



# DAVEY'S Locker



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September 2012

## Trusts & estate-pegging revisited

Still a shield against estate duty

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### Trust shield

It is somewhat ironic that a recent SCA court case, *Raath v Nel* (473/2011) [2012] ZASCA 86 (31 May 2012) (111 *TSH* 2012), based upon a delictual claim between two private citizens, has reaffirmed the effective use of a trust as a shield against estate duty.

### Facts

In essence, a businessman sued an anaesthetist for damages, being patrimonial loss suffered (loss of business profits) resulting from a botched medical procedure. The technical legal defence (which succeeded in this appeal) was that the businessman did not suffer any losses in his personal capacity, since his businesses were conducted through companies, which in turn were held by a trust. It followed that business losses, if any, were suffered by the trust, not the businessman, and could not be equated to personal loss.

### Estate-pegging

The SCA, in recognizing the use of a trust, amongst other things, for estate-planning purposes and after consideration of recent SCA cases pertaining to the requirement for independent co-trustees (for example, *Land and Agricultural Development Bank of SA v Parker and Others* (186-

2003) [2004] ZASCA 56; *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) said:

Applied to the present matter, the separateness of the trust estate must be recognized and emphasized, however inconvenient and adverse to the respondent it may be. What the respondent seeks, in effect, is the advantage of both a reduction in estate duty (which is perfectly legitimate) but also the continued retention of control and advantages of ownership of the trust assets. The respondent is by virtue of the common law and statute compelled to keep the trust assets separate from that of his own personal estate....

### Conclusion

Although estate duty is under review, this trust technique for estate-freezing will continue to prevail, provided the trust has trustees who exercise independent judgment and the trust is thus not treated as a sham.

[I give up—just about. The legal fraternity just refuses to grasp the principles of trust law. This particular trust was almost certainly invalid, and achieved nothing, least of all any shielding of any assets. See my more detailed comments in 111 *TSH* 2012.—Ed]