Completion and Religious Communities – How the End May Be a New Beginning

By Mark MacDougall

In my final semester of law school, I took a course called "Trusts and Estates I." I had no interest in becoming a probate or trust lawyer and knew nothing about that area of legal studies. But I was intent on sitting for the Maryland Bar following graduation. Several fellow students, who seemed to be well-connected, told me that the essay portion of the Maryland Bar exam frequently featured a question on wills, estates, remainders, or particularly obscure terms like *per stirpes*. I was married with a newborn son and passing the Bar on the first try weighed heavily on my mind.

So, I registered for Trusts and Estates I and began learning about how common law deals with the existential question of what happens after you are gone. In the first class, the professor introduced the subject of the course with the words: "Given the inevitability of death…"

The first time and every other time he used that phrase, I felt a slight chill run down my back. What did he mean by "the inevitability of death"? I was only 27 years old. Why would anyone say something like that to a classroom full of twenty-somethings? While this professor might be technically correct – that our lives are finite and will someday end – that concept had no relevance to the children of the 1980's. We were years away from paying off our student loans, much less accumulating a measure of wealth that could be generously called an estate.

By the end of the semester, whenever a student was called upon in class to address a case or explain a concept, the answer always began the same way: "Well professor, given the inevitability of death…" The Maryland Bar that year required no knowledge of any aspect of the law of estates, trusts, wills, or probate. Now, all these years later, the only thing that I really remember from Trusts and Estate I is that the common law has a set of tools for dealing with every human challenge – including the inevitability of death.

JUST LIKE PEOPLE, EVERY ORGANIZATION – CORPORATION, UNIVERSITY, PARTNERSHIP, FOUNDATION – HAS A FINITE LEGAL LIFESPAN.

Why do I start with this long-ago recollection? Just like people, every organization – corporation, university, partnership, foundation – has a finite legal lifespan. All will end by dissolution, merger, expiration of corporate status or some other legal event. Religious institutes are no different. Many religious institutes in the United States face the prospect of completion of their ministry and formal existence – driven by declining numbers and often a meager or non-existent stream of women or men seeking to enter formation. There are many reasons for this phenomenon, but those are beyond the scope what we are discussing here.

The Question at Hand

The central question, to paraphrase the professor in Trusts and Estates I, is: Given the inevitability of completion, what steps can religious institutes take to protect and direct their assets to continue mission and ministry after their last members are no longer active?

GIVEN THE INEVITABILITY OF COMPLETION, WHAT STEPS CAN RELIGIOUS INSTITUTES TAKE TO PROTECT AND DIRECT THEIR ASSETS TO CONTINUE MISSION AND MINISTRY AFTER THEIR LAST MEMBERS ARE NO LONGER ACTIVE?

The answer to that question begins with another consideration that is also not subject to any actual dispute. If a religious institute does not plan for the use of its assets after completion, someone else will make those decisions after the institute is no longer viable. Who or what will make – or will claim to have the authority to make – those decisions present a considerable risk for religious institutes that choose to ignore the need for a formal and legally enforceable completion plan. A local bishop, a college or university sponsored by the religious institute, a superior general of the international congregation, or a state attorney general are only some of the actors who may seek to decide how to use the assets of a religious institute that is no longer viable. That use, of course, may have nothing to do with the history, charism or ministry of the religious institute that is no longer in existence.

These are not hypothetical risks when a religious institute fails to establish a legal framework for the use of its assets following completion. There are multiple recent examples of a diocesan bishop seeking to take control of the property a religious community that has declined to a very few aged or infirm members. Likewise, schools, colleges and universities - that have a sponsorship or other historical association with a religious institute – may consider the real estate holdings or excess financial assets of the institute as an untapped source of operating capital.

There is a second and equally important ethical consideration for religious institutes that are nearing completion. Many will leave a very substantial estate comprised of financial assets (including unused retirement funds) and real property – but that may also include artwork, and valuable intellectual property. That accumulation of wealth is not the personal property of the current leadership of the religious institute – to freely dispose or allocate as they may see fit. Rather, the estate to be left by every religious institute is the product the labor of past generations of the community, the generosity of the laity, and – not to be forgotten – exemption from federal and state income and most property taxes, while still benefiting from the full menu of government services.

Other important factors, beyond the disposition of "hard" assets, require close consideration in completion planning. These include reserved powers held in sponsored works or ministries, perpetual care of institute cemeteries, preservation of archives and historical records, long term relationships with the local diocese and lay communities, as well as compliance with Canon Law. But the use and disposition of financial assets and real property – that for some religious institutes facing completion may total hundreds of millions of dollars – is the most certain area of risk once a religious institute and its leadership can no longer make its own decisions.

<u>What the Civil Law Provides</u>

The practical legal questions to be answered in a basic completion plan may be obvious:

- What mechanisms should be put in place to assure long-term care of retired or infirm members until final completion?
- Which assets should be preserved, and which should be liquidated in carrying out a completion plan?
- What legal structures are available to provide a platform to legally enforce a completion plan and to continue the mission and ministries of the religious institute following completion?
- Who (or what) persons or institutions will have the authority to execute the completion plan once the institute is no longer viable?

THERE ARE TWO LEGAL MECHANISMS THAT OFFER RELIGIOUS INSTITUTES A SOUND PLATFORM FOR A COMPREHENSIVE COMPLETION PLAN – A CHARITABLE TRUST AND A NON-PROFIT CORPORATION.

There are two legal mechanisms that offer religious institutes a sound platform for a comprehensive completion plan – a charitable trust and a non-profit corporation. Although other terms like "foundation" and "collective" are sometimes used to describe a charitable trust or non-profit corporation – those names are misleading. They do not describe actual legal structures and should be avoided when discussing a religious completion plan. Also, useful to remember is that concepts of Canon Law – like a *public juridic person* – have no standing in the civil law of the United States and will not be enforced or recognized in place of a properly organized charitable trust or corporation.

A charitable trust and a non-profit corporation have many common characteristics. Both are "legal persons" and have most of the rights of an individual or "natural person." Both a charitable trust and non-profit corporation may enter into contracts, own, sell and purchase property and otherwise engage in most forms of commerce. Both can sue and can be sued in civil courts, and both must comply with the same government regulations as a for-profit entity or a natural person. Both may also remain in existence with the requirement of a fixed term for expiration or dissolution – and both may enjoy federal tax exemption, be listed in the *Official Catholic Directory*, and participate in the USCCB Group Ruling issued by the Internal Revenue Service.

The differences between a charitable trust and a non-profit corporation may also be important to a religious institute planning completion. Non-profit corporations are creatures of state statute and come into existence only with the filing of articles with the secretary of state of incorporation. Those articles are then part of the public record of the corporation. A charitable trust, by comparison, can be created by a private written trust agreement without the need for approval by a government agency. Another significant difference is that a non-profit corporation is controlled by one or more "members" who are responsible for election of the board of directors (although, in many non-profit corporations, the members and the board of directors are the same group of individuals). A charitable trust, in contrast, is under the control of one or more trustees, who are obligated to manage the trust as directed by the trust agreement.

TRUSTS HAVE A LONG FOUNDATION IN COMMON LAW AND PROVIDE A SIMPLE LEGAL PLATFORM FOR A RELIGIOUS INSTITUTE APPROACHING COMPLETION TO DIRECT ITS ASSETS TOWARD A CONTINUATION OF MINISTRY OR OTHER DESIGNATED USE.

Trusts have a long foundation in common law and provide a simple legal platform for a religious institute approaching completion to direct its assets toward a continuation of ministry or other designated use. A trust involves three actors: the grantor, the trustee, and the beneficiary. In this context, as the name suggests, the grantor would be the religious institute which would convey title to its assets to a trustee of group of trustees. The trustee(s) may be an individual, a group of individuals or an institution (like a bank) and is charged with the management of the assets for the benefit of a designated class or group of beneficiaries. A trust is generally governed by a formal trust instrument or agreement, in which the grantor provides fixed directions to the trustee about how the assets (or the *corpus*) of the trust may be used.

Non-profit corporations act in much the same way as traditional corporations that engage in commerce while pursuing a profit. The Board of Directors (sometimes also called the "Board of Trustees" in the non-profit world) has the responsibility to manage the affairs of the corporation. The member(s) of a non-profit corporation – like the shareholders in a commercial corporation – enjoy limited liability for corporate debts and other obligations. In the context of a completion plan that make use of a non-profit corporate vehicle, careful preparation of the articles of incorporation and formulation of the by-laws are critical to ensuring that the intent of the completing religious institute is respected once the plan has been implemented.

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Risks Associated with Leaving the Problem to the Congregation…and Other Pitfalls

One common question for religious institutes nearing completion – that are constituents of an international order – is whether to simply leave the decisions regarding the disposition of assets to the congregation's leadership. While the notion of avoiding the unpleasant discussions that must take place in an institute nearing completion and leaving the problem to a future congregational superior may seem attractive, that approach to completion planning creates considerable risk. Many state laws require approval of the attorney general to transfer substantial assets out of the state. The interest of state governments in ensuring that those assets continue to serve the charitable needs of the local community are obvious.

Moreover, the international congregational superior(s) of a U.S. religious institute may likely have emerged from a different national culture and tradition – and may view the assets of a completed province or community in the United States as a windfall that is available to support the congregation's activities elsewhere. Such an avenue can result in an attempt to transfer assets - that were assembled and allowed to grow, tax free, in the United States – to a place and for a purpose far removed from the local community's charitable needs.

At the same time, much of the world does not enjoy the same legal protections for religious institutions and activities. For example, a general exemption of churches and other religious entities from income and property tax, civil courts that will fairly enforce property rights and contracts, and local government officials that are generally free of corruption and respect the rule of law are not present in much of the developing world.

How This Can Work

Perhaps the best way to place some of these concepts into a practical context is through a hypothetical example, like the following.

The Sisters of St. Bartholomew (the "SSB" - a fictitious religious order) was founded in 1786 in Louvain, Belgium as a teaching order. The first members of the institute arrived in the United States in 1844 and began establishing secondary schools – often located in towns where states were establishing colleges as part of the land-grant college system. As their mission expanded in the United States, the Sisters received gifts of real estate from local bishops and wealthy Catholic laypeople in exchange for a commitment to establish a school in their community. As a result, SSB schools were founded on large parcels of land in Charlottesville, Virginia; Columbus, Ohio; West Lafayette, Indiana; and Urbana, Illinois. At their peak membership in 1958, the U.S. Province of the SSB reported 1,172 members in perpetual vows who were primarily in ministry teaching and administering eighteen secondary schools in the eastern United States.

By the early 1990's, however, the number of Sisters in active educational ministry had plummeted to fewer than a hundred. Administration of most of the SSB schools had been transferred to lay boards of directors, but in each instance the U.S. Province retained title to the real estate that constituted the school's campus. The cost of staffing the schools with qualified lay teachers drove up the annual tuition cost in most of the SSB schools – which led directly to steady declines in enrollment. By 2002, many of the SSB schools could no longer sustain their operations and began to close. Most of the SSB campuses were located adjacent to thriving state universities, that were happy to make a substantial cash offer for land and buildings as the SSB school property was offered for sale. Each time an SSB school was closed and the campus sold, the proceeds were deposited in the retirement and long-term care fund of the U.S. Province of the SSB.

By 2022, fewer than 140 Sisters remained in the U.S. Province of the SSB and none were in full-time active ministry. The median age was 84 years and the last novice had entered formation in 1991. Due to the very substantial payments received from the sale of school campuses to state universities, however, at the end of 2021 the SSB Retirement Fund reported net invested assets of $283 million. The SSB still owned four campuses, occupied by struggling secondary schools located in Amherst, Massachusetts; Storrs, Connecticut; Rochester, New York and Chapel Hill, North Carolina. A recent set of appraisals suggested that those four campuses together had a fair market value of an additional $114 million.

The actuarial forecast indicated that by 2030, there would be fewer than 20 SSB sisters living and that none would be younger than 85 years.

So, in 2021, the SSB Provincial Council began formulating a completion plan with the overriding goal of continuing the institute's historical ministry in secondary education. The plan included the following elements:

- Based upon a study completed by a major elder care consulting firm, the SSB Provincial Council placed a total of $11.3 million in a special retirement fund, which the study indicated was an amount equal to 150% of the maximum amount required to care for the remaining SSB Sisters until final completion.

- With the remaining investment assets, exceeding $250 million, the U.S. Province of the SSB, as grantor, established the St. Bartholomew Education Trust. The presidents of Georgetown University, Villanova University, Providence College, Seton Hall University and St. Mary's College in Notre Dame, Indiana were designated as the *ex officio* trustees of the St. Bartholomew Education Trust.
- The stated purpose of the St. Bartholomew Education Trust is to fund the education of students seeking a career in secondary school teaching through loans covering full tuition, room and board at an accredited four-year university.
- Each student who received a four-year loan from the Trust would be required to formally agree to accept a full-time teaching position in an economically depressed school system designated by the Department of Education, an Indian reservation high school, or in a school that participates in the Teach for America Program.
- For each year of teaching, the St. Bartholomew Education Trust would agree to forgive 25% of the balance owed by the recipient of a full tuition, room and board loan. Upon completion of the four-year teaching commitment, the recipient would be entirely free of debt.
- The consulting firm forecast that when the program became fully operational in 2031, the investment income generated by the St. Bartholomew Education Trust would be sufficient to pay for training more than 1,200 new teachers to graduate and begin teaching in under-served communities each year…in perpetuity.

While this may be an extreme hypothetical example, the concept and the legal tools can be applied by any religious institute facing completion. Given my old law school professor's apparent obsession with how all things must end – a properly structured completion plan can provide for the ministry of a religious institute to continue…and the inevitable may not be so certain at all.

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