



THE WOODWARD BUILDING  
1927 FIRST AVENUE NORTH, SUITE 101  
BIRMINGHAM, AL 35203

Jackson M. Payne  
DIRECT DIAL: 205-986-5037  
DIRECT FAX: 205-986-5057  
EMAIL: jpayne@lsppc.com

TO: OUR CLIENTS AND FRIENDS  
FROM: JACKSON M. PAYNE  
DATE: AUGUST 15, 2023  
RE: FINANCIAL STRATEGIES FOR YOUR LIVES AND BUSINESSES

---

## **TRUSTS WITH POWERS OF APPOINTMENT LIMITED BY HEMS STANDARD**

In this newsletter we discuss trusts under which beneficiaries/trustees have powers limited by a so-called HEMS (health, education, maintenance, support) standard. It's difficult, if not impossible, to draft a trust with much specificity for an environment 100 years or more in the future. A trust that may last until the 22nd century should incorporate great flexibility, in light of the unpredictability of the tax system, social conditions, etc. in the future. But this flexibility must be provided for without running afoul of the estate tax inclusion rules as they exist today-in particular, the rules governing "powers of appointment."

The donor of a power of appointment authorizes the donee to dispose of property on the donor's behalf. When the donee of the power of appointment dies, the question arises whether the property subject to the power is includible in the donee's estate for estate tax purposes. This depends primarily upon the scope of the power. Ordinarily, only a general power of appointment will cause inclusion in the donee's estate.

One tax-effective way to incorporate flexibility into a trust arrangement is to include a provision in the trust instrument that permits a trust beneficiary to be appointed as a trustee of the trust, with the ability to make discretionary distributions to himself or herself for health, education, maintenance, and support. The Code excludes from the term "general power of appointment" a power to consume, invade, or appropriate trust income or principal, or both, for the benefit of the donee of the power if it is limited by an ascertainable standard relating to his or her health, education, maintenance, or support. A standard relating to health, education, maintenance, or support is often referred to as a "HEMS standard."

According to the regs, a power is limited by an ascertainable standard if the extent of the donee's duty to exercise and not to exercise the power is reasonably measurable in terms of the donee's needs for health, education, or support, or any combination of them. But "support" as used here is not limited to the bare necessities of life. The words "support" and "maintenance" are synonymous. Whether the donee is required first to exhaust his or her other sources of revenue is of no significance in determining whether a power is limited by an ascertainable standard.

The regs give examples of ascertainable standards. Thus, there is an ascertainable standard where powers are exercisable for the donee's-

- . . . support
- . . . support in reasonable comfort
- . . . maintenance in health and reasonable comfort
- . . . support in his or her accustomed manner of living
- . . . education, including college and professional education
- . . . health
- . . . medical, dental, hospital and nursing expenses and expenses of invalidism.

But the regs state that powers to use property for the donee's comfort, welfare, or happiness are not limited by the requisite standard.

To avoid any dispute with IRS as to whether a beneficiary/trustee has a general power of appointment, it's best if the trust instrument closely tracks the language blessed by the Code and regs.

PLEASE VISIT OUR WEBSITE AT [LSPPC.COM](http://LSPPC.COM)  
The Alabama State Bar requires the following disclosure:  
No representation is made that the quality of legal services  
to be performed is greater than the quality of  
legal services performed by other lawyers.

IRS Circular 230 Disclosure: To the extent this message contains tax advice, the U.S. Treasury Department requires me to inform you that any such advice, whether in the body of the message or in any attachment, is not intended or written by my firm to be used, and cannot be used by any taxpayer, for the purpose of avoiding any penalties that may be imposed under the Internal Revenue Code. Advice from my firm relating to tax matters may not be used in promoting, marketing or recommending any entity, investment plan or arrangement to any taxpayer.