

The Accountant's duty of care and role in the administration of clients' family trusts

By Viv Brownrigg

No doubt accountants will have read this week's Sunday Star Times article on the possible overhaul of trust regulations.

For those who didn't, read on and contemplate the possible implications for all accounting firms who have family trusts as clients.

Next month a paper will be issued by the Law Commission canvassing various options and seems likely to recommend a parallel enforcement regime similar to that governing companies. Options could include creating a register of trusts, establishing a trusts ombudsman paid for by an annual levy of trusts, setting out in a single statute the duties of trustees and making it easier for disgruntled beneficiaries to remove trustees.

It is estimated that there could be up to 500,000 family trusts in New Zealand and that as many as 75% of them are woefully managed, some by mum and dad trustees who are doing so on a DIY basis with little or no knowledge of their real responsibilities as trustees.

The implications for accountants in the role of Independent Trustee will be far reaching. Firms who accept this role, regardless of the structures they use for such appointments, will need to vigorously test their trust administration procedures for robustness.

But there's a wider implication here. Does the accounting firm who chooses not to accept independent trustee appointments and merely assumes the role of compliance accountant have a duty of care to ensure clients administer their trusts properly? Absolutely yes.

In many cases it is the accountant who first suggests, perhaps in tandem with the family solicitor, that a client consider a trust structure. But how far do we really go in helping our clients to attend to the necessary and ongoing administration? Do we educate our clients as to the responsibilities of being a trustee? Has someone, either the accountant, the solicitor or the client been given a clear brief to attend to this administration? Or are our clients just assuming that we are taking care of business? Many may well be doing just so.

Several years ago, when I was still a practising accountant in a provincial firm, I suggested to my partners that we undertake a risk review of our client trusts. In the main our clients understood the need for such a review and appreciated our diligence in reporting to them our findings and acting as facilitator to ensure that any legal and administrative matters were attended to.

We did have a small number of fee concerns. A minority of clients could not be convinced that a review or even that any form of ongoing trust administration was necessary. That will happen in any accounting practice, but it shouldn't sway firms from what they know is the right position to take, namely:

1. To educate existing clients as to the risks and responsibilities of being a trustee.
2. To ensure that someone (could be the accounting firm, could be the solicitor, will probably be the client in very limited circumstances) is attending to the ongoing administration in a structured and professional manner.
3. To pay very close attention to new client trusts. It really pays to stress the importance of administration before clients even make the final decision to proceed with a trust. If they aren't prepared to invest a small amount of money annually to see their trust properly administered, should they really be going ahead with such a structure? Would you buy a new car if you couldn't afford to insure it?

Recently I received an interesting letter from a local law firm acting for a Trust of which I am independent trustee. The firm was advocating a review of the Trust's administration processes and stated very clearly that unless clients were prepared to allow such a review they were unlikely to continue to act for them. A brave and proactive stance.

How many of your clients think you or someone else is taking care of their trust business?