CASE NO. E058293

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION: TWO

David Hitz, Chairman of the Board of Trustees of the L. L. Nunn Trust, acting on behalf of the Board of Trustees

Petitioner and Appellant,

v.

KINCH HOEKSTRA and EDWARD KEONJIAN, Trustees of the L. L. Nunn Trust

Objectors and Respondents

APPELLANT'S OPENING BRIEF

On Appeal From the Superior Court for the State of California, County of Inyo, Case No. SICVPB1253232, Hon. Judge Stout

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APPELLANT/PETITIONER: DAVID HITZ RESPONDENT/REAL PARTY IN INTEREST: KINCH HOEKSTRA, et al.	

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Full name of interested entity or person	Nature of interest *(Explain):*
(1) DEEP SPRINGS COLLEGE CORPORATION	Interested in outcome
(2)	
(3)	
(4)	
(5)	

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I.
INTRODUCTION

Appellant David Hitz, Chairman of the Board of Trustees of the L. L. Nunn Trust, acting on behalf of the Board of Trustees, appeals the Superior Court's ruling and order that the discretion explicitly granted to the Trustees of the L. L. Nunn Trust is not broad enough to support the Trustees' September, 2011, decision to extend admission to female students, in addition to male students, at Deep Springs College – a unique institution of higher learning.

Appellant requested a judicial interpretation of the Deed of Trust, the charter document for Deep Springs College, to confirm that the Trustees have the power to expand the admissions policy for the college to include both male and female students. The Superior Court sitting in probate determined that the Trustees' discretion was limited by the Court's conclusion that the purpose of the Deed of Trust restricted operation of the College to "the education of promising young men." (CT 1900-1907.) Appellant believes this view is mistaken, and that the admission of women – in addition to men – as students at Deep Springs College is consistent with the dominant purpose of the Trust, is not barred by the grantor's stated desire to educate young men for positions of leadership consistent with idealism and unselfish service, and rests well within the proper purview of the Trustees to decide and implement. The order issued by the court below is mistaken as a matter of law and should be reversed.

II.
STATEMENT OF THE FACTS

In 1917, Lucien L. Nunn ("L. L. Nunn") founded Deep Springs College in Inyo County, California. L. L. Nunn was a lawyer and a pioneer with George Westinghouse and Nikola Tesla in alternating current power generation and long-distance electrical transmission. His interests

shifted gradually to educational innovation and leadership development due to his experience training engineers and technicians for this new industry. (CT 84.) He established several educational experiments, including Deep Springs. (*Ibid.*)

By Deed of Trust executed November 5, 1923, L. L. Nunn created a trust endowed with the College property and specified amounts of his assets to provide for the educational work he began at Deep Springs in 1917 (the "Trust"). The eight trustees appointed by L. L. Nunn, their successors, and one student trustee designated by the Deep Springs College student body have administered the Trust since its inception.

The college continues to carry out Nunn's philosophy of education, in which student self-governance and labor are still given equal importance to academic study. Students govern their own community, participate in the hiring of faculty and selection of new students, and perform at least four hours each day of labor on the ranch in addition to a regular academic course load. Today, however, the L. L. Nunn Trust provides only a small portion of the funding for operation of Deep Springs College. (See CT 707.)

Deep Springs is located on a cattle ranch in the remote Deep Springs Valley in Inyo County between the Bristlecone Pine Forest and Nevada. It is now essentially a two year school with 26 students. All students, faculty, staff and their families live on campus. The entire community eats their meals in a central boarding house and participates in community events in the Main Room.

L. L. Nunn dictated in the Deed of Trust that his conveyance should be used "to provide for and carry on [the] educational work" he had already "inaugurated" and that such efforts be "similar to and in development of" that endeavor. (CT 46 (¶1).) In other words, L. L. Nunn

directed the Trustees to continue further development of what he had started, but did not restrict how that could best be done in the future.

Specifically, the Deed of Trust states that the Trust was established:

> **[T]o provide for and carry on educational work in the State of California similar to and in development of the work already inaugurated by Grantor at Deep Springs in Inyo County, California, but in such manner and form and at such place or places within said State as said Trustees in good conscience and the exercise of their best judgment may determine,** for the education of promising young men, selected by said Trustees or as they may prescribe, in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony with the Creator, in the conduct of which educational work democratic self government by the students themselves shall be a feature as is now the case at said Deep Springs and which work shall be carried on not for profit but solely for the advancement of the purpose hereinabove mentioned.

(CT 46 (¶1) [emphasis added] (hereinafter, "Purpose Paragraph").)

On December 30, 1924, approximately thirteen months after executing the Deed of Trust, L. L. Nunn wrote a document entitled "The Purpose" ("*The Purpose*"). (See CT 53-57.) According to L. L. Nunn, "[t]he purpose of Deep Springs [College] is to help in the training of the few. It is to create an environment where young men of sound character may find religious influence which will help them build the character for full employment in the service of their fellowmen." L. L. Nunn's selection of only male students from 1917 to 1923 and the references to young men in both Paragraph 1 of the Deed of Trust and *The Purpose* have influenced the admissions policy at Deep Springs College since 1923.

L. L. Nunn was committed to using highly democratic educational methods and lived experience to inspire gifted students to accept responsibility for themselves and their communities, to excel

ethically as well as academically, and to prepare consciously for leadership in their chosen fields. (CT 85.) Specifically, L. L. Nunn believed that leadership had to be practiced. Believing that other colleges and universities were failing to use such methods to instill leadership skills, L. L. Nunn began to experiment with the training of young power plant workers by developing innovative schools at his power stations. (*Ibid.*) Drawing on these experiments, in 1911 he established a scholarship house on the Cornell University campus (the "Telluride House"). (*Ibid.*) Founding Deep Springs College in 1917 as an independent liberal arts college for future leaders culminated his educational dream. (*Ibid.*) His plan, his experiment, was for his students to acquire an unparalleled liberal education foundation using his innovative ideas. (*Ibid.*)

For more than the past four decades, the question whether to expand the admissions policy at Deep Springs College to permit the admittance and education of women in addition to men has been debated by trustees, students, alumni, faculty, and staff. The most recent formal Trustee inquiry into the question of coeducation began in early 2011[1]. After extensive study, discussion with alumni, donors and educational experts and long debate, on September 17, 2011, the Trustees voted 10 to 2 to admit women, in addition to men, as students of Deep Springs College.

The Trustees' decision to transition to coeducation was based on three straightforward conclusions agreed upon by the ten who voted in the majority. First, the Trustees concluded that L. L. Nunn's reason for founding Deep Springs was, in his own words, not "...to conduct a conventional school... [or] to make a special point of preparing boys for

[1] Prior formal and comprehensive studies were carried out in 1978 and 1979, from 1992 to 1994, and during the 2002 to 2005 period. These efforts, like that which took place in 2011, addressed not only the meaning of the Deed of Trust, but also the increasing challenges to the continued viability of Deep Springs College as a single-sex male institution. (CT 36-37.)

college.... Deep Springs is endeavoring to add its mite to the creation of a class devoted to the country's needs and to be a pioneer in the method of education which, if successful, should become general." (letter to the Student Body June 22[1st] 1922). (CT 776.)

Second, the Trustees concluded that in 2013 and onward, a coeducational Deep Springs would be more successful in training and developing the leaders focused on service that L. L. Nunn hoped that Deep Springs would produce.

Finally, the Trustees concluded that they had the power and authority to make this change in the admissions policy because the Deed of Trust charges them with developing the Grantor's educational work to achieve the purpose, which they interpret as training that "class devoted to the country's needs...."

III.
STATEMENT OF THE CASE

On February 6, 2012, the Trustees filed a Petition requesting either (1) confirmation that the Trustees' correctly interpretated that the Deed of Trust grants the Trustees the discretion to use the Trust estate to benefit a coeducational Deep Springs, (2) modification of the Deed of Trust to permit use of the Trust estate for the education of both male and female students. (CT 32-57.) The two Trustees who voted against coeducation at Deep Springs College – Respondents in this matter – filed their Objection and Response on May 7, 2012, contending that the clause, "..., for the education of promising young men," legally obligates the Trustees to forever exclude women from the Deep Springs College student body. (CT 113-169.) The trial court bifurcated the two issues raised in the Petition – interpretation of the Trust and, modification of the Trust. (CT 601-605; CT 703-705.) The parties litigated the first issue.

Oral arguments on trust interpretation were held on November 19, 2012. (RT 1-136.) On January 8, 2013, the trial court issued a Chambers Order briefly stating its conclusion that "[t]he Trust can not [sic] be construed as giving the Trustees discretion to admit female students." (CT 1889-1890 (emphasis in original).) On February 13, 2013, the court issued a ruling and order (CT 1900-1925) holding that the purpose of the Deed of Trust is "the education of promising young men" (*Id.* at 1906), and therefore, the "Trust can not [sic] be construed as giving the Trustees discretion to admit female students (*Id.* at 1908 (emphasis in original)).

This appeal followed. (CT 1926-1929.)

IV.
STATEMENT OF APPEALABILITY

Code of Civil Procedure section 904.1 permits an appeal to be taken from an order made appealable by the provisions of the Probate Code. (Code of Civ. Proc. § 904.1, subd. (a)(10).) With respect to a trust, the grant or denial of any final order under Chapter 3 (commencing with Section 17200) of Part 5 of Division 9 of the Probate Code is appealable. (Prob. Code § 1304, subd. (a).) Therefore, the Superior Court's order under Probate Code section 17200 is appealable.

V.
STANDARD OF REVIEW

Unless the trial court's decision turned on credibility of extrinsic evidence or a conflict in the evidence, the interpretation of a trust instrument is a question of law subject to de novo review. (*Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 453-454.)

Because the trial court's decision neither turned on credibility of extrinsic evidence, nor a conflict of the evidence (CT 1904), de novo review is proper.

VI.
QUESTION PRESENTED

As a matter of law, does the plain language of the Deed of Trust, taken as a whole, prevent the Trustees from determining that the admission of women furthers the purpose of the Trust in educating young men for positions of leadership consistent with idealism and unselfish service and then acting on that determination?

VII.
ARGUMENT

Appellant brought this petition under California Probate Code section 17200, which provides that "a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust" including "[d]etermining questions of construction of a trust instrument."

The court interpreted the Deed of Trust as granting broad discretion to the Trustees (CT 1903-1905), found that the purpose of the Deed of Trust is limited to "the education of promising young men" and only men, and the Trustees' discretion is strictly confined by that purpose. (*Ibid.*) Therefore, according to the court, the Trustees do not have the discretion to admit both male and female students at Deep Springs College. (CT 1908.)

As a matter of law this result cannot be sustained. Taken as a whole, the Deed of Trust does not preclude the education of women – in addition to men – at Deep Springs College. Indeed, the well-considered decision of the Trustees that, nearly a century after the school began, coeducation would best serve the grantor's essential overall objective for Deep Springs is within their power and should be upheld by this Court.

A. Interpretation of a Trust Instrument Under California Probate Code Section 21101 *et seq.*

California Probate Code section 21101 *et seq.* governs interpretation of a trust instrument. Probate Code section 21102(a) states that "[t]he intention of the transferor as expressed in the instrument controls." Because charitable gifts are favored by the courts, the most liberal rules of construction are applied in interpreting the trust to accomplish the intent of the trustor. (*In re Estate of Tarrant* (1951) 38 Cal.2d 42, 45 [citing *Estate of Hinchley* (1881) 58 Cal. 457, 513].) The intent of the trust creator is determined by construing all parts of an instrument in relation to each other, if possible, to form a consistent whole. (Probate Code § 21121.) All provisions are looked at together, in their entirety, the instrument being one, rather than individual terms and conditions. Reading the instrument in this manner is sometimes referred to as reading "from its four corners." (*In re Bernatas' Estate* (1958) 162 Cal.App.2d 693, 700.)

If the transferor's intent is not clear from the unambiguous language of the instrument, the court uses rules of construction in the Probate Code to construe the document. (Cal. Prob. Code § 21102, subd. (b).) If there is ambiguity in the instrument concerning the transferor's intent, extrinsic evidence is admissible to aid interpretation. (*Estate of Russell* (1968) 69 Cal.2d 200; *see also* Cal. Prob. Code § 21102, subd. (c).)

Here, to interpret the Deed of Trust, it is only necessary to review the language in the Deed of Trust. Reliance on extrinsic evidence is unnecessary for this Court to determine that the Deed of Trust grants the Trustees' discretion to extend admission to both male and female students at Deep Springs College and does not restrict admission to men only by the phrase "promising young men."

B. The Deed of Trust Grants Broad Discretion to the Trustees to Provide for the Manner, Form, and Place of the Educational Work at Deep Springs College In Accordance With the Grantor's Intent

Both Paragraph 1 and Paragraph 2 of the Deed of Trust unambiguously grant broad discretion to the Trustees to determine the best manner, form and place to provide for and carry on the educational work.

1. Paragraph 1 of the Deed of Trust Unambiguously Grants Broad Discretion to the Trustees

This "Purpose Paragraph" reads in full:

> The purpose for which the property hereby conveyed and the rents, income, profits, and proceeds thereof, shall be used by said Trustees is to provide for and carry on educational work in the State of California similar to and in development of the work already inaugurated by Grantor at Deep Springs in Inyo County, California, but ***in such manner and form and at such place or places within said State as said Trustees in good conscience and the exercise of their best judgment may determine, for the education of promising young men***, selected by said Trustees or as they may prescribe, in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony with the Creator, in the conduct of which educational work democratic self government by the students themselves shall be a feature as is now the case at said Deep Springs and which work shall be carried on not for profit but solely for the advancement of the purpose hereinabove mentioned[]

(CT 46 (emphasis added).)

The Trustees interpretation is that the Grantor, L. L. Nunn's, purpose was to provide for carrying on and developing his educational work begun at Deep Springs as he stated succinctly in the first phrase. Although he did not place a period after Inyo County, California the overall purpose of continuing what he considered a revolutionary experiment in education clearly overshadows the details of that ongoing educational work

he briefly describes in the balance of the paragraph. To differentiate the purpose of this grant from his other educational ventures, L. L. Nunn accurately describes the work he began at Deep Springs for the education of promising young men. In both the Purpose paragraph itself and in paragraph 2, however, he makes clear that the Trustees have the authority to change any aspects of the work as it was described in 1923.

The phrase "but in such manner and form ... as said Trustees in good conscience and the exercise of their best judgment may determine," unambiguously affords broad discretion to the Trustees to determine the manner and form of carrying on the educational work at Deep Springs College. There are no limits placed on the discretion of the Trustees other than that such discretion shall be exercised in the Trustees' "good conscience" and their "best judgment" to further the purpose of the Deed of Trust.

Moreover, the phrase "but in such manner and form ... as said Trustees in good conscience and the exercise of their best judgment may determine," qualifies the phrase "similar to and in development of the work." This language provides purely subjective guidance to the Trustees and does not constrain the form or details that the educational work may take in the future. L. L. Nunn thus intended that trustee discretion not be limited to continuing Deep Springs College exactly as it existed in 1923 but that the Trustees use their discretion to further develop the Deep Springs educational program to achieve his broader vision for the school.

The intent of L. L. Nunn is also demonstrated by the undisputed fact Deep Springs was established as an experiment in education. Having created many educational experiments in his lifetime, L. L. Nunn knew that they inherently develop, change, and risk failure. L. L. Nunn wanted his "work" at Deep Springs to continue, and he obviously expected the Trustees to make adjustments to his experiment to improve or if it began to fail or

become less effective. His phrasing clearly affords the Trustees substantial discretion to make changes consistent with his overall vision. His phrase "similar to and in development of" gives the Trustees wide latitude to adjust the operating details of Deep Springs as society evolves. The Trustees determined that "..., the education of promising young men," is a description of the manner and form of the work in 1923 and not a limitation on their broad discretion to alter the manner and form of the Deep Springs program to further develop Mr. Nunn's experiment.

The grant of broad discretion in the Deed of Trust is similar to the grant for the H. Sophie Newcomb Memorial College at Tulane University that was evaluated twice by the Court of Appeal of Louisiana. (*See Howard v. Administrators of the Tulane Educational Fund* (2007) 970 So.2d 21 (hereinafter, *Howard*); *Montgomery v. Administrators of the Tulane Educational Fund* (2010) 51 So.3d 60 (hereinafter, *Montgomery*).) In 1886, Mrs. Newcomb donated $100,000 to Tulane University in memory of her deceased daughter. She advised the university that she was donating the funds "to be used in establishing the H. Sophie Newcomb Memorial College, in the Tulane University of Louisiana, for the higher education of white girls and young women." (*Howard* at 23; *Montgomery* at 64.) She further provided "I do not mean in this my act of donation to impose upon you restrictions which will allow the intervention of any person or persons to control, regulate, or interfere with your disposition of this fund, which is committed fully and solely to your care and discretion with entire confidence in your fidelity [sic] and wisdom." (*Ibid.*) Mrs. Newcomb also made a gift to the University in her will.

After New Orleans was devastated by Hurricane Katrina, Tulane University consolidated the H. Sophie Newcomb Memorial College with the University. Relatives of Mrs. Newcomb challenged the University's right to abolish the separate H. Sophie Newcomb Memorial

College as a women's college. In both *Howard* and *Montgomery*, the court held that the discretion granted to the University was broad enough that it was not bound to continue in perpetuity the single-sex college. (*Howard* at 26-28; *Montgomery* at 63.)

Similarly here, the grant of discretion to the Trustees is broad enough to permit the Trustees to choose to utilize the Trust estate for the education of women, in addition to men, at Deep Springs. Both Mrs. Newcomb and L. L. Nunn were wise enough to anticipate that unforeseen circumstances could adversely affect the effectiveness of methods used in their time in achieving their visions. They empowered the governing body to change the methods over time.[2]

2. Similarly, Paragraph 2 of the Deed of Trust Unambiguously Grants Broad Discretion to the Trustees

Like the Purpose Paragraph, in Paragraph 2 of the Deed of Trust L. L. Nunn afforded the Trustees broad discretion to manage and distribute the Trust estate. Paragraph 2 states as follows:

> ***In order to enable them to accomplish the purpose of this trust in such manner as they in the exercise of their best judgment may deem most fitting and expedient***, the said Trustees are hereby authorized and empowered to act in the matter and deal with any and all property now or hereafter held by them hereunder, (said property so held hereunder at any given time being hereinafter referred to as the trust estate), ***as they in good conscience and the exercise of their best judgment may deem proper and advisable***; and they are hereby given and granted full power and authority:

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[2] The trial court in the present case agreed with Appellant's interpretation of the Purpose Paragraph as it applied to a broad exercise of discretion and concluded that, "[r]eading the plain and ordinary meaning of the words in the purpose statement, the Trust appears to give the Trustees broad discretion over how and where to administer the educational component, but limited to the purpose of [the Deed of Trust]." (CT 1903-1904.)

(a) To hold, sell, convey, lease, subdivide, pledge, mortgage, encumber, invest, reinvest, loan, reloan, and in any and all other respects handle, manage, operate, and dispose of all or any portion of said trust estate in such manner, for such consideration, and upon such terms and conditions as said Trustees deem most advisable, ***and all without the intervention of any court or any limitation or restriction on the discretion of said Trustees*** as to the kind or class of property in which the proceeds of or income from said trust estate may be reinvested, and without obligation on the part of any purchaser of all or any part of the trust estate to see to the application of any of the purchase money paid therefor;

(b) ***To transfer and turn over***, without receiving pecuniary consideration therefor, ***all of the trust estate*** held hereunder ***to an educational corporation***, unincorporated association, *or* ***other like organization devoted to the cause of education***, whether formed by said Trustees or then existing, ***whenever so to do will in the judgment of said Trustees best maintain and carry out the purpose herein set forth***, provided that under no circumstances shall any of the trust estate be so transferred or turned over to any such organization formed or operated for private gain, or for use otherwise than in the accomplishment of the purpose of this trust; and, upon such transfer of said trust estate, the Grantee or Grantees thereof shall be substituted for the said Trustees and shall be subject, however, to such additional conditions and limitations as may be imposed by said Trustees;

...

(CT 47-48 (¶ 2) (emphasis added).)

As in the Purpose Paragraph, the only limit L. L. Nunn places on the Trustees' is that they exercise their discretion "in good conscience" and in their "best judgment."

The first phrase of Paragraph 2 repeats that the Trustees are to accomplish the Trust's purpose as they "may deem most fitting and expedient."

Furthermore, Paragraph 2(a) permits the Trustees to sell the entire trust estate "without ***"...any limitation or restriction on the***

discretion of said Trustees..." (emphasis added) and Paragraph 2(b) states: "***To transfer and turn over, ... all of the trust estate ... to an educational corporation***, unincorporated association, *or* ***other like organization devoted to the cause of education, ..., whenever so to do will in the judgment of said Trustees best maintain and carry out the purpose herein set forth***, **provided that under no circumstances shall any of the trust estate be so transferred or turned over to any such organization formed or operated for private gain, ...**"or for use otherwise than in the accomplishment of the purpose of this trust."[3] This language places specific limits on the discretion of the Trustees that the recipient of Trust assets must be devoted to education and cannot be formed or operated for private gain. L. L. Nunn does not, however, limit the Trustees discretion to transfer assets only to men's schools. If L. L. Nunn's intent was, as found by the Trial Court, to educate ONLY men, the meticulous lawyer described by the Respondents would have written "for men only", or similar language, as a third restriction on broad the authority he granted in Paragraph 2.

Together, the language in the Purpose Paragraph and Paragraph 2 establishes L. L. Nunn's intention to provide the Trustees with virtually unfettered discretion to use the Trust estate in any manner or for any means to advance the purpose of the Trust. That purpose, as determined by the Trustees, is to provide for and carry on education work

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[3] In 1998 the Trustees did transfer the key piece of the Trust real estate to an LLC owned by the Deep Springs Corporation and the Telluride Association—another entity started by L. L. Nunn.

similar to and in development of the program – the experiment – which L. L. Nunn had started at Deep Springs.[4]

C. The Phrase "Promising Young Men" Neither Articulates the Sole Purpose of the Deed of Trust, Nor Limits the Discretion of the Trustees In Carrying Out the Purpose of the Trust

The purpose of the Deed of Trust is not limited to "the education of promising young men" only. (CT 1906.) Educating promising young men is *one* of L. L. Nunn's aims, but not his only objective as set forth in his grant. The Trustees' determination that educating women with the men will provide a better education for the men is consistent with the plain language of the Deed of Trust. Had he meant to dictate that Deep Springs College would be a single-sex male institution in perpetuity, L. L. Nunn could and would have said so. The Purpose Paragraph and the balance of the Deed of Trust make clear that L. L. Nunn knew how to specify limitations on the Trustees' discretion. He specified that the education be conducted "...in a manner emphasizing the need and opportunity for unselfish service...," he explicitly limited Trustee discretion concerning student government; he forbade the Trustees from transferring Trust assets to a for-profit institution; but he never stated that the grant to Deep Springs was solely for male students or that female students were prohibited.

The trial court relied exclusively on four words in the Purpose Paragraph to reach its conclusions, without balancing the other

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[4] The trial court agreed with Petitioner's interpretation of Paragraph 2 and found that "the remaining provisions of the trust...do indeed provide broad discretion to the Trustees, but again are limited to taking any necessary actions for the *purpose of the Trust*." (CT 1905 (emphasis in original).)

objectives stated in the entire Deed of Trust, and without reference to L. L. Nunn's dominant goal to support Deep Springs College so it could produce young leaders imbued with certain virtues. The court stated that since "the Statement of Purpose is the only section of the Trust itself to which Nunn elaborates on the purpose for the school, it appears that the only purpose intended by him was to continue a men's college." (*Ibid.*) Proper analysis requires a different conclusion.

1. The Plain Language of the Deed of Trust Does Not Support the Conclusion That the Sole Purpose of the Trust is the "Education of Promising Young Men" Only, Nor the Conclusion That Such Language Limits the Discretion Granted to the Trustees

Considering all parts of the Deed of Trust in relation to each other to form a consistent whole as mandated by Probate Code section 21121, it becomes clear that (1) the purpose of the Deed of Trust is not the "education of promising young men" only, and (2) the phrase "promising young men" does not limit the discretion granted to the Trustees in the Deed of Trust to prevent them from admitting women now that they have concluded that admitting women is in furtherance of the purpose of the Trust.

a. The Plain Language of the Deed of Trust Does Not Support the Conclusion That the Admission of Women is Inconsistent With the Purpose of the Deed of Trust

The Trust purpose is to provide for and carry on educational work similar to and in development of the work which had already been inaugurated by L. L. Nunn at Deep Springs for the education of promising young men. The phrases "similar to" and "in development of" were and remain an invitation – if not a command – to the Trustees to build on what had been started, and direct them to not slavishly perpetuate the 1923 phase of the experiment. L. L. Nunn's goal was to support an educational

program that "similar to" and "in development of" his original work uses his stated philosophies to attract and train students best suited to work towards the goal of improving society. The gender of students 100 years later is only relevant in considering what will enable the college to effectively pursue the goal.

In the Deed of Trust Purpose Paragraph, L. L. Nunn did not attempt to describe his Deep Springs' educational work in detail. He did, however, refer to certain characteristics of the effort in progress. Those were, in the order and language stated in the Deed of Trust:

1. "[A]t Deep Springs in Inyo County, California...."

2. "[F]or the education of promising young men,...."

3. "[I]n a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony with the Creator."

4. "[I]n the conduct of which educational work democratic self government by the students shall be a feature as is now the case at Deep Springs."

5. "[W]hitch work shall be carried on not for profit but solely for the advancement of the purpose hereinabove mentioned."

L. L. Nunn gave direction to the Trustees and students on the importance of each characteristic in his conception of Deep Springs.

1. At Deep Springs, California. The Deed of Trust only notes that this is the current location and paragraph 2 specifically grants the Trustees the discretion to relocate the school. In other writings, however, L. L. Nunn expounded at length on the educational benefits of the location. He particularly emphasized the benefits of isolation to focus the students on the work at hand and the inspirational power of the desert.

2. For the Education of Promising Young Men. This is a correct description of the student body from 1917 to the 1923 signing of the Deed of Trust. It is stated as a parenthetical phrase in the long complex single sentence purpose paragraph but not mentioned again in the Deed of Trust. To Appellant's knowledge (after extensive research by both Appellant and Respondents) L. L. Nunn never elaborated on the reasons for or any educational benefits of an all male student body.

3. In a Manner Emphasizing the Need and Opportunity for Unselfish Service. This is a clear statement of L. L. Nunn's educational philosophy. He considers this important and different about Deep Springs and directs the Trustees to emphasize this concept as they continue to develop Deep Springs. In his letters he elaborates on this at great length as the central purpose of Deep Springs.

4. Self Government by the Students Shall be a Feature. This is clear direction to the Trustees the L. L. Nunn requires them to continue self government as part of the educational experiment. Paragraph 5 of the Deed of Trust elaborates extensively on the Grantor's requirement that student government be maintained by the Trustees and certain required aspects of student government. In particular, Paragraph 5 states, "Therefore, it shall be the duty of said Trustees to accord the Student Body the full right, power and authority of democratic self-government in accordance with its traditions and the **ideals and policies of Deep Springs educational institution set forth in the correspondence and documents of Grantor and of the institution...."** L. L. Nunn did, indeed elaborate extensively on the process and benefit of student government in his letters to the student body and other writings. (CT 48-49 (¶5).)

5. The Work Shall be Carried on Not for Profit. This is also clear direction limiting the Trustee's discretion. L. L. Nunn repeats this limitation in Paragraph 2 and elsewhere. (CT 48 (¶4).)

The Respondents have argued, and the trial court essentially agreed, that every word in the Purpose Paragraph should be given the same weight. Therefore, they argue that the promising young men phrase ought to be treated as a command to the Trustees to maintain an all male student body with the same import as the clear direction given by the Grantor concerning student government, non-profit status and the emphasis on service. Respondents have even argued that interpreting the Trust to allow the Trustees to admit women students as well as men would allow the Trustees to abolish student government.

In context however, it is clear that some elements of Deep Springs were more important to L. L. Nunn than others. He was extremely fond of the location but he allowed the Trustees to change it if they determined it was necessary or appropriate. He clearly used limiting language concerning student government and non-profit status. He elaborated extensively in his other writings about service and student government and specifically directed the Trustees to refer to and be guided by his documents and correspondence concerning student government. In the referenced letters to the student body, discussion of student government is intertwined with the purpose of Deep Springs to instill values and teach skills for unselfish service and discussion of the power of the remote desert location to transform students.

By contrast, L. L. Nunn did not use the express words of restriction (e.g. "only," or "solely" or "exclusively") to direct that Deep Springs College be used to educate male students and no one else. L. L. Nunn knew how to include a restriction in a legal document and gives clear direction of his intent. (CT 128 (¶40); CT 137-138 (¶¶71-73).) In the Deed of Trust L. L. Nunn's careful choice of language, places an imperative on service and student government. No such emphasis is given to the phrase "for the education of promising young men." In context, the phrase

"promising young men" must be interpreted merely as a description of Deep Springs as it existed at the time. The Deed of Trust and his other writings make clear that an all male student body was not as important to L. L. Nunn's vision as the isolated desert location but the Deed of Trust specifically allows the Trustees to change the location. Training selfless leaders devoted to lines of service is the purpose of Deep Springs. Active student government and practical work are the required means of instruction.

To interpret the Purpose Paragraph by ignoring the emphasis L. L. Nunn intentionally and carefully placed on particular items does a disservice to the Grantor's intention to entrust broad discretion to the Trustees. Read as a whole, the Deed of Trust clearly grants the Trustees broad discretion except as clearly limited by the language the Grantor intentionally chose. There is no evidence of any intent to limit the student body to males only, either in the Deed of Trust or in the other writings he cites. Therefore, the Trustees should be allowed the discretion to determine whether admitting females, as well as males, will further the purpose of Deep Springs set forth by the Grantor.

In addition to the *Howard* and *Montgomery* cases discussed above (where the court held that the discretion granted to the University was broad enough that it was not bound to continue in perpetuity the single-sex college), Appellant has found only two published cases where a court has been asked to determine whether language of a trust document directing support for a single-sex institution should be interpreted to prohibit use of the estate to also benefit the other sex. In both cases the court found that the trust assets could be used to benefit not just individuals of the sex identified in the grant, but members of the opposite sex as well.

The first case is from the Appellate Division of the Supreme Court in New York, *In re Estate of Edwards* (N.Y. App. Div. 1982) 86

A.D.2d 702 (hereinafter, *Edwards*). In *Edwards*, the testator created a trust in his will to assist an existing all-male boarding school in Massachusetts, Worcester Academy. The will stated that the trust should fund the school so long as it "continues to be operated as a boy's preparatory school, preparing boys for college entrance." *Ibid.* The will stated, if Worcester Academy ceased "to be operated as a preparatory school for boys," it was no longer eligible to receive funds from the trust. *Ibid.* Sometime after the will was admitted to probate, Worcester Academy became coeducational. An alternative trust beneficiary sued, asserting that Worcester Academy was barred from receiving the trust income because it had become coeducational. The trial court held that the school was not barred from continuing to receive the funds even though it began admitting female students.

The appellate division affirmed that "the paramount rule of testamentary construction is that the intention of the testator must be gleaned from the express language of the will." *Id.* at 703 (citing, *In re Estate of Jones* (N.Y. 1975) 38 N.Y.2d 189). It reasoned that the intention of the testator was to fund the school as long as it prepared boys for college, and that that particular function continued to be fulfilled even after the school became coeducational. Additionally, since the testator was "obviously intelligent and sophisticated," the will was precise and definite in expressing his intentions. *Ibid.* If the testator had desired the school to remain *for boys only* in order to receive money from the trust, he would have included language such as "solely" or "only." (*Ibid.* (emphasis added).) One factor the Edwards court considered was that the decedent was merely one of many donors to the school. Thus, his donations could not dictate school policy. Similarly, today the L. L. Nunn Trust provides only a very small portion of the operating funding for Deep Springs College so Deep Springs must rely on many other donors to survive. (CT 707.)

The second case is from the Massachusetts Supreme Judicial Court, *Ebitz et al. v. Pioneer National Bank* (1977) 372 Mass. 207 (hereinafter, *Ebitz*). In 1963, the testator executed his will, which established a scholarship fund in the name of a judge and the judge's wife. The testator directed that the fund

> [B]e used to aid and assist worthy and ambitious *young men* to acquire a legal education, so that they may be better fitted and qualified to become good citizens of their country, leaders in their community, and able members of the legal profession. To be eligible for consideration for assistance from the [F]und, the student or students, as the case may be shall be residents of the city of Northampton.
>
> (*Id.* at 208-209 (emphasis added).)

Female law students who applied for assistance from the scholarship fund were rejected on the grounds that only male applicants were eligible for consideration. They sued. The court held that the testator did not intend to exclude female residents of Northampton from eligibility for assistance from the fund. The judge concluded from its context in the will that the term "men" in the phrase "worthy and ambitious young men" was employed in a generic sense and was not intended to exclude females.

The Supreme Judicial Court of Massachusetts affirmed the judgment and concluded that the testator intended that Northampton residents of both sexes be considered as eligible applicants for assistance from the fund and "used the term 'men' in its generic sense, which includes women." (*Id.* at 211-212.) The Supreme Judicial Court based its interpretation on other language in the will. First, the testator had suggested in his will that the trustee use the educational program of the Knights Templar as a guide – an organization that does not discriminate on the basis of sex. Second, the testator, in his will, stated his general goal of assistance of "as many students as possible." Finally, the fund was dedicated to both the judge and his wife. (*Id.* at 211.) Together, these

elements support the conclusion that both men and women of Northampton may be considered.

The decisions in both *Edwards* and *Ebitz* demonstrate that referencing one sex can properly be interpreted to include both sexes unless it clearly appears that the grantor intended to impose an imperative obligation to exclude women. L. L. Nunn's phrase "education of promising young men" can and should be interpreted as permitting the Trustees to implement coeducation because it is not clear that L. L. Nunn intended to exclude women.

An analogous situation is addressed by the court in *Zahn v. Zahn* (1971) 16 Cal.App.3d 106 (hereinafter, *Zahn*) involving interpretation of a holographic will seemingly limiting use of the grant to support only *Christian* women and girls. The question presented was whether the property could also be used to benefit women and girls not of the Christian faith. The will stated in relevant part:

> I want to start a Rest Home ... for Christian women and girls who have no relatives, no smokers or drinkers only deserving citizens who are Native Californians. Perhaps the Salvation Army can recommend them....
>
> (*Id.* at 110.)

The court found that despite inclusion of the word "Christian," "[n]either the will nor the decree forbids, restricts or limits the use of the property to *Christian* women or students." (*Id.* at 116 (emphasis in original).) Although focused on religion rather than gender, *Zahn*, like *Edwards* and *Ebitz*, deals with language that might at first blush seem restrictive. Nevertheless, the court in *Zahn* held that the reference to "Christian" did not prevent the use of the property for a rest home that also benefited women of other faiths, or even women of no religion at all. Likewise, here, the Deed of Trust, even if read to say that the Trust estate

shall be used to support work for the "education of promising young men," should be interpreted as permitting the Trust estate to support the educational work at Deep Springs even if it also includes the education of women.

b. The Plain Language of the Deed of Trust Does Not Support the Conclusion That the Phrase "Education of Promising Young Men" Limits the Discretion of the Trustees Granted in the Deed of Trust

The Deed of Trust unambiguously grants broad discretion to the Trustees to determine the form, manner, and place of education at Deep Springs College. The relevant question is whether L. L. Nunn used the phrase "promising young men" to describe a characteristic of the work as it existed in 1923, or to put a permanent restriction on the Trustees' discretion in developing the work at Deep Springs College.

In 1917, L. L. Nunn was influenced primarily by the major educational institutions in the country, which were predominantly single-sex male. (See CT 87.) Additionally, when L. L. Nunn personally participated in choosing the students (1917 through 1924) those students were all male. However, whether L. L. Nunn intended to limit the Trustees' discretion so that they could admit only male students in perpetuity is a separate question from what L. L. Nunn decided was the appropriate composition of the Deep Springs student body at the extremely remote campus from 1917 through 1924.

The broad discretion granted to the Trustees is to allow the flexibility in pursuing the overarching purpose of Deep Springs. That discretion must include the ability to determine whether changing social conditions and the roles of men and women in modern society necessitate changes in the institution to better achieve the purpose of the Trust.

Put another way, the inquiry is whether L. L. Nunn intended by his words in the Deed of Trust to "impose an imperative obligation" on the Trustees to exclude women. (See *Estate of Duncan* (1956) 145 Cal.App.2d 612.) The phrase, "I would like to help, perhaps a secretary, at the [charity]" was held to be an outright bequest to the charity with the reference to "a secretary" merely a nonbinding hope or desire; *Estate of Hood* (1943) 57 Cal.App.2d 782.) Similarly, the phrase "for the education of promising young men" is not limiting language but a description the "manner and form of Deep Springs in 1923.

After thorough analysis, the Trustees determined that, because (1) the Trust directs the Trustees to exercise their discretion to determine the best manner and form of educating "promising young men," (2) the education of men at Deep Springs College is less effective at achieving the educational purpose of Deep Springs due to single-sex male admission policy, (3) the Trust does not expressly limit the discretion of the Trustees to educate female students, that coeducation is a necessary and reasonable method to achieve the Trust purpose.

The decision of the Trustees is similar to the decision made by the City of Quincy. In 1970, the Supreme Judicial Court of Massachusetts was asked to interpret the charitable trust establishing a school for Quincy natives. (*Trustees of Dartmouth College v. City of Quincy* (1970) 357 Mass. 521.) Testator left to the city all of his local real estate, and other property to found a school "for the education of females ... who are native born, I wish it to be understood, in the town of Quincy, and none other than these, to be allowed to attend this Institute which I wish to be as perfect and as well conducted as any other in the state." (*Id.* at 523.) Testator further provided that if the city failed to comply with the words and intent of his will, all property that would have gone to the city would instead pass to Dartmouth College. (*Id.* at 524.)

When it became difficult to keep the school running under the specific terms of the trust, the city sought an interpretation of the trust that would allow the school to provide education for Quincy-born girls, even though non-Quincy-born girls would also be admitted. The court relied on language in a previous decision by the court concerning the same trust, *City of Quincy v. Attorney General et al.* (1894) 160 Mass. 431. In that case, the court was asked to interpret the language of the gift over to Dartmouth College. There the court said:

> [I]t is plain from the whole will that the great thing in the testator's mind--his dominant intent--was to establish the female institute, *and the general intent gathered from all the words must prevail over any small detail which interferes with it, unless clearly he makes exact compliance essential.*
>
> (*Id.* at 436 (Emphasis added).)

The 1970 court relied on this principle to interpret the trust as requested by the city. The same principle should be applied in this case. The "dominant" intent of L. L. Nunn was to provide for the continuation of Deep Springs. Therefore, the Trustees are charged with that duty. Slavish adherence to the phrase "promising young men" is not required because L. L. Nunn never explicitly limited the Trustees' discretion to admitting only male students. Most importantly, the Trustees are not bound to admit only men because they have determined it is inconsistent with, and detrimental to, achieving the dominant and overarching purpose of the Trust to instill in students the ideals of service and train them in practical leadership skills.

2. The Extrinsic Evidence Presented to the Court Below Supports Appellant's Interpretation

If this Court interprets L. L. Nunn's intentions as stated in the Deed of Trust as ambiguous, this Court may consider extrinsic evidence. (*Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 511.) Furthermore, because any interpretation of extrinsic evidence by the

Superior Court did not depend upon the credibility of such evidence (see CT 1900-1907), this Court may consider the extrinsic evidence de novo. (*Foothill Properties v. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542, 1549 ("[w]hen there is ambiguity in the contract language, extrinsic evidence may be considered to ascertain a meaning to which the instrument's language is reasonably susceptible. [Citation.] ... We review the agreement and the extrinsic evidence de novo, even if the evidence is susceptible to multiple interpretations, unless the interpretation depends upon credibility. [Citation.]" (quoting *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 21-22)).)

a. Society in 1923 Likely Influenced the Initial Decision of L. L. Nunn to Admit Only Male Students to Deep Springs College

L. L. Nunn, choosing only male students in the initial years of Deep Springs, was consistent with the realities in 1923. At Deep Springs College, L. L. Nunn established a unique educational experiment in a very remote location. The educational program included classroom study, self governance and rigorous work running a cattle ranch and farm designed to train the students to become practical leaders in society. In 1923, L. L. Nunn reasonably determined that an isolated self governing coeducational student body would be very problematic at a remote school that required a Spartan lifestyle.

Although women did have access to higher education in 1923, the emerging collegiate system was aggressively segregating women with restrictive social controls and academic policies that steered women into stereotypic female roles and professions. (CT 36-37.) Today, women are able to attend all of the public, and most of the private, colleges and universities in the United States.

As of 2010, all public and almost all private colleges and universities admit women. Only four non-religious institutions remain all-male. The four institutions are Deep Springs College, Hampden-Sydney College, Morehouse College, and Wabash College. All of the single sex privately funded colleges that have chosen to become coeducation have been found legally able to make the transition. (CT 88.) Beginning in the 1980s (60 years after the creation of the Deed of Trust) the number of women enrolled in institutions of higher education has consistently exceeded the number of men. Women are encouraged to enter into the same fields as men, including law, medicine, and other fields associated with power and influence and the percentage of women in leadership positions is growing significantly. (CT 40 (¶17).) Many women desire to experience the lifestyle and education offered at Deep Springs College. Change in society makes a coeducational student body feasible as Deep Springs. Furthermore, in today's society, a school that offers only a single-sex male education faces challenges.

It is inconceivable that L. L. Nunn intended that the Trustees slavishly adhere to the single-sex male admissions policy when to do so harms the school and its students by excluding at least half of the potential leaders from the applicant pool. Most importantly, the Trustees have found that excluding women compromises the type of experiential leadership training sought by L. L. Nunn because an all male leadership environment is a thing of the past.

b. Aware of a Coeducational Trend in Higher Education Before Drafting the Deed of Trust, if L. L. Nunn Intended to Forever Limit Admission to Men Only, He Would Have Explicitly Forbid Coeducation in the Deed of Trust

At the time L. L. Nunn established the Deed of Trust he was aware of the growing trend of participation by women in all aspects of

higher education. Specific evidence of this knowledge is well documented by Respondents in the Objection and Response. (See CT 155-156 (¶¶146-149).) Specifically, L. L. Nunn's maternal grandmother attended college; his sister Emily received a formal education superior to that of her brother; his sisters were both teachers (one even taught at a coeducational school, Cleveland Academy), and L. L. Nunn himself received his early training from a groundbreaking female educator. (*Id.* at 154-155 (¶¶142-144).) Respondents have not, however, cited any evidence that L. L. Nunn disapproved of coeducational institutions or higher education of women.

Significantly, L. L. Nunn founded the Telluride House on the campus of Cornell University in 1911 when most ivy-league colleges had single-sex male student bodies but Cornell had been coeducational for 46 years, since its founding in 1865. (CT 64.) Given L. L. Nunn's thoroughness as an attorney and a businessman as documented by Respondents, he surely carefully considered all aspects of the Cornell University education, including the coeducation component, before embarking on the Telluride Association's educational partnership with Cornell University that remains successful to this day. The evidence cited by Respondents, and L. L. Nunn's experience with Cornell University, together show that L. L. Nunn was both aware of coeducational colleges and that he did not fundamentally disagree with the philosophy or rationale supporting coeducation.

Respondents have established that L. L. Nunn knew about coeducation, and he knew that it was an option the Trustees might consider for Deep Springs in the future. If L. L. Nunn had any concerns about coeducation at Deep Springs, or if he believed that it was important for the Trustees to maintain the single-sex male student body at Deep Springs in perpetuity, he would have most likely used his legal expertise to specifically prohibit coeducation. He chose, however, to say that the

Trustees could choose the manner and form of the educational work without stating that the Trustees could educate only men or that they could not use the Trust assets to educate women. If L. L. Nunn were founding the institution hundreds of years earlier, if he were unaware of coeducation at institutions of higher education, or if he could have reasonably assumed that coeducation would not continue to become more common, his failure to explicitly forbid coeducation, or conversely, to mandate a single-sex male student body, would be understandable. The uncontroverted evidence, however, is that L. L. Nunn was aware of the coeducation trend. Therefore, the absence of language limiting the Trustees to a single-sex male student body can only be interpreted as evidence that he did not intend to limit the Trustees' discretion to admit any students (including women) that the Trustees deem appropriate to carry on L. L. Nunn's educational work.

c. None of L. L. Nunn's Extensive Writings Concerning Deep Springs College Indicate an Intent to Forever Prevent the Trustees From Supporting a Coeducational Deep Springs

i. L. L. Nunn's Document *The Purpose* Demonstrates His Philosophy, Understanding, and Purpose in Inaugurating Educational Work at Deep Springs College, and It Lacks Any Prohibition on the Education of Women at Deep Springs College

As noted above, in Paragraph 5 of the Deed of Trust, L. L. Nunn specifically directs the Trustees to review the "correspondence and documents of the Grantor to fully understand his intentions for student government, a matter of paramount importance in the Deed of Trust. L. L. Nunn does not explicitly direct the Trustees to refer to his correspondence to interpret his overall intentions for Deep Springs. In studying L. L.

Nunn's writings concerning student government, however, the Trustees' interpretation has reasonably been influenced by L. L. Nunn's discussion of how self governance relates to the purpose of Deep Springs and how L. L. Nunn describes the purpose in his writings. In *The Purpose*, executed on December 30, 1924. (See CT 53-57.) L. L. Nunn, describes the purpose of Deep Springs College. It states:

> "[t]he purpose of Deep Springs [College] is to help in the *training* of the few. It is to create an environment where young men of sound character may find religious influence which will help them build the character for full employment in the service of their fellowmen."

The Purpose clarifies that L. L. Nunn intended that Deep Springs College would educate those individuals in society who have the potential to become society's leaders. Neither the Deed of Trust nor *The Purpose* discusses an all-male student body, or states that only male students may be educated at Deep Springs College. Taken as a whole, *The Purpose* implies that if the Trustees determine that any person has potential to be a leader in society and that such person's education at Deep Springs College will fulfill L. L. Nunn's vision, the Trustees may choose to educate that person at Deep Springs College regardless of that person's gender. Further, given the role of women in modern society, achieving the dominant Trust purpose today essentially requires training male students and female students together to be leaders in a gender-neutral environment.

ii. L. L. Nunn's Letters to the Deep Springs College Student Body Demonstrate His Philosophy, Understanding, and Purpose in Inaugurating Educational Work at Deep Springs College, and they Lack Any Prohibition on the Education of Women at Deep Springs College

L. L. Nunn considered himself a member of the Deep Springs College student body from the date that the first Deep Springs class entered

in 1917 until his death in April, 1925, but due to his ill health, he was not able to visit Deep Springs College as often as he wished. Instead, he engaged in extensive correspondence with the student body concerning matters of life at Deep Springs College. In particular, those letters addressed L. L. Nunn's hopes and ambitions for both the institution and the students. Those writings often discuss the purpose and key components of Deep Springs. Distinctly absent is any discussion of the rationale and/or benefits of a single-sex male education, or its importance to L. L. Nunn's vision for Deep Springs.

The letters from L. L. Nunn to the student body discussed a broad range of topics from the mundane (the stationery used by Deep Springs) to the profound (the inspiration to be gained from the surrounding desert). (CT 764-787.) Despite the broad range of topics in those letters to the student body, L. L. Nunn did not discuss, or even touch on, the question of the gender of the student body. While L. L. Nunn did consistently use the male pronouns ("man," "men," "boys," "he," "his" and "mankind") in his correspondence, it is clear that in most instances that he used those pronouns, in the fashion customary at the time, to mean all people rather than only males.

While Respondents have noted that following L. L. Nunn's death many of his business papers were destroyed (CT 130 (¶46)), they have not alleged that any letter(s) from L. L. Nunn to the student body (especially any letters expressing a position on the gender make-up of the students) have been destroyed. Nor have Respondents been able to explain why not one of the letters to the student body—letters that expound on lives of service and student body government as key elements and the purpose of the Deep Springs education—ever mention a reason for, or place any emphasis on, the gender of the students or the importance of excluding women students.

Most telling is that, while explaining the educational benefits of the isolation L. L. Nunn sometimes stated that he was opposed to students leaving the community to visit women (see CT 768 (letters dated March 23, 1920, and March 26, 1920); see also CT 777-778 (letter dated February 17, 1923)), but he never stated that he was opposed to females being part of the Deep Springs community. In fact, what L. L. Nunn opposed was diluting the student's focus on the community either by leaving to visit others or by inviting visits from individuals, male or female, who were not a part of the Deep Springs community. While the student body has always been single-sex male, there have always been females, of all ages, in the isolated community.

As an example, one of L. L. Nunn's letters to the student body is reprinted in relevant part below. This letter, written on June 1, 1922, reads:

> Deep Springs believes and teaches that since Lord Bacon's time the Anglo Saxon people have been overloading their Ship of State on the side of Science, resulting in the growth of materialism and commercialism and obscuring the ideals which flow from religion, philosophy and ethics. It teaches and believes that science has been made the ignominious slave of commercialism and that commercialism has found most profit in amusing and stupefying the people with every material device and sensual pleasure; that our educational intuitions too often prepare their most brilliant students to be the ill-paid hirelings of the avaricious, or, what is worse, participators in the results of an evil system. Deep Springs does not disregard mathematics or the general sciences, or even commercialism or the spread of the use of creature comforts, but, recognizing the overloading of the ship on one side, aims to place the small weight of its influence where it will tend to develop men of fixed purpose and character, who will dedicate themselves to the higher cause of service.
>
> Deep Springs does not conduct a conventional school. It does not make a special point of preparing boys for college, nor of providing a year or more of outing to build up their physique

> before they enter college. It does not teach agriculture or engineering, or specialize in any of the material sciences. Its purpose is not to finance education for those who cannot finance for themselves. It is not endeavoring to prepare its students for commercial pursuits. It aims at high scholastic work in ancient and modern language; in history, especially by the study of the lives of those who in various ages have made history conspicuous in the great epochs in the world's development; in the rise, fall, and general character of government; in philosophy; in ethics, especially emphasizing service to sentient being, loyalty to the moral order of the universe, and the taking of the oath of allegiance to that moral order of its Executive. Deep Springs attempts to form in its students the habit of extensive reading and thus to establish a close comradeship between them and those who have struggled and accomplished things worthwhile. Its aim is to prepare the student for his life work; preparation for college being only incidental.
>
> To conclude: Deep Springs is endeavoring to add its mite to the creation of a class devoted to the country's needs and to be a pioneer in the method of education which, if successful, should become general. It requires high-grade material which will respond to high-class instruction. Students should expect to remain not less than three years, preferably four, and to do while at Deep Springs the first two years of college work. They should consider the conditions seriously before coming so as to avoid being required to leave because of failing to meet them, or disappointing the institution by leaving the work undone.
>
> (CT 776.)

This letter describes the uniqueness of Deep Springs College in terms applicable to all mankind. L. L. Nunn' s purpose and intent in founding and endowing Deep Springs was solely to pursue his educational philosophy described in this letter and his other writings. What made Deep Springs different from other schools in 1923 was not a single-sex male policy. Rather, students at Deep Springs were taught and encouraged to pursue unselfish service, as they continue to be today. The purpose of

Deep Springs is to carry on education with that philosophy. The Trustees are to continue to develop the manner and form of the educational work to improve its effectiveness beyond what L. L. Nunn was able to develop in the first six years and to adapt the manner and form to changing circumstances in society. This should include the ability of the Trustees to extend admissions at Deep Springs College to both male and female students if they determine that change in operation will further the purpose of Deep Springs College.

D. It is Within the Discretion of the Trustees to Continue to Use the Trust Estate to Benefit Deep Springs College After it Becomes Coeducational

As recognized by the trial court, the Trustees have broad discretion to administer the Trust, but that discretion is "limited to taking any necessary actions for the purpose of the Trust." (CT 1905 (emphasis deleted).) Therefore, once the purpose of the Deed of Trust is ascertained, it is necessary to analyze whether the Trustees' decision to admit women furthers that purpose.

As stated, the plain language of the Deed of Trust supports neither the conclusion that the "education of promising young men" exclusively is the purpose of the Deed of Trust, nor the conclusion that such language limits the Trustees discretion. Additionally, the extrinsic evidence establishes that L. L. Nunn expressed no affirmative intention to exclude female students at Deep Springs College.

1. It is Within the Discretion of the Trustees to Conclude That Coeducation Furthers the Purpose of Providing for the "Education of Promising Young Men"

Assuming that the trial court is correct and the purpose of the Deed of Trust is "the education of promising young men" (CT 1900-1925), the proper inquiry for the court is whether coeducation at Deep Springs College furthers that purpose. The trial court concluded without analysis

that, as a matter of law, coeducation does not further such purpose. This conclusion was in error.

The Trustees have determined that the simultaneous education of men and women at Deep Springs College is the appropriate form and manner to educate "promising young men today and in the future." Respondents have cited no evidence or authority that such determination by the Trustees fails to further the purpose of education "promising young men." There is no support for the conclusion that coeducation at Deep Springs College would contravene the cited language in the Deed of Trust.

2. Whether the Trustees Breached Their Fiduciary Duties by Their Exercise of Discretion is Not Now Before the Court

When discretionary power is conferred upon a trustee, such as contained in the Deed of Trust, California law requires that such power shall be exercised either reasonably (Cal. Prob. Code § 16080), or in good faith (Cal. Prob. Code § 16081). Here, because the Deed of Trust confers "good conscience" and "best judgment" discretion on the Trustees, the appropriate standard for reviewing an exercise of discretion is good faith. (See Cal. Prob. Code § 16081.) Generally, under section 16081, when reviewing the Trustees' exercise of discretionary power the court's jurisdiction is limited to whether the Trustees failed to act in good conscience, or good faith, or to conscientiously exercise their best judgment according to the legal standard applicable to fiduciaries. That does not, however, mean that the Court may substitute its judgment for the Trustees determination of the best approach for advancing the purpose of Deep Springs. (*See Hallinan v. Hearst* (1901) 133 Cal. 645, 648 (a court cannot interfere with such determination except in case of gross abuse).)

Whether the Trustees acted in good faith is not strictly now before this court, as the Appellant seeks only a determination that the

Trustees have the authority to support a coeducational Deep Springs College. Furthermore, Respondents have not alleged that the Trustees have acted unreasonably or in bad faith. Rather, Respondents assert that the Deed of Trust restricts the Trustees' authority to support a coeducational school.

Even if this Court were to examine the Trustees' exercise of discretion, it is clear that the Trustees acted in good faith in voting to extend admission to both and male and female students. The Trustees examined and debated the financial, operational, educational, ethical, philosophical and moral impacts of the question of coeducation for many months before making a decision and that analysis was informed by decades of debate and prior research on the subject. The Trustees considered the effects of the single-sex male only admissions policy on student applications, faculty recruitment, fundraising, community support and the educational experience itself. Furthermore, the Trustees considered that admitting women to Deep Springs College would better prepare both male and female students for leadership roles outside of Deep Springs College, where women play increasingly important roles. For all of these reasons, the Trustees determined that the best "manner and form" to educate "promising young men" is to simultaneously educate women.

There is no evidence, nor any allegations, that any of the Trustees failed to fully and completely consider the issues, would derive any personal benefit from the outcome, or was inappropriately influenced in any manner in reaching their decision. Following their extensive deliberation, the Trustees determined that transitioning to coeducation would best achieve L. L. Nunn's purpose.

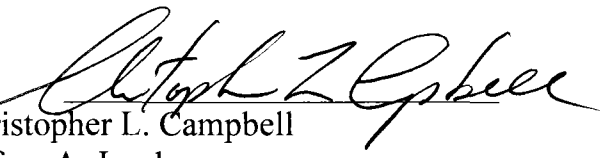
VIII.
CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the trial court's order finding that "[t]he Trust can not [sic] be construed as giving the Trustees discretion to admit female students" be REVERSED, and that this Court find and confirm that the Trustees of the L. L. Nunn Trust have the discretion under their expansive powers granted in the Deed of Trust to modify the original and current Deep Springs College admissions policy to authorize admission of female students as well as male students at Deep Springs College.

DATED: July 25, 2013

Respectfully submitted,

BAKER MANOCK & JENSEN, PC

By: 
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CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.204(c)(1) and 8.490(b)(6)]

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