustee to provide income to pay Mass stipends.⁵⁵ The O'Briens preferred to characterize the testamentary instructions as creating a power of appointment in the named person or institution to arrange for Masses to be offered by a priest, using as stipends such funds as the testator specified. The advantage of this characterization is apparent; even when a will makes a bequest to a specific priest for Masses, the bequest would not be characterized as a private gift, but would create in the priest a power of appointment to dispose of the money to priests, including himself, who will offer the requested Masses.⁵⁶

The O'Briens' analysis has not been accepted by the majority of American jurisdictions. Bequests for Masses, except where a

particular soul but extend to the other members of the church and to all the world, according to the doctrines of the Roman Catholic Church.

In several cases where a bequest was made to a particular priest for the saying of Masses, the bequest was upheld not as a charitable trust but as a beneficial gift to the priest conditioned upon his saying Masses.

Id.

52. See, e.g., *Lanza v. DiFronzo*, 92 N.E.2d 299, (Ohio P. Ct. 1949).

53. *Id.* at 300.

54. O'Brien, *Cardinal O'Connell's Bequest for Masses*, 25 B.U.L. REV. 260, 260 (1945).

55. See O'Brien, *The Parish Priest and the Federal Income Tax Under the Revenue Act of 1942*, 3 JURIST 129 (1943); O'Brien, *Bequests For Masses Rarely Create Charitable Trusts*, 3 JURIST 416 (1943); O'Brien & O'Brien, *Gifts for Masses Are Restricted by State Statutes and Church Laws*, 17 S. CAL. L. REV. 144 (1943) [hereinafter cited as *Gifts for Masses*]; O'Brien, *Foundations For Masses Should Never Create Trusts*, 4 JURIST 284 (1944); O'Brien & O'Brien, *Why Pennsylvania Restricts Gifts For Masses*, 48 DICK. L. REV. 179 (1944); O'Brien, *Mass Stipends Not Subject to Federal Gift Taxes*, 44 HOMILETIC AND PASTORAL REV. 342 (1944) [hereinafter cited as *Mass Stipends*]; O'Brien, *supra* note 54.

56. *Mass Stipends*, *supra* note 55, at 347.

specific priest is named,⁵⁷ are generally thought to establish charitable trusts, even where trust language is not used.⁵⁸ Specific trust language is not necessary to create a trust.⁵⁹ The only essential element is the clearly expressed intent of the testator that a definite amount of property, real or personal, be held for a certain purpose.⁶⁰ Money set aside in a will with the instruction that it be used for Masses, regardless of whether or not a trustee is named, is money impressed with a trust.

A third legal theory used to sustain the validity of Mass bequests asserts that they are an unconditional gift to the Church.⁶¹ Although this theory has not received wide judicial acceptance, it does reflect the doctrinal belief that a Mass cannot be purchased.⁶² The money given a priest who offers a Mass for a specific intention is not payment for his services, but rather a gift to the Church for the support of Her minister and, in particular, for the support of the priest, who, through his acceptance of the stipend, has a canonical obligation to remember the intent of the donor in the celebration of Mass.⁶³

The unconditional gift theory is difficult to justify when the priest who is to receive the stipend is named in the will. Courts have occasionally ruled that the priest is the donee, making the gift private and denying it charitable status.⁶⁴ On occasion, lawyers for the Church have been forced to argue just such a noncharitable theory so as to avoid the effect of statutes⁶⁵ which would otherwise invalidate testamentary dispositions of a charitable nature.⁶⁶

57. See *In re Estate of Holtermann*, 206 Cal. App. 2d 460, 473, 23 Cal. Rptr. 685, 693 (Dist. Ct. App. 1962).

58. See *supra* note 49 and accompanying text.

59. RESTATEMENT (SECOND) OF TRUSTS § 24(2) (1959). See *Kane v. Mercantile Trust Co.*, 513 S.W.2d 362 (Mo. 1974).

60. RESTATEMENT (SECOND) OF TRUSTS § 23 (1959).

61. Curran, *supra* note 49, at 53. See also *In re Estate of McCarthy*, 75 Misc. 2d 193, 347 N.Y.S.2d 490 (Sur. Ct. 1973) (a bequest for Masses is not a trust, but a gift upon restriction).

62. See J. HANNON, THE CANON LAW OF WILLS § 673 at 402 (1935).

63. See *supra* text accompanying notes 6-11.

64. See, e.g., *In re Estate of Holtermann* 206 Cal. App. 2d at 473, 23 Cal. Rptr. at 693; *In re Estate of Ward*, 125 Cal. App. 717, 722, 14 P.2d 91, 93 (Dist. Ct. App. 1932); *Harrison v. Brophy*, 59 Kan. 1, 2, 51 P. 883, 883 (1898).

65. See *infra* text accompanying notes 67-79.

66. See *In re Hamilton's Estate*, 181 Cal. 758, 186 P. 587 (1919); *In re Will of Zimmerman*, 22 Misc. 411, 50 N.Y.S. 395 (Sur. Ct. 1989); *Gifts for Masses*, *supra* note 55.

The treatment of a Mass bequest as a private gift, however, creates problems of its own. A lapse may result where the named priest predeceases the testator. In addition, the private gift theory is inconsistent with Church doctrine, which characterizes the stipend as a charitable sacrifice for the benefit of the Church rather than the priest.⁶⁷

Despite the availability of several legal theories for validating Mass bequests, problems occasionally arise with statutory restrictions, with the language expressing the bequest, and with taxation of the bequest.

B. *Statutory Restrictions*

There are no American statutes prohibiting bequests for Masses. Mass Bequests can, however, run afoul of Mortmain statutes, which generally restrict gifts to charities. These laws fall into three categories: (1) statutes which invalidate charitable bequests made within a certain time preceding the testator's death; (2) statutes which invalidate charitable bequests of an amount beyond a certain percentage of the decedent's estate; and (3) statutes which prohibit charities from retaining more than a certain amount of property.

(1) *Time-Limitation Mortmain Statutes*

Statutes invalidating charitable gifts in a will made within a certain time preceding the testator's death exist in the laws of various states.⁶⁸ Bogert has described their purpose as follows:

The motive behind these acts is not hostility to charity, but rather a desire to prevent imposition upon the donor and to protect his family against unwise generosity. The statutes are intended to require gifts to charity to be made with proper deliberation and at a time when the donor is in at least reasonably competent physical condition. They seek to hold for the near relatives of the donor a fair share of his estate, as against the claims of charity.⁶⁹

The Pennsylvania Supreme Court has spoken in this way regarding the state's Mortmain law:

The basic purpose of the 30 day requirement was and is to pre-

67. See *supra* text accompanying notes 6-11.

68. See RESTATEMENT (SECOND) OF TRUSTS § 362 comment c (1959).

69. 3 G. BOGERT, TRUSTS AND TRUSTEES § 326 at 683 (2d ed. 1964).

vent a testator during his last illness from being importuned or otherwise influenced, by hope of reward or fear of punishment in the hereafter, to leave his estate in whole or in part to charity or to church.⁷⁰

These statutes have at their heart the presumption that a testator making a will soon before his death is either incompetent or unduly influenced. To the extent that such a presumption is irrebuttable, it may deny charities due process of law.⁷¹ These statutes also make a classification — charitable gifts made in a will written within a certain period prior to death as opposed to charitable gifts made in a will outside a certain time period before death — which appears to have only a slight relation to the statutes' purpose, protection of the family. To the extent that the statutory classification is not reasonably related to the legislative purpose, it may deny charities equal protection of the law.⁷²

Where a Mass bequest otherwise subject to a Mortmain law names an individual priest, courts occasionally have held that such a gift is a private one to the named priest;⁷³ hence, the bequest is not charitable and does not fall within the ambit of the Mortmain law. Although this characterization successfully avoids the effect of the Mortmain law, it gives rise to the lapse and doctrinal problems mentioned above.⁷⁴ However, when a Mass bequest is made to a named priest "or his successor," or to a named priest who is further described by his office, the private gift theory is clearly an inaccurate characterization of the bequest. This language indicates that the priest is named only as an officeholder and not as an individual. The bequest is intended for the ecclesiastical division which is supervised by the named priest. As the duly constituted ecclesiastical leader of a diocese or parish, the Bishop or pastor holds all property for the benefit of the diocese or parish in a relationship of trust.⁷⁵ Mass bequests

70. *In re McGuigen Estate*, 388 Pa. 475, 478, 131 A.2d 124, 126 (1957).

71. *See Estate of French*, 365 A.2d 621, 624 (D.C. 1976); *Estate of Cavill*, 56 Erie County L.J. 44, 46-47 (Pa. Orphans' Ct. 1973).

72. *See Estate of French*, 365 A.2d at 62; *In re Estate of Cavill*, 459 Pa. 411, 416-17, 329 A.2d 503, 505-06 (1974); *In re Estate of Riley*, 459 Pa. 428, 430-31, 329 A.2d 511, 513 (1974), *cert. denied*, 421 U.S. 971 (1975); Note, 37 U. PITT. L. REV. 169, 173-74 (1975); Note, 37 U. PITT. L. REV. 341, 343-44 (1975).

73. *See supra* note 64.

74. *See supra* text accompanying notes 65-67.

75. Canon 1499 § 2, reprinted in T. BOUSCAREN, A. ELLIS, & F. NORTH, *CANON LAW, A TEXT AND COMMENTARY* (4th ed. 1966).

to priests in terms of their ecclesiastical office, either through the words "or his successor" or by a designation of the office, are always bequests to that part of the Church directed by the named priest.

(2) *Percentage-Limitation Mortmain Statutes*

In states which have a percentage limitation statute, a bequest for Masses exceeding in amount a certain percentage of the decedent's total estate can be voided to the extent of the excess. The State of New York has a typical percentage limitation statute in regard to charitable bequests. It reads in pertinent part as follows:

A person may make a testamentary disposition of his entire estate to any person for a benevolent, charitable, educational, literary, scientific, religious, or missionary purpose, provided that if any such disposition is contested by the testator's surviving issue or parents, it shall be valid only to the extent of one-half of such testator's estate, wherever situated, after the payment of debts. . . .⁷⁶

Such statutes are designed to prevent persons from disinheriting their immediate families through testamentary gifts to charities.⁷⁷ Here, as with the time-limitation statutes, serious constitutional questions arise on equal protection grounds. Percentage-limitation statutes prevent a testator from disinheriting his family through a charitable gift, but permit such a result when it is effected by a noncharitable gift.⁷⁸ The charitable-noncharitable classification seems to bear little relation to the purpose of the statute. Absent a successful constitutional attack, however, such statutes remain a potential problem to the validity of bequests for Masses.

(3) *Amount-Limitation Mortmain Statutes*

Another type of statute which may restrict a bequest for Masses limits the amount of property a charity may own. The

76. N.Y. EST. POWERS & TRUSTS LAW § 5-3.3 (McKinney 1967).

77. *Hastings v. Rathbone*, 194 Iowa 177, 185, 188 N.W. 960, 964 (1922).

78. A surviving spouse is not so easily disinherited due to the protection afforded by the statutory right to take against the will. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1979).

Commonwealth of Virginia has a typical statute of this type:

[T]he trustees of a Church diocese may take or hold not more than two hundred fifty acres in any one county at any one time; and they shall not take nor hold money, securities or other personal estate to the extent such taking or holding causes the money, securities or other personal estate held at the time of taking by such trustees to exceed in the aggregate. . .the sum of five million dollars.⁷⁹

While the large dollar value of the limitation makes any problem with Mass bequests seem remote, note that the statute speaks in terms of an aggregate amount, not of single bequests. A Mass bequest of modest means could be invalid where the particular diocese is already holding personal property reaching or exceeding the statutory limit. One solution to this problem is for the diocese to rapidly utilize incoming funds, for example in the distribution of stipends, so as to maintain the aggregate amount below the statutory limit. The intent of the individual donor, however, may not permit a quick outflow of funds. Inasmuch as the author can find no case in which a diocese was ever challenged on the amount of money it held at any one time for Masses, the problem may be wholly theoretical.⁸⁰

V. PROBLEMS OF EXPRESSION

Most problems in the execution of testamentary Mass bequests arise because the testator has omitted certain language from the expression of the bequest. Omissions create both civil and canonical legal difficulties.

Civil law difficulties in the area of omission generally fall into one of three categories: (1) failure to name a definite or charitable beneficiary; (2) failure to name the priest or religious organization which is to receive the bequest; or (3) failure to state the exact sum of the bequest. Bequests in the first two categories are rarely fatal; bequests in the third category are generally void.

A bequest "for Masses" or "for Masses for myself and family"

79. VA. CODE § 57-12 (1973). See also Kauper & Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1500, 1545 n.242 (1973) (list of states which limit the amount of property a church may possess).

80. *But cf.* Estate of Lawler, 52 T.C. 268 (1969) (validity of bequest for general diocesan purposes challenged as exceeding the statutory limit in Virginia).

sometimes causes beneficiary problems in a probate court. In the first instance, a court may find the gift void for lack of a beneficiary.⁸¹ In the second case a court may conclude that the beneficiaries are private and hence that the gift is not charitable.⁸² In both cases, the money given to the Church for Masses has the effect of advancing religion and therefore qualifies as a charitable gift.⁸³ Because a failure to name a definite beneficiary is not fatal to a charitable gift,⁸⁴ a bequest "for Masses" should not be deemed void. Likewise, a direction by the testator that the Mass be said "for myself and family" does not diminish the charitable nature of the gift.

Bequests that fail to name the priest or religious organization which is to receive the bequest have been challenged as being indefinite by failing to name a trustee or a beneficiary.⁸⁵ Where the trustee for a charitable trust is not named, however, courts have the authority to appoint one.⁸⁶ According to the Canon Law, a Bishop is the executor of all such bequests made in his diocese.⁸⁷ Civil courts should take judicial notice of this canonical responsibility and appoint the local Bishop as trustee where none is named. Similarly, where the trustee is named in the will but predeceases the testator, courts should appoint the Bishop as trustee.⁸⁸

81. See, e.g., *Obrecht v. Pujos*, 206 Ky. 751, 268 S.W. 564 (1925).

82. See *In re Estate of Hamilton*, 181 Cal. 758, 186 P. 587 (1919). *Will of Kavanough*, 143 Wis. 90, 126 N.W. 672 (1910).

83. RESTATEMENT (SECOND) OF TRUSTS §§ 368, 371 (1959).

84. *Boyd v. Frost Nat'l Bank*, 145 Tex. 206, 211-12, 196 S.W.2d 497, 499-501 (1946).

85. See *Obrecht v. Pujos*, 206 Ky. at 753, 268 S.W. at 565. Another difficulty sometimes arises when the named religious organization is unincorporated and cannot serve as the trustee of a bequest. In such a situation, the court should be asked to appoint a substitute trustee to preserve the bequest. Some courts are appointing individual members of the unincorporated association to act as trustees in lieu of invalidating the bequest. See *Murphy v. Traylor*, 292 Ala. 78, 83, 289 So. 2d 584, 587 (1974); Note, 26 ALA. L. REV. 499 (1974).

86. See *In re Estate of Connolly*, 50 Misc. 2d 673, 674, 243 N.Y.S.2d 727, 728 (Sur. Ct. 1963).

87. Canon 1515 § 1, reprinted in BOUSCAREN, *supra* note 75, at 827 ("The Ordinary (Bishop) is the executor of all pious wills ...").

88. It may even be argued that recent decisions of the United States Supreme Court require civil courts to follow canonical jurisprudence in the disposition of what can be characterized as church funds or property, provided there is no contravening "neutral principle of law" or state statute. See *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

The related argument that, by omission of a priest or religious organization, the testator has failed to name a beneficiary, conflicts with fundamental Church doctrine. Neither the priest nor the religious organization is ever the true beneficiary of the funds. They are the conduit through which a general benefit is bestowed on the entire Church, advancing the cause of religion.⁸⁹ The gift is charitable and valid in spite of the omission.

Unlike other omissions, failure to state the exact sum of a Mass bequest will cause the bequest to fail for indefiniteness.⁹⁰ No bequest can be enforced when the amount of the bequest is not known. Generally this happens by a simple omission of any sum at all. The same problem arises, however, when the duration of the trust is omitted.⁹¹ For example, a bequest of "seventy-five dollars per year" without stating the number of years involved has been held to be too indefinite to enforce.⁹²

Canon law difficulties arise when important instructions, such as the number of Masses to be offered, are omitted from the bequest. Although canonical errors generally are not fatal to a bequest, an attorney who prepares wills containing bequests for Masses should take care to avoid such oversights.⁹³

VI. TAX LAW CONSIDERATIONS

The attorney drafting Mass bequests should be cognizant of both federal and state tax laws to the extent that they impact on the form for a bequest for Masses. Generally, bequests for Masses are taxable as a part of a decedent's estate unless

89. See *supra* text accompanying notes 6-11.

90. *In re* Estate of Hofmeister, 48 N.Y.S.2d 351, 352 (Sur. Ct. 1944).

91. See *id.*

92. Gallagher v. Venturini, 124 N.J. Eq. 538, 540-41 3 A.2d 157, 159 (Ch. 1938).

93. The most common canonical problem is caused by the omission from the bequest of the number of Masses to be offered. For example, "I bequeath two thousand dollars to the Roman Catholic Diocese of Pittsburgh for Masses to be said for the repose of my soul." This gift is enforceable at civil law; the *res*, the trustee, and the purpose are clearly set forth. Resolution of the canonical difficulties created by the testator's failure to specify the number of masses is entrusted to the local bishop. Canon 1515 § 1, reprinted in BOUSCAREN, *supra* note 75, at 827 ("Since the ordinary is the executor of all pious wills, he has the right to interpret them if necessary"). In practice, bishops typically divide the amount of the bequest by the smallest common denominator—the least expensive mass stipend within their diocese—to arrive at the number of masses.

specifically excluded or made deductible.⁹⁴

Federal law, in section 2055(a)(2) of the Internal Revenue Code of 1954 ("Code"), permits as a deduction from the taxable estate any bequest, legacy, devise, or transfer "to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes."⁹⁵ Although the section requires that the beneficiary be a "corporation," another section of the Code defines "corporation" to include unincorporated associations.⁹⁶ A regulation⁹⁷ explaining this definition indicates that most unincorporated subdivisions of a hierarchical church and coequal divisions of a congregational church meet the tests for an association.⁹⁸ It is the practice of the Internal Revenue Service to recognize by a group exemption letter all divisions of hierarchical or congregational churches as legitimate recipients of charitable, tax-exempt gifts and bequests, whether incorporated or not.⁹⁹ The corporation requirement does, however, prevent bequests to named individual priests from qualifying as deductions, even though the priests may be under a vow of poverty and must turn over all such bequests to their religious order.¹⁰⁰

A further requirement of the federal statute is that the charity must take under the will.¹⁰¹ Thus, it follows that the deduction is not applicable where the charity takes by *cy pres* under order of the local court or where the charity receives an otherwise invalid gift by virtue of an agreement to honor the testator's expressed intent.¹⁰² Similarly, the Internal Revenue Service takes the position that when a priest in a religious order, having taken a vow of poverty, receives a Mass bequest and gives it to his Order, the money passes to the Order, not by operation of the will, but

94. I.R.C. § 61 (1976).

95. I.R.C. § 2055(a)(2) (1954).

96. I.R.C. § 7701(a)(3) (1954).

97. Treas. Reg. § 301.7701-1(a) to (e).

98. The tests for an association are whether or not it has continuity of life, centralization in management, limited liability of members and free transferability of assets. Treas. Reg. § 301.7701-2(a).

99. See Whelan, "Church" in the Internal Revenue Code: The Definitional Problems, 45 FORDHAM L. REV. 885, 905 n.86 (1977).

100. See Rev. Rul. 55-759, 1955-2 C.B. 607. See also *Delaney v. Gardner*, 204 F.2d 855, 860 (1st Cir. 1953).

101. *Langfitt v. United States*, 321 F. Supp. 360, 366 (W.D. Pa. 1970).

102. *Id.*

by the separate contractual relation which the priest has with his Order to convey his property.¹⁰³

State legislatures, like Congress, have enacted statutes permitting the deduction of charitable bequests from the donor's estate.¹⁰⁴ Curiously, however, at least three states have chosen to place limitations on Mass bequests in particular as distinguished from charitable bequests in general. The presence of these special limitation statutes has generated some confusion.

Pennsylvania has enacted legislation permitting the deduction of bequests to corporations or unincorporated associations organized and operated exclusively for religious purposes.¹⁰⁵ The Pennsylvania legislature has also enacted a statute which apparently limits the deductibility of bequests for religious services: "Bequests in reasonable amounts for the performance or celebration of religious rites, rituals, services or ceremonies, in consequence of the death of the decedent, shall be deductible."¹⁰⁶

The limitation is one of "reasonableness." A bequest for religious services can be deducted from the gross estate only to the extent that the bequest is considered reasonable by the taxing authorities. Thus, an incongruity exists between the two statutes. Where a bequest is made to a Catholic charity and the testator adds the words "for Masses," the full deductibility of the bequest may be in question.

Pennsylvania courts, however, have construed the two statutes so as to obviate the apparent inconsistency. The court in *Harrigan Estate*¹⁰⁷ ruled that the inheritance tax law had to be read as a whole, that bequests to a charity were fully deductible according to the the act, and that in this context the reasonableness limitation applied only to bequests for religious purposes to non-charitable legatees.¹⁰⁸ Under this interpretation of the statute, a properly phrased Mass bequest¹⁰⁹ would be fully deductible, while a Mass bequest to a named individual such as a priest,

103. Rev. Rul. 68-459, 1968-2 C.B. 411. See generally, *Barry's Estate v. Comm'r*, 311 F.2d 681, 685-86 (9th Cir. 1962); *Cox v. Comm'r*, 297 F.2d 36, 38 (2d Cir. 1961); *Lamson's Estate v. United States*, 338 F.2d 376, 378 (Ct. Cl. 1964).

104. See *infra* text accompanying notes 103-13.

105. PA. STAT. ANN. tit. 72, § 2485-302 (Purdon 1964).

106. PA. STAT. ANN. tit. 72, § 2485-617 (Purdon 1964).

107. 29 Pa. D. & C.2d 119 (Orphans' Ct. 1963).

108. *Id.* at 123.

109. See *infra* Appendix B.

would apparently fall subject to the reasonableness limitation.¹¹⁰ The *Harrigan* court's construction of the statute has been followed administratively by the Commonwealth of Pennsylvania.¹¹¹

Wisconsin and Iowa also have enacted inheritance tax legislation permitting the deduction of bequests to religious organizations.¹¹² In a separate statute, however, both states have limited the amount which may be deducted for the performance of religious services. The Wisconsin statute¹¹³ limits deductions to \$1000, while the Iowa statute¹¹⁴ establishes a \$500 deductibility limit. When considering the deductibility of a bequest for Masses to a Catholic charity in an amount over \$1000, the Wisconsin Supreme Court limited the deduction to the statutory amount.¹¹⁵ The court concluded that the general provision of deductibility for charitable bequests should yield to the more specific \$1000 limitation. The Iowa Supreme Court subsequently followed the Wisconsin court and limited the deductibility of a similar bequest to \$500.¹¹⁶

The propriety of the conclusion that a bequest for Masses is subject to the statutory limitations is questionable. First, the rulings ignore the policy established by the Wisconsin and Iowa legislatures favoring charitable bequests by blanket exemptions from estate taxes. Second, the rulings elevate form over substance; the same gifts to the same charities are fully tax-exempt when the words "for Masses" are not appended to the bequest. Finally, the ruling signifies a failure to grasp the nature of a Mass bequest, which is not a payment for religious services, but a personal sacrifice through which the donor shares in the greater sacrifice of the Mass and simultaneously contributes to the needs of the Church.¹¹⁷

110. *But c.f. supra* text accompanying notes 73-75.

111. This is based on the author's personal experience in filing Inheritance Tax returns with the Pennsylvania Department of Revenue.

112. WIS. STAT. ANN. § 72.01 (West 1953); IOWA CODE ANN. § 450.4(2) (West 1971).

113. WIS. STAT. ANN. § 72.045 (West 1953). The Wisconsin statute establishes a \$1000 limit on deductions for bequests "for the performance of a religious purpose or religious service for or on behalf of deceased or for or on behalf of any person named in his will." *Id.*

114. IOWA CODE ANN. § 450.4(4) (West 1971). The Iowa statute sets a \$500 limit on deductions for bequests "for the performance of a religious service or services by some person regularly ordained ... for or in behalf of the testator or some person named in his last will." *Id.*

115. *In re Miller's Estate*, 53 N.W.2d 172, 173-74 (Wis. 1952).

116. *Georgen v. State Tax Comm'n*, 165 N.W.2d 782, 788-89 (Iowa 1969).

117. *See supra* text accompanying notes 6-11.

VII. CONCLUSIONS: PRACTICAL CONSIDERATIONS FOR AN ATTORNEY

Mass bequests to named priests should be avoided whenever possible. If the testator wishes to benefit a particular priest for his past kindness or friendship, the proper reward is an outright bequest to that priest as an individual. Mass bequests to individual priests pose the problem of a potential lapse; they also reinforce the misconception that priests are paid for Masses and they are usually taxable. Further, Canon Law prohibits any priest from accepting stipends for more Masses than he can say in a year.¹¹⁸

The donee of a bequest for Masses should be an incorporated religious organization, or an unincorporated religious organization if state law permits unincorporated associations to serve as trustees. Examples of proper donees are the testator's diocese or parish, the Society for the Propagation of the Faith, the Catholic Church Extension Society, other mission societies, or one of the various religious orders. Reference to the name of the incumbent bishop of a diocese or the pastor of a parish should be avoided for reasons set forth above.¹¹⁹ In jurisdictions which prohibit an unincorporated association from serving as a trustee, it may be necessary to name an individual in terms of his ecclesiastical office to serve as trustee for Mass bequests. This should be done in a way that makes it clear that the named priest or bishop is acting in his capacity as pastor of a parish or bishop of a diocese.¹²⁰

The testator's preference that a particular priest offer the Masses in the bequest may be accommodated by naming the priest's religious unit, for example his diocese or order, as donee. Following the statement of the bequest, precatory language may be added asking, but not requiring as a condition precedent, that the desired priest celebrate the Masses. While the precatory language has no legal effect, thus preserving the nature of the bequest as an unconditional gift, it does have the desired effect in Canon Law.¹²¹ Hence, the legal problems involving Mass be-

118. Canon 835, *reprinted in* BOUSCAREN, *supra* note 75. This Canon effectively prohibits overly large Mass bequests to individual priests.

119. *See supra* text accompanying note 118.

120. A form for such bequests is provided at Appendix B, No. 1.

121. Canon 1514.

The wishes of the faithful who give or leave their goods (property) to

quests to individual priests are avoided, as is the canonical problem of a bequest to an individual priest for more Masses than he can offer in a year.¹²²

Precatory language is useful for another purpose in states like Pennsylvania, Wisconsin, and Iowa, which have laws limiting the deductibility of Mass bequests. In these states the donee should consider making an outright gift of a specific sum of money to a particular religious unit and accompanying the gift with a request that a specific number of Masses be offered. The request should be stated in language which is clearly precatory rather than conditional. In this way, the bequest cannot be considered "payment" for religious services. The use of such a format will have the same canonical effect as a direct bequest for Masses but will avoid the deductibility problems created by the state statutes.¹²³

Beyond these specific recommendations, the key is specificity. For example, an attorney drafting a will should specifically describe the religious unit which is to be the donee. Even though the words "Roman Catholic" are frequently omitted from the titles of Catholic institutions in ordinary usage, they should be used in all testamentary descriptions. Use an exact address note. The Kenedy Directory¹²⁴ contains the address of almost every religious unit or organization that can serve as donee of a bequest for Masses.

Where religious societies have both a local and a national office, as for example the Society for the Propagation of the Faith with national offices in New York City and offices locally, the local address should be used. This avoids the practical probate and tax problems which may arise when an alien donee is named.¹²⁵

pious causes, whether by an act *inter vivos* or one *Mortis causa*, are to be carried out most diligently even regarding the manner of administering and spending the gifts . . . (C. 1514). In this canon the Church enunciates a fundamental principle upon which she has always insisted, namely, the careful and exact carrying out of the wishes of the faithful who make bequests to pious causes. Undoubtedly, the obligation is a grave one, both at law and in conscience.

BOUSCAREN, *supra* note 75, at 824.

122. A form for such bequests is provided at Appendix B, No. 2.

123. A form for such bequests is provided at Appendix B, No. 3.

124. OFFICIAL CATHOLIC DIRECTORY (P. Kennedy & Sons 1980) (official listing of Roman Catholic organizations covered by the Internal Revenue Service group exemption letter). See Treas. Reg. §§ 1.508-1(a)(3)(c), 1.508-1(b)(7).

125. A bequest to an alien donee may not be deductible:

Inheritance tax exemptions for bequests to charitable, educational, or

Where the bequest is to a religious order or congregation, specify a local province of the order or congregation, because the order or congregation itself is often an international group with headquarters in a foreign country. Local provinces sometimes have even smaller local divisions, for example, Friaries within a Franciscan province, which should be accurately denominated.¹²⁶

Be specific about the amount involved. This is of critical importance, because failure to specify the amount of the bequest will cause the bequest to fail. Also be specific about the number of Masses the testator wishes to have offered, so as to avoid canonical problems which may arise when the number is left out. Apart from a minimum amount for a Mass stipend in a local diocese, no rule governs the number of Masses which may be requested with a single bequest.

Mass bequests are a means by which the work of religion advances and continues. They embody a religious tradition which has progressed from the plains of Israel, through the catacombs of Rome and the priestholes of England, to the cities of America. They should be drafted and defended with the care that befits their ancient and noble history.

religious bodies are ordinarily limited to organizations or institutions carrying on all of their activities within the state. A number of states, however, have enacted broader provisions exempting such bequests to institutions organized or incorporated in foreign states, providing that the law of the foreign state would grant a similar exemption to bequests by its residents to foreign organizations.

Annot., 12 A.L.R. 3d 918, 920 (1967) (footnotes omitted).

126. See *Estate of Beckley*, 92 Misc. 2d 965, 402 N.Y.S.2d 295, *rev'd in part*, 63 A. D. 2d 855, 405 N.Y.S.2d 861 (1978) (failure of the will to specify as to which of two local Franciscan Friaries was the intended donee caused extensive litigation). Examples of the recommended specificity can be found in the Forms provided in Appendix B.

Appendix A

Reported Cases Involving Mass Bequests Since 1956.

In re Estate of Holtermann, 206 Cal. App. 2d 460, 23 Cal. Rptr. 685 (Dist. Ct. App. 1962) (a bequest for Masses to the pastor of a church withstood challenges because it was made "directly to the pastor of a designated church, and is not a bequest in trust or for charitable uses").

Georgen v. State Tax Commission, 165 N.W.2d 782 (Iowa 1969) (a bequest for Masses was limited by statute in its tax exemptability).

In re Will of McCarthy, 75 Misc. 2d 193, 347 N.Y.S.2d 490 (1970) (bequests for Masses were held not to be formal legal trusts, but as "gifts upon restriction," creating an obligation, legally enforceable in equity, upon the donee to carry out the restrictions of the gift).

Estate of Beckley, 92 Misc. 2d 965, 402 N.Y.S.2d 295 (1978), *rev'd in part*, 63 A.D.2d 855, 405 N.Y.S.2d 861 (1978) (a bequest for Masses which is ambiguous about the religious group-recipient is interpreted by the court).

Kane v. Mercantile Trust Co., 513 S.W.2d 362 (Mo. 1974) (a bequest for Masses to the pastor of a named church creates a charitable trust with the pastor as trustee).

Gery v. Koval, 219 N.E.2d 853 (Prorate Ct. Cuyahoga County, Ohio 1966) (because the testator left no lineal descendants, bequests for Masses could not be challenged on mortmain grounds and were therefore valid).

In re Selewicz Estate, 29 Pa. D. & C.2d 742 (Orphan's Ct. 1962) (a bequest in trust to pay net income to a pastor of a named church for Masses is a charitable use).

In re Harrigan Estate, 29 Pa. D. & C.2d 119 (Orphan's Ct. 1962) (a bequest for Masses creates a charitable trust, fully exempt from state inheritance tax).

Appendix B

Suggested Forms For Mass Bequests

Form 1

Individual Trustee Named by Office

I give the sum of five thousand dollars (\$5,000) to Rev. Francis X. Smith, as Pastor of St. Leocadia Roman Catholic Church, presently located at 123 First Street, City, State, Zip Code, or his successor in the office of Pastor of said church, and I request, but I do not require as a condition of this gift, that this sum of five thousand dollars be used by the Pastor for the purpose of having ten masses offered for the repose of my soul in the regular schedule of masses of St. Leocadia Church.

Form 2

Masses to be Said by Named Priest

I give the sum of five thousand dollars (\$5,000) to the Eastern Province of the Holy Ghost Fathers, presently located at 6230 Brush Run Road, City, State, Zip Code. I request, but do not require as a condition of this gift, that this sum of five thousand dollars be used for the purpose of having ten masses offered for the repose of my soul by my good friend in life, Father Ignatius Loyola Jones, C.S.Sp.

Form 3

Precatory Language for Mass

I give the sum of five thousand dollars (\$5,000) to St. Thomas More Roman Catholic Church, presently located at 126 Fort Couch Road, City, State, Zip Code. I request, but do not require as a condition of this gift, that this sum of five thousand dollars be used for the purpose of having ten masses offered for the repose of my soul.

