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.

Superior Court of California, County of Inyo
Case No. SICVPB 1253232
The Honorable Judge Stout

RESPONDENTS' BRIEF

Case No. E058293

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COURT OF APPEAL, 4th APPELLATE DISTRICT, DIVISION 2	Court of Appeal Case Number E058293
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APPELLANT/PETITIONER: David Hitz RESPONDENT/REAL PARTY IN INTEREST: Kinch Hoekstra	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Objector/ Respondent,Kinch Hoekstra, et al.,

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) Deep Springs College Corporation	Interested in outcome
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: October 30, 2013

Joseph C. Liburt
(TYPE OR PRINT NAME)

▶ Joseph Liburt
(SIGNATURE OF PARTY OR ATTORNEY)

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I. INTRODUCTION

Lucien Lucius Nunn ("L. L. Nunn") established Deep Springs College in 1917. Deep Springs College is unique. The student body is exceptionally small, rarely exceeding 26 students at any given time. It is located on a cattle ranch and alfalfa farm in California's isolated High Desert. Students participate in manual labor, assuming substantial responsibilities on the farm and ranch, as well as extensive self-governance. And for the 96 years since its founding, the student body has been limited to promising young men, making it the only all-male liberal arts college in California and one of only four in the country (by contrast, there are over sixty women's colleges in the United States). (CT 611.) L. L. Nunn's Deed of Trust is the school's founding charter and binds its ongoing and future operation. The Deed of Trust states that the "purpose for which" L. L. Nunn conveys his estate is "to provide for and carry on educational work . . . for the education of promising young men," and concludes that this educational work "shall be carried on ... *solely* for the advancement of the purpose hereinabove mentioned." (CT 974 (¶1) [emphasis added].)

The Superior Court correctly concluded that the Deed of Trust means what it says: that L. L. Nunn established the Trust for the express purpose of educating "promising young men." This appeal is not about whether coeducation at Deep Springs College would be a good thing, or whether the Deed of Trust should be modified to allow coeducation (a separate issue pending in the trial court). This appeal is only about what L. L. Nunn intended when he executed the Deed of Trust, and his intention is clearly expressed in the language he used. Appellant has readily admitted that Mr. Nunn unquestionably "intended the Deep Springs College student body to be all-male when he founded the school." (Petition for Court Order Construing Trust Provisions, or, if Necessary, Modifying the

Trust Instrument (hereafter, the "Petition"), filed February 6, 2012, CT 37.) That should end the matter, and the decision below should be affirmed.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Deep Springs College is an all-male liberal arts college located on a cattle ranch and alfalfa farm in an isolated valley in Inyo County. Electrical pioneer L. L. Nunn founded the distinctive school in 1917 in order to help young men prepare for lives of service to humanity. The school's approximately 26 students, along with its staff and faculty, form a close community engaged in this intense project. Deep Springs College is currently thriving. It is more selective than most Ivy League institutions; it has been extremely successful in attracting highly qualified faculty and staff; the school has a stellar academic reputation; and it is in good financial shape. (Objection and Response to Petition, CT 140-150.) Since its founding, Deep Springs College has admitted as students only young men, consistent with the Deed.

In 1923, L. L. Nunn executed a Deed of Trust, conveying much of his estate to the L. L. Nunn Trust, sometimes referred to as the Deep Springs Free Educational Trust (the "Trust"). The Deed of Trust is the founding charter for Deep Springs College. It clearly defines the character and purpose of the school, and prescribes the fundamental principles that direct, empower, and limit its Trustees' actions. The recitals to the Deed of Trust explain that Mr. Nunn has established an educational institution at Deep Springs, and "has been there carrying on educational work for the education and development of promising young men." (CT 973.) The recitals further describe Mr. Nunn's "desir[e] to provide for the development and perpetuation of such educational work." (*Ibid.*) The Deed of Trust then conveys the property to the [g]rantees, and their successors

and assigns forever, but in trust . . . for the purpose, with the powers, and upon the terms and conditions hereinafter more fully set forth." (CT 973-974.)

The first numbered paragraph of the Deed of Trust lays out the purpose of the Trust, stating, in whole:

> *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.*

("Purpose Statement," CT 974(¶1)) [emphases added].)

The second numbered paragraph of the Deed of Trust then goes on to enumerate some of the specific authorities granted to the Trustees "[i]n order to enable them to accomplish the purpose of the trust." (CT 974 (¶ 2).) These authorities include, for example, "[t]o hold, sell, convey, lease . . . and in all other respects handle, manage, operate, and dispose of all or any portion of said trust estate" (CT 974 (¶2(a))), "to pay out of the trust estate . . . all the necessary and proper expense," (CT 975(¶2(c))), and "to hold meetings" (CT 975 (¶ 2(d)). All of these authorities, however, are limited to "accomplishing the purpose of this trust." (CT 974-975 (¶¶ 2, 2(b), 2(c), 2(f), 2(g)).) Numbered paragraphs three through six of the Deed of Trust dictate how Trustees will be chosen and operate the Trust, explain

that the students are the beneficiaries of the Trust, and more fully describe how the students will govern themselves. (CT 974-975 (¶¶3-6).)

For 88 years, the Trustees of Deep Springs College consistently interpreted the Deed of Trust as a direction to educate solely promising young men. In fact, as recently as 2010, the school completed an exhaustive Institutional Self Study Report, stating "L. L. Nunn, the founder of Deep Springs, directly stated the purpose of the College: to prepare young men for lives of service to humanity." (CT 1735; report endorsed by Appellant with his signature at (CT 1671.)

But on September 17th, 2011, the Board of Trustees of the L. L. Nunn Trust (the "Trustees") decided that it had the discretion to vote in favor of coeducation. The Board then voted to implement a transition to coeducation. On February 6, 2012, Appellant (on behalf of the majority Trustees) filed this action in the Superior Court of California, County of Inyo, requesting the court either to construe the Trust to allow coeducation or, if necessary, to modify the Trust. (*See* Petition.) At Appellant's request, the Superior Court bifurcated the proceeding into an interpretation proceeding and a modification proceeding. This appeal stems from the Superior Court's conclusion in the interpretation proceeding that the plain language of the Trust unambiguously precludes coeducation. The modification proceeding is ongoing in the Superior Court.

III. THE ORDER BELOW

After extensive briefing and oral argument, the Superior Court concluded that "the Trust can *not* be construed as giving the Trustees discretion to admit female students." (February 13 Order, at p. 9.) The Superior Court reasoned that the court must construe the Trust "according to the intention of the testator as expressed therein," "giving the words he

employed their plain and ordinary meaning," 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 education of promising young men.'*" (*Id.*, at pp. 4-5 [emphasis added] [internal quotation marks omitted].) Rejecting Appellant's argument that the use of "men" in this instance refers generically to mankind, the Superior Court concluded that "[i]n this case, there is nothing in the trust that raises questions that Nunn meant anything besides males when he used the term 'young men.'" (*Ibid.*) The Superior Court went on to reject Appellant's extrinsic evidence, "find[ing] the evidence unconvincing," as well as "inapplicable to the instant case" because it is "improper to look to extrinsic evidence in the absence of ambiguity." (*Id.*, at p. 5.) Finally, the Superior Court determined that while "the remaining provisions of the trust . . . do indeed provide broad discretion to the Trustees," they are "limited to taking any necessary actions for the *purpose of the Trust.*" (*Id.*, at p. 6 [emphasis in original].)

The Order ruling in favor of Respondents was signed on January 8, 2013, and the Superior Court filed an additional ruling and order on February 13, 2013 for the purpose of providing greater detail as to the court's reasoning and basis for its rulings and orders. On March 11, 2013, Appellant filed a Notice of Appeal in this Court, and on July 25, 2013, Appellant filed his opening brief.

IV. STANDARD OF REVIEW

A question of trust interpretation "is a question of law which [the Court of Appeals will] consider *de novo*," unless there is "a conflict in the relevant extrinsic evidence." (*Estate of Powell* (2000) 83 Cal.App.4th

1434, 1439; *Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 452-53 ["The interpretation of a written instrument, including a . . . declaration of trust, presents a question of law unless interpretation turns on the competence or credibility of extrinsic evidence or a conflict therein."].)

V. SUMMARY OF ARGUMENT

The language of L. L. Nunn's Deed of Trust is clear and unambiguous: the purpose for which the estate is conveyed is "the education of promising young men," and the work of the Trust "shall be carried on . . . solely for the advancement of the purpose." (CT 974.) In fact, all of the parties agree that "there is no question that L. L. Nunn intended the Deep Springs College student body to be all-male when he founded the school." (CT 37.) Under California law, where the interpretation of a trust instrument focuses on discerning the actual intent of the trustor by examining the plain and ordinary meaning of his words, this should end the matter.

Against this straightforward conclusion, Appellant principally argues that the Deed of Trust grants the Trustees "virtually unfettered discretion" to "change any aspect of the work as it was described in 1923." (App. Br., at pp. 9-10, 14.) This ignores the fundamental fact that Mr. Nunn specifically set out the purpose of the Trust and limited the work of the Trust solely to the advancement of that purpose. And it contradicts Mr. Nunn's intention in setting out the specific powers of the Trustees and limiting these powers to the accomplishment of the Trust's purpose. While the Trustees have broad discretion in the operation of the Trust, this authority is unambiguously circumscribed by the purpose of the Trust. As a matter of law, the "purpose of the trust is to be carried out no matter what

the document says about the trustee's discretion." (*In re Miller's Estate* (1964) 230 Cal. App. 2d 888, 907.)

Conceding that the Trustee's discretion is limited by the purpose of the Trust (App. Br., at pp. 10, 35), Appellant argues that the "education of promising young men" is not actually the purpose of the Trust, but is merely a description of Deep Springs College as it existed in 1923. In fact, Appellant argues that *all* of the language in the Purpose Statement, except for the language granting Trustee discretion, is merely descriptive and not the purpose. (*Id.*, at pp. 9-10.) This attempt to seize unlimited authority is indefensible. The Purpose Statement—which begins with the phrase, "[t]he purpose for which the property hereby conveyed . . . shall be used," and ends with the phrase, "and which work shall be carried out . . . solely for the advancement of the purpose hereinabove mentioned—" unambiguously sets out the *purpose* of the Trust; it is not a mere description. Appellant's reading, by contrast, guts the Purpose Statement and renders futile all of Mr. Nunn's directives that the Trustees' discretion must be used for the accomplishment of the purpose of the Trust.

Finally, in case the Court agrees that the Purpose Statement contains the purpose of the Trust, Appellant makes two alternative arguments. First, Appellant contends that while the "education of promising young men" may be an element of the purpose of the Trust, it is not the "dominant" element and should therefore be set aside. Second, Appellant argues that while the "education of promising young men" is the purpose of the Trust and L. L. Nunn unquestionably intended to establish a college with an all-male student body, that purpose is *now* best achieved in a way that Mr. Nunn did not intend, by educating those young men alongside young women. Neither of these arguments goes to the *interpretation* of L. L. Nunn's intent as expressed through his plain language. At the interpretation phase, purposes both large and small must be construed

faithfully according to the trustor's intent, and may not be omitted or overridden. If Appellant wishes to argue that the elements of L. L. Nunn's purpose are in conflict, or that because of changed circumstances since 1923 his purpose is now best achieved in a manner he did not intend, these arguments must be directed at *modifying* the Deed of Trust, a question not currently before this Court. L. L. Nunn's intent to establish an all-male college is plain, and the judgment of the Superior Court should be affirmed.

VI. ARGUMENT

By stating that the purpose of the Trust is to provide "for the education of promising young men" and that this educational work "shall be carried on...solely for the advancement of the purpose," the Deed of Trust clearly and unambiguously shows L. L. Nunn's specific intent to limit the activities under the aegis of the Trust to educating men. While the Trustees may have broad discretion in many areas of the Trust's operation, L. L. Nunn did not grant unlimited discretion; above all, the Trustees' discretion is limited by the purpose Mr. Nunn laid out in the Deed of Trust.

A. The Deed of Trust Clearly and Unambiguously Shows That L. L. Nunn Intended Deep Springs to Be a Men's College in Perpetuity.

The Superior Court correctly concluded that the Deed of Trust clearly and unambiguously shows that L. L. Nunn's intent was to provide for the education of an all-male student body.

1. Interpretation of a Trust Instrument Is a Question of Law Focused on Discerning the Actual Intent of the Trustor by Examining the Plain and Ordinary Meaning of His Words.

A trust must be administered in accordance with the trustor's intention. (Prob. Code, § 21102, subd. (a) ["The intention of the transferor

as expressed in the instrument controls the legal effect of the dispositions made in the instrument."]; *Newman v. Wells Fargo Bank, N.A.* (1996) 14 Cal.4th 126, 134; *In re Ferrall's Estate* (1953) 41 Cal.2d 166, 176.) "[T]he paramount rule in the construction of wills is that the intention of the testator must be given effect as far as possible . . . . [A]t all times such intention is of supreme importance, and all other rules of construction must yield to it." (*In re Munson's Estate* (1942) 54 Cal.App.2d 590, 592.)[1] The California Supreme Court has repeatedly affirmed this view. (*In re Estate of Russell* (1968) 69 Cal.2d 200, 206, *Lawrence,* (1941) 17 Cal.2d 1, 6; *In re Estate of Wilson* (1920) 184 Cal. 63, 66.) In ascertaining the testator's intent, "the intention to be determined is that which is *actually expressed* in the language of the will." (*Estate of Simoncini* (1991) 229 Cal.App.3d 881, 889 [emphasis in original].) In other words, courts "ascertain what the testator meant by the language he used." (*Russell, supra*, 69 Cal.2d, at pp. 205–206.) If Mr. Nunn's intent can be determined from words he actually used in the Deed of Trust, the "inquiry is ended." (*Simoncini, supra*, 229 Cal.App.3d, at p. 889.)

The testator's intent simultaneously sets the limits of Trustee discretion:

> When we pass to the consideration of the duty of the trustees in the administration of the trust and their conduct in compliance therewith, there is no divergence of authority to the effect that the trust must be administered in accordance with the intentions of the settlor.

(*Ferrall's Estate, supra*, 41 Cal.2d, at pp. 176–177). "The intention of the

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[1] The California Probate Code applies the same general rules of interpretation to "a will, trust, deed and any other instrument." (*Burkett v. Capovilla* (2003) 112 Cal.App.4th 1444, 1449 [citing Prob. Code § 21101].)

settlor as shown by the document creating the trust is the most important single element in the determination of the rights of the trustee." (*In re Miller's Estate* (1964) 230 Cal.App.2d 888, 908-909.) "The plan of the trustor must be followed. ... The trustee cannot substitute his own plan because he thinks it is a better one." (*Estate of Bothwell* (1944) 65 Cal.App.2d 598, 604.) This is so "no matter how unusual or unreasonable his intention may be." (*In re Robinson's Estate* (1968) 262 Cal.App.2d 32, 36.)

A court construes the intention of the trustor "by giving the most ordinary interpretation to the language used without resorting to specious and fanciful reasoning . . . ." (*Simoncini, supra*, 229 Cal.App.3d, at pp. 889-890 [citing *In re Kellers Estate* (1964), 134 Cal.App.2d, at pp. 235-236]; *see also* Civ. Code, § 3542.) A court should consider "all of [the words] . . . in the light of common sense. . . ." (*Ibid.*) The terms of an instrument are "given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained . . . ." (Prob. Code § 21122.)

The interpretation of a written document such as a trust instrument is a question of law unless interpretation turns on the competence or credibility of extrinsic evidence or a conflict therein. (*In re Estate of Cairns* (2010) 188 Cal.App.4th 937, 944.) At the same time, such construal "involves what might properly be called questions of fact . . . , [it] is essentially a judicial function . . . exercised according to the generally accepted canons of interpretation *so that the purposes of the instrument may be given effect.*" (*Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, 888 [emphasis added].) "Particularly in the field of interpreting trusts and wills, each case depends upon its own peculiar facts, and '. . . precedents have comparatively small value . . .'." (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73 [citing *In re Estate of Russell* (1968)

69 Cal.2d 200, 210-211; *In re Estate of Lawrence* (1941) 17 Cal.2d 1, 6].)

2. The Court Can Determine L. L. Nunn's Clear and Unambiguous Intent From the Language He Actually Used in the Deed of Trust.

Respondents agree with Appellant that to interpret the Deed of Trust, it is only necessary to review the Deed's language. (App. Br., at p. 8.)

a. The Language of the Deed of Trust Unambiguously Show's L. L. Nunn's Intent to Establish a Men's College.

The Deed of Trust unambiguously expresses L. L. Nunn's intent that Deep Springs College be wholly devoted to educating promising young men. The Purpose Statement of the Deed of Trust, quoted in full above, *supra* p. 3, could hardly be clearer: "The purpose for which the property is hereby conveyed . . . is to provide for and carry on educational work . . . for the education of promising young men." As the Superior Court correctly concluded, the plain and ordinary meaning of "promising young men" is promising young males, not "promising young men and women," or "promising young men, but not only men." There is nothing in the Purpose Statement or elsewhere in the Deed of Trust to indicate that Mr. Nunn intended to ascribe to "promising young men" anything other than its plain and ordinary meaning. The Deed of Trust means what it says.

In fact, no one argues that at the time Mr. Nunn executed the Deed of Trust, he intended the Trust to be used to educate men and women. (*See* CT 37 ["[t]here is no question that L. L. Nunn intended the Deep Springs student body to be all-male when he founded the school".) And for 88 years, the Trustees of Deep Springs College consistently interpreted the "promising young men" clause as a direction to educate solely promising young men. This is not surprising in light of the last clause of the Deed's

Purpose Statement, which specifies that the educational work at Deep Springs "*shall* be carried on . . . *solely* for the advancement of the purpose hereinabove mentioned" (CT 974 [emphases added].) Since the education of "promising young men" is indisputably stated as integral to the "purpose hereinabove mentioned," the directive to carry on that purpose "solely" cannot be interpreted to allow for the education of promising young women.

The term "young men," standing on its own, is unambiguously exclusive. Adjectival modifiers before "man" or "men" are reliable indicators that the term is being used in a gender-specific rather than a gender-inclusive way. "Man shall not live by bread alone" (Deuteronomy 8:3) is generic; "active young men cannot live by bread alone" obviously refers to young men only, howsoever true the statement would also be were it instead about active young women.

Next, whether "man" or "men" is being used in a generic or specific sense is generally discernible in context, often according to whether there is an implied distinction. When we refer to a men's choir, a men's clothing store, the men's basketball team, or the life expectancy of men in California, the meaning of "men" is clearly exclusive. Likewise, L. L. Nunn's direction that the college he founded shall be for young men binds that college to a specific future as an exclusively men's college. Moreover, when L. L. Nunn referred in 1923 to the education of young men, the historical context was that the great majority of colleges and universities were coeducational, and the number of women's colleges was overtaking the number of men's colleges, the latter number being in marked decline. To refer to the education of young men was to make an obvious contextual contrast. (Hoekstra Dec., CT 899-900.)

Third, though Appellant admits that there is "no question that L. L. Nunn intended the Deep Springs College student body to be all-male when

he founded the school" (CT 37), Appellant argues that if Mr. Nunn intended to constrain the Trustees to continue an all-male college, he would have written "for the education of promising young men" "only" or "soley"." (App. Br., at p. 19). Appellant ignores the last clause of the Purpose Statement, which indeed uses the word "solely." But even if he had not included this comprehensive "solely" clause, Mr. Nunn should not be required to use extra words to accomplish a meaning that is plain on its face. Consistent with the venerable principle of construction *expressio unius est exclusio alterius*,[2] an explicit restriction (such as "solely" or "only") was unnecessary. The restriction of "men" is fully in force in the term itself. It would be redundant for the triage medic to add "only" when ordering men to line up on the left. If a restroom door specifies "women," it need not state "women only" to be clear: the point of the sign is obviously not that women are allowed, but that only women are allowed. The gender-specific use of "men" means "and not women"; the gender-specific use of "young men" is similarly exclusive. Mr. Nunn's explicit addition of "solely" in the final phrase of the Purpose Statement serves to remove any possible doubt about this straightforward conclusion. In the Deed of Trust, the direction to educate promising young men—especially to do so "solely"— is a specific *and exclusive* direction. It would necessarily be defeated rather than accomplished by educating young women under the Trust.

Appellant points to two out-of-state cases for the proposition that the term "promising young men" doesn't mean what it says. The Superior Court correctly concluded that each case is inapposite. First, in *Ebitz v. Pioneer Nat. Bank* (1977) 372 Mass. 207, 211, the court construed a trust

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[2] "A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." (Black's Law Dictionary, Abridged Eighth Edition (Thomson/West, 2005), p. 494.)

instrument to include women despite gender-specific language about "worthy and ambitious young men." In so doing, however, the court carefully limited its holding to "the facts in this case," and stated that the "*term 'young* men' is unambiguous," but that an "element of ambiguity" was nonetheless introduced by conflicting language elsewhere in the instrument. (*Id.*, at pp. 209-212 [emphasis added].) The ambiguity in the trust instrument in *Ebitz* was introduced by the decedent's direction to the trustee to acquaint himself with the educational program of the Knights Templar, a coeducational program, and to use that program as a guide in carrying out the trust. In addition, ambiguity was introduced by the decedent's use of sex-neutral terms throughout the instrument, the trust's dedication to both he and his wife, and the stated testamentary goal of aiding as many students as possible. All of these ambiguities supported the *Ebitz* court's construction of the trust as inclusive of women. There are no such ambiguities in the Deed here.

In *Estate of Edwards* (N.Y. App. Div (1982) 86 A.D.2d 702), the decedent created a trust to benefit an existing all-male boarding school, Worcester Academy, and his will stated that the school would continue receiving payments as long as it "continues to be operated as a boys preparatory school." (*Ibid.*) The school decided to admit girls. The court held that the school, as beneficiary of a testamentary trust, was not disqualified from receiving the trust income. Referring to the conditional grant to the Academy, the court reasoned that "so long as [the Academy] prepares boys for college entrance," the decedent intended it to receive the trust funds. (*Id.*, at p. 703.)

As an initial matter, it appears that the *Edwards* court operated under the mistaken premise that the condition for receiving the funds was that the Academy still prepare boys for college entrance, and then came to the conclusion that the Academy did so even if it also prepared girls for

college. This is contrary to the decedent's specific and clear direction that the school be operated "as a boys preparatory school." Under California law, where primacy is accorded to the intent of the grantor based on the plain and ordinary meaning of the words he used, the decision of *Estate of Edwards* is likely wrong—the decedent there clearly stated that "[i]n the case the said Worcester Academy ceases to be operated as a preparatory school for boys, it shall thereupon become disqualified as a beneficiary." (*Id.*, at p. 702.) This language is plain on its face.

The Superior Court correctly concluded that several factors distinguish *Estate of Edwards* from this case. First, the court in *Estate of Edwards* expressly noted "that New York courts are cautious in divesting a named beneficiary." (*Id.*, at p. 703.) In *Estate of Edwards*, had the court concluded that the trust funds could not go to a coeducational institution, Worcester Academy would have ceased receiving funds from the trust. Here, a finding that the Trust does not permit coeducation would not divest Deep Springs College of its funding.

Second, the school at issue in *Estate of Edwards* was founded as a "school for the education of youth" and had previously been a coeducational institution. Deep Springs College, by contrast, was founded as a school "for promising young men," and has never been coeducational. As Appellant concedes, "[t]here is no question that L. L. Nunn intended the Deep Springs College to be [an] all-male institution when he founded the school." (CT 376.)

Third, as the decedent in *Estate of Edwards* was merely one of many donors to an already long established school, his wish that the school be a boys preparatory school held little sway. By contrast, Deep Springs College was founded by L. L. Nunn, the Deed of Trust is "the charter document for Deep Springs College" (App. Br., at p. 1), and the Trustees hold the estate in trust in perpetuity for the purpose, with the powers, and

upon the terms and conditions set forth in the Deed of Trust. Mr. Nunn was not merely one donor to the school, and the Trust is not merely one source of material support for it.

A declaration of trust constitutes a contract between the trustor and the trustee for the benefit of a third party. (*See In re Estate of Bodger* (1955) 130 Cal.App.2d 416, 424-425.) Here, the "[g]rantees, and their successors and assigns forever" promised "to have and to hold" the estate, "in trust, nevertheless . . . for the purpose, with the powers, and upon the terms and conditions hereinafter more fully set forth" in the Deed. (CT 973-974.) In exchange for this promise, and on these conditions, L. L. Nunn turned over the operation of the Deep Springs educational enterprise to the Trustees and granted them legal title to all assets listed in the Deed of Trust and all funds raised or income subsequently accrued under its aegis. When they joined the Board of Trustees, the current Trustees accepted the Trust's terms and conditions. As successors of the original trustees, their discretion is limited by these terms and conditions in perpetuity.

Since "a trust created in writing cannot be varied by a subsequent declaration of the trustee" (*Burling v. Newlands* (1896) 112 Cal. 476, 498), "[i]t is obvious that a trustee cannot thus change the trust upon which it holds property." (*Brown v. Mem'l Nat. Home Foundation* (1958) 162 Cal.App.2d 513, 524.) When Mr. Nunn wrote the Deed of Trust, he was confident that if the college survived, his directions would be honored. Such confidence was warranted because the grant was under a trust deed, and trust law imposes a high standard of care on trustees to obey those directions and not abuse the discretion afforded them. The Deed twice binds the "grantees, and their successors and assigns forever" to the restrictions of the Trust. (CT 973-974.) Absent a successful petition to modify the Trust's provisions (a matter currently before the Superior Court), the Trustees must forever act according to these restrictions.

Appellant contends that the Trust provides only a small amount of the College's funding, and misleadingly portrays the Trustees' role as merely one of providing assets from a trust fund. But the Deed of Trust is the College's founding charter and its restrictions apply to *all* of the College's assets and activities. (*See* CT 2011-2035.) The Deep Springs College Trustees are very differently situated than the decedent or his trustee in *Edwards*. Mr. Edwards was merely one of many donors and the *Edwards* trustee had no controlling relationship to or obligations toward the Academy, being simply in charge of disbursing the assets of an external donation. Here the Trustees not only provide assets to run the College, they are effectively its governing board (even if through their alter ego or agent) and have the fiduciary obligations delineated in the Deed. (*Ibid.*) Mr. Nunn set up the Trust to define and perpetuate the College, and in doing so restricted it to a certain specified purpose. *Edwards* is thus both incorrect and inapposite.[3]

When interpreting similar language in charitable trusts created to benefit men, courts in other states have found such language to be clear and unambiguous. A New York court found that "[t]he expressed purpose of testator to provide scholarships for 'bright and deserving young men' is set

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[3] Appellant briefly references *Zahn v. Zahn* (1971) 16 Cal.App.3d 106. That case is also inapposite. *Zahn* was decided under the rubric of *cy pres*, or modification, to prevent the failure of the charitable gift. (*Id.*, at pp. 113-114.) The *Zahn* court specifically found that "[t]he testatrix's will exhibits the intention to establish a charitable trust for a designated special class of members of the public," Christian women and girls. (*Id.*, at 115.) That court concluded that such a designation was permissible, was consistent with trustee Salvation Army's policies, and directed the Salvation Army to seek out and give preference to those women and girls who fit the decedent's description, and to seek further instruction from the court if that classification of beneficiaries proved too restrictive. (*Id.*, at p. 115-116.) Contrary to Appellant's claim, nothing in *Zahn* suggests that the phrase "promising young men" is not exclusive.

forth in the will clearly and without ambiguity." (*Matter of Johnson's Will* (N.Y. Sur. Ct. 1981) 108 Misc.2d 1066, 1068-1069 [reasoning supporting construction of gender restriction affirmed by *Matter of Estate of Wilson* (1983) 59 N.Y.2d 461, 472-475].) "The . . . intent of the decedent, which is clear" was to set up a "trust for scholarships for men only." (*Matter of Johnson's Will, supra*, 108 Misc.2d at p. 1069.) Due to the clarity of the intent with which that trust was established, that court found that "no construction [was] required to ascertain [the] testator's intent or dominant purpose." (*Ibid.*; *see also Matter of Cram's Will* (1980) 186 Mont. 37, 44 ["The intent of Cram to provide stipends to boys between the ages of 14 and 18 is clear and unambiguous."]; and *Green v. Old People's Home of Chicago* (1915) 269 Ill. 134, 150 [a devise to maintain and construct an old men's home held not to authorize use of funds to maintain home for old women].)

b. The Language of the Deed of Trust Unambiguously Constrains the Trustees' Discretion to the Accomplishment of the Purpose of the Trust.

Appellant's principal argument is not that Mr. Nunn intended Deep Springs College to be coeducational; he concedes Mr. Nunn did not. Rather, it is that Mr. Nunn intended to give his Trustees "virtually unfettered" discretion as to the manner, form, and place of the educational work of Deep Springs College, including discretion to institute coeducation. (App. Br., at p. 14.) At bottom, Appellant's interpretation entirely guts the Purpose Statement, and would allow the Trustees to ignore any part of the Deed with which they disagree. Appellant would have the Court believe that notwithstanding L. L. Nunn's careful and extensive delineation of the purpose, the Trustee's authority, and the limitation that

such authority must be used to accomplish the purpose, in essence the Deed really says "here's a bunch of money and property, you Trustees can do whatever you like as long as it has something to do with education." Appellant's argument lacks merit.

The Purpose Statement does indeed grant the Trustees discretion in certain respects, but it also lays out the purpose of the Trust and unambiguously constrains the Trustees to use the Trust "solely for the advancement of the purpose hereinabove mentioned." (CT 974 (¶ 1).) Nowhere does the Purpose Statement authorize the Trustees to change the *purpose* of the Trust or to ignore or eliminate one element of the purpose in order to do what they think better serves another element. As a matter of law, the "purpose of a trust is to be carried out no matter what the document says about the trustee's discretion." (*In re Millers Estate*, supra, 230 Cal.App.2d, at p. 907.) "The plan of the trustor must be followed." (*Estate of Bothwell, supra*, Cal.App.2d, at p. 604.) Moreover, specific directions for action and specific limitations on action trump any general grant of discretion. (*In re Greenleaf's Estate* (1951), 101 Cal.App.2d 658, 664-65; *see also* Civ. Code, § 3534; Code Civ. Proc., § 1859.)

The Purpose Statement contains the following specific directions as to the Trust's purpose. First, the Trust "*shall* be used to. . . 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." (CT 974 [emphasis added].) In 1923, when L. L. Nunn executed the Deed of Trust, Deep Springs College had been operating for six years as a men's college, and Mr. Nunn was intimately involved in its operations.

Second, the Trust "*shall* be used . . . for the education of promising young men." (*Ibid.* [emphasis added].) Mr. Nunn participated in selecting the students in the initial years, and the student body was all-male

throughout Mr. Nunn's life. As Appellant has conceded, there is "no question that L. L. Nunn intended the Deep Springs College student body to be all-male when he founded the school." (CT 37.) And Deep Springs College has operated as a men's college since its founding.

Third, the education shall be carried out "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." (CT 974 (¶ 1).) Fourth, "in the conduct of [this] educational work democratic self government by the students themselves *shall* be a feature." (*Ibid.* [emphasis added].) And fifth, the "work *shall* be carried on not for profit." (*Ibid.* [emphasis added].) Together, these elements compose "*the* purpose" of the Trust, and Mr. Nunn concludes by stating that the "work *shall* be carried on . . . *solely* for the advancement of the purpose hereinabove mentioned." (*Ibid.* [emphases added].)

To be sure, the Purpose Statement also grants discretion to the Trustees in certain respects. The "educational work" shall be "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 the Trustees in good conscience and the exercise of their best judgment may determine, *for the education of promising young men. . . .*" (*Ibid.* [emphasis added]) While granting the Trustees discretion to determine the manner, form, and place of the educational work, the Deed of Trust makes clear that such discretion is exclusively for and limited to the accomplishment of the specified purpose.

This interpretation is reinforced by the second numbered paragraph of the Deed of Trust (hereinafter, "Paragraph Two"). Paragraph Two elaborates a host of areas in which the Trustees are granted authority and discretion to manage the operation of the Trust, for example, to "handle, manage, operate, and dispose of all or any portion of said trust estate in

such manner . . . and upon such terms and conditions as said trustees may deem most advisable . . . ," "[t]o pay out of the trust estate . . . all of the necessary and proper expense . . . ," "[t]o hold meetings . . . ," and "[t]o adopt and change a name in which the business of this trust may be transacted . . . ." (CT 974-975 (¶¶2(a), (c), (d), & (e)).) This elaboration demonstrates the kinds of areas in which the Trustees are granted discretion to operate Deep Springs College. But Mr. Nunn was punctilious in stating that Trustee discretion is limited to the pursuit of the Trust's purpose. In fact, Paragraph Two of the Deed of Trust refers back to the Purpose Statement six times when delimiting the duties and powers of the Trustees. (*Id.* (¶¶2, 2(b), 2(c), 2(f), 2(g)).) For example, Mr. Nunn grants the Trustees power and authority:

> "[t]o transfer and turn over . . . all of the trust estate . . . 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 circumstance shall any of the trust estate be so transferred or turned over to any such organization . . . 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 to all their duties and responsibilities hereunder . . . ." (CT 974-975 (¶2(b)) [emphasis added].)[4]

And Mr. Nunn grants the Trustees power and authority to pay the "necessary and proper expense *of accomplishing the purpose of this trust.*" (*Id.* (¶ 2(c)) [emphasis added].) The final catch-all authority granted to the Trustees is "to do all such things and handle and dispose of the trust estate held hereunder as they may deem necessary and appropriate *for the*

[4] This contradicts Appellant's assertion that Mr. Nunn does not here "limit the Trustees discretion to transfer assets only to men's schools" (App. Br., at p. 14.)

accomplishment of the purpose of this trust." (CT 975 (¶ 2(g)) [emphasis added].)

These references demonstrate that the authority and discretion conferred in Paragraph Two is *limited* by the Trust's purpose. In fact, had Mr. Nunn intended to grant his Trustees the "virtually unfettered" discretion in the Trust's operation they now claim (*see* App. Br., at p. 14), there would have been no need to explicitly delimit the Trustees' authority in Paragraph Two, and that paragraph would be entirely superfluous.

To support his argument of "virtually unfettered" discretion, Appellant points to the Louisiana Court of Appeals' decision in *Montgomery v. Administrators of the Tulane Educational Fund* (La. 2010) 51 So.3d 60.[5] *Montgomery* regarded a series of gifts made by a grantor to the Administrators of the Tulane Educational Fund, including in her will.

There is a critical difference, however, between the grant at issue in *Montgomery* and the Trust here. Mrs. Newcomb provided in her will: "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 and wisdom." (*Montgomery, supra*, 51 So.3d, at p. 64.) Based on this language, the Louisiana Court of Appeals concluded that "Mrs. Newcomb's will created an unconditional bequest." (*Id.*, at p. 61.) That court concluded that the language of the will describing Mrs. Newcomb's hope that the money be used for a women's college was merely precatory and was used

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[5] Appellant also cites *Howard v. Administrators of the Tulane Educational Fund* (La. 2007) 970 So.2d 21, but the Louisiana Supreme Court vacated the specific holding of *Howard* concluding that the lower court "should never have reached th[e] [merits] issue," because the plaintiffs had not established their standing. (*Howard v. Administrators of the Tulane Educational Fund* (La. 2008) 986 So.2d 47, 60 at n. 16.)

only to advise and not direct. (*Id.*, at p. 62.) The court stated: "the will bequeaths upon Tulane an unconditional gift. Tulane has vested title in the property; and phrases made declaring Mrs. Newcomb's mere wishes or desires for the use of the money do not create a condition on the actual bequest." (*Id.*, at p. 63.) Accordingly bound by the unrestrictive and unconditional language of the will and bequest, the court concluded that it could not "take upon itself to rewrite [the] will in order to achieve a desired result." (*Ibid.*)

The Trust in this case is entirely different. Mr. Nunn did not state that he did not impose any restrictions upon his Trustees, nor that the Trust was committed fully and solely to their care and discretion. He did not create an unconditional trust or bequest. On the contrary, the Trustees took control of the Trust estate subject to the "terms and conditions" under which the Trustees shall "maintain and perpetuate" the educational enterprise at Deep Springs, and subject to the constraint that the Trust estate be used "solely for the accomplishment" of the purpose laid out in the Deed of Trust. This language is not merely precatory, but mandatory under California law, and binding on the Trustees in perpetuity. (*See Estate of Lawrence* (1941) 17 Cal.2d 1, 7.)

3. The Rules of Construction in the Probate Code Support the Conclusion that the Deed of Trust Unambiguously Requires an All-Male Student Body.

The rules of construction in the Probate Code, and elsewhere, provide further support for the conclusion that the Deed of Trust precludes coeducation. If the Court does not find that the Deed of Trust clearly indicates L. L. Nunn's intent to educate promising young men, to the exclusion of women, it may apply relevant rules of construction in the Probate Code to aid in interpreting the Deed. (Prob. Code § 21102,

subd. (b).) In addition, the general rules of construction and maxims of jurisprudence that courts apply when interpreting contracts, deeds, and wills likewise apply to the interpretation of trust dispositions. (*Burkett v. Capovilla* (2003) 112 Cal.App.4th 1444, 1449 [citing Prob. Code § 21101].) These rules of interpretation may be applied to support, but not to defeat, the testator's intention. (*In re Cowden's Estate* (1935) 10 Cal.App.2d 481, 482.)

The rules of construction in the Probate Code state that the words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative. (Prob. Code § 21120; Code Civ. Proc. § 1858 ["In the construction of a[n] instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted . . . ."]; Civ. Code § 3541 ["An interpretation which gives effect is preferred to one which makes void."].) The Court has no power to alter the terms of contract of trust between testator and his testamentary trustee by omitting terms or adding terms of its own composition. (*In re Estate of Bodger* (1955) 130 Cal.App.2d 416, 424.) As a result, courts, under the guise of construction, may not rewrite a trust. (*In re Keller's Estate* (1955) 134 Cal.App.2d 232, 235.)

In order to give effect to every expression in the Deed of Trust, the Court cannot omit the phrase "promising young men," as Appellant would like. Instead, the Court must give effect to the stipulation that the trust is "for the education of promising young men." This first rule of construction also requires the Court to give effect to the express and recurring expressions that limit Trustee discretion *solely* to the pursuit of the Trust's stated purpose. Appellant's interpretation that the Deed of Trust grants

broad discretion to the Trustees to alter the purpose of the Trust renders these limitations ineffectual.

The Probate Code also states that "[a]ll parts of an instrument are to be construed in relation to each other and so as, if possible, to form a consistent whole." (Prob. Code § 21121.) Here, the most consistent interpretation of the Deed of Trust is that the Purpose Statement sets out the Trust's purpose, granting the Trustees discretion in the Trust's operation, but limited to carrying out the Trust "for the advancement of the purpose" just delineated. Paragraph Two more fully describes some of the areas in which the Trustees have discretion in the operation of the Trust, but again channels this authority to "best maintain and carry out the purpose herein set forth." (CT 974-975 (¶ 2(b)).)

Moreover, in the second paragraph of the recitals of the Deed of Trust, Mr. Nunn writes that he "has heretofore established an educational institution at Deep Springs in Inyo County, California, and has been there carrying on educational work for the education and development of promising young men[.]" (CT 973.) Petitioner does not deny that in this instance the phrase "promising young men" should be interpreted to refer to males only. And to interpret the phrase in this way gives the Court strong reason to interpret the phrase "promising young men" in the same way in the Purpose Statement. Use of such a phrase "may be explained by any reference to or recital of that part in another part of the instrument." (Prob. Code § 21121.)

B. The Education of Promising Young Men Is Integral to the Purpose of the Trust.

Appellant does not actually argue that the Trustee's discretion is not limited by the purpose L. L. Nunn laid out in the Deed of Trust. (App. Br., at pp. 10, 35 ["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.'"].) Instead, appearing to realize that the Trustees are bound by the Trust's purpose, Appellant first argues that the restriction to "promising young men" merely *describes* Deep Springs College as it existed in 1923 and is not part of the Trust's purpose. In fact, Appellant is so bold as to assert that *all* of the language following the grant of discretion in the Purpose Statement—including the stipulations that the Trust be used to educate promising young men, that the education emphasize unselfish service, have self-government as a feature, and be carried out not for profit—merely "briefly describe[]" the "ongoing educational work" at Deep Springs College as it existed in 1923, and that "the Trustees have the authority to change any aspects of the work as it was described in 1923." (App. Br., at. pp. 9-10.)[6] This enormous grab of authority, for which Appellant provides no support, is inconsistent with the language of the Deed of Trust and is untenable.

The Purpose Statement begins with the phrase: "The purpose for which the property hereby conveyed and the rents, income, profits and proceeds thereof, shall be used by said trustees is to . . .". (CT 974 (¶1).) This beginning indicates that what follows is the purpose. And the Purpose Statement ends with the phrase: "and which work shall be carried on not for profit but solely for the advancement of the purpose hereinabove mentioned." (*Ibid.*) This ending indicates that what is mentioned "hereinabove," i.e., in the Purpose Statement, is the purpose. The entirety of the Purpose Statement states the purpose.

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[6] Note, however, that when Appellant expands upon the meaning of each of these alleged descriptors (App. Br., at pp. 16-20), he somehow discerns that some of them provide "clear direction to the Trustees," while others—including the direction to educate young men—are merely descriptors. (*Id.*, at p. 18.)

Appellant's reading, by contrast, guts the Purpose Statement, leaving the Trustees unlimited discretion to do what they want so long as they operate an educational institution (though it is unclear why Appellant thinks the Trustees are even limited to this). This could not be what Mr. Nunn intended. The absurdity of Appellant's reading is patent. The three words in "promising young men" each clearly relate to an implicit pairing (with the last being most intentionally dyadic): promising and not unpromising; young and not old; men and not women. If "promising young men" is merely descriptive and does not limit the Trustee's discretion to admit women, may the Trustees also make it a policy to admit unpromising old men? To suggest that in specifying that the students be men, Mr. Nunn did not intend to found and perpetuate a men's college, is no more plausible than to suggest that in specifying that the students be young and promising, Mr. Nunn nonetheless authorized the Trustees to devote the institution to educating the old and unpromising should they so choose.

It would follow from Appellant's reasoning that the Trustees have total discretion to alter the Trust's purpose to their own liking. Although Appellant sometimes admits that the Trustees' discretion is circumscribed by the purpose, this turns out to be meaningless because he claims that the purpose is nothing more than to give the Trustees discretion to develop the educational work as they think best. (App. Br., at pp. 9-10.) This, however, cannot be Mr. Nunn's intent. Else, why would he have included a Purpose Statement at all and specifically and repeatedly required the Trustees to adhere to that purpose? Appellant would render the Purpose Statement itself purposeless.

The California Supreme Court has held:

> [W]hen words of recommendation, request and the like are used in direct reference to the estate, they are *prima facie* . . . imperative and not precatory. While the desire of a testator for the disposal of his estate is a mere request when addressed

> to his devisee, it is to be construed as a command when addressed to his executor.

(*Estate of Lawrence* (1941) 17 Cal.2d 1, 7 [emphasis in original].) The relation between an executor and the legatees is like that between a trustee and the beneficiaries of the trust; therefore, the directions in the Purpose Statement are to be construed as commands to the Trustees. (*See Larrabee v. Tracy* (1943) 21 Cal.2d 645, 650.) While they are imperative in form, even if they were precatory in form their legal force would be imperative.

To be clear, as the Deed sets forth, the Trustees have significant discretion. But while the Trustees need not exactly reproduce the educational work already undertaken by L.L. Nunn, they are nonetheless required to carry on that work *within the prescribed limits set down in the Purpose Statement.*

C. Appellant's Remaining Arguments Should Be Directed to *Modifying* the Deed of Trust.

Perhaps realizing the fruitlessness of arguing that the bulk of the Purpose Statement is merely descriptive, Appellant tries two alternative arguments. First, he contends that operating a men's college was not L. L. Nunn's "dominant purpose" and can therefore be set aside. Second, he argues that while educating "promising young men" is a purpose of the Trust, that purpose is *now* best served in a manner L. L. Nunn did not intend: by the simultaneous education of young women. Both of these arguments go beyond interpretation of the plain language of the Deed of Trust, which must focus on L. L. Nunn's intent at the time he executed the Deed, and should be directed to the modification proceeding.

1. Arguments About the Relative Importance of the Elements of the Trust's Purpose Should Be Directed to *Modifying* the Deed of Trust.

Appellant devotes much of his argument to the proposition that "some elements of Deep Springs College were more important to L. L. Nunn than others." (App. Br., at p. 19.) Throughout his brief, Appellant alludes to "the dominant purpose" (*Id.*, at p. 1), "the essential overall objective" (*id.*, at p. 7), the "overall vision" (*id.*, at p. 11), the "dominant goal" (*id.*, at p. 16), the "central purpose" (*id.*, at p. 18), and "the overarching purpose." (*Id.*, at p. 24.) All of these formulations are simply ways for the Trustees to replace Mr. Nunn's specific and clear directives with their own vision for the College. And regardless of whether certain elements of Deep Springs College were, in fact, more important to Mr. Nunn than others, that does not give the Trustees or the Court the power to interpret the Deed of Trust to omit elements of the purpose that are explicitly included. At the interpretive phase, elements of the purpose big and small must be construed faithfully and may not be omitted or overridden. If Appellant wishes to make an argument that the components of L. L. Nunn's purpose are in conflict and the putatively more important ones must override less important ones, or that it is impossible to accomplish certain elements of the purpose without sacrificing others, that argument must be aimed at *modifying* the Deed of Trust, not interpreting it, which is the only issue now before this Court.

In making this argument, Appellant relies upon *Trustees of Dartmouth College v. City of Quincy* (1970) 357 Mass 521, 522-525, a case that discusses the "dominant intent" of a Trust. That case is readily distinguished. The trust instrument in *Trustees of Dartmouth* restricted admission to the Institute to a class of beneficiaries: native-born Quincy girls. (*Id.*, at p. 523.) Facing changed circumstances, including financial

straits and a paucity of Quincy-born applicants, the Institute proposed to admit non-Quincy-born girls while requiring that they pay full tuition to subsidize the Quincy-born girls. (*Id.*, at p. 525.) Therefore, the non-Quincy-born girls neither benefitted from the trust nor took the place of the intended beneficiary. In approving this plan, the court observed that it was reluctant "to enforce a forfeiture of a charitable trust" which would otherwise ensue, and relied heavily on equitable deviation to support its conclusion. (*Id.*, at p. 523) As Appellant notes, "it became difficult to keep the school running under the specific terms of the trust." (App. Br., at p. 26.) Indeed, the court noted that "there [was] substantial risk of complete failure of the primary charitable gift, if carried out in all its details precisely as [the trustor] planned." (*Trustees of Dartmouth College*, *supra*, 357 Mass., at p. 529.) Admitting non-Quincy-born girls benefited the Quincy-born girls by allowing the school to remain in operation and by subsidizing Quincy-born girls' education.

Here, by contrast, there is no substantial risk of complete failure of the Trust if carried out in its details. No one has argued that there is a substantial risk of the complete failure of Deep Springs College under the Trust's specific terms. And no one argues that admitting women is necessary for the College to remain in operation or to subsidize the education of the men. In fact, given that the Trustees intend to maintain the small size of the school and the full scholarship model if they are permitted to transition to coeducation, each admitted woman would take a spot that Mr. Nunn intended for "promising young men." (CT 932.) Moreover, even if the College were at risk, the relevant considerations must be put forward in the proceeding for modification rather than in this proceeding, which is limited to interpretation.

Furthermore, Appellant is wrong that the education of "promising young men" was a minor or overrideable element of the Trust's purpose. It

is undeniable that Mr. Nunn dedicated much of his adult life to the education of young men. And since 1923, the Trustees of Deep Springs have consistently construed the Deed's purpose accordingly. The practical construction the Trustees have placed upon the document for nearly 90 years is entitled to great weight in its interpretation. (*See Davenport v. Davenport Found.* (1950) 36 Cal.2d 67, 73.) Respondents have thoroughly demonstrated that Mr. Nunn consistently described Deep Springs College as dedicated to the education of young men, indicating the central importance of this specification. (*See* CT 869-878.) Indeed, when Mr. Nunn describes the work "already inaugurated" at Deep Springs College in his Trust's recitals, the *only* characteristic he specifies is that the college is "for the education and development of promising young men." (CT 973.) This demonstrates that the students' gender was fundamental to his enterprise.

2. Appellant's New Argument that Men Are Best Educated in Conjunction with Women Is Waived, Unconvincing, and Should Be Directed to *Modifying* the Deed of Trust.

Appellant then changes tack, suggesting for the first time on appeal that while the "education of promising young men" is an element of the purpose, that element is now best served in a way that Mr. Nunn did not intend: by educating those "promising young men" alongside women. As an initial matter, this argument was not raised in the Superior Court and is therefore waived. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29 ["Ordinarily the failure to preserve a point below [establishes] a waiver of the point. . . . It would be manifestly unjust to the opposing parties, unfair to the trial court, and contrary to judicial economy to permit a change of theory on appeal."].) Nowhere in the

extensive Superior Court briefing did Appellant raise this argument and this Court should not consider it for the first time now.

At any rate, Appellant makes this argument at the wrong stage of the case. At the interpretation phase, the court must focus on L. L. Nunn's intent at the time he executed the Deed of Trust, and nobody argues that L. L. Nunn intended Deep Springs College to be anything but a men's college. Moreover, as discussed in Part A.2.a, the plain and ordinary meaning of "promising young men" is promising young *males*, not promising young persons.[7] In this interpretation phase, this ends the matter.

Appellant's new argument is also unconvincing. To make it, Appellant must move away from the "overall vision" he has touted throughout the brief, detailing how society has changed and how women now should be afforded the same opportunities to be selfless leaders as men, and shift gears to argue that the reason to admit women to Deep Springs College is simply to benefit the "promising young men" who are the intended beneficiaries of the Trust. According to this new argument, Appellant would like permission to treat promising young women as mere instruments for the education of promising young men: their education under the Trust, according to this unedifying theory, would not be in any way due to a mission to educate promising young women in their own right or for the purpose that they help lift humanity from materialism to idealism and so forth, but would only be a collateral effect of providing some improvement to the education of the young men who could then better accomplish that purpose directly.

The Trustees, committed to retaining a full scholarship model and the current size of the student body in a coeducational Deep Springs (*see*

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[7] As explained in Part A.2.a, the formulation of the purpose *excludes* women (and the old and unpromising), so it is specious for Appellant to suggest that *including* them is best way to accomplish that purpose.

CT 932), would have this Court believe that they think the best way they can support the education of promising young men, and solely that purpose, is to educate approximately half as many of them, in essentially the same way they have done so heretofore but alongside female peers. "The trustee has a duty to administer the trust solely in the interest of the beneficiaries" (Prob. Code § 16002); in this case, as the class of beneficiaries is the class of promising young men, it is the Trustees' duty to administer the Trust solely in the interest of the selected young men. The Trustees' vote in favor of coeducation cannot credibly be understood as the result of their exclusive focus on the benefit of the young men who are the proper beneficiaries of the Trust.

D. The Extrinsic Evidence Supports a Conclusion that L. L. Nunn's Deed of Trust Supports an All-Male Institution.

A testator's intention is to be gathered from the language of the will, but if there is ambiguous language, its resolution "may be aided by extrinsic facts to help determine the testator's intention." (*In re Munson's Estate* (1942) 54 Cal.App.2d 590, 592.) To rely on extrinsic evidence, the Court would have to find that the language of the Deed is reasonably subject to conflicting interpretations; the mere fact that the parties advocate different interpretations does not in itself create or demonstrate an ambiguity. Extrinsic evidence as to the surrounding facts and circumstances under which a written instrument was made is admissible to interpret the instrument, although not to give it a meaning to which it is not reasonably susceptible. (*Russell, supra*, 69 Cal.2d, at p. 211; *see* Prob. Code § 21102, subd. (c).)

If the Court examines the extrinsic evidence, it will find that it is all one-sided. Mr. Nunn's papers demonstrate again and again that he envisioned Deep Springs College as a college for young men only.

Nowhere do his papers ever suggest that he allowed for the future possibility of women being educated at Deep Springs College. L. L. Nunn's papers further demonstrate the importance he ascribed to the purpose of the Deed of Trust and undermine any argument that the Trustees have discretion to alter that purpose.

1. The Documents Surrounding the Deed of Trust Demonstrate the Importance Mr. Nunn Assigned to the Purpose of the Trust.

L. L. Nunn was a sophisticated entrepreneur and lawyer. The choices he made in the legal language he used were deliberate. The year that he founded Deep Springs College, he demonstrated a firm grasp of the role of a trust's language in limiting the actions of trustees to its purpose: "Honesty as trustees requires that the trusteed property be protected against destruction. This includes the declared purpose, character and traditions, as well as the money." (L. L. Nunn, Letter to Oliver Clark (March 20, 1917), CT 1565) L. L. Nunn was adamant that the Trustees remain loyal to the purpose and foundational principles of Deep Springs as found in the language of the Deed of Trust:

> It is certainly true that Deep Springs has worked very imperfectly. I have never been satisfied with it, and I hope that the Trustees never will be. But the fundamental principles practiced at the institution are those which I wish to perpetuate. I shall keep driving home to you gentlemen, even if it takes my dying breath, that the purpose of Deep Springs is the education of promising young men 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.

(L. L. Nunn, Letter to the Trustees of Deep Springs College (1924) [quoted in Stephen A. Bailey, L. L. Nunn: A Memoir (1933)], CT 1570)

Other trusts created by Mr. Nunn around the time of the Trust created here further demonstrate that Mr. Nunn knew how to grant a trustee

absolute and unfettered discretion. For example, Mr. Nunn created a trust for Harold R. Waldo, which specified:

> 4.(r) To Harold R. Waldo, now of Salt Lake City, Utah, the sum of Five Thousand Dollars ($5,000.00) to be held in trust by him and expended in the education of his children, in such manner as he may deem fitting and proper. *Any portion of such sum not expended for such purpose may be used and applied in such manner as said Trustee may, in his absolute discretion, determine.* Said trust shall terminate on the death of said Trustee whereupon the trust estate shall immediately vest in and pass to the wife of said Harold R. Waldo if she shall survive him, otherwise to the surviving children of said Harold R. Waldo in equal shares[.]

(CT 982 (¶4(r)) [emphasis added]; *see also* CT 983 (¶4(s)-(t)), for the juxtaposition of a grant of unlimited discretion with the limited discretion Nunn afforded to the Trustees.) Documents such as this demonstrate that L. L. Nunn knew how to provide trustees with unlimited discretion and that he did so in another trust near the time that he specifically enumerated the powers of the Trustees of Deep Springs College, and limited those powers to the accomplishment of the purposes he laid out.

2. "The Purpose" Document and Other Documents Reinforce the Specific Purpose as Stated in the Deed of Trust.

Appellant devotes much space to discussing a document entitled "The Purpose," authored by Mr. Nunn a year after he executed the Deed of Trust. The language in "The Purpose" only serves to underline L. L. Nunn's clear intention as expressed in the Deed of Trust. For he says in that document that "[t]he purpose of Deep Springs is . . . to create an environment where young men . . . may . . . build the character for full employment in the service of their fellow men." (CT 1575-1576.) Mr. Nunn immediately goes on to describe this "environment" as consisting of:

"[a]n intimate association with a small group of young men which have declared themselves ready to accept the purpose of Deep Springs . . . ." As in the Deed of Trust, Mr. Nunn makes clear in "The Purpose" that the purpose of Deep Springs is to educate young men for a life of service. And Mr. Nunn's use of "young men" in this document cannot reasonably be interpreted as meaning "young men and women" or "young men but not exclusively young men."

There are many other documents by and about L. L. Nunn that clearly suggest that he regarded the education of promising young men as central to the future of the endeavor that he wished to perpetuate under the terms and conditions of the Trust. In these documents, there is no likelihood whatsoever that Mr. Nunn meant "young men" to have a gender inclusive sense.

Evidence adduced by Respondent Hoekstra demonstrates that L. L. Nunn consistently intended the nature and purpose of Deep Springs College and the activities to be promulgated under the Trust to be restricted to the education of young men. (*See* CT 866-878.) These documents illustrate Mr. Nunn's unwavering commitment to this position from the founding of Deep Springs until his death.

3. Appellant's Arguments About Extrinsic Evidence Are Unconvincing or Directed at *Modifying* the Trust.

Appellant makes several arguments that the extrinsic evidence demonstrates that Mr. Nunn did not intend to restrict the Trustees' discretion to implement coeducation at Deep Springs College. First, Appellant argues that society in 1923 likely influenced Mr. Nunn's initial decision to found an all-male institution, but that times have changed since then. Appellant contends that the purposes of the Trust are actually harmed

by limiting the education to young men because half of the potential leaders are excluded from the applicant pool, and the education of the young men who do attend suffers. But these are matters that must be left (if anywhere) to the modification proceeding. Once the Court is looking at things outside the Deed such as how societal changes may have affected the accomplishment of the Trust's purpose, it has left the realm of interpretation and entered the realm of modification.

Second, Appellant argues that Mr. Nunn was fully aware of prestigious coeducational colleges and universities and the predominance of coeducation. (App's Br., at p. 28-30.) But the natural inference from Mr. Nunn's awareness that coeducation was the norm is that his specification of something different from this norm should bear particular weight. Mr. Nunn's specification of the all-male student body should be respected as intentional and purposeful.

Finally, Appellant argues that none of L. L. Nunn's extensive writings concerning Deep Springs College indicate an intent to forever prevent the Trustees from supporting coeducation, citing to "The Purpose" and letters from Mr. Nunn to the student body. Again, these documents entirely support Respondents. As Appellant concedes, throughout these documents, Mr. Nunn talks about "young men." (App. Br., at p. 31.) For example, in the section of "The Purpose" quoted by Appellant, L. L. Nunn writes "[t]he purpose of Deep Springs 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 . . ." (*Ibid.*) Nowhere do these documents suggest that Mr. Nunn believed that women should attend Deep Springs College, that his restriction to the education of promising young men was temporary, or that he intended to grant the Trustees discretion to overturn his explicit direction.

Appellant goes so far as to claim that "[t]here is no evidence of any

intent to limit the student body to males only," either in the Deed of Trust or Mr. Nunn's other writings (App. Br., at p. 20)—as if Mr. Nunn's use of the language of educating "promising young men" as the unique descriptor of the work he had undertaken at Deep Springs, his use of the same language in stipulating Deep Springs' purpose, and his insistent referral later in the Deed to this purpose as controlling, were not irrefutable evidence of that intent and its importance. Mr. Nunn could scarcely have made it clearer that this controlling stipulation was intentional and central. Moreover, there is no reason to think that Mr. Nunn would have regarded "young men" as an ambiguous or complex stipulation requiring explanation or enabling discretion; he similarly leaves unexplained his unambiguous specifications that the college be non-profit and in California. They do not therefore become invalid, unimportant, or open to Trustee override. Not least, Appellant here confuses intent with motivation, the law of trusts being unconcerned with the latter whenever the intent or purpose is stated clearly in the instrument. (*See In re Robbins' Estate* (1962) 57 Cal.2d 718.)

VII. CONCLUSION

For the foregoing reasons, the Superior Court correctly held that the plain language of the Deed of Trust limits Deep Springs College, and any other enterprises under the Trust's aegis, to educating promising young men, and does not permit coeducation. Its ruling should be affirmed.

Dated: October 31, 2013

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CERTIFICATE OF WORD COUNT

California Rule of Court 8.204(c)

The text of this Respondent's Brief, excluding those parts permitted to be omitted from the word count by Rule of Court 8.204(c)(3), consists of 12,178 words as counted by Microsoft Word word-processing software used to generate this document.

Dated: 10-30-13

Joseph C. Liburt

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PROOF OF SERVICE BY OVERNIGHT DELIVERY

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, 1152 15th Street, NW, Washington, D.C., 20005. On October 31, 2013, I served the following document(s):

RESPONDENT'S BRIEF

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Executed on October 31, 2013, in Washington, D.C.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____

Juanita M. Greenfield