

Estate Planning Briefs

December 2020
2nd Edition

Inflation Adjustments

The IRS issued its annual inflation adjustments to the tax code. In the transfer tax area, the lifetime estate and gift tax exemption goes to \$11.7 million per person, and the annual gift tax exclusion is unchanged at \$15,000 per donee. The aggregate decrease in the value of qualified real property resulting from electing to use IRC §2032A (special use valuation for agricultural property) for purposes of the estate tax cannot exceed \$1,190,000.

— <https://www.irs.gov/pub/irs-drop/rp-20-45.pdf>

Family Feud

Frank Gomez was engaged to Louise in the early 1950s, but he broke off the engagement when he was sent to fight in the Korean War. When he returned from Korea, Frank married another woman, Beverly. They had four children together.

In 1998 the Frank and Beverly Gomez Living Trust was created to manage the family assets. Beverly died in 2012. Frank and Louise then rekindled their love affair, which had been dormant for about 60 years, marrying in 2014. Frank's daughter Tammy was upset about the remarriage, as was his son Richard.

Frank had a stroke in 2015. He then began discussing making financial arrangements for Louise in the event of his death. First, he amended his living trust to give Louise a life estate in their home. The next step was the reformation of the trust to become the Frank and Louise Gomez Living Trust, giving Louise a life estate in all the trust assets. Frank discussed the new trust with his estate planning attorney while he was recovering in a nursing home from surgery, and Louise was present for that discussion.

On August 19, 2016, Frank was sent home under hospice care. His lawyer had an appointment to meet with him the next day at home. However, that to sign the new trust documents.



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morning Tammy and Richard showed up at the house. When Louise warned them that Frank had an appointment with his lawyer, and the children would have to give them some privacy, Tammy demanded that Frank not sign anything. To enforce her desire, when the lawyer arrived, Tammy and Richard barred his entrance to the home.

Frank died about 13 hours later, never having met with the lawyer.

Louise won her lawsuit against Tammy and Richard for the tort of intentional interference with an expected inheritance. The lower court also held that Tammy violated her fiduciary duty to her father when she deliberately prevented a meeting between him and his lawyer. The California appellate court now affirms that judgment.

— <https://law.justia.com/cases/california/court-of-appeal/2020/co89338.html>

Attorney-Client Privilege in Nevada

Lawrence and Heidi Canarelli created an irrevocable trust for their son Scott in 1998. They were the family trustees of the trust, and their lawyer, Edward Lubbers, served as an independent trustee. Discretionary payments were made to Scott from the trust for his health, education, support, and maintenance.

Evidently there was a falling out in the family. In 2012 Scott threatened a lawsuit over the discretionary payment decisions. In May 2013 the parents resigned as trustees. One week later the remaining trustee, Lubbers, sold the trust assets for \$25 million.

Scott filed his lawsuit and asked for an inventory and accounting for the trust, as well as all relevant information about the purchase agreement. He filed a supplemental claim of breach of fiduciary duty. Lubbers later resigned as trustee, and he died six months after that.

During the discovery process, some of Lubbers' notes for meetings with outside counsel about the lawsuit were inadvertently provided to Scott's attorneys, and the defendants sought to claw them back. Litigation ensued over whether those notes were protected by the attorney-client privilege.

The lower court held that the notes were not protected, but the Supreme Court of Nevada reversed, holding that they remain privileged. Scott had argued that an exception to attorney-client privilege should apply to fiduciaries; that is, that trust beneficiaries should have full access to the legal communications of their trustees. Other states have recognized that exception. The Nevada Supreme Court holds that there are five specific exceptions provided by statute to the attorney-client privilege in Nevada, and a fiduciary exception is not among them. It's not the role of the court to add it. The notes in question were prepared in connection with communication with counsel, and so were therefore undiscoverable.

— *Canarelli v. Eighth Judicial Dist. Ct.*, 464 P.3d 114 (Nev. 2020)

COMMENT: The substance of the notes was not revealed in this Court's decision. The plaintiff can't "unsee" the notes and the information presented, but they will not be admissible as evidence.

Estate Tax Collections Hold Steady

A recent study by the Congressional Research Service reports that the federal estate taxes are paid by just 0.06% of decedents' estates. As a revenue source, the federal transfer tax collections are so small they are lumped into "other revenue sources" in the OMB spreadsheets tracking where the federal money is coming from.

Still, more than \$16 billion in federal estate and gift taxes were paid in 2019, and the projection for 2020 is over \$20 billion. Collections rise steadily in the OMB projections, reaching \$27.5 billion in 2025. Under current law, the federal estate tax exemption falls roughly in half in 2026, so transfer tax collections are poised to jump then, unless Congress takes action.

The year for the largest federal transfer tax revenue collection was 2000, when some \$29 billion was paid, according to the OMB historical records. That would be about \$45 billion in 2020 dollars.

— <https://www.whitehouse.gov/omb/historical-tables/>

COMMENT: For comparison, in 2019 the corporate income tax brought in \$230 billion, and the individual income tax, the largest revenue source, was \$1.71 trillion. Excise taxes were only \$99 billion, but still five times the transfer tax collections.

Limits of Malpractice Coverage

Phillip Farthing, a Virginia attorney, was the trustee of several trusts created for the Higginson family. In 2014, trust beneficiary Edith Higginson filed suit against Farthing, alleging mismanagement of trust assets, excessive and reckless stock trading, and collection of excessive trustee's fees. She died in 2016 before the case concluded, but her estate, other Higginson beneficiaries, and a successor trustee joined the suit.

Farthing lost the case rather decisively. The court found damage to the trust of \$1.3 million, excessive trustee fees of \$779,471, and awarded the Higginsons \$101,062 in attorney fees.

Farthing was covered by \$1 million worth of malpractice insurance, issued by ALPS Property & Casualty Insurance Companies. Following the verdict, ALPS filed a declaratory judgment action contending that the policy did not cover any of the damages awarded by the state court. ALPS also asked to be reimbursed for their costs of providing Farthing with his state court defense.

At trial, the parties conceded that the awards for excessive trustee fees and attorney fees were not covered by the insurance policy. The Court found that a contract exclusion for "... any conversion, misappropriation, improper commingling or negligent supervision by any person of client or trust account funds or property, or funds or property of any other person held or controlled by an insured in any capacity or under any authority, including any loss or reduction in value of such funds or property" meant that the poor investment management decisions of a trustee would not be repaired by the malpractice insurance. The exclusion language was not ambiguous.

— *ALPS Property & Casualty Ins. Co. v. Higginson, 805 Fed. Appx. 193 (4th Cir. 2020)*

COMMENT: The Higginsons will have to look only to Farthing's assets for their recovery, which may prove insufficient. The decision does not reveal the size of the trust or how long the trustee's malfeasance was allowed to continue.

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