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INYO CO. SUPERIOR COURT
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SUPERIOR COURT OF CALIFORNIA

COUNTY OF INYO

In re the Matter of the L. L. Nunn Trust for the benefit of Deep Springs College under the Deed of Trust dated November 5, 1923	Case No. SICVPB 12-53232 **STATEMENT OF DECISION**

This case commenced with the filing of Petitioner David Hitz's "Petition for Court Order Construing Trust Provision, Or, If Necessary, Modifying the Trust Instrument," on February 6, 2012. The subject of the Petition is the L. L. Nunn Trust for the Benefit of Deep Springs College Under the Deed of Trust dated November 5, 1923 (the "L. L. Nunn Trust" or the "Trust"). On May 9, 2012, Objectors and Respondents Kinch Hoekstra and Edward Keonjian ("Respondents") filed their Objection and Response. On June 13, 2012, Petitioner filed his Reply.

The Trust governs the application and administration of some of the assets used to operate a small college in Deep Springs Valley which has historically had an all-male student body. The case presents the question whether the Trust can be interpreted or modified to allow the admission of female students, in addition to male students, at the college.

By stipulation, the Court bifurcated the issues presented by the Petition: (1) interpretation of the Trust, and (2) modification of the Trust. On February 13, 2013, the Court issued its "Rulings and Orders on Petition for Court Order Interpreting Endowment Gift

Instrument," determining that the L. L. Nunn Trust could not be interpreted as affording the Trustees of the Trust discretion to institute coeducation at Deep Springs College ("Deep Springs" or "the College"). That decision has been appealed by Petitioner, which appeal is currently pending.

On March 22, 2013, Petitioner filed his "Supplement to Petition for Court Order Construing Trust Provisions, Or, If Necessary, Modifying the Trust Instrument." In the Supplement, Petitioner advanced two additional grounds to modify the Trust.

The issue of modification of the L. L. Nunn Trust came on regularly for trial to the Court commencing April 28, 2014. Trial continued April 29 through May 2, 2014, on May 13, 2014, and on May 27, 2014.

Petitioner was represented at trial by Christopher L. Campbell and Dirk Paloutzian of Baker Manock & Jensen, PC. Real Party in Interest Deep Springs College Corporation was represented at trial by Jon Michaelson, then of K&L Gates LLP. Respondents were represented at trial by Eric M. George and Ira Bibbero of Browne George Ross LLP, Joseph C. Liburt of Orrick, Herrington & Sutcliffe LLP, and Heather Hoekstra.

Testimony was taken from David Hitz, Cory Francis Myers, David Neidorf, David John Benedict Welle, Zachary Robinson, L. Jackson Newell, Roger Lehecka, Ronald Riggio, William Dominic Jones, Amity Michelina Wilczek, Laura Beth Marcus, Kinch Steven Hoekstra, Richard L. Stack and Brian Jones. Numerous exhibits were admitted into evidence, as indicated in the record.

Having considered the pleadings including post-trial briefings and heard and read the evidence presented and received, and having observed the witnesses who testified at the trial, the Court hereby issues its statement of decision.

I. FACTUAL BACKGROUND

The historical origins of this case are interesting, as well essentially undisputed among the parties. These basic facts are set forth immediately below in summary fashion and supplemented in the sections which follow to the extent necessary to fairly describe the Court's

determinations as to the ultimate facts and material issues in controversy. (Code Civ. Proc. § 632; *Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513.)

A. L. L. Nunn

L.L. Nunn was born in 1853. L.L. Nunn's formal education was spotty. He attended Harvard's law school for a short time. In his late twenties, he headed to the frontier west. There, between 1880 and roughly 1910, he started as a carpenter and restaurant owner and rose to become a mine manager and owner, banker, pioneer in the development of hydroelectric power, and eventually an innovator in education.

L.L. Nunn's signature accomplishments in the power industry were born out of necessity. In the 1880's, he owned several mines in and around Telluride, Colorado. Conditions became increasingly difficult and more expensive for local operators when coal needed to be purchased and shipped to mine sites because nearly all readily available timber had been cut and used to generate heat to run steam driven equipment. To overcome this problem, in 1890 L.L. Nunn teamed with George Westinghouse and Nikola Tesla to develop a hydroelectric plant that began operation just outside Telluride in 1891.

L.L. Nunn's interest in developing educational programs arose from his nascent power business. Generating and transmitting electricity in the 1890's involved new technology. A skilled and experienced work force did not exist; one had to be recruited and trained. L.L. Nunn focused on hiring young men, recently graduated from high school, to work at his power plants. In return for their commitment and labor, he offered and provided an education through small schools located at various power plants. As most of these sites were in remote locations, L.L. Nunn also promoted a degree of self-governance among his worker/students. L.L. Nunn frequently moved worker/students from one installation (and small school) to another, keeping track of them individually by placing pins on a map.

In 1911 and 1912, L.L. Nunn began to wind down his involvement in the power industry and to direct his complete attention to educational pursuits. In 1912, he formed and endowed the

Telluride Association. Telluride Association built a scholarship house adjacent to Cornell University. There, students could live (at no cost) while pursuing a degree.

In 1912, after selling most of his power industry assets, L.L. Nunn turned to establishing what he called his "primary branch" at the college level. The primary branch was intended to provide an initial two or three years of post-secondary education. The first attempt to open the primary branch took place in 1916 at Claremont, Virginia. This, however, was a failure and L.L. Nunn shut it down in short order. Then, in 1917, he founded Deep Springs College. Deep Springs College consumed most of L.L. Nunn's energy, attention, and wealth until he passed away in 1925.

Several other factors influenced L.L. Nunn throughout his life. First, L.L. Nunn was a theist. He held a deep commitment to living in harmony with certain eternal truths and to leading society away from materialistic concerns toward divinity through education, direct experience, and the study of religion.

Second, when he established new educational institutions during his later years, L.L. Nunn found inspiration in the ideas of Progressive Era luminaries such as John Dewey (who promoted democratic educational methods to induce personal and social responsibility), in the manner in which the British trained an elite few to lead their society (e.g., at Oxford and Cambridge and as expressed at the time by Cecil Rhodes), and in the approach of America's preeminent colleges and universities of the period such as Harvard, Yale, and Princeton. Consistent with the basic structure of each of these models, with rare exception, the individuals whom L.L. Nunn educated prior to founding Deep Springs College were all male.[1]

L.L. Nunn lived in a world that was all male in the things that mattered to him generally and personally. Almost all the institutions of higher learning on which he pinned his hopes and plans for Telluride Association and for Deep Springs were all male. In every one of his

[1] The rare exceptions were a handful of family members and one individual who was the daughter of one of L.L. Nunn's business competitors. All in all, not counting students who attended Deep Springs, L.L. Nunn financed the college or post-graduate education of more than 450 men.

enterprises, those with whom he interacted were men. There is no evidence that L.L. Nunn ever hired a woman to work in one of his businesses. All his private secretaries, for example, were men. More generally, according to 1920 Census data, it is unlikely that L.L. Nunn dealt with women in conducting his commercial affairs: of roughly 82,000 bankers in the U.S., only 4,226 were female; of more than 122,000 lawyers and judges, only 1,738 were women; of about 136,000 engineers, only 44 were women; and out of nearly 1.1 million workers engaged in the extraction of minerals and other substances from the earth, there were only 2,864 females. (Exh. 205; see also 496-497, 560 (Newell).)[2] Women were in the workforce in higher percentages in professions such as teaching, government officials, foreman and overseers although with the exception of teachers, the vast majorities of these workers were still men. (Exh. 205.)

While it is likely, as Respondents argue, that L.L. Nunn was aware of the rare woman at the time who participated at higher levels in education, business, or government, the exception proves the rule. L.L. Nunn's professional world was almost exclusively male.

B. Deep Springs College

Deep Springs College is located in remote Deep Springs Valley, in Inyo County. The College operates a cattle ranch and also raises much of the other food consumed on site.

The College is the smallest institution of higher learning in the United States, with 26 students and a normal compliment of six faculty members. Students pay no tuition. They undertake a program which lasts two years and is built around three "pillars": (1) academic pursuits in and outside the classroom; (2) a labor program which entails each student devoting at least four hours to ranch work each day; and (3) a unique opportunity to exercise self-governance, including meaningful direct participation in the management of College affairs. The students control their own Student Body and have broad responsibility to regulate their own behavior. They participate directly in virtually all aspects of College operations, including hiring and firing of administrators, faculty, and staff, recruitment and selection of new students,

[2] Page and page: line references are to the official transcript of trial proceedings. Exhibit ("Exh") references are to exhibits introduced and admitted into evidence at trial.

communications with the "outside" world, curriculum design, and even basic tasks such as cooking for the entire community, planting, maintaining, and harvesting the garden, milking cows, irrigating fields, cutting and baling hay, herding and branding cattle, assisting with the slaughter of livestock, washing dishes, cleaning toilets, and mopping floors. Students serve as full voting trustees of the Trust and members of the Board of Directors of the Deep Springs College Corporation.

The combination of these three pillars confronts and challenges Deep Springs students to develop skills, judgment, and character in a manner different from and far beyond what the normal college education entails and promotes. As President Neidorf put it, "Deep Springs is designed to allow gifted students to take an extraordinary amount of responsibility for their own lives." (165:15-17.) The intended result is to help these young people "develop greater strengths and rise to greater heights of ability, endurance, emotional robustness and virtue . . . than they otherwise knew they were capable of." (163:6-8.)

When L.L. Nunn started Deep Springs College and devoted significant attention to its early structure and operations until his death in 1925, he regarded the institution as the culmination of his life's work. During its early years, the College included classroom activity in traditional academic subjects, a labor program, self-governance by the Student Body (often entailing debate and negotiation between students and L.L. Nunn himself), and a focus on religious instruction. The students selected by L.L. Nunn to attend Deep Springs were men. Moreover, with rare exception, L.L. Nunn chose young men from wealthier families even though, as is the practice today, no one was charged tuition.

Over the decades, some elements of the experiment which L.L. Nunn inaugurated at Deep Springs have remained constant while others have changed. Deep Springs has continued to be small and isolated. Labor has remained a key feature of the College, but the scope and level of student responsibility within this "pillar" has expanded over the years. A formal academic program has always existed. Student self-governance has always been a hallmark of the College to a degree that is unusual if not unique in the annals of higher education in the U.S. in its

potential and often actual reach into virtually all areas of decision making for the institution. The self-governance pillar apparently was more limited in L.L. Nunn's day. One of the most important features of the College for L.L. Nunn personally – religious emphasis and instruction – was dropped within 20 or 25 years following his death. While all Deep Springs students to the present day have been young men, L.L. Nunn's preference for students from more established families disappeared.

Deep Springs has not sailed smoothly through its nearly 100 years of existence. Crises of various types and intensity have arisen. On occasions, Deep Springs has faced serious financial straits. This happened during the Great Depression, in the 1960's, when a benefactor came to the rescue, and in the mid-1990's when College infrastructure required complete overhaul but available resources were dwarfed by the accumulated deferred maintenance that had to be addressed for the College to continue functioning. Indeed, by the mid-1990's the College was at least $6 million in the red, having long before exhausted the financial corpus of L.L. Nunn's original gifts[3] and having no endowment to help ensure its survival. Specifically, the College was faced with $9 million in necessary maintenance and repairs while having only $3 million remaining in the endowment. And in at least one instance, financial catastrophe converged with intense disputes over policy and caused deep division among trustees, alumni and friends, students, faculty, and staff.

From as early as the 1950's, the question of coeducation arose at Deep Springs. As years passed, the issue became more inflammatory. In the 1960's, the Trustees first seriously considered the matter but took no action. In the late 1970's, coeducation was the subject of extensive formal study and debate by the Trustees and the community.

Renewed formal attention to coeducation in the mid-1990's coincided with the severe financial crisis of that era. Discourse was heated, and the subject threatened to tear apart the Deep Springs community. The Trustees deadlocked 4 to 4 with one abstention. The College

[3] Although the dollars he provided are long gone, the real property which L.L. Nunn contributed to the Trust continues to be used by the College.

needed repairs and the Trustees agreed to table the matter in order to devote their full attention to saving Deep Springs, and to consider coeducation anew once that goal was accomplished.

Deep Springs was saved from infrastructure collapse and financial ruin. But the question whether the admissions policy should be revised to include women in addition to men as students at the College remained. A formal Student Body by-law requires that the issue be discussed – at the very least among the students themselves – each and every year. From 2003 to 2005 a group of Trustees again studied the subject, including input from students and others, and attempted to provide an overall assessment of "pluses" and "minuses" of coeducation for Deep Springs. That effort ended without resolution and with no agreed articulation of a rationale for maintaining an all-male student body. Alumni and friends as well as students continued to raise the issue and to discuss the impacts of Deep Springs' all-male status on its current performance and future prospects.

In 2009, the Trustees identified coeducation as a strategic issue important to the College and decided to once more devote substantial time and attention to the topic. This most recent round of consideration resulted in the votes of the Trustees and of the Deep Springs College Corporation Board taken in September 2011 to implement coeducation and to the February 2012 filing of the Petition in this matter.

Trustee debate and decision during 2011 on the issue of coeducation took place against the backdrop of an institution that was (and remains today) in sound condition in many respects. The College attracts good students, hires good faculty and staff, sends its graduates to complete their undergraduate degrees at an impressive list of other colleges and universities, and has built its endowment to the highest dollar level ever achieved.

At the same time, Deep Springs College rests outside the mainstream in U.S. higher education in many ways. It is one of only four all-male colleges which still exist in the country. It is tiny, and has a correspondingly small alumni/donor base. Because of its all-male policy, it is potentially restricted from receiving federal funding, although the College does not currently accept funding from the U.S. Department of Education. The evidence regarding private

fundraising prospects was mixed, with evidence suggesting that only eight of the 33 major donors were explicitly opposed to co-education but evidence that one foundation would likely withdraw support if the College became coeducational. The evidence was more compelling that the all-male policy reduces the quality of the applicant pool and of the resulting student body, to burden and complicate the tasks of hiring and retaining the highest quality faculty and staff and to adversely impact the richness and pedagogical value of peer interactions among students in the classroom, in the labor program, and in self-governance. Notwithstanding its healthy current condition, the College has been described as "fragile" by both sides of the coeducation debate which played out during trial.

C. The L.L. Nunn Trust

Several portions of the instrument signed by L.L. Nunn in 1923 are relevant to this matter. The recitals set out:

> WHEREAS grantor 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; and
>
> WHEREAS grantor, desiring to provide for the development and perpetuation of such educational work, has heretofore conveyed the property hereinafter described to the above named grantees by a certain instrument in writing dated May 15, 1923, and duly executed and delivered by grantor, and now desires to supplement and confirm said conveyance dated May 15, 1923, by the execution and delivery of this conveyance which more particularly defines both certain of the property conveyed and the terms and conditions of the trust upon which grantor desires that he property conveyed by him to said grantees shall be held and used;

Paragraph number 1 of the Deed of Trust states that donated assets "shall" be used:

> [T]o provide for and carry on educational work in the State of California similar to and in development of the work already inaugurated by Grantor at Deep Springs in Inyo County, California, but in such manner and form and at such place or places within said State as said trustees in good conscience and the exercise of their best judgment may determine, for the education of promising young men, selected by said trustees or as they may

> prescribe, in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony with the Creator, in the conduct of which educational work democratic self government by the students themselves shall be a feature as is now the case at said Deep Springs and which work shall be carried on not for profit but solely for the advancement of the purpose hereinabove mentioned.

In relevant part, paragraph number 2 of the instrument addresses in further detail matters of Trustee power and authority as follows:

> In order to enable them to accomplish the purpose of this trust in such manner as they in the exercise of their best judgment may deem most fitting and expedient, the said trustees are hereby authorized and empowered to act in the matter and deal with any and all property now or hereafter held by them hereunder.... 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 may 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, ...;
>
> (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, ..., 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; ...
>
> (f) To receive, hold, and use in pursuance of the terms hereof, any and all other property that may be vested in them by deed or by will or otherwise to be devoted to the primary object of this trust.

And with respect to the subject of student self-governance as mentioned in paragraph 1, paragraph 5 of the Deed of Trust says this:

> The students in attendance receiving the benefits of the educational work being conducted hereunder are the sole beneficiaries of this trust, constitute the Student Body, and are to be considered as the beneficial owners of all the property at any time held by the said trustees under the terms hereof, title and authority being vested hereunder in said trustees only because of the probability that most of said students will be and remain minors while they are such students, and to maintain and perpetuate the work of this trust free from the changes that would inevitably result from the ever changing membership of the Student Body. Therefore, it shall be the duty of said trustees to accord the Student Body the full right, power and authority of democratic self-government in accordance with its traditions and the ideals and policies of Deep Springs education institution set forth in correspondence and documents of Grantor and of the institution, including the control of the conduct of its members and of the buildings used as students' dormitories and the power of majority vote to veto the dismissal of any member during the school year but not the power to dismiss any member. It shall also be the duty of said trustees to recognize the right of the Student Body to maintain its organization and hold its meetings under such rules and regulations as it may adopt and with no one present but its own members except on its invitation; to ascertain, consider, and comply with, so far as in good conscience they can so comply with, the desires of said Student Body; and to accord it full opportunity to make its wishes known to them. To this end, the Student Body shall be entitled to appoint one of its members to act as the Student Body Representative at all trustees' meetings, and it may remove at will any person so appointed; such appointment or removal to take effect upon the filing of a proper certificate with the secretary of the trustees. Each person so appointed shall continue as the Student Body Representative until removed or until the expiration of his term of office as may be fixed by the Student Body even though he many after his appointment cease to be a member of the Student Body. The Student Body Representative, during his continuance in office, shall be entitled to notice of, and to attend all trustees' meetings with full power to speak therein and to present his views and those of said Student Body on all matters connected with the carrying out of this trust the same as if he was made one of said trustees' by virtue of this deed, and to a vote, which shall be considered and counted as if he were one of said trustees, on all matters acted upon at any trustees' meeting except on matters involving the conveyance or transfer of any title to, or the imposition of any lien upon, any of the property forming a part of the trust estate, but not including as a transfer of title within the meaning of this exception the expenditure of money in the conduct of educational work hereunder or in the protection or preservation of the trust estate.

To the extent other portions of the Deed of Trust are also relevant those are referenced in the sections which follow.

II. THE PARTIES' RESPECTIVE POSITIONS

It is apparent that all parties are acting in good faith and are concerned about the well-being of Deep Springs.

In brief, Petitioner asserts that L.L. Nunn's overarching aim in creating the Trust was to provide funding to carry on Deep Springs as an institution to encourage and train students to become unselfish leaders in uplifting mankind from materialism to idealism. Petitioner contends that this goal cannot be achieved effectively today by excluding women from the Student Body. Petitioner asserts further that the references to "promising young men" in the Deed of Trust is not the primary purpose, not a material purpose, and not even a restriction on the use of Trust assets. Even if it was a purpose or restriction, Petitioner argues that the value of maintaining an all-male student population is outweighed by the need to achieve the more essential goal of training students capable of becoming leaders who will benefit society in the manner envisioned by L.L. Nunn.

The position of Real Party in Interest, Deep Springs College Corporation, is that single sex education is an anachronistic, substandard, and increasingly unacceptable approach from a purely educational standpoint, that an all-male admissions policy and an all-male student body add nothing of value to the ability of the College to meet its educational goals, and that the College risks ultimate failure unless it is able to educate men and women together.

In general terms, the Respondents meet these contentions by saying that L.L. Nunn's unambiguous intent was to found and maintain a college to educate promising young men for careers of selfless service, that nothing in the extrinsic evidence – even if admissible[4] – alters that essential element of L.L. Nunn's purpose, and, by all relevant measures, Deep Springs is doing well and does not need to change its admissions policy in order to continue to thrive as a single sex institution. Respondents assert that Deep Springs must be failing irretrievably and close to if not at a point of destruction before the Trust can be modified.

[4] Petitioner urges the Court to find that Respondents waived any objections to the admission of extrinsic evidence by allowing it to be introduced at trial. However, the Court was clear that the evidence was entered conditioned on arguments regarding admissibility.

III. PRELIMINARY MATTERS

Petitioner bears the burden of proof on all of his claims. "Whatever plaintiff is obligated to plead, plaintiff is obligated to prove." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 654.) Plaintiff has the burden to prove the facts supporting cy près (*Lynch v. Surprise Valley Lodge No. 2* (1972) 26 Cal.App.3d 265, 272), equitable deviation (see *Moxley v. Title Ins. & Trust Co.* (1946) 27 Cal.2d 457, 468), and the statutory claims.

Two issues permeate much of what the Court must determine in this proceeding: (1) whether the Deed of Trust is ambiguous so as to justify the consideration of extrinsic evidence, and (2) the determination of L. L. Nunn's purpose or purposes in creating the Trust. Each of these matters is addressed in this section to aid, and more fully explain, the Court's resolution of the claims advanced by Petitioner and opposed by the Respondents.

A. The Deed of Trust is Ambiguous as to the Purpose or Purposes of the Trust,

A main issue in this case is determining what the Trustor intended as the purpose, or purposes of, the Trust. The question of whether there is a singular, indivisible purpose or several is relevant in the context of modification because the instrument may be modified on some grounds if the trust instrument provides for more than one purpose. If the Trust instrument unambiguously provides for one purpose, and one purpose alone, certain grounds for modification may be unavailable. The first inquiry, therefore, is whether the Trust instrument is ambiguous as to whether it intended to include a single purpose or more than one. The second question is what the purpose(s) of the Trust is. Where balancing of more than one purpose is required, the discussion is addressed in more depth in the subsections analyzing the different grounds set forth in the Petition.[5]

Probate Code sections 21101 *et seq.* govern interpretation of a trust. The overriding principle of construction is that "[t]he intention of the transferor as expressed in the instrument

[5] The analysis could also be run another way, by determining the purpose(s) first and then deciding whether there was a primary or material purpose when analyzing under the separate grounds. As can be seen here, the purpose(s) of the Trust is ambiguous under any measure.

controls." (Id. § 21102(a).) Intent is determined by construing all parts of an instrument in relation to each other to form a consistent whole, if possible. (Id. § 21121.) All provisions are assessed together in their entirety, rather than the focus being on individual terms and conditions. (See, e.g., *In re Bernatas' Estate* (1958) 162 Cal.App.2d 693, 700.) A provision which is "ambiguous or doubtful" may be explained by any reference to or recital of the provision in another part of the instrument. (Prob. Code § 21121.)

In determining whether the Trust instrument is ambiguous, it is proper for the court to consider the circumstances under which the document was made. (See, e.g., *Estate of Russell* (1968) 69 Cal.2d 200, 208-210.) Extrinsic evidence in this limited respect is "admissible to interpret a trust, but not to give it meaning to which it is not reasonably susceptible." (Id. at 211.)

A written instrument such as a trust is deemed ambiguous when, in light of the circumstances surrounding its execution, "'the written language is fairly susceptible of two or more constructions.'" (*Estate of Russell*, supra, 69 Cal.2d at 211) (Citations omitted.) When an ambiguity exists, the court may properly consider a broader range of extrinsic evidence in order to resolve any uncertainty and to give effect to the trustor's intent. This broader range even includes expert testimony. (See, e.g., *Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 77-78.)

Applying this guidance, the Court concludes that the L. L. Nunn Trust is not ambiguous as to the fact that the education of men is a purpose of the Trust. The word "men" is an ordinary, not technical word. Unlike masculine pronouns or words like "man" or "mankind" which may be used to encompass both genders, the word "men" in the context of the instrument is not susceptible to such interpretation. The purpose clause instructs the Trustees to provide for and carry on educational work in California similar to and in development of the work already inaugurated at Deep Springs. This language alone arguably would allow for the education of women as being "similar" to the work begun at the College. However, the paragraph continues to clarify how the funds are to be directed and specifies it is for the education of promising young "men." The court finds that the Trust instrument is unambiguous that the education of

men is a purpose of the Trust. The alternate interpretation advanced by Petitioner, that the education of men is not a purpose at all is not a reasonably susceptible one, even considering the circumstances surrounding the execution of the instrument. For example, L.L. Nunn was trained in law, was a good writer and familiar with the idea of higher education for women. It is unreasonable to believe that he used the word "men" because the education of women just did not occur to him or that he intended the word to be inclusive of women.

The Deed of Trust is, however, ambiguous as to whether it expresses one purpose or several and to what the purpose(s) is. Paragraph number 1 of the Trust instrument is a lengthy sentence which enumerates several elements to the Trust's "purpose." For ease of reference, Paragraph 1 is reproduced here in part:

> [T]o provide for and carry on educational work in the State of California similar to and in development of the work already inaugurated by Grantor at Deep Springs ..., for 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... [including elements of self-government and not-for profit status}

One construction of this paragraph is that L.L. Nunn intended each and every one of these elements to be included in the Deep Springs undertaking in equal measure and with equal emphasis in perpetuity. In this interpretation, each element is clearly and fully delineated and the concluding phrase "solely for the advancement of the purpose herein above mentioned" references the entire sentence. Accordingly, the word "solely" applies to each individual element stated in that sentence. L.L. Nunn's purpose, then, would be construed as an integrated singularity, and not subject to departure in meaning from an inseparable combination of all of the exact terms he employed. This interpretation is reasonable in light of the fact that "the purpose" is referred to in the singular throughout the document and because the paragraph is drafted as one sentence. In addition, as Respondents point out, the recitals of the Deed of Trust describes Deep Springs as an institution for the education and development of promising young men.

Another construction of this paragraph is that Trustor's objective was stated in the initial phrase of the sentence: "The purpose for which the property hereby conveyed...is to provide for

and carry on educational work ... similar to and in development of the work..." he had "already inaugurated" at Deep Springs. Under this interpretation, because L.L. Nunn used the word "shall" at two particular points later in the text, but not elsewhere in the paragraph, the work must continue to include "democratic self-government by the students" and must be conducted on a "not for profit" basis. In this reading, the other individual items listed in paragraph 1 are not modified by the word "solely" found in the final phrase and these other elements should be understood as providing guidance to, but not strict limitations on, the Trustees relative to determinations made by them "in good conscience and the exercise of their best judgment." L.L. Nunn's purpose, then, would be construed as encompassing a number of mandatory objectives and several permissive but not essential directives or means. The undertaking would also be understood as subject to some degree of change and evolution over time as the Trustees continue the development of the educational work so long as self-governance by the Student Body and non-profit status were preserved.

In support of this argument, Petitioner notes that in Paragraph 2(f), L.L. Nunn authorized the Trustees to accept donations of other property and stated that such additional assets should be "devoted to the primary object of this trust." "Primary object" may or may not mean the same thing as the word "purpose" found in paragraph 1 and elsewhere in the document. "Primary object" also may or may not have been more important than "purpose" to the grantor. At the very least, Petitioner argues that the use of a different expression implies that L.L. Nunn intended more than one goal for use of Trust assets and that he intended that one of these objectives – the "primary object" -- should be treated as more important than others.

Petitioner also points out that in subsequent paragraphs of the document, L. L. Nunn reiterates and elaborates on each of the three themes that are emphasized in paragraph 1 by use of the word "shall": educational work, student self-government, and non-profit operation. As previously quoted, in Paragraph 2. (b) he authorizes transfer of assets to organizations "devoted to the cause of education" as long as they are "non-profit." In Paragraph 3, he directs that notices of the appointment of new trustees be recorded "...wherein the principal part of the

educational work provided for hereunder is being carried on...." In Paragraph 4, not for profit status is reinforced by the provision that "...Trustees shall receive no compensation...." Paragraph 5, quoted in full above, elaborates on both the educational work and the high importance of student self-government to L.L. Nunn. It begins, "[t]he students in attendance receiving the benefits of the educational work being conducted hereunder shall be the sole beneficiaries of this trust.... Therefore, it shall be the duty of said Trustees to accord the Student Body the full right, power and authority of democratic self -government in accordance with its traditions and the ideals and policies of Deep Springs educational institution set forth in the correspondence and documents of Grantor and of the institution...." And finally, paragraph 6 refers three times to "the educational work provided for hereunder" and once to the "school work in progress."

In paragraph 1, L. L. Nunn also refers to other aspects of his vision for and the then current character of Deep Springs. These phrases, both covered extensively during the trial, are "for the education of promising young men" and "emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony with the Creator...." This interpretation places these elements as possibly having less importance than the explicitly mandatory terms. The Court finds that Petitioner's interpretation is also a reasonable one.

A third reasonable interpretation is that the Trustor intended that the Trust have multiple purposes. A trust may have more than one purpose, without any particular one being specifically designated as primary or secondary, mandatory or permissive. For example, in *Estate of Ferrall* (1953) 41 Cal.2d 166, the court held that the trustor intended three things: to provide income to his daughter for life, to restrict any payments to his son-in-law and to provide for the remaindermen. In *Estate of Flannery* (1969) 269 Cal.App.2d 890, the trial court quoted from *Ferrall* and noted that the trust instrument indicated two intentions or "purposes" on the settlor's part. The primary purpose was for the maintenance of trustor's son, while her secondary intention was her wish that none of the trust estate be used for the benefit of her daughter-in-law

or granddaughter. (See, also *Thomas v. Gustafson* (2006) 141 Cal.App.4th 34, 40 [trust had two purposes: one was a beneficiary's support and the other was to make a gift to nieces and nephews].)

Here, the interpretation that the Trust has more than one purpose is supported by the fact that multiple elements are set forth in the "purpose" paragraph. In this reading of the instrument, L.L. Nunn intended that the Trust serve more than one purpose, one of which was the education of men.

As pointed out by Petitioner, one of the best indicators of the ambiguity of the instrument is that thoughtful individuals on both sides of this controversy, acting in good faith, have expressed divergent interpretations of the text. When reasonable minds can differ, the test for admission of extrinsic evidence has been satisfied. And second, cross-examination of several of these individuals as to their respective readings of the document illustrates further that key portions of L.L. Nunn's expression are indeed susceptible to at least two meanings. (See, e.g., 66-68, 71-72, 74 (Hitz); 868, 972-980 (Hoekstra).)

Without deciding (at least as part of this preliminary analysis) which of these interpretations is correct, it is apparent that paragraph 1 of the Trust instrument is reasonably susceptible of more than one interpretation in regards to whether there was a singular purpose or purposes plural. The instrument is ambiguous and the Court finds that extrinsic evidence is admissible for the purpose of interpreting L. L. Nunn's intent and the related matters at issue in Petitioner's request to modify the Trust.

Finally, the Deed of Trust contains at least two explicit references to extrinsic evidence. In paragraph 1, L.L. Nunn mentions the "educational work ... already inaugurated ... at Deep Springs." In paragraph 5, he directs the Trustees "to accord the Student Body the full right, power and authority of democratic self-government in accordance with its traditions and the ideals and policies of Deep Springs educational institution set forth in the correspondence and documents of Grantor and of the institution...." Even if the Court were to find that the document

is not ambiguous, it would still be appropriate to consider these particular categories of extrinsic evidence expressly identified in the Deed of Trust in determining what L.L. Nunn intended.

B. The Purpose or Purposes of the Trust in Light of Extrinsic Evidence

In this Court's February 13, 2013, Rulings and Orders on Petition for Court Order Interpreting Endowment Gift Instrument (the "Rulings and Orders."), the Court identified the purpose of the Trust in terms that suggested it was solely for the education of promising young men.

The Court notes that the language of the Rulings and Orders was fairly strong, and it could appear that the Court has already determined that the Trust has only one purpose. However, the Court reiterates that it did not enter orders regarding the purposes of the Trust in the context of the issue of modification.[6] 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 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.)

In the context of modification, the presence or absence of multiple purposes is relevant to theories presented by Petitioner. Even if there is only one purpose, it is possible that the Trust could still be modified under other theories. As discussed above, the language in the Trust instrument can be read at least three different ways, all of which interpretations are reasonable.

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[6] Ruling and Order on Respondents' Motion for Judgment on the Pleadings, or, in the Alternative, Motion in Limine, filed November 13, 2013, 2:14-3:18.

The Court must now turn to extrinsic evidence to resolve any ambiguity in regards to the purpose or purposes expressed in the Trust document. The ambiguity is whether the instrument (1) reflects grantor intent to establish a single purpose which would not be subject to change (Respondents' assertion), (2) reflects several objectives of varying levels of importance (Petitioner's perspective) or (3) simply indicates that L.L. Nunn intended for the Trust to have more than one purpose.

Extrinsic evidence tends to support the view that Trustor intended that the Trust have more than one purpose. A reading of the instrument along with extrinsic evidence reveals that L.L. Nunn's overarching purpose for the Trust was "educational work." The work was to take place in California and is described as "similar to and in development of the work already inaugurated at Deep Springs College." Therefore, Trustor intended both to continue Deep Springs as well as allow for the initiation of similar projects. The educational work was to be 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. Another purpose was for the education of promising young men.[7]

In contrast, democratic self-government and not-for profit status are not purposes of the Trust. Democratic self-government "is a feature in the conduct of" the stated *educational work* (emphasis added.) The not-for-profit feature is "...for the advancement of *the purpose* hereinabove mentioned" (emphasis added.) The extrinsic evidence supports the interpretation that self-government was either a teaching method in service to the purpose of educating students in a manner emphasizing unselfish service in uplifting mankind from materialism to idealism, to a life I harmony with the Creator. For example, "[y]ou are right, the development of a desire within to do right is one, probably the most important of the principal functions of the student body"; "[t]he student body must acquire authority by wise conduct. . . . Nobody will or can

[7] The wording in the recitals identify and describe Deep Springs as it was at the time and express a desire to perpetuate and develop such educational work, and does not necessarily restrict the purpose to the singular or remove ambiguity.

object to that and from such care will emanate control first and then authority. Were I to issue an absolute order giving authority it would do the student body no good and simply place me in the position of being an arbitrary dictator instead of a guiding influence"; and "[The Student Body] has authority over the conduct of its members and right to increase that authority to an absolutely unlimited extent under the law of the eternal fitness of things." (Exh. 201, letters of February 22, 1919, January 24, 1921, and April 5, 1921.) If the self-government feature was a tool in "developing the desire to do right," and the broad delegation of power was the only way to ensure it actually meant something.

Similarly, a not-for-profit status would support the purpose of non-materialism, especially in light of student participation in almost all aspects of running Deep Springs. Indeed, it is difficult to imagine that someone who founded an institution to help channel mankind "from materialism to idealism" would want it to be anything but a not-for-profit enterprise.

The Trust instrument also indirectly refers to other methods used in order to advance its purposes. The instrument refers to the "educational work ... already inaugurated ... at Deep Springs." It also directs the Trustees "to accord the Student Body the full right, power and authority of democratic self-government in accordance with its traditions and the ideals and policies of Deep Springs educational institution set forth in the correspondence and documents of Grantor and of the institution." Therefore, various traditions, ideals and polices were incorporated by reference although not necessarily directly named in the Trust instrument. As is the case of not-for-profit status and self-governance, these other elements were intended to serve the purposes of the Trust without being purposes of the Trust. (See also, L.L. Nunn's *The Purpose*, Exhs. 201, pgs. 38-39)

As one significant example, the writings of L.L. Nunn (as referenced in paragraph 5 of the Trust instrument) urge the Deep Springs students of his time to not stray from the Valley. Exh. 201 pp. 7-8 (March 26, 1920); pp. 25-27 (February 17, 1923). This emphasis on isolation – which all parties acknowledge was and has remained an essential feature of the College program

– is not referenced explicitly in the Trust. Yet it was important to L.L. Nunn and to the vision he had for the College:

> The desert has a deep personality; it has a voice; and God speaks through its personality and voice. Great leaders in all ages from Moses to Roosevelt, have sought the desert and heard its voice. You can hear it if you listen, but you cannot hear it while in the midst of uproar and strife for material things. Gentlemen, "For what came ye into the wilderness?" Not conventional scholastic training; not for ranch life; not to become proficient in commercial or professional pursuits for personal gain. You came to prepare for a life of service, with the understanding that superior ability and generous purpose would be expected of you, and this expectation must be justified. Even in scholastic work, average results obtained in ordinary school will not be satisfactory. The desert speaks. (Exh. 201 pp 26 (February 17, 1923.))

The isolation in the desert was a method to prepare superior students for a life of service. The preparation for a life of service is a purpose; the isolation is one manner of fulfilling the purpose.

In other writings, L.L. Nunn describes the program and his desires for the College in a manner which is not the same as what is set forth in terms of particular elements in paragraph 1. (Exhs. 201.) For instance, L. L. Nunn often refers in his letters to "the four hours of physical labor required as an important feature of the education...." (Exh. 26, p. 14 (April 4, 1921).) Today that is referred to as the labor program—one of the three pillars of the Deep Springs program — but it was not mentioned in the Deed of Trust. The extrinsic evidence suggests that ideals, policies and traditions of the College were multiple, beyond what was explicitly stated in the instrument itself. The labor program is again a tool toward advancement of the idealistic purposes of the Trust, but not a purpose of it in itself.

Relative further to this subject, Respondents point to L.L. Nunn's undated 1924 letter to the Trustees (Exh. 32), which states:

> 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 practised [sic] at the institution are what 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 and uplifting mankind from materialism to idealism, to a life in harmony with the Creator* (emphasis added.)

Beyond reflecting that L.L. Nunn may have expected and wanted change (as in fact he says directly), this paragraph reflects that there were fundamental principles (plural) that L.L. Nunn wished to perpetuate. This sentence is followed by a line in which L.L. Nunn refers to the "purpose" in the singular.

The text begs the question: what are the "fundamental principles practised at the institution" to which the author refers? One interpretation would be that the methods in service to the overarching purpose are the principles "practiced" at the institution. These methods (capable of being practiced) would be such features as student self-governance, non-profit operation, isolation, religious instruction and the labor program that were major elements of the Deep Springs program at the time. The second interpretation is that the fundamental principles and purpose are one in the same. It may be impossible to determine what L.L. Nunn meant by the phrase, "fundamental principles practised at the institution," but the language is clear as to the purpose.

The question then arises whether the three remaining components entail one purpose or several, namely (1) to provide for and carry on educational work in California similar to and in development of the work already inaugurated at Deep Springs College (2) for the education of promising young men (3) 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.

These elements or goals are interconnected in such a way it may be of little use to determine which ones might qualify as a separate purpose. It is sufficient, however, that there are at least two purposes: to continue the Deep Springs experiment and to educate promising young men in that or a similar fashion. While so far these two purposes have coexisted at Deep Springs, the Trust instrument gives the Trustees discretion to expand the experiment beyond the

original campus. Extrinsic evidence supports that expansion of his methods begun at Deep Springs (if successful) was a goal of L.L. Nunn's.

The Court turns to the determination of the relative importance of the expressed objectives. To avoid becoming overly technical in which element is a primary or essential purpose, a secondary purpose or merely a term, it may be helpful to consider whether an element is severable from the others without destroying the whole. For example, education cannot be removed without destroying the purpose of the Trust. The funds clearly could not be expended to open a shoe factory unless it was intended to also be an educational endeavor. On the other hand, the emphasis on "life in harmony with the Creator" has not been incorporated explicitly in the curriculum or policies or traditions practiced at Deep Springs for decades, presumably without destroying the character of the institution.

Evidence was presented that education in an idealistic manner is a central purpose of the Trust. Various writings and other pertinent facts reinforce the conclusion that this educational work was the overarching purpose of the Trust. Education was the exclusive focus of L.L. Nunn's entire life after 1911 or 1912. He devoted not just attention and energy to the undertaking, but also his wealth. It is clear in the instrument itself and expressed thoughtfully in other writings. L.L. Nunn clearly intended that Deep Springs not be just another prestigious college. The Trustor insisted on different methodologies, non-profit status and location to promote something much different.

The notion of promoting a life in "harmony with the Creator" appears to have been guiding principles during most of L.L. Nunn's life. Professor Newell described how, in his late twenties, L.L. Nunn wrote in a paper called "The Moral Sense" about his Christian theist position relative to the world being flooded with information, technology, and scientific knowledge. L.L. Nunn embraced these developments, but also felt there were certain God-given moral truths embedded in the universe and that it was essential to bring one's life into conformity with these truths. L.L. Nunn presented this paper and kept it close at hand throughout his life. (487-489 (Newell).) Consistent with this background and commitment, when L.L. Nunn

founded Deep Springs, religious instruction was a significant feature of the curriculum although it has been absent for years now.

In contrast, none of the extrinsic evidence indicates that L.L. Nunn believed that the education of men was as important as idealistic education and carrying on the work begun at the College. He did not include in any document a specification of his reasons for starting Deep Springs as a men's college. In his extensive study of L. L. Nunn, his writings, and what others wrote about him, Professor Newell found no "reference to Nunn dreaming about founding a men's college." (501: 23-24.) Respondents have cited no such evidence. Nor did L. L. Nunn include in any writing a statement indicating that he wished to exclude women as students either during the time he led the institution or thereafter. Admittedly, this lack of evidence may simply mean it was lost, destroyed or the thoughts were just never committed to writing outside the Trust.

It is interesting that in contrast to his use of the word "men" in the phrase "for the education of promising young men" in the Deed of Trust, in the undated 1924 letter quoted above L.L. Nunn interchangeably used the word "students" and "people" in reference to future applicants. Also, "[t]he general conduct has been that of ordinary students and not such as should be expected of a score of students especially selected from the hundred million people of this country as the best material out of which to make public servants and trustees of the country's welfare." (Exh. 201, letter of April 5, 1921.)

As related by Professor Newell, L.L. Nunn's restriction of the Deep Springs education to men was probably influenced by notions of efficiency. L.L. Nunn was founding a small college. To have the greatest impact, he needed to select as students individuals who had the greatest prospects for having an ultimate impact on society. (493-494 (Newell).) That explains, for example, the recruitment and selection of the vast majority of students in L.L. Nunn's day from families of financial means. (498-499 (Newell).) The same logic could be true of selecting men, and thus would be a matter of efficacy as much as it would have been of purpose, given the era

in which L.L. Nunn lived, including the roles which society considered to be acceptable for women to fill and the gender prejudices of the time.

The Court finds that the Trustor intended that the Trust contains several purposes. The overarching purpose for the Trust was "educational work" similar to and in development of that already inaugurated at Deep Springs College, in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism. For purposes of this discussion, this purpose shall be abbreviated to "the work" or "the educational work" as the phrase is used by L.L. Nunn himself. This purpose is clearly central to the Trust as reflected in the Trust instrument itself and other writings. "The work" was intended to be in a manner to encourage a life in harmony with the Creator. Encouraging life in harmony is a purpose, but not as central as "the work" is indicated by the evidence that religious instruction has since disappeared. The extrinsic evidence and the wording of the Trust do not support a reading that L.L. Nunn's primary purpose was to create or maintain an institution for religious instruction.

The education of promising young men is also a purpose, but a hybrid of purpose and a way to effectuate the "the work." In fact, each of the sub-elements to this phrase points to that element being in service to the overarching purpose of "the work." The emphasis on "promising" students is an example. Extrinsic evidence reveals that L.L. Nunn believed that these ideals could best be accomplished by a very limited number of exceptional students – that a certain force of character was needed to counter the prevailing norms. In addition to expression being used in the Trust, some of the grantor's writings expand on the point: for example, "[t]he general conduct has been that of ordinary students and not such as should be expected of a score of students especially selected from the hundred million people of this country as the best material out of which to make public servants and trustees of the country's welfare"; "[t]he Deep Springs Student] should know what to expect on entering service of his country in diplomatic fields abroad or in commissions or other fields at home, and to be ready to meet and reject any alluring opportunities." (Exh. 201, letters of April 5, 1921 and June 1, 1922.)

In addition, evidence suggests that the emphasis on "young" students was similarly in service to the overarching ideals. Young people may have been viewed as more flexible and adaptable to the rapidly changing world while being positioned to make a difference for a longer duration. The extrinsic evidence points toward the fact that L.L. Nunn may have at least given some thought to the former as his practice was to hire young men directly out of high school rather than to retrain seasoned businessmen.

The restriction to men similarly falls within this framework. The education of men is a purpose, but at the same time, a description of the *type* of student that could be most effective in carrying out the overarching purpose. Arguably, average students could be educated in an idealistic manner, or older students, or women. Nothing in the extrinsic evidence suggests that L.L. Nunn intended to limit his program to promising individuals simply to be elitist, or to young people simply to have a homogenous student body or to men simply to create a single-sex college (of which there were many at the time.) Putting too much emphasis on any one of the elements would tend to place form over function. The Court finds the, that the term "men" is a purpose that may be modified without destroying the greater whole, so long as the students admitted are most likely to fulfill the overarching purposes set out by L.L. Nunn.

Respondents concede that that education provided at Deep Springs College is achieved through a combination of elements, one of which is an all-male student body. As Dr. Hoekstra made the point: "It's not just a college for young men; it's not just a college in California; it's not just for providing the ultimate goal of uplifting mankind from materialism to idealism, it is the conjunction of those things." (5/1 Tr. [Hoekstra] 945:9-12.) The Court acknowledges that the ingredient of an all-male structure contributes to the uniqueness of the Deep Springs College that may be lost should the Petition be granted. (5/1 Tr. [Hoekstra] 848:8 20.) However, the Court is required to weigh the respective weights of the various purposes and terms in order to resolve the question of modification.

IV. PETITIONER'S THEORIES FOR MODIFICATION

Petitioner advanced four legal theories for modification, and evidence regarding each of these assertions was presented at trial.

A. MODIFICATION OF TRUST BASED ON CONSENT OF BENEFICIARIES (PROBATE CODE SECTION 15403)

Section 15403 reads in relevant part as follows:

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

1. Right to Petition

Respondents point to the text of section 15403 to argue that relief is not available under the statute because no beneficiary has petitioned the Court directly in this matter. The Court disagrees, and holds that a trustee of a trust may also institute and maintain a petition to modify or terminate a trust under this provision.

The authority of a trustee in this regard is established by Probate Code section 17200 as follows:

> (a) ...a trustee . . . of a trust may petition the court...concerning the internal affairs of the trust....
> (b) Proceedings concerning the internal affairs of a trust include, but are not limited, to proceedings for any of the following purposes:
> . . .
> (13) Approving or directing the modification or termination of the trust.

There is nothing in the language of this code that specifies that a trustee cannot proceed under section 17200 to seek modification of an instrument on any available grounds, including those set forth in section 15403. Section 17200 allows a trustee or beneficiary to bring a petition for modification. (Prob. Code § 17200 (b.) The Law Revision Commission Comments clarify that

section 15403 petition may be brought in a Probate Code section 17200 proceeding (which may be initiated by a trustee.) Law Revision Commission Comment (1990) to Probate Code section 17200 further clarifies, "Various provisions elsewhere in this division relate to proceedings under this chapter ... [a]s to modification and termination of trusts under paragraph (13), see Sections 15400-15410." And the Law Revision Commission Comment (1990) Probate Code section 15403 provides, "For provisions governing judicial proceedings, see Section 17200 et seq.".

On its face, Probate Code section 15403 does not require the petition of each beneficiary. (Prob. Code, § 15403, subd. (a) ("[I]f all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust upon petition to the court.") Although the words of 15403(a) might be read as saying that trust beneficiaries should be the ones who make the request, there is no express requirement that they do so and no express prohibition on a trustee taking the initiative instead.

Any doubt as to trustee empowerment and the ability of a court to act most broadly in response to a petition advanced in accordance with section 17200 is put to rest by the decision in *Ike v. Doolittle* (1998) 61 Cal.App.4th 51. That case involved several petitions to modify a trust brought pursuant to section 17200. The party who opposed modification argued that a trial court's statutory power to modify a trust was "strictly limited by the provisions of section 15400 et seq. ...." (Id. at 83.) Both the trial court and Court of Appeal rejected this contention. They did so not merely based on the language of section 17200 recited above, but also because none of the statutory provisions dealing specifically with trust modification contains express language which limited grounds for modification to the bases set forth in those particular sections, and because the scope of trustee authority described in section 17200 is non-exclusive. (Id. at 82-83.)

By close analogy, Petitioner here was well within his rights to initiate a request to modify the Nunn Trust on any available basis – including that set forth in section 15403. And this

Court's authority to adjudicate that petition pursuant to section 15403 is not constrained by any language found therein or in any other part of the Probate Code.[8]

Petitioner's decision to invoke section 15403 in this case also makes practical sense given the two-year character of the Deep Springs program. All those who were current students at the time the Petition was filed have graduated and ceased to be beneficiaries. When that happened, they lost their ability (standing) to continue the litigation. Each July newly admitted students would have to be substituted as current beneficiary petitioners in their place, and that process continued for however long the proceeding lasted. This would elevate form over substance and illustrates further that nothing of value would be accomplished if the Court were to accept Respondents' view as to proper procedure under section 15403. For this reason as well, the Court concludes that the Trustees had and have the authority to file and maintain a request to modify the L.L. Nunn Trust pursuant to Probate Code section 15403.

2. Required Consents

As set forth previously in the Court's "Ruling and Order on Respondents' Motion for Judgment on the Pleadings, or, in the Alternative, Motion in Limine," filed November 13, 2013, the issue of whether all beneficiaries have consented to modification within the meaning of section 15403, subdivision (a), is a matter 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.)

Probate Code section 24, subdivision (d), 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." In the context of a

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[8] A noted practice guide's sample petition under Probate Codes 17200 and 15403 provides without comment that the petition is brought by a trustee, not a beneficiary or beneficiaries. (California Trust and Probate Litigation (Cal CEB 2014) §16.13 [Form: Ex Parte Petition for Order Modifying Trust Terms].)

charitable trust, section 24 defines a beneficiary as "any person entitled to enforce the trust." (See *Boys & Girls Club*, supra, 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 like *Boys & Girls Club*. In many circumstances the Attorney General would be the only "beneficiary" of a charitable trust under Probate Code section 24, subsection (d), as in situations where the beneficiaries are indefinite and thus unable to consent on their own behalf. The Attorney General has an obligation (rather than mere discretion) to institute suit when there has been a breach of a charitable trust. Should another 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 reorganization 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.

Moreover, with specific reference to the case now at hand, it is apparent from language found in the Trust instrument (specifically in paragraph 5) that L.L. Nunn expected unnamed and unidentifiable students to become beneficiaries in the future. The Court finds that the Attorney General is entitled to and should consent (or decide to withhold consent) on behalf of these future students.

Consent of the Attorney General to the modification requested by Petitioner was filed with the Court on May 5, 2014. (Exh. 237.) The Court concludes that this consent by the Attorney General satisfies the requirements of Probate Code section 15403(a).

As to others who may be deemed beneficiaries of the Trust for purposes of Probate Code section 15403, the Court discussed this question as well in its November 13, 2013 Ruling and Order. There, the Court noted that persons with a "special interest" are sometimes granted standing to act as beneficiaries of a trust. (*Hardman v. Feinstein* (1987) 195 Cal.App.3d 157,161-162; Restatement Third of Trusts, section 94.)

The Court also identified the factors to be considered in such an analysis: (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, 2017); (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 may 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*, supra, 579 A.2d 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* (1994) 537 Pa. 194, 642 A.2d 467); and (9) The intent of the settlor regarding the class's beneficiary status (*In re Milton Hershey Sch.* (2006) 590 Pa. 35, 44.).

The Court observed further in this regard that 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.)

While this is again a situation where there is no California decision directly on point,[9] the Court concludes based on the above authorities that the students attending Deep Springs College at the time of trial should be afforded the status of special interest beneficiaries of the L. L. Nunn Trust.

The number of the students involved is small and defined. These students have taken a personal interest in the outcome of the litigation. (See, e.g., 378-379, 385-396, 401-404 (Robinson); 776-779, 789-792 (W.J.Jones); Exhs, 216, 232.) The nature of this case is unique and does not involve routine administrative operations of the Trust or Deep Springs. There is no evidence that any student enrolled at Deep Springs has anything to gain as an individual from this proceeding. The students in attendance at the time of trial are intimately familiar with and well versed in the nature of Deep Springs College and the possible impact of any decision in this case on the institution and its future students. (See, e.g,, 389-394, 408 (Robinson), 787 (W.J.Jones); 1052-1055 (Neidorf).) Students at Deep Springs participate (at the very least through their selected representatives) directly and materially in substantive decisions made by

[9] The lone 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*, supra, 169 Cal.App.4th 1049, involved named beneficiaries. Without analysis, the court determined that those named beneficiaries were the class of "all beneficiaries" entitled to enforce the trust. The unusual facts of the case drove this 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 Trustees as well as in a wide variety of important affairs of the College, to an extent that is not usually seen at other colleges or universities. (See, e.g., 123-126 (Myers); 162-166 (Neidorf); 364-369 (Robinson); 509 (Newell); 780 (W.J.Jones); 1052-1055 (Neidorf); Exh. 203.) This degree of student involvement over affairs of the College is one of its cornerstones, and given L.L. Nunn's words on the subject and language of the Trust instrument, it is unlikely that he would have intended to exclude current students from direct participation on this important question. Finally, L. L. Nunn himself identified those in attendance at the College as "the beneficial owners of all the property at any time held by" the Trustees. Deed of Trust, para. 5.

By contrast, the Court determines that individuals who have not yet applied for admission as well as those who have applied successfully to attend the College, but who were not yet in attendance as of the time this matter went to trial, are not special interest beneficiaries whose consent is required to satisfy Probate Code section 15403(a). Unlike those who were members of the Deep Springs Student Body at the time of trial, the size of this group is potentially large (especially considering that it could include applicants many years or decades in the future), it is impossible to identify all group members, and as compared to current students, these individuals will not be as familiar with Deep Springs and will not have participated in the governance of the institution. Moreover, the Deed of Trust refers to students in attendance – and not to those who might someday attend – as beneficiaries.

A more difficult issue is whether individuals who had been invited to become students at Deep Springs starting in early July 2014 should be considered beneficiaries for purposes of section 15403(a). This group of roughly 14 students is small and identifiable. (See 1087-1088.) They also will have matriculated by the time this matter was formally submitted for decision. They thus come closer to fitting into the concept of having a "special interest" in the proceeding. However, these students, at the time of trial, were not current students and thus not beneficiaries according to the terms of the Trust instrument. These students had no experience with self-governance or the affairs of the College upon which they could offer an informed decision on the modification of the Trust. The Court finds that the interests of these students is well-represented

by the Attorney General.[10] Therefore, the Court finds that this subset of students does not represent a "special interest" required to consent to the proposed modification.

The students in attendance at Deep Springs at the time of trial, all of whom were then 18 years of age or older, consented unanimously to the modification requested by Petitioner.[11] (See 1055 (Neidorf); Exhs. 216, 232.) The Court has considered the evidence regarding the conduct of the Trustees and their counsel in the process of obtaining the students' consent. The Court finds that those students gave an informed, free and voluntary consent through voting unanimously on the proposed modification of the Trust (as requested by Petitioner) after discussion and selecting a representative to appear in court to testify about the process and results. Combined with the consent provided by the Attorney General, Petitioner satisfied the requirement set forth in subdivision (a) of Probate Code section 15403.

3. Reasons for Proposed Modification in Light of the Purposes of the L. L. Nunn Trust

As set forth in Probate Code section 15403(b), even where all beneficiaries consent, the Court must still make an assessment of the proposed modification: would it impair achievement of a material purpose of the trust and, if so, does the reason for the change outweigh the interest in achieving that material purpose?

As with several other issues presented in this case, there is scant guidance in the law as to what is or is not "material" within the meaning of this statute. The Court has found no cases on point, and neither side in the controversy has identified any such authority. Secondary sources

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[10] As a practical reality, given the nature of legal proceedings and the two-year program at the College, obtaining consents of newly invited students would present a serious challenge to ever resolving this matter.

[11] Respondents argue, in part, that the consents are not valid because they are not verified. Respondent's argument is that only beneficiaries have standing to bring a petition under Probate Code section 15403, and petitions must be verified. The Court has determined that the beneficiaries need not petition the Court under Probate Code section 15403. There is no required form to express consent, and the parties have stipulated that the consent that the students obtained on March 8, 2014 is sufficient so long as the Court finds it valid. (The Court does not find that the parties stipulated as to students that matriculated after the trial.)

are also silent on the subject. The Court therefore looks to the plain and ordinary meaning of the term for assistance. Dictionary references to the word "material" as used in the context of section 15403(b) include "having real importance" or "of great consequence" (Merriam-Webster, Online Dictionary (2014)) and "significant" or "essential." (Black's Law Dictionary, Eighth Edition (2004) p. 998.)

As discussed above, the purposes of the Trust are to provide for and carry on educational work in California similar to and in development of the work already inaugurated at Deep Springs, for 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. Self-governance and not-for-profit status are mandatory features in conducting such educational work, although the Court finds that these terms are not purposes of the Trust.

A male student body was (and is) an explicit purpose of the Trust. As the meaning of the word "material" is so vague as to be unhelpful, the Court uses the more liberal construction that "material" means "significant." Given the placement of the term "men" in the purposes in Paragraph 1, and the multiple other references to "men", the Court finds that this purpose is at least "significant" and thus material.

The Court now turns to the weighing process. The Court finds in light of the evidence adduced at trial that the purpose of maintaining an all-male Deep Springs is outweighed by the reasons for the proposed modification. The Court is persuaded that an exclusively male education at the college level today impairs the overarching educational purpose of the Trust. The preponderance of evidence showed that the all-male restriction provides little social benefit to male students and adds little value in general.

The financial status of the College is not as viable as it could be as a result of the all-male restriction. (92 (Hitz); 180-185 (Neidorf); 315-318 (Welle).)

Testimony was provided regarding the experience at Columbia that the all-male approach excluded half the applicant pool, reduced the odds of the most qualified male invitees attending

the institution, and provided a poor quality of education, both in and outside the classroom, for male students. (See 582-583, 590-594, 596-597, 628 (Lehecka).) When it became coeducational, the outcome for Columbia was an improved applicant pool and stronger admissions, higher levels of academic performance, and an enhanced maturity level within the student body. (See 600-604 (Lehecka).)

As related by Dean Lehecka, "[I]f an institution were financially sound, had a terrific faculty, and still had promising students enrolled, I would consider [all male education] a mistake because the quality of education would not be what it should be." (642:23 - 643:1 (Lehecka).) The reliable scientific research supports this conclusion. Single gender education for men yields no academic advantages and likely has certain negative effects. (See, e.g., 693, 706-710, 733-734 (Riggio).) In the classroom in particular, Professor Newell, Dean Lehecka, and Professor Riggio, each described how instruction in an all-male environment lacks certain essential elements. (See, e.g., 515-518 (Newell); 634-635 (Lehecka); 728-729 (Riggio).) The perspectives which only female peers can contribute are necessary in order to create and provide the richest, well-rounded, and beneficial educational experience.

The evidence is equally compelling that these same observations apply to Deep Springs. When for a brief period in 2012 the College accepted and considered applications from females, the overall increase in quality of the second round applicant group was significant. (See 185-190, 241-243 (Neidorf); 365-371, 373-374 (Robinson); 804-807 (Wilczek).) Moreover, the addition of female candidates afforded greater opportunity for the College to have a more diverse student population not merely in terms of gender, but with respect to ethnicity, economic background, and other factors as well. (See 373 (Robinson).)

Even more directly, the Court had the opportunity to observe and hear Dr. Wilczek and Ms. Marcus, both of whom wanted to apply to the College when they neared completion of high school. (See 807 (Wilczek); 835-836 (Marcus).) Those two women personify the extraordinarily competent candidates Deep Springs has excluded because of its all-male admissions policy. The loss is material and, as a consequence, the Student Body has been in the

past and is today not as strong as it could and should be. (See, e.g., 187-188 (Neidorf); 441-443 (Robinson).)

In the Deep Springs classroom, as President Neidorf and Dr. Wilczek testified, the important if not essential pedagogical element of female student participation is missing. (See 247-251 (Neidorf); 810-813 (Wilczek).) Moreover, the deficiency is not limited to academics. Neither the labor program nor self-governance is as robust as it could and should be for the simple reason that no female students attend the College. (See 251-252 (Neidorf).)

The restriction to "men" impedes the advancement of the purpose of educating "promising" youth, as many of the most promising applicants are excluded. It is clear from the language of the Trust instrument and the extrinsic evidence that L.L. Nunn envisioned the education of "the few," certain exceptional students able to carry out his vision. In a conflict between admitting "men" and admitting "promising" students, the evidence reflects that L.L. Nunn gave considerably more attention and conscious thought to the latter.

The all-male composition of the Deep Springs Student Body has additional negative impacts on recruitment and retention of faculty and staff. (See 190-192, 243-247, 276-278 (Neidorf); 809, 813-815 (Wilczek).) Qualified candidates do not apply to work at the College. (Id.) This reflects in substantial measure an underlying problem that will persist unless and until the admissions policy changes. In academia, as explained by Dr. Wilczek, tolerance of gender stereotyping is low and sensitivity to lack of diversity high. (See 809-810.) As a result, a talented professional at the start of her or his career faces concern and resistance from mentors and letter (of recommendation) writers. (See 808-809 (Wilczek).) These are important contacts and relationships on which the academician is likely to have to rely later. (Id.) So long as Deep Springs remains out of step with prevailing mores regarding gender equality in higher education, such informal and unspoken impediments -- added to those similar thoughts which some individuals do actually express -- will continue to drive highly qualified candidates away from the College. The restriction to men therefore conflicts with the purpose of educational work.

Both Dean Lehecka and Professor Riggio testified that no one who founded a college today for the purpose of training leaders would make it all male. (See 615-616 (Lehecka); 734-735 (Riggio).) From a contemporary educational standpoint, such a model is not sound. (See 638-642 (Lehecka); 734-735 (Riggio).) President Neidorf testified that maintaining a men's college does not serve any legitimate educational objective (202-203), and an all-male Deep Springs "[abuses] the faith of our students by giving them a subpar experience." (225:10-12. Also see Exh. 210, p. 7.)

In contrast, the arguments extended in favor of retaining an all-male Student Body at Deep Springs are relatively weak. (See, e.g., 22-23, 116-117 (Hitz); 168-175, 182 (Neidorf); 315 (Welle), 518-519 (Newell); 589-590 (Lehecka); 713, 719 (Riggio); 1089-1090 (Neidorf).) At trial, Respondents did ascribe several benefits to the all-male student body as a component of the educational program at Deep Springs but the purportedly positive contributions did not outweigh the detriments.

One supposed advantage of an all-male Deep Springs is that it reduces distractions and promotes higher levels of intensity and focus among the students. (See, e.g., 848, 853 (Hoekstra).) Evidence was presented that intensity and focus flowed from other attributes of the College, such as isolation, the rigorous demands placed on students by the academic and labor pillars, and the broad and serious responsibilities imposed by self-governance. (See, e.g., 162-166, 1066-1067 (Neidorf).) Moreover, "We ask a great, great deal of these students, in terms of responsibility. And to tell the world, if a pretty girl walked into the room, they would not be able to function, . . . it's false." (174:15-18 (Neidorf).)[12]

A second benefit of an all-male student cadre identified by Respondents is that it minimizes a potential "profusion of sexual relationships" and resulting conflicts. (See, e.g., 851:5 (Hoekstra).) President Neidorf testified that it was not his experience that students

[12] Additionally, of course, male students are not insulated from distractions attendant to telephone calls from young females or attendant to visits to the College by girlfriends. (1066-1068 (Neidorf).)

abandoned academic and other responsibilities because they were too busy either pursuing erotic attachments or mourning the demise of erotic attachments. President Neidorf acknowledged that although some of that goes on at all colleges, Deep Springs 30 years' experience of openly gay students told him with certainty was that students could have a very, very strong Deep Springs experience without having to be sheltered from his own eroticism. (173:12 -174:8 (Neidorf)) Nor is the matter of sexual relationships among students an issue which the College is unable to handle appropriately. (See 1064 (Neidorf).)

Yet a third argument for maintaining current policy is that the all-male student population – or so-called "male space" – at Deep Springs leads to a special sort of bonding which cannot otherwise be achieved. (See, e.g., 992-993 (Hoekstra).) While the Court acknowledges that the single sex environment can offer something unique, bonding and concomitant character development can and do take place when men and women attend college together. (See, e.g., 1068-1070 (Neidorf).) And it is unclear whether the emergence of deep personal relationships among students is attributable to the Deep Springs single sex policy or is "an effect of the other unique aspects of the College's program." (See, e.g., 1068 (Neidorf).)

And finally, Respondents contend that an all-male Student Body is integral to the "very well-conceived combination of elements" developed by L.L. Nunn for the College which "work together extremely well." (868:6-12 (Hoekstra).) There are some flaws to this reasoning, as Deep Springs today does not encompass the same elements that were included when L.L. Nunn inaugurated the College. (See, e.g., 162-166 (Neidorf); 1102, 1113 (Newell).) Two, the combination of elements has not always worked positively or smoothly. (See, e.g., 519-521 (Newell); 989-992 (Hoekstra).) The all-male factor in particular has sometimes been a disruptive rather than constructive influence. And three, several elements which make Deep Springs such a remarkable place have nothing to do with restricting student participation to males. (See, e.g., 174-175 (Neidorf); 956-958 (Hoekstra); 1065-1071 (Neidorf).)

Without dismissing the importance of the single sex environment in the past and even the contributions it offers today, the evidence is persuasive that Deep Springs would offer a far more

effective program as a coeducational institution. Per Mr. Robinson, things would change and ". . , the all-male part of it would be something that is lost . . . however . . . the benefits would be overwhelmingly positive." (408:7-16.) Others active at and affiliated closely with the College agree. (See, e.g., 33-36, 57-64 (Hitz); 131-132 (Myers); 196-197 (Neidorf); 815 (Wilczek); Exhs. 210, 211, 212, 214, 216.) So do the educational experts. (See, e.g., 513-519 (Newell); 638-643 (Lehecka); 749-750, 769 (Riggio).)

And as to the contention that coeducation could be a "radical change" against which L.L. Nunn warned (e.g., 901-904 (Hoekstra)), discussion and deliberation for four or five decades belie the concern. The admission of female students at Deep Springs has been studied with care by the Trustees and others with decades of direct experience at the College, and is expected to enhance rather than negatively impact the educational goals of the institution and its ability to carry those out. (See, e.g., 31-35, 39-42; 57-64, 88-89 (Hitz); 269-272 (Neidorf); 350 (Welle); 518-519 (Newell); 1072 (Neidorf).) None of the other basic components of a Deep Springs education -- isolation, labor, small size of the College, small class size, faculty-student ratio, academic rigor, or student self-governance -- would be eliminated as a result of women attending the institution alongside men. (See 956-958.)

The court finds that even if modification would impair achievement of a material purpose of the trust (educating men), the reason for the change outweighs the interest in achieving that material purpose. The reasons for the change are to advance the overarching purposes of the Trust of education along idealistic lines and the attraction and development of "promising" young students that can make a difference in the world. For these reasons, the Court agrees with Petitioner that the Deed of Trust can and should be modified pursuant to Probate Code section 15403, and the Court grants Petitioner's request.

B. STATUTORY EQUITABLE DEVIATION (PROBATE CODE SECTION 15409)

Section 15409 reads in relevant part as follows:

> (a) 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.

As a preliminary matter, the statute provides that the court may modify the "administrative or dispositive provisions of the trust" (or even terminate the trust) under certain circumstances. Respondents argue that the provision for the education of "men" is not a dispositive provision, but only a purpose. However, Probate Code section 18100.5(d) states, "....the dispositive provisions of a trust which set forth the distribution of the trust estate." *Estate of Traung v. Baxter* (1962) 207 Cal.App.2d 818 quotes Bogert Trusts and Trustees (2d), which states that the dispositive provisions of a trust are the portions of the trust instrument that describe the beneficiaries who are to obtain benefits, fixes the size of the benefits, and in some cases states the purpose in providing the benefits, while the administrative provisions are the portion of the instrument in which the settlor provides the methods by which the trustee is to manage the trust property. (*Estate of Traung*, at 830.)

Any term that sets out the beneficiaries of the Trust is therefore a dispositive provision. Current students are the beneficiaries of the Trust. As the term regarding the education of "men" governs who is eventually admitted, this term is a dispositive provision (as well as being a purpose of the Trust.) As noted above, *Estate of Truang* pointed out the purpose in providing the benefits may also be a dispositive provision. In other words, "the devise may be inseparable from the purposes for which it is made." (1-30 John A. Hartog & Albert G. Handelman, California Wills & Trusts, § 30.04 (Matthew Bender).)

Respondents have argued 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. The Court

disagrees; this section is not so limited. Some cases have gone so far as to find that if the primary purpose(s) would be defeated by 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 here 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. (Civ. Code § 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 inappropriate. 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. This may be especially true where a purpose is also a dispositive provision and another is not. The Court therefore finds that the term "men" is a term susceptible to modification under the statute if the Petitioner has otherwise met his burden on the required conditions.

Although the parties have disputed whether L.L. Nunn knew or anticipated that women would eventually make up a greater proportion of those obtaining higher education, the record is convincing that probably no one could have anticipated or know the full reach and scope of the changes in gender roles over the next century. The court finds that these overall societal changes,

including the increasing numbers of women in positions of power and influence formerly reserved to men, was unanticipated and unknown by the Trustor at the time he executed the instrument.

The Court finds that continuation of the Trust under its terms would substantially impair the accomplishment of the purposes of the Trust. The Court now turns to whether it is necessary to carry out the purposes of the Trust to modify the dispositive provision/purpose regarding education of "men."

According to witness testimony and other evidence, material impacts of the all-male student population at Deep Springs are felt on several planes. For example, the College is not able to recruit the most promising students. (187-190 (Neidorf); 369-374, 443-444 (Robinson); 556 (Newell).) Some qualified male students do not apply for admission because the College is not coeducational. (185-186 (Neidorf).) And in many instances the most qualified applicants are females, who are not even permitted to apply. (369-374 (Robinson).) Further, the single-sex environment increasingly attracts less mature students. (187-190 (Neidorf).) If the quality of applicants and the resulting Student Body does not improve or in fact declines, the ability of the school to maintain a rigorous and highly challenging program is jeopardized. (194-195 (Neidorf); 513-518, 523-529 (Newell).)

Of equal importance, the testimony of both percipient and expert witnesses demonstrates that education in a single sex environment – especially in the classroom – is inferior. (247-251 (Neidorf); 409 (Robinson); 640-643 (Lehecka).) This appears to be true whether the goal is to train future leaders or more simply to furnish a top caliber educational experience. (251-252 (Neidorf); 510-511, 513-529 (Newell); 713-715, 721-727 (Riggio).) Similarly, testimony at trial revealed that the essential labor and self-governance "pillars" of the Deep Springs program were less robust than they could and should be without the participation of female students. (Id.)

To the extent it is also important to recognize and preserve L.L. Nunn's interest in educating "men," the record indicates further that male students attending the College are not well served by continued maintenance of a single gender program. The experts agree, and no

substantial evidence was advanced to the contrary, that an all-male educational environment is "subpar" and not something which anyone wishing to design and implement a college or university today would consider. (187-188, 247-251, 260-261 (Neidorf); 640-643 (Lehecka); 713-715 (Riggio).)

Finally, given that L. L. Nunn strongly desired that Deep Springs graduates make a positive difference in society, modification will enable the College to better meet that objective. As already noted, men educated in a single sex environment are less well prepared to participate in a society which currently is far closer to gender equality than it was nearly a century ago when the program was inaugurated. That means that current male graduates from Deep Springs are less likely to make a difference. Moreover, women today are involved – and involved with increasing effectiveness -- in all aspects of society of interest and concern to L.L. Nunn. Continuing to exclude women as students at Deep Springs is an additional barrier to the ability of the College to serve the mission which its founder articulated of encouraging "unselfish service in uplifting mankind from materialism to idealism."

The all-male character of the Deep Springs student population has other material negative consequences. The single sex admissions policy both limits the number of faculty and staff applicants and requires a more extensive recruiting effort to find a select faculty and staff of the quality sought by Deep Springs. (190-191, 198-199, 245-46 (Neidorf); 809 (Wilczek).) The policy may also hinder fundraising, either now or in the future, although that evidence is more equivocal. (92 (Hitz); 180-185 (Neidorf).) In light of the inherent challenges which the College already faces in these respects (301-305, 307-308 (Welle); 557 (Newell)), elimination of this obstacle will enable the Trustees to more effectively guide the school to better realize its more essential objectives.

The Court has considered the views expressed by Respondents concerning the benefits of the all-male experience at Deep Springs. According to Respondents, those include reduction of distractions (flowing from the presence of students of the opposite sex), promotion of higher levels of intensity and focus, minimization of a potential "profusion of sexual relationships," and

the availability of "male bonding" experiences. (848, 850-853 (Hoekstra).) The record, however, demonstrates that these alleged advantages may not be attributable to having an all-male Student Body, are not grounded in actual recent circumstances at the College, or both. (168-175, 1064-1071 (Neidorf).) Although the purpose may be important, it is not central to achieving the overarching purposes of the Trust.

Based on the evidence adduced at trial, the Court concludes that the all-male admissions policy at Deep Springs substantially impairs the accomplishment of the more fundamental purposes of the Trust. As a result, modification is justified on grounds of equitable deviation pursuant to Probate Code section 15409 and the Court grants Petitioner's request.

C. COMMON LAW EQUITABLE DEVIATION

Under common law, equitable deviation is available where (1) there was some expression in the trust instrument of the purpose of the trustor; (2) a peculiar or exceptional circumstance makes modification necessary to accomplish the purpose of the trustor; and (3) the change is necessary in order to carry out, not defeat, the primary purpose of the trustor as expressed in the trust instrument. (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 80-82; Moxley, supra, 27 Cal.2d at p. 468.)

Common law equitable deviation has been explained as making specific administrative terms of an instrument subservient to 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 strict adherence to the terms of the declaration of trust and when it is made to appear that the benefits and advantages which the trustor 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 those terms to accomplish the real intent and purpose of the trustor. (*Adams v. Cook* (1940) 15 Cal.2d 352, 361.) The theory allows terms of the trust to be altered in order to permit the trustee to do not what the testator intended them to do at the time the trust was created, but rather 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].) As with statutory equitable deviation, the theory is not limited to deviation of administrative terms. (*Estate of Traung,* supra, 207 Cal.App.2d at 831.)

The Court finds that there are peculiar or exceptional circumstances that make modification necessary to accomplish the purpose of the Trustor, particularly in light of the time at which the document was written. The evidence presented to the Court of relevant changed circumstances since 1923 is overwhelming. Women today have vastly more opportunities and play vastly different roles -- including especially leadership roles in all aspects of society, whether that be in education, business, politics, government, or elsewhere -- as compared to what L.L. Nunn experienced during his lifetime. (558-560 (Newell); 607-611 (Lehecka); Exhs. 204-209.) None of these changes was or could have been anticipated by L.L. Nunn – or probably anyone else for that matter – when the Deed of Trust was signed. (498 (Newell).)

The nature of higher education itself is materially different today than it was nearly a century ago. Whereas there were numerous all male institutions in the United States in the 1920s, including especially nearly all of the most elite colleges and universities, that is not the case now. Deep Springs is one of only four men's colleges remaining in the country. (640-641 (Newell).)[13] Diversity in all dimensions is now the norm in the college and university arena. (615-616 (Lehecka).) The educational benefits of coeducation are established and widely accepted. (Id.) And, again, there is no evidence that any of these developments was or could have been anticipated by the grantor.

In light of such evidence, the charge to the Court under the doctrine of common law equitable deviation is to determine what L.L. Nunn would have wanted if he had known of the relevant changes which took place in the more than 90 years since he executed his Deed of Trust.

[13] And while there are still a larger number of women's colleges operating today, that group of institutions continues to shrink. (1035 (B. Jones).)

The Court concludes in this regard that L.L. Nunn would have affirmatively wanted females to participate equally with males as students at Deep Springs.

Evidence indicates that L.L. Nunn wanted his experiment in education at Deep Springs to be successful and to continue to be viable into the indefinite future. (488, 499-500 (Newell).) Given the trajectory of his adult life – where he was on the cutting edge of new technology as conditions rapidly changed -- it is safe to say that he would have understood, accepted, and indeed expected that change would be necessary in order for this desires for Deep Springs to be realized. He was certainly sufficiently astute to know when and how best to respond to new information. Had L. L. Nunn been in attendance during trial—given what Professors Newell and Riggio, along with Dean Lehecka, had to say about the need for coeducation in order to maintain a viable institution of higher learning today, given what President Neidorf, Professor Wilczek, and others had to say about negative impacts of an all-male program in and outside the classroom, and given what Professor Wilczek and Ms. Marcus personify in terms of the capabilities and interests of women in this century – it is probable that he would regard the admission of female students at Deep Springs to be appropriate if not highly desirable.

And finally on this point, the evidence reveals that L.L. Nunn was not afraid of change. He was a pioneer in many things he did, including with respect to establishing a unique educational institution in Inyo County. Stating less graphically a point which Professor Newell made (507-508, 562) the Court agrees that L.L. Nunn would not have wanted his experimental undertaking at Deep Springs to remain the same. Even if the program was not broken, he would have pressed his Trustees to continually work as hard as possible to make the College even better. As he expressed in his undated 1924 letter to the Trustees (Exh. 32), L.L. stated he was never been satisfied with Deep Springs and hoped that the Trustees "never would be." If that meant admitting women in addition to men, the Court believes that L.L. Nunn would not have been reluctant to do so. In this Court's opinion, L.L. Nunn was an idealist, but a pragmatic one.

The Court determines that modification of the L.L. Nunn Trust is also appropriate under the common law as a permitted equitable deviation from what the Respondents have argued was the grantor's original intent, and the Court grants Petitioner's request.

D. THE CY PRÈS DOCTRINE

Petitioner's final claim is that principles of *cy près* also allow for modification of the Trust to allow coeducation at Deep Springs College. The legal theory can be summarized as follows:

> Unless the terms of the trust provide otherwise, where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the property to the designated purpose, the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose. (Rest.3d Trusts, § 67.)

As explained in the comments to section 67, if a settlor provides for a trust to support a school, but mandates conduct at the institution which seriously undermines the usefulness of the entity, the court may modify trust terms to allow a similar but more general charitable purpose to be accomplished. (Rest.3d Trusts, § 67, at com. c.)

The question presented, then, is whether the all-male admissions policy at Deep Springs makes it "unlawful, impossible or impractical" to continue to carry out L.L. Nunn's charitable purpose. Petitioner makes no argument based on illegality or impossibility. The matter thus narrows to impracticality.

"Impracticability" is not the same as "impossibility." In *Dunbar v. Board of Trustees of George W. Clayton College* (1969) 170 Colo. 327, the court held that in view of changing conditions, the charitable intent of testator whose 1899 will provided for establishment of a college for the care and training of poor, white male orphans between the ages of 6 and 10 years could best be served by extending admission to children regardless of color and between ages of 6 and 18 years who had been deprived of parental care and/or support:

> We would be less than candid if we did not state that many jurisdictions still equate the word 'impracticable' with the word 'impossible' when dealing with the cy près doctrine. We think this is an unenlightened view. Id. at 334.

More specifically, a purpose becomes "impracticable" under the *cy près* doctrine when it appears that under the circumstances the application of trust property to that designated aim would fail to accomplish the general charitable intention of the testator. (*Matter of Estate of Vallery* (Colo. Ct. App. 1993) 883 P.2d 24, 28.) The difficulty need be only a reasonable one and not such as to make the donor's plan a physical impossibility. (Id.)

Beyond such general statements, however, the law offers scant guidance for application of the theory. As the California Supreme Court put it, "[t]he *cy près* doctrine has meant many things to many courts and its limits have rarely been defined." (*Estate of Loring* (1946) 29 Cal. 2d 423, 436.)

This Court believes nonetheless that certain standards can be identified and should be applied generally. One, the impairment involved needs to be significant such that it has and will continue to have a material adverse impact on the charitable activity. Minor or transitory problems should not be the target of *cy près* requests. Two, the degree of materiality involved should be quite high. There is no exact formula to be applied, but something relatively close to complete failure of purpose should be involved. And three, an appropriate measure of immediacy is essential. Trustees of a charitable trust should not be required to wait until the undertaking reaches the edge of a precipice before they seek to act under the *cy près* rubric, but at the same time a request for modification under the doctrine which is made too long before a point of failure would improperly ignore the possibility that a less drastic solution might arise.

Pursuant to these guidelines, the Court determines that the request to modify the L.L. Nunn Trust pursuant to the *cy près* doctrine should be denied. The impracticality which

Petitioner pled and then substantiated at trial is not minor or transitory, but it does not rise to the level of close to complete failure.[14] Petitioner has not met his burden of proof on this ground.

V. CONCLUSION

The Court hereby decrees that the L.L. Nunn Trust should be modified by substituting the word "people" for "men" in the phrase "for the education of promising young men" in paragraph 1 of the instrument. Counsel for Petitioner shall prepare the Order.

Dated: Nov. 19, 2014

Dean T. Stout

Dean T. Stout
Judge of the Superior Court

[1414] The Court notes that conventional measures of success or failure may not be best suited to Deep Springs, an experiment that L.L Nunn measured by different criteria. However, even beyond conventional measures it cannot be said that Deep springs is close to failure.

PROOF OF SERVICE BY MAIL

CASE NO. SICVPB-12-53232

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Inyo, over the age of eighteen years and not a party to the within action or proceedings; that my business address is 301 West Line Street, Bishop, California; that on the date hereafter set forth I served the document described hereafter on the parties in said action or proceeding by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, a mail box regularly maintained by the Government of the United States at Bishop, California, addressed as follows:

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DOCUMENT(S) SERVED: Statement of Decision, filed 11-19-2014.

I certify under penalty of perjury that the foregoing is true and correct.
Executed on November 20, 2014, at Bishop, California.

Court Operations Manager,
Lindsay Eropkin