

- Bill (the claimant) and Bob (the wage earner) marry in MA after MA recognizes same-sex marriage. They were domiciled in MA. They move to and become domiciled in Texas. (TX does not recognize same-sex marriage.) Bill files for husband's benefits on Bob's record while they are domiciled in TX. They meet all other factors of entitlement.
- Bill (the claimant) and Bob (the wage earner) marry in MA after MA recognizes same-sex marriage. They were domiciled in MA. Bob then moves and becomes domiciled in TX while Bill remains domiciled in MA. Bill files for husband's benefits on Bob's record. They meet all other factors of entitlement.

While the full implementation of the Supreme Court's *Windsor* decision remains a work in progress, the Social Security Administration is moving toward this end. We will continue to monitor the decision's implementation and its effects in all facets of federal and state law impacting taxation and benefits.

#### About the author

Bob has 25 years of experience in taxation, starting his career with Ernst & Young. Since 2000, Bob has been with local CPA firms, where his clients have included high net worth individuals and their family businesses. He has a keen interest in estate and retirement planning, and enjoys writing and speaking on Social Security issues. Bob can be contacted at [rdaviescpa@msn.com](mailto:rdaviescpa@msn.com).



<sup>1</sup> *U.S. v. Windsor* (June 26, 2013) 570 U.S. \_\_.

<sup>2</sup> "Proposition 8 and DOMA: The Supreme Court rules" (August 2013) *Spidell's California Taxletter*®.

<sup>3</sup> Social Security Emergency Message EM-13022 REV

<sup>4</sup> Social Security POMS (Program Operations Manual System) Recent Change GN 00210, available at: <https://secure.ssa.gov/apps10/public/reference.nsf/links/08092013111040AM>

---

## Health, support, education, and maintenance: What does it really mean?

**ESTATES: With little guidance, the trustee must proceed with caution.**

By Richard B. Malamud, JD, CPA, LL.M.  
*Guest Contributor*

Trusts that require all income be distributed annually to the beneficiary often contain a variation of the following provision: "In addition, the trustee may distribute principal if needed for the health, support, education, or maintenance of the beneficiary."

The trust document can offer further definitions to guide the trust in determining what is meant by these four words. Unfortunately, most trusts do not include any further instructions as to the settlor's intent. Even non-binding written instructions would be helpful.<sup>1</sup>

When a trustee reads the trust with such little guidance, what should the trustee do? In California law, "The intention of the transferor as expressed in the trust instrument controls the legal effect of the dispositions made in the instrument."<sup>2</sup>

That guidance is not very helpful when all that exists are four words: "health, support, maintenance, or education." Case law may not even help, as "the determination of a testator's intention ... must depend upon its own peculiar facts."<sup>3</sup>

Thus, the trustee must look at each beneficiary and decide what is needed for the trustee's support (there is a lot of authority that "support" includes the three other terms: health, maintenance, and education).

### **What is support?**

It seems that identical trusts with different trustees and beneficiaries will come to different conclusions as to what is meant by the term "support." The following are a few typical questions that might arise for which the term support offers little guidance, unless the trust contains explicit statements which address these issues:

1. Must the beneficiary's other resources be taken into account to determine the need for support?<sup>4</sup>
2. If the beneficiary's adult child moves home, are the additional costs considered support of the beneficiary?
3. What about the college costs of the beneficiary's child or a step-child of a later marriage?
4. In determining support, what lifestyle (station in life) is to be used?
5. Does "health" include a spa vacation, face lift, hair transplant, etc.?
6. If the beneficiary wants to buy a house for \$1 million, what, if anything, should the trust pay?

The benefit and problem with using health, support, education, or maintenance is that it leaves a lot to the imagination. Donald Trump's support is far different than that of a 15-year-old or even the rest of us.

Even education could be problematic. Does it include undergraduate and graduate college? And what about private versus public education? In determining the meaning of education, one court included the costs between semesters.<sup>5</sup> Another case held that post-graduate school is not included in the term education.<sup>6</sup>

### **Cause for concern**

Why would the trustee even care about the extent of the terms such as education?

The answer is that the contingent or remainder beneficiaries, often the children or grandchildren of the settlor, will get what's left in the trust when their parent dies. So, whatever is distributed as support is money that won't be in the trust when they become the beneficiary.

### **The estate tax law caused all this!**

The reason most trusts use only these four words and not words such as "want" or "desire" is to avoid having the trust's value included in the beneficiary's estate.

If the beneficiary has a general power of appointment over the trust, then the trust's fair market value will be included in the beneficiary's estate at death. If the power is instead a limited power of appointment, it is not included in the taxable estate of the beneficiary.

A power is a limited power if it is limited by an "ascertainable standard" or, as the tax regulations state, a power that is "limited by a reasonably fixed or ascertainable standard." It further states that: "a power to distribute corpus for the education, support, maintenance, or health of the beneficiary; for his reasonable support and comfort; to enable him to maintain his accustomed standard of living; or to meet an emergency, would be such a (ascertainable) standard.

However, a power to distribute corpus for the pleasure, desire, or happiness of a beneficiary is not such a standard."<sup>7</sup> Lawyers drafting powers therefore use those approved terms.

### **Limited guidance**

There is almost no case law, regulation, or even commentary that provides guidance on the extent of these terms.

The Treasury (IRS) Regulations try to define these terms, stating:

*"Examples of powers which are limited by the requisite standard are powers exercisable for the holder's 'support,' 'support in reasonable comfort,' ... 'maintenance in health and*

*reasonable comfort,’ ‘support in his accustomed manner of living,’ ‘education, including college and professional education,’ ... ‘health,’ and ‘medical, dental, hospital and nursing expenses and expenses of invalidism.’*

*In determining whether a power is limited by an ascertainable standard, it is immaterial whether the beneficiary is required to exhaust his other income before the power can be exercised.”<sup>8</sup>*

### **How to measure support?**

Support must be measured by something. That something is the beneficiary’s lifestyle. The question is, when is that lifestyle measured?

The Restatement of Trusts takes the position that it should be at the time of the grantor’s death or the time the trust became irrevocable. That seems to make sense until an actual situation is encountered. For example, suppose a \$50,000,000 trust is set up for the settlor’s child and at the settlor’s death, the child was living on \$60,000 per year.

Is support based on the existing lifestyle of \$60,000 a year, or can that child now start to live as if he or she earned \$1,000,000 a year?

The Restatement says that even the original standard can be adjusted for inflation or additional health care costs due to illness and probably age related expenses, and for cost of the beneficiary’s dependents. Thus, the standard of living is not a fixed amount, but more of a starting point, with adjustments for normal changes in the economy and the family.

The Restatement also provides that support is not as broad as welfare or happiness, but it permits distributions to maintain the beneficiary’s accustomed manner of living.<sup>9</sup>

### **Some guidance is provided**

As for specific issues, the Restatement of Trusts says that support and maintenance include mortgage payments, property taxes, health insurance, other insurance, normal costs of living and vacations, and family and charitable gifts.<sup>10</sup>

Borderline expenses include luxuries and expenses that the beneficiary never had before; payments simply for the beneficiary’s happiness or to make extraordinary gifts are not included.

After the trustee determines the actual support of the beneficiary, should the beneficiary’s other income be considered when calculating the needed support that the trust should distribute?

It is interesting that the Restatement (Second) said no while the later Restatement (Third) said yes. In addition, there are numerous cases that go either way on support being calculated with or without considering the “beneficiary’s other means of support, including state or local public assistance.”<sup>11</sup>

In effect, absent case law in a specific state or explicit instructions, the trustee must make that call by trying to figure out what the settlor intended.

### **Trustee’s discretion?**

Does the trustee have unbridled discretion if the trust says that the trustee has absolute, sole, or uncontrolled power to determine the meaning of support?

Probably not, as that power may be limited by state statute. Cal. Prob. Code §16081 states that the fiduciary “... shall not act in bad faith or in the disregard of the purpose of the trust.” It further states that, if the beneficiary is the sole trustee or co-trustee, that in making discretionary distributions the trustee “shall exercise that power reasonably ...”

Thus, the total discretion has been limited to what appears to be a fiduciary standard by state law. Is good faith enough for this standard?<sup>12</sup>

In effect, even if given sole discretion, the trustee must not act in bad faith or fraudulently.<sup>13</sup> So, the final answer to the question of what the trustee should do is: his or her best.

**About the author**

Richard Malamud is a professor in the Department of Accounting and Finance at California State University Dominguez Hills, where he teaches federal income tax law. You may reach him at (310) 243-2239 or [rmalamud@csudh.edu](mailto:rmalamud@csudh.edu).



- <sup>1</sup> Bove Jr., Alexander A., and Langa, Melissa (February 13, 2006) "Distinguishing discretion in discretionary trusts" Rhode Island Lawyers Weekly
- <sup>2</sup> *Estate of Earl Guidotti* (2001) 90 Cal.App.4th 1403; California Probate Code §21102
- <sup>3</sup> *Estate of Welch* (1948) 83 Cal.App.2d 391
- <sup>4</sup> *Estate of Ferrall* (1953) 41 Cal.2d 166; *Sibson v. First National Bank & Trust Co.* (1960) 61 N.J. Super. 88
- <sup>5</sup> *Estate of Efan* (1942) 39 N.Y.2d 96
- <sup>6</sup> *Southern Bank & Trust v. Brown* (1978) 271 S.C. 260
- <sup>7</sup> Treas. Regs. §25.2511-1(g)(2)
- <sup>8</sup> Treas. Regs. §20.2041-1(c)(2)
- <sup>9</sup> Restatement 3d §50, comment d(2)
- <sup>10</sup> Restatement 3d §50, comment d(2)
- <sup>11</sup> "Bogert on Trusts and Trustees" (2d. ed., 1981) §811
- <sup>12</sup> *Estate of Gross* (1963) 216 Cal.App.2d 167
- <sup>13</sup> *Estate of Ferrall* (1953) 41 Cal.2d 166; *Estate of Traung* (1962) 207 Cal.App.2d 818

## IRS announces they will recognize same-sex marriages

**Same-sex married couples filing their 2012 returns on extension must file before September 16, 2013, if they do not want to file as married.**

By Renée Rodda, J.D.  
Associate Editor

The U.S. Department of the Treasury and the IRS ruled that same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for federal tax purposes.<sup>1</sup>

The ruling specifically states that it applies only to "legally married" same-sex couples, and not to registered domestic partnerships, civil unions, or similar formal relationships recognized under state law. However, it does apply regardless of whether the couple lives in a jurisdiction that recognizes same-sex marriage or a jurisdiction that does not recognize same-sex marriage.

Under the ruling, same-sex couples will be treated as married for all federal tax purposes, including income, gift, and estate taxes. The ruling applies to all federal tax provisions where marriage is a factor, including filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA, and claiming the Earned Income Tax Credit or Child Tax Credit.

To read the Revenue Ruling, go to:

[www.irs.gov/pub/irs-drop/rr-13-17.pdf](http://www.irs.gov/pub/irs-drop/rr-13-17.pdf)

### Filing as married

These taxpayers **must** file their 2013 federal income tax returns using either the married filing jointly or married filing separately filing status.