Delaware Well-Being Trust- An Analysis

Take-Away: Delaware's new Beneficiary Well-Being Trust statute is admittedly novel, but it carries many difficult, and so far, unanswered questions, especially for a trustee.

Background: In the summer of 2024 Delaware adopted its new Beneficiary Well-Being Trust statute. It comes as two different sections. One section {3345} is available only if the settlor affirmatively incorporated that Section into the trust instrument; when opted into, the Section *mandates* that the trustee provide beneficiary well-being programs (described below.) The other Section {3325} merely adds to the statutory trustee default powers; it authorizes the trustee, in absence of contrary terms in the trust instrument, to "provide financial education services to beneficiaries." Taken as a whole, these two provisions promote a trustee's role in supporting beneficiary health and financial education, rather than merely being limited to providing monetary distributions or other financial benefits pursuant to the terms of the trust instrument.

While novel in its approach, these new Delaware statutes create many legal uncertainties for trustees, some of which are described below.

Conflict of Interest: Section 3345 permits a trustee to initiate and design and implement a well-being program itself, without prior notice or disclosure to the trust beneficiaries, and also for the trustee to receive additional compensation for doing so. That creates an inherent conflict-of-interest in the trustee if the trustee can increase its compensation by creating and implementing well-being programs, without prior notice to or disclosure to the trust beneficiaries. Does this power prioritize trustee profit over beneficiary needs? One cynic has suggested that this new well-being statutory scheme is more for the trustee's financial benefit than the trust beneficiaries' benefit.

Discretion v. Mandate? Section 3345 provides that the trustee *shall provide* wellness programs, thus imposing an affirmative duty on the trustee and possibly a distribution trust director. This language potentially narrows the trustee's discretion. In Delaware, a trustee is given broad judicial deference when it comes to an exercise of its discretion. Delaware follows the Restatement (Second) of Trusts, Section 187, not the Restatement (Third) of

Trusts (Sections 50 and 60). The Second Restatement presumes a trustee's discretion is proper until it constitutes an abuse of discretion- "*a trustee's exercise of discretion is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.*" If the trustee is fashioning, at an additional expense to the trust, family well-being programs, is the trustee acting more like a trust director and not a fiduciary? This power to create well-being programs seems to blur the line between fiduciary decision-making and entrepreneurial self-interest.

HEMS Distribution Expansion? If the trust instrument limits beneficiary distributions to health, education, maintenance, and support (HEMS), how will expenditures from the trust for *"family retreats, family reunions, family history, family values"* fit within that HEMS standard? This could raise estate tax and creditor concerns if an individual trust beneficiary also serves as trustee under the HEMS trust with this expansion of trust distributions.

Under Section 3345, as written, the trustee is left to interpret who qualifies as *family,* a broad term that could extend well beyond the current permissible distributees of trust income or principal. By using *family,* does the statute unintentionally expand the class of trust beneficiaries. In addition, the trustee will undoubtedly face allocation decisions. One beneficiary may have 10 children while another beneficiary may have no children. If their trust pays for a family retreat as part of the trustee's well-being distribution power, does the one child-beneficiary (with no children of her own) subsidize her brother's 10 children, when all attend the family retreat in Hong Kong? The trustee is thus faced with disproportionate distributions and subjective assessments of *benefit* which can lead to friction among named trust beneficiaries.

In addition, the statute does not contemplate non-participation, whether voluntary or involuntary, by a family member which leaves the trustee without any direction on how to proceed.

Yet another concern is when a beneficiary relies on means-tested governmental benefits. The statute does not include any safeguards to ensure that a beneficiary's participant in, or payments for, family well-being programs do not unintentionally disqualify a current or future trust beneficiary from receiving public assistance.

Undisclosed Trust versus Well-Being Trust? If the trustee is paying for family reunions and retreats on behalf of a trust beneficiary, those expenditures will be at odds if the settlor also wants the trust to not be disclosed to the beneficiary until a much later date in time. As with any *silent* trust, how does the trustee explain to the trust beneficiary the Schedule K-1 that adds to the beneficiary's tax bill an expense like a first-class ticket to Hawaii to attend a *family retreat?* What is the trustee supposed to tell this trust beneficiary who does not know that the trust even exists? The Delaware Well-Being Trust is completely at odds with a settlor who wants a *silent* trust.

What is Meant by *Family?* The Sections rely heavily on terms such as *family, family retreat, and family values,* without the term *family* ever being defined. What is meant by the statute's use of the phrase *family's mental health and well-being*? Arguably a spouse or stepchild would be included in the concept of *family,* but those same individuals would not be named as trust beneficiaries. Would distributions under the term *family* to individuals who are not named trustees result in a breach of trust claim against the trustee?

Allocations under the UPIA? Section 3345(d)(1) labels a well-being program cost as a trust "*administrative expense..to the extent permitted by law."* This may affect how the trustee's discretion is exercised, or it may trustee's limit discretion. Moreover, it could be contrary to federal tax law.

Tax Treatment of Well-Being Expenses? If a well-being program expense paid by the trustee is not considered unique to trust administration, it may not be fully deductible at the trust level, and thus it may need to be passed through to trust beneficiaries as part of distributable net income (DNI) of the trust, which in turn triggers K-1 reporting. How does the trustee, or the trust director responsible for distributions, determine whether the power to provide financial education services to a trust beneficiary is an administrative power or a distribution power?

Joint and Several Liability? On a more technical level, Section 3345(c) provides that both an administrative trustee *and* a distribution trust director are mandated to provide well-being programs. This dual conjunction reference may not merely imply shared responsibility, but it could also create joint and several liability between them.

Tax Deduction? Assuming payments made by the trustee pursuant to a Well-Being Trust qualify as administration expenses, the next question is whether the expense is fully deductible, or subject to the 2% floor of IRC 67. If the beneficiary well-being program expenses arise uniquely in the contest of trust or estate administration, it may be fully deductible. It seems unlikely that the IRS will accept the deduction of all well-being program expenses at the trust level without attribution to the trust beneficiaries via DNI. A trustee seeking to deduct expenses for the benefit of specific beneficiaries without corresponding K-1 reporting, could easily find itself in trouble.

Conclusion: For those individuals who have sitused their trusts in Delaware, the Well-Being Trust is something that they need to be aware of, both as an opportunity, and as to many of the unresolved questions that they present for a trustee. Other states often follow Delaware's lead when it comes to trust laws, and it would not be surprising if other states want to 'jump on the well-being trust bandwagon.' It more states follow suit, hopefully their statutes will address some of the questions that Delaware's version of the well-being trust does not answer.

Gift Tax Exposure of Opting In? If a trust is modified, or decanting, to add Section 3345, i.e., the trustee is opting into that Section, and the trust beneficiaries either consent or they fail to object to the opting-in, they may be deemed to have made a taxable gift to the newly included participant *family members,* e.g., step-children, spouses, distant relatives who might come to enjoy trust funded *family retreats* at exotic locations in the name of promoting family 'connection.'

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