

IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
CUYAHOGA COUNTY, OHIO

WILLIAM MACFARLANE	)	CASE NO. DR03294327
)	
Plaintiff	)	JUDGE KARNER
)	
-vs-	)	<u>MEMORANDUM IN SUPPORT OF</u>
	)	<u>DEFENDANT’S MOTION TO VACATE</u>
MARIE CHRISTINE MACFARLANE	)	<u>PRIOR TEMPORARY ORDERS</u>
	)	and
Defendant	)	<u>MOTION TO TRANSFER</u>
	)	<u>JURISDICTION TO CHURCH</u>
	)	<u>TRIBUNAL AND COMPEL</u>
	)	<u>ARBITRATION</u>

Now comes Defendant in the above captioned matter who hereby supplements the Motion to Vacate with a memorandum in support of that motion. This “Memorandum” was prepared by Professor Stephen J. Safranek to aid this Honorable Court in determining the legal issues in this case. This Memorandum advises this Honorable Court to recognize the alternative jurisdiction of the Catholic Church to arbitrate the dispute in this case. A failure to do so not only undercuts the clear policy of Ohio in favor of arbitration, but also excessively entangles this Court with issues of faith, morals, and belief of the Catholic Church.

MEMORANDUM

1. **I. FACTS**

The facts in this case have already been set forth in “Defendant’s Motion to Vacate Prior Temporary Orders and Motion to Transfer Jurisdiction to Church Tribunal and Compel Arbitration” (“Defendant’s Memorandum”). All facts set forth in Defendant’s Memorandum and all arguments made therein are hereby accepted.

II. THE VALIDITY OF THE ARBITRATION PROCESS.

A. General Contracts requiring parties to settle their disputes before religious tribunals are valid.

Ohio favors arbitration agreements and seeks to uphold them:

Arbitration occurs when disputing parties contractually agree to resolve their conflict by submitting it to a neutral third party for resolution. It provides the parties with a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets. The whole purpose of arbitration would be undermined if courts had broad authority to vacate an arbitrator's award. Thus, this court has stated, "[i]t is the policy of the law to favor and encourage arbitration and every reasonable intendment will be indulged to give effect to such proceedings and to favor the regularity and integrity of the arbitrator's acts." *Mahoning County Bd. Of Mental Retardation & Developmental Disabilities v. Mahoning County TMR Education Asso.*, 22 Ohio St. 3d 80, 83-84 (1986) (quoting *Campbell v. Automatic Die & Products Co.*, 162 Ohio St. 321, 329 (1954).

When a dispute arises over an arbitration agreement, Ohio courts favor arbitration. "In examining an arbitration clause, a court must bear in mind the strong presumption in favor of arbitrability and resolve all doubts in favor of arbitrability." *Neubrand v. Dean Witter Reynolds, Inc.*, 610 N.E.2d 1089, 1090-91 (1992). Ohio and federal courts encourage arbitration to settle disputes. *ABM Farms, Inc. v. Wood*, 692 N.E.2d 574, 576 (1998).

Courts allow arbitration agreements to settle disputes even when determined according to religious principles and evaluated by arbitrators with no legal training. *Encore Productions, Inc. v. Promise Keepers*, 53 F.2d 1101 (D. Colo., 1999) is one example of such a case. Promise Keepers conducts Christian meetings and conferences in the United States. *Id.* at 1106. Encore agreed to provide Promise Keepers with production and consulting services. *Id.* Paragraph 18 of the Service Contract stated:

Any claim or dispute arising from or related to this Agreement shall be settled by mediation and, if necessary, legally binding arbitration, in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation. Such arbitration shall be held in Colorado unless otherwise agreed by both parties. Judgment upon an arbitration award may be entered in any court otherwise having jurisdiction. *Id.*

The court found that the arbitration agreement was valid because the parties did not expressly and clearly show that they intended to repudiate it. *Id.* at 1109. Encore also argued that the Christian Conciliation was an invalid arbitrator. The court found:

Ordinary contract principles determine who is bound by written arbitration provisions. . . . Encore and PK executed the Service Contract which contains an enforceable arbitration provision. The arbitration process between these corporations contemplates participation by their principals. By executing the Service Contract on behalf of Encore, Encore's principals consented to participate in an arbitration governed by the Rules of Christian Conciliation.

Furthermore, although Encore is correct that courts cannot employ “religious organizations as an arm of the civil judiciary to perform the function of interpreting and applying state standards,” here the parties themselves agreed and consented to arbitration before Christian Conciliation. Although it may not be proper for a district court to refer civil issues to a religious tribunal in the first instance, if the parties agree to do so, it is proper for a district court to enforce their contract. Therefore, Encore is now precluded from challenging the enforcement of this valid agreement. *Id.* at 1112 -13.

This case is not unique. In *Elmora Hebrew Center v. Fishman*, 125 N.J. 404 (1991), the synagogue hired Fishman, an ordained rabbi and later decided to terminate him. Fishman refused to give up his position and the Hebrew Center filed a civil action. *Id.* The trial court referred the matter to a Jewish tribunal, a Beth Din, because it found that some of the questions were religious. *Id.* at 411. The Hebrew Center challenged the Beth Din’s determination, but the New Jersey Supreme Court upheld the decision. *Id.* at 413. Although the court disapproved of the trial court ceding complete jurisdiction to the Beth Din, it found that the Center had, by its actions, agreed to the arbitration and was therefore bound by it. *Id.* at 419. The court reasoned:

These natural analogs to arbitration suggest that it is appropriate that the EHC, like a party to a civil arbitration, should be bound to observe the Beth Din's determination of any issues that the EHC agreed to submit to that tribunal. By way of comparison, we note that in statutory arbitrations, a party is bound by arbitrators' determinations even of issues clearly beyond the scope of a contractual agreement to arbitrate, so long as the party consented to the submission of those issues to the arbitrators. *See, e.g., In re Grover*, 80 N.J. 221, 403 A.2d 448 (1979). Thus, in the present procedural posture of the case, the initial concerns over whether some issues resolved by the Beth Din were more “secular” than religious, and therefore appropriately should have been resolved by a civil court, have dissipated. For the reasons expressed by the lower courts, the parties are now bound by the Beth Din's decision, because of their plenary agreement to submit their disputes to that body for its adjudication.

Id. at 418-419 (italics added).

A similar approach can be seen in *Prescott v. Northlake Christian Sch.*, 244 F. Supp. 2d 659 (D. La. 2002). Northlake Christian School hired Pamela Prescott to serve as principal of its elementary school. As a condition of being hired, Prescott was required to be a "born again" Christian. *Id.* at 667. Paragraph eleven of the employment contract stated that Prescott must follow the principles of Matthew 18, as well as other biblical principles. *Id.* The employment contract stipulated that all claims and disputes arising out of the employment agreement and relationship be submitted to biblically-based mediation and arbitration. *Id.* at 662. The contract required that the Rules of Procedure for Christian Conciliation "ICC Rules" govern the arbitration process. "The arbitrator was to grant any remedy that he deemed to be scriptural, just, and equitable, as long as it was within the scope of the parties' agreement." ICC RULE 40." *Id.* at 667. *Id.* Both parties agreed that arbitration would be the sole method for resolving claims and expressly waived the right to file a lawsuit, except to enforce the arbitration award. *Id.* The school terminated Prescott and she filed suit against them for gender discrimination, sexual harassment, retaliation, and breach of contract. *Id.* The court granted the school's motion to compel arbitration. The arbitrator found that the school breached its contract with Prescott "legally as well as Biblically" in wrongfully terminating her and the arbitrator stressed that the school failed to follow Matthew 18. *Id.* at 663. The court held:

Given the unique nature of this employment agreement and the parties' choice of arbitration method, it appears that the arbitrator's award was rationally related to the parties' agreement. While the employment contract does state that it should be interpreted under the laws of Louisiana, the contract and the arbitration agreement stress the supreme authority of the Bible in the employment relationship between Plaintiff and Defendant. The parties intended to be guided not only by state and federal secular law, but also by the Bible. Under the MUAA, the award cannot be overturned merely because a court would not have been able to award similar damages. Consequently, the arbitrator did not exceed his powers in the instant case by finding that there was a "biblical" breach of contract. *Id.* at 667.

Although the Fifth Circuit vacated and remanded the arbitration award, it did so because the arbitrator failed to evaluate the contract under Louisiana laws and the arbitration agreement was ambiguous as to whether or not the parties contemplated expanded judicial review. The Fifth

Circuit did not find biblically-based meditation and arbitration, using the ICC rules, were invalid. *Prescott v. Northlake Christian Sch.*, 369 F.3d 491 (5th Cir. 2004).

B. Antenuptial agreements that call for arbitration before a religious tribunal are enforceable.

Courts have readily recognized antenuptial agreements demanding the help of religious tribunals. For instance, in *Marriage of Goldman*, 196 Ill. App. 3d 785, the Goldmans married in a Reconstructionist Jewish ceremony. *Id.* at 788. Neither party was an Orthodox Jew, but Annette Goldman became Orthodox during the marriage. *Id.* Shortly after the couple married, they signed a document called a ketubah. *Id.* Neither party consulted a lawyer before signing it. *Id.* They were dressed in their wedding attire when they signed the ketubah. *Id.* Annette admitted that they never specifically discussed if her husband would give her a get in the event the marriage ended. *Id.* at 789. She brought in two Orthodox Jewish experts to testify that the ketubah was a valid contract. *Id.* at 789-90. The trial court ordered Kenneth Goldman to obtain a get. He appealed, contending that the ketubah was not a contract, but was merely intended as art or poetry, that if it was a contract, it was too vague for specific performance, and it would violate his constitutional rights under the establishment and free exercise clauses. *Id.* at 791. The Appellate Court affirmed:

First, the order has the secular purpose of enforcing a contract between the parties. The right to enter into contracts is recognized by both the Federal and State Constitutions. (U.S. Const., art. I, § 10; Ill. Const. 1970, art. I, § 16.) Also, the court order furthers two secular purposes set forth in the Illinois Marriage and Dissolution of Marriage Act: "[To] promote the amicable settlement of disputes that have arisen between parties to a marriage; [and to] mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage." (Ill. Rev. Stat. 1987, ch. 40, pars. 102(3), 102(4).) The evidence at trial established that under the Orthodox Jewish law, which the parties agreed would govern the status of their marriage, the marriage could be dissolved only by the securing of an Orthodox get. Without the get, Annette was prohibited by her religious beliefs from remarrying. It would have been detrimental to the parties and their children to leave the get issue unresolved.

Second, it is our opinion that the primary effect of the court order was to further the secular purposes stated above and not to advance or inhibit religion. Although the order required Kenneth's participation in an Orthodox Jewish practice, there was ample expert testimony that Judaism contains both secular and religious laws and that the get procedure was secular in nature. To comply with the court order, Kenneth need not engage in any act of worship or profess any religious belief. According to the expert witnesses, the acquisition of a get is a secular act which severs the marriage contract. To the extent that the court order advances Orthodox Judaism by requiring an Orthodox get, it is an incidental effect of the enforcement of the parties' contract that Orthodox Jewish law govern the status of their marriage.

Third, we believe that the court order avoids an excessive entanglement with religion. *Id.* at 794-795.

The court in *Goldman* could not have been more clear. The use of religious tribunals for determinations concerning marriage are completely constitutional and should be enforced.

This practice has been uniformly acknowledged for Jewish weddings. *See Avitzur v. Avitzur*, 58 N.Y.2d 108, 113-114 (1983) (signing of ketubah was a duly executed antenuptial agreement, by which the parties agree in advance of the marriage to the resolution of disputes that may arise after its termination, is valid and enforceable); *Matter of Sunshine*, 40 NY2d 875, affg 51 AD2d 326; *Matter of Davis*, 20 NY2d 70; *Hirsch v Hirsch*, 37 NY2d 312; *Bowmer v. Bowmer*, 50 NY2d 288, 293. Indeed as the *Avitzur* court noted, this agreement -- the Ketubah -- should ordinarily be entitled to no less dignity than any other civil contract to submit a dispute to a nonjudicial forum, so long as its enforcement violates neither the law nor the public policy of this State. *Avitzur v. Avitzur* at 113-114 (1983). A similar acknowledgement has been made of Islamic weddings. *Aziz v. Aziz*, 488 N.Y.S. 2d 123 (1985). Illinois is in accord. *See Gottlieb vs. Gottlieb*, 175 NE 2d 619 (Illinois, 1961).

Certainly, a Catholic wedding agreement should be no less worthy of recognition that that done under Jewish or Islamic auspices.

C. Even Child Custody Issues May be Subject to Arbitration Agreements.

In *Gottesman v. Gottesman*, 290 A.D.2d 201, 735 N.Y.S. 2d 113 (N.Y. App., 2002), a child support issue was determined by a rabbinical tribunal. The court stated, “The law is clear that child support issues are arbitrable but remain subject to judicial review, and may be vacated on public policy grounds, such as where the award is adverse to the best interests of a child.” *Id.* at 202. The court stated, “In this matter, we find that the rabbinical tribunal, in applying the factors set forth in the CSSA for parental income over \$80,000 (Domestic Relations Law § 240 [1-b] [f]), did not properly consider the best interests of the child, and her needs in view of the parties’ marital standard of living (*Matter of Mitchell v Mitchell*, 264 AD2d 535, *lv denied* 94 NY2d 754; *Matter of Gluckman v Qua*, 253 AD2d 267, *lv denied* 93 NY2d 814), especially in view of the father’s earning ability as contrasted with the mother’s income.” *Id.*

Thus, although even child custody issues are first subject to the arbitration process, the courts may intervene in light of the court’s duty to consider the best interests of the child as an overriding public policy concern. *See Kelm v. Kelm*, 73 Ohio App. 3d 395, 597 N.E.2d 535 (1992).

However, until and unless a determination is made that such consideration has been made by the Church tribunal, this court should defer acting and reverse any custody orders. Indeed, its failure to show any deference to a Catholic wedding – and the concomitant rights and duties the parties gained or undertook – threatens to entangle this Honorable Court in matters of Catholic belief, doctrine, law and faith. The *Kelm* court considered the relevance of arbitration after divorce, and as part of a final divorce decree. This case considers the relevance of a prenuptial agreement in which the parties named the arbitrator to which they agreed to be obligated prior to approaching the civil courts. The parties agreed to follow the arbitrators finding regarding the due maintenance, upbringing, education of children and support.

III. CHURCH STATE ISSUES

A. Whether under the common law or the neutral principles of law approach, civil courts must respect the decisions of church and religious organizations

when to do otherwise would require the civil court to become entangled with religious doctrine.

In *Lemon v. Kurtzman*, the Court created a three-part test to examine the applicability of a federal statute to a religiously-affiliated institution:

- (1) the statute must have a secular purpose;
- (2) its principal or primary effect must be one that neither advances nor inhibits religion; and
- (3) the statute must not foster an excessive government entanglement with religion.

403 U.S. 602, 612-613 (1971).

The question in most cases is whether or not the statute fosters an excessive government entanglement with religion. Under the common law, civil courts had no authority to contradict a religious group's decision in a matter involving faith, custom, or canon law.

The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Watson v. Jones, 80 U.S. 679, 728-729 (1872).

However, the Supreme Court has also applied what it calls a "neutral principles of law" approach to religious disputes. The neutral principles of law approach was first advanced by the Supreme Court in *Presbyterian Church v. Hull Church*. In that case, a church property dispute arose when two local Presbyterian Churches withdrew from the general church organization. As

allowed by Georgia law, a civil jury trial was used to determine whether the general church abandoned or departed from the tenets of faith and practice it held at the time the local churches were affiliated with it. The jury found for the local churches, but the Supreme Court reversed. The Court found that in this instance the property dispute did require resolution of religious doctrine and practice, and therefore the civil court should abide by the general church's decision. The Court reasoned that, "[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969). Nevertheless, it stated that there are cases where civil courts might legitimately intercede.

It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded.

Id. The Court did add this caution:

But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes . . . [and] commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. *Id.*

The Supreme Court again used the neutral principles of law approach in *Jones v. Wolf*. In *Jones*, a schism occurred in the Presbyterian Church. Two local Georgia Presbyterian Churches were unhappy with the direction of the national Presbyterian Church was taking, and petitioned the church for separation. The local churches also wanted to keep the property they occupied,

which had been purchased by funds contributed entirely by its members. The national church refused to give them the property, so the local churches filed suit in civil court. After a series of appeals, the Supreme Court found for the local churches. It reasoned:

The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general -- flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

Jones v. Wolf, 443 U.S. 595, 603-604 (1979). The Court acknowledged that this balancing test would sometimes be very difficult for civil courts. However it argued that such an approach encouraged religious entities and members to contractually decide in advance how disputes should be settled. *Id.* at 604.

The Court clarified the interaction of these two cases in *Little v. First Baptist Church*:

Because religious organizations may own property and enter into contracts, it is inevitable that they will become involved in legal disputes. However, where the use of property or the terms of contracts necessitate reference to ecclesiastical principles or authority, courts must exercise extreme care to avoid taking sides on matters of religious belief. This Court set down the basic framework for such situations over 100 years ago, in *Watson*. Although it has undergone some refinements, see, e. g., *Jones v. Wolf*, 443 U.S. 595 (1979), the *Watson* approach is simple. A court may apply neutral principles of secular law to the dispute at hand. When that process requires a court to determine the validity of a church decision, the court ordinarily must discern from the relevant canonical law what body is authorized to make a particular decision within the church, and what decision that body has reached. Having done so, the court may not inquire

whether the decision was made arbitrarily or whether it conflicts with the ecclesiastical precepts of the organization.

475 U.S. 1148, 1149 (1986)

The common law approach is used in most cases. However, when cases involve clear secular issues, courts may apply the neutral principles of law approach. For instance, when the California attorney general filed suit against a nonprofit religious and charitable corporation for the administration of its charitable trusts, the Supreme Court held that the civil court could adjudicate the matter because it involved secular trust laws. *Synanon Foundation, Inc. v. California*, 444 U.S. 1307 (1980).

B. The Government may not interfere with a religious organization's governance of its own affairs, unless the organization engages in fraud, collusion, or arbitrariness.

Under the First Amendment to the U.S. Constitution, Congress is barred from making any law “prohibiting the free exercise” of religion. Also, in addition to protecting against intrusive legislation, “the Free Exercise Clause restricts the government's ability to intrude into ecclesiastical matters or to interfere with a church's governance of its own affairs.” *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999) (citing *Kedroff v. St. Nicholas Church*, 344 U.S. 94 (1952)). The Supreme Court has stated that, “on matters of church discipline, faith, practice, and religious law, the Free Exercise Clause requires civil courts to refrain from interfering with the determinations of the ‘highest of these church judicatories to which the matter has been carried.’” *Lewis v. Seventh Day Adventists Lake*, 978 F.2d 940, 941-942 (6th Cir. 1992) (quoting *Watson v. Jones*, 80 U.S. 679, 727 (1871)).

In *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), the Serbian Orthodox Church suspended and removed Dionisije Milivojevich as bishop of the American-Canadian Diocese of that church and reorganized the area into three dioceses. During his tenure as bishop, the church received many complaints about Milivojevich, but the diocese also grew

substantially. When the church decided to reorganize, Milivojevich refused to accept the changes. As a result, he was suspended and finally defrocked. Milivojevich sued over control of the diocese and its property. The Illinois Supreme Court invalidated the reorganization and found that the church's proceedings against Milivojevich were procedurally and substantively defective. However, the United States Supreme Court reversed:

Consistently with the First and Fourteenth Amendments "civil courts do not inquire whether the relevant [hierarchical] church governing body has power under religious law [to decide such disputes] . . . Such a determination . . . frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-709 (1976) (quoting *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

Justice Brennan, speaking for the Court, admonished:

The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes. . . . For where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708 - 709 (1976).

The Court reasoned that civil courts face a substantial danger that the State will become entangled in essentially religious controversies in trying to resolve a property dispute between rival church factions. *Id.* at 709.

The Free Exercise Clause's protection is not limited to churches; it has been extended to various religiously-affiliated institutions, including schools. In *EEOC v. Catholic University of*

America, a Dominican Sister was denied tenure at Catholic University. 83 F.3d 455, 465 (D.C. Cir. 1996). She sued the university under Title VII for sexual discrimination. The court found for the university, reasoning that the application of Title VII to her employment required an intrusion by the court into religious affairs. *Id.* In *Little v. Wuerl*, a protestant teacher was fired from a Catholic school when she remarried. 929 F.2d 944, (3d Cir. 1991). All employee contracts incorporated the school's handbook by reference. *Id.* at 946. The handbook stated that an example of a violation of the "just termination clause" was entry into a marriage not recognized by the Church. *Id.* The teacher failed to have her first marriage annulled before remarrying and the school dismissed her. The court upheld the school's decision stating,

Title VII of the Civil Rights Act of 1964 . . . prohibits employers from discriminating on the basis of religion. Application of this prohibition to the Parish's decision would be constitutionally suspect because it would arguably violate both the free exercise clause and the establishment clause of the first amendment. . . . Application of Title VII's prohibition against religious discrimination to the Parish's decision would also be suspect because it arguably would create excessive government entanglement with religion in violation of the establishment clause. *Id.* at 947, 948.

The court has also upheld this principle in the context of religious charitable institutions. In *Natal v. Christian and Missionary Alliance*, a minister was fired from a not-for-profit religious organization where he had worked for forty years. 878 F.2d 1575 (1st Cir. 1989). The court upheld the religious organization's decision, reasoning that "[b]ecause of the difficulties inherent in separating the message from the messenger -- a religious organization's fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents" *Id.* at 1578. In *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), a nonprofit gymnasium, operated by two nonprofit corporations affiliated with the Mormon Church, required its employees to obtain a "temple recommend" certifying that the employees were members of the Church and eligible to attend its temples. The gym was open to the public. Plaintiff, a building engineer who had worked for the gym for sixteen years, was

discharged for failing to qualify for a “temple recommend.” *Id.* at 331. He filed suit against the gymnasium and the corporation for violation of Title VII of the Civil Rights Act of 1964. The Act states: “This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” The Supreme Court held that the Act does not violate the Establishment Clause as applied to this case because: (1) the Act, as extended to nonreligious activities, serves the permissible purpose of minimizing governmental interference with the decision making process in religions, in that it relieves organizations of the burden of predicting which of their activities a secular court might consider religious; (2) a law is not invalid simply because it allows churches to advance religion, where the government itself is not advancing religion through its own activities and influence; (3) any advancement of religion achieved by the gymnasium in this case cannot fairly be attributed to the government; and (4) the Act does not impermissibly entangle church and state but rather effectuates a more complete separation of the two. The court held:

Undoubtedly, Mayson's freedom of choice in religious matters was impinged upon, but it was the Church (through the COP and the CPB), and not the Government, who put him to the choice of changing his religious practices or losing his job. . . . [A]ppellee Mayson was not legally obligated to take the steps necessary to qualify for a temple recommend, and his discharge was not required by statute. *Id.* at 337.

Thus, it is clear that courts have readily acknowledged the power of religious tribunals to resolve issues critical to its affairs. Indeed, the state threatens religious institutions when it fails to recognize the legitimacy of such alternative tribunals.

If this court refuses to recognize the power of the church to manage a number of marriage issues relating to the Macfarlanes, it is making a sham of the religious marriage that the party freely entered into.

The Macfarlanes could have chosen to marry before a civil court, or they could have chosen to use a civil tribunal as the source of resolving disputes that arose consequent to their Catholic marriage. They did neither of these things. Instead, each of them, William and Marie, chose to have a Catholic wedding – a wedding that entails many more rights and obligations than merely a civil ceremony. In addition, Maria Macfarlane, has chosen to have the issues surrounding this marriage resolved before the tribunal that created it.

I. IV. CONCLUSION.

A failure of the courts to recognize the arbitration rights of the Catholic Church in this case not only violates the understanding Marie had when she entered upon this marriage, it necessarily entangles this court in issues relating to Catholic law, teaching, faith and belief. Accordingly, this court should forthwith allow matters regarding this marriage to first be resolved before a religious arbitration tribunal in accord with the rules and regulations of the Roman Catholic Church as articulated in the Code of Canon law and the Catechism and interpreted by the highest of these church judicatories to which Marie or William choose to carry the matter. Upon the resolution of such matters before that tribunal, this court can act according to its civil power.

Respectfully Submitted,

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