1. Read *King v. Trustees of Boston University*, 647 N.E.2d 1196 (Mass. 1995), and
*Maryland National Bank v. United Jewish Appeal Federation*, 407 A.2d 1130 (Md. 1979), and formulate a test fitting both cases for when a court in a jurisdiction that has not adopted *Restatement (Second) of Contracts* § 90(2) should enforce charitable pledges.

R2 § 90(1) requires proof of (1) a promise, (2) that the promisor could reasonably foresee would induce action or forbearance by the promisee, (3) which does induce such action or forbearance, (4) as a result of which injustice can be avoided only by enforcing the promise. Many courts add that the promisee’s reliance must be reasonable. See, e.g., *Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024 (Del. 2003); *First National Bank of Logansport v. Logan Manufacturing Co.*, 577 N.E.2d 949 (Ind. 1991); *Pop’s Cones, Inc. v. Resorts International Hotel, Inc.*, 704 A.2d 1321 (N.J. Super. Ct. App. Div. 1998); *Karnes v. Doctors Hospital*, 555 N.E.2d 280 (Ohio 1990); *Durkee v. Van Well*, 654 N.W.2d 807 (S.D. 2002).

The biggest stumbling block in most charitable subscription cases is for the charity to prove that it reasonably relied to its detriment on the promise and that its reasonable reliance was foreseeable. R2 § 90(2) eliminates the element of reliance (and, hence, reasonable reliance) from charitable subscription cases. However, most jurisdictions either have not adopted R2 § 90(2) or have specifically rejected it. See, e.g., *Arrowsmith v. Mercantile-Safe Deposit & Trust Co.*, 545 A.2d 674 (Md. 1988); *Congregation Kadimah Toras-Moshe v. DeLeo*, 540 N.E.2d 691 (Mass. 1989). In those jurisdictions, the primary factor courts use to decide whether to enforce charitable pledges under the doctrine of promissory estoppel seems to be whether the pledge was for a sufficiently specific purpose and of sufficiently significant value to presume foreseeable reliance by the charity, see, e.g., *King v. Trustees of Boston University*, 647 N.E.2d 1196 (Mass. 1995) (upholding university’s right to maintain papers given it by Dr. Martin Luther King, Jr. based on the many years that the university had maintained, catalogued, stored, and made the papers available for research) or whether it was a general pledge on the basis of which the pledgor could not reasonably foresee specific, detrimental reliance by the charity, see, e.g., *Maryland National Bank v. United Jewish Appeal Federation of Greater Washington, Inc.*, 407 A.2d 1130 (Md. 1979) (denying charity the right to enforce a pledge made to its general purpose fund against the estate of the pledgor).
2. Answer the “Problem on Third Party Benefits” at the top of p. 1080 in the Epstein, Markell & Ponoroff casebook. Please explain your answer.

In the Lynch case, from which the facts of this Problem were extracted, the Washington Supreme Court held that the attorney was not entitled to recovery. Although TMC incidentally benefited from E’s services, it was not unjustly enriched and the receipt of the incidental benefit does not alone create an implied contract. That is to say, it only recovered the amount which it was owed by P. Thus, it cannot be said that in equity and good conscience it is not entitled to retain the funds received by it as a result of E’s actions against P’s insurer. Remember, P, not TMC, hired E; and, therefore, E was obligated to pursue the claim diligently on P’s behalf. TMC should not be penalized because E was foolish in failing to get a retainer up front from P. Therefore, E is simply left with a breach of contract claim against P.


(1) What is the difference between interpreting and contradicting a writing? Interpreting a writing is a process; contradicting a writing is a result. Interpreting a writing – and, more particularly, a written contract – involves ascertaining the meaning that the parties to the writing attached to its terms when they executed it. If the parties shared the same meaning, then their shared meaning should prevail. If one party knew the other party’s meaning, and the second party neither knew nor had reason to know that the first party meant something different, then the first party’s meaning should prevail. If the parties did not share the same meaning and neither party knew or should have known the other party’s meaning and that the second party did not share the first party’s meaning, then the meaning that a reasonable, disinterested person in the parties’ position would attribute to the writing should prevail. See R2 § 201. Interpreting a writing such that it contradicts with one party’s understanding of the parties’ agreement is not the same thing as interpreting a writing such that it contradicts with the parties’ agreement. Interpreting a writing should only result in contradicting the writing’s terms if the parties made an error when committing their agreement to writing. Otherwise, any contradiction is not a result of interpreting the parties’ ex ante intent; rather, it results from twisting the writing and the circumstances surrounding its execution to suit a pre-determined ex post “meaning.”

(2) Why should parol evidence be used for the former purpose and not the latter? Because writings are often incomplete, ambiguous, or both, courts resort to extrinsic evidence to ascertain the meaning that the parties to the writing attached to its terms when they executed it. In so doing, courts do not set out to find a meaning that is contrary to what is written; rather, they set out to find the meaning of what is written in the context in which the parties wrote it. By contrast, looking beyond the writing solely for the purpose of contradicting one or more terms in the writing is not a legitimate exercise of a court’s discretion to consider parol evidence to ascertain the parties’ intent.

(3) What is the difference between the traditional approach to the parol evidence rule and the more liberal approach? The traditional (Willistonian) approach requires a court to find ambiguity before it can resort to extrinsic evidence. The more liberal (Corbinian) approach does
not require a court to find ambiguity before resorting to extrinsic evidence to explain or supplement a writing. Indeed, in some cases, the Corbinian approach may “create” ambiguity where none appears reading the “plain meaning” of the writing. But, then, Farnsworth (and many others) questions whether there really is such a thing as “plain meaning.”

(4) Does the liberal approach carry with it any dangers for contracting parties? Yes. If the parties intend a term or a provision of a writing to be irrefutably understood to mean one thing and one thing only, but they do not expressly define that term or adequately express their shared intention regarding that provision, they risk that a court, considering extrinsic evidence that the parties did not intend to be part of their agreement, will interpret their agreement in a way other than they intended.

4. Jose Avila and Louisa Gonzalez cohabited for approximately three years. One year into the relationship, Gonzalez bore a child, Maria. All parties stipulate that Avila is Maria’s father.

Shortly after Maria’s birth, Avila and Gonzalez jointly purchased a house in San Antonio, Texas. Avila and Gonzalez jointly executed (1) a written purchase agreement, by which they agreed to pay $60,000 cash and the balance of the purchase price and closing costs with funds borrowed from a mortgage lender, and (2) a mortgage loan agreement, by which the mortgage lender agreed to pay the house seller $180,000 in exchange for Avila and Gonzalez’s joint promise to repay the mortgage lender in equal monthly installments over 20 years (collectively, the “House Agreement”). Two years later, when their relationship dissolved, Avila signed a writing in which he promised to pay Gonzalez $5,000 per month to support her and Maria (the “Support Agreement”).

The Support Agreement, written and signed by Avila, is simply a promise to pay Gonzalez $5,000 per month (i.e., an “IOU”). It makes no mention of any return promise made or performance rendered by Gonzalez, nor does it address the duration of Avila’s promise. In the trial court, Gonzalez alleged that, in exchange for the Support Agreement, she promised to live with Maria in San Antonio (despite the fact that Gonzalez was in the U.S. illegally) and to remain home with Maria rather than seek employment. As for the duration of the agreement, Gonzalez alleged that Avila promised to make the monthly payments to Gonzalez until Maria turned 18, got married, or died, whichever happened first, so that Gonzalez would raise Maria in San Antonio, where Avila could visit her. Avila did not contradict either of these allegations, and the trial court found Gonzalez’s promise to keep Maria in San Antonio (i.e., near Avila) and to devote herself to Maria’s welfare to be sufficient consideration to support Avila’s written promise to pay $5,000 per month (despite the writing’s silence on the issue of consideration).

The House Agreement, signed by Avila and Gonzalez, as well as the mortgage lender, reflects their collective undertaking to purchase a house in San Antonio. In the trial court, Gonzalez alleged that she and Avila orally agreed that she would pay $60,000 down for the house, that Avila would pay the balance of the monthly
payments due on the mortgage loan, and that, in the event Gonzalez and Avila broke up, Gonzalez would get the use of the house for herself and Maria. Gonzalez further alleged that she paid the $60,000 up front, but that Avila stopped making monthly mortgage payments after less than two years. The mortgage lender has since foreclosed. Again, Avila did not contest Gonzalez’s allegations in the trial court, which found Gonzalez’s testimony sufficiently credible, in the face of no opposition, to hold Avila in breach of his remaining obligations under the House Agreement.

On appeal, Avila challenges the trial court’s findings that the agreements are enforceable against him and that he has breached those agreements. Avila argues, inter alia, that the trial court erred by reading additional obligations into both agreements based on Gonzalez’s self-serving oral testimony.

A. Did the trial court err by allowing Gonzalez to present parol evidence regarding the consideration she gave to support Avila’s promise to pay Gonzalez $5,000 per month? Please explain, using your own words and reasoning and not those of the Texas Court of Appeals in the real-life case on which this problem is based.

No. The Support Agreement does not appear on its face to be fully integrated; and, even if it did, this being a R2 jurisdiction, the trial court should consider evidence of the circumstances surrounding its formation in deciding whether and to what extent the writing is integrated. R2 § 210(3) & cmt. b. Only if the writing is fully integrated would the parol evidence rule contemplate preventing Gonzalez from offering evidence of an additional term to the jury. See R2 § 213(2). Regardless of the extent to which the Support Agreement is integrated or whether it is unambiguous, the trial court should always consider evidence of consideration. R2 § 218(2).

B. Did the trial court err by allowing Gonzalez to present parol evidence regarding her agreement with Avila about who would make the downpayment and who would make the monthly payments on the house? Please explain as above.

No. While the House Agreement is written, what is at issue here is an oral side agreement between Gonzalez and Avila regarding who would be responsible for what part of the House Agreement the two of them signed with the bank. The parol evidence rule does not bar the admissibility of any evidence offered to explain, supplement, contradict, or modify an oral agreement. See R2 §§ 209 & 213. Nor does it bar evidence of consistent additional oral terms to a written agreement. See R2 § 216. Nor does it bar evidence of a subsequent oral modification to a written agreement. And, as before, it does not bar evidence of consideration. R2 § 218(2).
5. The court in *Frigaliment* (EMP 548-54) did not apply UCC Article 2 to the contracts at issue because New York, whose law governed the transaction, had not yet adopted Article 2. Suppose that it had.

A. How should the court have decided the case if it had applied Article 2?

The court should have reached the same conclusion, although by a somewhat different path. The *Frigaliment* court decided that the term “chicken” in the parties’ contracts was ambiguous; therefore, it considered extrinsic evidence of, *inter alia*, the negotiations leading up to the contracts, trade usage, and course of performance to help explain the meaning of the term “chicken.” UCC § 2-202 does not require a threshold finding that a contract is ambiguous before a court may consider evidence of, *inter alia*, trade usage and course of performance to help explain or supplement the contract. See UCC § 2-202 & cmt. 1(c). As discussed below, the evidence of prior negotiations is a bit trickier under Article 2. However, because the court’s decision appeared to hinge more on the trade usage and course of dealing evidence than on the evidence regarding prior negotiations, the court should have reached the same conclusion applying Article 2 as it did not applying Article 2.

B. Of the various items of extrinsic evidence the court discussed in its opinion, which would and would not be allowed under the applicable provision(s) of UCC Article 2?

UCC § 2-202(a) expressly allows evidence of trade usage and course of performance offered to explain or supplement, but not contradict, an integrated term. It is a legal impossibility to contradict an ambiguous term. Therefore, all of the trade usage and course of performance evidence the *Frigaliment* court considered should still be fair game under Article 2.

UCC § 2-202 would exclude the evidence of prior negotiations to the extent that it contradicted an integrated term in the parties’ written contracts. “Chicken,” while ambiguous, is probably integrated. However, to the extent that the evidence of prior negotiations supplemented or explained, but did not contradict, an integrated term, Article should permit the court to consider it because § 2-202 is founded on honoring the parties’ agreement, and § 1-201 defines “agreement” to mean “the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of dealing or usage of trade or course of performance.” UCC § R1-201(a)(3). (Pre-revised § 1-201(3) uses almost identical language.) Surely, the negotiations of the parties leading up to the written contracts are “other circumstances” from which the court can ascertain “the bargain of the parties in fact.”

C. Would the express hierarchy of intrinsic and extrinsic terms imposed by UCC Articles 1 and 2 have favored Frigaliment or BNS?

While there is conflicting evidence on trade usage, the evidence regarding Frigaliment’s acceptance of the first shipment and apparent willingness to accept the second shipment (recall that BNS, not Frigaliment, ordered the second shipment stopped in transit) is not contradicted. Because the UCC gives preference to course of performance over trade usage, *see* R1-303(e), BNS has the upper hand.