California Bar Examination

Performance Test and Selected Answers

February 2018

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

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PERFORMANCE TEST AND SELECTED ANSWERS

FEBRUARY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the February 2018 California Bar Examination and two selected answers.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

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FILE

MEANEY v. TRUSTEES OF THE UNIVERSITY OF COLUMBIA

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. This performance test is designed to be completed in 90 minutes. Although there are no parameters on how to apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.

8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

FOGEL & DAVIS, LLP

One Walton Avenue

Belleville, Columbia

MEMORANDUM

TO: Applicant

FROM: Melissa Saphir

DATE: February 27, 2018

RE: Meaney v. Trustees of the University of Columbia

We have been retained by the Trustees of the University of Columbia to defend them in a breach of contract action.

The late Edward Kemper (Edward) was a wealthy businessman and a generous donor to the University. Pursuant to an agreement, Edward transferred a garden to the Trustees, which the Trustees agreed to retain in perpetuity as the "Kemper Scottish Garden." Sometime later, Edward married Sarah Meaney (Sarah). Before her death two years ago, Sarah had grown quite fond of the Kemper Scottish Garden -- so much so that it came to be known as "Sarah's Scottish Garden." Notwithstanding the agreement, the Trustees recently made the difficult decision to sell the garden so as to use the proceeds for pressing educational purposes.

The plaintiff in the breach of contract action I referred to is Brendan Meaney. Meaney is the only child of Sarah by a prior marriage. By his action, Meaney is seeking to prevent the Trustees from selling the garden.

I believe that we may be able to persuade the court to dismiss Meaney's breach of contract action on the ground that Meaney lacks standing. To confirm my

belief, I need to determine whether Edward transferred the garden to the Trustees by way of contract or gift and, if by way of gift, by way of what kind of gift.

To that end, please prepare an objective memorandum assessing whether Edward did indeed transfer the garden to the Trustees by way of contract or gift and, if by way of gift, by way of what kind of gift. Do not include a statement of facts, but use the facts in your analysis.

AGREEMENT

The Trustees of the University of Columbia (hereinafter "the Trustees") desire to obtain a garden parcel of real property now owned and occupied by Emily Gordon, located in Belleville, Columbia, commonly known as 625 Sierra Way.

Edward Kemper (hereinafter "Kemper") desires to facilitate such acquisition by acquiring the garden parcel and by transferring it to the Trustees, subject to certain restrictions as provided for herein.

Therefore, in consideration of the foregoing, the Trustees and Kemper do hereby agree as follows:

1. Kemper will acquire the garden parcel and transfer it to the Trustees.
2. The Trustees will cause the garden parcel to bear the name "Kemper Scottish Garden," use it for educational purposes, and retain it in perpetuity.

Kemper retains the right to modify the terms of this Agreement as necessary and appropriate to its purpose.

Dated: December 18, 1964.

_____*Edward Kemper*_____
Edward Kemper

___ *Harold Williamson*_____
Harold Williamson

Chairman of the Board of Trustees

February 2018

California Bar Examination

Performance Test

LIBRARY

MEANEY v. TRUSTEES OF THE UNIVERSITY OF COLUMBIA

LIBRARY

Behrens Research Foundation v. Fairview Memorial Hospital
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BEHRENS RESEARCH FOUNDATION v. FAIRVIEW MEMORIAL HOSPITAL

Columbia Court of Appeals (2008)

Behrens Research Foundation (Behrens), a non-profit public benefit corporation, gave Fairview Memorial Hospital (Fairview), a healthcare institution, a gift of $1 million. Fairview had a well-recognized Department of Cardiothoracic Surgery. Behrens had had a longstanding interest in advancing cardiothoracic surgery. Not long thereafter, as a result of various unforeseen changes, including departures of key staff, Fairview closed the department.

Behrens brought the underlying action in the District Court seeking an injunction directing Fairview either to reopen its Department of Cardiothoracic Surgery or to return Behrens' $1 million gift. Fairview moved to dismiss the action under Columbia Rule of Civil Procedure 12(b)(6), claiming that Behrens did not have standing to sue. The District Court granted the motion and entered a judgment of dismissal.

On appeal, Behrens contends that it did indeed have standing to sue.

We disagree.

It is well settled in Columbia that a donor is the master of his or her gift.

Because that is so, a donor can make a gift that is *absolute.* The donor can give property *unconditionally*, without (1) restricting use or disposition of the property, (2) retaining power to modify the gift, or (3) reserving a right to sue to enforce a restriction or to undo the gift in case of a restriction's breach by causing the property to revert to the donor him- or herself or to a third person. When a gift is absolute, the donor has relinquished, and the donee has assumed, full dominion

over the property -- i.e., the ability to use or dispose of the property at any time, in any manner, and for any purpose.

But a donor can also make a gift that is *not absolute.* The donor can give property *conditionally*, (1) restricting use or disposition, (2) retaining power of modification, and/or (3) reserving a right of enforcement or reversion. When a gift is not absolute, the donor has not relinquished, and the donee has not assumed, full dominion over the property; rather, both donor and donee share power over the property's use or disposition.

Although a donor is indeed master of his or her gift, the law presumes that a gift is *absolute* unless it clearly appears otherwise. In line with this presumption, the law further presumes that a donor has *not* restricted use or disposition, has *not* retained power of modification, and has *not* reserved a right of enforcement or reversion, unless it clearly appears otherwise.

These presumptions prove fatal to Behrens' position. The record on appeal contains the instrument by which Behrens made its $1 million gift to Fairview. In pertinent part, the instrument recites only that Behrens "hereby delivers" and Fairview "hereby accepts" the gift. Neither expressly, nor by implication, does the instrument evidence any reservation on Behrens' part of a right of enforcement. Behrens did not reserve any such right for itself. We cannot make up for its omission.

Affirmed.

COLLINS v. LINCOLN

Columbia Court of Appeals (2009)

Anita Collins brought an action for declaratory relief in the District Court against Stephen Lincoln, her adult son. In order to resolve various tax questions now pending before the State of Columbia Tax Board, Collins seeks a determination that the instrument by which she transferred certain property to Lincoln reflected a gift rather than a transfer by contract. Following a bench trial, the District Court entered judgment in Collins' favor, issuing the determination that she had sought. Lincoln appeals. We affirm.

The facts are undisputed: By deed dated June 26, 2002, Collins transferred to Lincoln a 260-acre vineyard in Parker County including a 20,000-square-foot Victorian main residence, guest house, pool, tennis courts, sports field, exercise studio, lake, olive orchard, and a stone winery with a tasting room and a permit to produce 5,500 cases of wine a year. The deed recited that Collins transferred the property to Lincoln "in consideration for his promise to use his best efforts to maintain the property in an ecologically sustainable manner." As of the date in question, the assessed value of the property was more than $35 million. Collins was then 65 years old, a widow, and the Chair of the Board of Directors of the Parker County Rural Conservancy, a locally-prominent environmental organization; Lincoln was 30 years old, unmarried, and the Rural Conservancy's Volunteer Coordinator; each was the other's sole living relative.

Property may be passed by gift. The elements of a gift consist of: (1) intent on the part of the donor to make a gift; (2) delivery, either actual or constructive, of property by the donor; (3) acceptance of the property by the donee; and (4) lack of consideration for the gift.

Property may also be passed by transfer by contract. The elements of a transfer by contract consist of: (1) an offer to buy or sell; (2) acceptance of the offer; and (3) consideration passing between the buyer and seller.

Gifts and transfers by contracts have two similar elements. First, a gift requires delivery by the donor and a transfer by contract requires offer by the buyer or seller. Second, a gift requires acceptance by the donee and a transfer by contract requires acceptance by the seller or buyer.

But one element is different. While a transfer by contract requires the *presence* of consideration, a gift requires the *absence* of consideration. In other words, without consideration, the passing of property is by gift, whereas with consideration, it is by transfer by contract.

Consideration has two requirements. The promisee must bargain with the promisor and must confer, or agree to confer, a benefit or must suffer, or agree to suffer, a burden.

The absence of consideration is clear when a gift is absolute. *See, Behrens Research Foundation v. Fairview Memorial Hospital* (Colum. Ct. App. 2008). In that instance, the donee does not bargain with the donor or confer, or agree to confer, any benefit. Neither does the donee bargain with the donor or suffer, or agree to suffer, any burden. Instead, the donor simply delivers the property and the donee simply accepts it.

But the absence of consideration is not clear when a gift is not absolute. *See, Behrens Research Foundation.* In that instance, the donee could be said to bargain with the donor, and could be said to confer, or agree to confer, a "benefit" on the donor or to suffer, or agree to suffer, a "burden." Consider the situation in which a university agrees to name a campus building in a donor's honor or to use the building for a specified purpose. The university could be said to "bargain"

with the donor -- negotiating the terms for the naming of the building or its use for the specified purpose -- and to confer, or agree to confer, a benefit or to suffer, or agree to suffer, a burden -- the naming of the building or its use for the specified purpose. Such a “bargain” and “benefit” and “burden” do not preclude a gift.

The presence or absence of consideration does not turn on the presence or absence of the term “consideration” in the instrument. For example, in *Salmon v. Wilson* (Colum. Supreme Ct. 1971), the Supreme Court held that a deed by which a father transferred 10 acres of land valued at $500,000 to his adult daughter effected a gift, even though the deed recited that he transferred the property to her “in consideration for $500.” The Supreme Court reasoned that, in light of all of the circumstances, the $500 paid by the daughter to her father was “nominal and immaterial,” and it was “clearly” the father’s intent to “donate the land to his daughter and not to sell it to her.”

Ultimately, what controls are the motives manifested by the parties. If the parties are motivated by a desire to buy and sell the property through a commercial transaction, there is a transfer by contract. But if the parties are motivated by a desire to deliver and accept the property through a non-commercial transaction, there is a gift.

Attacking the District Court’s determination that the deed by which Collins transferred the property in question reflected a gift rather than a transfer by contract, Lincoln claims that the deed impliedly recited Collins’ “offer” to transfer the property and his “acceptance” of the offer, and expressly recited the “consideration” -- his “promise to use his best efforts to maintain the property in an ecologically sustainable manner.” The “burden” of a promise to “use best efforts” is hard to quantify. But we have little doubt that it is adequate. Because that is so, such a promise could surely support a transfer by contract. But the fundamental question is whether there was in fact a transfer by contract rather than a gift. The answer is no. From all that appears, Collins and Lincoln were

not motivated by a desire to buy and sell the property through a commercial transaction, but instead by a desire to deliver and accept the property through a non-commercial transaction. Collins was Lincoln's mother, and he was her son. Each was the other's only living relative, and each was an environmentalist. As the Supreme Court concluded in *Salmon*, so do we conclude here: In light of all of the circumstances, Lincoln's "promise" to Collins "to use his best efforts to maintain the property in an ecologically sustainable manner" was nominal and immaterial, and it was clearly Collins' intent to donate the property to him and not to sell it.

Affirmed.

HOLT v. JONES

Columbia Supreme Court (1994)

Almost one hundred years ago, Ralph Polk created the Polk Trust by giving the Trustees of the University of Columbia a parcel of 10 acres in Silveyville, as a campus for the then newly-founded College of Physicians and Surgeons, and a sum of $5 million for the upkeep of the grounds. The Trustees of the University of Columbia are ex officio trustees of the Polk Trust.

Plaintiffs are three trustees of the University of Columbia and the Polk Trust. Defendants are the seven remaining trustees and the Attorney General of the State of Columbia.

Plaintiffs filed a complaint in the District Court. They alleged that defendant trustees had wrongfully diverted assets of the Polk Trust and sought an injunction to prohibit further wrongful diversion.

The Attorney General filed an answer to the complaint, denying plaintiffs' allegation for want of information and belief. In her answer, the Attorney General stated: "The Attorney General has reviewed the management of the Polk Trust and has determined that suit is not warranted."

Defendant trustees moved to dismiss the action on the ground that plaintiffs did not have standing to sue. The District Court granted the motion and entered judgment accordingly. The Court of Appeals affirmed. We granted certiorari.

The sole issue -- which is a question of first impression in Columbia -- is whether plaintiffs, as minority trustees of the Polk Trust, have standing to sue.

In accordance with the common law, all jurisdictions recognize that the Attorney General has standing to sue to enforce provisions of non-private trusts. At the

same time, a substantial majority of jurisdictions have adopted the position that the Attorney General's standing is not exclusive. These jurisdictions accord standing to any person with a special interest.

The common law recognizes the problem of providing adequate enforcement of provisions of non-private trusts.

The primary type of non-private trust is the so-called charitable trust. A charitable trust is created, as a matter of fact, whenever a settlor manifests an intent to give property, in trust, for a charitable purpose and actually gives the property, in trust, for such purpose. A charitable trust is also created, as a matter of law, whenever a person gives property to an educational, philanthropic, healthcare, or similar institution for an education, philanthropy, healthcare, or similar purpose.

Since there is usually no one who is willing to assume the burdens of suing to enforce the provisions of a non-private trust, the Attorney General has been accorded standing. But, in light of limited resources, the Attorney General cannot reasonably assume the burdens of suing to enforce the provisions of all non-private trusts.

The present case is representative. In her answer, the Attorney General stated that she had determined that suit was not warranted. But she also admitted that she had no information or belief as to plaintiffs' allegation that defendant trustees had wrongfully diverted property of the Polk Trust.

Although the Attorney General has primary responsibility for the enforcement of provisions of non-private trusts, the need for adequate enforcement is not wholly fulfilled by the authority given to him or her. There is no rule or policy against supplementing the Attorney General's standing by allowing standing to persons

with a special interest, i.e., persons who are trustees or beneficiaries or would otherwise have an ownership interest in the property.

For this reason, we join the substantial majority of jurisdictions that have adopted the position that the Attorney General's standing is not exclusive. We hold that any person with a special interest has standing to sue to enforce provisions of the trust.

The trustees of a non-private trust, as trustees, have a special interest in the trust. The trustees are also in the best position to learn about breaches of trust and to bring the relevant facts to a court's attention.

Therefore, we conclude that plaintiffs, as trustees of the Polk Trust, have standing to sue to enforce its provisions.

Reversed and remanded.

PT: SELECTED ANSWER 1

PRIVILEGED & CONFIDENTIAL

CONTAINS ATTORNEY WORK PRODUCT

FOGEL & DAVIS LLP

One Walton Avenue

Belleville, Columbia

MEMORANDUM

TO: Melissa Saphir

FROM: Applicant

DATE: February 27, 2018

RE: Meaney v. Trustees of the University of Columbia

I. Questions Presented

This memorandum addresses two questions: (1) whether Edward Kemper ("Edward") transferred what is now known as the Kemper Scottish Garden or, to some, Sarah's Scottish Garden ("Garden") to the Trustees of the University of Columbia ("Trustees") by way of contract or gift; and, (2) if by way of gift, by way of what kind of gift. This memorandum does not intend to address the merits question of whether Plaintiff Brandon Meaney ("Meaney") has standing to sue the Trustees.

This memorandum concludes that: (1) Edward transferred the Garden to the Trustees by way of gift, not contract, even though the transfer contains the indicia

of a contract; and that (2) Edward's transfer by gift likely constituted a conditional gift rather than an unconditional gift because of the express limitations placed on the Trustees, but that further research is required to determine whether Edward's conditional gift may also constitute a charitable trust.

II. Analysis

A. Whether Edward Transferred the Garden by Contract or Gift

Edward likely transferred the Garden by way of gift, even though many of the traditional hallmarks of transfer by contract are present in the 1964 Agreement signed by Edward and Harold Williamson ("Agreement"). Columbia law recognizes both gifts and contracts as legitimate mechanisms for the transfer of property. A property passes by gift when there exists: "(1) intent on the part of the donor to make a gift; (2) delivery, either actual or constructive, of property by the donor; (3) acceptance of the property by the donee; and (4) lack of consideration for the gift." *Collins v. Lincoln*, Library at 5 (Colum. Ct. App. 2009). Property passes by contract where there exists: "(1) an offer to buy or sell; (2) acceptance of the offer; and (3) consideration passing between the buyer and seller." *Id.* at 6.

1. Consideration Is Key, But Intent Is Often Dispositive

The key factor in determining whether a property passed by contract or gift, since both contracts and gifts share many elements, is the presence or absence of consideration. *See Collins*, Library at 6 ("While a transfer by contract requires the *presence* of consideration, a gift requires the *absence* of consideration. In other words, without consideration, the passing of property is by gift, whereas with consideration, it is by transfer of contract." (emphasis in original)). Consideration requires both a bargain between the promisee and the promisor and that the promisor confers, or agrees to confer, a benefit or suffers, or agrees to suffer, a burden. *Collins*, Library at 6.

The presence of buzzwords that signal consideration, including the word

"consideration," do not suffice to render a transfer a contract. The Columbia Supreme Court has held that a $500 payment for land referred to as "consideration" in a contract did not convert a gift into a contract because, "in light of all the circumstances," the donor intended to "donate the land . . . and not sell it." *Salmon v. Wilson* (Colum. Supreme Ct. 1971), *quoted in Collins*, Library at 7. And in *Collins*, the Columbia Appeals Court held that a gift occurred, even though the transferring document contained the terms "offer," "acceptance," and "consideration," because the mother donor and son donee did not behave commensurate with a commercial transaction and the promise to use "best efforts" to maintain the property a certain way were "nominal and immaterial." Library at 7-8.

Even where indicia of a contract are present, whether a property transfer is a contract or gift ultimately depends on the "motives manifested by the parties." *Id.* at 7. For example, the parties' intent to transfer property by commercial transaction suggests a contract, while the parties' intent to transfer by a non-commercial transaction suggests a gift. *See id*.

2. The Agreement Contains Indicia of a Contract, But the Parties' Intent Suggests a Gift

The Agreement contains the markings and elements of a contract, but a court would likely find that the circumstances and parties' intent render it a gift. The Agreement contains the phrase "in consideration of the foregoing" and specifies that Edward incurred the burden of acquiring the Garden and transferring it to Trustees, while Trustees acquired the benefit of the Garden and the burdens of naming it "Kemper Scottish Garden," using it for educational purposes, and retaining it in perpetuity. *See* Agreement at 1. Because Edward appears to have acquired the Garden as part of the Agreement in an arm's length transaction with another, and because the Trustees agreed to name the Garden, use it for a particular purpose, and never sell it, there are certainly indicia of a bargain between Edward and the Trustees that created both burdens and benefits, as one would find in a contract. *See Collins*, Library at 6 (defining consideration as

requiring a bargain and that the promisor confer a benefit or suffer a burden). And, unlike the transactions in *Salmon* and *Collins*, Edward and the Trustees have no familial relationship *id.* at 7. On the other hand, the Trustees did not make even a nominal payment for the land of the kind present in *Salmon*. *See id.* at 7 (quoting *Salmon*). And *Collins* reasoned that even, as here, a university "bargains" to grant naming rights to a donor and use property for a specific purpose, such a bargain does not "preclude a gift." *Id.* at 6-7 (citing *Behrens Research Foundation v. Fairview Memorial Hospital* (Colum. Ct. App. 2008)).

The Agreement here contains additional restrictions or "bargains" not contemplated by the *Collins*, *Behrens*, or *Salmon* courts: namely, the restriction that the Trustees agreement to "retain [the Garden] in perpetuity" and Edward's reserved right "to modify the terms of this Agreement as necessary and appropriate to its purpose." Agreement at 1. More research is required to determine whether Columbia courts have held these restrictions to suggest the presence of a contract or gift, but the totality of the circumstances appears to suggest that Edward gifted the Garden to the University. Edward paid what appears to be fair monetary consideration to another for the Garden and granted it immediately to the University for no monetary consideration in return. Edward specified in the Agreement use of the Garden for an educational purpose, which suggests the lack of a commercial transaction. And Edward's condition that the Trustees retain the Garden in perpetuity (note that this memorandum does not assess the legal propriety of a perpetual restriction on transfer by the Trustees) suggests that no further monetary value would be realized for the Garden.

Even though the Agreement contains many of the markings of a contract and contains arguably more "consideration" than was present in *Collins*, *Behrens*, or *Salmon*, the overall intent of the Agreement suggests that Edward gifted the Garden to the Trustees.

B. Whether Edward Conferred the Garden as an Absolute Gift or a

Conditional Gift

Edward likely gifted the Garden as a conditional gift, and possibly also as a charitable trust. "It is well settled in Columbia that a donor is the master of his or her gift." *Behrens*, Library at 2 (Colum. Ct. App. 2008). Gifts can be "absolute" or "conditional." A donor can give property unconditionally without restricting its use or disposition, retaining power to modify the gift, or reserving a right to sue to enforce a restriction or cause reversion of the property. *See id.* "When a gift is absolute, the donor has relinquished, and the donee has assumed, full dominion over the property -- i.e., the ability to use or dispose of the property at any time, in any manner, and for any purpose." *Id.* at 2-3. A donor can also give property conditionally by "(1) restricting use or disposition, (2) retaining power of modification, and/or (3) reserving a right of enforcement or reversion." *Behrens*, Library at 3. In the case of conditional gifts, donor and donee "share power over the property's use or disposition." *Id*.

1. Edward Likely Conferred a Conditional, Not an Absolute, Gift

Columbia law "presumes that a gift is *absolute* unless it clearly appears otherwise" and that "a donor has *not* restricted use or disposition, has *not* retained power of modification, and has *not* reserved a right of enforcement or reversion, unless it clearly appears otherwise." *Behrens*, Library at 3 (emphasis in original). In *Behrens*, the court found that a gift of $1 million without restrictive terms, which only said that donor "hereby delivers" and donee "hereby accepts" the gift, gave an unconditional gift and relinquished control over the donee's use of the gift. *See Behrens*, Library at 3. And an absolute gift evinces clear absence of consideration, such as where "the donor simply delivers the property and the donee simply accepts it." *Collins*, Library at 6 (citing *Behrens*).

The Agreement contains conditions that would prevent it from being adjudged an absolute gift. The gift at issue in *Behrens* contained no restrictions at all, and simply transferred money with the terms "hereby delivers" and "hereby receives." *Behrens*, Library at 3. The Agreement, by contrast, contains explicit

restrictions on the Trustees' use of the Garden: it must be named "Kemper Scottish Garden," it must be used for educational purposes, and the Trustees may never dispose of it. *See* Agreement at 1. In the Agreement, Edward further reserves a right to modify the Agreement "as necessary and appropriate to its purpose." The Agreement thus presents all of the factors for a conditional gift envisioned by the *Behrens* court but not presented in the facts of that case: restricted use, restricted disposition, and reserved rights. *Compare id.* at 1, *with Behrens*, Library at 3. Nor is this a case where "the donor simply delivers the property and the donee simply accepts it." *Collins*, Library at 6 (internal citation omitted).

A court would almost certainly find that Edward did not confer the Garden as an unconditional gift, without regard to the enforceability of the Agreement's conditions. Edward's retention of rights to modify the Agreement and restrictions on the Garden's use and disposition suggest a conditional gift.

2. Edward May Have Created a Charitable Trust

Edward's gift may also constitute a charitable trust, although more research than this memorandum provides is necessary to determine the interplay between charitable trusts and conditional gifts. The Columbia Supreme Court has held that a gift can also take the form of a charitable trust in certain circumstances. *See generally Holt v. Jones*, Library at 10 (Colum. Supreme Ct. 1994). Even where a property grant is not placed in trust by the donor, a charitable trust can be created by operation of law "whenever a person gives property to an educational, philanthropic, healthcare, or similar institution for an education, philanthropy, healthcare, or similar purpose." *Id*.

The Agreement, to be sure, does not create a trust of any kind. But a court may find under *Holt* that Edward's restriction on use of the Garden "for educational purposes" and gift of the Garden to the University of Columbia, an educational institution, may satisfy the criteria for the creation of a charitable trust by operation of law. More research is required to determine whether other aspects of Columbia law, or decisions of Columbia courts, would suggest the lack of a

charitable trust. And more research is needed to determine what effect, if any, the legal creation of a charitable trust would have on Edward's rights, the Trustees' rights, Plaintiff's rights in the instant lawsuit, or other claims that may arise.

IV. Conclusion

Edward more likely than not transferred the Garden to the Trustees by gift, rather than by contract, because the totality of the Agreement and the accompanying intent of the parties suggests a non-commercial transaction lacking proper consideration. If Edward's transfer of the Garden constitutes a gift, it is much more likely than not to be deemed a conditional gift than an absolute gift due to the Agreement's restrictions on use and disposition and Edward's retention of modification rights. Edward's transfer of the Garden may also constitute a charitable trust because the Agreement conveys property to an educational institution for an educational purpose, but more research is required to assess this possibility and its effects on the other issues discussed herein.

Please feel free to contact me with any questions regarding this memorandum, or if you would like additional research and analysis performed.

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PT: SELECTED ANSWER 2

FOGEL & DAVIS, LLP

One Walton Avenue

Belleville, Columbia

TO: Melissa Saphir, Managing Attorney

FROM: Applicant

DATE: February 27, 2018

RE: Meaney v. Trustees of the University of Columbia

I. Introduction

In order to persuade the court to dismiss Brendan Meaney's breach of contract action on the ground that he lacks standing, you have asked me prepare an objective memo first analyzing whether the Edward Kemper transferred the garden to the Trustees by way of contract or gift, and if the garden was transferred by gift, what kind of gift.

In short, a court will likely find that the transfer was by a not absolute gift in the form of a charitable trust.

II. Legal Analysis

Property may be passed by gift or by transfer by contract. *Collins v. Lincoln*, Columbia Court of Appeals (2009). The elements of a gift consist of: (1) intent on the part of the donor to make a gift; (2) actual or constructive delivery of property by the donor; (3) acceptance of the property by the donee; and (4) lack of consideration for the gift. *Id*. Alternatively, the elements of a transfer by contract

consist of: (1) an offer to buy or sell; (2) acceptance of the offer; and (3) consideration passing between the buyer and seller. *Id*. Accordingly, gifts and transfers by contract have two similar elements. A gift requires delivery by the donor and a transfer by contract requires offer by the buyer or seller. Additionally, a gift requires acceptance by the donee and a transfer by contract requires acceptance by the seller or buyer. But one element is different. While a contract requires the presence of consideration, a gift requires the absence of consideration. *Id*. In other words, without consideration, the passing of property is by gift, whereas with consideration, it is by transfer by contract.

A. The relationship between Edward Kemper and the Trustees of University of Columbia manifested an intent that the transfer be by gift rather than by contract because the parties were motivated by a non-commercial transaction.

The element of consideration has two requirements: the promisee must bargain with the promisor and must confer, or agree to confer, a benefit or must suffer, or agree to suffer, a burden. *Id.* The absence of consideration is clear when a gift is absolute. See, *Behrens Research Foundation v. Fairview Memorial Hospital*, Columbia Court of Appeal (2008). This is plain when the donor simply delivers the property and the donee simply accepts it. But where the facts suggest a bargained for exchange, where the donee confers or agrees to confer a benefit to the donor, or where the donee suffers, or agrees to suffer, a burden, the type of transfer is not as plain.

In the situation where a university agrees to name a campus building in a donor's honor or to use a building for a specified purpose, the university can be said to have "bargained" with the donor. This is because there was a negotiation for the terms for the naming of the building or its use for the specified purpose, and to confer, or agree to confer, a benefit or to suffer, or agree to suffer, a burden. Here, it is arguable that the Trustees of the University of Columbia have "bargained" with Edward Kemper. Meaney will argue that because the garden parcel was to bear the name "Kemper Scottish Garden" and to be used for

educational purposes in perpetuity in exchange for the parcel of property, that the exchange was bargained for. Additionally Meaney will argue that the Trustees of the University of Columbia negotiated the terms for the naming of the garden and agreed to suffer a burden, that is using the garden for educational purposes and retaining it in perpetuity. While this is likely, such a bargain and benefit and burden do not preclude a gift. *Id*.

The presence or absence of consideration does not turn on the presence or absence of the term "consideration" in the instrument. *Id.* For example, the Supreme Court held that a deed by which a father transferred 10 acres of land valued at $500,000 to his adult daughter effected a gift, even though the deed recited that he transferred the property to her in consideration for $500. *Salmon v. Wilson*, Supreme Court (1971). Rather than look at the terms of the deed objectively, the Supreme Court reasoned that, in light of the circumstances, the $500 paid by the daughter to her father was "nominal and immaterial," and it was "clearly" the father's intent to donate the land to his daughter and not to sell it to her. Here, we can show that Edward Kemper was a wealthy businessman and a generous donor to the University. To that end, he agreed to transfer a garden to the Trustees to use for educational purposes. Like in Salmon, we can argue that the naming of the garden was nominal and immaterial because the true purpose of the transfer was for educational purposes, not for the name of the garden to live on. To further show that the naming of the garden was a nominal and immaterial consideration, we can show that recently the garden came to be known as Sarah's Scottish Garden. Additionally, if naming of the garden was material, then Edward Kemper, having retained the right to modify the terms of the Agreement as necessary and appropriate to its purpose, would have taken actions to ensure that the name was not changed from Kemper Scottish Garden to Sarah's Scottish Garden. Additionally, in line with this argument, if the naming of the garden was material consideration for the transfer, Meaney would have brought suit earlier to enjoin the use of the name to require that the old name be used.

Ultimately, what controls are the motives manifested by the parties. *Collins*. If

the parties are motivated by a desire to buy and sell property through a commercial transaction, there is a transfer by contract. *Id.* But if the parties are motivated by a desire to deliver and accept the property through a non-commercial transaction, there is a gift. *Id*. Here, we can argue that the transaction was a manifestation of the parties desire to deliver the property through a non-commercial transaction. To support our position, we will show that Edward Kemper was a wealthy businessman and a generous donor. He had no intent in benefiting financially from the transaction and he didn't need to. If he had intended to benefit from the transaction, then he would have sold the property rather than donate it, like he had often donated in the past.

To counter our position that the parties were not motivated by a commercial transaction, Meaney will likely argue that the agreement impliedly recited that the transfer was subject to the Trustee's acceptance of the terms and restrictions. He will argue that by signing the agreement, the Trustees are burdened with the promise to maintain the garden with the name Kemper Scottish Garden" for educational purposes in perpetuity. The Court in Collins stated, that the burden of a promise, although hard to quantify, is adequate, and could support a transfer by contract.

But the fundamental question is whether there was in fact a transfer by contract rather than a gift. The primary element in resolving this issue is determining whether the parties are motivated by a desire to buy and sell the property through a commercial transaction. Here, they most likely are not. The relationship of Edward Kemper to the University of Columbia is similar to the relationship of Collins to Lincoln. It was only natural, based on the parties' relationship and past donations, that Edward Kemper and the Trustees would intend for the transaction to be noncommercial in nature. Under the totality of the circumstances, it is most likely that the transfer was by gift rather than by contract.

B. What Kind of Gift

A gift can be absolute, not absolute, or by charitable trust.

i. Gift Absolute versus Gift Not Absolute

It is well settled in Columbia that a donor is the master of his or her gift. The donor can give property by a gift that is absolute or that is not absolute. A gift that is absolute is without (1) restricting use or disposition of the property; (2) retaining power to modify the gift; or (3) reserving a right to sue to enforce a restriction or to undo the gift in case of a restriction's breach by causing the property to revert to the donor him-or herself or to a third person. *Behrens Research Foundation v. Fairview Memorial Hospital*, Columbia Court of Appeals (2008). When a gift is absolute, the donor has relinquished, and the donee has assumed, full dominion over the property--the ability to use or dispose of the property at any time, in any manner, for any purpose. Alternatively, a donor can make a gift that is not absolute. The donor can give property conditionally, (1) restricting use or disposition; (2) retaining power of modification; and/or (3) reserving a right of enforcement or reversion. *Id.* When a gift is not absolute, the donor has not relinquished, and the donee has not assumed, full dominion over the property; rather, both donor and donee share power over the property*. Id.*

The law presumes that a gift is absolute unless it clearly appears otherwise. *Id.* Additionally, the law presumes that donor has not restricted use or disposition, has not retained power of modification, and has not reserved a right of enforcement or reversion, unless it clearly appears otherwise. Here, in the Agreement between Edward Kemper and the Trustees of the University, Kemper explicitly retained the right to modify the terms of the Agreement as necessary and appropriate to its purpose. Unlike in Behrens, Edward Kemper reserved a right of enforcement or reversion, and retained power of modification. Under this analysis, it is likely that a court will find the gift to be not absolute.

ii. Charitable Trust

We can argue, though, that the gift was a non-private charitable trust. The primary type of non-private trust is the charitable trust. A charitable trust is created, as a matter of fact, whenever a settlor manifests an intent to give property, in trust for a charitable purpose and actually gives the property, in trust,

for such purpose. Holt v. Jones, Columbia Supreme Court (1994). A charitable trust is also created, as a matter of law, whenever a settlor manifests an intent to give property to an educational, philanthropic, healthcare, or similar institution for an education, philanthropy, healthcare, or similar purpose. *Id*. Here, it is plain from the agreement that the property was transferred to the Trustees of University of Columbia to use it for educational purposes. Therefore, we can argue that it is both a charitable trust as a matter of law and as a matter of fact. It is a charitable trust as a matter of fact because Edward Kemper intended to give it in trust for a charitable purpose and actually gave the property in trust for such purpose. Additionally, we can argue that it is a charitable trust as a matter of law because the property was given to an educational institution for education. We can show that it was "given" to the educational institution because the terms of the agreement state that it is "transferred" to the Trustees and that it was to be acquired for the purpose of transferring it to Trustees.

If the gift, although likely not absolute, is found to be a non-private charitable trust, in accord with the majority of jurisdictions, only the attorney general and some persons with a special interest will have standing to sue. Persons with a special interest include those who are trustees or beneficiaries, or would otherwise have an ownership interest in the property. Here, it is unlikely that Meaney will be found to be a trustee or beneficiary, or to otherwise have an ownership interest in the property, and will likely not have standing to sue.

III. Conclusion

Because we will likely be able to show that the gift, although not absolute, is a non-private charitable trust, the Court will likely dismiss Meaney's suit for lack of standing.

This has been a challenging and interesting project. Please let me know if I can provide any additional research on this issue.

Signed,

Applicant

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