CASE NO. E058293

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

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

Petitioner and Appellant,

v.

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

Objectors and Respondents

APPELLANT'S REPLY BRIEF

On Appeal from the Superior Court of the State of California
in and for the
County of Inyo, Case No. SICVPB1253232, Hon. Dean T. Stout

BAKER MANOCK & JENSEN, PC
Christopher L. Campbell #116329
Jeffrey A. Jaech #076876
Dirk B. Paloutzian #173676
Amanda M. Neal #258693
5260 North Palm Avenue, Suite 421
Fresno, California 93704
Telephone: 559.432.5400
Facsimile: 559.432.5620

LAW OFFICE OF PETER E. TRACY
Peter E. Tracy #78185
106 South Main Street, #200
P.O. Box 485
Bishop, California 93515
Telephone: 760.872.1101
Facsimile: 760.872.2971

Attorneys for Petitioner and Appellant

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 3

A. The Sole Question Before the Court Appeal is Whether the L. L. Nunn Deed of Trust Prohibits the Trustees From Admitting Women, in Addition to Men, as Students at Deep Springs College. 3

B. L. L. Nunn Charged the Trustees with the Task of Continuing His Work at Deep Springs College. 4

1. Appellant's Interpretation of the Purpose Statement of the Deed of Trust is Compelled By Basic Principles of Grammar and English Composition. 4

2. The Final Phrase of the Purpose Statement, Directing that Trust Assets "Be Used Solely For the Advancement Of the Purpose Hereinabove Mentioned," Cannot be Read as Limiting the Student Body at Deep Springs College to Promising Young Men. 7

3. The Balance of the Deed of Trust Emphasizes that L. L. Nunn Unambiguously Intended to Grant Broad Discretion to the Trustees and Further Establishes that There are Only Two Absolute Limitations on that Discretion. 8

C. The Theories Relied Upon by Respondents Are Fallacies and Should be Rejected. 11

1. The Phrase "Promising Young Men" is a Description of the Trustor's Work as it Existed in 1923, Not a Restriction on the Trustees' Discretion to Develop the Educational Experiment at Deep Springs College in the Future. 12

2. Respondents' Editing of the Purpose Statement is Incomplete, Improper, and Inconsistent 13

D. All of Appellant's Legal Theories Concerning the Interpretation of the L. L. Nunn Trust are Relevant to this Appeal. 17

1. L. L. Nunn's Dominant Intent Affords the Trustees Discretion to Admit Women as Students at Deep Springs College. 17

2. Appellant Did Not Waive His Argument that the Simultaneous Education of Men and Women at Deep Springs College Furthers the Purpose of the Trust. 19

E. The Reasoning in Analogous Cases Supports Appellant's Interpretation of the Deed of Trust. 20

1. Respondents' Reliance on *Estate of Simoncini* is Misplaced. 20

2. The *Edwards* and *Ebitz* Cases Support the Interpretation that the Trust Language does not Prevent the Trustees from Admitting Women to Deep Springs College. 20

3. The Cases Concerning the H. Sophie Newcomb Memorial College at Tulane University Also Provide Instructive Guidance Concerning the Need for Explicit Language to Establish a Restriction on Trustee Discretion. 23

4. The City of Quincy Cases Establish that a Trustor's Dominant Intent Can Allow a Court to Disregard Other Language in the Instrument. 24

F. Extrinsic Evidence Does not Support Respondents' Contention that L. L. Nunn Intended to Exclude Women From Deep Springs College. 25

III. CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

City of Quincy v. Attorney General et al. (1894) 160 Mass. 431 24

Collins v. State Dept. of Transp. (2003) 114 Cal.App.4th 859 19

Estate of Flannery (1969) 269 Cal App 2d 89 18

Estate of Simoncini (1991) 229 Cal.App.3d 881 20

Foothill Properties v. Lyon/Copley Corona Associates (1996) 46 Cal.App.4th 1542 25

Golden West Baseball Co. v. City of Anaheim (1994) 25 Cal.App.4th 11, 21-22 26

Howard v. Administrators of the Tulane Educational Fund (La. 2007) 970 So.2d 21 23

In re Bernatas' Estate (1958) 162 Cal.App.2d 693 3

Montgomery v. Administrators of the Tulane Educational Fund (La. 2010) 51 So.3d 60 23

State of CA ex rel. Public Works Bd. v. Bragg (1986) 183 Cal.App.3d 1018 19

Trustees of Dartmouth College v. City of Quincy (1970) 357 Mass. 521 ..... 18, 24

STATUTES

Code of Civil Procedure section 1858 16

Probate Code section 21121 ..... 3, 17

I.
INTRODUCTION

Appellant's interpretation of the Nunn Deed of Trust rests on three premises about the intent of Lucien L. Nunn ("L. L. Nunn" or the "Trustor"). First, L. L. Nunn expressly afforded the Trustees broad discretion to develop his educational experiment at Deep Springs College to train leaders devoted to unselfish service. He expected the Trustees to act to this end as "good conscience and the exercise of their best judgment may determine." Second, L. L. Nunn imposed only two absolute prohibitions on the Trustees: that Deep Springs College remain a not-for-profit enterprise and that student involvement in governance of the College be maintained. Third, nothing in the Deed of Trust or the extrinsic evidence demonstrates that L. L. Nunn intended for perpetuity to exclude the possibility of women – in addition to men – attending Deep Springs College. Respondents' opposition fails to diminish or contradict any of these conclusions.

The crux of the interpretation issue before this Court is not whether L. L. Nunn initially founded a men's only college or whether the Deed of Trust provides for broad discretion by the Trustees. All parties agree on those points. The question at hand is whether L. L. Nunn intended the phrase "promising young men" to be an absolute limitation on the broad discretion he granted to the Trustees to "carry on the educational work...similar to and in development of the work..." he had begun.

Appellant and a majority of the Trustees (in total 10 of the 12 Trustees), after extensive consideration of the language of the Deed of Trust, determined that the admission of women at Deep Springs would further the dominant purpose of the Trust – continuation and further development of L. L. Nunn's educational work at Deep Springs to train leaders devoted to unselfish service. Respondents, the two Trustees who voted against coeducation at Deep Springs disagreed , contending that the

clause, "..., for the education of promising young men," legally obligates the Trustees to forever exclude women from the Deep Springs student body. (CT 113-169.)

Respondents' position is belied by rules of grammar and by rules of law. Properly parsed, the plain meaning of the Purpose Statement in the Deed of Trust contradicts Respondents' view. Respondents ask this Court to ignore the manner in which the Trustor stated his desires. Likewise, Respondents' assertion that Appellant seeks to "gut the Purpose Statement and render futile all ... directives" to the Trustees fails to account, as required by law, for everything L. L. Nunn wrote in the Deed of Trust.

Had L. L. Nunn intended the student body at Deep Springs to remain single-sex male, not just in his day but in perpetuity, thereby restricting future evolution of his experiment in education, he could have and would have said so by including words such as "shall" or "only" or "solely" or "exclusively, or "forever" when he used the phrase "promising young men." That he did not means the Trustees were and are permitted to exercise their "good conscience" and "best judgment" to admit women – in addition to men – to the College.

The Superior Court determined that although the Trust gives the Trustees broad discretion (CT 1905), the purpose of the Deed of Trust is "the education of promising young men" (*Id.* at 1906), and therefore, the "Trust can <u>not</u> [sic] be construed as giving the Trustees discretion to admit female students (*Id.* at 1908 (emphasis in original))." This interpretation is mistaken as a matter of law, and should be reversed.

II.
ARGUMENT

A. The Sole Question Before the Court Appeal is Whether the L. L. Nunn Deed of Trust Prohibits the Trustees From Admitting Women, in Addition to Men, as Students at Deep Springs College.

A single word or phrase within a deed of trust – taken by itself and out of context – is not enough to show the intent of a trustor. Trustor intent must be determined by construing all parts of the instrument in relation to each other, if possible, to form a consistent whole. (Prob. Code § 21121.) The instrument is read "from its four corners." (*In re Bernatas' Estate* (1958) 162 Cal.App.2d 693, 700.) Focusing on one word does not allow the balance of the instrument to illuminate the trustor's full intent and purpose in making a grant.

Here, contrary to these rules of law, Respondents' solitary focus throughout their brief is on the phrase "promising young men." They ignore the balance of the Deed of Trust when making their arguments regarding L. L. Nunn's intent. In Respondents' view, because the first numbered paragraph of the instrument, the "Purpose Statement," includes the phrase "promising young men," Trust assets may only be used to support an all-male institution regardless of whether the Trustees determine that coeducation is both consistent with the terms of the Trust as a whole and in the best interest of the College.

Appellant asserts that L. L. Nunn unambiguously intended to extend sufficient discretion to the Trustees to allow them to determine what is necessary and reasonable to further the purposes of the Trust. With this empowerment of the Trustees, L. L. Nunn recognized that changes may be required or appropriate to further the purposes of the Trust. So long as a change does not contradict the purpose of the Trust, Appellant asserts that it is within the Trust's grant of discretion. The Trustees' conclusion that

admission of both male and female students at Deep Springs is appropriate to further the Trust purpose and their determination that this particular change is in the best interests of Deep Springs, do not contradict the Trust purpose or exceed the authority afforded to them by L. L. Nunn.

The question before this Court is narrow. It is not, as Respondents suggest, whether the record does or does not support the admission of women to Deep Springs in any general sense. The question is if, as a matter of law, the terms of the Trust foreclose the Trustees from determining that the admission of women furthers the Trust purpose. Whether this Court agrees or disagrees that a co-educational student body might be in the best interests of the institution is irrelevant to the issue presented. The Superior Court's holding was solely that the Trust cannot be interpreted to allow the Trustees discretion to admit women and that is the only issue now at hand. [1]

B. L. L. Nunn Charged the Trustees with the Task of Continuing His Work at Deep Springs College.

1. Appellant's Interpretation of the Purpose Statement of the Deed of Trust is Compelled By Basic Principles of Grammar and English Composition.

Appellant's interpretation that the Deed of Trust grants the Trustees broad discretion to allow for the admission of women is supported if not compelled by principles of grammar and basic English drafting. As

---

[1] To the extent Respondents attempt to go beyond the actual decision of the Superior Court, that Court subsequently clarified that its ruling on the subject of construing the Trust was strictly limited to the question "whether the language of the Trust instrument could be interpreted as giving the Trustees the discretion to institute coeducation at Deep Springs College." (Ruling and Order on Respondents' Motion for Judgment on the Pleadings or, in the Alternative, Motion in Limine, dated November 13, 2013 (hereinafter, the "Ruling") at 3:4-6.) Concurrently with filing this brief, Appellant has filed a Request for Judicial Notice of the Ruling.

Respondents recognize, L. L. Nunn, was a "sophisticated entrepreneur and lawyer. The choices he made in the legal language he used were deliberate." (Resp. Br., at p. 34; CT 128 (¶40); CT 137-138 (¶¶71-73).) Respondents have also observed that properly providing for Deep Springs was the primary obsession of L. L. Nunn's final years. (CT 129-130 (¶¶ 42-45); CT 835-837 (¶¶46-49).) In other words, Respondents acknowledge, and Appellant agrees, that L. L. Nunn meticulously crafted the Deed of Trust to mean exactly what it says when read as a whole.

The Purpose Statement in the Deed of Trust addresses L. L. Nunn's intended aims for the Trust. It is one lengthy sentence comprising (i) a subject (identified below in italics), (ii) a predicate (in bold italics), (iii) a phrase modifying the predicate (underlined), (iv) a series of non-restrictive prepositional and adjective phrases (in regular typeface), and (v) at the very end, two restrictive clauses containing the directive word "shall" (bold underlined).

The sentence states in its entirety:

> *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 herein above mentioned.**

The phrase "for the education of promising young men" appears in the middle of the sentence, after the subject and predicate have been defined and restricted. It is a non-restrictive prepositional phrase, not an imperative phrase. The words "for the education of promising young men" are not grammatically essential to specifically establish the Trust purpose. Therefore, the phrase cannot be the one and only definitive purpose as Respondents contend.[2]

In contrast, at the end of the Purpose Statement, L. L. Nunn explicitly directed the Trustees to maintain student involvement in College governance and to operate not for profit. Those instructions, and not the words on which Respondents rely, most accurately reflect the Trustor's intended limitations on Trustee discretion. L. L. Nunn's use of English and punctuation, and his careful attention to selection and placement of words, fully support Appellant's interpretation. Respondents' attempts to ignore essential structure and terms used (or not used) in particular places in the document only warp the expressed intent of the Trustor and should be rejected.[3]

---

[2] The phrase which follows "promising young men" is "selected by the Trustees or as they may prescribe." This is a good further illustration of the extent to which L. L. Nunn wanted the Trustees to have and to exercise discretion over the future development of his work at Deep Springs. Today, for example, the Trustees themselves do not select the student body. Rather, in accordance with their authorized discretion ("as they may prescribe"), a student-faculty admissions committee oversees the applications and decision-making process and makes recommendations to the College President. The President, in turn, makes recommendations for admission for review and ultimate approval by the Trustees. Similarly, when he directed the Trustees to "carry on educational work ... similar to and in development of" what he had already started, L. L. Nunn obviously did not demonstrate any interest whatsoever in imposing an inflexible framework for future decisions.

[3] Rules of English grammar have changed little since L. L. Nunn wrote his Deed of Trust. See Ayto, John, "Twentieth Century English – An

2. The Final Phrase of the Purpose Statement, Directing that Trust Assets "Be Used Solely For the Advancement Of the Purpose Hereinabove Mentioned," Cannot be Read as Limiting the Student Body at Deep Springs College to Promising Young Men.

The final phrase used by L. L. Nunn in the Purpose Statement is that Trust assets may be used "solely in the advancement of the purpose herein above mentioned." This is a general and non-specific reference to prior language in the Purpose Statement rather than a new, separate, and independent limitation in the same sense that the Trustor mandated that student government and non-profit status be maintained by the Trustees. The law and the Deed of Trust both require that the Trustees use Trust assets to advance the purpose of the Trust; however, nothing in the Deed of Trust indicates that educating "promising young men" was what L. L. Nunn meant when he said "the purpose hereinabove mentioned."

Respondents attempt to bootstrap from these final words to artificially convert the reference to "for the education of promising young men" into the Trustor's sole or primary purpose in creating the Trust. (See

---

Overview," Oxford English Dictionary, "Compared with earlier eras, English was fairly stable grammatically, orthographically, and phonologically during the twentieth century. Inevitably there were shifts in the fine detail of the language: the spread of *may have* into territory formerly occupied by *might have*, for example; a tendency for American *–or* to replace British *–our* in the Australian English spelling of words such as *colour* and *labour*; the start of the apparent long-term decline of the hyphen in compound words; the use of a rising, 'question' intonation at the end of ordinary declarative sentences. Here, however, there was nothing seismic. To that extent, a time-travelling Anglophone of the late-nineteenth century would find him- or herself in reasonably familiar territory at the start of the twenty-first. The vocabulary, though, might well faze them. The English lexicon has expanded hugely over the past hundred years." "Although it is not uncommon today for writing to be more colloquial, in the first half of the 20th century, written English was given high regard as the standard of what the language English language should be, and presented in its most formal manner."

for example Respondent's Brief ("Resp. Br.") pp. 12, 13,19 and 20.) This interpretation is circular and is not supported by logic or grammar. If L. L. Nunn's essential purpose was limited to educating promising young men, he could have and would have written simpler directions to instruct the Trustees. And he would not have repeatedly emphasized Trustee discretion to maintain and carry on the educational work similar to and in development of what had already been started at Deep Springs without also giving express instruction to maintain a single gender student body. For instance, in Paragraph 2(b) L. L. Nunn stated that the Trustees are authorized to transfer the trust assets "...whenever so to do will in the judgment of said Trustees best maintain and carry out the purpose herein set forth, provided that under no circumstances shall any of the trust estate be...transferred...for use other than in the accomplishment of the purpose of this trust."

If the purpose of the Trust was exclusively to educate promising young men, L. L. Nunn instead would have said that the Trustees were authorized to transfer all of the trust estate only to a non-profit institution for the benefit of promising young men. That he did not do so indicates that he had a broader concept in mind for the College.

3. The Balance of the Deed of Trust Emphasizes that L. L. Nunn Unambiguously Intended to Grant Broad Discretion to the Trustees and Further Establishes that There are Only Two Absolute Limitations on that Discretion.

The language of the Deed of Trust – taken as a whole – demonstrates that the Trustor intended to grant the Trustees the discretion necessary to make the determination now at issue as part of their responsibility to carry on the experiment in education he had initiated at Deep Springs. Respondents ignore key language from the Purpose Statement and the balance of the Deed of Trust to justify their

interpretation. They merely rely heavily on the assertion that when L. L. Nunn used the phrase "promising young men," he was not speaking in a generic sense that could include women. Although the phrase "promising young men" undoubtedly referred to men at the time the Deed of Trust was drafted, nothing indicates that L. L. Nunn intended to limit the broad discretion he granted to the Trustees to manage the Trust and the educational work he had begun. The phrase, "as said trustees in good conscience and the exercise of their best judgment may determine," is a grant of broad discretion that is not limited by the following non-restrictive prepositional phrase mentioning young men.

In addition to the Purpose Statement, the remaining language of the Deed of Trust emphasizes that the Trustor intended the Trustees to have broad discretion. The second numbered paragraph of the Deed of Trust ("Paragraph 2") states:

> ***In order to enable them to accomplish the purpose of this trust in such manner as they in the exercise of their best judgment may deem most fitting and expedient***, the said Trustees are hereby authorized and empowered to act in the matter and deal with any and all property now or hereafter held by them hereunder, (said property so held hereunder at any given time being hereinafter referred to as the trust estate), ***as they in good conscience and the exercise of their best judgment may deem proper and advisable***; and they are hereby given and granted full power and authority:
>
> (a) To hold, sell, convey, lease, subdivide, pledge, mortgage, encumber, invest, reinvest, loan, reloan, and in any and all other respects handle, manage, operate, and dispose of all or any portion of said trust estate in such manner, for such consideration, and upon such terms and conditions as said Trustees deem most advisable, ***and all without the intervention of any court or any limitation or restriction on the discretion of said Trustees*** as to the kind or class of property in which the proceeds of or income from said trust estate may be reinvested, and without obligation on the part

of any purchaser of all or any part of the trust estate to see to the application of any of the purchase money paid therefor;

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

...

(CT 47-48 (¶ 2) (emphasis added).)

Paragraph 2 states even more emphatically than the Purpose Statement that the Trustees' discretionary powers are bounded only by the few constraints that he had denoted specifically as such – as explicit limitations – in the Deed of Trust. If L. L. Nunn had intended the phrase "for the education of promising young men" to be a restriction on Trustee powers to transfer the Trust estate to another educational organization, he would have included that restriction in Paragraph 2(b) just as he repeated the already mandatory limitation that the property could be given only to a non-profit entity.

Similarly, in Paragraph 2(a), L. L. Nunn wrote, "...as said Trustees deem most advisable, ***and all without the intervention of any court or any limitation or restriction on the discretion of said Trustees....***" This express desire to minimize external oversight further demonstrates that L. L. Nunn wanted few restrictions placed on the Trustees. It also makes more telling and more important those very few

places in the document where strict limitations are plainly and clearly set forth: to wit, only relative to maintaining the role of the student body government and operating as a not–for-profit enterprise. Interpreting Trust language to impose any further absolute restriction on the Trustees would violate L. L. Nunn's intent and interfere with their ability to carry on the job which he assigned to them.

The only other language in the Deed of Trust that restricts Trustee discretion is in Paragraph 5 pertaining to student government. That states in part, "[t]herefore, it shall be the duty of said Trustees to accord the Student Body the full right, power and authority of democratic self-government in accordance with its traditions and the ideals and policies of Deep Springs educational institution set forth in the correspondence and documents of Grantor...." In addition, this paragraph states, "...the Student Body shall be entitled to appoint one of its members to act as the Student Body representative at all Trustees' meetings,...." L. L. Nunn goes into great detail about the student body in this portion of his instrument, but again does not specify or restrict the gender of the students.

Paragraphs 2 through 6 of the Deed of Trust are consistent with Appellant's interpretation. They emphasize Trustee discretion and expand on the only two explicit limitations—not for profit operation and student body governance—set forth in the Purpose Statement. But they do not add any restriction on student body gender.

C. The Theories Relied Upon by Respondents Are Fallacies and Should be Rejected.

The essence of this dispute is whether the phrase "promising young men" is a limitation on the broad discretion granted to the Trustees. Although Respondents repeatedly contend that this phrase is an absolute restriction, their argument is weak at best.

1. The Phrase "Promising Young Men" is a Description of the Trustor's Work as it Existed in 1923, Not a Restriction on the Trustees' Discretion to Develop the Educational Experiment at Deep Springs College in the Future.

Respondents dismiss Appellant's explanation that "promising young men" was merely a description of the Deep Springs student body in 1923, and not intended to be a restriction on Trustee discretion to operate the College. But their rationale in doing so (see Resp. Br., at pp. 26-28) makes little sense.

In 1917 when the work at Deep Springs began and in 1923 when the Deed of Trust was executed, students at the College were all promising young males. There is no evidence – reflected in the Deed of Trust or otherwise – that anyone expected females, older males, or the unpromising to be interested in participating in a radical form of preparatory education taking place in an isolated location and involving a unique combination of hard manual labor and rigorous academics. So, L. L. Nunn's reference in the Purpose Statement to "education of promising young men" taken in this context cannot be regarded as an instruction that the College be dedicated for all time to the education of ONLY promising young men or to limit what the Trustees might determine in the future is necessary to and consistent with that goal, including the admission of women.

To illustrate, imagine a donor in 2013 establishing a trust:

> To be used by the trustees to carry on the intercollegiate football program at the University of Southern California similar to and in development of the work already inaugurated and displayed on the gridiron this season, but in such manner and form as the trustees in good conscience and the exercise of their best judgment may determine, for the benefit of promising young men playing on the USC football team, selected by the trustees or as they may prescribe.

In 2013, only young men were members of the USC football team, no woman or older man has ever been on the team, and today we expect that always to be true. Read as a whole and in context, however, the donor has limited use of the trust to benefit the USC football program, but by using the words "promising young men" he has not imposed an explicit restriction on the selection of future members of the football team which would exclude women or older men in perpetuity. The donor's purpose is to help USC win football games and there is no indication that his goal would be violated if sometime in the distant future the trustees, in consultation with USC administrators and coaches, determine that adding women or older men to the team – in addition to young men – will help win games.

Likewise, L. L. Nunn's intent in 1923 was to educate practical leaders for lives of service, not to restrict who the Trustees could select to be Deep Springs students nearly a century later, or to limit benefits of the College to only young men. There is no indication that his purpose would be violated if the Trustees determine that adding women to the Deep Springs student body will result in more effective training of practical leaders – including young men – for lives of service.

2. Respondents' Editing of the Purpose Statement is Incomplete, Improper, and Inconsistent.

There is no dispute that L. L. Nunn knew how to include a restriction in a legal document. (CT 128 (¶40); CT 137-138 (¶¶71-73).) Had he meant to dictate that Deep Springs would be a single-sex male institution in perpetuity, he could have and would have said so. The Purpose Statement and the balance of the Deed of Trust show that L. L. Nunn knew how to grant and to limit trustee discretion. When Respondents quote the Purpose Statement, however, they inevitably insert or omit essential words and phrases to advance their arguments that the non-

restrictive prepositional phrase mentioning young men constrains Trustee discretion. Respondents add or ignore different words depending on the point they try to make. We need not address each and every variant of such selective editing. A few examples will suffice.

Respondents, for instance, state the purpose could "hardly be clearer," and then assert that "[t]he purpose for which the property is hereby conveyed . . . is to provide for and carry on educational work . . . for the education of promising young men." (Resp. Br., at p. 11.) Without any justification for doing so, Respondents have omitted and ignored both the conclusion (underlined below) of the predicate, which states in full "***is to provide for and carry on educational work similar to and in development of the work already inaugurated by grantor"*** and the entire phrase which modifies the predicate, "***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, ..."*** By such textual legerdemain Respondents seek to disregard important concepts that L. L. Nunn included to fully explain his charge to the Trustees and to empower the Trustees to fulfill his vision.

Respondents' argument that the "clear and unambiguous" intent is for Deep Springs to be limited to only "promising young men" fails in view of the explicit direction to "carry on educational work...similar to and in development of" [the Trustor's work], followed by the phrase "but in such manner and form ... as said Trustees in good conscience and the exercise of their best judgment may determine." Although the three words "promising young men" when taken alone and in isolation (contrary to the principles of interpretation) might be crystal clear, Respondents do not and cannot reconcile their contention that they represent an absolute restriction with the concepts of "similar to" and "in

development of" [the Trustor's educational work]. Indeed, no reconciliation is possible.

Respondents admit that the Trustees have "significant discretion" and they need not "exactly reproduce the education work already undertaken by L. L. Nunn." (Resp. Br., at p. 28.). In another example of selective editing, however, they attempt to reorder the Purpose Statement sentence to turn the lone phrase, "promising young men," into an explicit constraint on Trustee discretion. When Respondents claim that the Purpose Statement lists five restrictions on Trustee discretion, they state "[s]econd, the Trust *shall* be used…for the education of promising young men." (Resp. Br., at p. 19 (emphasis in original).) This contention is false; that is not what the document says. Respondents seek to insert the words "*shall be used*" at a location in the sentence where L. L. Nunn did not. Furthermore, Respondents rely even more heavily on importing the word "shall" to the phrase "for the education of promising young men" when they assert that phrase has the same importance and same meaning as the phrases in the Purpose statement where the Trustor did elect to use the term "shall."

Respondents are similarly and equally mistaken in their *expressio unius est exclusio alterius* argument. Yet once more their position rests on importing a word – in this instance the word "solely" – into a phrase where it does not in fact appear. The effort remains improper and unavailing. Reliance by Respondents on an implied "shall" and an implied "solely" where L. L. Nunn did not write those words does not generate the specific and exclusive direction which they contend should be attributed to the phrase "promising young men." (Resp. Br., at p. 13.)

In each of these arguments Respondents also engage in dubious reasoning. They start with a conviction that when he wrote the phrase "promising young men," L. L. Nunn meant "men" not "mankind."

Then they make a leap to the conclusion that if he was referring to "men," L. L. Nunn intended the phrase to be interpreted to read "men to the exclusion of women." This they say transforms the phrase "promising young men" into a specific purpose of the Trust creating an absolute restriction on Trustee discretion. This approach, however, is not viable because it requires a re-write of the Trust: the insertion of the words "shall" and "solely" in places in the Purpose Statement where L. L. Nunn did not have them, skipping over L. L. Nunn's broad grant to discretion and encouragement to further develop his educational work, and ignoring the more detailed explanation of the two key restrictions contained in the Purpose Statement in later sections of the Trust.

L. L. Nunn did not say what Respondents claim. He specified only two absolute restrictions in the Purpose Statement, in each case using the word "shall," and in both cases repeating or elaborating on the restriction later in the Trust. The requirements to maintain student self-government and to remain not-for-profit were clear, emphatic and repeated. By contrast, L. L. Nunn never stated that the Trust was solely for the benefit of male students or that female students were prohibited from attending the College. Reading the Purpose Statement as a whole, along with the remainder of the Deed of Trust, it is impossible to conclude that the prepositional phrase "for the education of promising young men" is a limitation comparable to the two explicitly stated by L. L. Nunn or that it is a primary or sole purpose of the Trust.

As Respondents admit, citing Code of Civil Procedure section 1858, "[i]n 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 insert what has been omitted, or omit what has been inserted . . .." (Resp. Br., at p. 24.) The Respondents' contention that the words "only" and "solely" should be added to the end of selected phrases of the

Purpose Statement and that all phrases included in the text have essentially the same weight is contrary to the statute. For this Court to discern and respect L. L. Nunn's intent, it must interpret the words he employed as and where he chose to place them. When read as written as a whole – without addition, subtraction, and/or rearrangement – the Trust grants the Trustees discretion to further the purpose of the Trust and does not include an absolute, permanent restriction on the gender of students.

The phrases "similar to" and "in development of" were and remain an invitation – if not a command – to the Trustees to build on what the Trustor started. Those phrases inform the Trustees that they are NOT to slavishly perpetuate the 1923 phase of the Deep Springs experiment. L. L. Nunn's goal was to support an evolving educational experiment. The Deed of Trust can and should be read correctly as granting the Trustees broad freedom to manage that evolution.

D. All of Appellant's Legal Theories Concerning the Interpretation of the L. L. Nunn Trust are Relevant to this Appeal.

1. L. L. Nunn's Dominant Intent Affords the Trustees Discretion to Admit Women as Students at Deep Springs College.

Respondents assert that the dominant intent argument discussed by Appellant in his Opening Brief best serves the modification phase of this case, and thus should not be considered as part of this appeal. (Resp. Br., at pp. 28-31.) Not so. An assessment of L. L. Nunn's dominant purpose as expressed in the Deed of Trust is necessarily a matter of interpreting the whole instrument. (*See* Probate Code § 21121.) As noted both in Appellant's Opening Brief and above, the Purpose Statement and the Deed of Trust read as a whole show that the dominant intent of L. L. Nunn was to support the continuation and further development of his

educational experiment at Deep Springs. This, of course, is a matter of interpretation of the instrument – not its possible modification.

A phrase that, if read as a restriction, would undermine the trustor's dominant purpose, must be construed as merely precatory or descriptive. (*See Estate of Flannery* (1969) 269 Cal App 2d 890; *Trustees of Dartmouth College v. City of Quincy* (1970) 357 Mass. 521.) In light of the explicit grant of broad discretion to the Trustees to determine the manner and form of the educational work, interpreting "promising young men" as a restriction would impair the Trustor's dominant intent. Therefore, the most appropriate construction is that the phrase "for the education of promising young men" is descriptive of Deep Springs in 1923 rather than a constraint on future development of the College.

Respondents also contend that two other related arguments advanced by Appellant should be directed only to modifying the Deed of Trust. (*See* Resp. Br., at p. 32.) First, Respondents wish to preclude consideration of the contention that the education of women in addition to men furthers L. L. Nunn's purpose because Deep Springs would continue to educate men. The basis of the Trustees' decision on coeducation, however, was the conviction that men are best educated alongside women and, in particular, leadership training is best conducted in a coeducational environment. As described in detail (see CT 37 (¶ 11); see also CT 67) in their consideration of coeducation, the majority of the Trustees determined that the purpose of the Trust and of Deep Springs is to train leaders committed to unselfish service as stated by L. L. Nunn. Then, in good conscience and exercise of their best judgment, the Trustees concluded that coeducation of men and women will "best maintain and carry out the purpose" (Deed of Trust paragraph 2(b)) by improving the relevance of the Deep Springs education to current, real world leadership situations that in

all aspects now involve and include a significant percentage of women.[4] As a result, the Trustees determined that a change to coeducation was within the bounds of their discretion and no modification of the Trust should be necessary. Because these concepts were the basis of the Trustees' determination that coeducation is allowed, if not mandated, by their obligation to advance the purpose of Deep Springs, they are central and relevant to the interpretation question before this Court.

2. Appellant Did Not Waive His Argument that the Simultaneous Education of Men and Women at Deep Springs College Furthers the Purpose of the Trust.

Respondents allege that the argument that educating women alongside men is within the purpose of the Trust was raised for the first time on appeal and is therefore waived. (Resp. Br., at p. 31.) Respondents are mistaken. Appellant advanced this position before the court below. (See CT 37 (¶ 11); see also CT 67.)

Moreover, Appellant has consistently argued that the decision to admit women was within the discretion of the Trustees. The basis for this assertion was and remains a construction that such action is within the terms of the Trust and furthers the Trust purpose. Because interpretation of the Deed of Trust is a matter of law and before this Court *de novo*, all such arguments, both direct and implicit, are preserved. (See *Collins v. State Dept. of Transp.* (2003) 114 Cal.App.4th 859, 865 (stating that waiver "does not apply when only a question of law is presented) (citing *State of CA ex rel. Public Works Bd. v. Bragg* (1986) 183 Cal.App.3d 1018, 1023-1024).)

---

[4] Moreover, Respondents' characterization that this assessment by the Trustees treats women as instruments for the education of men (Resp. Br., at p. 32) is ill-conceived and ill-advised. Appellant believes that allowing women to be admitted to Deep Springs would not only further enrich the overall educational experience at the school, but would provide women a unique, beneficial opportunity to learn there.

E. The Reasoning in Analogous Cases Supports Appellant's Interpretation of the Deed of Trust.

1. Respondents' Reliance on *Estate of Simoncini* is Misplaced.

Respondents cite *Estate of Simoncini* (1991) 229 Cal.App.3d 881, 889, in an attempt to support their argument that the Purpose Statement should be read without the key words and phrases both preceding and following "promising young men". (Resp. Br., at p. 9-10.) This reliance is misplaced because Respondents fail to properly apply the rule.

The rule in *Simoncini* is to "giv[e] the most ordinary interpretation to the language used . . .." To the contrary, and as explained in detail above, rather than giving language its ordinary interpretation, Respondents have excluded essential language in order to propound an interpretation which best suits their objective. Nothing in *Simoncini* undermines or contradicts an interpretation that L. L. Nunn did not intend education at Deep Springs to be limited to male students and only male students for all time.

2. The *Edwards* and *Ebitz* Cases Support the Interpretation that the Trust Language does not Prevent the Trustees from Admitting Women to Deep Springs College.

As discussed, the Trust purpose is to provide for and carry on educational work similar to and in development of the work which had already been inaugurated by L. L. Nunn at Deep Springs. In 1923, Deep Springs was educating only promising young men. Appellant has cited several cases supporting the conclusion that the admission of women is not inconsistent with a trust purpose that includes a focus on and mention of "men."

Respondents first attempt to dismiss one of these authorities, a similar case from New York, *Estate of Edwards* (N.Y.App.Div. 1982) 86

A.D.2d 702, by declaring that it was wrongly decided. They state that the New York court "operated under [a] mistaken premise." (Resp. Br., at p. 14.) However, nowhere in *Edwards* does it appear that the court was mistaken or relied on anything other than the facts presented to make its determination.

The *Edwards* court reached exactly the conclusion Appellant argues is appropriate in this matter:

> The language of the will indicates that the testator intended that the moneys go to the academy as long as it prepares boys for college entrance. This function continues to be fulfilled. Further, we find no other language elsewhere in the document which would indicate an intent to disqualify the academy. The will was drafted at the instruction of an obviously intelligent and sophisticated testator who was precise and definite in expressing his intentions. Had he wished to qualify his bequest by use of language such as "solely" or "only", we would expect to find such limiting language in the will. We note too that New York courts are cautious in divesting a named beneficiary (*Matter of Collins*, 13 N.Y.2d 194).

Respondents attempt to escape a similar result by pointing out that the trust analyzed in *Edwards* was not the only source of money for Worchester Academy. But the same is true here. The assets of L. L. Nunn's Trust were almost entirely depleted before the 1960s. The College ran capital campaigns to rebuild the physical infrastructure and to replenish the endowment. Even now, the endowment covers only about half of the College's ongoing expenses, so Deep Springs continues to rely upon generous donors to fund operations, maintenance and capital costs. Accordingly, *Edwards* remains instructive as an example that grantor restrictions should not be implied unless explicitly stated. A grantor's purpose to support the specified institution should take precedence over his assumptions or hopes about the institution. The same outcome is appropriate in this instance.

In the second analogous decision, *Ebitz v. Pioneer Nat. Bank* (1977) 372 Mass. 207, 211, a Massachusetts court determined that the trust "used the term 'men' in its generic sense, which includes women." As Respondents indicate, the court looked to language elsewhere in the trust to support this determination. Nevertheless, the court concluded, "we do not find that the testator intended to exclude an entire group of prospective beneficiaries without express language to that effect." The same is true here. Without any language indicating that L. L. Nunn intended to provide education exclusively for men in perpetuity, this Court should not find that L. L. Nunn wished to forever exclude an entire group of otherwise qualified students.

The *Ebitz* court also referenced Knights Templar principles in interpreting the grantor's intent because the grantor stated in the document that he admired their model. In paragraph 5 of the Deed of Trust, L. L. Nunn directed both Trustees and students at Deep Springs to refer to "...the ideals and policies of the Deep Springs educational institution set forth in the correspondence and documents of Grantor and of the institution,...." to fully understand how to appropriately implement student government at Deep Springs. Due to his emphasis on student government, L. L. Nunn clearly considered the writings which he referenced as key in explaining his intent. As in *Ebitz*, this Court can refer to the writings by L. L. Nunn about Deep Springs that are in the record. Those writings do not indicate any intent to exclude women students in perpetuity or to so limit Trustee discretion in student selection.

The decisions in both *Edwards* and *Ebitz* demonstrate that a reference to only one sex can properly be construed to include both sexes unless it clearly appears that the grantor intended to exclude the other. L. L. Nunn's phrase "education of promising young men" can and should be

interpreted as permitting the Trustees to implement coeducation, because L. L. Nunn did not explicitly exclude women.

3. The Cases Concerning the H. Sophie Newcomb Memorial College at Tulane University Also Provide Instructive Guidance Concerning the Need for Explicit Language to Establish a Restriction on Trustee Discretion.

Respondents assert that Appellant's reliance on *Howard v. Administrators of the Tulane Educational Fund* (La. 2007) 970 So.2d 21, is misplaced because the Court of Appeal in that matter vacated the decision after finding that the lower court "should not have reached th[e] [merits] of the issue." Because *Howard* was vacated on account of a standing issue, however, and not on substantive grounds, the discussion and conclusion reached remain applicable and offer helpful guidance in this case. In *Howard*, despite an apparent limit on the use of the gift to benefit female students, the court concluded that the discretion granted to the university was broad enough that it was not bound to continue in perpetuity the single-sex college. (*Id.* at 26-28.)

Respondents attempt to distinguish the related case, *Montgomery v. Administrators of the Tulane Educational Fund* (La. 2010) 51 So.3d 60, by focusing on the court's determination that the grant at issue was an unconditional bequest. That, however, is a distinction without a difference in the context of the matter at hand. The importance of *Montgomery* to the current case is the court's conclusion that a grant of broad discretion which lacks a restriction directed to a specific issue trumps statements of a grantor's more generally stated expectations or wishes. Likewise here, L. L. Nunn's grant of discretion to the Trustees trumps any expressed expectation that students at Deep Springs would be men. Trustor expectations or assumptions do not rise to the level of commands to or permanent restrictions on the discretion of trustees. It would be improper

to imply a restriction in this instance when the Trustor did not explicitly create one.

4. The City of Quincy Cases Establish that a Trustor's Dominant Intent Can Allow a Court to Disregard Other Language in the Instrument.

Respondents assert that Appellant's reliance on *Trustees of Dartmouth College v. City of Quincy*, *supra*, 357 Mass. 521, is misplaced because the holding in that case was made in an effort to prevent the forfeiture of a charitable trust. (Resp. Br. at pp. 29-30.) Respondents further argue that unlike the situation presented in *Quincy*, here there is no equivalent risk of complete failure of the College if the Trust is interpreted in accordance with their views.

Contrary to these assertions, although the City of Quincy filed suit because adhering to the literal mandate of the trust had become difficult, the court did not rely on that fact in making its decision. Rather, it rested its analysis upon a prior decision concerning the same trust in *City of Quincy v. Attorney General et al.* (1894) 160 Mass. 431. In that earlier case, the court was asked to interpret the language of the contingent gift to Dartmouth College. There the court said:

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

Relying on this principle, the court concluded that the terms of the subject trust were not as rigid as the contingent beneficiary had asserted.

The same principle should be applied in this case. The dominant intent of L. L. Nunn in creating the Trust was to provide for the continuation of Deep Springs. Even if the phrase "promising young men"

was meant as guidance to the Trustees or further yet as a restriction, mindless adherence is not required because admitting only male students is not the dominant purpose. The Trustees are not bound to admit only men because they have determined it is inconsistent with, and detrimental to, achieving the overarching purpose of the Trust to instill in students ideals of service and train them in practical leadership skills. Respondents have failed to show how Trustee discretion is explicitly limited beyond the unequivocal mandates established by L. L. Nunn for student government and non-profit status.

F. Extrinsic Evidence Does not Support Respondents' Contention that L. L. Nunn Intended to Exclude Women From Deep Springs College.

The Deed of Trust does not include an express statement that the Trustees should admit only male students; nor does it contain any other restriction on their discretion in admitting students. Furthermore, the language does not establish that L. L. Nunn intended to permanently exclude women. At most, Respondents' arguments might show an ambiguity about the meaning of the phrase "promising young men."

If this Court interprets L. L. Nunn's intent concerning student gender to be ambiguous, it may consider extrinsic evidence. (*Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 511.) The Superior Court did not rest its decision upon such evidence (see CT 1900-1907), so this Court may consider such evidence de novo. (*Foothill Properties v. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542, 1549 ("[w]hen there is ambiguity in the contract language, extrinsic evidence may be considered to ascertain a meaning to which the instrument's language is reasonably susceptible. [Citation.] ... We review the agreement and the extrinsic evidence de novo, even if the evidence is susceptible to multiple interpretations, unless the interpretation depends upon credibility.

[Citation.]" (quoting *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 21-22)).)

Respondents have not submitted writings or other evidence that provide any support for their contention that extrinsic materials (if analyzed) would support their view that L. L. Nunn intended for all time to restrict Deep Springs to a single-sex male student body. They assert that "[t]here are many other documents by and about L. L. Nunn that clearly suggest that he regarded the education of promising young men as central . . .." (Resp. Br., at p. 36.) Yet they fail to provide, list, or even cite to these "many other documents."

Nothing in the extrinsic evidence indicates that L. L. Nunn's intent was for Deep Springs to remain an all-male institution for all time. And while there is also nothing in the extrinsic evidence to indicate that L. L. Nunn considered the possibility of women being admitted as students at some time in the future, this lack of guidance in either direction is more consistent with Appellant's interpretation of the Deed of Trust than it is with Respondents. The very lack of attention paid to the issue by L. L. Nunn in his writings and other activities outside the Deed of Trust supports the view that maintaining a single-sex male student body was not an imperative for him in seeking to secure a viable future for Deep Springs.

///

///

///

///

///

///

///

III.
CONCLUSION

Appellant respectfully requests that the Superior Court's order finding that "[t]he Trust can not [sic] be construed as giving the Trustees discretion to admit female students" be REVERSED, and that this Court find and confirm that the Trustees of the L. L. Nunn Trust have the discretion under their expansive powers granted in the Deed of Trust to authorize admission of female students as well as male students at Deep Springs College.

DATED: December 30, 2013

Respectfully submitted,

BAKER MANOCK & JENSEN, PC

By:
Christopher L. Campbell
Jeffrey A. Jaech
Amanda M. Neal
Attorneys for Petitioner and Appellant

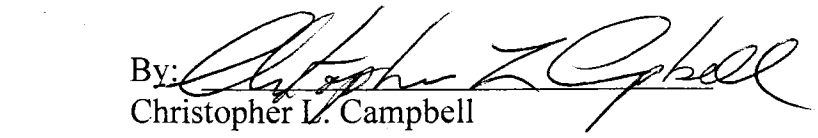
CERTIFICATE OF WORD COUNT

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

The text of this reply brief consists of 8,328 words as counted by Word 2007, a word processing program used to generate this brief.

DATED: December 30, 2013

BAKER MANOCK & JENSEN, PC

By: 
Christopher L. Campbell
Jeffrey A. Jaech
Dirk B. Paloutzian
Amanda M. Neal
Attorneys for Petitioner and Appellant

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Fresno, State of California. My business address is 5260 North Palm Avenue, Fourth Floor, Fresno, CA 93704.

On **December 30, 2013** I served true copies of the following document(s) described as **APPELLANT'S REPLY BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST
FOR INDICATED METHOD OF SERVICE

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address sgreco@bakermanock.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY OVERNIGHT DELIVERY (ON-TRAC): I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

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

Executed on **December 30, 2013**, at Fresno, California.

MARIE A. FAILLA

SERVICE LIST
Hitz, etc. v. Hoekstra, et al.
SICVPB12-53232

Peter Tracy, Esq. LAW OFFICE OF PETER TRACY 106 South Main Street, Suite 200 Post Office Box 485 Bishop, CA 93515	Attorneys for Petitioner / Appellant, DAVID HITZ **Via Federal Express**
Jon Michaelson, Esq. K & L GATES, LLP 630 Hansen Way Palo Alto, CA 94307	Attorneys for Respondents / Respondent, DEEP SPRINGS COLLEGE CORPORATION **Via On-Trac**
Joseph C. Liburt, Esq. ORRICK, HERRINGTON & SUTCLIFFE, LLP 1000 Marsh Road Menlo Park, CA 94025	Attorneys for Respondents / Respondents, KINCH HOEKSTRA and EDWARD KEONJIAN **Via On-Trac**
Heather M. Hoekstra, Esq. 420 Coventry Road Kensington, CA 94704	Attorneys for Respondents / Respondents, KINCH HOEKSTRA and EDWARD KEONJIAN **Via On-Trac**
COURTESY COPY TO: Tania M Ibanez, Esq. Supervising Deputy Attorney General 300 South Spring Street, Suite 1702 Los Angeles, CA 90013	**Via On-Trac**
COURTESY COPY TO: Honorable Dean T. Stout Inyo County Superior Court 168 North Edwards Street Post Office Drawer U Independence, CA 93526	**Via Federal Express**
California Supreme Court 350 McAllister Street San Francisco, CA 94102-4797	**Electronic Copy**