Table of Contents

1. **Introduction1**

**Part A – The Rise of the Perpetual Trust in Foreign Law: Positive Law and Normative Debate9**

1. **Trusts as the Optimal Legal Tool for Granting Property10**

2.1 Forms of inter-generational property transfer, and the rise of the use of Securities10

2.1.1 The wealth holder’s preference to transfer his property in his lifetime10

2.1.2 Consequences of the time gap between death and transfer……………………………………..……..10

2.1.3 Costs of writing a Will and the inheritance process or probate………………………………………..11

2.1.4 Publicity of the bequeathal process and probate……………………………………………………………..11

2.1.5 Limitations of the endower’s power to determine the identity of the beneficiaries…………12

2.1.6 Other limitations on Will content and structure……………………………………………………………….13

2.1.7 The endower’s desire to view his property’s management and the beneficiaries’ enjoyment of the inheritance during his lifetime………………………………………………………………………………………..14

2.1.8 Concern over unplanned jurisdiction………………………………………………………………………………..14

2.1.9 Concern over executor or alternative trustee appointment against the endower’s will……14

2.1.10 Simpler alternatives to post-mortem money transfer, not by inheritance or Will…………..15

2.1.11 Post-mortem property transfer for which Inheritance Law does not allow…………………….15

 2.2 The wealth holder’s preference to transfer his property in his lifetime……………………………………17

2.2.1 The Will as a way to transfer property post-mortem………………………………………………………..17

2.2.2 Disadvantages of the Will…………………………………………………………………………………………………19

2.2.2.1 The estate’s vulnerability to creditors’ demands and taxation………………………….19

2.2.2.2 Formal conditions for writing a Will………………………………………………………………….19

2.2.2.3 Forced inheritance and child support from the estate………………………………………21

2.2.2.4 The difficulty in proving that certain conditions of the Will were fulfilled and the circumstances which led to the writing of the Will……………………………………………………….21

2.2.2.5 The fundamental injury to freedom of bequest and to the honor of the deceased………………………………………………………………………………………………………………………22

2.2.2.6 The difficulty in understanding the endower’s wishes………………………………………23

2.2.2.7 How the Will copes with circumstantial changes after the endower’s death…….23

2.2.2.8 The endower’s desire to encourage its handling……………………………………………….23

2.2.2.9 Procedural and monetary ease, and prevention of the time lapse between the wealth holder’s death and reception of his estate…………………………………………………..24

2.2.2.10 Publicity of the Will……………………………………………………………………………………25

2.2.2.11 Statutory limitations regarding the content of the Will……………………………..25

2.2.3 Alternatives to the Will……………………………………………………………………………………………….25

 2.3 Old age and Estate Planning………………………………………………………………………………..………………27

 2.4 Trusts as an alternative to Wills……………………………………………………………………………………..……28

2.4.1 The definition of Trusts………………………………………………………………………………………………..29

2.4.2 The creation and purposes of Trusts……………………………………………………………………………30

2.4.3 The rise of Trusts’ popularity during one’s lifetime and the reasons thereof……………….31

2.4.3.1 The Trust creator’s desire to view its application and results during his lifetime……………………………………………………………………………………………………………………32

2.4.3.2 Reduction in the amount of oppositions brought to court…………………………..33

2.4.3.3 Criticism of the conditions of the Trust and monitoring of its application……33

2.4.3.4 Protection of beneficiaries while allowing for flexibility in the money’s division……………………………………………………………………………………………………………………34

2.4.3.5 Protection against the diminishment of the Trust creator’s legal capacity and the institution of a mechanism to aid his money management……………………………………..35

2.4.3.6 Professional management of assets…………………………………………………………….36

2.4.3.7 Prevention of probate or inheritance proceedings………………………………………34

2.4.3.8 Privacy of Trusts…………………………………………………………………………………………..36

2.4.3.9 Prevention of complexity……………………………………………………………………………..38

2.4.3.10 Management which is possible only through Trust creation……………………….39

2.4.3.11 Motivation for private Trust creation in lieu of a Will – three additional considerations………………………………………………………………………………………………………….40

2.4.3.11.1 Estate taxation…………………………………………………………………………….40

2.4.3.11.1.1 Tax planning in the context of estate and inheritance taxation…………………………………………………………………………………………..40

2.4.3.11.1.2 Difficulties raised by the application of estate tax………..41

2.4.3.11.1.3 Proposals for reinstating the Estate Tax Law………………..43

2.4.3.11.1.4 The Ban of Estate Tax and Gifts Tax Bill, 5760-2000……..45

2.4.3.11.1.5 Recommendations of the Public Committee for the Income Tax Reform (Ben Beset Report)…………………………………………………………45

2.4.3.11.1.6 Does Estate Tax have a moral advantage?.......................46

2.4.3.11.2 Taxation of Trusts…………………………………………………………………………47

2.4.3.11.3 Trusts as a haven from creditors…………………………………………………..51

2.4.3.11.3.1 Trusts are not a haven from creditors with rights to the Trusts’ assets…………………………………………………………………………………….51

2.4.3.11.3.2 Trusts as a haven from trustees’ “private” creditors……..52

2.4.3.11.3.3 Collection of the beneficiary’s debts from Trust-granted rights………………………………………………………………………………………………..54

2.4.3.11.3.4 Collection of the creator’s debts from the assets subject to the Trust…………………………………………………………………………………………..56

* + 1. The rise in Trust usage……………………………………………………………………………………………………..57

**3. The Perpetual Trust…………………………………………………………………………………………………………………….59**

**3.1 The motivation for creating a Perpetual Trust – Introduction……………………………………………..59**

**3.2 The history of The Rule Against Perpetuities………………………………………………………………………62**

**3.3 The debate of Perpetual Trust’s desirability in the lens of The Rule Against Perpetuities……67**

3.3.1 Criticism of the Perpetual Trust…………………………………………………………………………………….67

3.3.1.1 The difficulty of prediction…………………………………………………………………………….68

3.3.1.2 The financial institution as a trustee……………………………………………………………..71

3.3.1.3 The fear of wealth concentration and the fear of a new aristocracy……………..74

3.3.1.4 Producing the utmost benefit from society’s wealth…………………………………….75

3.3.1.5 Perpetual Trust and the question of equity…………………………………………………..76

3.3.1.6 The lack of ability to oversee trustees of private Trusts………………………………..78

3.3.1.7 Perpetual Trusts do not allow for a point of departure from the Trust or cancellation of the Trust for the beneficiaries………………………………………………………….78

3.3.1.8 Trusts may cause family conflicts…………………………………………………………………78

3.3.1.9 Criticism of the Trust’s secrecy…………………………………………………………………….76

 3.3.1.10 Criticism of Perpetual Charitable Trusts……………………………………………………..79

 **3.4 Rule change and cancellation in foreign systems of law…………………………………………………..80**

 3.4.1 The Perpetual and Long-Term Trust in the United States……………………………………………..80

 3.4.1.1 Cancellation of The Rule Against Perpetuities in the United States……………….82

 3.4.1.2 Taxation legislation as the central motivation for establishing long-term Trusts in the United States………………………………………………………………………………………………………86

 3.4.1.3 Criticism of Perpetual Trusts in the United States………………………………………….90

 3.4.1.3.1 Maximizing tax benefits as misguided motivation for creating long- term Trusts…………………………………………………………………………………………………..90

 3.4.1.3.1.1 Studies by Robert Sitkoff and Max Shanzenbach…………….91

 3.4.1.3.2 The change in the Rule Against Perpetuities was only made after deep thought………………………………………………………………………………………………………..92

 3.4.1.3.3 A change so widespread, with such economic influence, must be made in the Federal Congress and not via local, state-level changes……………………..93

 3.4.1.3.4 The benefit of discriminatory tax…………………………………………………..93

 3.4.1.4 Calls to change the legal reality regarding the possibility of creating long-term Trusts in the United States……………………………………………………………………………………….93

 3.4.1.4.1 The call to tax Trusts……………………………………………………………………..94

 3.4.1.4.2 Proposals for limiting Trust duration……………………………………………..95

 3.4.1.4.3 Can the clock be turned back?..........................................................96

 3.4.2 Trust duration in other legal systems……………………………………………………………………………98

 3.4.2.1 The United Kingdom of Great Britain and Northern Ireland………………………….99

 3.4.2.1.1 Limitation of Trust duration in England…………………………………………99

 3.4.2.1.2 Scotland……………………………………………………………………………………….101

 3.4.2.1.3 Northern Ireland…………………………………………………………………………..102

 3.4.2.2 Ireland………………………………………………………………………………………………………….102

 3.4.2.3 Canada…………………………………………………………………………………………………………103

 3.4.2.4 New Zealand………………………………………………………………………………………………..105

 3.4.2.5 Australia………………………………………………………………………………………………………107

 3.4.2.6 Trusts in Offshore States……………………………………………………………………………..110

 3.4.2.6.1 Offshore States which allow Perpetual Trusts………………………………111

 3.4.2.6.1.1 Commonwealth of The Bahamas…………………………………..111

 3.4.2.6.1.2 Bermuda……………………………………………………………………….112

 3.4.2.6.1.3 Others…………………………………………………………………………..112

 3.4.2.6.2 Offshore States which limit the duration of Trusts…………..113

* 1. **Summary, Part A…………………………………………………………………………………………………………….114**

**Part B – The Allowance for Creating Perpetual Trusts in Israeli Law………………………………………………116**

**4. Long-Term Trusts and the Inheritance Law, 5725-1965……………………………………………………………..117**

 **4.1 The Trusts Law’s ignoring of the question of Trust duration…………………………………………….117**

 **4.2 How are Trusts created in Israeli Law?..............................................................................118**

 4.2.1 Trust creation in Wills………………………………………………………………………………………………….118

 4.2.2 Time limits in the Inheritance Law, 5725-1965…………………………………………………………….121

 4.2.3 Proposals for time limits on the deceased’s control of his estate prior to the Inheritance Law, 5725-1965’s legislation………………………………………………………………………………………………...121

 4.2.4 The time limits which appear in clauses 3 and 42 of the Inheritance Law, 5725-1965….125

 4.2.5 The time limits which appear in clause 3 of the Inheritance Law………………………………….126

 4.2.6 The purpose of clause 3 of the Inheritance Law…………………………………………………………..126

 4.2.6.1 Pedigree of the inheritor from the endower………………………………………………..126

 4.2.6.2 Limitation of the “Dead Hand’s Reign” and the amount of time in which the deceased’s inheritors may be named……………………………………………………………………….129

 4.2.6.3 Establishing limitations on the capacity to inherit…………………………………………130

 4.2.6.4 Interpretation of clause 3 of the Inheritance law: Summary…………………………131

 4.2.7 The relationship between the Trust Law and the Inheritance Law regarding the time limits in clause 3 of the Inheritance Law………………………………………………………………………………………..132

 4.2.8 The time limit which appears in clause 42 of the Inheritance Law……………………………….133

 4.2.9 Possible contradiction between clause 8 of the Inheritance Law and the creation of long- term Trusts…………………………………………………………………………………………………………………………..135

 4.2.9.1 The irrelevance of clause 8 of the Inheritance Law regarding Trusts created during their creator’s life…………………………………………………………………………………………136

* + 1. Donatio Mortis Causa (Gift due to Death)……………………………………………………………….137
		2. Supremacy of the Trust Law over the Inheritance Law……………………………………………139

 4.2.12 Summary, Chapter 4……………..……………………………………………………………………………………140

**5. The Trust Law’s Silence Regarding the Duration of the Trust, and the Intent of the Legislator ………………………………………………………………………………………………………………………………………………………141**

 **5.1 The Trust Law’s silence regarding the duration of the Trust – possible interpretations……..141**

 **5.2 The Trust Law’s silence – the debates that preceded the Trust Law’s acceptance……………..143**

 **5.3 On the way to legislating the Trust Law – opinions and correspondences regarding whether there had been private Trusts in Israel prior to the law’s legislation…………………………………..144**

 5.3.1 Study of the documents located in the State Archives – the debate over whether there had been private Trusts before the current Trust Law entered into force…………………………………..…145

 5.3.2 Opinions of writers who support the institution of private Trusts in Israel and the legislation of the Trust Law……………………………………………………………………………………………………148

* 1. **On the way to the Trust Law – State Archive documents……………………………………………………153**
		1. The council for reviewing the Endowment Law and the Trusts Law………………………….153
		2. The initial draft of the Trust Law from 4.18.1962………………………………………………………154
			1. Adv. Kathryn Luti’s comments on the initial draft from 6.11.1963….…………………155
			2. Hayyim Cohen’s letter regarding the initial draft from 5.29.1964…………………….155
		3. The second draft of the Trust Law……………………………………………………………………………156
		4. The third draft of the Trust Law from 4.18.1965….……………………………………………………157
		5. The fourth draft of the Trust Law…..…………………………………………………………………………158
		6. Martin Glass’s comments from 1965………………………………………………………………………..158
		7. Memorandum proposal – Trust Bill entitled “Suggested name of legislation, Trust Law, 5728-1965”…… ………………………………………………………………………………………………………..159
		8. Letter from Martin Glass, Commissioner of Legislation, to Meir Goldman from 12.24.1967……..…………………………………………………………………………………………………………159
		9. Trust Bill – without date and without signature of its authors….……………………………….159
		10. The Trust Bill from 1972……………………………………………………………………………………………160
			1. The Association of Bank’s comments from 4.22.1973…………………………………...160
		11. Memorandum – the Trust Bill, 5734-1974…………………………………………………………………160
		12. The note, LIMITATION (SO 30 YEARS)?...... ……………………………………………………………….162
		13. The Trust Bill, 5735-1974, and its introductory notes…….…………………………………………162
			1. The letter accompanying the Trust Bill, 5735-1974………………………………………..163
			2. Then-Attorney General, Meir Shamgar’s letter from 7.19.1974…………………….163
		14. Bill proposed by the Bar Association…..………………………………………………………………….…164
		15. Debates in the Constitution, Law and Justice Committee over the bill….……………….…164
	2. **Interim Summary……………………………………………………………………………………………………….…..166**
1. **Israeli Court Cases Related to Time Limitations in the Inheritance Law and the Trust Law………171 6.1 First angle: commandment to uphold the deceased’s word in case law………………….…………172**

6.1.1 Scope of the commandment to uphold the deceased’s word in Jewish Law………………………172

6.1.2 Limitations cited in verdicts on the commandment to uphold the deceased’s word do not relate to limitations on the Trust’s duration….……………………………………………………………………………173

**6.2 Second angle: limiting “the dead hand’s reign” in case law……………………………………………….177**

6.2.1 Time limitations on gifts in case law…..…………………………………………………………………………180

**6.3 Third angle: changing and cancelling Trusts by the Court…..…………………………………………181**

6.3.1 What are the reasons which the Court views as requiring the Trust’s cancellation according to clause 23?....... …………………………………………………………………………………………………………………182

**6.4 Fourth angle: the Trust Law as taking precedence over the Inheritance Law – when a Will instructs the creation of a Perpetual Trust as well?..... ………………………………………………………184**

**Part C – The Proposed Limitation on Trust Duration in the Financial Law Bill: A Critical Discussion….188**

1. **Clause 588(b) of the Financial Law Bill, 5771-2011: A Critical Discussion…………………………………..189**

**7.1 The proposal to limit the Trust’s duration is unreasonable….…………………………………………190**

7.1.1 The number of Perpetual Trust’s that will be created will be relatively low, such that even if damage is done to the following generation, the damage will be minor…………………………………191

7.1.2 Intergenerational inequality can be perpetuated other than via Perpetual Trusts, such that Perpetual Trusts will not increase said inequality….……………………………………………………………….193

7.1.3 The claim that Perpetual Trusts for public purposes ought to be allowed and Perpetual Trusts for private purposes ought to be banned is misguided…………………………………………………194

7.1.4 In certain cases, the creator’s aims can be reached only via Perpetual Trusts………………..199

7.1.5 One’s property rights during his lifetime must be compared to those same rights post-mortem…..……………………………………………………………………………………………………………………………..200

7.1.6 Limiting Trust duration is an unenforceable decree………………………………………………………202

7.1.7 The responses to criticism of Perpetual Trusts and the opinion that the rule must be left in place…..…………………………………………………………………………………………………………………………………203

7.1.8 Perpetual Trusts do not do sweeping damage to Public Regulation – Opening Claims….211

 7.1.8.1 The definition of Public Regulation in Israeli case law……………………………………211

 7.1.8.2 Clause 34 of the Inheritance Law and Public Regulation regarding Trusts created by Wills………………………………………………………………………………………………………………………212

 7.1.8.3 Public Regulation is a flexible and dynamic concept….…………………………………..213

 7.1.8.4 Perpetual Trusts do not do sweeping damage to Public Regulation………………214

 7.1.8.5 It has not been proven that Perpetual Trusts do financial damage to the public………………………………………………………………………………………………………………………..215

**Part D – Improving the Perpetual Trust Regime in Israel: Discussion and Proposal…………………………220**

1. **The Trustee’s Obligations and the Court’s Authorities in the Current Trust Law………………………221**

**8.1 The matter of prediction………………………………………………………………………………………………221**

**8.2 The extant oversight mechanisms in the current Trust Law and the Bill for the Amendment of the Financial Law allow for coping with future prediction problems………………………………222**

8.2.1 The trustee’s obligations in the Trust Law and in the lens of Israel’s courts………………….222

8.2.2 The court’s authorities according to the Trust Law………………………………………………………226

 8.2.2.1 The court’s coping with changes to and completion of Trusts according to the current Trust Law………………………………………………………………………………………………..……..226

 8.2.2.2 The reasons for which the court would instruct to make a change in the conditions of a Trust or to cancel a Trust according to clause 23……………………….………227

 8.2.2.3 The current level of court oversight according to the Trust Law…………………....229

 8.2.2.4 Clause 587(a) of the Financial Law Bill….…………………………………………………..……229

**8.3 Clause 19 of the Trust Law – essential needs of the beneficiaries or their dependents….230**

8.3.1 The issue of conflicts of interest and the importance of the power given specifically to the court to give instructions to the trustee…………………………………………………………………………………231

8.3.2 The court’s accessions to beneficiaries’ requests to change or cancel the Trust….………..232

8.3.3 Completion of the Trust by the beneficiaries in English law…………………………………..………233

8.3.4 Completion of the Trust by the beneficiaries in the United States………………………………..234

8.3.5 The suggested solution – restricting the beneficiary’s power and respecting the creator’s essential aims……………………………………………………………………………………………………………………….236

1. **Proposed Amendments to the Current Trust Law…………………………………………………………………..240**

**9.1 Voiding the dispositive clauses in the current Trust Law………………………………………………240**

**9.2 Establishment of forms of oversight akin to those of custodians………………………………...242**

**9.3 Advertising regulations for investing Trust money………………………………………………………245**

**9.4 The Trustee’s obligation to report – for public/general trustees as well……………………..245**

**9.5 Trustee’s request to give instructions………………………………………………………………………….246**

**9.6 Trust protectors and co-trustees…………………………………………………………………………………246**

**9.7 Voiding the courts’ ability to declare conditions of Trusts whose durations exceed a statutory threshold as injurious, capricious, and damaging to Public Regulation……….………248**

**9.8 Allowing courts to change the identity of the trustee……………………………………………….…248**

**9.9 Shameful behavior of the beneficiary…………………………………………………………………….……249**

**9.10 Changing the language of clause 23 of the current Trust Law and of clause 587(a) of the Financial Law Bill so as to suit long-term Trusts……………………………………………………….………..249**

**9.11 Part four summary………………………………………………………………………………………………….…252**

1. **Summary….……………………………………………………………………………………………………………………………254**

**Bibliography….………..…………………………………………………………..…………………………………………………260**