

1 JOSEPH C. LIBURT (STATE BAR NO. 155507)  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
2 1000 Marsh Road  
Menlo Park, California 94025  
3 Telephone: 650-614-7400  
Facsimile: 650-614-7401  
4 jliburt@orrick.com

5 HEATHER M. HOEKSTRA (BAR NO. 276197)  
420 Coventry Road  
6 Kensington, California 94707  
Telephone: 510-525-1514  
7 hmatsumoto@berkeley.edu

8 Attorneys for Respondents  
Kinch Hoekstra and Edward Keonjian, Trustees of the  
9 L.L. Nunn Trust and Directors of the Deep Springs  
Corporation

10  
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF INYO  
13

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

Case No. SI CV PM 1253232

**RESPONDENTS' RESPONSE  
MEMORANDUM OF POINTS AND  
AUTHORITIES REGARDING  
INTERPRETATION OF DEED OF  
TRUST**

17  
18 **DATE: October 30, 2012**  
**TIME: 9:00 AM**  
19 **DEPT: 4**  
**JUDGE: Hon. Dean T. Stout**

20 **ACTION FILED: February 6, 2012**  
21  
22  
23  
24  
25  
26  
27  
28

TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<b>Page</b>
I. INTRODUCTION .....	1
II. THE DEED'S LANGUAGE SHOWS THAT THE TRUSTEES ARE OBLIGATED TO PROVIDE SOLELY FOR THE EDUCATION OF YOUNG MEN .....	1
III. THE TRUSTEES HOLD THE ESTATE IN TRUST, IN PERPETUITY, FOR THE PURPOSE, WITH THE POWERS, AND UPON THE TERMS AND CONDITIONS SET FORTH IN THE DEED OF TRUST.....	4
A. The L. L. Nunn Deed Of Trust Is A Perpetual Contract.....	4
B. L. L. Nunn Knew That The Terms and Conditions Of His Charitable Trust Were Perpetually Binding.....	4
C. Central to L. L. Nunn's Intent Is That The Trust Be Restricted To The Education Of Promising Young Men.....	5
D. The Trustees Have Broad Powers To Administer The Trust's Stated Purpose.....	6
E. The Trustees' Discretion Is Subject To The Trust's Terms And Conditions .....	7
F. The Discretion Granted To The Trustees Is Redundant To Trust Law, And Is Neither Extended Nor Absolute .....	9
G. The Trustees Have Abused Their Discretion Therefore The Question of Whether Their Actions Are Reasonable Is Moot.....	10
IV. PETITIONER FAILS TO DISTINGUISH BETWEEN INTERPRETATION AND MODIFICATION .....	11
A. Petitioner's Hypotheticals Are Irrelevant.....	11
B. Petitioner Cites Cases That Are Inapposite.....	12
V. CONCLUSION.....	15

TABLE OF AUTHORITIES

Page

CASES

1		
2		
3		
4		
5	<i>Brown v. Mem'l Nat. Home Found.</i>	
6	(1958) 162 Cal.App.2d 513.....	4
7	<i>Burling v. Newlands</i>	
8	(1896) 112 Cal. 476 .....	4
9	<i>City of Palm Springs v. Living Desert Reserve</i>	
10	(1999) 70 Cal.App.4th 613 .....	11
11	<i>Crocker-Citizens Nat'l Bank v. Younger</i>	
12	(1971) 4 Cal.3d 202 .....	10
13	<i>Davenport v. Davenport Found.</i>	
14	(1950) 36 Cal.2d 67 .....	5
15	<i>Ebitz v. Pioneer Nat. Bank</i>	
16	(1977) 372 Mass. 207.....	14
17	<i>Estate of Edwards</i>	
18	(N.Y. Sup. Ct. 1982) 86 A.D.2d 702.....	14
19	<i>Estate of Lawrence</i>	
20	(1941) 17 Cal.2d 1 .....	8
21	<i>Estate of Nicholas</i>	
22	(1986) 177 Cal.App.3d 1071.....	9
23	<i>Green v. Old People's Home of Chicago</i>	
24	(1915) 269 Ill. 134 .....	13
25	<i>Howard v. Adm'rs of Tulane Educ. Fund</i>	
26	(La. 2008) 986 So.2d 47.....	14
27	<i>Howard v. Adm'rs of Tulane Educ. Fund</i>	
28	(La. Ct. App. 2007) 970 So.2d 21.....	13
	<i>In re Beauchamp's Estate</i>	
	(1967) 256 Cal.App.2d 563.....	8
	<i>In re Canfield's Estate</i>	
	(1947) 80 Cal. App. 2d 443.....	7

**TABLE OF AUTHORITIES**  
(continued)

		Page
1		
2		
3	<i>In re Delaney</i>	
4	(1882) 71 L.J. Ch. 811, 814 .....	6
5	<i>In re Estate of Bodger</i>	
6	(1955) 130 Cal.App.2d 416.....	4
7	<i>In re Greenleaf's Estate</i>	
8	(1951), 101 Cal.App.2d.....	7, 9
9	<i>In re Miller's Estate</i>	
10	(1964) 230 Cal.App.2d 888.....	5, 7, 10
11	<i>In re Robbins' Estate</i>	
12	(1962) 57 Cal.2d 718 .....	6
13	<i>Larrabee v. Tracy</i>	
14	(1943) 21 Cal.2d 645 .....	8
15	<i>Matter of Cram's Will</i>	
16	(1980) 186 Mont. 37 .....	13
17	<i>Matter of Estate of Wilson</i>	
18	(1983) 59 N.Y.2d 461 .....	13
19	<i>Matter of Johnson's Will</i>	
20	(N.Y. Sur. 1981) 108 Misc.2d 1066.....	13
21	<i>Montgomery v. Adm'rs of Tulane Educ. Fund</i>	
22	(La. Ct. App. 2010) 51 So.3d 60 .....	14
23	<i>San Diego Gas &amp; Elec. v. Super. Ct.</i>	
24	(1996) 13 Cal.4th 893 .....	10, 11
25	<i>Trustees of Dartmouth College v. City of Quincy</i>	
26	(1970) 357 Mass. 521.....	13
27		
28		
	<b>STATUTES</b>	
	Civ. Code, § 3534 .....	7
	Code Civ. Proc., § 1859 .....	7
	Prob. Code, § 16080.....	10
	Prob. Code, § 17200(b)(5) .....	10

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**  
(continued)

Page

**OTHER AUTHORITIES**

Bogert, The Law Of Trusts And Trustees, § 992..... 12

Rest.3d Trusts § 87, cmt. c..... 1

Rest.3d Trusts § 87, cmt. c., illus. 1 & 2 (2007) [attached as Exhibit A for the Court’s  
convenience] ..... 11

Rest.3d Trusts, § 87, cmt. d..... 7, 10

Rest.3d Trusts § 87, cmt. d., illus. 5..... 10

1 **I. INTRODUCTION**

2 The L. L. Nunn Deed of Trust (the “Deed”) is the founding charter of Deep Springs  
3 College and binds its ongoing and future operations. This instrument clearly defines the character  
4 and purpose of the institution, and prescribes the fundamental principles and policies that direct,  
5 empower, and limit its Trustees’ actions. In return for the custody of this endowment and the  
6 power to operate the educational enterprise, the Trustees accepted its terms and conditions and  
7 undertook to be legally bound by the Trust’s purpose as stated in the Deed. The Deed neither  
8 grants the “unfettered discretion” that the majority Trustees now wish to have nor permits them to  
9 disregard or unilaterally modify the Trust Purpose. Its directives have the force of law, and they  
10 may not be dismissed as if they were mere “guidance” or “vision,” as Petitioner now contends.

11 The Court should intervene to prevent trustees from acting without due regard to the terms  
12 and purposes of discretionary power, or under a mistaken interpretation of trust terms, or  
13 according to a misunderstanding of applicable fiduciary law. (*See* Rest.3d Trusts § 87, cmt. c.)  
14 The Trustees’ conduct is based on an erroneous interpretation of the Trust terms; it is inconsistent  
15 with their basic fiduciary obligations; and it is unreasonable. Petitioner, on behalf of the majority  
16 Trustees, now makes the brazen claim that the Deed places *no* limitations on their discretion, that  
17 they “are not legally required to” follow the Trust’s clear restrictions, and that they can do  
18 whatever they want with the Trust estate and other entities controlled by the Deed without being  
19 subject to court scrutiny. (Petitioner’s Opening Brief on Interpretation of the L. L. Nunn Trust,  
20 hereinafter “Pet’r’s Interp. Br.” at pp. 4-5.) To arrive at this conclusion, Petitioner relies on  
21 audacious misinterpretation of the Deed, wishful thinking about the relation between the Trust  
22 and the Corporation (which is bound to administer the College in accordance with the Trust  
23 purpose), and invocation of a few out-of-state cases that, on scrutiny, prove to be inapposite,  
24 irrelevant, or actually support Respondents.

25 **II. THE DEED’S LANGUAGE SHOWS THAT THE TRUSTEES ARE OBLIGATED TO PROVIDE**  
26 **SOLELY FOR THE EDUCATION OF YOUNG MEN**

27 In his original memorandum, Petitioner stated that the words “promising young men” are  
28 what are at issue in this matter. The language has not proved tractable, however, so this matter

1 has metastasized into exorbitant assertions of unlimited discretion. Since the gender limitation in  
2 the Trust’s purpose nonetheless remains the central issue, Respondents first consider Petitioner’s  
3 cursory attempt to explain away the restriction to “promising young men.”

4 Petitioner claims that the phrase “promising young men” in the Purpose Statement of the  
5 Deed is best understood as a description of the educational work at Deep Springs in 1923, and as  
6 a description of L. L. Nunn’s “vision for Deep Springs to provide non-binding advice and  
7 guidance to the Trustees[.]” (Pet’r’s Interp. Br., p. 10.) Petitioner repeats this suggestion, but  
8 offers no evidence for it. Indeed, Petitioner slips back into reading the language as prescriptive as  
9 soon as he sets his sights on different quarry: “Although the Deed of Trust states that Deep  
10 Springs College **shall be** for the ‘education of promising young men,’ such language should not  
11 be interpreted as intending to limit the Trustees to providing education...to only male students.”  
12 (*Id.* at p. 13 [emphasis added].)

13 Petitioner first argues that the word “men” in 1923 was “used generally to describe both  
14 male and female persons.” (*Id.* at p. 13.) The single and dubious authority for this claim is  
15 Richard Grant White’s 1927 edition of *Words and Their Uses Past and Present*. This book was  
16 originally published in 1870, however, and the cited passage is exactly the same in the 1870  
17 edition; as it was written at least 53 years before the Deed of Trust, the passage’s reliability as a  
18 guide to how language was used in the 1920s is questionable.<sup>1</sup> Moreover, Mr. White does *not*  
19 argue that “men” was “generally” used in a gender-neutral way, stating instead the unremarkable  
20 proposition that the word “man” *could* be so used. Here, the relevant question is instead whether  
21 “young men” can be or could then have been used in a gender-inclusive way, a question that  
22 Petitioner does not address and to which Respondents have provided a decisive negative answer.  
23 White argues that a competent user of the language will be able to distinguish when “man” is  
24 being used in a gender-specific way and when not. It is noteworthy that the correspondents to  
25 whom Mr. White refers were concerned that words like “he” and “his” were already by 1870  
26 understood to refer specifically to males, and should be reserved for gender-specific uses.

---

27  
28 <sup>1</sup> The author, Richard Grant White, died in 1885, and his mocking reference to the “next Women’s Rights  
Convention” dates the passage (the last such convention was held in 1869) and indicates that Mr. White was sexist by  
the standards of his day.

1           Moreover, on the pages Petitioner provided, White insists that there are readily available  
2 alternatives for those who wish to refer to both men and women without using what may instead  
3 be mistaken as gender-specific language. White notes that “one” and “some” can substitute for  
4 the gendered pronouns causing such a stir when White wrote the passage by 1870. This indicates  
5 that Mr. Nunn could have utilized clear gender-neutral terms had he wished to, but he chose  
6 instead to disambiguate his intent with a gender-specific term.<sup>2</sup>

7           Second, Petitioner argues that Mr. Nunn was fully aware of prestigious coeducational  
8 colleges and universities and the predominance of coeducation. (Pet’r’s Interp. Br., at p. 13, 16-  
9 18.) But the natural inference from Mr. Nunn’s awareness that coeducation was the norm is that  
10 his specification of something different from this norm should bear particular weight. If there is  
11 no specification about a matter where there is a background norm, this might suggest that we  
12 default to that norm. But a specification *against* the prevailing norm, as Petitioner claims the  
13 specification of the all-male student body was, should be respected as intentional and purposeful.

14           Third, Petitioner argues that Mr. Nunn would have used language like “solely” or “only”  
15 if he had wished to forever restrict the Trustees to supporting the education of men and not  
16 women. (*Id.* at p. 13, 16.) Respondents argue at length in their Memorandum on Interpretation  
17 that Mr. Nunn’s specification of “promising young men” means that further restrictive language  
18 would be redundant. Nonetheless, Respondents agree with Petitioner that Nunn’s use of “solely”  
19 or “only” in reference to the stated purpose of educating “promising young men” would indeed  
20 demonstrate that he “intended to limit the Deep Springs College student body in perpetuity to  
21 males only” (*Id.* at p. 13). Mr. Nunn made perfectly clear in the Purpose Statement of the Deed  
22 that the work of the Trustees “shall be carried on...solely for the advancement of the purpose”  
23 mentioned therein, and that purpose was to provide “for the education of promising young  
24 men[.]” Respondents agree that when Mr. Nunn said that the work of the Trust was solely for  
25 education of promising young men, he thus limited the student body in perpetuity to males only.

26  
27  
28           <sup>2</sup> There are many relevant examples of language that Mr. Nunn could easily have used. One example is in the founding grant of Cal Poly in 1901, which declares that the purpose of the school is “to furnish to young people of both sexes mental and manual training in the arts and sciences” (Stats. 1901, ch. 101, p. 115).



1 **III. THE TRUSTEES HOLD THE ESTATE IN TRUST, IN PERPETUITY, FOR THE PURPOSE,**  
2 **WITH THE POWERS, AND UPON THE TERMS AND CONDITIONS SET FORTH IN THE**  
3 **DEED OF TRUST.**

4 A. **The L. L. Nunn Deed Of Trust Is A Perpetual Contract**

5 A declaration of trust constitutes a contract between the trustor and the trustee for the  
6 benefit of a third party. (*See In re Estate of Bodger* (1955) 130 Cal.App.2d 416, 424-25.) Here,  
7 the “Grantees and their successors and assigns forever” promised “to have and to hold” the estate,  
8 “in trust, nevertheless . . . for the purpose, with the powers, and upon the terms and conditions  
9 hereinafter more fully set forth” in the Deed. (Hoekstra Dec., Ex. 10, at p. 1. (unless otherwise  
10 stated, all references herein to Exhibits are to the Hoekstra Declaration filed October 3, 2012)) In  
11 exchange for this promise, and on these conditions, L. L. Nunn turned over the operation of the  
12 Deep Springs educational enterprise to the Trustees and granted them legal title to all assets listed  
13 in the Deed of Trust and all funds raised or income accrued under its aegis. When they joined the  
14 Board of Trustees, the current Trustees accepted the Trust’s terms and conditions. As successors  
15 of the original trustees, their discretion is limited by these terms and conditions in perpetuity.

16 B. **L. L. Nunn Knew That The Terms and Conditions Of His Charitable Trust**  
17 **Were Perpetually Binding**

18 Since “[a] trust created in writing cannot be varied by a subsequent declaration of the  
19 trustee” (*Burling v. Newlands* (1896) 112 Cal. 476, 498), “[i]t is obvious that a trustee cannot  
20 change the trust upon which it holds property.” (*Brown v. Mem’l Nat. Home Found.* (1958) 162  
21 Cal.App.2d 513, 524.) When Mr. Nunn wrote the Deed of Trust, he was confident that if the  
22 College survived, his directions would be honored. Such confidence was warranted because the  
23 grant was under a trust deed, and trust law imposes a high standard of care on trustees to obey  
24 those directions and not abuse the discretion afforded them. The Deed twice binds the “Grantees,  
25 and their successors and assigns *forever*” to the restrictions of the Trust. (Dec., Ex. 10, at p. 1  
26 [emphasis added].) Absent a successful court petition under the standards of *cy près* or equitable  
27 deviation to change the Trust’s purpose or its administrative or dispositive provisions  
28 respectively, the Trustees must forever act according to these restrictions. Thus, in establishing  
Deep Springs within trust law, L. L. Nunn justifiably depended on the Trustees so to act, and on

1 the Court to intervene should they fail so to act.

2 C. **Central to L. L. Nunn's Intent Is That The Trust Be Restricted To The**  
3 **Education Of Promising Young Men**

4 A testator confers discretion on his trustees for the purpose of carrying out his intent. So  
5 “[t]he purpose of a trust is to be carried out no matter what the document says about the trustee’s  
6 discretion.” (*In re Miller's Estate* (1964) 230 Cal.App.2d 888, 907.) The discretion given to a  
7 trustee is never unlimited and is always subject to that trustee’s fiduciary duties. (*Ibid.*)

8 In the Deed’s Purpose paragraph, the power of discretion conferred (“but in such manner  
9 and form and at such place or places within said State as said Trustees in good conscience and the  
10 exercise of their best judgment may determine”) qualifies the “work similar to and in  
11 development of the [educational] work already inaugurated by Grantor in the State of California.”  
12 (Ex. 10, at ¶ 1.) What is this work already inaugurated? It is stated in the first recital paragraph:

13 WHEREAS Grantor has heretofore established an educational institution at Deep  
14 Springs in Inyo County, California, and has been there carrying on educational  
work for the education and development of promising young men;

15 (Ex. 10, at p. 1.) The only characteristic Mr. Nunn uses to describe the work he has “already  
16 inaugurated” is that it is “for the education and development of promising young men.” (*Ibid.*)  
17 This shows that the gender of the students was a fundamental element of his enterprise.

18 It is undeniable that Mr. Nunn dedicated much of his adult life to the education of young  
19 men. And since 1923, the Trustees of Deep Springs have consistently construed the purpose of  
20 the Deed accordingly. The practical construction the Trustees have placed upon the document for  
21 nearly 90 years is entitled to great weight in its interpretation.<sup>3</sup> (*See Davenport v. Davenport*  
22 *Found.* (1950) 36 Cal.2d 67, 73.) Furthermore, Respondents have thoroughly demonstrated that  
23 Mr. Nunn consistently described Deep Springs as dedicated to the education of young men,  
24 indicating the central importance of this specification. (*See Hoekstra Decl.*, at ¶¶ 174-202.)

25 In his Reply to the Response and Objection and his Interpretation Brief, Petitioner  
26 nonetheless alleges that there is an absence of evidence of Mr. Nunn’s explanation of, or  
27

28 <sup>3</sup> Respondents vigorously deny Petitioner’s unsupported and unwarranted assertion that “a majority of  
Trustees in the last 30 years have interpreted the Trust otherwise.” (Pet’r’s Interp. Br., at p. 10.)

1 justification for, his stated intent to restrict the Trust to the education of young men. Particularly  
2 given the wholesale destruction of Mr. Nunn's documents after his death, including letters (*see*  
3 Ex. 14), Respondents insist on the simple principle that absence of evidence does not constitute  
4 evidence of absence. Moreover, there is no reason to think that Mr. Nunn would have regarded  
5 "young men" as an ambiguous or complex stipulation requiring explanation; he similarly leaves  
6 unexplained his unambiguous specifications that the College be non-profit and in California.  
7 They do not therefore become invalid or open to Trustee override. Not least, Petitioner here  
8 confuses intent with motivation, the law of trusts being unconcerned with the latter whenever the  
9 intent or purpose is stated clearly in the instrument. (*See In re Robbins' Estate* (1962) 57 Cal.2d  
10 718.) "Charity is necessarily altruistic, and involves the idea of aid or benefit to others; but, given  
11 the latter, the motive impelling it is immaterial." (*In re Delaney* (1882) 71 L.J. Ch. 811, 814.)

12         Petitioner claims that Mr. Nunn "did not indicate that a single-sex male student body was  
13 important to his educational philosophy and to the work that he had begun at Deep Springs"  
14 (Pet'r's Interp. Br., at p. 12), as if Mr. Nunn's use of the language of educating "promising young  
15 men" as the unique descriptor of the work he had undertaken at Deep Springs, his use of the same  
16 language in stipulating Deep Springs' sole purpose, and his insistent referral later in the Deed to  
17 this purpose as controlling, were insufficient to show this importance. Mr. Nunn could scarcely  
18 have made it clearer that this stipulation was important to him.

19         D.         **The Trustees Have Broad Powers To Administer The Trust's Stated Purpose**

20         L. L. Nunn refined his model of education for over 40 years. There were many features  
21 that he felt were extremely important to the success of his model, including isolation, labor, and a  
22 liberal arts curriculum. However, recognizing that the Trust could in principle last forever, Mr.  
23 Nunn did not want to tie the Trustees' hands on any matters other than those he regarded as  
24 strictly essential to his project. He refrained from building in all but a few requirements, leaving  
25 to the Trustees' discretion even a range of salient features that were very important to him.

26         So long as the Trustees showed due respect for Deep Springs' established traditions, in  
27 giving them the discretion to provide for and develop the "work already inaugurated at Deep  
28 Springs," he thereby granted them the authority to alter matters "in such manner and form . . . as

1 said Trustees in good conscience and the exercise of their best judgment may determine.” (Ex. 10,  
2 at ¶ 1.) These include matters so dear to his heart as: the size of the student body; the nature or  
3 even the existence of the labor program; the treatment of academic credit; the curriculum, and in  
4 particular offerings in the liberal arts as opposed to the sciences and their practical applications;  
5 the prohibition of alcohol and tobacco; the ongoing affiliation with Telluride Association; the  
6 name of the institution and where it is located *within* California; the provision of a full  
7 scholarship to all students; the amount of time students spend at Deep Springs; and the policy of  
8 isolation. These were all matters he believed to be important and on which he provided his views  
9 in informal communications. But on reflection he decided not to bind the Trustees to any of them  
10 in the Deed. What he does bind them to is set forth in the Deed, and in particular in the Purpose  
11 Statement, numbered paragraph 1. Some of those requirements are by their nature open to  
12 interpretation (What is “idealism”? What counts as “a life in harmony with the Creator”?).  
13 Others are not (the Trustees are to dedicate themselves *solely* to the education of young men, in  
14 California, and not for profit). But all of these requirements are obligatory.

15 E. **The Trustees’ Discretion Is Subject To The Trust’s Terms And Conditions**

16 “[T]here is no divergence of authority to the effect that the trust must be administered in  
17 accordance with the intentions of the settlor.” (*Miller’s Estate*, 230 Cal.App.2d at p. 907.)  
18 Determining whether the Trustees have abused their discretion in any way “requires a delineation  
19 of the scope of that discretion. Its outer limits are set by the terms of the trust.” (*In re Canfield’s*  
20 *Estate* (1947) 80 Cal. App. 2d 443, 449.) It is only within these limits that the Trustees are  
21 empowered to maximize the Trust’s benefits as they see fit.

22 Specific directions for action and specific limitations on action trump any general grant of  
23 discretion. (*In re Greenleaf’s Estate* (1951), 101 Cal.App.2d at pp. 664-65; *see also* Civ. Code, §  
24 3534; Code Civ. Proc., § 1859.) While the Trust bestows discretion on the Trustees, it  
25 particularly and unambiguously limits this discretion to administering the Trust’s purpose and  
26 subordinates this discretion to the Trust’s terms and conditions. To hold otherwise would be  
27 “contrary to sound policy, and a contradiction in terms [as it would] permit the settlor to relieve a  
28 *trustee* of all accountability.” (Rest.3d Trusts, § 87, cmt. d [emphasis in original].)

1           Petitioner’s theory that all directions in the Purpose Statement – other than the grant of  
2 discretion to determine the form and manner of the education at Deep Springs – are non-binding,  
3 descriptive, and merely advisory is speculative and far-fetched. Petitioner provides no support in  
4 the law for this claim, and the legal rule “seems well settled to the contrary.” (*In re Beauchamp’s*  
5 *Estate* (1967) 256 Cal.App.2d 563, 568.) The California Supreme Court has held that

6           when words of recommendation, request and the like are used in direct reference  
7 to the estate, they are prima facie . . . imperative and not precatory. While the  
8 desire of a testator for the disposal of his estate is a mere request when addressed  
to his devisee, it is to be construed as a command when addressed to his executor.

9 (*Estate of Lawrence* (1941) 17 Cal.2d 1, 7.) The relation between an executor and the legatees  
10 are like that between a trustee and the beneficiaries of the trust; therefore, the directions in the  
11 Purpose Statement are to be construed as commands to the Trustees. (*See Larrabee v. Tracy*  
12 (1943) 21 Cal.2d 645, 650.) While they are imperative in form, even if they were precatory in  
13 form, their legal force would be imperative.

14           Petitioner claims that the Trustees have “unfettered discretion,” that they can manage “the  
15 trust estate without any limitation or restriction on the discretion of the Trustees,” and may sell  
16 the entire trust estate without the “intervention of any court.” (Pet’r’s Interp. Br., at p. 8.) This  
17 Court will recognize why Petitioner proposes that the Trustees’ powers of discretion, like those of  
18 the Deity, are absolute and unrestricted: if there are *any* restrictions on Trustee action, surely the  
19 restrictions in the Purpose Statement will be paramount, and the Trustees will be limited to  
20 carrying out and providing for the education of promising young men. Having committed  
21 themselves to rejecting that limitation, the Trustees have thereby committed themselves to the  
22 wholesale rejection of any and all limitations on their powers, an absurd and presumptuous  
23 assertion of absolute authority wholly inconsistent with their fiduciary obligations as Trustees.

24           In asserting that the Trustees may act “without the intervention of any court or any  
25 limitation or restriction,” Petitioner relies on the language of paragraph 2(a) of the Deed, which  
26 states that the Trustees may dispose of any part of the trust estate

27           without the intervention of any court or any limitation or restriction on the  
28 discretion of said Trustees *as to the kind or class of property in which the*  
*proceeds of or income from said trust estate may be reinvested.*

1 (Ex. 10, at ¶ 2 (a) [emphasis added].) As he does repeatedly in his Opening Brief, Petitioner  
2 emphasizes the grant of discretion and then ignores any and all limitations stated immediately  
3 thereafter, and further fails to take seriously *the specific and explicit purpose for which the*  
4 Trustees are granted discretion. The “non-intervention” clause here quoted refers only to the  
5 Trustees’ discretion to decide the asset classes when reinvesting the proceeds from the sale of  
6 trust estate assets. Mr. Nunn prudently left judgments about the details of investments to the  
7 Trustees, though any such investments will nonetheless be limited to any and all restrictions in  
8 the overarching Purpose Statement. Although the Trustees shall have uncontrolled discretion *in*  
9 *this particular* of investment decisions, Mr. Nunn did not grant this discretion so that the Trustees  
10 could sell Trust assets to themselves (as directors of a corporation formed to carry out the Trust  
11 purpose) in order to avoid the explicit restrictions in the Trust’s purpose. Plan B is clearly an act  
12 “committed in a state of mind not contemplated by the settlor” and for a purpose contrary to the  
13 settlor’s purpose, and this Court should intervene to stop it. (*See Greenleaf*, 101 Cal.App.2d at p.  
14 662.)

15 When Petitioner claims there are *no restrictions* on the Trustees’ discretion, he dispenses  
16 with such language as the clear requirement that it “shall be the duty of the said Trustees”:

17 [1] to accord the Student Body the full right, power, and authority of democratic  
18 self-government in accordance with its traditions and the ideals and policies of  
19 Deep Springs educational institution set forth in the correspondence and  
20 documents of Grantor and of the institution. . . . [2] to recognize the right of the  
21 Student Body to maintain its organization and hold its meetings under such rules  
22 and regulations as it may adopt and with no one present but its own members  
23 except on its invitation; [3] to ascertain, consider, and comply with, so far as in  
24 good conscience they can so comply with, the desires of said Student Body; and  
25 [4] to accord it full opportunity to make its wishes known to them.

26 (Ex. 10, at ¶ 5.) Like the direction to educate promising young men solely, these and other  
27 directives in this paragraph are all clear and explicit limitations of the scope of the Trustees’  
28 discretion and power. Petitioner cannot in good faith claim otherwise.

29 F. **The Discretion Granted To The Trustees Is Redundant To Trust Law, And Is**  
30 **Neither Extended Nor Absolute**

31 The extent of a trustee’s powers depends on whether the trustee has been given absolute  
32 powers or mere discretionary powers. (*See Estate of Nicholas* (1986) 177 Cal.App.3d 1071,

1 1087.) A settlor may manifest an intention to grant greater than ordinary latitude in the trustee's  
2 exercise of discretionary judgment. (See Rest.3d Trusts, § 87, cmt. d.) Although Petitioner makes  
3 much of the phrase, "in such manner and form . . . as said Trustees in good conscience and the  
4 exercise of their best judgment may determine," thereafter depending on it to justify the Trustees'  
5 actions, this grant merely restates the objective standard of reasonableness required by California  
6 trust law. (See Prob. Code, § 16080.) This grant of discretion does not include words such as  
7 "absolute," "sole and uncontrolled," or "unlimited," nor does it resemble anything like an  
8 extended grant of discretion found in the Restatement Third of Trusts, granting the trustee  
9 "absolute and binding discretion, in the event of any controversy or uncertainty, to construe and  
10 finally determine the meaning of the trust provisions." (Rest.3d Trusts § 87, cmt. d., illus. 5; see  
11 also Mr. Nunn's grant of full discretion in the trust funds referred to in his Second Codicil, Ex. 12  
12 at ¶ 4 (r)-(s).) As this Probate Court surely recognizes, the Deed's grant of discretion is nothing  
13 special and is indeed boilerplate language. It does not extend the Trustees' discretion beyond the  
14 default legal standard in any way, and its exercise remains subject to the Deed's purpose and  
15 specific restrictions and to this Court's scrutiny.

16 G. **The Trustees Have Abused Their Discretion Therefore The Question of**  
17 **Whether Their Actions Are Reasonable Is Moot**

18 Bound as they are by the Deed's explicit language, the Trustees' discretion does not  
19 extend to implementing coeducation. The basic problem with Petitioner's entire position is that  
20 the Trustees do not have the authority they purport to act upon. The determination of how they  
21 have used their discretion is subsequent to the determination of what discretion they have. The  
22 discretion granted a trustee, no matter how broad, can never be employed to cancel the settlor's  
23 intention or defeat the trust's purpose. (*Miller's Estate*, 230 Cal.App.2d at p. 909.)

24 The Court should also find the Trustees' use of discretion unreasonable. The mere fact  
25 that a trustee is given discretion does not authorize him to act beyond the bounds of a reasonable  
26 judgment. (See Prob. Code, § 16080, and Prob. Code, § 17200(b)(5).) Therefore, a "discretionary  
27 power conferred upon a trustee may be controlled by the proper court if not reasonably  
28 exercised." (*Crocker-Citizens Nat'l Bank v. Younger* (1971) 4 Cal.3d 202, 212.) Reasonableness

1 is an objective test. (*See San Diego Gas & Elec. v. Super. Ct.* (1996) 13 Cal.4th 893, 938.)  
2 Hence, the relevant inquiry is not whether the Petitioner regards his own action as reasonable, as  
3 he repeatedly assures the Court, but whether prudent persons generally, looking at the  
4 circumstances impartially and objectively, would consider it to be reasonable. (*Ibid.*) Therefore, a  
5 violation of trust is also to be determined objectively, and not by the Petitioner's own  
6 understanding of his authority and the legal significance of his actions. (*See City of Palm Springs*  
7 *v. Living Desert Reserve* (1999) 70 Cal.App.4th 613, 625.)

8 The Restatement provides an enlightening illustration of the application of objective  
9 reasonableness when determining whether a trustee abused his discretion. (Rest.3d Trusts § 87,  
10 cmt. c., illus. 1 & 2 (2007) [attached as Exhibit A for the Court's convenience].) The action taken  
11 by the trustee is an abuse of discretion even though the discretion was exercised in good faith and  
12 based on inquiry and investigation, and despite the outcome being otherwise equitable absent the  
13 trust restriction. (*See ibid.*) So even if the Trustees "examined and debated the financial,  
14 operational, educational, ethical, philosophical, and moral impacts of the question of coeducation  
15 for many months before making a decision"<sup>4</sup> (Pet'r's Interp. Br., at p. 9), they still abused their  
16 discretion by exercising it for a purpose other than that for which they were granted discretion.

17 To clarify Petitioner's surprising insistence that Respondents absolve them (Pet'r's Interp.  
18 Br., at pp. 8-9): Respondents do allege that Petitioner's interpretation of the Deed is not in good  
19 faith; that Plan B was devised and adopted in bad faith; and that the Trustees failed to consider  
20 the issues adequately because they did not consider the legal issues, which Petitioner insists are  
21 merely instrumental matters of execution. (See Exs. 1, 2, 3, 4, and 5.)

#### 22 **IV. PETITIONER FAILS TO DISTINGUISH BETWEEN INTERPRETATION AND MODIFICATION.**

23 Petitioner confuses the applicable standards for interpretation, equitable deviation, and *cy*  
24 *près*. Even the hypotheticals Petitioner presents depend upon changed circumstances to support  
25 Petitioner's "construction" of the Trust Deed.

##### 26 **A. Petitioner's Hypotheticals Are Irrelevant**

27 In describing his hypothetical trusts for the XYZ Nursing School and the military  
28

---

<sup>4</sup> There is a notable absence of *legal* impacts or requirements from this list of what the Trustees considered.



1 academy, Petitioner apparently does not remember that the Parties, at his request, agreed to  
2 bifurcate the issues of construction and modification. Petitioner relies on “facts” such as “in  
3 1923, no one expected a nursing school would enroll men,” or “in 1923, [the founder] did not  
4 envision women having military careers.” (Pet’r’s Interp. Br., at p. 11.) Petitioner continues  
5 “[l]ikewise, in 1923, L. L. Nunn reasonably did not anticipate that women would be interested in  
6 attending a remote school that required a Spartan lifestyle and ranch work.”<sup>5</sup> (*Ibid.*) Since  
7 “[s]ociety has changed since 1923,” Petitioner posits that it would be inconceivable for Mr. Nunn  
8 to require the Trustees to “cease supporting” a coeducational Deep Springs and instead find  
9 another all-male school dedicated to the same goals, the likelihood of which “is essentially zero.”  
10 (*Ibid.*)

11 First, this is a disingenuous argument, as the Trustees are the ones who are attempting to  
12 make Deep Springs coeducational despite the controlling role of the Trust purpose in *both* the  
13 operation of Deep Springs *and* the provision of support for it. Second, what was inconceivable  
14 for Mr. Nunn was that his Trustees would have such little respect for his life’s work that they  
15 would attempt to rid themselves of the few limitations he placed on them.

16 **B. Petitioner Cites Cases That Are Inapposite**

17 “A trustee has no authority to change the trust terms by the trustee’s own conduct alone  
18 where the controlling trust instrument makes no provision for such action.” (Bogert, *The Law Of*  
19 *Trusts And Trustees*, § 992.) In his Petition, Petitioner posits that L. L. Nunn “empowered his  
20 Trustees to deviate from the strict adherence to the terms of the trust as the Trustees ‘in good  
21 conscience and the exercise of their best judgment may determine.’” (Pet. at p. 6.) As a result, he  
22 requests confirmation that he has “the discretion . . . to modify the original and current . . .  
23 admissions policy to authorize admission of female students. . .” (*Ibid.*) But without a provision  
24 in the Deed explicitly authorizing such a deviation without Court approval, the Trustees cannot  
25 deviate from the terms of the Trust; so the above claim is false and the request should be denied.

26 Further, the few cases he does cite, none of which are from California, are inapposite.<sup>6</sup>

27 \_\_\_\_\_  
28 <sup>5</sup> Aside from its irrelevance to the current inquiry, Respondents, based on their research about women in the  
American West in the early 20th century (see Hoekstra Decl. at ¶¶ 289-305), flatly deny this unsupported assertion.

<sup>6</sup> As a threshold issue, and as Petitioner concedes, the paramount rule is that the settlor’s intention is to be

1 For instance, the trust instrument in *Trustees of Dartmouth College v. City of Quincy* (1970) 357  
2 Mass. 521, 522-25 restricted admission to the Institute to a class of beneficiaries: native-born  
3 Quincy girls. (*Id.* at p. 523.) Facing changed circumstances, the Institute proposed to admit non-  
4 Quincy-born girls while requiring that they pay full tuition to subsidize the Quincy-born girls. (*Id.*  
5 at p. 525.) Therefore, the non-Quincy-born girls neither benefitted from the trust nor took the  
6 place of the intended beneficiary. In approving this plan, the court observed that it was reluctant  
7 “to enforce a forfeiture of a charitable trust,” and relied heavily on equitable deviation to support  
8 its conclusion. (*Ibid.*) As Petitioner notes, “it became impossible to keep the school running  
9 under the specific terms of the trust” (Pet’r’s Interp. Br., at p. 11); here, by contrast, it is not  
10 impossible to keep the College running under the Trust’s specific terms, and even if it were, the  
11 relevant considerations should be put forward under the rubric of *cy près* rather than  
12 interpretation. This Court is now being asked to interpret the Trust instrument and not modify it,  
13 there is no risk of forfeiture of the gift, and if the court permits coeducation, women will displace  
14 members of the intended class of beneficiaries (“promising young men”).<sup>7</sup>

15 Moreover, the cases involving the H. Sophie Newcomb Memorial College at Tulane  
16 University are wholly immaterial. Petitioner misstates the “relevant” holdings of both cases in  
17 claiming that “the court held that the discretion granted to the University was broad enough that it  
18 was not bound to continue in perpetuity the single-sex university.” (Pet’r’s Interp. Br., p. 6.)  
19 Rather, the court held that the discretionary language in Mrs. Newcomb’s donations created  
20 unconditional gifts, and as a result, her relations did not have standing to enjoin Tulane’s  
21 consolidation of its undergraduate colleges after it was devastated by Hurricane Katrina. (*See*

---

22  
23 derived from the express language, and the document is to be interpreted as a whole.

24 <sup>7</sup> In contrast, when interpreting similar language in charitable trusts created to benefit men (whether young or  
25 old), courts in other states have found such language to be clear and unambiguous. A New York court found that  
26 “[t]he expressed purpose of testator to provide scholarships for ‘bright and deserving young men’ is set forth in the  
27 will clearly and without ambiguity.” (*Matter of Johnson’s Will* (N.Y. Sur. 1981) 108 Misc.2d 1066, 1068-69  
28 [reasoning supporting construction of gender restriction affirmed by *Matter of Estate of Wilson* (1983) 59 N.Y.2d  
461, 472-475].) “The ... intent of the decedent, which is clear” was to set up a “trust for scholarships for men only,  
....” (108 Misc.2d at p. 1069.) Due to the clarity of the intent with which that trust was established, that court found  
that “no construction [was] required to ascertain [the] testator’s intent or dominant purpose.” (*Ibid.*; see also, *Matter*  
*of Cram’s Will* (1980) 186 Mont. 37, 44 [“The intent of Cram to provide stipends to boys between the ages of 14 and  
18 is clear and unambiguous”]; and *Green v. Old People’s Home of Chicago* (1915) 269 Ill. 134, 150 [A devise to  
maintain and construct an old men’s home held not to authorize use of funds to maintain home for old women].)

1 *Howard v. Adm'rs of Tulane Educ. Fund* (La. Ct. App. 2007) 970 So.2d 21, 26.)<sup>8</sup>

2 In *Montgomery v. Adm'rs of Tulane Educ. Fund* (La. Ct. App. 2010) 51 So.3d 60, 63, the  
3 appellate court also found that legatee Tulane was the recipient of an unconditional gift; Mrs.  
4 Newcomb's obviously precatory language declaring "her mere wishes for the use of the money  
5 did not create a condition on the actual bequest." Accordingly bound by the will's language, the  
6 court concluded it could not "take it upon itself to rewrite [the] will in order to achieve a desired  
7 result." (*Montgomery*, 51 So.3d at p. 63.) Here, however, the Trustees took control of the trust  
8 estate subject to the "terms and conditions" under which the Trustees shall "maintain and  
9 perpetuate" the educational enterprise at Deep Springs. As discussed above, such language is  
10 always construed as mandatory and imperative in California.

11 In *Ebitz v. Pioneer Nat. Bank* (1977) 372 Mass. 207, 211, the court construed language  
12 generically so that it was inclusive of women. In so doing, the court carefully stated that but for  
13 an "element of ambiguity" introduced into the instrument from conflicting language, the "**term**  
14 **'young men' is unambiguous.**" (*Id.* at p. 210 [emphasis added].) The ambiguity introduced by  
15 reference to the sex-neutral policy of the guiding example of the Knights Templar, the testator's  
16 use of sex-neutral terms throughout the instrument, its dedication to both he and his wife, and the  
17 stated testamentary goal of aiding as many students as possible, all supported the *Ebitz* court's  
18 construction of the trust as inclusive of women. There are no such ambiguities in the Deed here,  
19 as the only references to the beneficiaries' gender explicitly stipulate male students.

20 In *Estate of Edwards* (N.Y. Sup. Ct. 1982) 86 A.D.2d 702, the court held that an  
21 Academy, as beneficiary of a testamentary trust, was not disqualified from receiving the trust  
22 income bequeathed to it by the conditions of the Edwards will. The court, referring to the  
23 conditional grant to the Academy, reasoned that "so long as [the Academy] prepares boys for  
24 college entrance," the trustor intended it to receive the trust funds. The finding in *Edwards* in no  
25 way suggests that the Trustees can dedicate the College to a different purpose or ignore the  
26

27  
28 <sup>8</sup> Regardless, the Louisiana Supreme Court vacated this specific holding because the lower court "should never have reached th[e] issue" of whether the donations were unconditional. (*Howard v. Adm'rs of Tulane Educ. Fund* (La. 2008) 986 So.2d 47, 60 at fn. 16.)

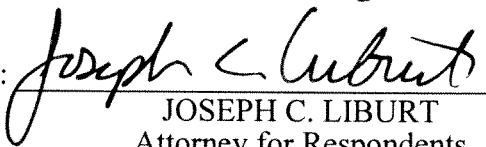
1 directions in the Deed.<sup>9</sup>

2 **V. CONCLUSION**

3 Throughout this proceeding, Petitioner has proposed several distinct “purposes” of L. L.  
4 Nunn’s Trust.<sup>10</sup> While each one is different from the one preceding it, the arrival of each new  
5 “purpose” makes abundantly clear that Petitioner is willing to propose any “purpose” so long as it  
6 makes no mention of the Trust’s clear directive restricting its actual purpose to the education of  
7 promising young men. Despite these efforts to inflate their own authority at the expense of the  
8 explicit directives in the Purpose Statement, L. L. Nunn’s binding purpose remains clear, for it is  
9 laid down explicitly in the Purpose Statement of the Deed. According to that statement of  
10 purpose, the Trustees are to pursue the work of the Trust “solely for the advancement of the  
11 purpose” of the Trust, which is “to provide for and carry on educational work” that is “for the  
12 education of promising young men[.]”

13 Dated: October 18, 2012

14 JOSEPH C. LIBURT  
Orrick, Herrington & Sutcliffe LLP

15  
16 By:   
17 JOSEPH C. LIBURT  
18 Attorney for Respondents  
19 Kinch Hoekstra and Edward Keonjian  
20

21 <sup>9</sup> Petitioner tries misleadingly to portray the Trustees’ role as merely one of providing assets from a trust fund  
22 independent of the College’s founding charter. The *Edwards* trustee was in a very different position; it had no  
23 relationship with the Academy other than being the *Edwards* trustee, and its actions in no way affected the  
24 enrollment policies of the Academy. Here the Trustees not only provide assets to run the college, they are effectively  
25 its governing board (even if through their alter ego or agent). Obviously their decisions affect the enrollment  
26 policies, and these decisions are inseparable from the educational work they provide for. The situation here is that  
27 Mr. Nunn set up the Trust to define and perpetuate the College, and in doing so restricted it to a certain specified  
28 purpose.

25 <sup>10</sup> “[T]o improve mankind” (Pet’r’s Interp. Br., at p. 19); to provide essentially an “unambiguous grant of  
26 discretion” to Trustees to do whatever they want (Pet’r’s Interp. Br., at pp. 4-7); “to train promising students who  
27 desire to be of service to society” (Pet’r Memo. P & A, at p. 11); “to prepare individuals for societal, professional,  
28 and political leadership” (Pet’r Memo. P & A, at p. 12); “to provide for and carry on educational work . . .  
emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism, to a  
life in harmony with the Creator” (Pet’r Memo. P & A, at pp. 16-17); “to provide for the continuation of Deep  
Springs” (Pet’r’s Interp. Br., at p. 12); “to support Deep Springs and to develop it as an educational institution”  
(Pet’r’s Interp. Br., at p. 9); etc.

# EXHIBIT A

---

## Exhibit A.

Illustrations 1 & 2 from Restatement Third on Trusts, section 87,  
comment c.

---

[S creates a trust,] the corpus [of which] passed on her death to T, as her successor trustee, to pay the trust income to S's daughter D during her lifetime, remainder thereafter to go by right of representation to the issue of D who survive her. The terms directed T to sell the real property that had served as S's home and to reinvest the proceeds, '*unless T, in his discretion, decides to retain that property for D's use as her residence, which T is hereby authorized to do if and for as long as he believes this to be an appropriate and reasonable use of that property.*'

[. . .]

[I]n the years between S's creation of the . . . trust and her death, D's husband died and her children became adults, left home, and married. T exercised his judgment, deciding that the residential property was not appropriate to D's needs and circumstances and also finding that D had no desire for the property to be retained for her use. Upon inquiry and investigation, T reached the further conclusion that the residential property would be just right for one of D's sons and his growing family. T therefore decided that the property should be retained and entered into a rental agreement with the son, setting a reasonable rent that could be paid to D as trust income. **Absent other facts (e.g., showing grounds for equitable deviation...), T has abused his discretion, even if in good faith, by exercising it for an improper motive—that is, for a purpose other than that for which he was granted discretionary power to retain the property, rather than sell it as otherwise directed.**

---