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VIDE INFRA

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FROM THE GCFA LEGAL TEAM:

Welcome to the Winter 2010 edition of *Vide Infra*.

In this issue, we cover several different tax issues, breakaway churches, and the statute of limitations for child abuse. As to this latter issue, the Illinois Supreme Court has ruled on an important case that we mentioned in our last newsletter.

As always, we welcome your comments and suggestions on how we can improve this newsletter, so please give us your feedback. Also, if there are topics that you would like to see covered in a future newsletter, please let us know.

-Rick, Dan, & Bryan

CLERGY TAX PACKET

The start of the New Year also brings about the start of the tax season. With that in mind, we want to remind you of the resources available in our Tax Packet. The Tax Packet covers a myriad of issues, including accountable reimbursement policies, moving expenses, pastor discretionary funds, housing/parsonage allowances, and timelines for local church tax filings (Forms 941, W-2, 1099, etc.).

CONSTITUTIONAL-BASED CHALLENGE TO THE PARSONAGE ALLOWANCE

On October 16, 2009, a complaint was filed in U.S. District Court in California challenging the constitutional validity of the tax exemption for clergy parsonage/housing allowances in Section 107 of the tax code. The lawsuit, which was filed by the Freedom from Religion Foundation, argues that the exemption unconstitutionally works to establish religion and to favor ministers over non-ministers. The suit names the U.S. Treasury, the IRS, and the California Franchise Tax Board as defendants.

Recently, a pastor asked the Court to allow him to intervene in the lawsuit. In denying the intervention request, the Court rejected the pastor's claim that the government defendants would not adequately represent the interests of ministers, generally, in defending the lawsuit.

SOUTH CAROLINA SUPREME COURT REJECTS EPISCOPAL CHURCH TRUST CLAUSE CLAIM (9/09)

All Saints v. Campbell

In 1745, sixty acres were conveyed, via trust deed, to George Pawley and William Poole, as trustees, for the benefit of "the inhabitants of Waccamaw Neck for use of a chapel or church for divine worship of the Church of England . . . ." In 1766, colonial South Carolina's Commons House established All Saints Parish in the Waccamaw Neck region, which began using the property conveyed via the 1745 trust deed, by no later than 1767. By this time, the trustees had died and neither the trust deed nor their wills named successors. After the Revolutionary War, All Saints Parish – no longer connected to the Diocese of London – was reestablished by the South Carolina General Assembly. The General Assembly officially incorporated the vestry of All Saints Parish in 1820, and then extended the incorporation indefinitely in 1852. An 1880 General Assembly Act mandated that inactive Episcopal Church property was held in trust by the Trustees of the South Carolina Episcopal Diocese ("Diocese").

By 1902, the congregation was worried about its incorporation status and the ownership of its property. In 1903, after discussions with the Diocese, the congregation reincorporated as All Saints Parish, Waccamaw, Inc. ("All Saints") and the Diocese quit claimed any interest it had in the property to All Saints. In 1987, the

Episcopal Church ("Church") added a trust clause – the Dennis Canon – to its constitution and canons. In 2000, All Saints – again concerned about the ownership of its property – conducted a title examination, which revealed the 1745 trust deed and the 1903 quit claim deed. Later that year, the Diocese recorded a notice stating that All Saints held the property in trust for the Diocese and the Church. All Saints then sought a declaratory judgment that it held the title to the property. The trial court ruled, via summary judgment, that the unknown heirs of George Pawley and William Poole held legal title, while the Waccamaw Neck residents held equitable title. In 2004, on appeal by the Diocese and the Church, the Court of Appeals held that there were genuine factual issues and remanded the case.

In the meantime, beginning in 2003, All Saints began the process of leaving the denomination. In response, the bishop declared that the vestry had abandoned their offices. In early 2004 the congregation voted to leave the denomination and to amend its corporate documents accordingly. Thereafter, a minority of the congregation met with the bishop and elected a "new" vestry (the "minority vestry"), while the rest of the congregation reelected the vestry removed by the bishop (the "majority vestry"). In 2005, the minority vestry sought a declaratory decision that it controlled All Saints. This action was combined with the one on remand. The trial court ruled the same way as to title to the property, while additionally holding that the minority vestry controlled the local church. The majority vestry appealed. The Supreme Court, applying "neutral principles of law," reversed the trial court as to both findings and held that the majority vestry controlled All Saints, which held complete title to the property.

The Court first determined that the 1745 trust deed was no longer valid, which acted to convey legal title to the beneficiary (i.e., All Saints). The Court then held that the Dennis Canon had no impact on All Saints' title to the property. The Court stated that "it is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another . . . ." According to the Court, when the Diocese recorded the notice in 2000, it had no interest in the property (presumably as a result of the 1903 quit claim deed) and thus could not establish a trust. As for which vestry had control, the Court found that the lower court had wrongly used the "deference approach" in reaching its conclusion. Applying neutral principles, the Court simply reasoned that, since the majority vestry followed all the steps required by the state's non-profit statutes to amend the articles and bylaws of All Saints, the separation from the denomination was effective and the majority vestry retained control.

The minority vestry is preparing to submit a petition for review to the U.S. Supreme Court. The Diocese and the denomination are not appealing the Court's decision.

Editor's Note: This is one of the few trust clause cases that goes into the "loss" column, from the standpoint of the denomination. Although the factual scenario of this case is fairly unique and convoluted, it establishes a precedent in South Carolina that will make enforcing the trust clause very difficult in that state.

SUPREME COURT OF ILLINOIS LIMITS REACH OF STATUE OF LIMITATIONS EXPANSION (9/09)

Doe v. Diocese of Dallas

Plaintiff, an eighth-grade student at a Catholic parochial school, was allegedly molested by a Catholic Priest in 1984, while the priest was a visiting lecturer. At the time of the molestation, church officials apparently knew the priest had previously abused children. Plaintiff did not disclose to anyone he was abused until December of 1998, when he sought treatment for "acute psychological problems." In 1998, the relevant statute of limitations required suit to be brought within two years of discovering the link between the abuse and the injury. In July 2003, the statute was amended, requiring such a suit to be brought within five years. The amendment stated that it applied to all pending actions and to all actions brought after its effective date. Plaintiff filed suit in November of 2003, alleging negligent hiring, negligent supervision, and fraud against the Diocese, among other claims. The trial court dismissed the lawsuit, holding the 2003 amendment could not be applied retroactively to revive Plaintiff's previously expired claims. Plaintiff appealed. The appellate court applied the 2003 amendment and reinstated Plaintiff's claims. Several of the defendants sought review by the state's Supreme Court. The Court granted review and held Plaintiff's claims could not be revived by the 2003 amendment without violating due process.

Initially, the Court stated it follows the approach adopted by the U.S. Supreme Court in *Landgraf v. USI Film Products*, which requires courts to defer to the "expressly prescribed . . . temporal reach of a statute . . . absent a constitutional prohibition." The 2003 amendment "expressly prescribed" its "temporal reach:" it

applied not only to instances of abuse occurring after its effective date, but also to those which occurred *prior* to its enactment. Thus, the Court had to determine whether a constitutional impediment existed to the amendment's retroactive effect. Quoting one of its previous cases – *M.E.H v. L.H.*, 177 Ill. 2d 207 (1997) – which involved similar circumstances, the Court stated that "once a statute of limitations has expired, the defendant has a vested right to invoke the bar of the limitations period as a defense . . . [and] that right cannot be taken away" without violating due process. This, according to the Court, is a "long-established rule." Thus, the 2003 amendment could not act to revive Plaintiff's previously expired claims and the trial court's dismissal of them was reinstated.

GCFA, together with a number of other religious organizations, joined an *amicus curiae* brief in support of the Diocese's position in this case.

Editor's Note: This is an important decision, as it places a limit on the expansion of the statute of limitations for sexual abuse claims, at least in Illinois. The trend toward expansion, as we discussed at length in the previous issue, is occurring in more and more states. As before, we request that you forward to us any court cases or proposed legislation regarding the issue in your state.

Supreme Court of Ohio Denies Property Tax Exemption for Administrative Offices (11/09)

Church of God in N. Ohio, Inc. v. Levin

Ohio Revised Code Annotated § 5709.07(A)(2) exempts "[h]ouses used exclusively for public worship" from real property taxation. A second statute – § 5709.12(B) – similarly exempts "property belonging to institutions that is used exclusively for charitable purposes." The Church of God in Northern Ohio ("Church") applied for exemption for a building, which houses the "State Executive Offices and Ministry Training Center" and the office and support staff of the administrative bishop, pursuant to § 5709.12(B). The Tax Commissioner and the Board of Tax Appeals both denied the exemption. The Church appealed to the Supreme Court of Ohio. The Court – split 4 to 3 – affirmed the denial of the exemption, based on its finding that "neither the activities conducted at the [property] nor the public worship conducted by the member congregations constitutes charitable activity."

In conducting its analysis, the Court examined two potential ways in which the Church could obtain the exemption (prior case law eliminated the possibility of the building being exempt under § 5709.07(A)(2)). The first way was if the Church's activities at the building were themselves charitable in nature. While it recognized that some "secondary or ancillary" activities conducted by the Church might be charitable, the Court found the primary use of the property – "administrative and corporate activities in support of public worship" – to not be charitable. Thus, the Court reasoned, the only remaining option for exemption was "the proposition that the public worship conducted at the local churches can itself be viewed as constituting charitable activity." In holding that public worship was not a charitable activity, the Court likened it to "fraternal associations:" "it inevitably focuses on serving the spiritual needs of those participants who are already to a greater or lesser degree members of the congregation, or at least of the larger denomination." The Court also found support for its conclusion in the separate statutes for exemption (one for houses of public worship and one for charitable purposes), reasoning that if public worship was a charitable activity, § 5709.07(A)(2) would be redundant and unnecessary. The dissent, which emphasized the evangelistic aspect of churches and public worship, seemingly disagreed with this characterization. The majority, based on its view of the activities conducted at the property and of public worship, held the property to be subject to taxation.

Editor's Note: The total impact of this decision, and its views on public worship and church administrative offices in Ohio, is not yet known. At the very least, any new application for property tax exemption of church administrative offices in Ohio will now most likely be denied. This decision could also trigger reconsideration and revocation of previously granted exemptions.

Wisconsin Court of Appeals Upholds Rejection of Exemption for Church Custodian's Residence (10/09)

Wauwatosa Avenue United Methodist Church v. City of Wauwatosa

The Wauwatosa Avenue United Methodist Church ("Church") owns a building, adjacent to its main property, that was once occupied by the Church's associate pastor. Since 1994, the Church's custodian has used the building as his personal residence. The Church requires the custodian to be on call 24 hours a day "for

maintenance, security and opening and closing the church." It is undisputed that the custodian is not "a pastor or other religious leader." Both the Church's main property and the building occupied by the custodian had been off the City of Wauwatosa's ("City") tax rolls since 1978. As part of a recent review of its tax rolls, the City notified the Church in 2007 that it would have to apply for tax exemption for its properties. The City denied the application for exemption, without a hearing, as to the building occupied by the custodian. The Church sought a declaratory judgment overturning the City's decision. The trial court granted summary judgment to the City, and the Church appealed. The Court of Appeals affirmed the trial court's conclusion, reasoning that the custodian did not meet the criteria set forth by the applicable Wisconsin statute to establish a basis for tax exemption of the property.

In upholding the decision of the City, the Court of Appeals examined § 70.11(4) of the Wisconsin Code, which exempts property "owned and used exclusively by . . . churches . . . and used for housing for pastors and their ordained assistants, members of religious orders and communities, and ordained teachers." The Church's sole argument that the custodian should be included within the scope of that exemption was based on a single sentence from a prior Wisconsin Supreme Court decision – namely, that the exemption should be limited to those "whose employment is integral to the functioning of the church." The Church wanted that phrase to be a new test for exemption. The Court refused to establish such a test. Further, the Court refused to accept the notion that a custodian could be necessary to a church's function, as the position has nothing to do with "spiritual formation or guidance." Thus, the building is not "used exclusively" for church purposes, a requirement of the statute, and the exemption was unavailable.

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