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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF INYO

In re the Matter of the

L.L. Nunn Trust for the benefit of Deep Springs College under the Deed of Trust dated November 5, 1923

Case No. SI CV PM 1253232

RESPONDENTS' MEMORANDUM OF POINT AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, MOTION IN LIMINE

DATE: September 24, 2013
TIME: 8:30 AM
DEPT: 4
JUDGE: Hon. Dean T. Stout

ACTION FILED: February 6, 2012

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I. INTRODUCTION

In his Petition For Court Order Construing Trust Provisions, Or If Necessary, Modifying The Trust Instrument, filed on February 6, 2012 (hereinafter "Petition" or "Petn.") and his Supplement to Petition For Court Order Construing Trust Provisions, Or If Necessary, Modifying The Trust Instrument (hereinafter "Petition Supplement" or "Petn. Suppl."), Petitioner alleges four bases to modify the L. L. Nunn Trust: (1) *cy près*, (2) Probate Code section 15409 (statutory equitable deviation), (3) common law equitable deviation, and (4) Probate Code section 15403 (modification with unanimous consent of the beneficiaries). Since the Petitioner is requesting that this Court change the legally construed purpose of the Trust, only *cy près* is applicable. Indeed, none of the other three theories have ever been used to modify the purpose of a charitable trust in California. In order to save time and avoid wasteful pre-trial discovery and depositions, and to ensure judicial efficiency, Respondents respectfully request that this Court determine in advance the applicable legal standard under which it will conduct the forthcoming trial on Petitioner's request to modify the Trust.

II. THIS COURT MAY GRANT RESPONDENTS' REQUEST EITHER AS A JUDGMENT ON THE PLEADINGS OR A MOTION *IN LIMINE.*

A court may grant a motion for judgment on the pleadings where "[t]he complaint does not state facts sufficient to constitute a cause of action against that defendant." (Cal. Civ. Proc. Code, § 438 subd. (b)(1)(ii).) The motion looks only to the legal sufficiency of the allegations of the pleading under attack. (*Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 100.) The motion may be made at any time up to and including the time of trial. (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 18.)

Motions *in limine* are commonly used tools of trial advocacy. (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 669.) Such motions are an integral part of trial, and are commonly viewed as the "first step" in the trial process. (*Eckert v. Super. Ct.* (1999) 69 Cal.App.4th 262, 266–267.) Although there is no specific statutory authority for a motion *in limine*, its use in California has been approved and even encouraged by the appellate courts. (*See Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 337–339.) Further, by resolving potentially

critical issues at the outset, motions *in limine* enhance the efficiency of trials. (*Kelly, supra*, 49 Cal.App.4th at p. 669.) In Inyo County, the timing of motions *in limine* in civil cases is governed by Rule of Court 6.12, which states that "[a]bsent leave of Court, upon a showing of good cause, all motions *in limine* shall be heard at the Pretrial Conference, be in writing, and are to be served and filed at least five (5) judicial days prior to the Pretrial conference." Therefore, Respondents respectfully request that this Court grant their request to submit this motion *in limine* far in advance of a pre-trial conference because a determination on the applicable legal theory will greatly reduce the time and effort spent in discovery.

III. ARGUMENT

A. This Court Has Determined That The Purpose of The Deed of Trust is Limited to the Education of Promising Young Men.

In its February 13, 2013 Rulings And Orders On Petition For Court Order Interpreting Endowment Gift Instrument (hereinafter "Rulings and Orders"), this Court stated that

> Reading 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 education of promising young men**. For example, it appears that the Trustees could relocate the school, change it to a four-year program, or cease farming operations, but **whatever form it takes must be "for the education of promising young men**.

(Ruling and Orders, 4:26-5:5 [emphases added].) Moreover, "[a]s the Statement of Purpose is the only section of the Trust itself in 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***." (Ruling and Orders, 7:5-8 [emphasis added].)

B. Judicial Modification Of The Purpose Of The L. L. Nunn Trust Requires The Court To Apply The *Cy Près* Doctrine Rather Than Equitable Deviation.

Since Petitioner is requesting that this Court modify the clear and unambiguous **purpose** of the L. L. Nunn Trust rather than its **administrative** or **dispositive** provisions, the Court must apply the stringent standard of the *cy près* doctrine.

1. The Cy Près Doctrine

The common law doctrine of *cy près* provides the sole legal standard according to which the purpose of a charitable trust may be altered on petition. It is a rule for the construction of charitable trust instruments that is not to be applied to a charitable trust unless it is impossible or impracticable to carry out the specific charitable purpose of the creator of the trust. (*See Estate of Klinkner* (1978) 85 Cal.App.3d 942, 951.) The doctrine remains in effect in California. (Cal. Prob. Code § 15002; *see e.g., Arman v. Bank of America, N.T. & S.A.* (1999) 74 Cal.App.4th 697, 703.)

The traditional common law *cy près* doctrine exists and functions alongside the trust provisions of the California Probate Code. As the California Law Revision Commission, in their Recommendation to the State Legislature, noted: "traditional doctrines of common law that apply to charitable trusts and that are not displaced by a specific statutory provision are not disturbed by [the Code]." (Recommendation Proposing The Trust Law, 18 Cal. Law Revision Com. Rep. 604, fn. 418 (1985).) As noted, the Probate Code has not displaced the *cy près* doctrine in California. (See *Arman, supra*).

2. The Court Cannot Apply Statutory Equitable Deviation (Probate Code Section 15409) to Grant Petitioner's Request To Change The Court-Determined Purpose Of The Deed Of Trust.

Petitioner requests that the Court modify the stated purpose of the L. L. Nunn Trust under Probate Code section 15409. This request is inapt. The relevant part of Probate Code section 15409, subdivision (a) reads:

> On petition by a trustee or beneficiary, the court may modify ***the administrative or dispositive provisions*** of the trust . . . if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the ***purposes*** of the trust. In this case, if necessary to carry out the ***purposes*** of the trust, the court may order the trustee to do acts that are not authorized or are forbidden by the trust instrument. (Emphases added.)

Probate Code section 15409 makes clear that in addition to administrative and dispositive provisions in trusts, trusts also have a purpose that is distinct from whatever administrative and dispositive provisions exist to carry out that purpose. The language of section 15409 is clear that

its function is to allow certain changes "if necessary to carry out the purposes of the trust"; nothing in section 15409 suggests that it can be used to change the purposes themselves. Petitioner proposes to transform a statutory provision dedicated to ensuring the accomplishment of a trust's purposes into a vehicle for altering or defeating those purposes.

Essentially, Probate Code section 15409 is the statutory codification of the doctrine of equitable deviation. (Rest.3d Trusts § 66, cmt. b.) Under section 15409, a court may modify administrative or dispositive provisions of the trust, those provisions which concern "the powers and duties of the trustees of charitable trusts with respect to the administration of the trust" (Rest.2d Trusts § 381, cmt. a.) or the terms governing the distribution of the trust income or principal to beneficiaries. (*Moxley v. Title Ins. & Trust Co.* (1946) 27 Cal.2d 457, 466.) In other words, equitable deviation may apply only to "the methods of accomplishing the purposes of the trust" (Rest.2d Trusts § 381, cmt. a.) or "directing advances of trust income or principal to the beneficiaries." (*Moxley*, *supra*, 27 Cal.2d at p. 466.) The Restatement Second of Trusts commentary on section 381 goes on to distinguish equitable deviation from *cy près*:

> The question of the extent to which the court will permit or direct the trustee to apply the trust property to charitable purposes other than the particular charitable purpose designated by the settlor where it is or becomes impossible or illegal or impracticable to carry out the particular purpose involves the doctrine of *cy près*....

(Rest.2d Trusts § 381, cmt. a.) Consequently, while courts may apply equitable deviation to modify the manner in which trustees carry out a trust's purpose, if trustees seek to change or redefine the settlor's specific charitable purpose or intent, as in the present case, a court must analyze such a request under the *cy près* standard. (See Rest.2d Trusts § 381, cmt. a.)

Therefore, as a matter of law, this Court cannot grant Petitioner's request to modify the L. L. Nunn Trust's purpose based on equitable deviation because it is the incorrect standard. Such a foundational modification must satisfy the *cy près* standard.

3. The Court Cannot Apply Common Law Equitable Deviation To Change The Court-Determined Purpose of The Deed Of Trust.

As with statutory equitable deviation under section 15409, so common law equitable deviation is the incorrect standard to apply to change the purpose of the L. L. Nunn Trust. As

explained by a well-known treatise:

> § 7. *Cy près distinguished from equitable deviation.* Under the general power over the administration of trusts, the courts in some cases have permitted a deviation from the express directions or suggestions of a settlor or testator with respect to matters relating to the administration of a trust—as opposed to or distinguished from the purposes of the trust—especially in cases where compliance with such administrative directions or provisions had become impossible or illegal, or in instances where, owing to circumstances unknown to the testator or settlor, or changes in conditions not anticipated by him or her, compliance with his or her prescribed mode or method of administration would defeat or substantially impede the attainment or the carrying out of the trust purposes. ...This principle with regard to the court's power to permit a variation with regard to the administration of a trust has been referred to as the doctrine of deviation, or of equitable deviation. Under the doctrine of equitable deviation, the court will permit the trustees of a charitable trust to deviate from the mechanical means of administration of the trust where circumstances not known or foreseen by the testator have come about, and where such change in circumstances in combination with the administrative means provided in the trust would defeat or substantially impair the accomplishment of the intended trust purpose. **In applying the doctrine of deviation, the court cannot change the original charitable objective of the settlor or divert the bequest to an entity with a charitable purpose different from the purpose set forth in the trust instrument.** ...Equitable deviation can be distinguished from the somewhat similar doctrine of cy près in that the equitable deviation deals only with changes in the administrative provisions of a trust, while cy près involves an alteration of the purpose to which the res of the trust is to be applied.

(88 Am. Jur. Proof of Facts 3d 469 (Originally published in 2006) [Emphasis added. All citations omitted.])

In California, probate courts have equitable power, founded in common law, to modify a Trust provided "(1) a 'peculiar' or 'exceptional' circumstance made modification necessary **to accomplish the purpose of the trustors**, and (2) there was some expression in the trust instrument of the purpose of the trustors." (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 83 [emphasis added].) Thus, like statutory equitable deviation, common law equitable deviation is designed to "accomplish the purpose" of the trust, not to change that purpose. This equitable power to modify or reform a trust extends to situations where the trust instrument contains some expression of the trustor's intention, but a drafting error renders that expression ambiguous. (*Ike v. Doolittle*, 61 Cal.App.4th at p. 82.) There is no drafting error alleged in the present matter.

Also consistent with this doctrine, a "court of equity has the power to change the method of administering a trust estate...." when it is shown that such a change is necessary to accomplish

the purpose of the trust (*Adams v. Cook* (1940) 15 Cal.2d 352, 358.) In *Adams*, the trust property was conveyed to the trustee for the benefit of the beneficiaries and it was the stated intent of the trustors that the beneficiaries should secure the largest return possible on their investment. Since the purpose of the trust was to maximize the returns for the beneficiaries, the court used its equitable power to modify the dispositive terms requiring a fixed-price sale in order to fulfill the trust's primary purpose. (*See id.* at pp. 359-360.)

Even where courts have refused to exercise this equitable power, they have made clear that only the administrative and dispositive provisions of the trust are available for equitable deviation. Importantly, such changes are executed "in order to carry out, rather than to defeat, the primary purpose of the trustor as expressed in the trust instrument." (*Moxley*, 27 Cal.2d at p. 468.) In the matter presently before this Court, the Petitioner seeks to change the purpose of the Trust.

> Except in unusual or emergency situations the courts will limit the trustees to the powers conferred. But the courts will not permit **the main purpose** of a trust to fail by compelling slavish adherence to the **administrative limitations** of the trust instrument. **Where the main purpose of the trust is threatened the courts will and should grant permission to deviate from restrictive administrative provisions.** But the court should not permit a deviation simply because the beneficiaries request it where the main purpose of the trust is not threatened and no emergency exists or is threatened. It must be remembered that it is the theory of this rule that, by the exercise of this power, the court is not defeating the trust, but in fact is furthering it.

(*Stanton v. Wells Fargo Bank & Union Trust Co.* (1957) 150 Cal.App.2d 763, 770 [emphases added].) As with section 15409, common law equitable deviation cannot as a matter of law be used to accomplish Petitioner's goal.

4. <u>The Court Cannot Modify The Purpose of The Deed Of Trust Based On The Consent Of All Beneficiaries (Probate Code § 15403).</u>

In the Supplement to his original Petition, Petitioner proposes a new legal theory to modify the trust instrument. (Petn. Suppl., 2:22-3:13.) He contends that under Probate Code section 15403, if all beneficiaries agree to the modification of the trust, the court can permit modification. More specifically, he contends that if the California Attorney General consents to the proposed modification of a charitable trust such as the L.L. Nunn Trust, then the Court is compelled to modify the trust. Petitioner misconstrues and misapplies section 15403.

First, section 15403 has never been used to change the **purpose** of a trust; it has been used only to modify **dispositive** provisions. Petitioner cannot use this statute to modify the trust's purpose. Second, the Attorney General's role is to enforce and uphold charitable trusts, not to consent to modifications that gut the purposes of charitable trusts. Third, even for modification of dispositive provisions, section 15403 requires the consent of all beneficiaries, and Petitioner cannot show that here.

a. Section 15403 Cannot Be Used to Change a Trust's Purpose.

"The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*In re Estate of Kampen* (2011) 201 Cal.App.4th 971, 985-86 [internal citations omitted].) All trust modification provisions of the Probate Code (Prob. Code §§ 15400 et seq.) concerning irrevocable trusts deal exclusively with the **administrative** and **dispositive** provisions of trusts. Therefore, construing section 15403 in its statutory context clarifies that it would be unreasonable to permit the modification of a charitable trust's **purpose** under that section.

Further, case law involving modification based on the consent of all beneficiaries before and after enactment of section 15403 deals entirely with modification or deviation of dispositive provisions rather than changing the charitable purpose of the trust *per se*. (*See e.g., Boys and Girls Club of Petaluma v. Walsh* (2008) 169 Cal.App.4th 1049; *Estate of Gilliland* (1974) 44 Cal.App.3d 32.) As a result, changing the court-determined charitable purpose of the deed of trust under section 15403 would be a misapplication of that section.

b. The Attorney General's Non-Exclusive Role in Charitable Trust Matters Is To Ensure Trusts are Carried Out According to Their Terms.

The Attorney General's relationship to charitable trusts is one of enforcement and supervision. (Cal. Gov. Code, § 12598; Cal. Probate Code, § 17210; *see also Holt v. College of Osteopathic Physicians & Surgeons* (1964) 61 Cal.2d 750, 754.)

To be sure, the Attorney General is empowered to act in the public interest on behalf of unnamed beneficiaries who "are ordinarily indefinite and therefore unable to enforce the trust in

their own behalf." (*Holt*, 61 Cal. 2d at 754.) But as the *Holt* decision makes clear, the Attorney General does not have exclusive power to enforce a charitable trust. The decision endorses and adopts "the prevailing view of other jurisdictions" that "a trustee or other person having a sufficient special interest may also bring an action for this purpose." (*Id.* at 753.) This position is adopted by the American Law Institute (Rest.2d Trusts, § 391) and is supported by many scholars. (*L.B. Research and Education Foundation v. UCLA Foundation* (2005) 130 Cal.App.4th 171, 180.)

Statutes authorizing the Attorney General to enforce charitable trusts were enacted to provide adequate supervision and enforcement of charitable trusts. (*Patton v. Sherwood* (2007) 152 Cal.App.4th 339, 343.)

> [T]he Attorney General has been empowered to oversee charities as the representative of the public, a practice having its origin in the early common law. [Citation.] [¶] In addition to the general public interest, however, there is the interest of donors who have directed that their contributions be used for certain charitable purposes. **Although the public in general may benefit from any number of charitable purposes, charitable contributions must be used only for the purposes for which they were received in trust.**

(*Ibid.* [emphasis added].) The Attorney General's intervention in charitable trust cases is therefore limited to enforcing and upholding the trust purposes.

c. <u>Not All Beneficiaries Consent to the Modification.</u>

California Probate Code section 15403 states that:

> (a) Except as provided in subdivision (b), if all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust upon petition to the court.
>
> (b) If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust . . ..

Based on a footnote in *Boys and Girls Club of Petaluma v. Walsh* (2008) 169 Cal.App.4th 1049, Petitioner contends that if the Attorney General consents to the proposed modification, then the court is compelled to modify the trust. There are two main problems with this approach. First, neither the consent nor the recommendations of the Attorney General with respect to charitable

trusts are binding on the courts. (*See, e.g., In re Veterans' Industries, Inc. of Long Beach, California* (1970) 8 Cal.App.3d 902, 920 [holding that "while the Attorney General may consent to the distribution to the nominee suggested by a petitioner or recommend others for the consideration of the court, neither such consents nor recommendations by the Attorney General are binding upon the court upon whom the ultimate responsibility for the proper application of *cy près* rests."].)

Second, Probate Code section 24, subdivision (d) defines a "beneficiary" in relation to charitable trusts as "a person to whom a donative transfer of property is made or that person's successor in interest, and . . . includes **any person** entitled to enforce the trust." (Emphasis added.) The Petitioner's reason for invoking section 15403 is as follows: "As the Attorney General represents the charitable beneficiaries of the trust, it may consent on behalf of all the trust beneficiaries." (Petn. Suppl. at p. 3:2-4.) This is mistaken. To begin with, the students in attendance at Deep Springs, who are beneficiaries, would have to unanimously consent. Furthermore, because trustees are "entitled to enforce the trust", and Respondent trustees do not consent, Petitioner **cannot** show that all "beneficiaries" consent.

The issue of whether all beneficiaries consent to the modification within the meaning of section 15403, subdivision (a), is a question of statutory interpretation and is a pure question of law. (*Boys and Girls Club of Petaluma v. Walsh* (2008) 169 Cal.App.4th 1049, 1057.) Further, interpretation of section 24 also presents a question of law. (*Patton v. Sherwood*, 152 Cal.App.4th at p. 345.) The first step in statutory construction is to scrutinize the actual words of the statute, giving them a plain and common sense meaning. (*People v. Valladoli* (1996) 13 Cal.4th 590, 597.) "We construe the words of a statute in context, and harmonize the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole. [Citations.]" (*Patton v. Sherwood,* 152 Cal.App.4th at p. 345.)

The first sentence of section 24 states that 'Beneficiary' means "a person to whom a donative transfer of property is made or that person's successor in interest...." The Legislature used the word "and" to link this sentence to subparagraph (d) which states: "As it relates to a charitable trust, includes any person entitled to enforce the trust." The word "includes" is

ordinarily a word of enlargement, not limitation. (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101.) Here the phrase "includes any person," as used in section 24, subdivision (d), expands the class of persons who may bring an action to enforce a charitable trust. (*Patton v. Sherwood*, 152 Cal.App.4th at p. 346.) Therefore, Respondent Trustees, being persons also entitled to enforce the trust, are defined as "beneficiaries" under the Probate Code. (*See, e.g., Holt v. College of Osteopathic Physicians & Surgeons*, 61 Cal.2d at p. 752-756.) The Attorney General, also being a person entitled to enforce the trust under Government Code section 12598 and Probate Code section 17210, is merely one "beneficiary" under the Probate Code and should she consent to the modification her consent would still be defeated for the purposes of this section by the non-consent of any other beneficiary. Since obviously not all beneficiaries consent to such a modification, Probate Code section 15403, subdivision (a) cannot apply as a matter of law.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court determine that the standards of statutory equitable deviation (Probate Code section 15409), common law equitable deviation, and modification with the consent of the beneficiaries (Probate Code section 15403) are inapplicable grounds for the Petition and that the trust cannot be modified on any of those grounds, and grant Respondents' Motion for Judgment on the Pleadings or, in the alternative, Motion *in Limine*.

Dated: August 5, 2013

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