ALON KAPLAN

ADVOCATE & NOTARY

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By Dr. Alon Kaplan & Meytal Liberman

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ALON KAPLAN
ADVOCATE & NOTARY

Dr. Alon Kaplan

Advocate & Notary, PhD, TEP

Founder, *Alon Kaplan, Advocate & Notary*

Dr. Alon Kaplan, LLM (Jerusalem), PhD (Zurich), TEP, was admitted to the Israel Bar in 1970, was appointed a notary in 1989, and practices law in Tel Aviv. He was admitted to the New York Bar in 1990 and became a Member of the Frankfurt Bar in 2010.

Among the founders of STEP Israel in 1998, he is currently the President of STEP Israel, and has advised the Israel Tax Authority on Trust legislation. Alon is co-chairman of The Committee for Private International Law of the Israel Bar Association

Alon has taught in the LLM program at Tel Aviv University's Faculty of Law and is a Lecturer and Academic Coordinator of the STEP Diploma Course in Israel.

He is an Academician of the International Academy of Estate and Trust Law and a member of ACTEC The American Trust and Estate College. He is the Israel Country Correspondent for the Oxford Journal "Trusts and Trustees."

Alon is General Editor of Trusts in Prime Jurisdictions (4th edition, April 2016, Globe Law and Business). He is author of Trusts in Israel: Development and Current Practice (2015 Helbing Lichtenhahn Verlag), Trusts and Estate Practice in Israel (2016 Juris Publishing) and a book in Hebrew on Trusts in Israel – Theory and Practice (Dec. 2017, Halachot Publishing)

Alon is a member of the New York State Bar Association, the American Bar Association, and the International Bar Association

Alon is a member of the Board of Trustees of IMPACT, a charitable trust that awards scholarships to IDF soldiers who have completed their term of duty, and is also a member and a director of the of the Israel -Switzerland and Liechtenstein Chamber of Commerce.

He has been an active member of the Society of Friends of the Weizmann Institute of Science since 1999 and in November 2016 was appointed a member of the International Board of the Weizmann institute.

Meytal Liberman

Advocate, LLM, TEP

Associate Attorney, *Herzog, Fox & Neeman, Law Office*

Meytal Liberman was admitted to the Israel Bar in 2013, and today she advises clients from Israel and overseas on trusts and estate planning as an Associate Advocate at Herzog Fog & Neeman's Private Client Practice, after she had acquired an expertise in her filed of practice as an Associate Advocate at the practice of Dr. Alon Kaplan, Advocate & Notary. Meytal Earned her LLB degree at Bar Ilan University in 2012, and her LLM degree in Commercial Law at Tel Aviv University in 2015.

She has been a member of the Society of Trusts and Estates Practitioners (STEP) since 2015, after she had completed two years of studies and earned a Diploma in International Trust Management.

Meytal is the General Editor and contributor of the book "Trust in Israel: Theory and Practice" by Dr. Alon Kaplan, which was published in Hebrew in 2017.

THE ISRAELI TRUST

The use of the *hekdesh* as an efficient estate-planning instrument

BY DR ALON KAPLAN AND MEYTAL LIBERMAN

ABSTRACT

- *Israel's trust law applies to any trust relationship; however, the main route to create a private trust is by creating a* hekdesh, *also known as an endowment. The* hekdesh *is a document signed unilaterally by the settlor and can be executed either before a notary or as a last will and testament.*

- *Since a trust under Israeli law, including a* hekdesh, *is not considered a legal entity, common practice is to use an underlying company to hold the trust assets. The use of a* hekdesh *combined with an underlying company offers an efficient instrument for estate planning, contrary to a trust created by a contract between the settlor and the trustee.*

- *This article will review the trust under Israeli law, with an emphasis on the* hekdesh *and its use. It will also investigate the recognition of foreign trusts under Israeli law.*

The legal system in Israel is known as a mixed legal system, since it incorporates elements from both common law and civil law. 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 then gradually replaced by new independent *Knesset* (Parliament) legislation and decisions of the Supreme Court of Israel (the Supreme Court) on the establishment of the Israeli state.[1]

Trusts in Israel are provided for under the *Trust Law, 5739–1979* (the Law),[2] s.1 of which defines a trust as 'the duty imposed on a trustee to hold or to otherwise deal with assets under its control for the benefit of another, or for some other purpose'. Under s.2 of the Law, a trust can be created either in accordance with the law, by a contract with the trustee or by deed of *hekdesh* (endowment). In this article, we outline the principal types of trust, with particular attention paid to the *hekdesh*.

1 The Library of Congress, 'Introduction to Israel's Legal System', bit.ly/2HMYJJZ
2 33 LSI 41 (1966-1967) (Isr)

'Section 42 of the Law provides that the provisions of the Law shall apply where no other Israeli law contains special provisions on the matter in question'

A TRUST CREATED UNDER LAW

A trust that is created in accordance with the law is a relationship that complies with the definition of s.1 that its terms and conditions are determined in legislation. Section 42 of the Law provides that the provisions of the Law shall apply where no other Israeli law contains special provisions on the matter in question. It therefore follows that, in the circumstances of a trust relationship subject to a specific law, the Law can be viewed as a complementary mechanism only.

TRUSTEES APPOINTED BY A JUDICIAL AUTHORITY

Scholar Shlomo Kerem[3] 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 they do not need any other legal means in order to execute their 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 to the trustee.
- The trustee's demise terminates the powers of the acting trustee.
- The appointing authority may replace the trustee without need of transferring any right of ownership.

A good example of such a trustee is an estate executor appointed in accordance with the *Succession Law, 5725-1965* (the Succession Law).[4] Under ss.77 and 78, the court may appoint an executor, who, under s.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 the execution of the succession order or of the probate order. Further, under s.86, the executor must keep accounts and file reports to the Administrator General (AG) regularly.

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 AG as the Public Trustee: s.36 of the 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 AG was appointed to act in the capacity of Public Trustee in 1985.[5] In the case of the *Public Trustee* v *Agmon*,[6] Justice Barak held that the court holds the authority to supervise the Public Trustee's activity, and to give instructions when necessary to uphold the purposes of the trust, including instruction regarding the appropriate time to release the Public Trustee from office.
- The AG as the administrator of abandoned assets: according to s.2(b) of the *Administrator General Law*,[7] the AG 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

Kerem points out the mutual characteristics of such consensual trustees:[8]

- Legislation is limited to the minimum required to ensure the proper operation of the trustee.

3 Shlomo Kerem, *Trust Law*, 5739-1979, 144 (4th ed., 2004)
4 *Succession Law, 5725-1965*, 19 SH 215, §§ 77-96 (1964-65) (Isr.)
5 Government Notices 3250, 22/09/1985
6 PCA 9420/04 *Pub. Tr.* v *Agmon* 59(1) PD 627 (2005) (Isr.)
7 *Administrator General Law*, 5738-1978, 883 SH 61 (1978) (Isr.)
8 See note 3

'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'

- Subject to the said minimum legislation, the parties are free to agree between them on the powers of the trustee, and its rights and obligations.
- 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.

A debenture trustee, whose modus operandi is governed by the *Securities Law*,[9] and a trustee 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),[10] serve as good examples of such trustees.

A TRUST CREATED UNDER A CONTRACT

A trust created by a contract is one governed by the Israeli contracts laws[11] 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 s.34 of the *Contracts (General Part) Law, 1973* (the Contracts Law), 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 form conditions, and it applies to any trust relationship that complies with the definition set forth in s.1, it therefore follows that, to determine whether a contract can be regarded as a trust contract, the nature of the relationship between the parties should be examined.

Goren J affirmed this in the case of *Arnon* v *Pieutrekovsky*,[12] 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.'[13]

As mentioned above, s.23 of the Contracts Law provides that a contact may be entered orally, i.e. 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 J addressed this issue in the case of *Wallas* v *Gat*,[14] 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

9 *Securities Law, 5728-1968*, 541 SH 234 (1968) (Isr.)
10 Income Tax Rules (Tax Relief in the Allocation of Shares to Employees), 5763-2003, KT 6222, 448 (Isr.)
11 *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
12 File No. 548/06 District Court (Tel Aviv), *Arnon* v *Pieutrekovsky* (30 June 2013), Nevo Legal Database (by subscription) (Isr.)
13 See note 3
14 CA 3829/91 *Wallas* v *Gat* 48(1) PD 801, 810 [1994] (Isr.)

'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 when a testamentary trust is concerned'

behavior, that although the asset is registered under the name of one of them, the beneficial ownership belongs to the other.'

A TRUST CREATED BY DEED OF *HEKDESH* (ENDOWMENT)

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

- A written document signed by the *hekdesh*'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 *hekdesh*'s creator, created in accordance with the Succession Law,[15] which provides that a written will can be made before two witnesses, the court or a notary, or in the handwriting of the testator.[16] A trust created in this manner is commonly known as a testamentary trust under Israeli law.
- A payment instruction in accordance with s.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 *hekdesh*.

15 9 LSI 215 (1964–1965) (Isr.)
16 Succession Law

COMMENCEMENT OF A *HEKDESH*

Section 17(b) of the Law provides that the *hekdesh* shall become effective on 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 when a testamentary trust is concerned. Section 54 of the *Succession Regulations, 1998*[17] provides that a copy of an application for a probate order shall be submitted to the review of the AG,[18] which may, at its discretion, conduct additional inspection of the application and request further information and documents. Further to that inspection, the AG may also intervene in the probate procedure and effectively alter the terms and conditions of the testamentary trust set forth by the testator.

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 thereof, the court may declare the existence of a *hekdesh* and may determine its objectives, property, conditions and date of commencement.

In the case of *Weinstein* v *Fox*,[19] the testator bequeathed his entire estate to his children, who were resident in the US, on the provision that they immigrate to Israel, and that all the 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 immigrate to Israel. Ultimately, the Supreme Court approved his appointment as trustee and declared the existence of a *hekdesh* under s.17(c).

17 KT 5923 (Isr.)
18 A governmental department within the Ministry of Justice, which *inter alia* supervises inheritance guardianship and charity procedures in Israel.
19 CA 5717/95 *Weinstein* v *Fox* 54(5) PD 792 [2000] (Isr.)

'A trust pursuant to contract, where one of its objectives is the furtherance of a public purpose, would be considered as a public *hekdesh*, and therefore subject to registration with the registrar'

THE CHARITABLE TRUST: THE PUBLIC *HEKDESH*

As regards charitable trusts, s.26 of the 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 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* is not required to meet the conditions of s.17 of the Law. Hence, a trust pursuant to contract, where one of its objectives is the furtherance of a public purpose, would be considered as a public *hekdesh*, and therefore subject to registration with the registrar.

USE OF COMPANIES

The trust, including the *hekdesh*, is not recognised as a legal entity in Israel,[20] and, therefore, a common practice of trustees is to hold the assets of a trust via an underlying company incorporated in accordance with the provisions of the *Income Tax Ordinance (New Version), 5721-1961* (the Ordinance),[21] thereby creating a designated legal entity to hold the *hekdesh* assets on behalf of the trustee.

According to the Ordinance, such an underlying company is defined as a company that holds trust assets for the trustee, whether directly or indirectly, in accordance with the terms set forth below:

- That the underlying company is incorporated solely for the purpose of holding the trust assets.
- That notice of the incorporation of the underlying company be provided to the tax authority within 90 days of the underlying company's incorporation where it is an underlying company of the following trusts:
  - an Israeli resident trust;
  - an Israeli resident beneficiary trust;
  - a testamentary trust of which an Israeli resident is a beneficiary; or
  - any trust in which the trust assets are in Israel.
- That the trustee holds all of the underlying company's shares, directly or indirectly; the term 'indirect holding' is only a holding through another company, which is one that meets the provisions of paras.(1) and (2) of the Ordinance, as mentioned above, and all of the shares are held by the trustee.

TRUSTS AND ESTATE PLANNING

A trust, properly set up, can serve as a good mechanism to transfer assets to the next generation. To understand the advantages of a trust for estate-planning purposes in Israel, the difficulties and complexity of the inheritance procedure in Israel should first be demonstrated.

Under the Succession Law, the rights of the heirs in the estate are created only on the issuance of order with respect to the estate by the competent authority. In circumstances where the deceased left a will, an application should be made for a probate order, and only on the issuance of the order does the will become valid and enforceable. It should also be noted that only a probate order issued in Israel in accordance with the Succession

20 PCA 46/94 *Zacks-Abramov v Land Registry Officer* 50(2) PD 202 [1996] (Isr.)
21 *Income Tax Ordinance (New Version), 5721-1961*, 6 DMI 120 (1961) (Isr.)

Law is regarded as valid, and probate orders issued by foreign authorities are invalid.[22]

However, in circumstances where the deceased left a will relating to only a part of their estate, or the deceased did not leave a will at all, an application should be made for an inheritance order.[23]

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.[24] However, in the circumstances described in s.67A of the Succession Law, the Registrar of Inheritance must forward the application to the relevant court. Such circumstances arise, for example, when the application is contested, when the will is defected, or when the AG represents a minor in the application. The court is authorised accordingly to issue the relevant order.[25]

Probate procedure in Israel requires that the original will be submitted with the Registrar of Inheritance, except for an oral will. In the absence of an original will, such as when the original has already been submitted in another jurisdiction, a separate application should be made to the court to approve the submission of a copy.[26]

Section 54 of the *Inheritance Regulations* (the Regulations)[27] provides that a copy of any application, including an application for a probate or inheritance order, shall be submitted to the review of the AG, which may, in its discretion, conduct additional inspection of the application and require further information and documents.

Section 17 of the 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(b)(4) of the Regulations provides that an application for a probate or inheritance order shall be dismissed unless a registered mail certificate or an affidavit were attached to the application, which confirms that a notice on the submission of the application has been delivered to the heirs under law, the beneficiaries under a will or the deceased's family members, as set forth below:

- In the case of an inheritance application: a notice on the submission of an application for an inheritance order shall be delivered to all heirs listed in the application, and shall include the portion of each of them in the estate.
- In the case of a probate application: a notice on the submission of an application for a probate order shall be delivered to all beneficiaries under the will, together with a copy of the will. If the beneficiaries under the will do not include the children of the deceased or their children, the parents of the deceased or their children, or the spouse of the deceased, such notice shall be delivered, in addition, to the children of the deceased and to the person who was the deceased's spouse at the time of their death. If the deceased left no spouse or children, such notice shall be delivered to the deceased's parents, and if the deceased left no parents either, then such notice shall be delivered to their sibling.

The inheritance procedure in fact allows the scrutiny and intervention of the court, where otherwise such would be avoided, thereby effectively changing the instructions of the testator. In the case of *The Estate of the deceased GB* v *The Administrator General*,[28] the deceased left a will where he bequeathed his estate to a *hekdesh*, whose purpose was the well-being of his two incapacitated sons. The deceased appointed two trustees for the *hekdesh*. On the demise of the deceased, one of the trustees was appointed as a guardian of the two sons. The Family Court of Tel Aviv (the Court) held that a guardian, due to their responsibility and the trust given in them by the court to take care of the incapacitated person, is subject to more supervision in comparison to a trustee, who is independent and exercises discretion in the management of the trust. Therefore, the Court held that both trustees are to be subject to the supervision of the AG as if both have been appointed as guardians.

Another important issue relating to estate planning concerns s.8(b) of the Succession Law, which provides that a gift granted by a donor

22 Succession Law, § 39
23 At § 66
24 *Ibid*
25 At § 67A(b)
26 At § 68(b)
27 *Inheritance Regulations*, 1998, KT 5923 (Isr.)

28 File no. 12695/06 Family Court (Tel Aviv) *The Estate of the deceased GB* v *The Administrator General* (Apr. 16, 2008) Nevo Legal Database (by subscription) (Isr.).

'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'

during the donor's lifetime, when such gift is to be effectively provided to the donee after the donor's demise, is null and void, unless such gift was included within a valid will.

In the case of *Doe* v *Doe*,[29] the deceased made several wills and one draft of will prior to his demise. In the first wills, the deceased bequeathed his estate mainly to his family members, whereas in the last two wills and the draft will he bequeathed his estate to another person, and instructed that the two persons whom had been added as co-owners to his bank account execute certain payments, which were not expressly stated in the wills.

The Supreme Court determined that the written and executed wills of the deceased were void due to unjust influence,[30] and the addition of the co-owners to the bank account was made unlawfully, and was therefore also void. Under these circumstances, the court held that no *hekdesh* was properly set up.

It was further argued that a trust had been created by an oral contract in accordance with s.2 of the Law. The Supreme Court held that the purpose of the deceased was to set up an arrangement of payments to be executed on his demise; therefore, it did not accord with s.8(b) of the Succession Law, which requires that such arrangements be set up by will. The Supreme Court continued and held that the creation of such trust should have been made in accordance with s.17 of the Law.

As evident from the above, the inheritance procedure in Israel is a complex and cumbersome procedure. It may also be uncomfortable for the deceased's family members, who are required to disclose the contents of the will. Due to this reason, it is usually advisable to set up an *inter vivos* trust, rather than a testamentary trust, and special attention should be paid to the transfer of assets into the trust in order to avoid a situation where such transfer is struck down by the court under s.8(b), as mentioned above.

RECOGNITION OF FOREIGN TRUSTS AND TRUST-LIKE STRUCTURES IN ISRAEL

Several different wealth management or 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.[31]

Further, s.75C of Israel's *Income Tax Ordinance (New Version), 5721-1961* (the Income Tax Law)[32] defines a trust as an arrangement according to which a trustee holds the trust's assets in favour of a beneficiary, which was established in Israel or outside Israel, whether it is defined under the law applicable to it as a trust or whether defined otherwise.

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 said First Schedule A are the following:

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

29 File no. 7033/15 Supreme Court, *Doe* v *Doe* (1 September 2016) Nevo Legal Database (by subscription) (Isr.)

30 Section 30 of the Succession Law provides that a will made as a result of unjust influence – i.e. not out of free will – is void.

31 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.

32 *Income Tax Ordinance (New Version), 5721-1961*, 6 DMI 120, Fourth2 Chapter: Trusts (1961) (Isr.) (the Income Tax Law).

The fact that foreign trusts are recognised under Israeli law is demonstrated more forcefully in the case of *Lnl Reg Trust* v *Levine*,[33] where a trust entity litigated in the Israeli District Court (the District Court). In this case, the trust entity, Lnl Reg Trust, was established in 1965 for holding assets and the administration 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 by-laws of the trust entity and other legal arrangements within the trust and determined the rights of the beneficiaries accordingly.

TAX CONSIDERATIONS

Under the Income Tax Law, trusts with an Israeli-resident settlor, or an Israeli-resident beneficiary, or that have assets situated in Israel, are subject to reporting and tax in Israel. As can be inferred, the location of the trustee is irrelevant for this purpose. The transferring of assets to a trust, whether a testamentary trust or an *inter vivos* trust, may, however, impose reporting and tax obligations on the trustee.

It should be noted that there is no gift or estate tax in Israel, and, should a person decide to transfer their assets by way of inheritance to a trustee in accordance with the Succession Law, or by way of will, the transfer would not be considered a tax event in Israel, regardless of the nature of the assets.[34]

The Ordinance provides for tax benefits to new immigrants and long-term returning residents, namely an exemption from tax and reporting obligations for a period of ten years on all forms of income, active or passive, as long as they are derived from sources abroad. These benefits may be applied to a trust of such new immigrants and long-term returning residents accordingly.

CONCLUSION

The Israeli trust institution, which has its foundations in Israeli case law, became statutory on the enactment of the Law in 1979, and has since continued its development through court cases.

The above analysis demonstrates that a trust can be considered as an efficient instrument to plan an estate, as it both minimises the need for inheritance procedures and allows a greater degree of control over the assets, provided it is set up properly.

For this purpose, it is therefore recommended to set up a trust in accordance with the procedure set out in s.17 of the Law, preferably as an *inter vivos* trust that does not require probate proceedings. The trust instrument should be drafted carefully, with special care given to future events that may occur, such as death and divorce of beneficiaries. It is also highly recommended to use an underlying company to hold the trust assets, thereby holding them by a designated separate legal entity. The transfer of the assets to the underlying company can be made either during the lifetime of the settlor or by way of succession to the trustee or underlying company as heirs. Although it is usually preferred to transfer the assets during the life of the settlor, the type of assets and the tax consequences of the transactions should also be considered.

DR ALON KAPLAN TEP IS AN ADVOCATE AT ALON KAPLAN, ADVOCATE & NOTARY, AND MEYTAL LIBERMAN TEP IS AN ADVOCATE AT HERZOG, FOX & NEEMAN

33 File no. 1327/96 District Court (TA) *Lnl Reg Trust* v *Levine* (2 January 2008) Nevo Legal Database (by subscription) (Isr.)

34 It should be noted that, in the case of a sale of a real property that was received by way of inheritance, the *Taxation of Real Property Law (Capital Gains and Purchase), 5723-1963*, 17 SH 193 (1963) (Isr.) provides that the time period in which the property was owned by the deceased is taken into account when capital gains tax due is calculated.