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NON-TAX HOT TOPICS – A NON-TAX BUFFET
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ALAN J. MITTELMAN
SPECTOR GADON & ROSEN
PHILADELPHIA, PA
(215) 241-8912
amittelman@lawsgr.com

ANTA CISSÉ-GREEN
SULLIVAN & CROMWELL LLP
NEW YORK, NY
(212) 558-4742
cissegreena@sullcrom.com

RICHARD W. NENNO, ESQ.
CHAIR, NON-TAX ESTATE PLANNING CONSIDERATIONS GROUP
WILMINGTON TRUST COMPANY
(302) 651-8113
rlenno@wilmingtontrust.com

1) *In re Estate of Feinberg*, 919 N.E. 2d 888(Ill. 2009).

The testator created two testamentary trusts for his wife. On her death, the trusts were to be consolidated and 50% of the combined trust held for the benefit of the descendants of his children. Any beneficiary who married outside of the Jewish faith or whose non-Jewish spouse did not convert within one year of marriage, however, would be deemed deceased as of the date of the marriage and his or her share of the trust would be distributed to the testator's children. The testator's wife exercised her power of appointment over the combined trust to give \$250,000 to each of her children and to each grandchild who satisfied the marriage restriction at the time of her death. Only one grandchild met the condition. One of the other grandchildren sued to invalidate the restriction and was successful in the trial court. A divided appellate court affirmed. A unanimous Illinois Supreme Court reversed, holding that the condition attached to the exercise of the power of appointment did not violate public policy because the grandchildren had no vested interest in the trust property and because the restriction had no prospective application and therefore could not influence the grandchildren's behavior.

2) ***Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.***, 283 S.W. 3d 786 (Mo. Ct. App. 2009).

A trustee and the mother of a beneficiary brought suit against the predecessor trustees and the trust protector alleging that the trustees improperly managed the trust and that the trust protector violated his duties. Finding that the Missouri statutes (identical to Uniform Trust Code § 808) does not define the function and duties of a trust protector, the court turned to the trust document, which stated that the trust protector is a fiduciary, is not to be liable for actions taken in good faith, and has the power to remove the trustee. The court held that the trust language created a duty in the trust protector sufficient to exercise the power to remove the trustee and reversed the lower court's summary judgment for the trust protector.

3) ***Keener v. Keener***, 682 S.E. 2d 545 (Va. 2009).

The Supreme Court of Virginia held that a no-contest provision in a revocable trust “that constitutes part of a decedent’s testamentary estate plan” is subject to the same principles applied to such clauses in wills, in particular the principle that such clauses are to be strictly construed.

4) ***In re Stuart Cochran Irrevocable Trust***, 901 N.E. 2d 1128 (Ind. Ct. App. 2009).

The corporate trustee of an irrevocable trust recognized that there was an issue with the life insurance policy in a trust and was aware of its fiduciary duties. In that case, the trust held variable life insurance with a death benefit of approximately \$8 million. Although that seemed favorable, the trustee requested in-force illustrations of the policies and discovered that the policies were not going to remain in force for as long as originally projected or intended – they were scheduled to lapse because of underperformance. The trustee had documented this properly. It decided to replace the existing insurance with approximately \$2 million in guaranteed death benefit, recognizing that while it was notably less coverage, it would not lapse. The trustee had this documented as well. Unexpectedly, the insured died shortly thereafter – at a time when the \$8 million would have still been in force. The beneficiaries sued the trustee. The court ruled that the trustee did not breach its fiduciary duties because the Prudent Investor Act does not apply a test of hindsight. Rather, the court pointed out that the trustee diligently monitored the trust asset and made a decision that seemed prudent at the time. The court noted that the trustee worked with other professionals in making this prudent decision.

5) ***In re Estate of Kissinger***, 206 P. 3d 665 (Wash. 2009).

Charged with first degree murder for the slaying of his mother, stepbrother, and his mother’s boyfriend, the defendant was found not guilty by reason of insanity. The mother’s estate received a wrongful death recovery and began a proceeding to determine statutory beneficiaries and argued that the defendant was a “slayer” under Washington’s slayer statute. See West’s RCWA 11.84.010 et seq. In this case of first impression, the Supreme Court of Washington held that the defendant was disqualified under the statute, which applies to anyone participating in a “wilful and unlawful” killing. The standard to be used is civil not criminal; “wilful” therefore is to be taken in its everyday meaning and the verdict of not guilty by reason of insanity did not make an unlawful killing lawful.

6) ***In re Estate of Stephano***, 981 A. 2d 138 (PA. 2009).

The testator gave stock in a closely held family corporation subject to the condition that the dividends on some of the stock be given to the testator's sister. Litigation ensued over the question of whether the gift created a trust for the benefit of the sister or a debtor-creditor relationship between the sister and the legatee. Relying on the Restatement of Trusts, the trial court held and the intermediate appellate court affirmed that the gift created a trust, refusing to follow *In re Pollock's Estate*, 159 A. 555 (Pa. 1932), because the court did not have the benefit of the Restatements at the time of its decision. The Supreme Court reversed, holding that the Restatements are not the law until the Supreme Court adopts them, and even under the Restatement of Trusts, the gift would not create a trust because the legatee was given the stock for his own use, not solely to distribute the dividends to the sister. The result is a debtor-creditor relationship. Three of the seven justices joined in a concurrence that argued that the result would be different under Pennsylvania's version of the Uniform Trust Code because of the Code's reliance on the Restatement (Third) of Trusts.

7) ***SEC v. Solow***, 2010 U.S. Dist. Lexis 10561 (S.D. Fla. 2010).

The SEC sought to hold the debtor in civil contempt for failing to turn over assets (including assets in a multi-million-dollar Cook Islands trust established in the course of the litigation) in violation of the court's \$3,424,788.90 disgorgement order involving an alleged fraudulent trading scheme. The court summarized the civil-contempt rules in the Eleventh Circuit as follows (*Id.* at 32-34):

“Courts have inherent power to enforce compliance with their lawful orders through civil contempt. Civil contempt is remedial; the penalty serves to enforce compliance with a Court order or to compensate an injured party. In a civil contempt proceeding, the petitioning party bears the burden of establishing by “clear and convincing” proof that the underlying order was violated. However, once the moving party makes a prima facie showing that the court order was violated, the burden of production shifts to the alleged contemnor to show a present inability to comply that goes beyond a mere assertion of inability.

Therefore, the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue. Conduct that evinces substantial, but not complete, compliance with the court order may be excused if it was made as part of a good faith effort at compliance. Therefore, under the Eleventh Circuit's case law, the alleged contemnor may avoid a contempt finding by showing an inability to comply or a good faith effort to comply. While inability to pay is a defense to civil contempt, inability to pay is not a defense if the contemnor created the inability.”

Finding that the debtor's failure to obey the court's disgorgement order in a timely fashion constituted civil contempt (*Id.* at 38-40) and that he had failed to make in good faith all reasonable efforts to comply with the judgment (*Id.* at 40-57), the court ordered, inter alia, that, “Mr. Solow shall surrender to the custody of the U.S. Marshal's Office for the Southern District of Florida ... by 2:00 p.m. on Monday, January 25, 2010” (*Id.* at 62), and that, “Mr. Solow shall remain incarcerated until such time that he has complied with the conditions set forth in this Court's May 14, 2008 Order” (*Id.* at 63).