When the economy has a downturn, trustees are under more pressure to make distributions. Beneficiaries lose jobs, their individual asset portfolios decrease, and they may make the decision to go back to school. Moreover, with the current COVID-19 pandemic, health care expenses may increase. Due to these factors, trustees are under more pressure to make larger distributions under a discretionary health, education, maintenance ("HEMS") standard.

What does a HEMS distribution standard trust include? The Restatement (Third) of Trusts provides that 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. Restatement (Third) of Trusts, §50 (2003). 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; and college as part of a study abroad program. *Id.* The terms “support” and “maintenance” are considered synonymous, and are generally placed into three categories: what is generally deemed to be included, what might be included, and what expressly is not included. *Id.* The following expenses are 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. The following expenses might be included: reasonable additional comforts or luxuries; and special vacations of a type the beneficiary had never taken before. The following expenses are generally 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. When applying this standard, a trustee should consult the law of the relevant jurisdiction because these categories and what are included may vary.

When faced with a request for a distribution, the trustee should first consult the trust document. Most of the Texas Trust Code provisions are default provisions that may be overridden in a trust instrument; so, generally, the trust document controls. Tex. Prop. Code Ann. § 111.0035(b). Where the Texas Trust Code is silent and where a given trust instrument is also silent, the next source of authority is the common law. Texas Trust Code § 113.051 provides in part that “[i]n the absence of any contrary terms in the trust instrument or contrary provisions of [the TTC], in administering the trust, the trustee shall perform all of the duties imposed on trustees by the common law.” Tex. Prop. Code § 113.051.

In Texas, the use of the words “support” and “maintenance” in a trust instrument evinces the creation of “support trusts.” *State v. Rubion*, 158 Tex. 43, 308 S.W.2d 4, 8-10 (1957); *Duncan v. O’Shea*, No. 07-11-0088-CV, 2012 Tex. App. LEXIS 6494 (Tex. App.—Amarillo Aug. 7, 2012, no pet.). The considerations a trustee must refer to in exercising its discretion regarding a support and maintenance trust, include “1) the size of the trust estate, 2) the beneficiary’s age, life expectancy, and condition in life, 3) his present and future needs, 4) the other resources available to him or his individual wealth, and 5) his present and future health, both mental and physical.” *Estate of Dillard*, 98 S.W.3d 386 (Tex. App.—Amarillo 2007, pet. denied). See also *Keisling v. Landrum*, 218 S.W.3d 737, 744 (Tex. App.—Fort Worth 2007, pet. denied). Even though a trustee has a responsibility to distribute the trust’s income and principal for maintenance, it also has a competing responsibility to manage the trust prudently and responsibly to preserve it for her future support and maintenance. Tex. Prop. Code Ann. § 113.006 (Vernon Supp. 2006) (stating that a trust may manage the trust property on the conditions and for the lengths of time as the trustee deems proper); *Keisling v. Landrum*, 218 S.W.3d at 744; *Brault v. Bingham*, 493 S.W.2d 576, 579 (Tex. Civ. App.—Waco 1973, writ ref’d n.r.e.) (holding that safety of the trust fund is the first care of the law, and on this depends every rule which has been made for the conduct of trustees). Thus such a trust “does not state that [the trustee] must give into [a beneficiary’s] every support and maintenance whim; it simply notes that income and principal from the trust shall be distributed to appellant to support and maintain her if appellant’s income does not suffice.” *Keisling v. Landrum*, 218 S.W.3d at 744.
So, a distribution standard featuring the terms support and maintenance, does not afford trustees unbridled discretion. Rather, the trustee’s discretion must be “reasonably exercised to accomplish the purposes of the trust according to the settlor’s intention and his exercise thereof is subject to judicial review and control.” *Kelly v. Womack*, 268 S.W.2d 903, 907 (Tex. 1954); *Powell v. Parks*, 86 S.W.2d 725 (Tex. 1935); *Davis v. Davis*, 44 S.W.2d 447 (Tex. Civ. App.—Texarkana 1931, no writ).

For example, in *State v. Rubion*, the court had to decide what interest the beneficiary had when the trust instrument allowed the trustee to distribute assets for the beneficiary’s support and maintenance. 158 Tex. 43, 308 S.W.2d 4, 8 (1957). The court noted that those terms evinced the creation of a support trust. *Id.* And, though a trustee’s discretion regarding distributions from such a trust may be considerable, it was not unbridled. *Id.* at 8-9. The trustee must act reasonably and in a manner commensurate with the purpose of the trust. *Id.* at 9. This meant that his decision to distribute income or corpus for the beneficiary’s support and maintenance could not be exercised at a whim. The court ruled that the trustee abused his discretion by refusing to invade the principal of the trust to make payments for the beneficiary’s care while she was in a state mental hospital. The trustee argued that he was within his discretion to withhold payments of principal because the corpus of the trust should be preserved for her support if she were ever discharged from the hospital, and further, that if the trust corpus were used to pay all of her medical care it would completely destroy the trust. Disagreeing, the court held the trustee abused his discretion by withholding the entire principal and the trustee should have determined what amount could have been distributed while still preserving the long-term health of the trust.

In *Penix*, the appellate court ruled that a trustee was within its discretion to withhold principal as well as income, in order to meet the future needs of the beneficiary. *Penix v. First Nat’l Bank of Paris*, 260 S.W.2d 63 (Tex. Civ. App.—Texarkana, writ ref’d). There, the trustee argued successfully that, because the beneficiary was only nine years old, the income produced from the trust was well in excess of what was needed for her current support, and any excess above the beneficiary’s current needs should be held in reserve for emergencies. The court found that the trustee was within its discretion. The court discounted any significance of the word “shall” within the grant.

Another factor that a trustee must consider is the needs of other beneficiaries. A trustee has a duty to treat all beneficiaries with impartiality. Texas Jurisprudence states:

A trustee must act for all the beneficiaries; he or she may not properly act for only some of them. The trustee owes the same fiduciary duty to all to protect their respective interests, without partiality or favor to some at the expense of others; thus, a trustee is bound, in the absence of instructions to the contrary, to administer the trust with an eye to a remainder interest, as well as to the interest of a life tenant, and he or she cannot slight one interest for the benefit of the other. Additionally, a trustee owes the same fiduciary duty to a contingent beneficiary as to one with a vested interest, insofar as necessary for the protection of the rights
of the contingent beneficiary in the trust property. This duty of impartiality has been codified in the Uniform Prudent Investor Act, which states that if a trust has two or more beneficiaries, the trustee must act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.


In a recession, a trust’s asset portfolio will likely decrease even with sound diversification and investing strategy. So, there are often more requests for distribution at a time when the source of distributions is decreasing. What is a trustee to do?

First, the trustee should garner all relevant information to make a sound decision. The trustee should evaluate the financial market and where it is headed. The trustee should gather information for the requesting beneficiary’s individual needs and sources of income. The trustee should seek a detailed report on all sources of funding for a beneficiary and all anticipated expenses. The trustee should also obtain the beneficiary’s balance sheet showing all assets and liabilities. The trustee should also obtain the beneficiary’s tax statements for the three previous years. The trustee should also seek information on the potential needs for other beneficiaries.

Second, when exercising discretion in a support trust, a trustee should use this information to consider both the present and future needs of the requesting beneficiary and other beneficiaries, as well as other relevant facts and circumstances. Regarding the HEMS standard:

1) The size of the trust estate. Does the trust hold $50 million or $200,000?

2) The beneficiary’s age, life expectancy, and condition in life. Is the beneficiary young and healthy or elderly? Does the beneficiary have special health needs that will require funding in the future?

3) The beneficiary’s present and future needs. What are the current needs? Is the beneficiary a young student that can obtain school loans? Does the beneficiary have health needs that will require funding for years to come?

4) The other resources available to the beneficiary or his individual wealth. Does the beneficiary have individual sources of income? Is the beneficiary a beneficiary of other trusts?

5) The beneficiary’s present and future health, both mental and physical.
Does the beneficiary have current health needs that require funding? Does the beneficiary have health insurance? Can the trust obtain health insurance for the beneficiary? Will the beneficiary need assistance in the future?

6) Other beneficiary's needs and consideration. Are there other beneficiaries that are entitled to a distribution under HEMS standard? What are their needs and conditions? Are there future contingent beneficiaries?

After evaluating these and other factors, a trustee should make a decision and document the file as to its due diligence. The decision is generally not set in stone, and a trustee can reevaluate the decision at any time when factors change. A trustee can always seek assistance from an attorney to provide legal advice on the factors involved in making distributions, and the fact that the trustee seeks legal advice is evidence to support a finding that a trustee has complied with its fiduciary duties.

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