Article

The Israeli private trust as an alternative to succession proceedings

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Abstract

How to use a trust as an alternative to a will to transfer assets to the next generation? This article will answer this question by first introducing the reader to inheritance and trust law in Israel. It will explore the endowment and how it should be used in order to regulate the transfer of assets to the next generation—how a trust should be set up and how assets should be transferred to it. The conclusion drawn from this analysis points out the key elements which should be considered when creating a trust to survive death under Israeli law.

Inheritance procedure in Israel

Inheritance in Israel is governed by the Succession Law.[1] According to section 2 of the Succession Law, the estate of a deceased passes to his heirs in accordance with the law—ie, intestate inheritance, unless the deceased has left a valid will, in which case the estate is bequeathed in accordance therewith.

In the absence of a valid will, the Succession Law provides a mechanism that determines the order of inheritance, and the portion of each heir. Accordingly, the first right of inheritance is divided equally between the spouse of the deceased and his children. The spouse receives one-half of the estate and the children divide the remaining half between themselves in equal shares.[2]

Alternatively, the estate can be distributed as set out in the testator's will. Under the Succession Law, a will can be made in one of four ways,[3] the most common being in the presence of witnesses.[4] Such will is written, dated, and signed by the testator before two witnesses after the testator has declared before the witnesses that it is the testator's will. The witnesses must attest by their signature on the will that the testator has declared and signed the will as stated.

The rights of the heirs to the estate become enforceable in Israel upon the issuance of an inheritance order or a probate order in Israel, as the case may be.[5] Accordingly, if the deceased left a valid will, probate proceedings should be initiated, which require that the original be submitted, otherwise an additional application should be made to the court to approve the submission of a copy.[6]

Once an application for an inheritance or a probate order is made, a notice with respect thereof is publicly published, and any interested person may submit an

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1. Succession Law, 5725-1965, 19 SH 215 (1964-65) (Isr.).
2. Succession Law, §§ 11, 12.
3. Succession Law, §§ 18–23.
4. Succession Law, § 20.
5. Succession Law, § 66(a).
6. Succession Law, § 68(b).

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objection within two weeks of publication.[7] Once an objection is filed in the proceedings, the application is then forwarded to the Family Court.[8]

Section 54 of the Inheritance Regulations[9] provides that the Administrator General,[10] who may, in his discretion, conduct an additional inspection of the application and request further information and documents, shall submit a copy of any application, including an application for a probate or inheritance order, to the Attorney-General for review.

Section 17 of the Inheritance Regulations requires that a notice with respect to the application for an inheritance or probate order be published in one of the daily newspapers and in the formal publication of the State of Israel (*Reshumot*). The notice includes an invitation to contest the application, if so desired.

Section 14(b)(4) of the Inheritance Regulations provides that an application for a probate or inheritance order shall be dismissed, unless notifications are sent as follows:

a. In the instance of an application for an inheritance order—notifications to the heirs listed in the application. Each notification shall indicate the share of the addressed heir.
b. In the case of an application for a probate order—notifications to the beneficiaries under the will, together with a copy of the will itself. Since it is possible for the deceased to disinherit part or all of his family members in his will, Section 14(b)(4) obliges the applicant to notify the deceased's family members even if they are not named as heirs under the will. Accordingly, the section details who should be notified under what circumstances. The purpose of this obligation is to ensure that any person who may be affected if the will is probated has the opportunity to contest it in court.

As it becomes evident from the above, inheritance procedures in Israel are complex and cumbersome. They may also be uncomfortable for the deceased's family members if an objection is filed, or the contents of the will are disclosed. Furthermore, inheritance procedures may be especially complicated, when assets or heirs are situated in more than one jurisdiction.

The Israeli trust

A trust can be used as an alternative to a will, or within a will, to transfer assets to the next generation in a manner that better fulfils the wishes of the owner of the assets.

Under the Israeli Trust Law,[11] "a trust is a relationship dealing with property by virtue of which a trustee is bound to hold same property or to act in respect thereof in the interest of a beneficiary or for some other purpose." The Trust Law further provides that "a trust is created by Law, by contract with a trustee or by an instrument of endowment (Hekdesh)".[12]

An endowment under the Trust Law is defined as a dedication of any property in favour of a beneficiary or for some other purpose, requiring a written document—ie, an "instrument of endowment", in which the settlor of the endowment expresses his intention to create an endowment, and determines its objects, property and conditions. Such written document may be a declaration in writing signed by the settlor of the endowment before a notary—an *inter vivos* trust, or a written will of the settlor in which the settlor expresses his intention to create an endowment—a testamentary trust.[13]

An endowment commences upon the transfer of control over the endowment property to the trustee.[14] Accordingly, when the endowment is created as a

7. Succession Law, § 67.
8. Succession Law, § 67A.
9. Inheritance Regulations, 1998, KT 5923 (Isr.).
10. The Attorney-General is a governmental authority under the Ministry of Justice. The Administrator-General and Official Receiver is a department of the Ministry of Justice representing the Attorney-General in civil and religious courts in legal proceedings pursuant to the Inheritance Law. *Ministry of Justice*, MFA.GOV.IL, https://www.mfa.gov.il/mfa/mfa-archive/1999/pages/ministry%20of%20justice.aspx (last visited 30 January 2022).
11. Trust Law, 5739–1979, 33 LSI 41, § 1 (1966-1967) (Isr.).
12. Trust Law, § 2.
13. Trust Law, § 17(a). The section also provides for a third alternative to the creation of an endowment through a direction of the settlor with respect to a provident fund.
14. Trust Law, § 17(b).

testamentary trust, it commences only upon the issuance of a probate order, provided the will is valid and all inheritance procedures have been executed properly in accordance with the law.

A trust to survive death

A trust created to regulate the transfer of assets to the next generation may be set up during the lifetime of the settlor with the intention that it continues to operate after his death, or alternatively, in the settlor's will as a testamentary trust. However, as shown below, a trust created with such purpose must comply with two main requirements: the trust must be created in the proper legal form, and the transfer of the assets to the trustee must be done in the correct manner, as detailed below.

Form

An endowment

Section 8(a) of the Succession Law provides that "an agreement concerning a person's estate and a waiver of his estate, made while that person was alive, is void."

In the case of *Anonymuos*,[15] the deceased, prior to his death, added co-owners to his bank account. The co-owners later claimed that the deceased had asked them to commemorate him and his wife after his death, and for this purpose, he added them as co-owners prior to his death. Accordingly, they further claimed that in these circumstances, the deceased, in fact, had created a trust under an oral contract. No valid will was left to support their claim.

The Supreme Court held that no trust contract was entered into between the deceased and the other co-owners, and even if such had been entered into, it would not have been valid under section 8(a) of the Succession Law. The Supreme Court continued and held that the creation of such trust should have been made as an endowment under section 17 of the Trust Law—ie, an *inter vivos* trust executed before a notary, or a testamentary trust.

An endowment which is a testamentary trust

A trust created in a will as a testamentary trust is subject to Israeli inheritance law. First, such a trust must comply with the formalities required for the execution of a valid will. Second, the fact that the creation of a testamentary trust is subject to probate proceedings increases the risk that the trust would not be created as the settlor had originally intended due to various reasons. For example, the trust, and the will that contains it, may be challenged by the heirs; it is subject to the supervision of the Administrator General, who may intervene in the proceeding if deemed appropriate; and when the deceased or any of the assets are situated outside of Israel, private international law issues may arise.

The case of *Dr DR*[16] provides a good example for a testamentary trust which was declared invalid due to a fundamental flaw in the will. In this case, the deceased was diagnosed with cancer and was hospitalized. Within six months of her hospitalisation, she passed away at the age of 43. The deceased left two minor children. The deceased had divorced from the father of her children, and at the time of her passing she had a new spouse. The deceased left a will executed before witnesses that included assets in an accumulative value of over US$6.5 million. The will was executed during her hospitalisation, approximately six weeks prior to her passing. The main beneficiaries under her will were her two minor children in equal shares. The will was drafted by Advocate Doron Refuah.

The deceased inserted trust provisions in her will, which provided as follows: if at the time of her passing, her children had not reached the ages of 29 and 30, the share of each child should be held in trust in accordance with the provisions of the will. Furthermore, the deceased appointed Advocate Doron Refuah as trustee, and directed that the trustee would have the authority to act freely, without supervision, and without any

15. Family Appeal Application 7033-15 Supreme Court, *Anonymuos v. Anonymuos* (Sep. 1, 2016), Nevo Legal Database (by subscription) (Isr.).
16. Estate File 9947/01 Family Court (Tel Aviv), *Dr. D.R. v. M.R.* (Dec. 13, 2006), Nevo Legal Database (by subscription) (Isr.).

obligation to justify his decisions, which would be final. As trustee, Advocate Refuah would be entitled to an annual fee of 3% of the value of the assets in addition to VAT.

The deceased granted additional powers to Advocate Refuah in her will: Advocate Refuah was empowered to interpret the will, and his interpretation was to be final; Advocate Refuah was appointed as administrator of the estate; Advocate Refuah was appointed as second in line to be appointed as the children's caregiver after their father, and the will granted further rights to the person who would bear this responsibility.

The deceased's spouse, who was entitled to US$100,000 under the will, applied for the probation of the will. The deceased's children objected (through their father) on the grounds of section 35 of the Succession Law, which provides as follows: "A testamentary provision—other than in an oral will—in favor of a person who prepared the will or witnessed it or otherwise participated in its preparation and a testamentary provision in favor of the spouse of any of these—is void."

The children argued that Advocate Refuah had played a fundamental part in the planning and consolidation of the will and its provisions, in such a manner that if probated as it were, Advocate Refuah would be entitled to the benefit of most of the estate—up to 60% of it. On the other hand, Advocate Refuah argued that the deceased transferred all her assets to him during her lifetime, and the trust created in the will was nothing but a continuation of the trust the deceased had already created during her lifetime.

The Family Court accepted the objection to the will and determined that Advocate Refuah's conduct at the time close to the decease's passing and the nature of the will, including the manner and circumstances of its drafting, indicated that Advocate Refuah was the one to conjure up the provisions of the will in a way to ensure his share in the estate in a hidden way, which amounted to 60% of the value of the estate of the deceased. This was a wrongful involvement deriving from ulterior motives, which did not coincide with the true wishes of the deceased. Therefore, the conditions of Section 35 of the Succession Law were fulfilled, and the will was invalid. The Family Court further stated that the provision of Section 35 could not be overcome by the Trust Law and the setting up of a trust, as was the case in the case of *Lishitzky*,[17] which is described below. Doing so would be an infringement of the free will of the deceased and the requirement that the will be a personal act, in other words—an infringement of the core principles upon which the inheritance law is based.

In contrast to the case of *Dr. DR*, in the case of *Lishitzky*, there was no express trust in the will, but the court rather used the Trust Law to remedy flaws in a will. In this case, the deceased, Betty Lishitzky, made a will and signed it before two witnesses three and a half years before her death. In that will, she asked to pass all of her property to a "good soldier, a good person, who wants to study but does not have the means, in order to help him to study, to purchase an apartment and to help him progress in life. That soldier shall recite the Kaddish [prayer for the dead] in my memory." In addition, the deceased stipulated and stressed that none of her property should be left to her husband or to her adopted son.

After the passing of Betty Lishitzky, the Attorney General filed an application for a probate order in the view that this document constituted a valid will. The deceased's widower objected to the application on the grounds that it infringed sections 29 and 33 of the Succession Law, which require a testator to properly identify the beneficiaries and their shares in the estate in his will, or at least, to specify a group of persons or assets specific enough that a selection of beneficiaries and beneficiaries out of this group can be made—otherwise, the will is void. The widower accordingly argued that the will was invalid, thus an inheritance order should be issued, naming him as one of the heirs. The District Court accepted the objection of the widower and declared the will void. The Attorney General appealed to the Supreme Court.

17. CA 4660/94 *Attorney-Gen. v. Lishitzky* 55(1) PD 88 [1999] (Isr.).

The Supreme Court analysed sections 29 and 33 of the Succession Law and determined that they did not constitute part of the core provisions of the Succession Law, which, by their nature, are intended to manifest public policy or the policy of the legislator, such as the provisions concerning the legal capacity of the testator, or the annulment of a will as a result of coercion, undue influence, or fraud. Moreover, sections 29 and 33 were considered of "weaker power", and therefore the provision of section 17(a)(2) of the Trust Law concerning a testamentary trust prevailed over them.

The Supreme Court continued and concluded that the requirements of section 17(a)(2) of the Trust Law were properly fulfilled, and that the deceased had, in fact, created an endowment—a testamentary trust.

Both the *Lishitzky* and the *Dr. DR* cases demonstrate that the creation of a testamentary trust is subject to the fulfilment of all the core principles upon which inheritance law is based, namely—the will as being an expression of one's free will. In the *Lishitzky* case, the court applied the Trust Law even though the will was flawed, and no express trust provisions were included in it because the wishes of the deceased were clear; and in the *Dr. DR* case, despite the existence of express trust provisions in the will, the court held it void because significant doubts existed with respect to the deceased's wishes.

The creation of a testamentary trust is subject to the fulfilment of all the core principles upon which inheritance law is based

The way assets are transferred to the trustee

In the case of a testamentary trust, the assets are transferred to the trustee by way of inheritance, ie—under a probate order issued with respect to the will and the testamentary trust. This usually does not create any difficulty.

However, when an *inter vivos* trust is concerned, great significant is given to the way the assets are transferred to the trust. In such a case, the transfer of assets to the trustee is made by way of a gift, whereby the purpose of such gift is to remove those assets from the settlor's ownership so that they are excluded from his estate upon his demise. To achieve this, the gift must be made in accordance with the provisions of two laws, as set forth below:

- Section 8(a) of the Succession Law provides that "A gift made by a person with the intention that it be vested in the donee only upon the donor's death is not valid, except if made by a will under the provisions of this Law."
- Sections 2 and 5 of the Gift Law.[18] Section 2 deals with an immediate gift and provides that "A gift is completed upon the transfer of the subject of the gift to the donee, whilst it is agreed between them that the subject is disposed of by way of gift." Section 5 deals with the undertaking to make a gift, and it sets out several conditions that must be met in a situation of a undertaking to make a gift:

  a. An undertaking to make a gift in the future requires a written document.
  b. Unless the donor has waived the right to do so in writing, he may withdraw the undertaking if the recipient has not changed his situation in reliance thereon.
  c. Besides as provided in subsection (b), the donor may withdraw his undertaking if the withdrawal is warranted by disgraceful conduct on the part of the donee towards the donor, or towards a member of the donor's family, or by a considerable deterioration in the donor's financial condition.

In the case of *Lola Baer*[19] (Civil Appeal 3727/99), the deceased, Lola Baer, wrote a letter to Ben-Gurion University, in which she made a commitment to pay the university an amount of US$50,000 annually, and she further stated that should she pass away, the

18. Gift Law 5728-1968, 22 LSI 113 (1968) (Isr.).
19. Civil Appeal 3727/99 Supreme Court, *Ben-Gurion Univ. of the Negev v. Ben-Bassat* (Jul. 7, 2002), Nevo Legal Database (by subscription) (Isr.).

administrator of her estate was to pay the university the balance up to the amount of US$1 million. Lola Baer bequeathed her estate in her will to her family members. Eventually, she indeed passed away before having paid the entire gift to the university in the amount of US$1 million. The university petitioned the court and asked to prevent the distribution of the estate until the payment of the gift was completed as per the deceased's letter.

The Supreme Court regarded the deceased's undertaking as one continuous commitment to grant a single gift in the amount of US$50,000, rather than a gift vested in the donee upon death; therefore it was a valid commitment as it complied with the requirement of Section 5 of the Gift Law.

The Supreme Court further held that since the deceased had not completed the gift during her lifetime, said undertaking bound her estate and heirs. Although section 5 allows the donor to withdraw from the gift, this right cannot be exercised by the executor of the estate or the heirs, therefore the undertaking became irrevocable.

To conclude, a valid undertaking to grant a gift that the donor intended to fulfil during his or her lifetime, even if in practice the donor did not complete the granting of the gift in full, is a valid gift. Therefore, it follows that the transfer of assets to an *inter vivos* trust should preferably be made as an immediate and irrevocable gift. If, however, this cannot be done under the circumstances, the undertaking to transfer the assets to the trust must be in writing and include an explicit waiver of the settlor from his right to retract the granting of the assets to the trustee. Furthermore, the settlor must be solvent at the time of transferring the assets to the trustee.

The transfer of assets to an inter vivos *trust should preferably be made as an immediate and irrevocable gift*

Conclusion

A trust can be an efficient instrument to transfer assets to the next generation, provided it is created properly.

One alternative is to create an *inter vivos* trust by creating an endowment executed before a notary. In such case it is highly important to transfer the assets to the trustee by way of complete gift. This means that the ownership in the assets should be transferred to the trustee immediately in order to effectively be included as a part of the trust assets.

The other alternative is to create a testamentary trust by creating an endowment in a will. In such a case, the will should be drafted carefully to properly comply with the provisions of the Succession Law. However, careful drafting of the will and the terms of the trust therein, although important, does not eliminate the possibility that the terms of the trust would be altered or varied because of objections from family members or intervention of the Administrator-General in the court proceedings.

The creation of an *inter vivos* trust provides a secure procedure for transferring assets to the next generation, whereas the creation of a testamentary trust is subject to probate procedures, thereby making the implementation and set up of the trust more complicated.

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