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NOTE

A JOURNEY THROUGH THE BRIAR PATCH: THE LEGAL IMPLICATIONS OF THE SUPREME COURT OF VIRGINIA'S HOLDING IN *COM. EX REL. BOWYER V. SWEET BRIAR INSTITUTE*

T. Joel Francis[†]

ABSTRACT

On March 14, 2014, Sweet Briar College announced that it would be closing its doors after more than one hundred years of operation. Just one year later, Sweet Briar College announced that it was, in fact, not closing and would continue to carry on its proud tradition of education. But what exactly happened in between these two contrary announcements that caused Sweet Briar College to completely change direction?

Soon after Sweet Briar College released its announcement, it was named a defendant in a lawsuit aimed at preventing Sweet Briar College's closure. The lawsuit claimed that Sweet Briar College, which is registered as a corporation, was a trustee and could not unilaterally close its doors. The parties, Sweet Briar College and the Commonwealth of Virginia, soon found themselves in front of the Supreme Court of Virginia.

The Supreme Court faced two questions: (1) whether trust law can apply to a corporation and (2) what is the legal status of Sweet Briar College. The Supreme Court answered the first question affirmatively—trust law can apply to a corporation. However, the Court declined to answer the second question.

This Note, however, argues that the Court did in fact rule on the legal status of Sweet Briar College, despite its comment to the contrary. This Note will advance four arguments to prove that the Court ruled on the legal status of Sweet Briar College. First, it will examine the background and history of Sweet Briar College's formation and operation. Second, it will analyze the Virginia Uniform Trust

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Code and the Virginia Nonstock Corporation Act to illustrate the ways in which they are incompatible. Third, this Note will then apply the facts of Sweet Briar College's formation and operation to the law. After these three steps, this Note will conclude that the Supreme Court of Virginia (1) knew that the two areas of law were incompatible and (2) essentially ruled upon the legal status of Sweet Briar College in its holding that "trust law can apply to a corporation." Finally, this Note will provide an alternative theory that was not argued by either party to the litigation or considered by the Court, but which potentially solves Sweet Briar College's legal conflicts.

I. INTRODUCTION

Sweet Briar College (SBC) is a historic, private Virginia college with a rich and proud tradition that dates back to its founding in 1901.¹ It holds a special place in Virginia history, especially in the Virginia private college community. On an even greater scale, Sweet Briar College is an institution cherished by its students, faculty, alumni, and the community of Amherst County and Lynchburg, Virginia. However, with a sudden and unforeseen announcement on March 4, 2015, that the college would be closing its doors at the end of the then current academic year, students, alumni, professors, the Virginia private college community, and the Commonwealth as a whole bore witness to the end of an era and the loss of a storied part of Virginia history.² The college's president cited insurmountable financial odds as the reason for closing, despite the school's eighty-five million dollar endowment.³ Just after the announcement, the Commonwealth of Virginia filed a lawsuit bearing an interesting claim: Sweet Briar College, an institution that is registered as a corporation, is also a trustee and therefore cannot unilaterally close its doors.

This claim brought the school's history—specifically its founding—into great light. Indiana Fletcher Williams, the founder of Sweet Briar College,⁴ is a celebrated figure on Sweet Briar's campus. But when she founded the

1. Will of Indiana Fletcher Williams ¶ 13.1 (Nov. 23, 1900) (on file with author).

2. Christy Jackson, *Board of Directors Votes to Close College at End of 2014-2015 Academic Year*, SWEET BRIAR COLLEGE (Mar. 4, 2015), <http://sbc.edu/news/board-of-directors-votes-to-close-college-at-the-end-of-2014-2015-academic-year/>; Com. *ex rel. Bowyer v. Sweet Briar Inst.*, No. 150619, 2015 WL 3646914, at *1 (Va. June 9, 2015).

3. *Bowyer*, 2015 WL 3646914, at *1; Jackson, *supra* note 2; Scott Jaschik, *Shocking Decision at Sweet Briar*, INSIDE HIGHER ED (Mar. 4, 2015), <https://www.insidehighered.com/news/2015/03/04/sweet-briar-college-will-shut-down>.

4. Brief History of Sweet Briar College obtained from the Sweet Briar College Archives (1901) (on file with author).

school had she created an entity that could not be closed? This question quickly ascended to the Supreme Court of Virginia and evolved into these legal questions: (1) whether trust law can apply to a corporation and (2) whether Indiana Fletcher Williams created a trust through her will naming the college as trustee or created solely a corporation.

The difference in classification between a trust and a corporation is important. As this Note explains, the implications of the classification include what type of law governs, how the entity may be formed, how it may operate, how it may terminate, and the responsibilities of those in charge. Resolving Sweet Briar College's entity classification is gravely important for the future of the storied school. As efforts to save Sweet Briar continue, legal clarity is necessary.

This Note will prove that the Supreme Court of Virginia in *Com. ex rel. Bowyer v. Sweet Briar Inst.* was aware of the legal incompatibility between trust and corporate law.⁵ With such awareness, the Court crafted an opinion that, despite its comment to the contrary, inherently reconciled the two areas of law. This Note endeavors to answer the greater question: is Sweet Briar College a corporate trustee, or is it solely a corporation? To answer that question, this Note will analyze the formation, operation, and termination of both a trust and corporation under the Virginia Uniform Trust Code and Virginia Nonstock Corporation Act, respectively. This analysis will conclude that trust law and corporate law are incompatible and cannot necessarily coexist. Such a conclusion brings about another question: how are the two types of law reconciled? In other words, which law ultimately governs? This final question turns the focus back to the Supreme Court of Virginia in *Bowyer*. This Note will provide clarity to a muddied situation created by the Court in that opinion so that the future of Sweet Briar College will be as rich as its past.

II. BACKGROUND

Bowyer is a curious case that resulted from a very curious situation. On March 4, 2015, the Sweet Briar Board of Trustees announced that Sweet Briar College would be closing its doors due to insurmountable financial challenges.⁶ A litigious and political firestorm developed quickly and ultimately reached the Supreme Court of Virginia in June of 2015.⁷

5. *Bowyer*, 2015 WL 3646914, at *1.

6. *Bowyer*, 2015 WL 3646914, at *1; Jackson, *supra* note 2.

7. *Bowyer*, 2015 WL 3646914, at *1.

There were two issues before the Court: one explicit and one implicit, underlying the entire controversy. The first issue was whether “[t]he law of trusts can apply to a corporation.”⁸ The Court decided this issue in the affirmative: “[t]he law of trusts can apply to a corporation.”⁹ The second issue concerned Sweet Briar Institute’s (the corporate body formed in 1901 that does business as Sweet Briar College)¹⁰ legal status as a corporation acting as a trustee or acting solely as a corporation. In fact, the Court noted that “[i]t is important to emphasize, however, that our holding today does not rule upon the legal status of any particular party to this litigation.”¹¹ Because the Supreme Court of Virginia declared that trust law can apply to a corporation, that issue is settled. However, the question regarding Sweet Briar Institute’s legal status, the question the Court declined to answer, is the question that this Note will explore. In its endeavor to answer the latter question, this Note will prove that the Court subtly provided an answer to the question it declined to answer.

A. *A Brief History of Sweet Briar Institute and Sweet Briar College*

Indiana Fletcher Williams, the credited founder of Sweet Briar Institute, died in November 1900.¹² Her will (hereinafter Williams’s Will), which was probated the same month, devised a massive estate in land and personal property to four trustees who were charged with the task of incorporating Sweet Briar Institute.¹³ After incorporation, the trustees were to convey the land devised to them by Williams’s Will to the newly-incorporated Sweet Briar Institute.¹⁴ The will then directed Sweet Briar Institute to establish an all-female school on the land conveyed by the trustees.¹⁵ The trustees were then directed to appoint seven directors to form a Board of Directors that would govern the school.¹⁶ The school was also to be named Sweet Briar

8. *Id.* at *2.

9. *Id.*

10. Will of Indiana Fletcher Williams ¶ 13.1 (Nov. 23, 1900) (on file with author).

11. *Com. ex rel. Bowyer v. Sweet Briar Inst.*, No. 150619, 2015 WL 3646914, at *1-2 (Va. June 9, 2015).

12. Brief History of Sweet Briar College obtained from the Sweet Briar College Archives (1901) (on file with author).

13. Will of Indiana Fletcher Williams ¶ 13 (Nov. 23, 1900) (on file with author).

14. *Id.* ¶ 13.2.

15. *Id.* ¶ 13.1.

16. *Id.* ¶ 13.2.

Institute (however, the educational function of Sweet Briar Institute as it is known today is Sweet Briar College).¹⁷

Williams's Will placed several restrictions and conditions upon the land devised to Sweet Briar Institute. Among them were that the land and personal property devised and bequeathed by Williams be held by Sweet Briar Institute forever; that the school was solely for the education of white girls; that no part of the land was to be sold or alienated by the corporation at any time; that the school was to be self-supporting and grant scholarships; and that the corporation was to maintain a cemetery on the corporation's property.¹⁸ In the 1960s, the restriction on who can be admitted to the school (white girls only) was lifted to include girls of other races.¹⁹

By February of 1901, a mere three months after the death of Williams and the probate of her will, the trustees named in Williams's Will successfully obtained the incorporation of Sweet Briar Institute.²⁰ At that time in Virginia, legislation from the General Assembly was necessary to be incorporated. Therefore, Sweet Briar Institute's charter is a bill of incorporation granted by the General Assembly.²¹ The purpose and scope of Sweet Briar Institute, as declared by the bill of incorporation, honored the directions given by Williams's Will, namely to operate as a school.²² A month later in March 1901, the Board of Directors held its first meeting and laid out its vision for Sweet Briar Institute.²³

Until now, Sweet Briar Institute has functioned for 114 years and has had only one case, other than *Bowyer*, indirectly question its legal status and its restrictions.²⁴ *Bowyer* is a unique and important case in Sweet Briar's history because, for the first time, the answer to the looming question of its legal status may very well determine Sweet Briar's future. In the months following *Bowyer*, the Commonwealth and Sweet Briar Institute (along with many third parties who pledged money to keep the school open) reached a

17. *Id.*

18. *Id.*

19. *See Sweet Briar Inst. v. Button*, 280 F. Supp. 312, 312 (W.D. Va. 1967).

20. 1901 Va. Acts 125.

21. *Id.*

22. *Id.*

23. Brief History of Sweet Briar College obtained from the Sweet Briar College Archives (1901) (emphasis added) (on file with author).

24. *See Button*, 280 F. Supp. at 317-18. This case will be analyzed later in this Note to examine the binding effects of the restrictions of Williams's Will. It should be noted that the primary issue in *Button* was not Sweet Briar Institute's legal status, but whether one of its restrictions violated the 14th Amendment to the U.S. Constitution.

settlement deal to revive Sweet Briar and keep the school open.²⁵ The deal was only short-term, however, and the long-term solution for Sweet Briar Institute depends on an answer to the underlying question of its legal status.

B. Statement of the Case

The facts of *Bowyer* are relatively brief compared to the facts of the entire controversy. This is because of the manner in which the Supreme Court of Virginia decided the issues (or rather, issue), and because the facts are still developing. Indeed, the Supreme Court of Virginia even acknowledged the narrow scope of the facts in its decision:

The proceedings in this case, and indeed in all of the cases filed in response to the announcement of the College's closing, are ongoing. The parties are engaged in widely publicized, closed-door negotiations. The legal issues are still evolving, and the factual record underpinning the parties' allegations and defenses has yet to be fully developed. In short, the controversy of the College's scheduled closing is far from over, and all agree that the ultimate merits of the controversy are not, at least for today, squarely before this Court.²⁶

Nevertheless, following Sweet Briar College's March 2015 announcement that it would be closing at the end of August 2015,²⁷ Amherst County Attorney Ellen Bowyer immediately filed a lawsuit against Sweet Briar Institute, SBC's Chairman of the Board of Directors, and SBC's interim President to enjoin SBC's closure.²⁸ Her standing as the plaintiff in the suit was not on behalf of Amherst County, but on behalf of the Commonwealth of Virginia.²⁹ While this standing relationship is rare, it is linked to her claim that Sweet Briar Institute is a corporation acting as a trustee and is governed by the Virginia Uniform Trust Code (VUTC).³⁰ This means that

25. Memorandum of Understanding between Ellen Bowyer, Saving Sweet Briar, Sweet Briar Institute, and the Attorney General of Virginia (June 20, 2015) (on file with author).

26. *Com. ex rel. Bowyer v. Sweet Briar Inst.*, No. 150619, 2015 WL 3646914, at *1 (Va. June 9, 2015).

27. Jackson, *supra* note 2.

28. Commonwealth's Memorandum in Support of Motion for Temporary Injunction at 1, *Com. ex rel. Bowyer v. Sweet Briar Inst.*, No. 150619, 2015 WL 3646914, at *1 (Apr. 7, 2015) (Case No. CL15009373-00); *Bowyer*, 2015 WL 3646914, at *1.

29. VA. CODE ANN. §§ 57-59 (West 2003) (authorizes a county attorney to sue on behalf of the Commonwealth of Virginia to enforce a charitable purpose).

30. The Commonwealth's claim, as it will be explained later, is that Sweet Briar Institute is a corporate trustee for a charitable trust, and therefore the county attorney has standing to

Sweet Briar Institute cannot close at will, but instead must follow the specific legal procedures required to terminate a trust.³¹ Thus, Bowyer requested a temporary injunction restraining Sweet Briar Institute from engaging in procedures to close SBC.³² In opposition, Sweet Briar Institute argued that it was not a trust, but a corporation that was permitted to operate or close according to its own business judgment and according to the laws of the Virginia Nonstock Corporation Act, not the VUTC.³³

The circuit court granted in part and denied in part Bowyer's request for an injunction.³⁴ Specifically, according to the circuit court judge, the injunction was to be limited to sixty days and was not a determination that Sweet Briar Institute was prohibited from closing, nor was it an order removing any of Sweet Briar Institute's leadership.³⁵ Rather, the circuit court granted the injunction preventing Sweet Briar Institute from engaging in certain actions to close the college.³⁶ Further, the circuit court judge also declared that Sweet Briar Institute is not a trust, but a corporation.³⁷ This holding effectively struck down the Commonwealth's argument that an injunction should be granted on the grounds that Sweet Briar Institute is a trust governed by the VUTC.

On appeal, the Supreme Court of Virginia focused on the injunction alone. The Supreme Court of Virginia stated that "the circuit court erred to the extent it exercised its discretion in acting upon the motion for a temporary injunction based upon this erroneous legal conclusion."³⁸ The circuit court's erroneous legal conclusion that the Supreme Court of Virginia refers to is that "the law of

enforce the charitable purposes on behalf of the Commonwealth. *See also* VA. CODE ANN. § 64.2-723 (West 2012).

31. Commonwealth's Memorandum in Support of Motion for Temporary Injunction, *supra* note 28, at 21; *Bowyer*, 2015 WL 3646914 at *1.

32. *Com. ex rel. Bowyer v. Sweet Briar Inst.*, No. 150619, 2015 WL 3646914, at *1 (Va. June 9, 2015).

33. Sweet Briar Institute's Demurrer and Motion to Dismiss at 7, *Com. ex rel. Bowyer v. Sweet Briar Inst.*, No. 150619, 2015 WL 3646914, at *1 (Apr. 6, 2015) (Case No. CL15009373-00).

34. *Bowyer*, 2015 WL 3646914, at *1.

35. Transcript of Hearing at 263, *Com. ex rel. Bowyer v. Sweet Briar Inst.* No. 150619 (Apr. 15, 2015), 2015 WL 3646914, at *1 (Case No. CL15009373-00).

36. *Bowyer*, 2015 WL 3646914, at *1.

37. Transcript of Hearing, *supra* note 35, at 255.

38. *Com. ex rel. Bowyer v. Sweet Briar Inst.*, No. 150619, 2015 WL 3646914, at *1-*2 (Va. June 9, 2015).

trusts cannot apply to a corporation.”³⁹ The narrow scope of the Supreme Court of Virginia’s decision derives from the procedural mechanics of the appeal in that it was only to consider the injunction. However, the Supreme Court of Virginia also noted that the entire controversy was not “squarely before this court” and thus acknowledged that it did not answer the question underlying controversy: whether the college is both a corporation and a trustee or solely a corporation.⁴⁰

III. THE PROBLEM

As previously stated, the Supreme Court of Virginia considered two questions in *Bowyer*: whether the law of trusts applies to a corporation and, in a less explicit fashion, whether Sweet Briar Institute is a trustee or a corporation. It is this Note’s opinion that the Supreme Court of Virginia provided the answer to both questions in its opinion, despite its comment that it was declining to answer the latter question. Thus, the purpose of this Note is to start from scratch, analyze all facts and law concerning the formation, operation and termination of Sweet Briar Institute, reconcile the competing interests of trust and corporate law by looking back to the Supreme Court of Virginia, and determine Sweet Briar Institute’s legal status.

It is arguable that such a determination was of no consequence before 2015 because the vision for Sweet Briar Institute was that it would exist and operate in perpetuity.⁴¹ However, the determination of Sweet Briar Institute’s legal status is of the utmost importance at the present time and for the future. Sweet Briar Institute is in the midst of a valiant rebuilding effort aimed at preserving its proud traditions for future generations. The outstanding question concerning the applicable law under which the school shall operate will do nothing but inhibit its efforts to rebuild. The author’s sincere hope is that this Note will bring clarity to a confusing situation and remove roadblocks from an institution that is on the road to rebuilding.

39. *Bowyer*, 2015 WL 3646914, at *1-*2. It should be noted that the circuit court judge acknowledged the error during a settlement hearing on June 22, 2015. See Transcript of Hearing, *supra* note 35, at 22.

40. *Bowyer*, 2015 WL 3646914, at *1.

41. Will of Indiana Fletcher Williams ¶ 13.2 (Nov. 23, 1900) (on file with author).

IV. ANALYSIS

A. *Trust vs. Corporation—What is the Difference and Which Law Applies to Sweet Briar Institute*

To preface the analysis of whether Sweet Briar Institute is a trustee or a corporation, it is beneficial to briefly review the substantive differences and similarities between the two legal forms. In Virginia, both trusts and nonstock corporations are governed by statute; trusts are governed by the Virginia Uniform Trust Code (VUTC) found in Va. Code Ann. §§ 64.2-700-1108.⁴² Nonstock corporations are governed by the Virginia Nonstock Corporation Act (Act) found in Va. Code Ann. §§ 13.1-801-908.⁴³

Ultimately, trusts and corporations are different in three key ways: formation, operation, and termination. With the fundamental aspects of these three categories laid out, the facts of the case can be applied to the different types of law in order to come to a legal conclusion and answer the underlying question of the Note. Importantly, because the case never went to trial, but rather settled,⁴⁴ no discovery took place. Therefore, there is no record that can supply evidence for some of the deeper questions that may arise. Nevertheless, an examination of the will, the bill of incorporation, and various letters, tax documents, cases, and pleadings provide enough background information as to how Sweet Briar Institute was formed, how it operated, and how these two factors influenced its termination.

1. Formation

a. VUTC versus Virginia Nonstock Corporation Act

Under the VUTC, a trust is created by a transfer of property through multiple means including a death-time transfer through a will or other disposition upon the death of the settlor.⁴⁵ Regardless of the means, however, the essential element in the creation of the trust is a transfer of property.⁴⁶ In order to create a trust, the settlor must have the capacity to create the trust, the settlor must indicate an intention to create a trust, the trust must have a beneficiary, the trustee must have duties to perform, and

42. See generally VA. CODE ANN. §§ 64.2-700-1108 (West 2012).

43. See generally VA. CODE ANN. §§ 13.1-801-908 (West 2007).

44. See generally Memorandum of Understanding between Ellen Bowyer, Saving Sweet Briar, Sweet Briar Institute, and the Attorney General of Virginia (June 20, 2015) (on file with author).

45. VA. CODE ANN. § 64.2-719 (West 2016).

46. *Id.*

the same person cannot be the sole trustee and the sole beneficiary of the trust.⁴⁷ The most crucial step in analyzing the formation of a trust is identifying the settlor's intent to create the trust. The VUTC "implements a cardinal principle of the law of trusts: the policy of the law is to effectuate the known wishes of the settlor, unless contrary to public policy or fundamental principles of equity jurisprudence."⁴⁸ Thus, a trust may only be created for lawful purposes that are possible to achieve, and the trust and the terms of the trust must benefit its beneficiaries.⁴⁹ Additionally, if the trust is charitable, it must be created for a distinct charitable purpose as specified by the VUTC.⁵⁰

In contrast, a corporation is formed under the Act when incorporators submit articles of incorporation to the Virginia State Corporation Commission.⁵¹ These articles must contain various criteria including: a name; provisions of purpose; management; powers; members; and an address.⁵² If the articles are satisfactory, then the corporation commission will approve the corporation and issue a certificate.⁵³ Once corporate status is achieved, it is left to the incorporators to elect a board of directors, establish bylaws, and otherwise organize for business.⁵⁴

b. Application

The circumstances in *Bowyer* are unique and complicated in that the facts appear to indicate that both a trust and a corporation were formed.⁵⁵ In this case, it is certain that a corporation was formed, just not by the same means that the Act prescribes. As detailed earlier in this Note, the General Assembly incorporated Sweet Briar Institute through an act of legislation because no state corporation commission existed in 1901.⁵⁶ However, while the incorporating body may have changed, the basic framework for incorporation has not. In multiple letters written by their attorney, the

47. *Id.* § 64.2-720.

48. John E. Donaldson & Robert T. Danforth, *The Virginia Uniform Trust Code*, 40 U. RICH. L. REV. 325, 334 (2005).

49. VA. CODE ANN. § 64.2-722 (West 2012).

50. *Id.* § 64.2-723.

51. VA. CODE ANN. § 13.1-818 (West 2015).

52. *Id.* § 13.1-819.

53. *Id.* § 13.1-820.

54. *Id.* § 13.1-822.

55. *See generally* Com. ex rel. *Bowyer v. Sweet Briar Inst.*, No. 150619, 2015 WL 3646914, at *1 (Va. June 9, 2015).

56. 1901 Va. Acts 125.

trustees named in Williams's Will disclosed the name of the desired corporation, the purpose of incorporation, the residence of the corporation, and the managers of the corporation.⁵⁷ Therefore, the requirements to incorporate were fulfilled under the law as it stood in 1901, which parallels the modern requirements under the Act.

The next question concerns whether the terms of Williams's Will created a trust and established the Sweet Briar Institute as a trustee of that trust. Williams did create a trust consisting of multiple tracts of land, including her Sweet Briar Plantation; she also named four trustees to hold the land in trust and to follow specific instructions provided in her will.⁵⁸ These instructions included obtaining the incorporation of Sweet Briar Institute and then conveying the land to Sweet Briar Institute.⁵⁹ Thus, it is reasonable to conclude that a trust was created and the four individuals named in the will are trustees because (1) there was a death-time transfer of real and personal property; (2) the trust instrument demonstrated the settlor's intent and capacity to create the trust; and (3) the named trustees have certain duties to perform. Based on the language in the will, it appears that the trust was a charitable trust. According to the VUTC, a charitable trust does not have to identify a definite beneficiary in the trust instrument.⁶⁰

The question that naturally follows is whether Sweet Briar Institute, the corporation, is a trustee and how. The key excerpt from Williams's Will, and what must be the foundation of the Commonwealth's overall argument, is the phrase which states:

Immediately upon the formation and organization of such corporation, the said trustees shall grant and convey, *and I hereby give and devise*, the said real estate and personal property last above described to the said corporation, *to have and to hold* the same unto it, and its successors forever, upon the conditions and for purposes hereinafter declared⁶¹

Williams's Will then continued to express the duties of the corporation with respect to the property bequeathed and devised as if the corporation

57. Letter from C.L. Scott to Virginia Legislature, Reasons for Granting the Charter of Sweet Briar Institute of Amherst County, Virginia (Jan. 30, 1901) (on file with the Sweet Briar College Archives); Letter from C.L. Scott to Amherst County Representative (Jan. 30, 1901) (on file with author).

58. Will of Indiana Fletcher Williams ¶ 13 (Nov. 23, 1900) (on file with author).

59. *Id.*

60. VA. CODE ANN. § 64.2-720 (West 2012).

61. Will of Indiana Fletcher Williams ¶ 13.2 (Nov. 23, 1900) (emphasis added) (on file with author).

were to be the new trustee. Such duties and restrictions included establishing and carrying on a school known as Sweet Briar Institute upon the trust property, never alienating or selling the property, and using personal property as an endowment.⁶² The VUTC does contemplate a successor trustee being named in the trust instrument and provides the duties placed upon that successor.⁶³ Additionally, the VUTC contemplates a corporation being a trustee as well.⁶⁴

Overall, it appears that Williams intended the property, real and personal, to remain in trust even after the exchange between the original trustees and Sweet Briar Institute. This intent is further evidenced by a 1901 letter from the trustees to an Amherst county representative, which stated that “[a]s soon as the charter is obtained and the directors are appointed, [the original] trustees have no further connection with the matter.”⁶⁵

There is no doubt that the original trustees named in the will formed a corporation. However, there is evidence that suggests that not only did Williams establish a trust, but she also named Sweet Briar Institute as a trustee. Thus, one can foresee the possible legal dilemma between trust law and corporate law. This dilemma will be further evidenced in the following two sections and must ultimately be reconciled.

2. Operation

a. VUTC versus Virginia Nonstock Corporation Act

The manner in which a trust or corporation operates pertains largely to the type of duty with which the trustee or director is charged. A trustee is required to administer a trust in good faith and in compliance with the trust’s terms solely in the interests of its beneficiaries.⁶⁶ Thus, the trustee is to avoid any transaction that might present a conflict between the trustee’s personal interests and the trustee’s fiduciary duties to the trust.⁶⁷ The code further states that the trustee has a duty of loyalty to the beneficiaries of the trust, as well as a duty to prudently administer the trust.⁶⁸ On a more logistic note, the trustee has a duty to inform, report, and make periodic accountings on the trust to the

62. *Id.*

63. VA. CODE ANN. § 64.2-757 (West 2012).

64. *Id.* § 64.2-706(c); Brief in Support of Commonwealth’s Petition for Review as Amici Curiae, *Com. ex rel. Bowyer v. Sweet Briar Inst.*, No. 150619, 2015 WL 3646914, at *8 (Va. June 9, 2015).

65. Letter from C.L Scott to Amherst County Representative ¶ 1 (Jan. 30, 1901) (on file with author).

66. VA. CODE ANN. § 64.2-763 (West 2012).

67. *Id.*

68. *Id.* §§ 64.2-764-766.

beneficiaries of the trust⁶⁹ and to keep adequate records of the administration of the trust.⁷⁰ Altogether, these responsibilities indicate that a trustee has a fiduciary duty to the trust and its beneficiaries that exceed the duties owed to a corporation by its directors.⁷¹

On the other hand, a director of a corporation has quite a different scope of responsibilities and duties. The Act requires that a director discharges her duties with her good faith business judgment in the best interest of the corporation.⁷² So long as a director acts in this manner, she cannot be liable for her decisions.⁷³ Further, the Act gives broad discretion to a corporation to establish its own duties within its articles of incorporation and bylaws for its directors and officers.⁷⁴ The Act also states that a corporation generally has the power to engage in any lawful act,⁷⁵ and any corporate act may not be challenged on the ground that the corporation lacked such power to act.⁷⁶ In its operation, the corporation is required to keep records of its meetings and actions, but is not required to report these records to anyone in particular.⁷⁷

Thus, the scope of duties and responsibilities of corporate directors is quite broad and unlimited. A director of a corporation still has fiduciary duties to the corporation; however, so long as she acts according to the best interests of the corporation, she is protected from liability. Anyone who charges the director with a violation of such duty has the burden of proving the alleged violation.⁷⁸ Altogether, the standards of care and loyalty imposed by the Act are not as great as the standards imposed by the VUTC.

b. Application

The two types of entities impose different duties upon the trustee or director. When the status of the entity itself is a mystery, a useful way to determine what the entity is and which law applies is by looking to evidence

69. *Id.* § 64.2-775.

70. *Id.* § 64.2-772.

71. See generally Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 Nw. U. L. REV. 651, 663 (2002). This article not only neatly summarizes the similarities between the duties imposed on trustees and directors, but it also explains how the duties for directors have evolved into a lesser, liability-shielding standard. *Id.* at 663.

72. VA. CODE ANN. § 13.1-870 (West 2012).

73. *Id.*

74. *Id.* § 13.1-853.

75. *Id.* § 13.1-825.

76. *Id.* § 13.1-828.

77. *Id.* § 13.1-932.

78. *Id.* § 13.1-870.

of how the entity operated. How the entity operated serves as evidence for what the entity was, and what the entity was serves as evidence of the intent of the founder. This proposition leads to two questions: (1) how did Sweet Briar Institute operate after it was formed, and (2) does that evidence point to trust law or corporate law. Additionally, how the school operated can further evidence how it interpreted the intent of Williams's will. For example, evidence of the college operating according to and honoring the terms of the trust can support the proposition that Sweet Briar is a trustee. But evidence of the school ignoring Williams's intentions and operating more under corporate terms supports that it is a corporation.

Again, the general scope of the trust's terms was to maintain a school for "white girls and young women," to refrain from alienating or selling any portion of the trust property, and to hold the bequeathed personal property as an endowment for the school.⁷⁹ Until the recent conflict concerning the school's closure, Sweet Briar Institute honored the terms of Williams's Will as if it were a trustee: the land has not been sold or alienated, the college is still operating, it remains an all-female institution, and the school continues to preserve a cemetery on the property as Williams requested.⁸⁰

Sweet Briar's consistent efforts for more than 100 years to abide by these terms would suggest the school is fulfilling its duties as a trustee—including the duty to prudently administer the trust,⁸¹ to remain loyal to the trust,⁸² and to protect the trust's property.⁸³ The only exception occurred when, in 1967, Sweet Briar Institute altered the terms of the trust to relieve the "white girls only" admission restriction in order to admit all girls, regardless of race.⁸⁴ In *Sweet Briar Inst. v. Button*, the court acknowledged that the college, "chartered by Virginia as a non-stock, non-profit corporation and as such a *testamentary trustee*, brought this suit to have enforcement of the restriction enjoined . . ."⁸⁵ This statement by the court in *Button* evidences Sweet Briar's efforts, as a trustee, to legally modify the terms expressed in Williams's Will: a process that is contemplated by the VUTC.⁸⁶

Additionally, in a November 2, 1963, Declaration by the Board of Directors of Sweet Briar Institute, the Board expressed that "in

79. Will of Indiana Fletcher Williams ¶ 13.2 (Nov. 23, 1900) (on file with author).

80. *Id.*

81. VA. CODE ANN. §§ 64.2-763-766 (West 2012).

82. *Id.* § 64.2-764.

83. *Id.* § 64.2-771.

84. See *Sweet Briar Inst. v. Button*, 280 F. Supp. 312 (W.D. Va. 1967).

85. *Id.* at 312 (emphasis added).

86. VA. CODE ANN. § 64.2-728 (West 2012).

administering the affairs of Sweet Briar College we are satisfied that we are governed by the will of our Founder benefactor”⁸⁷ The consistency of the court’s and the board’s acknowledgment of the binding aspect of Williams’s Will throughout the judicial process of altering the terms of the will demonstrates Sweet Briar Institute’s dedication to its role and responsibilities as a trustee.

Furthermore, the Commonwealth of Virginia itself has recognized the binding aspect of Williams’s Will on two separate occasions. The first was a statute passed by the General Assembly in 1908 that permitted Sweet Briar Institute to sell portions of its land, thereby acknowledging the restrictions placed upon Sweet Briar’s property and thus evidencing Sweet Briar’s role as a trustee.⁸⁸ Second, in the *Button* case, the Commonwealth was the defendant fighting to enforce the racial restrictions imposed in the will, a defense that failed based on the Fourteenth Amendment.⁸⁹ Ultimately, Sweet Briar’s own acknowledgement of its trustee status, the court’s acknowledgement, and the Commonwealth’s acknowledgement that Sweet Briar was bound by the terms of the will appear to support (1) that a trust was formed and the college was established as a trustee, and (2) that it has honored the restrictions of the trust and met the care, loyalty, and administration requirements provided in the Virginia Code.⁹⁰ Such evidence would support the Commonwealth’s argument in *Bowyer* that Sweet Briar Institute cannot close at will, or else the college, as a trustee, would be breaching its duties and violating the terms of the trust and of Williams’s Will.⁹¹

As for the evidence in support of the school behaving more as a corporation and not a trust, and to further complicate the answer to the overall issue, a few key documents and expressions seem to indicate that the directors of Sweet Briar Institute perceived themselves to be bound by corporate law more so than trust law. For example, because Sweet Briar Institute is registered as a 501(c)(3) non-profit organization for federal tax purposes,⁹² it must file an IRS form 990 every year to disclose its income, expenses, compensation, and liabilities. On the first page, the form provides the organization with four types of legal entities to choose from:

87. Declaration by the Sweet Briar Institute Board of Directors (Nov. 2, 1963) (on file with author).

88. VA. CODE ANN. § 13.1-901 (West 1985).

89. See generally *Sweet Briar Inst. v. Button*, 280 F. Supp. 312 (W.D. Va. 1967).

90. See VA. CODE ANN. §§ 64.2-763-765 (West 2012).

91. *Id.*

92. Letter from Internal Revenue Service to Sweet Briar Institute (Apr. 14, 2010) (on file with author).

corporation, trust, association, or other.⁹³ On each document gathered, Sweet Briar Institute selected the “corporation” box instead of the “trust” box.⁹⁴ Such evidence is certainly not definitive as to Sweet Briar’s legal status, for it can be interpreted in two different ways. On one hand, it may support the conclusion posited by the Commonwealth that Sweet Briar is a corporate trustee. On the other hand, the question still exists as to why Sweet Briar would elect to be registered as a corporation instead of a trust. A fair conclusion may very well be that Sweet Briar Institute, as of 1972 when it originally filed for tax-exempt status with the IRS,⁹⁵ perceived itself to be a corporation and not a trustee.

Moreover, evidence from the first meeting in March of 1901 of Sweet Briar’s newly appointed Board of Directors suggests that the will was not as binding as later evidence might indicate:

Untrammelled by State or denominational control, or by the *testamentary directions of a will*, and, therefore, relieved of the necessity of bidding for popular favor through the employment of adventitious or temporary expedients, it is declared the wish and purpose of its Board of Directors to give such shape and scope to the Sweet Briar Institute⁹⁶

Likewise, evidence from the Bill of Incorporation itself demonstrates that the Virginia legislature provided the Board of Directors with broad authority to govern the school, control the affairs of the school, and regulate the business of the school in a fashion consistent with the requirements and authorities prescribed and granted by the Virginia Nonstock Corporation Act detailed above.⁹⁷ To the contrary, however, in the very next paragraph of the Bill of Incorporation, the legislature states that the corporation is to take the land subject to the terms and restrictions in Williams’s Will.⁹⁸ This suggests that the board of directors does not have quite the broad authority granted to the directors of a corporation under the Act.⁹⁹

93. See generally IRS Form 990, Return of Organization Exempt from Income Tax (2011-2013).

94. IRS Form 990, Return of Organization Exempt from Income Tax (2011-2013).

95. Letter from Internal Revenue Service to Sweet Briar Institute (Apr. 14, 2010).

96. Statement from the First Meeting of the Board of Directors of Sweet Briar Institute from The Brief History of Sweet Briar College obtained from the Sweet Briar College Archives (Mar. 1901) (emphasis added) (on file with author).

97. 1901 Va. Acts 125 ¶ 2.

98. Will of Indiana Fletcher Williams ¶ 13.2 (Nov. 23, 1900) (on file with author).

99. 1901 Va. Acts 125 ¶ 3.

Lastly, one peculiar factor that falls in favor of the college operating more as a corporation than as a trust is the absence of any evidence that Sweet Briar Institute, as a trustee, has made any periodic accountings to the beneficiaries or has kept adequate records of the administration of the trust as required by the VUTC.¹⁰⁰ Again, the record of the case suffers because the parties never entered discovery. However, the fact that no evidence regarding this issue exists at this time does support the claim that the college is not a trustee, but a corporation and has operated as such by not fulfilling the aforementioned requirements under the VUTC.

Ultimately, the most persuasive evidence to the point that the college is a trustee under the “operation” aspect of the analysis is that it has abided by the terms of the will and Williams’s intentions. That is, it abided by the will’s terms and Williams’s intentions up until the events immediately preceding the closing and the closing announcement of the school itself. Despite some peculiar evidence that the board of directors has, at times, viewed themselves to be less restricted by the terms of the will than at other times, overall the college, the Commonwealth, and the courts have acknowledged Sweet Briar Institute’s status and operation as a trustee, and its behavior has evidenced that point.

A dual-natured entity lacks legal clarity. The fact that there are two different standards for operating each entity reflects the incompatible nature of the two areas of law and the need for reconciliation or, at least, prioritization. Following the “operation” analysis, the need for clarity as to which law will govern is becoming clearer. However, where the differing standards of trust law and corporate law really conflict in this case is in the circumstances surrounding the “termination” aspect of the analysis. As described below,¹⁰¹ the two forms of law are entirely incompatible under that analysis, and one law must trump the other.

3. Termination

a. VUTC vs. Virginia Nonstock Corporation Act

In general, a trust terminates when the terms of the trust expire, when the purpose of the trust is achieved, or when the purpose of the trust is impossible to achieve, contrary to public policy, or unlawful.¹⁰² However, the process is not automatic. The VUTC requires that the court either modify the administrative terms of the trust in an attempt to prolong its operation or terminate the trust if, because of unanticipated circumstances,

100. VA. CODE ANN. §§ 64.2-764-765 (West 2012).

101. See *infra* Section IV.A.3.a.

102. VA. CODE ANN. § 64.2-728 (West 2012).

neither modification nor termination will further the purposes of the trust.¹⁰³ Under this section, the means by which the purposes of a trust are furthered following the trust's termination include a distribution of the trust property in a manner consistent with the purposes of a trust.¹⁰⁴ With respect to a charitable trust, like Sweet Briar is alleged to be, a distribution of the trust's property would have to serve some charitable purpose.¹⁰⁵ Such a process is called *cy pres*.¹⁰⁶ *Cy pres* provides that if a charitable purpose becomes unlawful, wasteful, impracticable, or impossible to achieve, the trust does not necessarily fail in part or in whole, but the court may terminate the trust by directing the trust property to be distributed in a manner consistent with the trust's original charitable purpose.¹⁰⁷ Nevertheless, no matter the type of trust, a proceeding to approve or disapprove the termination of the trust can be brought by a trustee, a beneficiary, or a settlor.¹⁰⁸ All in all, the requirements and procedures associated with terminating a trust, especially a charitable trust, are extensive and involve the courts.

The termination process for a corporation, however, is a much different process in that it can be handled entirely within the corporation and without involving the court system. If the directors of a corporation decide to terminate the corporation, they can enter into the dissolution process by proposing the dissolution to the voting members of the corporation.¹⁰⁹ If the members vote in favor of dissolution, the termination process may proceed.¹¹⁰ If there are no voting members in the corporation, the directors may unilaterally vote to dissolve the corporation.¹¹¹ Upon a vote to proceed with dissolution, the corporation must then file articles of dissolution with the State Corporation Commission, and if the Commission approves of the articles, the corporation will receive a certificate of dissolution.¹¹²

After the certificate is issued, the corporation is effectively terminated; it only exists to distribute its assets, pay its debts, and complete the winding

103. *Id.* § 64.2-730.

104. *Id.*

105. *Id.* §§ 64.2-730-731.

106. *Id.* § 64.2-73.

107. *Id.* To be clear, *cy pres* is not restricted solely to charitable trusts, but applies generally to the charitable purpose of a trust. *Id.*

108. VA. CODE ANN. § 64.2-728 (West 2012).

109. VA. CODE ANN. § 13.1-902 (West 2007).

110. *Id.*

111. *Id.* § 13.1-903.

112. *Id.* § 13.1-904.

up and liquidation process.¹¹³ Once the corporation has liquidated and distributed all of its property and assets, it may file articles of termination with the State Corporation Commission to finally complete the termination process.¹¹⁴ It is important to note that, unlike the trust termination process, the court is not required to be involved at any point in the corporate dissolution process. The matter can be handled entirely within the corporation and among its leadership. The courts will only get involved when a member, director, creditor, or the Commission begin a judicial dissolution proceeding, or when the directors request court supervision of the dissolution process.¹¹⁵ The process to terminate a corporation is undoubtedly more independent.

b. Application

While the termination analysis is unique due to the fact that Sweet Briar Institute, either as a corporation or as a trustee, was never actually terminated, the termination analysis is integral to the overall conclusion of this Note because the analysis demonstrates a key area where the two types of law are incompatible. At the end of the day, one type of law must prevail. Moreover, it was the attempted termination of Sweet Briar Institute that gave rise to the case central to this Note. Thus, all of the evidence and analysis preceding the “termination” section culminates here.

According to the summary of each type of law above, if Sweet Briar Institute is bound only by the Virginia Nonstock Corporation Act, then its termination procedure is far less complicated than if the college were governed by the VUTC. The board of directors would be allowed to unilaterally decide to close the college and the court system need not ever be involved.¹¹⁶ This is what Sweet Briar Institute, its president, and its board of directors were aiming for: a corporate termination process without any interference or involvement of the judicial system.¹¹⁷ To that same point, any decision by the board of directors would be protected by the business judgment rule so long as there is no dishonesty or willful misconduct present.¹¹⁸ Ultimately, in order for the board to successfully terminate the corporation and wind-up its business, it is necessary that Sweet Briar

113. *Id.* § 13.1-906.

114. VA. CODE ANN. § 13.1-912 (West 2007).

115. *Id.* § 13.1-909.

116. *See* VA. CODE ANN. §§ 13.1-903, 13.1-909 (West 2007).

117. Jackson, *supra* note 2.

118. VA. CODE ANN. § 13.1-870 (West 2007).

Institute be solely a corporation operating under the Act and not a corporate trustee operating under the VUTC.

However, if the alternative is true and Sweet Briar is a trustee bound by the terms of the trust established by Williams's Will, the termination process requires the court's involvement. In this case, because the school was to be operated in perpetuity and because no piece of the land upon which the school is operated is permitted to be alienated or sold, closing the school by a simple board vote is a direct violation of Williams's Will and constitutes a breach of the trustee's fiduciary duties for which the trustee, the college, is liable. To effectively terminate the trust, the board of directors would have to enter a cy pres action and prove that the purposes of the trust are no longer practicable.¹¹⁹ It would then be up to the court to decide if the board carried its burden of proof. If so, it would be the court's responsibility to ensure that the assets of the trust are distributed toward a purpose similar to that of the former trust.¹²⁰

It is evident why the former board of directors and the former president of Sweet Briar Institute would make the case that the college is solely a corporation—it makes their role in the termination process much easier and allows them to avoid any litigation associated with a complex cy pres procedure. Their desire to close so quickly, however, is not as evident. The Supreme Court of Virginia in *Bowyer* even mentioned that not all issues were “squarely before the Court.”¹²¹ Regardless of motives or intention, there still must be some reconciliation between the two competing types of law since they cannot operate together. The Virginia Code even anticipates the two being incompatible.

For example, under the Act, the Virginia Code provides that all corporations existing at the time the Act was passed shall be subject to the provisions of the Act.¹²² Alternatively, the VUTC provides that all trusts existing prior to the passage of the VUTC shall be subject to the provisions of the VUTC.¹²³ Not only are the legal principles conflicting on the topic, but the code itself also demonstrates how the two areas of law are not necessarily designed to work together. However, before this Note can be concluded, it is beneficial to briefly analyze the parties' arguments and compare how closely they correlate with the analysis provided by this Note. The summaries provide an illustration of similar approaches by the parties

119. VA. CODE ANN. § 64.2-731 (West 2012).

120. *Id.*

121. Com. *ex rel.* *Bowyer v. Sweet Briar Inst.*, No. 150619, 2015 WL 3646914, at *1 (Va. June 9, 2015).

122. VA. CODE ANN. § 13.1-937 (West 2007).

123. *Id.* § 64.2-808.

to the Sweet Briar litigation and will provide insight as to how the court responded and how this Note fills in the gaps.

B. Where the Parties Stand

1. The Case for the Commonwealth

The Commonwealth first examined Williams's Will and the restrictions placed within the will upon the estate devised to the trustees named in the will.¹²⁴ The most significant restrictions referenced were that the corporation is to hold the land forever and that the land shall not be sold or alienated by the corporation at any time.¹²⁵ The Commonwealth then made the point that the charter incorporating Sweet Briar Institute specifically referenced Williams's estate and established Sweet Briar Institute as a corporation to receive the estate property and hold the property subject to the restrictions placed upon it by Williams's Will.¹²⁶ This, the Commonwealth argued, is evidence of the trust continuing beyond incorporation and that Sweet Briar Institute is a trustee of the property conveyed.

The focus of the argument then turned to the operation of Sweet Briar Institute and turned on three main points: a Virginia statute, a board resolution, and the *Button* case in 1967.¹²⁷ The Commonwealth argued that the statute, the resolution, and *Button* confirm that Sweet Briar Institute was not only aware, but also dedicated to operating as a trust and affirmed by the court as a trust. Finally, the Commonwealth argued that because the Sweet Briar Institute was founded as a trustee and has operated as a trustee of the trust property, the VUTC must apply.¹²⁸

Under the application of the VUTC, the Commonwealth alleged that Sweet Briar Institute and its directors are bound by fiduciary duties to administer the trust according to a certain standard set out by the VUTC.¹²⁹ The Commonwealth argued that Sweet Briar Institute and its directors had breached their duties and acted in a manner inconsistent with Williams's Will, the bill of incorporation, and the VUTC by taking action to close the

124. Complaint at 4, ¶ 13, Com. *ex rel.* Bowyer v. Sweet Briar Inst., No. 150619 (Va. June 9, 2015), 2015 WL 3646914.

125. *Id.* at 4-5, ¶¶ 13, 16.

126. *Id.* at 4-5, ¶ 18.

127. *Id.* at 5-6, ¶¶ 21-22.

128. *Id.* at 16, ¶ 55.

129. *Id.* at 17, ¶ 58.

college and sell its assets.¹³⁰ This breach, therefore, gave rise to the Commonwealth's action to enforce the terms of the trust and enjoin the college's closing.

2. The Case for Sweet Briar Institute

Sweet Briar Institute undoubtedly put a different spin on the facts. First, the college conceded that the school was founded by Williams's Will and that the will directed an estate to be devised to trustees named in the will.¹³¹ However, the college stressed the corporation-like structure that was established at Sweet Briar Institute after the bill of incorporation was passed and Sweet Briar's charter was granted.¹³² This is evidence, the college argued, of Sweet Briar Institute's deviation from any sort of trustee status.

Sweet Briar Institute did not address many of the operation arguments that the Commonwealth raised. Yet it pointed out that the court in *Button* also acknowledged that the college was a corporation.¹³³ Thus, Sweet Briar Institute argued that *Button* is not dispositive evidence of the legal status of the institute because it did not decisively conclude what was the legal status of Sweet Briar Institute.

Next, Sweet Briar Institute turned to the Virginia Nonstock Corporation Act and its inherent conflicts with the VUTC.¹³⁴ The college argued that the Sweet Briar Institute, as a Virginia corporation, falls under the Act and is therefore governed by the Act, not the VUTC.¹³⁵ Under the Virginia Nonstock Corporation Act, the college posited that the business judgment rule should apply rather than the heightened duties and procedures required under the VUTC.¹³⁶ Additionally, the college argued that the VUTC does not apply because the college is not a trustee based on the premise that the alleged trust assets are also the college's assets and have

130. Complaint at 17, ¶¶ 59-60, Com. ex rel. Bowyer v. Sweet Briar Inst., No. 150619 (Va. June 9, 2015), 2015 WL 3646914.

131. Sweet Briar Institute's Demurrer and Motion to Dismiss at 2, ¶ 1, Com. ex rel. Bowyer v. Sweet Briar Inst., No. 150619 (Va. June 9, 2015), 2015 WL 3646914.

132. *Id.* at 3, ¶¶ 4-5.

133. *Id.* at 10 n.6.

134. *Id.* at 7.

135. *Id.*

136. Sweet Briar Institute's Demurrer and Motion to Dismiss at 8, Com. ex rel. Bowyer v. Sweet Briar Inst., No. 150619 (Va. June 9, 2015), 2015 WL 3646914; Oral Arguments between the Commonwealth and Sweet Briar Institute, held by the Supreme Court of Virginia at 28:00 (June 2015), http://www.courts.state.va.us/courts/scv/oral_arguments/2015/jun/150619.MP3.

thus merged.¹³⁷ Also, the college stated that due to the conflicting nature between winding up a corporation and terminating a trust, the college cannot be both a corporation and a trustee.¹³⁸

Finally, to buttress its argument, Sweet Briar Institute relied upon *Dodge v. Trustees Randolph-Macon Women's College*, 661 S.E.2d 805 (Va. 2008), in which the Supreme Court of Virginia ruled on an issue not identical, but similar to the one present in the Sweet Briar litigation.¹³⁹ Interestingly, the one key difference between the facts in *Dodge* and the facts in *Bowyer* may prove to illustrate the central conflict of this Note and the tendency to lean toward Sweet Briar being a corporate trustee.

In *Dodge*, the plaintiffs alleged that Randolph Macon Women's College began using assets donated to the college to convert itself from an all-female institution to a co-educational institution.¹⁴⁰ They argued that such actions were "contrary to [the College's] original and ongoing express charitable purpose as an institution created primarily to educate women in a liberal arts curriculum under the name of Randolph-Macon Woman's College."¹⁴¹ The basis of the plaintiff's argument was that Virginia Code § 2.2-507.1 requires a charitable corporation to hold its assets in trust for the public for such charitable purposes.¹⁴² The plaintiffs argued that by using its assets to expand into a co-ed institution, the college breached its fiduciary duties under the VUTC.

In response, the college argued that Virginia Code § 2.2-507.1 merely authorizes the Attorney General to take certain action to protect public interests in charitable corporations and otherwise indicates that nonstock corporations are subject to the Act.¹⁴³ The Supreme Court of Virginia held that the college was not subject to the VUTC; nor did Virginia Code § 2.2-507.1 impose any duties upon a nonstock corporation.¹⁴⁴ The Court reasoned that Virginia Code § 2.2-507.1 merely granted the Attorney General authority and did not impose duties upon charitable corporations

137. Oral Arguments between the Commonwealth and Sweet Briar Institute, held by the Supreme Court of Virginia at 28:00 (June 2015), http://www.courts.state.va.us/courts/scv/oral_arguments/2015/jun/150619.MP3.

138. *Id.*

139. Sweet Briar Institute's Demurrer and Motion to Dismiss at 7, Com. *ex rel.* Bowyer v. Sweet Briar Inst., No. 150619 (Va. June 9, 2015), 2015 WL 3646914.

140. *Dodge v. Trustees Randolph-Macon Women's College*, 661 S.E.2d 805, 806-07 (Va. 2008).

141. *Id.* at 807.

142. *Id.*; VA. CODE ANN. § 2.2-507.1 (West 2004).

143. *Dodge*, 661 S.E.2d at 808; VA. CODE ANN. § 2.2-507.1 (West 2004).

144. *Dodge*, 661 S.E.2d at 805, 810.

and certainly did not transform nonstock corporations into trusts subject to the VUTC.¹⁴⁵

The import of Sweet Briar Institute's argument was that *Dodge* "unambiguously and definitively mandates that charitable corporations are not subject to trust law."¹⁴⁶ Except for one glaring difference between Sweet Briar College and Randolph Macon Women's College, Sweet Briar's argument would have considerable teeth: that difference lies in the foundation of the two schools. As has been stressed earlier, Sweet Briar's foundation is rooted in a trust document, the will of Indiana Fletcher Williams, while the *Dodge* case alludes to Randolph Macon Women's College being founded as solely a corporation.¹⁴⁷ Thus, the Supreme Court of Virginia in *Dodge* did not have to consider the presence of a trust document, but merely the argument that a statute imposed trust law on a corporation. Therefore, in *Dodge*, there was no tension between an entity and two incompatible areas of law because only one law clearly governed, and there was no difficulty in managing and honoring the intent of a settlor in *Dodge* as there was in *Bowyer*. These stark differences demonstrate that (1) the *Button* case is more dispositive than *Dodge*, because it addresses the unique "corporation versus trust" tension that exists at Sweet Briar; and (2) determining whether Sweet Briar is a corporate trustee or solely a corporation depends on a review of Sweet Briar's formation, operation, and a reconciliation of two incompatible areas of law.

V. ALTERNATIVE THEORY AND IMPLICATIONS

As this Note has demonstrated, the parties to the Sweet Briar litigation endorsed two views. The Commonwealth argued that Sweet Briar College was both a corporation and a trustee governed by the VUTC, while Sweet Briar argued that it was solely a corporation bound by the Virginia Nonstock Corporation Act. Evidence so far falls in favor of the Commonwealth and suggests that Sweet Briar Institute is a corporate trustee governed by the VUTC. Additionally, despite its comment to the contrary, the Supreme Court of Virginia endorsed that view in its opinion in *Bowyer*. However, there is one theory that has not been espoused by either party that finds a middle ground between Sweet Briar's position and the Commonwealth's position. It is plausible, based on evidence, that (1)

145. *Id.* at 809.

146. Sweet Briar Institute's Demurrer and Motion to Dismiss at 8, Com. *ex rel.* *Bowyer v. Sweet Briar Inst.*, No. 150619 (Va. June 9, 2015), 2015 WL 3646914.

147. *Dodge*, 661 S.E.2d at 805-807.

Sweet Briar Institute is solely a corporation, not a trustee; and (2) that the estate devised and bequeathed to Sweet Briar Institute from Indiana Fletcher Williams was a conditional gift. This theory is creative, yet it still reasonably abides by the intentions of Williams's Will and still provides Sweet Briar with the flexibility of a corporation.

Looking back to Williams's Will, Williams devised and bequeathed certain real and personal property to a trust that was managed by four trustees named in the will.¹⁴⁸ After designating the trust property and the trustees, she then instructed the trustees to obtain the incorporation of Sweet Briar Institute.¹⁴⁹ The will then directed the trustees to convey the property to the corporation under the conditions described later in the will.¹⁵⁰ After incorporation was obtained and the conveyance was made, evidence suggests that the trustees were to have no further influence in the matter, but rather the management of the college (the Sweet Briar Institute corporation) was to be turned over to seven directors.¹⁵¹

Previously, this Note used this evidence to suggest that perhaps the college was a successor trustee,¹⁵² which is a reasonable proposition. However, when viewed in a different light, it is reasonable to believe that the trust existed solely to obtain the incorporation of Sweet Briar and fulfilled its purpose once that task was completed (which would trigger its termination under the VUTC).¹⁵³ Further evidencing this alternate view is the use of the word "gift" throughout a 1901 letter written by the attorney for the trustees to an Amherst County representative asking for incorporation of the college.¹⁵⁴ The letter explained that at the time of the will's probate, relatives of Williams threatened her estate with a lawsuit.¹⁵⁵ In response to this threat, the attorney wrote that the trustees were advised to obtain a bill of charter to avoid litigation and because such charter would "authorize [the school] to receive these gifts."¹⁵⁶ In the next paragraph, the attorney again wrote that incorporation is necessary so the school could "accept the gift, with these conditions attached, and keep it from going to

148. Will of Indiana Fletcher Williams ¶ 13 (Nov. 23, 1900) (on file with author).

149. *Id.* ¶ 13.1.

150. *Id.* ¶ 13.2.

151. Letter from C.L. Scott to Amherst County Representative, ¶ 1 (Jan. 30, 1901) (on file with author).

152. *See supra* Section IV.A.1.b.

153. VA. CODE ANN. § 64.2-728 (West 2012).

154. Letter from C.L. Scott to Amherst County Representative, ¶¶ 4-6 (Jan. 30, 1901) (on file with author).

155. *Id.* ¶ 4.

156. *Id.* ¶ 6.

the[] relatives”¹⁵⁷ He then appealed to Virginia pride by writing that the Commonwealth should not hesitate to receive “so valuable a gift for a school[] to be established in one of its counties” or to honor the legacy of Williams.¹⁵⁸ He stressed yet again that the trustees “are simply discharging the duties imposed upon them in the will, in obtaining a charter, and have no interest in the matter further than, as good citizens, to perform the duty required of them by Mrs. Williams.”¹⁵⁹ At no point in the letter did the attorney reference the school behaving as a trustee or becoming the successor trustee to the original trustees appointed by the will, but instead seemed to indicate that the trustees merely wanted to incorporate the school so that it could receive a gift subject to various conditions.

Similar to the letter written to the Amherst County representative, the attorney for the trustees also wrote a letter to the Virginia Legislature that explained the reasons for granting Sweet Briar Institute its charter. He began by saying that Williams gave real and personal property to four trustees.¹⁶⁰ He then wrote that all that is asked from the legislature is that “a gift” be accepted by the school once it is granted a charter.¹⁶¹ The only conditions on the gift, the attorney wrote, were stated in the will and included the restriction of alienability and the maintenance of a family graveyard.¹⁶²

The import of these two letters demonstrates the intent of Williams and her named trustees mere months after her death and the probate of her will.¹⁶³ The repetitive references to “gift” and the trustees merely performing their duty indicate that perhaps Williams’s intent was not to form a trust for which the college was a trustee, but merely a trust that was purposed to incorporate a college and convey land subject to conditions. The end result may look similar to the Sweet Briar College known today: a school with a massive estate-in-land with restricted alienability. However, without a trustee classification, corporate law would govern and the directors of the school would have greater flexibility and discretion in how they operate the school and, ultimately, close the school.

157. *Id.* ¶ 7.

158. *Id.* ¶ 16.

159. *Id.* ¶ 8.

160. Letter from C.L. Scott to Virginia Legislature, Reasons for Granting the Charter of Sweet Briar Institute of Amherst County, VA, ¶ 1 (Jan. 30, 1901) (on file with Sweet Briar College Archives).

161. *Id.* ¶ 6.

162. *Id.* ¶ 5.

163. Brief History of Sweet Briar College obtained from the Sweet Briar College Archives (Mar. 1901) (on file with author). Williams passed away in November of 1900. *Id.* This means that the letters from C.L. Scott were written two months following her death.

Another way to identify legal entities is to track the money and transactions in which the entity partakes. Two specific documents dating back to 1901 and 1903 track money and various other financial assets being transferred from Williams's estate, by the estate executor, to Sweet Briar Institute.¹⁶⁴ The receipts show money being transferred from the estate by the executor to Sweet Briar many months, and even years, after the probate of the will. The documents make no reference to Sweet Briar being a trustee of the funds, or that the funds are to be held in trust, but just that Sweet Briar is to be the receiver of the assets. While this evidence may not be entirely dispositive, it does lean towards the possibility that Sweet Briar was incorporated to receive money and real estate as conditional gifts.

Another piece of evidence that may be viewed in an alternate light, and actually makes more sense being viewed in such a way, is the bill passed by the Virginia legislature in 1908 which permitted Sweet Briar Institute to alienate land that was restricted by the conditions stated in Williams's Will.¹⁶⁵ This law, which is still active, permits an "incorporated educational institution . . . [that] owns or holds more than 1,000 acres of land" to sell any and all real estate in excess of 1,000 acres.¹⁶⁶ Moreover, the law permits the land to be sold "notwithstanding any provision in its charter, or in the deed, will or muniment of title under which such real estate is held, by a majority vote of all of the members of such board."¹⁶⁷

There is no doubt that this law applies to Sweet Briar Institute as it was passed shortly after the foundation of the school and because Sweet Briar owned more than 1,000 acres of land.¹⁶⁸ All that is required is a majority board vote to sell the land. The natural question then is why would the legislature, which included the restrictions on alienability in the bill of incorporation,¹⁶⁹ permit the terms of a trust to be violated? It seems less likely that the legislature would pass a law that would permit a trustee to

164. Sweet Briar Institute Receipt of Funds from Executor of I.F. Williams's Estate, Stephen R. Harding (Nov. 1901) (on file with author); Sweet Briar Institute Receipt of Funds from Executor of I.F. Williams's Estate, Stephen R. Harding (Mar. 1903) (on file with author).

165. VA. CODE ANN. § 13.1-901 (West 1985).

166. *Id.*

167. *Id.*

168. Letter from C.L. Scott to Virginia Legislature, Reasons for Granting the Charter of Sweet Briar Institute of Amherst County, VA, ¶ 5 (Jan. 30, 1901) (Sweet Briar College Archives). Paragraph five states that the estate-in-land devised by Williams consisted of "some two thousand acres." *Id.*

169. 1901 Va. Acts 125.

violate the terms of a trust document and more likely that the legislature would pass a law that would lighten the burden of conditions on a gift.

According to the statute, the only prerequisite to selling nearly half of the school's property is a majority vote from the board. The law gives the board of directors greater power to act like a board governed by corporate law, but still respects conditions on the property. Viewed from the perspective of a conditional gift, the law makes sense because lawmakers generally want to avoid completely restricting alienability;¹⁷⁰ whereas viewed under trust law, the legislature would be endorsing the violation of a settlor's intent. The whole purpose of a trust, however, unless contrary to public policy, is to "effectuate the known wishes of the settlor."¹⁷¹

Finally, a point that was referenced earlier in this Note must be repeated as it also goes toward the alternative conditional gift theory. In an article written to introduce the Uniform Trust Code (UTC) to the Virginia legal community after the UTC was passed by the Virginia General Assembly in 2005,¹⁷² the authors described variations in the new VUTC that were different from the model UTC. However, one aspect that did not change was the continued requirement that trustees of testamentary trusts "file annual accountings with the appropriate Commissioner of Accounts unless such requirement is waived by the instrument and other conditions are satisfied."¹⁷³ If Sweet Briar is, in fact, a corporate trustee of a testamentary trust, why is there no record or evidence of the college filing accountings with the Commissioner of Accounts? While this evidence, or lack thereof, was previously used to demonstrate that there are holes in the Commonwealth's corporate trustee theory, it does not take away from the alternative theory that Sweet Briar Institute is a corporation that received conditional gifts, which it has honored since 1901.

The point of the alternate theory is not to confuse the issue—the evidence in its totality still strongly suggests that Sweet Briar College is a corporate trustee bound by the VUTC. There is no doubt that this argument is stronger than Sweet Briar Institute's argument during the litigation. One can wonder though, if this middle ground theory was proposed, would the Supreme Court of Virginia hold differently?¹⁷⁴ The

170. *Carson v. Simmons*, 96 S.E.2d 800, 803 (Va. 1957).

171. John E. Donaldson & Robert T. Danforth, *The Virginia Uniform Trust Code*, 40 U. RICH. L. REV. 325, 334 (2005).

172. *Id.* at 325.

173. *Id.* at 334.

174. However, case law in Virginia suggests that "neither a testator in a will nor a grantor in a deed can give a fee simple estate in either real or personal property and endeavor to impose upon the donee any condition incompatible with the usual and necessary incidents

answer is probably not. As this Note will show in its conclusion, the Supreme Court of Virginia had a reason behind ruling the way that it did. But the result of the ruling did favor the Commonwealth who pushed the corporate trustee theory. In fact, following the Supreme Court of Virginia's holding, the circuit court confessed that it erred and that Sweet Briar College was a trustee.¹⁷⁵

While such a decision provided Sweet Briar College with a second chance at remaining open and preserving a future for itself—an undeniable reason to celebrate—the consequences of the decision cannot be ignored. Because the Commonwealth prevailed, more than 2,000 acres of land will continue to be bound in perpetuity. Even if Sweet Briar closes its doors one day, the VUTC would require all of its land to go to another charitable purpose, meaning it still would not be freely alienable.¹⁷⁶ This alternative theory, however, finds a way to respect Indiana Fletcher Williams's intent yet still give Sweet Briar's board of directors the freedom to manage the school under the more flexible terms of the Virginia Nonstock Corporation Act. Moreover, it does not necessarily bind thousands of acres of land in perpetuity.

VI. CONCLUSION

In *Bowyer*, the Supreme Court of Virginia was presented with two issues: (1) whether trust law can apply to a corporation and (2) what is the legal status of Sweet Briar Institute. This Note endeavored to address the latter question by analyzing three integral areas of two competing types of law: formation, operation, and termination. The analysis revealed that not only are trust law and corporate law competing, but they are also incompatible with each other. One type of law must govern in order to reconcile their conflicting nature.

The “formation” section proved that the means of establishing each type of entity are vastly different, with the most important difference being trust law's protection and required adherence to a settlor's intention. This intention is what binds and directs the trust from beginning to end. The “operation” section detailed how the entity, whether a trust or a corporation, is to be governed and carried out by analyzing the duties imposed on trustees and directors. There is no doubt that a corporation

accompanying a fee simple estate. Among such incidents are the complete right of alienation” *Carson v. Simmons*, 96 S.E.2d 800, 803 (Va. 1957) (quoting *Dunlop v. Dunlop's Ex'rs*, 132 S.E. 351 (Va. 1926)).

175. See Transcript of Hearing at 22, *Com. ex rel. Bowyer v. Sweet Briar Inst.*, No. 150619 (Va. June 9, 2015), 2015 WL 3646914.

176. VA. CODE ANN. § 64.2-730 (West 2012).

governed by the Act provides far greater freedom, flexibility, and protection for a director than the VUTC does for a trustee. Finally, the “termination” section demonstrated where the current debate surrounding the entire Sweet Briar matter lies. The processes by which a trust and a corporation terminate are so vastly different that they serve as a perfect example as to why the two areas of law are incompatible: trust law requires a strict process and involvement from the Commonwealth while corporate law permits a director to begin the termination process almost at will.

This Note also examined the intent of Indiana Fletcher Williams, her will, and the facts and circumstances surrounding Sweet Briar’s founding and history. Based on this application, it is reasonable to see that Sweet Briar is a corporate trustee governed by the VUTC, not solely a corporation subject to the Act. Sweet Briar should have approached termination under this light.

Ultimately, a definitive conclusion is difficult to reach because there is simply not enough evidence to rely on due to the lack of discovery and lack of a record created by the trial court. Nonetheless, the Supreme Court of Virginia, in a roundabout way, did provide an answer for which this Note is searching. When the Supreme Court of Virginia ruled that “the law of trusts can apply to a corporation,”¹⁷⁷ it provided reconciliation to the conflicting nature of trust law and corporate law detailed under the “termination” analysis. The court was aware that both areas of law were incompatible and that in this very peculiar circumstance involving a corporate trustee, one type of law must prevail. That law, in this present case, is the law of trusts. This must be because the court is more comfortable settling on the higher standard of fiduciary duties imposed by trusts and because the law of trusts provides greater protection for the settlor’s original intentions.

Therefore, if the court decided that the prevailing law in the battle between trust law and corporate law is the law of trusts, this Note would have to find that Sweet Briar Institute is a corporate trustee bound by the VUTC. Despite the fact that the court expressly stated that it was not ruling on the legal status of the parties involved, its holding that the law of trusts can apply to a corporation must serve some greater purpose than simply correcting an error by the circuit court. That purpose, as it has been demonstrated, was to reconcile the competing nature between the two incompatible types of law. And through that reconciliation, the court was, without issuing a judgment on the merits, declaring Sweet Briar Institute a corporate trustee. This Note, by weighing the totality of the evidence,

177. *Com. ex. rel. Bowyer v. Sweet Briar Inst.*, No. 150619, 2015 WL 3646914, at *2 (Va. June 9, 2015).

examining the intent of Indiana Fletcher Williams, and discerning the differences between the two areas of law, is able to fill in the holes left by the court and by the parties to the litigation. Through this process, it is reasonable to conclude that the answer to the court's question is that Sweet Briar College is a trustee bound by the VUTC.