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In The  
Supreme Court of Virginia

RECORD NO. 071248

JENNA DODGE, *et al.*,

*Appellants,*

v.

THE TRUSTEES OF RANDOLPH-MACON WOMAN'S COLLEGE,  
D/B/A RANDOLPH-MACON WOMAN'S COLLEGE,  
A Virginia non-stock charitable corporation,

*Appellees.*

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BRIEF OF APPELLANTS

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## **BRIEF OF APPELLANTS**

The Appellants – students and donors of Randolph-Macon Woman’s College (“R-MWC” or “the College”) – have been granted an appeal from the decision of the Circuit Court of the City of Lynchburg, wherein that court dismissed, on demurrer, their challenge to the decision to transform the College from a single-sex institution for women into a co-educational school.<sup>1</sup> They now ask that the decision below be reversed and the case remanded for trial on the merits.

### **INTRODUCTION**

Randolph-Macon Woman’s College has long occupied a prominent place on Virginia’s educational landscape. Founded in 1891, the College has educated generation after generation of young women, providing them a liberal arts education in a single-sex environment – an environment that many young women prefer and that many educators believe entails distinct educational advantages. Unfortunately, the charitable purpose of the College is now threatened by the actions of its Board of Trustees, which seeks to turn the College away from its established mission, even though it is “neither impossible nor impracticable” to adhere to that original charitable purpose. J.A. 109 (Complaint, ¶ 36).

The issue presented is not simply a policy dispute between those who wish to preserve for young women the choice of attending a single-sex college, and those who may lack sympathy for that valuable tradition or mistakenly believe it cannot survive. It

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<sup>1</sup> Reflecting the national reputation of the College, the student-petitioners are: Jenna Dodge, a freshman from Kentucky; Sarah Hassmer, a sophomore from Virginia; Laura McKean-Peraza, a junior from North Carolina; Kelsey McCune, a freshman from Oklahoma; and Jennifer C. Mullins, a junior from Virginia. J.A. 104 (Complaint, ¶¶ 4, 5, 7, 8, 9). The donor-petitioners are Alice Dammeyer Priebe of Illinois and Roy Clinton Johns of California. *Id.* ¶¶ 10, 11.

is, most fundamentally, a question of law. By its actions, the Board of Trustees would divert the trust assets of R-MWC to another purpose and, in doing so unilaterally, violate their fiduciary responsibilities and run afoul of Virginia law. It is to vindicate the lawful charitable purpose of the College that the plaintiffs – beneficiaries and settlors of the trust – brought their lawsuit to challenge the actions of the Board.

An institution as venerable as Randolph-Macon Woman’s College should not be so transmogrified – and its charitable purpose abandoned – without full compliance with the law. Moreover, beyond the fate of the College, the decision of the trial court adopts erroneous and troublesome legal precepts which have far-reaching consequences and which must be reversed. It is for these reasons – as explicated and expanded below – that the Appellants respectfully ask the Court to reverse the decision of the trial court and remand the case for trial.

### **ASSIGNMENTS OF ERROR**

1. The trial court erred by sustaining the Demurrer to the Complaint and/or the Amended Complaint.
2. The trial court erred by ruling that the Virginia Uniform Trust Code does not apply to the Trustees of Randolph-Macon Woman’s College and the assets held by that charitable corporation.
3. The trial court erred by ruling that the Trustees of Randolph-Macon Woman’s College breached no duty by voting to change the purpose of the College from the education “primarily of women” to the education of “men and women.”
4. The trial court erred by ruling that the Trustees of Randolph-Macon Woman’s College breached no duty by voting to change the name of the College from “Randolph-Macon Woman’s College” to “Randolph College,” or, alternatively, by failing to rule on that issue.
5. The trial court erred by ruling that the doctrine of *cy pres* is not applicable to the facts alleged in the Complaint and/or Amended Complaint.

6. The trial court erred by ruling that the petitioners lack standing to bring this action.

### **QUESTIONS PRESENTED**

The Complaint alleges that it is neither impossible nor impracticable for R-MWC to adhere to its original charitable purpose of providing liberal arts higher education primarily for women under the name Randolph-Macon Woman's College. Given this allegation – which, on demurrer, must be taken as true – the following questions are presented:

1. Did the Board of Trustees breach a legal duty by abandoning the original purpose of the charitable corporation and diverting its assets to the education of “men and women” at a coeducational college under a new name? (Relates to Assignments of Error 1, 2, 3 and 4.)
2. Does Virginia Code § 2.2-507.1 impose on the Trustees of Randolph-Macon Woman's College a duty to use its assets to provide higher education primarily for women under the name “Randolph-Macon Woman's College”? (Relates to Assignments of Error 1, 3, and 4.)
3. Does the Virginia Uniform Trust Code apply to the Trustees of Randolph-Macon Woman's College? (Relates to Assignments of Error 1, 2, 3 and 4.)
4. Does the doctrine of *cy pres* apply to the facts alleged by the petitioners? (Relates to Assignments of Error 1 and 5.)
5. Do the beneficiaries and/or donors of Randolph-Macon Woman's College have standing to object to actions by the Board of Trustees that breach its duty to use the assets of the College to provide higher education for women in a single-sex environment? (Relates to Assignments of Error 1 and 6.)

### **NATURE OF THE CASE AND MATERIAL PROCEEDINGS**

In September of 2006, the Board of Trustees voted to abandon the College's long-established charitable purpose of providing a liberal arts higher education to women in a single-sex setting. Without seeking judicial review and without necessity, they adopted a new purpose: providing an unspecified “global honors” program to men and women in a

co-educational setting. The following month, several of the current students at the College – together with two substantial donors – filed their Complaint in the Circuit Court of the City of Lynchburg. *See* J.A. 103 (Complaint).<sup>2</sup> Named as the sole defendant was the Virginia non-stock charitable corporation known as “The Trustees of Randolph-Macon Woman’s College” (“the Board of Trustees” or “the Board”). No one serving as a trustee was named individually, and no individual liability has been asserted.

The original Complaint contained two counts. Count One alleged that the Board of Trustees is subject to the Virginia Uniform Trust Code (“VUTC”), Virginia Code § 55-541.01 *et seq.*, and that the Board violated its duties under the VUTC when it acted to co-educate the College. Count Two alleged that, under the doctrine of *cy pres*, the Board of Trustees cannot change the College’s charitable purpose without first proving to the satisfaction of a Virginia circuit court that it is impossible or impracticable to continue the charitable purpose. In support of their argument, the plaintiffs relied on Virginia Code § 2.2-507.1, which treats assets of a charitable corporation as held in trust for the purposes expressed in the applicable governing documents.

In defending against the Complaint, the Board did not contend that it was impossible or impracticable to continue the College’s long-established charitable purpose. Instead, it filed a Demurrer, thereby admitting as true all facts alleged in the Complaint and all inferences reasonably drawn from those facts.

After briefing, the Demurrer was argued to the trial court in January of 2007. Ruling from the bench, the trial court noted the difficulty of the issue, the lack of

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<sup>2</sup> Plaintiffs joined in a single complaint because their claims involve common issues of fact, arise out of the same occurrence and otherwise meet the requirements of Virginia’s Multiple Claims Litigation Act. *See* Va. Code § 8.01-267.1 *et seq.*

precedent and the “inherent conflict” between two parts of § 2.2-507.1 *See* J.A. 362-63 (Jan. 23, 2007 hearing). The trial court then sustained the Demurrer.

Following the January hearing, the plaintiffs were allowed to file an Amended Complaint in which they left intact their original Count One, but amended Count Two. As amended, Count Two clarified its allegation that the Board of Trustees was in breach of its duty under Virginia Code § 2.2-507.1, which requires the Board to use the assets of R-MWC for the charitable purposes set forth in the governing documents of the College.

The Board of Trustees again demurred. Again, the Demurrer was sustained, this time with respect to both the original Complaint and the Amended Complaint. In so ruling, the trial court wrote a two-page letter opinion in which it adopted – wholesale and by reference – the reasoning stated by the Board of Trustees in its memoranda and oral argument. The trial court then made a series of findings and rulings, as follows:

- “The [Virginia Uniform Trust Code] is only applicable to trusts created by statute and administered in the manner of an express trust;”
- “[Section] 2.2-507.1 of the Virginia Code grants the Attorney General standing to address misapplication of charitable trust assets, but does not eliminate the statutory provisions of the Non-Stock Corporation Act, which governs the actions of the Trustees of RMWC;”
- “[T]he defendant has not breached any duties by voting to admit males to R-MWC which has been done in the past.”
- “This vote was a corporate decision that should not be second-guessed by the courts, students or donors.”
- “[T]he doctrine of *cy pres* is not applicable to the facts as alleged in these pleadings [Complaint and Amended Complaint],” and

- “[E]ven if [*cy pres*] was [sic] applicable, the plaintiffs lack standing to bring this cause of action.”

J.A. 231 (Letter Opinion, March 13, 2007)

A final Order entered by the trial court sustained the Demurrer and dismissed the case, adopting “the reasons set forth by Defendant in its briefs and at the hearing and expressed by the Court at the hearing.” J.A. 232. The final order was entered March 13, 2007. An appeal was timely noted on April 6, 2007 (J.A. 234), and a petition for appeal was timely filed on June 13, 2007. This Court granted the petition, issuing its writ of appeal on September 19, 2007. The requisite bond was posted on October 4, 2007.

### **STATEMENT OF FACTS**

Because the trial court sustained the Demurrer, the Appellants are entitled on appeal to have taken as true all facts alleged in the Complaint and/or Amended Complaint<sup>3</sup> and all inferences reasonably drawn from those facts.<sup>4</sup> Among the factual allegations and inferences pertinent to this appeal are the following:

#### **The Original Charitable Purpose of Randolph-Macon Woman’s College**

Randolph-Macon Woman’s College is a well-known liberal arts college that offers Bachelor of Arts degrees in the liberal arts to women in a *single-sex* educational environment. It is not by happenstance that this is so. From its very beginning in 1891,

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<sup>3</sup> For purposes of brevity, all references to the Complaint are intended to include the Amended Complaint, unless stated otherwise.

<sup>4</sup> See, e.g., *Mattaponi Indian Tribe v. Commonwealth*, 261 Va. 366, 370, 541 S.E.2d 920, 922 (2001) (noting that, on appeal from an order sustaining a demurrer, the Court “shall recite the facts alleged, and all reasonable inferences flowing from those facts, as though they are true, in accordance with settled principles of appellate review.”).

the mission – *i.e.*, the charitable purpose – of the College has been to educate *women* – *not women and men*. As stated in the first Prospectus of R-MWC:

We wish to establish in Virginia a college where our young *women* may obtain an education equal to that given in our best colleges for young men, and under environments in harmony with the highest ideals of *womanhood*; where the dignity and strength of fully-developed faculties and the charm of the highest literary culture may be acquired by our *daughters*. . . .

J.A. 105 (Complaint, ¶ 14) (emphasis added).

Thus, the initial endowment raised in 1891 by Dr. William Smith was for the sole purpose of establishing a woman’s college in Virginia, as illustrated by Dr. Smith’s remarks to Randolph-Macon’s Board of Trustees in June of 1891: “[Y]our Board will have established for our young women a College with assets equal to those secured for the College for young men.” J.A. 105 (Complaint, ¶ 15). Moreover, through the years, the College has taken pains on numerous occasions to reaffirm its single-sex purpose, not only by the unequivocal expression of intent written into its name, but in equally clear statements found in numerous legal documents. For example:

- The 1952 Certificate of Incorporation reaffirmed R-MWC’s primary purpose:

(1) To conduct, maintain and operate a college, or university, or institution, *under the name of Randolph-Macon Woman’s College*, for the higher education and culture, *primarily of women*, and for their instruction and training in the *liberal arts*, language, literature, sciences and other branches of learning usually taught in institutions of like character; and for the inculcation among its students of right character, service and conduct. . . .

J.A. 106 (Complaint, ¶ 17) (emphasis added).

- In a 1953 deed, the Trustees of Randolph-Macon College transferred legal title of the Lynchburg campus to The Trustees of Randolph-Macon *Woman's* College and, in the documents, reiterated R-MWC's status as "a college primarily for the education of women. . . ."

J.A. 106 (Complaint, ¶ 18) (emphasis added).

- In 1983 and, again, in 1990, the Articles of Incorporation were amended and, each time, the Articles, as amended, continued to reaffirm R-MWC as "a college . . . *under the name of Randolph-Macon Woman's College*, for the higher education . . . *primarily of women.*"

J.A. 106 (Complaint, ¶ 19).<sup>5</sup>

The single-sex status of the College has been a material inducement to many donations of money and valuable property. As explained in the Complaint, all gifts and donations made to the College since the initial endowment in 1891 – including real estate and personal property – have been in support of R-MWC's primary purpose of educating the individual woman.<sup>6</sup> J.A. 106 (Complaint, ¶ 16). For example:

- Among the real estate owned by the College in Lynchburg is a one-hundred-acre riding center and arena, which support a riding program with a long history of excellence. J.A. 106 (Complaint, ¶ 20).
- The College also owns real estate in Reading, England, which is used to house young women from the College who study abroad at the University of Reading during their junior year. J.A. 107 (Complaint, ¶ 21).

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<sup>5</sup> Thus lodged in the Articles of Incorporation as part of the charitable purpose, the name of the institution – "Randolph-Macon *Woman's* College – helps give content to the purpose embodied in the phrase, "primarily for women." At a *woman's* college, the presence of any male students must be no more than incidental.

<sup>6</sup> These factual allegations also coincide with Virginia Code § 57-57(N), which provides that, "with respect to funds raised by general appeals" by a charitable or civic organization, such funds must be used for "the general purposes of the charitable or civic organization on whose behalf the solicitation was made." In this case, R-MWC's general purpose is to provide single-sex higher education for women.

- All of this property – in Lynchburg and England – was bought, improved and maintained by funds donated to R-MWC for the purpose of supporting the College as a liberal arts, single-sex educational institution. J.A. 106-07 (Complaint, ¶¶ 20-21).
- There are numerous works of art housed in various locations across the R-MWC campus and in the College’s Maier Museum. These works of art – as well as the facilities to house such works – were also bought, improved and maintained by funds donated to R-MWC for the purpose of supporting the College as a liberal arts, single-sex educational institution. J.A. 107 (Complaint, ¶ 22).

**The College Has the Ability to  
Adhere to its Original Charitable Purpose.**

A Virginia circuit court could enter an order approving a *change* in the original charitable purpose *if* the Board of Trustees could show that it was either impossible or impracticable to adhere to that original purpose. *See* Va. Code § 55-268.7. However, the Board has never petitioned a circuit court for such an order or even attempted to make such a showing. J.A. 109 (Complaint, ¶ 35). On the contrary, the fact is that it is *neither impossible nor impracticable* for R-MWC to adhere to its original charitable purpose of providing liberal arts higher education primarily for women under the name Randolph-Macon Woman’s College. J.A. 109 (Complaint, ¶ 36). In other words, given the Complaint, the College must be presumed to have the ability to *continue* providing young women with a liberal arts education in a *single-sex* environment, just as it has done for well over a century. The Board has simply chosen to do something different.

**The Board Decided to Abandon  
the Original Charitable Purpose.**

Despite the ability of the College to adhere to its original purpose, the current Board of Trustees voted to abandon that purpose and to divert the assets of the College to a new purpose, a co-educational institution. This is not a decision about details. It is a

decision that goes to the heart of this century-old woman's college. It is a decision plainly inconsistent with the original charter of the College as well as the Articles of Incorporation, as amended and restated in 1953 and 1990. It is also inconsistent with the intent of the donors who contributed money and property to the College. The Board's actions include the following:

- The Board voted on September 9, 2006, to amend the Articles of Incorporation to delete the key phrase "primarily of women" and to replace it with the phrase "men and women." J.A. 107 (Complaint, ¶ 23).
- The Board then voted to adopt a so-called "Strategic Plan" calling for co-education and the implementation of an undefined "global honors" program. J.A. 107 (Complaint, ¶ 23).
- The amendments to the Articles were approved by the State Corporation Commission – a ministerial function – on September 19, 2006. J.A. 108 (Complaint, ¶ 26).
- In mailings to high school students and on its web site, the Board has forecast that co-education and a still undefined "global honors" curriculum will be implemented in the fall of 2007. J.A. 108 (Complaint, ¶ 29).
- The Board has taken steps toward changing the name of the College from Randolph-Macon Woman's College to a new name consistent with its intention to change the College into a co-educational institution. J.A. 109 (Complaint, ¶ 32).
- Even though the Riding Center and the Reading property were acquired by funds donated for the purpose of supporting the College as a single-sex institution, the Board has taken significant steps toward selling assets from those properties in order to fund the physical changes that the campus would require to change the College into a co-educational institution. J.A. 108 (Complaint, ¶ 30).
- Despite the purpose of the funds by which the works of art were acquired – the education of women – the Board has taken significant steps toward selling off the Maeir Museum's permanent collection to make possible the changes required for the admission of men. J.A. 108 (Complaint, ¶ 31).

In sum, the Complaint shows that the Board's actions are not only unnecessary, they are wholly contrary to the College's original and on-going express charitable

purpose as an institution created primarily to educate women in a liberal arts curriculum under the name, “Randolph-Macon Woman’s College.”

**The Plaintiffs Will Suffer Harm from the Board’s  
Decision to Abandon the Original Charitable Purpose.**

Among the Appellants are several students at the College. Ranging from freshmen to juniors at the time the petition was filed, they are now sophomores through seniors. As young women who deliberately chose to attend a single-sex college, they are direct, current beneficiaries of the original purpose of the College. Moreover, because co-education was scheduled to begin – and now, has begun – before their anticipated graduation dates, they are each individually and directly harmed by the Board’s decision. J.A. 104, 108 (Complaint, ¶¶ 4, 5, 7, 8, 9, 29). As a result of the Board’s action, each suffers harm different from that suffered by the public generally.

The Appellants also include two donors to the College. One of them, Alice Dammeyer Priebe, is a fifth-generation graduate of R-MWC who has donated, *inter alia*, \$40,000 toward scholarships at her single-sex alma mater. J.A. 105 (Complaint, ¶ 11). The other donor, Roy Clinton Johns, is married to a graduate of R-MWC and has donated both money and artwork to the College. J.A. 105 (Complaint, ¶ 12). These donations were made in support of the College’s primary purpose of educating women, and the donors are harmed by the Board’s decision to abandon that purpose and to divert the College’s resources – including their donations – to a different purpose. J.A. 106 (Complaint, ¶ 16). Like the student-Appellants, the donor-Appellants will suffer harm different from that suffered by the public generally.

## ARGUMENT

### **A. The Board of Trustees Has Breached Its Legal Duties by Diverting the Assets of R-MWC from the Charitable Purpose Set Forth in the Governing Documents of the College.**

Reduced to their essentials, the allegations in this case establish three basic facts. Indisputable on a demurrer, those facts are as follows: First, as shown by its governing documents, the original and on-going charitable purpose of the College is to provide liberal arts education – primarily for *women* – under the name “Randolph-Macon Woman’s College.” Second, it is neither impossible nor impracticable for R-MWC to adhere to that purpose. Third, the Board of Trustees has nevertheless acted to divert the charitable assets of the College to a different purpose.

As the following discussion will show, such a diversion of charitable assets is unlawful. The Virginia statutes that are implicated include Virginia Code § 2.2-507.1, and the Virginia Uniform Trust Code (Virginia Code § 55-541.01 *et seq.*). *If* the Board could make the requisite showing of necessity, it could obtain a court order authorizing its actions under the *cy pres* doctrine. *See* Va. Code § 55-268.7. However, it has not attempted to make such a showing or to obtain such an order. Unless and until it does so, its actions should be enjoined. By sustaining the demurrer, the trial court erred.

#### **1. The Board Has Breached Its Duties Under Virginia Code § 2.2-507.1.**

##### **a. Critical Background: The JOCO Case**

A short time ago, this Court was confronted by a case in which the directors of a charitable corporation unilaterally changed the purpose of the charity and then used charitable resources to pursue that new purpose. At that time, three sitting Justices of this Court expressed their conclusion that “a charitable corporation under the circumstances

is, essentially, a trust.” *Commonwealth v. The JOCO Foundation*, 263 Va. 151, 558 S.E.2d 280 (2002) (Lemons, J., joined by Koontz and Kinser, JJ., dissenting). Although these views were expressed in a dissenting opinion, it would be a mistake to infer that the majority expressed a view contrary to that particular statement by the dissent. It did not. The *JOCO* majority was decidedly *undecided* on that question and based its decision on other grounds. Instead of deciding the question, the majority simply took note of the question whether a “nonstock corporation devoted to charitable purposes ‘essentially’ is a charitable trust,” then quoted two treatises suggesting that the answer is unclear:

- IVA Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 348.1, at p. 23 (4th ed. 1989) (“The truth is that it cannot be stated dogmatically that a charitable corporation either is or is not a trust”);
- Edith L. Fisch, *et al.*, *Charities and Charitable Foundations* § 134, at p. 132 (1974) (“Despite its fundamental importance no clear answer or decisive criterion exists for resolution of the question . . . whether any particular asset of a charitable corporation or association is held absolutely or in trust”).

*Quoted in JOCO*, 263 Va. at 161, 558 S.E.2d at 284-85 (Compton, S.J., joined by Carrico, C.J., Lacy and Keenan, JJ., majority opinion).

Having left the issue in legal limbo, the majority then decided in favor of the corporate defendant by holding that the circuit court had no jurisdiction to provide the relief requested by the Attorney General. Also discussed, but not clearly resolved, was whether the Attorney General lacked standing to seek such relief. *Id.* at 160, 558 S.E.2d at 284 (disagreeing with Attorney General, but mentioning only the circuit court jurisdiction issue in the holding of the case).

**b. The Enactment of Virginia Code § 2.2-507.1**

Announced on January 11, 2002, the *JOCO* case provoked such strong reaction that, within days after the decision was announced, efforts were initiated in the General Assembly to overturn it. On January 18, 2002, a leading State Senator, Walter Stosch, introduced SB 676, which promptly passed both houses and was signed into law by the Governor on April 8, 2002. The legislation reversed the majority decision and wrote into law the views of the dissent, including its view that a charitable corporation is, essentially, a trust.

The legislation was composed of three sentences. The first sentence – and the one that is most pertinent here – adopted the three-Justice view that a charitable corporation is essentially a trust. This sentence read:

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 *donor's intent as expressed in governing documents* or by other applicable law.

2002 Va. Acts, ch. 792 (codified at Va. Code § 2.2-507.1). The second sentence performed a different task. It reversed any suggestion by the majority that the Attorney General lacked standing to seek judicial relief.<sup>7</sup> Similarly, the third sentence reversed

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<sup>7</sup> The second sentence read:

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.

2002 Va. Acts, ch. 792 (codified at Va. Code § 2.2-507.1).

the holding that circuit courts have no jurisdiction to hear such matters.<sup>8</sup>

This analysis of the relationship between *JOCO* and § 2.2-507.1 is not only straightforward, it is consistent with the official summary of the legislation, which describes the law as “overruling the decision in *Commonwealth of Virginia v. The JOCO Foundation*.” See Legislative Information Service, SB 676 (2002), summary as passed, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=021&typ=bil&val=sb676> (last visited June 12, 2007). Not surprisingly, commentators agree. See, e.g., Michael W. Peregrine & James R. Schwartz, *Key Nonprofit Corporate Law Developments in 2002*, 12 Health Law Rep. (BNA) 324 (2003) (describing § 2.2-507.1 as “enacted . . . to overturn the decision of the Supreme Court in . . . *JOCO* . . .”); Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 Ind. L.J. 937, 965-966 (2004) (“Within months [after *JOCO*] the Virginia legislature overturned this decision and explicitly applied charitable trust doctrine to nonprofit corporations.”).

Applying this legal principle to the case at hand, it is obvious that the crucial first sentence of § 2.2-507.1 applies to the College. R-MWC is a charitable corporation that is both incorporated in the Commonwealth and conducting business here. “A court is

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<sup>8</sup> The third sentence read:

The Circuit Courts shall have the same subject matter jurisdiction over matters pertaining to assets of charitable corporations, incorporated in or doing any business in Virginia, as the circuit courts have with respect to assets held by unincorporated charitable trusts and other charitable entities, including the power to require accountings, appoint receivers, award damages and enter injunctive relief against such charitable corporations, their officers, directors, agents, employees and others as may be necessary to protect the public interest in such assets.

2002 Va. Acts, ch. 792 (codified at Va. Code § 17.1-513.01).

bound to follow the plain meaning of a statute.” *Blake Constr. Co. v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 575, 507 S.E. 2d 711, 719 (2003) (citations and internal quotation marks omitted). Thus, under the statute, the College’s “assets . . . shall be deemed to be *held in trust* for the public.” Va. Code § 2.2-507.1 (emphasis added). Moreover, those assets are held in trust, *not* for whatever purpose its trustees may choose, but specifically for “such purposes as are established by the donor’s intent as expressed in *governing documents*. . . .” *Id.* (emphasis added). The governing documents of any corporation are, most fundamentally, its articles of incorporation. And, until the change now at issue, the Articles of Incorporation of this charitable corporation consistently have expressed its purpose as being “[t]o conduct, maintain and operate a college . . . under the name Randolph-Macon *Woman’s College*, for the higher education . . . *primarily of women*. . .” J.A. 106 (Complaint, ¶¶ 17-19) (emphasis added).

For the law to require trust assets to be used in a particular manner is to impose a legal obligation on the *trustees* of those assets. By abolishing the established purpose of the College and diverting the assets of the College to a new and different purpose, the Board of Trustees breached that obligation.<sup>9</sup> No other analysis is needed. The statute enacted by the General Assembly in response to *JOCO* was sufficient to impose on the

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<sup>9</sup> Contrary to the argument advanced to the trial court by the Board of Trustees, a corporate charity cannot comply with § 2.2-507.1 by simply changing its articles of incorporation to match the new purpose favored by the corporate board. The statute is not so easily evaded. Changing the corporate articles as part of an asset diversion scheme was what was at issue in *JOCO*. See *JOCO*, 263 Va. at 157, 558 S.E. 2d at 282. It was part of the reason the Attorney General brought suit and it is part of the problem the General Assembly sought to prevent when it enacted § 2.2-507.1. If it were different, the statute essentially could be ignored by any board of trustees that complied with the procedural requirements for amending its governing documents.

Board of Trustees – in its corporate capacity – a clear standard of conduct, which the Board has clearly violated.

**c. The 2004 Amendment to Virginia Code § 2.2-507.1**

The conclusion that the Board acted unlawfully is not changed by the 2004 amendment to the statute. Under that amendment, two changes were made. First, the key sentence was slightly modified to read as follows:

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 ~~donor's intent as expressed in~~ governing documents *of such charitable corporation, the gift or bequest made to such charitable corporation*, or other applicable law.

Va. Code § 2.2-507.1 (as amended by 2004 Va. Acts, ch. 289).<sup>10</sup> This amendment underscored the point that, in the absence of any instructions accompanying a gift or bequest, the “governing documents” that are to be consulted are the governing documents *of the charitable corporation*. Real estate, art, money or other property given to R-MWC, without any instructions on their use, were impressed with the purpose found in the Articles of Incorporation, as those governing documents existed at the time of the gift.<sup>11</sup>

As part of the same 2004 legislation, a second amendment – Subsection B – also was adopted. This amendment provides that:

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<sup>10</sup> The strikethrough indicates the words that were deleted by the 2004 amendment; the italics indicates the words that were added.

<sup>11</sup> This amendment is consistent with the requirements found at Virginia Code § 57-57(N). *See supra* at 8, n. 6.

Nothing 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.

2004 Va. Acts, ch. 289 (codified as Va. Code § 2.2-507.1(B)) (emphasis added).

In explaining its decision to sustain the Demurrer, the trial court said that there is “an inherent conflict between the two sections of the statute, and it’s up to the Court to interpret that.” J.A. 362-63 (Jan. 23, 2007 hearing). In resolving that conflict, the trial court essentially agreed with the Board of Trustees that, because of Subsection B, trustees of charitable corporations need not act in the best interest of the *beneficiaries*; they must act in the best interest of the *corporation*, just as directors of other corporations are obliged to act in the best interests of their corporations. *See* J.A. 123 (Brief in Support of Defendant’s Demurrer) (citing Va. Code § 13.1-870(A)); J.A. 231 (Letter Opinion) (adopting rationale of the Board).

The interpretation adopted by the trial court is flawed. “[I]t is the settled rule . . . that where two acts dealing with the same subject can be harmonized, it is the duty of the court to give effect to both.” *Tresnon v. Board of Sup’rs*, 120 Va. 203, 205, 90 S.E. 615, 615 (1916). Rather than giving effect to both parts of § 2.2-507.1, the trial court adopted an interpretation that renders meaningless the first sentence of the statute. If directors of a corporate charity could alter the purposes for which the corporation was founded, on the theory that the corporation would be better off if they did so, then there would be no work left for that sentence, which says that those assets are to be “held in trust for such purposes as are established by the governing documents.” As this Court repeatedly has explained, “every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary.” *Sansom v. Board of Supervisors*, 257 Va. 589, 595, 514 S.E.2d 345, 348 (1999) (citing *Hubbard v. Henrico Ltd.*

*Partnership*, 255 Va. 335, 340-41, 497 S.E.2d 335, 338 (1998); *Sims Wholesale Co. v. Brown-Forman Corp.*, 251 Va. 398, 405, 468 S.E.2d 905, 909 (1996); *Raven Red Ash Coal Corp. v. Absher*, 153 Va. 332, 335, 149 S.E. 541, 542 (1929)).

Moreover, even if some meaning might still be found for the first sentence of the statute, the interpretation adopted by the trial court would vitiate the *central purpose* of the statute. This, too, would violate a basic canon of statutory construction:

When we know the object of a statute and are called upon to construe a phrase or a sentence which, standing alone, may be susceptible of different interpretations, . . . an interpretation . . . which will carry into effect the object sought to be accomplished by the statute, . . . should be adopted, in preference to one which would be equally consistent with the language used, standing alone, but which would *defeat, or tend to defeat, the manifest intent of the legislature.*

*Harris v. Commonwealth*, 142 Va. 620, 625, 128 S.E. 578, 579 (1925) (emphasis added).

In enacting § 2.2-507.1, the manifest interest of the legislature was to reverse the decision in *JOCO* and, thus, prevent the directors of a corporate charity from diverting assets to a purpose different from the one established by the applicable governing documents. Stated differently, the statutory purpose of § 2.2-507.1 was to give those charitable purposes the force and effect of law. Whatever interpretation may be placed on Subsection B, it must be an interpretation that does not defeat – or even “tend to defeat” – those purposes. Because the interpretation adopted by the trial court would have such a prohibited effect, it must be rejected.

The trial court’s opinion also glosses over the fact that the fundamental interest of a charitable corporation is not to serve itself, but to serve its charitable purpose. If the directors abandon that purpose in order for the organization to be bigger or richer or more popular – or, as here, simply to serve a different purpose – then the directors are not acting in the interests of the *beneficiaries*, nor are they acting in the corporation’s

*legitimate* interests. For example, a charity founded to raise money for the orphans in Darfur might decide that it would attract more interest – and raise more money – if it changed its purpose and sponsored educational seminars on rare Hawaiian wildlife. But that does not mean that the corporation can take assets having the purpose of aiding starving children and divert them to the amusement of tropical tourists. It was this sort of change in charitable purpose that was at issue in *JOCO*.<sup>12</sup> It was this sort of change that the General Assembly enacted § 2.2-507.1 to guard against. Thus, there is no dichotomy between serving the interest of the beneficiaries and serving the interests of the corporation. Insofar as the beneficiaries represent the tangible objects of the charitable purpose, the interests of the beneficiaries *are* the interests of the corporation.<sup>13</sup>

In marked contrast with the approach followed by the trial court, any apparent conflict between the two parts of § 2.2-507.1 can be readily reconciled in a manner that allows room for each. The “standard of conduct” to which Subsection B refers is found at Virginia Code § 13.1-870 (general standards of conduct for directors) and is intended to establish a standard by which a director’s *individual* liability will be judged. *See, e.g., Lake Monticello Owner’s Ass’n v. Lake*, 250 Va. 565, 571, 463 S.E. 652, 656 (1995)

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<sup>12</sup> In *JOCO*, the original articles of incorporation called for the JOCO Foundation to use its proceeds for the benefit of charities in the United States and, particularly, charities in the Roanoke, Virginia area. Following a change in the articles of incorporation by the board of directors, proceeds were used in the Dominican Republic to construct a school and pay for travel to a resort in that foreign country. *JOCO*, 263 Va. at 156-57, 558 S.E.2d at 281-82.

<sup>13</sup> To equate the interests of the beneficiaries with the interests of the charitable corporation would not necessarily be persuasive *if* it were impossible or impracticable to carry out the charitable purpose; however, on demurrer, it must be assumed that it is *not* impossible or impracticable for the Board of Trustees to carry out the original purpose of R-MWC as a college for women.

(holding that “a corporate director has no individual liability for business decisions made ‘in accordance with his good faith judgment of the best interests of the corporation.’”) (citing § 13.1-870(A)). In the case at bar, no individual liability is sought. Thus, § 13.1-870 is not implicated.

The Board has suggested that – even in the context of § 2.2-507.1 – the “standard of conduct” found in §13.1-870 is intended not just to address individual liability, but also corporate powers. Appellants disagree. However, even if § 13.1-870 were construed to address corporate powers, it would not help the Board. Its decision to divert the assets of the College to a new purpose exceeds the limits of any discretion afforded to corporate directors by § 13.1-870. As this Court has explained:

[A] necessary predicate for the application of the business judgment rule is that the directors decision be that of a *business judgment* and not a decision... which construes and applies a statute and a corporate bylaw. In the latter instance, a trial court reviews the decision just as it would review a similar decision by any other party.”

*Lake Monticello*, 250 Va. at 571, 463 S.E.2d at 656 (emphasis added). Indeed, “even under [the] business judgment rule, [the] action of [a] corporation must be in accordance with *law* and *corporate powers*.” *Id.* (emphasis added) (citing *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 857-58, 102 S.E.2d 345 352-53 (1958)). In other words, the discretion – and protection – provided to directors under § 13.1-870 applies *only* within the parameters established by law and corporate powers.

With that standard in hand, it is clear that the very point of § 2.2-507.1 is to *limit* the corporate powers of a charitable corporation. Under that statute, assets must be used for “such purposes as are established by the governing documents of such charitable corporation. . . .” Here the governing documents provide for the education of women, not

women and men. So long as the Board acts within the parameters of single-sex education – and any other parameters in the governing documents – the Board has the benefit of the “standard of conduct” cited by Subsection B. But, that is not what the Board did. The Board’s actions, however altruistic, violate the parameters set by the governing documents and, thus, cannot claim protection under Subsection B.

In sum, the Board of Trustees has a duty under Virginia Code § 2.2-507.1 to apply the assets of Randolph-Macon Woman’s College to provide higher education for *women*. By diverting those assets to a co-educational purpose, the Board has breached that duty. By sustaining the Board’s demurrer, the trial court erred.

**2. The Board Has Breached Its Duties Under the Virginia Uniform Trust Code.**

In light of the duties imposed by Virginia Code § 2.2-507.1, the Board of Trustees would be acting unlawfully even if the General Assembly had never adopted the Virginia Uniform Trust Code. Even so, the enactment of the VUTC greatly compounds the problem for the Board.<sup>14</sup> It creates another source of legal duties that the Board is obligated to follow – duties that the Board is violating. For this reason, too, the trial court erred in sustaining the Demurrer.

The threshold question – and the one on which the trial court went astray – is whether the VUTC applies to the College. The answer is found in Virginia Code § 55-541.02. As that statute explains, there are two avenues by which the VUTC may apply to a corporate charity. First, there are the specific criteria of § 55-541.02(A); second, there

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<sup>14</sup> The VUTC was enacted by the General Assembly in 2005 with an effective date of July 1, 2006. *See* 2005 Va. Acts, ch. 935.

is the “catch-all” provision of § 55-541.02(B). Each of these subsections will be addressed in turn.

**a. Subsection 55-541.02(A)**

Subsection A explains when the VUTC applies through specific criteria:

This chapter applies to express inter vivos trusts, charitable or non-charitable, and [1] *trusts created pursuant to a statute*, judgment or decree that [2] *requires the trust to be administered in the manner of an express trust*.

Va. Code § 55-541.02(A) (emphasis added). Both of these highlighted criteria are satisfied here.

First, it is clear, in Virginia, that a charitable corporation is a trust. At the time *JOCO* was decided in early 2002, a majority of the Supreme Court was manifestly unwilling to make such a statement. *See JOCO*, 263 Va. at 161; 558 S.E.2d at 284-85 (declining to agree with Attorney General that a charitable corporation is, essentially, a trust). Then, the General Assembly enacted § 2.2-507.1 and, by adopting the views of the *JOCO* dissent, essentially decreed that corporate charities are trusts, thereby satisfying the statutory criterion that the trust be “created pursuant to statute.”<sup>15</sup>

One need not rely on § 2.2-507.1, however, in order to conclude that the College is “a trust created pursuant to statute.” In 1839, the General Assembly enacted a statute which, still on the books, provides as follows:

Every gift, grant, devise or bequest which, since April 2, 1839, has been, or at any time hereafter shall be, made for . . . education, and every gift, grant, devise or bequest hereafter made for charitable purposes, whether made in any case to a body corporate or unincorporated, or to a natural

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<sup>15</sup> Contrary to the suggestion of the Board of Trustees, the fact that the College existed as a *corporation* before 2002 is not relevant. The point is that, if the College were not already a trust and subject to trust principles, then the *statute* gave the corporation its status as a *trust*.

person, shall be as valid as if made to or for the benefit of a certain natural person. . . .

Va. Code § 55-26.1 (1839 Va. Acts, p. 11).

The purpose of this legislation was “[to] validate charitable trusts for education, which were not permitted prior to this legislative approval.” *Sweet Briar Institute v. Button*, 280 F. Supp. 312, 313 (W.D. Va. 1967) (three judge court); *also see, e.g., Moore v. Perkins*, 169 Va. 175, 192 S.E. 806 (1937) (discussing entities created pursuant to this statute as “trusts”). In 1891, the founders of the College assembled its first endowment and created that institution as a corporation, and also as a trust created pursuant to the 1839 statute. Clearly, the first criterion of § 55-541.02(A) is met.

The second criterion of § 55-541.02(A) is met as well. It is black letter law that an express trust must be administered in a manner that complies with the purposes found in the documents creating the trust. *See, e.g., Pracht & Co. v. Lange*, 81 Va. 711, 722 (1886) (“The power of a trustee is limited by the instrument creating the trust.”); 19 M.J., *Trusts and Trustees*, § 87 (a trustee “can only do with the trust property what the instrument either in express terms or by necessary implication authorizes him to do.”). In the same way, the effect of § 2.2-507.1 is that a charitable corporation must use its assets for the purposes found in applicable “governing documents.” By requiring compliance with those governing documents, that statute requires the trust to be administered in “the manner of an express trust.” Va. Code § 55-541.02(A).

This straightforward reading of the scope of the VUTC – as explained by § 55-541.02(A) – is strengthened by the official commentary to the Model Uniform Trust Code. This commentary describes the model statute as “comprehensive” and juxtaposes the “express trusts” that it covers with the “resulting and constructive trusts” that it

excludes. *See* Uniform Trust Code, § 102, Comment (2005).<sup>16</sup> The trust created by § 2.2-507.1 is neither a “resulting trust”<sup>17</sup> nor a “constructive trust.”<sup>18</sup> By process of elimination, a trust created by § 2.2-507.1 is an “express trust” for purposes of the VUTC.

**b. Subsection 55-541.02(B)**

Even if the College were not an express trust within the meaning of Subsection A, it would still be appropriate to apply the VUTC under Subsection B. This is because of the statute’s permissive “catch-all” clause:

Notwithstanding subsection A, a court, in exercising jurisdiction over the supervision or administration of trusts, may determine that application of the policies, procedures or rules of the Code is appropriate to resolution of particular issues.

Va. Code. § 55-541.02(B). As admitted by the Demurrer, the College has accumulated its assets by holding itself out for more than a century as a woman’s college and by obtaining gifts of cash, art and real estate from donors who relied upon the College’s representations as to its purpose. J.A. 106-07. The equities created by such reliance are

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<sup>16</sup> Official commentary to the model law is persuasive not only because it was written by the drafters of that model, the National Conference of Commissioners of Uniform State Laws, but also because adherence to the official commentary fosters the goal of interstate uniformity of construction, which the General Assembly sought to achieve when it adopted the VUTC. *See* Va. Code § 55-551.01.

<sup>17</sup> “For a *resulting trust* to arise, the alleged beneficiary must pay for the property, or assume payment of all or part of the purchase money before or at the time of purchase, and have legal title conveyed to another without any mention of a trust in the conveyance.” *1924 Leonard Rd., L.L.C. v. Van Roekel*, 272 Va. 543, 552, 636 S.E.2d 378, 383 (2006) (emphasis added).

<sup>18</sup> “A *constructive trust* is created by operation of law and is independent of the intention of the parties. It may arise from breach of a fiduciary duty as well as from actual fraud or unconscionable conduct amounting to constructive fraud.” *Greenspan v. Osheroff*, 232 Va. 388, 400 351 S.E.2d 28, 36 (1986) (emphasis added).

reinforced by the provisions of Virginia Code § 57-57(N), which expressly prohibits the sort of fund diversion contemplated by the trustees here. *See supra* at 8, n. 6.

Thus, one way or the other, the VUTC applies, and the Board of Trustees has an obligation “[to] administer the trust . . . in accordance with its terms and *purposes* and the interests of the beneficiaries.” Va. Code § 55-548.01 (emphasis added). Breach of that duty subjects the Board to a variety of legal remedies, including an order compelling the trustees to perform their duties, enjoining the trustees from committing a breach, and providing other appropriate relief. Va. Code § 55-550.01. These are the equitable remedies that the donors and beneficiaries seek here.

**B. The Donors and Beneficiaries of R-MWC Have Standing to Challenge the Board of Trustees’ Decision to Divert the Assets of the College.**

The trial court ruled that, even if the actions of the Board of Trustees were unlawful, there was nothing *these* plaintiffs could do about it. According to the trial court, only the Attorney General has standing; donors and beneficiaries do not. This also is error.

The Appellants know of no statement by any Virginia Attorney General claiming to have the exclusive prerogative thrust upon that office by the trial court. Yet, the trial court’s decision has the effect of concentrating power in the hands of that single state official, to the detriment of the individual citizens who are most directly harmed by the diversion of charitable assets. It is not just the College that is affected. The precedent created by the trial court’s decision sweeps very broadly and, unless reversed, will undermine the ability of other charitable donors and beneficiaries to hold trustees accountable under Virginia law.

This is not the first case to consider who has standing to challenge the trustees of a private women’s college in Virginia. In *Sweet Briar, supra*, at 24, a three-judge federal court looked to Virginia law and rejected the idea that only the Commonwealth’s Attorney or Attorney General has power to enforce the terms of a charitable trust. “Otherwise,” the court said, “these officials would become the sole judges of the correctness of trust administration.” 280 F. Supp. at 318 n.2. Created for a wide variety of charitable purposes – and often for the advancement of the poor and disadvantaged – charitable trusts are too important to be afforded protection only if and when the Attorney General is able and willing to go to court. This is an issue on which the court below departed from precedent and greatly erred.

**1. The Petitioners Have Standing Under the Common Law.**

In 1895, just four years after the College was founded, this Court decided a case having direct bearing on the standing of those who now seek to preserve the College’s original purpose. The case was *Clark v. Oliver*, 91 Va. 421, 22 S.E. 175 (1895), and there the Court had this to say:

The question here is, not as to the inherent powers of a court of equity to compel a due execution of a trust, charitable or otherwise. Its power to that end is ample. The true question is, by whom the exercise of those powers may be invoked. In our opinion, . . . ***[the court’s jurisdiction] with respect to the disposition and control of this fund, must be called into active exercise either*** by the Attorney General, acting upon behalf of the public, or by the trustees charged with its custody and administration, or ***by some person having a beneficial interest in the object of the trust.***

91 Va. at 427-428, 22 S.E. at 177 (emphasis added). *See infra* at 32 (noting that the eighteen jurisdictions to have considered the question recognize special interest standing). There is no doubt that the young women who currently attend the College

have a beneficial interest in the object of the trust.<sup>19</sup> See, e.g., *Ettlinger v. Trustees of Randolph-Macon College*, 31 F.2d 869, 871 (4th Cir. 1929) (holding that students are beneficiaries of nonprofit charitable corporation operating educational institution notwithstanding payment of tuition). Thus, under the common law – as explicated by *Clark* – the student-plaintiffs have standing to bring this lawsuit.<sup>20</sup>

It also should be noted that, while the *Clark* decision is over a century old, it has never been overruled. Indeed, it remains a source of authority to which Virginia courts – including this Court – have recently turned. See *Tauber v. Commonwealth*, 255 Va. 445, 451, 499 S.E.2d 839, 842 (1998) (citing *Clark*); *Richlieu v. Kirby*, 48 Va. Cir. 260, 262 (Fairfax County, 1999) (rejecting the view that “the Attorney General . . . is the only person with standing to sue in the event of a breach of a fiduciary duty by a nonprofit corporation or its officers or directors.” (citing *Tauber* and *Clark*). Similarly, the three-Justice dissent in *JOCO* relied on the same passage of *Clark* quoted here. *JOCO*, 263 Va. at 166, 558 S.E.2d at 287. Moreover, the *JOCO* majority did not repudiate *Clark* or the trust law principles it outlines. Instead, the majority simply reached the conclusion that a charitable corporation is not subject to trust law (a conclusion that § 2.2-507.1 now has overturned).

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<sup>19</sup> Young women who are college bound but who have not yet applied or been accepted at Randolph-Macon Women’s College may also have standing at common law for the reasons given in *Hooker v. Edes Home*, 579 A.2d 608 (D.C. App. 1990), discussed *infra* at 32. However, this is not an issue the court needs to reach in this case.

<sup>20</sup> While explaining that beneficiaries have standing, the decision in *Clark* also rejected the argument that the donors have standing. 91 Va. at 427-28, 22 S.E. at 177. However, standing for the donor-plaintiffs is now supplied by the VUTC, which grants standing to donors as “settlers.” See *infra* at 30.

The trial court disregarded *Clark*. Instead, it adopted the Board's argument that § 2.2-507.1 gave the Attorney General *exclusive* standing. This was error. The purpose of § 2.2-507.1 was not to adopt a comprehensive statutory scheme; it was to reverse *JOCO*. Its purpose was to clarify that the Attorney General has the standing that *JOCO* suggested he lacked, not to deny standing to others to whom the common law had previously given it. The purpose of the statute was not to derogate the common law, but to restore it.

Virginia is, of course, a common law state. *See* Va. Code § 1-200 (adopting English common law); *Long v. Vlastic Food Products Co.*, 439 F.2d 229, 231 (4th Cir. 1971) (“Virginia courts have applied this provision to justify reliance on contemporary as well as preenactment common law doctrines.”). Virginia's common law rule with respect to the standing of beneficiaries to enforce charitable trusts is found in *Clark*, and “[a]lthough the General Assembly can abrogate the common law, its intent to do so must be ‘plainly manifested.’” *Wackwitz v. Roy*, 244 Va. 60, 65 418 S.E.2d 861, 864 (1992). Section 2.2-507.1 does not say that the Attorney General's standing shall be “exclusive.” Moreover, the circumstances of enactment point to a much more limited purpose, *i.e.*, reversing *JOCO* and making sure that the Attorney General's standing was indisputable. It would be ironic indeed to interpret that statute now to deprive beneficiaries of the standing that was recognized in *Clark* over a century ago and never rejected by this Court at anytime thereafter. Thus, it cannot be said that the General Assembly “plainly manifested” a purpose to reverse the common law rule found in *Clark* and deprive beneficiaries of their right to bring suit. On this point, *Clark* remains good law.

**2. The Petitioners Have Standing Under the Virginia Uniform Trust Code.**

Even if § 2.2-507.1 could be read to deny standing to Appellants, the VUTC must be read to give it back to them. Taking effect in July of 2006, the VUTC contains a section expressly devoted to the enforcement of charitable purposes, § 55-544.05. Included in that statute is a provision that “[t]he settlor of a charitable trust, *among others*, may maintain a proceeding to enforce it.” Va. Code § 55-544.05(C) (emphasis added). This broad grant of standing has two implications for the case at bar. First, the donor-plaintiffs have standing because, under the VUTC, each donor to a trust is a settlor. *See* Va. Code § 55-541.03 (defining “Settlor” as “a person . . . who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution. . . .”).

Second, the words “among others” are significant. Written broadly and in the plural, such language is not what the General Assembly would have used if the only “other” person it had in mind was the Attorney General. Instead, these words mean what the drafters of the model law say they mean: “The grant of standing to the settlor does not negate the right of the state attorney general *or persons with special interests* to enforce either the trust or their interests.” *See* Uniform Trust Code, § 405, Comment (2005) (emphasis added).

As explained in one recent decision, “[t]he ‘special interest’ test is the current, common-law view of standing to enforce charitable trusts, adopted by the Restatement (Second) of Trusts . . . , leading commentators and other state courts.” *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 91 P.3d 1019, 1025 (Ariz. Ct. App. 2004).

As the *Schalkenbach* court went on to explain, “[a] suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, *or by a person who has a special interest* in the enforcement of the charitable trust. . . .” *Id.* (quoting Restatement (Second) of Trusts, § 391 (1959)).

As current students at the College, the student-plaintiffs are a small, sharply defined class of beneficiaries who have a “special interest” in its enforcement distinct from that of the general public.<sup>21</sup> They chose R-MWC, in part, because of the single-sex environment it offered them. Now, having turned down other opportunities and having embarked on their academic careers at the College, they are seeing the benefits of that choice taken from them. Thus, their interests are *special* indeed. Under the VUTC, they have standing to challenge the co-education decision by the Board of Trustees.

### **3. Recognizing “Special Interest” Standing Agrees with Decisions from Other Jurisdictions and Avoids Unreasonable Results.**

The conclusion that beneficiaries and/or donors have standing – and not just the Attorney General – is reinforced by the decisions of other jurisdictions that have considered the question and by the unreasonable results that would flow from the narrow construction that the trial court placed upon Virginia law. The conclusion reached by this court in *Clark* is not unique. Indeed, “[t]he prevailing view of other jurisdictions is that the Attorney General does not have exclusive power to enforce a charitable trust and that a trustee or *other person having a sufficient special interest* may also bring an action for

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<sup>21</sup> Under the VUTC, a “beneficiary” includes “a person that . . . has a present or future beneficial interest in a trust, vested or contingent . . .” Va. Code § 55-541.03. Young women who have accepted admission to the College have not just a future contingent interest, but a present vested interest.

this purpose.” *Holt v. College of Osteopathic Physicians & Surgeons*, 394 P.2d 932, 934 (Cal. 1964) (emphasis added) (collecting authorities).<sup>22</sup>

Prominent among the cases from other jurisdictions is *Hooker v. Edes Home*, 579 A.2d 608 (D.C. App. 1990), which involved a home for the elderly that the trustees wished to shut down so they could transfer its assets to another charitable purpose –

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<sup>22</sup> Many other jurisdictions recognize the doctrine of special interest standing, holding that the Attorney General does not have exclusive power to enforce a charitable trust. See, e.g., **Arizona:** *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 91 P.3d 1019, 1025 (Ariz. Ct. App. 2004) (recognizing special interest test as current common law view of standing to enforce charitable trusts); **Connecticut:** *Carl J. Herzog Found. v. Univ. of Bridgeport*, 699 A.2d 995, 999 (Conn. 1997) (noting it is well established that charitable trust is enforceable by person with special interest); **Delaware:** *Pollock v. Peterson*, 271 A.2d 45 (Del. Ch. 1970) (denying standing for want of special interest in trust); **Georgia:** *Warren v. Bd. of Regents of the Univ. Sys. of Ga.*, 544 S.E.2d 190, 192-93 (Ga. Ct. App. 2001) (denying standing for failing to demonstrate special interest); **Iowa:** *Mitchellville Cmty. Ctr., Inc. v. Vos*, 679 N.W.2d 31, 36 (Iowa 2004) (applying special interest test to determine standing in charitable trust enforcement action); **Kentucky:** *Greenway v. Irvine’s Tr.*, 131 S.W.2d 705, 709 (Ky. Ct. App. 1939) (finding plaintiffs lack special interest to permit standing); **Massachusetts:** *Lopez v. Medford Cmty. Ctr., Inc.*, 424 N.E.2d 229, 232 (Mass. 1981) (recognizing standing for plaintiffs with interests in charitable trust organizations distinct from those of general public); **Michigan:** *St. John’s – St. Luke’s Evangelical Church v. Nat’l Bank of Detroit*, 283 N.W.2d 852, 858 (Mich. Ct. App. 1979) (granting standing to plaintiff under doctrine of special interest standing); **New Jersey:** *First Camden Nat’l Bank & Trust Co. v. Hiram Lodge, F. & A.M.*, 35 A. 2d 490, 493 (N.J. Ch. 1944) (denying standing for want of special interest in trust); **New Mexico:** *Forrest Guardians v. Powell*, 24 P.3d 803 (N.M. Ct. App. 2001) (applying doctrine of special interest standing); **New York:** *Alco Gravure, Inc. v. Knapp Found.*, 479 N.E.2d 752, (N.Y. 1985) (granting standing to plaintiffs with special interest in charitable organization); **North Carolina:** *Kania v. Chatham*, 254 S.E.2d 528, 530 (N.C. 1979) (recognizing standing for plaintiff with special interest in performance of charitable trust); **North Dakota:** *Diocese of Bismarck v. Atkinson*, 553 N.W.2d 222, 224-25 (N.D. 1996) (noting plaintiff with special interest may enforce charitable trust); **Oregon:** *Assoc. Students of the Univ. of Or. v. Or. Inv. Council*, 782 P.2d 30, 31-32 (Or. Ct. App. 1986) (noting plaintiff must show interest sufficiently special to distinguish from society’s interest to maintain enforcement action); **Pennsylvania:** *Wiegand v. Barnes Found.*, 97 A.2d 81, 83 (Pa. 1953) (denying standing for plaintiff for want of special interest); **Texas:** *Lokey v. Texas Methodist Found.*, 479 S.W.2d 260, 265 (Tex. 1972) (granting standing to plaintiffs with special interest in charitable trust not shared by general public).

serving the chronically and terminally ill. Several potential residents of the home brought suit to keep the trustees from taking such action. The trial court ruled the plaintiffs had no standing because they were *potential* residents, not actual residents of the home; however, on appeal, the trial court was reversed. The D.C. Court of Appeals held that actual residence in the home was not necessary. Because the plaintiffs were elderly women with the *potential* for living in the home, they had a “special interest in continued performance of the trust distinguishable from that of the public at large.” *Hooker*, 579 A.2d at 612. This was sufficient to give them standing. In the case at bar, the Court need not go so far as *Hooker*. The student-plaintiffs are not high school students with the *potential* for attending R-MWC one day. They are already there. Even more than the plaintiffs in *Hooker*, they have a special interest in continued performance of the trust distinguishable from that of the public at large. They based a major life decision on R-MWC’s continuing as a woman’s college while they are there. This is the very essence of a special interest. Thus, they, too, have standing to challenge the actions of the trustees.<sup>23</sup>

Similarly, in *Township of Cinnaminson v. First Camden National Bank*, 238 A.2d 701, 703, 708 (Super. Ct. N.J. 1968), the court held that individual residents of a township had standing to sue for enforcement of a charitable trust established for the purpose of constructing a library in the township. Students at a college have an interest in their higher education at least as strong as township residents have in their local library

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<sup>23</sup> Albeit in another context, this Court also has followed a more generous approach to standing in its recent jurisprudence. *See, e.g., Philip Morris USA, Inc. v. Chesapeake Bay Found., Inc.*, 273 Va. 564, 643 S.E.2d 219 (2007) (finding broad representational and individual standing to challenge government renewal of permit).

services. If the residents have standing to enforce the trust created for their benefit, then surely the students must have standing to enforce the trust created for theirs.

Where possible, a court also should avoid an interpretation of law that leads to unreasonable results. *See, e.g., VEPCO v. Citizens for Safe Power*, 222 Va. 866, 869, 284 S.E. 2d 613, 615 (1981). To make the Attorney General the only person capable of challenging trustees who misdirect assets would be unreasonable. As a historical matter, between 1832 and 1970, the Attorney General apparently initiated no actions to enforce a charitable trust. *See Note, Charitable Trust Enforcement in Virginia*, 56 Va. L. Rev. 716, 720 (1970). In more recent years, the Attorney General has been somewhat more active in this arena; however, outside of non-profit health care entities, where his routine involvement is legislatively expected,<sup>24</sup> the Attorney General has typically confined his involvement to certain narrow categories of cases. These categories include: (1) where state institutions are beneficiaries,<sup>25</sup> (2) where there is evidence of self-dealing and no readily identifiable set of beneficiaries with the means of challenging the trustees,<sup>26</sup> and/or (3) where the Attorney General is asked to participate by one or more trustees

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<sup>24</sup> *See* Va. Code § 55-531 *et seq.*

<sup>25</sup> *See, e.g.,* Jeff Sturgeon, “Danville Newspaper Set to Be Sold; Media General Announces Plans to Make Purchase This Summer,” *The Roanoke Times*, June 15, 1996 (describing intervention by Attorney General on behalf of beneficiaries VMI and University of Virginia to stop sale of trust-owned newspaper for \$19 million, subsequent sale for \$38 million).

<sup>26</sup> *See, e.g., JOCO*, 263 Va. at 156, 558 S.E.2d at 281 (describing allegations of self-dealing in suit brought by Attorney General against directors of charitable corporation); *Tauber v. Commonwealth*, 255 Va. 445, 449-50, 499 S.E.2d 839, 841-42 (1998) (describing allegations by Attorney General that funds and assets received by defendants as directors and trustees of charitable corporation were “misappropriated” and “usurped”).

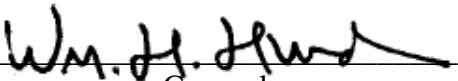
and/or sides with the trustees.<sup>27</sup> Under such circumstances, to ratify the decision of the trial court would make the Attorney General choose between expanding substantially the role of his Office, or risking the appearance of dereliction of duty. For the trial court to find that the Attorney General has exclusive standing is, in effect, to impose on him by judicial decree a singular duty that the legislature has not seen fit to assign him. For this reason, too, the trial court erred.

### CONCLUSION

The decision of the trial court should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

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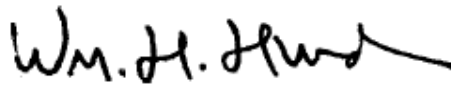
<sup>27</sup> See, e.g., Associated Press, “Earley Says Mrs. Cooke Isn’t Due Estate Share,” *Daily Press*, Feb. 11, 1998 (describing intervention by Attorney General in support of trustees of charitable foundation to protect bequest against challenge).

**CERTIFICATE PURSUANT TO RULE 5:26(d)**

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I hereby certify that, on October 29, 2007, twenty copies of this brief were hand-delivered to the Clerk of the Supreme Court of Virginia, Supreme Court Building, 100 North Ninth Street, Richmond, Virginia 23219; and three copies of this brief were mailed by first-class mail, postage prepaid, to counsel for the respondents at their addresses set forth below:

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