

TRUSTS AND SUCCESSION LAW IN ISRAEL

Dr. Alon Kaplan, Advocate & Notary, TEP

Meytal Liberman, Advocate, TEP

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Abstract

The Succession Law and the Trust Law in Israel have certain provisions which may turn a trust ineffective when the settlor of the trust wishes to avoid inheritance procedure. The article will discuss problems and solutions.

What is the issue for STEP members? Special care should be given when drafting a trust deed and to its management after creation.

What does it mean for STEP members? Understanding the risk of inheritance procedure which may invalidate trust.

What can I take away? Understanding possible conflict between the trust law and the succession law.

Introduction

The concept of a trust is well-established in Israel throughout its history. In the ottoman period, the Muslim Waqf was widely used by both Jewish and Muslim people. One of the well-known Waqfs was that of Hürrem Sultan, which was known as the “Miri Mukafah Waqf Haski Sultany”, meaning the real estate trust of Haski Sultany.¹ Waqfs exist until today, and are governed by the Sharia laws and the Muslim Sharia courts in Israel. The trusts continued to form a part of the land’s economic and legal culture under the British Mandate as well under the English Common Law, as evident in the Charitable Trusts Ordinance of 1924-1925.² This tradition was later drawn into the Israeli legal system through different legal arrangements and case law, and was finally formally implemented into the Israeli law upon the legislation of the Israeli Trust Law in 1979.³

The Israeli Succession Law⁴ was enacted in 1965 and comprises the core of the inheritance law in Israel, together with case law and other relevant legislation.

This article will focus on the relationship between the trust law and the inheritance law in Israel, while specifically addressing the transfer of assets upon death under each of these laws.

¹ Different Appeal (Jerusalem) 2/97 *Machmed and Ibrahim Abed Rabu v. Administrator General Jerusalem*, par. 42 (13 Sep. 2006), Nevo Legal Database (by subscription) (Isr.)

² Charitable Trusts Ordinance 1924, Official Gazett of the Government of Palestine, issue no. 116 of 1 June, 1924, at pages 672-680; Charitable Trusts (Amendment) Ordinance 1925, Official Gazett of the Government of Palestine, issue no. 142 of 1 July, 1925, at Pages 343-345 (the “**Charitable Trusts Ordinance**”).

³ Trust Law, 5739-1979, 33 LSI 41 (1966–1967) (Isr.) (the “**Trust Law**”).

⁴ Succession Law, 5725-1965, 19 LSI 215 (1964–1965) (Isr.) (the “**Succession Law**”).

Inheritance Law in Israel

All inheritance proceedings in Israel are governed by the Succession Law, which provides in Section 2 that the lawful heirs of a deceased are the beneficiaries under his or her will, and in the absence of a will - the heirs under law, as determined in accordance with the mechanism detailed in Sections 10-17.

Another cornerstone of the inheritance law in Israel is the principle of Freedom of Testation. This principle manifests in Section 27, which provides in sub-section (a) that "an undertaking to make a will, to change it, to cancel it, or to refrain from doing any of the same – is invalid", and in sub-section (b) that "a provision in a will the negates or limits the right of the testator to change the will or to cancel it – is invalid".

The Succession Law also provides in Section 8(a) that "an agreement regarding a person's inheritance or a waiver of his inheritance, made during the lifetime of that person, is void". Subsection (b) states that "[a] gift made by a person, such that it shall be granted to the recipient only following the death of the donor, shall have no validity, unless made in a will pursuant to the provisions of this law".

It therefore follows that if a person wishes to grant a gift, he or she must do so during their lifetime, or under a will; any gift that is to become effective upon demise is void. Given the principle of Freedom of Testation, there is no limitation on the gift itself, i.e. there is no forced heirship under the Succession Law.

It should also be noted that under Section 39, a will become effective only upon the issuance of a probate order with respect to it. The probate process may take several months, up to a year. During which time, limitations are usually imposed on the deceased's assets.

The creation of trust under the Trust Law

The Israeli Trust Law defines a trust in Section 1 as the duty imposed on a person to hold or to otherwise deal with assets under his or her control for the benefit of another or for some other purpose.

Under the Trust Law, trust may be created by a contract, by a deed or by a testament, as set out below:

- a) A trust created by contract requires an agreement between the settlor and the trustee with no specific procedure necessary for its creation.
- b) A Trust created by a deed must be in writing and signed in the presence of an Israeli notary. This Trust is known as *hekdes* (i.e., *inter vivos* trust). It becomes operative during the lifetime of the settlor upon the transfer of the assets of the settlor to the control of the trustee.
- c) A testamentary trust, also referred to under the Trust Law as a testamentary *hekdes*, refers to a trust which is created by way of probate proceedings under the Succession Law. Accordingly, a testamentary trust must comply with the formal requirements under the Succession Law for executing a will. These include signing

the will in the presence of two witnesses or an Israeli notary. A testamentary trust becomes valid only upon the issuance of a probate order with respect to it.

The invalidation of trust under the Succession Law

Due to the limitations set by Section 8 of the Succession Law mentioned above, a trust contract between the settlor and the trustee, under which control of the trust's assets passes to the trustee only upon the death of the settlor, is ineffective. The control must be granted during the lifetime of the settlor, or alternatively, the trust must be a *hekdes* (i.e., *inter vivos* trust) with assets effectively transferred to the control of the trustee during the lifetime of the settlor, or a testamentary trust, which becomes effective upon the issuance of a probate order with respect thereof.

It therefore follows, that if trust is created pursuant to a contract, the death of one of the parties to the contract will terminate the trust relationship and require a succession procedure to transfer the rights of the deceased to his or her heirs.

It should also be noted that the choice of the form of trust, as mentioned above, requires consideration of personal and family circumstances, as well as tax planning considerations.

This article focuses on the transfer of assets upon death, but reality shows that legal capacity issues should also be considered during the lifetime of a person. To deal with such issues, new legislation was recently implemented: Amendment 18 of the Legal Capacity and Guardianship Law,⁵ which regulates the creation and use of an enduring power of attorney. This power of attorney allows a competent person (the "Appointer") to appoint another person (the "Delegate") to attend to his or her personal, and/or medical, and/or property affairs, when the Appointer is no longer able to properly understand the matter and attend to these affairs.

Conclusion

The interrelationship between the law of succession and the law of trust is complex and challenging.

If a person wishes to create a trust that would prevail after his or her demise, special care should be given to the form of the trust, i.e. a trust contract, an *inter-vivos* trust (*hekdes*), or a testamentary trust, as well as to its drafting and subsequent management. Other factors should also be considered, such as tax and family circumstances.

Once an *inter-vivo* trust (*hekdes*) is created, the settlement of assets into the trust and under the control of the trustee should be made and completed during the lifetime of the settlor irrevocably. Otherwise, the settlement of the assets into the trust may be contested by potential heirs of the settlor after his or her demise, which may result in costly and cumbersome litigation in court.

⁵ Legal Capacity and Guardianship Law (Amendment 18), 5776-2016, 2550 SH 798 (2016) (Isr.) ("Amendment 18").

