

# CHARITABLE NAMING RIGHTS TRANSACTIONS: GIFTS OR CONTRACTS?

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## ABSTRACT

*Stunning disasters result when donors, charities, and courts apply the law of gifts to transactions in which generous philanthropists donate and in exchange acquire naming rights over university buildings and other charitable spaces and places. Despite the natural inclination to apply the law of gifts to charitable contributions, this Article asserts that donors, charities, and courts would enjoy more predictable and reasonable results using contract law and practices for these vogue transactions.*

“It will not do to say that the bestowal of a name is a valueless act.”<sup>1</sup>

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## INTRODUCTION

It seems obvious that we should apply the law of gifts to charitable donations. Unfortunately, this obvious approach has caused disasters in situations involving naming rights<sup>2</sup> over charitable buildings and other properties.

For example, in one case, a court's choice of gift law over contract law allowed a donor who contributed only \$50,000 of the initial \$150,000 needed to build a university dormitory to recover over \$1.2 million from the school when the school removed the donor's name.<sup>3</sup> Even more disturbing, this donor contributed nothing to a \$2.5 million renovation of the dormitory,<sup>4</sup> and this donor had enjoyed the exclusive naming rights for eighty years.<sup>5</sup>

In another case, an elderly donor contributed her life savings to a hospital.<sup>6</sup> She expected the hospital to establish a lasting tribute to her deceased grandfather in connection with the donation,<sup>7</sup> but she failed to express that intent at the appropriate time. Under the law of gifts, the court concluded that the hospital could keep all the money without honoring the donor, her grandfather, or anybody else, in any way.<sup>8</sup> Despite noting the hospital's "callousness" and its failure to "take great care to see that [the donation] was adequately

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2. See John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375, 385 (2005) (describing naming rights transactions as situations in which a "donor's name [is] associated in some way with the organization, its institutions, activities, or facilities").

3. *Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 119 (Tenn. Ct. App. 2005) [hereinafter *Daughters of the Confederacy*]; Nick Anderson, *Vanderbilt University Removes "Confederate" from Inscription at Front of Dorm*, WASH. POST (Aug. 15, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/08/15/vanderbilt-university-removes-confederate-from-inscription-at-front-of-dorm/> [https://perma.cc/A4SN-KEL9] (reporting that Vanderbilt University will pay \$1.2 million).

4. *Daughters of the Confederacy*, 174 S.W.3d at 106.

5. See *id.* at 105 (reporting that the school finished constructing the dormitory in 1935, when it inscribed the donor's name on the pediment); Anderson, *supra* note 3 (stating that Vanderbilt announced in August of 2016 that it will remove the donor's name).

6. *Courts v. Annie Penn Mem'l Hosp., Inc.*, 431 S.E.2d 864, 865 (N.C. Ct. App. 1993).

7. *Id.* at 864-65. The donor's grandfather was a surgeon at the hospital and a prominent member of the local community. *Id.* at 864.

8. *Id.* at 868.

recognized,” the court concluded that under the law of gifts it could not provide any remedy for the elderly donor or her family.<sup>9</sup>

Also, in a headline-grabbing story, a sophisticated charity’s failure to negotiate a reasonable duration for building naming rights cost the charity and its patrons dearly. In 1973, Lincoln Center was renovating its philharmonic hall. It accepted a \$10.5 million donation from Avery Fisher, and it granted him perpetual naming rights.<sup>10</sup> In 2002, when Lincoln Center needed to renovate the hall again, the Fisher family threatened legal action to prevent renaming.<sup>11</sup> The end result was that Lincoln Center delayed the renovation for over a decade while thousands of patrons, and many performing artists, endured the outdated, shabby facilities. In addition, when the parties finally settled in 2014, Lincoln Center paid the Fisher family \$15 million along with various perks.<sup>12</sup> Amazingly, soon after the settlement with the Fishers, Lincoln Center made the same mistake again. It agreed that a new donor contributing approximately 20% of the cost of the concert hall’s renovation in 2015 would have *perpetual* naming rights over the renovated concert hall.<sup>13</sup>

This Article asserts that for these transactions the parties and the courts should embrace contract law, rather than the law of gifts, to minimize disputes and reach more reasonable results. Charitable naming rights are controversial. They are very popular with charities. Behavioral-economics research indicates that “publicity [sharply] increases charitable giving in [the] aggregate”<sup>14</sup> and that “anonymity . . . causes low contributions.”<sup>15</sup> On the other hand, moralist and armchair philosophers criticize the practice. These critics assert that

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9. *Id.* at 867-68.

10. Robin Pogrebin, *Lincoln Center to Rename Avery Fisher Hall*, N.Y. TIMES (Nov. 14, 2014), [http://www.nytimes.com/2014/11/14/arts/music/lincoln-center-to-rename-avery-fisher-hall.html?\\_r=0](http://www.nytimes.com/2014/11/14/arts/music/lincoln-center-to-rename-avery-fisher-hall.html?_r=0) [<https://perma.cc/XTY7-37BJ>].

11. *Id.* (reporting that Lincoln Center renovated all the other performing arts buildings at its campus before it could renovate Avery Fisher Hall).

12. *Id.*

13. See Robin Pogrebin, *David Geffen Captures Naming Rights to Avery Fisher Hall with Donation*, N.Y. TIMES (Mar. 4, 2015), <http://www.nytimes.com/2015/03/05/arts/david-geffen-captures-naming-rights-to-avery-fisher-hall-with-donation.html> [<https://perma.cc/DH22-X9Q9>] (stating that the decision to grant perpetual naming rights was shortsighted).

14. Brian Broughman & Robert Cooter, *Charity and Information: Correcting the Failure of a Disjunctive Social Norm*, 43 U. MICH. J.L. REFORM 871, 885 n.49 (2010).

15. *Id.* at 871.

publicity “contaminat[es] the spirit of philanthropy,”<sup>16</sup> and they maintain that anonymous giving is more virtuous.<sup>17</sup> Others stake out a middle ground, such as the art columnist who wrote, “[I]n the nine circles of hell that are nonprofit fundraising, surely the mildest sin is allowing benefactors to attach their names to parts of buildings . . . . [W]hat real harm is done by giving these donors a lift?”<sup>18</sup>

Despite some criticism, the practice has exploded since the mid-1990s.<sup>19</sup> Today, perhaps “less than one percent of [substantial] charitable gifts are anonymous.”<sup>20</sup> Surprisingly, there is scant legal scholarship on the negotiation and enforcement of these popular arrangements.<sup>21</sup>

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16. Pablo Eisenberg, *Egotists Who Are Renaming New York City*, FIN. TIMES (Sept. 2, 2008, 3:00 AM), [http://www.ft.com/cms/s/0/0b25ba5a-7886-11dd-acc3-0000779fd18c.html?ft\\_site=falcon&desktop=true](http://www.ft.com/cms/s/0/0b25ba5a-7886-11dd-acc3-0000779fd18c.html?ft_site=falcon&desktop=true) [<https://perma.cc/YE4J-PBKJ>].

17. See *infra* notes 36-38 and accompanying text.

18. Lee Rosenbaum, *The Isherwood Files: Should Donors Put Their Names on Elevators? Should Critics Speak on Ads for Events They Will Later Review?*, CULTUREGRRRL (Dec. 5, 2007), [http://www.artsjournal.com/culturegrrl/2007/12/the\\_isherwood\\_files\\_should\\_don.html](http://www.artsjournal.com/culturegrrl/2007/12/the_isherwood_files_should_don.html) [<https://perma.cc/8SGG-X6TW>].

19. TERRY BURTON, NAMING RIGHTS: LEGACY GIFTS & CORPORATE MONEY 49 (2008) (“Since the mid-1990s, there has been a groundswell of naming rights activity.”).

20. Sarah Murray, *Shush Funds: Anonymous Giving Exposed*, OBSERVER (Nov. 1, 2014, 10:18 AM), <http://observer.com/2014/11/shush-funds-anonymity-exposed/> [<https://perma.cc/J5LY-BZPM>] (“[R]esearch on the topic is admittedly limited,” presumably because the anonymous tend to be, obviously, shrouded in secrecy); Amihai Glazer & Kai A. Konrad, *A Signaling Explanation for Charity*, 86 AM. ECON. REV. 1019, 1021 (1996) (reporting that in a limited study of school annual reports, less than 1% of all gifts were anonymous); see also Jack Shakely, *Philanthropic Naming Rights, and Naming Wrongs*, L.A. TIMES (Mar. 10, 2015, 5:35 PM), <http://www.latimes.com/opinion/op-ed/la-oe-0311-shakely-philanthropy-naming-rights-20150310-story.html> [<https://perma.cc/6GNZ-TETD>] (“The anonymous gift is pretty much extinct in 21<sup>st</sup> century America anyway”); BURTON, *supra* note 19, at 7-8 (describing an \$85 million anonymous gift to fund a new Business School at the University of Wisconsin at Madison as “unprecedented”); Philip Fine, *U.S.: Naming Rights Net Millions—But at a Price*, U. WORLD NEWS (Mar. 2, 2008), <http://www.universityworldnews.com/article.php?story=20080228160422788> [<https://perma.cc/GHB2-LXW2>].

21. The existing articles focus on trust law, morals clauses, and tax rules. See, e.g., Eason, *supra* note 2 (focusing on trust law in considering a charity’s options when it wants to remove a donor’s name after the donor has committed misdeeds or when the charity needs to resell the naming rights to raise funds to renovate the building); Adam Scott Goldberg, *When Charitable Gift Agreements Go Bad: Why a Morals Clause Should Be Contained in Every Charitable Gift Agreement*, 89 FLA. B.J. 48, 50 (2015). Commentators have considered the federal income tax implications of naming rights, or the lack thereof. See, e.g., John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions*

The judicial treatment of charitable pledges and naming rights has been controversial and confusing.<sup>22</sup> Commentators often criticize Justice Cardozo's landmark opinion on this topic.<sup>23</sup> Courts may treat these arrangements as gifts, charitable trusts, or contracts.<sup>24</sup> The legal characterization can turn on the intentions of the donor, and those intentions can be multifaceted, opaque, or indecipherable.<sup>25</sup>

Charities and donors sometimes appear perplexed when structuring these financial transactions.<sup>26</sup> For example, charities frequently offer and grant perpetual naming rights for properties that will need to be renovated in twenty or thirty years, setting the stage for a conflict among the parties and their successors when the charity needs to grant naming rights to a big donor to underwrite a substantial part of the renovation.<sup>27</sup> Also, donors and charities frequently fail to specify exit mechanisms if the misdeeds of the

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*Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657 (2001); William A. Drennan, *Where Generosity and Pride Abide: Charitable Naming Rights*, 80 U. CIN. L. REV. 45 (2011); Ethan G. Stone, *Halos, Billboards, and the Taxation of Charitable Sponsorships*, 82 IND. L.J. 213 (2007).

22. See *Allegheny Coll. v. Nat'l Chautauqua Cty. Bank*, 159 N.E. 173, 174 (N.Y. 1927) ("The law of charitable subscriptions has been a prolific source of controversy . . ."); *Dunaway v. First Presbyterian Church*, 442 P.2d 93, 95 (Ariz. 1968) (commenting that the law in this area "is neither uniform nor well settled").

23. See, e.g., Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379, 1402 (1995) (stating that Justice Cardozo's "analysis in *Allegheny College* is regularly criticized as contrived and artificial"); Peter Linzer, *Consider Consideration*, 44 ST. LOUIS U. L.J. 1317, 1324 (2000) ("[S]ome . . . say [Justice Cardozo's legal analysis compares] with the misdirection of a three-card monte pitchman on the New York City subway."); see also Matthew J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1336 (1989) (referring to *Allegheny College* as a "landmark opinion").

24. See *infra* Part II.

25. See Colombo, *supra* note 21, at 669 (discussing the work of academics in the social sciences to determine motives for charitable giving and stating that "human motivations are terribly complex").

26. Goldberg, *supra* note 21; Chris Pomorski, *Legacy Building: Paying to Write Your Name in Stone Doesn't Always Ensure Immortality*, OBSERVER (Nov. 1, 2014, 10:17 AM), <http://observer.com/2014/11/legacy-building-paying-to-write-your-name-in-stone-doesnt-a> [<https://perma.cc/B3QV-ZZXZ>].

27. See, e.g., *infra* notes 492-97 and accompanying text; see also *infra* notes 199-207 and accompanying text (discussing *St. Mary's Med. Ctr., Inc. v. McCarthy*, 829 N.E.2d 1068 (Ind. Ct. App. 2005)). See generally Eason, *supra* note 2 (discussing the availability of the trust doctrines of *cy pres* and equitable deviation after the donor has made all the promised donations and the charity wishes to remove the donor's name).

donor, a related person, or the charity render the arrangement embarrassing for one side.<sup>28</sup>

This Article focuses on the choice between contract law or gift law in structuring and enforcing these arrangements. In a future article, I plan to reconcile the treatment of these arrangements as contracts for state law purposes with their treatment as tax-deductible gifts for federal income tax purposes. A scholar has already examined the application of trust law principles to older charitable naming rights arrangements when the donor has made all the promised donations, but the charity wishes to remove the donor's name.<sup>29</sup> Accordingly, this Article will discuss trust principles sparingly.

Part I of this Article briefly describes the creative,<sup>30</sup> controversial, and expanding charitable naming rights market. Offering naming rights as a fundraising tool has spread from educational organizations to all types of nonprofits including hospitals, museums, zoos, social service organizations, and even our national parks.<sup>31</sup> Naming opportunities seem limited only by the boundaries of human imagination. Donors emblazon their names on all sorts of real and personal property from the otter playground at the Louisville Zoo<sup>32</sup> to the restrooms at Harvard Law School, the University of Colorado at Boulder, and the Museum of Modern Art in Manhattan.<sup>33</sup> Donors name even the quarterback or linebacker positions on college football teams.<sup>34</sup>

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28. See generally Eason, *supra* note 2, at 394-98 (discussing transactions with "bad actors" and "shamed donors"); Goldberg, *supra* note 21, at 48.

29. See Eason, *supra* note 2.

30. See *Mt. Sinai Hosp., Inc. v. Jordan*, 290 So. 2d 484, 486 (Fla. 1974) ("The scope of charitable pledges is as broad as human imagination and certainly there is no attempt by this Court to draw guidelines encompassing the breadth of creativity . . .").

31. Lisa Rein, *Yosemite, Sponsored by Starbucks? National Parks to Start Selling Some Naming Rights*, WASH. POST (May 9, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/05/09/yosemite-national-park-brought-to-you-by-starbucks/> [<https://perma.cc/F6G9-TTYE>].

32. William P. Barrett, *Cash Strapped Charities Put Donors' Names on Just About Everything*, FORBES (Sept. 21, 2009, 12:00 AM), <http://www.forbes.com/forbes/2009/0921/creative-giving-cash-strapped-charities-donors-names.html> [<https://perma.cc/W3AP-KG27>].

33. Sarah Murray, *Institutional Naming Rights Gaining Favour Among Wealthy Donors*, FIN. TIMES (Sept. 18, 2014), <https://www.ft.com/content/5c1d62e0-3834-11e4-a687-00144feabdc0> [<https://perma.cc/7BG7-NJP8>]; Barrett, *supra* note 32 (discussing the University of Colorado at Boulder restrooms); Michael Gross, *Charities Get Inventive with Name-Dropping*, NBC NEWS (June 14, 2008, 2:46

Part II analyzes when courts choose to classify charitable naming rights transactions as (i) gifts or (ii) contracts. The focus is on the largely ignored case law categorizing these transactions. This Part also discusses the case law from other honor or glory markets, including the baby-name market in which money is paid for the right to name a child, and the embarrassing secrets market in which hush money keeps secrets under wraps.

Part III explores negotiating opportunities for charities and donors structuring charitable naming rights contracts. It also explores options for courts in resolving disputes. The Part focuses on the practices and doctrines available under contract law that can avoid the disasters encountered with the law of gifts.

The conclusion highlights potential benefits for charities, donors, and courts in choosing contract law and practices in this area. Contract practices can introduce flexibility in structuring key terms such as the duration of naming rights for property that will eventually need renovation and morals clauses for when the donor or the charity threatens to tarnish the other's reputation. Also, courts would have greater flexibility in resolving disputes. For example, if the parties fail to agree on an important term such as the duration for the naming rights to a building, under contract law the court may be able to supply a reasonable duration mechanism.<sup>35</sup>

## I. THE EXPANDING, CREATIVE, AND CONTROVERSIAL MARKET FOR CONSPICUOUS GENEROSITY

A donor and a charity can structure a contribution relationship at a point along a publicity spectrum with complete anonymity at one end and enthusiastic broadcasting at the other end. With complete anonymity, no one would know the donor's identity, not even the charity or other recipient. Some ancients considered complete

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AM), [http://www.nbcnews.com/id/25147900/ns/us\\_news-giving/t/charities-get-inventive-name-dropping/#.WCoCKXeZPVo](http://www.nbcnews.com/id/25147900/ns/us_news-giving/t/charities-get-inventive-name-dropping/#.WCoCKXeZPVo) [<https://perma.cc/CG76-PV4C>] (discussing a gift in excess of \$100,000 from 83-year-old Jerome L. Stern "to see his and his wife Ellen's names writ large—on the museum's four restrooms").

34. Drew Lindsay, *How the Billion-Dollar College Football Industry Acts Like a Charity*, CHRON. PHILANTHROPY (Sept. 24, 2015), <https://www.philanthropy.com/article/How-the-Billion-Dollar-College/233203> [<https://perma.cc/TTXD-R3ZK>] ("It is now possible . . . to endow a linebacker or quarterback the same way you might endow a chair for a Nobel Prize-winning economist or a Pulitzer Prize winner." (quoting investigative journalist Gilbert Gaul)).

35. See *infra* notes 529-32 and accompanying text.



anonymity an act of great virtue.<sup>36</sup> The primary texts of major religions include passages that seem to encourage anonymous giving.<sup>37</sup> In Europe, donors still “tend to keep a low profile.”<sup>38</sup>

Today in the United States, complete anonymity is impractical for big donations. For one thing, a donor must receive a contemporaneous written receipt from the charity acknowledging the gift to claim a federal income tax charitable deduction.<sup>39</sup> As a result, the charity must know the identity of the donor (or the donor’s entity)<sup>40</sup> unless the donor is willing to forego the income tax deduction. In addition, a donor wishing extreme anonymity for a large contribution might need to employ money-laundering strategies to avoid disclosure under the banking laws.<sup>41</sup>

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36. The twelfth century Jewish philosopher and jurist Moses Maimonides ranked generosity on a scale of virtue, with anonymous generosity ranking high. Murray, *supra* note 20 (“Maimonides . . . ranked anonymous donations second (topped only by gifts, loans, or employment that lift people from dependence.)”); see also Roy A. Walter, *Volunteerism: Because We Care, Because It’s Right*, 34 HOUS. LAW. 50, 52 (1996); Anita L. Allen, *Disrobed: The Constitution of Modesty*, 51 VILL. L. REV. 841, 844 (2006).

37. See Eric Konigsberg & Ben Ryder Howe, *The Name Game: An Inside Look at the Politics of Donations*, TOWN & COUNTRY MAG. (Mar. 24, 2016), <http://www.townandcountrymag.com/society/money-and-power/a5341/naming-rights-philanthropy-anonymous-giving/> [<https://perma.cc/V9N9-Z3XZ>] (referring to the Bible and the Koran); see also Shakely, *supra* note 20 (“[T]he Purist School . . . embraces the Biblical admonition to let not your right hand know what your left hand is doing in almsgiving.”); Pablo Eisenberg, *Stop Appealing to Billionaire Egos with Naming Rights*, CHRON. PHILANTHROPY (Mar. 12, 2015), <https://www.philanthropy.com/article/opinion-stop-appealing-to/228459> [<https://perma.cc/8UGE-2CE5>] (“[F]undraisers have encouraged one of the most distressing features in our society: The extraordinarily inflated egos of America’s growing number of multimillionaires and billionaires.”).

38. Murray, *supra* note 33.

39. I.R.C. § 170(f)(8) (2015) (applying to gifts over \$250).

40. A donor might attempt to keep his or her identity secret by funneling the money through an entity, but in that case, the donor would need to disclose the name of the entity to the charity to receive the receipt from the charity and benefit from a federal income tax charitable deduction. *Id.* Also, charities are required to list substantial donors on Schedule B of IRS Form 990, which is the annual information return each charity must file with the IRS. INTERNAL REVENUE SERV. SCHEDULE B, FORM 990, Schedule of Contributors (2016), <https://www.irs.gov/pub/irs-pdf/f990ezb.pdf> [<https://perma.cc/6X8R-PCAZ>] (generally requiring that the charity list donors who contributed \$5,000 or more during the year).

41. See Max Biedermann, *G8 Principles: Identifying the Anonymous*, 11 BYU INT’L L. & MGMT. REV. 72, 72 (2015) (discussing the use of “shell corporations . . . to hide the true owners of assets”); see also Jack B. Siegel, “Try to Be Pure at Heart, They Arrest You for Robbery:” *Ethical Issues Facing the Nonprofit Practitioner*, ALI-CLE COURSE MATERIALS, Nov. 13-14, 2014, SW011-

Historically, relative anonymity in giving was more common.<sup>42</sup> “In the U.S., [relative] philanthropic secrecy was once ‘the thing to do.’”<sup>43</sup> Before the mid-1990s, many donors were content with what I would call “strategic publicity” or “peer publicity.” Many wealthy donors interviewed in a dissertation study in the early 1990s were satisfied as long as the charity’s other big donors were aware of their contributions. As described in her book, *Why the Wealthy Give: The Culture of Elite Philanthropy*,<sup>44</sup> written on the cusp of the naming revolution, Francie Ostrower summarized her interviews with scores of generous philanthropists and found that often their primary desire was obtaining a position on the charity’s board of directors or another important charitable committee. These donors anticipated that capturing a place on the board or committee would give them the opportunity to meet, mix, and mingle with the other big givers and secure business and other practical advantages from these associations. These donors expressed little or no interest in having their names plastered on facades, foyers, or other places and spaces.

While the norm likely was greater anonymity historically, it seems there were usually some exceptions. Commentators discuss charitable givers who had their names engraved on Sumerian tablets 5,000 years ago.<sup>45</sup> In 1502, King Henry VII’s mother established what is believed to be the first named endowed professorship, the Lady Margaret Professorship of Divinity.<sup>46</sup> In 1639, John Harvard

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ALI-CLE 285 (available on Westlaw) (posing a hypothetical involving a client attempting to donate anonymously by passing the money through her attorney’s trust fund account); Murray, *supra* note 20 (discussing the maneuvers of “duty-free magnate Charles F. Feeney . . . [who] covertly doled out billions” through subsidies of an off-shore foundation staffed with employees sworn to secrecy).

42. See Eisenberg, *supra* note 37 (“Whatever happened to anonymous giving?”); Charles Isherwood, *The Graffiti of the Philanthropic Class*, N.Y. TIMES (Dec. 2, 2007), <http://www.nytimes.com/2007/12/02/theater/02ishw.html> [<https://perma.cc/HPP3-3XBH>] (“Whatever happened to Anonymous? . . . [W]hat became of those wealthy philanthropists who used to support . . . charitable institutions without requiring that their names be slapped somewhere—anywhere, it sometimes seems—on a building.”).

43. Murray, *supra* note 20 (quoting fundraising expert Robert Osborne).

44. See generally FRANCIE OSTROWER, *WHY THE WEALTHY GIVE: THE CULTURE OF ELITE PHILANTHROPY* (1997).

45. Eason, *supra* note 2, at 379 n.9 (citing Henry Goldstein, *When Wealthy Philanthropists Put Their Mouth Where Their Money Is*, CHRON. PHILANTHROPY (Nov. 28, 2002), <https://www.philanthropy.com/article/When-Wealthy-Philanthropists/189121> [<https://perma.cc/8E9B-AHRC>]).

46. BURTON, *supra* note 19, at 114.

acquired naming rights for a new university near Boston, Massachusetts, in exchange for his gift of 400 books and 779 British pounds.<sup>47</sup> Powerful tycoons of the industrial revolution, such as Carnegie, Sage, and Kellogg, aggressively publicized their philanthropy perhaps in attempts to redeem their reputations besmirched by reports of greed.<sup>48</sup> John D. Rockefeller, Eli Lilly, Andrew Carnegie, and other titans of industry often used charitable trusts to facilitate their generosity and promote publicity.<sup>49</sup> When asked about Andrew Carnegie's elephantine philanthropic giving, including endowing a staggering 3,500 libraries, Mark Twain commented, "He has bought fame and paid cash for it . . . He has arranged that his name shall be famous in the mouths of men for centuries to come."<sup>50</sup>

Today, a charity embarking on a major capital campaign could be accused of jeopardizing its charitable mission if it failed to sell naming rights.<sup>51</sup> Also, it might be considered ungrateful.<sup>52</sup> Charities have been advertising the sale of naming rights in exchange for online donations, listing the naming opportunities menu style.<sup>53</sup> One charitable insider says, "[C]urrently [the] dominant model is Transactional Philanthropy."<sup>54</sup>

A broad survey discovered a dramatic rise in charitable naming in the mid-1990s.<sup>55</sup> Educational institutions led the way by granting charitable naming rights for campuses and quads, lecture halls and libraries, and classrooms and conference rooms, as well as scholarship funds and endowed professorships.<sup>56</sup> The expansion in

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47. Barrett, *supra* note 32.

48. See William H. Byrnes, IV, *The Private Foundation's Topsy Turvy Road in the American Political Process*, 4 HOUS. BUS. & TAX L.J. 496, 531-32 (2004).

49. *Id.*

50. Konigsburg, *supra* note 37.

51. BURTON, *supra* note 19, at xvii, 134 ("If your organization does not ask a qualified donor about making a named gift, there is a high probability that another one will.").

52. See, e.g., *Courts v. Annie Penn Mem'l Hosp., Inc.*, 431 S.E.2d 864, 867 (N.C. Ct. App. 1993) (describing a charity's failure to grant naming rights as callous).

53. See generally Drew Lindsay, *YourNameHere.Org*, CHRON. PHILANTHROPY, June 2015, at 20. See also Barrett, *supra* note 32, at 74.

54. Shakely, *supra* note 20. Mr. Shakely is president emeritus of the California Community Foundation.

55. BURTON, *supra* note 19, at 49 ("Since the mid-1990s, there has been a groundswell of naming rights activity."); see also *id.* at xi (discussing the survey).

56. See *id.* at 7.

the market also comes from other charities adopting this ethos, including hospitals,<sup>57</sup> symphony orchestras,<sup>58</sup> theatres,<sup>59</sup> museums,<sup>60</sup> public school districts,<sup>61</sup> and even national parks.<sup>62</sup> All of these types of institutions, and more,<sup>63</sup> have been adopting charitable naming rights initiatives.

In another new twist, it's been alleged that a candidate for governor in the midst of a campaign contributed to a state university and named the university's computer science school after himself in an attempt to influence voters. In response, other politicians sponsored a bill to prevent public schools from naming their properties after a candidate for office.<sup>64</sup> A union official wrote a letter to the University Board of Regents stating the University System should not allow itself to be "used as a pawn for political gain" and remarked, "So now they are going to buy titles at universities and get press for it in an election cycle? I can't imagine anything that is more inappropriate."<sup>65</sup> The candidate won the primary in June of 2016.<sup>66</sup>

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57. *Id.* at 138-39, 148 (noting that "[h]ospitals . . . have taken on aggressive naming initiatives").

58. *See* Pogrebin, *supra* note 13 (discussing naming rights for an orchestra hall).

59. BURTON, *supra* note 19, at 137-38.

60. *Id.* at 58-59; *see* Rosenbaum, *supra* note 18 (discussing The Brooklyn Museum's program allowing members of the public to "adopt" a work of art; in exchange for a donation, the museum acknowledged the donor on the wall label next to the art work).

61. *See* Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 7-8 (2007) (discussing "dozens—if not hundreds—of public schools [signing] naming rights deals" in the immediate wake of a transaction between an East Coast school district and the ShopRite grocery chain).

62. *See* Knowledge Wharton, *Selling America's National Parks*, VALUEWALK, July 4, 2016, 2016 WLNR 20369737 (emphasizing that the national parks are only selling "indoor" naming rights); Rein, *supra* note 31.

63. *See* BURTON, *supra* note 19, at 119 (including YWCAs and environmental groups); *id.* at 49-50 ("Not only nonprofits but other organizations as well, including municipalities, state and federal government departments, are out there marketing their shopping list to would-be supporters.").

64. *See* Troy Carter, *Lawmakers Propose Bill in Response to Gianforte's MSU Donation*, BOZEMAN DAILY CHRON. (May 17, 2016), [http://www.bozemandailychronicle.com/news/politics/lawmakers-propose-bill-in-response-to-gianforte-s-msu-donation/article\\_4993e3bd-09e8-529a-969a-fde4d17a2599.html](http://www.bozemandailychronicle.com/news/politics/lawmakers-propose-bill-in-response-to-gianforte-s-msu-donation/article_4993e3bd-09e8-529a-969a-fde4d17a2599.html) [<https://perma.cc/55ZW-EMJ7>]; Gail Schontzler, *Students Criticize School Naming; MSU's Cruzado Willing to Talk*, BOZEMAN DAILY CHRON., May 25, 2016, at A1, 2016 WLNR 15918111.

65. Corin Cates-Carney & Eric Whitney, *Montana Dems Cry Foul Over 'Gianforte School of Computing' at MSU*, MONT. PUB. RADIO (May 17, 2016) (quoting Al Eckblad, AFL-CIO Executive Secretary), <http://mtpr.org/post/montana-dems-cry-foul-over-gianforte-school-computing-msu> [<https://perma.cc/5NJW-52CU>].

This could become another trend driving the charitable naming rights market.

Along with the entrance of different types of charities, the naming rights market has grown thanks to the boundless imagination of philanthropic-development professionals who find new things and funds to name.<sup>67</sup> Naming rights for buildings, atriums, elevators, offices, staircases, and other major physical places and spaces are passé. The modern naming rights market includes almost all tangible charitable properties from green rooms at theaters<sup>68</sup> to restrooms at law schools.<sup>69</sup> Furthermore, while scholarship funds and endowed professorships bearing the donor's name are "more common than the grass in the summer,"<sup>70</sup> donors are now endowing all sorts of positions and functions, from the clinical research director of a hospital<sup>71</sup> to the linebackers and the quarterback on a college football team.<sup>72</sup>

With the coming of the digital age and social media, charities have taken the marketing of naming rights to a new level. In connection with major fund drives, many charities now advertise naming opportunities and the related "ask amounts," like a shopping list on the charity's website.<sup>73</sup> As an example, in 2015, Fordham Law

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66. Phil Drake, *Governor's Race*, GREAT FALLS TRIB., June 8, 2016, at A3, 2016 WLNR 17481577 (reporting that Greg Gianforte will face Steve Bullock in the general election for governor).

67. BURTON, *supra* note 19, at 146 ("[T]he areas and items that can be named are limited only by your imagination."); Barrett, *supra* note 32 ("Nonprofits creatively mine money from names, partly by subdividing their turf.").

68. BURTON, *supra* note 19, at 138-39 (discussing naming rights for a green room in a theatre and nurses' stations at a hospital); Isherwood, *supra* note 42 (discussing naming rights throughout theaters); Pomorski, *supra* note 26 (reporting that former broadcaster Barbara Walters donated \$10 million to name the Acute Care Medical Treatment Center inside a New York hospital).

69. See Murray, *supra* note 33 (reporting that one donor has contributed and named restrooms at Harvard Law School and Berkeley Law School); see also BURTON, *supra* note 19, at 135-36 (listing other types of properties, including gardens, parking lots, and walkways).

70. Fine, *supra* note 20 (quoting Jonathan Knight of the Association of American University Professors).

71. BURTON, *supra* note 19, at 120 (discussing endowed chairs in clinical research).

72. Lindsay, *supra* note 34 ("It is now possible . . . to endow a linebacker or quarterback the same way you might endow a chair for a Nobel Prize-winning economist or a Pulitzer Prize winner." (quoting investigative journalist Gilbert Gaul)).

73. See Lindsay, *supra* note 53, at 20; see also BURTON, *supra* note 19, at 88-89.

School advertised 249 naming opportunities on its website as part of the fund drive for its new law school.<sup>74</sup>

Also, corporations and other commercial entities are becoming active players in the charitable naming rights market.<sup>75</sup> Initially, colleges and universities were slow to embrace corporate names on their scholarly structures.<sup>76</sup> As an example, in 2007, the University of Washington publicly disclosed its “Facilities and Spaces Naming Policy,” which encouraged corporations to give, but to grant the naming rights to “a person or family important to [the] success [of the business].”<sup>77</sup> A commentator warned that a corporation’s practices might tarnish the reputation of a revered institution.<sup>78</sup>

Corporations gained a foothold with naming college athletic stadiums and fields.<sup>79</sup> In 1996, the University of Louisville became the first Division 1A<sup>80</sup> school to name its football stadium after a corporation with Papa John’s Stadium.<sup>81</sup> Many similar arrangements have continued this college athletic commercialism.<sup>82</sup> In 2007, a

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74. *New Law School Building Naming Opportunities*, FORDHAM U. (on file with the author); see *New Law School Building*, FORDHAM U., <http://law.fordham.edu/1461.htm> [<https://perma.cc/NN26-LWPL>] (last visited Jan. 2, 2017) (“Giving levels range from \$1,000 for furnishings and locker[s] to \$25,000,000 to name the building.”); Lindsay, *supra* note 53, at 21-22.

75. BURTON, *supra* note 19, at 10.

76. *Id.* at 13, 141.

77. University of Washington: Facilities and Spaces Naming Policy (Campaign University of Washington: Creating Future Facilities and Spaces Naming Policy), reprinted in BURTON, *supra* note 19, at 202.

78. See BURTON, *supra* note 19, at 173 (emphasizing that the charity should have the right to revoke the corporation’s name in the event of a “corporate scandal” such as with Enron or WorldCom).

79. See Mike Tanier, *When Colleges Dedicate Courts, Squabbles Often Follow*, N.Y. TIMES (Mar. 17, 2012), <http://www.nytimes.com/2012/03/18/sports/ncaabasketball/when-colleges-dedicate-courts-squabbles-often-follow.html> [<https://perma.cc/V9CS-9HQY>] (“For strapped institutions, the alternative to dedicating the hardwood to a coach is selling the naming rights to a corporation.”).

80. See John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109, 110 n.4 (2010) (explaining that prior to 2006, the NCAA used the term “Division 1A” to refer to the most competitive collegiate sports programs; after 2005, the 120 most competitive sports universities were members of the “Football Bowl Subdivision”).

81. Alex Davis, *Yum Puts Its Name on U of L Center*, COURIER J. (LOUISVILLE), Sept. 20, 2006, at D1, 2006 WLNR 25049364.

82. See, e.g., Andrea Adelson, *Schools Going Corporate*, ORLANDO SENTINEL, July 5, 2010, at C2, 2010 WLNR 13458369; Kristi Dosh, *Naming Rights on College Stadiums and Arenas*, BUS. OF COLL. SPORTS (June 21, 2011), <http://businessofcollegesports.com/2011/06/21/naming-rights-on-college-stadiums-and-arenas> [<https://perma.cc/N4YB-LQK3>].

researcher wrote, “The nonprofit sector has begun to see a *tidal wave* of corporate acquisitions of nonprofit naming rights on a multitude of properties.”<sup>83</sup> Also, corporations are beginning to acquire naming rights over academic buildings at major universities. The law school at Washington University in St. Louis, Missouri is named Anheuser-Busch Hall,<sup>84</sup> and AT&T “has naming rights to the AT&T Executive Education and Conference Center at the University of Texas.”<sup>85</sup>

## II. CHOOSING THE LAW OF GIFTS OR THE LAW OF CONTRACTS

### A. The Law of Gifts: The Natural Inclination Leading to Extreme Results

The terminology surrounding charitable contributions and related naming rights likely encourages donors, charities, advisors, and courts to think of these arrangements as gifts, rather than contracts. Often these arrangements spring from capital campaigns or other fund drives<sup>86</sup> featuring altruistic-sounding slogans, such as “Building the Dream”<sup>87</sup> or “The World Is Waiting: The Campaign for Harvard Medicine.”<sup>88</sup> Charities usually market naming rights in exchange for big contributions as naming “opportunities.”<sup>89</sup> Also, a charity may anticipate documenting a donation with only a pledge card or other form less than one page in length<sup>90</sup> rather than with a multi-page contract with extensive boilerplate typically used for big-money transactions. Charities may hope this brevity will encourage

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83. BURTON, *supra* note 19, at 150 (emphasis added).

84. Richard B. Kuhns, “*Instant Tradition*”—A Challenge to Legal Education in the Twenty-First Century, 76 WASH. U. L.Q. 203, 203 (1998).

85. BURTON, *supra* note 19, at 73.

86. *Id.* at 52 (referring to “fundraising campaigns and the naming rights gifts they attract”).

87. See, e.g., *Building the Dream, Naming Opportunities*, HOSPICE OF THE PANHANDLE (last updated May 2012), <http://www.hospiceotp.org/files/images/Naming%20Opportunities.pdf> [<https://perma.cc/BVV4-BE67>].

88. *The World Is Waiting: The Campaign for Harvard Medicine*, HARV. MED. SCH. (Nov. 14, 2014), <https://hms.harvard.edu/world-waiting> [<https://perma.cc/6QTD-9ZR2>].

89. See BURTON, *supra* note 19, at 134.

90. See William A. Drennan, *Charitable Pledges: Contracts of Confusion*, 120 PENN ST. L. REV. 477, 495 (2015); Pomorski, *supra* note 26 (quoting Ellis Carter, a lawyer representing both charities and donors, stating “I’ve seen very explicit agreements, but I’ve also seen instances where people make naming rights gifts with nothing more than a pledge form—just trusting the institution”).

prospective donors to act promptly on their generous impulses<sup>91</sup> without consulting attorneys, accountants, or financial planners who often assist with lengthy, complex documents.

Tax advisors and other experts<sup>92</sup> accurately inform everyone involved that the federal income tax law treats these arrangements as gifts, and the donor is allowed to deduct all amounts contributed as a charitable “gift”<sup>93</sup> regardless of the level or value of public recognition given in exchange,<sup>94</sup> the aggressiveness of the charity in hawking the naming rights, and the amount of haggling involved.<sup>95</sup> Pursuant to the income tax rules, the charity will issue a written receipt proclaiming that no goods or services were given in return<sup>96</sup> for the donation even when the donor aggressively bargained for prominent naming rights or other forms of public recognition.<sup>97</sup> Also, when publicizing the naming contribution in press releases, on websites, or at banquets or groundbreaking ceremonies, charities use phrases such as “generous gift” or “principal benefactor.”<sup>98</sup> Thus, in

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91. Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 4-6 (1979) (observing that “actors involved in a donative transaction are often emotionally involved”); Mary Frances Budig, Gordon T. Butler & Lynne M. Murphy, *Pledges to Nonprofit Organizations: Are They Enforceable and Must They Be Enforced?*, 27 U. S.F. L. REV. 47, 59 (1992) (“Charitable solicitations are often charged with high emotions.”).

92. See, e.g., JOSEPH P. TOCE, JR. ET AL., *TAX ECONOMICS OF CHARITABLE GIVING* 197 (2006) (discussing donor recognition and concluding that “the contribution deduction amount should be unaffected”); Stone, *supra* note 21, at 222 (stating that acknowledgements “would not prevent donors from deducting the . . . contributions as charitable donations”). See generally Colombo, *supra* note 21.

93. See I.R.C. § 170(c)(2)(D) (2015) (describing a tax-deductible contribution to charity as a “gift”).

94. Rev. Rul. 68-432, 1968-2 C.B. 104 (1968) (“Such privileges as being associated with or being known as a benefactor of the organization are not significant return benefits that have a monetary value . . .”).

95. See Rev. Rul. 73-407, 1973-2 C.B. 383 (1973) (describing a situation in which the parties obtained a court order holding that a charity could change its name to adopt the donor’s name and bind itself not to change its name again for ninety-nine years).

96. I.R.C. § 170(f)(8)(B) (applying to contributions of \$250 or more); Treas. Reg. § 1.170A-13(f)(2) (1996).

97. See Rev. Rul. 68-432, 1968-2 C.B. 104; see also *supra* note 94; Rev. Rul. 77-367, 1977-2 C.B. 193 (1977) (involving a charity that named its facility after a corporate donor and mentioned the corporate donor in every publication the corporation financed).

98. See, e.g., Spring Arbor Univ., *Groundbreaking Ceremony for SAU’s New Tennis Facility*, SAU BLOG (June 3, 2016), <https://www.arbor.edu/posts/2016/06/03/tennis-complex/> [<https://perma.cc/JX8C-2UH6>] (regarding the ceremony at Spring Arbor University for the “upgrades [to the tennis courts] made possible



these naming deals, there may be a barrage of verbiage signaling that the transaction is a gift. In contrast, the argot of the contracts world may be absent. There is seldom any public mention of offer, acceptance, consideration, exchange, or bargain. As a result, it is not surprising when charities, donors, and their advisors fail to draft multi-page contracts even if substantial amounts are involved,<sup>99</sup> and when courts seem drawn to analyze these transactions under the law of gifts.<sup>100</sup> In 2014, an attorney practicing in this area stated, “I’ve seen very explicit agreements, but I’ve also seen instances where people make naming rights gifts with nothing more than a pledge form.”<sup>101</sup>

A gift is a “voluntary transfer of property by one to another, without any consideration.”<sup>102</sup> A contract or sale is for consideration; a gift is not.<sup>103</sup> Under the law of gifts, courts and commentators state that the number of necessary elements is as few as two<sup>104</sup> or as many as six.<sup>105</sup>

In charitable naming rights transactions, the most challenging element likely will be whether the donor “intends to make a gift.”<sup>106</sup> The other five elements are less likely to trigger controversy because it often will be clear whether: (i) the donor had the requisite mental capacity;<sup>107</sup> (ii) the donor delivered the money or property pledged;

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thanks to a generous gift from Ron and Marvel Jones”); Dennis Brown, *Jordan Hall Groundbreaking Ceremony Set for Saturday*, NOTRE DAME NEWS (Oct. 29, 2003), <http://news.nd.edu/news/6294-jordan-hall-groundbreaking-ceremony-set-for-saturday> [<https://perma.cc/M9Q4-FULM>] (referring to the “hall’s principal benefactor John W. ‘Jay’ Jordan”).

99. See Goldberg, *supra* note 21, at 50 (indicating that documents drafted for charitable naming arrangements often lack typical contract language).

100. See, e.g., Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98, 112 (Tenn. Ct. App. 2005); see *infra* notes 164-91 and accompanying text (discussing the *Daughters of the Confederacy* case).

101. Pomorski, *supra* note 26 (quoting attorney Ellis Carter).

102. 38A C.J.S. *Gifts* § 1 (2008); 38 AM. JUR. 2D *Gifts* § 2 (2010).

103. 38 AM. JUR. 2D *Gifts* § 2 (“Due to the absence of consideration for a gift, a gift *inter vivos* does not come within the legal definition of a contract . . . . Likewise, the chief distinction between a sale and a gift is that valuable consideration is necessary to support a sale . . .”).

104. 38A C.J.S. *Gifts* § 1 (stating that a gift “requires two things: a delivery of the possession of the property to the donee, and an intent that the title thereto shall pass immediately to him or her”).

105. 38 AM. JUR. 2D *Gifts* § 14; 38A C.J.S. *Gifts* § 10.

106. 38A C.J.S. *Gifts* § 10; see *infra* notes 111-19 and accompanying text.

107. See 38A C.J.S. *Gifts* § 12 (“As a general rule, any person of legal age, having the mental capacity to understand the nature of the transaction, may be the donor of property . . .”).

(iii) the charity accepted the money or property contributed;<sup>108</sup> (iv) the donor is “divest[ed] of all control” of the money or property contributed;<sup>109</sup> and (v) the contribution of money or property was absolute.<sup>110</sup>

The donor must intend to irrevocably transfer title currently to the donee without consideration. Without this intent, there is no gift.<sup>111</sup> The donor’s intent must be “clear and unmistakable . . . and this contention must be inconsistent with any other theory.”<sup>112</sup> In contrast to the intent associated with forming a contract, which is mutual between the parties, the intent required to make a gift is “entirely unilateral.”<sup>113</sup>

Whether the alleged donor had the requisite intent to make a gift is a question of fact.<sup>114</sup> The party seeking to establish a gift must present “clear, unmistakable, and unequivocal” evidence of the intent to make a gift,<sup>115</sup> but no specific language is required.<sup>116</sup> Courts determine intent based on all the facts and circumstances, which may include the words of any relevant instrument, the donor’s actions, and the relationship of the donor and donee.<sup>117</sup>

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108. *Cluck v. Ford*, 152 P.3d 279, 282-83 (Okla. Civ. App. 2006) (noting that if the gift is beneficial, the court may presume acceptance); *Brown v. Brown*, 501 So. 2d 24, 27 (Fla. Dist. Ct. App. 1986).

109. 38A C.J.S. *Gifts* § 10.

110. *Id.*

111. *Wash. Univ. v. Catalona*, 490 F.3d 667, 674 (8th Cir. 2007); *see generally* 38A C.J.S. *Gifts* § 16; 38 AM. JUR. 2D *Gifts* § 15.

112. *Ferer v. Aaron Ferer & Sons Co.*, 732 N.W.2d 667, 674 (Neb. 2007).

113. *Brown*, 501 So. 2d at 27 (contrasting a unilateral intent in the case of a gift on the one hand with a contract in which the parties have a “meeting of the minds”).

114. *See* 38 AM. JUR. 2D *Gifts* § 16; *Cluck v. Ford*, 152 P.3d 279, 283 (Okla. Civ. App. 2006) (“Where there is conflicting evidence, the trial court’s determination will not be set aside unless the determination is clearly against the weight of the evidence.”).

115. 38 AM. JUR. 2D *Gifts* § 15; *see also* *Ferer*, 732 N.W.2d at 673-74; *Wash. Univ.*, 490 F.3d at 674 (requiring “clear and convincing evidence”).

116. *Wash. Univ.*, 490 F.3d at 674. *But see* *Prentis Family Found. v. Karmanos Cancer Inst.*, 698 N.W.2d 900, 915 (Mich. Ct. App. 2005) (emphasizing that the agreement failed to use the words “in consideration for” and instead used the phrase “[in] recognition of and appreciation to” in concluding that the naming arrangement was a gift and not a contract).

117. *Wash. Univ.*, 490 F.3d at 674; *see* 38A C.J.S. § 10 (citing *Zink v. Stafford*, 509 S.E.2d 833 (Va. 1999)). *But see* *Knight v. Knight*, 182 A.D.2d 342, 344 (N.Y. App. Div. 1992) (concluding that the donor’s intent could be determined from the gifting instrument and the circumstances surrounding its execution).

For example, in *Washington University v. Catalona*,<sup>118</sup> the University and one of its former prominent cancer researchers, who had recently jumped to another major research university, argued about whether human research subjects made completed gifts of their biological samples to Washington University, or whether the research subjects were free to redirect the samples to the researcher's new university. The court considered as evidence the language of the brochure soliciting human research subjects, the language of the consent form referring to “*donation[s]*” of bodily tissues or blood,<sup>119</sup> and the relationship of the parties.<sup>119</sup> The court concluded that the human research subjects made completed gifts to Washington University when the samples were drawn and could not reassign those samples to another university.

### 1. Promises to Make a Future Gift

Outside the charitable giving arena, it is axiomatic that a mere promise to make a gift in the future is unenforceable.<sup>120</sup> “Words alone . . . are not [enough] . . . .”<sup>121</sup> Even a signed document promising a future gift is insufficient.<sup>122</sup>

For example, in the classic case of *Dougherty v. Salt*,<sup>123</sup> Aunt Tillie orally promised to make a \$3,000 gift to her eight-year-old nephew Charlie. At the goading of Charlie's guardian,<sup>124</sup> Aunt Tillie signed a promissory note stating that her estate would pay nephew

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118. *Wash. Univ.*, 490 F.3d at 667 (concluding that under the particular facts, research subjects made irrevocable gifts when contributing biological samples).

119. *Id.* at 674-75 (emphasis added).

120. 38 AM. JUR. 2D *Gifts* § 18 (“A promise to make a gift in the future . . . is revocable at any time until the gift is executed.”); *Brown v. Brown*, 501 So. 2d 24, 27 (Fla. Dist. Ct. App. 1987); *Courts v. Annie Penn Mem'l Hosp., Inc.*, 431 S.E.2d 864, 866 (N.C. Ct. App. 1993).

121. 38 AM. JUR. 2D *Gifts* § 18; *In re Estate of Piper*, 676 S.W.2d 897, 899 (Mo. Ct. App. 1984).

122. *See Bobo v. Stansberry*, 834 N.E.2d 373, 381 (Ohio Ct. App. 2005) (“And even if there had been a delivery of the paper during the life of the donor, ‘the gift of the maker's own note is the delivery of a promise only, and not of the thing promised, and the gift therefore fails.’” (citation omitted)).

123. *Dougherty v. Salt*, 125 N.E. 94, 94 (N.Y. 1919) (concluding an aunt made an unenforceable promise to make a gift in the future to her nephew, even though she signed a promissory note).

124. *Id.* (reporting that after Aunt Tilly said she would “take care” of Charlie, and that “she loved him very much,” Charlie's guardian said to Aunt Tilly, “I know you do, Tillie, but your taking care of the child will be done probably like your brother and sister done, take it out in talk”).

Charlie \$3,000 if she failed to pay Charlie during her lifetime. Aunt Tillie hand delivered the promissory note to Charlie and said, “[D]o not lose it. Some day it will be valuable.”<sup>125</sup> Upon Aunt Tillie’s death, Charlie sued her estate to collect the \$3,000. The court concluded that Aunt Tillie merely made an unenforceable promise to make a gift in the future. There was no enforceable contract because there was no consideration to support Aunt Tillie’s promise.<sup>126</sup>

Several policy arguments support this view that a promise to make a gift in the future should not be enforceable. One scholar writes, “Where a donative promise is based on affective considerations, in the absence of reliance a donative promisee is morally obligated to release a repenting promisor.”<sup>127</sup> Furthermore, with no consideration, there is no bargain, no quid pro quo, and no mutual agreement for the court to enforce.

Also, events occurring after the donor promises to give, but before he or she delivers the cash or property, may make enforcement inappropriate. For example, an aunt might promise to make a substantial gift to her eight-year-old nephew, and soon thereafter the aunt’s home might be destroyed in a fire or flood so that her family would not be able to afford food and housing and would need government assistance if a court enforced the gift.<sup>128</sup> In that situation, justice might be better served if a court refused to enforce the gift. Similarly, if the aunt promised to make a gift to her nephew, but the nephew intentionally trashed the aunt’s living room in an angry rage before the aunt delivered the money, again justice might be better served by not forcing aunt to make the gift.<sup>129</sup> These policies may explain, in part, why “[n]o legal system enforces all promises.”<sup>130</sup>

With this legal and policy foundation, it might seem that in the absence of naming rights or other consideration, a donor’s promise to contribute to a charity in the future would be unenforceable, and the old axiom that a promise to make a gift in the future is unenforceable would prevail. But U.S. courts have followed these fundamental

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125. *Id.* at 95.

126. *Id.* (also stating that Aunt Tillie “was not paying a debt. She was conferring a bounty”).

127. Melvin A. Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821, 821 (1997).

128. *See* Eisenberg, *supra* note 91, at 4-6.

129. *Id.*

130. JOSEPH M. PERILLO & JOHN D. CALAMARI, CALAMARI AND PERILLO ON CONTRACTS 149 (6th ed. 2009).

principles in only a handful of charitable giving cases with particular facts.<sup>131</sup>

In contrast, in the vast majority of charitable giving cases, courts create legal fictions to enforce a mere promise to contribute to a charity in the future.<sup>132</sup> Courts typically use special terminology, referring to a future promise to make a gift to a charity as a “pledge”

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131. Common facts in these cases tend to include: (i) the donor died before completing the pledge; (ii) the donor did not specify a particular use for the donation; and (iii) there was no evidence supporting the assertion that naming rights induced the donor’s gift. For example, in *Mount Sinai Hospital of Greater Miami, Inc. v. Jordan*, 290 So. 2d 484, 485 (Fla. 1974), Harry Burt executed two pledges of \$50,000 each but contributed only \$20,000 total before his death. The only consideration recited in the pledge forms was “to induce the subscription of others,” and most importantly, the pledge forms did not state any particular purpose for the donated funds. *See id.* at 486. The Hospital sued to enforce the pledges, but the Florida Supreme Court concluded there was no contract because there was no consideration. *Id.* at 486-87. Also, the court found that the Hospital failed to show reliance on the pledge under the doctrine of promissory estoppel. *Id.* at 487.

Also, in the case of *In re Bashas’ Inc.*, 468 B.R. 381, 382-83 (D. Ariz. 2012), the court refused to enforce a corporation’s pledge to pay \$25,000 per year for ten years to St. Joseph’s Foundation and Barrow Neurological Foundation after the donor declared bankruptcy under chapter 11. The court refused to enforce the pledge in part because: (i) although the pledge arose out of St. Joseph’s Pushing Boundaries Capital Campaign to finance construction of a new medical tower, the donor’s letter did not mention a specific purpose for the gift; and (ii) the charity made no promise to publicly honor the donor. *Id.* at 383.

Similarly, in *Congregation Kadimah Toras-Moshe v. DeLeo*, 540 N.E.2d 691 (Mass. 1989), the court refused to enforce a pledge when the donor had died because there was “no indication as to how the money should be used, or what [the Congregation] was required to do if anything in return for this promise,” *id.* at 692, 694, and the charity failed to show sufficient reliance. *Id.* at 693 (concluding that merely allocating the \$25,000 pledge in its budget was insufficient to prove reliance). Also in *DeLeo*, the pledge was oral. *Id.* at 692. Furthermore, although the charity argued that it planned to renovate a storage room into a library and name it after the donor, “there [was] no evidence in the record that the Congregation’s plans to name [the] library after the decedent induced him to make or to renew his promise.” *Id.* at 692. *See also* *Dalhousie Coll. at Halifax v. Boutilier Estate*, [1934] S.C.R. 642 (Can.) (describing in great detail why a court should not enforce a mere promise to make a gift to a charity). *Dalhousie* is cited in Budig et al., *supra* note 91, at 146, under “Foreign Cases” as *Governors of Dalhousie College v. Estate of Boutilier*, 3 D.L.R. 593 (Can. 1934).

132. *See* PERILLO & CALAMARI, *supra* note 130, at 225 (“With great frequency, but not with complete uniformity, charitable subscriptions have been enforced in [the U.S.]”); Budig et al., *supra* note 91, at 49-50 & n.3 (“[T]he result [generally] has been the enforcement of charitable subscriptions . . .”).

or a “subscription.”<sup>133</sup> In some cases, courts indulge in a fiction that the charity’s agreement to use the future contributions for charitable purposes provides consideration;<sup>134</sup> this is questionable because the charities generally have a pre-existing duty to use their funds for charitable purposes.<sup>135</sup> Other times, courts adopt the fiction that the promises of other donors to contribute constitute consideration to enforce each donation;<sup>136</sup> this is dubious as any private benefit from the donations of others seems very speculative.<sup>137</sup> Courts also turn to the doctrine of promissory estoppel to enforce charitable pledges<sup>138</sup> and may allow charities to enforce pledges under promissory estoppel when the charity cannot prove all the usual elements.<sup>139</sup>

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133. See *King v. Trs. of Bos. Univ.*, 647 N.E.2d 1196, 1199 n.3 (observing that the terms charitable “subscription” and charitable “pledge” frequently are used interchangeably).

134. See, e.g., *In re Morton Shoe Co.*, 40 B.R. 948, 951 (Bankr. D. Mass. 1984) (“The pledge document . . . clearly indicates that by accepting the subscription [the charity] agrees to apply the pledged amounts in accordance with the charitable purposes set forth in its charter. This is sufficient consideration to support the promise.”); *Neb. Wesleyan Univ. v. Estate of Couch (In re Estate of Couch)*, 103 N.W.2d 274, 276 (Neb. 1960) (finding consideration because the donor pledged \$5,000 for scholarships for “worthy girls”); *Cent. Me. Gen. Hosp. v. Carter*, 132 A. 417, 420 (Me. 1926).

135. A charity is obligated to use its resources for charitable purposes under both state law and federal tax law. See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 67-68 (11th ed. 2016) (“An organization is organized exclusively for one or more tax-exempt, charitable purposes only if its articles of organization limit its purposes to one or more exempt purposes . . .”). If a party already has an obligation to perform an action, an agreement to perform that action is not consideration for contract law purposes under the pre-existing duty rule. PERILLO & CALAMARI, *supra* note 130, at 213 (“The pre-existing duty rule [is] conceptually grounded on the idea that no promise is binding unless it is paid for by bargained-for detriment.”); see *Aerel, S.R.L. v. PCC Airfoils, L.L.C.*, 448 F.3d 899 (6th Cir. 2006).

136. See 13 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 37:40, at 280-83 nn.1-9 (4th ed. 2013) (listing nine sets of cases supporting this view).

137. See, e.g., *Mt. Sinai Hosp., Inc. v. Jordan*, 290 So. 2d 484, 486-87 (Fla. 1974) (holding pledge unenforceable even though pledge document stated it was made in consideration of the pledges of others); *I. & I. Holding Corp. v. Gainsburg*, 12 N.E.2d 532, 533 (N.Y. 1938) (“It is unquestioned that the request that other subscribers make contributions, . . . stated as a consideration in the subscription agreement, is not consideration.”).

138. See, e.g., *King v. Trs. of Bos. Univ.*, 647 N.E.2d 1196 (Mass. 1995). See generally Budig et al., *supra* note 91, at 53 n.14 (citing *Trs. of Farmington Acad. v. Allen*, 14 Mass. 172, 175-76 (1817)).

139. The American Law Institute (ALI) endorses relaxing the requirements for charities. *RESTATEMENT (SECOND) OF CONTRACTS* § 90 cmt. b (AM. LAW INST.

Thus, despite the general maxim that mere promises to give in the future are not legally enforceable, in the charitable arena, courts typically twist the rules to enforce charitable pledges whether or not the charity will grant naming rights in exchange for the donation.

## 2. Unconditional Completed Gifts

If a transaction satisfies all the elements for a valid gift,<sup>140</sup> including delivery and acceptance, then the gift is enforceable and the donor cannot revoke it. Courts and commentators say a completed gift is enforceable like a contract.<sup>141</sup> Thus, once the donor delivers the cash or property and the charity accepts, generally the donor cannot recover his or her donation, or obtain any other remedy, in the absence of fraud, undue influence, or similar conditions.<sup>142</sup>

As a result, if the donor does not secure his or her rights to name before or simultaneously with delivering the cash or property,<sup>143</sup> under the law of gifts, generally the charity need not grant naming rights. The very sad case of *Courts v. Annie Penn Memorial Hospital, Inc.*<sup>144</sup> demonstrates this legal principle and the attendant risks for donors.

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1981) (“[R]eliance need not be of [a] substantial character.”); see *Salsbury v. Northwestern Bell Tel. Co.*, 221 N.W.2d 609, 613 (Iowa 1974) (adopting the ALI approach).

140. See *supra* notes 102-05 and accompanying text (listing the elements for a valid gift).

141. See 38A C.J.S. § 1 (2008) (citing *Wilson v. Fackrell*, 34 P.2d 409, 412-13 (Idaho 1934)) (“[E]very perfected gift may be regarded as an executed contract, . . . and, where no rights of creditors intervene to affect its validity, such a transaction stands on the same footing as contracts founded on a valuable consideration”).

142. See 38 AM. JUR. 2D *Gifts* § 75 (2010) (“If a gift has been obtained by fraud or undue influence, an action may be brought to rescind or set aside the transaction.”). Remedies would be available if the other elements for a valid gift are not satisfied, such as if the donor lacks capacity. See *supra* notes 104-10 and accompanying text (listing the elements for a valid gift). Most important, the donor may recover the gift if it was subject to a condition subsequent that the charity failed to fulfill. See *infra* Subsection II.A.3.

143. If the donation is beneficial, the charity’s acceptance can be presumed. See 38A C.J.S. *Gifts* § 31 (“An acceptance will be presumed where the gift is beneficial to the donee.”).

144. 431 S.E.2d 864, 868 (N.C. Ct. App. 1993) (concluding that donor made an unconditional gift when donee accepted the property before donor stated that she intended for the gift to be subject to conditions).

Ms. Julia Courts grew up in Reidsville, North Carolina, and admired her grandfather who was a surgeon and prominent member of the Reidsville community.<sup>145</sup> Once she started working in 1927, Ms. Courts invested her excess earnings in the stock market and planned to someday donate her wealth to the Annie Penn Memorial Hospital located in Reidsville in honor of her grandfather.<sup>146</sup> After saving for over sixty years, Ms. Courts donated her stock to the Hospital by endorsing the stock certificates and mailing them directly to the Hospital's President.<sup>147</sup> Unfortunately, Ms. Courts failed to include with the stock certificates any direction that the hospital must acknowledge the service of her grandfather as a condition of the gift. The Hospital's President accepted the gift of the stock certificates immediately upon receipt. Although Ms. Courts subsequently told the Hospital President and other representatives that she donated "in honor of or to honor her family,"<sup>148</sup> the Hospital ultimately decided that it would provide absolutely no recognition to Ms. Courts, her grandfather, or any other member of her family.<sup>149</sup>

The Hospital indicated no reason for not providing any type of recognition other than that it never agreed to recognize the gift.<sup>150</sup> The North Carolina Court of Appeals referred to the "callousness"<sup>151</sup> of the Hospital representatives and commiserated with Ms. Courts

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145. *Id.* at 864.

146. *Id.*

147. *Id.* at 864-65. Ms. Courts planned to leave the stock to the Hospital in her will, but she decided to donate during her life when she learned that a private investor intended to purchase the stock of a company in which she was invested heavily. *Id.* at 864. Although not stated by the court, perhaps the outside investor's acquisition would have triggered a substantial capital gains tax for Ms. Courts. Donors frequently contribute substantially appreciated property to charity, rather than cash, to avoid the capital gains tax. *See* BRUCE R. HOPKINS, *THE TAX LAW OF CHARITABLE GIVING* 146 (3d ed. 2005) ("One of the chief principles underlying (and creating) the advantages of charitable contributions of securities . . . [is that] the amount of appreciation in the property, . . . which would be taxed as capital gain if the property were sold, escapes regular income taxation."); *see also* JOEL S. NEWMAN & DOROTHY A. BROWN, *FEDERAL INCOME TAXATION* 600 (6th ed. 2016).

148. *Courts*, 431 S.E.2d at 865.

149. *Id.* at 865-66 (explaining that Ms. Courts requested that the Hospital name its foundation after her family, and the Hospital declined). *But see id.* at 865 (noting some area newspapers ran stories about the substantial donation and the family's history in Reidsville).

150. *Id.* at 867 (stating "the Hospital did not explain to Ms. Courts in detail" its naming policy for its foundation or that Ms. Courts could establish "within the foundation a lasting endowment . . . in the Courts family name").

151. *Id.*



who “had unselfishly donated her life’s savings to the Hospital.”<sup>152</sup> Although Ms. Courts may have found some solace in the appeals court’s stern words toward the Hospital, ultimately the court concluded that under the law of gifts there was no remedy the court could provide. The appeals court noted that even if the donor intended to obtain naming rights, “any ‘undisclosed intention is immaterial in the absence of mistake, fraud, and the like.’”<sup>153</sup> Once the Hospital accepted the stock certificates, the gift was complete, and “‘after-the-fact’ conditions are not recognized by the law . . . [and] to allow conditions to attach later would put the donee in a position fraught with uncertainty regarding his or her rights to the property received.”<sup>154</sup> As discussed later, the court might have had some options if it had applied contract law rather than the law of gifts.<sup>155</sup>

### 3. *Conditional Gifts*

A valid gift must vest title to the donated property in the donee.<sup>156</sup> Nevertheless, a valid gift can be subject to a condition subsequent<sup>157</sup> so that if the condition is not satisfied the gift will fail.<sup>158</sup> A typical gift with a condition subsequent arises if the donor transfers title to the property and simultaneously limits the donee’s “use of the [property] to a particular purpose and provide[s] that title will revert to the donor if the use for the special purpose ceases.”<sup>159</sup>

If the donee fails to satisfy the condition subsequent, the donor’s remedy is “limited to a recovery of the gift.”<sup>160</sup> This creates an extreme, all-or-nothing situation, where either the donee keeps the gift or the gift reverts to the donor. Perhaps because the results are so extreme, one court has stated that “conditions must be created by express terms or by clear implication and are construed strictly.”<sup>161</sup> The donor’s mere hopes or expectations are insufficient to create a

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152. *Id.*

153. *Id.* at 866 (quoting *Howell v. Smith*, 128 S.E.2d 144, 146 (N.C. 1962)).

154. *Id.* at 868.

155. *See infra* notes 524-33 and accompanying text (discussing the definition of an “offer” and the ability of a court to supply omitted terms).

156. 38A C.J.S. *Gifts* § 38 (2008).

157. *Id.* § 39.

158. 38 AM. JUR. 2D *Gifts* § 67 (2010); *Courts*, 431 S.E.2d at 866.

159. 38 AM. JUR. 2D *Gifts* § 67.

160. 38A C.J.S. *Gifts* § 38.

161. *Id.* (citing *Tenn. Div. of United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98 (Tenn. Ct. App. 2005)).

condition subsequent.<sup>162</sup> In some situations, courts have refused to enforce oral conditions.<sup>163</sup>

In a factually complex charitable naming rights case, the court ultimately found that a division of the Daughters of the Confederacy made a conditional gift to a predecessor of Vanderbilt University.<sup>164</sup> The convoluted facts included three gifting instruments and negotiations spanning almost twenty years. A division of the Daughters of the Confederacy wanted to sponsor a college or university dormitory where female descendants of Confederate soldiers could stay rent-free and pay other dormitory expenses at cost.<sup>165</sup> In 1913, that division of the Daughters of the Confederacy entered into an agreement with a teachers college that ultimately would merge into Vanderbilt University. This first agreement provided in part that the Daughters would raise \$50,000, which would cover the college's entire anticipated construction cost for a dormitory. By 1927, the Daughters had not even raised \$18,000, but at that time they entered into a second agreement with the teachers college under which the Daughters contributed slightly less than \$18,000 to the teachers college. The teachers college agreed to invest the funds at interest, but the teachers college would return the amount if the Daughters of the Confederacy "decided to recall [the money]."<sup>166</sup>

Finally, in 1933, the Daughters of the Confederacy had raised the \$50,000, but by that time all parties agreed that \$150,000 would be needed to build the dormitory. In a 1933 document, the Daughters donated approximately \$32,000 (to reach the \$50,000 goal), and the teachers college agreed to build the dormitory if a government agency called the National Recovery Administration would provide the extra \$100,000 needed. The teachers college also agreed that it would "place on the [dorm] an inscription naming it 'Confederate Memorial.'"<sup>167</sup> This third document "explicitly stated that it was 'the

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162. 38 AM. JUR. 2D *Gifts* § 67.

163. See, e.g., *State v. Thom*, 563 P.2d 982 (Haw. 1977). *But see* *Martinez v. Martinez*, 678 P.2d 1163 (N.M. 1984) (enforcing an alleged oral condition). When engagement rings are involved, however, some courts have been willing to imply a condition that the donee must return the ring if the parties do not marry. See, e.g., *Lindh v. Surman*, 742 A.2d 643 (Pa. 1999); *Cooper v. Smith*, 800 N.E.2d 372 (Ohio Ct. App. 2003). *But see* *Albinger v. Harris*, 48 P.3d 711, 720 (Mont. 2002).

164. *Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 120 (Tenn. Ct. App. 2005).

165. *Id.* at 104.

166. *Id.*

167. *Id.* at 105.

intention of the parties that this contract shall be void and of no effect in case [the additional funding] is not obtained from said National Recovery Administration.”<sup>168</sup> The National Recovery Administration never provided the additional \$100,000; instead the teachers college paid the final \$100,000 to make the dormitory construction possible.<sup>169</sup>

The dormitory opened in 1935 with the words “Confederate Memorial Hall’ in incised lettering on the pediment on the front of the building.”<sup>170</sup> From 1935 until the late 1970s, female descendants of Confederate soldiers lived in the dormitory rent-free and paid “other dormitory expenses on an estimated cost basis.”<sup>171</sup> In 1979, the teachers college merged into Vanderbilt University.<sup>172</sup> In 1983, Vanderbilt ended the practice of leasing rent-free and allowing expenses to be paid at cost.

In 1987 and 1988, “Vanderbilt spent approximately \$2.5 million to renovate and upgrade Confederate Memorial Hall,”<sup>173</sup> and apparently the Daughters of the Confederacy contributed nothing to the cost of that renovation. After paying \$2.5 million for the renovation and upgrade, certain University officials and the Vanderbilt University Student Government Association began discussing the “propriety of retaining” the word “Confederate” in the name of the dormitory.<sup>174</sup> In connection with these conversations about the impact of the word “Confederate,”<sup>175</sup> the University

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168. *Id.*

169. *Id.* (explaining that the National Recovery Administration denied the request because the teachers college “was not a ‘public body’”).

170. *Id.*

171. *Id.* at 104-05.

172. *Id.* at 106.

173. *Id.*

174. *Id.* at 106-07. The court summarized the positions as follows:

According to Vanderbilt, the maintenance of the inscription on the pediment of Confederate Memorial Hall forces Vanderbilt to send a message of racial hatred and exclusion that it no longer wishes to send. According to the Tennessee [Daughters of the Confederacy], the inscription is not a symbol of racial intolerance and oppression, and Vanderbilt’s decision to remove it is nothing less than an attempt to rewrite history in a manner that demeans its members’ ancestors.

*Id.* at 120.

175. In response to the discussions after the renovation, Vanderbilt University’s Chancellor Joe B. Wyatt issued a statement “announcing that he was not inclined to recommend renaming Confederate Memorial Hall based on the historical information currently available and because of ‘the absence of any indication that the naming . . . was in any sense intended to support either slavery or any other form of prejudice toward Blacks.’” *Id.* at 107.

installed a plaque at the entrance to the dormitory explaining the motivations for the name but did not change the name of the dormitory at that time.<sup>176</sup> Eventually, in 2002, a new chancellor of Vanderbilt University announced that the word “Confederate” would be stricken, the name of the dormitory would change to “Memorial Hall,” and the University reflected the change on its maps, website, and correspondence.<sup>177</sup>

The division of the Daughters of the Confederacy sued for breach of contract.<sup>178</sup> The trial court held for Vanderbilt University, in part because the 1933 document was the only one that required the “Confederate” name on the dormitory, and the 1933 document was void according to its express terms because the National Recovery Administration failed to provide the \$100,000 in construction funds.<sup>179</sup>

On appeal, the court rejected contract law and chose to apply the law of gifts.<sup>180</sup> The court stated that although each of the three documents between the parties used the word “contract,”<sup>181</sup> the court was not bound by isolated statements and instead would analyze all the language of the documents, the actions of the donor, and the relationship of the parties to determine whether the donor had the requisite intent to make a gift.<sup>182</sup> In finding that the arrangement was a conditional gift, the court stated, “[T]he plain language of the three agreements . . . repeatedly describes the \$50,000 . . . as a ‘gift’”<sup>183</sup>

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176. *Id.* at 107 & n.11 (reproducing a draft version of the inscription on the plaque stating in part that the Daughters of the Confederacy contributed funds to construct the dormitory “in memory of their fathers and brothers who fought in the War between North and South, 1861–65”).

177. *Id.* at 107-08.

178. *Id.* at 109.

179. *Id.* at 110.

180. In rejecting the law of contracts, the court stated, “[The agreements] do not purport to establish a typical commercial arrangement in which one party provides certain goods or services in return for a sum to be paid by the other party.” *Id.* at 112. Nevertheless, the court went on to mention that certain aspects of its analysis were consistent with contract law. *See id.* at 118 (stating that “[t]he courts do not concern themselves with the wisdom or folly of a contract” in response to concerns about enforcing the requirement that Vanderbilt use the term “Confederate” to keep the gift).

181. *Id.* at 112.

182. *See supra* notes 111-19 and accompanying text (regarding the intent to make a gift).

183. *Daughters of the Confederacy*, 174 S.W.3d at 112. For example, the 1913 document was labeled “Contract,” but the document specifically stated it was intended “to evidence . . . ‘the conditions which will be attached to the gift.’” *Id.* at 104 (emphasis added).

and noted that the charitable status of the college “suggests the possibility of a donative intent on the part of the [Daughters of the Confederacy].”<sup>184</sup>

The court stated that any conditions to a gift “must be created by express terms or by clear implication and are construed strictly.”<sup>185</sup> Based on the documents, the court found three conditions to the gift: (i) that the college must use the \$50,000 towards the construction of a dormitory; (ii) that the college allow female descendants of Confederate soldiers to live rent-free in the dorm; and (iii) that there must be “an inscription naming the [dorm] ‘Confederate Memorial.’”<sup>186</sup> The court found that Vanderbilt University and its predecessor satisfied the naming conditions for over sixty-five years, but Vanderbilt would fail if it removed the word “Confederate” as it threatened to do in 2002.

The court held that if Vanderbilt removed the word “Confederate” from the building’s pediment, it would have to repay the Daughters the \$50,000 original donation, plus an additional amount based on the change in the consumer price index,<sup>187</sup> which would amount to approximately \$700,000.<sup>188</sup> Initially, Vanderbilt avoided paying the money by leaving the inscription above the dormitory doors but deleting all references to “Confederate” when referring to the building.<sup>189</sup> In 2016, however, Vanderbilt announced that it would remove the word “Confederate” from the building’s pediment and pay the Daughters \$1.2 million.<sup>190</sup>

The court chose not to treat the arrangement as a charitable trust, stating, “A donating party will be deemed to have created a

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184. *Id.* at 112.

185. *Id.* at 115.

186. *Id.* at 116.

187. *Id.* at 119.

188. The Bureau of Labor Statistics provides an online calculator using the “average Consumer Price Index for a given calendar year.” *About the CPI Inflation Calculator*, BUREAU LAB. STAT., [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) [<https://perma.cc/Z78h-XZNC>] (last visited Jan. 2, 2017) (determining that \$50,000 in 1933 has the purchasing power of \$751,153.85 in 2005); *see also* R. WILSON FREYERMUTH, JEROME M. ORGAN & ALICE M. NOBLE-ALLGIRE, *PROPERTY AND LAWYERING* 218 (3d ed. 2011) (stating that the amount was \$700,000).

189. Scott Jaschik, *Lost Cause at Vanderbilt*, *INSIDE HIGHER ED* (July 13, 2005, 4:00 AM), <http://www.insidehighered.com/news/2005/07/13/vandy> [<https://perma.cc/NS7F-5XYX>].

190. Anderson, *supra* note 3.

trust only if the party has expressed with certainty its intent to create a trust.”<sup>191</sup>

#### 4. *All-or-Nothing Remedy*

In the case of a conditional gift, a court’s ability to redress a problem is severely limited. For example, in the *Daughters of the Confederacy* case, the court stated that if Vanderbilt failed to satisfy the condition, the gift would fail, and the only remedy was for the gift to revert back to the Daughters of the Confederacy.<sup>192</sup> In that circumstance, in 2005, the court would award the Daughters of the Confederacy approximately \$750,000.<sup>193</sup> As Vanderbilt University pointed out, multiple facts strongly indicated this recovery was disproportionate to any harm caused to the Daughters of the Confederacy or to any wrongdoing on Vanderbilt’s part. The Daughters of the Confederacy contributed only \$50,000 in 1933 toward the construction of a dormitory that cost \$150,000.<sup>194</sup> Female descendants of Confederate soldiers stayed rent-free in the dorm from 1935 through 1983 and paid only cost for certain dormitory charges.<sup>195</sup> The dorm was named “Confederate Memorial Hall” for over sixty-five years, and the Daughters of the Confederacy apparently contributed nothing when Vanderbilt spent \$2.5 million to renovate the dorm in 1987 and 1988.

The Tennessee Court of Appeals stated that “where a donee fails or ceases to comply with the conditions of a gift, the donor’s remedy is limited to recovery of the gift.”<sup>196</sup> The court found that because “the value of a dollar today is very different from the value of a dollar in 1933 . . . the amount Vanderbilt must pay to the [Daughters of the Confederacy] . . . to return the gift should be based on the consumer price index.”<sup>197</sup> In rejecting Vanderbilt University’s argument to reduce the damage award for the value of the free rent and the naming rights enjoyed by the Daughters for over sixty-five

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191. *Daughters of the Confederacy*, 174 S.W.3d at 113.

192. *Id.* at 119; see generally 38A C.J.S. *Gifts* § 38 (2016).

193. See *supra* note 188 and accompanying text.

194. See also *Daughters of the Confederacy*, 174 S.W.3d at 104.

195. *Id.* at 106.

196. *Id.* at 119.

197. *Id.* (reasoning that the index should be based on figures “published by the Bureau of Labor Statistics of the United States Department of Labor”).

years, the Tennessee Appeals Court summarily stated that the calculation of that amount would be “impermissibly speculative.”<sup>198</sup>

Apparently appreciating the potential harshness of this approach, at least one court has attempted to introduce some discretion. In *St. Mary’s Medical Center, Inc. v. McCarthy*,<sup>199</sup> an Indiana court indicated, in dicta, that a condition to a gift could be satisfied by “substantial” compliance even though the charity, at some point, fails to comply with the condition.<sup>200</sup>

In the *St. Mary’s* case, under her will, Cornelia Haney indirectly donated approximately \$250,000 to St. Mary’s Hospital “for the purpose of creating . . . a Haney Memorial.”<sup>201</sup> The court indicated this declaration of purpose might not constitute a “condition,”<sup>202</sup> but the court discussed the results *if* this created a condition.<sup>203</sup> The Hospital used the money to construct a chapel in 1956 with a plaque stating that it was a memorial to Cornelia Haney. In 2003, the Hospital determined that to expand its medical facilities it needed to demolish the chapel.<sup>204</sup> A distant family member sought an injunction, and the trial court likely applied some traditional gift rules because it concluded that the hospital must “do nothing that might hasten the chapel’s demise and that [the hospital must] wait until the chapel crumble[s] of its own accord” perhaps in another fifty to seventy-five years.<sup>205</sup> On appeal, the court held that even if Haney made a conditional gift, the Hospital had *substantially* complied with the condition because the Hospital publicized the

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198. *Id.*

199. 829 N.E.2d 1068 (Ind. Ct. App. 2005).

200. *See id.* at 1077. In the case of a trust, a failure to literally comply with a condition may be excused under the doctrine of *cy pres*. *See Allison Anna Tait, Publicity Rules for Public Trusts*, 33 CARDOZO ARTS & ENT. L.J. 421, 447-48 (2015).

201. *St. Mary’s*, 829 N.E.2d at 1071. Haney donated the money for the benefit of the hospital and instructed a committee to designate how the hospital could use the donation.

202. Cornelia Haney made the gift under her will, and in these circumstances the court stated “the clear majority rule is ‘that nothing short of express provisions for forfeiture and either a reverter, a gift over or a right to retake . . . would enable a donor to effectively impose a condition subsequent.’” *Id.* at 1076.

203. *See id.* at 1077 (noting that “even *if* there was a . . . valid condition subsequent, St. Mary’s use of the chapel for nearly fifty years represents substantial compliance with any such . . . condition” (emphasis added)).

204. *Id.*

205. *Id.* at 1077 n.4.

Haney name for almost fifty years with the plaque at the chapel.<sup>206</sup> The appeals court specifically noted that the Hospital owned the land under the chapel; the Haney contribution merely built the chapel, and the Hospital likely did not anticipate its land would be occupied for approximately one hundred and twenty-five years when it accepted the Haney gift.<sup>207</sup>

The Indiana court's use of a substantial compliance standard, even in dicta, may provide courts using the gift rules with a bit more flexibility. Nevertheless, it still leaves courts with only an all-or-nothing option. If the donee-charity complies (or perhaps substantially complies), there is absolutely no remedy at all for the donor. On the other hand, if the donee-charity fails to comply (or fails to substantially comply), then the entire gift must revert back to the donor even if the donor enjoyed substantial benefits before the charity failed.

#### B. Contract Law: Can a Charitable Donation Be a Contract?

This Article asserts that donors and charities may find more predictability by structuring naming rights transactions as contracts, rather than as gifts, and courts may reach more reasonable results when disputes arise by applying the law of contracts rather than the law of gifts. But is there any authority for treating charitable contributions as contracts?

A court has stated that granting naming rights or other public recognition does not prevent a transfer from being a charitable contribution.<sup>208</sup> This conclusion seems sound for substantial contributions because the normal "ask amount" for a charitable naming gift is 50% of the cost of the item named,<sup>209</sup> and commercial firms typically pay only 10% to 20% of the cost of a professional sports stadium or arena for naming rights.<sup>210</sup>

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206. *Id.* at 1077 (relying on Indiana cases suggesting that compliant use for nearly fifty years constitutes substantial compliance).

207. *Id.* at 1077 n.4 (questioning whether the hospital understood that it was "tying up a substantial piece of its grounds for at least 100 to 125 years when it agreed to use the funds from Haney's estate to build the chapel").

208. *Id.* at 1073 n.2 ("It is well-settled that a gift does not lose its charitable character simply because the donor also wants the gift to be recognized as a personal or family memorial.").

209. BURTON, *supra* note 19, at 142.

210. *See* Drennan, *supra* note 21, at 94-96.



The analysis to determine if a charitable contribution could be a contract can begin with the fundamentals. Parties create a contract<sup>211</sup> with (i) an offer and (ii) an acceptance, (iii) supported by consideration.<sup>212</sup> The search for the offer and the acceptance in a charitable naming rights arrangement can be challenging, and the potential questions involving consideration are multifaceted and existential.<sup>213</sup>

1. *Offer and Acceptance: Bargaining Over Generosity and Praise*

The Restatement (Second) of Contracts (“Restatement”) provides working definitions of “offer” and “acceptance.” An offer is a “manifestation of willingness to enter into a bargain” that invites acceptance and is intended to conclude negotiations.<sup>214</sup> An acceptance is a manifestation of assent to an offer in the manner invited by the offeror.<sup>215</sup> When the promisor has made an offer, and the promisee accepts, there is mutual assent.<sup>216</sup>

A number of cases categorize certain charitable naming arrangements as contracts rather than gifts. Generally, these cases find that the donor made the offer when pledging<sup>217</sup> to donate, and the charity accepted either when it verbally assented, when it retained the first pledge payment, or when it incurred liabilities based on the pledge.

A bilateral contract arises if the offeror allows his or her promise to be accepted by a return promise, and the offeree accepts by *promising* to perform.<sup>218</sup> For example, the donor and the charity may sign a letter agreement specifying when the donor will make a series of donations, how the charity will use the money donated, the

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211. In general, a contract is a set of promises if the law recognizes the performance as a duty, and the law grants a remedy for a breach. See RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981).

212. PERILLO & CALAMARI, *supra* note 130, at 23, 151.

213. See Cozzillio, *supra* note 23, at 1335 (stressing that without consideration there is no enforceable contract).

214. RESTATEMENT (SECOND) OF CONTRACTS § 24.

215. *Id.* § 50.

216. *Id.* § 17.

217. A pledge is a promise to make a series of donations to a charity over time. See *King v. Trs. of Bos. Univ.*, 647 N.E.2d 1196, 1204 (Mass. 1995). The terms “charitable pledge” and “charitable subscription” are interchangeable. See *id.* at 1199 n.3.

218. PERILLO & CALAMARI, *supra* note 130, at 57.

details of the naming arrangement, and other terms.<sup>219</sup> In contrast, a unilateral contract arises when an offeror allows acceptance by actual performance, and the offeree accepts by performing.<sup>220</sup> As a classic example, if I publicly post an offer to pay \$300 to anyone who finds and returns my lost dog to me, I have made an offer for a unilateral contract.<sup>221</sup> I am bargaining for the return of my lost dog, not for a mere *promise* to find and return my dog. Courts in charitable naming rights cases may find either (i) a bilateral contract or (ii) a unilateral contract.

#### a. Bilateral Contracts

Justice Cardozo's landmark opinion in *Allegheny College* concludes that the charitable naming rights arrangement was a bilateral contract.<sup>222</sup> In *Allegheny College*, the College launched a drive to raise \$1.25 million, and the appeal eventually reached Mary Yates Johnston. Johnston signed a document called an "estate pledge" stating her estate would pay the College \$5,000 within thirty days after her death.<sup>223</sup> The pledge was subject to the requirements that the College retain the donated amount in a separate fund, publicize it as the "Mary Yates Johnston Memorial Fund," and use it for scholarships for ministry students.<sup>224</sup> Although she had not promised to donate during her life, Johnston contributed \$1,000 to the College toward the pledge. Later, she repudiated her pledge to donate the balance.<sup>225</sup>

When Johnston's estate failed to pay within thirty days of her death, the College sued the executor of her estate for the \$4,000 balance. Justice Cardozo, writing for the majority, held for the

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219. See, e.g., *Dunaway v. First Presbyterian Church*, 442 P.2d 93, 96 (Ariz. 1968).

220. ROBERT A. HILLMAN, *PRINCIPLES OF CONTRACT LAW* 50 (2d ed. 2009).

221. See Keith A. Rowley, *You Asked for It, You Got It . . . Toy Yoda: Practical Jokes, Prizes, and Contract Law*, 3 NEV. L.J. 526, 550 (2003); see also PERILLO & CALAMARI, *supra* note 130, at 67.

222. *Allegheny Coll. v. Nat'l Chautauqua Cty. Bank*, 159 N.E. 173, 176 (N.Y. 1927) (concluding that the charity's agreement to provide naming rights was consideration to support a bilateral contract); see Cozzillio, *supra* note 23, at 1336 (referring to *Allegheny College* as a "landmark" opinion).

223. *Allegheny Coll.*, 159 N.E. at 174.

224. *Id.* (specifying that the school was to use the funds "to educate students preparing for the ministry, either in the United States or in the Foreign Field").

225. *Id.*

College and concluded that the pledge was a bilateral contract.<sup>226</sup> In identifying the offer and acceptance, Justice Cardozo wrote that after Johnston pledged to donate, then “[t]he moment that the college accepted \$1,000 as a payment on account there was an assumption of a duty . . . to maintain the . . . spirit of its creation.”<sup>227</sup> In other words, there was a bilateral contract because Johnston, in writing, offered to donate in exchange for the College’s promise to name the fund after Johnston and use the money for the specified scholarships, and the College’s act of retaining her \$1,000 donation was an implied promise to comply with her terms involving contributions totaling \$5,000.<sup>228</sup> Several commentators question Justice Cardozo’s approach in *Allegheny College*.<sup>229</sup> Nevertheless, *Allegheny College* clearly concludes that a charitable naming rights arrangement can be a contract.

In *Dunaway v. First Presbyterian Church of Wickenburg*, the Church’s pastor invited parishioner S. Judson Dunaway to make a presentation on fundraising to the Church’s Building and Finance Committee to kick-start a campaign to build an annex for the Church’s Sunday school.<sup>230</sup> At the end of the meeting, Dunaway stated that he and his wife would “‘start the ball rolling’ by a contribution of stock worth \$10,000 to be applied to the construction of the [annex] and stipulat[ed] that there be a plaque ‘honoring Reverend and Mrs. Poling.’”<sup>231</sup> The Dunaways contributed the stock, and the Church’s pastor, Reverend Poling, promptly transferred the stock to the Church treasurer.<sup>232</sup> Soon, the Reverend Poling resigned as pastor. Approximately one year after the transfer of stock, church officials wrote and asked the Dunaways if the Church could use

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226. *Id.* at 176.

227. *Id.* at 175.

228. *Id.*

229. See *supra* note 23; see also Cunningham, *supra* note 23, at 1403 n.131 (asserting that “Cardozo’s treatment of the contract as bilateral . . . was necessary to respond to [Judge] Kellogg’s dissent”). But see Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149, 150, 152 (2005) (observing, “[A]lmost everyone complains about the opinion,” but Professor Bridgeman defends Justice Cardozo’s approach, stating, “Cardozo was . . . applying [the doctrine of consideration] in a way that respected both how the parties likely understood the transaction themselves and how parties typically understand [charitable naming rights] transactions”).

230. 442 P.2d 93, 94 (Ariz. 1968) (concluding that a charitable pledge was a bilateral contract when the charity accepted the donated property).

231. *Id.*

232. *Id.*

\$8,000 of the contribution to purchase real estate across the street, rather than build a Sunday school annex.

The Dunaways refused and sued to recover the stock arguing that the Church could only use the donation to build a Sunday school annex “as a memorial for the Reverend Poling.”<sup>233</sup> After observing that “the law in this [area] is neither uniform nor well settled,”<sup>234</sup> the Arizona Supreme Court stated “where the gift has passed into the hands of the donee, there is an *implied promise* agreeing to the purposes for which it is offered from the acceptance of the donation and there arises a bilateral contract supported by a valuable consideration.”<sup>235</sup> Specifically in regards to acceptance, the Court stated, “[T]he Church, by exercising dominion over the stock, assented to the conditions of the donation and is bound both in law and in good conscience to perform the conditions or to return the stock and dividends.”<sup>236</sup> The Court concluded that unless the Church uses the donation to build the annex with a plaque honoring the Reverend Poling within a reasonable time, it must return the stock and all intervening dividends to the Dunaways.<sup>237</sup>

In *Stock v. Augsburg College*, Augsburg College solicited donations for its 21st Century Fund to raise \$25 million.<sup>238</sup> The campaign brochure said, “Named gift opportunities are numerous.”<sup>239</sup> After some negotiations with alumnus Elroy Stock, a College representative sent a letter to Stock recognizing Stock’s “right to designate . . . the ‘Elroy Stock Communications Wing’” in a new building in anticipation of a \$500,000 donation.<sup>240</sup> Subsequently, the College’s Board of Regents voted to name the wing after Elroy Stock, and Stock donated the \$500,000.

Shortly thereafter, news outlets reported that Stock had conducted a racist letter-writing campaign.<sup>241</sup> The College’s Board of

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233. *Id.*

234. *Id.* at 95.

235. *Id.* (emphasis added) (citing *Allegheny Coll. v. Nat’l Chautauqua Cty. Bank*, 159 N.E. 173 (N.Y. 1927), and eight other cases).

236. *Id.* at 96 (discussing as authority RESTATEMENT (FIRST) OF CONTRACTS § 72(2) (AM. LAW INST. 1932), stating that exercising “dominion in the absence of other circumstances showing a contrary intention is an acceptance”).

237. *Id.* at 96.

238. No. C1-01-1673, 2002 WL 555944, at \*1 (Minn. Ct. App. Apr. 16, 2002).

239. *Id.* at \*6.

240. *Id.* at \*1.

241. *Id.* at \*2 (“Following a . . . news report that exposed [Stock’s racist] letter-writing campaign, there was a great deal of unfavorable publicity about

Regents voted to keep Stock's \$500,000 donation and use it to build the new wing, but they also voted *not* to name the new Communications Wing after Stock. Instead, the Regents chose to name it the Foss-Lobeck-Miles Center.<sup>242</sup>

Eventually, Elroy Stock sued for breach of contract seeking to recover the \$500,000. The court did not expressly state whether the arrangement was a bilateral or unilateral contract. Nevertheless, in concluding that there was a contract and that the College breached the contract by failing to name the wing after Stock, the court stated the "[College] *promised* to name the wing after [Elroy Stock] in exchange for [his] \$500,000 donation."<sup>243</sup> The court's focus on the College's *promise* to name indicates that Stock made an offer for a bilateral contract, which the College accepted by its *promise* to name the building after Stock. Ultimately, Stock was unable to recover his donation because the statute of limitations on a contract action expired before he filed the lawsuit.<sup>244</sup>

#### b. Unilateral Contracts

*Paul & Irene Bogoni Foundation v. St. Bonaventure University* is a naming rights case in which the court found an offer to create a *unilateral* contract and an acceptance of that offer.<sup>245</sup> After discussions with a University representative, the Bogonis executed two documents each titled "Gift Commitment."<sup>246</sup> Under the first Gift Commitment document, the Bogonis pledged to contribute \$1.5 million over sixteen months to establish and support a new Bogoni Center for Gerontology Studies at the University.<sup>247</sup> Under the second

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[Stock]," and "[t]he publicity included articles about . . . his ties to Augsburg [College], his large contribution, and Augsburg's intent to name a wing of the building after [Stock].").

242. *Id.* at \*4.

243. *Id.* (emphasis added).

244. *Id.* (concluding that the naming arrangement was an enforceable contract, but the donor failed to sue to enforce his naming rights within the statute of limitations period for a contract action).

245. *Paul & Irene Bogoni Found. v. St. Bonaventure Univ.*, No. 102095/08, 2009 WL 6318140, at 11-12 (N.Y. Sup. Ct. Oct. 6, 2009) (concluding that the donors' promise to contribute and the charity's expenditure of donated funds created a unilateral contract).

246. *Id.* at 2-3. The foundations established by the Bogonis were likely the actual parties of many of the actions, *see id.* at 5 n.1, but for ease of reference, this discussion refers to the individuals rather than the foundations.

247. After signing the Gift Commitment, a few days later the Bogonis signed an "Endowment Agreement" specifying the name as The Paul and Irene Bogoni

Gift Commitment document, the Bogonis pledged to contribute \$2 million<sup>248</sup> over nineteen months to construct the “Paul and Irene Bogoni Library Addition,”<sup>249</sup> which would house the University’s rare books collection.

The Bogonis paid approximately \$2.6 million total, but they refused to pay the final \$900,000 of the library addition pledge.<sup>250</sup> The Bogonis complained about the University’s use of the funds and sued for specific performance. The Bogonis asked the court to enforce the terms of the arrangement, or alternatively, require that the University return all amounts to the Bogonis or pay those amounts into the court. The University moved for summary judgment asserting entitlement to the \$900,000 balance of the pledge.<sup>251</sup> Although the parties captioned the original documents “Gift Commitments,”<sup>252</sup> the court indicated the Bogonis made offers for unilateral contracts. In effect, the court found that the Bogonis offered to donate but only if the charity performed.<sup>253</sup>

Based on the evidence, the court determined that the University properly established the Bogoni Center for Gerontology Studies, would name the library addition for the Bogonis when it received the final \$900,000,<sup>254</sup> and incurred liability debts in reliance on the donors’ pledges.<sup>255</sup> The court quoted with approval an earlier case that “[i]t is the well established law of this State that charitable subscriptions (pledges) are enforceable . . . [as] an offer of a unilateral contract which, when accepted by the charity by incurring liability in reliance thereon, becomes a binding obligation.”<sup>256</sup> Thus, the court found acceptance because the University spent money to

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GRACE Project, with GRACE serving as an acronym for Gerontology Research, Academic Preparation, and Community Enrichment. *Id.* at 2-3.

248. *Id.* at 4-5. The original pledge for the library addition was \$1.5 million, and the Bogonis later increased the pledge to \$2 million. *Id.*

249. *Id.* at 5. Other documents indicated the name would be “The Paul and Irene Bogoni Rare Books Library.” *See id.* at 15 n.2.

250. *Id.* at 8-9.

251. *Id.* at 11.

252. *Id.* at 4.

253. *Id.* at 11-17.

254. *Id.* at 11. At the time of trial, the parties failed to clearly state the name of the library addition. In any event, the court declined to treat the University as failing to meet its naming obligation, presumably because if the University had not already named the addition after the Bogonis, it would once the Bogonis fulfilled the pledge. *Id.* at 15 n.2.

255. *Id.* at 11-17.

256. *Id.* at 12 (quoting *Cohoes Mem’l Hosp. v. Mossey*, 25 A.D.2d 476 (N.Y. App. Div. 1966)).

build the library addition. The court in *Bogoni* relied heavily on an earlier case, *Woodmere Academy*, in concluding this was a unilateral contract.<sup>257</sup>

In *Woodmere Academy*,<sup>258</sup> the Academy solicited pledges in 1969 to build a new school library. Later that year, a donor executed a formal printed pledge for \$375,000 payable in installments before January 1, 1973. By December 1972, the donor had paid only \$50,000, and on December 12, 1972, both the Academy and the donor signed a letter “in the nature of an agreement” calling for \$125,000 payable immediately and \$200,000 payable December 31, 1973.<sup>259</sup> The letter agreement stated in part that “[i]n recognition of your concern and interest . . . our library . . . has been named” for your spouse.<sup>260</sup> The donor paid the \$125,000 promptly but failed to pay the final \$200,000. The Academy sued for the \$200,000 balance. The court found that the December 12, 1972 letter was a “binding agreement” and quoted two prior cases for the conclusion that “such subscriptions are enforceable on the ground that they constitute an offer of a unilateral contract which, when accepted by the charity by incurring liability in reliance thereon, becomes a binding obligation.”<sup>261</sup> On appeal, the court affirmed but did not address whether the contract was bilateral or unilateral.<sup>262</sup>

A commentator describing a 2014 case provides a very succinct and practical summary of this unilateral contract approach.

[T]he pledge was ostensibly made in furtherance of a fundraising campaign, so it must be examined under the theory of a unilateral contract. Thus, the pledge would not become binding until the charity had sufficiently acted upon the pledge so as to incur liability . . . . This would include starting construction, employing architects and paying for plans, raising additional pledges based upon the disputed pledge, or taking on a construction loan for the project. The donor’s partial payment of the pledge, whether alone or in conjunction with concrete action on the part of

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257. *Id.* at 12-14. Consistent with a contract approach, the court employed the parol evidence rule to ignore the Bogonis’ allegations that the charity agreed to other conditions not stated in the two Gift Commitment documents. *Id.*

258. *Woodmere Acad. v. Steinberg*, 53 A.D.2d 156 (N.Y. App. Div. 1976), *aff’d*, 363 N.E.2d 1169, 1171 (N.Y. 1977) (concluding that the donor and the charity entered into a unilateral contract).

259. *Id.* at 157-58.

260. *Id.* at 158.

261. *Id.* at 159-60 (quoting *I. & I. Holding Corp. v. Gainsburg*, 12 N.E.2d 532, 534 (N.Y. 1938); *Cohoes Mem’l Hosp. v. Mossey*, 25 A.D.2d 476, 476-77 (N.Y. App. Div. 1966)).

262. *Woodmere Acad.*, 363 N.E.2d at 1172 (applying the parol evidence rule from general contract law).

the charity, has also been deemed sufficient to indicate acceptance of the unilateral contract.<sup>263</sup>

Based on the approach taken by the courts in these cases, it does not appear to make much difference whether a pledge agreement is a bilateral contract or a unilateral contract. Under the bilateral contract approach in *Allegheny College*, once the charity accepts one payment, the donor is contractually bound to make the remaining payments under the pledge, and the charity must name the property when the donor makes all the payments. Under the unilateral contract approach in *Bogoni*, once the charity incurs liabilities in reliance on the pledge, the donor must make the remaining pledge payments, and the charity must name the property when the donor makes all the pledge payments.

## 2. *When Is Public Recognition Consideration for a Promise to Donate?*

A foundational doctrine of contract law is the objective bargain theory of consideration.<sup>264</sup> The following three-part test determines whether the parties' mutual assent is supported by consideration under the doctrine: (i) the promisee must suffer a legal detriment,<sup>265</sup> or the promisor (or a third party) must enjoy a legal benefit;<sup>266</sup> (ii) the

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263. Spencer L. Reames, In re *Kramer and the Enforceability of Charitable Pledges*, 87 N.Y. St. B.J. 22, 24 (Jan. 2015).

264. See generally RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981); PERILLO & CALAMARI, *supra* note 130, at 152-53 (observing “[t]he essence of consideration . . . is legal detriment, that has been bargained for by the promisor, and exchanged by the promisee in return for the promisor’s promise,” and “[t]he idea of consideration ‘as a bargained-for exchange’ must be understood in the context of the objective theory of contracts”).

265. PERILLO & CALAMARI, *supra* note 130, at 151.

266. There is ample authority that either a detriment or a benefit can serve as sufficient consideration; it is not necessary that the promisee’s detriment cause a benefit for the promisor. See *Hamer v. Sidway*, 27 N.E. 256, 257 (N.Y. 1891) (“Consideration means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first”); *Cozzillio*, *supra* note 23, at 1336 (stating that either a detriment to the promisee or a benefit to the promisor is necessary for consideration, but not both); see also *Pennsy Supply, Inc. v. Am. Ash Recycling Corp.*, 895 A.2d 595 (Pa. Super. Ct. 2006) (involving a situation in which the promisor enjoyed a benefit even though the promisee arguably did not suffer a detriment); PERILLO & CALAMARI, *supra* note 130, at 152 (indicating that the benefit may flow to a third party “so long as it is bargained for and given in exchange for the promise”).



detriment or benefit must induce the promise;<sup>267</sup> and (iii) the promise must induce the detriment or benefit.<sup>268</sup> A dense thicket of rules implement and supplement this three-part test.

Technically, a thorough search for consideration in a bilateral contract requires a double analysis. Each party is a promisor, and each party is a promisee, and both promises must be supported by consideration.<sup>269</sup> In the case of a typical bilateral charitable naming rights arrangement, however, there will be little doubt that the charity's promise to name something after the donor is supported by the donor's promise to transfer substantial cash or valuable property. As a result, this discussion of consideration will focus on whether the charity provides consideration to support the donor's promise to contribute.

#### a. Detriment, Benefit, Inducement, and Adequacy of Consideration

In general, the detriment to the promisee (the charity) includes a promise to do something the promisee (the charity) is not legally obligated to do, or to promise to refrain from doing something which the promisee (the charity) is legally entitled to do.<sup>270</sup> In these transactions, the charity normally will make two kinds of promises that may constitute a detriment: (i) a publicity promise and (ii) a promise regarding the use of the contributed funds, such as for the construction of a new building.

First, the promise to publicize, including the promise to name, can be a detriment because the charity is not otherwise legally

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267. PERILLO & CALAMARI, *supra* note 130, at 151.

268. *Id.* The Restatement (Second) of Contracts avoids the term "detriment," but it captures the concept by requiring a "performance or return promise," and defining "performance" broadly to include "(a) an act . . . or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation." RESTATEMENT (SECOND) OF CONTRACTS § 71(2)-(3). See PERILLO & CALAMARI, *supra* note 130, at 151 n.4 (noting that "[t]he difference . . . is not a difference of substance; rather, it is a difference in vocabulary").

269. PERILLO & CALAMARI, *supra* note 130, at 153 (noting that "in a bilateral contract there are two promisors").

270. *Id.*; *Hamer*, 27 N.E. at 257 ("'Consideration' means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first [party].").

obligated to publicize the donor's name.<sup>271</sup> The charity presumably will incur expenses in publicizing the donor's name, such as engraving the donor's name on the building, purchasing, engraving and installing a plaque, changing letterhead, commissioning and hanging a portrait, developing press releases or newsletters, and similar items. Some charities have a policy that they will not spend more than 1% of the donation to honor the donor.<sup>272</sup> Also, the charity is promising to forego its right to sell the naming honor to a different donor. For example, if the "ask amount" for a particular naming right is \$250,000, and the first donor pledges \$250,000 and claims the naming right, the charity has lost its right to sell that naming right to anyone else. In contrast, if the first donor pledges \$250,000 and requests anonymity, the charity still can offer the naming opportunity for \$250,000.

Second, in regards to the charity's promise to use the contribution for a particular purpose, as discussed in greater detail below,<sup>273</sup> not every legal detriment will be sufficient to satisfy the consideration requirement because of the party's intentions or other factors.<sup>274</sup> In regards to the charity's promise to use the donated funds for a particular purpose, some courts indicate this can be consideration,<sup>275</sup> but other courts, for sound reasons, have rejected this argument. The argument is particularly weak when a charity merely agrees to use the donated funds consistent with its charitable purposes<sup>276</sup> or when the donor's intent is to make a conditional gift.<sup>277</sup>

In regard to whether the detriment to the charity induces the donor's promise, this test asks whether the donor promised to contribute because the charity promised naming rights or agreed to another legal detriment. Intuitively, it might seem that this requirement would prevent some charitable naming rights

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271. See *Courts v. Annie Penn Mem'l Hosp., Inc.*, 431 S.E.2d 864, 867 (N.C. Ct. App. 1993) (concluding that a substantial donor was not entitled to any recognition).

272. See, e.g., BURTON, *supra* note 19, at 151-52.

273. See *infra* notes 308-13 and accompanying text (discussing the benevolent man hypothetical).

274. For example, the donor may be indifferent about the name and may not have bargained for the naming right. See, e.g., Eisenberg, *supra* note 16 (reporting that when Steven A. Schwarzman gave \$100 million for the renovation of the New York Public Library System it "was not his idea" to have the library named after him).

275. See *infra* note 326 and accompanying text.

276. See *infra* note 327 and accompanying text.

277. See *infra* notes 308-21 and accompanying text.

transactions from being contracts because the donor might have given even without the naming. For example, Stephen Schwarzman maintains that when he donated \$100 million to the New York Public Library, he did not intend to acquire the naming rights.<sup>278</sup>

In applying this test,<sup>279</sup> there are two important, non-intuitive, established doctrines that can be difficult to apply in charitable naming rights deals. First, it is well settled that the charity's detriment need not be the only thing that induces the promise, and courts and commentators observe that a part-gift/part-sale transaction is a contract supported by consideration.<sup>280</sup> Second, if the donor is making a gift and merely imposes a condition that is necessary for the charity to receive the gift, the charity's agreement to perform the condition is not consideration to support a contract.<sup>281</sup> These doctrines are discussed in more detail below.<sup>282</sup>

In regard to whether the donor's promise induced the charity's detriment, often it is clear that the charity is granting the naming rights in return for a particular pledge, especially in the context of a fundraising drive.<sup>283</sup> Nevertheless, there may be situations in which the donor has a strong connection to the charity, and it might be possible that the charity would have named the item regardless of a promised donation. For example, a school may be building a new athletic facility, a former coach at the school might promise to make a significant donation to help defray the cost, and the school might decide to name the new facility after the coach. There could be a *bona fide* issue of whether the coach's donation induced the school to name the facility after the coach. Perhaps the school would have named the athletic facility after the former coach even if the coach had contributed nothing.<sup>284</sup>

In regard to the adequacy of consideration, the case of a charitable naming transaction involving substantial sums, the amount of the contribution likely will significantly exceed the economic

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278. The library system added Schwarzman's name to the façade in front of its flagship building on Fifth Avenue in New York City. See *supra* note 274 and accompanying text.

279. See *infra* notes 283-84 and accompanying text.

280. See *infra* notes 285-99 and accompanying text.

281. See *infra* notes 308-21 and accompanying text.

282. See *infra* notes 285-321 and accompanying text.

283. BURTON, *supra* note 19, at 134 (discussing the practice of offering naming opportunities to donors as part of a successful capital campaign).

284. See, e.g., *In re Carson's Estate*, 37 A.2d 488, 489-90 (Pa. 1944) (educational and religious organization planned to name a new building after Dr. John F. Carson even before his sister-in-law made a pledge).

value of the naming rights. A researcher has concluded that as a rule of thumb, charities tend to ask a naming donor to contribute 50% of the construction cost of the property to be named,<sup>285</sup> although the percentage can be lower in the case of a mega-gift<sup>286</sup> from a donor with “pharaonic wealth.”<sup>287</sup> The analogy is not perfect, but commercial firms typically pay from 10% to 20% of the construction cost to name a new professional sports stadium or arena.<sup>288</sup> Also, while cost may have little or no correlation to value in this area, it is worth noting that some charities have a policy of not spending more on publicity than 1% of the donor’s gift.<sup>289</sup> Although this analysis is far from precise, it seems likely that a donor’s contribution typically will exceed the monetary value of the naming rights.<sup>290</sup>

It is a fundamental maxim of contract law that courts will not inquire into the adequacy of consideration,<sup>291</sup> even when the economic value given in exchange is much less.<sup>292</sup> The policy is that “it would be an unwarranted interference with freedom of contract if [the courts] were to relieve an adult party from a bad exchange.”<sup>293</sup>

Related to this concept, if the promisor makes a part gift/part sale, there will not be a failure of consideration because the consideration “need not be the sole or even the predominant inducement, but *it must be enough of an inducement so that it is in fact bargained for.*”<sup>294</sup> A leading commentator provides the following example: If you sell your friend a used car worth \$5,000 for \$1,000, the promise to pay \$1,000 can be regarded as an inducement for your

285. BURTON, *supra* note 19, at 142 (“The general rule of thumb for naming a newly constructed building or outdoor space is a donation equivalent to 50% of the project cost.”).

286. *See, e.g.*, Pogrebin, *supra* note 13 (stating that entertainment mogul David Geffen pledged \$100 million and that the renovation is expected to cost more than \$500 million); Eisenberg, *supra* note 16 (reporting that Stephen Schwarzman donated 10% of the cost to renovate the New York City library system).

287. Pomorski, *supra* note 26 (discussing donors with “pharaonic wealth”).

288. *See* Drennan, *supra* note 21, at 94-96.

289. *See* BURTON, *supra* note 19, at 151.

290. *See* St. Mary’s Med. Ctr., Inc. v. McCarthy, 829 N.E.2d 1068, 1073 n.2 (Ind. Ct. App. 2005).

291. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. c (AM. LAW INST. 1981); *see also* PERILLO & CALAMARI, *supra* note 130, at 154.

292. RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. a.

293. PERILLO & CALAMARI, *supra* note 130, at 154.

294. *Id.* (emphasis added); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. c (“Ordinarily . . . courts do not inquire into the adequacy of consideration . . . even when it is clear that the transaction is a mixture of bargain and gift.”).

promise to transfer the car, and therefore adequate consideration, even though the most important factor inducing your promise was friendship.<sup>295</sup> Justice Oliver Wendell Holmes employed a “famous hypothetical that if a painter agrees to paint a portrait for [only] \$500, the transaction will be treated as a bargain even if the painter is chiefly motivated by a desire for fame.”<sup>296</sup> This latter example may be a transaction in a glory or honor market.<sup>297</sup> In the case of a charitable naming transaction, the facts may be crucial in deciding whether the naming was enough of an inducement so that it is in fact bargained for. For example, it seems unlikely and unreasonable to believe that Betty Ford bargained for a charity to name an alcoholism center after her,<sup>298</sup> or that Arnold Palmer bargained to have his name emblazoned on a prostate cancer center.<sup>299</sup>

Although it seems unlikely to arise in a naming transaction, disparity in value may indicate that the purported consideration was merely a pretense designed to make the promise of a future gift legally enforceable. In these situations, the amount or value exchanged has been described as “nominal.”<sup>300</sup> The Restatement (Second) of Contracts provides this example: “[I]n consideration of one cent received, A promises to pay \$600 in three yearly installments of \$200 each. The one cent is merely nominal and is not consideration for A’s promise.”<sup>301</sup> Similarly, a leading commentator provides an example in which a daughter promises her father \$10 in exchange for the father’s promise to transfer property worth \$100,000 to the daughter in the future.<sup>302</sup> In these situations, the nominal amount did not induce the other party’s promise, so there was no genuine bargain.<sup>303</sup> Whether the stated consideration is a mere pretense is a question of fact for the jury.<sup>304</sup> In addition, gross

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295. See PERILLO & CALAMARI, *supra* note 130, at 159.

296. See Eisenberg, *supra* note 127, at 823-24 n.14 (citing OLIVER WENDELL HOLMES, THE COMMON LAW 320 (1881)).

297. See *infra* notes 390-433 and accompanying text.

298. See *Betty Ford Center Rancho Mirage*, HAZELDEN BETTY FORD FOUND., <http://www.bettyfordcenter.org> [<https://perma.cc/YB74-7W8Q>] (last visited Jan. 2, 2017).

299. See *Arnold Palmer Prostate Center*, EISENHOWER MED. CTR., <http://www.emc.org/health-services/eisenhower-lucy-curci-cancer-center-of-excellence/arnold-palmer-prostate-center/> [<https://perma.cc/5SKQ-V86R>] (last visited Jan. 2, 2017).

300. RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. d.

301. *Id.* illus. 5.

302. PERILLO & CALAMARI, *supra* note 130, at 159.

303. See *id.*

304. See *id.*

inequality in the exchange may be relevant in proving that the arrangement is unenforceable because of lack of capacity, misrepresentation, fraud, mistake, duress, or undue influence.<sup>305</sup>

Likewise, although it is unlikely to be an issue in a substantial charitable naming transaction, the mere diminutiveness of a detriment or benefit may trigger other doctrines that will make the contract unenforceable. For example, the consideration may be so small that it may contribute to a court concluding that the parties really did not intend for the transaction to be legally enforceable.<sup>306</sup> Thus, if a donor contributes millions and the charity includes the donor's name on a plaque along with hundreds of other donors who each gave at least \$10,000, a court may conclude that the publicity will not change the transaction from a gift to an enforceable bargain. Also, a court can declare a bargain unenforceable because "the law disregards trifles" if the naming right is *de minimis*.<sup>307</sup>

#### b. Distinguishing Contracts from Conditional Gifts

A part-gift/part-sale transaction is an enforceable contract supported by consideration,<sup>308</sup> but a conditional gift transaction is not. Thus, it's necessary to draw a line distinguishing these transactions. Courts demonstrate a conditional gift with the story of the benevolent man and the homeless man. In the story, the benevolent man promises the homeless man that the homeless man can receive an overcoat and charge it on the benevolent man's account if the homeless man will go to the department store around the corner and pick out an overcoat.<sup>309</sup> The homeless man promises to make the trip and acquire an overcoat. Although the homeless man, in the absence of this transaction, would not be legally required to walk around the corner and pick out an overcoat, and thus he appears

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305. See RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. e; see also *Dohrmann v. Swaney*, 14 N.E.3d 605, 612-14 (Ill. Ct. App. 2014).

306. See RESTATEMENT (SECOND) OF CONTRACTS § 21 (providing that "a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract").

307. See generally Jeff Nemerofsky, *What Is a "Trifle" Anyway?*, 37 GONZ. L. REV. 315, 316, 323-24, 333 (2002). See also *Harris v. Time, Inc.*, 191 Cal. App. 3d 449, 452, 458 (Cal. Ct. App. 1987).

308. See *supra* notes 303-07 and accompanying text.

309. See *Pennsy Supply, Inc. v. Am. Ash Recycling Corp.*, 895 A.2d 595, 600-01 (Pa. Super. Ct. 2006). See generally 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 112, at 231-32 (1920).

to perform an act constituting a legal detriment, this transaction is classified as an unenforceable promise to make a future gift.<sup>310</sup>

In addition to agreeing on the benevolent man example, courts and commentators also agree that it can be difficult to draw the line between (i) a detriment that is bargained for and (ii) a detriment that is merely a condition of a gift.<sup>311</sup> Actual determinations may be controversial.<sup>312</sup> For example, in the hoary, often-studied case of *Kirksey v. Kirksey*,<sup>313</sup> a landowner wrote to his widowed sister-in-law stating he had “more open land than [he] can tend,” and he would furnish her with a house and land to cultivate until she had raised her children if she would “come down and see [him].”<sup>314</sup> The widow was renting at the time, “was comfortably settled,” and “would have attempted to secure the land she lived on.”<sup>315</sup> Nevertheless, within a month or two of receiving the brother-in-law’s letter, she and her children moved approximately sixty miles to live in a house and cultivate a parcel on her brother-in-law’s land.<sup>316</sup> After two years he evicted his sister-in-law. The sister-in-law sued, but the court concluded that the brother-in-law made a promise of a “mere gratuity” and that the actions taken by the sister-in-law were merely necessary conditions to accepting the gift.<sup>317</sup> As a result, the landowner did not breach a contract; he merely cancelled his promise to make a future gift, so his sister-in-law was entitled to no damages.

Leading commentators suggest two factors to draw the line between a legal detriment that qualifies as consideration and an action or promise that is merely a condition to receive a gift. First, “[t]he smallness of the detriment is one of the factors . . . in determining whether the promisor has bargained for the named

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310. See *Pennsy*, 895 A.2d at 600-01.

311. See PERILLO & CALAMARI, *supra* note 130, at 156; see also 3 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 7:18, at 415-16 (4th ed. 2008) (citing six cases).

312. See, e.g., William R. Casto & Val D. Ricks, “*Dear Sister Antillico . . .*”: *The Story of Kirksey v. Kirksey*, 94 GEO. L.J. 321, 323-24 (2006) (questioning the *Kirksey* case); see also, e.g., Gerald Caplan, *Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*, 73 ALBANY L. REV. 1, 40-44 (2009) (indicating that the record in the *Kirksey* case did not accurately reflect the transactions, making it difficult to determine if the court ruled wisely).

313. 8 Ala. 131 (1845).

314. *Id.* at 132.

315. *Id.*

316. See *id.*

317. See *id.* at 131-32.

detriment.”<sup>318</sup> This helps determine “whether the promisor manifests a gift-making state of mind or a contract-making state of mind.”<sup>319</sup> Second, if the “happening of the contingency would be a benefit to the promisor,” there is likely consideration to support a contract.<sup>320</sup> Focusing on whether the promisor received a benefit, some courts endorse a reasonableness test.

As to the distinction between consideration and a condition, it is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test, in determining which construction of the promise is more *reasonable* is an inquiry into whether the occurrence of the condition would benefit the promisor. If so, it is a fair inference that the occurrence was requested as consideration. On the other hand, if the occurrence of the condition is no benefit to the promisor but is merely to enable the promisee to receive a gift, the occurrence of the event . . . is not properly construed as consideration.<sup>321</sup>

### c. Consideration in Charitable Naming Rights Cases

Often the enforceability of the charitable naming right is intertwined with the enforceability of the donor’s pledge. For example, in the landmark *Allegheny College*<sup>322</sup> case, the donor, Mary Yates Johnston, pledged \$5,000 and directed that the College hold the money in a fund for scholarships to be known as the Mary Yates Johnston Memorial Fund.<sup>323</sup> Later, Johnston contributed \$1,000 toward the pledge, and the College set the \$1,000 aside as a scholarship fund. When Johnston died, the College sued to enforce the remaining \$4,000 pledge.<sup>324</sup> Justice Cardozo, writing for the majority, had a few choices when deciding whether Johnston’s promise to donate was supported by consideration. First, the pledge

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318. PERILLO & CALAMARI, *supra* note 130, at 156.

319. *Id.*

320. *Id.* at 157.

321. *See, e.g.,* Pennsy Supply, Inc. v. Am. Ash Recycling Corp., 895 A.2d 595, 601 (Pa. Super. Ct. 2006) (emphasis added); *see also, e.g.,* Allegheny Coll. v. Nat’l Chautauqua Cty. Bank, 159 N.E. 173, 176 (N.Y. 1927); *see also, e.g.,* Fritz v. Fritz, 767 N.W.2d 420, 2009 WL 779544, at \*5 (Iowa Ct. App. Mar. 26, 2009) (citing 3 WILLISTON & LORD, *supra* note 311, § 7:18, at 412-18).

322. *Allegheny Coll.*, 159 N.E. 173 (N.Y. 1927).

323. *See id.* at 174. The pledge document included language that also could be read to allow the College to place the money in an endowment. *See id.* (“The proceeds of this obligation shall be added to the Endowment of [the College], or expended [as a scholarship].”).

324. *See id.*



document itself recited, “in consideration of others subscribing, I hereby subscribe and will pay [\$5,000].”<sup>325</sup> Some courts have concluded that other donors’ pledges toward the same project can constitute consideration to support a contract,<sup>326</sup> but other courts and some leading commentators have severely criticized that approach as a legal fiction.<sup>327</sup> Second, the pledge document restricted the College’s use of the \$5,000; according to the court, the College had to use the money as a scholarship fund for ministry students.<sup>328</sup> This restriction on the College’s use of the money technically could have qualified as a legal detriment, and therefore consideration, because the College agreed to do something it was not legally obligated to do.<sup>329</sup> Arguably this seems like a variation of the story of the benevolent man and the homeless man; if the homeless man asks for the money to buy a coat, and the benevolent man says, “I promise to give you \$150 tomorrow that you must use to buy a coat,” it appears this is simply an unenforceable promise to make a gift in the future. In also questioning whether the charity provides consideration to support a donor’s promise to contribute in the future by using the

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325. *Id.*

326. *See* 13 WILLISTON & LORD, *supra* note 136, § 37:40, at 281-82 n.1 (listing nine cases regarding this approach).

327. *See, e.g.,* Md. Nat’l Bank v. United Jewish Appeal Fed’n, 407 A.2d 1130, 1138 (Md. 1979) (“[The donor’s pledge] was utilized . . . to obtain substantial pledges from others. But this was a technique employed to raise money. It did not supply a legal consideration . . .”); *see also, e.g.,* Mt. Sinai Hosp., Inc. v. Jordan, 290 So. 2d 484, 485-87 (Fla. 1974) (holding a pledge unenforceable even though the pledge document recited that the pledge was in consideration of the subscription of others); PERILLO & CALAMARI, *supra* note 130, at 226 (stating that a donation “may be motivated by [other gifts] . . . but there is ordinarily no element of exchange between the various promisors”); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 272 (5th ed. 2011) (“The typical subscriber is not bargaining for the promises of others.”); Budig et al., *supra* note 91, at 52; *see also* I. & I. Holding Corp. v. Gainsburg, 12 N.E.2d 532, 533 (N.Y. 1938) (“It is unquestioned that the request that other subscribers make contributions, . . . stated as a consideration in the subscription agreement, is not consideration . . .”).

328. *See Allegheny Coll.*, 159 N.E. at 174.

329. *See, e.g.,* Dunaway v. First Presbyterian Church, 442 P.2d 93, 94, 96 (Ariz. 1968) (demonstrating that a court can order a charity to return a contribution if the charity fails to use the amount within a reasonable time for the designated project); *see also, e.g.,* Neb. Wesleyan Univ. v. Estate of Couch (*In re* Estate of Couch), 103 N.W.2d 274, 276-77 (Neb. 1960) (the school’s agreement to use a \$5,000 donation for scholarships to “worthy girls” was consideration); Cent. Me. Gen. Hosp. v. Carter, 132 A. 417, 420 (Me. 1926) (an agreement to use the funds received for a special purpose was “a sufficient consideration to support the promise to give”).

money for a specific charitable purpose, the Canadian Supreme Court has stated, “the promise implied in the acceptance involves no act advantageous to the [donor] or detrimental to the [charity], and hence does not involve a case of mutual promises and . . . the duty of the [charity] arise[s] from trusteeship rather than a contractual promise . . . .”<sup>330</sup>

Justice Cardozo rejected these two options and chose to employ a third approach. He directly addressed the issue whether the naming right over the scholarship fund was adequate consideration.<sup>331</sup> Justice Cardozo employed the basic three-part objective bargain test for consideration discussed earlier<sup>332</sup> along with the principle that a part gift/part sale can be a contract supported by adequate consideration. Justice Cardozo wrote, “The promise and the consideration must purport to be the motive each for the other, in whole or at least in part.”<sup>333</sup> Clearly, the consideration supplied by the donor was the promise to contribute \$5,000. On the other side of the transaction, Justice Cardozo concluded that the College provided adequate consideration to Johnston for two reasons: (i) the College incurred a legal detriment and (ii) the donor enjoyed a benefit.<sup>334</sup> First, the College incurred a legal detriment because it promised “to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation,”<sup>335</sup> including “the duty . . . to perpetuate the name.”<sup>336</sup> Justice Cardozo stated that this obligation was “sufficient in itself to give validity to the subscription.”<sup>337</sup> This conclusion is particularly significant in the naming rights market because the College likely had minimal duties in connection with this named scholarship fund. In contrast to other naming situations, the donor’s name did not need to be inscribed in

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330. See, e.g., *Dalhousie Coll. at Halifax v. Boutilier Estate*, [1934] S.C.R. 642, 649 (Can.).

331. See *Allegheny Coll.*, 159 N.E. at 175.

332. See *supra* notes 264-68 and accompanying text; see also Cozzillio, *supra* note 23, at 1336 (attributing the three-part test to Justice Cardozo’s analysis in *Allegheny College*). Justice Cardozo also indicated that he could have resolved this dispute by reference to promissory estoppel concepts. See *Allegheny Coll.*, 159 N.E. at 175; see also Bridgeman, *supra* note 229, at 150 (pointing out that most contracts casebooks deal with *Allegheny College* in the promissory estoppel section).

333. *Allegheny Coll.*, 159 N.E. at 174 (quoting *Wis. & Mich. Ry. Co. v. Powers*, 191 U.S. 379, 386 (1903)).

334. *Id.* at 175-76.

335. *Id.* at 175.

336. *Id.* at 176.

337. *Id.*

stone, letterhead and business cards did not need to be changed, and no one had to answer the phone differently.

Second, Justice Cardozo found that the charitable naming rights provided a benefit to the donor. He stated, “The longing for posthumous remembrance is an *emotion* not so weak as to justify us in saying that its *gratification* is a negligible good.”<sup>338</sup> Justice Cardozo stated that if the promisor enjoys a benefit, “it is a fair inference that the happening was requested as a consideration.”<sup>339</sup> Justice Cardozo concluded that the gratification of an *emotion* can be a benefit qualifying as consideration, even though he makes no attempt to place a dollar value on that emotion. There are other situations in which courts have concluded that a benefit with only speculative economic value will constitute consideration.<sup>340</sup>

Also, in *Stock v. Augsburg College*, the court indicated that a charity’s agreement to name is sufficient consideration to allow a charitable pledge to be a contract.<sup>341</sup> Elroy Stock pledged and paid \$500,000 in connection with Augsburg College’s promise that a new building would have an “Elroy Stock Communications Wing.”<sup>342</sup> The College accepted and retained Stock’s money, but the College later refused to name the wing after Stock.

The court considered whether Stock could have recovered his \$500,000 transfer to the College if he had sued within the six-year statute of limitations for contract actions.<sup>343</sup> In deciding that the transaction was a contract rather than a conditional gift, an important factor was the donor’s intent.<sup>344</sup> The court found that the following facts supported the donor’s argument that he intended a contractual bargain rather than a gift: (i) the College’s literature for the fund drive stated, “[N]amed gift opportunities are numerous;” (ii) a College representative suggested that the wing could be named after Stock and later sent a letter that “recognized [Stock’s] . . . right to . . . name the wing;” (iii) the College’s Board of Regents voted to name the wing after Stock; and (iv) Stock increased the amount of his

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338. *Id.* (emphasis added).

339. *Id.* (quoting 1 WILLISTON, *supra* note 309, § 112, at 232-33).

340. *See infra* notes 390-417 (baby-name cases).

341. *See Stock v. Augsburg Coll.*, No. C1-01-1673, 2002 WL 555944, at \*7 (Minn. Ct. App. Apr. 16, 2002) (concluding that the arrangement was an enforceable contract, but the donor failed to sue within the applicable statute of limitations period).

342. *Id.* at \*1.

343. *See id.* at \*6-7.

344. *See id.* at \*6.

donation to \$500,000 because he thought it would be inappropriate to have the naming rights if he merely contributed the original amount (\$100,000) suggested by the College's representative.<sup>345</sup> Based on these facts, the court concluded that the College "[solicited money] in exchange for the promise to name,"<sup>346</sup> and Stock's intent was "not [to make] a donation to the [College's] general building fund."<sup>347</sup> In support of this conclusion, the court listed the following policy reasons: (i) Colleges, like individuals and other entities, should honor their commitments; (ii) courts of law and equity should enforce legal contracts; and (iii) just debts should be paid.<sup>348</sup>

Consistent with the approach in *Augsburg College*, in the case of *In re Bashas' Inc.*, when considering whether to enforce a ten-year pledge after the donor reneged in year two, the court, in dicta, said, "Perhaps if [the charity] demonstrated that they promised to acknowledge debtors *in exchange for* [the debtor's] promise to donate money, there might have been consideration."<sup>349</sup>

Two cases indicate that even if the naming arrangement will honor a third party rather than the donor, the charitable arrangement may be a contract. In *Dunaway v. First Presbyterian Church of Wickenburg*,<sup>350</sup> the donor pledged \$10,000 toward construction of an annex to the Church's Sunday school building and stipulated "that there be a plaque 'honoring Reverend and Mrs. Poling.'"<sup>351</sup> There is no indication that the donor was in any way related to the Reverend Poling or Mrs. Poling other than the donor attended services at the Church, and the Reverend Poling was the pastor. When Church officials asked the donor if they could use the money for a different purpose, the donor requested the return of his contribution. The court stated that the Church's acceptance of the stock was "an implied promise agreeing to the purposes for which it [was] offered,"<sup>352</sup> then it concluded that from this promise "arises a bilateral contract supported by a valuable consideration."<sup>353</sup> The court cited nine cases for this proposition<sup>354</sup> but provided no substantive analysis of the

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345. *Id.* at \*1.

346. *Id.* at \*7.

347. *Id.*

348. *See id.* at \*6.

349. *In re Bashas' Inc.*, 468 B.R. 381, 383 (D. Ariz. 2012).

350. 442 P.2d 93, 93 (Ariz. 1968) (concluding that the charitable arrangement was a bilateral contract).

351. *Id.* at 94.

352. *Id.* at 95.

353. *Id.*

354. *See id.* (including *Allegheny College*).

consideration issue. Thus, it may be that the court found consideration because the Church agreed to use the money for a specific purpose (building the annex), although courts and commentators analyzing charitable pledges often reject that view.<sup>355</sup> Alternatively, perhaps the court found consideration because the Church agreed to include the plaque honoring the Reverend and Mrs. Poling. The latter is a possibility because a promise that does not benefit the promisor may still be consideration if the benefit flows to a designated third party.<sup>356</sup>

Also, in *Carson's Estate*, the donor made a pledge to help finance a new building to be named after her brother-in-law at Stony Brook School.<sup>357</sup> When the school failed to build the building, the court concluded that the charity had breached a contract,<sup>358</sup> and the charity could not collect on the pledge. The court's analysis of the consideration issue was conclusory.<sup>359</sup>

In other cases involving prominent charitable naming rights, the courts concluded that the donor's promise to contribute was supported by consideration, but the courts failed to indicate whether it was the promise to grant naming rights, or some other promise or action by the charity, that was the consideration. For example, in *Paul & Irene Bogoni Foundation v. St. Bonaventure University*, the donors pledged \$2 million to the University toward the construction of an addition to St. Bonaventure's library to house its rare books collection.<sup>360</sup> The University constructed the addition and agreed to name it after the donors.<sup>361</sup> The donors failed to pay \$900,000 of the pledge. In the ensuing litigation, the court concluded that the arrangement was a contract, and the University accepted the donors' offer "by incurring liability in reliance thereon."<sup>362</sup> Unfortunately, there was no discussion of whether the consideration was the

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355. See *supra* note 327 and accompanying text.

356. See PERILLO & CALAMARI, *supra* note 130, at 152.

357. See *In re Carson's Estate*, 37 A.2d 488, 489 (Pa. 1944).

358. See *id.* at 489.

359. See *id.* at 491 ("There is no question at this time that it was a valid contract, and that it was supported by consideration sufficient to contracts of this sort.").

360. See *Paul & Irene Bogoni Found. v. St. Bonaventure Univ.*, No. 102095/08, 2009 WL 6318140, at 9 (N.Y. Sup. Ct. Oct. 6, 2009).

361. See *id.* at 15 n.2 ("The July 2007 correspondence . . . indicates that they agreed [on the name] . . . [h]owever, . . . the record does not indicate whether the University withheld [the naming] honor in view of the [donors'] refusal to fulfill their pledge obligation.").

362. *Id.* at 12.

University's agreement to use the funds for the donors' specified purpose<sup>363</sup> or the University's promise to name.

Similarly, in *Woodmere Academy*,<sup>364</sup> the donor failed to pay the full amount of his pledge even though the Academy named its library after his wife.<sup>365</sup> The court found that the arrangement was a contract<sup>366</sup> but failed to specify the legal detriment to the charity, or the benefit to the donor, that constituted the consideration. The court merely said that the Academy had accepted the pledge "by incurring liability in reliance thereon."<sup>367</sup>

#### d. Reflections on Bargaining and Charitable Naming Rights

It is difficult to categorically conclude that all charitable naming rights transactions are gifts or that they are all contracts, in part because of the wide variation in the facts concerning bargaining between the charity and the donor. At one end of the spectrum are situations when it would probably be in the donor's best economic interest if the charity would *not* use the donor's name. Examples might include the Betty Ford Alcoholism Rehabilitation Treatment Facility, the Arnold Palmer Prostate Center, and the Kirk Douglas Alzheimer's Care Pavilion.<sup>368</sup>

Another example on that half of the spectrum might be the addition of Stephen Schwarzman's name to the façade of the New York City Public Library's flagship building on Fifth Avenue at 42nd Street in connection with his \$100 million contribution.<sup>369</sup>

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363. See *id.* at 4 (the specified purpose was to build the rare books addition to the library).

364. *Woodmere Acad. v. Steinberg*, 363 N.E.2d 1169 (N.Y. 1977), *aff'g* 53 A.D.2d 156 (N.Y. App. Div. 1976) (concluding that the charitable arrangement was a unilateral contract).

365. *Woodmere Acad.*, 53 A.D.2d at 158-59 (summarizing correspondence in which the Academy states, "[O]ur library, as you know, has been named 'The Barbara Steinberg Learning Center,'" and that the "building will continue to be so designated as long as it is a part of the school").

366. See *id.* at 160.

367. *Id.*

368. See *supra* notes 298-302 and accompanying text (regarding Betty Ford and Arnold Palmer); see also Ben Gose, *Bill Cosby, Donald Sterling and Charities' "Nightmare" Naming-Rights Problem*, HOLLYWOOD REP. (Aug. 20, 2015, 9:00 AM), <http://www.hollywoodreporter.com/news/bill-cosby-donald-sterling-charities-815959> [<https://perma.cc/LVM2-9HY4>] (discussing the Kirk Douglas Alzheimer's Center).

369. See Pogrebin, *supra* note 13.

Schwarzman says the naming was at the charity's insistence,<sup>370</sup> and Schwarzman's name is carved in smaller letters at the library entrance than the library's earlier benefactors, namely Astor, Tilden, and Lenox.<sup>371</sup> Arguably, under these facts, the library's agreement to add Schwarzman's name did not induce Schwarzman to contribute.

At the other end of the spectrum might be the failed negotiations between Paul Smith's College in upstate New York and Sanford and Joan Weill. Sanford Weill is the former CEO of Citigroup, and the Weills are extremely generous. One article states the Weills have contributed "so many hundreds of millions to so many causes, especially in New York City, that the Weill name has become virtually ineluctable."<sup>372</sup> In 2015, the Weills pledged \$20 million to Paul Smith's College on the condition that the school change its name to Joan Weill-Paul Smith's College. When a judge ultimately ruled that a stipulation in Paul Smith's will that the school be "forever known" as Paul Smith's College of Arts and Sciences prevented the proposed name change, the Weills "rescinded their gift."<sup>373</sup> These facts indicate the Weills bargained for the naming rights because they refused to make the donation without the naming rights.

Heavy-handed terms in favor of a naming donor may indicate that the donor bargained for the naming rights. In the Lincoln Center-Fisher family situation, Lincoln Center granted Avery Fisher perpetual naming rights over the philharmonic hall in 1973 in connection with his \$10.5 million donation.<sup>374</sup> This proved very costly for Lincoln Center because the Fisher family blocked the charity's attempt to renovate the building in 2002 and only relented in 2014 when Lincoln Center paid the Fisher family \$15 million plus various perks.<sup>375</sup> After paying off the Fisher family, Lincoln Center began its fund raising drive to renovate the philharmonic hall. Eventually Lincoln Center accepted a \$100 million pledge from generous entertainment mogul David Geffen, but it agreed to grant *perpetual* naming rights to Geffen. Under the circumstances, it seems unlikely that Lincoln Center suggested that Geffen take perpetual naming rights. Some have called Lincoln Center's decision

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370. See Eisenberg, *supra* note 16.

371. See Konigsberg & Howe, *supra* note 37.

372. *Id.*

373. *Id.* Technically it would be more accurate to say the Weills were relieved of their pledge obligation because the College failed to meet a condition. *Id.*

374. See *supra* notes 10 & 13 and accompanying text.

375. See Pogrebin, *supra* note 13.

“shortsighted.”<sup>376</sup> It seems much more reasonable that Lincoln Center would have offered Geffen twenty or thirty year naming rights. One charitable expert stated, “Perpetuity is a very long time. . . . This will not be the last renovation of Avery Fisher Hall, and when you give rights in perpetuity you make it very challenging to find the money that will be needed 20, 30, 40, 50 years from now.”<sup>377</sup> When asked about the perpetual feature, Geffen reportedly said, “I think it’s appropriate. . . . How often can you change the name of this hall?”<sup>378</sup> Geffen likely bargained strenuously for the perpetual naming rights.

e. Transactions Involving Emotional Benefits, Including Baby Names and Hush Money Deals

It may seem challenging to find that a charity’s promise to grant naming rights is consideration for a donor’s pledge because naming rights are difficult to value. With naming rights, the benefits may be emotional as well as economic. An individual donor acquiring significant charitable naming rights likely is enjoying both (i) emotional benefits such as improved self-esteem and a “warm glow”<sup>379</sup> that are present in a typical, unenforceable gift situation<sup>380</sup> and (ii) potential economic benefits such as an improved reputation for power, wealth, and generosity among referral sources and other business associates.<sup>381</sup> As an indication that a naming contribution likely involves some altruistic generosity,<sup>382</sup> as a rule-of-thumb,

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376. Robin Pogrebin, *How David Geffen’s \$100 Million Lincoln Center Gift Came Together*, N.Y. TIMES (Mar. 23, 2015), [http://www.nytimes.com/2015/03/24/arts/music/how-david-geffens-100-million-lincoln-center-gift-came-together.html?\\_r=0](http://www.nytimes.com/2015/03/24/arts/music/how-david-geffens-100-million-lincoln-center-gift-came-together.html?_r=0) [<https://perma.cc/33J8-P9J2>].

377. *Id.* (quoting Michael M. Kaiser, Chairman of the DeVos Institute of Arts Management at the University of Maryland).

378. Pogrebin, *supra* note 13.

379. Colombo, *supra* note 21, at 663, 669-79 (discussing research in the fields of economics, evolutionary psychology, and social psychology).

380. In the hypothetical of the benevolent man and the homeless man, see *supra* notes 309-10 and accompanying text. The benevolent man may experience improved self-esteem and the warm glow commonly associated with charitable giving. See Colombo, *supra* note 21, at 663, 669-79 (discussing benefits from charitable giving).

381. See Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 575-76 (1997) (stating that charitable giving signals wealth and generosity); see also OSTROWER, *supra* note 44 (discussing the potential business benefits of charitable giving).

382. *But see* Colombo, *supra* note 21, at 669-79 (discussing social science research indicating that altruism may not be involved in charitable giving for many).



charities typically set the ask amount for a naming opportunity at 50% of the construction cost of the named item.<sup>383</sup> In contrast, corporations purchasing naming rights to professional sports stadiums and arenas typically pay from 10% to 20% of the construction cost of the stadium or arena.<sup>384</sup> Granted, the type of economic benefit differs, but the fact that donors pay more to charities suggests some altruism.<sup>385</sup>

Although the mixed benefits make it difficult to establish a monetary value for the charitable naming rights, contract law does not require precise valuations; it is not necessary that the value given by each party is equal to have a contract.<sup>386</sup> Also, as discussed above, there is authority that consideration can be noneconomic. In *Allegheny College*, Justice Cardozo expressly states that the gratification of an *emotion* can be consideration.<sup>387</sup> On the other hand, courts have concluded that love and affection are not consideration because they are not for sale,<sup>388</sup> perhaps suggesting that the love of one person is not what induces the love of another person.<sup>389</sup> So when there is an emotional benefit, how do the courts decide whether the transaction is a gift or a contract? These types of issues can arise in other markets, including the baby-name market and the embarrassing secrets market.

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383. BURTON, *supra* note 19, at 142. *But see* Pogrebin, *supra* note 13; *infra* note 384 and accompanying text. The percentage may be significantly less for mega-gifts.

384. *See* Drennan, *supra* note 21, at 94-96.

385. Commercial entities buying the naming rights for professional sports stadiums and arenas typically are purchasing brand recognition. *See* BURTON, *supra* note 19, at 41-42. The economic benefit for the individual donor buying charitable naming rights is more likely a greater reputation for wealth, power, and generosity among potential referral sources and other constituencies. *See* Posner, *supra* note 381, at 575-76.

386. *See supra* notes 291-97 and accompanying text.

387. *See* *Allegheny Coll. v. Nat'l Chautauqua Cty. Bank*, 159 N.E. 173, 176 (N.Y. 1927).

388. *See, e.g.,* *Lesnik v. Estate of Lesnik*, 403 N.E.2d 683, 687 (Ill. App. Ct. 1980) (concluding that "love and affection are not subject to sale, [therefore] a promise founded upon these considerations is not enforceable and cannot be the foundation for a legal action").

389. *See supra* notes 264-68 (discussing the three-part test for consideration, which includes that the promise or action of one party must induce the promise or action of the other party).

The leading baby-name case is *Schumm v. Berg*<sup>390</sup> involving an illegitimate child of the famous actor Wallace Beery.<sup>391</sup> Gloria Schumm and Wallace Beery conceived a child in May 1947 when Wallace Beery was sixty-three years old. Beery declined to marry and refused to acknowledge paternity, but the court found that he agreed to a detailed and lengthy oral contract.<sup>392</sup> Under the contract, Gloria Schumm agreed to (i) include the name “Wallace” in the child’s name if the child was a boy or “Wally” if the child was a girl and (ii) refrain from instituting a paternity suit which the parties agreed would damage Wallace Beery’s “social and professional standing as a prominent motion picture star.”<sup>393</sup> Generally, under state law, a father who neither marries the mother nor acknowledges paternity does not have a right to name the child; instead, that right belongs to the mother.<sup>394</sup> In exchange for Gloria’s promise to name, Wallace Beery agreed to arrange for the payment of \$100 per week to the child (as a third party beneficiary under the contract), plus a lump sum of \$25,000 to the child when the child attained age twenty-one,<sup>395</sup> in addition to the customary obligation to pay for the “maintenance, support and education according to the station in life and standard of living of Wallace Beery.”<sup>396</sup> The child was a boy, and Gloria Schumm named him Johan Richard *Wallace* Schumm.

Wallace Beery died approximately fourteen months after the child was born. When his estate refused to make payments, the child’s guardian sued for damages of \$104,135.<sup>397</sup> The estate argued that the “right to name”<sup>398</sup> did not constitute consideration to support

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390. *Schumm v. Berg*, 231 P.2d 39 (Cal. 1951) (en banc) (featured in Lewis C. Warden, *Validity and Enforceability of Contract in Consideration of Naming Child*, 21 A.L.R.2d 1061 (1952)).

391. Wallace Beery won an Academy Award for Best Actor, appeared in approximately 250 films, and at one time was regarded as one of Hollywood’s top ten movie stars. See *Wallace Beery Biography*, FANDANGO (last visited Jan. 2, 2017), <http://www.fandango.com/people/wallace-beery-47308/biography> [<https://perma.cc/3H9B-YN8G>]; see also *Wallace Beery*, MOVIE DATABASE (last visited Jan. 2, 2017), <https://www.themoviedb.org/person/29260-Wallace-beery> [<https://perma.cc/NVN6-AWFL>].

392. See *Schumm*, 231 P.2d at 41-43.

393. *Id.* at 41-42.

394. See Carton F.W. Larson, *Naming Baby: The Constitutional Dimensions of Parental Naming Rights*, 80 GEO. WASH. L. REV. 159, 164-66 (2011).

395. See *Schumm*, 231 P.2d at 42. Wallace Beery was to acquire two life insurance policies that would provide the funds to make the payments. *Id.*

396. *Id.* at 42-43.

397. See *id.* at 43.

398. *Id.* at 44.

a contract. The California Supreme Court, en banc, stated that the mother's promise to name the child with the given name Wallace was "adequate consideration [because] [i]t was a detriment to Gloria and a benefit to Beery."<sup>399</sup> In response to the estate's argument that prior case law "did not give serious consideration to . . . the sufficiency of the 'right to name' as consideration,"<sup>400</sup> the court stated,

Reason supports the rule, for having a child bear its father's name is commonly considered a *privilege and honor*, and Beery assumed it was, for he obtained such a promise running to him. Merely because in the cited cases the promise was to use the putative father's surname does not make them distinguishable. That is merely a matter of degree, and as seen, the validity of consideration does not depend on its value.<sup>401</sup>

An older baby-name case relies upon *charitable* naming rights authority in concluding that the promise to name a baby is sufficient consideration to support a contract. In *Wolford v. Powers*,<sup>402</sup> an eighty-seven-year-old friend of the family, Charles Lehman, promised to pay \$10,000 if Mr. & Mrs. Wolford would name their son Charles Lehman Wolford.<sup>403</sup> The eighty-seven-year-old friend executed a promissory note memorializing his promise before his death, but his estate refused to pay the \$10,000 arguing there was no consideration to support the promise.

In response, the Indiana Supreme Court quoted a "philosophic treatise"<sup>404</sup> by Thomas Hobbes stating, "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give."<sup>405</sup> The Indiana court acknowledged that the analysis is more challenging when the court cannot easily reduce the exchanged detriment or benefit to a monetary value, but stated, "[w]here a party contracts for the performance of an act which will afford him *pleasure, gratify his ambition, please his fancy*, or express his

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399. *Id.*

400. *Id.*

401. *Id.* at 45 (emphasis added).

402. *See generally* 85 Ind. 294 (1882).

403. *See id.* at 294-95.

404. *Id.* at 296; *see also* Ryan v. Weiner, 610 A.2d 1377, 1381 n.2 (Del. Ch. 1992) (identifying the treatise as THE LEVIATHAN).

405. *Wolford*, 85 Ind. at 296 (quoting FREDERICK POLLOCK, PRINCIPLES OF CONTRACT: BEING A TREATISE ON THE GENERAL PRINCIPLES CONCERNING THE VALIDITY OF AGREEMENTS IN THE LAW OF ENGLAND 189 (3d ed. 1881)); *see also* Lewis C. Warden, *Validity and Enforceability of Contract in Consideration of Naming Child*, 21 A.L.R.2d 1061, 1063 (1952) (referring to Hobbes).

appreciation of a service another has done him, his estimate of value should be left undisturbed, unless, indeed, there is evidence of fraud.”<sup>406</sup> After reviewing several English and U.S. cases on the enforceability of contracts and the sufficiency of consideration, the court concluded that baby naming should qualify as consideration because *charitable naming rights historically have been consideration.*

We find scattered through the books cases where devises of property are made upon conditions having no pecuniary value at all, and yet they are always enforced; and so we find men in life making subscriptions to colleges on condition that they shall bear their names, or endowing professorships upon condition that they shall be given their names, and, so far as our observation has extended, the validity of such conditions has never been challenged. It is evident that the naming of a college professorship or the like has always been considered as a matter of *importance and value*, for to declare otherwise would be to affirm that courts and law-writers have for ages been solemn respecters of worthless trifles. It will not do to say that the bestowal of a name is a valueless act, and if once it be granted to be of some value, then, in the absence of fraud and oppression, it must be held to possess the value placed upon it by the contracting parties.<sup>407</sup>

In another case, the Supreme Judicial Court of Massachusetts held that a promise to pay \$10,000 at death in exchange for naming a child Edward Gerrish Gardner was supported by consideration because the child “loses the opportunity of receiving a more advantageous name, and is compelled to bear whatever detriment may flow from the name imposed upon him.”<sup>408</sup> This court’s discussion in 1914 about the advantages of some names and the detriment of others, found support in social science research relied upon by a legal scholar considering baby names recently:

One study concluded that individuals with unusual first names show “more severe personality disturbance than those with common names.” Another found that there was a “significant tendency for boys with peculiar first names to be more severely emotionally disturbed than boys with non-peculiar first names.” A more recent study determined that “unpopular names are positively correlated with juvenile delinquency for both blacks and whites,” although the authors caution against inferring causation.<sup>409</sup>

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406. *Wolford*, 85 Ind. at 303 (emphasis added).

407. *Id.* at 308-09 (emphasis added).

408. *Gardner v. Denison*, 105 N.E. 359, 359-60 (Mass. 1914).

409. Larson, *supra* note 394, at 195 (quoting A. Arthur Hartman et al., *Unique Personal Names as a Social Adjustment Factor*, 75 J. SOC. PSYCHOL. 107, 107 (1968); Albert Ellis & Robert M. Beechley, *Emotional Disturbance in Children*

Other baby-name cases support the view that naming is consideration even when the familial or friendship ties seem so strong that a transfer between the parties normally would be a gift. For example, in *Daily v. Minnick*, John Cochrane had taken James C. Daily into his home and raised him from the time he was a child until his marriage.<sup>410</sup> The court stated that James C. Daily “was treated by Cochrane as a son,”<sup>411</sup> although the court never referred to James C. Daily as Cochrane’s foster child. Shortly after the birth of James C. Daily’s son, Cochrane promised that if the child was named after Cochrane, he would acquire forty acres of land and leave it to the child upon Cochrane’s death. James C. Daily and his wife named the child after Cochrane. Cochrane acquired the land and held title to it, and he allowed James C. Daily to farm it and harvest the timber.<sup>412</sup> After Cochrane died, James C. Daily sued to quiet title on behalf of his son. Although the close relationship of the parties might suggest the intent to give,<sup>413</sup> the Iowa Supreme Court held that Cochrane “received the benefit of the name, and the parents parted with the right to give the child such name as they might choose. This, as has been seen, is a valuable consideration.”<sup>414</sup>

A baby-name case in which the court found a contract supported by consideration rather than a gift despite a direct family relationship was *Babcock v. Chase*.<sup>415</sup> The parents named the child Catharine Babcock, and that was her name for four months. Initially, when her grandfather urged the parents to change the child’s first name to Harriett so that the name would “be kept in the family,” the parents refused.<sup>416</sup> When grandfather promised to pay \$500 to the child (upon the grandfather’s death), however, the parents agreed. After the grandfather’s death, the child sued the grandfather’s estate to collect the \$500. Rather than concluding this was an unenforceable promise to make a gift from a grandparent to a

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with *Peculiar Given Names*, 85 J. GENETIC PSYCHOL. 337, 339 (1954); David E. Kalist & Daniel Y. Lee, *First Names and Crime: Does Unpopularity Spell Trouble?*, 90 SOC. SCI. Q. 39, 39 (2009)).

410. See 91 N.W. 913, 915 (Iowa 1902) (concluding that a baby-name transaction was a contract).

411. *Id.* at 914.

412. See *id.* Cochrane would not transfer title to the land to James C. Daily “for fear he would squander it.” *Id.*

413. See *supra* notes 111-17 (discussing “intent to give” as an element for making a gift).

414. *Daily*, 91 N.W. at 915.

415. See 36 N.Y.S. 879, 881 (N.Y. Gen. Term 1895).

416. *Id.* at 879.

grandchild, the court relied on *Wolford v. Powers* and concluded that “we are of the opinion that a sufficient consideration is alleged for the promise . . . . There is no question here about the adequacy. That has been fixed by the parties.”<sup>417</sup>

Recently, a written agreement to pay money and property for a name change was declared unenforceable, in part, because the consideration to name the children was illusory.<sup>418</sup> In *Dohrmann v. Swaney*, forty-year-old neurosurgeon George Dohrmann convinced his eighty-nine-year-old neighbor, Mrs. Rogers, to sign a document under which she agreed to pay Dohrmann \$4 million from her estate plus her apartment on Lake Shore Drive in Chicago and all of its contents (an estimated total value of \$5.5 million) in exchange for George Dohrmann’s agreement to incorporate the Rogers’ surname as a middle name “into his children’s name.”<sup>419</sup> After George Dohrmann changed the name of his thirteen-year old son to George John Rogers Dohrmann and changed the name of his seven-year old son to Geoffrey Edward David Rogers Dohrmann and Rogers passed away, George Dohrmann sued to collect.<sup>420</sup> The court declared the contract unenforceable, in part, because the promise to name was illusory, stating,

[T]he contract is brief and makes no provision for when or even if the boys must actually use the name Rogers. It appears from the record before us that the boys have used the name only intermittently. Moreover, there is nothing in the contract to prevent the boys from legally removing Rogers as a middle name, particularly because they, as minors, were not parties to the contract. Where the consideration for a contract is illusory, the contract will be invalidated for gross inadequacy of consideration. Although the children allegedly took the Rogers name as their own in order to perpetuate the Rogers name after Mrs. Rogers’ death, enforcing that obligation is a legal impossibility. Accordingly, the consideration to this contract is illusory.<sup>421</sup>

The court in *Schumm v. Berg* stated that “privilege and honor” can be sufficient consideration to support a promise.<sup>422</sup> The court did not explicitly state whether there was consideration because the mother incurred a detriment or because Wallace Beery enjoyed a benefit, but presumably the court was referring to the “privilege and

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417. *Id.* at 881.

418. *See Dohrmann v. Swaney*, 14 N.E.3d 605, 614-15 (Ill. App. Ct. 2014).

419. *Id.* at 608-09, 613.

420. *Id.* at 608 n.1, 610.

421. *Id.* at 614-15.

422. 231 P.2d 39, 44-45 (Cal. 1951) (en banc).

honor” enjoyed by Wallace Beery. This is suggested by the language following the reference to “privilege and honor.”<sup>423</sup>

A famous contract law case arguably might involve pride, honor, or other good feelings even though the court never decides whether the promisor received a benefit at all. In *Hamer v. Sidway*,<sup>424</sup> at a family party,<sup>425</sup> an uncle promised his fifteen-year old<sup>426</sup> nephew that if the nephew “would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become [twenty-one] years of age,” he would pay him \$5,000.<sup>427</sup> After the nephew satisfied the requirements and the uncle died, the nephew’s assignee sued the uncle’s estate for the \$5,000. The court concluded the nephew’s performance was consideration for the uncle’s promise. The court emphasized the detriment to the nephew and avoided affirmatively stating whether the uncle enjoyed a benefit.<sup>428</sup> In regards to a benefit to the uncle, the court stated,

[I]t is of no moment whether such performance actually provided a benefit to the [uncle], and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense.<sup>429</sup>

Arguably an uncle might enjoy some feelings of pride and satisfaction in the commendable lifestyle of his nephew and might want to avoid feelings of regret and shame if the nephew became the town drunk, card shark, or pool hustler. Family members have expressed regret for the misdeeds of other family members on some occasions.<sup>430</sup>

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423. *Id.* at 45. Immediately after referring to “privilege and honor” the court discusses Wallace Beery, not the mother; the court says Beery “assumed it was [a privilege and honor] for he obtained such a promise running to him.” *Id.*

424. 27 N.E. 256 (N.Y. 1891). Frequently, *Hamer* is included in law school casebooks. See Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 556 (1999) (referring to *Hamer v. Sidway* as a “war horse”).

425. *Hamer*, 27 N.E. at 256. Family and friends were celebrating the golden wedding anniversary of the uncle’s parents. *Id.*

426. The uncle made the promise on March 20, 1869, and the nephew attained age twenty-one on January 31, 1875. *Id.*

427. *Id.*

428. See *id.* at 257.

429. *Id.*

430. See, e.g., Cory Pippin, *Father of Orlando Nightclub Shooter Condemns Son’s Actions, Calls It Act of ‘Terror’*, KIMA TV (June 13, 2016), <http://kimatv.com/news/nation-world/father-of-orlando-nightclub-shooter-condemns-sons-actions-calls-it-act-of-terror> [<https://perma.cc/HQK8-JVHV>]; see also, e.g., Katrease Stafford, *Kalamazoo Suspect’s Family Condemns His Actions*, DET. FREE PRESS (Feb. 23,

The New York Court of Appeals in *Hamer v. Sidway* discussed other cases reaching similar results. In *Shadwell v. Shadwell*, an uncle promised his nephew “150 pounds yearly . . . until [his] annual income derived from [his] profession of a Chancery barrister shall amount to 600 guineas” if he would marry Ellen Nicholl.<sup>431</sup> In *Lakota v. Newton*, the defendant promised the plaintiff \$100 if he would “leave off drinking for a year.”<sup>432</sup> In *Talbott v. Stemmons*, a step-grandmother made an agreement with her grandson that she would pay him \$500 at her death “if he will never take another chew of tobacco or smoke another cigar during [her life] . . . and if he breaks this pledge he is to refund double the amount to his mother.”<sup>433</sup> In each case, the court enforced the promise.

On the other hand, neither love nor affection are deemed consideration for contract law purposes. For example, in *Lesnik v. Estate of Lesnik*, the wife transferred the marital home into a land trust for the benefit of her children from a prior marriage, thereby preventing her second-husband from electing to take against her estate and claiming an interest in the home.<sup>434</sup> Among other arguments, the husband asserted that the wife had promised to title the home as joint tenants with right of survivorship with him in exchange for “[his] promise . . . to be a kind, loving and affectionate husband.”<sup>435</sup> The court stated that whether there was consideration was a question of law, and “because love and affection are not subject to sale, a promise founded upon these considerations is not enforceable.”<sup>436</sup> Presumably, courts conclude that love is not subject to sale because love is not given in exchange for love; A may love B regardless of whether B loves A.<sup>437</sup> Countless sad songs memorialize

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2016, 7:31 PM), <http://www.freep.com/story/news/local/michigan/2016/02/22/kalamazoo-shooters-family-condemns-his-actions/80770444/> [https://perma.cc/EEB8-FD8U].

431. *Hamer*, 27 N.E. at 257 (quoting *Shadwell v. Shadwell* [1860] 142 Eng. Rep. 62, 62).

432. *Id.* (referring to *Lakota v. Newton* as “an unreported case”).

433. *Id.* (referring to *Talbott v. Stemmons* as a “case not yet reported”).

434. *Lesnik v. Estate of Lesnik*, 403 N.E.2d 683, 685 (Ill. App. Ct. 1980).

435. *Id.* at 687.

436. *Id.*

437. Professor Corbin states that love and affection would not be consideration “even if the promise is given in order to induce, and actually does induce, feelings of love and affection in the promisee for the promisor [and] [e]ven if it is bargained for as a consideration.” ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 232, at 326 (One Volume ed. 1952); *see also id.* § 131, at 190-91.



situations in which a person's love is not reciprocated.<sup>438</sup> Perhaps particularly appropriate for arguing that love is not consideration is, “[C]an’t help falling in love with you.”<sup>439</sup>

Also, courts typically hold that a moral obligation is not consideration.<sup>440</sup> In these cases, the courts implicitly reject the argument that consideration should be found because the promisor benefits from a clear conscience or the emotional relief of no longer feeling beholden to the other.

Emotional benefits also can qualify as consideration when the promisor pays to improve or protect his or her reputation. Publicity about charitable giving can improve the donor's reputation for power, wealth, and generosity.<sup>441</sup> In addition to economic benefits that may ensue,<sup>442</sup> there are the hard-to-value emotional benefits such as improved self-esteem, self-confidence, and personal satisfaction.

The flip side is when reputation is tarnished. There can be economic and emotional *costs*. Shakespeare wrote, “Good name in man and woman . . . Is the immediate jewel of their souls: Who steals my purse steals trash . . . But he that filches from me my good name Robs me of that which not enriches him And makes me poor indeed.”<sup>443</sup> Courts routinely enforce certain promises calling for a party to pay big money, and all the other side has to do is keep their mouth shut. These provisions reflect the workings of the embarrassing information market, and courts often enforce these provisions without even questioning whether the other side's promise to merely keep their mouth shut is consideration. The implication is that remaining silent is a sufficient detriment to the

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438. See, e.g., Gary Lewis and the Playboys: “This Diamond Ring”, OLDIELYRICS, [http://www.oldielyrics.com/lyrics/gary\\_lewis\\_and\\_the\\_playboys/this\\_diamond\\_ring.html](http://www.oldielyrics.com/lyrics/gary_lewis_and_the_playboys/this_diamond_ring.html) [<https://perma.cc/9NRH-XUTN>] (last visited Jan. 2, 2017); Bobby Vee—Take Good Care of My Baby Lyrics, SONGLYRICS, <http://www.songlyrics.com/bobby-vee/take-good-care-of-my-baby-lyrics/> [<https://perma.cc/UZ5M-92UX>] (last visited Jan. 2, 2017).

439. Elvis Presley—Can’t Help Falling in Love with You Lyrics, SONGLYRICS, <http://www.songlyrics.com/elvis-presley/can-t-help-falling-in-love-with-you-lyrics/> [<https://perma.cc/H5XP-E9QG>] (last visited Jan. 2, 2017).

440. See CALAMARI & PERILLO, *supra* note 130, at 197 (stating the general rule but listing a variety of exceptions observed by some courts).

441. Posner, *supra* note 381, at 575-76.

442. See OSTROWER, *supra* note 44 and accompanying text (discussing the desire to obtain a position on the charity's board of directors or other influential committee).

443. William Shakespeare, Othello act 3, sc. 3.

hushed, or a sufficient benefit to the party with secrets to hide, to avoid characterization as a gift.

Several cases involve friends and lovers settling a potential lawsuit and trying to buy embarrassment avoidance. The seminal case is *Trump v. Trump*,<sup>444</sup> in which Donald and Ivana Trump signed a prenuptial agreement eighteen days before their wedding,<sup>445</sup> providing in part that in the event of divorce Donald Trump would pay Ivana Trump a lump sum of \$10 million plus \$350,000 per year, and Ivana Trump would not “publish . . . any diary, memoir, letter . . . article . . . account, or description or depiction of . . . [the] marriage . . . or any other aspect of [her] husband’s personal, business or financial affairs.”<sup>446</sup> After their divorce, Ivana Trump filed an action to challenge the confidentiality provision, arguing that (i) it was not incorporated into the divorce decree and (ii) it restrained protected speech. Without questioning whether Donald Trump’s payments were supported by adequate consideration, the court rejected Ivana Trump’s arguments and concluded that the confidentiality provision was enforceable.<sup>447</sup>

Building on the *Trump* case, in *Anonymous v. Anonymous*, the court considered a divorce settlement agreement under which the ex-husband was obligated to pay maintenance to his ex-wife, but if the ex-wife discussed certain information the ex-husband could reduce his payments by \$500,000 per breach.<sup>448</sup> The confidentiality provision included some of the same language from the agreement in *Trump* but specifically stated that the ex-wife agreed not to “make any remarks or relate any information about the intimate life of [her ex-husband]” or “make any disparaging remarks about [his] personal, private or family life.”<sup>449</sup> The ex-wife sued to collect maintenance payments due, and the ex-husband attempted to offset arguing the ex-wife had breached the confidentiality clause. The court did not discuss whether the promise of confidentiality constituted valid consideration but cited the *Trump* case and stated,

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444. 582 N.Y.S.2d 1008 (N.Y. App. Div. 1992) (concluding that a confidentiality clause was enforceable); *see also* *Anonymous v. Anonymous*, 649 N.Y.S.2d 665, 67 (N.Y. App. Div. 1996) (Ellerin, J., concurring) (referring to *Trump* as the seminal case).

445. They amended the agreement at least twice during their marriage. *Trump*, 582 N.Y.S.2d at 1009.

446. *Id.*

447. *Id.* at 1011.

448. 649 N.Y.S.2d 665, 666 (N.Y. App. Div. 1996).

449. *Id.*

“[W]e have previously found that such a confidentiality agreement is enforceable.”<sup>450</sup> The court agreed with the ex-husband that the confidentiality provision was enforceable but ultimately sided with the ex-wife because the ex-husband failed to produce sufficient evidence that it was the ex-wife who had disclosed certain information about him to the media.<sup>451</sup>

In these friends and lovers confidentiality cases, rather than focusing on whether a promise to keep quiet about embarrassing details is adequate consideration, the courts focus on whether the contract can be rescinded on other grounds, such as public policy or duress. In *Kaplan v. Kaplan*,<sup>452</sup> after the husband and wife separated, the wife hired private investigators that “forcibly broke into an apartment and took photographs of [the husband] and another woman.”<sup>453</sup> The wife “expressly threatened to publicize the photographs by suing the other woman for alienation of affections” and taking other actions designed to cause “great embarrassment” to the husband, the other woman, and to the other woman’s family.<sup>454</sup> In connection with the divorce, the husband signed an agreement to pay “permanent alimony” of \$5,200 per year for the life of his ex-wife.<sup>455</sup>

Three years later, after the husband had remarried and the other woman in the photograph had married someone else, the husband sought to have the settlement agreement set aside because the wife had provided no consideration for his promise to pay permanent alimony and because he signed under duress.<sup>456</sup> In regards to consideration, the court summarily stated that the mutual promises provided consideration because both husband and wife had waived their marital rights under the property settlement. The court made no analysis concerning the relative economic value of each side’s marital rights.<sup>457</sup> In regards to duress, the court stated that “it is not duress to institute or threaten to institute civil suits”;<sup>458</sup> the wife had an “honest belief . . . that she had a cause of action for alienation of

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450. *Id.*

451. *Id.* at 667.

452. 182 N.E.2d 706, 710 (Ill. 1962) (concluding that a party can threaten to disclose embarrassing details about another person’s behavior and collect money for keeping that information secret).

453. *Id.* at 708.

454. *Id.*

455. *Id.* at 707-08 (stating that the agreement was subject to adjustments if the ex-wife remarried or enjoyed an increase in income).

456. *Id.* at 707.

457. *Id.* at 708.

458. *Id.* at 709.

affections,” and “duress is not shown by subjecting one to annoyance or vexation.”<sup>459</sup>

More recently, in *Jordan v. Knafel*,<sup>460</sup> Karla Knafel told basketball star Michael Jordan that he was the father of her child. In response to her threat to file a paternity suite, Jordan agreed to pay her \$250,000 promptly, and then \$5 million upon his retirement from professional sports, in exchange for her promise of silence.<sup>461</sup> After it was determined that Jordan was not the father, and Jordan had retired from professional sports, Knafel filed a counterclaim against Jordan for the \$5 million.<sup>462</sup> One of Jordan’s arguments was that the agreement was against public policy because paying money in exchange for silence is “inherently extortionate.”<sup>463</sup> The court rejected this argument and instead said, “there is a presumption of validity and enforceability attaching to settlement agreements which include confidentiality provisions.”<sup>464</sup> The court stated that the three classes of contracts for silence that may violate public policy are (i) contracts to suppress information about harmful products, (ii) agreements to conceal criminal conduct, and (iii) contracts that constitute blackmail.<sup>465</sup>

The risk that a contract of silence will be unenforceable because of blackmail increases when the only cause of action is breach of contract. In contrast to the cases described above involving property rights under pre-marital agreements or divorce settlements, attorney Richard Yao sued a former lover simply for breach of contract.<sup>466</sup> Yao asserted that after a “brief, intimate relationship” with John Bult, a wealthy financial executive, he and Bult entered into an oral contract in which Yao agreed not to publicize “certain embarrassing information about Mr. Bult’s personal life” in exchange for “\$10,000 per month for life.”<sup>467</sup> When Bult failed to pay after the first month, Yao sued for breach of contract seeking

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459. *Id.* at 710.

460. 823 N.E.2d 1113, 1120 (Ill. App. Ct. 2005) (concluding that a party can threaten to disclose information about another and collect money for agreeing to keep the information secret).

461. *Id.* at 1117.

462. *Id.* at 1116, 1122.

463. *Id.* at 1119.

464. *Id.*

465. *See id.*

466. *See In re Yao*, 661 N.Y.S.2d 199, 200 (N.Y. App. Div. 1997) (disciplinary proceeding against Yao for filing the breach of contract action in *Yao v. Bult*, 666 N.Y.S.2d 159 (N.Y. App. Div. 1997)).

467. *See id.*

\$15 million in actual damages and \$5 million in punitive damages. The trial court dismissed Yao's claim of breach of contract saying that the contract was against public policy, and the trial court fined Yao \$10,000 and Yao's trial attorney \$1,000 for filing a frivolous lawsuit.<sup>468</sup> In a subsequent action to disbar Yao, Yao submitted a pleading asserting that Bult was a "sexual predator who had a history of pouncing on younger innocent victims and exposing them to the threat of HIV and AIDS."<sup>469</sup> Nevertheless, Yao had only sued for breach of contract at the trial court, and in the disciplinary proceeding the court disbarred Yao for committing extortion and engaging in frivolous litigation.<sup>470</sup>

Courts routinely enforce confidentiality clauses in commercial contracts<sup>471</sup> if they are not an undue restraint of trade.<sup>472</sup> One commentator discusses Bill Gates's use of a confidentiality clause in dealing with a construction firm working on his \$40 million home.<sup>473</sup> In *Coady v. Harpo, Inc.*, a court enforced a confidentiality clause in the employment contract of the senior associate producer of The Oprah Winfrey Show.<sup>474</sup> The clause required the producer to "keep confidential, during her employment and thereafter, all information about the Company, Ms. Winfrey, [and] her private life."<sup>475</sup>

### III. NEGOTIATING OPPORTUNITIES AND JUDICIAL OPTIONS WITH CONTRACT LAW

One commentator contrasts the "world of contract" and the "world" of gifts,<sup>476</sup> and this terminology appropriately dramatizes that radically different things happen depending on whether planners

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468. *Id.* at 201.

469. *In re Yao*, 680 N.Y.S.2d 546, 547 (N.Y. App. Div. 1998).

470. *Id.* at 548.

471. See Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 269-70 (1998).

472. See, e.g., *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1281 (Ariz. 1999).

473. Garfield, *supra* note 471, at 273 (citing Dee Ann Glamsner, *No Place Like Home for Gates—a \$40M Home*, USA TODAY, Sept. 30, 1996, at 6A).

474. 719 N.E.2d 244 (Ill. App. Ct. 1999) (concluding that a contract is enforceable when one party pays money, in part, for the other party's secrecy).

475. *Id.* at 246.

476. See Eisenberg, *supra* note 127, at 823. Professor Eisenberg apparently would land a charitable pledge on the world of gifts if it "is not expressly conditional on a reciprocal exchange . . . even though the [donor] is subjectively motivated by a desire to be invited onto the [charity's] board or to enhance her status in the community." *Id.* at 823-24 n.14.

and courts choose to apply contract law or gift law. Contract law is intricate and detailed. The first-year law school curriculum typically devotes four to six credit hours exclusively to contract law,<sup>477</sup> and contracts casebooks routinely exceed 1,000 pages in length.<sup>478</sup> In contrast, the law of gifts typically is shunted off to a corner of the property law course, and property law casebooks may spend less than twenty or thirty pages on the law of gifts.<sup>479</sup>

#### A. Negotiating Duration, Bad Boy, and Other End-Game Terms

As with different worlds, each legal regime has its own separate atmosphere. The gift world often has a casual atmosphere; making a gift usually is a simple matter. Who hires an attorney to orchestrate a transaction consisting of a birthday gift or holiday present to a family member? A casual atmosphere may also pervade charitable contribution transactions. Even when a charity requests big money, it may expect the donor to sign a one-page pledge form. A review of fifty-seven pledge forms and agreements available online found that “[a] standard charitable pledge form typically is less than one page,” although there was no indication that the pledge forms surveyed involved naming rights.<sup>480</sup> An attorney practicing in this area states, “I’ve seen very explicit agreements, but I’ve also seen instances where people make naming rights gifts with nothing more than a pledge form—just trusting the institution.”<sup>481</sup>

The typical one-page pledge form tends to address only the

[Total] gift amount, the number of donations, the timing of donations (*e.g.*, monthly, quarterly, annually), donation method (*e.g.*, check or credit card), designated purpose . . . , [any] matching gift information, donor information . . . , and publicity preference (*e.g.*, anonymous, in honor of a decedent, naming rights, or other).<sup>482</sup> These one-page pledge forms do

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477. Marc L. Roark, *The Contracts Course Survey*, 61 J. LEGAL EDUC. 435, 436-37 (2012) (“The average hourly credit total for the contracts course is 5.04 hours.”).

478. See, *e.g.*, RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* (5th ed. 2012) (with 1138 pages); CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* (8th ed. 2016) (with 1183 pages).

479. See, *e.g.*, FREYERMUTH, ORGAN & NOBLE-ALLGIRE, *supra* note 188, at 205-36; JESSE DUKEMINIER ET AL., *PROPERTY* 157-72 (6th ed. 2006); JOHN E. CRIBBET ET AL., *PROPERTY CASES AND MATERIALS* 213-35 (9th ed. 2008).

480. Drennan, *supra* note 90, at 495.

481. Pomorski, *supra* note 26 (quoting Ellis Carter, a lawyer representing both charities and donors).

482. Drennan, *supra* note 90, at 495.

“not include the boiler-plate clauses usually [found] in a binding contract, such as a forum selection clause, choice of law clause, jurisdiction and venue clause, severability clause, waiver clause, or costs of collection and attorney fees clause.”<sup>483</sup>

On the other hand, if the charity and the donor are willing to embrace the world of contracts at the time the donor promises to give, they may negotiate and agree upon a variety of important topics. Some highly sophisticated donors seek to negotiate and document big contributions as precisely as commercial transactions.<sup>484</sup> A few cases already discussed in this Article reveal topics the parties could agree on in advance to avoid disputes and reach reasonable results when circumstances change.

### 1. *Duration Problems: The Perils of Perpetuity*

One researcher, after an extensive study, concludes that “traditionally, naming rights were granted in perpetuity.”<sup>485</sup> Unfortunately, experience shows that a promise of perpetual naming over a building or other depreciating property sets the stage for trouble. Someday, the charity will need to renovate the building or other depreciating property, and at that time the charity will need to offer naming rights for the building or property to a new big donor to raise the money to renovate.<sup>486</sup>

In the case of a gift of undeveloped land, there may be a stronger case for granting the donor a perpetual naming right because undeveloped land does not depreciate.<sup>487</sup> Thus, a donor may contribute land to a church or a hospital with the condition that the land must revert back to the donor or the donor’s descendants if the charity ever uses the land for something other than a church or a

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483. *Id.*

484. Shakely, *supra* note 20 (“The . . . currently dominant model is Transactional Philanthropy, or Charity by Lawyers. Here the charitable impulse is codified. . . . Transactional philanthropy contracts often spell out the terms of a gift with great specificity.”).

485. BURTON, *supra* note 19, at 2. *But see id.* at 143, 163-64 (suggesting that charities might find it advantageous to limit the duration).

486. *Id.* at 162-64; Pogrebin, *supra* note 376 (quoting Michael M. Kaiser, Chairman of the DeVos Institute of Arts Management at the University of Maryland) (indicating that charities granting perpetual naming rights on buildings are shortsighted).

487. NEWMAN & BROWN, *supra* note 147, at 242 (“[V]acant land does not depreciate.”); INTERNAL REVENUE SERV., PUB. 946, HOW TO DEPRECIATE PROPERTY 6 (2016).

hospital.<sup>488</sup> In that case, the land may maintain its value and may be easily identified decades or even centuries later.

In contrast, when a donor contributes for the construction and naming of a building, the named property invariably will need renovation or replacement.<sup>489</sup> In negotiating a duration for the naming rights in these situations, a starting point could be that the duration of the naming rights should not exceed the named property's depreciable life for tax purposes if the charity could claim a tax deduction for the depreciation of the property.<sup>490</sup> For example, the depreciable life of non-residential real estate is generally thirty-nine years.<sup>491</sup> Alternatively, the parties could negotiate that the naming right would expire when the charity commences a fundraising campaign for a reasonably needed renovation of the building.

The Lincoln Center and Fisher family situation demonstrates the potential consequences of failing to negotiate a reasonable duration for naming rights<sup>492</sup> and suggests possibilities in negotiation. Avery Fisher contributed \$10.5 million toward the renovation of Lincoln Center's philharmonic hall in 1973, and Lincoln Center agreed to use the name Avery Fisher "on tickets, brochures, program announcements . . . and the like . . . in perpetuity."<sup>493</sup> In 2002, when Lincoln Center began renovating the rest of its campus, the Fisher family threatened legal action if Lincoln Center tried to raise funds to renovate the philharmonic hall by selling the right to name the hall.<sup>494</sup> As a result, Lincoln Center delayed renovation on the philharmonic hall while its patrons complained about bad acoustics and poor amenities.<sup>495</sup> Lincoln Center was unable to negotiate a settlement with the Fisher family until 2014. Because of the failure to negotiate the transaction like a contract, the charity had to pay the Fisher

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488. See, e.g., *Alice Phelan Sullivan Corp. v. United States*, 381 F.2d 399, 400 (Ct. Cl. 1967).

489. BURTON, *supra* note 19, at 143, 162-64; Pogrebin, *supra* note 376.

490. Presuming the charity is a tax-exempt organization under I.R.C. § 501(c)(3) and the property is not regularly used in an unrelated trade or business under I.R.C. §§ 511-13, the charity would not be claiming depreciation deductions for the property under I.R.C. §§ 167-68.

491. INTERNAL REVENUE SERV., *supra* note 487, at 34-35 (listing the depreciable period for "Nonresidential real property").

492. See *supra* notes 10-13 and accompanying text (discussing the Lincoln Center situation).

493. Pogrebin, *supra* note 10.

494. Pogrebin, *supra* note 376.

495. Pogrebin, *supra* note 13 (referring to the hall as "outdated and acoustically problematic").



family \$15 million, grant the family various privileges,<sup>496</sup> and delay the renovation for twelve years.

With a contract view, Lincoln Center might have negotiated a twenty or thirty-year term on the naming rights when Avery Fisher contributed \$10.5 million in 1973. Alternatively, at the time of the original gift, Lincoln Center might have negotiated for an end to the Fisher naming rights whenever Lincoln Center began a fundraising campaign for a reasonably necessary renovation. The negotiated contract might have provided that the Fisher family could continue to name the philharmonic hall if it contributed a certain percentage of the expected renovation costs.<sup>497</sup>

The *Daughters of the Confederacy* case<sup>498</sup> also demonstrates potential negative consequences from failing to negotiate a limited duration. In the early 1930s, when the Daughters contributed just one-third of the original cost of building the dormitory, if Vanderbilt University's predecessor had negotiated a duration clause of thirty, forty, or fifty years, Vanderbilt University could have removed the word "Confederate" from the dormitory's pediment in connection with the \$2.5 million renovation in 1987 and 1988.<sup>499</sup> This would have been especially appropriate because the Daughters apparently contributed nothing to the \$2.5 million renovation. The failure of its predecessor to negotiate a reasonable duration for the naming right cost Vanderbilt \$1.2 million to remove the word "Confederate" from the dormitory in 2016.<sup>500</sup>

## 2. *Bad Boy Clauses*

In his 2005 article, Professor Eason described many situations in which charities struggled to remove a disgraced donor's name because it failed to negotiate a bad boy clause.<sup>501</sup> A famous example involved former Tyco CEO Dennis Kozlowski and Seton Hall

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496. Pogrebin, *supra* note 10. There will be a prominent tribute to Mr. Fisher in the building lobby, Mr. Fisher will be inducted into the Lincoln Center Hall of Fame, and a Fisher family member will serve on the Hall of Fame's advisory board. *Id.*

497. *Id.* (discussing David H. Koch's "right of first refusal" clause over his naming rights for the New York State Theater).

498. See *supra* notes 164-90 and accompanying text (discussing the case).

499. Vanderbilt University conducted the \$2.5 million renovation in 1987 and 1988. See *Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 106, 116, 119 (Tenn. Ct. App. 2005).

500. Anderson, *supra* note 3.

501. See Eason, *supra* note 2, at 394-98.

University. Kozlowski achieved rock-star status as a successful executive until he was convicted for grand larceny and other crimes, and a judge sentenced him to at least eight years and four months, and up to twenty-five years, in prison.<sup>502</sup> As his empire unraveled, the press published embarrassing stories about Kozlowski's wasteful habits, such as paying \$16,000 for a dog-shaped umbrella stand and \$6,000 for a shower curtain hanging in the maid's bathroom of his \$18 million Manhattan apartment.<sup>503</sup> Kozlowski also funded a \$2 million birthday party for his wife and their friends on the island of Sardinia in Italy complete with naked ice sculptures and Jimmy Buffet singing Happy Birthday.<sup>504</sup> Despite the crime and extravagance, Kozlowski was extremely generous, having contributed \$3 million to name the business school at Seton Hall.<sup>505</sup> Apparently, various Seton Hall constituencies were not pleased about the bad publicity, and eventually Kozlowski and the President of Seton Hall negotiated an end to Kozlowski's naming rights.<sup>506</sup> This situation inspired an attorney practicing in this field to write that Kozlowski's "voluntarily agreeing . . . suggests that Seton Hall did not have an automatic right to remove his name."<sup>507</sup>

An interesting angle is the dynamics between the charity and the naming donor that necessitates a bad boy clause. The Tennessee Court of Appeals discussed the donor-charity relationship and the views of different constituencies in the *Daughters of the Confederacy* case. The Vanderbilt University Student Government Association asserted that in addition to acknowledging a financial contribution, naming a building after a donor, and preserving that

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502. Grace Wong, *Kozlowski Gets Up to 25 Years*, CNN (Sept. 19, 2005, 4:31 PM), [http://money.cnn.com/2005/09/19/news/newsmakers/kozlowski\\_sentence/](http://money.cnn.com/2005/09/19/news/newsmakers/kozlowski_sentence/) [<https://perma.cc/32JV-7KW5>] (reporting that the sentence was 8-1/3 to 25 years, the fine was \$70 million, and Kozlowski and the former Tyco CFO had to repay \$134 million to Tyco); Anthony Bianco, William Symonds & Nanette Byrnes, *The Rise and Fall of Dennis Kozlowski*, BUS. WK., Dec. 23, 2002, at 65.

503. Goldberg, *supra* note 21, at 48 (discussing Kozlowski's extravagant lifestyle); Mark Maremont & Laurie P. Cohen, *A \$15,000 Umbrella Stand? Decorating the Tyco Way*, WALL STREET J. (Sept. 18, 2002, 12:01 AM), <http://www.wsj.com/articles/SB1032292279372822035> [<https://perma.cc/M4NM-VNGC>].

504. See William A. Drennan, *Enron-Inspired Nonqualified Deferred Compensation Rules: "If You Don't Know Where You're Going, You Might Not Get There."*, 73 TENN. L. REV. 415, 420-21 (2006).

505. Bianco et al., *supra* note 502; see also Goldberg, *supra* note 21, at 48 (stating that Kozlowski also donated approximately \$4 million to Cambridge University in England).

506. Goldberg, *supra* note 21, at 48.

507. *Id.*

name, signals what the University celebrates and what it takes pride in.<sup>508</sup> The Chancellor of the University stated that a building's name commemorates the University's values, and implies an *endorsement*, and perhaps a celebration, of the named donor.<sup>509</sup> In 2015, the Chancellor of Vanderbilt University said a name is a "symbol."<sup>510</sup> In athletics, naming a field after one coach rather than another may elevate his or her status and "undercuts the legacy of another."<sup>511</sup>

A marketing professor observed that negative publicity about a naming donor may signal that the charity did not do its homework and tends to act recklessly. The professor said, "[R]umors about [comedian Bill] Cosby's sexual conduct circulated for decades and should have been uncovered by any group thinking about accepting his money. . . . 'It reflects on the operations, intentions and leadership of that organization. Why was that celebrity chosen? Was the organization just trying to play the fame game?'"<sup>512</sup>

With a contract approach, a charity might seek to negotiate that it can remove the donor's name promptly upon the first publication of a creditable allegation that the donor: (i) committed an act of moral turpitude; (ii) committed a felony under state or federal law; or (iii) failed to act with due regard to social conventions, public morals, and decency.<sup>513</sup> This may seem like an impossible negotiation. A practicing attorney in this area states, "[S]uch a clause may seem impolite to include in [a charitable donation] agreement."<sup>514</sup> Can a fundraiser really say to a donor, "We would greatly appreciate your \$10 million contribution, and we will name

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508. 174 S.W.3d 98, 108 (Tenn. Ct. App. 2005). A Vanderbilt Student Government Association resolution stated in part, "names on buildings are usually a sign of pride and thankfulness for the contributions made to construct them, but that Vanderbilt was not proud of the legacy of slavery attached to the name of Confederate Memorial Hall." *Id.*; see also *id.* at 120 (summarizing the arguments of the parties regarding the name "Confederate," but the court stated it decided the case on "neutral principles of law").

509. *Id.* at 108.

510. Steven Hale, *Vanderbilt to Officially Rename 'Confederate Memorial' Hall*, NASHVILLE SCENE (Aug. 15, 2016, 2:00 PM), <http://www.nashvillescene.com/news/pith-in-the-wind/article/20830807/vanderbilt-to-officially-rename-confederate-memorial-hall> [<https://perma.cc/F6ZY-Z5V5>].

511. Tanier, *supra* note 79.

512. Gose, *supra* note 368 (quoting USC marketing professor Jeetendr Sehdev).

513. See Goldberg, *supra* note 21, at 50 (providing sample language for a moral clause).

514. *Id.*

the building after you, but we need you to sign a legally binding document protecting us if you commit an act of moral turpitude?”

Although donors may resist including a bad boy clause, a contracts view may help a charity obtain a bad boy clause in at least three ways. First, many charities have naming rights policies.<sup>515</sup> Sometimes, these primarily function as internal documents that set uniform rules for processing naming rights transactions.<sup>516</sup> In addition to this internal function, however, a charity could seek to incorporate its naming rights policy into any substantial naming rights agreement with a donor. Thus, when a charity initially offers a significant naming right, it could start the negotiation by telling the donor that it has a standard form with a bad boy (or morals) clause. The University of Washington has made its policy available to the public, and it includes a provision allowing the University to remove a donor’s name if the donor no longer has a “positive image” or “demonstrated integrity.”<sup>517</sup> Using a naming rights policy can allow the charity’s fundraisers to appear that they are merely following standard operating procedures when proposing the bad boy clause, rather than suggesting that the charity is concerned about one particular donor’s vices.

Second, a charity might make a bad boy clause more palatable by including a somewhat reciprocal provision. Charities can do things that, if publicized, can embarrass some of their donors, such as funding the extravagant lifestyles of their executives,<sup>518</sup>

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515. See BURTON, *supra* note 19, at 139-52.

516. Internal consistency may be especially important for far-flung charities with loose organization structures. For example, a University’s Board of Regents may not want one school within the University system selling perpetual naming rights cheap, while another school in the same University system is demanding premium prices for naming rights over a term of years.

517. See BURTON, *supra* note 19, at 208 (quoting the University of Washington Facilities and Spaces Naming Policy). Elsewhere, the University’s policy provides, “A building or outdoor area may be named . . . based upon the following criteria[:] The individual . . . has a positive image and demonstrated integrity. In the event of changed circumstances, the University reserves the right, on reasonable grounds, to revise the form of or withdraw recognition in consultation with the donor when possible.” *Id.* at 203.

518. See, e.g., Anne Flaherty, *FTC: Family Raised \$187M for Cancer, Spent It on Themselves*, ST. LOUIS POST-DISPATCH (MO), May 20, 2015, at A1, 2015 WLNR 14933562 (“[H]is family . . . [bought] themselves cars, gym memberships and [took] luxury cruise vacations . . . in one of the largest charity fraud cases ever, involving all 50 states.”).

discriminating against certain groups,<sup>519</sup> and incurring excessive administrative costs. Furthermore, a charity may take a controversial position that a particular donor may not want to be associated with. For example, in 2015, Amnesty International adopted a “proposal in favor of the ‘full decriminalization of consensual sex work,’ sparking a storm of controversy.”<sup>520</sup> In 2012, the Susan G. Komen Foundation (to fight breast cancer) announced it would cut off funding for Planned Parenthood and contributions dropped 22% during the next year.<sup>521</sup> The charity’s standard form could include a clause allowing the donor to request a partial refund if the charity misbehaves or reasonably embarrasses the donor. Thus, when the charity’s philanthropic development officer seeks to obtain a donor’s agreement to a bad boy clause, the charity’s officials can point to a “bad charity” clause.

Third, a contracts view can set a tone of bargaining in which both sides realistically understand they will not get everything they want. Thus, the charity may open the negotiation offering twenty-year naming rights subject to a bad boy clause. Perhaps the donor will counter with thirty years and no bad boy clause; and maybe the parties settle on twenty-five years with a bad boy clause.

## B. Judicial Flexibility to Supply Missing Terms, Award Benefit-of-the-Bargain Damages, and Employ Other Contract Tools

Contract law is complex and can provide different doctrinal paths to follow when disputes arise. As an example, in the *Courts* case, the donor gave her sizable life savings to the Hospital expecting a tribute to her deceased grandfather who apparently

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519. See, e.g., Ari Nussbaum, *Women’s Colleges Adopt Transgender Admissions Policies, Others Continue to Rally*, CAMPANIL (Nov. 4, 2014), <http://www.thecampanil.com/womens-colleges-adopt-transgender-admissions-policies-others-continue-to-rally/> [https://perma.cc/69GD-M62R] (reporting that “students at some women’s colleges are still fighting for change”).

520. Emily Bazelon, *Should Prostitution Be a Crime?*, N.Y. TIMES MAG., (May 5, 2016), [http://www.nytimes.com/2016/05/08/magazine/should-prostitution-be-a-crime.html?\\_r=0](http://www.nytimes.com/2016/05/08/magazine/should-prostitution-be-a-crime.html?_r=0) [https://perma.cc/3V4-YLSW].

521. Michael Hiltzik, *Susan G. Komen Foundation Discovers the Price of Playing Politics*, L.A. TIMES (Jan. 8, 2014, 1:25 PM), <http://www.latimes.com/business/hiltzik/la-fi-mh-susan-g-komen-20140108-story.html> [https://perma.cc/DFS4-UQPJ]; Associated Press, *Susan G. Komen for the Cure Contributions Plummet After Planned Parenthood Controversy*, BLAZE (Jan. 4, 2014, 2:18 PM), <http://www.theblaze.com/stories/2014/01/04/susan-g-komen-for-the-cure-contributions-plummet-after-planned-parenthood-controversy/> [https://perma.cc/L43D-SJT7].

provided exemplary service as a community leader.<sup>522</sup> Unfortunately, the generous donor failed to express her desire for a memorial to her grandfather when mailing her stock certificates to the Hospital's President. Under the law of gifts, the court held that the gift became complete and the terms were fixed once the President accepted the stock certificates, so there was no way to require the Hospital to grant naming rights. The court seemed unhappy with the result it reached, describing the Hospital's executives as callous, but the court concluded that it had no choice under the law of gifts.<sup>523</sup> In contrast, if the court had taken a contract view, it may have had two other choices based on (i) the contract law definition of "offer" and (ii) the ability of a court to supply an omitted term in a contract.

### 1. *Definition of Offer and the Courts Case*

If it had adopted a contracts view, the court in *Courts* might have reached a more balanced result. The Restatement (Second) of Contracts defines an "offer" as a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."<sup>524</sup> In other words, under contract law, a statement is an offer only if the receiving party reasonably believes that the statement contains all the terms the sending party expects under the contract.

Judge Easterbrook has provided significant flexibility for courts analyzing whether a statement is an offer under the law of contracts. In *Hill v. Gateway 2000, Inc.*,<sup>525</sup> Judge Easterbrook considered a situation in which the seller advertised a computer for sale in a catalogue at a certain price.<sup>526</sup> The customer ordered the computer over the phone and provided a credit card number for payment of the price. When the seller sent the computer to the customer, the seller included four pages of detailed terms and conditions in the box. The customer might argue the phone call was an offer, the seller accepted when it took the payment, and no

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522. *Courts v. Annie Penn Mem'l Hosp., Inc.*, 431 S.E.2d 864, 864 (N.C. Ct. App. 1993).

523. *Id.* at 867-68.

524. RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981).

525. 105 F.3d 1147, 1149 (7th Cir. 1997) (concluding that a communication will only be an offer if it invites acceptance without further negotiation).

526. *Id.* at 1148-49; *see also* *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996) (involving computer software).

additional terms can be added thereafter. Under this approach, the customer would argue the four-page form with the terms and conditions included in the box never became a part of the contract because the terms of the contract became fixed once the seller accepted the payment. Judge Easterbrook, writing for the majority of the Seventh Circuit, concluded that although the customer ordered the computer and made arrangements for payment, this was *not* an offer under contract law because it would be unreasonable for a customer to believe that the seller of a computer would communicate all the terms and conditions to the buyer over the phone before the parties agreed on contract terms.<sup>527</sup> Judge Easterbrook pointed out that if a seller attempted to read the terms and conditions to the customer over the phone before taking the customer's order, the customer likely would end the call without placing an order.

If the court in *Courts* had considered contract law, it might have found that it was unrealistic for the Hospital to believe, when it received the stock certificates, that the donor did not intend to specify any terms at all relative to how the funds should be used and the type of public recognition expected. Under Judge Easterbrook's approach, the Hospital would make the offer, and Ms. Courts would have accepted much later, perhaps when she subsequently met with Hospital officials and discussed certain naming rights available at the Hospital.<sup>528</sup> Thus, with a contracts view, the court could have reached an intermediate result and avoided a total victory for the callous Hospital.

## 2. *Supplying an Omitted Term and the Courts Case*

Alternatively, the court might have reached a reasonable result under the contract rules by supplying an omitted term. The Restatement (Second) of Contracts and several cases hold that a court can supply a term in a contract even if the parties did not negotiate or agree on the item if it is essential to determine the rights and duties of the parties.<sup>529</sup> One of the specific reasons a court may supply an

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527. *Id.* at 1149; *see also* DeFontes v. Dell, Inc., 984 A.2d 1061, 1069 (R.I. 2009) (indicating that *ProCD* represents the majority view).

528. *Courts v. Annie Penn Mem'l Hosp., Inc.*, 431 S.E.2d 864, 865 (N.C. Ct. App. 1993).

529. RESTATEMENT (SECOND) OF CONTRACTS § 204 (AM. LAW INST. 1981); *see, e.g.*, Snyder v. Howard Johnson's Motor Lodges, Inc., 412 F. Supp. 724, 728 (S.D. Ill. 1976) (supplying a covenant that a restaurant will be operated consistently with defendant's other restaurants).

omitted term is when the parties have “expectations but fail to manifest them.”<sup>530</sup> Where there has been no agreement between the parties, but the court decides to supply an omitted term, the court should supply a “reasonable term based on a logical deduction from the agreed terms or, where that is not possible, [a term based] on standards of fairness . . . .”<sup>531</sup> One court, speaking frankly, admits that in these circumstances a court is “to a considerable extent ‘remaking’ a contract . . . where it seem[s] necessary and appropriate so to do.”<sup>532</sup>

Thus, even if a court found that Ms. Courts made an offer that the Hospital accepted, the court might supply a reasonable naming right. This would have been especially appropriate in the *Courts* case because the Hospital deposited Ms. Court’s donation in an endowment, and the Hospital and the court both indicated it would have been appropriate to designate a “Courts Endowment” under the Hospital’s foundation.<sup>533</sup>

### 3. *Bad Boy Clauses and Frustration of Purpose*

As discussed above, it may be difficult for a charity to negotiate a bad boy clause with a big donor.<sup>534</sup> Even if they treat the naming rights transaction as a contract, the parties may fail to agree on a bad boy clause. Under the doctrine of frustration of purpose, a court may excuse a party from compliance with a contractual duty if “a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made.”<sup>535</sup> The classic example is the English case of *Krell v. Henry* in which the defendant rented a party room on a high floor so he and his friends could enjoy the coronation parade of King Edward VII.<sup>536</sup> The King suddenly

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530. RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b.

531. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 500 (4th ed. 2001); see also RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (stating that the supplied term should comport “with community standards of fairness and policy”).

532. *Parev Products Co. v. I. Rokeach & Sons*, 124 F.2d 147, 149 (2d Cir. 1941).

533. *Courts*, 431 S.E.2d at 867 (discussing the Hospital’s failure to adequately explain this option to Ms. Courts).

534. See *supra* note 514 and accompanying text.

535. RESTATEMENT (SECOND) OF CONTRACTS § 265.

536. *Krell v. Henry*, [1903] 2 K.B. 740 (C.A.) (discussed in KNAPP, CRYSTAL & PRINCE, *supra* note 478, at 726).



became ill and cancelled the parade. The defendant's duty to pay rent was not impossible because he and his friends could have occupied the room and watched an ordinary day go by on the street; nevertheless, the court held the defendant need not pay the promised rent because his principal purpose was frustrated.<sup>537</sup>

If a charity accepted a big donation and named a building or other space or place for the generous donor, and subsequently the naming arrangement would shame the charity because of publicity about the donor, perhaps a court would discharge the charity's continuing naming obligation under this doctrine. A preliminary inquiry would be determining the charity's principal purposes. Most likely the charity's top priority was obtaining all the donor's pledge payments so that it could afford the project. In addition, another principal purpose might have been inducing other donors to pledge by demonstrating that the charity thanks its donors by offering naming rights.<sup>538</sup> The requirement that the intervening event was not the party's fault probably would not be difficult; the charity likely had nothing to do with the donor's misdeeds and subsequent public embarrassment.

For a charity, in some circumstances, it may be challenging to prove that one of its principal purposes has been substantially frustrated. Has the donor's reputation sufficiently slipped that having the donor's name on the charity's building damages the charity? Will the donor be able to apologize or take other steps to salvage his or her public reputation? Would it help the donor to regain his or her favorable reputation if the charity stands by the donor and keeps the donor's name on the building? Some celebrities have made public-relations comebacks. Party-planning and home-decorating maven Martha Stewart was temporarily shunned for her conviction and imprisonment on insider securities trading charges,<sup>539</sup> but she has regained her position as an endorsement juggernaut and was even inducted into the New Jersey Hall of Fame.<sup>540</sup> Others who appeared to have lost their place on the public pedestal and have arguably

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537. *Id.* at 745.

538. *See supra* notes 51-52 and accompanying text.

539. Etan Smallman, *July 16, 2016 on this Day*, DAILY MAIL (UK), July 16, 2016, 2016 WLNR 21668711 (reporting that in 2004 Martha Stewart was sentenced to five months in jail).

540. *Happy Birthday to Westport's Martha Stewart*, WESTPORT DAILY VOICE (WESTPORT, CT), Aug. 3, 2016, 2016 WLNR 23665044.

recovered might include professional athlete Kobe Bryant,<sup>541</sup> actor Robert Downey Jr.,<sup>542</sup> and politician Mark Sanford.<sup>543</sup>

Perhaps one indication that a charity faces harm to its public image is whether other institutions have abandoned the donor. For example, Bill Cosby has lost honorary academic degrees in the wake of numerous allegations of sexual assault and rape.<sup>544</sup> The President of Brown University stated the rescission “was a result of [Cosby’s] not living up to the institutional values on which [Brown University] was based,” and the rescission constitutes a “public denunciation[] of his actions.”<sup>545</sup> A reporter described it as an attempt to shield the school from the “ongoing blowback.” The International Tennis Hall of Fame expelled tennis star Bob Hewitt after his conviction on charges of rape and sexual assault of minors.<sup>546</sup> Wheaton College has removed the name of former Speaker of the U.S. House of Representatives and Illinois Congressman Dennis Hastert from its Center for Economics, Government, and Public Policy in connection with his indictment for a financial crime linked to allegations of sex with minors.<sup>547</sup> The State of Illinois has refused to hang a portrait of

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541. Dave Zirin, *Wrestling with Kobe Bryant’s Forgotten Apology*, NATION’S BLOGS, Apr. 19, 2016, 2016 WLNR 11881935.

542. Tom Payne, *Iron Man Star Wins Pardon for Drug Bust*, DAILY MAIL (UK), Dec. 26, 2015, at 36, 2015 WLNR 38368566 (discussing a pardon of Robert Downey’s 1996 drug conviction).

543. Rex Smith, *Second Acts Arise from Failed Efforts*, ALBANY TIMES UNION, Feb. 6, 2016, at D1 (reporting that Mark Sanford resigned as governor of South Carolina after admitting an affair with a mistress but was elected to Congress two years later).

544. Adrienne Green & Alia Wong, *Bill Cosby Is Being Stripped of His Honorary Doctorates But What’s the Point?*, ATLANTIC (Sept. 30, 2015), <http://www.theatlantic.com/education/archive/2015/09/bill-cosby-is-being-stripped-of-his-honorary-doctorates/408235/> [<https://perma.cc/C2HJ-QG7>] (reporting that Brown, Fordham, and Marquette have rescinded degrees they bestowed).

545. *Id.*

546. Kristen De Groot, *Murky Legacy Follows Tennis Pioneer: A Historical Marker for Bill Tilden is Blocked Because of His History of Sexual Misconduct*, L.A. TIMES, May 1, 2016, at 1; Tanisha Heiberg & James Macharia, *South African Court Dismisses Ex-tennis Star Bob Hewitt’s Appeal Against Rape Conviction*, REUTERS (June 9, 2016, 8:12 AM), <http://www.reuters.com/article/us-safrica-hewitt-idUSKCN0YV1B9> [<https://perma.cc/95A2-8GRA>].

547. Katherine Skiba, *Amid Allegations, Some Consider Removing Dennis Hastert’s Presence*, CHI. TRIB. (June 13, 2015, 6:18 AM), <http://www.chicagotribune.com/news/ct-hastert-portrait-us-capitol-20150612-story.html> [<https://perma.cc/767B-XL88>].

former Governor Rod Blagojevich in the Illinois Capital Building as a result of his impeachment for corruption.<sup>548</sup>

#### 4. *Bad Boy Clauses and Supplying Omitted Terms*

As discussed above in connection with duration clauses, a court can supply an omitted term to a contract if it is essential to determine the rights and duties of the parties. As more and more donors are disgraced and the publicity surrounding this issue intensifies, it may be more likely that courts will be more understanding to a charity's argument that it is essential to remove the donor's name. A factor may include the extent of the donor's misdeeds. For example, a court might be more likely to find de-naming essential when the donor is charged with being a sexual predator than when there are rumors the donor had a consensual extramarital affair.

#### 5. *Remedies: The All-or-Nothing Approach Under the Law of Gifts*

Under the law of gifts, the donor will receive a huge windfall, or will receive nothing, depending on whether the court finds the charity satisfied the condition. Two cases demonstrate the extremes when the parties fail to agree on the duration for charitable naming rights. In *St. Mary's Medical Center*, a hospital wished to tear down a chapel serving as a memorial to a deceased donor.<sup>549</sup> Although at the time of the gift the parties failed to agree on a term for the memorial, the court held that because the Hospital maintained the chapel for fifty years, it had *substantially* complied with its naming obligation.<sup>550</sup> As a result, the family received nothing when the Hospital tore down the memorial to the donor.<sup>551</sup> On the other hand, in the *Daughters of the Confederacy* case, certain facts were similar, but the court reached the opposite result.<sup>552</sup> At the time of the contribution, the parties failed to agree on a term for the Daughters'

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548. Doug Finke, *Blago the Only Illinois Governor Without an Official Portrait*, RRSTAR.COM (Jan. 28, 2010, 12:01 AM) <http://www.rrstar.com/x690798567/Blago-the-only-Illinois-governor-without-an-official-portrait> [<https://perma.cc/SUB2-4ABK>].

549. *St. Mary's Med. Ctr., Inc. v. McCarthy*, 829 N.E.2d 1068, 1071 (Ind. Ct. App. 2005).

550. *Id.* at 1076.

551. *Id.* at 1077.

552. *See generally* Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98 (Tenn. Ct. App. 2005).

naming rights on a university dormitory. For approximately seventy years, Vanderbilt University (and its predecessors) named the dormitory “Confederate Memorial Hall,” but when Vanderbilt University wished to remove the word “Confederacy” from the pediment of the dormitory, the court did not discuss substantial compliance.<sup>553</sup> Instead, the court concluded that if Vanderbilt removed the word in 2005, it would violate a condition of the gift and must return the entire original \$50,000 donation plus earnings on that amount through 2005 of approximately \$700,000.<sup>554</sup> In 2016, Vanderbilt announced that it would remove the word “Confederate” and pay \$1.2 million.<sup>555</sup> The Daughters’ recovery was not reduced in any way to recognize that the Daughters had enjoyed the naming rights for over seventy years.

One could reasonably anticipate that under the law of gifts courts would face a similar all-or-nothing choice if the donor and the charity failed to agree on a bad boy clause, and the charity removed the donor’s name because of the donor’s improprieties. A court following *St. Mary’s Medical* might conclude that the charity had substantially complied by honoring the naming contributor for a long time before the adverse publicity. In contrast, a court might use the *Daughters of the Confederacy* approach and conclude the charity simply violated the naming condition and therefore must repay the entire amount of the donation plus earnings based on the consumer price index,<sup>556</sup> with no reduction for the prior naming. In a naming rights case, the court might prefer the *Daughter of the Confederacy* approach and apply “neutral principles” of law.<sup>557</sup> This may help the court avoid appearing to judge the donor.

#### 6. Remedies: Some Flexibility in Contract Law

The normal approach for calculating the plaintiff’s money damages in a breach of contract case is to determine the value of the promised performance breached,<sup>558</sup> also called the “expectation

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553. *Id.* at 105-06.

554. *See supra* note 188 and accompanying text.

555. Anderson, *supra* note 3.

556. *See supra* note 188 and accompanying text.

557. *See Daughters of the Confederacy*, 174 S.W.3d at 120 (the court stated that it applied “neutral principles” in holding for the Daughters of the Confederacy).

558. KNAPP, CRYSTAL & PRINCE, *supra* note 478, at 852 (quoting Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 57 (1936)).

interest” or the “benefit of the bargain.”<sup>559</sup> The theory is that “the breach may cause the injured party a loss by depriving that party, at least to some extent, of the performance expected under the contract.”<sup>560</sup> The method for calculating the basic damage amount is “[t]he difference between the value to the injured party of the performance that should have been received and the value to that party of what, if anything, actually was received.”<sup>561</sup>

Courts have applied this method for calculating the amount of basic damages to different types of contract cases.<sup>562</sup> As an illustration of how courts use the method,

If . . . a buyer of goods has a claim for damages for partial breach because the goods were nonconforming, the *loss in value* equals the difference between the value to the buyer of the goods that were to have been delivered and the value of the goods that were actually delivered.<sup>563</sup>

With a construction contract, “the reasonable cost of replacement or completion is the measure.”<sup>564</sup> In a “contract for the sale of land, the difference between the contract price and the market value constitutes general damages.”<sup>565</sup> In addition to the general damages, the innocent party can recover “any other loss, including incidental or consequential loss, caused by the breach,”<sup>566</sup> with limits.

The parties can agree on the damages in the contract; these provisions are sometimes included in an “endgame” section.<sup>567</sup> Thus, the parties could, in effect, specify prices for the charity to buy out the donor’s naming rights at different times. In the Fisher family–Lincoln Center dispute, the parties had to arrive at their own settlement amount in 2014 when Lincoln Center was under

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559. RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. LAW INST. 1981).

560. KNAPP, CRYSTAL & PRINCE, *supra* note 478, at 854 (quoting E. ALLAN FARNSWORTH, CONTRACTS 765 (4th ed. 2004)).

561. *Id.*

562. *Id.* at 853.

563. *Id.* at 854 (quoting FARNSWORTH, *supra* note 560, at 765) (emphasis added).

564. *Am. Standard, Inc. v. Schectman*, 80 A.D.2d 318, 321 (N.Y. App. Div. 1981).

565. KNAPP, CRYSTAL & PRINCE, *supra* note 478, at 881.

566. RESTATEMENT (SECOND) OF CONTRACTS § 347(b). The amount recoverable would be reduced by any cost or loss that the innocent party avoided as a result of the breach. *Id.* § 347(c).

567. TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 191 (2d ed. 2013).

significant pressure to reach a deal.<sup>568</sup> Perhaps Lincoln Center could have negotiated a more favorable buy-out deal with Avery Fisher in 1973 when Fisher made his \$10.5 million donation.<sup>569</sup> In regards to setting the amount of the liquidated damages amounts in a contract, the Restatement provides:

Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.<sup>570</sup>

There are restrictions on the amount of damages the plaintiff can recover; two are especially relevant. The landmark case of *Hadley v. Baxendale* establishes that the plaintiff cannot recover more than the potential damages each party reasonably contemplated.<sup>571</sup> Another key restriction is that the plaintiff must prove damages with reasonable certainty, and *the damages cannot be too speculative*.<sup>572</sup>

One appellate court has applied the *too speculative* rule in a naming rights case but in a very strange manner. In the *Daughters of the Confederacy* case, the Tennessee Court of Appeals concluded that the charitable naming rights transaction was a gift and not a contract, sided with the Daughters, and allowed the Daughters to receive a full refund of their donation plus earnings based on the consumer price index.<sup>573</sup> In dicta, and without a full explanation, the court said that if it allowed the Daughters to receive interest on the original donation rather than earnings based on the consumer price index, “[s]uch an approach would invite an offset defense by Vanderbilt and would require the trial court to attempt to quantify the

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568. Pogrebin, *supra* note 10.

569. *See id.* In 1973, Fisher might not have demanded that his estate receive a high buy-out price if Lincoln Center removed his name after his death.

570. RESTATEMENT (SECOND) OF CONTRACTS § 356(1).

571. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854), *reprinted in* KNAPP, CRYSTAL & PRINCE, *supra* note 478, at 878; *Am. Standard, Inc. v. Schectman*, 439 N.Y.S.2d 529, 532 (N.Y. App. Div. 1981). The test is objective, at least in part, because the “breaching party is liable for losses about which it had reason to know.” KNAPP, CRYSTAL & PRINCE, *supra* note 478, at 882.

572. *See* RESTATEMENT (SECOND) OF CONTRACTS § 352 (“Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.”).

573. *See supra* notes 187-88 and accompanying text.

value to the [Daughters] . . . of having the inscription on the pediment of the building for the past seventy years.”<sup>574</sup>

Normally the *plaintiff* would need to prove the amount of contract damages, so if there was a dispute over the value of a charitable naming right, it normally would be the donor who would need to quantify. But in the *Daughters of the Confederacy* case, as discussed above, the court reversed expectations and placed the burden to value on the charity. After placing the burden on Vanderbilt University, the court stated, “Determining the value of an inscription is not a matter that is subject to easy proof or to reasonably definite calculation, and any attempt to do so would lead to a calculation of damages that was impermissibly speculative in nature.”<sup>575</sup> In support, the court cited *Prentis Family Foundation v. Barbara Ann Karmanos Cancer Institute*, but in that case only the trial court considered the value of the naming rights, and the appellate court did not address that topic.<sup>576</sup>

The courts in *Allegheny College, Stock*, and *Dunaway* said the relevant charitable naming transaction was a contract, but unfortunately none of those cases provide guidance on valuing charitable naming rights transactions.<sup>577</sup> In *Allegheny College*, the College did not remove, or even threaten to remove, the donor’s name from the scholarship fund; instead, the College was suing to collect the balance of the pledge.<sup>578</sup> In both *Stock* and *Dunaway*, the donors paid the charities the full amounts promised under the pledges, but the charities never named the properties after the donors.<sup>579</sup> As a result, the courts ordered full refunds of the gifts and did not need to reduce the damage awards for the value of enjoying the naming rights for a period of time.

Valuing charitable naming rights will be difficult, but the refusal to value leads to extreme results as demonstrated in the *Daughters of the Confederacy* case.<sup>580</sup> Estimating values makes more sense when the naming rights last for only a period of years (either

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574. Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98, 119 (Tenn. Ct. App. 2005).

575. *Id.*

576. Prentis Family Found. v. Karmanos Cancer Inst., 698 N.W.2d 900, 913 (Mich. Ct. App. 2005).

577. Allegheny Coll. v. Nat’l Chautauqua Cty. Bank, 159 N.E. 173 (N.Y. 1927); Stock v. Augsburg Coll., 2002 WL 555944 (Minn. Ct. App. Apr. 16, 2002); Dunaway v. First Presbyterian Church, 442 P.2d 93 (Ariz. 1968).

578. *Allegheny Coll.*, 159 N.E. at 174.

579. *Stock*, 2002 WL 555944 at \*7; *Dunaway*, 442 P.2d at 95.

580. *Daughters of the Confederacy*, 174 S.W.3d at 119.

by express agreement or when the court supplies a reasonable term) or covers property with a limited useful life (such as a building). In the cases involving the dormitory named for the Daughters of the Confederacy and the chapel at the St. Mary's Medical Center, the donors enjoyed naming rights for a period of years beyond the expected useful lives of the buildings. As a result, in the contracts world, a court could conclude that the donors received the benefits of the bargain and would have no damages. If a charity breached an express or supplied agreement and terminated a donor's naming rights, a court might reduce the refund using a fraction, with the numerator being the number of years the donor has enjoyed naming rights, and the denominator being the number of years the parties agreed to, or reasonably expected.

### CONCLUSION

In choosing a legal regime for charitable naming rights transactions, a contract approach offers several potential benefits. First is flexibility in initially structuring the arrangement. For example, it may be beneficial if the charity approaches the arrangement as a contract negotiation with a standard publicity policy and a standard naming rights agreement that includes options regarding: (i) choices of public recognition methods;<sup>581</sup> (ii) the duration of the naming rights and other publicity; and (iii) the terms of a bad boy clause allowing the charity to remove the donor's name in the event of varying degrees of shame, misdeeds, and proof.<sup>582</sup> With this contract approach, the charity may be more likely to obtain the donor's consent to a package that includes a bad boy clause and a limited duration for the naming rights. In contrast, if the parties proceed as if this is a gift and the donor should propose all the terms, it may be more difficult for the charity's representative to even mention the charity's need for a bad boy clause and a reasonable duration for the naming rights.

A second benefit is the potential certainty offered by contract law in carrying out, managing, and enforcing these arrangements throughout the term of the deal for items that the parties agreed upon.

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581. Types of publicity may include naming rights on a building or other space or place, prominent discussion on the charity's website or in the charity's newsletter, and placement of the donor's portrait at the building. *See* BURTON, *supra* note 19, at 67-68, 100-01.

582. *See supra* notes 501-21 and accompanying text (discussing bad boy clauses).



A third potential benefit is the judicial flexibility in resolving disputes on items that the parties failed to agree upon. Courts could use contract doctrines to supply omitted terms and award benefit-of-the-bargain damages specifically tailored to the particular situation.

Over the past few decades, society has depended more on contractual approaches to respect the freedom of parties to negotiate and arrange their own affairs.<sup>583</sup> Following this trend could be helpful for those involved in the creative, controversial, and expanding market for charitable naming rights.

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583. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *YALE L.J.* 625, 630 (1995) (“Contract has become the dominant doctrinal current in modern American law.”).