

CIVIL LAW

COMMENTARIES

VOL. 2

WINTER 2009

ISSUE 1

Enforceability of Charitable Pledges

Thomas B. Lemann¹

A lot of ink has been spilled, some with dubious accuracy, on this subject. Whether a charitable pledge is enforceable is, of course, purely a question of state law, and the state holdings are not unanimous; or as *Corpus Juris Secundum* puts it:²

“A conflict of authority exists as to whether the mutual promises of subscribers constitute a consideration for the subscription.”

All agree that in a situation of promissory estoppel, where the charitable pledgee has changed its position substantially, e.g. signed a building contract on the basis of pledges received, the pledge is enforceable; the split of authority exists as to enforceability based only on beneficence and “mutual promises” of other donors.

¹ A. B. Harvard College 1949, LL.B Harvard Law School 1952, M.C.L. Tulane Law School 1953. Of Counsel, Liskow & Lewis, New Orleans.

² 83 CJS verbo Subscriptions, § 14.

In Florida, for example, the Supreme Court has made it difficult to recover on charitable pledges. The pledge card in Mt. Sinai Hospital v. Jordan³ read as follows:

“In consideration of and to induce the subscriptions
of others, I promise to pay . . .”

Out of a pledged total of \$100,000, the donor had paid \$20,000 during his lifetime, and the charity sued the estate for the remaining \$80,000. Held, in the absence of any claim of reliance, the pledge was not enforceable; it was a mere gratuitous promise of a future gift, lacking consideration; or on the rationale of Williston on Contracts (1920), the pledge was merely an offer, subject to acceptance when the work it contemplated has been done or at least begun, “or liability incurred in regard to such work on the faith of the subscription.” Construing the pledge as an offer, it must follow that if no work has been done or liability incurred, it must expire at death of the offeror.

So held the Supreme Court of Florida, and similar results have been reached in several other states, as noted in an ALR Annotation⁴ and also in 83 CJS verbo Subscriptions.

An adherent of the contrary rule is Iowa, where two leading cases in its Supreme Court have held charitable pledges binding and enforceable without any proof of reliance or other “consideration.”⁵ And in a recent case from the Iowa Court of Appeals it was held that even oral pledges are similarly enforceable. In Iowa, “there is no requirement to show consideration or detrimental reliance.”^{4a} The Restatement of Contracts has come down squarely in favor of enforceability without the need of proving reliance:

“A charitable subscription . . . is binding . . . without
proof that the promise induced action or forbearance.”⁶

³ 290 S.2d 484 (Fla. Sup. Ct. 1974).

⁴ 86 ALR 4th 241.

⁵ Salsbury v. Northwestern Bell, 221 N.W.2d 609 (1974), and PHCCC v. Johnston, 340 N.W.2d 774 (1983).

^{4a} Estate of Schmidt, Court of Appeals of Iowa, September 6, 2006

⁶ Restatement 2d of Contracts, § 90 (2).

Now what of Louisiana? It is clear that in Louisiana, with unbroken jurisprudence going back to 1836, charitable pledges are legally enforceable. In the first case on the subject, Louisiana College v. Keller,⁷ the defendant subscribed \$500 to a new college to be established. When the donor refused to honor his subscription, the college brought suit, and the Supreme Court upheld the validity of the pledge, holding that lack of mutuality and consideration was not a defense:

“But the defendant seeks to avoid the payment of the sum subscribed by him, under the plea that his promise was without consideration and is not binding on him. An obligation, according to the Code, is not the less binding though its consideration or cause is not expressed. We are not informed as to the consideration of this promise, by any thing on the face of the papers. It may have been the advantage the defendant expected to derive from the establishment of a college at his own door, by which he would save great expense in the education of his children, or it may have been a spirit of liberality and a desire to be distinguished as the patron of letters. Whatever it may have been, we see nothing illicit in it; nothing forbidden by law, and the promise binds him, if he consented freely, and the contract had a lawful object. **In contracts of beneficence, the intention to confer a benefit is a sufficient consideration.**”

Similarly in Homer College v. Calhoun,⁸ a charitable subscription was again enforced by the Supreme Court. The syllabus says:

“An obligation in favor of an educational institution, made to create a fund for its endowment, payable in

⁷ 10 La. 164 (1836).

⁸ Mann.Unrep.Cas. 140 (1877).

instalments, is enforceable against the obligor, and when he seeks to escape or evade payment by setting up conditions precedent, upon the nonfulfilment of which his liability would not attach, he must establish them satisfactorily, or judgment will go against him.”

Further, a charitable pledge was also enforced in Baptist Hospital v. Cappel,⁹ In that case the pledge card read thus:

“For a valuable consideration, receipt of which is hereby acknowledged, and in consideration of the subscription of others, I hereby subscribe and promise to pay to the order of the Baptist Hospital at Rapides Bank, Alexandria, Rapides Parish, Louisiana.”

In upholding enforceability of the pledge against the defense of failure of consideration, etc., the court said:

“There can be no question about the validity of the contract at the time the pledge card was signed. The Supreme Court of this state correctly laid down the law governing such contracts in the case of Louisiana College v. Keller, 10 La. 164 . . .”

Enforceability of charitable pledges was reiterated, by way of dicta, in Dillard Univ. v. Local Union 1419.¹⁰ In the first case the court quoted with approval from the decision in La. College v. Keller that

“In contracts of beneficence, the intention to confer a benefit is a sufficient consideration.”

⁹ 14 La.App. 626, 129 So. 425 (1930).

¹⁰ 144 S.2d 710 (La.App. 1962) and 169 S.2d 221 (La.App. 1964).

In the second case the court said flatly:

“We find no difficulty in reaching the conclusion that a pledge of this nature is valid and binding, Louisiana College v. Keller, 10 La. 164.”

The pledge card involved in the Dillard cases was in the standard format (“In consideration of the gifts and pledges of others, I/we promise to pay ...”) and was a simple instrument, not in authentic form, i.e. not notarized. Before 1984 no doubt was raised anywhere as to the enforceability of charitable pledges in Louisiana. But some have expressed a concern that doubt may have been cast on unnotarized pledges by the enactment of Civil Code Art. 1967.¹¹ It provides in part that

“Reliance on a gratuitous promise made without required formalities is not reasonable.”

Can we infer from this enactment a legislative intent to overrule the jurisprudence on charitable pledges, and to require an authentic act or some sort of notarial pledge to justify enforceability?¹² (Practically all charitable pledges are executed on simple cards, without any notary or witnesses.)

To answer that question, one must turn to the grand pantologue of Louisiana obligations law, Professor Litvinoff of LSU, Reporter for the 1984 revision and whose treatise on Obligations is the leading authority. The short answer is No, Art. 1967 does not require charitable pledges to be in authentic form to be enforceable; but the explanation requires something of a civil law discursus.

Art. 1967 deals only with gratuitous promises, and under the civil law a charitable pledge is actually an onerous contract. As has been well pointed out,¹³ someone making a charitable gift or pledge expects the charity to do something in return: the donor to a hospital expects the

¹¹ Act 331 of 1984.

¹² As required by Civ. Code Art. 1536 for donations of immovables or incorporeals.

¹³ By Professor Litvinoff.

hospital to tend sick people, as the donor to a school or college expects the institution to perform educational functions; the symphony orchestra is expected to perform music, the art museum to display works of art.

Planiol in his 1933 treatise has explained the civil law approach to charitable subscriptions.¹⁴ He begins by noting that the reason such subscriptions are not held to the solemnities required for purely gratuitous promises is that the charitable subscription is a “special contract” rather than a donation, and he goes on:

“The courts have begun to decide on this question. The Court of Appeals of Nancy, in a decision of March 17, 1920, held that a charitable subscription was not a question of donation but an unnamed contract subjected solely to the general rules of obligations. The Civil Chamber, Feb. 5, 1923, rejected an appeal and declared that a subscription, by its very nature, would not fall within the formalities of Art. 931.” (Emphasis added.)

And here is what appears in the Law Institute translation of the 1938 edition of Planiol:

“Open subscriptions for the creation or support of some public welfare work are usually accompanied by an immediate contribution, which is valid as a manual gift. Can a pledgor be held to his promise if he refuses to honor it, or should this type of a donation be considered void for lack of form? The courts have held that such a pledge is a nameless contract, which can serve to realize a donation if it is motivated by an intention to make a gratuity.”¹⁵ (Emphasis added.)

¹⁴ 5 Planiol & Ripert, *Traité Pratique de Droit Civil Français* (1933), § 418.

¹⁵ Planiol & Ripert, *Treatise on the Civil Law* (11th ed. 1938), § 2545A.

In France, therefore, a charitable pledge is not a gratuitous donation that must be in authentic form, but rather a “special contract” or a “nameless contract” exempt from notarial requirements.

Louisiana courts have reached the same result. In Thompson v. Société Catholique¹⁶ the decedent made a gift in 1889 to a Catholic institution for educational purposes. The real estate so conveyed was clearly community property. After his death his widow brought an action to annul the gift on the ground that a husband could not alienate community immovables gratuitously. The Supreme Court held that the conveyance was not a gratuitous donation at all, but rather an onerous contract, in view of the fact that the donee was bound to use the gift for educational purposes. Citing Civil Code Arts. 1523 and 1526, the court concluded:

“The conditions and charges thus imposed and exacted of the donee impresses upon the donation the character of an onerous donation, or more properly speaking, an onerous contract, and is not subject to the rules peculiar to real gratuitous donations.” (Emphasis added.)

The concept that a charitable subscription is, in civil law, equivalent to an onerous contract and hence exempt from the formal requirements of a pure gratuity is also set forth in other cases¹⁷ and, of course, in Professor Litvinoff’s treatise.¹⁸ It seems quite clear, then, that a charitable subscription or pledge is not subject to the formal requirements of Art. 1536.¹⁹

In view of the unbroken jurisprudence in Louisiana, there can be no reasonable ground for doubt that charitable pledges are enforceable; either because no consideration is required or because if it is, “the intention to confer a benefit is a sufficient consideration.”

Will an unpaid charitable pledge be deductible for estate tax purposes? Clearly so. We may start with IRC § 2053: claims against the estate are deductible when “allowable by the laws of the jurisdiction under which the estate is being administered,”²⁰ i.e. if enforceable under state

¹⁶ 157 La. 875, 103 So. 247 (1925).

¹⁷ Castleman v. Smith, 148 La. 233, 86 So. 778 (1920); Mobley v. Lee, 318 So.2d 631 (3rd Cir. 1975) (dictum)

¹⁸ Litvinoff on Obligations, La. Civil Law Treatise, Vol. 6 (1969), § 103.

¹⁹ Of course any charitable gift is considered gratuitous for forced heirship purposes. Loyola Univ. v. Deutsch, 483 S. 2d 1250 (4th Cir. 1986).

²⁰ IRC § 2053 (a).

law. Then the statute goes on to provide explicitly that with regard to a charitable pledge, it will be deductible as long as it would have been allowable if a bequest.²¹ Accord, Regs. § 20.2053-5.

In PLR 97-18031 (1997) the IRS conceded that enforceability of a charitable pledge would turn on state law, citing IRC § 2053(a)(3). And the Tax Court, in Levin,²² reached the same conclusion, holding the charitable pledges not deductible because unenforceable under Florida law (as we have seen, above).

There has been no case, as far as I know, questioning the estate tax deductibility of an unpaid charitable pledge; but based on the authorities cited herein, it appears clear that if such a position were asserted it could be successfully resisted.

²¹ IRC § 2053 (c)(1)(A).

²² 69 TCM 1951 (1981).