
Record No. 071248

**In The
Supreme Court of Virginia**

**JENNA DODGE, SARAH HASSMER,
LAURA McKEAN-PERAZA,
KELSEY McCUNE, JENNIFER C. MULLINS,
ALICE DAMMEYER PRIEBE, and ROY CLINTON JOHNS,**

Appellants,

v.

**TRUSTEES OF RANDOLPH MACON WOMAN'S COLLEGE,
d/b/a RANDOLPH-MACON WOMAN'S COLLEGE,**

Appellee.

**On Appeal from
the Circuit Court of the City of Lynchburg**

**BRIEF OF THE
COMMONWEALTH OF VIRGINIA
AS AMICUS CURIAE
IN SUPPORT OF NEITHER PARTY**

ROBERT F. McDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State Solicitor General

October 29, 2007

WILLIAM C. MIMS
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219

Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the Commonwealth of Virginia

QUESTION PRESENTED

Although this Court has granted the appeal on a variety of issues, the Commonwealth's Amicus Brief is confined to a single issue:

As a matter of Virginia law, may persons other than the Attorney General of the Commonwealth bring an action to enforce the terms of a charitable trust?

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Virginia Attorney General Robert F. McDonnell, on behalf of the Commonwealth, submits this amicus curiae brief in support of neither party. For the reasons set forth below, this Court should hold that persons other than the Attorney General of the Commonwealth may enforce the terms of charitable trusts. The Commonwealth does not address any other issues.

INTERESTS OF THE COMMONWEALTH

The Commonwealth's interest is clear—to ensure that private persons are able to vindicate their legal rights in the courts. It is the individual, not the government, who can best decide whether litigation is necessary to vindicate the individual's legal rights. If the enforcement of private legal rights is exclusively the responsibility of the government, then the enforcement of private legal rights necessarily will be constrained by limitations on government resources.

ARGUMENT

ALTHOUGH THE ATTORNEY GENERAL PLAYS A SIGNIFICANT ROLE IN THE ENFORCEMENT OF CHARITABLE TRUSTS, THE ATTORNEY GENERAL'S ROLE IS NOT EXCLUSIVE.

Our constitutional system expresses a fundamental distrust of any concentration of power. *See The Federalist No. 51*, at 291 (James Madison) (Clinton Rossiter ed., 1961, Mentor Books Ed. 1999) (The Constitution establishes a double security by dividing sovereignty between the States and National Government and dividing power within the National Government among the three Branches.). Although not explicitly reflected in our constitutional design, the mechanisms for the enforcement of charitable trusts reflect this fundamental distrust of concentrations of power. First, because it is often difficult to check the power of the

administrators of a charitable trust, the Attorney General, acting in the public interest, may take appropriate actions to enforce the charitable trust. *See Virginia Code* § 2.2-507.1. Second, because the resources of the Attorney General are limited and because vesting exclusive authority in the Attorney General represents a concentration of power, many States also allow any person with a sufficient legal interest to enforce the charitable trust. *See Holt v. College of Osteopathic Physicians & Surgeons*, 394 P.2d 932, 934 & 934 n.1 (Cal. 1964) (stating that additional private enforcement is the prevailing view and collecting cases).

While it is clear that the Attorney General, as the guardian of the interests of all Virginians, will always play a significant role in charitable trust matters, there is nothing in the *Virginia Constitution* or the *Virginia Code* that precludes private parties with sufficient legal interests from pursuing private enforcement. To contrary, the Virginia Uniform Trust Act,¹ which was based on the *Uniform Trust Code*, implicitly suggests that private enforcement is possible. *Virginia Code* § 55-544.05.C (“The settler of a charitable trust, *among others*, may maintain a proceeding to enforce the trust.”) (emphasis added). This implicit suggestion is reinforced by the commentary to the *Uniform Trust Code*, which makes it clear that private persons with special interests may bring enforcement actions. *Uniform Trust Code* § 405, *Comment*. Moreover, this Court has suggested that, at common law, private persons could bring enforcement actions in appropriate circumstances. *Clark v. Oliver*, 91 Va. 421 427-28, 22 S.E. 175, 177 (1895).

Furthermore, in a wide variety of other contexts, Virginia recognizes that, in addition to governmental actions, a private citizen may seek to vindicate his or her interest. For example, private litigants may seek relief for trespass, wrongful death or nuisance, even though the State

¹ *Virginia Code* §§ 55-544.01 through 55-544.23

may also litigate these matters. *Cooper v. Horn*, 248 Va. 417, 448 S.E.2d 403 (1994) (civil action for trespass); *Virginia Code* § 18.2-119 (criminal trespass statute); *Virginia Code* § 15.2-900 (municipalities can seek the abatement or removal of nuisances); *Bowers v. Westvaco Corp.*, 244 Va. 139, 419 S.E.2d 661 (1992) (discussing private cause of action for nuisance); *Virginia Code* § 8.01-50 (allowing civil cause of action for wrongful death); *Virginia Code* § 18.2-32 (murder statute). This Court should say explicitly what the *Virginia Code* and *Clark* say implicitly—private parties may enforce the terms of a charitable trust.² The Attorney General’s authority is not exclusive.

Such a holding is supported by public policy consideration. There are literally hundreds, if not thousands, of charitable trusts in Virginia. While the Attorney General is diligent in exercising his responsibility to guard the public interest, he does not have the resources to enforce every single provision of every single charitable trust. There will be times when the Attorney General, in the exercise of his discretion, will choose not to bring an enforcement action. In such situations, private parties, who have a sufficient legal interest, should be allowed to pursue private enforcement. Private enforcement will not displace the Attorney General’s role, but will merely complement it. In effect, private enforcement will act as an additional check on the concentration of power with the trust administrators.

² To be sure, a general holding that, in addition to the Attorney General, private parties may bring an enforcement action does not end the inquiry. This Court must still evaluate whether these particular Appellants have an interest that is sufficient to confer standing upon them to enforce the trust. The Commonwealth takes no position on that issue.

CONCLUSION

For the reasons stated above, this Court should declare that private parties may enforce the terms of charitable trusts.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By: /s/ William E. Thro
Counsel

ROBERT F. McDONNELL
Attorney General of Virginia

WILLIAM C. MIMS
Chief Deputy Attorney General

WILLIAM E. THRO
State Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

STEPHEN R. McCULLOUGH
Deputy State Solicitor General

October 29, 2007

Counsel for the Commonwealth of Virginia

CERTIFICATE OF SERVICE

I certify that on this 29th day of October 2007, twenty copies of the BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY have been filed in the office of the clerk of the Supreme Court of Virginia and three copies have been mailed by first class, postage prepaid, U.S. Mail to counsel listed below:

William H. Hurd
Anthony F. Troy
Ashley L. Taylor, Jr.
Stephen C. Piepgrass
TROUTMAN SANDERS LLP
Post Office Box 1122
Richmond, Virginia 23219

Wyatt B. Durette, Jr.
Barrette E. Pope
Halliday Moncure Merrick
DURRETEBRADSHAW PLC
600 East Main Street, 20th Floor
Richmond, Virginia 23219

Counsel for Appellants

Edward J. Fuhr
Eric H. Feiler
Craig T. Cronheim
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219

Counsel for Appellees

/s/ William E. Thro
Counsel