



BUSINESS LAW SECTION

NONPROFIT & UNINCORPORATED ORGANIZATIONS COMMITTEE
THE STATE BAR OF CALIFORNIA
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CHARITABLE PLEDGES

LEGISLATIVE PROPOSAL (BLS-2010-03)

TO: Office of Governmental Affairs
FROM: Lani Meanley Collins, Chair
Business Law Section (the “Section”) Nonprofit & Unincorporated Organizations
Committee (the “Committee”)
DATE: July 31, 2009
RE: Proposal to add California Civil Code Section 1616

SECTION ACTION AND CONTACTS

Date of Approval by Section Executive Committee (the “Executive Committee”): June 5, 2009
Approval Vote:

For: 15 Against: 0

Date of Approval by Legislative Subcommittee of the Executive Committee: July 31, 2009
Approval Vote:

For: 6 Against: 0

Date of Approval by the Committee: May 22, 2009
Approval Vote:

For: 9 Against: 0

Date of Approval by Legislative Subcommittee of the Committee: June 1, 2009
Approval Vote:

For: 5 Against: 0

Executive Committee Contact:	Committee Contact:
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HISTORY, DIGEST AND PURPOSE

This Proposal adds Civil Code Section 1616 to provide clear guidance on when a charitable pledge is enforceable.

History

Currently, no Civil Code Section addresses consideration in the context of charitable pledges.

Proposal and Reasons for the Proposal

The problem which this section would address is that charitable pledges are not enforceable in California unless the pledgor receives consideration for making the pledge. In many situations there is no such consideration. In others, its existence is uncertain. Uncertainty can lead to litigation. Also, the Internal Revenue Service will examine a pledge to determine if it is enforceable and thus deductible for federal estate tax purposes. (See LTR 9718031 issued by the IRS on February 4, 1997.) Moreover, Statement of Financial Accounting Standards No. 116 requires that nonprofit organizations book charitable pledges as income whether or not they are legally enforceable which can result in a distortion of income if pledges are not honored because they are not legally enforceable although such distortion may be ameliorated by a reserve for uncollectable pledge.

To be enforceable, a pledge agreement must be a valid contract. Section 90(2) of the Second Restatement of Contracts, one of the leading authorities consulted with respect to contract law, takes the modern position that no consideration need be furnished by the charitable pledgee to the pledgor in order for a pledge to be an enforceable contract. Some courts have adopted this position. Others have not and continue to hold to the traditional position that a mere promise to make a charitable gift is unenforceable.¹ While it is possible that, in the future, California courts might follow the Restatement, the California courts have historically required some form of consideration. University of Southern California v. Bryson, 103 CA 39 (1929); Bd. of Home Missions v. Manley, 129 CA 541 (1933); Calvary Presbyterian Church v. Brydon, 4 CA 2d 676 (1935); First Trust & Savings Bank v. Coe College, 8 CA 2d 195 (1935).

The mere recitation of consideration in a contract that there is good and valuable consideration at best creates a rebuttable presumption that there was in fact sufficient consideration. On the other hand, it is possible that, although there is no written instrument identifying consideration, other evidence would demonstrate that it is present.

¹ The issue of the enforceability of pledge agreements was addressed by the New York University School of Law Program on Philanthropy and the Law. Its report was published in 27 University of San Francisco Law Review 47 (1992-93). This article also discusses the duty of a charitable organization to enforce a pledge. There is also a survey of case law on the subject reported in 97 ALR 3d 1054.

Consideration which has been judicially recognized as valid by California courts usually takes one or both of the following forms:

1. The gift is specifically made in consideration of other donors making gifts so that there is mutual consideration flowing between donors. University of Southern California v. Bryson, *supra*; Calvary Presbyterian Church v. Brydon, *supra*.

2. The charity unconditionally obligates itself in some manner such as promising to build a building named after the pledgor or to establish a scholarship fund in his or her name. Buchtel College v. Chamberloix, 3 CA 246 (1906). First Trust & Savings Bank v. Coe College, *supra*.

In some cases, the courts have held that the pledgor is estopped from denying the existence of a contract because the charity has detrimentally relied on the pledgor's promise to make a charitable contribution. In such cases, the charities have been able to demonstrate that they have incurred significant costs or obligations in reliance of the promised gifts such as having begun the construction of a building. University of Southern California v. Bryson, *supra*.

California could resolve the problem by adopting proposed Section 1616 as set forth below.

APPLICATION

If enacted in 2010, the proposed legislation would become effective in 2011.

PENDING LITIGATION

We are not aware of any specific pending litigation that would be affected by this Proposal.

LIKELY SUPPORT AND OPPOSITION

We anticipate support from organizations that receive charitable pledges but have not taken any steps to assess the potential for or solicit such support. We are unaware of any specific segments that might oppose this Proposal.

FISCAL IMPACT

None.

GERMANENESS

The matters addressed in this Proposal require the special knowledge, training, experience or technical expertise of the Section and of members of the Committee. The position advanced would promote clarity, consistency, and comprehensiveness in the law.

TEXT OF PROPOSAL

SECTION 1. Section 1616 is added to the Civil Code, to read:

1616. A promise to make a gift, bequest or devise of cash or other property to an organization described in section 501(c)(3) of the Internal Revenue Code is contractually binding with or without consideration if the promisor indicated in writing an intent that the promise be a binding legal obligation.