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Decision on Milwaukee archdiocese's cemetery funds could have range of implications

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A federal judge's decision that creditors cannot access funds in a separate cemetery trust as part of the Milwaukee archdiocese's bankruptcy proceedings could have a wide range of implications should it outlast a possible appeal regarding the judge's familial ties to the cemeteries.

On Thursday, Bankruptcy Judge Susan V. Kelley ordered archdiocesan records related to any interest U.S. District Court Judge Rudolph T. Randa or some of his family members have in cemeteries, crypts, mausoleums or the trust to be turned over to lawyers for the claimants. Archdiocesan lawyers agreed to do so.

The order came in response to an emergency motion filed Aug. 2 by the creditors' committee following Randa's decision [1] that $57 million moved to a cemetery trust in 2007 could not be accessed in the bankruptcy proceedings.

Describing the situation as "unusual and unique," Kelley cautioned that the order should not be construed as a ruling on the "appropriateness or non-appropriateness of a recusal or non-recusal or finding that [Randa] has a financial interest."

Lawyers for the claimants, primarily alleged victims of clergy sex abuse, told *NCR* the requested documents are necessary to review ahead of a possible recusal motion or an appeal to the 7th Circuit Court of Appeals in Chicago. The motion would need to be made by the end of August.

The claimants' legal team has questioned Randa's ruling and cite a possible conflict of interest after learning that his parents and other family members are buried in the archdiocese's cemeteries.

"It was our view that there had to be something else going on," Marci Hamilton, counsel to the creditors' committee and a law professor at Yeshiva University, told *NCR*. "And when we looked, we learned for the first time that many of his family members are buried in the very cemeteries that were the subject of the opinion."

Randa ruled July 30 that including the archdiocese's cemetery trust in its bankruptcy process "would substantially burden the Trustee's free exercise of religion" given that the perpetual care of cemeteries represent a core belief of the Catholic faith.

"By administering and holding funds for the ongoing care of the Milwaukee Catholic Cemeteries, the Trust and Trustee assume canonical and moral responsibility for that perpetual care," he wrote.

Should the Randa decision hold up, legal observers remain uncertain about its ramifications for other cases, both in and outside of bankruptcy. From a legal standpoint, it lacks binding authority outside its jurisdiction because it came from a district court. But the opinion may hold persuasive value for other cases.

The ruling came on the back of two religious liberty laws: the Religious Freedom Restoration Act and the First Amendment's free exercise clause. In restricting the cemetery fund's use in bankruptcy claims, Randa stated that first, the claimants represented government actors in the proceedings "under color of law" for Religious Freedom Restoration Act purposes, and second, depleting the funds would "substantially burden the Trustee's [Archbishop James Listecki's] free exercise of religion."

Thomas Berg, a law professor at the University of St. Thomas School of Law, said the restoration act requires that the government have a compelling interest in putting a burden on an entity's right to religious exercise. That the diocese owes money to creditors, which include sex abuse victims, could satisfy that rule, he said. On the other hand, federal bankruptcy laws allow numerous property exclusions from the reachable estate, he said.

"When the bankruptcy law allows you to exempt other things, shouldn't it allow you to exempt or protect things as a matter of religious doctrine? ... It's not an easy case," Berg told *NCR*.

Others have questioned the ruling's application of canon law and adherence to it as a basis for invoking the free exercise of religion. In his decision, Randa stated:

> "Canon law dictates that the funds in the Trust must be used for the perpetual care of those interred under the tenets of the Catholic faith. Removing some or all of these funds from the Trust and placing them in the bankruptcy estate would undoubtedly put 'substantial pressure' on Archbishop Listecki and the Trust to 'modify [their] behavior' and 'violate [their] beliefs.'"

While canon 1267 states that "offerings from the faithful for a certain purpose can be applied only for that same purpose," Dominican Fr. Tom Doyle, a canon lawyer, questioned whether the existence and support of cemeteries constituted a religious act requiring protection under the free exercise clause.

"It's a pious custom, but it's not an exercise of religious worship by any means. It's not something that's required," he told *NCR*.

Doyle said the church in canon 1240 encourages cemeteries where possible, but said ecclesiastical property such as cemeteries and churches are not required to exercise religion.

"To make the connection that this is a violation of the free exercise of religion is simply not true," he said.

Among those hoping the cemetery funds could be opened to claims, fear exists that the ruling could offer a road map for other dioceses to shield money from lawsuits. But the Los Angeles archdiocese's decision to dip into cemetery maintenance funds for its own sex abuse settlements pokes holes in that argument, Berg said.

"I think the fact that another diocese did not challenge cemetery funds being available may call into question this prediction," he said.

Nicholas Cafardi, dean emeritus of Duquesne University's School of Law with doctorates in both canon and civil law, said church law identifies cemetery funds as "clearly restricted funds, given by the faithful for a particular purpose."

"They never should have been in the diocesan general treasury to begin with," he said, adding that going forward, dioceses should keep restricted gift funds and parish funds separate from the general treasury.

"The problem is that too many bishops want it both ways: They want to be able to say the funds are legally restricted, but they still want access to them. You can't have both," Cafardi said.

Outside of bankruptcy cases, some have speculated the ruling could affect the numerous lawsuits against the Department of Health and Human Services and its contraception mandate in the 2010 health care law.

Randa's citation of Catholic theology in substantiating the Milwaukee archdiocese's burden is "certainly relevant in the HHS cases," Berg said, because Catholic organizations have cited their faith for their decision to refuse contraceptive coverage. But the principle has less weight in cases in which for-profit companies have sought religious freedom protections.

Cafardi said the HHS cases operate with "a more compelling government interest" than whether creditors get paid in a single case, and thus can support a more substantial burden.

But Hamilton envisions a "troubling" scenario in which the ruling allows for-profit corporations to claim themselves as religious entities to charge their creditors with constitutional violations.

"It just opens the door to a lot of mischief on the part of religious organizations or believers claiming bankruptcy, and then being able to attack creditors they're trying to escape from," she said.

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