4th Civil No. E058293, Consolidated with 4th Civil No. E062777

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

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DAVID HITZ, Trustee of the L.L. Nunn Trust,

*Petitioner and Respondent,*

vs.

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

*Respondents and Appellants.*

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# APPELLANTS' OPENING BRIEF

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Appeal from the Superior Court for the County of Inyo,
Case No. SICVPB 12-53232
Hon. Dean T. Stout

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APP-008

| COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO | Court of Appeal Case Number: E062777 |
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| APPELLANT/PETITIONER: DAVID HITZ Trust<br>RESPONDENT/REAL PARTY IN INTEREST: KINCH HOEKSTRA, EDWARD KEONJIAN | |

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## I. INTRODUCTION.

L.L. Nunn established Deep Springs College as a two-year college "for the education of promising young men," as stated in the trust Mr. Nunn set up for the benefit of the college. Almost a century later, Mr. Nunn's education experiment not only endures, but by any relevant measure – academic, financial, and success of the graduates – prospers.

Now, a trial court order would eliminate the single-sex foundation of the school by expanding the trust purpose to provide for the education of "promising young *people*." Should the order take effect, it will relegate to the history books one of the country's singularly remarkable educational experiments, eliminating California's only non-sectarian all-male liberal arts college. It would also disappoint the expectations of major donors to Deep Springs College, and possibly jeopardize other charitable trusts whose donors rely on their contributions being used for the purpose that motivated them to donate, which purposes should not be subject to the whim of a current board of trustees.

There is no sound legal basis for a court to change the single-sex nature of Deep Springs College. There is nothing pernicious or inequitable about the maintenance in California of an all-male two-year college. (There are three all-female four-year colleges in the State.) As set forth below, moreover, the present students at Deep Springs College are not empowered to alter the Trust's purpose, even with the concurrence of the

Attorney General, and no consent was sought or received from either the unnamed beneficiaries who may attend the school in the future – some of whom may already be keen to attend the country's sole all-male two-year college – or from the 14 identifiable beneficiaries comprising the college's next crop of students. Indeed, modification by consent should not be permitted for charitable trusts at all. Nor can the trust be altered under California statutory or common-law equitable deviation procedure, which may not be used to change a trust's purpose.

For these reasons, as discussed more fully below, this Court should vacate the trial court's January 5, 2015 order modifying Mr. Nunn's trust.

## II. STATEMENT OF FACTS.

### A. L.L. Nunn, the Trust, and Deep Springs College.

Since its 1917 founding, the approximately 20-member student body of Inyo County's two-year Deep Springs College has been all-male. (3 RT 505:8-10 (Newell) (founded in 1917); 3 RT 626:3-8 (Lehecka) (approximately 20 students); 1 AA 0005:12-13 (all-male).)[1]

[1] Citations to the reporter's transcript are of the form x RT y, where "x" is the volume number and "y" is the serial page number. Citations to the Appellant's Appendix are of the form x AA y, where "x" and "y" have the same explanations. Line or paragraph numbers and other designators (such as the name of the testifying witness for reporter's transcript citations) are added where necessary or helpful.

It was always intended to be so. Founder L.L. Nunn established the school with the purpose that it be "for the education of promising young men." (3 AA 0618.)[2] In full, the November 5, 1923 Deed of Trust (the "Trust"), in what is uniformly referred to as the "Purpose Paragraph" (see 6 RT 1102:21-25 (Newell)), provides:

> The purpose for which the property hereby conveyed and the rents, income, profits, and proceeds thereof, shall be used by said trustees is to provide for and carry on educational work in the State of California similar to and in development of the work already inaugurated by grantor at Deep Springs in Inyo County, California, but in such manner and form and at such place or places within said state as said trustees in good conscience and the exercise of their best judgment may determine, for the education of promising young men, selected by said trustees or as they may prescribe, in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony with the Creator, in the conduct of which educational work democratic self government by the students themselves shall be a feature as is now the case at said Deep Springs, and which work shall be carried on not for profit but solely for the advancement of the purpose hereinabove mentioned.

(03 AA 0618 ) This is the only provision in the Trust setting forth its purpose. (See 03 AA 0615-0630.)

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[2] Deep Springs College shares the distinction of being an all-male liberal arts college with only three other non-religious colleges in the United States. (2 RT 286:7-10 (Neidorf).) The President of Deep Springs, David Neidorf, considers Deep Springs to be a cut above the other three. (04 AA 0918; 2 RT 286:11-14 (Neidorf).) Hence, according to President Neidorf, the trial court's order would do away with the best all-male college in the country.

California has three all-female colleges. (1 RT 105:14-19 (Hitz).)

This purpose is not merely set forth in the Trust, but is relied upon by the school itself as a basis for maintaining its accreditation. A 2010 self-study report prepared by Deep Springs in support of reaffirmation of the college's accreditation stated: "L.L. Nunn, the founder of Deep Springs, directly stated the purpose of the college: to prepare young men for lives of service to humanity." (03 AA 0726.)[3]

The undisputed facts adduced at trial demonstrate that Mr. Nunn, the grantor, was trained as a lawyer and "maintained his wits until his deathbed . . . ." (3 RT 568:7-11 (Newell).)[4] David Hitz ("Petitioner"), Deep Springs board of trustees Chairman and petitioner below, testified that Mr. Nunn was "[a] fine writer" with "legal training." (1 RT 74:23-75:2 (Hitz).) Deep Springs alumnus, former president, and school historian Dr. L. Jackson Newell, an expert called by Petitioner, testified that Mr. Nunn wrote the Trust "knowingly, consciously, and intentionally . . . ." (3 RT 568:14-16 (Newell).) Mr. Nunn "knew precisely what he was doing when he executed the Deed of Trust" and "would have been full[y] aware of the legal implications of doing something by way of a deed of Trust . . . ." (3 RT 564:1-8 (Newell).) As Dr. Newell testified, Mr. Nunn "chose to educate promising young men." (3 RT 564:24-26 (Newell).)

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[3] The report was certified by, among others, respondent David Hitz and President Neidorf. (03 AA 0662.)

[4] Mr. Nunn died in 1925. (3 RT 500:6-8 (Newell).)

Mr. Nunn created an all-male college despite being aware of coeducational colleges "from an early age" and despite having underwritten and supported the education of young women – including his female relatives – at such schools. (3 RT 540:11-26, 497:23-498:7, 542:3-543:1, 543:11-15 (Newell).) Dr. Newell testified that nothing prevented Mr. Nunn from creating Deep Springs College as a coeducational institution had that been his purpose. (3 RT 541:24-542:2 (Newell).)

Single-sex education continues today to retain the imprimatur of our state and federal governments. Brian Jones, former General Counsel to the United States Department of Education tasked by Congress with providing guidance on the legal status of single-sex education, testified that "single-sex schools have long been within the mainstream of higher education" both in the United States and in California. (5 RT 1008:23-1009:18, 1010:19-1011:2 (Jones).)

### B. The Trustees Vote to Alter the Trust Although Deep Springs Is Flourishing.

Notwithstanding the Trust's unambiguous purpose statement and the evidence that Mr. Nunn, the grantor, carefully chose the words of the Trust to express a particular purpose, the Trust's trustees in 2011 voted 7 to 2 to permit Deep Springs to be run as a coeducational school. (1 RT 61:8-13.) The two who voted against the resolution are appellants herein, Edward Keonjian and Kinch Hoekstra (collectively, "Objectors"). (01 AA 0027:16-

19.) They considered it their fiduciary duty to uphold Mr. Nunn's purpose of establishing an institution for the education of young men. (4 RT 888:1-14 (Hoekstra), 5 RT 911:10-912:1 (Hoekstra).)

As Deep Springs stated in a publication issued after the vote, "[n]o particular event precipitated the board's decision to review its all-male policy . . . ." (03 AA 0631.) Neither did any "financial or legal pressures motivate a change in the admissions policy." (*Ibid*.) In fact, the administration never expressed to the trustees that they were concerned about the quality of the education or the quality of the faculty at Deep Springs prior to the time the trustees decided to review the all-male policy. (2 RT 279:3-280:16 (Neidorf); 4 RT 875:15-878:6 (Hoekstra).)

There was good reason the school's administration did not express any urgency to convert Deep Springs College from single-sex to coeducation: at the time of the vote, as well as at the time of trial, Deep Springs College was thriving in all respects, as the trial court found (02 AA 0485 (Deep Springs "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.")):

- Academically and faculty recruitment: According to the Dean of Deep Springs College, Kenneth Cardwell, "the life of the mind flourishes at Deep Springs." (4 RT 824:25-825:25 (Cardwell, by

stipulation); 04 AA 0844.) Deep Springs president David Neidorf acknowledged that Deep Springs College has "good faculty right now[.]" (1 RT 199:10-11 (Neidorf).) Mr. Neidorf wrote in the school's 2009 Annual Report that as a result of a fundraising campaign then going on, the school was able "to remain competitive in the recruitment of staff and faculty . . . ." (1 RT 211:10-19 (Neidorf); 03 AA 0648.) The school's 2010 accreditation report states: "The Deep Springs academic program is rated among the best in the country by most college guides." (1 RT 218:26-219:10 (Neidorf); 03 AA 0665.) The report continues that "'Deep Springs' success in filling administrative and faculty positions has sustained the smooth, efficient operation of the college.'" (1 RT 220:7-22 (Neidorf); 03 AA 0748.)

- Student recruitment: Deep Springs College is so successful at recruiting students that it is able to accept fewer than ten percent of its applicants. (1 RT 216:10-13 (Neidorf).) Zachary Robinson, co-chairman of the Deep Springs College Applications Committee as of Spring 2014, believed that the pool of applicants in 2014 was "unusually strong" in terms of quality. (2 RT 372:7-16, 420:23-421:9 (Robinson); 04 AA 0849.) The pool of applicants was also larger than the previous year's, 199 compared with 140-150. (2 RT 421:23-25; 04 AA 0849.)

- Student success: Deep Springs College alumni generally continue their education at elite schools. (1 RT 219:20-220:4 (Neidorf); 03 AA 0666-0667.) Recent Deep Springs College graduate Cory Myers, who at the time of trial was attending Yale, testified that ten or eleven Deep Springs College alumni were then also attending Yale. (1 RT 142:21-23 (Myers).) As of 2003, the last year for which evidence was presented at trial, nearly 60 percent of Deep Springs College graduates held doctoral degrees. (1 RT 217:1-6 (Neidorf).)
- Financially: As of April 2011, according to Deep Springs College's Development Director, David Welle, Deep Springs College's endowment had "'fully recovered the ground it lost as a result of the 2008 market crash.'" (2 RT 347:16-21 (Welle); 04 AA 0809.) In May 2011, Deep Springs College's endowment reached $17 million, "the strongest ever." (2 RT 343:9-17 (Welle).) In December 2011, the Deep Springs College endowment was "healthy." (2 RT 343:23-344:12 (Welle); 04 AA 0802.) By December 31, 2013, the Deep Springs College endowment reached a record level of over $20 million, and was able to provide 53% of the school's operating funds in 2013, and a higher percentage in the following academic year. (2 RT 351:16-352:7 (Welle); 04 AA 0878.) The school has few liabilities, and only has one debt, which it incurred "'carefully and in

full agreement with its partner in the LLC in order to avoid jeopardizing the interests of either organization.'" (1 RT 221:10-21 (Neidorf); 03 AA 0763.)

- Generally: Dr. Newell testified that, in his opinion, Deep Springs College has in the past and continues to accomplish Mr. Nunn's purpose. (3 RT 555:5-556:10 (Newell).) Mr. Welle wrote in a 2008 fundraising letter and testified it was true at the time of trial that the "current students are thriving," the "physical plant of the college is robust and conducive to our educational vision," and "Deep Springs is stable . . . ." (2 RT 340:16-341:14 (Welle); 04 AA 0794.) Mr. Myers testified and wrote a position paper in 2011 that, at that time, the college was in "excellent condition." (1 138:14-20 (Myers); 03 AA 0787.)

### C. The Trustees Sue to Alter The Trust.

On February 6, 2012, Petitioner filed this action, asking the court below to either (1) construe the Trust such that the word "men" as used in the Trust includes women, or (2) modify the Trust to permit use of the Trust estate for the education of both women and men at Deep Springs. (01 AA 0011:14-22.) Petitioner sought modification under theories of statutory and common law equitable deviation. (01 AA 0009-0011 (citing Probate Code section 15409, hereinafter "Section 15409," and *Adams v. Cook* (1940) 15 Cal.2d 352).)

On May 9, 2012, Objectors responded that the Trust was then serving the precise purpose intended by its grantor, and that there was neither a need nor a legal basis to modify the Trust. (01 AA 0027-0288.) Objectors considered it their fiduciary duty to appear and oppose the petition. (5 RT 924:12-925:7 (Hoekstra).)

On August 2, 2012, the trial court bifurcated the issues of construction and of modification, and ordered the question of construction tried to the bench without an evidentiary hearing. (02 AA 0289-0293.) Clearly, bifurcation was intended to break the trial into one part focusing on what the Trust means and what Mr. Nunn's purpose was, and a second part focusing on whether the Trust must be modified to accomplish the Trust's purpose.

### D. The Trial Court Construes the Trust to Require Deep Springs College to Remain Single-Sex.

On February 13, 2013, the court denied the first form of relief sought by Petitioner, quoting the "Purpose Paragraph" in full in its written order, and ruling that "the Trust appears to give the Trustees broad discretion over how and where to administer the educational component, but limited to the purpose of 'the education of promising young men.'" (02 AA 0296:22-0297:9, 02 AA 0297:27-0298:2.) The court rejected Petitioner's proffer of extrinsic evidence to construe the trust, holding "it is improper to look at

extrinsic evidence to interpret the trust in the absence of ambiguity in the terms of the instrument." (02 AA 0298:23-27.)[5]

Petitioner appealed the February 13, 2013 order. (02 AA 0319.) That appeal is currently pending.

On March 22, 2013, Petitioner supplemented his petition by seeking to modify the Trust with the unanimous consent of the beneficiaries (pursuant to Probate Code section 15403, hereinafter "Section 15403") and under the doctrine of *cy près*. (02 AA 0322-0323.) Objectors responded to the supplemental petition. (02 AA 0327-0330.)

On August 6, 2013, Objectors moved – unsuccessfully – for judgment on the pleadings or *in limine*, seeking to dismiss or exclude evidence supporting all modification theories other than *cy près*, i.e. to exclude evidence supporting consent and statutory and common law equitable deviation. (02 AA 0331-0461; 02 AA 0462-477.)

### E. The Trial on Modification and the Modification Order.

The question of modification was tried to the court on seven days between April 28 and May 27, 2014. (02 AA 0479.) During the trial, the

[5] At the same time, the trial court also granted a preliminary injunction against Deep Springs and joined Deep Springs College Corporation as a party, both on the motion of Objectors. The majority trustees had voted to sell the Trust's property to the Corporation in an effort to sidestep the judicial proceedings and trust restrictions. The joinder and preliminary injunction are not at issue in this appeal.

court admitted into evidence a consent to modification of the Trust signed by one representative of the then-constituted Deep Springs student body, and a consent to modification signed by the Attorney General. (03 AA 0788, 03 AA 0790.)

Also admitted into evidence was a May 7, 2014 announcement by Deep Springs College of the 14 students named as the "incoming Deep Springs Class of 2014."[6] (04 AA 0921.)[7]

On November 19, 2014, the trial court issued its Statement of Decision on the question of modification, holding that the Trust "is ambiguous and . . . 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." (02 AA 0495.) The court held that the operation of a men's college was a material purpose, but that the Trust had other purposes. (02 AA 0513.)

The November 19, 2014 Statement of Decision permitted modification on three of four proffered theories. The court held (i) that all beneficiaries consented to the modification (and that other purposes outweighed the purpose of operating a single-sex school) (02 AA 0508,

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[6] Deep Springs numbers classes by the starting year, not by the anticipated finishing year.

[7] By agreement of the parties and the order of the court, the 14 names were redacted from the exhibit. (6 RT 1090:11-24.)

0512, 0513, 0518; (ii) that statutory equitable deviation supported modification; and (iii) that common law equitable deviation supported modification. (02 AA 0523, 0526.) The court denied the request for modification under *cy près*, holding that "it cannot be said that Deep [S]prings is close to failure." (02 AA 0528, fn. 14.)

On January 5, 2015, the Court entered an order modifying the November 5, 1923 Deed of Trust to "substitute the word 'people' for 'men' in the phrase 'for the education of promising young men.'" (02 AA 0534.)

On January 22, 2015, Objectors appealed from the January 5, 2015 order. (02 AA 0536.)

## III. STATEMENT OF APPEALABILITY.

The trial court's January 5, 2015 order is appealable as a final order modifying a trust. An order modifying a trust is one made under Probate Code section 17200, subdivision (b)(13) (proceedings for "[a]pproving or directing the modification or termination of the trust"). A final order under section 17200 is appealable. (Prob. Code, § 1304, subd. (a); *Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 522 ("In the case of trusts, the Probate Code permits an appeal to be taken from any final order under Probate Code section 17200 et seq. . . . .").)

## IV. STANDARD OF REVIEW.

Issues in this appeal involving the application of undisputed facts to the law are reviewed *de novo*:

> Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied. If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently.

(*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

"The issue of whether all beneficiaries consented to the modification within the meaning of section 15403, subdivision (a), is a question of statutory interpretation and is a pure question of law." (*Boys and Girls Club of Petaluma v. Walsh* (2008) 169 Cal.App.4th 1049, 1057 ("*Walsh*"), citing *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

Objectors contend the trial court committed reversible error by (i) modifying the Trust under Section 15403, which may not be applied to charitable trusts or trusts with indefinite beneficiaries, and which may not be applied absent the consent of all beneficiaries; (ii) applying common law and statutory equitable deviation to modify the purpose of the Trust; and (iii) applying common law equitable deviation where that doctrine no longer applies. The Trust would not have been modified absent these

errors. Therefore, the trial court's ruling must be set aside. (See *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

## V. THE TRIAL COURT ERRED BECAUSE IT MODIFIED THE TRUST UNDER SECTION 15403 WITHOUT CONSENT OF ALL BENEFICIARIES.

The trial court erred by employing Section 15403 to modify the Trust without the consent of all beneficiaries. Section 15403 provides, in relevant part: "if all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust upon petition to the court." (Prob. Code, § 15403, subd. (a).) Application of Section 15403 here was error both because Section 15403 may not be applied to charitable trusts and because all beneficiaries did not consent.

### A. Section 15403 Should Not Apply to Charitable Trusts with Unascertainable Beneficiaries.

The legislative history of Section 15403 and the scholarly work on which it is based and which followed it demonstrate that modification by consent of the beneficiaries was never intended to apply to a charitable trust with unascertainable beneficiaries.

Although the Trust Law (Division 9 of the Probate Code, sections 15000-19403) generally applies to both private and charitable trusts, the California Law Revision Commission recognized that courts may "find a statute inapplicable to a charitable trust in appropriate circumstances."

(Selected 1986 Trust and Probate Legislation, 18 Cal. Law Revision Com. Rep. (1986) 1201, 1306, fn. 412; Prob. Code, § 15004.) The difficulty – indeed incoherence – of obtaining meaningful consent of all beneficiaries of this charitable trust exemplifies why this Court should not apply Section 15403 in this matter.

Before the 1986 enactment of the Trust Law, the California Law Revision Commission investigated the issue of trust modification and termination by consent of all beneficiaries. The section of the Commission's report on modification and termination of trusts does not mention charitable trusts. (Recommendation Proposing the Trust Law, 18 Cal. Law Revision Com. Rep. (1986) 501, 565-575.) Nor does the report relied on by the Commission discuss the modification of charitable trusts by consent of the beneficiaries. (Bird, *Trust Termination: Unborn, Living, and Dead Hands – Too Many Fingers in the Trust Pie* (1985) 36 Hastings L.J. 563 (cited by Recommendation Proposing the Trust Law, 18 Cal. Law Revision Com. Rep. (1986) p. 565, fn. 241).)

The Restatement Third of Trusts (2003) section 65, which differs from Section 15403 only in that it does not require a petition to the court, notes in its comments that modification by consent does not apply to charitable trusts that designate a purpose:

> *Material purpose and charitable trusts.* Where a specific charitable purpose is designated in the terms of a trust, that designation reflects a material purpose of the settlor under the

> rule of this Section, so that the specific charitable purpose cannot be changed or exchanged for a trust or other benefits serving a different charitable purpose. (Compare, however, § 67 on the cy pres doctrine.)

(Rest.3d Trusts § 65, com. g (underlining added).)

Thus, where, as here, the specific purpose of a charitable trust is designated in a trust document, it cannot be changed by consent. It can only be changed, the Restatement authors state, through the *cy près* doctrine. Here, the specific charitable purpose is stated in the Purpose Paragraph (03 AA 0618), and while other paragraphs refer to the purpose stated in the Purpose Paragraph, no other charitable purpose is stated in the Trust. This charitable purpose can only be changed if the *cy près* standard is met. Therefore, the trial court should not have used Section 15403 to change the specific charitable purpose of the Deed of Trust.

The same conclusion is reached by analysis of the Uniform Trust Code ("UTC"), which was drafted in coordination with the Restatement Third of Trusts. (English, *Is there a Uniform Trust Code in Your Future* (2000) 14 Prob. & Prop. 25, 25.) Statutes from various states influenced the preparation of the UTC, "however, the California Probate Code, which has separate provisions for court alterations due to changed circumstances and for termination and modification under the material purpose doctrine was most influential." (Walker, *Get Your Dead Hands Off Me: Beneficiaries' Right to Terminate or Modify a Trust under the Uniform*

*Trust Code* (2002) 67 Mo. L. Rev. 443, 457 (footnotes omitted).) The UTC specifically limits modification by consent of all beneficiaries to noncharitable trusts. (Uniform Trust Code, § 411 ("A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries . . . .").) Even though "[t]he overall objective" of the UTC sections relating to modification and termination of trusts "is to enhance flexibility consistent with the principle that preserving the settlor's intent is paramount[,]" the UTC provided for only one means to modify a charitable trust: "[c]haritable trusts may be modified or terminated under *cy pres* to better achieve the settlor's charitable purposes." (Uniform Trust Code, Prefatory Note, p. 6.)

This is a sensible and equitable restriction. There is a clear meaning to unanimous consent of the beneficiaries in the case of noncharitable trusts. Unanimity in the case of the beneficiaries of a charitable trust, by contrast, is inherently indeterminable and ultimately illusory. In this case, there is no need to chase such an illusion, for the Court can readily identify beneficiaries of the Trust who did not consent to the Petitioner's proposed modification: the unnamed beneficiaries and the Deep Springs Class of 2014.

### B. The Unnamed Beneficiaries Did Not Consent.

The unnamed beneficiaries of the Trust did not consent to modification. Logically, Section 15403 cannot be applied to a trust with indefinite, unnamed beneficiaries, such as the Trust here.

Indeed, this case contrasts with those involving a definite named set of beneficiaries, who can consent to the modification of a trust. (See, e.g., *Walsh*, *supra*, 169 Cal.App.4th at 1055-1056 (for purposes of Section 15403, the five beneficiaries listed in the trust constituted "all beneficiaries").)[8]

It is no answer that the Attorney General may consent for the unnamed beneficiaries because he or she has supervisory authority over charitable trusts. "Beneficiaries of a charitable trust, unlike beneficiaries of a private trust, are ordinarily indefinite and therefore unable to enforce the trust in their own behalf. [Citations.] Since there is usually no one willing to assume the burdens of a legal action, or who could properly represent the interests of the trust or the public, the Attorney General has been empowered to oversee charities as the representative of the public, a

[8] Although *Walsh* involved a charitable trust, there was no discussion in that case as to whether Section 15403 should be applied to a charitable trust. "[A] case is not authority for a proposition it does not address." (*Borikas v. Alameda Unified Sch. Dist.* (2013) 214 Cal.App.4th 135, 164.) In any event, in *Walsh*, the *res* was to be distributed to a fixed number of beneficiary charities.

practice having its origin in the early common law." (*Holt v. College of Osteopathic Physicians and Surgeons* (1964) 61 Cal.2d 750, 754.) But no court has held that the Attorney General has the power to stand in the shoes of the unnamed beneficiaries of a charitable trust by consenting to modifying the trust on their behalf. Nor has the Attorney General here claimed that her consent constitutes the consent of the unnamed beneficiaries. Nor would such a claim be plausible, not only because many of those would-be beneficiaries will be deprived of the benefits of this Trust by this modification, but also because the Attorney General has no qualification to represent future beneficiaries from other states and countries.

To the contrary, if the Attorney General determined that the Trust needed to be modified, she should have sought to do so through the doctrine of *cy près*. The Attorney General may, and often does, obtain modification, where warranted by the law, through the application of *cy près*. (*In re Veterans' Industries, Inc.* (1970) 8 Cal.App.3d 902, 919-920 (holding that "in the usual case," the Attorney General participates in planning for *cy près* and "'renders comparable assistance in developing suitable reorganization plans and in invoking the doctrine of cy pres'") (quoting Howland, *The History of the Supervision of Charitable Trusts and Corporations in California* (1966) 13 UCLA L. Rev. 1029, 1032).) Here,

of course, the trial court held that *cy près* was not warranted. (02 AA 0527-528.)[9]

### C. The Class of Students Starting in 2014 Did Not Consent.

The other class of beneficiaries that did not consent to modification was the 14 or so students who, as of the time of trial, had already accepted an offer of admission by Deep Springs College for the class starting in 2014. (6 RT 1085:8-1087:15 (Neidorf).)[10]

At the time of trial, a class of 14 students had been offered admission to Deep Springs College, and President Neidorf expected that "a majority" of them would become students. (6 RT 1085:8-1087:15 (Neidorf).) Although these students were plainly beneficiaries of the Trust, they did not consent to its modification. Thus, it cannot be said that "all beneficiaries" consented to modify the Trust. (Prob. Code, § 15403, subd. (a).)

It is no answer that these students were not beneficiaries because they were not presently enjoying the benefits of the Trust. In *Walsh*, the five beneficiaries named in the trust therein were not presently receiving

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[9] Although the Attorney General consented to modification in *Walsh*, his "consent" was immaterial. There, the Attorney General consented after the trial court granted the Section 15403 petition, and the Court of Appeal "did not rely on [the consent], because it was not before the probate court." (*Walsh, supra,* 169 Cal.App.4th at p. 1059, fn. 7.)

[10] President Neidorf testified that some of the 14 students had accepted an offer of admission, some had not. (6 RT 1085:8-1087:15 (Neidorf).)

benefits under the trust – that was the point of the lawsuit – and yet the court held that their consent was necessary to invoke Section 15403 because they hold "future interests" or "contingent interests." (*Walsh*, *supra*, 169 Cal.App.4th at p. 1058.) The 14 or so students starting in 2014 were just as much beneficiaries of the Trust here as the five beneficiaries were of the trust in *Walsh*. Their consent was necessary.

The reason for this rule, at least in this case, is clear: a student may work hard to gain admission to Deep Springs College, a thriving, successful institution, only to have the fundamental nature of the school change before he starts attending because the students then in attendance (including those who would have completed their two-year education before the school became coeducational) wanted to change the purpose of the College. The law should not countenance such a "bait and switch."

The trial court found that these students' interests should be disregarded because they "ha[ve] 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." (02 AA 0511.) There is no requirement in Section 15403 that a future beneficiary have experience with or be informed about a trust estate for that beneficiary's consent to be necessary. Moreover, all evidence was contrary to the court's findings. The Deep Springs application process consists of two stages. In the first, the students are evaluated based on applications, test scores, essays, and the like. (2 RT

365:1-8 (Robinson).) The students who pass the first stage then visit the campus "where they live in the dorms for a few days and experience student life by visiting classes, potentially an S.B. [student self-governance body] meeting while they're there, if they're there during a meeting, and having the opportunity to participate in labor." (2 RT 367:24-368:4 (Robinson).) While the 14 students at issue here may not have actually participated in self-governance, they certainly experienced a few days on the Deep Springs campus, knew that a single-sex student environment was and always had been an aspect of Deep Springs life, and may have observed self-governance in action.

Section 15403 only requires consent, and experience with self-governance is not necessary for a beneficiary to decide whether the single-sex college one accepted admission to should remain single-sex when one attends the school. The 14 or so students starting in 2014 met the sole qualification of Section 15403 – they were beneficiaries – and they likely met the extra conditions articulated by the trial court. Their consent should have been obtained. It was not, and without such consent, the court had no authority to modify the Trust under Section 15403.

## VI. THE TRIAL COURT ERRED BECAUSE IT CHANGED THE PURPOSE OF THE TRUST THROUGH STATUTORY AND COMMON LAW EQUITABLE DEVIATION.

The trial court also erred when it employed both statutory and common law equitable deviation to change the purpose of the Trust.

The Court held in February 2013 that the purpose of the Trust was "to continue a men's college." (02 AA 0300:5-8.) As Dr. Newell testified, Deep Springs continues to serve the trustor's purpose. (3 RT 555:5-556:10 (Newell).) As further explained by Dr. Newell, Mr. Nunn "knowingly, consciously, and intentionally" drafted the Trust and "knew precisely what he was doing when he executed the Deed of Trust": Mr. Nunn "chose to educate promising young men." (3 RT 564:1-8, 564:24-26, 568:14-16 (Newell).) As Brian Jones testified, this remains a legitimate goal in higher education today, nearly one century after Mr. Nunn started Deep Springs. (5 RT 1010:19-1011:2.)

Nevertheless, the trial court in November 2014 ordered the Trust's purpose changed from what Mr. Nunn "knowingly, consciously, and intentionally" intended. This it cannot do under equitable deviation.

### A. Equitable Deviation May Only Be Used to Carry Out the Purpose of a Trust, Not to Change the Purpose.

Under either statutory or common law equitable deviation, a court may only modify a trust to carry out its purpose; equitable deviation is not available to modify a trust's purpose.

Statutory equitable deviation is codified as follows:

> 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.

(Prob. Code, § 15409, subd. (a).)

As Section 15409 makes clear, a trust has one or more purposes, and it separately has "administrative or dispositive provisions," which are what may be changed to accomplish the trust's purpose or purposes. (See *Stewart v. Board of Medical Quality Assurance* (1978) 80 Cal.App.3d 172, 179 (noting "the elementary rule of statutory construction which dictates that effect be given, if possible to every word, clause and sentence").) Nothing in Section 15409 suggests that the statute may be used to change the purpose itself. Indeed,

> the court may modify or permit modification of the trust terms, to prevent frustration of the trust purposes. In doing so, however, the court is merely exercising its general powers

> over trust administration. Moreover, the court often exercises these same powers as to charitable trusts. In the case of a private trust, however, the court ordinarily does not substitute new beneficiaries for those designated in the terms of the trust; nor does it ordinarily enlarge the interest of one beneficiary at the expense of another. Similarly, in exercising these powers in the case of a charitable trust, the court ordinarily does not substitute one charitable purpose for another.

(6 Scott & Ascher, Trusts (5th ed. 2007) § 39.5, at pp. 2701 [emphasis added].)

Under the common law, "'California courts have long had the equity power to modify the terms of a trust where such modification is necessary to preserve the trust or *serve the original intentions of the trustor*. . . .'" (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 80 (quoting *Stewart v. Towse* (1988) 203 Cal.App.3d 425, 428, italics added by *Ike*).) Courts have modified trusts' dispositive or administrative provisions under common law equitable deviation only where there exist "peculiar circumstances" or in "exceptional situations in which modification was decreed in order to carry out, rather than to defeat, the primary purpose of the trustor as expressed in the trust instrument." (*Moxley v. Title Ins. & Trust Co.* (1946) 27 Cal.2d 457, 468.)

This restriction on deviation from the purpose of a trust follows from the general rule that the job of a trustee is to implement the trust, and not substitute what the trustee might deem to be a wiser choice:

> The plan of the trustor must be followed. It may not be departed from in particulars wherein it is specific, merely because it may be considered in those particulars to be unwise. The trustee cannot substitute his own plan because he thinks it is a better one, and if he does the court should not approve his action to the prejudice of any beneficiary, even if it has operated to the general advantage of the estate.

(*Estate of Bothwell* (1944) 65 Cal.App.2d 598, 604.)

Both the common law and statutory versions of equitable deviation, therefore, are aimed at accomplishing the purpose or purposes of the trustor. *Ike* looks to section 167 of the Restatement Second of Trusts for a description of common law equitable deviation. (*Ike, supra*, 61 Cal.App.4th at p. 80 & fn. 10 (quoting subsection (1) of section 167).) So, too, did the 1989 California Law Revision Commission when it recommended, and the Legislature adopted, the new Probate Code that included Section 15409. (Recommendation Proposing New Probate Code, 20 Cal. Law Revision Com. Rep. (1989) 1001, 1880 ("Subdivision (a) is drawn from Sections 167 and 336 of the Restatement (Second) of Trusts (1957)."); see Recommendation Proposing the Trust Law, 18 Cal. Law Revision Com. Rep. (1986) 501, 642 (same, from 1985 report leading to 1986 adoption of same provision).) Section 167 of the Restatement provides:

> The court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust; and in such case, if necessary to carry out the

> purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust.

(Rest.2d Trusts, § 167 (1).)

Both the text of section 167 and Comment a make clear that the deviations contemplated are those necessary to carry out the purposes of the trust. The three sets of illustrations in Comment a are introduced as follows:

- "In order to carry out the purposes of the trust, the court may permit or direct the trustee not to perform an act directed by the terms of the trust."
- "In order to carry out the purposes of the trust, the court may permit or direct the trustee to do acts not authorized by the terms of the trust."
- "In order to carry out the purposes of the trust, the court may permit or direct the trustee to do acts which are forbidden by the terms of the trust."

(Rest.2d Trusts, § 167, com. a.) Clearly, the deviations permitted under this section of the Restatement are all "to carry out the purposes of the trust . . . ."

As our Supreme Court further explained:

> Undoubtedly, unusual circumstances may arise which justify deviation from the trust. However, 'the court should not permit a deviation simply because the beneficiaries request it

> where the main purpose of the trust is not threatened and no emergency exists or is threatened,' [citation], for the power to modify a trust must be exercised 'sparingly and only in the clearest of cases' [citation]. . . . [¶] . . . However, in order for a change in circumstances to justify deviation, there must be a showing that the change was unforeseen by the trustor and that compliance with the trust would defeat its main purposes.

(*Crocker-Citizens Nat'l Bank v. Younger* (1971) 4 Cal.3d 202, 211-212 (citing, among other authorities, Rest.2d Trusts, § 167, com. b).) As the same Court earlier held: "when it is made to appear in a court of equity, as was shown in the present case, that the benefits and advantages which the trustors desired to confer upon the beneficiaries would not accrue to them by 'a slavish adherence to the terms of the trust', the court may modify the terms of the trust to accomplish the real intent and purpose of the trustors." (*Adams, supra*, 15 Cal.2d at p. 361 (emphasis added).)

Thus, equitable deviation, whether statutory or common law, may not be employed to alter the purpose of a trust, but only to advance that purpose.

### B. The Trial Court Impermissibly Changed the Trust's Purpose Through Equitable Deviation.

The trial court here, however, impermissibly employed equitable deviation to change the purpose of the Trust. This was error both because a trust's purpose may not be changed in this way, and because the conditions precedent for equitable deviation were not satisfied.

The trial court found in February 2013 that the purpose of the Trust was to continue a men's college. (02 AA 0300:5-8.) This expression of the purpose is clearly supported by the Purpose Paragraph, and the trial court was not free to revisit the purpose because the February 2013 order was on appeal during the pendency of the trial leading to the order on appeal here. (*Sacks v. Superior Court* (1948) 31 Cal.2d 537, 540 ("A duly perfected appeal divests the trial court of further jurisdiction in the cause and of the power to act other than with respect to specified excepted or collateral matters.").) Indeed, as mentioned above, the reason the case was bifurcated was to establish the purpose during the first phase – which the trial court did – and to establish whether modification was necessary to accomplish that purpose during the second phase.

Having established the Trust's purpose, the trial court was not free to change that purpose absent the exceptional circumstances that call for the application of *cy près*. As Chief Justice Marshall found long ago, in rejecting laws passed by New Hampshire to alter the charter of Dartmouth College, founders of charitable institutions rely on the continuity of the restrictions placed on their donations, and would be loath to start such institutions were their trusts to be at risk of modification solely because future trustees or courts had a different vision:

> These eleemosynary institutions do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete

> acquisitions to literature. They are donations to education; donations, which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind, to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution . . . .

(*Trustees of Dartmouth College v. Woodward* (1819) 17 U.S. 518, 647.) Donors, too, rely on the continuity of purpose of the institutions to which they contribute. (*Holt, supra*, 61 Cal.2d at p. 754 ("In addition to the general public interest, however, there is the interest of donors who have directed that their contributions be used for certain charitable purposes. Although the public in general may benefit from any number of charitable purposes, charitable contributions must be used only for the purposes for which they were received in trust.").)

These concerns are not merely theoretical: evidence at trial showed Deep Springs College would lose the support of at least three current major donors of it becomes coeducational. The Hugh and Hazel Darling Foundation – one of the top ten non-alumni donors to Deep Springs College in the past 12 years – donated $796,000 in large part because Deep Springs College is single-sex; its trustee, Richard L. Stack, stated that he would "sincerely doubt . . . making gifts in the future" should the school become coeducational. (6 RT 1076:15-25 (Neidorf); 5 RT 1000:4-9, 1003:9-15

(Stack).) Two other donors, who collectively gave approximately $2.8 million to Deep Springs, have expressed opposition to coeducation at Deep Springs College. (6 RT 1060:3-9 (Neidorf).)[11]

The trial court's February 2013 finding that the Trust's purpose is to continue a men's college is sound and supported by the Deed of Trust itself, which is where a court must look for the grantor's statement of purpose. (*Estate of Simoncini* (1991) 229 Cal.App.3d 881, 889 (testator's intention "is that which is *actually expressed* in the language of the will") (emphasis in original).)[12] The construction of the Trust is discussed in detail in Objectors' Respondent's Brief in the concurrently-pending appeal from the February 2013 ruling. (See Respondent's Brief, Case No. E058293, filed Nov. 1, 2013, at pp. 25-31.) As discussed at trial, Mr. Nunn's purpose is the "conjunction of those things" stated in the Purpose Paragraph – the education of promising young men, in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind, and featuring democratic self-government. (03 AA 0618; 5 RT 944:9-947:13

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[11] Foundation support for women's colleges is five to fifteen times greater than support for men's colleges. (2 RT 315:18-316:19 (Welle).) Diminution of the protection of the purpose of the Trust here will affect Deep Springs' funding, but it may also have a ripple effect that will turn away donors to women's colleges because they can no longer count on their donations being used for the single-sex education they intended to support.

[12] The same general rules of interpretation apply to "a will, trust, deed and any other instrument." (*Burkett v. Capovilla* (2003) 112 Cal.App.4th 1444, 1449.)

(Hoekstra).) Other features of education at Deep Springs that may have been important to Mr. Nunn and were part of the program when the Trust was formed, such as the school's labor program, its isolation, and prohibitions on smoking and swearing, did not "make the cut" for the Purpose Paragraph in the Trust. (5 RT 948:10-949:5 (Hoekstra).) Objectors submit that, consistent with the rules of trust construction and the text of the Purpose Paragraph, those that did make the cut – including the education of promising young men – are indispensable, and no court should be free to change them through equitable deviation.

The trial court here thus erred by ordering a change to the purpose of the Trust, to continue a men's college. The court did not order a change to an administrative or dispositive provision of the Trust to carry out the purpose. For example, paragraph 2 of the Trust, and its subparagraphs, set forth the powers vested in the trustees "[i]n order to enable them to accomplish the purpose of this trust . . . ." (03 AA 0618-0620.) The trial court could have, on a proper showing, modified any of those subparagraphs if necessary to carry out the purpose articulated in the Purpose Paragraph. Paragraph 3 of the Trust sets forth the means of appointing successor trustees. (03 AA 0620-0621.) That provision, too, could have been altered on a proper showing if necessary to carry out the Trust's purpose. But the Purpose Paragraph itself, including its provision that Deep Springs College is established "for the education of promising

young men," sets forth the purpose of the Trust, not its administrative or dispositive provisions, and is thus not open for modification under equitable deviation.

Indeed, should the trial court's modification take effect, Deep Springs' ability to accomplish Mr. Nunn's purpose will be greatly diminished. As discussed above, the school is small; its total student body numbers in the twenties, and there is no evidence that the trustees intend to expand it. Assuming half of an incoming class to a coeducational Deep Springs consists of women, Deep Springs will only be able to educate ten or so men at a time. If Mr. Nunn's purpose was, as stated in the Purpose Paragraph and found by the Court in February 2013, to educate young men, it will only be half as effective should it be made coeducational.

This is not to say that a trial court has no authority to change the purpose of a trust. Two such sources of authority to change a trust's purpose were invoked by Petitioner: with consent of all beneficiaries under Section 15403, and through the doctrine of *cy près*. As discussed above, the court should have denied modification by consent because Section 15403 may not be applied to charitable trusts and because the beneficiaries did not all consent. A trust may be modified under the doctrine of *cy près* where (1) it is illegal, impossible, or impracticable to give literal effect to the specific charitable purpose of the trust; and (2) the illegality, impossibility, or impracticability is permanent. (*Arman v. Bank of*

*America, N.T. & S.A.* (1999) 74 Cal.App.4th 697, 703, fn. 11; *Estate of Mabury* (1976) 54 Cal.App.3d 969, 985.) The court found the *cy près* conditions were not satisfied. (02 AA 0527-0528.) Indeed, that decision was compelled by the successful record of the school discussed in the Statement of Facts.

As noted above, Deep Springs continues to serve the trustor's purpose, which is "to continue a men's college." (3 RT 555:5-556:10 (Newell); 02 AA 0300:5-8; see 02 AA 0513 (continuing a men's college is a material purpose of the Trust).) The Trust may be modified under equitable deviation only if "the continuation of the trust under its terms would defeat or substantially impair the accomplishment" of that purpose and the change is "necessary to carry out the purposes of the trust . . . ." (Prob. Code, § 15409, subd. (a).) Not only have those conditions not been met – the Trust's purpose is currently being accomplished, and therefore coeducation is not necessary to carry out that purpose – but under the ruling on appeal here, the purpose of the Trust is no longer to continue a men's college. The trial court both applied equitable deviation where its conditions precedent were not satisfied, and it ordered the purpose of the Trust changed through equitable deviation. For those reasons, it erred.

### C. The Court Erred by Applying Common Law Equitable Deviation.

The trial court further erred by applying common law equitable deviation because that doctrine has been cabined in by Section 15409, and is no longer available to modify a trust where, as here, the petitioner contends that the modification is necessary because of changed circumstances. (See 01 AA 0010, ¶ 20 (citing "[c]ircumstances not known to, and not anticipated by, L.L. Nunn" as the reason to apply common law equitable deviation).) This is significant because, while the conditions precedent to the application of statutory equitable deviation – "the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purpose of the trust" and the change is "necessary to carry out the purposes of the trust" (Prob. Code, § 15409, subd. (a)) – are set forth in the Probate Code, common law equitable deviation may be more flexible. The Legislature specifically intended to require those conditions precedent to be applied in the case of a modification sought for changed circumstances, and a probate court should not be permitted to sidestep them by application of the common law.

Where the Probate Code has displaced the common law, as it has with equitable deviation based on changed circumstances, common law standards no longer apply. (Prob. Code, § 15002 ("Except to the extent that the common law rules governing trusts are modified by statute, the

common law as to trusts is the law of this state."), 15409 (permitting change "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").) Therefore, because common law equitable deviation based on changed circumstances has been codified and displaced by Section 15409, when applying equitable deviation based on changed circumstances, a court must apply the statutory standard.

The cases cited by the trial court in support of its application of common law equitable deviation are inapposite because they either pre-date the recodification of the Probate Code in 1986 or modify trusts in ways unaddressed by the modification chapter of the Trust Law. (See Prob. Code, §§ 15400-15414.)

Three of the four common law equitable deviation cases relied upon by the trial court – *Adams, supra*, 154 Cal.2d 352, *Stanton v. Wells Fargo Bank & Union Trust Co.* (1957) 150 Cal.App.2d 763 and *Estate of Traung* (1962) 207 Cal.App.2d 818 – involved changed circumstances but they all predated the Trust Law. In *Adams*, our Supreme Court used the common law modification power "to change the method of administering a trust estate when it is shown that such a change is necessary to prevent loss or destruction of the trust property . . . ." (*Adams*, *supra*, 15 Cal.2d at p. 358.) *Stanton* concerned modification of a testamentary trust's administrative

provisions, which limited the ways in which the trustees could invest the corpus, because there had been "a change in economic conditions not anticipated by the settlor since the trust was executed, and that, should the restrictive investment provision be followed, such changed circumstances may substantially impair the purposes of the trust." (*Stanton*, *supra*, 150 Cal.App.2d at p. 766 (reversing order granting modification because there was no emergency).) *Traung*, *supra*, 207 Cal.App.2d at p. 835, modified a trust based on the changed and unanticipated circumstance of the beneficiary becoming incompetent.

*Stewart v. Towse* (1988) 203 Cal.App.3d 425 explains that, since the passage of the Trust Law, modification based on changed circumstances must be pursuant to Section 15409. In *Stewart*, the petition asked the court to "modify certain terms of the trust, or to authorize [the petitioner] to make modifications otherwise forbidden by the trust instrument, including a change in the designated successor trustee." (*Id.* at p. 429.) *Stewart* addressed whether the then-recent statutory codification to the Trust Law should apply to the modification in question. *Stewart* found that the statutory codification of Section 15409 should apply, but that even if the statute were not applicable given the date of the action, the statutes and common law in force before Section 15409 still allowed for the same result. (*Id.* at pp. 429-430.) *Stewart* thus held that Section 15409 codified and superseded the common law standard, and that the common law no longer

applies to equitable deviation based on changed circumstances. Had the circumstances in *Adams*, *Stanton* and *Traung* presented themselves after the 1986 enactment of the Trust Law, *Stewart* teaches that the courts deciding those cases would have applied Section 15409, rather than the common law standard, to the situation.

The trial court also relied on *Ike, supra*, 61 Cal.App.4th 51, but that case involved modification based on a drafting error, and not one sought for changed circumstances. In *Ike*, the court found "that the common law equitable power of a trial court to modify or reform a trust extends to situations where . . . the trust instrument contains some expression of the trustor's intention, but a drafting error renders that expression ambiguous." (*Id.* at pp. 81-82.) In order to reform these drafting errors, *Ike* found that probate courts have equitable power, founded in common law, to modify a trust "under 'peculiar' or 'exceptional' circumstances" where that modification is "necessary to accomplish the purpose of the trustors and . . . there was some expression in the trust instrument of the purpose of the trustors." (*Id.* at p. 82.) Because the circumstances of the case warranted it, the court exercised its common law equitable power because the power to reform a trust due to a drafting error was not explicitly provided for nor excluded in the modification chapter of the Trust Law.

Unlike in *Ike*, the petition here was brought not based on "peculiar or exceptional circumstances" but based on changed circumstances. Per

*Stewart*, the trial court should have declined to apply common law equitable deviation. Therefore, the trial court erred by finding that the Trust should be modified under common law equitable deviation.

## VII. THE TRIAL COURT'S ERRORS WERE PREJUDICIAL.

Unquestionably, the errors committed by the trial court, described above, were prejudicial, and therefore reversal is warranted. An error is prejudicial when it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Cassim, supra*, 33 Cal.4th at p. 800.)

Here, the trial court ordered that the Trust be modified to permit the admission of female students to Deep Springs College. Objectors sought to prevent the Trust from being modified, consistent with their fiduciary duty to maintain the Trust. (Prob. Code, § 16000; see *Bothwell, supra*, 65 Cal.App.2d at p. 604.) Had the trial court not found that Section 15403 applied to charitable trusts or that all beneficiaries consented to the modification, it could not have changed the Trust under Section 15403. Had the trial court properly applied the law of equitable deviation, it would not have changed the purpose of the Trust, which, as the court found in February 2013, was to continue a men's college. Thus, absent the errors, a result more favorable to the Objectors would have been reached. Therefore, the errors were prejudicial.

## VIII. CONCLUSION.

For the foregoing reasons, appellants respectfully request that the Court vacate and set aside the January 5, 2015 order modifying the Trust to substitute the word "people" for "men" in the phrase "for the education of promising young men" in the Trust.[13]

DATED: October 5, 2015

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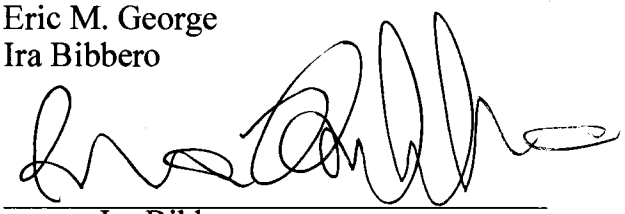
By 
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[13] The contact information for Objectors' co-counsel Heather M. Hoekstra recently changed. The contact information is correct on the caption page of this brief, but incorrect on the caption pages for the Appellants' Appendix. The undersigned apologizes for any confusion or inconvenience.

## CERTIFICATE OF WORD COUNT

**(Cal. Rules of Court, Rules 8.204(c)(1))**

The text of this brief is proportionately spaced, has a typeface of 13 points or more and contains 9,665 words, including footnotes but excluding the Certificate of Interested Parties, the Table of Contents and Authorities, this Certificate and the attached Proof of Service, as counted by the Microsoft Office Word 2010 word-processing program used to generate the brief.

DATED: October 5, 2015

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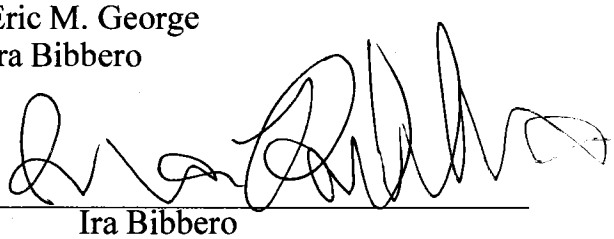
By 
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## PROOF OF SERVICE

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 2121 Avenue of the Stars, Suite 2400, Los Angeles, CA 90067.

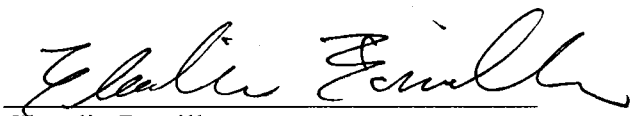
On October 5, 2015, I served true copies of the following document(s) described as **APPELLANTS' OPENING BRIEF; AND APPELLANTS' APPENDIX** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Browne George Ross LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on October 5, 2015, at Los Angeles, California.



Claudia Bonilla

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

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

Executed on October 5, 2015, at Los Angeles, California.

Claudia Bonilla