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Health, Education, Maintenance, Support: How to Avoid Distribution Problems

By **Bruce M. DiCicco**

Every practiced estate planner knows that designating distributions from trusts for the "health, education, maintenance and support" (referred to herein at times as HEMS or the Standard) of the beneficiary are "magic" tax words in that they establish a special power of appointment rather than a general power. IRC §2041. But whereas the tax results of such standards are well known, how is that familiar tax standard interpreted in New York for purposes of distributions? How can estate planners avoid construction proceedings in order to determine the intent of a grantor when HEMS is the standard for distribution? This article will discuss relevant case law where available and suggest some approaches in drafting the standard.

No truer statement has been made than "no will has a brother and that each testamentary instrument must be judged on its own text against the background existent when the will was signed." *In re Egan's Estate*, 39 N.Y.S. 2d 96, 98 (Sur. N.Y. Cty. 1942). Trusts and estate questions must track the intent of a testator or a grantor and this is the paramount objective of the courts. *In re Levinson's Will*, 5 Misc. 2d 979 (Sur. Kings Cty. 1957). Intent, in turn, can be discerned in a number of ways and is easily skewed one way or another by a single word or circumstance. Reliance, therefore, on any particular case is unlikely to be definitive in interpretive questions of this kind but the decisions can certainly direct the planner in the right direction. It is further the case that the circumstances in which issues have arisen in the interpretation of the Standard must be considered in evaluating the results of various cases.

Education

A review of the case law dealing with distribution authority for "education" rapidly leads practitioners to the conclusion that it would be best to clarify the intent of the testator in the governing instruments. It has been observed, further, that the type of expenses covered under the term "education" depends on express directions or reasonable implications from the use of the term. Bogert's The Law of Trusts and Trustees, Chp. 39, §811, Payments and Distributions—Construction of Payment Clauses. The naked term "education" has been held to include college expenses but whether or not secondary school expenses were intended was remanded to the lower court to determine whether such were in the best interests of the beneficiary by a trustee who had obligations to the same beneficiary under a child support agreement. *In re Estate of Wallens*, 9 N.Y.3d 117, 120 (2007). The case is instructive of the utility in defining the levels of education one intends to include in the term "education." Here are some things to think about: Would vocational school be included? Are books and materials included?

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What about room and board while attending school? Are only accredited universities to be included? How about community college? Should post-graduate education be included? Should primary and secondary school be included? Should schooling outside of the United States be included? Should age limit of the beneficiary be imposed?

Providing for distributions for "education," however, do not always include college expenses. Take for example cases where the trustee is given broad discretion to make distributions. Where beneficiaries could have used a college savings account or applied for public benefits for the costs of education, the trustee was not required to make distributions for "education." *In re Trusts for McDonald*, 100 A.D.3d 1349, 1351 (2012). The court has construed "education" to authorize the payment of expenses of the beneficiaries throughout the whole calendar year (even while not attending classes) if the beneficiaries reasonably devote themselves to the completion of their education. *In re Egan's Estate*, supra.

Whether or not part-time employment over the summer, during school breaks or at other times should be considered in making distributions for "education" is another question. *In re Egan's Estate* held that "such facts may legitimately be taken into account by the fiduciaries in determining what are 'necessary and proper expenses'. The court reasoned,

> If it shall be feasible (as clearly it is in the present day) for the beneficiaries to accelerate their progress in education by attending summer schools that fact may be considered by the fiduciaries in determining what are "necessary and proper expenses". If they think the beneficiaries should have vacations rather than attend summer school they are authorized by the will to pay the living costs of the beneficiaries in such periods to the degree which they deem necessary and proper.

The *Egan* court pointed out that the deceased in that case reposed substantial authority in his executors and from this we see that the precise interpretation of the term "education" in any given situation can also depend on the level of discretion given the fiduciary.

Health

The interpretation of the term "health" has arisen in a number of circumstances. The » Page 6

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Distributions

« Continued from page 4

volume of case law is directed toward whether or not invasions of trust principal should be allowed in connection with claims by the Department of Social Services for the repayment of medical care expenses or in the context of invasions pursuant to EPTL 7-1.6.[1] Here are some things to think about: Should the standard be liberally or conservatively applied? Is dental care included? Is mental health included? Are payments for health insurance included? How about rehabilitation expenses? Abortion? Extended care? Cosmetic surgery? Prescription drugs? Counseling? Long-term nursing care?

Maintenance and Support

Consideration of "maintenance" and "support" are discussed together due to the common coupling of the two standards. "Maintenance" and "support" have been said to be synonymous. *In re Wells' Will*, 165 Misc. 385, 388, 300 N.Y.S. 1075, 1078 (Sur. Westchester Cty. 1937). Indeed, as we will see below, these terms also overlap and can include "health." The term "maintenance" is typically a word indicating general welfare and comprehends food, clothing and medical care. *In re Surbeck's Estate*, 56 N.Y.S. 2d 487 (Sur. Oneida Cty. 1944). "The term 'support' comprehends anything required for housing, feeding, clothing, health, proper recreation, vacation, traveling expense, or other proper cognate purposes included within the scope of the word." *In re Vanderbilt's Estate*, 129 Misc. 605, 607 (Sur. NY Cty. 1927); *In re Well's Will*, 165 Misc. 385 (Surr. Westchester Cty. 1937).

So under a *maintenance, support and education* provision for the benefit of an infant the court found that where the foster parents lacked resources, the trust should be used to pay for necessary reasonable physicians, dentists, hospital charges, drugs, medicine, and medical supplies. *In re Sylvester's Estate*, 101 N.Y.S.2d 804 (Sur. Queens Cty. 1950). The trustee was also directed to invade principal to pay for nursing home care under provision for the *support, care and general welfare* of the beneficiary. *In re Browning's Estate*, 76 Misc. 2d 1041, 1042, 352 N.Y.S.2d 769, 770 (Sur. Columbia Cty. 1974). Under a maintenance and support provision, the trustees were directed to expend principal for clothing and necessaries, including support of the incompetent beneficiary in a state institution. *In re Rosenberg's Will*, 121 N.Y.S.2d 874, 877 (Sur. Bronx Cty. 1953)

Under the terms *care, support and maintenance*, the court held that it included all the items set forth in *In re Vanderbilt's Estate*, supra, and added travelling expenses to the scope of the standard. *In re Becker's Will*, 31 N.Y.S. 2d 482, 484 (Sur. Schoharie Cty. 1941).

Other Considerations

Whether or not the trustee should consider outside means of support of the beneficiary could be discussed with a client. What if the beneficiary marries well and his or spouse has adequate or substantial funds to provide for the health, education, maintenance and support of the beneficiary? Does the trustee still have to dissipate the trust for such needs? Testators and grantors often leave that decision to the fiduciary by stating:

> The trustee/executor may, but is not required to, take into account other means of support of the beneficiary.

A classic example is a situation where the trust provided for support and maintenance with no indication as to the consideration of other assets. The income generated from the trust was far greater than the beneficiary could ever use during her lifetime and a court proceeding was necessary to determine the intent of the testator as to whether or not distributions should be made for luxury. *Matter of Rockefeller*, 46 Misc. 2d 543 (Surr. Ct. N.Y. Cty. 1965). See also *In re Downey's Will*, 87 N.Y.S 2d 60, 62 (Sur. Chenango Cty. 1949), decree aff'd, 277 A.D. 921, 98 N.Y.S.2d 439 (App. Div. 1950), regarding the consideration of other assets of the beneficiary. This brings to mind whether the standard for maintenance and support should be preceded by words like "*reasonable*" support and maintenance or "*proper*" support and maintenance. Both words change the meaning of the standard as compared to the HEMS standard in the absence of those words. Or should the standard be followed by "in the standard of living in which the beneficiary had become accustomed at the time this trust takes effect?" The words "standard of living" had been held to be a factual determination, not an objective determination by the fiduciary. See *In re Golodetz' Will*, 118 N.Y.S.2d 707, 713 (Sur. West. Cty. 1952). What if the beneficiary is young and is just getting started in life? Is the beneficiary stuck with a meager distribution forever with the addition of the limitation? In *In re Levinson*, supra, where distributions were for the "*suitable* support and maintenance," the court held:

> The trustees have a the duty to take into consideration the station in life and custom and the manner in which the beneficiaries of the trust were accustomed to live during the lifetime of the testator.

Courts generally will not, however, rule on exactly what distributions are to be made once the parameters of a particular standard has been enunciated, for that is the job of the fiduciary, not the courts. *Matter of Andersen*, 10 Misc. 2d 871, 172 N.Y.S. 2d 208 (Sup. Ct. N.Y. Cty. 1958).

Conclusion

Consideration of the HEMS standard should be reflected upon not only from a tax perspective but also from a distribution perspective. The distribution perspective is dependent on a number of factors and relates to other provisions of the governing instrument. It is wise to try to avoid construction issues by giving careful thought to the definition of the terms intended. It is also wise to document in correspondence and file notes, if possible, the intention of the testator and how it was arrived at.

1. The statute provides a means by which the court could effectuate the testator's intent under changed circumstances —§15-a of the Personal Property Law and §103-a of the Real Property Law were enacted (L.1965, ch. 699, §§2, 3)—which permitted the court to authorize the trustee to invade principal to the extent that there was a deficiency of income for the support of the beneficiary. These statutes were combined in 1966 in EPTL 7-1.6 (L.1966, ch. 952) and form our present law. The statute empowers the court in its discretion to make allowances from principal to an income beneficiary whose support is not sufficiently provided for, whether or not such beneficiary is entitled to any part thereof, upon finding that such allowances effectuate the intention of the creator. Such allowance may be authorized, however, only if there is no contrary provision in the disposing instrument.