

1 Christopher L. Campbell #116329
 Jeffrey A. Jaech #076876
 2 BAKER MANOCK & JENSEN, PC
 5260 North Palm Avenue, Fourth Floor
 3 Fresno, California 93704
 Telephone: 559.432.5400
 4 Facsimile: 559.432.5620
 Email: CCampbell@bakermanock.com

5 Peter E. Tracy #78185
 6 LAW OFFICE OF PETER E. TRACY
 106 South Main Street, #200
 7 P.O. Box 485
 Bishop, California 93515
 8 Telephone: 760.872.1101
 Facsimile: 760.872.2971
 9 Email: inyomono@stanfordalumni.org

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INYO CO. SUPERIOR COURT
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J Baker

10 Attorneys for Petitioner Deep Springs College Corporation
11

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

15 In re the Matter of the
 16
 17 James R. Withrow, Jr. Chair for
 Government, the James R. Withrow, Jr.
 18 Lectureship Fund, and the James R.
 Withrow, Jr. General Fund,
 19 Endowments created under the Will of
 James R. Withrow, Jr. at Deep Springs
 College Corporation

CASE No. **SI CV PB 12 53 233**
**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 PETITION FOR COURT ORDER
 INTERPRETING ENDOWMENT GIFT
 INSTRUMENT**

[Probate Code § 17200]
 DATE: March 9, 2012
 TIME: 9:00 AM
 DEPT:
 JUDGE:

24
 25 Petitioner, Deep Springs College Corporation, respectfully submits this
 26 Memorandum of Points and Authorities in Support of its Petition for Court Order Interpreting
 27 Endowment Gift Instrument.
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**I.
INTRODUCTION**

James R. Withrow, Jr. ("Testator"), an alumnus of Deep Springs College living in the State of New York, in his last will, gave Deep Springs College Corporation (the "Corporation") a portion of his estate for the creation of several endowments at Deep Springs College. This bequest included a condition subsequent (the "Condition"), which was accepted by the Corporation, that could cause the Corporation to forfeit the Endowments. The Condition relates to Deep Springs College ceasing to be an educational institution "for the education of promising young men" as provided in a document of Deep Springs College's founder, L. L. Nunn. This petition concerns the proper interpretation of the Condition, in light of the Corporation's decision to become coeducational starting in 2013.

As explained below, under both New York and California law, the Condition will not be triggered by the admission of women, along with men, to Deep Springs College.

**II.
BACKGROUND**

What is now Deep Springs College was founded in 1917 by Lucien L. Nunn ("L. L. Nunn"). From 1917 until 1923, Deep Springs College carried on "educational work for the education and development of promising young men." (Lucien L. Nunn Deed of Trust dated November 5, 1923 [hereinafter, "Deed of Trust"].) In November 1923, L. L. Nunn established a trust (the "Trust") designed to fund Deep Springs College. The Trust's purpose was to provide for and carry on the educational work "similar to and in development of" the operation already in place since 1917. The trustees were given broad power to select the manner, form and location of the enterprise. They were charged with providing for "the education of promising young men" in a manner emphasizing unselfish service, constrained only by the Trustees' "good conscience and the exercise of their best judgment." The Deed of Trust also specified that Deep Springs College be a non-profit organization that would allow the students to be self-governing.

In 1967 the Corporation was established with the Testator as an initial member of the Corporation's Board of Directors (the "Board of Directors"). Testator served on the Board of

1 Directors continuously through 1980. Today, pursuant to a contract between the Trust and the
2 Corporation, the Board of Directors is responsible for the operation of Deep Springs College.
3 Although the Corporation is affiliated with the Trust, the Corporation is a legally separate entity
4 formed as a non-profit public benefit corporation. The specific and primary purposes of the
5 Corporation were initially to assist the Trust with fundraising. In the 1996 revision of the bylaws
6 of Deep Springs College Corporation, the purpose of the Corporation was amended to include
7 continuing the educational work begun at Deep Springs College by L. L. Nunn. That change was
8 to facilitate the Corporation assuming the primary role in operating Deep Springs College.

9 In 1984, Testator, an alumnus of Deep Springs College and Cornell Law School,
10 executed his last Will and Testament. Testator was an attorney in the State of New York and was
11 a member of the Board of Trustees of the L. L. Nunn Trust from 1963 through 1980 and of the
12 Deep Springs College Corporation from 1967 through 1980. He continued to serve and attend
13 Trustee meetings (on a less regular basis) as an honorary Trustee/Director through the Spring of
14 1986. Testator was a member of the Board of Trustees of the L. L. Nunn Trust and Deep Springs
15 College Corporation in 1979 when the trustees considered whether Deep Springs College should
16 change its admissions policy to permit the admission of both men and women. On May 12, 1979,
17 the trustees declined to transition Deep Springs College into a coeducational institution but
18 resolved to revisit the issue in five years. When Testator executed his will in 1984, he was aware
19 of the resolution, that he voted for, providing that the trustees would consider the question of
20 coeducation in the near future.

21 Testator gave the Deep Springs College Corporation one million dollars and twenty
22 percent of his residuary estate to establish an endowed professorship, lectureship, and general
23 fund. Testator placed the Condition on these bequests:

24 [S]hould DEEP SPRINGS COLLEGE cease to be an educational
25 institution "for the education of promising young men" as provided in Par.
26 1 of the Deed of Trust dated November 5, 1923 ... all of the funds passing
27 under this Article [i.e. the Endowments] shall revert to the TELLURIDE
ASSOCIATION ... or, if ... the TELLURIDE ASSOCIATION refuses to
accept such funds, to the VISITING NURSE SERVICE OF NEW YORK.

28 (Paragraph (D) of Article Fifth of Testator's last will.) The funds would also revert to the

1 Telluride Association if Deep Springs College permitted “the use of intoxicating liquor or illegal
2 drugs,” but that condition is not at issue here.

3 The Telluride Association is the only other educational institution founded by L. L.
4 Nunn that remains in operation. The Telluride Association is discussed in detail in the Declaration
5 of L. Jackson Newell in support of the concurrent petition asking this court to interpret the
6 language of the Deed of Trust of L. L. Nunn. Testator lived at Telluride House on the Cornell
7 University Campus beginning in 1930 and he promptly joined the Telluride Association. He
8 served as Association President from 1941 to 1943 and Treasurer from 1963 to 1973. Telluride
9 Association transitioned from an all male student population to coeducational from 1962 through
10 1964.

11 Testator died in 1987. His estate was administered in New York.

12 In addition to this Petition seeking an interpretation of the Condition, David Hitz,
13 as Chairman of the Board of Trustees of the L. L. Nunn Trust for the benefit of Deep Springs
14 College, has filed a concurrent petition on behalf of the Board of Trustees of the L. L. Nunn Trust
15 asking this court to interpret the language of the Deed of Trust. Specifically, this Court has been
16 asked to construe Paragraph 1 of the Deed of Trust to permit the trustees to use the trust estate
17 granted in the Deed of Trust for the education of both men and women at Deep Springs College.
18 The Condition refers explicitly to the language of Paragraph 1 in the Deed of Trust.

19 **III.**
20 **LAW AND ANALYSIS**

21 Whether the Court interprets the Condition under New York law or California law,
22 the Condition should be construed as permitting Petitioner to retain the Endowments when Deep
23 Springs College begins to admit female as well as male students.

24 **A. Under New York Law, the Condition Will Not Be Triggered When Deep Springs**
25 **College Begins to Admit Female As Well As Male Students.**

26 Testator devised to Deep Springs College Corporation one million dollars and
27 twenty percent of his residuary estate to establish endowed professorship, lectureship, and general
28 funds (the “Endowments”). Testator placed the Condition on these Endowments: “should Deep

1 Springs College cease to be an educational institution ‘for the education of promising young men’
2 [as provided in the Trust, then] all of the funds [given to Deep Springs College] shall revert to the
3 Telluride Association.”

4 Petitioner acknowledges that it took the Endowments subject to the Condition.
5 Petitioner’s inquiry at issue is the proper interpretation of the Condition. In 1982, the Appellate
6 Division of Supreme Court in New York interpreted a condition similar to that in Testator’s will in
7 *In re Estate of Edwards* (N.Y. App. Div. 1982) 86 A.D.2d 702 (hereinafter, *Edwards*). In
8 *Edwards*, the testator created a trust in his will to assist an existing all-male boarding school in
9 Massachusetts, Worcester Academy. The will stated that the school could receive payments from
10 the trust so long as it “continues to be operated as a boys preparatory school, preparing boys for
11 college entrance.” *Id.* As stated in the will, if Worcester Academy ceased “to be operated as a
12 preparatory school for boys,” it was no longer eligible to receive funds from the trust. *Id.*
13 Sometime after the will was executed and admitted to probate, Worcester Academy became
14 coeducational. The change to a coeducational institution caused an alternative beneficiary of the
15 trust to sue arguing that Worcester Academy was barred from receiving the trust income because it
16 had become coeducational. The trial court held that the school was not barred from continuing to
17 receive the funds even though it began admitting female students.

18 The appellate court affirmed the decision of the trial court. The court held that “the
19 paramount rule of testamentary construction is that the intention of the testator must be gleaned
20 from the express language of the will.” *Id.* at 703 (citing *In re Estate of Jones* (N.Y. 1975) 38
21 N.Y.2d 189). The court reasoned that the intention of the testator was to fund the school as long
22 as it prepared boys for college, and that function continued to be fulfilled even after the school
23 became coeducational. Additionally, since the testator was “obviously intelligent and
24 sophisticated,” the will was precise and definite in expressing his intentions. *Id.* If the testator
25 desired the school to remain for boys only in order to receive money from the trust, he would have
26 included language such as “solely” or “only.” *Id.*

27 The provision in the will in *Edwards* is more restrictive than the Condition. The
28 Condition only requires that Deep Springs College remain an institution “for the education of

1 promising young men,” while the more restrictive condition in *Edwards* required that Worcester
2 Academy: (1) prepare boys for college entrance, and (2) “continue[] to be operated as a boys
3 preparatory school.” *Id.* at 702. The holding in *Edwards* compels the conclusion that the Deep
4 Springs College Corporation may continue to use the Endowments after Deep Springs College
5 becomes coeducational. First, since the court in *Edwards* upheld this more restrictive provision as
6 allowing coeducation, under New York law, Petitioner should be permitted to retain the
7 Endowments even when Deep Springs College becomes coeducational. Second, like the
8 circumstances in *Edwards*, even as a coeducational institution, Deep Springs College will continue
9 to be an educational institution “for the education of promising your men as provided in Par. 1 of
10 the Deed of Trust dated November 5, 1923” because young men will continue to receive education
11 at Deep Springs College, along with women.

12 Under New York law, the primary rule is that a testator’s intent must be ascertained
13 from the will itself and cannot be shown by extrinsic evidence unless the extrinsic evidence is
14 offered for the purpose of explaining an ambiguity in the will. However, extrinsic evidence may
15 also be offered to assist the court in ascertaining the testator’s intent. *Margulis v. Teichman* (1985)
16 127 Misc.2d 168, 169-170. The following extrinsic evidence is relevant to assist the Court in
17 ascertaining Testator’s intent in drafting the Condition.

18 Testator adopted the Condition more than two years after *Edwards* was decided.
19 *Edwards* was decided in January 1982 and Testator’s will was executed in September 1984. A
20 testator is presumed to know the applicable law in effect when a will is executed. *In re Allar’s*
21 *Will* (N.Y. Sur. Ct. 1962) 36 Misc.2d 405, 407. Also, it is presumed that the will’s drafter is
22 acquainted with the law, and such knowledge is imputed to the testator. *In re Appel’s Estate* (N.Y.
23 Sur. Ct. 1947) 189 Misc. 417, 420-421. Therefore, both Testator and the drafter of Testator’s will
24 are deemed to have notice of the decision in *Edwards* at that time Testator’s will was executed.
25 Furthermore, because both Testator and the drafter of Testator’s will were sophisticated attorneys
26 practicing in New York, they undoubtedly would be aware of a relatively recent New York
27 appellate decision on a topic closely related to provisions proposed for Testator’s will (i.e., the
28 Condition).

1 In addition, notably, in 1979, while a member of the Deep Springs Board of
2 Trustees, Testator participated in formal discussions considering whether to change Deep Springs
3 to coeducation. Those discussions culminated in the following resolution:

4 Resolved, that Deep Springs continue its present educational
5 policies, including its status as an all-male institution, but that these
6 policies be reviewed in five years in order to assure the Board that
7 the primary educational objectives of the Founder can be achieved,
8 in view of changes which may occur in social conditions and
9 attitudes in the meantime.

10 Therefore, at the time he executed his will, Testator knew that coeducation would be reconsidered
11 at Deep Springs in the near future.

12 Since Testator and the drafter of Testator's will had notice of the decision in
13 *Edwards*, were sophisticated attorneys, and were aware that coeducation at Deep Springs would
14 soon be reconsidered, they could have easily drafted the will in accordance with *Edwards* to state
15 "solely" or "only" men if Testator's intention was for Testator's bequest to revert to the Telluride
16 Association if and when Deep Springs College became coeducational. Their failure to so specify
17 shows a contrary intent.

18 **B. Likewise, under California Law, the Condition Should be Interpreted to Allow**
19 **Petitioner to Retain the Endowments When Deep Springs College Begins to Admit**
20 **Female As Well As Male Students.**

21 **1. Testator's Transfer of Property to the Corporation Was Subject to a**
22 **Condition Subsequent.**

23 In *L.B. Research and Education Foundation v. UCLA Foundation* (2005) 130
24 Cal.App.4th 171, the court held that a contribution to establish an endowed chair at the UCLA
25 medical school created a conditional transfer of property between the parties. In July 2000, the
26 L.B. Research and Education Foundation gave the UCLA Foundation a contribution of \$1 million
27 to establish an endowed chair of cardiothoracic surgery. *Id.* at 175. The gift instrument provided
28 in part: "if the Cardiothoracic Surgery program shall cease to exist at UCLA, or in the event that
UCLA does not meet the terms and conditions of this agreement, any and all funds shall be
transferred to support an endowed chair in Cardiothoracic Surgery [at a different university]...."
Id. at 175-176. The first issue before the court was whether the endowment gift created a

1 charitable trust or created a conditional transfer. The court found that because the donor had
2 included a forfeiture provision in the gift, the agreement was a conditional transfer. *Id.* at 180.

3 Here, Testator gave the Corporation funds subject to a forfeiture provision similar
4 to the one in *L.B. Research and Education Foundation*. Like in *L.B. Research and Education*
5 *Foundation*, this Court should find that the agreement between the parties created a conditional
6 transfer.

7 **2. Because Testator Intended to Incorporate the Language of the Deed of Trust**
8 **as Interpreted and/or Modified into the Condition, the Condition Will Not be**
9 **Triggered if This Court Interprets or Modifies the Deed of Trust to Permit**
10 **Use of the Trust Property for the Education of Both Men and Women.**

11 a. Testator Intended to Incorporate the Language of the Deed of Trust of the L.
12 L. Nunn Trust as Interpreted and/or Modified.

13 As stated above, to avoid forfeiture, Deep Springs College must operate ““for the
14 education of promising young men’ as provided in Par. 1 of the Deed of Trust dated November 5,
15 1923.” (Paragraph (D) of Article Fifth of Testator’s last will.) This language specifically
16 incorporates language from the Deed of Trust and refers to the Deed of Trust. This demonstrates
17 Testator’s intent to link the interpretation of the Condition to the interpretation of the Deed of
18 Trust. The plain language of the Condition states that the money reverts to Telluride if Deep
19 Springs ceases to be an institution "for the education of promising young men" as provided in the
20 Deed of Trust. Stated that way, the meaning of the Condition can only be ascertained by
21 interpreting what is “provided” in the Deed of Trust.

22 b. If this Court Interprets or Modifies the Deed of Trust to Permit Use of the
23 Trust Property for the Education of Both Men and Women, this Court
24 Should Find that the Condition Has Not Been Triggered.

25 David Hitz, as Chairman of the Board of Trustees of the L. L. Nunn Trust has filed
26 a concurrent petition asking this Court to interpret the language of the Deed of Trust. Specifically,
27 this court has been asked to construe or modify Paragraph 1 of the Deed of Trust to permit the
28 Board of Trustees to use the trust estate granted in the Deed of Trust for the education of both men
and women.

If the court interprets or modifies the Deed of Trust to permit the Board of Trustees
of the L. L. Nunn Trust to use the trust estate for the education of both men and women at Deep

1 Springs College, then Deep Springs College will not cease “to be an educational institution ‘for
2 the education of promising young men’ as provided in Par. 1 of the Deed of Trust dated November
3 5, 1923” when it becomes coeducational.

4 **3. Even Without Reference to the Deed of Trust, the Plain Language of the**
5 **Condition Compels the Conclusion that the Education of Both Men and**
6 **Women at Deep Springs College Will Not Trigger the Condition.**

7 California Probate Code section 21102(a) provides that “[t]he intention of the
8 transferor as expressed in the instrument controls the legal effect of the dispositions made in the
9 instrument.” Therefore, when interpreting the meaning of the Condition, this Court should focus
10 on the express language of the Condition itself.

11 The Condition states: “should Deep Springs College cease to be an educational
12 institution ‘for the education of promising young men’ [as provided in the Trust, then] all of the
13 funds [given to Deep Springs College] shall revert to the Telluride Association.”

14 Coeducation at Deep Springs does not contradict the express language of the
15 Condition. The Corporation may retain the Endowments so long as Deep Springs College does
16 not cease to be an educational institution for the education of “promising young men.” The
17 education of both men and women at Deep Springs College will not cause Deep Springs College
18 to “cease to be an educational institution for the education of promising young men.” Deep
19 Springs College will continue to educate young men after it becomes coeducational. Further,
20 Deep Springs College’s admission requirements will not change (other than eliminating the gender
21 restriction); thus, Deep Springs College will continue to admit the same type of students, using the
22 same rigorous admissions standards, that it currently employs. The only difference is that female
23 students may be admitted in conjunction with the admission of male students.

24 Although courts are generally limited to the express language of the gift instrument,
25 the court may consider extrinsic evidence to do either of the following: (1) determine the intention
26 of the transferor, Probate Code section 21102(c), or (2) to resolve or show the existence of a latent
27 ambiguity, *Estate of Flint v. Kulp* (1972) 25 Cal.App.3d 945. Here, it is appropriate for the court
28 to consider extrinsic evidence to determine Testator’s intent in including the Condition.

Testator, an attorney and a member of the Deep Springs Board of Directors when a

1 shift to coeducation was discussed and voted on just a few years earlier, was sophisticated enough
2 to draft his will in a way that accurately conveyed his intentions. If Testator had intended that
3 coeducation would trigger the Condition, he could have easily included a modifier such as “only”
4 or “solely” into the Condition or specifically stated that if Deep Springs became coeducational the
5 funds would revert to the contingent beneficiaries. His failure to do so is evidence that Testator
6 did not intend that coeducation would trigger the Condition.

7 **4. The Law Disfavors a Forfeiture, So the Condition Should be Strictly**
8 **Construed.**

9 As stated in *Lobb v. Brown* (1929) 208 Cal.476, a forfeiture provision must be
10 strictly construed and forfeiture avoided if reasonably possible. Specifically,

11 [a] forfeiture clause is to be strictly construed, that is while it is valid and
12 is to be enforced according to the ascertained intent of the testator, yet in
13 ascertaining his intent, no wider scope is to be given to his language than
14 is plainly required.

15 As discussed above, coeducation at Deep Springs does not contradict the express
16 language of the forfeiture provision (the Condition). The Corporation may retain the gifted funds
17 so long as Deep Springs College does not cease to be an educational institution for the education
18 of promising young men. Deep Springs College will continue to educate young men after it
19 becomes coeducational. Further, Deep Springs College’s admission requirements will not change
20 (other than eliminating the gender restriction); thus, Deep Springs College will continue to admit
21 the same type of students, using the same rigorous admissions standards, that it currently employs.
22 The only difference is that female students may be admitted in conjunction with the admission of
23 male students.

24 Because the explicit language of the forfeiture provision is not triggered by
25 coeducation and the admission of women to Deep Springs College, the Corporation should be
26 permitted to retain the Endowments.

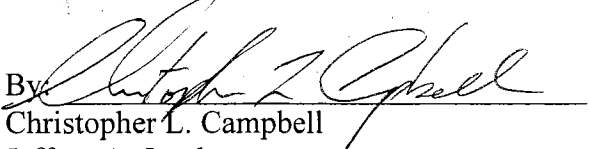
27 **IV.**
28 **CONCLUSION**

Whether the Court applies New York or California law, the Court should find that

1 Deep Springs College's decision to educate both men and women does not trigger the Condition
2 and permit Deep Springs College to retain the Endowments.

3 DATED: February 3, 2012

4 BAKER MANOCK & JENSEN, PC

5
6 By 

7 Christopher L. Campbell
8 Jeffrey A. Jaech
9 Attorneys for Petitioner DEEP SPRINGS
10 COLLEGE CORPORATION
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