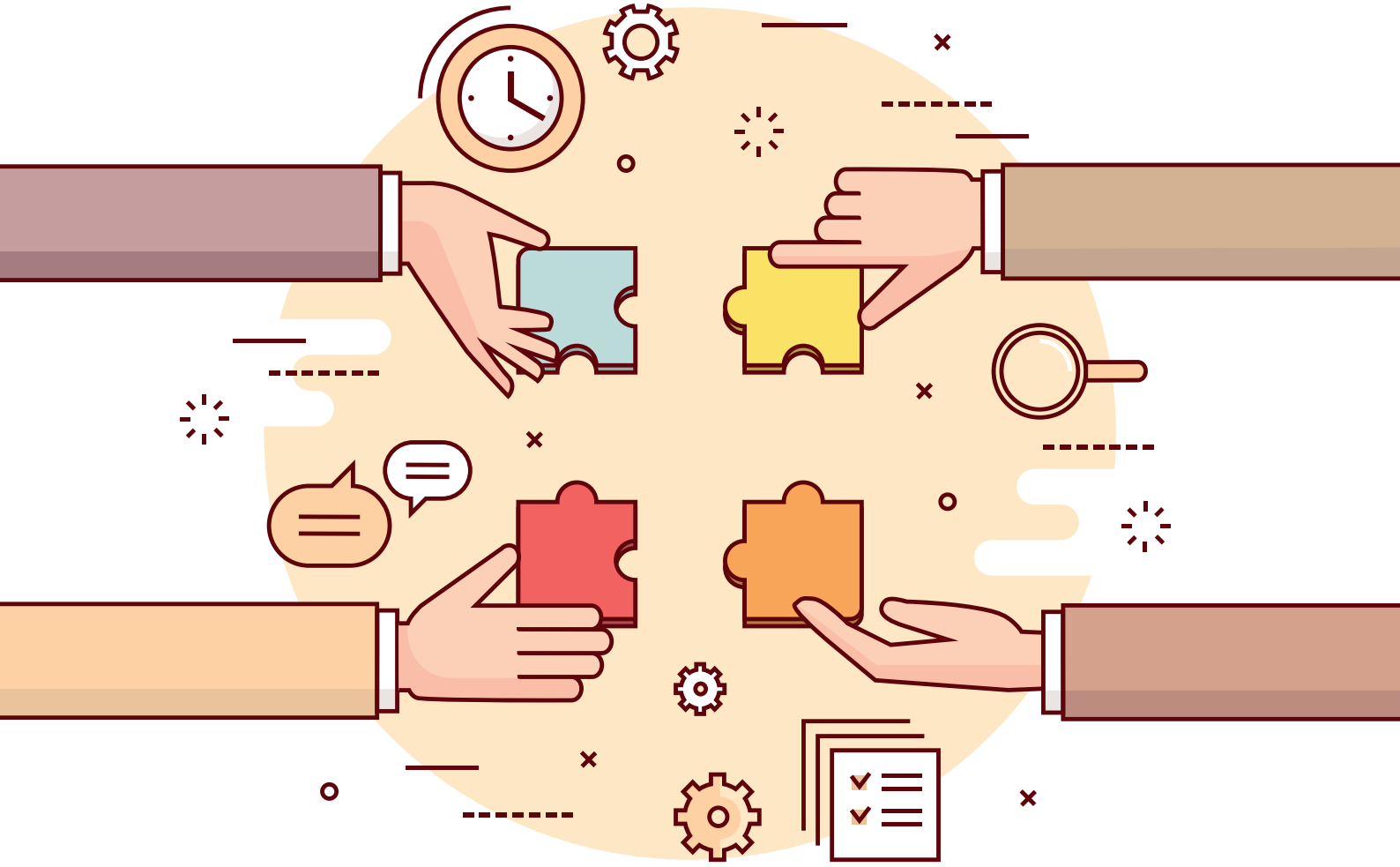
STEP JOURNAL
WWW.STEP.ORG/JOURNAL
MAY 2018 VOLUME 26/ISSUE 4

Advice across borders

Estate planning tips from the US and Canada

STEP
ADVISING FAMILIES ACROSS GENERATIONS



SUCCESSION IN ISRAEL

MEYTAL LIBERMAN AND **DR ALON KAPLAN** HIGHLIGHT PROVISIONS IN ISRAELI LAW THAT CAN MAKE A TRUST INEFFECTIVE

KEY POINTS

WHAT IS THE ISSUE?
Special care should be given when drafting a trust deed, and to the trust's management after creation. Succession law and trust law in Israel have certain provisions that may turn a trust ineffective when the settlor of the trust wishes to avoid the inheritance procedure.

WHAT DOES IT MEAN FOR ME?
Practitioners should understand the risk of the inheritance procedure, which may invalidate a trust.

WHAT CAN I TAKE AWAY?
An understanding of the possible conflicts between the trust law and the succession law.

THE CONCEPT OF a trust has been well established in Israel throughout its history. In the Ottoman period, the Muslim trust, known as *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* still exist, and are governed by Shari'a law and the Muslim Shari'a courts in Israel. Trusts continued to form a part of Israel's economic and legal culture under the *British Mandate*, as well as under the English common law, as evident in the *Charitable Trusts Ordinance, 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 under the Israeli *Trust Law* in 1979.[3]

The Israeli *Succession Law*[4] was enacted in 1965, and comprises the core 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.

INHERITANCE LAW IN ISRAEL

All inheritance proceedings in Israel are governed by the *Succession Law*, which provides in s2 that the lawful heirs of the deceased are the beneficiaries under their will, and, in the absence of a will, the heirs under law, as determined in accordance with the mechanism detailed in ss10–17.

Another cornerstone of the inheritance law in Israel is the principle of freedom of testation. This principle manifests in s27, which provides in subsection (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 subsection (b) that 'a provision in a will that negates or limits the right of the testator to change the will or to cancel it – is invalid'.

The *Succession Law* provides in s8a that 'an agreement regarding a person's inheritance or a waiver of his inheritance, made during the lifetime of that person, is void'. Subsection 8b states that '[a] gift

'If a person wishes to grant a gift they must do so during their lifetime, or under a will'

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 they must do so during their lifetime, or under a will; any gift that is to become effective on 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 s39, a will becomes effective only on the issuance of a probate order with respect thereof. The probate process may take from several months up to a year – during which time, limitations are usually imposed on the deceased's assets.

THE CREATION OF A TRUST UNDER THE *TRUST LAW*

The Israeli *Trust Law* defines a trust in s1 as the duty imposed on a person to hold or to otherwise deal with assets under their control for the benefit of another or for some other purpose.

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

- A trust created by contract requires an agreement between the settlor and the trustee, with no specific procedure necessary for its creation.
- A trust created by a deed must be in writing and signed in the presence of an Israeli notary. This trust is known as *hekdesh* (i.e. an *inter vivos* trust). It becomes operative during the lifetime of the settlor on the transfer of the assets of the settlor to the control of the trustee.
- A testamentary trust, also referred to under the *Trust Law* as a testamentary *hekdesh*, refers to a trust that 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 on the issuance of a probate order with respect thereof.

THE INVALIDATION OF A TRUST UNDER THE *SUCCESSION LAW*

Due to the limitations set by s8 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 on 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 *hekdesh*, with assets effectively transferred to the control of the trustee during the lifetime of the settlor, or a testamentary trust, which becomes effective on the issuance of a probate order with respect thereof.

It therefore follows that, if a 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 in order to transfer the rights of the deceased to their heirs.

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

ENDURING POWER OF ATTORNEY

This article focuses on the transfer of assets on 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 No 18 to the Legal Capacity and Guardianship Law*,[5] which regulates the creation and use of an enduring power of attorney (EPA). The EPA allows a competent person (the appointer) to appoint another person (the delegate) to attend to their personal and/or medical and/or property affairs when the appointer is no longer in a position to properly understand the matter and attend to these affairs by themselves. Certain matters require an express authorisation or approval of the court.

The demise of the appointer will terminate the power of the delegate, and consequently an inheritance will be required with the appointer's assets. Because of this, the creation of an *inter vivos* trust during the lifetime of the appointer would probably provide a more effective solution to manage the assets of the appointer during their lifetime and after their demise.

CONCLUSION

The inter-relationship of the *Succession Law* and the *Trust Law* is complex and challenging. If a person wishes to create a trust that would prevail after their demise, special care should be given to the form of the trust – i.e. a trust contract, an *inter vivos* trust 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 vivos* trust is created, the irrevocable settlement of assets into the trust and under the control of the trustee should be made and completed during the lifetime of the settlor. Otherwise, the settlement may be contested by potential heirs of the settlor after their demise, which may result in costly and cumbersome litigation in court.

1 Different Appeal (Jerusalem) 2/97 *Machmed and Ibrahim Abed Rabu v Administrator General Jerusalem*, par 42 (13 September 2006), Nevo Legal Database (by subscription) (Isr) **2** *Charitable Trusts Ordinance 1924, Official Gazette of the Government of Palestine*, issue no 116 of 1 June 1924, at pp672–680; *Charitable Trusts (Amendment) Ordinance 1925, Official Gazette of the Government of Palestine*, issue no 142 of 1 July 1925 at pp343–345 **3** *Trust Law, 5739-1979*, 33 LSI 41 (1966–1967) (Isr) **4** *Succession Law, 5725-1965*, 19 LSI 215 (1964–1965) (Isr) **5** *Legal Capacity and Guardianship Law (Amendment 18), 5776-2016*, 2550 SH 798 (2016) (Isr)

MEYTAL LIBERMAN TEP IS ASSOCIATE ADVOCATE, AND **DR ALON KAPLAN TEP** IS THE FOUNDER AND MANAGING PARTNER, AT ALON KAPLAN ADVOCATE AND NOTARY. ALON IS ALSO PRESIDENT OF STEP ISRAEL