

## "We're Very Sorry For Your Loss."

02.20.15 | Linda J. Rosenthal, JD



*The eldest son of the late philanthropist turned his attention to the large stack of mail just pushed through the door slot. It had become a comforting ritual in recent afternoons.*

*The top item was an elegant Hallmark card from one of the old gentleman's favorite local charities. Below the printed message of condolence was a thoughtful, handwritten note: "We're very sorry for your loss. Your father was a pillar of the community whose support over the years for our cause and others will be gratefully remembered. Our new headquarters building will be a lasting monument to his generosity when it is completed and opened next summer."*

*The charity did not receive the standard, embossed acknowledgment. Instead, what popped up in the organization's mail a few weeks later was a formal letter from the estate attorney: "Your benefactor's family are very sorry for your loss as well. The executor has informed me that the estate will not honor the alleged pledge for the remaining balance of your construction costs."*

Ok. We're making up the part about the tacky response from counsel.

But sometimes – in real life – a benefactor's heirs may have second thoughts about the dearly departed's generosity, and a worthy charity may be left holding the (empty) bag.

### **A Brief Recap**

In "[What, Exactly, is a Pledge?](#)," we began a discussion of charitable pledges. Depending on the circumstances – and on state law – a promise to make a future donation may or may not be a legally enforceable contract.

Pledges are evaluated under the usual elements of contract law: offer, acceptance, and consideration. The term "consideration" means bargained-for, mutual, promises. Some states are loose about whether and how much consideration is needed to make a charitable pledge enforceable.

California is not.

Generally, charitable pledges in this state are not enforceable without consideration, unless one of just a few limited exceptions apply. The most common one is “promissory estoppel”; that is, when the donee-charity relies to its detriment on the promise of future money. An example is when a donor promises to underwrite the cost of a new building and makes an initial part-payment. If the organization starts construction and incurs substantial costs and obligations before the donor reneges, a court may enforce the full pledge.

We posed some questions at the end of “What, Exactly, is a Pledge?”:

- What if a donor doesn’t make good on the promise of a future gift? (We described several examples in “What Happens if a Donor Threatens to Renege on a Pledge?”);

and

- “What if the donor makes certain payments, but then dies before the pledge is completed?” Is the pledge legally enforceable at all?

***Some Illustrations: Donor Dies with Unpaid Pledges***

Each situation is unique and – of course – decided under that state’s law.

***Marshall’s Millions***

The late J. Howard Marshall II, Texas oil tycoon, was a colorful character. In addition to his May-December marriage to the late Anna Nicole Smith, he played the extravagant supporter of numerous institutions and causes around the nation. For example, over a few decades, Mr. Marshall had pledged millions of dollars to Haverford College in suburban Philadelphia. Some promises were in writing, but others were oral. The institution returned the favor by naming buildings and professorial chairs after him.

But when he died in 1995, it was revealed that this extremely wealthy man had left a string of unpaid charitable pledges around the nation: to Haverford as well as other prestigious institutions including Yale University. The New Haven school apparently chose not to pursue unpaid pledges in amounts reported to be as much as \$25 million.

Haverford had other ideas, though, and filed a lawsuit in a Texas Probate Court against J. Howard’s estate to collect the promised pledge balance.

Haverford faced off against the estate’s legal team assembled by J. Howard’s younger son and sole heir, E. Pierce Marshall. Pierce was a relentless opponent. After a long battle, Haverford lost the fight . (So did Anna Nicole – in a lawsuit for a big chunk of J. Howard’s fortune, but that’s another story for an entirely different blog.)

The jury made a specific finding that Haverford had not substantially relied on the total alleged pledge, and so it was unenforceable under Texas law. (Haverford eventually received about \$1.2 million from one of J. Howard’s Louisiana charitable remainder annuity trusts, but that was much less than the promised total pledge amount asserted to be \$4 million.)

This multi-year, multi-state litigation was a tough and costly lesson for the prestigious institution of higher learning.

*Mrs. Johnson's Scholarship Fund*

There was a different result in a much older case in New York State.

Historically, many educational institutions have been reluctant to sue post-mortem for unfulfilled pledges, but in the 1920's, Allegheny College didn't hesitate at all to go after the estate of one Mary Yates Johnston.

Allegheny sent out a fundraising appeal. Mrs. Johnston responded with a letter pledging \$5,000, due 30 days after her demise. (Back then, \$5,000 was no small potatoes.)

The letter included instructions to her executor to pay this amount; "(i)n loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund, the proceeds from which shall be used to educate students preparing for the Ministry, ..." Two years later, the lady was still alive, and chose to pay \$1,000 of the promised sum. Allegheny College established the scholarship fund in her name. Later, for an unexplained reason, she sent a letter revoking the pledge.

The College was having none of this and – exactly 30 days after the death of Mary Yates Johnson – filed suit against her heirs for the remaining \$4,000 of the pledge.

Allegheny won. The court ruled that, under New York law, there was – indeed – detrimental reliance on the promised gift because the college had set up the scholarship fund. That was enough to create a legal obligation enforceable against the estate and establish important legal precedent that continues in force to the present day.

*The \$2-Million Promise*

Even if a pledge might otherwise qualify as legally valid, it may not be enforced if there are defenses available to the deceased donor's descendants.

Consider the case of Francis K. Snyder, who signed a document promising a future \$2 million to the Texas A&M-Corpus Christi Foundation. She died shortly after.

But here's the rub: This generous lady was 99 years old when she made the pledge.

Her heirs smelled the proverbial rat. They filed suit against the organization to rescind the gift on grounds of mental incompetence and the undue influence.

The estate presented a slew of witnesses, including Mrs. Snyder's friend, her professional advisers, and her medical team, who testified she was "mentally incapacitated" when she signed the gift documents.

Her administrator was also able to prove that the Foundation's president had private meetings with her, and exerted undue influence. The original gift was \$1 million; Mrs. Snyder's attorney had drawn up the document. But in the final version – drafted by the Foundation president and presented to the elderly donor alone, without family or advisers present – the pledge mysteriously changed to \$2 million – an amount beyond her means.

The Texas court set aside the pledge. These and other factors, taken together, led to a reasonable inference of undue influence and lack of capacity.

***A Few Suggestions***

There are certain precautions that a charitable organization and a donor can make to ensure that their mutual understanding and agreement is fulfilled after death.

First, the institution should draft a written pledge agreement that includes all of the particulars about the donor and the donation, sets out a specific payment schedule, and recites how the organization will potentially rely to its detriment on the pledge. There should be follow-up as well, with written notice to the donor when each step in reliance on the pledge is taken.

Second, the donor should discuss charitable pledges with heirs and advisers, and update his or her estate planning documents with these details, including specific instructions to the personal representative to fulfill the entire remaining pledge amount on death.