

**Wills, Trusts & Estates****When it's time for a trust to follow beneficiaries south**By **Susannah Roth**

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(July 14, 2021, 8:29 AM EDT) -- In the estate context, it's not easy dealing with trusts where U.S. beneficiaries are involved. U.S. beneficiaries can seriously complicate an estate plan, particularly regarding ongoing trusts. In a previous article, *Estate Planning When a Child Moves to the U.S.*, I discussed the tax implications and Canadian tax filings which can arise where there are U.S. resident beneficiaries of a Canadian estate. This article discusses the potential for migrating a Canadian trust to the U.S. where the trust has U.S. beneficiaries.

There are many reasons to use a trust, whether *inter vivos* or testamentary, in an estate plan. In creating wills and long-term trusts where there are existing or contingent U.S. beneficiaries, it is important that flexibility is built in to allow for a trust to be migrated to another jurisdiction. This would include provisions to change the governing law where possible and appropriate.

However, not all trusts are drafted with such flexibility, and trustees of long-term trusts in particular often find themselves dealing with very different circumstances from those originally foreseen.

Whether or not the U.S. residency of beneficiaries was considered at the planning stage, the existence of U.S. beneficiaries will mean that the trustees will need to consider, both at inception and on an ongoing basis, various issues in order to ensure that the trust is administered as efficiently as possible.

One of these considerations is whether the appointed trustees are the best choice to handle the trust administration. Taxation of the trust is affected by where the management and control of the trust is. If the appointed trustees are resident in Canada, often the trust will be considered to be tax resident in Canada.

If there are U.S. beneficiaries, there may be benefits if the trust becomes tax resident in the U.S. For example, certain withholding and other tax payments could be eliminated, and foreign exchange issues will no longer be a concern. As well, there may be a lower tax rate on the trust's income, depending on which U.S. state is chosen.

This is not a decision that should be made hastily, and expert cross-border tax advice should be sought. In addition, the beneficiaries should be consulted to determine if they intend to remain in the U.S. long term, as that will affect the analysis.

However, if it is decided that the beneficiaries would be best served by the trust being U.S. tax resident, then the trustees will need to resign and new trustees will need to be appointed typically who are all, or the majority of whom are, resident in the U.S.

Moreover, depending on the state in which the U.S. beneficiaries live and what may be practical in regard to professionals or other persons stepping into the trustee role, for example, whether the size and terms of the trust make the appointment of a professional trustee a reasonable and viable option, it may be beneficial to consider appointing new trustees who are resident in a low-tax U.S. state other than where the beneficiaries reside. Local taxation rules will need to be considered for such an option as well.

Legal advice in the Canadian jurisdiction which governs the trust and the U.S. jurisdiction to which the trust is to be migrated should also be sought. There will be legal documentation and possibly a court application required for the change of trustees. As well, the resigning trustees may need to pass their accounts in court or obtain approval and releases from the adult and capable beneficiaries of the trust before the new trustees take over the administration of the trust.

There will likely be legal documentation to be completed for the new U.S. jurisdiction. In some U.S. states, trustee resolutions may be necessary to change certain aspects of the trust administration to bring it into line with the applicable local laws, to confirm the change of jurisdiction of the trust or even to resettle the trust into a new trust drafted in accordance with local law.

One of my fondly remembered childhood songs is Kermit the Frog's *It's Not Easy Being Green*. And trusts are definitely not easy to effectively "repatriate" to the U.S., with just a green card.

Where "greenbacks" are involved, trustees should ensure that they are considering all matters which are or could be of benefit to the beneficiaries of the trust, even if this might lead to a change of trustees to effect a change of tax residency and the trust administration jurisdiction.

And as always, experienced professional advice is key to optimal decision-making and avoidance of legal and tax pitfalls.

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