

Protecting Your Congregation's Assets

*Presented by the Christian Church Foundation
General Assembly, Ft. Worth, July 2007*

Please note - The Christian Church Foundation does NOT provide or legal or tax advice to individuals or congregations. You are encouraged to discuss any educational information presented by the Foundation as well as your congregation's unique issues with your legal counsel.

Christian Church Foundation involvement in asset protection:

Late in 2005, the Foundation was contacted by a number of Disciples leaders (regions, church leadership, and church members) and asked whether the Foundation could provide any assistance to churches "under attack." Questions came from both congregations who have funds invested with the Foundation as well as other churches concerned about the protection of their real estate.

One of the long-standing ministries of CCF has been to help churches that are closing to think about their legacy and the ongoing stewardship of assets entrusted to them by previous generations. Similar questions are raised as both healthy and attacked congregations consider the protection of their assets in a manner that reflects the congregation's heritage. In our work with congregations (just like in our ministry with donor individuals) the role of the CCF is to LISTEN to what the donor congregation hopes to achieve. Our goal is to help fully educate congregations as to their legacy opportunities, and then to work together with them to achieve *their* desired legacy. We try to represent past generations of donors as well as the current stewards – and we try to provide information that represents all aspects of our life together in this denomination, including local, regional, and general unit ministries. Our ultimate goal is to work with congregations to achieve what *they* hope to accomplish, so long as a majority of their legacy benefits the Christian Church (Disciples of Christ).

We began working with our legal counsel early in 2006 to try and educate our zone vice presidents on potential solutions to the questions they were fielding from churches that felt they were under attack.

Typical issues that arise when assets are threatened:

- ❖ Power and control – failing to address asset protection issues *before they are an issue* leaves the door open for significant divisiveness in a congregation.
- ❖ Denominational concerns – The growing pastoral shortage makes it more challenging to find congregational leadership with a commitment to our Disciples heritage. Our strong ecumenical commitment may, on occasion, translate into a weak denominational commitment.
- ❖ Significant church assets – A growing value of assets (both real property and financial assets), especially when coupled with a small or shrinking membership, should be a wake-up call to congregations to consider their responsibility for stewardship and protection of these assets.

The “Governance” practices of mainline Protestant denominations reflect both on our unique histories and on our theology. It is inappropriate to think that a challenge to the church down the street’s assets will be similar for your congregation:

- Disciples
 - congregationally governed
 - low barriers to membership
 - congregation typically owns building without restrictions

- United Methodist
 - Low barriers to membership
 - Deed restriction on church building states property must be used for United Methodist ministries

- Lutheran – Missouri Synod
 - Three classes of membership makes it unlikely that a group of individuals would easily orchestrate a “hostile takeover”
 - Real property tends to be held by local congregation

- American Baptist Churches in the U.S.A.
 - To become a new member of an ABC, one must generally be received by the current members of the local congregation. Some congregations have a membership committee to oversee the admission of new members.
 - Deed restrictions similar to United Methodists

THE BOTTOM LINE: Among the denominations studied, Disciples have unique vulnerability to their assets being diverted away from Disciple ministries.

Note: all of the above discussion was taken from work done for the Christian Church Foundation by our outside legal counsel. While we believe this information to be accurate in terms of the general practice of the above denominations, we’re also aware that many denominations, just like the Disciples, may have diversity in their practice.

Asset Protection Strategies:

Barriers to membership

- Theological and historical conflict with Disciples practice?
- Does not address the congregation that, with a new pastor or new leadership family, “drifts” toward independence.

Restrictions on Real Property and Endowment assets:

- Put into separate congregationally managed trust or Foundation
- Bylaw provisions
- Deed restrictions
- Endowment options with the Christian Church Foundation

Possible Strategies: Separately managed trust or Foundation

- Strategy already in place in a number of congregations
- Pros:
 - Flexibility – wide variety of control over investment, distribution, and administration of trust property is possible.
 - Can work for both real property and financial assets
 - Separate entity – completely separate legal entity – “control” of church does not need to impact control of property held in the trust.
- Issues:
 - Control: Congregation no longer has full control of property
 - Complexity: May be complex to create, implement and administer
 - Administrative burden: Fiduciary responsibility as landlord or prudent investor
 - Tax issues: **May** be covered by group exemption for denomination. (Don’t assume it is without proper drafting of agreements.) Property tax exemption may vary by state law.
 - Legal risk as fiduciaries
 - Cost – setup costs and ongoing legal/tax/bookkeeping costs
 - Conflict: Potential conflict between church and church foundation

(The Christian Church Foundation’s attorneys aren’t enthusiastic in recommending these separate foundations because of the legal and administrative issues that must be complied with on an ongoing basis. Nevertheless, a number of well-known Disciples congregations have chosen this strategy as the one that best met their needs.)

Possible Strategies – Bylaw restrictions

- Pro: Simple and cost effective declaration
- Issue: May be changed when control changes, and therefore may well be ineffective for the desired purpose.

Possible Strategies – Deed Restrictions

Example: *“If at any time the First Christian Church congregation which customarily meets on this property ceases for any reason to be a participating congregation of the Christian Church (Disciples of Christ), this property shall immediately be transferred and conveyed to the [choose CC(DOC) entity or organization], or if such is not then a participating entity of the Christian Church (Disciples of Christ), then to such entity or for such purposes as the General Board of the Christian Church (Disciples of Christ) shall select. Upon receipt of the property by [the CC(DOC) entity selected] or by such other entity or for such purpose, as the case may be, the immediately preceding sentence (the “transfer restriction) shall be null and void.”*

NOTE: Local counsel may also wish to consider whether a “perpetuities savings clause” to protect against the *rule against perpetuities* is needed in your state.

Pros –

- ❖ Modest legal/administrative requirement
- ❖ Low cost
- ❖ Generally supported by local courts
- ❖ Can’t be changed by new group
- ❖ Reduces incentive by an outside group to attempt to take control

Issues –

- ❖ The transfer entity (region?) may be reluctant to assume future ownership if property has issues (structural, asbestos, environmental, etc.) (*we’re working with our legal counsel to find ways to make the transfer optional on the part of the region.*)
- ❖ Requires high level of trust between congregation and transfer entity
- ❖ Does not address concerns about endowment (financial) assets

Mechanics:

- Obtain local counsel with expertise in real estate law. (Estimated cost is \$300 - \$500)
 - Document in congregation minutes the congregation’s desire to protect these assets and/or the proceeds of these assets for their historic purposes (for the benefit of the CC(DOC)) as the explicit reason why the deed restrictions are being put in place.
 - Deed the property over to selected Disciple entity (we tend to suggest this be the region)
 - Receiving entity then immediately deeds property back to congregation, with restrictions similar to those above.
 - After this is filed with recorder’s office, it will not be able to be changed without a waiver from the region.
- BE ADVISED: Future mortgages against the property may require approval of selected entity

Possible Strategies – Financial/Endowment Assets

- Separately managed trust or Foundation (benefits and issues are the same as for real property)
- Bylaw provisions (benefit and issues are the same as for real property)
- Christian Church Foundation options

Financial Assets – Christian Church Foundation options

- Gift assets to a permanent fund
 - Ultimate “protection” for assets with a very specific endowment purpose
 - Excellent record keeping and attention to both legal provisions and donor instructions for endowment gifts.
 - May lack desired flexibility if the full use of the funds might be desired at some future date.
 - Not available as security for future debt

- Invest assets with “special provisions”

Example: Invested in the CCF Joint Investment Trust with a provision that says congregation can’t withdraw more than 25% without permission from [other Disciples entity].

Example: Invested in the CCF JIT with a provision that says if CCF has reason to suspect that congregation is leaving the Disciples they can limit withdrawals to income distributions until matter is resolved.

There is NO BOILERPLATE language for these special provisions. We will work with any specific congregation to address their concerns and to work with them to develop provisions that help protect their assets, while still giving future members the ability to place funds with other investment managers if the issue is investment performance or service.

- Tailored to meet congregational needs
- May allow for more flexibility
- Assets invested with CCF are not available as security for future debt

CAUTIONS: **NOT** appropriate to “gift” assets or add special provisions

- To avoid known legal liability
- To “steal back” assets at risk with new church governing body
- Temporary solution

Relational issue for both financial and real estate options is trust.