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To: Melissa Saphir

From: Applicant

Date: February 27, 2018

Re: Meany v. Trustees of the University of Columbia

Questions Presented for research:

1) Was the transfer of the Kemper Scottish Garden (Garden) to the UC Trustees by way of Contract or Gift?

Elements of each:

When property is passed by transfer by contract the elements consist of: 1) Offer to buy or sell; (2) acceptance of the offer; and (3) Consideration passing between the buyer and seller. On the other hand, property that is transferred by gift has the following elements: (1) Intent on the part of the donor to make a gift (2) delivery either actual or constructive, of the property by the donor; (3) acceptance of the property by the donee; and (4) lack of consideration for the gift. (Collins)

The Court in Collins analysis of the similar elements both requires either delivery by donor or offer by buyer/seller) and that a gift requires acceptance by the donee, while a transfer requires acceptance by the buyer/seller. The Court then delves further into the analysis by discussing how consideration differs in a contract the requirement is the presence of consideration, in a gift, the requirement is the absence of consideration. (Collins)

Generally Consideration has two requirements, the conferment of a benefit or agreement to confer a benefit and the sufferance of a burden or the agreement to suffer a burden.

However, the absence of consideration is unclear if gift is not absolute. (Collins) Citing Behrens, the Court in Collins, discusses that 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. Rather the donor simply delivers the property and the donee accepts it. And, to the contrary, the Court in Collins also citing Behrens held that the absence of consideration is not clear when the gift is not absolute. Holding that the act of naming a campus building in the donor's honor or using the building for a specified purpose may be akin to the University bargaining with the donor and negotiating the terms for the naming and use and that in doing so, the University suffers the burden of the named building and its specified use, although ultimately the Court in Collins concludes that naming or specific use do not preclude the transfer being a gift. (Collins citing Behrens)

The Presence of consideration doesn't turn on term in written instrument. The Court in Collins cites Salmon v. Wilson where a father transferred a large amount of property to his daughter "In consideration of \$500". In Salmon the Supreme Court reasoned that in light of all the circumstances, the consideration of \$500 was nominal and immaterial and that clearly the father intended a gift. (Collins citing Salmon)

Here, the Agreement between Kemper and the Trustee's includes the term "consideration" in the agreement however, by the above analysis, that alone doesn't preclude the transfer from being a gift. The Collins court ultimately determined what controls in differentiating between a contract and a gift is the motive manifested by the parties, such as a buy/sell via a commercial contract or the delivery and acceptance through a non commercial transaction / gift.

Referring to the agreement between Kemper and the Trustee's it appears that although a buy/sell contract with a third party (Emily Gordon) to acquire the garden parcel by Kemper was necessary to facility the acquisition. The motive (desire) of the Trustees was to obtain the garden parcel, and the motive (desire) of Kemper was to acquire the parcel and transfer it to the Trustees.

Argument for Transfer by Contract:

Using the analysis of the Collins court discussed supra, the trustees were required to name the parcel a specific name decided on by Kemper, as well as they were required to use the property for educational purposes and to retain it for perpetuity. It may be argued that the Trustees agreed to suffer the burden of the name, and use for specified purpose and the duration of it's use as consideration for the property. The Trustees further, must suffer the burden of the ongoing maintenance and upkeep. However, again as detailed in the Collins holding, such a 'bargain, benefit and burden do not preclude a gift."

Further, although the Agreement uses the words "in consideration of the foregoing" the Courts holding in Collins again reminds us that the presence or absence consideration does not turn on the presence or absence of the term "consideration" in the writing.

Argument for Transfer by Gift:

This transfer was subject to certain restrictions that would not likely be present in a business commercial transaction transfer, such as Kemper retaining the right to modify the terms of the agreement as necessary and appropriate to it's purpose. Generally when property is transferred between two parties by contract, the new owner has the right to do as he sees fit with the property, and the former owner does not have the right to retain rights to modify or change the agreement. Here, because Kemper retained these rights, there is a strong argument that the Motive behind Kemper's transfer of the land, was that it would remain a garden and that be used for educational purposes, in perpetuity.

Conclusion:

Based on the above facts, including the use of the term consideration, and the possibility that consideration may be present in the form of a burden on the part of the Trustee's to name, and maintain the use/grounds for perpetuity does not preclude the transfer from being a gift. There is a strong presumption that the transfer was a gift rather than a contract.

2) If by Gift, what kind of gift?

Absolute Gift - when the Donor gives the gift *unconditionally*, Without (1) restricting use or disposition of the property, (2) retaining power to modify the gift, (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 himself or a third person. -- By giving an Absolute gift the donor relinquishes and the donee assumes, full dominion, over the property, including the ability to use or dispose of the property at any time, in any manner, for any purpose. (Behrens)

Non-Absolute Gift - When the Donor gives 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. (Behrens)

In Behrens, the court held that the Donor is the master of his gift, and as such, a donor can make a gift that is absolute or not absolute, the law presumes that the gift is absolute, and that the donor has not restricted use or disposition, has not retained power to modify or reserved a right of enforcement or reversion, unless it clearly appears otherwise.

Here, in the agreement between Kemper and the Trustees, Kemper transfers the property to the Trustees "subject to certain restrictions as provided for herein." In analyzing the consideration portion of the agreement Kemper

agreed to purchase the garden parcel and transfer it to the Trustees, in consideration that the trustees will (1) "name the parcel "Kemper Scottish Garden"" (2) "Use it for educational purposes" (3) "retain it in perpetuity." Further, the agreement states that Kemper retains the right to modify the terms of this Agreement as necessary and appropriate to its purpose."

Given the former, it appears that the motive or intent of Kemper was to give the garden parcel to the Trustee's as a non-absolute gift. Further, the agreement between the parties supports this theory. Here the agreement explicitly references Kemper's retention of rights for the power of modification of the terms as necessary and appropriate to its purpose. Kemper's restriction of the use for educational purposes, naming and the retention of the property, further underline this fact.

It appears that the not absolute gift was given in the form of a non private trust, most likely a Charitable trust (described infra), and that Kemper included specific provisions within the agreement for the transfer of the property to Trustees regarding it's use and purpose.

Charitable Trust - a trust 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 that such purpose. This includes property given to educational, philanthropic, healthcare, or similar institution for an education, philanthropy, healthcare or similar purpose. Or a Charitable trust may be created as a matter of law, whenever a person gives property to an educational, philanthropic, healthcare, or similar institution for an educational, philanthropy, healthcare or similar purpose. (Holt)

Note, Although in a charitable trust the beneficiaries are not ascertainable, it is not subject to the Rules against Perpetuity, nor run afoul of the vesting of interests.

By reason of the agreement, Kemper manifested his intent to give the garden to the UC, and through the agreement transferred the property to the trustees (placed the property in trust to the UC) for for the educational purpose of the

perpetual use of garden. As such it is likely that a charitable trust of the property was created by both a matter of fact, and law when Kemper transferred the property to the trustees.

On point with the matter at hand, the Holt opinion discusses in detail the standing considerations for enforcement of a charitable trust.

Standing for non-private trusts. In accordance with common law all jurisdictions recognize that the Attorney General has standing to sue to enforce provisions of a non-private trust. However, a majority of jurisdictions have adopted the position that the Attorney General's standing is not exclusive, and accord standing to any person with a special interest. (Holt) Further, in light of limited resources, the attorney general cannot assume the burden of suing to enforce the provisions of all non private trusts. (Ibid) Although the Attorney General has primary responsibility for the enforcement of non-private trusts, the need for adequate enforcement is not wholly fulfilled in the authority given to the Attorney General, and there is no rule or policy against supplementing the Attorney General's standing by allowing standing to persons with a special interest (such as trustees or beneficiaries who would otherwise have an ownership interest in the property) (Holt)

As such the Supreme Court under Holt as discussed supra has adopted the position that the Attorney General's standing is not exclusive, and that anyone with a special interest has standing to enforce the provisions of the trust. In the court's reasoning, the court stated that as Trustee's of the non-private trust, they were in the best position to learn about breaches of the trust and to bring the relevant facts to the courts attention, and as such were granted standing.

Conclusion:

It appears that Kemper intended to give a "not absolute gift" in the form of a Charitable trust, and that Kemper included specific provisions within the agreement for the transfer of the property to Trustees regarding it's use and

purpose. As such, depending on whether or not the court will hold that Brendan Meaney, the child of Kemper's second wife Sarah, is a person with a special interest, a beneficiary, or would otherwise have an ownership interest in the property will ultimately determine if the court finds that Brendan Meaney has standing to sue based on Breach of Contract in regards to the Trustee's decision to sell the garden to use the proceeds for pressing educational purposes, rather than retaining it for perpetuity.

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