No. E062777
[consolidated with E058293]
(Inyo County Super. Ct. No. SI CV PB 1253232)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT
DIVISION TWO

DAVID HITZ, AS CHAIRMAN OF THE BOARD OF TRUSTEES OF THE L.L. NUNN TRUST, ACTING ON BEHALF OF THE BOARD OF TRUSTEES,

Petitioner and Respondent,

v.

KINCH HOEKSTRA AND EDWARD KEONJIAN, AS TRUSTEES OF THE L.L. NUNN TRUST,

Objectors and Appellants,

DEEP SPRINGS COLLEGE CORPORATION,

Real Party in Interest and Respondent.

Appeal From A Judgment Of The Superior Court
For The County Of Inyo
(Hon. Dean T. Stout, Presiding)

RESPONDENTS' BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Respondent David Hitz

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest *(Explain):*
(1)	Deep Springs College Corporation	Will be affected by ruling
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: October 21, 2015

Steven L. Mayer
(TYPE OR PRINT NAME)

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(SIGNATURE OF PARTY OR ATTORNEY)

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INTRODUCTION

In 1923, when L.L. Nunn deeded property for the benefit of Deep Springs College, the leaders in business, politics and the professions were all men. Women had been able to vote for President for only three years, since ratification of the Nineteenth Amendment in 1920. There had never been a female cabinet Secretary, elected Senator, or federal judge.[1] The prevailing division of labor between men and women seemed fixed and immutable.

Women were also excluded from the most prestigious institutions of higher learning. Elite undergraduate institutions such as Harvard, Yale, and Princeton were all male and not about to change. 3-RT-608:21-23, 609:10-14. These were the institutions that Nunn wanted Deep Springs to emulate, because they focused on preparing leaders and public servants. 3-RT-608:21-26. Accordingly, the Deed of Trust by which Nunn donated property and other assets to the L.L. Nunn Trust ("Trust") for the benefit of the College described one of its purposes as the education of "promising young men." 3-AA-618.

But this was not its only purpose. As the trial court found, the "overarching purpose" of the Trust was continuing the "educational work" already begun at the College "in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism." 2-AA-503.

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[1] These respective "firsts" were Secretary of Labor Frances Perkins, appointed in 1933; U.S. Senator Hattie Caraway (D-AR), elected in 1932, after succeeding her husband; Judge Genevieve Rose Cline, appointed in 1928 to the U.S. Customs Court (now known as the U.S. Court of International Trade). *See* U.S. Dept. of Labor, *Frances Perkins, Hall of Secretaries*, *available at* http://www.dol.gov/dol/aboutdol/history/perkins.htm; Mildred L. Amer, *Women in the United States Congress: 1917-2008* (Congressional Research Service 2008), at (i); U.S. Courts, *Women's History Month*, *available at* http://www.uscourts.gov/about-federal-courts/educational-resources/annual-observances/womens-history-month.

Moreover, the Superior Court found that Nunn's decision to educate "promising young men" was due more to efficiency than ideology. Because Nunn was founding a tiny college, "he needed to select as students individuals who had the greatest prospects for having an ultimate impact on society." 2-AA-502. In his day, that meant men.

Needless to say, the roles of men and women have changed in dramatic and unanticipated ways since 1923. Women now participate as leaders and public servants in all sectors of society. And the world of higher education has changed as well. Institution after institution—big and small, prestigious or not—has decided that an all-male student body is incompatible with its educational mission.[2] Indeed, while there were 117 all-male colleges in the United States in 1920 (3-RT-550:20-551:2; RA-145), now there are only four. 3-RT-640:25-641:2.

After a six-month long process of consultation and deliberation, the Trustees of the Nunn Trust voted by a 7-2 margin to make the College coeducational. (Appellants were the two dissenters.) This decision reflected the unanimous view of five former College Presidents and the faculty. In announcing the Trustee's decision, the Chair, Respondent Hitz, stated that "Nunn's key mission was preparing leaders for a life of service…. In today's world, this group includes women. Most trustees believe that effective training must include women and men working together." RA-2.

The trial court likewise found that an all-male student body impaired the College's ability to fulfill Nunn's "overarching purpose." After a six-day trial, at which all the

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[2] The colleges that have become coeducational since 1923 include Amherst, Babson College, Boston College, Brown, Columbia, Dartmouth, Davidson, Georgetown, Hamilton, Harvard, Haverford, Princeton, Tulane, Williams, Yale, and all the military academies.

educational experts who testified favored coeducation, the court found that an all-male student body decreases the quality of Deep Springs students, impairs hiring and retention of the most qualified faculty, diminishes the education provided to current students, and adversely affects the College's financial viability. 2-AA-486-522. The court therefore concluded that "the all-male admissions policy at Deep Springs substantially impairs the accomplishment of the more fundamental purposes of the Trust." 2-AA-523. In contrast, the court found that "the arguments extended in favor of retaining an all-male Student Body at Deep Springs are relatively weak." 2-AA-516.[3]

Appellants do not contend that *any* of these findings are unsupported by substantial evidence. Accordingly, to prevail on appeal they must show that the Superior Court committed legal error in modifying the Trust to change "promising young men" to "promising young people," even though an all-male student body decreases student quality, hinders faculty hiring and retention, makes the students' educational experience "subpar," and thereby "impairs the overarching educational purpose of the Trust." 2-AA-513. Not surprisingly, they cannot make the necessary showing.

STATEMENT OF FACTS

Every appellant's opening brief must "'accurately and fairly state the critical facts (including the evidence), free of bias.'" *In re Marriage of Davenport*, 194 Cal. App. 4th 1507,

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[3] Nothing in the trial court's findings—or in this brief, for that matter—calls into question the benefits for *women* attending women's colleges. Those benefits have been well-documented by studies that show a continuing need to overcome bias against women in coeducational settings. *See, e.g.*, Jillian Kinzie et al., *Women Students at Coeducational and Women's Colleges: How Do Their Experiences Compare?*, 48 J.C. STUDENT DEV. 145 (2007).

1531 (2011) (quoting JON B. EISENBERG ET AL., CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS ¶9:27 (2010)). Moreover, all evidence "must be viewed most favorably to [respondent] and in support of the [trial court's] order." *Id.* Appellants' Opening Brief does not come close to meeting these standards. While it purports to describe a few "undisputed facts adduced at trial" (AOB 4), these "facts" represent a tiny fraction of the evidence heard by the trial court, and have been assiduously cherry-picked to support Appellants' claims. Indeed, not even the most diligent reader of Appellants' brief would realize that the trial court held a six-day trial on Respondent's petition to modify the Trust; that the parties presented conflicting evidence at trial regarding the purposes of the Trust, Nunn's intent, and the impact of the all-male admissions policy on the College's ability to achieve the Trust's purposes; and that all these factual issues were resolved adversely to Appellants by the trial court in a detailed Statement of Decision comprising fifty-one pages. 2-AA-478-528. Indeed, with one limited exception relating to whether admitted but not enrolled students know anything about the College (AOB 22), Appellants' Opening Brief does not even mention *any* of the trial court's factual findings or the evidence that supports them. And with this one limited exception, they do not even attempt to demonstrate that the findings made by the trial court are unsupported by substantial evidence.

Appellants have therefore waived any challenge to all but one of the trial court's findings. Accordingly, these findings must be taken as true for purposes of this appeal. The following Statement of Facts therefore tracks the trial court's Statement of Decision, as well as the evidence that supports it.

A. Nunn's Life And World.

L.L. Nunn was born in 1853. 2-AA-480. His education was spotty. *Id.* After briefly attending Harvard Law School, he headed west. *Id.* There, between 1880 and roughly 1910, he became a mine manager and owner, banker, and a pioneer in developing hydroelectric power. *Id.*

Nunn's signature accomplishments in the power industry were born of necessity. *Id.* In the 1880s, he owned several mines around Telluride, Colorado. *Id.* Generating power to run steam-driven equipment became an issue after all readily available timber had been cut, because coal was expensive and difficult to deliver to the mines. *Id.* To overcome this problem, Nunn teamed with George Westinghouse and Nikola Tesla to develop a hydroelectric plant that began operation outside Telluride in 1891. *Id.*

Nunn's interest in education arose from his power business. *Id.* Generating and transmitting electricity in the 1890s involved new technology. *Id.* Because a skilled and experienced work force did not exist, one had to be recruited and trained. *Id.* Nunn focused on hiring young men, recently graduated from high school. *Id.* In return for their commitment and labor, he provided an education through small schools located at the plants. *Id.* As most of these sites were in remote locations, Nunn also promoted a degree of self-governance among his worker/students. *Id.*

In 1912, after selling most of his power industry assets, Nunn turned to establishing a college level institution. 2-AA-481. After one unsuccessful attempt, he founded Deep Springs College in 1917. *Id.* The College consumed most of Nunn's energy, attention, and wealth until he died in 1925. *Id.*

In establishing Deep Springs, Nunn found inspiration in the manner in which the British trained an elite few to lead their society (*e.g.*, at Oxford and Cambridge), and in the approach of America's preeminent colleges and universities,

such as Harvard, Yale, and Princeton. *Id.* Consistent with these models, the individuals whom Nunn educated before founding Deep Springs College were (with rare exceptions) all male. *Id.*[4]

Nunn's professional world was almost exclusively male. 2-AA-482. He never hired a woman to work in one of his businesses. *Id.* All his private secretaries were men. *Id.* Similarly, the people with whom Nunn interacted in business would have been overwhelmingly male. In 1920, of roughly 82,000 bankers in the U.S., only 4,226 were female; of more than 122,000 lawyers and judges, only 1,738 were women; of about 136,000 engineers, only 44 were women; and out of nearly 1.1 million workers in the mining industry, only 2,864 were women. *Id.*

Nunn's purpose in founding Deep Springs College was "to prepare leaders to serve the nation." 6-RT-1102:4 (Newell). He described the experience of attending the College as "a short season of preparation for the work of the few, the great work—the heavy toil of leadership." RA-44. However, as an academic historian and biographer of Nunn testified, "the few" who "were going to become leaders in his era were men." 3-RT-496:7-9.

B. The Deed Of Trust.

Nunn's Deed of Trust granted the property on which the College is located, as well as liquid assets that were eventually exhausted. 3-AA-615-29; 2-AA-484 & n.3. Paragraph 1 of the Deed ("the Purpose Paragraph") is a single, 174-word sentence, which contains numerous clauses and is punctuated by eleven commas. It reads as follows:

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[4] The exceptions were a handful of family members and the daughter of one of L.L. Nunn's business competitors. 2-AA-481.

> The purpose for which the property hereby conveyed and the rents, income, profits, and proceeds thereof, shall be used by said trustees is to provide for and carry on educational work in the State of California similar to and in development of the work already inaugurated by grantor at Deep Springs in Inyo County, California, but in such manner and form and at such place or places within said state as said trustees in good conscience and the exercise of their best judgment may determine, for the education of promising young men, selected by said trustees or as they may prescribe, in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony with the Creator, in the conduct of which educational work democratic self government by the students themselves shall be a feature as is now the case at said Deep Springs, and which work shall be carried on not for profit but solely for the advancement of the purpose hereinabove mentioned. (3-AA-618)

C. Many Of The College's Distinctive Features Have Changed Since Its Founding.

The College is located in remote Deep Springs Valley, in Inyo County. 2-AA-482. It is the smallest institution of higher learning in the United States, with 26 students and six faculty members. *Id.* Students pay no tuition. *Id.*

The College's two-year program is built around three "pillars": (1) academic pursuits; (2) a labor program which requires each student to devote at least four hours to ranch work each day; and (3) a unique opportunity to exercise self-governance, including direct participation in managing College affairs. *Id.* The combination of these three pillars challenges Deep Springs students to develop skills, judgment, and character in a manner different from and far beyond what college education normally entails. 2-AA-482-83. As the College's President testified, "Deep Springs is designed to allow gifted students to take an extraordinary [amount] of responsibility for their own lives." 1-RT-165:15-17.

Over the decades, some aspects of Deep Springs have remained constant. 2-AA-483. It has always been small and isolated. *Id.* A formal academic program has always existed. *Id.*

In contrast, three other key elements have changed materially. *First*, while manual labor has remained a distinguishing feature of the College, the scope and level of student responsibility has expanded since 1923. *Id.* While "Nunn was in no way prepared to let students manage student labor themselves" (3-RT-506:15-16), students now prepare food for the whole community, including raising, slaughtering and butchering the cattle, cooking the resulting meat, and providing the eggs, milk, and the produce from the garden. 1-RT-164:26-165:4.

Second, the scope and level of student self-governance has also expanded. 2-AA-483. In Nunn's day, student self-governance was limited: the students governed their collective life in the dormitories. 2-AA-483-84; 1-RT-165:20-22. But now students participate directly in virtually all aspects of College operations, including hiring and firing of administrators, faculty, and staff; recruitment and selection of new students; communications with the "outside" world; and curriculum design. 2-AA-482-83.

Third, in the Purpose Paragraph Nunn stated that he wanted students to be educated to lead "a life in harmony with the Creator." 3-AA-618. Indeed, religious emphasis and instruction was one of the most important features of the College for Nunn personally. 2-AA-484. Yet religious emphasis and instruction was dropped within 20 or 25 years following his death (2-AA-484; 3-RT-508:2-18), and the College stopped asking applicants about religious affiliation in 1965. 6-RT-1113:3-13.

D. The College's Decades-Long Consideration Of Coeducation Culminates With A Lopsided Vote In 2011 To Abandon The Single-Sex Policy.

Appellants pejoratively describe the coeducation decision as being based on "the whim of a current board of trustees." AOB 1. In fact, however, coeducation was discussed as early as the 1950s. 2-AA-484. It received serious attention in the 1960s, was the focus of extensive formal study and debate in the 1970s and again in the mid-1990s, and was studied yet again from 2003 to 2005. 2-AA-484-85. This last debate ended inconclusively when the Trustees could not agree on a rationale for maintaining an all-male student body. 2-AA-485.

In 2009, the Board Chair, Respondent Hitz, asked the Trustees to identify five strategic planning issues. 1-RT-20:9-21:3; RA-97. One of the issues identified by the Trustees was coeducation. 1-RT-20:9-21:3. At the time, Hitz thought there were two acceptable alternatives: go co-ed or remain all-male and explain why that was the best way to fulfill Nunn's mission. 1-RT-22:15-19.

At their spring 2011 meeting, the Trustees agreed to try to determine whether Nunn's mission would be best served by coeducation. 1-RT-27:14-17. All the members of the Trustees' Executive Committee, including Appellant Hoekstra, agreed with this approach. 1-RT-28:16-19. They also agreed to go co-ed only if a supermajority agreed to do so. 1-RT-29:4-5. And they agreed to vote on the issue at the Trustees' fall 2011 meeting. 1-RT-129:22-23.

To prepare for that meeting, the Trustees sent emails to friends, family and alumni, and held 10-15 town halls all over the country, seeing hundreds of people. 1-RT-30:12-17. Each town hall was attended by at least two trustees. 1-RT-30:16-17. In addition, the Trustees had a retreat at the College to discuss the issue, and read hundreds of documents from previous discussions of coeducation. 1-RT-30:19-22.

Hitz also spoke to all the living ex-Presidents of the College, except for two who had served less than a year. 1-RT-33:3-7. Although some had previously opposed coeducation, each was now in favor. 1-RT-35:1-4. They all gave the same reason: Deep Springs' primary focus was on leadership and service, and these functions are now done in environments with women in a way that hadn't been true in Nunn's time. 1-RT-35:6-12. As the result of these discussions and his own reading of Nunn's writings, Hitz concluded that the College's mission of service and leadership required coeducation. 1-RT-42:7-13.[5]

The faculty also unanimously supported admitting women. 3-AA-632. They told the Trustees that "we see no compelling reason for denying the admission of highly qualified, enthusiastic, and committed women applicants." RA-54. They also stated that coeducation would "widen the applicant pool and result in a more diverse and highly qualified class," "enhance minority recruitment" of students, and have "a positive impact on faculty recruitment." *Id.* In contrast, they stated that an all-male student body interfered with the College's educational goals:

> A fundamental and distinguishing aspect of the educational experience at Deep Springs is that students must think and act in ways that stretch them beyond their own accepted perceptions and prior experiences; moreover students must relate with others in these ways as well. A single sex student population constricts this experience, limiting students' preparation to pursue lives of service beyond the valley, where mixed gender and broadly diverse communities are the rule. (RA-55)

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[5] The trial court admitted the materials submitted to the Trustees, such as Hitz's discussions with the ex-Presidents and the faculty views discussed below, for the limited purpose of explaining the Trustees' vote. 1-RT-34:5-19, 62:4-8. These materials are discussed here for the same purpose.

In September 2011, the Trustees voted in favor of coeducation by a 7-2 margin. 1-RT-61:8-13. Appellants cast the two negative votes. 5-RT-920:25-921:14 (Hoekstra). Nevertheless, Appellant Hoekstra acknowledged that he had had a "fully fair opportunity to express my views, have them heard … and argue about it." 5-RT-984:23-24.

E. The Superior Court Decides In Phase I That The Trustees Cannot Unilaterally Decide To Adopt Coeducation.

In February 2012, the Trustees, acting through their Chair, Respondent Hitz, filed a "Petition for Court Order Construing Trust Provisions Or, If Necessary, Modifying The Trust Instrument." 1-AA-1. The Petition sought three alternative forms of relief: (1) a judicial declaration that the word "men" in the Trust does not exclude women; (2) a judicial declaration that the Trust gives the Trustees power to adopt coeducation in the exercise of their discretion; and (3) if necessary, an order modifying the Trust Deed to permit coeducation. 1-AA-11. Appellants filed an "Objection and Response" to the Petition. 1-AA-27-83.

The court thereafter issued an "Order re Bifurcation and Briefing Schedule," based on the parties' stipulation. 2-AA-289-93. After stating that Respondent had sought "an interpretation of the … Trust Instrument and, if necessary, a modification of such instrument," the court found that "[t]he economy and efficiency of handling the litigation would be promoted by bifurcating the trial … such that the interpretation issue is heard and decided first." 2-AA-290. The court also ordered—again, on stipulation of the parties—that the interpretation trial would proceed without live testimony. 2-AA-290-91.

The trial court resolved the interpretation issue in favor of Appellants. 2-AA-294-317 ("Phase I ruling"). The court first acknowledged that the issue before it was "whether the

language of the Trust can be interpreted as giving the Trustees the discretion to institute coeducation at Deep Springs College." 2-AA-296. In holding that it did not, the court rejected the argument that the Trust's references to "promising young men" referred "generically to mankind": "there is nothing in the Trust that raises questions that Nunn meant anything besides males when he used the term 'young men.'" 2-AA-298. Consequently, the court found that "the only purpose intended" by Nunn in the Trust "was to continue a men's college." 2-AA-300.[6]

Respondent appealed this ruling to this Court. 2-AA-319. That appeal, which is pending as No. E058293, has been consolidated with this appeal for purposes of oral argument and decision. Order consolidating cases, dated Feb. 10, 2015, Ct. of App. No. E062777. Respondent also supplemented his Petition, to add claims for modification of the Trust under Probate Code Section 15403 and the doctrine of *cy pres*. 2-AA-322-24.[7]

Appellants then filed a Motion for Judgment on the Pleadings with respect to Respondent's claims for modification under Sections 15403 and 15409 and the common law. 2-AA-331-32. The motion was based on the theory that these claims were barred by the trial court's alleged finding, in its Phase I ruling, that the Trust had a single purpose: the education of "promising young men." *See* 2-AA-337 ("Since the Petitioner is requesting that this Court change the legally construed purpose of the Trust, only *cy près* is applicable").

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[6] At the same time, the trial court granted Appellants' motion for preliminary injunction. 2-AA-308-13. This ruling was based primarily on the balance of harms, rather than the court's estimate of likelihood of success on the merits. 2-AA-309. No issue concerning the preliminary injunction is raised in these appeals.

[7] Unless otherwise indicated, all statutory references are to the Probate Code.

The trial court denied the motion. 2-AA-462-76. It held that its Phase I ruling did not bar the modification claims to be heard in Phase II because the two phases involved different issues. As the court explained, in Phase I "the court did not enter orders regarding the purposes of the Trust in the context of the issue of modification." 2-AA-464. Instead, the "issue in [the] first part of the bifurcated trial was whether the language of the Trust instrument should be interpreted as giving the Trustees the discretion to institute coeducation at Deep Springs College." *Id.* "The question of whether the Trust could be modified in light of the Trust's various purposes … was not before the Court." *Id.*

F. The Court In Phase II Allows Modification On Three Separate Grounds, Resolving All Disputed Issues Of Fact With Respect To These Claims In Respondent's Favor.

The trial on Respondent's modification requests lasted six days. Respondent presented seven percipient witnesses, including the Board Chair (Respondent Hitz), the College President (David Neidorf), the Development Director (David Welle), a current faculty member (Amity Wilczek), one student Trustee at the time the coeducation vote was taken (Cory Meyers), another student who testified about the students' unanimous consent to modifying the Trust (Nick Jones), and the current student chair of the Applications Committee (Zachary Robinson). In addition, Respondent presented three experts: a former President of the College, who is also an historian and the author of a scholarly book on Nunn and Deep Springs[8] (Jackson Newell); the former Dean of Students at Columbia College, who oversaw the implementation of coeducation there (Roger Lehecka); and a

[8] L. JACKSON NEWELL, THE ELECTRIC EDGE OF ACADEME: THE SAGA OF LUCIEN L. NUNN AND DEEP SPRINGS COLLEGE (2015).

psychologist at Claremont-McKenna College, who is an expert on leadership (Ronald Riggio). In contrast, Appellants presented only three percipient witnesses, including Appellant Hoekstra; an official from a single foundation that allegedly would not continue to contribute to Deep Springs once the College became coeducational (Richard Stack); and a member of the College staff who on her own initiative had begun to explore prospects for a "Nunnian" institution for women (Laura Marcus).[9] The only expert called by Appellants was a former lawyer for the Office of Civil Rights in the Department of Education (Brian Jones). Accordingly, unlike Respondent, Appellants did not present *any* educational experts. They therefore presented *no* expert testimony regarding how the lack of women students affects the quality of the education Deep Springs currently provides and, therefore, its ability to carry out Nunn's purpose. Similarly, and again unlike Respondent, Appellants presented no expert testimony concerning Nunn's life and writing, and the milieu in which he lived.

With those exceptions, though, both sides presented evidence addressing all the issues raised by the modification Petition, including Nunn's purpose in establishing the Trust, the history and character of Deep Springs, the state of the College at the time the Trustees voted to admit women, the educational benefits and burdens attributable to an all-male student body, and the corresponding advantages and disadvantages of coeducation.

After two rounds of post-trial briefing (*see* 6-RT-1152:17-22), the trial court rendered a fifty-one page Statement of

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[9] Both Ms. Marcus and Professor Wilczek had wanted to apply to Deep Springs. 2-AA-514. The trial court described them as "personifying the extraordinarily competent candidates Deep Springs has excluded because of its all-male admissions policy." *Id.*

Decision. 2-AA-478-528. The court first made numerous findings describing four different ways in which having an all-male student body impaired the College's ability to educate students and fulfill Nunn's purpose:

(1) The Single-Sex Policy Adversely Affects The Quality of Students: There are multiple reasons why the "all-male policy reduces the quality of the applicant pool and of the resulting student body." 2-AA-486. To begin with, "in many instances the most qualified applicants are females, who are not even permitted to apply." 2-AA-521; *see* note 9, *supra*. "Moreover, the addition of female candidates afforded greater opportunity for the College to have a more diverse student population not merely in terms of gender, but with respect to ethnicity, economic background, and other factors as well." 2-AA-514. In addition, "[s]ome qualified male students do not apply for admission because the College is not coeducational." 2-AA-521. Instead, "the single-sex environment increasingly attracts less mature students." *Id.*

(2) The Single-Sex Policy Adversely Affects Faculty Hiring and Retention: The all-male policy "burden[s] and complicate[s] the tasks of hiring and retaining the highest quality faculty and staff" (2-AA-486) because "qualified candidates do not apply to work at the College." 2-AA-515. In academia, "tolerance of gender stereotyping is low and sensitivity to lack of diversity high." *Id.* Consequently, as "long as Deep Springs remains out of step with prevailing mores regarding gender equality in higher education," the all-male policy "will continue to drive highly qualified [faculty] candidates away from the College." *Id.*

(3) The Single-Sex Policy Adversely Affects The Quality of Education: The all-male policy "adversely impact[s] the richness and pedagogical value of peer interactions among students in the classroom, in the labor program, and in

self-governance." 2-AA-486. "Single gender education for men yields no academic advantages and likely has certain negative effects." 2-AA-514. "The perspectives which only female peers can contribute are necessary in order to create and provide the richest, well-rounded, and beneficial educational experience." *Id.* This "deficiency is not limited to academics. Neither the labor program nor self-governance is as robust as it could and should be for the simple reason that no female students attend the College." 2-AA-515. In short, "education in a single sex environment—especially in the classroom—is inferior." 2-AA-521. Consequently, "male students attending the College are not well served by continued maintenance of a single gender program." *Id.*

(4) The Single-Sex Policy Adversely Affects The College's Financial Position: "The financial status of the College is not as viable as it could be as a result of the all-male restriction." 2-AA-513. "In light of the inherent challenges which the College already faces in these respects, elimination of this obstacle will enable the Trustees to more effectively guide the school to better realize its more essential objectives." 2-AA-522 (citations omitted).[10]

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[10] Appellants' "Statement of Facts" relies on carefully-selected snippets of evidence in an attempt to demonstrate that the College was "thriving in all respects" when the Trustees voted to become coeducational. AOB 6. But Appellant Hoekstra testified that the College was "fragile" and "comparatively weak" in a number of respects. *See* 4-RT-868:10 (college was "fragile"); 5-RT-927:20-21 ("very fragile and unique institution"); 5-RT-988:22 (college is in a "comparatively weak financial position"); 5-RT-988:23-24 ("comparatively weak situation as far as the academic program"). Moreover, Appellants have failed to assert that the trial court's findings regarding the adverse impact of the single-sex policy on the College's ability to fulfill Nunn's purposes are unsupported by substantial evidence. *See* p.4, *supra*. They are bound by those findings, and therefore cannot rely on a rosy picture of the College that the trial court

(. . . continued)

Next, the court made a series of findings supporting its conclusion that, in contrast to the benefits of coeducation, "the arguments extended in favor of retaining an all-male Student Body at Deep Springs are relatively weak." 2-AA-516. In particular, the court found that the all-male policy was unnecessary to avoid "distraction" and promote "intensity," to prevent or minimize conflict arising from sexual relationships, or to foster male bonding in an "all-male space." 2-AA-516-17.

The court then made a series of findings demonstrating that that the Trust was sufficiently ambiguous to render extrinsic evidence admissible in determining its purposes. 2-AA-491-95. Appellants refer in passing to "the Trust's unambiguous purpose statement" (AOB 5), and mention the trial court's decision to permit extrinsic evidence. AOB 12. But they do not contend that this decision was erroneous. Accordingly, this Court must presume that the trial court was correct in holding that "extrinsic evidence is admissible for the purpose of interpreting L.L. Nunn's intent and the related matters at issue." 2-AA-495.

After considering this extrinsic evidence, the court held that the Trust has "more than one purpose" (2-AA-497), and described how those purposes relate to one another:

> **(1) The Trust Has At Least Two Purposes: Continuing The Educational Work Started At Deep Springs And Educating Promising Young Men.** The "overarching purpose" of the Trust is "educational work … similar to and in development of the work already inaugurated at Deep Springs College." 2-AA-497; *accord* 2-AA-503. That work was to be done "in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism." 2-AA-497; *accord* 2-AA-503.

(. . . continued)
rejected.

Another purpose was "the education of promising young men." 2-AA-497. In other words, there were "at least two purposes: to continue the Deep Springs experiment and to educate promising young men in that or a similar fashion." 2-AA-500.

(2) The Second Purpose Is Subordinate To The First. Nunn did not believe "that the education of men was as important as idealistic education and carrying on the work begun at the College." 2-AA-502. For example, he "did not include in any document a specification of his reasons for starting Deep Springs as a men's college." *Id.* Respondent's expert Newell, who made an "extensive study of L. L. Nunn, his writings, and what others wrote about him," found no 'reference to Nunn dreaming about founding a men's college.'" *Id.* Nor did Nunn ever write "that he wished to exclude women as students either during the time he led the institution or thereafter." *Id.*

(3) Nunn's Decision To Educate Men Was A Means To A Greater End. "Nunn's restriction of the Deep Springs education to men was probably influenced by notions of efficiency." 2-AA-502. He "was founding a small college. To have the greatest impact, he needed to select as students individuals who had the greatest prospects for having an ultimate impact on society." *Id.* That explains why "the recruitment and selection of the vast majority of students in L.L. Nunn's day from families of financial means." *Id.* "The same logic could be true of selecting men." *Id.* In short, excluding women "would be a matter of efficacy as much as it would have been of purpose, given the era in which L.L. Nunn lived, including the roles which society considered to be acceptable for women to fill and the gender prejudices of the time." *Id.*

(4) Accordingly, The Trust Could Be Modified Without Destroying Its Dominant Purpose. Based on these

findings, the court concluded that "the term 'men' is a purpose that may be modified without destroying the greater whole, so long as the students admitted are most likely to fulfill the overarching purposes set out by L.L. Nunn." 2-AA-504.

Having concluded that the Trust *could* be modified, the court turned to whether it *should* be modified. In deciding that modification was permissible under three of the theories advanced by Respondent, the court relied heavily on its factual findings regarding the disadvantages of a single-sex policy and the advantages of coeducation. For example, in discussing modification under Section 15403, the court found that "an exclusively male education at the college level today impairs the overarching educational purpose of the Trust." 2-AA-513. Accordingly, the court held that "even if modification would impair achievement of a material purpose of the Trust (educating men), the reason for the change outweighs the interest in achieving that material purpose." 2-AA-518.

Similarly, in finding that modification under Section 15409 was permissible, the court first listed the numerous ways in which a single-sex environment impaired the College's educational mission. 2-AA-521-22. It then held that coeducation was a means of preserving "Nunn's interest in educating 'men,'" because "male students attending the College are not well served by continued maintenance of a single gender program." 2-AA-521. The court therefore concluded that "the all-male admissions policy substantially impairs the accomplishment of the more fundamental purposes of the Trust." 2-AA-523.

Finally, in approving common law equitable deviation, the court first held that "there are peculiar or exceptional circumstances that make modification necessary to accomplish the purpose of the Trustor, particularly in light of the time at which the document was written." 2-AA-524. As the court

explained: "Women today have vastly more opportunities and play vastly different roles—including especially leadership roles in all aspects of society, whether that be in education, business, politics, government, or elsewhere—as compared to what L.L. Nunn experienced during his lifetime." *Id.* Moreover, '[n]one of these changes was or could have been anticipated by L.L. Nunn—or probably anyone else for that matter—when the Deed of Trust was signed." *Id.*

Accordingly, these changed circumstances justified deviation from the exact terms of the Trust in order to serve the Trustor's intent. The court first acknowledged that it had to "determine what L.L. Nunn would have wanted if he had known of the relevant changes which took place in the more than 90 years since he executed his Deed of Trust." 2-AA-524. The court then concluded that Nunn "would have affirmatively wanted females to participate equally with males as students at Deep Springs." 2-AA-525. As the court stated,

> Had L. L. Nunn been in attendance during trial—given what Professors Newell and Riggio, along with Dean Lehecka, had to say about the need for coeducation in order to maintain a viable institution of higher learning today, given what President Neidorf, Professor Wilczek, and others had to say about negative impacts of an all-male program in and outside the classroom, and given what Professor Wilczek and Ms. Marcus personify in terms of the capabilities and interests of women in this century—it is probable that he would regard the admission of female students at Deep Springs to be appropriate if not highly desirable. (*Id.*)

STANDARDS OF REVIEW

The trial court authorized modification of the Trust under three alternative grounds. The standard of review applicable to each is as follows:

1. Whether all beneficiaries consented to modification, as required by Section 15403, and whether the statute applies to this case, are issues of law subject to *de novo* review.

2. Trial courts have discretion to permit modification of a trust under Section 15409(a). *See* §15409(b) ("The court shall consider a trust provision restraining transfer of the beneficiary's interest as a factor in making its decision whether to modify or terminate the trust, but the court is not precluded *from exercising its discretion* to modify or terminate the trust solely because of a restraint on transfer") (emphasis added). Accordingly, the applicable standard of review is abuse of discretion. "Appellate courts will disturb discretionary trial court rulings only upon a showing of a clear case of abuse and a miscarriage of justice." *Molenda v. Dep't of Motor Vehicles*, 172 Cal. App. 4th 974, 986 (2009).

3. The same standard of review applies to decisions authorizing modification of a trust under the common law. Section 17206 provides that "[t]he court *in its discretion* may make any orders and take any other action necessary or proper to dispose of the matters presented" by a petition under Section 17200, and Section 17200(a)(13) specifically authorizes petitions to modify a trust under the common law. *See* pp.44-45, *infra*.

ARGUMENT

As noted above, this appeal has been consolidated with Respondent's appeal from the Phase I ruling. Accordingly, Respondent can prevail, and Deep Springs can become coeducational, if Respondent prevails in the Phase I appeal *or* if the Court affirms on *any* of the three grounds for modification invoked by the trial court in Phase II. Respondent therefore has four different routes to success. In contrast, to prevent coeducation Appellants must prevail in *both* the Phase I appeal and on *all* three issues presented by this appeal. We now turn to these three issues.

I.

THE TRIAL COURT CORRECTLY HELD THAT SECTION 15403 APPLIES TO THIS CASE.

Section 15403 provides:

> (a) Except as provided in subdivision (b), if all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust upon petition to the court.
>
> (b) If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust.

Appellants do not challenge the trial court's exercise of discretion under Section 15403(b). Instead, they raise a host of procedural challenges to application of the statute in the first instance. Each is meritless.

A. The Trust Instrument Identifies Its "Sole Beneficiaries" As The Current Students, All Of Whom Consented To Modification.

All Deep Springs students attending the College at the time of trial filed a formal consent to modification. 3-AA-788-89. Appellants slight that document by describing it as "signed by one representative of the then-constituted Deep Springs student body." AOB 12. But the document shows on its face that it represents the unanimous consent of all Deep Springs students to modification of the Trust. 3-AA-788. The trial court likewise found that all current students had consented (2-AA-512), and Appellants do not contend that this finding is unsupported by substantial evidence.

That is sufficient to invoke Section 15403. The Trust instrument expressly identifies the "students in attendance" at the College as the Trust's "sole beneficiaries":

> The *students in attendance* receiving the benefits of the educational work being conducted hereunder are the

> *sole beneficiaries* of this trust, constitute the Student Body, and are to be considered *as the beneficial owners* of all the property at any time held by the said trustees under the terms hereof, title and authority being vested hereunder in said trustees only because of the probability that most of said students will be and remain minors while they are such students .... (3-AA-621-22 (emphases added))

Appellants concede that where a trust defines "a definite named set of beneficiaries," they "can consent to the modification of a trust." AOB 19. That concession undermines Appellants' Section 15403 claims. The Trust describes "a definite named set of beneficiaries"—the "students in attendance" at the College—who have all consented to modification.

California law requires no more. *Boys & Girls Club of Petaluma v. Walsh*, 169 Cal. App. 4th 1049 (2008) ("*Walsh*"), squarely holds that Section 15403 is satisfied by consent of the beneficiaries specifically named in a trust. In that case, a trust designated five charitable organizations as beneficiaries; however, the trustees had discretion to determine how much, if any, of the trust assets to distribute to each beneficiary and could, in addition, "name additional beneficiaries and distribute the Trust to them." *Id.* at 1052. The settlor then wrote a letter to his attorney, listing eighteen organizations and designating the distributions that each organization would receive annually. *Id.* at 1053. After the trustees filed a petition to ascertain the beneficiaries, seeking judicial guidance on whether the settlor's letter modified the trust, the organizations listed in the trust and the letter settled their claims against each other and petitioned the court to distribute the trust to them in accordance with their settlement. *Id.* at 1055-56. The trustees opposed modification; the trial court granted the petition; and the trustees appealed. *Id.*

On appeal, the trustees contended that modification pursuant to Section 15403 was improper because "all beneficiaries ha[d] not been identified" in response to their petition to

ascertain the beneficiaries "and, as a result, could not have consented to the modification." *Id.* at 1057. But the court rejected the argument, holding that "the five beneficiaries named in the trust instrument" were the only beneficiaries whose consent was needed under the statute. *Id.* at 1058. "These five entities do not lack the status of beneficiaries merely because appellants have not exercised their powers as successor trustees to select the five, or other charitable organizations." *Id.*[11]

Like the trust in *Walsh*, the Nunn Trust identifies specific beneficiaries. To be sure, it identifies a specific *class* of beneficiaries, rather than individual beneficiaries. But that should be irrelevant where the class members can be readily identified with certainty and all members of the class consent. Accordingly, *Walsh*'s holding that Section 15403 is satisfied by the consent of the named beneficiaries is right on point.

Indeed, this is a stronger case than *Walsh* for applying Section 15403, for two reasons. First, the Trust in this case (unlike the trust in *Walsh*) describes the current students as its "sole beneficiaries." Second, while it was unclear in *Walsh* whether any of the named beneficiaries would ever share in the trust proceeds (because of the discretion granted to the trustees), in this case all students attending the College are, in fact, benefitting from the Trust. Because all the students "in attendance" at the College at the time of trial consented to modification, the trial court properly invoked Section 15403.[12]

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[11] Appellants contend that *Walsh* is distinguishable because it did not expressly decide whether Section 15403 applies to charitable trusts. AOB 19 n.8. But *Walsh* did decide whose consent is required if the statute does apply to such trusts.

[12] The Attorney General also consented to modification of the Trust. 6-RT-1119:16-17 ("The AG, as representing the unnamed parties, has consented, just like all the other beneficiaries.") (statement of Deputy Attorney General Horwitz); RA-141. So whether her consent is required under

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B. Students Who Had Been Admitted But Had Not Yet Enrolled Did Not Need To Consent.

Appellants contend that the trial court erred in modifying the Trust pursuant to Section 15403 without the consent of those students who had been admitted but had not enrolled before the trial ended. AOB 21-23. This contention suffers from multiple defects, all fatal.

First, it contradicts the terms of the Trust. Appellants contend that future students are "plainly beneficiaries of the Trust." AOB 21. But they cite no record support for this statement, and it is contrary to the evidence. As noted above, the Trust identifies the "students *in attendance receiving the benefits of the educational work being conducted hereunder*" as "the *sole beneficiaries* of this trust." 3-AA-621. Students who have been admitted but have not yet begun to study at the College are neither "in attendance" at Deep Springs nor "receiving the benefits of the educational work being conducted" under the Trust. Accordingly, they cannot be Trust beneficiaries.

Any other conclusion would contradict Nunn's intent. Nunn studied at Harvard Law School (2-AA-480), and Hoekstra admitted that Nunn "was a very careful drafter of legal documents." 5-RT-974:9-10. So when Nunn made the current students the "sole beneficiaries" of the Trust, he knew what he was doing.[13]

Second, there are obvious reasons why Nunn would have limited the "sole beneficiaries" of the Trust to students "in

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Section 15403 is moot, as the trial court held. 2-AA-508.

[13] Appellants claim that the admitted but not enrolled students "were just as much beneficiaries of the Trust here as the five beneficiaries were of the trust in *Walsh*." AOB 22. Not so. The five beneficiaries in *Walsh* were named in that trust. The admitted but not enrolled students were not. Indeed, the Trust *excludes* them from the status of beneficiaries.

attendance" at the College. Everyone agrees that Deep Springs is unique in the amount of self-governance granted to the students. Indeed, student self-governance is mentioned twice in the Trust Deed: once in the Purpose Paragraph ("in the conduct of which educational work democratic self-government by the students themselves shall be a feature as is now the case at said Deep Springs") and again in the paragraph identifying the current students as the "sole beneficiaries." *See* 3-AA-622 ("it shall be the duty of said trustees to accord the Student Body the full right, power and authority of democratic self-government in accordance with its traditions and the ideals and policies of Deep Springs educational institution set forth in the correspondence and documents of Grantor"). It therefore was logical for Nunn to insist, as he did, that only "current students" be beneficiaries of the Trust, because only those students—unlike future students—would have had the direct experience in self-government that Nunn valued so greatly.[14]

Third, even if Nunn's definition of the "sole beneficiaries" were not dispositive, strong policy reasons justify rejecting Appellants' argument. In the first place, future students would not have experienced the unique Deep Springs program—a blend of isolation, labor, student self-governance, etc.—and therefore would not be in a good position to judge whether the College should become coeducational.[15]

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[14] Appellants argue that actual experience in self-governance is unnecessary because the admitted students would all have had the opportunity to visit the College for a couple of days "and may have observed self-governance in action." AOB 23. But the issue before the Court is not whether a rational trustor could have made admitted but not enrolled students beneficiaries. Instead, it is whether Nunn did so, and he plainly did not.

[15] In the only argument even remotely resembling a challenge to the trial court's findings, Appellants contend that "all evidence was contrary" to the trial court's finding that

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Moreover, at the time of trial it was unclear whether all the admitted students would attend the College. *See* AOB 21 ("majority" would decide to go to Deep Springs); 6-RT-1087:10-15. Giving a single student who might never attend the College the right to render the unanimous consent of current students inoperative makes no sense.

Fourth, letting admitted but not enrolled students count as beneficiaries makes cases like this subject to the vagaries of the court calendar at best and prone to manipulation at worst. The trial in this case happened to occur in late April and early May 2014, after admissions decisions were made. But it could easily have occurred before admissions decisions were made in the Spring, or after students were enrolled in July. In other words, for nine months of the year there would be no "admitted but not attending students" whose consent would be necessary under Appellants' theory. However, application of Section 15403 should not depend on the happenstance of when during the academic calendar the trial starts and/or ends. Indeed, as the trial court noted (without contradiction from Appellants), "given the nature of legal proceedings and the two-year program at the College, obtaining consents of newly invited students would present a serious challenge to ever resolving this matter." 2-AA-512 n.10.

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admitted but not enrolled students could not make an informed decision regarding coeducation. AOB 22. But the fact that applicants for admission who have not even been admitted can "live in the dorms for a few days and experience student life" (AOB 23) scarcely justifies overturning the trial court's decision for lack of substantial evidence. To the contrary, the trial court's decision that mere applicants were not qualified to make an informed decision on a matter of enormous importance to the College was entirely rational.

C. Even If The Consent Of Unascertainable Beneficiaries Was Necessary, The Attorney General Gave Such Consent.

Appellants assert that Section 15403 is inapplicable to this case because "indefinite, unnamed beneficiaries" did not consent to modification. AOB 19-21. However, those beneficiaries consented through the Attorney General. 6-RT-1119:16; RA-141. Appellants contend this consent is meaningless. AOB 19-21. This contention is both factually and legally meritless.

In the first place, Appellants err in asserting that the Attorney General has not "claimed that her consent constitutes the consent of the unnamed beneficiaries." AOB 20. In fact, the Attorney General expressly said that she was "representing the unnamed parties." 6-RT-1119:16.

Appellants have failed to provide any reason why the Attorney General could not do so. The principal case Appellants cite stands for the proposition that the Attorney General has supervisory authority over charitable trusts precisely because she can represent the interests of indefinite charitable beneficiaries:

> Beneficiaries of a charitable trust, unlike beneficiaries of a private trust, are ordinarily indefinite and therefore unable to enforce the trust in their own behalf. Since there is usually no one willing to assume the burdens of a legal action, or who could properly represent the interests of the trust or the public, the Attorney General has been empowered to oversee charities as the representative of the public, a practice having its origin in the early common law. (*Holt v. College of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 754 (1964) (citations omitted))

Holt's rationale supports Respondent, not Appellants. If, as *Holt* holds, the Attorney General can represent the interests of unnamed beneficiaries to *enforce* a trust, she should also be able to represent the interests of the same beneficiaries by consenting to *modify* a trust. In other words, "[i]t is the Attorney General's duty to protect interests of the beneficiar-

ies of a charitable trust" (*In re Veterans' Indus., Inc.*, 8 Cal. App. 3d 902, 919 (1970)), regardless of whether those interests are served by preventing an improper modification of a trust or consenting to a proper one.

Moreover, Appellants do not acknowledge the logical result of their argument. If the Attorney General cannot consent to modification of a charitable trust on behalf of the trust's unnamed beneficiaries, then no one can (since the unnamed beneficiaries are, by definition, unascertainable). That would make Section 15403 inapplicable to such trusts, at least where (unlike this case) there are no identified beneficiaries who can provide the consent necessary to invoke the statute. In other words, Appellants' argument that the Attorney General cannot consent to modification of a trust on behalf of unnamed beneficiaries simply recycles their contention that Section 15403 does not apply to such charities. We now turn to that argument.

D. Section 15403 Applies To Charitable Trusts Regardless Of Whether They Have Unnamed Beneficiaries.

Appellants assert that Section 15403 "was never intended to apply to a charitable trust with unascertainable beneficiaries." AOB 15. This issue is not presented by this appeal. As noted above, the Trust identifies the current students as its "sole beneficiaries." *See* Part I(A), *supra*. Consequently, the Trust beneficiaries are not "unascertainable."

Moreover, Appellants' argument is inconsistent with *Walsh*. As noted above, in that case the court applied Section 15403 despite the existence of unnamed charitable beneficiaries. *See* pp.23-24, *supra*. *Walsh* therefore stands foursquare for the proposition that the existence of such beneficiaries does not preclude application of Section 15403.

Appellants' claim is also inconsistent with the Probate Code. As Appellants acknowledge, "the Trust Law," of which

Section 15403 is a part, "generally applies to both private and charitable trusts." AOB 15. However, they cite a statement by the Law Revision Commission that "courts may 'find a statute inapplicable to a charitable trust in appropriate circumstances.'" AOB 15 (citing *Selected 1986 Trust and Probate Legislation*, 18 CAL. L. REV. COMM'N REP. 1201, 1306 n.412 (1986)).[16]

Unfortunately for Appellants, the Probate Code itself defines when charitable trusts are exempt from the provisions of the Trust Law, and precludes any wholesale exclusion of charitable trusts from Section 15403. Section 15001(a) provides that the Trust Law "applies to all trusts, regardless of whether they were created before, on, or after July 1, 1987." Section 15004 then describes when this sweeping rule does not apply. It provides:

> Unless otherwise provided by statute, this division applies to charitable trusts that are subject to the jurisdiction of the Attorney General to the extent that the application of the provision is not in conflict with the Uniform Supervision of Trustees for Charitable Purposes Act….

This statute could not be clearer. It creates two exceptions to Section 15001(a): (1) where a statute provides otherwise; or (2) if application of the provision would conflict with the Uniform Supervision of Trustees for Charitable Purposes Act. Appellants do not contend that either exception applies to this case. This Court cannot add exceptions that do not appear in the statutory text. CODE CIV. PROC. §1858 ("In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in sub-

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[16] The only case cited by the Law Revision Commission was an old opinion holding that the statutes prohibiting provisions prohibiting perpetuities did not apply to charitable trusts, an issue that has nothing to do with this case. *See* 18 CAL. L. REV. COMM'N REP., *supra*, at 1306 n.412 (citing *Estate of Sutro*, 155 Cal. 727 (1909)).

stance contained therein, not to insert what has been omitted, or to omit what has been inserted"). Appellants' contention that Section 15403 does not apply to charitable trusts, or to some sub-category thereof, is therefore incompatible with the governing statutes.

Because the language of Section 15004 is unambiguous, Appellants' reliance on legislative history is misplaced. *Gilmer v. State Farm Mut. Auto. Ins. Co.*, 110 Cal. App. 4th 416, 422 n.2 (2003) ("the statute is unambiguous and reference to the legislative history is therefore unnecessary"). And even if that were not true, all the legislative history proves is that the Legislature may not have considered how Section 15403 would apply to charitable trusts. That does not support Appellants' claim that the statute is inapplicable. As the court explained in *People v. Bell*, 241 Cal. App. 4th 315 (2015):

> Statutes are not to be confined to the particular application[s] … contemplated by the legislators. Instead, they are interpreted as embracing everything that 'subsequently fall within [their] scope.' As a result, if the statute's language fairly brings a given situation within its terms, 'it is unimportant that the particular application may not have been contemplated.'" (*Id.* at 343 (citations and some internal quotation marks omitted))

Faced with no support from either the statutory text or the case law, Appellants grasp at straws. For example, they cite a comment to Section 65 of the *Restatement (Third) of Trusts* for the proposition that Section 15403 cannot be used to change "the specific charitable purpose" of a trust. AOB 16-17. However, the trial court expressly found that the Trust has multiple purposes, and Appellants do not contend that this finding is unsupported by substantial evidence. *See* pp. 38-43, *infra*.

Moreover, the Restatement supports application of Section 15403 to charitable trusts. Section 15403 "is drawn from Section 337 of the Restatement (Second) of Trusts." 18 CAL.

L. REV. COMM'N REP., *supra*, at 1344. And Section 337, which addressed only termination, applied to both charitable and non-charitable trusts. *See Franklin Found. v. Attorney General*, 163 N.E.2d 662, 668 (Mass. 1960) (principle set forth in Section 337 of the Restatement applies to charitable trusts); *Estate of Somers*, 89 P.3d 898, 904 (Kan. 2004) (applying Section 337 to a charitable trust). Consequently, when the Legislature enacted Section 15403, it modified the Restatement by providing that the beneficiaries could consent to modification, as well as termination, of a trust. Yet the Legislature simultaneously refused to distinguish between charitable and non-charitable trusts when it came to the modification power. Nothing in the Second Restatement justifies overturning these legislative decisions.[17]

Nor can Appellants rely on Section 411 of the Uniform Trust Code. AOB 17-18. While Section 411 expressly applies only to non-charitable trusts, Section 15403 makes no such distinction. Indeed, as discussed above, any such distinction would be contrary to Section 15004.

In short, Appellants' claim that Section 15403 applies only to private trusts, and not charitable trusts, contradicts the case law, applicable statutes and the common law. It should therefore be rejected.

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[17] Nor does anything in the Third Restatement. In fact, Section 65 of the Third Restatement, like Section 337 of the Second Restatement, applies to charitable trusts. *See Convention of Protestant Episcopal Church of the Diocese of Washington v. PNC Bank, N.A.*, 802 F. Supp. 2d 664, 669 (D. Md. 2011) (citing Section 65 in support of terminating trust with one charitable beneficiary).

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AUTHORIZING MODIFICATION UNDER SECTION 15409.

As the Statement of Decision indicates, the trial court's decision to modify the Trust under Section 15409 was based on the following logic. The court first found that the Trust was ambiguous, so as to permit the introduction of extrinsic evidence to determine its meaning. 2-AA-492-96. Next, after considering the extrinsic evidence, the court found that the trust's "overarching purpose" was "'educational work' similar to and in development of the work already inaugurated at Deep Springs College, in a manner emphasizing the need and opportunity for unselfish service in uplifting mankind from materialism to idealism." 2-AA-497. Then, the court found that, while the education of "promising young men" was also a purpose of the Trust, Nunn did not believe "that the education of men was as important as idealistic education and carrying on the work begun at the College." 2-AA-502. Finally, the court concluded, on the basis of its findings regarding the inadequacy of all-male education, that modification under Section 15409 was permissible because "the all-male admissions policy substantially impairs the accomplishment of the more fundamental purposes of the Trust." 2-AA-523.

Appellants do not directly challenge *any* of these findings. Instead, they argue that the trial court had no *power* to do what it did. They first contend that the trial court's Phase I ruling held that the Trust had a single purpose: the education of promising young men. AOB 30. Next, they contend that the trial court "was not free to revisit the purpose because [the Phase I ruling] was on appeal during the pendency of the trial leading to the order on appeal here." *Id.* Finally, they argue that neither statutory nor equitable modification can be used to change a trust's purpose, as the trial court purportedly did here. AOB 30-35.

Just as a chain is only as strong as its weakest link, this argument is only as strong as its weakest premise. And here that premise is Appellants' contention that Respondent's appeal from the Phase I ruling prevented the trial court from holding in Phase II that the Trust had more than one purpose. Accordingly, our analysis begins there.

A. Respondent's Appeal From The Phase I Ruling: (1) Did Not Prevent The Trial Court From Holding In Phase II That The Trust Has Multiple Purposes; And (2) Does Not Prevent This Court From Affirming The Phase II Decision.

Although it is critical to their case, Appellants' contention that Respondent's appeal from the Phase I ruling barred his claim for statutory and equitable modification rests entirely on a single quotation wrenched out of context from a case decided more than sixty-five years ago. *See* AOB 30 (quoting *Sacks v. Superior Court*, 31 Cal. 2d 537, 540 (1948) ("A duly perfected appeal divests the trial court of further jurisdiction in the cause and of power to act other than with respect to specified excepted or collateral matters")). Appellants' reliance on this snippet is misplaced for multiple reasons.

First, *Sacks* itself recognized that the rule it enunciates does not apply to "specified excepted or collateral matters." This case falls within that exception. Based on the parties' stipulation, the trial court agreed to decide first whether the Trust should be interpreted to give the Trustees power to initiate coeducation *without* court approval and then, if court approval was needed, decide whether it would be forthcoming. 2-AA-289-92. In other words, as Appellants themselves concede, the trial on "interpretation" was supposed to determine whether "the word 'men' as used in the Trust includes women." AOB 9. But issues bearing on whether the Trust should be modified were to be resolved in Phase II, and were therefore specifically "excepted" from Phase I.

Sacks proves the point. That case concerned a petition to appoint a guardian for the person and estate of Ms. Sacks. 31 Cal. 2d at 538. The trial court initially appointed a guardian of the estate but not of the person, and Ms. Sacks appealed. *Id.* at 539. While the appeal was pending, the trial court clerk issued a citation requiring Ms. Sacks to show cause why a guardian should not be appointed for both her person and estate. *Id.* Ms. Sacks then sought a writ of mandate from the Supreme Court to prevent further proceedings on the citation. *Id.*

The Court granted the writ, holding that the pending appeal from the order appointing a guardian of Ms. Sacks' estate prevented the trial court from proceeding on the clerk's citation. But the Court was careful to point out that the appeal divested the trial court of power to proceed with the guardianship over the *person* (as opposed to the *estate*) only because the clerk had no power to "split the proceeding":

> The citation, it is true, purported to cover both the matter of guardianship of the estate and the matter of guardianship of the person.... But the citation cannot for that reason be said to have been void as to the estate matter and effective as to a separate or collateral matter, i.e., the personal guardianship. *The clerk, by his issuance of process, could not thus split the proceeding*. The jurisdictional defect as to the estate matter rendered the entire citation void. (*Id.* at 540 (emphasis added))

By contrast, in this case the parties did stipulate to "split the proceeding" and that stipulation was embodied in a court order that no one has challenged. 2-AA-289-92. *Sacks* is therefore distinguishable.[18]

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[18] Appellants' current position contradicts their brief in the Phase I appeal. There they claimed that the interpretation issue that the trial court decided in Phase I did *not* present *any* of the issues that the trial court ultimately decided in Phase II, specifically including whether the Trust had multiple and conflicting purposes that needed to be

(. . . continued)

Second, "[s]teps in probate are generally independent, and an appeal from one order does not stop the administration proceedings." 9 B.E. WITKIN, CALIFORNIA PROCEDURE *Appeal* §21 (5th ed. 2012). Indeed, the rule could not be otherwise. As the court explained in *Estate of Kennedy*, 87 Cal. App. 2d 795 (1948):

> A statute that would prohibit the probate court from administering an estate pending the appeal of an order made in due course would be intolerable. Such a law would return us to the days of Jarndyce and Jarndyce and seriously retard final distribution of estates. (*Id.* at 798)

While this case involves a trust rather than an estate, the rationale for the rule set forth in *Estate of Kennedy* is equally applicable. If all proceedings in Phase II had to await the outcome of the appeal from Phase I, the case would be delayed for years, and the advantages of bifurcation would be lost. Moreover, and even more fundamentally, the Trust's ability to obtain a prompt and definitive ruling on whether the College could become coeducational would be destroyed. That result might suit Appellants, but otherwise it has nothing to recommend it.

Third, even if Probate Code proceedings were not *sui generis*, *Sacks* overstates the effect of taking an appeal. More recent cases recognize that an appeal does not divest the trial court of all "further jurisdiction in the cause." For example,

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(. . . continued)
harmonized:

> If Appellant wishes to make an argument that the components of L. L. Nunn's purpose are in conflict and the putatively more important ones must override less important ones, or that it is impossible to accomplish certain elements of the purpose without sacrificing others, that argument must be aimed at *modifying* the Deed of Trust, not interpreting it, which is the only issue now before this Court. (Respondents' Brief, No. E058293, at 29; *accord, id.* at 7-8)

the appeal of a trial court's decision granting or denying an anti-SLAPP motion "does not … stay proceedings relating to causes of action not affected by the motion." *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 195 n.8 (2005). Consequently, "where an anti-SLAPP motion is granted as to part but not all of the plaintiff's case," the plaintiff may elect "to litigate the remaining claims." *Hewlett-Packard Co. v. Oracle Corp.*, 239 Cal. App. 4th 1174, 1185 n.7 (2015). That is analogous to the situation presented here, where the interlocutory appeal affected only one of Respondent's five causes of action.

Fourth, Appellants' argument depends on the premise that Respondent's appeal from the Phase I ruling prevented the trial court from later revising any portion of that ruling's rationale. But that premise has no legal basis. Appellate courts "review the correctness of the [trial court's] order and not the [trial] court's reasons." *In re Marriage of Bodo*, 198 Cal. App. 4th 373, 392 (2011). Accordingly, while an appeal from a trial court order may prevent the trial court from revisiting that *ruling*, it does not prevent the trial court from revisiting its *reasoning* if that reasoning is relevant to otherwise permissible future proceedings. Moreover, as the trial court recognized, Appellants' claim that language in the Phase I opinion was controlling in the Phase II proceedings contradicts California law. *See* 2-AA-464 ("The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning") (quoting *McGee v. Superior Court*, 176 Cal. App. 3d 221, 226 (1985)). That is even more true for trial court decisions, because "trial courts make no binding precedents." *Neary v. Regents of the Univ. of Cal.*, 3 Cal. 4th 273, 282 (1992) (citation, brackets and internal quotation marks omitted). Accordingly, neither the appeal from the Phase I ruling nor

that ruling itself prevented the trial court from addressing the Trust's purpose again in the context of a different claim.[19]

Fifth, Appellants overlook the differences between the trial court and this Court. Even if *the trial court* could not have revisited its Phase I discussion of the Trust's purpose in Phase II, *this Court* is not so limited—particularly since the appeals from Phase I and Phase II have been consolidated. Accordingly, to overturn the trial court's Phase II findings regarding the Trust's multiple purposes, Appellants would have to show that these findings are erroneous. This they have failed to do. Appellants did not and could not have addressed these findings in the Phase I appeal because their brief was written before the trial court's Phase II decision. And they do not address the merits of these findings in this appeal, either. Instead, they challenge only the trial court's power to rule as it did. Accordingly, this Court can affirm the trial court's decision based upon those findings, regardless of whether that court had the power to hold that the Trust has multiple purposes.

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[19] Appellants do not contend that the trial court would have been powerless to revisit the Trust's purposes absent the Phase I appeal. And for good reason. "If a court believes one of its prior interim orders was erroneous, it should be able to correct that error no matter how it came to acquire that belief." *Le Francois v. Goel*, 35 Cal. 4th 1094, 1108 (2005). Accordingly, in bifurcated proceedings findings made in one phase can always be revised in subsequent phases. *See Tilem v. City of Los Angeles*, 142 Cal. App. 3d 694, 706 (1983) ("The findings of fact and conclusions of law prepared at the conclusion of the liability phase of this action constituted nothing more than an interlocutory or provisional order. As such, it was subject to modification at the trial level after further evidence or law had been considered").

B. In All Events, The Trial Court Did Not Abuse Its Discretion in Authorizing Modification Pursuant To Section 15409.

Section 15409(a) authorizes a court to "modify the administrative or dispositive provisions of the trust … if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust." The trial court found that both prerequisites for application of this statute had been met. It first found that "no one could have anticipated or know the full reach and scope of the changes in gender roles" since 1923. 2-AA-520. Then, it found that "continuing to exclude women at Deep Springs" impaired "the ability of the College to serve the mission which its founder articulated of encouraging 'unselfish service in uplifting mankind from materialism to idealism.'" 2-AA-522.[20]

Appellants do not contend that the trial court abused its discretion under Section 15409. Instead, they contend that the Phase II ruling exceeded the court's authority under the statute. They say that Section 15409(a) authorizes a court to modify only a trust's "administrative or dispositive provisions," and that the trial court "did not order a change to an administrative or dispositive provision of the Trust." AOB 33.

This contention is based on the premise that "a trust has one or more purposes, and it separately has 'administrative or dispositive provisions.'" AOB 25. But the purposes of a trust and its "dispositive provisions" do not rest in separate, water-

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[20] Appellants argue that "should … modification take effect, Deep Springs' ability to accomplish Mr. Nunn's purpose will be greatly diminished." AOB 34. But this claim is based on only the evidence supporting Appellants, and does not mention, much less controvert, the substantial evidence that supports the trial court's contrary findings. *See* 2-AA-521-23 (describing evidence supporting trial court's ruling that the all-male policy impairs achievement of the Trust's purposes).

tight compartments. The "dispositive provisions of [a] trust" are those "which set forth the distribution of the trust estate" (§18100.5(d)), and the distribution of a trust is the means by which it accomplishes its purposes. Consequently, the dispositive provisions of a trust are those "in which the settlor describes the beneficiaries who are to receive financial benefits, fixes the size of those benefits, *and in many cases states the purposes of the trustor in providing for these benefits*." *Estate of Traung*, 207 Cal. App. 2d 818, 830 (1962) (emphasis added). Moreover, as noted above, the Trust describes its "sole beneficiaries" as the "students in attendance" at the College. *See* Part I(A), *supra*. Accordingly, the trial court's decision that women as well as men can attend the College changed the description of the Trust's beneficiaries. It therefore changed a dispositive provision under Section 15409.[21]

Appellants may contend in reply that this interpretation of "administrative and dispositive provisions" makes those words superfluous. But "[a]lthough a statute or constitutional provision should be interpreted so as to eliminate surplusage, there is no rule of construction requiring us to assume that the Legislature has used the most economical means of expression in drafting a statute or constitutional amendment." *Voters for Responsible Retirement v. Bd. of Supervisors*, 8 Cal. 4th 765, 772–73 (1994). That is particularly true here, where these words were included in Section 15409 to emphasize that courts have power to modify *both* the administrative *and* the dispositive provisions of a trust. *See Recommendation Proposing The Trust Law*, 18 CAL. L. REV. COMM'N REP. 501, 573 (1986) (Section 15409 "gives the court specific authority to direct or permit modification of *both*

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[21] Appellants seek to evade *Traung* by arguing that it predates enactment of Section 15409(a). AOB 37-38. But Section 15409(a) merely "codified" the common law power of equitable deviation. *See* pp.46, *infra*.

administrative and distributive provisions of a trust") (emphasis added).

Moreover, as Appellants themselves recognize, Section 15409(a) was "drawn from" Section 167 of the Restatement (Second) of Trusts. AOB 27. And that section permitted deviation from any "term of the trust," if compliance with that term "would defeat or substantially impair the purposes of the trust." That is precisely what the trial court found here. 2-AA-523.

Faced with these unchallenged findings, Appellants rely on a series of snippets from deviation cases, all of which support Respondent. First, they cite the rule that deviation does not permit a court to "substitute one charitable purpose for another." AOB 26 (quoting 6 A.W. SCOTT ET AL., ASCHER ON TRUSTS §39.5 (5th ed. 2007)). This makes sense: a court cannot modify a trust intended to feed the hungry by directing the proceeds to the municipal orchestra. But where a trust has *multiple* purposes, as the trial court found (2-AA-500), a court may use deviation to modify the "secondary purpose" in order to preserve the "dominant purpose." *See* GEORGE G. BOGERT ET AL., BOGERT'S TRUSTS AND TRUSTEES §396 (2015) ("Sometimes the courts have discussed the problem in terms of preserving the settlor's dominant purpose by modifying what is described as his secondary purpose, often the method or means for carrying out the dominant purpose. In such a case the court would seem to be applying equitable deviation rather than cy pres principles") (footnote omitted). And because Appellants' modification arguments are premised on the mistaken assertion that the Trust has only a single purpose, they never explain why a court should be prohibited from modifying a less important purpose of a trust to accomplish a more fundamental objective.

Next, Appellants cite the principle that deviation may only be used "to carry out, rather than to defeat, the primary pur-

pose of the trustor as expressed in the trust instrument." AOB 26 (quoting *Moxley v. Title Ins. & Trust Co.*, 27 Cal. 2d 457, 468 (1946)). That principle helps Respondent, not Appellants. The trial court found that the "overarching purpose" of the Trust is "educational work … similar to and in development of the work already inaugurated at Deep Springs College." 2-AA-497; *accord* 2-AA-503. It also found that "an exclusively male education at the college level today impairs the overarching educational purpose of the Trust." 2-AA-513. Consequently, modification in this case furthers, rather than defeats, the Trust's primary purpose. Modification is therefore authorized by Section 15409, which codifies the equitable power of a trial court to "modify a trust where the primary purpose of the trust would be defeated by 'slavish adherence' to its terms." *Ike v. Doolittle*, 61 Cal. App. 4th 51, 80 (1998).

Appellants then invoke the principle that modification is permitted only when necessary to "serve the original intentions of the trustor." AOB 26 (quoting *Ike v. Doolittle*, 61 Cal. App. 4th at 80). But in modification cases "the court is only doing what the trustors would have done had they had the same facts before them then that were before th[e] court at the trial of th[e] action." *Adams v. Cook*, 15 Cal. 2d 352, 360 (1940); *accord*, *Stanton v. Wells Fargo Bank & Union Trust Co.*, 150 Cal. App. 2d 763, 770 (1957) ("The equity court is simply doing what the testator, presumably, would have done had he anticipated the changed conditions"). That is all the trial court did here. *See* 2-AA-525 ("The Court concludes in this regard that L.L. Nunn would have affirmatively wanted females to participate equally with males at Deep Springs College"). Appellants do not contend that this finding is unsupported by substantial evidence.[22]

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[22] Appellants also cite *Estate of Bothwell*, 65 Cal. App. 2d
(. . . continued)

Finally, Appellants argue that the trial court's modification ruling should be set aside because "[t]he trial court's February 2013 finding that the Trust's purpose is to continue a men's college is sound and supported by the Deed of Trust." AOB 32. But the validity of that finding is not before the Court on this appeal. Once the Court determines that the trial court's Phase I ruling did not prevent the trial court from making findings in Phase II regarding the Trust's multiple purposes, their relative importance, and the substantial impairment of the "overarching purpose" caused by the all-male policy, the Phase I findings become irrelevant to this appeal. Instead, Appellants bear the burden of showing that the Phase II findings are unsupported by substantial evidence, a burden that they have not even attempted to carry.[23]

(. . . continued)
598 (1944). AOB 26-27. But that case concerns apportionment, not modification.

[23] Even where Appellants mention the evidence, their cherry-picked examples fall far short of showing error. For example, Appellants say that the "College would lose the support of at least three current major donors [i]f it becomes coeducational." AOB 31. But the trial court found that "[t]he financial status of the College is not as viable as it could be as a result of the all-male restriction." 2-AA-513. Appellants neither mention nor challenge this finding.

Appellants' description of the evidence they cite is also misleading. The only foundation that may not give to the College due to coeducation contributed less than 1% of the donations received by the College from 2002 to 2013. 6-RT-1057:24-1058:7. The two other donors mentioned by Appellants have given million-dollar gifts since the coeducation vote. 6-RT-1060:3-9.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AUTHORIZING MODIFICATION UNDER THE COMMON LAW DOCTRINE OF EQUITABLE DEVIATION.

In authorizing modification, the trial court also relied on the common law doctrine of equitable deviation, finding that "there are peculiar or exceptional circumstances that make modification necessary to accomplish the purpose of the Trustor, particularly in light of the time at which the document was written." 2-AA-524; *see* pp.19-20, *supra*. Appellants do not challenge *any* of the trial court's findings. Instead, they contend that the common law doctrine of equitable deviation "has been cabined in by Section 15409, and is no longer available to modify a trust where, as here, the petitioner contends that the modification is necessary because of changed circumstances." AOB 36.[24]

The claim is at odds with the case law, the relevant provisions of the Probate Code, and Section 15409's legislative history. To begin with, two cases hold that Section 15409 does not supersede a court's equitable authority to modify a trust under the common law. *Ike v. Doolittle*, 61 Cal. App. 4th 51 (1998), rejected the argument that "a trial court's statutory authority to modify a trust is strictly limited by the provisions of Probate Code section 15400 et seq." *Id.* at 84. Instead, *Ike* held that courts *also* have modification authority under the common law. This is due to Section 15002, which provides: "Except to the extent that the common law rules governing trusts are modified by statute, the common law as to trusts is the law of this state." As *Ike* stated:

> Absent … an express statutory provision limiting the grounds for modification of a trust to those set forth in

[24] To the extent Appellants oppose common law equitable deviation on grounds that also apply to modification under Section 15409 (*see* AOB 24-35), we have addressed those issues in Part II(B), *supra*.

> sections 15400 et seq., *we conclude the broader equitable power of trial courts to modify or reform a trust is preserved by operation of section 15002 ….* (*Id.* at 84 (emphasis added))

Bilafer v. Bilafer, 161 Cal. App. 4th 363 (2008), states the same rule even more explicitly. That case involved a settlor's attempt to modify a trust to conform to his intent, a modification he claimed was necessary due to drafting errors by his attorney. *Id.* at 367. Section 15409 was inapplicable because that statute "applies only when circumstances arising *after* the creation of the trust interfere with its purpose." *Id.* at 369 (emphasis in original). Yet *Bilafer* held that trial courts nevertheless had the power to modify the trust under the common law:

> In 1986, the Legislature substantially revised the Probate Code and codified the common law equitable power of trial courts to modify the terms of a trust instrument where such modification is necessary to serve the original intentions of the trustors. Though this revision was intended to impose comprehensive rules for modifying trusts, the sections enacted do not expressly provide that they are the exclusive means to do so. Thus, the broader equitable power of trial courts to modify or reform a trust is preserved by operation of section 15002 …. (*Id.* at 368 (citations, footnote and internal quotation marks omitted))

These decisions are correct. Under Section 15002, the common law continues to govern California trusts "[e]xcept to the extent that the common law rules governing trusts are modified by statute." Consequently, Section 15409 displaced the common law only if the statute modified the common law.

Appellants contend that the statute did just that, arguing that "common law equitable deviation may be more flexible" than modification under Section 15409. AOB 36. Not so. The common law permitted modification where adherence to the terms of a trust "would defeat or substantially impair the accomplishment of the purposes of the trust." RESTATEMENT (SECOND) OF TRUSTS §167 (1959). Section 15409 permits

modification where "the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust." There is no meaningful difference between these two standards.

This is no accident. Section 15409 "is drawn from" Sections 167 and 336 of the Restatement (Second) of Trusts. *Recommendation Proposing The Trust Law*, 18 CAL. L. REV. COMM'N REP. 501, 573 n.278 (1985). Indeed, Appellants themselves concede that "[b]oth the common law and statutory versions of equitable deviation … are aimed at accomplishing the purpose or purposes of the trustor." AOB 27. Accordingly, Section 15409 did not modify, and therefore did not displace, the common law.

To be sure, the cases hold that Section 15409 codified the common law. *Ike v. Doolittle*, 61 Cal. App. 4th at 82; *Stewart v. Towse*, 203 Cal. App. 3d 425, 428 (1988). But codifying common law is not the same as modifying it. Indeed, it is the exact opposite. That is why *Ike* could simultaneously hold that Section 15409 codified the common law, but did not displace it.[25]

Appellants do not cite *Bilafer*, but contend *Ike* is distinguishable on the flimsiest of grounds. They concede, as they must, that "*Ike* found that probate courts have equitable power, founded in common law, to modify a trust 'under "peculiar" or "exceptional" circumstances.'" AOB 39. However, they say this case is different, because "the petition here was brought not based on 'peculiar or exceptional circumstances' but based on changed circumstances." *Id.* Here, as elsewhere, Appellants ignore trial court findings that they cannot refute. When it upheld common law deviation, the

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[25] Appellants assert that *Stewart* "held that Section 15409 codified *and superseded* the common law standard." AOB 38 (emphasis added). But they cite no support for this mischaracterization, and it contradicts both *Ike* and *Bilafer*.

court expressly found that "peculiar or exceptional circumstances" justified modification. 2-AA-524. Appellants do not contend that this finding is unsupported by substantial evidence. Accordingly, what even Appellants acknowledge as the standard for common law modification has been satisfied.

CONCLUSON

The order modifying the Trust should be affirmed.

DATED: January 22, 2016.

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CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.204(c)(1)

Pursuant to California Rule of Court 8.204(c)(1), and in reliance upon the word count feature of the software used to prepare this document, I certify that the foregoing Respondents' Brief contains 13,778 words, exclusive of those materials not required to be counted under Rule 8.204(c)(3).

January 22, 2016.

/s/
STEVEN L. MAYER

PROOF OF SERVICE

I am over eighteen years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Three Embarcadero Center, Tenth Floor, San Francisco, California 94111-4024.

On January 22, 2016, I served the following documents described as follows as

RESPONDENT'S BRIEF;
RESPONDENT'S APPENDIX

on the persons listed below by U.S. Mail. I placed the document in a sealed envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Dated: January 22, 2015

/s/
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