STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

John Sloan, individually, and on behalf of all others similarly situated, and NOLAS Trading Co., Inc.,

Appellants,

v.

Clemson University, and its Life Trustees E. Smyth McKissick III, David E. Dukes, Cheri M. Phyfer, Mark S. Richardson, William "Bill" C. Smith, Jr., Kim Wilkerson, and David H. Wilkins,

Respondents.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2023-CP-39-00416

ORDER

This matter comes before the Court on Appellants John Sloan, individually, and on behalf of all other similarly situated and NOLAS Trading Co., Inc.'s (collectively, "Appellants") appeal of the Probate Court's April 3, 2023 Order granting Respondent Clemson University ("Clemson University") and Respondents' E. Smyth McKissick III, David E. Dukes, Cheri M. Phyfer, Mark S. Richardson, William "Bill" C. Smith, Jr., Kim Wilkerson, and David H. Wilkins' (the "Successor Trustees"[1] and, collectively with Clemson University, "Respondents") Motions to Dismiss.

The parties fully briefed the appeal and the Court heard oral argument on June 14, 2024. James G. Carpenter, Esq. appeared for the Appellants, Boyd B. Nicholson, Jr., Esq. appeared for Clemson University, and Blake T. Williams, Esq. appeared for the Successor Trustees.

[1] Appellants named the individual trustees as Clemson University "Life Trustees" in the Summons and Complaint. Respondents have asserted they should be referred to as the "Successor Trustees" instead. Based on the findings of the Probate Court, which this Court affirms, the Court uses the term "Successor Trustees" herein.

Having considered the matters of record including the briefing, the parties' oral argument, and the record on appeal, the Court **AFFIRMS** the Probate Court's findings of fact and conclusions of law in its well-reasoned Order. The Court agrees with and adopts the Probate Court's holdings that: (1) Appellants have standing; (2) the Successor Trustees are not "elected or appointed" as contemplated by the South Carolina Constitution; (3) even if it was determined they were elected or appointed, which the Court finds they were not, the language in the Constitution of 1868 and 1895 is similar and therefore does not give Appellant relief; and (4) the United States and South Carolina Constitutions protect against any impairment of contracts, which would occur here if Appellant is granted relief, as does the South Carolina Probate Code for charitable trusts.

I. BACKGROUND

This action concerns the Last Will and Testament of Thomas Green Clemson (the "Will") providing for the establishment of Clemson University and the General Assembly's Act of Acceptance in 1889 (the "Act of Acceptance") accepting the terms of the Will. Thomas Green Clemson executed his Will in 1886 and an accompanying Codicil in 1887.[2]

Relevant to this matter, the Will provided for, and the Act of Acceptance accepted, a board of trustees consisting of: (i) seven trustees named by the Will and their successors, and (ii) six trustees to be chosen by the General Assembly. 1889 S.C. Act No. 166 § 1; *see also* S.C. Code Ann. § 59-119-40.

[2] The Will is a public record on file with the Probate Court. The Court may "take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984). Additionally, the Court "may take judicial notice of information publicly announced on a party's web site, so long as the web site's authenticity is not in dispute and 'it is capable of accurate and ready determination.'" *Jeandron v. Bd. of Regents of Univ. Sys. of Md.*, 510 F. App'x 223, 227 (4th Cir. 2013). Appellants have not disputed the authenticity or accuracy of the reprinting of the Will cited by Respondents, and the Probate Court properly took judicial notice of its contents.

Item 2 of the Will provided that:

> The seven trustees appointed by me shall always have the right, and the power is hereby given them and their successors, which right the legislature shall never take away or abridge, to fill all vacancies which may occur in their number by death, resignation, refusal to act or otherwise.

Last Will & Testament of Thomas Green Clemson. Item 1 of the Will stated that the Chief Justice of South Carolina should review the State's acceptance of the devise to ensure it was in accordance with Thomas Green Clemson's wishes. *Id.* The Will contemplated that, upon the Chief Justice's approval, the executor of Thomas Green Clemson's estate would execute a deed of the property to the State so long as the State holds the property "in good faith" and "devotes said property to the purposes of the donation." *Id.* at Item 3.

After Thomas Green Clemson's death in 1888, the General Assembly passed the Act of Acceptance, which the Governor signed into law on November 27, 1889. In the Act, the General Assembly "expressly declare[d] that it accept[ed] the devise and bequest of Thomas G. Clemson subject to the terms and conditions set forth in his said last will and testament." 1889 S.C. Act No. 166 § 1. The Act of Acceptance provided Clemson University would be governed in the manner specified by the Will. *Id.* Regarding the Board, the Act of Acceptance stated that Clemson "shall be under the management and control of a board of thirteen trustees, composed of the seven members nominated by said will and their successors and six members elected by the General Assembly in joint assembly." *Id.* at § 3.

After passage of the Act of Acceptance, the Chief Justice of South Carolina, W.D. Simpson, issued an opinion finding that "the State has accepted said devise and bequest of the said

Thomas G. Clemson, deceased, subject to the terms and conditions set forth in his last will and testament."[3]

Clemson University has operated in accordance with the Will and Act of Acceptance since 1889.

II. PROCEDURAL HISTORY

Appellants first petitioned the Supreme Court of South Carolina on February 21, 2020 to accept this matter in its original jurisdiction. However, the Supreme Court declined to hear the matter via a 2-2 vote.

Appellants then filed their Complaint with the Court of Common Pleas for Greenville County on July 1, 2020.

The contents and provisions of the Will, Act of Acceptance, and Chief Justice's opinion are not in dispute. Instead, Appellants' Complaint posed the purely legal question of whether the terms of service of the Successor Trustees are unconstitutional. Specifically, Appellants alleged that the terms of service violate Articles VI and XVII of the South Carolina Constitution. Article VI, § 1 sets forth, in part, as follows: "No person may be elected or appointed to office in this State for life or during good behavior, but the terms of all officers must be for some specified period except officers in the militia." S.C. CONST. ART. VI, § 1. Similarly, Article XVII, § 1B states, in part, that: "No person shall be elected or appointed to office in this State for life or during good behavior, but the terms of all officers shall be for some specified period, except Notaries Public and officers in the Militia." S.C. CONST. ART. XVII, § 1B.

[3] The Chief Justice's Opinion is also reprinted on Clemson University's website. *See* Appendix C, *Board of Trustees Manual*, Clemson University (last visited March 11, 2023), *available at* https://www.clemson.edu/administration/bot/manual/index.html. Appellants have not disputed the authenticity of this reprinting of the Opinion.

The Constitution of 1895 does not define "office" or "officer." However, Appellants' Complaint asserted that the Successor Trustees are "officers" as defined by S.C. Code Ann. § 8-1-10, and are thus subject to these constitutional provisions. *See* S.C. Code Ann. § 8-1-10 (defining "public officers" to mean "all officers of the State that have heretofore been commissioned and trustees of the various colleges of the State, members of various State boards and other persons whose duties are defined by law"). Appellants alleged that the Will and the Act of Acceptance are unconstitutional because the Successor Trustees are "officers" whose term is not for "some specified period." (Compl. at ¶ 14.)

Appellants requested that the court: (1) declare that the parts of the Acceptance Act accepting and authorizing the Successor Trustees are incompatible with S.C. Constitution, Art. VI, § 1, and Art. XVII, §1B, and are invalid, null, and void; (2) declare that each individual defendant is holding office as a Clemson University "Life Trustee" in violation of S.C. Constitution, Art. VI, § 1 and Art. XVII, §1B; (3) enjoin or terminate the service of each individual Defendant as a Clemson University "Life Trustee"; and (4) enjoin any election or appointment of any Clemson University Successor Trustees in violation of S.C. Constitution, Art. VI, § 1 and Art. XVII, § 1B . (*Id.* at WHEREFORE.) Appellants also sought to recover their attorney's fees and costs under S.C. Code Ann. § 15-77-300. (*Id.*)

Respondents timely moved to dismiss or, in the alternative, to transfer venue to the Pickens County Probate Court. Respondents' motions initially were initially heard by the Honorable Alex Kinlaw on July 27, 2021. On September 28, 2021, Judge Kinlaw entered an order continuing Respondents' motions to dismiss and granting their alternative request to transfer venue to the Pickens County Probate Court.

After receiving the case, the Probate Court proceeded to consider the merits of Respondents' 12(b)(6) motions and held a hearing on September 30, 2022. After carefully evaluating the issues raised in the motions, the Probate Court entered an Order granting Respondents' motions on April 3, 2023. Appellants then appealed to this Court as provided by S.C. Code Ann. § 62-1-308.

III. STANDARD OF REVIEW

On appeal from the final order of the probate court, the circuit court should apply the same standard of review that the Supreme Court or Court of Appeals would apply on appeal. *In re Est. of Boynton*, 355 S.C. 299, 302, 584 S.E.2d 154, 155 (Ct. App. 2003).

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), [SCRCP,] an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). A motion to dismiss under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure should be granted when a complaint fails to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRCP. In considering a 12(b)(6) motion, a "court must base its ruling solely based upon allegations set forth on the face of the complaint." *Baird v. Charleston County*, 333 S.C. 519, 526, 511 S.E.2d 69, 73 (1999). "[W]ell pleaded facts are admitted, but inferences drawn by the plaintiff from such facts and conclusions of law are not admitted." *Jensen v. S.C. Dep't of Soc. Servs.*, 297 S.C. 323, 326, 377 S.E.2d 102, 104 (Ct. App. 1988)

A motion to dismiss under Rule 12(b)(1) of the South Carolina Rules of Civil Procedure should be granted when a court lacks subject matter jurisdiction. Rule 12(b)(1), SCRCP. "Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong." *Bardoon Props., NV v. Eidolon Corp.*, 326 S.C. 166, 169, 485 S.E.2d 371, 373 (1997). Subject matter jurisdiction issues are reviewed de novo. *Seels*

v. Smalls, 437 S.C. 167, 172, 877 S.E.2d 351, 354 (2022) (stating that de novo applies to issues of subject matter jurisdiction).

IV. THE COURT'S ANALYSIS

I. Appellants have public importance standing.

Respondents have contended that Appellants lack standing to assert the claims raised in this action. Like the Probate Court, this Court agrees that although Appellants lack constitutional, statutory, or taxpayer standing, Appellants have satisfied the requirements for showing public importance standing.[4]

Public importance standing is an exception to the "general rule" that "a litigant must have a personal stake in the subject matter of the litigation." *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).[5] This exception recognizes that in certain circumstances "standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance" even without an allegation of particularized injury. *Id.*

"The key to the public importance analysis is whether a resolution is needed for future guidance." *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 341-42, 878 S.E.2d 891, 895 (2022)

[4] The Court concurs with the Probate Court that Appellants lack constitutional standing because they have not shown any particularized injury, harm, or prejudice that they would personally suffer as a result of the actions detailed in the complaint. *See S.C. Pub. Int. Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 117-18, 804 S.E.2d 854, 858 (2017) (setting forth the elements for establishing constitutional standing). Additionally, Appellants lack statutory standing since they have not identified any statute conferring a right to sue. *See Youngblood v. S.C. Dep't of Social Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). Finally, the Supreme Court of South Carolina has foreclosed any theory of standing premised on generalized injury as a taxpayer. *See Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013).

[5] Respondents contend that "public importance standing" is an unconstitutional conferral of standing because it was judicially created and not a product of the Constitution, statute, or the Supreme Court's rulemaking authority. However, like the Probate Court, this Court is bound by Supreme Court precedent supporting the continued viability of public importance standing.

(quoting *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)). "Courts must cautiously balance competing interests—the citizenry's need to hold public officials accountable for alleged injustices and 'the concomitant integrity of government action'—to determine whether the issue presented is 'inextricably connected to the public need for court resolution for future guidance.'" *Id.* (quoting *SCDOT*, 421 S.C. at 118-19, 804 S.E.2d at 858). "Only then can the issue 'transcend[ ] a purely private matter and rise[ ] to the level of public importance.'" *Id.* (quoting *ATC S.*, 380 S.C. at 199, 669 S.E.2d at 341).

The Probate Court relied on *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), finding it to be instructive. That case involved a challenge to the composition of the Board of Trustees of the South Carolina Transportation Infrastructure Bank, with the plaintiffs alleging that it violated the prohibition against dual office holding and separation of powers. *Id.* The court found that the plaintiffs presented a colorable claim that the board was unconstitutionally comprised, which cast a cloud of illegitimacy that could marginalize the important decisions of the board. *Id.* at 646, 744 S.E.2d 521, 524 (2013). Therefore, the court held that "resolution of this question is certainly of importance and concern to the public" and the plaintiffs had standing. *Id.*

The Probate Court found this analysis of the standing question, along with other South Carolina case law that has granted standing in cases that are more similar in posture to this case and fact scenario, to be more persuasive than the *contra* authorities cited by Respondents.[6]

[6] For example, Respondents contended that, like in *Jowers v. South Carolina Dep't of Health and Envtl. Control*, 423 S.C. 343, 366, 815 S.E.2d 446, 458 (2018), there are alternative mechanisms by which the issue in this case could be addressed. Specifically, the Attorney General is tasked with protecting the interests of the public at large in administering or enforcing charitable trusts. Although the Attorney General has such an interest, as detailed below, the Court agrees with the Probate Court's finding that it does not eliminate Appellants' standing. Moreover, Respondents cite to *Adams v. McMaster*, 432 S.C. 225, 851 S.E.2d 703 (2020) to support their argument that

Therefore, the Probate Court found that Appellants have public importance standing. This Court agrees and adopts that analysis.

II. Appellants have presented a justiciable controversy.

The Probate Court also found that Appellants have presented a justiciable controversy. Respondents correctly note that the Uniform Declaratory Judgment Act and public importance exception to standing both require the plaintiff to present an underlying controversy for resolution. Respondents contend that Appellants have no legal rights or duties with respect to the constitutional provisions raised and have not alleged any injury. The Probate Court, however, found that a justiciable controversy exists in this matter because it is in line with the cases granting public importance standing where the plaintiff raises issues of constitutional import. Thus, the Probate Court found that Appellants' contention that the Act of Acceptance and the ongoing actions of Respondents are unconstitutional presents a justiciable controversy. The Court also concurs with this finding.

III. Appellants have failed to state facts sufficient to constitute a cause of action.

Although, like the Probate Court, the Court finds that Appellants have standing and have presented a justiciable controversy, the Court agrees with the Probate Court that Appellants' Complaint fails to state facts sufficient to constitute a cause of action.

In reaching this conclusion, the Probate Court acknowledged and considered that its ruling must be based solely on the allegations set forth in the Complaint and that a motion to dismiss should not be sustained if the Appellants are entitled to relief on any theory of the case. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) (quoting *Stiles v. Onorato*, 318 S.C. 297,

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public importance standing is not necessary where there is no need for future guidance. The Court finds, however, like the Probate Court, that there is a need for future guidance here.

300, 457 S.E.2d 601, 602 (1995)). Moreover, the Probate Court construed the pleadings liberally in favor of the Appellants. *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Finally, the Probate Court recognized that dismissal should not be granted merely because the Court doubts Appellants will prevail in the action. *Plyler*, 373 S.C. at 645, 647 S.E.2d at 192 (2007). This Court has likewise taken this guidance into consideration.

Mindful of these considerations, the Court agrees with the Probate Court that the dispute here is not as to the underlying facts but as to the interpretation of the law and the controversy is already established in the pleadings. Therefore, it was properly resolved on a motion to dismiss. *See Palmer v. State*, 427 S.C. 36, 43, 829 S.E.2d 255, 259 (Ct. App. 2019).

A. The Successor Trustees are not "elected or appointed" as contemplated by the South Carolina Constitution.

The constitutional provisions raised by Appellants only reference a person "elected or appointed" to office. *See* S.C. CONST. ART. VI, § 1; S.C. CONST. ART. XVII, § 1B. "Office" and "Officer" are not defined by the Constitution. Therefore, the Appellants rely on a subsequently adopted statute, S.C. Code Ann. § 8-1-10, which provides that "public officer" includes "trustees of the various colleges of the State." *Id.* Appellants assert that the Successor Trustees are public officers and, as a result, their term must be for "some specified period." They contend that the term of service under the Will and Act of Acceptance does not meet this requirement. [7]

The Probate Court correctly began its analysis with the recognition that the courts "will not construe statutes to be unconstitutional when susceptible to a constitutional interpretation."

[7] Respondents have contended that the Successor Trustees do not actually serve for "life or good behavior" because they have all agreed not to serve past 75 years old. The Probate Court noted that its ruling was in no way based on this alleged private agreement, and agreed with Appellants that the existence or implications of such agreement is outside the scope of Rule 12(b)(6). This Court does not reach this issue either.

Hampton v. Haley, 403 S.C. 395, 408, 743 S.E.2d 258, 265 (2013). Thus, as the Supreme Court has "long recognized," "legislative acts are to be construed in favor of constitutionality and will be presumed constitutional absent a showing to the contrary." *Bailey v. State*, 309 S.C. 455, 464, 424 S.E.2d 503, 508 (1992). Moreover, "[r]epeal by implication is disfavored" and should only be found "when two statutes are incapable of any reasonable reconcilement." *State v. Taub*, 336 S.C. 310, 317, 519 S.E.2d 797, 801 (Ct. App. 1999).

The Court agrees with the Probate Court that a reasonable reading of the constitutional provisions at issue is that "elected" means voted on either by the populace or General Assembly, and appointed means by either the Governor, General Assembly, governmental body, or other body to whom the foregoing officials have delegated authority. Other types of college trustees (including the legislatively appointed trustees at Clemson) would be subject to the provisions. However, the Successor Trustees, are not "elected or appointed" as contemplated by the Constitution. Rather, the Will named the original seven Successor Trustees, and that group of trustees has been self-perpetuating ever since, choosing new Successor Trustees as the Will provides. The Act of Acceptance expressly describes the Successor Trustees as those persons "nominated" by the Will "and their successors." *See* 1889 S.C. Act No. 166 § 3; S.C. Code Ann. § 59-119-40.[8]

Appellants' arguments that: (1) because the Will refers to the initial Successor Trustees as being "appointed" by Thomas Green Clemson and the Will gives them the power to resign, this

[8] As the Supreme Court explained in dicta in *Rice Hope Plantation v. S.C. Pub. Serv. Auth.*, 216 S.C. 500, 518, 59 S.E.2d 132, 139 (1950), *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), Clemson, although "highly useful and valuable to the State, is not an institution or corporation wholly owned and controlled by the State." *Id.* The court highlighted the terms of the Will and the structure of the Board, noting "of course this method of choice of the trustees prevails under the law." *Id.* (emphasis added).

brings them within the purview of the Constitutional provisions and (2) because the South Carolina Code declares the Board of Trustees to be a "body politic and corporate," this also means the Successor Trustees are subject to the constitutional provisions are unpreserved. Appellants did not raise either of these arguments to the Probate Court. "It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (citing *Creech v. South Carolina Wildlife and Marine Res. Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997)). Where a party fails to raise the issue in its briefing and argument to the trial court, that party is precluded from raising that issue on appeal. *Easterling v. Burger King Corp.*, 416 S.C. 437, 452-53, 786 S.E.2d 443, 451-452 (Ct. App. 2016). Regardless, even if these arguments were preserved, they are not a reasonable reconciliation of the applicable constitutional provisions and statutes and interpreting them in this fashion would strain to reach an unconstitutional reading.

For the foregoing reasons, the Court affirms the Probate Court's holding that the Successor Trustees are not "elected or appointed" as contemplated by the South Carolina Constitution.

B. The Probate Court correctly found that the operative Constitution of 1868 further supports the propriety of the Successor Trustee term of service.

As the Probate Court correctly determined, the Constitution of 1868 was the operative constitution at the time of the Act of Acceptance. The Constitution of 1868 already prohibited the creation of an office "the appointment to which shall be longer for a time than good behavior." S.C. CONST. ART. I, § 32 (1868). The Will and Act of Acceptance specifically provide that the Successor Trustee term of service is until "death, resignation, refusal to act or otherwise." S.C. Code Ann. § 59-119-40 (emphasis added). Appellants concede that the successor trustee position

was constitutional under the Constitution of 1868. (*See* Br. of Appellants at 19 (noting that the Act of Acceptance "did not violate the Constitution of 1868 when it was enacted").)

Appellants' Complaint alleged that the Successor Trustee position has a term of "life." Taking Appellants' allegation as true, as the Court must at this stage, this term would necessarily have been longer than a term of good behavior. The General Assembly and the Chief Justice, however, deemed the term of service lawful under the terms of the Constitution of 1868 because, as detailed herein, Clemson University was viewed as a unique entity not subject to this restriction because of its status as a charitable trust. Therefore, the Successor Trustee term of service is equally lawful under the Constitution of 1895.[9] *See* S.C. CONST. ART. XVII, § 10 ("All laws now in force in this State and not repugnant to this Constitution shall remain and be enforced until altered or repealed by the General Assembly, or shall expire by their own limitations."); *see also* S.C. CONST. ART. XVII, § 11 (explaining that all laws in force and all "rights of individuals, of bodies corporate and of the State, when not inconsistent with this Constitution," remain valid and in full force). As the Supreme Court has explained, the framers of the Constitution of 1895 intended "that there should not be a break in any of the departments of government, as otherwise great inconvenience would have ensued." *In re Hooper*, 48 S.C. 149, 26 S.E. 466, 468 (1897).

Therefore, the Court also affirms the Probate Court's conclusion that even if it the Successor Trustees were "elected or appointed," which they are not, the language in the Constitution of 1868 and 1895 is similar and therefore does not give Appellant relief.

[9] As Respondents correctly note, Appellants misconstrue the Probate Court's holding here—it did not find that the Constitution of 1895 made no change to the prohibited terms of office. Rather, what the Probate Court found was that the new provisions did not alter the constitutionality of the Successor Trustee position.

C. Even if the Successor Trustees were "public officers" the constitutional provisions raised by Appellants would be unconstitutional as applied to them.

Finally, the Probate Court further appropriately found that even if Appellants were correct that the Successor Trustees are "public officers" under S.C. Code Ann. § 8-1-10 and their terms of service are subject to the restrictions of Article VI, § 1 and Article XVII, § 1B (which neither this Court nor the Probate Court found), these constitutional provisions and statute would be unconstitutional as applied.

The Court agrees they are not applicable to the Successor Trustee position due to Clemson University's status as a charitable trust created through a contract between Thomas Green Clemson and the State of South Carolina. *See Hopkins*, 77 S.C. 12, 57 S.E. at 558 (1907) ("[T]he state holds the fee in the 814 acres contained in the Fort Hill place, and has founded and is maintaining the 'Clemson Agricultural College of South Carolina' by and through 'the board of trustees,' as its agents, in accordance with the terms of the trust, created in the will of Mr. Clemson, and specifically accepted by the state."); *see also* Op. S.C. Att'y Gen., 1978 WL 34673, at *1 (Jan. 26, 1978) (noting that *Hopkins* "recognize[d] the binding nature of the Trust established by Clemson and accepted by the State").

Under South Carolina law, the General Assembly cannot terminate or alter a charitable trust. *S.C. Dep't of Mental Health v. McMaster*, 372 S.C. 175, 183, 642 S.E.2d 552, 556 (2007). Rather, any changes must be approved by a court of equity since supervision of a charitable trust is an "an inherent judicial function and is not a matter for the legislature." *Id.* Legislative interference with the charitable trust would constitute an impairment of contract in violation of the Contract Clauses of both the federal and State constitutions. *See* U.S. CONST. ART.. I, § 10; S.C. S.C. CONST. ART. I, § 4 (providing that the State shall not enter into any law "impairing the obligation of contracts"); *Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 28-29, 736 S.E.2d 651,

658 (2012) (explaining that a Contracts Clause violation occurs where a new provision goes beyond merely clarifying existing law and operates retroactively to substantially impair pre-existing contracts by materially changing their terms).

The Successor Trustee structure was a fundamental term of the bequest to the State. As the Probate Court correctly found, Clemson University and the Successor Trustee structure is unique and any legislative attempts to modify the board in a way that conflicts with the Will and Act of Acceptance would impermissibly impair the contract. *See* Op. S.C. Att'y Gen., 1978 WL 34673, at *1 (Jan. 26, 1978) (concluding that the legislature cannot increase the number of trustees on Clemson's board in light of its status as a charitable trust, explaining that "[t]he terms of such a Trust, when accepted by the State, are binding upon the State"); Op. S.C. Att'y Gen., 1971 WL 22432, at *1 (Mar. 16, 1971) (same).[10] Applying the statute and constitutional provisions in the manner advanced by Appellants to restrict the Successor Trustee terms of service would result in an improper, substantial impairment of a material provision of the contract between Mr. Clemson and the State. *See* Op. S.C. Att'y Gen., 1971 WL 22432, at *1 (Mar. 16, 1971) (opining that an attempt by the General Assembly to enlarge Clemson's board would be an unconstitutional impairment of a contract by the State); *see also Bogert's The Law of Trusts and Trustees* § 397 (explaining that statutes attempting to "alter a trust ***with regard to the method of selecting successor trustees*** have been held unconstitutional" (emphasis added)).

The Probate Court also correctly noted that the Attorney General has the power, and is the proper party, to address any concerns regarding the administration of a charitable trust such as those claimed by the Appellants in this matter. *See Epworth Children's Home v. Beasley*, 365 S.C.

[10] Although they are not binding authority, like the Probate Court, this Court finds these opinions of the Attorney General persuasive. *See Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560-61, 713 S.E.2d 604, 609 (2011).

157, 164 n.3, 616 S.E.2d 710, 714 n.3 (2005) (explaining that, under South Carolina law, the Attorney General is "the proper party to protect the interests of the public at large in the matter of administering or enforcing charitable trusts"); *see also Wilson v. Dallas*, 403 S.C. 411, 431, 446-67, 743 S.E.2d 746, 757, 765-66 (2013) (stating that the Attorney General has the "duty to represent the unspecified charitable beneficiaries," and serves as "protector, supervisor, and enforcer of charitable trusts"). Therefore, the charitable trust structure is not without oversight and Appellants do not have a viable cause of action purporting to vindicate the rights of the public here.

The Probate Court properly declined to interpret and apply the "public officer" statute in the manner advocated by Appellants. *See Henderson v. Evans*, 268 S.C. 127, 132, 232 S.E.2d 331, 333-34 (1977) ("Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation."); *Foster v. Taylor*, 210 S.C. 324, 329, 42 S.E.2d 531, 534 (1947) ("It is equally well settled that determination of unconstitutionality of a legislative act will be avoided when possible."). To adopt Appellant's position would require a finding of repeal by implication which, as noted above, is disfavored and only appropriate where there is no possibility of reconcilement of the provisions. *See Taub*, 336 S.C. at 317, 519 S.E.2d at 801.[11]

Therefore, the Court affirms the Probate Court's holding that the United States and South Carolina Constitutions protect against any impairment of contracts, which would occur here if

[11] The General Assembly's longstanding recognition of the validity of Clemson's structure is also noteworthy. As our Supreme Court has explained: "Both this Court and the United States Supreme Court have found that courts should accord weight to past practice and legislative interpretations." *Williams v. Morris*, 320 S.C. 196, 205-06, 464 S.E.2d 97, 102 (1995); *see also N.L.R.B. v. Noel Canning*, 573 U.S. 513, 533 (2014) ("[T]hree-quarters of a century of settled practice is long enough to entitle a practice to 'great weight in a proper interpretation' of the constitutional provision").

Appellant was granted relief, and the Attorney General is the proper party to protect the interests of the public at large with regard to a charitable trust.

IV. Appellants' equitable deviation argument is not preserved.

For the first time in their Reply appellate brief to this Court, Appellants contended that the Court should apply the doctrine of equitable deviation and modify the Successor Trustee term of office to require that they serve terms of "some specified period." This argument is not preserved. Appellants did not state a claim for equitable deviation in their Complaint, raise the doctrine in any of their briefing to the Probate Court, or raise it in their opening brief to this Court.[12]

Regardless, the Court finds that equitable deviation would not be appropriate in this matter. This doctrine "permits deviation from a term of the trust if, owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust." *Epworth Children's Home v. Beasley*, 365 S.C. 157, 169, 616 S.E.2d 710, 716–717 (2005). The court's authority to deviate from the terms of the trust is where it is necessary "to carry out the settlor's intent," *All Saints Par., Waccamaw v. Protestant Episcopal Church in the Diocese of S.C.*, 358 S.C. 209, 227, 595 S.E.2d 253, 263 (Ct. App. 2004), or "carry out the purposes thereof." *Furman University v. McLeod*, 238 S.C. 475, 490, 120 S.E.2d 865, 872 (1961). Here, modifying the trust in the manner advanced by Appellants is not necessary to carry out Thomas Green Clemson's intent (and, in fact, would directly contradict it) or carry out the purpose of the trust.

[12] The Court disagrees with Appellants that Respondents "raise[d] the doctrine of Equitable Deviation." (Reply Br. of Appellant p. 5.) The portion of Respondents' brief quoted by Appellants was merely discussing the General Assembly's lack of power to terminate or alter a charitable trust and noted that this power was reserved to a court of equity. Respondents were not advancing any argument that the Court should apply equitable deviation in this case, nor have they at any point in this case. f

V. CONCLUSION

For the foregoing reasons, the Court finds that the Probate Court correctly determined that, as a matter of law, the Successor Trustee position established under the Will and its term of service does not run afoul of the South Carolina Constitution and that, as a result, Appellants have failed to state facts sufficient to constitute a cause of action. As a result, the Probate Court properly granted Respondents' motions to dismiss pursuant to Rule 12(b)(6), SCRCP.

IT IS THEREFORE ORDERED that the Probate Court's April 3, 2023 Order is **AFFIRMED**.

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The Honorable G.D. Morgan
Presiding Judge

Pickens Common Pleas

Case Caption: John Sloan , plaintiff, et al VS Clemson University , defendant, et al

Case Number: 2023CP3900416

Type: Order/Other

So Ordered

G.D. Morgan Jr.