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James T. Brennan

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## *Bequests for Religious Services*

*James T. Brennan\**

**T**WO TECHNICAL LEGAL OBJECTIONS may be raised to bequests for religious services: lack of a definite human beneficiary and the rule against perpetuities. The lack of a human beneficiary is the primary objection, since the rule against perpetuities is measured in terms of human lives, except for the gross period of twenty-one years in most jurisdictions.

Charitable uses, uses lacking a definite human beneficiary, were permitted<sup>1</sup> even prior to the Statute of Charitable Uses.<sup>2</sup> There was uncertainty on this point however in the United States immediately following the Revolutionary War.<sup>3</sup> Once bequests are permitted which are not for the benefit of specific persons, the inapplicability of a limitation measured in terms of human lives becomes apparent. Thus the rule against perpetuities is not applied to charitable gifts.<sup>4</sup>

The only English common law which might be construed as authority for permitting religious uses is found in the Preamble to the Statute of Elizabeth which states “. . . some for repair of . . . churches . . .”; however, gifts for the advancement of religion are clearly charitable today.<sup>5</sup>

The distinction between charitable and private trusts is that the charitable trust is for general purposes which will benefit society rather than a specific person whereas the private trust is for the benefit of a specific human being. “Charitable” purposes are defined by the common law,<sup>6</sup> broadened in many states by statute.<sup>7</sup> The rule against perpetuities is no longer enforced against the continuance of charitable trusts, but continues to apply to honorary trusts,<sup>8</sup> even though the inappropriateness of measuring gifts, for the accomplishment of specific purposes not directly benefiting human beneficiaries, in terms of human lives is ob-

\* Ass't Prof. of Law, Syracuse University.

<sup>1</sup> *Vidal v. Girard's Ex'r*, 43 U.S. (2 How.) 127, 11 L.Ed. 205 (1844).

<sup>2</sup> 43 Eliz., c. 4 (1601).

<sup>3</sup> *Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs*, 17 U.S. (4 Wheat.) 1 (1819) which held a gift for a perpetual fund for the education of Baptist youths void for indefiniteness of beneficiaries since Virginia had passed an act repealing all English statutes, and since the act felt charitable trusts had been established by statute it was reasoned that there could thus be no charitable trusts in Virginia.

<sup>4</sup> Restatement (Second) of Trusts § 365 (1959); Restatement of Property § 398 (1944).

<sup>5</sup> Restatement (Second) of Trusts § 368 and § 371 (1959).

<sup>6</sup> *Id.* at § 368.

<sup>7</sup> See the Estates, Powers and Trust Law (New York) § 8-1.1.

<sup>8</sup> Restatement (Second) of Trusts § 124 (1959); *In re Estate of Searight*, 87 Ohio App. 417, 95 N.E. 2d 779 (1950).

vious. The apparent reason is that some time limitation is needed on the length of time during which gifts may be dedicated to noncharitable purposes which do not directly benefit any human beneficiary; and the courts have been, or at least have felt themselves, unable to develop any more appropriate limitation.

Thus the questions we are concerned with are: is a bequest for the performance of religious services valid at all, and if valid, is the bequest for the performance of religious services charitable in nature or may it be upheld only as an honorary trust?

If a bequest for the performance of religious services is not regarded as charitable and upheld only as an honorary trust, then it may be defeated if: the transferee of the property does not voluntarily apply it to the designated purpose; the direction violates the applicable rule against perpetuities; or the purpose is capricious.<sup>9</sup> While the purposes with which we are concerned would not normally be regarded as capricious, the amount of the gift might be. In such an event any amount of property in excess of a reasonable amount should be held by the transferee as a resulting trust for the residuary legatee or heirs as the case may be. It should be noted that while honorary trusts have been recognized in Ohio,<sup>10</sup> by some other jurisdictions and by legal scholars, the validity of honorary trusts remains an open question in many jurisdictions.

Today gifts for religious purposes are special favorites of the law.<sup>11</sup> This was not always the case.<sup>12</sup> Our ancestors were far more concerned than we are about the amount of society's property which was dedicated to religious and charitable purposes.<sup>13</sup> It is possible that at some future time our society will face serious social problems created by the dedication of a disproportionate amount of property to religious and charitable purposes; but at the present time, this possibility is remote.

### Bequests for the Saying of Masses

Bequests for the saying of masses are universally held valid today. There remains, however, considerable doubt as to the "correct" theoret-

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<sup>9</sup> Restatement (Second) of Trusts § 124; *Detwiller v. Hartman*, 37 N.J. Eq. 347 (1883): here the court upheld a bequest of \$40,000 for the erection of a tomb, but held invalid a bequest to hire a band to play dirges on the grave of the testator on the anniversary of his death. The latter violated the rule against perpetuities.

<sup>10</sup> *In re Estate of Searight*, *supra* note 8.

<sup>11</sup> *In re Durbrow's Estate*, 245 N.Y. 469, 157 N.E. 747 (1927); here it was held that a testamentary gift for the general purpose of advancing Christ's kingdom on earth was valid.

<sup>12</sup> Professor John Curran notes in his article, *Charitable Trusts for Masses*, 5 *De Paul Law Review* 246 (1956) that English courts held trusts for the saying of masses invalid until 1919.

<sup>13</sup> See discussion in 2 *Scott on Trusts*, § 371 (1967). Formerly the Constitution of Missouri declared void every testamentary gift for the support of any minister or religious sect. See also, *Schmucker's Estate v. Reel*, 61 Mo. 592 (1876).

ical explanation for these decisions.<sup>14</sup> Two major sets of variables add to the confusion which is often compounded by a touch of judicial legerdemain<sup>15</sup> in favor of the bequests. The first major type of variable is the language of the bequest. The second is the underlying reason for which the issue of charity has been raised.

The language of the bequest may create a funded trust with an active trustee;<sup>16</sup> however, this type of bequest is relatively rare. More often the executor is directed to have masses said for the testator's soul<sup>17</sup> and frequently for the souls of others as well. The inclusion of masses for persons other than the testator does not affect the validity of the bequest.<sup>18</sup>

Often the bequest will be to specific named priests for the saying of masses.<sup>19</sup> In such instances the named priest may predecease the testator

<sup>14</sup> This was sometimes the case in England before *In re Caus*, 1 Ch. 162 (1934), when gifts for masses were first held to be charitable trusts; *Reichenbach v. Quinn*, 21 L.R. Ir. 138: an Iowa court held that although a gift in trust for the saying of masses was not valid as a charitable trust, the trust was valid nonetheless. *Wilmes v. Tiernay*, 187 Ia. 390, 174 N.W. 271 (1919); *Moran v. Kelley*, 124 A. 67 (N.J. Ch. 1924): the court upheld a bequest of the entire residue in trust to be employed to have masses said for the happy repose of the testator's soul. The court stated: "It is to be noted that the bequest is to definite persons, in trust for a specific purpose, and creates a use intended for the benefit of the testator specifically. Such a use, when possessing those elements of definiteness, is sustained, generally, by the American authorities. . . ."

<sup>15</sup> *Lanza v. Di Fronzo*, 92 N.E. 2d 299 (1949).

<sup>16</sup> *In re Reilly's Estate*, 138 Ohio St. 145, 33 N.E. 2d 987 (1941) there was such a trust: "I give and bequeath to M. James Roche . . . or in the event that he shall not survive me, or be incapable to act, I nominate and appoint the Cleveland Trust Company of Cleveland, Ohio, as such trustee, the sum of ten thousand dollars (\$10,000), in trust, however, for the uses and purposes following, to wit: To hold, manage, control, invest and reinvest the same, and out of the income and principal thereof to pay to the pastor of the Immaculate Conception Roman Catholic Church of Cleveland, Ohio, and to the pastor of St. Mary's Roman Catholic Church, Brookpark Road, Cleveland, Ohio, the sum of not less than five dollars (\$5) each weekly, for the purpose of singing high masses for the repose of the souls of my father, mother and myself; and to the pastors of the Franciscan Roman Catholic churches located at Woodland Avenue and East 23rd St., and Rocky River Drive in Cleveland, Ohio, the sum of not less than five dollars (\$5) weekly jointly for the purposes of saying low masses for the repose of the souls of my father, my mother and myself."

<sup>17</sup> Such a direction was contained in the rest, residue, and remainder clause of the will in *In re Shanahan's Estate*, 159 Ohio St. 487, 112 N.E. 2d 665 (1953). ". . . I direct my executrix to expend one-sixth for Masses, according to the ritual of the Roman Catholic Church, for the repose of my soul. I further direct my executrix to expend two-thirds of such total for such Masses for the repose of my soul, the souls of my parents, Bartholomew and Margaret Shanahan, and the souls of my brothers, John, Maurice, Bartholomew and Frank Shanahan. I direct that all inheritance, succession, legacy or estate taxes on any legacy made in this my will be paid out of the remainder of such total. . . ."

<sup>18</sup> "We have no doubt that a trust for the saying of masses for one's soul or for the souls of others—if otherwise valid—is good as a charitable trust." *Sedgwick v. National Savings and Trust Co.*, 130 F.2d 440 (4th Cir. 1942).

<sup>19</sup> *In re Liebeck's Estate*, 109 N.Y.S. 2d 147 (1951): "I give and bequeath the sum of Three Hundred Dollars (\$300.00) to Rev. Sebastian B. Englerth, Rector of St. John's Evangelist Church, Greece, New York, to be used as he may see fit for Church purposes. I also give and bequeath to the said Rev. Sebastian B. Englerth the sum of Two hundred dollars (\$200.00), to be used for the saying of masses for the repose of my soul."

and the question arises as to whether or not the legacy lapses.<sup>20</sup> In these cases the courts hold that there is a trust rather than a legacy and the gift does not lapse.<sup>21</sup> In other instances the bequest is either to the holder of a specified office<sup>22</sup> or to a church.<sup>23</sup> Bequests to churches have been attacked on the grounds that unincorporated associations can't take property, but these attacks have been unsuccessful.<sup>24</sup> Finally, there are the directions to no definite individual that masses be said.<sup>25</sup>

In a very excellent article, "Seventy Years of Bequests for Masses in New York Courts 1883-1953,"<sup>26</sup> the authors, O'Brien and O'Brien, maintain that in every instance, but those in which a funded trust with an active trustee is established, dedication of property should be characterized as powers in trust. Their reason is that the donee of the power actually contracts<sup>27</sup> with a priest to say the masses, and even the priest is not entitled to the money for his own use until he has performed the mass. Thus even in the instances where a specific priest is named to say the masses, he is not a legatee. There is much force in this argument particularly in those states which have the New York Revised Statutes' statutory scheme of powers; however, even the New York courts do not speak of bequests to say masses in the language of powers.<sup>28</sup> They use the language of trusts, although it is clear that rarely is any funded trust which is to be separately administered involved. An Ohio case upholds the validity of a dedication of property for the saying of masses.<sup>29</sup> In

<sup>20</sup> *Ibid.*

<sup>21</sup> *Matter of Idem's Will*, 256 App. Div. 124, 8 N.Y.S. 2d 970 (1939), *aff'd* 280 N.Y. 756, 21 N.E. 2d 522 (1939); *In re Liebeck's Will*, *supra* note 19. *Matter of Neary*, 194 Misc. 201, 86 N.Y.S. 2d 312 (1949).

<sup>22</sup> "Mrs. Brown's will, so far as here material, gave a legacy of \$500 to the pastor of St. John's Church . . . Brooklyn, 'to be used for the saying of masses for the repose of the souls of myself and of my husband. . .'" *Matter of Brown*, 135 Misc. 611, 238 N.Y.S. 160 (1929).

<sup>23</sup> *Sedgwick v. Nat'l Savings & Trust Co.*, *supra* note 18, "Item III. All of the rest, residue and remainder of my estate and property, of whatsoever character, whensoever acquired and wheresoever situate, including all estate and property to or in which I shall have any right title, claim or interest whatsoever at the time of my death, I give, devise and bequeath, in fee simple and in absolute estate, unto the Holy Name Cathedral, State and Superior Streets, Chicago, Illinois, for masses for the repose of my soul."

<sup>24</sup> *Lanza v. Di Fronzo*, *supra* note 15; *Matter of Korzeniewska*, 163 Misc. 323, 297 N.Y.S. 997 (1937); *Matter of Idem's Will*, *supra* note 21.

<sup>25</sup> *Lanza v. Di Fronzo*, *supra* note 15. "The balance of my estate to go for Masses for the repose of the souls of myself and my beloved wife, Maria Di Fronzo.

<sup>26</sup> 23 *Fordham L. Rev.* 147 (1954).

<sup>27</sup> Perhaps a somewhat unhappy secular choice of language. According to *The Canon Laws of Wills*, at 402, paragraph 673, Father Hannan states: "A Mass cannot be bought, because its infinite supernatural value transcends any equivalent in material wealth. The Priest has the power to offer this Sacrifice; the layman, not. The latter cannot buy the favor, and the former cannot sell it. But, by accepting the gift of the latter, the former binds himself to bestow the favor on the donor rather than on some other man who has not shown benevolence to him."

<sup>28</sup> *Morris v. Edwards*, 227 N.Y. 141, 124 N.E. 724 (1919).

<sup>29</sup> *Lanza v. Di Fronzo*, *supra* note 15.

that case the court spoke of the direction for the saying of masses as a valid charitable trust.<sup>30</sup>

Two Ohio cases have held dedications of property for the saying of masses subject to the Ohio succession tax.<sup>31</sup> *In re Reilly's Estate*<sup>32</sup> the court held that a funded trust with an active trustee is subject to the succession tax and not exempted as "or to or for the use of an institution for purposes only of public charity."<sup>33</sup> *In re Shanahan's Estate*<sup>34</sup> the court held that a direction to the executrix to have masses said is subject to the succession tax. Since money given to a priest to pay his expenses does not, in reality inure to the priest for his personal benefit, but rather to the benefit of the church, it might be that the result in the *Shanahan* case should be reexamined, since this ground for considering the dedication exempt does not appear in the probate court decision.<sup>35</sup>

In states which either hold wills executed in favor of charities invalid if executed within a certain period prior to death, or which have a statutory restriction on the percentage of a person's estate which may be given to charities, the question will arise as to whether dedications of property for the saying of masses fall within these statutes.<sup>36</sup> The cases are in conflict,<sup>37</sup> often even within the same jurisdiction.<sup>38</sup> It would seem that the purpose of these statutes is as applicable to the dedication of property for the saying of masses as it is to gifts to hospitals, universities, etc. The small size of some of these gifts and the preferred position of religious institutions are probably the causes for contrary results. It is submitted that these statutes should be applied to the dedication of property for the saying of masses.

Where a named priest has predeceased the testator, the simplest means for effectuating the testator's primary desire to have masses said is to declare the gift a charitable trust, apply the *cy pres* doctrine and appoint another priest to say the masses.<sup>39</sup> Such bequests would perhaps be more appropriately conceived of as directions to the executor than as charitable trusts, legacies or powers in trust. Treating such directions

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<sup>30</sup> *Lanza v. Di Fronzo*, 92 N.E. 2d 299 at 301 (1949): "On February 14, 1938, this Court in an unreported decision (Case No. 244751) in a matter to construe a will (*Margaret M. Dempsey v. Christ the King Church*) found that income to be used for the saying of Masses created a valid charitable trust."

<sup>31</sup> There are no cases on the deductibility of bequests for the saying of masses under Int. Rev. Code of 1954, § 2055 (2).

<sup>32</sup> 138 Ohio St. 145, 33 N.E. 2d 989 (1941).

<sup>33</sup> General Code of Ohio, § 5334.

<sup>34</sup> *In re Shanahan's Estate*, *supra* note 17.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Lanza v. Di Fronzo*, *supra* note 15.

<sup>37</sup> Annot., 111 A.L.R. 525 (1937).

<sup>38</sup> See O'Brien and O'Brien, *Seventy Years of Bequests for Masses in New York Courts 1883-1953*, 23 *Fordham L. Rev.* 147 (1954).

<sup>39</sup> This was done in *In re Liebeck's Will*, *supra* note 19.

as charitable trusts leads to the application of funds which were directed to be used for the saying of masses to other charitable purposes. In *in re Jeglich's Will*<sup>40</sup> the executors held one half of the residue in trust for the saying of masses.<sup>41</sup> The successor church declined to say masses for a period of more than two years. It is rather difficult to understand how the church ever declined since this case involved a funded trust, and as such it was the duty of the executors as trustees to administer it. From the income and possibly the principal they should have periodically arranged for the saying of masses. In any event, the court applied the *cy pres* doctrine to the excess of the trust over the amount required for the saying of masses for two years. It ordered the excess distributed to the Passionist Monastery of the Immaculate Conception in Jamaica, New York. This appears to be a rather dubious use of the *cy pres* doctrine. The reason probably is that if bequests for the saying of masses were regarded as honorary trusts, the courts should have the power to permit the transferee to exercise the power only as to a reasonable amount of the property appropriate to the decedent's state in life. When the bequest is regarded as charitable, the court does not have this power.

In *matter of Backes*<sup>42</sup> the testatrix directed her executors "To cause masses to be read in a German Catholic church in the city of Buffalo, for herself and her deceased husband, from any balance of cash money which might be left after the payment of her just debts, doctor bills and funeral expenses." The surrogate only permitted an amount in accordance with the testatrix's station in life to be used for masses and the remainder was distributed as though she had died intestate. The limitation of dedication of property for the saying of masses according to the station in life of the testator was abolished in *Morris v. Edwards*.<sup>43</sup> In that case the executor wished to distribute the residue of approximately \$5,500 as intestate property despite the language of the will: "I bequeath all . . . the residue . . . to my executor . . . to pay funeral expenses, say masses, and put a modest tombstone over my remains." The court held that the executor held the residue in trust and stated that the testatrix was free to judge what was a reasonable amount of money for these purposes.

Occasionally the question may arise whether bequests for the saying of masses are to come ahead of the general legacies, or are to be treated

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<sup>40</sup> 178 N.Y.S. 2d 363 (1959).

<sup>41</sup> "Sixth: All the rest, residue and remainder of my property, both real and personal, of whatsoever nature and kind and wheresoever the same may be situated, I direct my executors, hereinafter named, to hold the same in trust for the following purposes:

b) I hereby direct my executors, hereinafter named, to have a Mass offered for the repose of the immortal souls of my late husband, John Jeglich and myself at St. Teresa's Roman Catholic Church in Sunnyside, New York, every three (3) months."

<sup>42</sup> 9 Misc. 504, 30 N.Y.S. 394 (1894).

<sup>43</sup> *Morris v. Edwards*, *supra* note 28.

as funeral expenses. In *Matter of Dwyer*<sup>44</sup> the court held that a \$500 item for masses was an expense. This case appears wrong in principle, and the great weight of cases hold that bequests for masses do not take precedence over general legacies and are not expenses.<sup>45</sup> However, it would seem that the funeral mass should be treated as an expense, even though not an absolutely necessary part of the funeral services.<sup>46</sup>

At one time gifts for the saying of masses were considered superstitious uses and against public policy.<sup>47</sup> More recently a trust to propagate the teachings of Joanna Southcote, who claimed she was with child by the Holy Ghost and that a second Messiah was to be born of her body, was upheld.<sup>48</sup>

The average adherent to any religion is not a doctor of theology. It is believed that the vast majority of testators who wish to have masses said for their souls and the souls of their family intend to benefit themselves and their family in the Afterlife. There is likely no thought on their part that the masses they provide to be said should benefit others. From this point of view the dedication of property for the saying of masses for the testator or his family could hardly be characterized as charitable.

In *in re Beckwoldt's Estate*,<sup>49</sup> the surrogate judge expressed the following opinion which frequently reoccurs in the reported cases:

Whereas such a gift may be made to a religious society, it is not for a general religious purpose since its object is not to promote religion as a whole, but . . . according to tenets of the Roman Catholic and Jewish faiths, to secure for the testator a particular individual benefit, by promoting the eternal welfare of his soul. . . .

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As a matter of first impression and in the absence of controlling authority, this court would be of the opinion that this direction could not properly be deemed to fall within the terms of this statute. The varieties of gifts generally considered to be within its description are those which contemplate a general benefit to mankind or to an indefinite but appreciable segment thereof, in other words, those which evince a general charitable and benevolent purpose for the advancement of the public welfare. (Citations omitted.) In the present

<sup>44</sup> 192 App. Div. 72, 182 N.Y.S. 64 (1920).

<sup>45</sup> *In re Nolan's Will*, 99 N.Y.S. 2d 622 (1950); *In re De Molina's Estate*, 35 N.Y.S. 2d 24 (1942); *Matter of McArdle*, 147 Misc. 876, 264 N.Y.S. 764 (1933); *Matter of Cunningham*, 140 Misc. 91, 249 N.Y.S. 439 (1931); *Matter of Werrick*, 135 Misc. 876, 239 N.Y.S. 740 (1930).

<sup>46</sup> But see *Matter of McAvoy's Estate*, 112 App. Div. 377, 98 N.Y.S. 437 (1906).

<sup>47</sup> *In re Blundell's Trusts*, 30 Beau. 360 (1861). *West v. Shuttleworth*, 2 Myl. and K 684 (1835).

<sup>48</sup> *Thornton v. Howe*, 31 Beau. 19, 54 Eng. Rep. 1042 (1862).

<sup>49</sup> 176 Misc. 549, 27 N.Y.S. 2d 938 (1941).



instance no general benevolent conception is involved; no benefit to the public as a whole was intended.

However, the court upheld the legacy as a valid gift for religious uses because it felt itself to be bound by the decision in *matter of Morris*.<sup>50</sup> The Surrogate's opinion expressed in *in re Beckwoldt's Estate*<sup>51</sup> makes the giver's motive important in determining whether or not a gift is charitable, and recalls Mr. Binney's famous definition of a charity in *Vidal v. Girard's Ex'rs.*:

whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives, and to these ends—free from the stain or taint of every consideration that is personal, private or selfish.

Nevertheless, Professor Scott in his treatise on trusts<sup>52</sup> states flatly that, "It is not the motive which induces the giver to make his gift which makes a gift charitable." Certainly in this day of tax avoidance this is the correct statement of the law. The terms of the gift rather than the motive of the giver must determine whether or not the gift is charitable.<sup>53</sup>

It appears to be the doctrine of the Roman Catholic Church that the saying of masses is a benefit to the entire membership in the Catholic church, both living and dead, and that any person participating in the sacrifice of the mass gains spiritual benefit from his participation.<sup>54</sup> Thus the majority of modern courts have upheld the dedication of property for the saying of masses as a charitable trust.<sup>55</sup>

There is little, if any, cost involved to the church in saying masses. Often many individuals will be remembered in the same mass, and in general, the mass would be said by a priest whether or not any gift had been made. In this way gifts for the saying of masses (and in the Jewish faith *Yahrzeit*) differ from gifts for the care of cemetery lots or the care of animals. They are, in fact, gifts to the church or religious organization, though in the form of service contracts, because the church would perform the religious service in any event. From these bequests the church earns considerable income to devote to its general purposes.

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<sup>50</sup> 227 N.Y. 141, 124 N.E. 724 (1920).

<sup>51</sup> *Supra* note 49; *supra* note 1.

<sup>52</sup> 4 Scott on Trusts § 348 (1967).

<sup>53</sup> See *supra* note 4 § 348.

<sup>54</sup> According to Father Charles Borgognoni, Roman Catholic Chaplain of Syracuse University.

<sup>55</sup> Restatement (Second) of Trusts § 371 (1959) comment (g). So held, *Kerrigan v. Tabb* (N.J. Ch.), 39 A. 701 (1898); *Matter of Dobbins*, 206 Misc. 64, 132 N.Y.S. 2d 236 (1953); *Mahoney v. Nollman*, 309 Mass. 522, 35 N.E. 2d 265 (1941); *Estate of Hamilton*, 181 Cal. 758, 186 Pac. 587 (1919); Scott on Trusts, § 371.5.

It appears to be the practice in the internal accounting of the Catholic Church to treat a gift for a specified number of masses differently from a gift for an indefinite number of masses for the soul of the donor.

Gifts for the saying of a specified number of masses are treated as income to the priest who says the mass, whereas gifts coupled with a request that an indefinite number of masses be said are treated as income to the parish or organization to which the gift was made for the general purposes of the parish or organization.

While gifts for the saying of a specified number of masses are treated as income to the priest saying the masses as far as internal accounting is concerned, this is not personal income to the priest within the ordinary meaning of that term. To defray his expenses each priest is given a maximum salary of \$1500 per year. If he earns more than \$1500 per year by saying masses, he does not receive it; and it goes to the church to pay the salary of the priests who do not earn enough to cover their expenses by saying masses.

Hence, in effect, all gifts for the saying of masses are in reality gifts to the general funds of the church and the church allocates these funds in its internal accounting system to cover the expenses of its priests.<sup>56</sup>

It should be remembered that the motive of a testator making a gift does not affect the determination of the question of whether or not a gift is charitable. A gift is charitable if it is given for charitable purposes.<sup>57</sup> Since a gift for the advancement of religion is charitable, gifts for the saying of masses should be regarded as charitable gifts.<sup>58</sup>

In light of the foregoing, it appears that gifts for the saying of masses are in reality gifts to the church; and any restrictions imposed on charitable trusts for religious purposes should apply equally to trusts for the saying of masses. On the other hand, there seems no reason for imposing restrictions on gifts for the saying of masses which are not imposed upon other gifts to religious institutions.

In jurisdictions which do not consider trusts for the saying of masses charitable trusts, they are usually upheld as honorary trusts.<sup>59</sup> In these jurisdictions the rule against perpetuities applies to trusts for the saying of masses.<sup>60</sup> While it is believed that these jurisdictions are in error in their classification, the only occasion on which this difference would, in

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<sup>56</sup> I am again indebted to Father Charles Borgognoni, Roman Catholic Chaplain of Syracuse University for this information.

<sup>57</sup> Restatement (Second) of Trusts § 368-374 (1959).

<sup>58</sup> *Supra* note 55.

<sup>59</sup> This was sometimes the case in England before *In re Caus*, 1 Ch. 162 (1934) when gifts for masses were first held to be charitable trusts; *Reichenbach v. Quinn*, *supra* note 14. An Iowa court held that although a gift in trust for the saying of masses was not valid as a charitable trust, the trust was valid nonetheless. *Wilmes v. Tierney*, *supra* note 14.

<sup>60</sup> Restatement of Property § 370 and § 374 (1944); 2 Scott on Trusts § 124.1 (1967); American Law of Property § 24.67; Restatement (Second) of Trusts § 124 (1959).

theory, lead to a different result in fact would be when such a bequest would violate the rule against perpetuities. It is arguable that it is sounder social policy to place some time limit on such dedications of property. The basis for this argument is really that the rule against perpetuities or some analogous rule should be applied to charitable gifts. Perhaps this should be the law, but it is not.<sup>61</sup>

### Yahrzeit

Kaddish is said every day after the death of a Jewish person for 11 months, and thereafter yearly upon the anniversary of the person's death, Yahrzeit. The general thrust of the language of the prayers is a glorification of God rather than a plea for the deceased. However, many people may feel that the prayer will do them spiritual good after their death, and there is some Jewish legendary lore in support of this view.

Normally it is the duty of the eldest son to see that the Kaddish is observed at Yahrzeit. The saying of the Kaddish plays an important role in consoling the relatives of the deceased for the death of their kinsman. Since the deceased was a member of the religious community and the person saying the Kaddish is a member of the community, there is benefit to the entire religious community from the saying of Kaddish.

Since it is the duty of the eldest son to see that Kaddish is said, there will not normally be any formal arrangements made for the saying of Kaddish unless there is no son or unless the parents feel that the son will not perform his duty. In either of these instances a person may leave a sum of money to a Jewish institution in order that the Kaddish may be said at Yahrzeit.

The cost of saying Kaddish is purely nominal, and Kaddish would probably be said on that day at the institution in any event.<sup>62</sup> In effect, a gift for the saying of Yahrzeit is an absolute gift to a religious institution of the sum involved for the general use of that institution, although the gift is clearly coupled with a duty to say Kaddish at Yahrzeit. Such gifts should be considered charitable gifts for the same reasons that gifts to Roman Catholic institutions for the saying of masses should be considered charitable gifts.<sup>63</sup>

It follows by analogy that all that is applicable to the dedication of property for the saying of Masses should be applicable to dedications of property for the saying of Kaddish at Yahrzeit.

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<sup>61</sup> *Supra* note 4 at § 365.

<sup>62</sup> I wish to express my appreciation to Dr. Milton Elefant, Jewish Chaplain of Syracuse University for the information he supplied on Jewish customs and beliefs.

<sup>63</sup> In *Matter of Fleishfarb*, 151 Misc. 399, 271 N.Y.S. 736 (1934); In *Matter of Goldberg*, 33 N.Y.S. 2d 1021 (1942).

### Other Rituals

It would seem that any religious ritual which would not be illegal and against public policy may be provided for by the testator.<sup>64</sup> The real issues are still the size of the gift and the rule against perpetuities. The chances are that today a provision for religious rituals for the benefit of the deceased will be upheld as a charitable trust, and if not as a charitable trust, then as an honorary trust. It would seem prudent, however, to make sure that a dedication of property for the performance of religious rituals of a socially unaccepted religious sect on behalf of the decedent complies with the rule against perpetuities, for there is the danger that a court might find the bequest for the exclusive benefit of the deceased and hence not charitable.<sup>65</sup> In addition, if a real trust fund is established for the performance of rituals like placing candles or food on a grave, or the lighting of firecrackers, the money will not go to the general use of an organized religious community in the same manner that bequests for the saying of Masses or Yahrzeit go into the general funds of the priesthoods of the Roman Catholic and Jewish religions.

It should be noted that whenever funds are not to be turned over to the organized ministry of a religion to perform the desired religious ritual, the funds must be held to be an active trust by a trustee. In such instances there are good reasons based on public policy for limiting the duration of the dedication of property to such specific purposes which do not directly advance any religion to a period within the rule against perpetuities.

### Conclusion

The dedication of property for the saying of Masses or Kaddish at Yahrzeit is a charitable use. The funds directed to be employed for these purposes aid the advancement of the Roman Catholic and Jewish religions to the same extent as other gifts to religious organizations of these faiths. In addition, the religious doctrines of these faiths declare that the religious services benefit the entire community and not merely the decedent remembered in the service. Probably, however, it would be best for courts to avoid the theological thicket in deciding whether or not a dedication of property for religious services is a charitable use. An easy-to-apply objective test would be whether or not the funds dedicated were turned over to the organized ministry of the religion for use in

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<sup>64</sup> See 2 Scott on Trusts § 371.4.

<sup>65</sup> It was held in *In re Estate of Khoo Cheng Teow*, Straits Settlement L.R. 226 (1932), that a trust of land to apply the rents in performance of a Chinese religious ritual *Sin Chew* to perpetuate the memory of the decedent was not a charitable trust; however, since the trust did not violate the rule against perpetuities, the trust was valid; whereas in *Yeap Cheah Neo v. Ong Cheng Neo*, L.R. 6 Probate Court 381 (1875) a bequest for the perpetual performance of a Chinese religious ritual was held invalid.

advancing the purposes of the religion. This test might not be met by dedications of property for the performance of the rituals of certain oriental and minority religious groups. However, in these instances where no organized religion is being directly aided by contributions to its general funds, the advancement of religion in the interest of the public welfare is not being fostered and the duration of the dedication of property to the specified purposes should be limited in time.