

# Who's Afraid of Promissory Estoppel?: Charitable Giving in Virginia and the Enforceability of Promised Gifts

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In May of 2005, the Virginia Museum of Fine Art (“VMFA”) announced that collectors James W. and Frances G. McGlothlin intend to bequeath their collection of American realist art.<sup>2</sup> The bequest is valued at \$100 million, and includes 33 American paintings, drawings and watercolors as well as a new wing for the museum. However, what happens if the McGlothlins change their mind? Is there any way for the VMFA, or any museum in Virginia, to improve the enforceability of charitable pledges of works of art?

## **BACKGROUND**

Museums often acquire objects as charitable gifts.<sup>3</sup> These gifts may be as significant as \$100 million dollars or as limited as a single painting. Problems may arise when a donor who has promised to give a gift either changes his mind, or dies before his intent has been made clear. In the first situation, the museum must consider its future relationship with the donor as well as

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<sup>2</sup> See, e.g., Clarke Bustard, *Bequest is 'Huge Win' for Museum: Artwork, Funds, Being Donated by Couple Top \$100 Million in Value*, RICHMOND TIMES-DISPATCH, May 17, 2005, at A1, available at [www.timesdispatch.com](http://www.timesdispatch.com); Mark St. John Erickson, *Growing Collection*, DAILY PRESS, July 10, 2005, at G2, available at [www.dailypress.com](http://www.dailypress.com); *Virginia Museum of Fine Arts Announces Landmark Gift*, at [http://www.vmfa.state.va.us/mcglathlin\\_gift.html](http://www.vmfa.state.va.us/mcglathlin_gift.html) (May 16, 2005); Katherine Houstoun, *Extraordinary Generosity*, Richmond.com, at [http://www.richmond.com/museums/output.aspx?Article\\_ID=3669832&Vertical\\_ID=155&tier=20&position=2](http://www.richmond.com/museums/output.aspx?Article_ID=3669832&Vertical_ID=155&tier=20&position=2) (May 17, 2005).

<sup>3</sup> *Black's Law Dictionary* defines a charitable gift as, “[a]n inter vivos or testamentary donation to a nonprofit organization for the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, governmental, or municipal purposes, and other purposes the accomplishment of which is beneficial to the community.” BLACK’S LAW DICTIONARY 709 (8th ed. 2004).

the ramifications of potential negative publicity resulting from a court battle.<sup>4</sup> In the second situation, the donor's estate may refuse to realize the deceased's wishes if they were not clearly expressed in a legally binding way.<sup>5</sup> Disputes with donors' estates are more often settled in court than disputes with a living donor.<sup>6</sup> In addition, a museum must consider its fiduciary duty to the public as a charitable institution when deciding whether or not to enforce a charitable pledge.<sup>7</sup>

The law of charitable giving varies widely from state to state.<sup>8</sup> It is sometimes treated as promissory liability and sometimes addressed with principles of property.<sup>9</sup> Promises are only enforceable by law when they include consideration and mutual assent, and these two elements can take different forms.<sup>10</sup> Offer and acceptance is not typically difficult to establish; consideration on the part of the museum may be difficult to prove.<sup>11</sup> Promised gifts may be enforced through promissory estoppel, which treats detrimental reliance as a consideration substitute.<sup>12</sup> Some courts, notably those of New York, enforce charitable subscriptions solely on the basis of public policy.<sup>13</sup> However, Virginia is the only State which does not recognize the doctrine of promissory estoppel in any form.<sup>14</sup> Virginia's refusal to recognize promissory estoppel leaves contract theory as a viable route of enforcement. In order for charitable pledges to be enforceable as contracts, the concept of consideration must be expanded significantly.<sup>15</sup>

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<sup>4</sup> See generally, MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 365-66 (2d ed. 1998); Stephen K. Urice, *Promised Gifts to Museum or Would a Pledge By Any Other Name Be More Enforceable?*, C989 ALI-ABA 463, 466 (1995).

<sup>5</sup> See 1-7 HARRISON ON WILLS & ADMINISTRATION FOR VIRGINIA & WEST VIRGINIA § 109 for a discussion of testamentary intent.

<sup>6</sup> Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876, 1906 (2001).

<sup>7</sup> See 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, 85 (1992).

<sup>8</sup> See Carolyn C. Clark & Jay W. Swanson, *Promised Gifts to Museums: Monet in the Bank?*, 6-FEB. PROB. & PROP. 12, 12 (1992).

<sup>9</sup> Compare *Virginia School of the Arts v. Eichelbaum*, 493 S.E.2d 510 (1997) (applying contract principles), with *Hebrew University Ass'n v. Nye*, 26 Conn.Supp. 342, 345 (1966) (applying the elements of a gift to the facts of the case).

<sup>10</sup> Stephen K. Urice, *A Contract Law Primer for the Museum Administrator*, SD38 ALI-ABA 195 (March 11, 1999).

<sup>11</sup> Malaro, *supra* note 10, at 365-66.

<sup>12</sup> 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 139 (1921).

<sup>13</sup> E. Allan Farnsworth, *Promises to Make Gifts*, 43 AM. J. COMP. L. 359, 365-66 (1995).

<sup>14</sup> One commentator has even described Virginia's refusal to recognize the doctrine as "mired in this first stage of evolution," referring to the nineteenth century. Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 478-79 (1996).

<sup>15</sup> Farnsworth, *supra* note 12, at 365-66.

Unilateral promise and reliance principles can be used to draw attention to actions taken by the museum which constitute consideration.<sup>16</sup> Pledge forms are indispensable in order to comply with the statute of frauds as well as to clarify the intent of the parties for future reference.<sup>17</sup>

Some sources differentiate a pledge, connoting a monetary donation, from a promised gift, implying a piece of personal property. A gift is legally enforceable if the donor's intent is clear and both possession and title are transferred to the museum.<sup>18</sup> The law of property applies to charitable subscriptions once the gift has been delivered—in whole or in part.<sup>19</sup> Once delivered, the difficulties encountered concern how to use the charitable gift consistently with the donor's intent; doctrines governing this aspect of charitable pledges, such as *cy pres*, are outside the scope of this comment.<sup>20</sup>

## DISCUSSION

This section will examine the statutory and case law surrounding charitable pledges of goods or money in Virginia. In addition, it will set out several options for solidifying promises to make gifts, and discuss each option's legal viability.

### I. THEORIES OF ENFORCEMENT

#### A. Enforcement through Promissory Liability

Promissory liability is an umbrella term that refers to promises enforceable by law.<sup>21</sup> Some theories of promissory liability include public policy, promissory estoppel, and contract.<sup>22</sup> Each of these methods of enforcing promises has the same effect, but each is different in its

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<sup>16</sup> Budig et al., *supra* note 6, at 54.

<sup>17</sup> Malero, *supra* note 3, at 366; Clark & Swanson, *supra* note 7, at 14-15.

<sup>18</sup> Malero, *supra* note 3, at 361.

<sup>19</sup> See Kreitner, *supra* note 5, for an in-depth discussion of the element of delivery.

<sup>20</sup> See, e.g., Malero, *supra* note 3, at 135-149; John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375 (2005); Wendy A. Lee, *Charitable Foundations and the Argument for Efficiency: Balancing Donor Intent with Practicable Solutions Through Expanded Use of Cy Pres*, 34 SUFFOLK U. L. REV. 173 (2000).

<sup>21</sup> See generally Paul Dubbeling, Note, *Contract Theory in Nineteenth-Century Indiana Courts: An Argument for Non-Bargain Based Promissory Liability*, 80 IND. L.J. 473, 475-76, 482 (2005).

<sup>22</sup> *Id.*

constituent elements. In order for a promised gift to be enforced in a court, each element must be met.

a. Public Policy

Some courts, notably those of New York, enforce promised gifts based solely on public policy.<sup>23</sup> The public policy method is supported by the Restatement 2d of Contracts §90, which states, “(2) A charitable subscription or a marriage settlement is binding...without proof that the promise induced action or forbearance.”<sup>24</sup> Subsection (2) requires neither detrimental reliance nor consideration for enforcement. Under this philosophy, the goals of public service and education are more important to our society as a whole than donors’ impulsive actions.<sup>25</sup> New York has chosen to opt for the enforceability of charitable gifts in furtherance of the goal of supporting charities.<sup>26</sup> Regardless of the worthy rationale behind New York’s public policy, Virginia has chosen not to enforce promised gifts on the basis that charitable purposes are thereby served.

b. Promissory Estoppel

A second subset of promissory liability is known as promissory estoppel. The elements of this claim are satisfied when,

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.<sup>27</sup>

Detrimental reliance is sometimes viewed as a substitute for contract and sometimes as a substitute for consideration.<sup>28</sup> Those who support the use of promissory estoppel in the United States believe that the doctrine serves as a safety valve for rigid contract principles, and they point to the laws of other nations such as France and Germany.<sup>29</sup> These European nations have separate governing principles for charitable gifts which are entirely different than those of

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<sup>23</sup> Farnsworth, *supra* note 12, at 369.

<sup>24</sup> RESTATEMENT (SECOND) OF CONTRACTS §90 (1981).

<sup>25</sup> See Russell G. Donaldson, Annotation, *Lack of Consideration as Barring Enforcement of Promise to Make Charitable Contribution or Subscription*, 86 A.L.R.4TH 241 (1991).

<sup>26</sup> Budig et al., *supra* note 6, at 61(quoting *I. & I. Holding Corp. v. Gainsburg*, 12 N.E.2d 532, 533-34 (N.Y. 1938)).

<sup>27</sup> RESTATEMENT (SECOND) OF CONTRACTS §90 (1981).

<sup>28</sup> Malara, *supra* note 3, at 362.

<sup>29</sup> Farnsworth, *supra* note 12, at 364 (quoting JOHN P. DAWSON, GIFTS AND PROMISES 102-13, 165 - 85 (1980)).

contract.<sup>30</sup> As helpful as this doctrine may at first seem, case law indicates that Virginia is the only state not to recognize promissory estoppel.<sup>31</sup> Opponents of the doctrine assert that the law of contract is broad enough to encompass these sorts of claims without creating a completely new set of rules.<sup>32</sup> Under this theory, detrimental reliance may be considered as part of the larger picture, or as part of consideration, but will not serve as a consideration substitute.<sup>33</sup> A closely related doctrine is equitable estoppel, but unlike promissory estoppel, it requires a misrepresentation between the parties.<sup>34</sup>

### c. Contract

Since promissory estoppel and public policy are not favorably viewed by Virginia courts, what remains is contractual theory for the enforcement of promised gifts. The elements of contract are mutual assent and consideration.<sup>35</sup> Mutual assent is most likely present in the situation of a promised gift, since the donor has manifested his intent and the charity wants to receive the gift. Unless the donor's intent is for some reason difficult to prove and a court cannot

<sup>30</sup> *Id.*

<sup>31</sup> *See, e.g.,* W.J. Schafer Assocs., Inc. v. Cordant, Inc., 493 S.E.2d 512 (Va. 1997); Tuomala v. Regent Univ., 477 S.E.2d 501 (Va. 1996); Virginia Sch. of Arts, Inc. v. Eichelbaum, 493 S.E.2d 510 (Va.,1997); Ward's Equip., Inc. v. New Holland N. Am., Inc., 493 S.E.2d 516 (Va.,1997). North Carolina recognizes promissory estoppel on a limited basis. *See* Home Elec. Co. of Lenoir, Inc. v. Hall & Underdown Heating & Air Conditioning Co., 358 S.E.2d 539 (N.C. 1987) (stating that promissory estoppel cannot serve as substitute for consideration in breach of contract action in North Carolina).

<sup>32</sup> *But see*, 3-8 Corbin on Contracts §8.12.

**Virginia**—The Old Dominion seems vaingloriously mired in its rich history and archaic legalese of the past, so much so Virginia courts doggedly refuse to admit, candidly and definitely, that they in fact apply the doctrine of "promissory" estoppel. Virginia courts seem reluctant to surrender to the doctrine's natural evolution and concede the true basis of their promissory-estoppel decisions. Nonetheless, these decisions achieve a "just result" by either stating "estoppel" or "equitable" rather than "promissory" estoppel, or by torturing an illusory bargained-for consideration as its ground for decision. However, Virginia's history of masquerading "promissory estoppel" in its modern decisions retards the doctrine's natural evolution in Virginia just as it has in neighboring North Carolina. All other American jurisdictions have cut the cord to this historical clandestine practice and allow the doctrine naturally to evolve and mature.

<sup>33</sup> *Id.* "Decisions throughout the jurisdictions are replete with equitable estoppel masquerading as promissory estoppel... Promissory estoppel in section 90 becomes "pretend consideration" like a seal, and has no separate identity apart from estoppel."

<sup>34</sup> *See* Boykins Narrow Fabrics Corp. v. Weldon Roofing and Sheet Metal, Inc., 266 S.E.2d 887 (Va.,1980). *See generally* 4 SAMUEL WILLISTON, WILLISTON ON CONTRACTS §8:4 (Richard A. Lord ed., 4th ed. 2001).

<sup>35</sup> RESTATEMENT (SECOND) OF CONTRACTS §17 (1981).

identify an offer to contract, mutual assent should not be a difficult hurdle. A museum should always clearly document the donor's intent to avoid confusion. Consideration, however, poses more of a problem. Consideration is evidence of a bargained-for exchange.<sup>36</sup> It has been said that any physical thing, even a peppercorn can constitute consideration.<sup>37</sup>

In *Allegheny College v. National Chautauqua County Bank of Jamestown*,<sup>38</sup> Judge Benjamin Nathan Cardozo stretched the doctrine of consideration to encompass a case involving a charitable pledge.<sup>39</sup> Mary Yates Johnson donated \$1,000 to Allegheny College, documenting her intention to give \$4,000 more after her death.<sup>40</sup> The money was to become the Mary Yates Johnson Memorial Fund, to be used "to educate those preparing for the ministry."<sup>41</sup> Upon her death her estate refused to pay the remaining money.<sup>42</sup> At first glance, it seemed that the College had not manifested consideration for the bargain, and that the pledge was an unenforceable gift. However, Cardozo emphasizes the public policy importance of enforcing charitable gifts, and held that there was consideration in the parties' actions.<sup>43</sup> The donor had taken advantage of a charitable naming opportunity when she pledged the money to Allegheny College. The consideration offered by the museum was a promise to perpetuate Mary Yates Johnson's name.<sup>44</sup> Although never relied upon in Virginia, the Allegheny College case has been cited in West Virginia<sup>45</sup> and Maryland<sup>46</sup>—two of the five states in the Fourth Circuit. Neither of the Carolinas have cited Allegheny College.

Another way to prove consideration is present can be through the benefit/detriment theory, whereby both parties have gained and lost through the deal.<sup>47</sup> Benefit and detriment are not

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<sup>36</sup> *Id.* §72.

<sup>37</sup> See *Horace Mann Ins. Co. v. Government Employees Ins. Co.*, 344 S.E.2d 906 (Va. 1986) (stating that parties to a contract are at liberty to determine their own valuations, and courts generally will not inquire into adequacy of consideration); E. Allan Farnsworth, *Promises and Paternalism*, 41 WM. & MARY L. REV. 385, 395 (2000).

<sup>38</sup> *Allegheny Coll. v. Nat'l Chautauqua County Bank of Jamestown*, 159 N.E. 173 (N.Y. 1927).

<sup>39</sup> Farnsworth, *supra* note 12, at 366.

<sup>40</sup> *Allegheny*, 159 N.E. at 372.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 379.

<sup>44</sup> *Id.* at 375.

<sup>45</sup> *McMillen v. Dettore*, 242 S.E.2d 459, 461 (W.Va. 1978).

<sup>46</sup> *Maryland Nat. Bank v. United Jewish Appeal Federation of Greater Washington, Inc.*, 407 A.2d 1130, 1137 (Md. 1979).

<sup>47</sup> 2-5 Corbin on Contracts §§ 5.9-5.10

required, but can be evidence of consideration.<sup>48</sup> Often it would be difficult to prove the museum has lost something by accepting the promised gift. For example, they probably have not turned down other beneficial offers and therefore lost an opportunity because they expected to receive the gift in question. Charitable naming gifts can be evidence of the bargaining process on the part of the museum, and therefore provide the consideration necessary for a bilateral contract.<sup>49</sup> This is a valuable tool for charities, since name association provides an incentive for donors.<sup>50</sup> The way the charity chooses to display the name can be quite diverse, spanning from one of thousands of bricks making up a walkway to a prominent wing of the building. Another option is for a museum to offer minimal consideration such as free membership. However, it should be noted that there is a possibility of negating the tax benefits of charitable donations for the donor if the deal can no longer be considered a gift for tax purposes.<sup>51</sup> (The details of tax ramifications are outside the scope of this comment.)

The concepts of unilateral<sup>52</sup> and bilateral<sup>53</sup> contracts have also been relied upon to enforce promised gifts. If an enforceable contract exists, then the parties must prove a total or material breach in order to receive damages.<sup>54</sup> Specific performance is a distinct possibility when the focus of the contract is something as unique as an art object.<sup>55</sup> Typically, specific performance is reserved for contracts dealing with real property, since land has unique characteristics that are irreplaceable.<sup>56</sup> Likewise, due to the distinctive characteristics of art objects, it is unlikely that a court would require the breaching party to pay the nonbreaching museum the value of a Monet instead of handing over the actual painting.

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<sup>48</sup> 3 WILLISTON, *supra* note 33, § 7:4; Budig et al., *supra* note 6, at 51 (citing JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS (3d ed. 1987)).

<sup>49</sup> *Allegheny*, 159 N.E. at 175. *See generally*, Eason, *supra* note 19.

<sup>50</sup> Eason, *supra* note 19, at 378, n.2.

<sup>51</sup> *See* 4-51 Federal Income, Gift and Estate Taxation § 51.04

<sup>52</sup> Budig et al., *supra* note 6, at 61-64. *See* I. & I. Holding Corp. v. Gainsburg, 12 N.E.2d 532 (N.Y. 1938), in which the New York Court of Appeals enforced a charitable subscription benefiting a hospital on the basis of unilateral contract.

<sup>53</sup> Budig et al., *supra* note 6, at 55-57. The *Allegheny College* case may be viewed as an example of a classic bilateral contract in the context of charitable giving.

<sup>54</sup> 24 WILLISTON, *supra* note 33, § 64:1.

<sup>55</sup> 12-63 Corbin on Contracts § 1142

<sup>56</sup> 25 WILLISTON, *supra* note 33, § 67:1.

## B. Enforcement through Property Law Doctrines

Promised gifts can be viewed through the lens of property principles as well as through that of contract. If title and possession are transferred while the donor is alive, the gift is referred to as “inter vivos.”<sup>57</sup> When a gift is provided for in a donor’s will, it is called a testamentary gift.<sup>58</sup> There are a myriad of options and types of gifts which combine aspects of inter vivos and testamentary gifts, such as fractional gifts, living trusts, retained life estates, causa mortis gifts, legacies, and charitable gift annuities. These types of gifts are common and usually not difficult to enforce unless one of the elements is missing. Problems are likely to arise when a gift is promised or partially made, followed by a change of circumstances (such as the donor’s death, a change of fortune, etc.).

### a. Inter Vivos Gifts

For a gift to be legally enforceable there must be transfer of title as well as transfer of possession.<sup>59</sup> If either of the elements are missing then the ownership of the object may be challenged.<sup>60</sup> A museum should carefully document the transfer of title as well as the object’s location in the museum in order to avoid problems.<sup>61</sup>

If a donor promises to make a gift, and then changes his mind, it is not uncommon for a museum to back down in order to preserve the relationship.<sup>62</sup> This choice is popular since the donor may decide to go through with the transfer in the future if the museum does not alienate him by acting in an adversarial manner. It is both expensive and bad publicity for a charitable institution such as a museum to litigate against a donor.<sup>63</sup> Museum trustees may be concerned, however, about breaching the museum’s fiduciary duty if they decide not to go to court when an enforceable agreement exists.<sup>64</sup>

### b. Testamentary Gifts

If the donor’s will is legal and unambiguous in expressing his intent, testamentary gifts do not pose an enforceability predicament.<sup>65</sup> If the decedent’s estate refuses to abide by the

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<sup>57</sup> BLACK’S LAW DICTIONARY 710 (8<sup>th</sup> ed. 2004).

<sup>58</sup> *Id.*

<sup>59</sup> Malaro, *supra* note 3, at 361.

<sup>60</sup> See Kreitner, *supra* note 5, at 1911-1915 for an in-depth discussion of the delivery element.

<sup>61</sup> Malaro, *supra* note 3, at 364.

<sup>62</sup> *Id.* at 365-66.

<sup>63</sup> *Id.* at 365.

<sup>64</sup> See generally Budig et al., *supra* note 6.

<sup>65</sup> 1-7 HARRISON *supra* note 4, § 109.



terms of the will, the museum can once again avoid problems by providing clear documentation of the donor's intent which could be interpreted by a court.<sup>66</sup> A museum may be more likely to go to court over a dispute with the donor's estate than with the donor himself, since the museum may profit in the future by preserving the donor/museum relationship, while it is unlikely that a litigious estate would donate in the future.<sup>67</sup> (The details of estate planning and planned giving are outside the scope of this comment.<sup>68</sup>)

## II. SCENARIOS WITH LEGAL ANALYSIS

Each of the following scenarios will assume the donor has not legally bequeathed his collection to the museum. In each situation, one or two variables change and the ramifications will be examined.

### **Scenario #1: The donor comes to the museum, and orally states his intention to leave his collection of art objects to VMFA in his will. However, he dies in an automobile accident on his way home—before he gets a chance to change his old will.**

This situation does not meet the elements of a legal gift. There may have been donor intent, but if it is only oral, the museum may not be able to provide evidence in court. The museum received neither legal title, nor possession of the collection. In order for the museum to improve the enforceability of this claim, it should have requested from the donor a written record of donor intent, as well as a signed transfer of title. However, without possession of the actual object, even with these elements, it is not likely that a court would not uphold the gift.

A contract claim is of doubtful merit as well. If the conversation between donor and museum had been recorded or documented, then an oral offer and acceptance could be shown. However, the statute of frauds prevents certain types of contracts from being enforced if they are

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<sup>66</sup> 1-7 HARRISON *supra* note 4, § 110 (referring to *Fenton v. Davis*, S.E.2d 372 (1948) and *Bailey v. Ford*, 243 S.E.2d 484 (1978)).

“It has been held in Virginia that the finality of testamentary intent must be ascertained from the face of the paper and extrinsic evidence is not admissible to prove or disprove it. However, where there is a legitimate dispute as to the meaning of words used in a will evidence showing the facts and circumstances surrounding the testator at the time the will was executed may be considered upon the question of testamentary intent. (citations omitted)”

<sup>67</sup> Budig et al., *supra* note 6, at 50.

<sup>68</sup> The VMFA, for example, has presented several options to potential donors, which are outlined on the museum's website at [http://www.vmfa.state.va.us/support/support\\_planned.html](http://www.vmfa.state.va.us/support/support_planned.html).

not in writing and signed by the party to be charged.<sup>69</sup> If the statute of frauds does not cover this type of contract, then an oral agreement could suffice. Since the Virginia statute of frauds covers agreements which cannot be made within one year as well as those for \$500 or more, it would be prudent to make sure there is a signed document.<sup>70</sup> Even if mutual assent is present and the agreement abides by the statute of frauds, there is no consideration to validate the contract. Nothing was exchanged and there does not seem to be evidence of a bargaining process. Hence, it is unlikely the museum could prevail on a claim to the artwork.

**Scenario #2: The donor states his intention in a signed writing to leave his collection of art objects to VMFA in his will. However, he dies on his way home—before he gets a chance to change his old will.**

In this scenario, the museum does not have possession of the objects, and therefore does not have a valid gift claim. Intent is expressed clearly in the signed writing, and the writing could also contain a valid transfer of title. However, without possession—which is, as the legal maxim states, nine-tenths of the law<sup>71</sup>—the gift is unenforceable.

A contract claim is possible, but doubtful in this scenario. The signed writing alleviates any concerns over mutual assent, since the offer and acceptance are documented. Once again, there is no consideration since a reviewing court could not find any evidence of a bargained-for-exchange. Some scholars point to moral obligation as a form of consideration,<sup>72</sup> but that theory is risky at best since there is no precedential support in Virginia.

**Scenario #3: The donor states his intention in a signed writing to leave his collection of art objects to VMFA in his will. As consideration, the donor leaves a signed copy of the catalog of his collection, and the museum gives him a lifetime membership. However, the donor dies on his way home—before he gets a chance to change his old will.**

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<sup>69</sup> Va. Code Ann. § 8.2-201 (Michie 2001); see Carolyn C. Clark, *Promised Gifts and Partial Gifts: Guidelines for Negotiation and Administration*, C379 ALI-ABA 337, 344 (1989); Malaro, *supra* note 3, at 364; Budig et al., *supra* note 6, at 72-73.

<sup>70</sup> Malaro, *supra* note 3, at 364.

<sup>71</sup> Black's Dictionary definition of "maxim" includes this as an example of a legal maxim. BLACK'S LAW DICTIONARY 1000 (8th ed. 2004).

<sup>72</sup> See *Parker v. Carter*, 18 Va. 273 (1814) (finding no moral obligation to pay the debts of a parent); *Davis v. Anderson*, 39 S.E. 588 (Va. 1901) (finding no moral obligation to support a needy relative). 4 WILLISTON, *supra* note 33, § 8:12; Farnsworth, *supra* note 12, at 366-368.

Scenario #3 is similar to scenario #2 with regard to a legally enforceable gift. Although there is documented intent and a possibility of title transfer, the lack of physical possession leaves the claim unenforceable.

Contract principles present a stronger argument. Since the party to be charged has signed a written memo, there are no problems concerning the statute of frauds. This document serves as evidence of mutual assent. Consideration may also be present in this situation. Some types of consideration, such as an exchange of money, would negate the tax incentives for the donor.<sup>73</sup> Since a court may not quantitatively calculate the value of the consideration,<sup>74</sup> a catalog is an illustrative example of the sort of symbolic gesture desirable in this situation. On the side of the museum, free lifetime membership represents consideration since the membership is of some value. Mutual assent, represented through offer and acceptance, coupled with consideration creates an enforceable contract.

**Scenario #4: The donor states his intention in a signed writing to leave his collection of art objects to VMFA in his will. As consideration, the donor leaves a signed copy of the collection catalog. The museum writes several press releases including interviews with the donor regarding his plans, gives a charity ball in his honor, and the donor's business experiences a surge in popularity as a result of the effect on his reputation. However, he dies before he gets a chance to change his old will.**

As in the scenarios above, the museum's contract claim is more viable than its gift claim. The element of possession is not present, and therefore the gift is not enforceable. A contract's required element of mutual assent is present, and evidenced in a signed writing. Consideration is less robust here than in scenario #3, and would depend on the individual court's willingness to stretch the doctrine. Public disclosure before the donor's death—notably press releases, interviews, and the like—has undoubtedly provided a boost to his reputation. However, a court may find this relationship to be too attenuated or not the direct cause of the benefit. Evidence should be produced to show that the donor's reputation benefited directly from the bargained-for deal with the museum. In addition, it should be shown that the museum spent funds which could

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<sup>73</sup> See generally Ralph E. Lerner, Practising Law Institute, *Legal Aspects of Owning Art and Other Valuable Personal Property*, in 2779 TAX LAW AND ESTATE PLANNING COURSE HANDBOOK SERIES, ESTATE PLANNING AND ADMINISTRATION 111 (2004); DAVID DONALDSON & CAROLYN OSTEEN, *THE HARVARD MANUAL ON TAX ASPECTS OF CHARITABLE GIVING* (Carolyn Osteen & Martin Hall eds., 8th ed. 1999).

<sup>74</sup> See *Horace Mann Ins. Co. v. Gov't Employees Ins. Co.*, 344 S.E.2d 906 (Va. 1986).

have been spent courting other donors. If a court is willing to find consideration on the part of the museum, then the exchange is enforceable as a contract. However, the museum would be safer providing a more concrete form of consideration.

**Scenario #5: The donor states his intention in a signed writing to leave his collection of art objects to VMFA in his will. As consideration, the donor leaves a signed copy of his collection catalog. The museum names its new wing after the donor, inscribing it in several places around the building. However, the donor dies before he gets a chance to change his old will.**

A gift claim is not enforceable in this situation. Despite the documented intent and possibility of transfer of title, the museum does not have possession of the objects.

Both elements of contract may be present. Offer and acceptance are not difficult to prove, since a court could see the signed writing. The inscriptions on the building provide a valuable incentive to the donor, and may be viewed as a benefit received from the bargain. However, since the museum probably does not lose any money or other opportunities, courts may be reluctant to view charitable naming gifts as consideration. It could be argued that the museum lost other potential donors who may have wanted their names displayed; on the other hand, one donor's name above a doorway might encourage other potential donors to give. In a situation where the museum had relied to their detriment by actually breaking ground or beginning construction, a court would be more likely to view their action as consideration.<sup>75</sup> Another option for a museum which has spent considerable money or broken ground is a tort action for damages. While a contract claim may be enforceable here, it depends on the magnitude of the detrimental reliance and the court's view of consideration.

**Scenario #6: The donor states his intention in a signed writing to leave his collection of art objects to VMFA in his will. He stipulates that the museum will only receive the gift if they follow certain conditions specified in the signed memo. As consideration, the donor leaves a signed catalog of his collection. However, he dies before he gets a chance to change his old will.**

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<sup>75</sup> In states other than Virginia, scenario #5 is an example of an enforceable promissory estoppel claim. There was a promise upon which reliance could be expected, the museum relied to its detriment, and injustice can only be avoided by enforcing the contract. Detrimental reliance in Virginia, however, must be evidence of consideration and does not stand alone as an enforceable claim.

Again, a gift claim would not be enforceable by a court since the element of possession is absent.

A contract claim could be enforced in this scenario, depending on the specific conditions of the gift. Offer and acceptance are provided for in the signed writing. In the event that the condition requires the museum to spend money, rely detrimentally, or renege on other opportunities, a court could find consideration on the part of the museum.<sup>76</sup> Conditions which probably would not constitute consideration are those which do not require the museum to exert any time, effort, or money in reliance of the gift. An example of this is a donation on the condition that the museum will only display the object in front of pink walls instead of white.

**Scenario #7: The donor states his intention in a signed writing to leave his collection of art objects to VMFA in his will. He leaves five valuable paintings with the museum curator, as a taste of what is to come. However, he dies on his way home—before he gets a chance to change his old will.**

The claim of a legal gift is tricky here, and would only be enforceable if the museum is faultless in its documentation. The signed writing, ideally, would have to include a transfer of title. If so, then the museum has an enforceable gift claim for the five paintings already in its possession. If the museum intends to claim the rest of the donor's pieces, then the documentation should specify the quantity and contain detailed descriptions of each object in the collection. If the memorandum contains anything less than a perfect account of the donor's intent, then the word "collection" could be construed to mean only the five paintings already in the museum's possession. The court would have no way of knowing how many of paintings the donor intended to convey. The Allegheny College case is an example of partial delivery, but in the context of money, not art objects.<sup>77</sup> Specificity in documentation is the key in this scenario.

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<sup>76</sup> For example, the gift of a very large and valuable futurist sculpture might contain a condition requiring the museum to refuse other gifts of the same type. The donor wants his sculpture to be the center of attention, without lesser works detracting from its grandiose presence. The museum's curator is approached by another donor who offers a futurist sculpture of lesser value, and he refuses, relying on the promise of the first donor. If the first donor changes his mind, and the museum has documented its refusal of the second sculpture, then they may be able to convince a court that act was valuable consideration. Other possible conditions which could constitute consideration are the cleaning of a damaged work, the promise not to loan the work to other museums, or storage and transportation.

<sup>77</sup> *Allegheny Coll. v. Nat'l Chautauqua County Bank of Jamestown*, 159 N.E. 173 (N.Y. 1927).

A contract claim would be valid in this situation as well, as long as the court can find evidence of consideration on the part of the museum through their actions—i.e. free membership, charitable naming gift, etc. Mutual assent is present in the signed memorandum.

**Scenario #8: The donor states his intention in a signed writing to leave his collection of art objects to VMFA in his will. He delivers his current collection to the museum for exhibition on loan, but does not wish to give the museum title because he wants to continue collecting. However, he dies on his way home—before he gets a chance to change his old will.**

Here, title is the element missing from an enforceable gift claim. While intent and possession are present, a gift is not valid without transfer of title. If the donor's intent is unequivocally clear, and no one else has an interest in the property, the museum could acquire title in another manner such as adverse possession.<sup>78</sup>

Offer and acceptance are present, fulfilling the first requirement for a valid contract. The donor has offered consideration because he loaned valuable art to the museum, which he could have been enjoying himself, selling, or loaning to other institutions. Consideration on the museum's side, however, is more of a stretch. The museum could argue that it would lose future members or donors who would rely on the present donation.<sup>79</sup>

This scenario could also be viewed as an agreement to contract, instead of a contract itself.<sup>80</sup> In that case, it would not be enforceable after the donor's death.

**Scenario #9: The VMFA is undergoing extensive renovations. The donor states his intention in a signed writing to donate his collection of art objects to VMFA. He transfers title to the museum, but wishes to keep the collection in his home until the museum**

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<sup>78</sup> Malaro, *supra* note 3, at 83-84.

<sup>79</sup> The following hypothetical illustrates this point: Fran loves art from 1920's San Francisco. She attends a VMFA exhibition of 1920s San Francisco figuration, and reads a plaque that states the collection has been bequeathed to the VMFA by ninety-nine year old George. Fran, relying on this information, decides to buy a membership to the VMFA. She also decides to donate her collection to the VMFA instead of the MoMA, based on the fact that they will already have a similar collection. When George dies 6 months later, and his estate refuses to donate the collection, Fran cancels her membership and donates to the MoMA.

*See In re Upper Peninsula Dev. Bureau*, 110 N.W.2d 709 (Mich. 1961); *Congregation B'nai Sholom v. Martin*, 160 N.W.2d 784 (Mich. Ct. App. 1968), *rev'd*, 173 N.W.2d 504 (Mich. 1969). *See generally* Budig et al., *supra* note 6.

<sup>80</sup> *See United States v. Conservation Chem. Co.*, 661 F.Supp. 1416, 1419 (W.D. Mo. 1987).

**renovations are finished. However, he dies before he gets a chance to change his old will, which bequeaths the entire collection to his cook.**

Since intent and title are both present in this situation, the museum could have worked out a plan with the donor that would have made the gift enforceable. Instead of keeping the entire collection in the donor's home, the museum could have bargained for a rotating exhibit. As each smaller part of the collection arrives at the museum, that part becomes property of the museum. When it goes back to the donor's residence for safekeeping, the museum could draft another document which would establish a sort of reverse loan. In this way, the entire collection would become property of the museum, and the donor would still be able to enjoy the art. It should be taken into consideration, however, that some art is likely to be damaged each time it is packaged and transported. For example, a painting on canvas is much more easily transported than a Calder mobile.

Scenario #9 could also be enforced on contract principles, assuming the museum has proffered valuable consideration of some sort. Similarly to scenario #8, it could also be considered an agreement to contract.

**Scenario #10: The donor arrives at the museum, with a station wagon full of valuable objects d'art. He transfers title to the museum, and dumps everything in the parking lot. The museum curator is so elated that he forgets to offer the donor anything in return. Two days later, the donor realizes that he didn't get his free membership, and wants to take back the gift.**

This situation provides for an enforceable claim of legal gift. At the time of the gift-over, the donor's intent was to give the art to the VMFA. The other elements of title and possession were also fulfilled. It is of no legal consequence that the donor subsequently changed his mind, because the gift is enforceable. However, a museum would want to avoid this situation, since a good relationship with a donor can often bring future benefits.

This situation does not create an enforceable contract. Despite the written offer and acceptance, the museum has done nothing to show a bargained-exchange took place.

**Scenario #11: The donor makes a fractional gift to the museum. He transfers a half interest in his collection to the museum, keeping the other half for himself for tax purposes until it would be more prudent to donate it to the museum. However, he dies before**

**donating the other half-interest. As a result, his estate breaks up the half-interest among his 28 children.**

Fractional gifts are a tempting, but thorny, method of gift-giving.<sup>81</sup> When a donor gives an undivided fractional interest to a charity such as the VMFA, he can maximize the tax deduction—or even increase it as the painting becomes more valuable over time. A museum should always require that the donor promise to give or bequeath the balance of the undivided interest in order to avoid the nightmarish situation described in scenario #11. In that situation, a court would have to auction the painting and partition the proceeds. The subject of fractional gifts is broad, and its implications too numerous to be addressed in this memo. However, if properly handled, a fractional gift can be a useful tool.

### CONCLUSION

There are many different ways a donor can choose to give a charitable gift. Each of the ways are full of variables which may come back to haunt a museum if not properly attended to at the outset of the deal. Many of these options only apply in certain situations: some apply to monetary pledges, others to art objects; some apply in the situation of an inter vivos transfer, others to the situation of a conflict with a donor's estate. Each option should be considered within the context of the individual situation. However, some generalizations about the legal viability of each option can be made.

A museum must strike a balance between protecting its own interests and alienating donors.<sup>82</sup> In order to protect the museum's interest, a museum should not rely on an oral promise to make a donation. At the same time, it must be careful that its thorough documentation does not alienate the donor by making him jump through legal hoops. Giving the donor a token in return—no matter how small—works to serve as consideration of contract as well as a way to build a relationship with the donor. A museum also must be careful with respect to timing a court action if one becomes necessary. If the museum acts aggressively, it runs the risk of alienating the donor and losing future opportunities.<sup>83</sup> If it waits too long to enforce a valid claim, it may run the risk of not fulfilling its obligation to the public. Although undesirable because of the expense and bad publicity, when a museum must go to court in Virginia, it should not rely on the theories of promissory estoppel or public policy.

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<sup>81</sup> Lerner, *supra* note 72, at 111; Clark & Swanson, *supra* note 7, at 15-16.

<sup>82</sup> Malaro, *supra* note 3, at 365.

<sup>83</sup> Budig et al., *supra* note 6, at 50.



Finally, there are a few good options that are helpful regardless of the individual gift situation. First, a museum should attempt to get title of the object. This may be included in the initial written document when first approached by a donor. Secondly, the museum should get possession of the object, if only on loan or through partial delivery. Most importantly, put it in writing! A signed and written memorandum, also known as a pledge form, is indispensable in both the gift and contract scenarios. The documentation should be as specific and meticulous as possible, and a myriad of misunderstandings and legal difficulties can be avoided.<sup>84</sup> Despite the fact that publicity and media documentation can serve to bolster written agreements in the eyes of the court as well as the public, it should be remembered that charitable giving in Virginia is governed by the law of contract and must be supported by offer, acceptance, and consideration.

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<sup>84</sup> For example pledge forms, see Malaro, *supra* note 3, at 367-68.