IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

vs.

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

PETITION FOR REVIEW

After a Decision by the Court of Appeal,
Fourth District, Division Two
Case No. E058293 c/w E062777

On Appeal from the Superior Court of California,
County of Inyo, Case No. SICVPB 12-53232
(The Honorable Dean T. Stout)

BROWNE GEORGE ROSS LLP
* Eric M. George (SBN 166403)
egeorge@bgrfirm.com
Ira Bibbero (SBN 217518)
ibibbero@bgrfirm.com
2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697

ORRICK, HERRINGTON
& SUTCLIFFE LLP
Joseph C. Liburt (SBN 155507)
jliburt@orrick.com
1000 Marsh Road
Menlo Park, CA 94025
Telephone: (650) 614-7400
Facsimile: (650) 614-7401

Heather M. Hoekstra (SBN 276197)
heather@mlfprobate.com
2175 N. California Blvd. Ste. 424
Walnut Creek, CA 94596
Telephone: (925) 322-8615
Facsimile: (925) 357-3151

Attorneys for Petitioners Kinch Hoekstra, Edward Keonjian,
Trustees of L.L. Nunn Trust

TABLE OF CONTENTS

Page

I. QUESTIONS PRESENTED FOR REVIEW 5

II. INTRODUCTION 5

III. STATEMENT OF THE CASE. 9

IV. THE COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT QUESTION OF LAW CONCERNING THE SURVIVAL OF THE *CY PRÈS* DOCTRINE IN CALIFORNIA. 13

A. Section 15409 May Not Be Used to Change the Purpose of a Charitable Trust. 13

B. The Purpose of a Charitable Trust May Be Changed Only Under the Doctrine of *Cy Près*. 17

V. CONCLUSION. 19

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Trustees of Dartmouth Coll. v. Woodward
(1819) 17 U.S. 518 6

CALIFORNIA CASES

Estate of Gatlin
(1971) 16 Cal.App.3d 644 7

Estate of Klinkner
(1978) 85 Cal.App.3d 942 ..... 7, 18

Estate of Loring
(1946) 29 Cal.2d 423 18

Estate of Mabury
(1976) 54 Cal.App.3d 969 7

Estate of Puckett
(1980) 111 Cal.App.3d 46 7

Estate of Traung
(1962) 207 Cal.App.2d 818 ..... 15, 16

In re Metropolitan Baptist Church of Richmond, Inc.
(1975) 48 Cal.App.3d 850 18

In re Veterans' Industries, Inc.
(1970) 8 Cal.App.3d 902 19

L.B. Research and Educ. Found. v. UCLA Found.
(2005) 130 Cal.App.4th 171 7

O'Hara v. Grand Lodge Independent Order of Good Templars
(1931) 213 Cal. 131 18

OTHER STATE CASES

Board of Trustees of Museum of American Indian, Heye Foundation v. Board of Trustees of Huntington Free Library and Reading Room
(N.Y. App. Div. 1994) 197 A.D.2d 64, 610 N.Y.S.2d 488 15

Niemann v. Vaughn Community Church
(2005) 154 Wash.2d 365, 113 P.3d 463 18

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATE STATUTES

Prob. Code, § 15002 17

Prob. Code, § 15403 10

Prob. Code, § 15409 ..... 5, 8, 9, 11, 13, 14, 17, 19

RULES

Cal. Rules of Court, rule 8.500(b)(1) 9

OTHER AUTHORITIES

Bogert, The Law of Trusts and Trustees (rev. ed. Sept. 2016) § 561 ..... 15, 16

Cal. Trust Administration (Cont. Ed. Bar 2nd ed. 2017) § 16.18A(a) 8

Restatement (Third) of Trusts, § 66 (2003) 14

Restatement (Third) of Trusts, § 67 (2003) 8, 18

6 Scott and Ascher on Trusts (5th ed. 2007) § 39.5 ..... 8, 14

The Digest of Justinian (Dig. 33.2.16) 17

I. QUESTIONS PRESENTED FOR REVIEW

Whether *cy près* will remain the sole standard by which California courts permit or direct a trustee to apply trust property to charitable purposes other than those designated by the settlor,

or

whether the specified purposes may be altered or abandoned through equitable deviation, which, (1) has historically been applicable only to private trusts; and (2) as codified in Probate Code section 15409 allows changes only to the "administrative or dispositive provision of [a] trust," and then only if the changes are "necessary to carry out the purposes of the trust." (Prob. Code, § 15409, subd. (a).)

II. INTRODUCTION

Deep Springs College, a tiny school in Inyo County, has operated continuously since 1917 and has been governed since 1923 by the terms of a trust providing, among other things, that the trust assets shall be used "for the education of promising young men . . . ." (2 AA 481, 486.)[1] True to that trust provision, and consistent with founder L.L. Nunn's stated intention, the school's student body has consisted of only men since 1917. Deep Springs College is not suffering from the types of existential danger that would support the application of *cy près*. (2 AA 527.) To the contrary,

---

[1] "AA" refers to the Appellant's Appendix. Citations include volume and page numbers.

the trial court described it as "healthy." (2 AA 486.) This case presents a situation where, as the Court of Appeal summarized, the single-sex restriction results in incremental differences from what that Court posits would be true of a coeducational Deep Springs: the quality of the student body is "'reduce[d],'" hiring is "'burden[ed] and complicate[d],'" school activities are "'adversely impact[ed],'" and the schools "'financial status . . . is not as viable as it could be . . . .'" (Opinion at 9-10.) Nevertheless, the Court of Appeal's opinion spells the end of the only remaining non-religious all-male college in California, and one of only four left in the United States. (See Opinion at 5.)

Strong public policy favors private charitable giving, and courts have long recognized that strictly enforcing donor restrictions, unless illegal, impossible, or impracticable to fulfill, furthers that strong public policy:

> 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.

(*Trustees of Dartmouth Coll. v. Woodward* (1819) 17 U.S. 518, 647 [Marshall, J.].)

> 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.

(*L.B. Research and Educ. Found. v. UCLA Found.* (2005) 130 Cal.App.4th 171, 181 [emphasis added].)

There exists a grand compromise between the charitable donor and the public that donor intends his assets to serve. The donor dedicates his or her wealth to charitable purposes that benefit the many rather than the few. In return, the donor's specific charitable intent is preserved and protected through, among other things, application of a heightened standard of modification: *cy près*.

Before the Opinion below was issued, to change the purpose of a charitable trust, California courts applied the doctrine of *cy près*. (See, e.g., *Estate of Puckett* (1980) 111 Cal.App.3d 46, 50; *Estate of Klinkner* (1978) 85 Cal.App.3d 942, 951; *Estate of Mabury* (1976) 54 Cal.App.3d 969, 985; *Estate of Gatlin* (1971) 16 Cal.App.3d 644, 648.) In exercising their *cy près* power, courts may permit the application of trust property to a charitable purpose other than that designated in the terms of the trust, if accomplishment of the designated purpose has become unlawful,

impossible, impracticable, or wasteful.[2] (6 Scott and Ascher on Trusts (5th ed. 2007) § 39.5, at pp. 2701-2702.)

Here, the trial court expressly found that the requirements of *cy près* had not been met. In other words, the trial court held that the petitioning trustees failed to establish that there was a sufficient threat to or failure of the specific charitable purpose at issue to warrant application of *cy près*. Nevertheless, the trial court opted to change the purpose of the charitable trust through Probate Code section 15409, known as statutory equitable deviation. Therefore, the trial court order modifying the trust, later affirmed by the Court of Appeal, deviates substantially from established California law.[3] While the Court of Appeal's opinion is unpublished[4], and

---

[2] In defining "wasteful", the Restatement authors make clear that this standard is applicable only where there is a surplus of funds exceeding "what is needed for the particular charitable purpose to such an extent that the continued expenditure of all the funds for that purpose, although possible to do, would be wasteful." (Restatement (Third) of Trusts, § 67 (2003), cmt. (c)(1).) Indeed, the term "wasteful" does not "suggest a lesser standard of merely 'better use' will suffice." (*Ibid.*)

[3] Indeed, one practice guide presents this case as a change in the law:

> **NOTE:** In 2014, a superior court applied the related doctrine of equitable deviation to modify a trust created in 1923 that established Deep Springs College as a 2-year college "for the education of promising young men," to allow the college to admit women over the objections of individual trustees . . . The trial court denied a request for modification under *cy près*, noting that the college was not "close to failure." The decision is currently on appeal in *Hitz v Hoekstra* (E058293, E062777) (appellant's opening brief filed Oct. 15, 2015).

(Cal. Trust Administration (Cont. Ed. Bar 2nd ed. 2017) § 16.18A(a).)

therefore not precedential, it offers a roadmap to other trustees who wish to change their charitable trust and redirect their donors' contributions from what their settlor envisioned to something the trustees would prefer or something they believe is incrementally better.

As explained below, the public – and the State – have a strong interest in maintaining fidelity to the purposes of charitable trusts, except in those circumstances where the requirements of *cy près* have been met. Accordingly, review is proper in this case under California Rules of Court, rule 8.500(b)(1) to settle an important question of law: where the requirements of *cy près* have not been met, may a court discard what it has found to be a purpose of a charitable trust by application of Probate Code section 15409?

III. STATEMENT OF THE CASE.

Deep Springs College was founded by L.L. Nunn in 1917. (2 AA 481.) In 1923, Nunn executed a Deed of Trust establishing the L.L. Nunn Trust (the "Trust"), a charitable trust providing land and money to the college, but imposing restrictions on their use. (2 AA 486.) The college is extremely small – there were 26 students at the time of trial – and unique. (Opinion at 4-5.)

---

[4] A request for publication is pending.

Nunn's intent in establishing the Trust is set forth in a paragraph from the Deed of Trust, stating that the assets "shall" be used

> [T]o provide for and carry on education 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 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.

(2 A 486-487 (quoting Deed of Trust).)

As the Court of Appeal noted, "[o]ne aspect of the college that has not changed since its inception is that all of the students have been men; it is one of four all-male colleges that still exist in the United States." (Opinion at 5.)

The majority of the trustees of the Trust sought to change that aspect of the Trust's purpose when they filed the action below in 2012 seeking (i) a declaration that the trustees may admit women to the college, or, in the alternative, (ii) to modify the Trust. (Opinion at 7.) The majority of the trustees sought to modify the trust on several theories: consent under Probate Code section 15403 (2 AA 505), statutory equitable deviation

under Probate Code section 15409 (2 AA 519), common law equitable deviation (2 AA 523), and *cy près* (2 AA 526).

Two trustees, Kinch Hoekstra and Edward Keonjian, the petitioners before this Court, objected. The action was bifurcated into interpretation and modification phases, and in 2013, the trial court concluded that the Trust does not permit the admission of women absent a modification to the Trust. (*Ibid.*) A trial on modification ensued.

In November 2014, following a bench trial, the court issued a Statement of Decision. (2 AA 478.) The court found that the "overarching purpose for the Trust was 'educational work.'" (2 AA 497.) The court concluded, however, that "[t]he education of promising young men is also a purpose, but a hybrid of purpose and a way to effectuate the '. . . work.'" (2 AA 503.)

The trial court denied the request to modify the Trust under *cy près*. It held that the doctrine applies where three conditions apply: (1) an impairment that is "significant such that it has and will continue to have a material adverse impact on the charitable activity," (2) "the degree of materiality involved should be quite high," and (3) "an appropriate measure of immediacy is essential." (2 AA 527.) The court found that "it cannot be said that Deep [S]prings is close to failure." (2 AA 528, fn. 14.) Indeed, the trial court described the college's "current condition" as "healthy." (2 AA 486.)

The trial court found modification warranted under the remaining three theories. The Court of Appeal affirmed only as to statutory equitable deviation, and we address only that theory in this petition.

Underpinning the application of statutory equitable deviation was not a finding that the Trust was failing in any way, but one that things would be better if Deep Springs admitted women students. As summarized by the Court of Appeal, the trial court

> found "compelling" evidence that the [single-sex] policy "reduces the quality of the applicant pool and of the resulting student body"; that it "burden[s] and complicate[s] the tasks of hiring and retaining the highest quality faculty and staff"; that it "adversely impact[s]" not only the classroom education at the college, but also the other two "pillars" of the college's program, labor and self-governance; and that the college's "financial status . . . is not as viable as it could be as a result of the all-male restriction."

(Opinion at 9-10.)

The objectors now petition this Court to review the opinion of the Court of Appeal.

IV. THE COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT QUESTION OF LAW CONCERNING THE SURVIVAL OF THE *CY PRÈS* DOCTRINE IN CALIFORNIA.

A. Section 15409 May Not Be Used to Change the Purpose of a Charitable Trust.

The Opinion below impermissibly applies the doctrine of equitable deviation, as codified in Probate Code section 15409, to change an express purpose of a charitable trust. Section 15409 provides in relevant part that:

> [T]he 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.

(Prob. Code, § 15409, subd. (a).) Section 15409 demonstrates that in addition to administrative and dispositive provisions, trusts can have purposes that are distinct from whatever administrative and dispositive provisions exist to carry out that purpose. Section 15409 clearly states that its function is to allow certain changes "if necessary to carry out the purposes of the trust"; nothing in section 15409 suggests that it can be used to change the purposes themselves. Indeed, as one respected treatise states:

> 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. . . . [I]n 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].) The point of allowing modification of a trust's dispositive provisions is to effectuate the settlor's intent. (Restatement (Third) of Trusts, § 66 (2003), cmt. a.) The Opinion transforms a statutory provision dedicated to ensuring the accomplishment of a trust's purposes into a vehicle for altering or defeating those intended purposes.

The Court of Appeal accomplished the task of altering the purpose of the Trust by declaring that "the education of promising young men" – a stated purpose of the Trust – is also "an administrative or dispositive provision, subject to modification pursuant to section 15409." (Opinion at 15.) But in making that declaration, the Court of Appeal essentially retired the *cy près* doctrine, and consequently lowered the threshold for altering the purposes of charitable trusts. (Opinion at 15.) The New York appellate court provides insight into the significant consequences that flow from such a loosening of the standards of *cy près*:

> Cy pres does not authorize judicial alteration of a charitable disposition simply because there may be some even more efficacious way of achieving the dispositional purposes. The unsettling effect of such a promiscuous resort to the cy pres power can hardly be overstated; courts would be constantly involved in the redeployment of charitable assets, sanctioning their transfer from institution to institution upon the merest showing that the assets might be more usefully situated. Cy pres is not a means for the comprehensive rearrangement of charitable holdings, but only of those holdings whose use in accordance with the literal terms of a governing disposition has become "impracticable or impossible".

(*Board of Trustees of Museum of American Indian, Heye Foundation v. Board of Trustees of Huntington Free Library and Reading Room* (N.Y. App. Div. 1994) 197 A.D.2d 64, 81, 610 N.Y.S.2d 488.)

The Court of Appeal not only sidestepped the requirements of *cy près* to change a charitable trust's purpose, but it did so through misapplication of the law. The Opinion cites only two authorities as the basis for its decision that equitable deviation is an appropriate means to change a charitable trust's purpose: (1) Section 561 from Bogert's Treatise on the Law of Trusts and Trustees, and (2) *Estate of Traung* (1962) 207 Cal.App.2d 818, 830. (Opinion at 14-15.) Neither authority supports the Court of Appeal's conclusion.

Traung concerns a private trust, not a charitable trust. The portion of *Traung* cited by the Court of Appeal relies on section 561 of Bogert's treatise. (*Traung,* supra, 207 Cal.App.2d at p. 830.) And the passage from the treatise expressly applies to <u>private</u> trusts, not <u>charitable</u> trusts. The Opinion reasons (or, rather, misreasons):

> [A]s explained in Bogert's treatise on trust law, every trust has two parts; the "dispositive provisions" are those parts "in which the settlor describes the beneficiaries who are to obtain the financial benefits, determines the amount or size of those benefits, *and in many cases states the purposes of the settlors in providing those benefits*"; the "administrative provisions are those in which the settlor provides the methods by which the trustee is to manage the trust property . . . ." (Bogert, The Law Of Trusts And Trustees (rev. ed. Sept 2016) § 561 at p. 1, italics added) see *In re Estate of Traung, supra*, 207

> Cal.App.2d at p. 830 [quoting a substantially similar previous edition of treatise].)

(Opinion at 14-15.)

Yet, the first sentence of section 561 of the Bogert treatise – immediately preceding the portions quoted by the Court of Appeal – states: "Every instrument creating a private trust contains two parts." (Bogert, *supra*, § 561 [emphasis added].) Thus, the treatise's explanation that a trust's dispositive provisions may include its purposes applies only to private trusts. After making abundantly clear that deviation may only be used to modify how a trust is administered and not its purposes, the treatise notes later in section 561 that courts hold a power of administrative deviation also for charitable trusts. The treatise immediately warns, however, that deviation cannot be used to modify a charitable purpose: "This is not to be confused with the cy pres power where an emergency necessitates a court modification of the charitable objectives, rather than merely a change in methods of administration of the trust." (*Ibid.*)

The Opinion thus, without explanation, applies section 561 of Bogert's treatise – and *Traung*, which relies on that section – to charitable trusts, when the two authorities apply only to private trusts. A careful review of the authorities should yield a different result, especially given that Bogert's treatise advises that *cy près* is the relevant standard to change

a purpose of a charitable trust, and that equitable deviation may not so be used.

Cy près has been part of the law, in various forms, for well over a millennium. (See *The Digest of Justinian* (Dig. 33.2.16).) And nothing in the Probate Code is intended to change *cy près* as it has been applied before and since the adoption of Probate Code section 15409. (See 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.").) California courts should not be permitted to lower the standards for deviation from the intent of a charitable trust's settlor without examination of the issue by this Court.

B. The Purpose of a Charitable Trust May Be Changed Only Under the Doctrine of *Cy Près*.

Under the common law, and as continued in California pursuant to Probate Code section 15002, courts instead turn to the strict standards of *cy près* where it is necessary to change the purpose of a trust and alter the grand compromise between the donor and the public. *Cy près* is described in the Restatement (Third) of Trusts:

> 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.

(Restatement (Third) of Trusts § 67 (2003).)

The Washington Supreme Court described the distinction between the doctrines of equitable deviation and *cy près* succinctly: "courts apply equitable deviation to make changes in the manner in which a charitable trust is carried out while courts apply *cy près* in situations where trustees seek to modify or redefine the settlor's specific charitable purpose." (*Niemann v. Vaughn Community Church* (2005) 154 Wash.2d 365, 378, 113 P.3d 463, 469.)

Before this Opinion, California courts have only changed the purpose of a charitable trust by applying the doctrine of *cy près*. (See, e.g., *Estate of Loring* (1946) 29 Cal.2d 423 [*cy près* applied when trust fund shrank thereby making it insufficient to fund the construction of a hospital]; *O'Hara v. Grand Lodge Independent Order of Good Templars* (1931) 213 Cal. 131, 134 [buildings used as orphanage were in dismal state and could not be remodeled without prohibitive expense to organization]; *In re Metropolitan Baptist Church of Richmond, Inc.* (1975) 48 Cal.App.3d 850, 853 [the dissolving church's membership had dwindled down to three persons]; *Estate of Klinkner* (1978) 85 Cal.App.3d 942, 947 [the church ceased to exist and thus could not receive a share of testator's residuary estate].) So, too, a proceeding where "a charitable corporation being

wound up and dissolved and its assets held upon a charitable trust are to be transferred to another corporation, organization, society, or trust so that the original trust purposes can be carried out if that is possible" calls for "an application of the equitable doctrine of *cy pres*." (*In re Veterans' Industries, Inc.* (1970) 8 Cal.App.3d 902, 917-918.)

Our research reveals no published cases in California that apply Probate Code section 15409 to change a charitable trust's purpose, as the courts below here permitted. This Court should grant review to determine whether California law permits a charitable trust settlor's intent to be disregarded absent the conditions calling for *cy près*.

V. CONCLUSION.

For the foregoing reasons, petitioners respectfully request that this Court grant this petition and order review of the decision of the Court of Appeal below to settle the important question of law of whether the purpose of a charitable trust may be modified under Probate Code section 15409 when the requirements of *cy près* have not been met.

DATED: May 23, 2017

BROWNE GEORGE ROSS LLP
Eric M. George
Ira Bibbero
ORRICK, HERRINGTON & SUTCLIFFE LLP
Joseph C. Liburt
Heather M. Hoekstra

By: _____
Ira Bibbero
Attorneys for Petitioners Kinch Hoekstra, Edward Keonjian, Trustees of L.L. Nunn Trust

CERTIFICATE OF COMPLIANCE WITH RULE 8.204

Pursuant to Rule 8.204 of the California Rules of Court, the attached PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO is proportionately spaced, has a typeface of 13 points or more and contains 4,776 words, including footnotes.

DATED: May 23, 2017

BROWNE GEORGE ROSS LLP
Eric M. George
Ira Bibbero
ORRICK, HERRINGTON & SUTCLIFFE LLP
Joseph C. Liburt
Heather M. Hoekstra

By: _____
Ira Bibbero
Attorneys for Petitioners Kinch Hoekstra, Edward Keonjian, Trustees of L.L. Nunn Trust

Court of Appeal, Fourth Appellate District, Division Two
Kevin J. Lane, Clerk/Administrator
Electronically FILED on 4/13/2017 by B. Frey, Deputy Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DAVID HITZ, as Chairman of the Board etc., Plaintiff and Appellant, v. KINCH HOEKSTRA, as Trustee, etc. et al., Objectors and Respondents.	E058293 (Super.Ct.No. SICVPB1253232)
DAVID HITZ, as Chairman of the Board etc., Plaintiff and Respondent, v. KINCH HOEKSTRA, as Trustee, etc. et al., Objectors and Appellants.	E062777 (Super.Ct.No. SICVPB1253232) OPINION

APPEAL from the Superior Court of Inyo County. Dean T. Stout, Judge.

Affirmed.

Arnold & Porter, Steven L. Mayer, Lisa Hill Fenning and Andras Kosaras; Baker Manock & Jensen, Christopher L. Campbell, Jeffrey A. Jaech, Dirk B. Paloutzian, and

Amanda M. Neal; Law Office of Peter E. Tracy and Peter E. Tracy for David Hitz, as Chairman of the Board, etc.

Brown George Ross, Eric M. George and Ira Bibbero; Orrick, Herrington & Sutcliffe and Joseph C. Liburt; Heather M. Hoekstra for Kinch Hoekstra and Edward Keonjian, Trustees of L.L. Nunn Trust.

Since its founding in 1917, Deep Springs College has accepted only male students. In 2011, the board of trustees of a trust set up in 1923 by the school's founder, L.L. Nunn (the L.L. Nunn Trust or the Trust) voted by a 7-2 margin to make the college coeducational. Naturally, litigation ensued.

These consolidated appeals present the questions of whether the Trust can be interpreted or modified to allow the admission of female students. Petitioner David Hitz, as chairman of the board of trustees of the L.L. Nunn Trust, acting on behalf of the board of trustees, answers both questions in the affirmative, as does real party in interest Deep Springs College Corporation.[1] Objectors Kinch Hoekstra and Edward Keonjian, as trustees of the L.L. Nunn Trust—who cast the two dissenting votes in 2011—answer both questions in the negative.[2]

---

[1] The Deep Springs College Corporation Board also voted in September 2011 to implement coeducation. And in March 2014, the 2013-2014 student body of the college unanimously voted to consent to modification of the Trust to allow for the education of women, in addition to the education of men.

[2] Petitioner is the appellant in appeal No. E058293, but respondent in appeal No. E062777; conversely, objectors are respondents in appeal No. E058293, but appellants in appeal No. E062777. In the interest of clarity, we will refer to the parties as "petitioner" and "objectors," respectively.

Trial of the matter was bifurcated. In the first phase, the trial court concluded the Trust cannot be interpreted to allow the trustees the discretion to institute coeducation at the college. Petitioner appealed this ruling (case No. E058293). Subsequently, in the second phase of the trial, the trial court concluded the Trust both can be and should be modified to allow the trustees such discretion on any of three alternative bases: (1) the consent of all beneficiaries, pursuant to Probate Code[3] section 15403; (2) the court's statutory equitable power to modify the Trust pursuant to section 15409; and (3) the court's common law equitable power to modify the Trust.[4] Objectors appealed the phase two rulings (case No. E062777). We ordered the two appeals consolidated for purposes of oral argument and decision.

We find that objectors have demonstrated no error with respect to the trial court's exercise of its statutory equitable power to modify the trust. We affirm the judgment on that basis, without reaching the other issues raised by the parties.[5]

---

[3] Further undesignated statutory references are to the Probate Code.

[4] The trial court rejected a fourth ground for modification asserted by petitioner, the *cy près* doctrine. This ruling has not been raised on appeal by any party, however, so it will not be discussed.

[5] We previously reserved for consideration with the appeal petitioner's request for judicial notice filed in case No. E058293 on January 15, 2014. The request is granted as unopposed. Moreover, the document that is the subject of the request is part of the record on appeal in case No. E062777.

I. FACTUAL BACKGROUND[6]

Deep Springs College was founded in 1917 by L.L. Nunn, who made his fortune in the power industry, and then turned his attention to educational pursuits. From 1917 until Mr. Nunn's death in 1925, the college consumed most of his energy, attention, and wealth; he regarded the institution as the culmination of his life's work. In 1923, Mr. Nunn executed the "Deed of Trust" at issue in the present case, which governs the application and administration of some of the assets used to operate the college.[7]

The college is located in Deep Springs Valley, a remote area of Inyo County. It operates a cattle ranch, and raises much of the other food consumed on site. It is the smallest institution of higher learning in the United States, with 26 students at the time of the trial in this matter, and a normal compliment of six faculty members. Students pay no tuition.

The college's two-year program is built around three "pillars": (1) academic pursuits; (2) a labor program, requiring each student to devote at least four hours each day to ranch work; and (3) a unique opportunity to exercise self-governance, including direct participation in the management of college affairs. The college's president

---

[6] As the trial court noted, the historical origins of this case are "interesting" and "essentially undisputed among the parties." Our description of the background facts underlying these appeals is in large part derived from the trial court's more expansive discussion in its statement of decision following the second phase of the trial.

[7] The liquid assets Mr. Nunn provided to the college are, in the words of the trial court, "long gone," but the college is located on property contributed by Mr. Nunn to the Trust.

testified that the program "'is designed to allow gifted students to take an extraordinary amount of responsibility for their own lives.'"

Various aspects of the college's program have changed since its founding. One of the most important features of the college's academic program in the eyes of its founder was its religious emphasis and instruction, which was dropped within 20 or 25 years following Mr. Nunn's death. During Mr. Nunn's lifetime, student self-governance was limited to their collective life in the dormitory. Now, students serve as full voting trustees of the Trust and as members of the board of directors of the Deep Springs College Corporation. Students participate in virtually all aspects of the college's operation, including hiring and firing of administrators, faculty, and staff, recruitment and selection of new students, communications with the "outside" world, and curriculum design. Students are responsible for even basic tasks, such as cooking for the entire community, planning, maintaining, and harvesting the garden, milking cows, irrigating fields, cutting and bailing hay, herding and branding cattle, assisting with the slaughter of livestock, washing dishes, cleaning toilets, and mopping floors.

One aspect of the college that has not changed since its inception is that all of the students have been men; it is one of four all-male colleges that still exist in the United States. A change to this aspect of the college has, however, long been considered and debated. The issue of coeducation at the college was first raised in the 1950s, and first seriously considered by the trustees in the 1960s. The issue was the subject of extensive formal study and debate among the trustees and the college community in the late 1970s, and again in the mid-1990s, and yet again from 2003-2005, each time without a

resolution. A formal student body bylaw requires that the issue be discussed—at least among the students themselves—every year. In 2009, the trustees again decided to devote substantial time and attention to the issue, resulting in the 2011 vote to implement coeducation.

Several portions of the 1923 Deed of Trust are relevant to the issue of coeducation. In the recitals, the instrument acknowledges that "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* . . . ." (Italics added.)

The Trust also identifies the "purpose" of the grant in a paragraph consisting of a single, 174-word sentence: "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." (Italics added.)

The Trust identifies "[t]he students in attendance receiving the benefits of the educational work being conducted hereunder" as the "sole beneficiaries" of the Trust, and they are "to be considered as the beneficial owners of all the property at any time held by the said trustees" under the terms of the Trust.

II. PROCEDURAL BACKGROUND

This case commenced in 2012 with the filing of petitioner's "Petition for Court Order Construing Trust Provisions, Or, If Necessary, Modifying the Trust Instrument" (the petition). The petition sought a judicial declaration construing the provisions of the Trust to allow the board of trustees the discretion to institute coeducation, or in the alternative, an order modifying the Trust to allow the trustees such discretion, pursuant to the court's equitable powers under section 15409 or the common law.

Pursuant to a stipulation of the parties, the trial court bifurcated the proceedings so as to hear and decide first the "interpretation issue," that is, "whether the language of the Trust can be interpreted as giving the Trustees the discretion to institute coeducation at Deep Springs College." On February 13, 2013, the trial court ruled in favor of objectors, finding that the Trust cannot "be construed as giving the Trustees discretion to admit female students."

In so ruling, the trial court rejected petitioner's argument that Mr. Nunn used the term "men" in the phrase "for the education of promising young men" to refer generically

to mankind; the court observed that "it appears that the only purpose intended by him was to continue a men's college."

On March 11, 2013, petitioner filed a notice of appeal with respect to the trial court's ruling on the interpretation issue (case No. E058293).

On March 22, 2013, petitioner supplemented the petition to allege two additional grounds for the modification of the Trust, namely, modification with the consent of all beneficiaries pursuant to section 15403, and the *cy près* doctrine.

Trial on the modification issue was conducted over six days in April and May 2014. The trial court issued its statement of decision on November 19, 2014. The court found that modification of the Trust was appropriate on three grounds: (1) the consent of all beneficiaries, pursuant to section 15403; (2) the court's statutory equitable power to modify the Trust, pursuant to section 15409, and (3) the court's common law equitable power to modify the Trust.

In so ruling, the trial court found the language of the Trust to be ambiguous as to its purpose or purposes, in that it "can be read at least three different ways, all of which interpretations are reasonable." After looking to extrinsic evidence to resolve the ambiguity, the trial court concluded that Mr. Nunn intended the Trust have several purposes. The "overarching purpose" for the Trust was to conduct "'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." The trial court found the phrase "the education of promising young men" also to describe "a purpose" of the Trust, but "at the same time, a

description of the *type* of student that could be most effective in carrying out the overarching purpose." Put another way, "[n]othing 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 homogeneous student body or to men simply to create a single-sex college (of which there were many at the time.)" On that basis, the trial court found "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."

The trial court went on to conclude that the Trust should be modified on any of three alternative bases: (1) the consent of all beneficiaries, pursuant to section 15403; (2) the court's statutory equitable power to modify the Trust pursuant to section 15409; and (3) the court's common law equitable power to modify the Trust.

The trial court's decision to modify the Trust was supported by factual findings regarding the effects of the all-male admissions policy. The trial court found that the societal changes in gender roles since the founding of the school, "including the increasing numbers of women in positions of power and influence formerly reserved to men, was unanticipated and unknown by [Mr. Nunn] at the time he executed the instrument." It also found "compelling" evidence that the policy "reduces the quality of the applicant pool and of the resulting student body"; that it "burden[s] and complicate[s] the tasks of hiring and retaining the highest quality faculty and staff"; that it "adversely impact[s]" not only the classroom education at the college, but also the other two

"pillars" of the college's program, labor and self-governance; and that the college's "financial status . . . is not as viable as it could be as a result of the all-male restriction."

The trial court found objectors' arguments in support of the "supposed advantage[s]" of maintaining an all-male student body to be "relatively weak." Among other things, it found the policy unnecessary to reduce "distractions" and promote "higher levels of intensity and focus among the students," or to minimize conflict arising from sexual relationships between students. It acknowledged that a "single sex environment can offer something unique" with respect to bonding among students, but found that "bonding and concomitant character development can and do take place when men and women attend college together." It found it to be "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.'" And it rejected the objectors' argument that an all-male student body is "integral" to the "well-conceived combination of elements" developed by Mr. Nunn for the college, noting that the college has changed in other important respects since Mr. Nunn's time; that the "all-male factor in particular has sometimes been a disruptive rather than constructive influence"; and that "several elements which make Deep Springs such a remarkable place have nothing to do with restricting student participation to males."

On January 5, 2015, the trial court issued its order modifying the Trust as follows: "substitute the word 'people' for 'men' in the phrase 'for the education of promising young men.'" Objectors filed their notice of appeal on January 22, 2015 (case No. E062777).

In February 2015, on objectors' motion, we ordered the two pending appeals consolidated for purposes of oral argument and decision.

III. DISCUSSION

Objectors contend, among other things, that the trial court erred by modifying the trust pursuant to section 15409. We find objectors have demonstrated no error in that ruling, and therefore affirm the trial court's judgment on that basis.

A. Applicable Law and Standard of Review

Section 15409 provides that a court may "modify the administrative or dispositive provisions of 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." (§ 15409, subd. (a).) Section 15409 codifies the common law equitable power of trial courts to modify the terms of a trust instrument where modification is necessary to preserve the trust or to serve the original intentions of the trustors. (*Bilafer v. Bilafer* (2008) 161 Cal.App.4th 363, 368; *Stewart v. Towse* (1988) 203 Cal.App.3d 425, 428.) The language of section 15409 derives from the description of the common law equitable power in the Restatement Second of Trusts, which allows the court to direct or permit the trustee to deviate from the terms of a trust where compliance "would defeat or substantially impair the accomplishment of the purposes of the trust."[8] (Rest. 2d Trusts, § 167, subsection (1); see also *id.*, § 336 [similar language regarding termination of trust].)

---

[8] Like the Legislature, California appellate courts have looked to the Restatement Second of Trusts for description of the trial courts' common law equitable power to modify a trust. (E.g. *In re Estate of Traung* (1962) 207 Cal.App.2d 818, 829.)

The substantial evidence standard applies to any review of the trial court's factual findings based on its evaluation of extrinsic evidence. (*Estate of Dodge* (1971) 6 Cal.3d 311, 318-319.) In conducting a substantial evidence review, we resolve any conflicts and draw all legitimate and reasonable inferences in favor of the judgment. (*Estate of Bristol* (1943) 23 Cal.2d 221, 223.)

The trial court's decision to modify the Trust under section 15409 is an exercise of discretion. (See § 15409 [the court "may" modify a trust, under certain circumstances]; see also § 17200, subds. (a), (b)(13) [authorizing petition to modify a trust]; § 17206 ["[t]he court *in its discretion* may make any orders and take any other action necessary or proper to dispose of the matters presented" by a petition under section 17200] (italics added).) We therefore review the trial court's decision under the abuse of discretion standard: "The appropriate [appellate] test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.)

The proper interpretation of statutory language is a question of law that this court reviews de novo, independent of the trial court's ruling or reasoning. (*Union Bank of California v. Superior Court* (2004) 115 Cal.App.4th 484, 488.)

B. Analysis

On appeal, objectors have not challenged any of the trial court's factual findings as lacking the support of substantial evidence. Nor have they argued that its conclusions derived from its weighing of the evidence exceeded the bounds of reason.

Objectors argue, however, that the trial court exceeded the scope of its power to modify the Trust under section 15409 in several respects. First, they argue that in the

interpretation phase of the trial, the trial court determined the Trust to have a single purpose—to educate promising young men—and that it "was not free to revisit the purpose" because that ruling was on appeal during the trial of the modification issue. Second, they argue that section 15409 "may not be employed to alter the purpose of a trust, but only to advance that purpose." In other words, in objectors' view, the phrase "'for the education of promising young men'" is neither an administrative nor a dispositive provision of the Trust, in the meaning of section 15409, but instead a purpose, which can be modified only with the consent of all beneficiaries under section 15403, or through application of the *cy près* doctrine.

Each of objectors' arguments fails. First, objectors' characterization of the trial court's ruling in the interpretation phase of the bifurcated trial is incorrect. As the trial court acknowledged, the language of its interpretation phase ruling was "fairly strong," and out of context it "could appear" that the trial court had determined the Trust had only one purpose. Nevertheless, "'[l]anguage used in any opinion is of course to be understood in light of the facts and the issue then before the court . . . .'" (*People v. Scheid* (1997) 16 Cal.4th 1, 17, quoting *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) The matter at issue in the interpretation phase was only "whether the language of the Trust can be interpreted as giving the Trustees the discretion to institute coeducation at Deep Springs College." In this context, the trial court's comment that "it appears that the only purpose intended by [Mr. Nunn] was to continue a men's college" is properly understood as an interpretation of the phrase "for the education of promising young

men"—specifically, that it excludes female students—not a ruling that the sole purpose of the Trust is for the education of male students.

Objectors are incorrect, therefore, that the trial court's analysis regarding modification improperly "revisit[ed]" any finding made in the first phase of the bifurcated trial. Whether or not the Trust instrument expressed multiple purposes, and how multiple expressed purposes might relate to or conflict with one another, was a matter explicitly set aside for determination later, in the second phase of the trial, as objectors acknowledged in their briefing on petitioner's appeal of the interpretation phase ruling. Petitioner's appeal of the trial court's ruling in the first phase of the bifurcated trial did not divest the trial court of jurisdiction to consider such "specified excepted . . . matters" during the second phase. (*Sacks v. Superior Court* (1948) 31 Cal.2d 537, 540.)

Objectors' second argument—that the phrase "for the education of promising young men" is not an administrative or dispositive provision of the Trust, in the meaning of section 15409, but instead expresses a purpose of the Trust, so it cannot be modified pursuant to section 15409—is also unpersuasive. Objectors have presented no authority in support of the notion that a provision expressing a purpose of a trust must necessarily be something other than the "administrative or dispositive provisions of the trust" in the meaning of section 15409.

To the contrary, as explained in Bogert's treatise on trust law, every trust has two parts; the "dispositive provisions" are those parts "in which the settlor describes the beneficiaries who are to obtain financial benefits, determines the amount or size of those benefits, *and in many cases states the purposes of the settlor in providing for these*

benefits"; the "administrative provisions" are those in which "the settlor provides for the methods by which the trustee is to manage the trust property . . . ." (Bogert, The Law of Trusts and Trustees (rev. ed. Sept. 2016) § 561 at p. 1, italics added); see *In re Estate of Traung, supra*, 207 Cal.App.2d at p. 830 [quoting substantially similar previous edition of treatise].) Applying these definitions to the facts of the present case, the clause "for the education of promising young men" is a dispositive provision; the "students in attendance" are the "sole beneficiaries" of the Trust, so any clause directing who may become a student describes the beneficiaries who are to obtain the benefits of the Trust.

We conclude, therefore, that by means of the phrase "administrative or dispositive provisions of the trust," section 15409 specifies that the trial court is empowered to modify either type of substantive provision of a trust, under the appropriate circumstances. The purpose of a trust may also be expressed elsewhere than in the administrative or dispositive provisions—say, in the recitals. Regardless, there is no basis for objectors' assumed premise that, because a provision expresses a purpose of the trust, the provision cannot also be an administrative or dispositive provision, subject to modification pursuant to section 15409.

Our analysis is supported by the circumstance that, as objectors recognize in their briefing, section 15409 was drawn in particular from section 167 of the Restatement (Second) of Trusts. That section provides that the court will direct or permit the trustee to deviate from any "term of the trust," under the appropriate circumstances. (Rest. 2d Trusts, § 167, subsection (1).) Objectors can point to nothing in the legislative history that suggests any intent to narrow the scope of the trial court's authority in this regard.

Because the trial court did not exceed the scope of its power under section 15409, and because objectors have failed to demonstrate any other abuse of the trial court's discretion, the trial court's judgment modifying the Trust must be affirmed. We therefore need not, and do not, address either petitioner's claim of error with respect to the trial court's interpretation phase ruling, or objectors' arguments with respect to the other alternative bases for the trial court's modification phase ruling.

IV. DISPOSITION

The judgment is affirmed. Petitioner is awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.

PROOF OF SERVICE

Kinch Hoekstra, Edward Keonjian adv. David Hitz
Court of Appeal, Fourth Appellate District, Division Two –
4th Civil No. E058293, Consolidated with 4th Civil No. E06277

Inyo Superior Court Case No. SICVPB 12-53232

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 2800, Los Angeles, CA 90067.

On May 23, 2017, I served true copies of the following document(s) described as **PETITION FOR REVIEW** 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 the practice of Browne George Ross LLP for collecting and processing correspondence for mailing. On the same day that 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 am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Los Angeles, California.

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

Executed on May 23, 2017, at Los Angeles, California.

J. Baker

Jacqueline E. Baker

SERVICE LIST

Kinch Hoekstra, Edward Keonjian adv. David Hitz
Court of Appeal, Fourth Appellate District, Division Two –
4th Civil No. E058293, Consolidated with 4th Civil No. E06277

Inyo Superior Court Case No. SICVPB 12-53232

BAKER MANOCK & JENSEN, PC — Counsel for David Hitz
Christopher L. Campbell, SBN 116329
Jeffrey A. Jaech, SBN 076876
Dirk B. Paloutzian, SBN 173676
Amanda M. Neal, SBN 258693
5260 North Palm Avenue, Suite 421
Fresno, CA 93704
Tel. (559) 432-5400 / Fax (559) 432-5620
CCampbell@bakermanock.com
DPaloutzian@bakermanock.com
ABridges@bakermanock.com
JJaech@bakermanock.com

LAW OFFICES OF PETER E. TRACY
Peter Tracy, SBN 78185
106 South Main Street, Suite 200
P. O. Box 485
Bishop, CA 93515
Tel. (760) 872-1101 / Fax (760) 872-2971
inyomono@stanfordalumni.org

ARNOLD & PORTER LLP
Steven L. Mayer, SBN 62030
Three Embarcadero Center, 10th Flr.
San Francisco, California 94111-4024
Tel. (415) 471-3100 / Fax (415) 471-3400
Steve.mayer@aporter.com

ARNOLD & PORTER LLP
Andras Kosaras
601 Massachusetts Ave. NW
Washington, D.C. 20001
Tel: (202) 942-5000

Jon Michaelson
KILPATRICK TOWNSEND
& STOCKTON LLP
1080 Marsh Road
Menlo Park, CA 94025
Tel. (650) 326-2400 / Fax (650) 326-2422
jmichaelson@kilpatricktownsend.com

Counsel for Deep Springs College Corporation

Tania M. Ibanez
Wendi Horwitz
Supervising Deputy Attorney General
Charitable Trusts Section
California Attorney General's Office
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
tania.ibanez@doj.ca.gov
wendi.horwitz@doj.ca.gov

Attorney General

California Court of Appeal
3389 Twelfth Street
Riverside, California 92501
Tel: (951) 782-2500

Honorable Dean T. Stout
Judge of the Superior Court
County of Inyo Superior Court
168 North Edwards Street
Post Office Drawer U
Independence, California 93526
Tel: (760) 872-3038

Case No. SICVP 12-53232