



COMMONWEALTH of VIRGINIA

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April 8, 2015

VIA UPS

Hon. Roy C. Mayo, III, Clerk
Amherst Circuit Court
113 Taylor Street
Amherst, Virginia 24521

Re: Commonwealth of Virginia, ex rel., Ellen Bowyer, in her official capacity as
County Attorney for the County of Amherst, Virginia v. Sweet Briar
Institute, et. al.
Case No.: CL15009373

Dear Mr. Mayo:

Enclosed please find the Attorney General's Motion for Leave to Participate as Amicus Curiae and Amicus Curiae Brief of the Attorney General to be filed in the above-referenced action.

By copy of this letter, we are respectfully submitting a courtesy copy of the enclosed pleadings to Judge Updike's chambers in Bedford.

Sincerely yours,

A handwritten signature in black ink, appearing to read "H. Lockerman", written over a horizontal line.

Heather Hays Lockerman
Senior Assistant Attorney General/Section Chief

HHL

Enclosures

cc: Ellen E. Bowyer, Esq. (via over-night mail)
Harold E. Johnson, Esq. (via over-night mail)

VIRGINIA:

IN THE CIRCUIT COURT OF AMHERST COUNTY

COMMONWEALTH OF VIRGINIA,)	
ex. rel. Ellen Bowyer, in her official)	
capacity as COUNTY ATTORNEY)	
FOR THE COUNTY OF AMHERST,)	
VIRGINIA,)	
)	
Plaintiff,)	Case No. 15009373
)	
v.)	
)	
SWEET BRIAR INSTITUTE, et al.,)	
)	
Defendants.)	

MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

Mark R. Herring, Attorney General for the Commonwealth of Virginia, hereby moves for leave to participate in the case as *amicus curiae* in support of the public interest and states as follows in support of this motion:

1. The Complaint alleges that Sweet Briar Institute, Paul G. Rice, and James F. Jones, Jr. (collectively “Sweet Briar”) have violated Virginia law governing charitable funds. The Amherst County Attorney alleges that Sweet Briar has engaged in the unauthorized use of funds raised by charitable solicitation for purposes other than the solicited purposes or the general purposes of the charitable organization in violation of § 57-57 of the *Code of Virginia*. The Amherst County Attorney further alleges that certain directors and the president of Sweet Briar are breaching their duties as trustees under §§ 64.2-764, -766, and -792 of the *Code of Virginia*.

2. Common law and § 2.2-507.1 of the *Code of Virginia* give the Attorney General authority to act on behalf of the public with respect to assets of charitable corporations, “including the authority to seek such judicial relief as may be necessary to protect the public interest

in such assets.”

3. Section 64.2-708 of the Virginia Uniform Trust Code¹ (“VUTC”) establishes that “[t]he Attorney General has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in the Commonwealth.” Through that grant of a qualified beneficiary’s rights and other provisions, the VUTC provides for the Attorney General to act on behalf of the public interest.²

4. The Uniform Prudent Management of Institutional Funds Act³ provides that an institution seeking judicial modification of a restriction shall notify the Attorney General and that “the Attorney General shall be given an opportunity to be heard.”⁴ The same section allows the Attorney General to approve some modifications without application to a court.⁵

5. In accordance with the authority and role that the General Assembly has given the Attorney General, the Attorney General’s participation in this case is appropriate and necessary to protect the public interest. At present, participation in briefing and hearings as *amicus curiae* is sufficient.

6. The Attorney General’s proposed *amicus curiae* brief is attached as Exhibit A.

The Attorney General respectfully requests that he be granted leave to file an *amicus curiae* brief, and to participate in any upcoming hearings in this case.

¹ Va. Code §§ 64.2-700 through 64.2-808 (2012).

² See, e.g., Va. Code § 64.2-713(A)(3)(a) (requiring public notice, a purpose of which is to allow interested persons “the opportunity to share their views in regard thereto with the Attorney General”); Va. Code § 64.2-759(A) (Attorney General may seek removal of a trustee of a charitable trust).

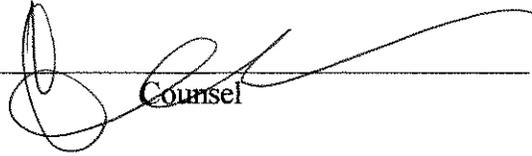
³ See Va. Code §§ 64.2-1100 thru 64.2-1108 (2012).

⁴ Va. Code § 64.2-1104(B) & (C).

⁵ See Va. Code § 64.2-1104(D) & (E).

Respectfully submitted,

THE COMMONWEALTH OF VIRGINIA

By:  Counsel

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Attorney General of Virginia

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Certificate of Service

I hereby certify that on April 8, 2015, I caused a true copy of the foregoing to be sent via overnight delivery to:

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VIRGINIA:

IN THE CIRCUIT COURT OF AMHERST COUNTY

**COMMONWEALTH OF VIRGINIA,)
ex. rel. Ellen Bowyer, in her official)
capacity as COUNTY ATTORNEY)
FOR THE COUNTY OF AMHERST,)
VIRGINIA,)
Plaintiff,)
v.)
SWEET BRIAR INSTITUTE, et al.,)
Defendants.)**

Case No. 15009373

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL

The Commonwealth of Virginia, by Attorney General Mark R. Herring, the Chief Executive Officer of the Department of Law,¹ submits this amicus curiae brief in support of the public interest. For the reasons set forth below, this Court should hold that the Amherst County Attorney’s enforcement power under Chapter 5 of Title 57 of the Code of Virginia, is eclipsed by the Attorney General’s authority pursuant to Va. Code §2.2-507.1 and the Uniform Prudent Management of Institutional Funds Act. Additionally, the Court should hold that the Amherst County Attorney lacks standing to bring an action in the name of the Commonwealth for alleged violations of the Virginia Uniform Trust Code. The Commonwealth does not address any other issues.

INTRODUCTION

As established at both common law and by statute, the Attorney General is the public official designated to protect the public interest in charitable assets. In all matters,

¹ The Attorney General is responsible for “all legal service in civil matters for the Commonwealth.” See Va. Code § 2.2-507 (2014).



including that of the Sweet Briar Institute (“Sweet Briar”), the Attorney General exercises this authority in a careful and measured way in light of the facts and circumstances of the individual matters. This balanced approach requires a consideration of many factors and emphasizes awareness of the need to preserve assets for a charitable purpose and a preference for the avoidance of wasting assets in disputes regarding the disposition of charitable assets. As a result, the Attorney General is uniquely positioned to work with various interests to ensure the continued charitable use of assets given for a charitable purpose.

The Attorney General sympathizes with all individuals who are connected to Sweet Briar – students, alumnae, faculty, administrators and staff, as well as the community of Amherst – during this difficult time. However, the Attorney General recognizes that the decision regarding whether Sweet Briar, a private school, remains open rests with the Sweet Briar Board of Directors (“Board”). Under Virginia law, the Board’s February 28 decision is, like all decisions made by any board of directors in Virginia, subject to the business judgment rule which is spelled out at Va. Code at § 13.1-870.²

The Attorney General is concerned that the disruption and conflict engendered by challenges raised against the decision of the Sweet Briar Board of Directors to close Sweet Briar are counterproductive to protecting the interests of the public, the students, alumnae, faculty, administrators and staff of Sweet Briar, and other interested parties.

² See also *Dodge v. Trs. of Randolph-Macon Woman’s College*, 276 Va. 10, 16-17, 661 S.E.2d 805, 809 (2008) (“The General Assembly made clear in [Code § 2.2-507.1(B)] that directors of charitable nonstock corporations remain subject to existing statutory and common law related to those corporations. Code § 2.2-507.1(B), by its express and explicit language, negates the imposition of any additional duties upon directors of charitable corporations. Rather, Code § 13.1-870, which is a part of the Virginia Nonstock Corporation Act, and the common law govern the standards of conduct applicable to directors of nonstock charitable corporations.”).

I. The Attorney General Is the Voice of the Public and Speaks for the Commonwealth with Respect to Charitable Assets.

It has long been the recognized purview of the Attorney General, both at common law and by statute, to protect the public interest in having charitable assets used in accordance with their purpose. Virginia courts recognized the Attorney General's common law authority with respect to charitable assets as early as the 1800's: "whatever jurisdiction is thereafter entertained by the courts with respect to the disposition and control of this [charitable] fund must be called into active exercise either by the Attorney General, acting upon behalf of the public," or by the trustee or trust beneficiary.³ Section 2.2-507.1⁴ recognizes and supplements the common law by granting the Attorney General the same broad authority regarding charitable assets held by a corporation as he has with respect to charitable trusts and other charitable entities:

A. The assets of a charitable corporation incorporated in or doing any business in Virginia shall be deemed to be held in trust for the public for such purposes as are established by the governing documents of such charitable corporation, the gift or bequest made to such charitable corporation, or other applicable law. The Attorney General shall have the same authority to act on behalf of the public with respect to such assets as he has with respect to assets held by unincorporated charitable trusts and other charitable entities, *including the authority to seek such judicial relief as may be necessary to protect the public interest in such assets.*

³ *Clark v. Oliver*, 91 Va. 421, 427, 22 S.E. 175, 177 (1895); *see also Protestant Episcopal Education Society v. Churchman*, 80 Va. 718, 778 (1885) (recognizing authority of the attorney of the commonwealth [now the attorney general] to ask the circuit court to appoint a trustee for a charitable trust when no trustee has been appointed, or the trustee has died or refuses to act); *Gallego's Ex'ors v. The Attorney General*, 30 Va. 450 (1832) (attorney general filed a bill and information against executors of a will to enforce payment of a bequest to a charitable organization).

⁴ As part of the same Act of Assembly in which the General Assembly enacted § 2.2-507.1, it also enacted § 17.1-513.01 which clarified the jurisdiction of the circuit courts with respect to charitable assets. *See* 2002 Va. Acts 1321; *see also* 2004 Va. Acts 420 (amending and reenacting Va. Code §§ 2.2-507.1 and 17.1-513.01).

B. Nothing contained in this section is intended to modify the standard of conduct applicable under existing law to the directors of charitable corporations incorporated in or doing any business in Virginia. [emphasis added].

The Attorney General's established role with respect to charitable assets is also evident in the Virginia Uniform Trust Code ("VUTC")⁵ which includes a number of provisions detailing the authority of the Attorney General regarding charitable trusts.⁶ The VUTC grants the Attorney General qualified beneficiary status, allowing him to sue to protect the assets of charitable trusts.⁷ Section 64.2-713 positions the Attorney General as the voice of the public with respect to charitable trusts by requiring that notice of judicial proceedings involving trusts, "including proceedings to modify or terminate a trust," be given to certain interested parties so that "the public [is made] aware of the nature of such proceedings, the remedy being sought therein, and the opportunity to share their views in regard thereto with the Attorney General."⁸ Finally, the Attorney General is one of a select group of individuals that may petition a court to remove a trustee.⁹ The Supreme Court of Virginia has cited the VUTC giving the Attorney General the rights of a qualified beneficiary for the protection of charitable trusts as "illustrative" of how "[t]he framers of the [Uniform Trust Code] were careful to preserve the guiding

⁵ Va. Code §§ 64.2-700 through 64.2-808 (2012).

⁶ In addition to the provisions specifically mentioned below, other sections of the VUTC also require involvement of the Attorney General when certain actions with respect to a charitable trust are contemplated. *See, e.g.*, Va. Code § 64.2-736 (giving the Attorney General the authority to consent, without court intervention, to the modification of a charitable trust so that the trust may be in conformity with IRS requirements for tax exemption of the trust); Va. Code § 64.2-757 (requiring that a charitable trust obtain the concurrence of the Attorney General when filling a trustee vacancy when the Attorney General has "previously requested of an organization so designated that he be consulted regarding the selection of successor").

⁷ Va. Code § 64.2-708 (2012); *see also* Va. Code § 64.2-728 (2012) (giving a beneficiary the right to file suit to disapprove a proposed modification or termination of a trust or trust combination or division).

⁸ Va. Code § 64.2-713(A)(3)(a) (2012).

⁹ *See* Va. Code § 64.2-759 (2012).

principles that have historically been the foundations of trust law.”¹⁰

As discussed below, this Court should continue the judiciary’s long-standing recognition of the exclusive role given the Attorney General with respect to the use and management of charitable assets.

II. The Complaint Filed By the Amherst County Attorney Creates Duplicative, Costly, and Inconsistent Oversight of Sweet Briar’s Charitable Assets.

Along with certain other public officials (including local government attorneys, such as the Amherst County Attorney), the Attorney General may maintain a suit on behalf of the Commonwealth against a charitable entity believed to be using donated funds for a purpose other than that for which the funds were donated.¹¹ The General Assembly, however, contemplated that there would be times when an institution may *properly* use funds for a purpose other than that for which the funds were donated, so the General Assembly enacted the Uniform Prudent Management of Institutional Funds Act (“UPMIFA”).¹² An institution may modify or release restrictions on charitable assets so long as it follows the process established by UPMIFA.¹³ Only the Attorney General and the judiciary have the authority to oversee an institution’s plans to modify or release restrictions on the purpose for which a charitable fund may be used.¹⁴

A thorough evaluation of UPMIFA modification requests requires a review of each gift instrument to determine whether the restriction in question “is unlawful, impracticable,

¹⁰ *Ladysmith Rescue Squad, Inc. v. Newlin*, 280 Va. 195, 210, 694 S.E.2d 604, 608 (2010).

¹¹ Va. Code §§ 57-57, -59 (2012).

¹² See Va. Code §§ 64.2-1100 thru 64.2-1108 (2012).

¹³ See Va. Code § 64.2-1104 (2012).

¹⁴ See *id.*

impossible to achieve, or wasteful.”¹⁵ Additionally, the Attorney General must ensure that any proposed modification will modify the restriction on the use of the fund “in a manner consistent with the charitable purposes expressed in the gift instrument.”¹⁶ Pursuant to UPMIFA, Sweet Briar has submitted requests for authorization to “modify the purpose of the fund or the restriction on the use in a manner consistent with the charitable purposes expressed in” certain gift instruments under § 64.2-1104(D) or to “release or modify the restriction, in whole or part,” on funds which qualify for consideration under § 64.2-1104(E). The Attorney General is taking a measured approach in reviewing these requests, pursuant to his office’s standard procedures for the review of UPMIFA modification requests, and will object to any proposed modification that does not comply with UPMIFA.

The Amherst County Attorney seeks to ignore the process that the General Assembly provided through UPMIFA for institutions to properly use gifts restricted for one purpose for another consistent purpose. Furthermore, by filing this suit, the Amherst County Attorney has placed the Commonwealth in the impossible position of simultaneously serving adverse interests: the Commonwealth, ex. rel. Ellen Bowyer, seeks to enjoin any use of charitable funds while the same Commonwealth, through the Attorney General and the judiciary, are asked to consider what may be properly supported requests for release of restrictions or modification of purpose pursuant to UPMIFA. The Amherst County Attorney’s general authority under § 57-59 should not be given precedence over the Attorney General’s specific authority to oversee the modification of certain charitable gifts under UPMIFA.

The Attorney General recognizes that both common law and Virginia Code § 2.2-507.1 give him broad power and authority with respect to charitable assets, extending even to

¹⁵ Va. Code § 64.2-1104(D), (E).

¹⁶ Va. Code § 64.2-1104(D), (E).

addressing matters of corporate governance of charitable organizations. Such power and authority, however, must be wielded responsibly with due regard for the public interest in promoting both continued charitable giving and continued participation in charitable governance. The most far reaching of such powers should be reserved for egregious acts of corporate misgovernance substantiated by objective evidence. Thus, in the absence of any credible evidence that the Board has failed in its fiduciary duties, acted improperly, or exceeded its authority, the Commonwealth of Virginia will not take the extraordinary step of trying to force the ouster of the Board or officers of a private corporation.

Accordingly, the Office of the Attorney General should be permitted to continue its examination of the decision to close Sweet Briar and its review of proposed modifications to charitable gifts without interruption by this case so that it may assure that Sweet Briar's assets are used for purposes consistent with the restrictions originally placed on the donations. Furthermore, the review of proposed modifications under UPMIFA does not require the costs associated with litigation such as this, thus avoiding wasting Sweet Briar's remaining assets, which could be directed toward educational and charitable purposes.

III. The Amherst County Attorney Lacks Any Authority to Speak on Behalf the Commonwealth with Respect to Alleged Violations of the Uniform Trust Code.

It is notable that both the will of Indiana Fletcher Williams and the Act of Assembly chartering the College provide for the creation of a corporation. The will calls for a "corporation to be created by due process of law," and the Act of Assembly chartering Sweet Briar Institute establishes a corporation of perpetual succession "with all the powers and rights herein specifically granted, or which, under the general law of the state of Virginia, may pertain to corporations of a like character."¹⁷ Furthermore, in the similar case of *Dodge v. Trustees of*

¹⁷ See Will of Indiana Fletcher Williams, attached to the Amherst County Attorney's Complaint

Randolph-Macon Women's College, 276 Va. 10, 661 S.E.2d 805 (2008), the Supreme Court rejected the argument that Randolph-Macon was a charitable trust and held that Randolph-Macon was a nonstock corporation.¹⁸ Furthermore, the Amherst County Attorney admits in the Memorandum in Support of Motion for Temporary Injunction at page 25 that Sweet Briar “is a nonstock corporation registered with the State Corporation Commission.”

Regardless of whether charitable assets are held in a nonstock corporation, in a trust, or in another charitable entity, the Attorney General has authority to protect the public interest in the use of those assets.¹⁹ The Amherst County Attorney, however, has no such broad grant of authority and is not authorized to speak on behalf of the Commonwealth with respect to violations of the VUTC. In fact, the VUTC does not authorize *any public official other than the Attorney General* to maintain a proceeding with respect to a charitable trust. The Attorney General is the only public official given qualified beneficiary status with respect to charitable trusts, a status that allows him to sue to protect charitable trusts,²⁰ and he is the only public official who may sue to remove a trustee.²¹ As discussed above, the VUTC requires that notice be given to the public when there are proceedings involving trusts so that the public may share any concerns with the Attorney General.²² Neither the Amherst County Attorney nor any other local government attorney is given this authority.

The Amherst County Attorney should not be allowed to parlay the very limited

as Exhibit A; 1901 Va. Acts 127, attached to the Amherst County Attorney's Complaint as Exhibit B.

¹⁸ See *id.* at 17-18.

¹⁹ See Va. Code § 2.2-507.1 (2014).

²⁰ Va. Code § 64.2-708; see also Va. Code § 64.2-728 (giving a beneficiary the right to file suit to disapprove a proposed modification or termination of a trust or trust combination or division).

²¹ Va. Code § 64.2-759.

²² Va. Code § 64.2-713.

authority given to her by Va. Code § 57-57 and § 57-59 into authority to speak for the Commonwealth and the public with respect to charitable trusts or assets. An expanded role for the Amherst County Attorney would improperly and unnecessarily create conflict between Chapter 5 of Title 57 and other statutes concerning charitable assets – namely, UPMIFA and Va. Code § 2.2-507.1.²³ An expanded role for the Amherst County Attorney also would set the stage for confusion in future cases where charitable assets affect more than one locality and different localities’ attorneys have different views about the disposition of such assets. By contrast, recognizing the unique role of the Attorney General, pursuant to clear statutory authority to pursue the public interest of the Commonwealth as a whole, best effectuates all relevant statutes and ensures that the Commonwealth speaks with one voice as clearly contemplated by the common law and statutes governing charitable assets.

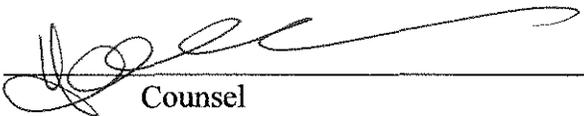
IV. Conclusion

The Court should ensure that its ruling in this case avoids further loss of Sweet Briar’s assets in litigation and allows the Attorney General to fulfill his unique role in protecting the public interest in charitable assets, pursuant to the authority granted him by the General Assembly. Allowing this litigation brought by the Amherst County Attorney to proceed will do neither.

²³ Virginia courts read related statutes together, avoiding conflict wherever possible. *See, e.g., McKinney v. Va. Surgical Assocs., P.C.*, 284 Va. 455, 460, 732 S.E.2d 27, 29 (2012) (“Statutes dealing with the same subject matter must be read together so as to adhere to the legislative intent underlying them and to permit them to operate together without conflict.”).

Respectfully submitted,

THE COMMONWEALTH OF VIRGINIA

By:  _____
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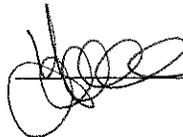
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Certificate of Service

I hereby certify that on April 8, 2015, I caused a true copy of the foregoing to be sent via overnight delivery to:

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