

# In re Kramer and the Enforceability of Charitable Pledges

By Spencer L. Reames

Laypersons and legal practitioners alike may often take the enforceability of charitable subscriptions or pledges as a given. This assumption is well grounded in the case law in New York, which has historically and actively upheld charitable pledges as a public policy matter. Indeed, the weight of legal precedent is so firmly tilted towards charities that it is rare to find a case in which a charity cannot make a case for enforcement.<sup>1</sup> The recent Kings County Surrogate's Court decision in *In re Kramer*,<sup>2</sup> however, is one such case where a charity did not prevail. *Kramer* serves as a useful reminder that the enforcement of charitable pledges should not be taken for granted and is based upon the historical development of defined legal underpinnings. Despite the generally broad judicial policy favoring charities, a charity must demonstrate some adherence to the established legal framework in order to justify enforceability.

## Enforcement as a Matter of Public Policy

Historically, the characterization and enforcement of charitable pledges in New York was unsettled and a "prolific source of controversy."<sup>3</sup> Courts struggled to reconcile promises, which were clearly motivated by the principles of gift-giving, with the strict elements of contract, most principally the requirement of consideration.<sup>4</sup> It was unlikely that the proponent of enforcement could show the requisite bargained-for exchange, or *quid pro quo*, that contract principles demand, and subscription agreements were consequently deemed void and unenforceable in early decisions.<sup>5</sup>

Over time, however, decisions shifted towards the benefit of charities, and defenses grounded upon lack of consideration came to be disfavored in the courts. Judge Cardozo, writing for the Court of Appeals in *Allegheny College v. National Chautauqua County Bank*, recognized that "[v]ery likely, conceptions of public policy have shaped, more or less subconsciously, the rulings thus made,"<sup>6</sup> as judges subscribed to the belief that defenses against the enforcement of charitable pledges constituted breaches of faith towards the public. With this in mind, Judge Cardozo declared that decisions in favor of pledge enforcement "which are supported by so many considerations of public policy and reason" would not be overruled.<sup>7</sup>

The decision in *Allegheny* laid the foundation for the principles of charitable pledge enforcement as they exist today. The Court of Appeals further ratified and strengthened the public policy behind pledge enforcement in cases such as *I & I Holding Corporation v. Gainsburg*<sup>8</sup> and *Woodmere Academy v. Steinberg*.<sup>9</sup> As stated by

the New York Surrogate's Court, judicial support of charitable pledges has been deemed important because "[t]he philanthropic work carried on by organized charities, made possible through voluntary subscriptions, is a distinguishing and distinguished feature of our free society. It is a demonstration of the human sympathy, mercy, consideration and good will borne by those more fortunately endowed towards their less fortunate fellowmen."<sup>10</sup>

A major step towards judicial support of the public policy in favor of voluntary charitable pledges came from a determination that parol evidence, or evidence outside the subscription agreement or pledge itself, would be admissible to prove consideration by the charitable donee.<sup>11</sup> Thus, a charity seeking enforcement may bring forward useful evidence for the purpose of demonstrating consideration, and to elaborate upon the transactions or acts surrounding the pledge.<sup>12</sup>

Weighing this admissible parol evidence, courts have utilized three legal theories to sustain the enforceability of charitable pledges, namely, the creation of a bilateral contract, the completion of a unilateral contract, and the equitable remedy of promissory estoppel.

## Bilateral Contract

The bilateral contract theory is based upon the traditional contract principles of a mutual exchange. In such a case, the donor is found to have given the pledge in return for something of value from the charity. This usually arises in the case where the donor seeks a memorialization or remembrance as a condition of the pledge in the form of a named building, endowed scholarship, or the like. The key difference from a non-charitable contract is that the charity's return promise is often not spelled out, but, rather, is implied by the charity's very acceptance of the conditional pledge. Bilateral contract cases are typified by the Court of Appeals case of *Allegheny College* in which the donor pledged money to establish a memorial scholarship in her name. The Court found that, by accepting the pledge, and an advance payment on account, the college had made a return promise and created an obligation to the donor, albeit implied. This constituted consideration and created an enforceable contract.<sup>13</sup>

## Unilateral Contract

Perhaps the most commonly utilized theory in the enforcement of charitable contracts is that of unilateral contract. This theory comes into use when the pledge is more gratuitous in nature, such as a contribution to a charity's general fund or for a fundraising campaign. Unlike a bilateral contract, a unilateral contract is not

deemed to be binding at inception, but, rather, is an offer conditioned upon the charity performing some act at a future date, or within a reasonable time. If the charity performs, then the contract offer is deemed to have been accepted and the contract matures into an enforceable obligation. The Court of Appeals case of *I & I Holding* is an example and ratification of the unilateral contract rationale. In this case, the donor made a pledge to “aid and assist the Beth Israel Hospital Association in its humanitarian work.”<sup>14</sup> The Court held that “[o]ur courts have definitely ruled that such subscriptions are enforceable on the ground that they constitute an offer of a unilateral contract which, when accepted by the charity by incurring liability in reliance thereon, becomes a binding obligation.”<sup>15</sup> A request or invitation for a charity to go on with its charitable work, even if merely implied, was deemed a sufficient offer and was found to have been accepted, providing the requisite consideration.<sup>16</sup>

The theory of unilateral contract is often frequently invoked in cases involving fundraising campaigns, such as building campaigns. In these cases, even if the building project has not been completed or has been modified, courts will usually uphold the pledge as long as the charity has taken some action towards completion of the campaign.<sup>17</sup>

### Promissory Estoppel

The promissory estoppel theory is based upon an equitable remedy rather than contract theory and supports enforcement of a charitable pledge where the charity has taken action in direct reliance on the promise of the donor. In these cases, the charity has incurred liability to its detriment and would suffer damages were the pledge not enforced. As noted in *Allegheny College*, the promissory estoppel doctrine was invoked by courts as a workaround to the failure of consideration defense before the Court of Appeals made clear that charitable subscriptions would be generally enforced as a matter of public policy.<sup>18</sup> Based upon the Court of Appeals’ decision in *I & I Holding*, it seems that an appeal to promissory estoppel should only be utilized as a final resort when a charity cannot justify enforcement under a bilateral or unilateral contract theory.<sup>19</sup>

### In re Kramer

In light of the favorable history and case law preceding *Kramer*, where did the charity go wrong? In short, the Kings County Surrogate’s Court found that the charity had done next to nothing in reliance upon the pledge, and thus, consideration could not be found under any of the three rationales.

*Kramer* involved a motion by a charity, Educational Institute Oholei Torah-Oholei Menachem, for summary judgment dismissing objections to its petition to

determine the validity and enforceability of its claim against the Estate of Isaac Kramer. The charity’s claim was based upon a pledge card and promissory note, in the face amount of \$1,800,000, allegedly signed by the decedent approximately a year and a half before his death, and ostensibly payable six months prior to the decedent’s death. The pledge was allegedly given for the purpose of supporting a building campaign proposed by the charity to construct a new ritualarium, or mikveh, for use of the charity’s members. No payment on the pledge had been made by the decedent or demanded by the charity prior to the decedent’s death. Representatives of the charity claimed they consciously withheld demands for payment because of the decedent’s illness shortly before his death.

Objections to the charity’s petition were filed by the Kings County Public Administrator, as fiduciary of the decedent’s estate, and four additional groups representing various purported testamentary legatees and distributees. The respective objections raised multiple theories for rejection of, and affirmative defenses against, the charity’s claim including (i) forgery of the decedent’s signature, (ii) lack of due execution, (iii) lack of consideration, (iv) lapse upon the decedent’s death, (v) laches and unclean hands, (vi) expiration of the statute of limitations, (vii) fraudulent inducement, and (viii) the decedent’s lack of capacity. Upon the charity’s summary judgment motion, two of the respondents cross moved for summary judgment upon an additional theory of the charity’s failure to demonstrate acceptance of the pledge by taking action in reliance thereon.

The Court granted the charity’s motion for summary judgment concerning the objections based upon lack of due execution, laches, unclean hands, expiration of the statute of limitations, fraudulent inducement, capacity and forgery of the decedent’s signature, because they were either unsupported or raised no triable issues of fact.

The defense of lack of consideration, however, turned out to be dispositive against the charity. The Court noted that since the pledge was ostensibly made in furtherance of a fundraising campaign, it must be examined under the theory of a unilateral contract. Thus, the pledge would not become binding until the charity has sufficiently acted upon the pledge so as to incur liability on the part of the donor.

Referring to the public policy history in this area of law, the Court stated that it has been the “noted policy of the courts to sustain the validity of subscription agreements whenever a counter promise of the donee can be sustained from the actions of the parties or it can be demonstrated that any legal detriment has been sustained by the promise in reliance upon the promised gift.”<sup>20</sup> For instance, the Court noted that, charita-

ble subscriptions have been deemed enforceable where the donee has made some substantive progress towards the charitable goal for which the pledge was made. This would include starting construction, employing architects and paying for plans, raising additional pledges based upon the disputed pledge, or taking on a construction loan for the project. The donor's partial payment of the pledge, whether alone or in conjunction with concrete action on the part of the charity, has also been deemed sufficient to indicate acceptance of the unilateral contract. The Court cited as examples, among other cases, the seminal Court of Appeals cases of *Allegheny College*,<sup>21</sup> *I & I Holding*,<sup>22</sup> and *Woodmere Academy*,<sup>23</sup> along with some other notable cases, including *In re Lord*,<sup>24</sup> *In re Lipsky*,<sup>25</sup> *In re Metz*,<sup>26</sup> and *In re Field*.<sup>27</sup>

Despite the broad policy in favor of enforcement, the Court found that the charity in *Kramer* was unable to meet the burden to show that it had meaningfully acted in reliance upon the pledge. Indeed, it was undisputed that no actual construction had begun on the proposed building project. Nor was there any specific date upon which construction was to begin, or any reasonable time frame for completion of the project. The Court characterized the construction project as more of a "hoped-for occurrence" than an actual plan.<sup>28</sup> Moreover, despite its claims to the contrary, the charity could not prove that it had expended any sums of money on any construction-related expenses, such as soil samples or architectural plans. Nor could the charity produce any contracts or engagement letters from architects, engineers, or contractors. There was also no proof of building permit or zoning applications. Finally, though the charity claimed to have used the decedent's pledge to solicit other pledges, no independent evidence of receipt or fulfillment of such additional pledges was offered.

In sum, the Court found that the charity had done nothing meaningful or substantive in reliance on the decedent's pledge. Thus, the charity's motion for summary judgment on the consideration issue was denied, and the cross-motions dismissing the charity's petition were granted. It is worth noting that the lack of any material reliance would have also foreclosed a claim under the promissory estoppel theory. Nor could the charity have proceeded under a bilateral contract theory, as the pledge was not conditioned on receiving something in return.

## Endnotes

1. "[R]ecovery upon subscription agreements has become the rule rather than the exception." *In re Lord*, 175 Misc 921, 923,

25 NYS2d 747 (Sur. Ct., Kings Co. 1941). *In re Lord* provides a useful and comprehensive overview of the history and case law in the area of charitable pledge enforcement.

2. N.Y.L.J., April 21, 2014, p. 24 (col. 6) (Sur. Ct., Kings Co.).
3. *Allegheny College v. National Chautauqua County Bank*, 246 NY 369, 372, 159 NE 173 (1927).
4. *See In re Field*, 15 Misc 2d 950, 951, 181 NYS2d 922 (Sur. Ct., Suffolk Co. 1959).
5. *See Allegheny College*, *supra*, at 372; *see also Matter of Lord*, *supra*, at 922-923.
6. *Allegheny College*, *supra*, at 374.
7. *Id.* at 375.
8. 276 NY 427, 433, 12 NE2d 532 (1938). "We realize that the principles upon which courts of differing jurisdictions have placed their decisions sustaining subscriptions for charitable purposes are all subject to criticism from a legalistic standpoint. Nevertheless, we feel that we should follow the decisions of our own courts, extending, as they do, over a long period."
9. 41 NY2d 746, 749, 395 NYS2d 434 (1977). "Preliminarily, we observe that, as a matter of public policy, pledge agreements calculated to foster eleemosynary enterprises are enforceable."
10. *In re Lipsky*, 45 Misc 2d 320, 322, 256 NYS2d 429 (Sur. Ct., N.Y. Co. 1965).
11. *See I & I Holding*, *supra*, at 432; *see also In re Lord*, *supra*, at 923.
12. *See id.*
13. *See Allegheny College*, *supra*, at 377-378.
14. *I & I Holding*, *supra*, at 432.
15. *Id.* at 433.
16. *See id.* at 434.
17. *See In re Metz*, 262 AD 508, 30 NYS2d 502 (1st Dep't 1941) (while the central building was not completed as originally planned, construction was completed on portions and, thus, there was no frustration of the project so as to relieve the donor of liability).
18. *See Allegheny College*, *supra*, at 374.
19. *See I & I Holding*, *supra*, at 434 ("it is only when a request or invitation [for the charity to perform] cannot be implied in fact that it is necessary to invoke that doctrine"); *see also In re Lord*, *supra*, at 926.
20. *Kramer*, N.Y.L.J., April 21, 2014, p. 24 (col. 6).
21. 246 NY 369, 159 NE 173 (1927).
22. 276 NY 427, 12 NE2d 532 (1938).
23. 41 NY2d 746, 395 NYS2d 434 (1977).
24. 175 Misc 921, 25 NYS2d 747 (Sur. Ct., Kings Co. 1941).
25. 45 Misc 2d 320, 256 NYS2d 429 (Sur. Ct., N.Y. Co. 1965).
26. 262 AD 508, 30 NYS2d 502 (1st Dep't 1941).
27. 15 Misc 2d 950, 181 NYS2d 922 (Sur. Ct., Suffolk Co. 1959).
28. *See Kramer*, *supra*.

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