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SUPERIOR COURT OF CALIFORNIA

COUNTY OF INYO

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| In re the Matter of the<br><br>L.L. Nunn Trust for the benefit of Deep Springs College under the Deed of Trust dated November 5, 1923 | Case No. SICVPB 12-53232<br><br>RULING AND ORDER ON RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE, MOTION IN LIMINE |

On August 6, 2013, Objectors/Respondents Kinch Hoekstra and Edward Keonjian, Trustees of the L.L. Nunn Trust ("Respondents") filed their Motion for Judgment on the Pleadings or, in the alternative, Motion in Limine. This matter came on for hearing on September 24, 2013. Respondents were represented by Joseph C. Liburt and Heather M. Hoekstra. Petitioner, David Hitz, Chairman of the board of trustees of the Lucien L. Nunn Trust (the "L.L. Nunn Trust" or "Trust"), acting on behalf of the board of trustees (the "Trustees") was represented by Christopher L. Campbell, Dirk Paloutzian, Jeff Jaech, and Peter E. Tracy. Mr. Jon Michaelson appeared on behalf of Real Party

in Interest, Deep Springs College Corporation. Without objection, the Court took judicial notice as requested by Respondents in their Request filed September 6, 2013. Following oral argument, the matter was taken under submission. The Court has considered the pleadings, evidence, arguments of counsel, and good cause appearing therefore, rules as follows:

Petitioner has alleged four legal theories for modification of the Trust instrument.[1] In their motion, Respondents argue that three of the four theories are inapplicable subsequent to this Court's February 13, 2013, Rulings and Orders on Petition for Court Order Interpreting Endowment Gift Instrument (the "Rulings and Orders.")

*A. Preliminary Matters: The Purpose of the Trust*

Judgment on the pleadings may be granted where the complaint does not state facts sufficient to constitute a cause of action against the defendant. (CCP § 438(b)(1)(ii)) Respondents allege that the Court has determined that the purpose of the Trust is limited to the education of promising young men and that the only purpose is to continue a men's college. Respondents also allege that Rulings and Orders are the final judgment on this issue and thus controlling in all subsequent phases of this bifurcated matter. However, the Rulings and Orders are on appeal and thus not final.

[1] See Petitioner's "Petition For Court Order Construing Trust Provisions, Or, If Necessary, Modifying The Trust Instrument" filed February 6, 2012, and Petitioner's "Supplement To Petition For Court Order Construing Trust Provisions, Or, If Necessary, Modifying The Trust Instrument" filed March 22, 2013.

Even if the Rulings and Orders are final, the court did not enter orders regarding the purposes of the Trust in the context of the issue of modification. The issue in first part of the bifurcated trial was whether the language of the Trust instrument could be interpreted as giving the Trustees the discretion to institute coeducation at Deep Springs College. The question of whether the Trust could be modified in light of the Trust's various purposes as alleged by Petitioner was not before the Court. "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, footnote 2. "The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning. [Citations.]" *McGee v. Superior Court* (1985) 176 Cal.App.3d 221, 226.

*B. The Cy Près Doctrine*

Both Petitioner and Respondents agree that this theory is available.

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*C. Statutory Equitable Deviation (Probate Code section 15409)*

Respondents argue that this section of the code cannot be used to change the purpose of a charitable trust; rather, it is limited to modification of administrative or dispositive provisions. Subsection (a) of this section reads in full:

> On petition by a trustee or beneficiary, the court may modify the administrative or dispositive provisions of the trust or terminate 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. Probate Code section 15409, subsection (a).

Although this statute may not have been used to modify a charitable trust's purpose,[2] the court may order the trustee to do acts that are not authorized or are forbidden by the trust instrument if it carries out the purposes of the trust. In Petitioner's Petition for Court Order Construing Trust Provisions, or if Necessary, Modifying the Trust Instrument, his Supplement thereto and Declaration of L. Jackson Newell

[2] Respondents did not argue that Probate Code section 15409 is not applicable to charitable trusts at all.

(collectively, the "Petition"), Petitioner has alleged that that the purposes of the Trust include that the school be non-profit, that it be located in California, that it emphasize the need and opportunity for uplifting mankind from materialism to idealism and that it feature student self-government. Petitioner has also plead that changed circumstances have substantially impaired the ability to achieve the Trust purposes with an all-male student body. The Court has not ruled on purposes of the Trust in this context.

Respondents counter that Probate Code section 15409 may not be applied to alter a charitable trust's purpose and that at most it may be used to cure a scrivener's error. In reviewing the statute and cases in the common law, this code is not limited to correcting a scrivener's error. In fact, some cases have gone so far as to find that if the primary purpose(s) would be defeated to a slavish adherence to a secondary purpose, the secondary purpose should fail. *Samarkand of Santa Barbara, Inc. v. County of Santa Barbara* (1963), 216 Cal.App. 2d 341, 357 ["Clearly, educational, scientific and literary purposes are to be pursued only so far and in such manner as the board of trustees may deem them in furtherance of the primary purpose 'To furnish food, lodging and medical care to elderly persons and to otherwise fulfill their wants and needs and provide for their life care.'"] *Estate of Flannery* (1969) 269 Cal.App.2d 890, 897-898 ["Were the court so to construe her intent, a secondary trust purpose … would be accomplished and her primary purpose … would be frustrated and the tail would wag the dog."]

Statutory equitable deviation is a thoroughly equitable creation. Equity looks at substance rather than form. Civil Code section 3528; *Giammarrusco v. Simon* (2009) 171 Cal App 4th 1586. Searching for technical definitions of words such as "primary purpose" and "material purpose" or insistence upon narrow application of those terms is misguided. In this context, equity demands not a search for technical definitions but an answer to the question "What was most important to the settlor?" Many trusts do have a single purpose such as, "to fund a hospital" or, "to provide for the poor of the county." But often, trusts have more than one purpose, such as to provide for a life tenant with the remainder to charity. When a conflict arises, the court must decide which term or purpose must be preserved and which may be sacrificed in order to continue the trust according to the main intent of the settlor.

In light of the multiple purposes identified in the Petition, Petitioners have stated a cause of action that the Trustees may be ordered to do something not authorized or forbidden by the Trust (admitting women) in order to carry out the purpose(s) of the Trust.

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*D. Common Law Equitable Deviation*

Common Law Equitable Deviation has been explained as making specific administrative terms of an instrument subservient to the dispositive provisions in the event of a conflict. *Estate of Traung* (1962) 207 Cal.App.2d 818, 830, citing 2 Scott on Trusts (2d ed. 1956) section 167 at pages 1176-1177. Where the primary purpose of the trust would not be accomplished by a strict adherence to the terms of the declaration of trust and that when it is made to appear that the benefits and advantages which the trustors desired to confer upon the beneficiaries would not accrue to them by a slavish adherence to the terms of the trust, the court may modify the terms of the trust to accomplish the real intent and purpose of the trustors. *Adams* v. *Cook* (1940) 15 Cal.2d 352, 361. The theory allows the terms of the trust to be altered in order to permit the trustees to do, not what the testator intended them to do but to what the court thinks the testator would have intended, if he had anticipated the circumstances that ultimately arose. *Stanton* v. *Wells Fargo Bank etc. Co.* (1957) 50 Cal.App.2d 763, 770 [summarizing authorities.]

The theory is not limited to deviation of administrative terms. For example, in *Estate of Traung* (1962) 207 Cal.App.2d 818, 831, the testator provided for distribution to a beneficiary at age 40 on the condition that he was capable of managing his finances. When the beneficiary turned 40, he was incompetent and represented by a guardian. The court held that if the testator had anticipated the circumstances of the

beneficiary's incompetency, he would have authorized distribution of the corpus to the guardian rather than holding it in trust. *Estate of Traung*, at 833. The majority opinion held that the main purpose of the trust was for the beneficiary to receive his share at age 40 while the dissent opined that the purpose was to restrict access to the corpus and that any deviation should be restricted to administrative provisions.

As discussed in Section C, above, A rigid adherence to narrow definitions of terms like "administrative" as opposed to "distributive" terms is not appropriate in an action based on equity and is not completely supported by the authorities. Carrying this thought to the extreme, the Trust could be subject to *cy près* if the only way to fulfill its purpose would be to slightly modify some minor distributive provision. This poor result is exactly what equity intends to avoid.

The Petitioner has stated a cause of action that the intent (or purpose) of the Trust to provide for the education of society's leaders cannot effectively be accomplished by strict adherence to the phrase, "for the education of promising young men," thus requiring deviation.

*E. Modification of Trust Based on consent of Beneficiaries (Probate Code section 15403)*

The issue of whether all beneficiaries consented to the modification within the meaning of section 15403, subdivision (a), is a question of statutory interpretation and has been described as a pure question of law. *Boys & Girls Club of Petaluma v. Walsh* (2008) 169 Cal.App.4th 1049, 1057. However,

as discussed below, identification of "special interest" beneficiaries also involves questions of fact.

Probate Code section 24 defines a beneficiary as "a person to whom a donative transfer of property is made or that person's successor in interest … ," including "a person who has any present or future interest, vested or contingent." (§ 24, subd. (c).) In the context of a charitable trust, section 24 defines a beneficiary as "any person entitled to enforce the trust." (§ 24, subd. (d).) *Boys & Girls Club*, at 1058.

No California case has decided whether the Attorney General is a beneficiary for the purposes of consent under Probate Code section 15403, although such is implied in cases such as *Boys and Girls Club*. In many cases, the Attorney General would be the only "beneficiary" of a charitable trust under Probate Code section 24, subsection (d), as in cases where the beneficiaries are indefinite and thus unable to consent on their own behalf. The Attorney General has an obligation (rather than a mere discretion) to institute suit when there has been a breach of a charitable trust. Should any other person institute the proceedings, the Attorney General must be made a party. "No doubt this latter requirement is to permit him to exercise his duty as the primary guardian of the general public's interest in charitable trusts." *In re Veterans' Industries, Inc.* (1970) 8 Cal.App.3d 902, 919-920. The Attorney General actively participates in developing plans to carry out *cy près* requirements in connection with reorganizations of charities. The Attorney General may consent to the distribution to the nominee suggested by a petitioner or recommend others for the

consideration of the court. *Id.*, at 919-920. The Attorney General also has power to recommend or appoint another distributee. *Estate of Buck* 1994) 29 Cal.App.4th 1846, 1859. Therefore, it would strain logic to conclude that the Attorney General was not intended as one of the beneficiaries required to sign the consent in cases involving charitable trusts under Probate Code section 15403.

The phrase "includes any person," as used in Probate Code section 24, subdivision (d), expands the class of persons who may bring an action to enforce a charitable trust to include the Attorney General and other interested persons. *Patton v. Sherwood* (2007) 152 Cal.App.4th 339, 346; *Holt v. College of Osteopathic Physicians & Surgeons* (1964) 61 Cal.2d 750, 755-756.

The plain language of Section 24, subsection (d) suggests that the co-trustees are beneficiaries for purposes of consent. It is well-settled that minority co-trustees may enforce a charitable trust. *Holt v. College of Osteopathic Physicians & Surgeons* (1964) 61 Cal.2d 750, 752-756; Restatement Third of Trusts, section 94. However, the language, taken in context, does not require co-trustees consent to modification of the trust. By analogy, in regards to a private trust, there is no requirement that trustees consent, because they are not beneficiaries with some present or future interest in the trust. Probate Code section 24, subsection (c). Unlike the Attorney General, the Trustees do not have a stake in the outcome.

Probate Code section 15403 is drawn from Section 337 of the Restatement Second of Trusts. Law Revision Commission Comments, Deering's Annotated Family Code (2013.) The comments to the

Restatement reflect the possible tension between trustees and beneficiaries:

> If all of the beneficiaries of a trust wish to terminate it, the trust will not be continued merely in order to enable the trustee to obtain further compensation. The trustee as such is not a beneficiary of the trust. See § 126, Comment c. (Rest.2d Trusts, § 337, com. a)

In addition:

> Whether trustee is beneficiary. Although a trustee is entitled to compensation for acting as trustee (see § 242), he is not as such a beneficiary of the trust (compare § 337, Comment b). ((Rest.2d Trusts, § 126, com. c.)

Therefore, in the matter at hand, consent of the Trustees is not necessary under Probate Code section 15403.

The more difficult question is whether the present or future students of Deep Springs College are beneficiaries for purposes of Probate Code section 15403. No California case is on point.

In terms of persons entitled to enforce the terms of a trust, persons with a "special interest" are sometimes granted such standing. *Hardman v. Feinstein* (1987) 195 Cal.App.3d 157, 161-162; Restatement Third of Trusts, section 94. The trend has

been to liberalize standing, but there is no clear rule as to what qualifies as a "special interest." Some factors that have been considered are: (1) Whether the interest is current or only potential. *Robert Schalkenbach Foundation v. Lincoln Foundation, Inc.* (2004) 208 Ariz. 176, 91 P.3d 1019, 1025, 1027; (2) Whether the person seeking standing is likely to be injured or has something personal to gain by the action. *Price v. Akaka* (1990) 915 F.2d 469, 472; *Y.M. C.A. of City of Washington v. Covington* (1984) 484 A.2d 589, 591; (3) Whether the class of potential beneficiaries is sharply defined and limited in number as opposed to interest that is no greater than the interest of all the other members of a large class of potential beneficiaries of a charitable trust. *In re Rosenthal*, 99 A.D.3d 573; *Mt. Jezreel Christians v. Bd. of Trustees* (1990) 582 A.2d 237, 239; *Rhone v. Adams* (Ala. 2007) 986 So. 2d 374, 377; (4) Public policy concerns and objectives. Restatement Third of Trusts, section 94; (5) The nature of the challenge (theory not favored in cases of an ordinary exercise of discretion on a matter expressly committed to the trustees which make give rise to recurring litigation.) *Kania v. Chatham* (1979) 297 N.C. 290, 254 S.E.2d 528; *Hooker v. Edes Home* (D.C. 1990) 579 A.2d 608, 615; (6) Whether the suit is by a representative aimed to vindicate the interests of the entire class or to interests of a given individual. *Hooker v. Edes Home*, at 615; (7) The ability of the Attorney General to represent any interest. *Warren v. Board of Regents of University System of Georgia* (2001) 247 Ga.App. 758, 759-762, 544 S.E.2d 190, 192-194; (8) A class's direct input on trust affairs in terms of decision-making power

or administration over the trust. *In re Milton Hershey School* (2006) 590 Pa. 35, 43, 911 A.2d 1258, 1260, 1262; *In re Francis Edward McGillick Fund* (1991) 406 Pa.Super. 249, 594 A.2d 322, 328, *affirmed in part, reversed in part* 537 Pa. 194, 642 A.2d 467 (1994); (9) The intent of the settlor regarding the class's beneficiary status *In re Milton Hershey Sch.* (2006.) 590 Pa. 35, 44.

The Restatement Third proposes that a small group of students may represent a class:

> If a charitable trust is created to benefit the members of a described group of persons that is reasonably limited (though "indefinite" … ), one or more members of that group may be allowed to maintain a suit, on behalf of its members generally, against the trustee for enforcement of the trust. …. So, too, if a college is trustee of a trust the terms of which direct that its income be used to provide graduate-study scholarships each year to selected students graduating from the college, based on prescribed procedures and criteria, the trust purpose may be enforced by one or more of the current students who might reasonably expect to meet the criteria. (Rest.3d Trusts, § 94.)

The one California case that discusses the ability of beneficiaries to consent to modification of a charitable trust under the current statute is not instructive. *Boys & Girls Club*

*of Petaluma v. Walsh* (2008) 169 Cal.App.4th 1049 involved named beneficiaries. Without analysis, the court determined that the named beneficiaries were the class of "all beneficiaries" entitled to enforce the trust. The unusual facts of the case drove the result as acknowledged in the opinion itself; the court was interested in having the corpus distributed to charity without further delay, even if some terms of trust were ignored. *Id.*, at 1061.

The decision to grant standing to special interest beneficiaries is policy and fact driven, with factors relevant to the issue of consent. That the students may be within the class of special interest beneficiaries is evident even with a superficial glance at the factors. It is undisputed that the class is very small and defined. Current students may have a personal interest in the outcome of the litigation, at least as much as would the general public - the admission of women may change the character of the school in the way the sale of a building or defunding of a public park may change the quality of a neighborhood. *Y.M.C.A. of City of Washington v. Covington* (1984) 484 A.2d 589. The nature of the challenge is unique and not likely to be repeated, as opposed to a routine administrative exercise of discretion such as decisions over which students to admit. Current students may represent interests of the class rather than aim to benefit themselves as individuals. The Attorney General may not be as equipped to represent the interests of current students simply due to time constraints or lack of knowledge about the college. To the extent that students have direct input on Trust affairs in terms

of decision-making power or administration, this power is consistent with one stated purpose of the Trust instrument: student governance. It is not clear from the record the extent of the students' involvement in the administration of the Trust, an issue that could prove to be pivotal.[3]

The factors do not rule out requiring consent of current students to modify the Trust. Trial is necessary to allow the parties to present evidence on the various factors.

In addition, The Court has not passed on the issue of a material purpose of the Trust in the context of modification under Probate Code section 15403. The Court may be required to engage in the weighing process set forth in Probate Code 15403, subsection (b) and must receive evidence on those factors. There is no indication that Petitioner will fail to obtain the necessary consents prior to trial, nor would the consents alone necessarily determine the outcome.

Good cause appearing therefore, Respondents' Motion For Judgment On The Pleadings, Or, In The Alternative, Motion In Limine is DENIED.

So Ordered.

Dated: November 13, 2013

Dean T. Stout
Judge of the Superior Court

[3] If the students are found to be special interest beneficiaries, the parameters of that class must be determined, for example, whether students who have been admitted but not yet in attendance would qualify.