There are many standards regularly used to convey a grantor’s intent with regard to distributions to beneficiaries. The most commonly used standard is the health, education, maintenance and support (“HEMS”) standard, as it is expressly referenced in Internal Revenue Code Section 2041(b)(1)(A). This HEMS standard is commonly referred to as an “ascertainable standard” as it allows a trustee with parameters in which to make decisions regarding what distributions are appropriate for a particular trust beneficiary. In using this standard, a grantor can be assured that there will be a balance between the prevention of distributions for extravagant purposes and provision for the beneficiary’s needs.

In addition to the lack of arbitrary decision making which accompanies the use of an ascertainable standard, there are important estate planning purposes for utilizing this type of standard. Where a trust may at some time have a beneficiary serving as trustee, its safe harbor can guard such a beneficiary-trustee from estate tax inclusion and avoid the pitfalls of Internal Revenue Code Section 2041. Under this Section, a trustee whose discretionary authority is exercised without sufficient parameters can be deemed to have exercised a general power of appointment. By utilizing an ascertainable standard to determine scope of the trustee’s authority, the trustee can avoid such inclusion concerns as the exercised power will be deemed to be limited.

The following are examples of distributions which would be permissible under a HEMS standard:

**HEALTH**

The standard of “health” is generally thought to include the following:

- Emergency medical treatment;
- Psychiatric treatment;
- Psychological treatment;
- Routine health care examinations;
- Dental;
- Eye care;
- Cosmetic surgery;
- Lasik surgery;
- Health, Dental, or Vision Insurance;
- Unconventional medical treatment;
- Home health care;
- Gym memberships;
- Spa memberships;
- Golf Club memberships; and
- Extended vacations to relieve tension and stress.

If the grantor does not wish to make any of the above items accessible to beneficiaries, it is important to expressly provide such limitations by defining the term within the trust document.

**EDUCATION**

The standard of “education” is thought to include the following:

- Grammar, secondary and high school tuition;
- Graduate school;
- Post-graduate school;
- Medical school, law school, or other professional school;
- Support of the beneficiary while in school;
- Support of beneficiary while not in school (between semesters);
• Studies for the student that makes a career out of learning;
• Technical school training;
• Career training;
• College in Europe as part of a study abroad program; and
• Related expenses such as supporting the beneficiary not only during the semester, but also between semesters. 5

SUPPORT AND MAINTENANCE

The terms “support” and “maintenance” are considered synonymous. 7 In addition, the Restatement (Third) of Trusts takes several notable positions with regard to what can fairly be interpreted to be permissible distributions pursuant to a “support and maintenance” standard. The list provided within the Restatement (Third) is specifically broken down into three categories: (1) what is generally deemed to be included, (2) what might be included, and (3) what expressly is not included.

Generally included:
• Regular mortgage payments;
• Property taxes;
• Suitable health insurance or care;
• Existing programs of life and property insurance;
• Continuation of accustomed patterns of vacation;
• Continuation of family gifting; and
• Continuation of charitable gifting.

Might be included:
• Reasonable additional comforts or luxuries; and
• Special vacations of a type the beneficiary had never taken before.

Not included:
• Payments unrelated to support which merely contribute to the beneficiaries contentment or happiness;
• Distributions to enlarge the beneficiaries personal estate; and
• Distributions to enable the beneficiary to make extraordinary gifts. 8

When applying an ascertainable standard, it is important to note that the specific definition of each term within the HEMS standard will vary from state-to-state as the definition is dependent upon how the specific terms have been construed under the jurisdiction’s statutory provisions and case law.

1See also Treas. Reg. §20.2041-1(c)(2).
2See Estate of Wall v. Commissioner, 101 T.C. 300 (1993); Estate of Vak v. Commissioner, 973 F.2d 1409 (8th Cir. 1992); Rev. Rul. 95-58. Whereas pursuant to I.R.C. §2041, the exercise of a general power of appointment by an individual is deemed to cause estate tax inclusion of the assets which were the subject of the exercise in the estate of the trustee having exercised the discretion.
4Id.
6Paying for education of the beneficiary during his adult life permitted where testator was a scholarly man himself. In the Matter of Estate of Wolfe, 164 Misc. 504, 299 NY Supp 99 (Sur. Ct. 1937). But see Lanston v. Children’s Hospital, 148 F. 2d. 689 (D.C. Cir. 1945) Trustee was upheld in refusing payment for education of a 42 year old beneficiary; and Southern Bank & Trust Co. v. Brown, 246 S.E.2d. 598 (S.C. 1978) payment for post graduate education is not usually authorized pursuant to education standard.
7See Delaware Trust Co. v. Tease, 125 A.2d 169 (Del.Ch. 1956) ruled that support and maintenance are often employed synonymously, meaning to provide a beneficiary with sufficient means to “live comfortably.”