

Trusts in Prime Jurisdictions

Fifth Edition
Volume II

General Editor **Alon Kaplan**
Advisory Editor **Barbara R Hauser**

Consulting editor

Alon Kaplan

Advisory editor

Barbara Hauser

Managing director

Sian O'Neill

***Trusts in Prime Jurisdictions, Fifth Edition*
is published by**

Globe Law and Business Ltd
3 Mylor Close
Horsell
Woking
Surrey GU21 4DD
United Kingdom
Tel: +44 20 3745 4770
www.globelawandbusiness.com

Printed and bound by CPI Group (UK) Ltd, Croydon CR0 4YY, United Kingdom

Trusts in Prime Jurisdictions, Fifth Edition

ISBN 9781787422988

EPUB ISBN 978-1-78742-299-5

Adobe PDF ISBN 978-1-78742-300-8

Mobi ISBN 978-1-78742-301-5

© 2019 Globe Law and Business Ltd except where otherwise indicated.

All rights reserved. No part of this publication may be reproduced in any material form (including photocopying, storing in any medium by electronic means or transmitting) without the written permission of the copyright owner, except in accordance with the provisions of the Copyright, Designs and Patents Act 1988 or under terms of a licence issued by the Copyright Licensing Agency Ltd, 6–10 Kirby Street, London EC1N 8TS, United Kingdom (www.cla.co.uk, email: licence@cla.co.uk). Applications for the copyright owner's written permission to reproduce any part of this publication should be addressed to the publisher.

DISCLAIMER

This publication is intended as a general guide only. The information and opinions which it contains are not intended to be a comprehensive study, or to provide legal advice, and should not be treated as a substitute for legal advice concerning particular situations. Legal advice should always be sought before taking any action based on the information provided. The publisher bears no responsibility for any errors or omissions contained herein.

Table of contents

Part Three: Trusts, estate and family planning

Trusts and estate planning in Israel _____ 5

Alon Kaplan
Alon Kaplan Advocate & Notary
Meytal Liberman
Herzog, Fox & Neeman

Trusts in Switzerland: core implications for the Swiss estate planning environment _____ 21

Dominique Jakob
Georg Picht
University of Zurich

The use of US trusts in international estate planning _____ 41

Stanley A Barg
Kozusko Harris Duncan

Trusts, trustees and family businesses _____ 47

Christian Stewart
Family Legacy Asia (HK) Limited

Part Four: Special topics

Asset protection trusts _____ 71

Gideon Rothschild
Moses & Singer LLP

International trust litigation jurisdiction and enforcement _____ 101

David Faust
Gallet Dreyer & Berkey LLP

The trustee as fiduciary: some practical considerations _____ 127

David Faust
Gallet Dreyer & Berkey LLP

Fiduciary responsibility: the trustee role and its risks _____ 143

Susan R Schoenfield
Wealth Legacy Advisors LLC

Waqf as a form of trust _____ 159

Mohammad Abu Obied
Sharia Court, Nazareth
and Baqa, Israel

Settlor control and influence using settlor-reserved powers and private trust companies _____ 169

Paul Matthams
Stonehage Fleming

The UK tax treatment of offshore trusts _____ 183

Maggie Gonzalez
Buzzacott LLP

The role of trust and _____ 243
company service providers
in the fight against money
laundering and terrorist
financing

Yehuda Shaffer
Independent consultant

International family _____ 265
governance: integration
with family trusts

Barbara R Hauser
Independent family adviser

Trusts and divorce _____ 275

Ziva Robertson
McDermott Will & Emery

The trust protector: _____ 293
a mini-revolution in trust law

Alexander A Bove, Jr
Bove & Langa Law Firm

The European Union _____ 327
and data protection campaign

Filippo Nosedà
Mishcon de Reya LLP

Beneficial ownership _____ 337
registers in the European
Union under the Fourth and
Fifth Anti-money Laundering
Directives

Paolo Panico
Paolo Panico's Law Chambers

Trust information _____ 369
disclosure

Simon Gibb
McDermott Will & Emery

About the authors _____ 383

Trusts and estate planning in Israel

Alon Kaplan

Alon Kaplan Advocate & Notary

Meytal Liberman

Herzog, Fox & Neeman

1. Introduction: the legal, demographic and economic environment

Israel has a mixed legal system, which incorporates elements from both common law and civil law.¹ Its civil law influences derive from the Ottoman Empire era, while the UK government introduced English principles of common law and equity during the British Mandate (1923–1948). These were gradually replaced by new independent *Knesset* (Parliament) legislation and decisions of the Supreme Court of Israel on the establishment of the Israeli state.²

Israel is a country of immigration. Formal statistics³ show that at the time of its establishment, Israel's population was only 872,700, of whom 716,700 (82%) were Jews and 156,000 (18%) were Muslims, Christians and Druze. Formal statistics⁴ further show Israel's phenomenal population growth: at the end of 2018, the population stood at 8,955,300, of whom 6,554,700 (73%) were Jews, 1,874,800 (21%) Muslims and 525,800 (6%) others, all of whom enjoy equal legal rights in all areas of life. From the establishment of the state of Israel up to 2017, approximately 110,000 immigrants were born in the United States.⁵

Israel is also known as a 'start-up nation' in relation to high-tech and technology. This sector of the economy is a source of tremendous wealth and has created a new generation of rich families. *Israel 21c* magazine reported that in 2017,⁶ the value of Israeli high-tech exits totalled \$7.44 billion – an increase of 9% on 2016 – and 9% of those deals were each worth \$400 million to \$1 billion.

-
- 1 This chapter is based upon the following publications by the authors: "The Israeli Trust", 17(2) *Trusts Quarterly Review* 11 (June 2019); "Trusts and Estate Planning in Israel", *The US-Israel Legal Review* 30 (2019), <https://lp.landing-page.mobi/index.php?page=landing&id=248533&token=fb100c5136180ae03b01d7b703d6856b>; and "The Use of Real Estate Trust for Holding of and Management of Property in Israel", 25(1) *Trusts & Trustees* 135 (1 February 2019), <https://academic.oup.com/tandt/advance-article/doi/10.1093/tandt/tty182/5258080?searchresult=1>.
 - 2 The Library of Congress, "Introduction to Israel's Legal System", bit.ly/2HMYJJZ.
 - 3 Central Bureau of Statistics, *Population, by Religion and Population Group*, www.cbs.gov.il/he/publications/DocLib/2004/2.%20Shnaton%20Population/st02_01.pdf.
 - 4 Central Bureau of Statistics, *Population, by Population Group*, www.cbs.gov.il/he/publications/doclib/2019/yarhon1218/b1.pdf.
 - 5 Central Bureau of Statistic, *Immigrants, (1) By Period of Immigration, Country of Birth and Last Country of Residence*, www.cbs.gov.il/he/publications/doclib/2018/4.%20shnatonimmigration/st04_04.pdf.
 - 6 *ISRAEL21c* staff, "Israeli high-tech exits in 2017 totaled \$7.44 billion", *Israel21c* (31 December 2017), www.israel21c.org/israeli-high-tech-exits-in-2017-totaled-7-44-billion.

This legal, demographic and economic environment is a fertile ground for the growth of family businesses and high-net-worth individuals, as well as for investment by foreign persons – whether foreign nationals residing in Israel or Israeli nationals residing abroad – in assets in Israel. This is in turn creating a growing need for estate planning for the purpose of transferring family businesses or other assets to the next generation efficiently and successfully.

Such estate planning often proves difficult, as high-net-worth individuals and families often have ties to multiple jurisdictions worldwide. Consider the example of Sir Frank Lowy, a well-known billionaire and holocaust survivor: he was born in 1930 in what is now Slovakia, where he worked as a plumber, spent some time in Hungary before serving as a soldier in the days of the establishment of the state of Israel, immigrated with his mother and father to Australia in 1952 and then – at the age of 88 – immigrated back to Israel, having sold his shopping centre company in Australia in December 2017 for \$33 billion.⁷

Over the course of his life, Lowy accumulated assets in Australia, Israel, the United Kingdom and the United States.⁸ He has family members in Sydney, New York, Los Angeles and other locations in the United States.⁹ Lowy has always valued his family: his sons have always been an integral part of the business¹⁰ and today he lives in a in a nine-story seaside building in Tel Aviv, where he can entertain his entire family.¹¹

In addition to the complexity of estate planning for international families, costly family disputes should also be taken into consideration.

This chapter describes the main laws governing estate planning in Israel.

2. Inheritance in Israel

One of the main instruments through which to transfer assets to the next generation is under the inheritance procedure. Inheritance in Israel is governed by the Succession Law.¹² According to Section 2 of the Succession Law, the estate of a deceased passes to his or her heirs in accordance with the law (intestate inheritance), unless the deceased has left a valid will, in which case the estate is bequeathed in accordance thereof.

7 *Times of Israel* staff, "Australian billionaire Sir Frank Lowy makes Aliyah", *Times of Israel* (29 May 2019), www.timesofisrael.com/australian-billionaire-sir-frank-lowy-makes-aliyah.

8 Swati Pandey and Byron Kaye, "With Westfield sale, Frank Lowy calls time on rags-to-riches story", *Reuters* (12 December 2017), www.reuters.com/article/us-westfield-m-a-unibail-rodamco-lowy/with-westfield-sale-frank-lowy-calls-time-on-rags-to-riches-story-idUSKBN1E619J; Gili Izikovich, "The Story of the Jewish Child Who Survived Holocaust to Become a Billionaire Real Estate Baron", *Haaretz* (23 June 2019), www.haaretz.com/israel-news/.premium.MAGAZINE-escaping-nazis-at-13-australian-billionaire-frank-lowy-looks-back-in-new-biography-1.7397015.

9 "Frank Lowy retires to live in Israel", *Jmedia.online* (30 May 2019), <https://jmedia.online/2019/05/30/frank-lowy-retires-to-live-in-israel/>.

10 Jill Margo, "2018 AFR Rich List: What Frank Lowy and sons will do after Westfiel", *Financial Review* (23 May 2018,) www.afr.com/rich-list/2018-afr-rich-list-what-frank-lowy-and-sons-will-do-after-westfield-20180413-h0yqnm.

11 Izikovich, *supra* note 8.

12 Succession Law, 5725-1965, 19 SH 215 (1964-65) (Isr).

The Israeli court has jurisdiction over a person's estate, provided that his or her centre of life at the time of his or her death was in Israel, or he or she left assets in Israel.¹³ Accordingly, the Israeli court has jurisdiction, for example, over the estate of a US resident who passes away leaving assets in Israel or that of a US person who immigrated to Israel.

2.1 Intestate inheritance

In the absence of a valid will, the Succession Law provides a mechanism that determines the order of inheritance and the portion to be inherited by each heir. Accordingly, the first right of inheritance is divided equally between the spouse of the deceased and his or her children. The spouse receives one-half of the estate and the children divide the remaining half between them in equal shares.¹⁴

2.2 Inheritance under a will

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:¹⁵

- Handwritten will:¹⁶ This must be written entirely in the testator's own hand and dated and signed by the testator.
- Will made in the presence of witnesses:¹⁷ This must be written and dated, and signed by the testator before two witnesses after the testator has declared before them that the will is the testator's own. The witnesses must attest by their signature on the will that the testator has declared and signed the will as stated.
- Will made before an authority:¹⁸ This is made by the testator stating its provisions orally before a judge, a court registrar, the registrar of inheritance or a member of a religious court, or by the deposit of a written will by the testator with any of these authorities. For this purpose, a notary is equivalent to a judge.
- Oral will:¹⁹ People who are on their deathbeds or who in all circumstances reasonably regard themselves as facing death may declare a will orally before two witnesses. The testator's directions and the circumstances of the making of the will must be recorded in a memorandum signed by the two witnesses and deposited with the Registrar of Inheritance. An oral will becomes invalid within one month if the circumstances which warranted its making change and the testator is still alive.

13 Succession Law, §§ 135–136.

14 Succession Law, §§ 11, 12.

15 Succession Law, §§ 18–23.

16 Succession Law, § 19.

17 Succession Law, § 20.

18 Succession Law, § 22.

19 Succession Law, § 23.

Despite the formal requirements mentioned above, the court is authorised to validate a will even if it is defective or missing certain formal requirements, provided that the court is satisfied that it reflects the true and free will of the testator.

2.3 Freedom of testation

The principle of freedom of testation is a cornerstone of Israeli inheritance law. Section 27, entitled “Freedom of Testation”, provides as follows: “(a) An undertaking to make, to change or to revoke a will – or to abstain from doing any of these things – is of no effect; (b) A testamentary provision that negates or restricts the testator’s right to change or revoke the will is void.”

The principle of freedom of testation is also evident in Section 8 of the Succession Law, entitled “Transactions with future inheritances”, which provides as follows: “(a) An agreement about a person’s estate and a waiver of his estate, made while that person was alive, is void; (b) 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.”

Justice Cheshin stressed the importance of freedom of testation in *Lishitzky*:²⁰

If there is a foundation principle, if you will, a super-principle, in inheritance law, there is none but the principle that instruct us that a person, any person, is at liberty to bequeath his estate, and the principle that derives from it, whereby the living are obliged to keep the deceased’s wishes. The freedom of testation and the obligation to keep the deceased’s wishes – two sides of the same coin – the two as one derive from the human dignity, and the personal autonomy derived from the dignity.

2.4 Maintenance out of the estate

An exemption to the principle of freedom of testation is the right to receive maintenance from the estate.²¹ Section 56 of the Succession Law provides that where the deceased leaves a spouse, children or parents who are in need of maintenance, they shall be entitled to such maintenance, regardless of whether the deceased has made a valid will.

Moreover, Section 63 of the Succession Law provides a ‘claw-back’ rule, which provides that if the estate is insufficient to provide maintenance to all those entitled to it, the court is authorised to view transfers of assets carried out without proper consideration in the two years prior to the death of the deceased as part of the estate, except for gifts and donations made as customary under the circumstances.

20 CA 4660/94 *Attorney-Gen v Lishitzky* 55(1) PD 88, 115 [1999] (Isr).
21 Succession Law, §§ 56–65.

Section 57 defines the scope of the right for maintenance from the estate and, among other things, provides that a child of the deceased under the age of 18 who is disabled, mentally ill, or cognitively disabled is entitled to maintenance.

In *Levitt*²² Chief Justice Shamgar clarified that it is insufficient to belong to a class of persons who are entitled to maintenance from the estate; a need for maintenance must also be established. Where this need is not properly established, the testator may bequeath his or her entire estate to another. Shamgar further held that this need exists only where the applicant for maintenance cannot properly satisfy his or her basic needs. According to Shamgar, the wishes of the testator should be enforced to a certain extent only. The limit lies where a first-degree relative of the testator becomes an unreasonable burden on society. The maintenance from the estate reflects the notion that the existence of a family relationship justifies the imposition of a maintenance obligation on the estate, in specific instances.

2.5 Inheritance procedure in Israel

Under the Succession Law, the rights of the heirs in the estate are created only upon the issuance of an order with respect to the estate by a competent authority. If the deceased left a will, an application should be made for a probate order; only upon the issuance of this order does the will become valid and enforceable. Only a probate order issued in Israel in accordance with the Succession Law is regarded as valid; probate orders issued by foreign authorities are invalid.²³ However, if the deceased left a will relating to only a part of his or her estate, or did not leave a will at all, an application should be made for an inheritance order.²⁴

Both an application for a probate order and an application for an inheritance order are made to the Registrar of Inheritance, which is authorised to declare the rights of the heirs accordingly.²⁵ However, in the circumstances described in Section 67A of the Succession Law, the Registrar of Inheritance must forward the application to the Family Court. These circumstances include where:

- the application is contested;
- the will is defective; or
- the administrator general represents a minor in the application.

The Family Court is authorised to issue the relevant order accordingly.²⁶

22 CA 393/93 *Doe v the estate of Israel Levitt* (3 April 1994), Nevo Legal Database (by subscription) (Isr).
 23 Succession Law, § 39.
 24 Succession Law, § 66.
 25 Succession Law, § 66.
 26 Succession Law, § 67A(b).

Probate procedure in Israel requires that the original will be submitted to the Registrar of Inheritance, except in the case of an oral will. In the absence of an original will, such as where the original has already been submitted in another jurisdiction, a separate application should be made to the Family Court to approve submission of a copy.²⁷

Section 54 of the Inheritance Regulations²⁸ provides that a copy of any application, including an application for a probate or inheritance order, shall be submitted to the review of the administrator general, who may, at his or her discretion, conduct an additional inspection of the application and require further information and documents.

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

Section 14 of the Inheritance Regulations provides that an application for a probate or inheritance order shall be dismissed, unless notifications are sent with respect thereof as follows:

- in the case of an application for an inheritance order, notifications to the heirs under law listed in the application; and
- 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. If the beneficiaries under the will do not include children of the deceased or their children, parents of the deceased or their children, or the deceased's spouse, then such notifications should be delivered to the deceased's children and spouse at the time of his or her death. If none of those is alive, the notifications should be delivered to the deceased's parents or, if none of those is alive, to the deceased's siblings.

As is evident from the above, the inheritance procedure in Israel is complex and cumbersome. It may also be uncomfortable for the deceased's family members, due to the requirement to disclose the contents of the will.

3. A corporate structure as an instrument of estate planning

Another possible avenue through which to transfer assets to the next generation is in accordance with the applicable law of contracts,²⁹ the Succession Law and the Companies Law.³⁰

In this context, the articles of association of a company can be regarded as a contract between the shareholders and the company, as well as a contract

27 Succession Law, § 68(b).

28 Inheritance Regulations, 1998, KT 5923 (Isr).

29 Contracts Law (General Part), Contracts Law (Remedies), and case law.

30 Companies Law, 5759-1999, 1711 SH 189 (1999) (Isr).

between the shareholders among themselves, in accordance with the well-known theory of ‘nexus of contracts’, which views the company as a collection of contracts between different parties.³¹

The articles of association of a company holding assets or operating a family business can therefore be drafted to better meet the needs of the family and, in effect, constitutes the family constitution³² within a company framework. This allows the shareholders to protect their rights and to ensure the implementation of the family constitution through the Companies Law and the corporate documents of the company.

For example, the articles of association can provide for several classes of shares, thereby allowing the founder to hold the management while assigning dividend shares, which do not grant voting rights, to other family members. The management shares can subsequently be bequeathed to selected family members. This separation of classes is also possible in the United Kingdom.³³

Other relevant mechanisms can be added to the articles of association, such as alternative dispute resolution clauses under the Arbitration Law.³⁴

4. A trust as an instrument of estate planning

Another efficient instrument of estate planning is a trust under Israeli law, as it allows for the holding of assets under central management and the regulation of its activities. The Israeli Trust Law³⁵ defines a ‘trust’ as “a relationship to property by virtue of which a trustee is bound to hold the same or to act in respect thereof in the interest of a beneficiary or for some other purpose”. Section 2 of the Trust Law further provides that “a trust is created Law, by a contract with the trustee or by an instrument of *Hekdesh*”, as set out below.

4.1 A trust created by law

A trust that is created in accordance with the law is a relationship that complies with the definition in Section 1 that its terms and conditions are determined in legislation. Section 42 of the Trust Law provides that the provisions of the Trust

31 Williamson, “Corporate Governance”, 93 *Yale LJ* 1197 (1984); Uriel Procaccia, *New Company Laws in Israel* 14 (1989) (Hebrew).

32 A family constitution is a formal document which sets out the rights, values, responsibilities and rules applying to stakeholders in the family business and provides plans and structures to deal with situations which arise in the course of the family business. Such a document may assist the family in dealing with unexpected events; keeping it focused on the matters that are most important to it; managing disputes; and creating a common language and values to serve as the guidelines for the family business – even for future generations that were not involved in the business when it was first established. A family constitution tends not to be legally binding on family members (Taryn Hartley, “Family Constitutions – What, When and Why”, *Lexology* (2 November 2015), www.lexology.com/library/detail.aspx?g=e5d5c264-e453-4d03-b1a6-b93f958f9f17).

33 Spencer Summerfield and Beliz McKenzie, “Shareholders’ Rights in Private and Public Companies in the UK (England and Wales): Overview”, *Thomson Reuters Practical Law* (1 June 2015), [https://uk.practicallaw.thomsonreuters.com/5-613-3685?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/5-613-3685?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

34 Arbitration Law, 5728-1968, 22 LSI 210 (1967–1968).

35 Trust Law, 5739-1979, 33 LSI 41 (1966–1967) (Isr).

Law shall apply where no other Israeli law contains special provisions on the matter in question. It therefore follows that, in the case of a trust relationship subject to a specific law, the Trust Law can be viewed as a complementary mechanism only.

Trustees appointed by a judicial authority: Scholar Shlomo Kerem³⁶ sets out the four main characteristics of a trustee appointed by a judicial authority as follows:

- The scope of the trustee's powers to act is determined by the legislation. The trustee receives control over the property by way of law and does not need any other legal means in order to execute his or her duties, such as a licence, ownership or any other right in the property.
- A special law sets out the modus of the appointing body and the powers, duties and obligations conferred on the trustee.
- The trustee's demise terminates the powers of the acting trustee.
- The appointing authority may replace the trustee without the need to transfer any right of ownership.

A good example of such a trustee is an estate executor appointed in accordance with the Succession Law. Under Sections 77 and 78, the court may appoint an executor who, under Section 82, is subject to the instructions of the court, and must assemble the assets of the estate, manage the estate, discharge the debts of the estate and distribute the balance of the estate among the heirs, in accordance with a succession order or a probate order, and do anything else necessary for execution of the succession order or the probate order. Further, under Section 86, the executor must keep accounts and file regular reports with the administrator general.

Administrative statutory bodies acting in the captivity of a trustee: These are bodies of the state that effectively act in the capacity of a trustee on behalf of the state in matters of need, such as those listed below:

- The administrator general as the public trustee: Section 36 of the Trust Law provides that the minister of justice shall appoint a public trustee, who may be appointed by the court as a trustee of trusts. Accordingly, the administrator general was appointed to act in the capacity of public trustee in 1985. In *Public Trustee v Agmon*,³⁷ Justice Barak held that the court holds the authority to supervise the public trustee's activity and to give instructions where necessary to uphold the purposes of the trust, including instructions regarding the appropriate time to release the public trustee from office.

36 Shlomo Kerem, *Trust Law*, 5739–1979, 144 (4th ed, 2004).

37 PCA 9420/04 *Pub Tr v Agmon* 59(1) PD 627 (2005) (Isr).

- The administrator general as the administrator of abandoned assets: according to Section 2(b) of the Administrator General Law,³⁸ the administrator general is responsible for the administration of abandoned assets. Section 1 defines an ‘abandoned asset’ as an asset without a known owner, or without a person entitled to or capable of administering the asset, which has a connection to Israel: the asset is either situated in Israel or belongs to an Israeli resident, citizen or corporation.

Trustees appointed with the consent of a governmental regulatory body:

Kerem³⁹ points out the mutual characteristics of such consensual trustees as follows:

- Legislation is limited to the minimum required to ensure the proper operation of the trustee.
- Subject to the minimum legislation, the parties are free to agree between themselves on the powers, rights and obligations of the trustee.
- The parties must confer on the trustee power and authorities by transferring the proprietary rights in the assets to the trustee, or by granting the trustee control and power over the assets.

Debenture trustees, whose *modus operandi* is governed by the Securities Law,⁴⁰ and trustees of employee stock option incentive programmes, whose *modus operandi* is governed by the Income Tax Rules (Tax Relief in the Allocation of Shares to Employees),⁴¹ are good examples of such trustees.

4.2 A trust created under a contract

A trust created by contract is governed by the Contracts Law⁴² and accordingly requires an agreement between the settlor and the trustee. Under this framework, a trust contract can be viewed as being established for the benefit of a third party in accordance with Section 34 of the Contracts (General Part) Law, 1973, thereby granting the beneficiary a right to enforce the trust contract.

Section 23 of the Contracts Law provides that a contract may be made orally, in writing or in some other form, unless a form is a condition of validity by virtue of law or agreement between the parties. Since the law does not require the fulfilment of any formal conditions and applies to any trust relationship that complies with the definition set forth in Section 1, it therefore follows that in order to determine whether a contract can be regarded as a trust contract, the nature of the relationship between the parties should be examined.

38 *Administrator General Law*, 5738–1978, 883 SH 61 (1978) (Isr).

39 *Supra* note 36.

40 *Securities Law*, 5728–1968, 541 SH 234 (1968) (Isr).

41 *Income Tax Rules (Tax Relief in the Allocation of Shares to Employees)*, 5763–2003, KT 6222, 448 (Isr).

42 *Contracts (General Part) Law*, 5733–1973, 27 SH 117 (1972–1973) (Isr) and *Contracts (Remedies for Breach of Contract) Law*, 5731–1970, 25 SH 11 (1970–1971) (Isr), and relevant case law relating thereto.

Justice Goren affirmed this in *Arnon v Pieutrekovsky*,⁴³ stating: “A transaction shall be regarded as a trust transaction subject to the provisions of the Trust Law if the conditions of the definition stipulated in the Law have been materially fulfilled. The applicability of the definition of a trust on a transaction is not subject to the mere wishes of the parties, and despite using the phrase ‘trust’ in the transaction between them, the transaction shall not be a trust transaction and subject to the provisions of the law if its contents do not go in line with the definition of the trust in the Law.”

As mentioned above, Section 23 of the Contracts Law provides that a contract may be entered into orally (ie, without a written document). Therefore, a trust relationship may be created by the mere behaviour of the parties. This is commonly known as an ‘implied trust’. Shamgar addressed this issue in *Wallas v Gat*,⁴⁴ stating the following: “The Implied Trust was created in the Common Law to deal with circumstances where the behavior of the parties and their actions imply that they intended to create a trust, but for some reason, this intention was not explicitly expressed ... It is implied from their relationship and behavior, that although the asset is registered under the name of one of them, the beneficial ownership belongs to the other.”

4.3 A trust created by deed of *hekdes* (endowment)

Section 17 of the Trust Law deals with the creation of a *hekdes* and provides in Section 17(a) that a *hekdes* is created when a property is dedicated in favour of a beneficiary or for some other purpose by a written document, in which the *hekdes*'s creator expresses his or her intention to create the *hekdes* and determines its objectives, property and conditions. The written document should take one of the following forms:

- a written document signed by the *hekdes*'s creator before a notary. A trust created in this manner is commonly known as an *inter vivos* trust under Israeli law;
- a written will from the *hekdes*'s creator, created in accordance with the Succession Law, which provides that a written will can be made before two witnesses, the court or a notary, or in the handwriting of the testator. A trust created in this manner is commonly known as a testamentary trust under Israeli law; or
- a payment instruction in accordance with Section 147 of the Succession Law, which provides that payments made to beneficiaries under an insurance policy are not included in one's estate. Accordingly, the setting out of beneficiaries in an insurance policy is regarded as a *hekdes*.

43 File 548/06 District Court (Tel Aviv), *Arnon v Pieutrekovsky* (30 June 2013), Nevo Legal Database (by subscription) (Isr).

44 CA 3829/91 *Wallas v Gat* 48(1) PD 801, 810 [1994] (Isr).

Commencement of a *hekdesh*: Section 17(b) of the Trust Law provides that the *hekdesh* shall become effective upon the transfer of control of the *hekdesh* property to the trustee. Accordingly, an *inter vivos* trust commences on the transfer of the trust assets to the control of the trustee and a testamentary trust commences on the issuance of a probate order with respect to the will, which effectively transfers the assets to the control of the trustee.

While the transfer of assets to a trustee during the lifetime of the settlor does not usually give rise to any special difficulties, this may not be the case where a testamentary trust is concerned. Section 54 of the Succession Regulations⁴⁵ provides that a copy of an application for a probate order shall be submitted for the review of the attorney general,⁴⁶ who may, at his or her discretion, conduct additional inspection of the application and request further information and documents. Further to that inspection, the attorney general may also intervene in the probate procedure and effectively alter the terms and conditions of the testamentary trust set forth by the testator.

The Trust Law does not set a perpetuity period for the *hekdesh* and once commenced, it can last forever.

A declaration of a *hekdesh* by the court: Section 17(c) further provides that, when any property is *de facto* a *hekdesh*, but no instrument of *hekdesh* exists with respect thereto, the court may declare the existence of a *hekdesh* and may determine its objectives, property, conditions and date of commencement.

In *Weinstein v Fox*⁴⁷ the testator bequeathed his entire estate to his children, who were resident in the United States, on the provision that they immigrate to Israel and that all assets of the estate and the income derived therefrom remain in Israel. Under these circumstances, the executor of the estate, Advocate Fox, applied to the court to release him from his position of executor of the estate, but simultaneously appoint him as trustee with respect to the assets under his control for the period until the children of the deceased immigrated to Israel. Ultimately, the Supreme Court approved his appointment as trustee and declared the existence of a *hekdesh* under Section 17(c).

4.4 The charitable trust: the public *hekdesh*

As regards charitable trusts, Section 26 of the Trusts Law provides that:

A trustee of a trust, the objective or one of the objectives of which, is the furtherance of a public purpose (hereinafter: public hekdesh) shall, within three months from the date on which he becomes a trustee, inform the Registrar of the existence of the hekdesh and of the particulars enumerated hereunder, unless notification thereof

45 Succession Regulations, 1998 KT 5923 (Isr).

46 A governmental department within the Ministry of Justice, which supervises inheritance guardianship and charity procedures in Israel, among other things.

47 CA 5717/95 *Weinstein v Fox* 54(5) PD 792 [2000] (Isr).

has been made previously, and he shall inform the Registrar of any change in those particulars within three months of the date thereof. Notification of the existence of a public hekdesh shall be accompanied by a copy of the instrument of hekdesh.

As evident from the wording of this section, such a public *hekdesh* need not meet the conditions of Section 17 of the Trust Law. Hence, a trust pursuant to contract, where one of its objectives is the furtherance of a public purpose, will be considered a public *hekdesh* and will therefore be subject to registration with the registrar.

4.5 Use of companies

The trust, including the *hekdesh*, is not recognised as a legal entity in Israel.⁴⁸ Therefore, a common practice of trustees is to hold the assets of a trust via an underlying company incorporated in accordance with the Income Tax Ordinance,⁴⁹ thereby creating a designated legal entity to hold the *hekdesh* assets on behalf of the trustee.

According to Section 75C of the Income Tax Ordinance, such an underlying company is defined as set forth below:

a company that directly or indirectly holds trust assets for a trustee and for which all the following hold true:

- (1) it was set up only in order to hold trust assets;*
- (2) in respect of a company that holds trust assets of Israel residents, or of an Israel resident beneficiary trust, or assets of a trust under a will in which there is an Israeli resident beneficiary, or trust assets that are in Israel, notice of its incorporation and status as such shall be communicated to the Assessing Officer within 90 days after the incorporation.*
- (3) the trustee directly or indirectly holds all its shares; for purposes of this paragraph, "holding indirectly" – only holding through another company to which the provisions of paragraphs (1) and (2) apply and all the shares of which the trustee holds.*

4.6 Recognition of foreign trusts and trust-like structures in Israel

Several different wealth management and legacy structures can be found in operation in Israel. These structures include not only common law trusts, but also foundations, establishments and settlements made under the laws of other jurisdictions. Evidence on the operation of foreign trust-like entities in Israel can be found in the records of the Israeli Registrar of Companies as foreign corporations.⁵⁰

Further, Section 75C of the Income Tax Ordinance (New Version), 5721-

48 PCA 46/94 *Zacks-Abramov v Land Registry Officer* 50(2) PD 202 [1996] (Isr).

49 Income Tax Ordinance (New Version), 5721-1961, 6 DMI 120 (1961) (Isr).

50 A review of the records of the Registrar of Companies shows, for example, a company named 'Favorit Establishment', which was incorporated on 19 November 1987 in Liechtenstein.

1961 (the 'Income Tax Law')⁵¹ defines a 'trust' as an arrangement according to which a trustee holds the trust's assets in favour of a beneficiary, whether established in Israel or outside Israel, and whether it is defined under the law applicable to it as a 'trust' or is otherwise defined.

The Income Tax Law further provides that a 'trustee' is "a person to whom assets or income of assets are attributed, or who holds assets in trust ... For this purpose, ... a legal entity listed in the First Schedule A shall be regarded as a trustee; the Minister of Finance may, by order, add corporate bodies to First Schedule A".

The legal entities listed in First Schedule A are the following:

- a foundation under the laws of Liechtenstein, Panama, the Bahamas or the Netherlands Antilles (Curaçao);
- an establishment under the laws of Liechtenstein; or
- a registered trust enterprise (trust reg) under the laws of Liechtenstein.

The fact that foreign trusts are recognised under Israeli law was demonstrated in *Lnl Reg Trust v Levine*,⁵² in which a trust entity litigated in the Israeli District Court. In this case, the trust entity, Lnl Reg Trust, was established in 1965 to hold assets and administer thereof for a family. A dispute arose with respect to the validity of a certain document executed by the founder, where he left instructions to the trustee, since it was not probated as a will.

The importance of this case lies in the fact that the legal capacity of a Liechtenstein trust reg entity was effectively recognised by the Israeli District Court, since it was able to file a claim and litigate in Israel. Further, the district court reviewed the bylaws of the trust entity and other legal arrangements within the trust and determined the rights of the beneficiaries accordingly

4.7 Real estate trusts

A real estate trust (RET) is a legal structure under which real estate is purchased by a trustee or is transferred to a trustee, which acts as a nominee – that is, a 'bare trustee' – for an identifiable beneficiary. This legal structure is governed by the Taxation of Real Property Law⁵³ and the Trust Law.

Under such a structure, the trustee is recorded in the Land Register⁵⁴ as the legal owner of the real property either directly in its name or indirectly via a company incorporated for this purpose (ie, a special purpose vehicle), whose shares are wholly held by the trustee.

51 Income Tax Ordinance (New Version), 5721–1961, 6 DMI 120, Fourth Chapter: Trusts (1961) (Isr) (the Income Tax Law).

52 File 1327/96 District Court (TA) *Lnl Reg Trust v Levine* (2 January 2008) Nevo Legal Database (by subscription) (Isr).

53 Taxation of Real Property Law (Capital Gains and Purchase), 5723–1963, 17 SH 193 (1963) (Isr).

54 Under the Land Law, 5729–1969, 23 SH 293 (1968-1969) (Isr), the Ministry of Justice keeps and manages a public record of property rights – the Land Register. Under Section 125 of the Land Law, Land Register records are regarded as conclusive evidence of the rights prescribed therein.

Accordingly, real property may be registered in the name of a trustee to hold and manage in accordance with the terms of a trust contract or a *hekdesh*, whereas the transfer of the real property to the trustee can be executed during the lifetime of the settlor under a trust contract or an *inter vivos* trust (*hekdesh*), or upon the death of the settlor under a testamentary trust (*hekdesh*).

The merits of the relationship are to determine the existence of the trust with respect to the real property, as evident in the following cases.

In *RG*,⁵⁵ the apartment in dispute was purchased and registered in the name of the daughter, while her father provided most of the funds required for the purchase. The apartment was used alternatively for the parents and the daughter upon her visits to Israel. After the demise of the mother, the daughter filed a claim against the father demanding the eviction of the father from the apartment, claiming that she had ownership of the apartment. The court dismissed the claim, recognising the ownership rights of the father, who provided evidence that the apartment was his property held by the daughter as a trustee for the father.

The Supreme Court's decision in *Amster* is also interesting.⁵⁶ A trustee was registered in the Land Register as the owner of a real property. The registration did not reference the fact that the property was held in trust.⁵⁷ The trustee was declared bankrupt and a creditor tried to attach the property for the satisfaction of his claim against the trustee. The court was presented with evidence that the property was held in trust for beneficiaries and, upon accepting this evidence, ruled that the creditor had no right against the real property, even though the Land Register included no reference to the rights of the beneficiaries. This was an important precedent reconfirming the concept of holding real estate in trust for a beneficiary and ensuring beneficiaries' rights against third parties.

Separate from the RET described above, the 'Israeli-made constructive trust' is a RET which have been declared as such by the court, such as *Tzimblor*.⁵⁸ In this case, the Tzimblor spouses purchased an apartment, but before the rights were registered under their name, the seller passed away, leaving the apartment to his widow, who refused to register the apartment under the name of the Tzimblor spouses. The Supreme Court held that the Tzimblor spouses had a beneficial right in the apartment, which was a semi-proprietary right, recognised under Israeli law; therefore, a trust relation existed under law between them and the widow held the title of the apartment for the benefit of the Tzimblor spouses as beneficiaries.

55 File 19831-04-10 Family Court (TA) *RG v MP* (7 July 2013) Nevo Legal Database (by subscription) (Isr).

56 File 5955/09 Supreme Court, *Amster (Receiver) v Tauber Tov* (19 July 2011), Nevo Legal Database (by subscription) (Isr).

57 Such a reference is possible under a procedure named 'caveat' under Section 4 of the Trust Law, and Land Law, 5729-1969, 23 SH 293, §127 (1968-1969) (Isr).

58 CA 1559/99 *Tzimblor v Turgeman* 57(5) PD 49 [1993] (Isr).

Under the Taxation of Real Property Law⁵⁹ and a tax ruling issued in 2012,⁶⁰ the holding of real property under a RET does not create adverse tax consequences.

6. Tax considerations

There is no gift tax or estate tax in Israel. Should a person decide to transfer his or her assets by way of inheritance in accordance with the Succession Law, or by way of will, the transfer will not be considered a tax event, regardless of the nature of the assets. However, such transfer of assets in Israel may be regarded as a tax event under non-Israeli law.

Should a person decide to transfer his or her assets by way of creating a trust – an *inter vivos* trust or a testamentary trust – there may be applicable reporting and tax obligations in accordance with the law on the taxation of trusts from 2006, as subsequently amended in 2014.⁶¹ Although the transfer of assets to a trustee in a testamentary trust is not considered a tax event, reporting and tax obligations may be imposed upon the trustee and the beneficiaries under the Law for the Taxation of Trusts.⁶²

Israel is a party to many double tax treaties,⁶³ although these do not usually regulate estate tax.

7. Conclusion

Israel's legal system allows for a significant degree of flexibility through the use of various estate planning instruments, aligning Israel suitable with other modern jurisdictions when it comes to sophisticated estate planning.

This chapter further demonstrates that estate planning in Israel is a complex task, which requires high-level expertise in inheritance law, company law, contract law, trust law and legal capacity law, among others. In addition, this task usually involves multiple jurisdictions, as assets and some family members are often situated outside Israel. Therefore, cooperation with foreign professionals is also of utmost importance.

The Israeli trust is an efficient instrument for estate planning, as it both minimises the need for inheritance procedures and allows for greater control over the assets, provided that it is approached properly. It can also be advantageous for those who wish to ensure that their assets are managed in accordance with their instructions for a relatively long period following their

59 Taxation of Real Property Law (Capital Gains and Purchase), 5723–1963, 17 SH 193 (1963) (Isr).

60 Tax Ruling 3324/12, *The Establishment of a Hekdesh – Tax Ruling in Agreement*, www.misim.gov.il/tmmisuyweb/frmShowLinkedAbs.aspx?num=20120030 (Hebrew).

61 Income Tax Ordinance [New Version], 5721–1961, 6 DMI 120, §§ 75C-75R (1961) (Isr).

62 A comprehensive review of the taxation of trusts in Israel can be found in section 2.4. of the chapter on Israel.

63 All of Israel's treaties for the avoidance of double taxation are available at <https://mof.gov.il/en/InternationalAffairs/InternationalTaxation/Pages/AvoidanceDoubleTaxationTreaties.aspx>.

death. However, tax implications should be taken into consideration when deciding on the best course of action.

For this purpose, it is recommended to set up a trust in accordance with the procedure set out in Section 17 of the Trust Law – preferably an *inter vivos* trust that does not require probate proceedings. It is also recommended to use an underlying company to hold the trust assets, thereby holding them through a designated separate legal entity.