Meaney v. Trustees of the University of Columbia
February 2018

February 2018

California Bar Examination

Performance Test

INSTRUCTIONS AND FILE

MEANEY v. TRUSTEES OF THE UNIVERSITY OF COLUMBIA

FILE

MEANEY v. TRUSTEES OF THE UNIVERSITY OF COLUMBIA

INSTRUCTIONS

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

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

T = objective
A = boss
P = memo
O = issues
S = no stmt. of facts

FOGEL & DAVIS, LLP

One Walton Avenue

Belleville, Columbia

MEMORANDUM

TO: Applicant

FROM: Melissa Saphir

DATE: February 27, 2018

RE: Meaney v. Trustees of the University of Columbia

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client

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

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

plaintiff

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

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

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

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

AGREEMENT

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

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

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

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

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

Dated: December 18, 1964.

_____*Edward Kemper*_____
Edward Kemper

___ *Harold Williamson*_____
Harold Williamson

Chairman of the Board of Trustees

February 2018

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LIBRARY

MEANEY v. TRUSTEES OF THE UNIVERSITY OF COLUMBIA

LIBRARY

Behrens Research Foundation v. Fairview Memorial Hospital
Columbia Court of Appeals (2008).....

Collins v. Lincoln
Columbia Court of Appeals (2009) .....

Holt v. Jones
Columbia Supreme Court (1994) .....

BEHRENS

BEHRENS RESEARCH FOUNDATION v. FAIRVIEW MEMORIAL HOSPITAL

Columbia Court of Appeals (2008)

Facts

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

Facts

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

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

We disagree.

Rule

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

Rule - absolute gift

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

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

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

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

Analysis - absolute gift

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

Affirmed.

Collins

COLLINS v. LINCOLN

Columbia Court of Appeals (2009)

Facts

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

Facts

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

Rule - gift

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

Rule - K

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

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

Rule - K vs. gift

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

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

Rule - consideration

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

Rule

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

Example - similar to our case.

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

Rule

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

Salmon

Rule - parties' motives

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

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

Issue

Analysis

Analysis

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

Affirmed.

Holt

HOLT v. JONES

Columbia Supreme Court (1994)

Facts

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

Facts

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

Proc. History

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

Proc. History

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

Issue - Standing

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

Issue - Standing

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

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

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

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

Rule - Charitable Trust

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

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

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

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

Rule

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

Rule

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

Analysis

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

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

Reversed and remanded.

BarMD Breakdown: Meaney v. Trustees of the University of Columbia

For the most part, this is a fairly straightforward PT. The task memo gives you the issues you are to address – (1) whether the garden was transferred by contract or by gift, and (2) if by gift, what kind of gift. The law is fairly straightforward as well, albeit a bit cumbersome.

This PT presented a couple of challenges. First, people were surprised that the File just contained one document in addition to the task memo – an agreement to buy a garden in exchange for naming the garden after the Donor, Edward Kemper. There were two takeaways from this: (1) you might have a very small file, and (2) the task memo is incredibly important and contains facts that you should use (i.e., don't disregard the task memo as a source for information).

Second, the third case seems to come a bit out of left field because it didn't seem to address either of the two issues you were told to address in the task memo. Rather, it addresses standing to sue for breach of a charitable trust. So, in addition to addressing the issues you are specifically told to address in the task memo, you also had to address whether the garden trust was a charitable trust and whether Meaney had standing to sue to enforce the charitable trust. The takeaway from this is twofold: (1) you must use every case in the library, and (2) if you get a case that seems not to fit, still use it – add another section onto your PT addressing the same issue presented in the case, extracting the rules, use the case to draft a rule proof, and apply the law just as you would for any other issue.

After Step 2

MEMORANDUM

To: Melissa Saphir
From: Applicant
Date: February 27, 2018
Re: Meaney v. Trustees of the University of Columbia

I. INTRODUCTION

Below, please find my analysis of whether Edward transferred the garden to the Trustees by way of contract or gift, and if by way of gift, by way of what kind of gift.

II. ANALYSIS

A. Whether the Garden was Transferred by Way of Contract or by Gift

R

P

A

C

C

B. If by Way of Gift, by Way of What Kind of Gift

R

P

A

C

C

III. CONCLUSION

Thank you for allowing me to conduct this analysis for you. If I can be of further assistance, please let me know.

After Step 4

MEMORANDUM

To: Melissa Saphir
From: Applicant
Date: February 27, 2018
Re: Meaney v. Trustees of the University of Columbia

I. INTRODUCTION

Below, please find my analysis of whether Edward transferred the garden to the Trustees by way of contract or gift, and if by way of gift, by way of what kind of gift.

II. ANALYSIS

A. Whether the Garden was Transferred by Way of Contract or by Gift

R -- Collins

P – Collins; Salmon

A

C

C

B. If by Way of Gift, by Way of What Kind of Gift

R – Behrens

P – Behrens

A

C

C

C. Was the Garden Transferred by Charitable Trust

R – Holt

P – Holt

This issue was not one directly asked for in the task memo; however, you must use each case. Thus, I created an additional section addressing the additional issue – whether the garden was transferred by charitable trust and whether Meaney has standing under that theory.

A

C

C

III. CONCLUSION

Thank you for allowing me to conduct this analysis for you. If I can be of further assistance, please let me know.

After Step 5

MEMORANDUM

To: Melissa Saphir
From: Applicant
Date: February 27, 2018
Re: Meaney v. Trustees of the University of Columbia

I. INTRODUCTION

Below, please find my analysis of whether Edward transferred the garden to the Trustees by way of contract or gift, and if by way of gift, by way of what kind of gift.

II. ANALYSIS

A. Whether the Garden was Transferred by Way of Contract or by Gift

Property may be passed by contract or by gift. The elements of transfer by gift and contract both require delivery and acceptance. Collins. However, a transfer by contract requires consideration whereas a transfer by gift requires the absence of consideration. Collins. Consideration has two requirements: (1) the promisee must bargain with the promisor and (2) must confer, or agree to confer a benefit, or must suffer, or agree to suffer, a burden. Collins. The absence of consideration is clear when a gift is absolute but is not clear when a gift is not absolute. Collins. The presence of consideration does not turn on the presence or absence of the term "consideration" in the instrument. Collins. Ultimately, what controls is the parties' intent. Collins. If the parties are motivated to buy and sell, the transfer is by contract. Collins. But if the parties are motivated by a desire to deliver and accept the property by a non-commercial transaction, there is a gift. Collins.

In Collins, the court held a transfer was by way of gift when a mother transferred property to her son, each was the other's only living relative, and each was an environmentalist. The court further explained that a promise to "use best efforts to maintain the property in an ecologically sustainable manner" was nominal and immaterial and, in light of the circumstances, the mother intended to donate the land to her son. Collins. In Salmon, the court held a transfer was a gift a father transferred 10 acres of land valued at $500,000 to his adult daughter was a gift, even though the deed stated he transferred the property to his daughter "in consideration of $500" because the $500 was nominal and immaterial and it was "clear" the father intended to donate the land to his daughter and not sell it to her.

A

C

C

B. If by Way of Gift, by Way of What Kind of Gift

A donor is the master of his or her gift. Behrens. A donor can make a gift that is absolute or not absolute. Behrens. A donor can give property unconditionally, without (1) restricting use or disposition of the property, (2) retaining power to modify the gift, or (3) reserving a right to sue to enforce a restriction or to undo the gift in the case of a restriction's breach by causing the party to revert to the donor him- or herself or to a third person. Behrens. When a gift is absolute, the donor has relinquished, and the done has assumed, full dominion over the property. Behrens. Alternatively, a donor can give a gift conditionally, (1) restricting use or disposition, (2) retaining power of modification, and/or (3) reserving a right of enforcement or reversion. Behrens. When a gift is not absolute, the donor has not relinquished, and the donee has not assumed, full dominion over the property; rather, both the donor and the donee share power over the property's use or disposition. Behrens. The law presumes a gift is absolute unless it clearly appears otherwise. Behrens. The law further presumes a donor has not restricted use or disposition, has not retained power of modification, and has not reserved a right of enforcement or reversion, unless it clearly appears otherwise. Behrens.

In Behrens, the court held a donor gave an absolute gift to a donee when the instrument merely recited that the donor "hereby delivers" and the donee "hereby accepts" the gift and the presumptions about an absolute gift applied when nothing clearly appeared otherwise.

A

C

C

C. Was the Garden Transferred by Charitable Trust

A charitable trust is created, as a matter of fact, whenever a settlor manifests an intent to give property, in trust, for a charitable purpose and actually gives the property, in trust, for such purpose. Holt. A charitable trust is also created, as a matter of law, whenever a person gives property to an educational, philanthropic, healthcare, or similar institution for an education, philanthropy, healthcare, or similar purpose. Holt. The Attorney General has standing to sue to enforce provisions of non-private trusts; however, any person with a special interest may also sue to enforce provisions of non-private trusts. Holt. Persons with a special interest are those who are the trustees or beneficiaries or would otherwise have an ownership interest in the property. Holt.

In Holt, the court held the trustees of a non-private trust, had a special interest because they were trustees of the trust at issue, reasoning that the trustees were in the best

position to learn about breaches of trust and to bring the relevant facts to a court's attention.

A

C

C

III. CONCLUSION

Thank you for allowing me to conduct this analysis for you. If I can be of further assistance on this, or any other, matter, please do not hesitate to let me know.

Final Draft

MEMORANDUM

To: Melissa Saphir
From: Applicant
Date: February 27, 2018
Re: Meaney v. Trustees of University of Columbia

I. INTRODUCTION

Below, please find my objective analysis of whether Edward transferred the garden to the Trustees by way of contract or gift, and if by gift, by way of what kind of gift. This analysis was done to confirm your belief that Mr. Meaney lacks standing.

II. ANALYSIS

A. Whether Mr. Meaney Transferred the Garden to the Trustees by Contract or Gift

Property may be passed by contract or by gift. The elements of transfer by gift and contract both require delivery and acceptance. Collins. However, a transfer by contract requires consideration whereas a transfer by gift requires the absence of consideration. Collins. Consideration has two requirements: (1) the promisee must bargain with the promisor and (2) must confer, or agree to confer a benefit, or must suffer, or agree to suffer, a burden. Collins. The absence of consideration is clear when a gift is absolute but is not clear when a gift is not absolute. Collins. The presence of consideration does not turn on the presence or absence of the term "consideration" in the instrument. Collins. Ultimately, what controls is the parties' intent. Collins. If the parties are motivated to buy and sell, the transfer is by contract. Collins. But if the parties are motivated by a desire to deliver and accept the property by a non-commercial transaction, there is a gift. Collins.

In Collins, the court held a transfer was by way of gift when a mother transferred property to her son, each was the other's only living relative, and each was an environmentalist. The court further explained that a promise to "use best efforts to maintain the property in an ecologically sustainable manner" was nominal and immaterial and, in light of the circumstances, the mother intended to donate the land to her son. Collins. In Salmon, the court held a transfer was a gift a father transferred 10 acres of land valued at $500,000 to his adult daughter was a gift, even though the deed stated he transferred the property to his daughter "in consideration of $500" because the $500 was nominal and immaterial and it was "clear" the father intended to donate the land to his daughter and not sell it to her.

Here, just as the transfers in Collins and Salmon for nominal consideration such as "maintaining property in an ecologically sustainable manner or for a mere fraction of the

value, the transfer here was also for nominal consideration because it was merely to "cause the garden to bear the name 'Kemper Scottish Garden,' use it for educational purposes, and retain it in perpetuity." Additionally, while the Agreement transferring the garden said it was transferred "in consideration" of the Trustees adhering to certain terms, whether the transfer was by contract or gift does not turn on the use of the word "consideration" in the instrument. See Collins. Rather, here, the lack of bargaining and suffering a detriment on behalf of the Trustees suggests Mr. Kemper was motivated by a desire to deliver a non-commercial transaction. See Collins.

Although, unlike the transfers in Collins and Salmon, the transfer here was not from one family member to another, which suggests the court may be more inclined to find the naming of the garden sufficient consideration for the transfer to be by way of contract, that argument is unpersuasive because there was no monetary transfer and the amount of work involved in naming the garden is less than what was required in Collins and Salmon and the court found there was no consideration in each of those cases.

Thus, just as the courts in Collins and Salmon found the transfer was by way of gift, the court here will likely find the transfer from Mr. Kemper to the Trustees was by way of gift.

B. If Mr. Meaney Transferred the Garden by Gift, by What Kind of Gift

A donor is the master of his or her gift. Behrens. A donor can make a gift that is absolute or not absolute. Behrens. A donor can give property unconditionally, without (1) restricting use or disposition of the property, (2) retaining power to modify the gift, or (3) reserving a right to sue to enforce a restriction or to undo the gift in the case of a restriction's breach by causing the party to revert to the donor him- or herself or to a third person. Behrens. When a gift is absolute, the donor has relinquished, and the done has assumed, full dominion over the property. Behrens. Alternatively, a donor can give a gift conditionally, (1) restricting use or disposition, (2) retaining power of modification, and/or (3) reserving a right of enforcement or reversion. Behrens. When a gift is not absolute, the donor has not relinquished, and the donee has not assumed, full dominion over the property; rather, both the donor and the donee share power over the property's use or disposition. Behrens. The law presumes a gift is absolute unless it clearly appears otherwise. Behrens. The law further presumes a donor has not restricted use or disposition, has not retained power of modification, and has not reserved a right of enforcement or reversion, unless it clearly appears otherwise. Behrens.

In Behrens, the court held a donor gave an absolute gift to a donee when the instrument merely recited that the donor "hereby delivers" and the donee "hereby accepts" the gift and the presumptions about an absolute gift applied when nothing clearly appeared otherwise.

Unlike in Behrens, where there were no restrictions on use of the gift, Mr. Kemper did issue some restrictions on the use of the garden. Here, Mr. Kemper transferred the garden "subject to certain restrictions" to name the garden Kemper Scottish Garden, use it for educational purposes, and retain it in perpetuity. Such restrictions amount to a restriction

on the use of the property. Further, Mr. Kemper expressly retained the right to modify the terms of the Agreement as necessary and appropriate to its purpose, which is further proof that Mr. Kemper gave the gift conditionally.

Thus, the court will likely find the gift was a conditional gift.

C. Whether Mr. Meaney Transferred the Garden by Charitable Trust

A charitable trust is created, as a matter of fact, whenever a settlor manifests an intent to give property, in trust, for a charitable purpose and actually gives the property, in trust, for such purpose. Holt. A charitable trust is also created, as a matter of law, whenever a person gives property to an educational, philanthropic, healthcare, or similar institution for an education, philanthropy, healthcare, or similar purpose. Holt. The Attorney General has standing to sue to enforce provisions of non-private trusts; however, any person with a special interest may also sue to enforce provisions of non-private trusts. Holt. Persons with a special interest are those who are the trustees or beneficiaries or would otherwise have an ownership interest in the property. Holt.

In Holt, the court held the trustees of a non-private trust, had a special interest because they were trustees of the trust at issue, reasoning that the trustees were in the best position to learn about breaches of trust and to bring the relevant facts to a court's attention.

Here, Mr. Kemper likely did create a charitable trust because he intended to give the garden for "educational purposes," as stated in the Agreement. Further, he gave the garden to the University of Columbia – an educational institution – for "educational purposes." As such, the Agreement may be construed as a charitable trust.

Even though the Agreement may have created a charitable trust, and anyone with a special interest may sue, the trustees are those with a special interest who have an ownership interest in the property and Mr. Meaney has no such special interest which would confer standing upon him.

Therefore, the court may find that the Agreement created a charitable trust but would Mr. Meaney lacks a special interest to have standing to bring the claim.

III. CONCLUSION

Based on the above, the court is likely to find that the gift was a conditional gift. Further, the court is likely to find that even if Mr. Kemper transferred the garden by charitable trust, Mr. Meaney lacks standing to sue to enforce the provision of the trust.

Thank you for allowing me to conduct this analysis for you. If I can be of further assistance on this, or any other, matter, please do not hesitate to let me know.