

Wake-up call for mum and dad trustees

By ROB STOCK - Sunday Star Times
01/08/2010



A trust crackdown is coming with an overhaul of trust regulation likely to create a parallel enforcement regime similar to that governing companies.

A paper to be issued by the Law Commission next month could canvass options including creating a register of trusts, establishing a trusts ombudsman paid for by an annual levy on trusts, setting out in a single statute the duties of trustees and making it easier for disgruntled beneficiaries to remove rotten trustees.

The statute suggestion, in some ways providing a parallel to the Companies Act which sets out company directors' duties, would include penalties, both civil and criminal, for trustees who fail in their duties and would hand more power to trust beneficiaries.

'If we are going to give people these sorts of benefits, then there have to be responsibilities,' says George Tanner.

A review of trust law has long been on the commission's agenda, and there has been a growing body of anecdotal evidence that the boom in trusts – there could be up to 500,000 of them in New Zealand – has resulted in perhaps as many as 75% being woefully mismanaged. Often, those involved are mums and dads who have no clue about their legal duties.

Many trusts would turn out to be expensive shams if ever tested in court, critics say.

"When we started to look at this whole review, it was really conceived of as an attempt to tidy up some of the legislation relating to trusts which is quite old, impenetrable in a lot of respects, and not particularly effective," law commissioner George Tanner said.

Suggestions will include holding trustee-removal hearings in the district court rather than the more expensive high court. Although this could result in many more trust cases, an ombudsman-style scheme could also deliver stronger policing of trustees.

"If we are going to give people these sorts of benefits, then there have to be responsibilities," he said.

Some of the benefits of trusts could also come up for discussion.

"One of the issues is the extent that trusts are being used for protection against creditors, to avoid means-testing regimes, as a means of avoiding obligations under property relationship legislation," Tanner said. "Do we engage in that area or say those areas are just a matter for the IRD, the justice sector or the family courts? Or do we have some thoughts about that?"

Given New Zealand was a "world leader" in terms of the number of trusts, the lack of clarity in trust law was worrying, he said.

Experts could not even agree on whether there was a core set of trustee duties. "If you go to the Companies Act, you will see what the duties of directors are. It seems to me, and we haven't made any firm proposals, that there is a strong case for having a robust statute that does some of this."

Jonathan Cron of New Zealand Trustee Services has called for government intervention because so many family trusts have been set up at a significant cost for mums and dads who simply did not understand what they were getting into, and who lacked the skills or knowledge to operate them on a DIY-basis, which was what most did.

"The mess we're uncovering every day leads me to conclude that the government needs to take action," he writes in *Family Trusts in New Zealand*, which hits bookshelves tomorrow. "I would be in favour of having a compliance regime put in place to regulate trusts in this country. Otherwise we could see ordinary New Zealanders facing huge losses over the next decade or so."

Cron said immediate action was needed as tax and policy changes could lead to a new wave of trust creation. If the government abolishes gift duty, as it is planning, then any asset, no matter how valuable, could be gifted into a trust overnight.