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11 L. L. Nunn Trust, acting on behalf of the Board of Trustees

12  
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
14 COUNTY OF INYO

15  
16 In re the Matter of the  
17  
18 L. L. Nunn Trust for the benefit of  
Deep Springs College under the Deed  
19 of Trust dated November 5, 1923

CASE No. SI CV PB 12 5 3 2 3 2

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PETITION FOR COURT ORDER  
CONSTRUING TRUST PROVISIONS,  
OR, IF NECESSARY, MODIFYING THE  
TRUST INSTRUMENT; REQUEST FOR  
JUDICIAL NOTICE

[Probate Code §§ 17200 and 15409]

DATE: March 9, 2012  
TIME: 9:00 AM  
DEPT:  
JUDGE:

25 Petitioner, David Hitz, Chairman of the Board of Trustees of the L. L. Nunn Trust,  
26 acting on behalf of the Board of Trustees (the "Trustees"), respectfully submits this Memorandum  
27 of Points and Authorities in Support of his Petition for Court Order Construing Trust Provisions,  
28 or, If Necessary, Modifying the Trust Instrument, Request for Judicial Notice.

1068831v1 / 9478.0006

**FILED**

FEB 06 2012

INYO CO. SUPERIOR COURT  
TAMMY L. GRIMM, CLERK

BY *J. Baker* DEPUTY

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**I.**  
**INTRODUCTION**

What is now Deep Springs College was originally established in 1917 by L. L. Nunn. On May 15, 1923, by unrecorded deed of trust<sup>1</sup> (the "May Document"), for the purpose of continuing the work at Deep Springs, L. L. Nunn granted to eight trustees the land on which Deep Springs College sits. Subsequent to that unrecorded conveyance, on November 5, 1923, L. L. Nunn executed a deed of trust in favor of the same eight trustees to "supplement and confirm" the May 15, 1923 conveyance (the "Deed of Trust"). In addition to the eight named trustees in Paragraph 5, the Deed of Trust provided that a student body representative will serve as a full voting member of the Trustees. The language at issue in this action is found in both documents so this memorandum refers only to the November 5, 1923 Deed of Trust. Specifically, this petition focuses on the phrase "promising young men" in Paragraph 1 of the Deed of Trust.

Understanding that the usage of the word "men" in 1923 when the Deed of Trust was executed did not necessarily exclude women, this Court should construe the language of the Deed of Trust to allow the Trustees to utilize the trust assets for the education of both men and women. That is, this Court should interpret the Deed of Trust to grant authority to the Trustees of the L. L. Nunn Trust, if acting in good conscience and using their best judgment, to use the trust assets to fund the education of women, in addition to men, at Deep Springs College. In short, Petitioners assert that L. L. Nunn, expecting the L. L. Nunn Trust to continue for many decades, had the foresight to recognize that the world and the specific circumstances of Deep Springs College would change, from time to time. Therefore, he limited the restrictions on the Trustees' discretion in choosing the methods of achieving his purpose to key items of importance—specifically that the enterprise be non-profit and that student self government be a feature. Subject to those two restrictions, L. L. Nunn empowered the Trustees to utilize any methods to achieve the

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<sup>1</sup> Petitioner has been able to locate a copy of the May 15, 1923 document in a Deep Springs College safety deposit box; however the Inyo County Recorder's Office searched all documents recorded between 1923 and 1945 and verified that the May 15, 1923 document was never recorded.



1 along with other real and personal property. (See Deed of Trust.) According to the Deed of Trust,  
2 executed almost six months after the May Document, L. L. Nunn desired to more particularly  
3 describe the property so conveyed, as well as to define the terms and conditions on which said  
4 property was conveyed. At the time the Deed of Trust was executed, the corpus of the L. L. Nunn  
5 Trust included real estate, water rights, buildings, libraries, furniture, vehicles, farming implements,  
6 machinery and equipment, cattle, horses, poultry and other livestock, brands, and other real and  
7 personal property. Today, the corpus of the L. L. Nunn Trust includes a substantially similar  
8 inventory.

9 L. L. Nunn dictated in the Deed of Trust that his conveyance should be used "for the  
10 development and perpetuation of such educational work" as previously found at Deep Springs and that  
11 the educational work at Deep Springs College should be "similar to and in development of the work  
12 already inaugurated by Grantor at Deep Springs in Inyo County." (Deed of Trust at ¶1.) Deep  
13 Springs, since 1917, has been operated as an all-male institution.

14 The statement of purpose in the Deed of Trust states that the trust was established:

15 [T]o provide for and carry on educational work in the State of  
16 California similar to and in development of the work already  
17 inaugurated by Grantor at Deep Springs in Inyo County, California, but  
18 in such manner and form and at such place or places within said State as  
19 said Trustees in good conscience and the exercise of their best  
20 judgment may determine, **for the education of promising young**  
21 **men**, selected by said Trustees or as they may prescribe, in a manner  
22 emphasizing the need and opportunity for unselfish service in  
23 uplifting mankind from materialism to idealism, to a life in harmony  
24 with the Creator, in the conduct of which educational work  
25 democratic self government by the students themselves shall be a  
26 feature as is now the case at said Deep Springs and which work shall  
27 be carried on not for profit but solely for the advancement of the  
28 purpose hereinabove mentioned.

23 (Deed of Trust at ¶ 1 [emphasis added].)

24 Approximately thirteen months after executing the Deed of Trust, on December 30,  
25 1924, L. L. Nunn drafted that certain document entitled "The Purpose" ("*The Purpose*"). According to  
26 L. L. Nunn, *The Purpose* describes the purpose of Deep Springs College. According to L. L. Nunn, "[i]t  
27 is a fact of social evolution that the few always dominate" and "the burden of leadership is in part the  
28 consciousness of the call – the vision of the need – but the acceptance of the calling to be one of the few

1 is half of the labor accomplished." L. L. Nunn continues by stating that "[t]he purpose of Deep Springs  
2 [College] is to help in the training of the few. It is to create an environment where **young men of sound**  
3 **character** may find religious influence which will help them build the character for full employment in  
4 the service of their fellowmen." (Emphasis added.)

5 The highlighted language from both Paragraph 1 of the Deed of Trust and *The Purpose*  
6 have influenced the continuation of the male-only admissions policy at Deep Springs College. However,  
7 for more than four decades, the question of whether to change the admissions policy at Deep Springs  
8 College to permit the admittance of women in addition to men has been debated by the Trustees,  
9 students, alumni, faculty, and staff. The most recent formal Trustee inquiry into the question of  
10 coeducation began in early 2011<sup>2</sup>. On September 17, 2011, the Board of Trustees of the L. L. Nunn  
11 Trust voted in favor of implementing coeducation. The vote carried 7-2<sup>3</sup>. On the same day, the Board of  
12 Directors of the Deep Springs Corporation, the California non-profit public benefit corporation that is  
13 now responsible for the day-to-day operation of Deep Springs College, by a vote of 10-2<sup>4</sup>, voted to begin  
14 the transition necessary to allow the admission of women.

### 15 III. 16 LAW AND ANALYSIS

#### 17 A. The Deed of Trust Should be Construed to Permit the Trustees to Use the Trust 18 Property for the Education of Women, in Addition to Men, at Deep Springs College.

19 California Probate Code section 17200 provides that "a trustee or beneficiary of a trust  
20

21 <sup>2</sup> The prior formal and comprehensive Trustee inquiries were the 1978 to 1979 review, the 1992 to 1994  
22 Impact Commission on Student Body Composition and Size, and a 2002 to 2005 analysis done by the Trustees' long  
range planning committee.

23 <sup>3</sup> The Trustees consist of the successors of the original eight named trustees and one student body trustee  
appointed pursuant to Paragraph 5 of the Deed of Trust.

24 <sup>4</sup> The Board of Directors of Deep Springs College consists of the nine Trustees of the L. L. Nunn Trust, one  
25 additional student director, two additional at large directors and an ex officio position for the President of the Telluride  
26 Association. The Telluride Association is the other educational venture founded by L. L. Nunn that is still in  
27 operation. Prior to the vote on coeducation the Telluride President resigned from the Board due to the potential  
Telluride conflict of interest concerning the disposition of the Withrow funds that are addressed in the petition  
submitted simultaneously with this action. The Telluride President did, however, present both his own views and the  
official position of Telluride Association during the discussion.

1 may petition the court under this chapter concerning the internal affairs of the trust" including  
2 "[d]etermining questions of construction of a trust instrument."

3 California Probate Code section 21101 *et seq.* governs the rules for the  
4 interpretation of a trust instrument. Probate Code section 21102(a) states that "[t]he intention of the  
5 transferor as expressed in the instrument controls." Because charitable gifts are favored by the courts,  
6 the most liberal rules of construction will be applied in interpreting the trust to accomplish the intent of  
7 the trustor. (*In re Estate of Tarrant* (1951) 38 Cal.2d 42, 45 [citing *Estate of Hinchley* (1881) 58 Cal.  
8 457, 513].) The intent of the trust creator is determined by construing all parts of an instrument in  
9 relation to each other, if possible, to form a consistent whole. (Probate Code § 21121.) All provisions  
10 are looked at together, as a whole, the instrument being one, rather than individual terms and conditions.  
11 Reading the instrument in this manner is sometimes referred to as reading "from its four corners." (*In*  
12 *re Bernatas' Estate* (1958) 162 Cal.App.2d 693, 700.)

13 **1. When L. L. Nunn Executed the Deed of Trust in 1923, the Word "Men" was**  
14 **Commonly Used to Include both "Men" and "Women."**

15 There is no question that L. L. Nunn intended the Deep Springs College student  
16 body to be all-male when he founded the school. L. L. Nunn personally participated in choosing  
17 the students from 1917 through 1924; those students were all male. Whether L. L. Nunn intended  
18 to limit the Trustees' discretion so that they could admit only male students in perpetuity is,  
19 however, a separate question from what L. L. Nunn decided was the appropriate composition of  
20 the Deep Springs Student Body from 1917 through 1924. The Deed of Trust does not indicate that  
21 L. L. Nunn had the specific intent to prevent the Trustees from ever admitting female students.

22 Although the Deed of Trust states that Deep Springs College shall be for the  
23 "education of promising young men," such language should not be interpreted as intending to limit  
24 the Trustees to providing education at Deep Springs College to only male students. In 1923, the  
25 word "men" was used generally to describe both male and female persons. According to Richard  
26 Grant White in his 1927 publication *Words and Their Uses Past and Present: A Study of the*  
27 *English Language*, "[a] speaker of common sense and common mastery of English would say [for  
28 example], 'If a man wishes to sleep, he must not eat cheese at supper,' where *man*, as in the word

1 *mankind*, is used in a general sense for the species." (White, Words and Their Uses Past and  
2 Present: A Study of the English Language (1927) p. 221 [As discussed more fully in Section V  
3 below, Petitioner requests that this court take judicial notice of this document, attached hereto as  
4 Exhibit "A"].) "Men" as the plural for "man" would similarly be used to describe a group of  
5 persons. White makes clear that in 1927 it was proper to use the word "man," or by extension  
6 "men," to describe both male and female persons. (*Id.*) Therefore, when L. L. Nunn executed the  
7 Deed of Trust in 1923, the mere use of the word "men" should not be construed to demonstrate  
8 that L. L. Nunn necessarily intended to limit the Trustees to educating only male students. Nunn  
9 was certainly aware that universities he respected admitted female students. L. L. Nunn founded  
10 the Telluride Association and its scholarship house on the Cornell University campus. Cornell has  
11 been coeducational since its founding in 1865. Therefore, if L. L. Nunn intended to limit the Deep  
12 Springs College student body in perpetuity to males only, L. L. Nunn would be expected to use  
13 terms such as "solely" or "only" males or other specific language of limitation more precise than  
14 the then commonly ambiguous term "men".

15           When L. L. Nunn wanted to limit the Trustees' discretion in the method of  
16 education, he knew how to express a limitation. In Paragraph 1 L. L. Nunn specifically limited the  
17 Trustees' discretion in choosing methods of education by emphasizing that "...democratic self  
18 government by the students themselves shall be a feature as is now the case...and which work  
19 shall be carried on not for profit but solely for the advancement of the purpose...." In addition,  
20 Paragraph 2 of the Deed of Trust again clearly limits the Trustees' discretion by prohibiting any  
21 private gain and Paragraph 5 greatly expands on the importance and method of student  
22 government. By contrast, L. L. Nunn did not elaborate in any way on the term "young men" used  
23 in Paragraph 1.

24           If this Court finds that use of the word "men" in the Deed of Trust does not  
25 unambiguously indicate Nunn's intent to limit the student body to males only, then this Court  
26 should use extrinsic evidence to determine L. L. Nunn's intent. (Probate Code § 21102, subd. (c).)

27           The most relevant document executed by L. L. Nunn regarding the purpose of Deep  
28 Springs College is *The Purpose*, which was executed on December 30, 1924. According to L. L. Nunn,

1 *The Purpose* describes the purpose of Deep Springs College. *The Purpose* states, “[i]t is a fact of social  
2 evolution that the few always dominate” and “the burden of leadership is in part the consciousness of the  
3 call – the vision of the need – but the acceptance of the calling to be one of the few is half of the labor  
4 accomplished.” L. L. Nunn continues by stating that “[t]he purpose of Deep Springs [College] is to help  
5 in the training of the few. It is to create an environment where young men of sound character may find  
6 religious influence which will help them build the character for full employment in the service of their  
7 fellowmen.” *The Purpose* clarifies that L. L. Nunn intended that Deep Springs College would educate  
8 those individuals in society who have the potential to become society’s leaders. Neither the Deed of  
9 Trust nor *The Purpose* discusses an all-male student body, or states that only male students may be  
10 educated at Deep Springs College. Taken as a whole, *The Purpose* implies that if the Trustees determine  
11 that any person has potential to be a leader in society, the Trustees may educate that person at Deep  
12 Springs College regardless of gender.

13 **2. The Deed of Trust Grants the Trustees Broad Authority in Operating Deep**  
14 **Springs College Such that the Trustees, if Acting in Good Conscience and the**  
15 **Exercise of Their Best Judgment, May Determine that the Purpose of the Deed**  
16 **of Trust will be Furthered by Admitting Women to Deep Springs College.**

17 In the specific language of the Deed of Trust, L. L. Nunn granted the Trustees  
18 broad authority and discretion in operating Deep Springs College to achieve the purpose.  
19 Paragraph 1 of the Deed of Trust states that the educational work carried on at Deep Springs  
20 College shall be “in such manner and form ... as said Trustees in good conscience and the exercise  
21 of their best judgment may determine.” Paragraph 2 of the Deed of Trust goes on to say:

22 In order to enable them to accomplish the purpose of this trust in  
23 such manner as they in the exercise of their best judgment may  
24 deem most fitting and expedient, the said Trustees are hereby  
25 authorized and empowered to act in the manner and deal with any  
26 and all property now or hereafter held by them hereunder, (said  
27 property so held hereunder at any given time being hereinafter  
28 referred to as the trust estate), as they in good conscience and the  
exercise of their best judgment may deem proper and advisable; and  
they are hereby given and granted full power and authority: [List of  
powers granted omitted]

29 In exercising their broad powers, the Trustees' discretion is qualitatively limited only by the  
30 following language: (1) the Trustees must “act in good conscience,” and (2) the action must be one



1 that "the exercise of their best judgment [ ] deem[s] proper and advisable[.]" (*Id.*) The only  
2 substantive limitations on the Trustees' discretion are the explicit prohibitions on private gain  
3 stated in Paragraphs 1 and 2(b) and the requirement in Paragraph 1 that "democratic self-  
4 government by the students themselves shall be a feature...." In Paragraph 5 the Trust language  
5 emphasizes "it shall be the duty of said Trustees to accord the Student Body the full right, power  
6 and authority of democratic self government...." Paragraph 5 then elaborates at length on the  
7 importance, powers and conduct of Student Body self government.

8           No other language in the Deed of Trust further limits the discretion and authority of  
9 the Trustees in operating Deep Springs College and utilizing the trust property. Certainly there is  
10 no language stating that the Trustees shall admit only male students or shall not admit females.  
11 This is in stark contrast to L. L. Nunn's explicit and emphatic directions concerning the non-profit  
12 requirement and Student Body governance. Additionally, Petitioner is unaware of any extrinsic  
13 evidence of L. L. Nunn's intent respecting the words "promising young men" that support the  
14 interpretation that it limits the discretion and authority of the Trustees in operating Deep Springs  
15 College to carry out the purpose of the trust. Therefore, the specific language of the Deed of  
16 Trust, giving the words their ordinary meaning, makes clear that the Trustees have broad authority  
17 when carrying out the purpose of the trust.

18           This broad grant of power to the Trustees of the L. L. Nunn Trust is persuasive  
19 evidence that L. L. Nunn's primary purpose in creating the trust was not to limit educational  
20 support to only male students. As stated in Paragraph 2(b) of the Deed of Trust, if the Trustees  
21 determine, in good conscience and with the exercise of their best judgment, that turning over the  
22 trust estate to "a [different] educational corporation, unincorporated association, or other like  
23 organization devoted to the cause of education" would better carry out the purpose of the trust, the  
24 Trustees have the authority to do so. (Deed of Trust at ¶ 2(b).) The authority granted in Paragraph  
25 2(b) is only limited to non-profit organizations. The gender of the student-body of the educational  
26 entity is not mentioned. In that the Deed of Trust does not preclude the Trustees' authority to turn  
27 over the trust estate to a coeducational college, the Deed of Trust should be construed to also allow  
28 the Trustees to operate Deep Springs College itself with a coeducational student body.

1 Similarly, the language in Paragraph 1 seems to limit the location of the  
2 educational work to California. The language in Paragraph 2(b), however, does not limit the  
3 Trustee's discretion to institutions in California. While there is no proposal to change the location.  
4 both the Deed of Trust and L. L. Nunn's other writings clearly indicate that the Trust purpose is  
5 broader than the State of California.

6 Interpreting the specific language of the Deed of Trust, including the broad powers  
7 granted to the Trustees, the purpose of the trust appears to be to:

8 provide for and carry on educational work ... emphasizing the need and  
9 opportunity for unselfish service in uplifting mankind from materialism to  
idealism, to a life in harmony with the Creator.

10 Pursuing this general purpose is not necessarily inhibited by coeducation at Deep Springs College.  
11 Now that the Trustees of the L. L. Nunn Trust have determined, in good conscience and with the  
12 exercise of their best judgment, that the educational work at Deep Springs College is best carried  
13 out by extending admissions to female as well as male students, they should be found to have such  
14 authority. Therefore, a judicial determination that the Trustees of Deep Springs College have the  
15 authority under the Deed of Trust to determine, in good conscience and in their best judgment, that  
16 the purpose of the trust will be furthered by admitting women to Deep Springs College is proper.

17 **B. If the Deed of Trust is Not Construed to Allow the Trustees the Discretion to Admit**  
18 **Women Students, then, the Deed of Trust Should be Modified to Permit Deep Springs**  
**College to Admit Women.**

19 1. **Under Probate Code Section 15409 the Deed of Trust Should be Modified**  
20 **Because Due to Circumstances Not Known to L. L. Nunn and Not Anticipated**  
21 **by Him, the Continuation of the Trust Under its Terms Would Defeat or**  
**Substantially Impair the Accomplishment of the Trust's Purposes.**

22 California Probate Code section 15409 permits a court to modify the terms of a  
23 trust upon the petition of a trustee or beneficiary if "owing to circumstances not known to the  
24 [trust creator] and not anticipated by the [trust creator], the continuation of the trust under its terms  
25 would defeat or substantially impair the accomplishment of the purpose of the trust."<sup>5</sup> This statute  
26

27 <sup>5</sup> Prior to the adoption of Probate Code section 15409 in 1986 (in 1990 section 15409 was repealed and re-  
28 enacted without change), modifications to the terms of a trust were addressed under the common law. Under the  
(footnote continued)

1 provides for a two step process. First, the trustee or beneficiary filing the petition must demonstrate  
2 that circumstances not known to the trust creator and not anticipated by him exist that defeat or  
3 substantially impair the accomplishment of the purpose(s) of the trust. Second, if the court finds  
4 that such circumstances exist, the court must then determine whether a proposed or contemplated  
5 modification will advance the trust purpose(s). If the court determines that the proposed or  
6 contemplated modifications will advance the trust purpose(s), the trust should be so modified.<sup>6</sup>

7           **a.       A Judicial Modification of the Trust is Necessary Because**  
8           **Circumstances Not Known Nor Anticipated By L. L. Nunn**  
          **Substantially Impair the Accomplishment of the Purpose of the Trust.**

9                   **i.       a.       The Purpose of the L. L. Nunn Trust.**

10           As discussed above, the purpose of the L. L. Nunn Trust, as stated in the Deed of  
11 Trust, is:

12                   [T]o provide for and carry on educational work ... emphasizing the need  
13                   and opportunity for unselfish service in uplifting mankind from  
                  materialism to idealism, to a life in harmony with the Creator[.]

14 (Deed of Trust ¶ 1.)

15           This language has traditionally and consistently been interpreted by the Deep  
16 Springs Trustees and alumni as outlining a purpose to train promising students who desire to be  
17 of service to society.

18                   **ii.       Present Circumstances Were Not Known Nor Anticipated by L.**  
19                   **L. Nunn When He Established the L. L. Nunn Trust.**

20           In 1923, coeducation had been widely implemented in public universities.  
21 (Declaration of L. Jackson Newell [hereinafter, "Newell Decl.,"] 5:21-22.) However, the  
22

23 \_\_\_\_\_  
24 common law, the objective of the court was to give effect to what the settlor's intent probably would have been had  
25 the circumstances in question been anticipated. (See Restatement (Third) of Trusts § 66.) However, Probate Code  
26 section 15409 includes no such requirement. Instead, the court is to focus on whether changed and unanticipated  
circumstances exist. If so, the court must determine whether the modification will accomplish the purpose(s) of the  
trust.

27           <sup>6</sup> Petitioner has been unable to locate any published opinion to illustrate how courts apply this test. Since the  
28 adoption of Probate Code section 15409, several cases have cited Probate Code section 15409; however, these cases do  
no more than quote the statute.

1 country's most prestigious private colleges like Harvard<sup>7</sup> and Yale<sup>8</sup>, that Nunn sought to emulate  
2 in some regard, still maintained single-sex male student bodies in 1923. (Newell Decl. 5:23-24.)

3           The type of education offered at Deep Springs College, an education to prepare  
4 individuals for societal, professional, and political leadership roles in society, was not the type of  
5 education that was often made available to women in 1923. Although women did have access to  
6 higher education in 1923, the emerging collegiate system was aggressively segregating women  
7 with restrictive social controls and academic policies that steered women into stereotypic female  
8 roles and professions. (Newell Decl. 5:25-6:4.) Women were discouraged from entering fields  
9 such as engineering, law, medicine, politics, and other fields that were associated in the public  
10 mind with power and influence. (Newell Decl. 6:4-5.) Instead, women were guided into fields  
11 such as teacher education, home economics, and other fields that reinforced traditional  
12 definitions of femininity. (Newell Decl. 6:2-4.)

13           Education today, and especially education available to women, is far different  
14 than it was in 1923. The types of changes in education that have occurred since 1923 could not  
15 have been anticipated by L. L. Nunn when the Deed of Trust was established, because males had  
16 been dominating fields of power and prestige in Anglo-American society for centuries. In  
17 retrospect, a profound change had already begun in 1923 but the broad manifestation of that  
18 change took decades.

19           Today, women are able to attend all of the public, and most of the private,  
20 colleges and universities in the United States.<sup>9</sup> Furthermore, more women than men are

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21  
22           <sup>7</sup> Harvard began admitting women to graduate programs in the 1940s. (Margaret Zierdt, *Drew Gilpin Faust*,  
23 available at [http://nwfp.org/news/drew\\_gilpin\\_faust.php](http://nwfp.org/news/drew_gilpin_faust.php).) Harvard did not admit women to its undergraduate  
program until 1973. (*Id.*)

24           <sup>8</sup> Yale College did not admit women until 1969. (*Landmarks in Yale's History*, available at  
<http://www.yale.edu/timeline/1969/index.html>.)

25           <sup>9</sup> As of the date of this petition, the number of non-religious male-only institutions has decreased to only  
26 four, including Deep Springs College. The other three are Hampden-Sydney College in Virginia, Morehouse College  
27 in Georgia, and Wabash College in Indiana.

1 enrolling in, and graduating from, college. Beginning in the 1980s (60 years after the creation of  
2 the Deed of Trust) the number of women enrolled in institutions of higher education has  
3 consistently exceeded the number of men. Finally, today, women are no longer exclusively  
4 steered towards fields that perpetuate traditional gender roles. Women are encouraged to enter  
5 into the same fields as men, including law, medicine, and other fields associated with power  
6 and influence. (Newell Decl. ¶ 17.) Therefore, today, almost 90 years after the creation of the  
7 Deed of Trust, due to the changing role of women in education, many women are interested in  
8 the type of program offered at Deep Springs College.

9 **iii. The Above-Described Circumstances Substantially Impair the**  
10 **Accomplishment of the L. L. Nunn Trust's Purposes.**

11 Deep Springs College was established by L. L. Nunn to provide the best-quality  
12 education to promising students who desire to be of service to society. In recent years, the  
13 accomplishment of this purpose has been impaired by the continuation of the single-sex male  
14 admissions policy. Deep Springs College, and its students, have been negatively impacted by  
15 the single-sex admission policy in the following areas: (1) student applications, (2) faculty  
16 recruiting, (3) fundraising, (4) community recognition, and (5) education.

17 Deep Springs College's single-sex admissions policy has inhibited the college's  
18 ability to recruit those individual students who best exemplify the values of Deep Springs  
19 College for two reasons. One, some male students are unwilling to attend because Deep  
20 Springs College is not coeducational. (Newell Decl. ¶24.) Second, in some cases, the best  
21 individuals for admission to Deep Springs College are undoubtedly females, who are not even  
22 permitted to apply for admission.

23 To provide the type of education it seeks to provide, Deep Springs College must  
24 be able to hire as presidents, faculty, and staff those individuals who exemplify the values  
25 taught at Deep Springs College. Deep Springs College's single-sex admissions policy has  
26 inhibited the college's ability to recruit and hire such individuals as members of the faculty and  
27 as presidents. Some potential faculty members have been unwilling to teach at a college with a  
28 single-sex admissions policy. (Newell Decl. ¶23.) There is a systemic concern in academia

1 about single-gender higher education institutions—especially male-only institutions—and that  
2 has hindered recruiting the academic leaders needed to achieve the Deep Springs College’s  
3 purpose. (Newell Decl. 9:23-25.)

4           Deep Springs College’s single-sex admissions policy has inhibited the college’s  
5 ability to fundraise. Deep Springs College is a unique institution in that it does not charge its  
6 students tuition. The effect of this policy is a heightened need for monetary donations to the  
7 school. Potential donors have expressed concern over Deep Springs College’s single-sex  
8 admissions policy and have made clear that their decision not to donate has been directly  
9 influenced by that policy. (Newell Decl. ¶25.)

10           In addition, as described in detail in the Newell Declaration, the single sex  
11 admission policy has limited both the direct financial support and other institutional support  
12 that is available from Deep Springs College’s sister institution, the Telluride Association.  
13 (Newell Decl. ¶27.)

14           Deep Springs College’s single-sex admission policy has caused a negative effect  
15 on community recognition of the college by the higher education community that Deep Springs  
16 relies upon as the talent pool for recruiting presidents and faculty. (Newell Decl. ¶28.)

17           Finally, the continuation of the current single-sex admissions policy hinders the  
18 education of students at Deep Springs College. Research demonstrates a complementarity in  
19 learning and behavior between men and women. (Newell Decl. 7:18-20.) Whereas men tend  
20 primarily toward analytical responses to phenomena around them, women’s responses more  
21 often also include deep feelings about human challenges and predicaments. (Newell Decl.  
22 7:16-18.) In classrooms where no women are present, it is difficult, and at times impossible,  
23 for a professor to engage students at an empathic level. (Newell Decl. 8:9-10.) The inclusion  
24 of women in the classroom enhances the educational benefits for all students because it allows  
25 both genders to observe and benefit from each other’s response to phenomena. (Newell Decl.  
26 8:13-15.)

1                   b.       **A Judicial Modification of the Trust to Permit the Education of Women  
2                   and Men Together at Deep Springs College would Advance the Trust's  
3                   Purpose.**

4                   Modifying the Deed of Trust to permit the Trustees to use the trust property for the  
5 benefit of both male and female students at Deep Springs College would advance the purpose of  
6 the Deed of Trust:

7                   [T]o provide for and carry on educational work ... emphasizing the need  
8 and opportunity for unselfish service in uplifting mankind from  
9 materialism to idealism, to a life in harmony with the Creator[.]

10                   Admitting women to Deep Springs College would better prepare students for  
11 leadership roles outside of Deep Springs College, where women play increasingly important roles.  
12 For example, one important skill for someone in a leadership position is communication and public  
13 speaking. The adoption of coeducation would permit the students at Deep Springs College to  
14 enhance their communication skills by forcing the students to consider their audiences more  
15 carefully when appealing to a sense of shared experience, or by articulating an argument in a way  
16 that accounts for more diverse listeners. (Newell Decl. ¶ 20.) This is merely a single example of  
17 how coeducation would better prepare students at Deep Springs College for the world outside of  
18 Deep Springs College.

19                   Furthermore, the manner in which Deep Springs College educates by helping its  
20 students flourish in leadership roles, would assist both male and female students at Deep Springs in  
21 realizing their leadership potential. Therefore, a judicial modification of the Deed of Trust to  
22 permit the education of men and women together at Deep Springs College is necessary to continue  
23 to fulfill the purpose of the trust.

24                   **2.       In the Alternative to a Modification Under Probate Code Section 15409,  
25                   Under the Common Law, the Deed of Trust Should be Modified to Allow the  
26                   Education of Both Men and Women at Deep Springs College Because Such  
27                   Modification is Necessary to Accomplish the Purpose of L. L. Nunn in  
28                   Executing the Deed of Trust.**

29                   California courts have equitable power, founded in common law, to modify a trust  
30 under "peculiar" or "exceptional" circumstances where necessary to accomplish the purpose of the  
31 trustor as expressed in the trust instrument. (*See Adams v. Cook, supra*, 15 Cal.2d 352; *see also*

1 *Stewart v. Towse* (1988) 203 Cal.App.3d 425; *Ike v. Doolittle, supra*, 61 Cal.App.4<sup>th</sup> 51.)

2           In *Adams v. Cook, supra*, 15 Cal.2d, the California Supreme Court held that trial  
3 courts have equitable power to modify a trust where the primary purpose of the trust would be  
4 defeated by “slavish adherence” to its terms, stating:

5           {T}he rule against courts modifying the terms of a contract ... does not  
6 apply to declarations of trust, where the primary purpose of the trust  
7 would not be accomplished by a strict adherence to the terms of the  
8 declaration of trust and ... *when it is made to appear in a court of equity*  
9 *... that the benefits and advantages which the trustor desired to confer*  
10 *upon the beneficiaries would not accrue to them by “a slavish adherence*  
11 *to the terms of the trust”, the court may modify the terms of the trust to*  
12 *accomplish the real intent and purpose of the trustors*

10 (*Id.* at 361 (italics added).)

11           In *Stewart v. Towse, supra*, 203 Cal.App.3d 425, the Court of Appeal found that the  
12 trial court had jurisdiction to authorize a requested modification to an irrevocable trust to change a  
13 named trustee. In so holding, the Court of Appeal stated that such jurisdiction was based on the  
14 1986 revisions to the Probate Code which codified the common law equitable power of trial courts  
15 to modify the terms of a trust where such modification is necessary to serve the original intentions  
16 of the trustors. (*Id.* at 428-429.)

17           As discussed in *Ike v. Doolittle, supra*, 61 Cal.App.4<sup>th</sup> 51, the *Adams* and *Stewart*  
18 cases “are instructive of how broad is the common law power of a trial court in equity to modify a  
19 trust.” (*Id.* at 79.) Further, when one party challenged a court’s authority to modify the trust in a  
20 manner not consistent with the provisions set forth in Probate Code section 15400 *et seq.*, the  
21 Court of Appeal held that “the broader equitable power of trial courts to modify or reform a trust is  
22 preserved by operation of [Probate Code] section 15002, which expressly provides: ‘Except to the  
23 extent that the common law rules governing trusts are modified by statute, the common law as to  
24 trusts is the law of this state.’” (*Id.* at 84.)

25           **a. A Judicial Modification of the Trust is Necessary to Accomplish L. L.**  
26           **Nunn’s Purpose in Creating the Trust.**

27                           **As discussed above, the purpose of the L. L. Nunn Trust, as**  
28                           **stated in the Deed of Trust, is:**

[T]o provide for and carry on educational work ... emphasizing the need



1 and opportunity for unselfish service in uplifting mankind from  
2 materialism to idealism, to a life in harmony with the Creator[.]

3 (Deed of Trust ¶ 1.)

4 This language has traditionally and consistently been interpreted as stating a  
5 purpose to train those few individuals who have the potential to become society's leaders in the  
6 future.

7 **b. Radical Changes in Society Necessitate a Modification of the Deed of  
8 Trust.**

9 As discussed more fully above, women now have vastly more opportunities in  
10 society than in 1923. Today, women are able to attend all of the public, and most of the private,  
11 colleges and universities in the United States. They are enrolling in, and graduating from, college  
12 in greater numbers than men. Finally, today, women are no longer exclusively steered towards  
13 fields that perpetuate traditional gender roles. Women are encouraged to enter into the same fields  
14 as men, including law, medicine, politics, and other fields associated with power and influence.

15 **c. A Judicial Modification of the Trust to Permit the Education of Women  
16 at Deep Springs College would Advance the Trust's Purpose.**

17 Modifying the Deed of Trust to permit the trustees to use the trust property for the  
18 benefit of both male and female students at Deep Springs College would advance the purpose of  
19 the Deed of Trust stated above.

20 Admitting women to Deep Springs College would better prepare both male and  
21 female students for leadership roles outside of Deep Springs College, where women play an  
22 important role, and will better prepare students at Deep Springs College as leaders in the world  
23 outside of Deep Springs.

24 Therefore if this Court does not find that the Deed of Trust can be construed to  
25 allow the Trustees to admit male and female students, then, a judicial modification of the Deed of  
26 Trust, pursuant to common-law equitable principles, to permit the education of women at Deep  
27 Springs College is necessary to achieve the purpose of the trust.

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**IV.  
CONCLUSION.**

Petitioner petitions this Court for a judicial determination that the language of the Deed of Trust allows the Trustees of the L. L. Nunn Trust, in their discretion, to use the trust property to fund the education of women, as well as men, at Deep Springs College. Such interpretation is warranted because it is consistent with the broad discretion granted to the Trustees in the Deed of Trust.

If the Court does not construe the language of the Deed of Trust to permit the education of both men and women at Deep Springs College, Petitioner petitions this Court for a judicial modification of the Deed of Trust to permit use of the trust for the education of women, in addition to men, at Deep Springs College. Such modification is warranted under Probate Code section 15409 because, due to circumstances not known nor anticipated by L. L. Nunn, the continuation of the Trust under its current terms would defeat or substantially impair the accomplishment of the purposes of the Trust. In the alternative, such modification is warranted under the common law because such modification is necessary to accomplish the purpose of L. L. Nunn in executing the Deed of Trust.

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**V.  
REQUEST FOR JUDICIAL NOTICE**

Pursuant to Evidence Code Sections 451 Petitioner respectfully requests this Court to take judicial notice of the following document: Excerpt from *Words and Their Uses Past and Present: A Study of the English Language* by Richard Grant Wright and published in 1927 ("Exhibit "A").

Pursuant to California Evidence Code section 451(e), the court shall take judicial notice of "[t]he true signification of all English words and phrases and of all legal expressions." The excerpt from *Words and Their Uses Past and Present: A Study of the English Language* (attached as Exhibit "A") describes the meaning of the word "men," an English word, as used in 1927.

1 Exhibit "A" should accordingly be judicially noticed.

2 A true and correct copy of Exhibit "A" is attached hereto.

3 DATED: February 3, 2012

4 BAKER MANOCK & JENSEN, PC

5  
6 By:   
Christopher L. Campbell

7 Jeffrey A. Jaech  
8 Attorneys for Petitioner DAVID HITZ

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**EXHIBIT A**

Excerpt from *Words and Their Uses Past and Present: A Study of the English Language*

**WORDS AND THEIR USES**  
**PAST AND PRESENT**

*A Study of*  
*The English Language*

BY  
**RICHARD GRANT WHITE**

*Revised Edition*



BOSTON AND NEW YORK  
**HOUGHTON MIFFLIN COMPANY**  
*The Riverside Press Cambridge*  
1927



## CHAPTER VIII

### FORMATION OF PRONOUNS. — SOME. — ADJECTIVES IN EN. — EITHER AND NEITHER. — SHALL AND WILL

#### FORMATION OF PRONOUNS

TWO correspondents have laid before me the great need — which they have discovered — of a new pronoun in English, and both have suggested the same means of supplying the deficiency, which is, in the words of the first, “the use of *en*, or some more euphonious substitute, as a personal pronoun, common gender.” “A deficiency exists there,” he glibly continues, “and we should fill it.” My other correspondent has a somewhat juster notion of the magnitude of his proposition, or, as I should rather say, of its enormity. But still he insists that a new pronoun is “universally needed,” and as an example of the inconvenience caused by the want, he gives the following sentence: —

“If a person wishes to sleep, they must n’t eat cheese for supper.”

“Of course,” he goes on to say, “that is incorrect; yet almost every one would say *they*.” That I venture to doubt. “Few would say in common conversation, ‘If a person wishes to sleep, he or she must n’t eat cheese for supper.’ It is too much trouble. We must have a word to take the place of *he*

or *she*, *his* or *hers*, *him* or *her*, etc. . . . As the French make the little word *en* answer a great many purposes, suppose we take the same word, give it an English pronunciation (or any other word), and make it answer for any and every case of that kind, and thus tend to simplify the language."

To all this there are two sufficient replies. First, the thing can't be done; last, it is not at all necessary or desirable that it should be done. And to consider the last point first. There is no such dilemma as the one in question. A speaker of common sense and common mastery of English would say, "If a man wishes to sleep, he must not eat cheese at supper,"<sup>1</sup> where *man*, as in the word *man-kind*, is used in a general sense for the species. Any objection to this use of *man*, and of the relative pronoun, is for the consideration of the next Woman's Rights Convention, at which I hope it may be discussed with all the gravity befitting its momentous significance. But as a slight contribution to the amenities of the occasion, I venture to suggest that to free the language from the oppression of the sex and from the outrage to its dignity, which have for centuries lurked in this use of *man* and *he*, it is not necessary to say, "If a person wishes to sleep, *en* must n't eat cheese for supper," but merely, as the speakers of the best English now say, and have said for generations, "If one wishes to sleep, one must n't, etc." *One*, thus used, is a good pronoun, of healthy, well-rooted growth. And we have in *some* another word which supplies all our need in this respect without our going to the French for their over-worked

<sup>1</sup> Unless we mean that the supper consisted entirely or chiefly of cheese, we should not say cheese *for* supper, but cheese *at* supper.