Welcome to this podcast on Agreements Lacking Consideration: Gift Promises brought to you by CALI. I’m Professor Jennifer S. Martin.

The topic of this podcast is when agreements are not enforceable as contracts because they are not supported by consideration due to the fact that the promise is a gift. In this podcast, we will look at common situations involving gift promises, including conditional gifts.

We don’t enforce all agreements as contracts just because the parties mutually assented. In forming a contract, we require a bargain comprised of a manifestation of mutual assent and consideration or some other justification for enforcing the promises. For purposes of this podcast, presume that the mutual assent aspect is satisfied. We will focus on the consideration element of contract formation. Consideration is generally used to indicate that each promisee “gave consideration” for the promise or performance of the promisor. The word “consideration” is often used as a justification for enforcing a promise. A promise to make a gift, however, does not have consideration due the lack of a bargained-for-exchange. It is worth noting that completed gifts are not subject to this rule and are in fact governed by the basic rules of property law as to the nature of the gift being complete.

Suppose I say to Aaron, “Will you watch my dogs for $50 per day for 3 days?”, and Aaron replies, “Sure.” The consideration in this contract would be that I am seeking the promise of dog watching for three days from Aaron in exchange for my promise of $50 per day totaling $150. Aaron is seeking my promise of the $150 in exchange for his promise of watching the dogs for three days. On the other hand, what if Aaron promises to watch my dogs for three days as a favor? There’s no consideration here because there is no bargained-for exchange. Aaron has promised to watch the dogs gratuitously. Aaron was not seeking a promise of payment from me in exchange for the dog watching. Even if I later promise to pay for the dog watching, the promise would not be enforceable.

While parties may use many justifications to attempt to satisfy the consideration requirement, sometimes the transaction is really a gift promise despite efforts to cast it as otherwise. Such was the case in *Schnell v. Nell*, 17 Ind. 29 (1861). In *Schnell*, Theresa Schnell died without individual property because all her property was jointly owned with her husband, Zach. Despite having no assets, her will promised to pay three named beneficiaries, including Nell, $200 each. Zach signed an agreement in which he agreed to pay each of the three beneficiaries the $200. As consideration for Zach’s promise, the agreement recited: (i) that Theresa was a “dutiful and loving wife” and the “love and respect” he had for his wife; (ii) the promise of the beneficiaries to pay 1 cent to Zach and (iii) the beneficiaries’ promise not to bring a claim against Theresa’s estate. The court ruled that there was no consideration for Zach’s promise to pay Nell and the others the $200. First, the love and affection and contributions of Theresa were, at most, past consideration and not given in exchange for the $200 promises. Second, while courts don’t traditionally inquire into the adequacy of consideration, the promise of 1 cent cannot be consideration for Zach’s promise to pay $200 as the doctrine of adequacy does not apply to exchanges of money that are fixed in value. Third, the beneficiaries’ promise to abstain from bringing suit against Theresa’s estate is not consideration where the estate had no property, so any claim against the estate would be worthless. Despite the efforts of the parties to cast the transaction as being supported by consideration, it was really just a gift promise to the beneficiaries and was not enforced due to the lack of consideration.

Sometimes, a promisor making a gift promise will add a condition that the promisee must satisfy in order to receive the gift. Despite the addition of the condition, these promises are gift promises and not supported by consideration.

For instance, Parent invited Daughter to lunch and promises to give Daughter a check for $10,000 in hopes that she will use the money for graduate school. Without any additional facts, no reasonable person would presume that Parent is seeking the presence of Daughter at lunch in exchange for the $10,000. The expectation is that if Daughter attends the lunch, Parent intends to make her a gift. Yet, while attending the lunch could be consideration if in fact it was requested as the “price” for the $10,000, it is more likely that the lunch is just a condition of Parent’s gratuitous promise.

Of course, this example can be compared with the well-known case of *Hamer v. Sidway*, 124 N.Y. 538, 27 N.E. 256 (1891), where an uncle while at a large family gathering, and later in letters, promised $5000 to his nephew on his 21st birthday if the nephew did not drink, smoke, swear or gamble until that age. The nephew so promised and refrained from the stated activities. Did the uncle benefit from this promise? It’s possible that the uncle was benefited in that he wouldn't have to worry so much about his young nephew or that the family name would be protected. However, both of these benefits are unclear from the evidence in the case. The court, however, enforced the promise and found that the lack of clear benefit to the uncle was not fatal to the claim on the contract when there was a detriment to the nephew in forbearing his legal right to pursue the behaviors his uncle wanted him to quit. Because the uncle bargained for the nephew’s forbearance, the $5000 promise was not a gift and was enforceable.

Recall that consideration can be for the benefit of a third party, such that such promises are not gifts. For instance, assume Parent promises to guarantee payment of medical bills to Doctor for Daughter, who is attending graduate school, if Doctor agrees to provide care for Daughter. There’s consideration here because Parent is seeking the promise of Doctor to care for Daughter in exchange for Parent’s promise to guarantee the medical bills. Doctor is seeking the promise of Parent guaranteeing the payment of the medical bills in exchange for her own promise to care for Daughter.

Sometimes it can be tricky to determine if charitable promises are gifts or are supported by consideration. The key is to determine if there is in fact a bargained-for-exchange. For instance, if Alumna promises to pay School $50,000, it is doubtful that there’s consideration here in the absence of some indication that there is anything bargained for. The $50,000 is simply a promise to make a gift. This would still be true if Alumna requires School to come to her home to pick up the check. The addition of the condition, picking up the check, does not transform the promise into one supported by consideration. Of course, the situation might be different if Alumna promises to pay School $50,000 if School creates a garden and names the garden after Alumna. There is consideration for the exchange here as Alumna has sought the naming of the garden in exchange for the $50,000 and School has sought the $50,000 in exchange for the naming of the garden. It does not matter if the values exchanged are unequal or unknown.

At this point, you should be able to explain that in order for there to be a contract, there must be consideration or another justification for enforcing the agreement. You should be able to explain that promises to make a gift are not supported by consideration. You should be able to explain and apply the rule for bargained-for exchange as requiring a promise or performance sought by a party in exchange for the other party’s own promise or performance where the exchange is present on a reciprocal basis. You should be able to identify situations where there’s no consideration because there is a promise of a gift, even where the promise to make a gift has a condition to obtaining the gift.

I hope you’ve enjoyed this podcast on Agreements Lacking Consideration: Gift Promises.

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