

11-1-2016

The Will to Prevail: Inside the Legal Battle to Save Sweet Briar

William H. Hurd

Troutman Sanders LLP, Richmond, Virginia

Ashley L. Taylor Jr.

Troutman Sanders LLP, Richmond, Virginia

Nancyellen Keane

Vice President for Administration and General Counsel, Sweet Briar College

Stephen C. Piepgrass

Troutman Sanders LLP, Richmond, Virginia

C. Reade Jacob Jr.

Troutman Sanders LLP, Richmond, Virginia

See next page for additional authors

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>



Part of the [Education Law Commons](#), [Estates and Trusts Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

William H. Hurd, Ashley L. Taylor Jr., Nancyellen Keane, Stephen C. Piepgrass, C. R. Jacob Jr., James M. Giudice & J. W. Smithers III, *The Will to Prevail: Inside the Legal Battle to Save Sweet Briar*, 51 U. Rich. L. Rev. 227 (2016).

Available at: <https://scholarship.richmond.edu/lawreview/vol51/iss1/11>

This Essay is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

The Will to Prevail: Inside the Legal Battle to Save Sweet Briar

Authors

William H. Hurd, Ashley L. Taylor Jr., Nancyellen Keane, Stephen C. Piepgrass, C. Reade Jacob Jr., James M. Giudice, and J. Westwood Smithers III

THE WILL TO PREVAIL: INSIDE THE LEGAL BATTLE TO SAVE SWEET BRIAR

William H. Hurd *
Ashley L. Taylor, Jr. **
Nancyellen Keane ***
Stephen C. Piepgrass ****
C. Reade Jacob, Jr. *****
James M. Giudice *****
J. Westwood Smithers III *****

INTRODUCTION

Sweet Briar College was established over a century ago by the will of a prominent Virginia landowner, Indiana Fletcher Williams, as an institute for the education of young women. Located in the foothills of the Blue Ridge Mountains on a breath-taking 3250-acre former plantation, the campus is a National Historic District and home to twenty-one buildings on the Virginia Landmarks Register and the National Register of Historic Places.¹ Chartered in 1901 by the Virginia General Assembly, the school officially opened its doors in 1906.² Since then, Sweet Briar has

* Partner, Troutman Sanders LLP, Richmond, Virginia. J.D., 1977, University of Virginia School of Law; B.A. 1973, University of Virginia.

** Partner, Troutman Sanders LLP, Richmond, Virginia. J.D., 1993, Washington and Lee School of Law; B.A., 1990, Virginia Military Institute.

*** Vice President for Administration and General Counsel, Sweet Briar College; Of Counsel, Troutman Sanders LLP, Richmond, Virginia. J.D., 1982, University of Richmond School of Law; A. B., 1978, Sweet Briar College.

**** Partner, Troutman Sanders LLP, Richmond, Virginia. J.D., 2005, University of Virginia School of Law; B.A., 1999, Duke University.

***** Partner, Troutman Sanders LLP, Richmond, Virginia. J.D., 2005, University of Virginia School of Law; B.A., 1999, Duke University.

***** J.D. Candidate, 2017, University of Richmond School of Law.

***** J.D. Candidate, 2017, University of Richmond School of Law.

1. Karin Kapsidelis, *Sweet Briar Campus on List of Endangered Historic Places*, RICH. TIMES-DISPATCH (May 18, 2015, 12:00 AM), http://www.richmond.com/news/article_1a2738fd-d30c-5e15-afca-9286cfd6471.html.

2. *Graduate Catalog 2010-2011*, SWEET BRIAR COLLEGE 5, 30, <http://oldweb.sbc.edu/>

developed into a well-respected educational institution for young women and has carried out its mission to “empower and educate young women to build and reshape their world”³

Despite the school’s storied past and deep historical roots, on March 3, 2015, the Sweet Briar Board of Directors announced its intention to shut down the college—permanently—the following summer.⁴ The Board cited “insurmountable financial challenges,” including falling enrollment, a lack of unrestricted funds in its endowment, and the century-old school’s lack of appeal to modern generations of students.⁵ The Board claimed the school was no longer financially viable, because though its \$84 million endowment was sizeable by most measures, the school needed an endowment three times that size to stay open.⁶ Students, faculty, staff, and alumnae were blindsided by the news that their college would abruptly shut its doors. Unanswered questions led to controversy and distrust, and groups of Sweet Briar supporters were galvanized to take action.⁷

Immediately following the announcement, a movement to halt the school’s closure arose and quickly gained momentum, leading to a hotly contested legal battle that went from the circuit court to the Supreme Court of Virginia and back again. Amherst County Attorney, Ellen Bowyer, boldly brought the principal lawsuit in the name of the Commonwealth of Virginia.⁸ The lawsuit alleged the College had violated the Virginia Charitable Solicitations Act by using charitable funds, raised to operate the school, for the purpose of closing it instead.⁹ The lawsuit also claimed violations of the Virginia Uniform Trust Code. In the end, the supporters of Sweet Briar won.¹⁰ This is their story.

Part I provides an in-depth factual overview, beginning with the college’s founding in the early 1900s. The commentary then

sites/default/files/*/Graduate%20Catalog%202010-11.pdf (last visited Oct. 3, 2016).

3. *Welcome, SWEET BRIAR COLLEGE*, <http://sbc.edu/about/> (last visited Oct. 3, 2016).

4. *See* discussion *infra* Part I.

5. *See infra* notes 24–26 and accompanying text.

6. *Id.*

7. *See infra* notes 41–46 and accompanying text.

8. Complaint at 1, Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. CL15009373-00 (Va. Cir. Ct. Mar. 30, 2015) (Amherst County) (unpublished decision).

9. *Id.* at 1–2.

10. *See* discussion *infra* Part I.D.

turns to the controversial decision to close and discusses the facts and legal theories of the case, the decisions by the circuit court and the Supreme Court of Virginia, and the eventual settlement that kept the school alive.

In Part II, the discussion shifts to the landmark nature of this case, not only for Sweet Briar College, but also for other Virginia colleges and non-profits around the country. The essay analyzes the legal questions arising from the case, including whether a Virginia corporation could also be a trustee, and, what were the Board's legal obligations in this case?

I. FACTUAL OVERVIEW

A. *Sweet Briar Institute Established in 1901*

Sweet Briar College (more formally known as Sweet Briar Institute) opened its doors in rural Amherst County, Virginia, in 1906.¹¹ Officially chartered in 1901, the college was established by the will of Indiana Fletcher Williams (the "Will"),¹² who left her family's former Sweet Briar plantation land for the purpose of establishing an institute that would educate young women.¹³ The Will directed that Williams' property be used to establish and maintain a women's college "*upon the conditions and for the purposes hereinafter declared . . . namely: The said corporation shall . . . establish and shall maintain and carry on . . . a school or seminary, to be known as the 'Sweet Briar Institute,' for the educa-*

11. *History*, SWEET BRIAR COLLEGE, <http://sbc.edu/about/history/> (last visited Oct. 3, 2016).

12. *Id.*; see also *Will of Indiana Fletcher Williams*, ARCHIVE.ORG 2-3, <https://archive.org/stream/willofindianafle00unse#page/n3/mode/2up> (last visited Oct. 3, 2016) [hereinafter *The Will*].

13. *The Will*, *supra* note 12, at 2-3. Note that the Will actually provided "for the education of white girls and young women." *Id.* at 3. During the Civil Rights Era, the College took legal action to make a revision to the charter in order to allow African-American women of other races to be students at the school. *Sweet Briar College: History*, PLEXUSS, <https://plexuss.com/college/sweet-briar-college> (last visited Oct. 3, 2016). The request to alter the Will was initially denied, with the trial court citing the "plain, unambiguous, conclusive, and binding" language of the Will. *Id.* Although the three-judge federal court initially abstained from addressing the issue, the matter was then taken before the Supreme Court, which reversed the district court and remanded the case. *Sweet Briar Inst. v. Button*, 387 U.S. 423, 423 (1967) (per curiam). Upon remand, the federal district court granted a permanent injunction barring enforcement by the Commonwealth of the racial restriction on grounds that such enforcement action would violate the Fourteenth Amendment. *Sweet Briar Inst. v. Button*, 280 F. Supp. 312, 312 (W.D. Va. 1967).

tion of . . . girls and young women.”¹⁴ The Will directs that the college be established as “a *perpetual* memorial” to Williams’ daughter, Daisy.¹⁵ It provides that “[n]o part of the [donated land] shall at any time be sold or alienated by the corporation” and that “[t]he personal property herein given shall be *kept inviolate* as an endowment fund, which shall be invested and re-invested by the corporation, and of which the income only shall be used for the support and maintenance of the school,” except that the corporation is authorized to expend a part of the principal for constructing and equipping capital improvements.¹⁶

This clear and unambiguous testamentary document was followed by action of the Virginia General Assembly, which adopted the Charter of Sweet Briar Institute, a nonprofit corporation (the “Charter”).¹⁷ The Charter instructed the corporation to “accept the real and personal property . . . devised and bequeathed [in the Will], *subject to the terms and conditions specifically prescribed in the said will.*”¹⁸

With its rural location and idyllic campus, Sweet Briar developed as a premiere educational institution for young women over its hundred-plus year history. Enrollment was intentionally kept small, despite the sprawling physical campus.¹⁹ Sweet Briar aimed to be as highly regarded as other prominent women’s colleges, such as Smith, Mount Holyoke, and Wellesley.²⁰ At the same time, given Indiana Williams’ directive that students be “useful members of society” upon graduation, Sweet Briar sought to distinguish its curriculum from that of its role models.²¹ Sweet Briar became known for its practical, hands-on curricular model. While the College slowly became a more traditional liberal arts

14. *The Will*, *supra* note 12, at 2–3 (emphasis added).

15. *Id.* at 4 (emphasis added).

16. *Id.*

17. 1901 Va. Acts ch. 123.

18. *Id.* (emphasis added).

19. See Sheryl Stolberg, *Anger and Activism Greet Plan to Shut Sweet Briar College*, N.Y. TIMES (Mar. 22, 2015), http://www.nytimes.com/2015/03/23/education/sweet-briars-imminent-closing-stirs-small-uprising-in-a-college-idyll.html?_r=0.

20. *Best Women’s Colleges*, BESTCOLLEGES.COM, <http://www.bestcolleges.com/features/top-womens-colleges/> (last visited Oct. 3, 2016).

21. *The Will*, *supra* note 12, at 4.

school over the years, Sweet Briar stayed true to its core mission of offering hands-on education to young women.²²

B. *Decision to Close*

On February 28, 2015, meeting behind closed doors, the Sweet Briar Board of Directors voted to shut down the college.²³ This decision, which was not announced until March 3, cited “insurmountable financial challenges.”²⁴ Among those supposed challenges were falling enrollment rates, an alleged lack of unrestricted funds in the endowment, the declining appeal of a women-only liberal arts education, and an insufficient alumnae base for fundraising.²⁵

Interim President James Jones and the Board of Directors made their case for closure: unrestricted funds in the school’s \$84 million endowment were insufficient to cover operating costs and outstanding debts.²⁶ According to the Board, \$65 million of the \$84 million endowment was restricted and could not be used for ongoing operations at the College.²⁷

The policies Sweet Briar had implemented in the past decade—such as discounting tuition for low-income students, minorities and first generation students²⁸—backfired by dramatically lower-

22. *Mission*, SWEET BRIAR COLLEGE (May 2004), <http://sbc.edu/about/mission/>.

23. Amy Friedenberger, *Sweet Briar College Faculty Passes Resolution Opposing Closure*, ROANOKE TIMES (Mar. 16, 2015, 9:02 PM), http://www.roanoke.com/news/education/higher_education/sweet-briar-college-faculty-passes-resolution-opposing-closure/article_dec8426a-e75e-585a-970f-aabc0fc96774.html.

24. *Id.*; Nick Anderson & Susan Svrluga, *Sweet Briar College to Close Because of Financial Challenges*, WASH. POST (Mar. 3, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/03/03/sweet-briar-college-to-close-because-of-financial-challenges/>.

25. Abigail Jones, *The End of Sweet Briar College and the Problem with Women’s Colleges*, NEWSWEEK (Apr. 29, 2015, 6:26 AM), <http://www.newsweek.com/2015/05/08/end-sweet-briar-college-and-problem-womens-colleges-326363.html>.

26. Peter Jacobs, *‘Something Just Doesn’t Add Up’ with an Imploding College’s Financials*, BUS. INSIDER (Mar. 16, 2015, 5:41 PM), <http://www.businessinsider.com/sweet-briar-college-financials-2015-3>. According to the Board of Directors and President Jones, the College’s endowment had dropped from \$96.2 million to \$84 million between 2011 and 2015. *Id.*

27. Jones, *supra* note 25.

28. See Catherine Morris, *Alumnae Declare Victory in Fight to Save Sweet Briar*, DIVERSE ISSUES IN HIGHER EDUC. (June 22, 2015), <http://diverseeducation.com/article/74105/>. This policy was adopted in reaction to a study on demographic changes in the makeup of women’s colleges published by the University of California, Los Angeles. See LINDA J. SAX, JENNIFER BERDAN LOZANO & COLLEEN QUINN VANDENBOOM, WHO ATTENDS

ing the number of students paying full price.²⁹ The College could no longer cover operating costs with tuition alone. By the fall of 2014, 43 percent of Sweet Briar students received federal need-based financial aid in the form of Pell grants.³⁰ “[B]oth Mr. Jones and Paul Rice, the board chairman, said Sweet Briar’s rich-girl days were long gone. . . . Of students who entered in fall 2014, Mr. Jones said, 43 percent received Pell grants, federal aid for needy students; 37 percent are first-generation College students; and 32 percent are minorities.”³¹ Even adding an engineering major in 2005 did not increase enrollment.³² Enrollment—and especially enrollment of students paying full tuition—had undeniably dropped.

Jones cited financial reports that estimated the College had \$28 million in deferred maintenance and \$25 million in debt.³³ These reports were prepared by financial consultants hired as the Board of Directors planned to shut the college down—consultants who claimed the school would require a \$250 million endowment in order to survive.³⁴ Jones and the Board also claimed that they had recently conducted a fundraising study, which had determined that there was an inadequate base of prospective donors to support the College.³⁵ The Board also cited a wide range of options they had considered, such as going coeducational or merging with another school, but claimed it found no viable option that could keep the College operating.³⁶

A WOMEN’S COLLEGE? IDENTIFYING UNIQUE CHARACTERISTICS AND PATTERNS OF CHANGE, 1971–2011, UCLA, at iv–vi (Sept. 2014). The study and its use in justifying the decision to close the College was later criticized by Sweet Briar College Professor Dan Gottlieb, for basing its conclusions on an artificially high sample size from historically black women’s colleges. See Dan Gottlieb, *Enrollment, Race, and the Unfortunate Case of Dr. Sax’s Sample Bias: The Sweet Briar Story, Part 2*, UNSOLICITED GURU (Apr. 20, 2015), <http://www.unsigned.guru/sweet-briar/enrollment-race-and-the-unfortunate-case-of-dr-saxs-sample-bias-the-sweet-briar-story-part-2/>.

29. Gottlieb, *supra* note 28.

30. *Id.*

31. Stolberg, *supra* note 19.

32. *Id.*

33. *Id.*

34. *Id.*

35. Elizabeth H.S. Wyatt & Sandra A. Taylor, *Sweet Briar Directors Faced an Impossibly Difficult Decision*, RICH. TIMES-DISPATCH (Apr. 29, 2015, 10:30 PM), http://www.richmond.com/opinion/their-opinion/guest-columnists/article_6684faad-1a48-59ff-ac0c-23c023a4b3fd.html.

36. Stolberg, *supra* note 19.

The Board also cited a “Donor Insight Survey,” by Grenzebach Glier and Associates, which they termed a “fundraising feasibility”³⁷ study in support of their conclusion that an appeal to alumnae would be “insufficient in its results and counterproductive in its nature.”³⁸ Critics later pointed out that the survey actually was not a “feasibility study” and employed methodology that would have been improper for such a study and argued that its results were being misinterpreted by both the Board and Jones.³⁹

Students, parents, faculty, and alumnae were skeptical of Jones’ and the Board’s assessment of the college’s viability. Many wondered aloud why the Board had not been more forthcoming with its alumnae, who might have donated in greater numbers to aid their beloved alma mater, had they known it was in such supposedly dire straits.⁴⁰ Conspiracy theories abounded. Some felt Jones had been brought in by the Board as “an axman” to shut the school down.⁴¹ Questions were raised about the approximately \$84 million endowment and how much of it was actually unavailable to meet operating costs.⁴² Others asked: Who benefits from closing the College?⁴³ Leading to more distrust by alumnae, it was

37. Resolution of the Board of Directors of Sweet Briar Institute (Feb. 28, 2015), https://savingsweetbriar.com/wp-content/uploads/2015/04/College-Demurrer-compressed_Redacted.pdf.

38. Elizabeth H.S. Wyatt, *We Tried Hard, But Sweet Briar’s Problems Are Terminal*, WALL ST. J. (June 3, 2015), <http://www.wsj.com/articles/we-tried-hard-but-sweet-briars-problems-are-terminal-1433274483>; see also Sarah Clement & Edie McRee Bowles, *Closing Sweet Briar Isn’t Justified*, RICH. TIMES-DISPATCH (May 4, 2015, 10:30 PM), http://www.richmond.com/opinion/their-opinion/guest-columnists/article_a6764e23-2a28-5237-9ccf-e7e626914049.html; Elizabeth H.S. Wyatt & Sandra A. Taylor, *Sweet Briar Directors Faced an Impossibly Difficult Decision*, RICH. TIMES-DISPATCH (Apr. 29, 2015, 10:30 PM), http://www.richmond.com/opinion/their-opinion/guest-columnists/article_6684faad-1a48-59ff-ac0e-23e023a4b3fd.html.

39. See Stacey Sickels Locke, *Donor Insights Study Analysis (Not a Feasibility Study): My Response to Board Member’s Erroneous Statements in National Media*, BEING UNLOCKED (Jun. 3, 2015), <http://beingunlocked.com/2015/06/donor-insights-study-an-analysis-by-a-donor-professional-fundraiser/>.

40. See, e.g., *id.*

41. Stolberg, *supra* note 19.

42. See Susan Svrluga, *Lawsuit Seeks to Stop Sweet Briar College From Closing*, WASH. POST (Mar. 30, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/03/30/lawsuit-seeks-to-stop-sweet-briar-college-from-closing/>.

43. Because so many of the stated rationales for closure appeared questionable to the alumnae, speculation arose about whether other motivations could explain the decision. See Elizabeth MacDonald, *Emac’s Bottom Line: Saving Sweet Briar*, FOXBUSINESS (June 18, 2015), <http://www.foxbusiness.com/features/2015/06/18/saving-sweet-briar.html> (noting that “[a]lumnae and former board members . . . ask who benefits from shutting Sweet Briar, to, say, sell it for another purpose, since the college sits near an economic development

revealed that the Board's decision to close came just a few weeks after it accepted a \$1 million donation from a donor in her estate plan, in response to which, Interim President Jones wrote in a thank you letter: "What a *wonderful* thing you have done!"⁴⁴

The Board's decision led the College's faculty to pass, by unanimous vote, a declaration of no confidence in the President and Board of Trustees, formally asking them all to resign.⁴⁵ Notably, the no-confidence vote stated that "the decision of the Board of Directors to close the College was made without consultation with the Faculty and other stakeholders of the College in any stage of the process, and without allowing any or all of those groups to propose solutions to the current financial challenges. . . ."⁴⁶

C. *Legal Challenges to Closure*

Galvanized into action by news of the institution's pending closure, Sweet Briar supporters quickly responded. Integral to events that follow was the formation of Saving Sweet Briar, Inc., ("Saving Sweet Briar") an alumnae-run organization created to organize the effort to keep the college open. Saving Sweet Briar retained legal counsel and began planning its legal strategy.⁴⁷

zone and a major highway?"). After the agreement to save the College was reached, it came to light that discussions were ongoing between the College's previous administration and the University of Virginia ("UVa"). Steve Kolowich, *That Time Sweet Briar Tried to Merge with the U. of Virginia*, CHRONICLE OF HIGHER EDUC. (July 14, 2015), <http://chronicle.com/article/That-Time-Sweet-Briar-Tried-to/231573>. These discussions included email correspondence between Sweet Briar Board Member and UVa professor emeritus David W. Breneman and UVa Provost John Simon about "the Sweet Briar conversation." *Id.* (Breneman and Interim President Jones each were former Presidents of Kalamazoo College.) They also included a meeting between Jones and then-UVa Rector George Keith Martin. *Id.* Martin's notes show that a "[p]roposal to make Sweet Briar an extension of UVa" was discussed. *Id.* The discussions never materialized into an agreement, and it is unclear what role the prospects of such a deal may have played in the decision to close. *Id.*

44. Ruth McCambridge, *The Sweet Briar Donor Acknowledgement Letter Used in Suit to Block School's Closing*, NONPROFIT Q. (Apr. 2, 2015), <https://nonprofitquarterly.org/2015/04/02/the-sweet-briar-donor-acknowledgement-letter-used-in-suit-to-block-schools-closing>.

45. Susan Svrulga, *Sweet Briar Faculty Unanimously Votes No Confidence in the President and Board*, WASH. POST (Mar. 31, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/03/31/sweet-briar-faculty-unanimously-votes-no-confidence-in-the-president-and-board/>.

46. *Id.*

47. *Sweet Briar College Alumnae Hire Prominent Law Firm to Fight Closure of College*, SAVINGSWEETBRIAR.COM (Mar. 6, 2015), <http://savingsweetbriar.com/sweet-briar-college-alumnae-hire-prominent-law-firm-to-fight-closure-of-law-firm/>.

Although not immediately apparent to the public, Saving Sweet Briar and its counsel were working behind the scenes with the Amherst County Attorney, Ellen Bowyer. After settlement overtures were rejected, Bowyer filed suit on March 30, 2015.⁴⁸ This suit was entitled *Commonwealth of Virginia, ex rel. Ellen Bowyer, in her official capacity as County Attorney for the County of Amherst, Virginia v. Sweet Briar Institute*.⁴⁹ Bringing a suit in the name of the Commonwealth avoided sticky legal issues that would have complicated the case had Saving Sweet Briar—a group of alumnae—been the named plaintiff instead.

Shortly thereafter, another suit, *Jessica Campbell v. Sweet Briar Institute*, was brought on behalf of several students of the college and their parents.⁵⁰ These students, once on their way to receiving a degree from the unique women's liberal arts institution, now sought to regain this opportunity by claiming that the Board's action to close the College constituted a breach of contract.⁵¹

Another lawsuit, *John Gregory Brown v. Sweet Briar Institute*, was brought by a group of fifty faculty and staff members of Sweet Briar College.⁵² This particular suit, unlike the others, was not designed to try to keep the college open. Rather, this group of college employees alleged a breach of their employment contracts after being terminated pursuant to the Board's decision to close.⁵³

But, it was the Bowyer lawsuit that commanded center stage.⁵⁴ Bowyer sought injunctive relief to block Sweet Briar's closing pursuant to both the Virginia Charitable Solicitations Act and the

48. Complaint, *Commonwealth ex rel. Bowyer v. Sweet Briar Inst.*, No. CL15009373-00 (Va. Cir. Ct. Mar. 30, 2015) (Amherst County) (unpublished decision).

49. No. CL150619, 2015 Va. LEXIS 22 (Va. June 9, 2015) (unpublished decision).

50. Complaint at 1, *Campbell v. Sweet Briar Inst.*, No. CL15009390-00 (Va. Cir. Ct. Apr. 17, 2015) (Amherst County) (unpublished decision).

51. See *id.* at 1–2, 7; see also Jessie Pounds, *Complaints Seek Injunctions to Stop Sweet Briar College Closure*, NEWS & ADVANCE (Mar. 30, 2015, 10:45 PM) http://www.newsadvance.com/news/local/complaints-seek-injunctions-to-stop-sweet-briar-college-closure/article_a22e6b76-d721-11e4-a656-5be3e8ff0f16.html.

52. Complaint at 2–3, *Brown v. Sweet Briar Inst.*, No. CL15009395-00 (Va. Cir. Ct. Apr. 24, 2015) (Amherst County) (unpublished decision).

53. *Id.*

54. For purposes of this article, the authors refer to the plaintiff in the *Commonwealth of Virginia, ex rel. Ellen Bowyer, in her official capacity as County Attorney for the County of Amherst, Virginia v. Sweet Briar Institute* as either “Bowyer” or the “Commonwealth.”

Virginia Uniform Trust Code.⁵⁵ She alleged that the Board was in violation of Virginia Code section 57-57(N) of the Charitable Solicitations Act by using charitable donations, raised to operate the college, to close the school instead.⁵⁶ In what became known as the “Orphaned Funds” claim, Bowyer further argued that it was impermissible to use even *unrestricted* funds for closure because, by doing so, the Board necessarily would render itself unable to use the remaining funds in accordance with the purpose for which they were given.⁵⁷ Bowyer also argued that the Board was a trustee of a charitable trust and was acting in violation of its fiduciary duties under the Uniform Trust Code, Virginia Code section 64.2-700.⁵⁸

In opposing Bowyer’s claims, the Board argued that the College was not a trustee, an argument it based on an earlier case in which alumnae unsuccessfully opposed the coeducation of a women’s college, *Dodge v. Trustees of Randolph-Macon Women’s College*.⁵⁹ The Board also argued that, as a county attorney, Bowyer lacked standing to enforce a charitable trust under the Code.⁶⁰

Bowyer’s standing was an issue of contention throughout the case.⁶¹ It was argued that the Attorney General has sole authority to enforce these statutes on behalf of the Commonwealth.⁶² While Virginia Code section 57-59(D) expressly empowers a county attorney to enforce the Charitable Solicitations Act.⁶³ It is less clear

55. Memorandum in Support of Motion for Temporary Injunction at 19, Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. CL15009373-00-00 (Va. Cir. Ct. Apr. 7, 2015) [hereinafter Motion for Temporary Injunction] (Amherst County).

56. *See id.* at 24–25.

57. *Id.* at 15.

58. *See id.* at 27; *see also* Petition for Review Pursuant to Code § 8.01-626, Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. 150619, 2015 LEXIS 22 (Va. Apr. 29, 2015) [hereinafter Petition for Review] (unpublished decision).

59. *See* Petition for Review, *supra* note 58, at 9; *Dodge v. Trs. of Randolph-Macon Woman’s Coll.*, 276 Va. 10, 12–14, 661 S.E.2d 805, 806–07 (2008).

60. *See* Brief in Opposition to Petition for Appeal at 6, Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. 150619, 2015 Va. LEXIS 22 (Va. May 5, 2015) [hereinafter Brief in Opposition to Petition for Appeal].

61. *See* Demurrer and Motion to Dismiss Count II of the Complaint for Lack of Standing at 6, Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. CL15009373-00 (Va. Cir. Ct. Apr. 6, 2015) [hereinafter Motion to Dismiss] (Amherst County) (unpublished decision).

62. *Id.*

63. *See* VA. CODE ANN. § 57-59(D) (Repl. Vol. 2012) (empowering a county attorney, among other officials, to bring action on behalf of the Commonwealth upon reasonable belief that a violation of the Act has occurred or will occur).

who may enforce a charitable trust under the Uniform Trust Code's vaguely worded provisions, which grants standing to "[t]he settlor . . . among others."⁶⁴

D. *Challenges to the Factual Basis for the Closure Decision*

Opponents of closure challenged the litany of negative facts and trends cited by the Board and Interim President Jones in support of their decision to close the College.⁶⁵ The previous administration pointed to dwindling enrollment, a significant tuition discount rate, and the inability to raise sufficient funds as reasons why the school was no longer financially viable.⁶⁶ But, through diligent research and analysis, opponents of closure were able to cast doubt on these assertions.

Opponents of closure alleged that the Board made no meaningful attempt to address the challenges faced by the school. They noted that, as recently as 2008, Sweet Briar had a successful capital campaign in which it raised \$110 million; however, the Board had declined to launch another capital campaign.⁶⁷ Additionally, dissident Board members, who had sought to present information in support of keeping the school open, claimed that they had been forced to resign as a result of their criticism.⁶⁸ As a result, some alleged that those driving the Board's decision to close had nefarious intentions and were planning to sell the College's vast real estate to developers; however, their "conspiracy theories" were never substantiated.

1. Financial Condition

Saving Sweet Briar hired a forensic accountant, Steven Spitzer, to examine the school's financial condition and produce a report, the Preliminary Analysis of Financial Condition of Sweet

64. VA. CODE ANN. § 64.2-723(C) (Repl. Vol. 2012).

65. See Motion for Temporary Injunction, *supra* note 55, at 10–12.

66. Exhibit A to Demurrer and Motion to Dismiss Count II of the Complaint for Lack of Standing, Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. CL15009373-00 (Va. Cir. Ct. Apr. 6, 2015) [hereinafter Exhibit A to Motion to Dismiss] (Amherst County) (unpublished decision).

67. *Id.*; Clement & Bowles, *supra* note 38.

68. See Motion for Temporary Injunction, *supra* note 55, at 8.

Briar Institute (the “Spitzer Report”).⁶⁹ Spitzer based his analysis on audited financial statements for the year ending June 2014 (the last report available) and concluded that “the College was not in dire financial straits just eight months before the College’s Board and Interim President announced they were closing” and accordingly, it did not need to close.⁷⁰

In his report, Spitzer also relied on information from three reputable sources to arrive at the conclusion the college was financially healthy.⁷¹ First, the Spitzer Report relied on a study in Forbes magazine analyzing the financial health of non-profit institutions. Forbes gave Sweet Briar a grade of “A,” and ranked it 88 out of more than 900 institutions studied.⁷² Only four Virginia colleges studied by Forbes ranked above Sweet Briar; the remaining 23 fell *below* Sweet Briar in terms of financial health.⁷³ Second, the Spitzer Report relied on the Composite Financial Index (the “CFI”)—a metric developed by several consulting groups and endorsed by the Council of Independent Colleges, which assigns institutions a score on a scale of -4 to 10, with any score greater than 3 indicating a strong financial position.⁷⁴ The CFI for Sweet Briar was 5.09 in 2014 and 4.72 in 2013, indicating that the College was financially stable.⁷⁵ Finally, the U.S. Department of Ed-

69. UPDATE: CPA Releases Report on Sweet Briar’s Finances; School Responds, WSET (Apr. 7, 2015), <http://wset.com/news/sweet-briar-closing/sweet-briar-college-responses-to-forensic-accountants-review>.

70. R. STEVEN SPITZER, PRELIMINARY ANALYSIS OF FINANCIAL CONDITIONS OF SWEET BRIAR INSTITUTE (Apr. 6, 2015) [hereinafter SPITZER REPORT], <http://savingsweetbriar.com/preliminary-analysis-of-financial-condition-of-sweet-briar-institute-sweet-briar-colleges-financial-condition-did-not-warrant-closure/>.

71. *Id.*

72. *Id.*; Forbes College Financial Grades SCRIBD (2014), <https://www.scribd.com/doc/155687329/Forbes-College-Financial-Grades-As-and-Bs>.

73. SPITZER REPORT, *supra* note 70. The only four Virginia colleges that ranked above Sweet Briar were Washington & Lee University, University of Richmond, Hollins University, and Randolph College. *Id.*

74. *Id.* The CFI is a tool that allows leaders of colleges and universities who have no background in finance or accounting to understand their institutions’ overall financial health. *Id.* Additionally, to minimize reporting requirements the CFI is computed from data found in the U.S. Department of Education’s Integrated Postsecondary Education Data System and IRS Form 990. Karla Hignite, *Diagnosing Fiscal Fitness*, NAT’L ASSOC. OF COLL. & UNIV. BUS. OFFICERS (Apr. 2009), http://www.nacubo.org/Business_Officer_Magazine/Magazine_Archives/April_2009/Diagnosing_Fiscal_Fitness.html.

75. SPITZER REPORT, *supra* note 70. *Id.* The CFI considers an institution’s financial health with its ability to accomplish its mission. Scores should be evaluated over a three to five-year period. Hignite, *supra* note 74. A score of 3 indicates the institution has “sufficient and adequately managed resources to fulfill its mission objectives.” *Id.* An average

ucation (“USDOE”) uses a financial responsibility composite score derived from official audited financial statements to determine an institution’s financial health, and scores this overall financial health of institutions on a scale from -1.0 to 3.0.⁷⁶ As noted in the Spitzer Report, the USDOE gave Sweet Briar the highest possible score of 3.0, as of June 30, 2014.⁷⁷

At the time of the Spitzer Report, Sweet Briar ranked seventeenth out of thirty-five public and private colleges in the region in terms of endowment size, and tenth out of thirty public and private schools in Virginia in terms of endowment size per student.⁷⁸ Furthermore, since 2009, the College’s asset-to-liability ratio had improved, and its endowment actually rose from \$74.3 million to \$84 million.⁷⁹ While the Board asserted that it needed a \$250 million endowment for the College to remain open,⁸⁰ the Spitzer Report noted that schools with endowments of that size typically dwarf Sweet Briar, and serve student populations more than ten times Sweet Briar’s size.⁸¹

2. Enrollment

According to the Board, another factor increasing the college’s financial burden was declining enrollment.⁸² But, Sweet Briar’s Dean of Enrollment from 2012 to 2013 disagreed, noting in the seven years leading up to the announcement to close, the school had seen three of its largest first-year classes in history in 2007, 2008, and 2013.⁸³ A mere eighteen months prior to the announcement to close, the school was experiencing record first-year enrollment.⁸⁴

score of 7–8 indicates the financial health of the institution is strong enough to allow for experimentation with new initiatives. *Id.*

76. *Financial Responsibility Composite Scores*, FED. STUDENT AID, U.S. DEPT OF EDUC., <https://studentaid.ed.gov/sa/about/data-center/school/composite-scores> (last visited Oct. 3, 2016).

77. *Id.*

78. SPITZER REPORT, *supra* note 70.

79. Peter Jacobs, *supra* note 26.

80. Stolberg, *supra* note 19.

81. SPITZER REPORT, *supra* note 70 (citing schools with populations more than 10 times the size of Sweet Briar with \$250 million endowments).

82. Exhibit A to Motion to Dismiss, *supra* note 66.

83. See Motion for Temporary Injunction, *supra* note 55, at Exhibit F.

84. *Id.*

Prior to the Board's announcement to close Sweet Briar, 530 students were enrolled at the college;⁸⁵ but, with the senior class soon graduating, no new freshman class admitted, and others looking to transfer, it seemed to some that it was already too late to keep a student body interest. But, during his courtroom testimony in April 2015, the former Sweet Briar Dean of Enrollment said he believed that enrollment of 225 at the start of the new academic year would represent success in light of the detrimental effect of the announcement to close.⁸⁶ By August 2015, within six weeks after the settlement keeping the college open, the school had exceeded the goal of 225 students and enrolled 320 students,⁸⁷ with a long term enrollment goal of 800.⁸⁸

3. Debt and Donor Base

According to Scott Shank, the Vice President for Finance and Administration when closure was announced, the threat of default on \$25 million of outstanding bonds was a contributing factor in the Board's decision.⁸⁹ Under the terms of one of the bonds, if the College failed to maintain a certain liquidity ratio while simultaneously failing to meet an S&P credit rating of BBB, the banks could trigger a default on the outstanding bonds.⁹⁰

But only one of these triggers occurred when the S&P credit rating of the bonds dropped below BBB. And that only occurred *after* the announcement to close was made, not before.⁹¹ The se-

85. Jessie Pounds, *Sweet Briar College Students Return to Campus*, RICH. TIMES-DISPATCH (Aug. 26, 2015, 10:30 PM), http://www.richmond.com/news/virginia/article_18237524-3b44-54ce-947a-a1caf5713a6a.html.

86. Katrina Dix, *For Sweet Briar, Emphasis Turns to Enrollment*, NEWS & ADVANCE (July 15, 2015, 8:00 PM), www.newsadvance.com/news/local/for-sweet-briar-emphasis-turns-to-enrollment/article_9b9df494-2b03-11e5-813c-df0a26a64098.html.

87. *Sweet Briar College Fact Sheet 2015–16*, SWEET BRIAR COLL., <http://sbc.edu/institutional-research/wp-content/uploads/sites/16/sbc-fact-sheet-2015-2016.pdf> (last visited Oct. 3, 2016).

88. *Statement of Core Principles and Strategic Goals*, SWEET BRIAR COLL., <http://sbc.edu/president/wp-content/uploads/sites/8/sweet-briar-college-board-core-principles-and-strategic-goals.pdf> (last visited Oct. 3, 2016).

89. Sheresee Gore, *Bonds Spelled Trouble as Financial Problems Mounted at Sweet Briar College*, NEWS & ADVANCE (May 3, 2015, 9:42 PM), http://www.newsadvance.com/news/local/bonds-spelled-trouble-as-financial-problems-mounted-at-sweet-briar/article_e12245e4-f1fe-11e4-849d-477891ca990b.html.

90. *Id.*

91. *Id.*

cond requirement for default—the liquidity ratio—was never triggered, as the analysis to determine compliance with the liquidity ratio only occurred once yearly as of June 30. Thus, it is reasonable to conclude that the threat of the bonds being called could not have been a major reason for closure.

4. Legal Proceedings

On April 7, 2015, Bowyer, on behalf of the Commonwealth, filed a motion for a temporary injunction, seeking to (1) bar the Board from taking steps or using funds to close the college; and (2) replace the Board with a court-appointed special fiduciary to operate the college and oversee its assets.⁹² The next day, the Attorney General of Virginia filed an amicus brief to contest Bowyer's standing, a position also taken by the Board.⁹³ At a hearing held on April 14, 2015, Bowyer announced that she had appointed Troutman Sanders—the same law firm that represented Saving Sweet Briar—as special counsel to assist her in presenting the case. The move sparked controversy. The Board claimed a conflict of interest, and the Attorney General took the position that only he could choose special counsel for the Commonwealth.

The Board filed a motion to dismiss, arguing that the case was not properly before the court on the theory that, as County Attorney, Bowyer lacked standing to enforce the Uniform Trust Code.⁹⁴ The Board also relied heavily on its theory that under *Dodge*, the UTC does not apply to corporations. The Board claimed that, as a practical matter, the obligations of a corporation and a trustee could not coexist and that applying trust law to a charitable corporation was not workable.⁹⁵

Judge Updike rejected the challenges to the Troutman Sanders' appointment, and the hearing proceeded the following day on Bowyer's motion for a temporary injunction. At the conclusion of the hearing, Judge Updike issued an order granting a sixty-day

92. See Motion for Temporary Injunction, *supra* note 55, at 33–34.

93. See Amicus Curiae Brief of Attorney General, Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No CL15009373-00 (Va. Cir. Ct. Apr. 8, 2015) (Amherst County) (unpublished decision).

94. Motion to Dismiss, *supra* note 61, at 4.

95. See *id.* at 7.

injunction pursuant to the Charitable Solicitations Act,⁹⁶ barring the use of solicited charitable funds to close the College, but denying an injunction pursuant to the Uniform Trust Code.⁹⁷ At the urging of the Board, Judge Updike reasoned that Sweet Briar College was a charitable corporation and, ipso facto, could not be governed by the law of trusts.⁹⁸ Judge Updike relied on the 2008 decision in *Dodge v. Trustees of Randolph-Macon Woman's College*.⁹⁹ In *Dodge*, the Supreme Court of Virginia held that Randolph-Macon Woman's College was not a trust subject to Virginia Code section 55-541.02(B).¹⁰⁰

The Commonwealth subsequently filed a Petition for Review to the Supreme Court of Virginia to appeal the circuit court's ruling. In its Petition for Review, the Commonwealth sought a preliminary injunction, arguing that the circuit court (1) read too narrowly the scope of its authority under the Charitable Solicitations Act; and (2) mistakenly asserted that Sweet Briar could not be both a corporation and a trustee subject to trust law.¹⁰¹ Specifically, Bowyer asserted that the circuit court misread the decision in *Dodge* and relied upon a "false dichotomy" between status as a trustee and status as a corporation.¹⁰² She urged that the unique circumstances and characteristics, which arguably made Sweet Briar College both a corporation and a trustee, were not present in *Dodge*.¹⁰³

Perhaps the keystone of Bowyer's case before the supreme court was a brief *amici curiae* written by three iconic professors of

96. *Judge in Sweet Briar Lawsuit Hearing Grants Temporary Injunction*, WSLs (Apr. 15, 2015, 8:55 PM), <http://wsls.com/2015/04/15/judge-in-sweet-briar-lawsuit-hearing-grant-s-temporary-injunction/>.

97. Jessie Pounds, *Judge's Ruling Extends Efforts to Keep Sweet Briar College Open*, NEWS & ADVANCE (Apr. 14, 2015, 7:30 PM), www.newsadvance.com/news/local/judge-s-ruling-extends-efforts-to-keep-sweet-briar-college/article_3831e310-e2c0-11e4-afd2-3773ff62fdc4.html.

98. *Id.*

99. Karin Kapsidelis, *Court Ruling Extends Efforts to Keep Sweet Briar Open*, RICH. TIMES-DISPATCH (Apr. 14, 2015, 1:45 PM), http://www.richmond.com/news/article_9add e6aa-4b38-5d51-ba36-7150671d1767.html; *Dodge v. Trs. of Randolph-Macon Woman's Coll.*, 276 Va. 10, 18, 661 S.E.2d 805, 809 (2008).

100. *Dodge*, 276 Va. 10, 18, 661 S.E.2d at 809.

101. Petition for Review, *supra* note 58, at 2.

102. *Id.* at 9–11.

103. *Id.*

trusts and estates law.¹⁰⁴ The brief detailed why an organization can in fact be both a trustee and a corporation and argued that Sweet Briar met the criteria for this dual designation.¹⁰⁵ Other amicus briefs were filed in support of Bowyer's petition by fundraising experts; a group of students, parents, alumnae; and a group of Virginia legislators.¹⁰⁶ Although the Board asked the court not to consider the amicus briefs, the request was rejected and the briefs were received.

In the meantime, the students and parents moved forward, seeking a lengthier injunction in their breach of contract case against the Board and bringing the matter for hearing on April 28, 2015. At the hearing, Judge Updike granted a more extensive injunction—preventing the college from using “general donations” for closure purposes for six months.¹⁰⁷

The parties in the Bowyer case were heard in oral argument before the supreme court on June 4, 2015.¹⁰⁸ Bowyer argued that swift action was necessary to ensure that the College could actually be saved were the injunction to be granted.¹⁰⁹ Tipping his hand perhaps, Chief Justice Don Lemons asked why the Board was trying so hard to close the College.¹¹⁰

On June 9, the supreme court overruled Judge Updike, explaining that he erred when he held “that the law of trusts cannot apply to a corporation.”¹¹¹ The supreme court remanded the case

104. See Brief of Amici Curiae Professors J. Rodney Johnson, John E. Donaldson, and Robert T. Danforth in Support of Commonwealth's Petition for Review Pursuant to Code § 8.01-626, Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. 150619, 2015 Va. LEXIS 22 (June 9, 2015) [hereinafter Professors' Brief].

105. See *id.* at 6.

106. *Legal Proceedings*, SAVING SWEET BRIAR, <http://savingsweetbriar.com/legal-proceedings/> (last visited Oct. 3, 2016).

107. M. Grigsby, *Judge Issues 2nd Injunction Against Sweet Briar, Amherst Co. Attorney Appeals*, WSLs (Apr. 29, 2015, 9:35 PM), <http://wsls.com/2015/04/29/judge-issues-2nd-injunction-against-sweet-briar-amherst-co-attorney-appeals/>.

108. Supreme Court of Virginia Order Scheduling Oral Argument, SAVING SWEET BRIAR, <https://savingsweetbriar.com/legal-proceedings/virginia-supreme-court-oral-argument-date/> (last visit Oct. 3, 2016).

109. Petition for Review, *supra* note 58, at 1.

110. Supreme Court of Virginia Audio Recordings of Oral Arguments, Commonwealth, *ex rel.*, Bowyer v. Sweet Briar Inst., SUPREME COURT OF VIRGINIA, http://www.courts.state.va.us/courts/scv/oral_arguments/2015/jun/home.html.

111. Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. 150619, 2015 Va. LEXIS 22, at *3-4 (June 9, 2015) (unpublished decision).

back to the circuit court, extending that court's injunction to June 24 for further consideration on the matter.¹¹²

5. Settlement Reached

As the litigation continued, so did attempts to settle the issue. On April 30, 2015, the Attorney General's office sent a letter to the parties expressing the desire to facilitate mediation so that the issue could be resolved.¹¹³ A professional mediator was brought in to facilitate discussions, and in the weeks leading up to the supreme court's hearing, all parties—including Bowyer, Saving Sweet Briar, the groups of students and parents, and the faculty and staff who had sued the college—were engaged in mediation in conjunction with the Attorney General's office.¹¹⁴ Although by the day of the hearing no settlement had been reached, the rulings in favor of Bowyer and remand to the circuit court, together with the parallel actions by students, parents, and faculty, made settlement discussions more attractive. A hearing on remand was set for Monday, June 22, 2015. However, on June 16, 2015, a pretrial hearing was held in Bedford, Virginia, in which Judge Updike signaled that he would reverse his earlier decision on the trust issue. This gave further impetus to settlement. With the parties working through the weekend, on June 20, a memorandum of understanding among all parties, including the Attorney General, was finally reached and was submitted to the court.¹¹⁵

The memorandum of understanding outlined a proposed settlement agreement between the parties, which ultimately provided that the College would remain open subject to certain condi-

112. *Id.* at *6.

113. See Letter from John W. Daniel, II, Deputy Attorney General, (Apr. 30, 2015), SAVING SWEET BRIAR, <https://savingsweetbriar.com/legal-proceedings/virginia-attorney-generals-letter-regarding-sweet-briar-and-bowyer-troutman-sanders-response/>.

114. Memorandum of Understanding between Ellen Bowyer, Saving Sweet Briar, Inc., Sweet Briar Institute, and the Attorney General of Virginia (June 20, 2015) [hereinafter Memorandum of Understanding], <https://savingsweetbriar.com/legal-proceedings/settlement-agreement-memorandum-of-understanding/>. The Memorandum of Understanding was "reached by and between Ellen Bowyer, in her capacity as the County Attorney for the County of Amherst, Saving Sweet Briar, Inc. ("SSB") (together with Bowyer, the "Bowyer Plaintiffs"), Sweet Briar Institute (the "College"), and the Attorney General of Virginia." *Id.*

115. See *id.*

tions.¹¹⁶ Under this proposal, Saving Sweet Briar was to deliver \$12 million in donations for the operation of the College, with the first \$2.5 million installment due by July 2.¹¹⁷ Further, the Attorney General would consider the release of \$16 million in restricted funds from the College's endowment. Once the initial installment was delivered, the Board members would resign and be replaced by a new board, selected by Bowyer and Saving Sweet Briar.¹¹⁸

At the hearing on June 22, all parties signed the proposal and came before the court. Judge Updike vacated his original order regarding his analysis of the trust issue pursuant to the supreme court's ruling and issued a consent settlement order approving the proposed settlement agreement.¹¹⁹ In speaking from the bench and vacating his previous order, Judge Updike conceded that his earlier conclusion on the trust issue was simply wrong, deferring to the supreme court's judgment and giving particular authoritative weight to the amicus brief of the three professors as a reliable and authoritative analysis.¹²⁰ Judge Updike stated during the hearing, "I'm convinced that Sweet Briar College will not merely endure, it will prevail."¹²¹

Following the settlement, Saving Sweet Briar met its July 2 deadline, triggering the resignation of the old Board and the replacement with a new one. Phillip C. Stone, known for his previous tenure as President of Bridgewater College, became the new President.¹²² With new leadership in place, the decision to close the College was quickly reversed, and, in August 2015, students

116. *Id.*

117. *Id.*

118. *Id.*

119. See Sheryl Gay Stolberg, *Virginia Judge Approves Deal to Keep Sweet Briar College Open*, N.Y. TIMES (June 22, 2015), http://www.nytimes.com/2015/06/23/us/virginia-judge-approves-deal-to-keep-sweet-briar-college-open.html?_r=0; Susan Svrluga, *Sweet Briar Survives: Judge Approves Settlement Deal to Keep the College Open*, WASH. POST (June 22, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/06/22/sweet-briar-survives-judge-approves-settlement-deal-to-keep-the-college-open/>.

120. Transcript of Hearing before the Honorable James W. Updike, Jr. at 20–22, Commonwealth *ex rel. v. Sweet Briar Inst.*, No. CL15009373-00 (Va. Cir. Ct. June 22, 2015) (Amherst County) (unpublished decision).

121. *Id.* at 26.

122. Mona Abdi, *Phillip Stone Becomes Sweet Briar's 12th President*, WSET (July 2, 2015), <http://wset.com/news/sweet-briar-closing/phillip-stone-becomes-sweet-briars-12th-resident>.

returned.¹²³ Saving Sweet Briar completed its \$12 million commitment on schedule in September 2015. The College has been saved, though further efforts will be needed as it works to recover from the fallout following the closure announcement.¹²⁴

There still remains no legal ruling on the merits of the allegation that the Board violated trust law. But the law in Virginia advanced, insofar as the Supreme Court of Virginia ruled that an entity can be both a corporation and a trust, thus distinguishing *Dodge*. This essay analyzes Virginia corporate and trust law in the context of the Sweet Briar case, addressing the relevant issues raised by the case and the ramifications for nonprofit organizations in Virginia.

II. RAMIFICATIONS FOR VIRGINIA COLLEGES AND OTHER NONPROFITS

The landmark nature of the Sweet Briar case is not only due to the promising outcome for the College, but also to the legal questions the case presented. The distinctive aspects of the College's founding and legal structure contained the ingredients for a serious inquiry as to whether an organization can be both corporation and trustee. If an organization can be both a corporation and a trustee, additional questions arise: What were the obligations of a corporate trustee in this case? Who may enforce a charitable gift? This part first examines the overarching issue of whether an organization can be both a corporation and a trustee.

A. *Can an Organization be a Corporation and a Trustee?*

Approaching the issue of whether an organization can assume the dual roles of corporation and trustee requires an examination of the relevant aspects and legal history surrounding Sweet Briar College and distinguishing this case from others. Specifically, it is

123. Jessie Pounds, *Sweet Briar College Students Return to Campus*, RICH. TIMES-DISPATCH (Aug. 26, 2015, 10:30 PM), http://www.richmond.com/news/virginia/article_18237524-3b44-54ce-947a-a1caf5713a6a.html.

124. See Katherine Flynn, *Saving Sweet Briar College, One Coat of Paint at a Time*, NAT'L TR. FOR HISTORIC PRES. (Sept 10, 2015), <https://savingplaces.org/stories/saving-sweet-briar-college-one-coat-of-paint-at-a-time#.V2FRn1Uwjcs>.

important to understand how the 2015 Sweet Briar case is distinguishable from *Dodge v. Trustees of Randolph-Macon Woman's College*, and the founding Sweet Briar College.

B. *Distinguishing Dodge*

In *Dodge*, students from a private women's college, Randolph-Macon Woman's College ("RMWC"), brought suit to block the College's impending transformation into a coeducational institution.¹²⁵ The students alleged that RMWC, a charitable non-stock corporation, was also a charitable trust under Virginia Code section 2.2-507.1.¹²⁶ Under this code section, "assets of a charitable corporation incorporated in or doing any business in Virginia shall be deemed to be held in trust . . ."¹²⁷ The students argued that this provision renders a charitable corporation subject to the Uniform Trust Code.¹²⁸

The Supreme Court of Virginia held that RMWC was not a trust because section 2.2-507.1 does not "render[] a nonstock charitable corporation subject to . . . the Uniform Trust Code" or "transform all charitable Virginia nonstock corporations into charitable trusts."¹²⁹ The court stated that, rather, the provision merely serves to give the Attorney General authority to protect public interests in charitable corporation assets.¹³⁰

In the Sweet Briar case, the College argued before the Supreme Court of Virginia that *Dodge* conclusively determined that the Virginia Uniform Trust Code did not apply to the College.¹³¹ "As this Court held in *Dodge*," the College asserted, "the General Assembly has 'made clear . . . that directors of charitable nonstock corporations remain subject to existing statutory and common law related to those corporations.'¹³² Instead, according to the Col-

125. See *Dodge v. Trs. of Randolph-Macon Woman's Coll.*, 276 Va. 10, 13, 661 S.E.2d 805 (2008).

126. See *id.* at 10, 13, 661 S.E.2d at 807.

127. See VA. CODE ANN. § 2.2-507.1 (Repl. Vol. 2012).

128. See *Dodge*, 276 Va. at 13, 661 S.E.2d at 806-07.

129. *Id.* at 10, 16-17, 661 S.E.2d at 806, 808.

130. See *id.* at 10, 16, 661 S.E.2d at 806, 808.

131. See Brief in Opposition to Petition for Appeal, *supra* note 60, at 12.

132. *Id.* at 16 (quoting *Dodge*, 276 Va. at 16-17, 661 S.E.2d at 809).

lege, “the directors of Sweet Briar are subject to the business judgment rule.”¹³³

Bowyer, on the other hand, asserted that *Dodge* was legally and factually distinguishable for two reasons. First, Bowyer argued that Sweet Briar’s status as a trustee had nothing to do with section 2.2-507.1.¹³⁴ Instead, Bowyer relied on the two instruments that served to found Sweet Briar Institute: the will of Indiana Fletcher Williams (the “Will”) and a charter created by the 1901 Act of the General Assembly (the “Charter”).¹³⁵ *Dodge* involved neither an actual trust instrument such as a will, nor a statutory decree implementing the terms of a will.¹³⁶

Second, though the court in *Dodge* held that RMWC was not a trustee, it did not hold that a charitable nonstock corporation can never be a trustee.¹³⁷ What *Dodge* actually says, contrary to the circuit court’s original reading in the Sweet Briar case, is that the Uniform Trust Code did not apply to RMWC specifically because it “is not an express inter vivos trust, charitable trust, or non-charitable trust created pursuant to a statute, judgment, or decree.”¹³⁸ Thus, the supreme court in Sweet Briar’s case found that the circuit court erred in its assertion that trust law cannot be applied to a corporation simply because it is a corporation.¹³⁹ It follows, then, that the defining aspects of this issue in the context of Sweet Briar Institute are grounded in the founding of the College and its formative documents.

C. *Founding and Formative Documents*

Sweet Briar College lies in Amherst County, Virginia amidst what was once a plantation inherited and owned by Indiana Fletcher Williams. Williams died testate having survived both her husband and her young daughter and having included her

133. *Id.*; Brief in Opposition to Petition for Appeal, *supra* note 60, at 16.

134. *See* Petition for Review, *supra* note 58, at 9–11.

135. *See id.* at 9.

136. *See id.* at 10.

137. *See id.* at 9–10.

138. *Dodge v. Trs. of Randolph-Macon Woman’s Coll.*, 276 Va. 10, 17, 661 S.E.2d 805, 809 (2008).

139. *See* Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. CL150619-00, 2015 LEXIS 22, at *3 (Va. June 9, 2015) (unpublished decision).

“Sweet Briar Plantation” in her last will and testament.¹⁴⁰ The Will states:

I give and devise all my plantation and tract of land known as Sweet Briar Plantation . . . and also the rest and remainder of all my real and personal property . . . unto [four named persons] as Trustees upon the trusts and with the powers and duties hereinafter specified, that is to say:

I direct the said trustees forthwith after my decease, to procure the incorporation in the State of Virginia, of a corporation to be called the “Sweet Briar Institute,” such corporation to be created by due process of law, either under the general laws relating to the formation of corporations or by a special charter to be obtained from the Legislature of the State of Virginia.¹⁴¹

The Will also places restrictions on the corporation’s alienation of the Sweet Briar property and endowment income and imposes duties of investment, proclaiming an underlying purpose to establish a “perpetual memorial” for Williams’ late daughter, Daisy.¹⁴² In the 2015 Sweet Briar case, Bowyer argues that the language of this document is sufficient to establish a testamentary trust.¹⁴³ This was the original document that founded Sweet Briar College and, by its own instruction, led to the subsequent incorporation of Sweet Briar Institute as a charitable nonprofit corporation.¹⁴⁴

In 1901, an Act of the Virginia General Assembly created the Charter establishing Sweet Briar Institute as a nonprofit corporation.¹⁴⁵ At the time, it was a common and often necessary practice to form a nonprofit corporation in order to carry out the purposes of a charitable trust.¹⁴⁶ In its opposition to Bowyer’s 2015 petition for review, the College asserted that the Charter clearly established the school as a charitable corporation and nothing more.¹⁴⁷ While the Charter expressly established Sweet Briar Institute as a corporation, it also incorporated the terms of the Will and authorizes the corporation to “accept the real and personal property . . . devised and bequeathed [in the Will], subject to the

140. See *The Will*, *supra* note 12, at 2.

141. *Id.* at 2–3.

142. *Id.* at 4.

143. See *Petition for Review*, *supra* note 58, at 7.

144. See *The Will*, *supra* note 12, at 3.

145. See Act of Feb. 9, 1901, ch. 123, 1901 Va. Acts 125.

146. See *Professors’ Brief*, *supra* note 104, at 11.

147. See *Brief in Opposition to Petition for Appeal*, *supra* note 60, at 12.

terms and conditions specifically prescribed in the said [W]ill.¹⁴⁸ In light of this language of the Will and incorporation of its terms into a legislative act, Bowyer argued that Sweet Briar Institute is a trustee of a testamentary charitable trust.¹⁴⁹ While there is no dispositive ruling on whether Sweet Briar is or is not a trustee, the supreme court's ruling makes it clear that an organization can be both a trustee and a corporation. The circumstances of the College's formation make a very strong case that it is both.

D. *Prior Legal History*

Events following the College's founding also speak to these issues.¹⁵⁰ The Charter remains in effect, though it has since been altered by legislation.¹⁵¹ In 1908, the Virginia General Assembly enacted legislation, allowing an "incorporated educational institution" to sell part of its land in excess of a certain amount, "notwithstanding any provision in its charter, or in the deed, will or munument [sic] of title under which said real estate is held."¹⁵² This enactment was apparently requested by Sweet Briar Institute.¹⁵³ As stated by the college years later in *Sweet Briar Institute v. Button*, the legislation was enacted to "permit sale of a portion of the real estate . . . acquired by Sweet Briar from Mrs. Williams."¹⁵⁴ This corporate code amendment suggests an understanding by both the college and the General Assembly that the

148. Act of Feb. 9, 1901, ch. 123, 1901 Va. Acts 125, 127.

149. See Petition for Review, *supra* note 58, at 8–11.

150. Ms. Williams' will has withstood prior challenge from her own family in 1900, and also when the County of Amherst sued in 1901 for back taxes. See *Commonwealth v. Williams' Ex'r*, 102 Va. 778, 779–80, 47 S.E. 567, 867–68 (1904); Nicole Steenburgh, *A Prevailing Will: Sweet Briar College Founder's Will Has Survived Many Challenges*, NEWS & ADVANCE (July 1, 2015, 10:26 AM), http://www.newsadvance.com/new_era_progress/news/a-prevailing-will-sweet-briar-college-founder-s-will-has/article_2f84a228-1ffd-11e5-b0c9-eba0ff711a50.html.

151. See KATHERINE A. HEARN, *THE INTEGRATION OF SWEET BRIAR, THE SWEET BRIAR COLLEGE CASE 1963–1967* 1 (1985), <https://ia801307.us.archive.org/28/items/TheIntegrationOfSweetBriarTheSweetBriarCollegeCase19631967/The%20Integration%20of%20Sweet%20Briar:%20The%20Sweet%20Briar%20College%20Case%201963%20-%201967.pdf> (discussing the legal battle in the mid-1960s to desegregate the college).

152. Act of Feb. 8, 1908, ch. 29, 1908 Va. Acts 35.

153. See Professors' Brief, *supra* note 104, at 5.

154. *Id.* at 4 (quoting Jurisdictional Statement at 8, *Sweet Briar Inst. v. Button*, 387 U.S. 423 (1966) (No. 1106)).

original act granting the Charter is to remain in effect and can be altered only by subsequent legislation.¹⁵⁵

The *Button* case, mentioned above, occurred in the 1960s, years after the founding and code amendment. In *Button*, the College sued the Commonwealth of Virginia, seeking to invalidate a portion of the Will that only allowed the College to educate “white girls and young women.”¹⁵⁶ After an abstention by the lower court, the case was appealed to the United States Supreme Court.¹⁵⁷ In its appeal, Sweet Briar told the Court that it was “seeking to enjoin Virginia state officers from enforcing a racial restriction contained in a will under which appellant holds property *as trustee* of an educational trust.”¹⁵⁸ Bowyer used this statement to reinforce her claim that the College is a trustee and while not treated by the Supreme Court of Virginia as dispositive, it is certainly strong evidence.¹⁵⁹

E. *What Were the Obligations of the College as Corporate Trustee in This Case?*

1. Uniform Prudent Management of Institutional Funds Act

The Uniform Prudent Management of Institutional Funds Act¹⁶⁰ (UPMIFA or the “Act”) is a revision of the Uniform Management of Institutional Funds Act (UMIFA), and was adopted by the Uniform Law Commission in 2006.¹⁶¹ The Act “guides charities on the management and investment of funds, provides rules on spending from endowment funds, and permits the release of restrictions on the use and management of charitable funds.”¹⁶²

155. *See id.* at 5.

156. *Sweet Briar Inst. v. Button*, 280 F. Supp. 312, 312 (W.D. Va. 1967) (quoting *The Will*, *supra* note 12, at 3).

157. *Id.*

158. Jurisdictional Statement at 6, *Sweet Briar Inst. v. Button*, 387 U.S. 923 (1967) (No. 1106) (emphasis added).

159. *See* Petition for Review, *supra* note 58, at 11–12.

160. UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT, UNIF. L. COMM’N (2006) [hereinafter UPMIFA].

161. *See* Susan Gary, *UMIFA Becomes UPMIFA*, UNIF. L. COMM’N (2007), <http://uniformlaws.org/Shared/Docs/UMIFA%20Becomes%20UPMIFA.pdf>.

162. *Id.*

Forty-seven states, including Virginia, have adopted UPMIFA.¹⁶³ The Act updates the applicable prudence standard for the management of charitable funds, modernizes the rules governing expenditures from these funds, and allows for the modification of restrictions on these funds to facilitate more efficient management.¹⁶⁴ UPMIFA is applicable to charities organized as either nonprofit corporations or as trusts.¹⁶⁵

Under UPMIFA, the overarching standard of care for the management of charitable funds is prudence.¹⁶⁶ This UPMIFA prudence standard is a blend of corporate and trust law and takes language from different statutes.¹⁶⁷ Individuals who manage and invest institutional funds are required to: (i) give primary consideration to donor intent as expressed in a gift instrument; (ii) act in good faith with the care an ordinarily prudent person in a like position would exercise; (iii) incur only reasonable costs in investing and managing charitable funds; (iv) make a reasonable effort to verify relevant facts; (v) make decisions about each asset in the context of the portfolio of investments as part of an overall investment strategy; (vi) diversify investments unless, due to special circumstances, the purposes of the fund are better served without diversification; (vii) dispose of unsuitable assets, and, in general; and (viii) develop an investment strategy appropriate for the fund and the institution.¹⁶⁸ These factors taken together put the manager of the trust under several fiduciary duties: a duty of loyalty, care, cost minimization, and investigation.¹⁶⁹

When donor intent is clearly expressed, UPMIFA requires the trustee give effect to that intent.¹⁷⁰ If the donor's intent is not clearly expressed, the Act requires the trust to be prudently man-

163. *Id.*; LEGISLATIVE FACT SHEET—PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT, UNIF. LAW COMM'N, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Prudent%20Management%20of%20Institutional%20Funds%20Act> (last visited Oct. 3, 2016).

164. Gary, *supra* note 161.

165. *Id.*

166. *Id.*

167. *Id.* (discussing UPMIFA's use of language from the Revised Model Nonprofit Corporation Act and the Uniform Prudent Investor Act).

168. UPMIFA, *supra* note 160, at § 3; VA. CODE ANN. § 64.2-1101 (Repl. Vol. 2012).

169. UPMIFA, *supra* note 160, at § 3 cmt.; *see* VA. CODE ANN. § 64.2-1102 (Repl. Vol. 2012).

170. UPMIFA, *supra* note 160, at § 3.

aged in ways consistent with the purpose of the fund with the aim of continuing the fund into perpetuity.¹⁷¹ These requirements ensure that funds are used in a manner consistent with donor intent, are protected long-term, and will continue to be used for such purposes in the future.¹⁷² UPMIFA's prefatory note explicitly states that the doctrine of *cy pres*, which will be discussed in more detail below, still applies to nonprofit corporations and charitable trusts alike.¹⁷³

Funds must be managed with two fundamental duties in mind: first, the duty to comply with the donor's intent and, second, the duty to act in accordance with the purposes of the institution when making management and investment decisions.¹⁷⁴ The language creating the duty of care in UPMIFA is similar to that found in the Model Business Corporation Act, and imposes the duty to act in good faith, "with the care an ordinarily prudent person in a like position would exercise under similar circumstances."¹⁷⁵ To fulfill this duty, the trustee must minimize the costs associated with management of the funds, and ensure the accuracy of information upon which the trustee relies when making investment decisions through reasonable investigation.¹⁷⁶

Additionally, UPMIFA includes an optional provision, creating a presumption of *imprudence* if the institution spends more than 7 percent of its endowment in any one year.¹⁷⁷ Even though not adopted in Virginia, the 7 percent threshold provides a good baseline when analyzing excessive spending from an endowment fund. In sum, for its decisions to be considered "prudent" an institution must always take into account its mission, as defined in the donor's original intent, and ensure its actions further that mission.

2. Sweet Briar Examined Under UPMIFA

As previously discussed, Saving Sweet Briar hired Steven Spitzer, an expert accountant with experience in college and uni-

171. *See id.*

172. *See id.*

173. *Id.* at Prefatory Note.

174. *Id.* at § 3 cmt.

175. *Id.*

176. *Id.*

177. *Id.* at § 3.

versity finances, to examine the College's audited financial statements.¹⁷⁸ The report concluded that "the College was not in dire financial straits just eight months before the College's Board and Interim President announced they were closing"¹⁷⁹ Mr. Spitzer relied on a study from Forbes magazine, the CFI, and the financial responsibility composite score used by the Department of Education that is based on official audited financial statements.

It appeared the College's financial situation had at least stabilized if not improved in recent years. In comparison to other colleges in the region in terms of endowment size Sweet Briar was above average, and ranked in the top half of private schools in Virginia.¹⁸⁰ Since 2009, the College's asset-to-liability ratio has improved and in fact its endowment is up by nearly \$10 million.¹⁸¹ Despite these positive trends, Bowyer—and the plaintiffs in the parallel litigation—alleged the Board made no meaningful effort to cut costs, raise additional funds, hire an admissions director to boost enrollment, or otherwise find a path to long-term prosperity.¹⁸² While opponents of closure viewed this course of conduct by the Board as suggesting a failure to meet the requirements of UPMIFA, it was never necessary for a court to resolve this issue due to the settlement.

F. *Cy Pres Doctrine*

Charitable trusts are potentially infinite in duration.¹⁸³ This perpetual nature can lead to problems when the settler's original intent becomes outdated, obsolete, or even illegal as circumstances and society change over time.¹⁸⁴ When such circumstances arise, the doctrine of *cy pres* requires that a testator's intent be

178. UPDATE: CPA Releases Report on Sweet Briar's Finances; School Responds, WSET, (Apr. 7, 2015) <http://wset.com/news/sweet-briar-closing/sweet-briar-college-responds-to-forensic-accountants-review>.

179. SPITZER REPORT, *supra* note 70.

180. *Id.*

181. Jacobs, *supra* note 26.

182. *Id.*

183. Roger G. Sisson, Comment, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 635 (1988).

184. *Id.*

carried out “as near as possible” to the exact manner originally specified.¹⁸⁵ In Virginia, the doctrine has been codified and allows courts to modify or terminate a trust when its charitable purpose has become “unlawful, impracticable, impossible to achieve, or wasteful.”¹⁸⁶ For the doctrine to be invoked there must be a valid charitable trust with an existing charitable intent. Additionally, the beneficiaries of the trust must be indefinite or uncertain, or the purpose of the trust must be impossible or impracticable to perform.¹⁸⁷ Following the doctrine, the trust is then modified or terminated, and the assets of the trust are used for a purpose that aligns as closely as possible with the original intent of the donor.¹⁸⁸

If the doctrine of *cy pres* had been invoked in this case, the Board would not have acted unilaterally, but would have gone to court to seek permission to close the College. A judge then would have decided if the purpose of the Will could no longer be carried out and, if not, how best to adhere to Williams’ original intent.¹⁸⁹ Assuming this court agreed that the College needed to close (not a likely result), the court would stipulate the College’s remaining endowment and other assets be used for a charitable purpose, probably providing young women with higher education.¹⁹⁰ According to Reid Weisbord, Vice Dean and Professor of Law at Rutgers University, the Board could not sell the schools assets without court approval, and it is highly unlikely the Board could have obtained court approval in light of the clear restrictions of Williams’ Will.¹⁹¹ However, the Board did not seek modification of the Will prior to announcing closure.¹⁹²

185. United States *ex rel.* United States Coast Guard v. Cerio, 831 F. Supp. 530, 535 (E.D. Va. 1993) (quoting VA. CODE ANN. § 55-31 (Repl. Vol. 1992)).

186. VA. CODE ANN. § 64.2-731 (Repl. Vol. 2012).

187. *Id.*

188. RESTATEMENT (SECOND) OF TRUSTS, § 399 (AM. LAW INST. 1959).

189. Abby Jackson, *A Virginia College That’s Imploding Can’t be Sold, According to the Founder’s Last Will and Testament*, BUS. INSIDER (Mar 9, 2015, 3:08 PM), <http://www.businessinsider.com/sweet-briar-college-land-cannot-be-sold-according-to-founders-last-will-and-testament-2015-3>.

190. *See id.*

191. *Id.*

192. Exhibit A to Motion to Dismiss, *supra* note 66.

Instead, believing trust laws did not apply to the College, and that the Board's decisions regarding the future of the College were restricted only by the business judgment rule, the Board first decided to close the college and then considered how to dispose of its assets. The Board voted to close the college on February 28, 2015, before sending a letter on March 25, 2015, requesting that the Attorney General authorize the release or modification of certain restrictions on the use of the college's funds.¹⁹³ In the letter, the Board proposed to use the funds for the orderly wind up of the College, to provide support for transitioning students and faculty, and to dispose of the College's tangible and real property.¹⁹⁴ As a corporate trustee, the Board had a duty to give effect to Ms. Williams' originally expressed intent, and the Board's decision to close the College and use its funds contrary to the purpose of the trust does not comply with the *cy pres* doctrine.

G. *Virginia Charitable Solicitations Act*

As a nonprofit institution of higher education, Sweet Briar is classified as a charitable organization under Virginia law,¹⁹⁵ which defines a charitable organization as "any person that is or holds itself out to be organized or operated for any charitable purpose, or any person which solicits or obtains contributions solicited from the public."¹⁹⁶ The College is a non-stock corporation registered with the State Corporation Commission that actively solicits contributions from the public.¹⁹⁷ As a charitable organization, Sweet Briar has a duty to spend money in a manner consistent with the general purposes for which those funds were solicited.¹⁹⁸ The Charitable Solicitations Act makes it unlawful to use "funds raised by a charitable solicitation for any purpose oth-

193. *Id.*

194. *Id.*

195. See VA. CODE ANN. § 57-60(A)(1) (Repl. Vol. 2012 & Cum. Supp. 2016) (stating that while "exempt from the registration requirements of § 57-49," institutions of higher education shall be subject to the provisions of section 57-60).

196. VA. CODE ANN. § 57-48 (Repl. Vol. 2013 & Cum. Supp. 2016). Additionally, "person" means "any individual, organization, trust, foundation, association, partnership, corporation, society, or other group or combination acting as a unit." *Id.*

197. *President's Office*, SWEET BRIAR COLLEGE, <http://sbc.edu/president/board-of-directors/> (last visited Oct. 3, 2016).

198. VA. CODE ANN. § 57-57(N) (Repl. Vol. 2012).

er than the solicited purpose or, with respect to funds raised by general appeals, the general purpose of the charitable or civic organization on whose behalf the solicitation was made.¹⁹⁹

Donations to nonprofit institutions typically fall into two categories, restricted and unrestricted funds.²⁰⁰ Unrestricted funds, which constitute the majority of donations, may be used for any general purpose, including day-to-day operations.²⁰¹ Boards of directors may allocate unrestricted funds for any purpose, so long as such funds are used in a manner that falls within the general purpose of the organization. Funds that are specifically donated for certain purposes are considered restricted, and must be used in a manner consistent with the purpose for which they were given.²⁰² Once the Board decided to close the college, it sought the removal of restrictions on various institutional funds,²⁰³ and it took the position that funds donated for general purposes may be used to close down the College.²⁰⁴

Sweet Briar has a history of actively soliciting funds for the purpose of operating the College. For instance, a document from 2011 soliciting donations was provided to visitors of the College's website and provided an explanation of how the College intended to use donated funds.²⁰⁵ The document speaks solely of using donated funds in a manner related to the ongoing operation of the College.²⁰⁶ There is no indication that the funds could or would be used to shut down the school. Even if these funds technically fall in the unrestricted category, they still must be used for the general purpose of operating the College, not for the contrary purpose of shutting down the College.

To adhere to the language and spirit of the Charitable Solicitations Act, Sweet Briar must use donated funds to carry out its

199. *Id.*

200. Joanne Fritz, *What Are Restricted and Unrestricted Funds for a Nonprofit?*, ABOUT MONEY, (Oct. 31, 2015), <http://nonprofit.about.com/od/glossary/g/restricted.html>.

201. *Id.*

202. VA. CODE ANN. § 57-57(N) (Repl. Vol. 2012).

203. Exhibit A to Motion to Dismiss, *supra* note 66.

204. *Id.*

205. See *The Annual Fund at Work*, SWEET BRIAR COLLEGE (2011), http://webcache.googleusercontent.com/search?q=cache:1KIVdktID9wJ:sbc.edu/sites/default/files/Annual_Fund/Annual%2520Fund%2520at%2520Work%25202011%2520Updated%2520012011.pdf+%&c&d=1&hl=en&ct=clnk&gl=us.

206. *Id.*

purpose as set forth in Mrs. Williams' will and as generally understood by its donors. Thousands of alumnae have contributed millions of dollars with the expectation that the funds would be used for the operational purposes advertised on the college's website. When the decision was made to close the College, the Board proposed to use these funds for the purpose of closing the school, an action that Bowyer claimed would violate the Charitable Solicitations Act. It was this action that Judge Updike enjoined, thus indicating, as a legal matter, the circuit court's agreement, if only preliminary, with Bowyer's position.

H. *Who May Enforce a Charitable Trust?*

The Board's opposition to the lawsuit filed by Bowyer focused largely on contesting the County Attorney's standing to bring the case. A provision of the Virginia Uniform Trust Code ("VUTC"), section 64.2-723(C), empowers the "settlor of a charitable trust, *among others*, [to] maintain a proceeding to enforce the trust."²⁰⁷ While "others" is not defined, another provision of the VUTC, Virginia Code section 64.2-805, emphasizes "the need to promote uniformity of the law . . . among states that enact [the Uniform Trust Code]."²⁰⁸ This statute enhances the persuasive authority of court decisions in other states interpreting the "among others" language. In addition, the Comments of the Uniform Trust Code (the "Comments") provide a helpful guide assuring interest in enacting the VUTC.²⁰⁹

1. Attorney General

The Attorney General is charged with representing the interests of the people of Virginia.²¹⁰ He undoubtedly has authority to enforce public interests in a charitable trust on behalf of the

207. VA. CODE ANN. § 64.2-723(C) (Repl. Vol. 2012) (emphasis added).

208. VA. CODE ANN. § 64.2-805 (Repl. Vol. 2012).

209. See Brief of Amici Curiae Hon. John Chapman Petersen et al., in Support of the Commonwealth's Petition for Review at 5, Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. CL150619, 2015 LEXIS 22 (Va. June 9, 2015) [hereinafter Legislators' Brief].

210. *About the Office*, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, <http://www.oag.state.va.us/our-office/about-the-office#responsibilities> (last visited Oct. 3, 2016).

Commonwealth. Virginia Code section 64.2-708(D) gives the Attorney General the rights of a qualified beneficiary of a charitable trust.²¹¹ In the Sweet Briar matter, however, the Attorney General declined to take enforcement action.

The Board argued that the Attorney General has exclusive authority to bring a suit on behalf of the public to protect charitable trust assets.²¹² The Board also suggested that the County Attorney lacked standing because the VUTC gives various grants of authority to the Attorney General but never mentions county attorneys.²¹³ The Comment to UTC section 405 states that granting the settlor standing to enforce a trust “does not negate the right of the state attorney general or *persons with special interests* to enforce either the trust or their interests.”²¹⁴

Similarly, the Comment to UTC section 1001 says that “the state attorney general . . . and other persons with a special interest” also have standing to enforce a charitable trust.²¹⁵ The Comment also cites the Restatement (Second) of Trusts section 391, which recognizes that other “person[s] who [have] a special interest” including “other public officer[s]” within this scope of authority as well.²¹⁶ Bowyer argued that the County Attorney qualified under the person with a special interest” and as “other public officer” categories.²¹⁷

2. Other States

Other states have recognized broader standing for other citizens when the attorney general declines to file a suit to enforce a trust. In *Valley Forge Historical Society v. Washington Memorial*

211. See VA. CODE ANN. § 64.2-708(D) (Repl. Vol. 2012). Virginia Code section 64.2-708(D) deems the Attorney General a qualified beneficiary of a charitable trust. *Id.*

212. See Brief in Opposition to Petition for Appeal, *supra* note 60, at 8.

213. See *id.* The Board also argued that the County Attorney’s efforts to enjoin Sweet Briar from closing ran afoul of UPMIFA because it potentially placed the College “in the untenable position of working with the Commonwealth through the Attorney General on one hand and litigating with the Commonwealth through the County Attorney on the other.” *Id.* at 7. The Board asserted that the “Commonwealth cannot take contradictory positions regarding [the College’s] ability to close and/or its ability to redirect donated funds for another purpose under UPMIFA.” *Id.*

214. UNIF. TRUST CODE § 405 CMT. (UNIF. LAW COMM’N 2015) (emphasis added).

215. UNIF. TRUST CODE § 1001 CMT. (UNIF. LAW COMM’N 2015).

216. See *id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 391 (AM. LAW INST. 1959)).

217. See Petition for Review, *supra* note 58, at 14.

Chapel, the Supreme Court of Pennsylvania found that a historical society had standing to enforce the terms of a charitable trust that founded a chapel out of which the historical society operated a museum.²¹⁸ The attorney general declined to participate in the lawsuit, which claimed that evicting the museum violated the terms of the trust.²¹⁹ The court held that the historical society's relationship and historical ties with the chapel gave it "special interest" standing to enforce the trust once the attorney general declined to do so.²²⁰

In *Kapiolani Park Preservation Society v. City & County of Honolulu*, the City of Honolulu, Hawaii sought to lease a park, which had been established as a charitable trust, to a private entity.²²¹ When the attorney general declined to file suit, citizens formed a non-profit corporation and sued on behalf of the public to enforce the trust and prevent the lease.²²² The court held that the corporation had standing since the trustee "will not seek instructions of the court as to its duties," and the "attorney general, as *parens patriae*, has abandoned the defense of the possible rights of the beneficiary of the trust, the public."²²³

Multiple legislators agreed with Bowyer's argument that, as the Amherst County Attorney, she had a special interest in Sweet Briar College due to the County's close relationship with and historical ties to the College and the hardship faced by the County if the College were to close.²²⁴ Furthermore, Bowyer's involvement was arguably the County's only path to a remedy since the Attorney General declined to take enforcement action.²²⁵ While there is no ruling on Bowyer's standing in the Sweet Briar case, the authorities suggest that enforcement authority under the VUTC can

218. *Valley Forge Historical Soc'y v. Wash. Memorial Chapel*, 426 A.2d 1123, 1127 (Pa. 1981).

219. *See id.*

220. *Id.*

221. *See Kapiolani Park Pres. Soc'y v. City and Cty. of Honolulu*, 751 P.2d 1022, 1024 (Haw. 1988).

222. *See id.* at 1024-25.

223. *Id.* at 1024 (reasoning that holding otherwise would leave the public unprotected and without a remedy); *see also Jones v. Grant*, 344 So. 2d 1210, 1212 (Ala. 1977) (holding that "students of a charitable institution are beneficiaries of a charitable trust," and have a "special interest which would entitle [them] to sue without making the attorney general a party").

224. *See Legislators' Brief*, *supra* note 209, at 6-8.

225. *See id.* at 8.

be undertaken by others besides the Attorney General. Further examination would suggest that this is not merely limited to private parties.

3. Local Government Officers

Although reported cases on the issue are not definitive, it appears that public officials other than the attorney general have historically had authority and even the duty to enforce a trust in Virginia. In *Fitzgerald v. Doggett's Executor*, the Supreme Court of Virginia held that the Commonwealth's Attorney had standing to sue on behalf of the Commonwealth to enforce a trust "if the trustee fails in the execution of [the] trust."²²⁶ The court reasoned that a statute imposed upon the Commonwealth's Attorney a duty to ensure that a trust does not fail for lack of a trustee or for a trustee's failure to act.²²⁷

Additionally, in the *Button* case, the College stated that the Commonwealth's Attorney and Attorney General both have responsibility to enforce educational trusts as officers of the Commonwealth.²²⁸ This statement, together with cases like *Fitzgerald*, demonstrates that these two types of public officers have historically shared the duty to enforce charitable trusts.²²⁹

Although a County Attorney is not the same position as a Commonwealth's Attorney, a 1968 law that provided for the appointment of county attorneys is helpful to the analysis.²³⁰ Under Virginia Code section 15.2-1542, routine civil enforcement duties transferred from the local Commonwealth's Attorney to the county attorney upon appointment.²³¹ Thus, it arguably follows that the established role of Commonwealth's Attorneys extends to county attorneys as a civil enforcement authority transferred pursuant to statute.²³²

226. *Fitzgerald v. Doggett's Executor*, 155 Va. 112, 129, 155 S.E. 129, 135 (1930).

227. *See id.*; *see also* *Tauber v. Commonwealth*, 255 Va. 445, 451, 499 S.E.2d 839, 842 (1998) (holding that the Commonwealth's Attorney could properly bring a suit to require a trustee to carry out the terms and obligations set out in the respective trust).

228. *See* Complaint at 2, *Sweet Briar Inst. v. Button*, 280 F. Supp. 312 (W.D. Va. 1966).

229. *See* Legislators' Brief, *supra* note 209, at 11.

230. *See id.* at 12.

231. *See* VA. CODE ANN. § 15.2-1542 (Repl. Vol. 2012).

232. *See* Legislators' Brief, *supra* note 209, at 12.

CONCLUSION

Over its one hundred-plus year history, Sweet Briar developed into a premiere educational institution for young women. The College distinguished itself by focusing on a practical, hands-on curriculum, which shaped its students into “useful members of society.”²³³ The abrupt announcement to close the school was met with great resistance. Ultimately, the decision to close was defeated by a group of passionate alumnae, students, faculty, staff, and a tenacious county attorney who would not give up and see the College close without a fight.

Sweet Briar is unlike most colleges in that it was founded pursuant to a will, which not only established the college over a century ago, but was the linchpin in the fight to save the school. The unique set of facts presented by this case created the opportunity to explore and define the boundaries and connections between Virginia corporate and trust law. With potentially profound legal consequences, the Sweet Briar case was followed—and continues to be followed—closely by nonprofits from across the country.²³⁴

The distinctiveness of the College’s origin and legal structure was outcome determinative. Despite settlement of the case leaving some legal questions unanswered, the Supreme Court of Virginia ruled that the College can be a corporation and a trust, and it distinguished *Dodge*.²³⁵ Thus, the arguments made by the College in its efforts to close may not be successfully made in the future.

Against all odds, Sweet Briar has been saved. While the announcement to close presented serious challenges, the college has met or exceeded fundraising and enrollment goals on its path to

233. *The Will*, *supra* note 12, at 4.

234. See, e.g., Ruth McCambridge, *Codifying Governance Lessons Learned the Hard Way: Sweet Briar College’s New By-Laws*, NONPROFIT Q. (May 31, 2016), <https://nonprofitquarterly.org/2016/05/31/codifying-governance-lessons-learned-the-hard-way-sweet-briar-colleges-new-by-laws/>; Lily Lynch, *Nonprofit Takeaways from Sweet Briar Saga*, MASS. NONPROFIT NETWORK (July 7, 2015), http://webcache.googleusercontent.com/search?q=cac he:3Eat_iFgDpAJ:massnonprofitnet.org/blog/nonprofit-takeaways-from-sweet-briar-saga/+&cd=1&hl=en&ct=clnk&gl=us; Michael Peregrine, *Sweet Briar’s Remarkable Reopening Has Lessons for All Nonprofits*, CHRON. OF PHILANTHROPY (June 23, 2015), <https://philanthropy.com/article/Opinion-Sweet-Briar-s/231101>.

235. Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. 150619, 2015 Va. LEXIS 22 (June 9, 2015) (unpublished decision).

recovery. With new leadership, an energized alumnae community, and a reinvigorated sense of purpose, the future looks bright for Sweet Briar. Never losing its will to prevail, the women's college nestled in the foothills of the Blue Ridge Mountains is back to its mission of empowering young women to build and shape the world around them, now and in perpetuity.
