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No. 89603-8

SUPREME COURT OF THE STATE OF WASHINGTON

**WILLIAM E. WALL, ESTATE OF JAMES H. JACK by and
through its Personal Representatives, SHARON A. JACK and
LINDA R. LEIBICH,**

Appellants,

v.

**THE STATE OF WASHINGTON acting by and through the
WASHINGTON STATE LEGISLATURE and JAMES McINTYRE,
Treasurer of the State of Washington; BRIAN SONTAG, Auditor of
the State of Washington; and BRAD FLAHERTY, Director of the
Dept. of Revenue, State of Washington,**

Respondents.

REPLY BRIEF OF APPELLANTS

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 ORIGINAL

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I. SUMMARY OF REPLY

Respondents spend the majority of their brief urging this Court to avoid the merits of the Constitutional challenges. Their preclusive affirmative defenses are inapplicable. Article VII, Section 5 of the Washington Constitution applies to non-property taxes, including the estate tax.

Any change to the object of the estate tax hidden in budget and appropriations legislation constitutes substantive law. Both Article VII, Section 5 and Article II, Section 19 render the legislation and diversion of \$67 million to the State General Fund unconstitutional. The court should declare such and direct return of the funds to the Education Legacy Trust Account.

Respondents rely upon multiple affirmative defenses to avoid the constitutional challenges arising from wrongful diversion of estate tax proceeds to the general fund. The trial court rightly rejected respondents' affirmative defenses declining to dismiss the case on statute of limitations, standing, mootness or separation of powers.

Respondents again ask for dismissal on these grounds, not the merits. Respondents had their chance to seek cross review of the trial court's

rejection of these affirmative defenses. Nonetheless, appellants must address each of respondent's affirmative defenses in this reply brief.

Respondents urge that Article VII, Section 5 of the Washington Constitution only applies to property taxes yet the early cases they rely upon are not inconsistent with more recent cases, which apply Article VII, Section 5 to non-property taxes.

The plenary power of the Legislature to enact and change tax legislation stops where the Constitution begins. Any change in the object of a tax must meet the "state distinctly" requirement of Article VII, Section 5. Substantive legislation, buried in budget and appropriation bills, changing the object of the estate tax and directing estate tax funds to the general fund not only violates Article VII, Section 5 but also Article II, Section 19 of the State Constitution.

II. REPLY TO RESPONDENTS' STATEMENT OF FACTS

It is beyond question the object and purpose of the Estate and Transfer Tax Act (RCW Ch. 83.100) was to "provide funding for education." Laws of 2005, Ch. 516, Sec. 1. It is also undisputed that all estate tax proceeds were to be deposited in the Education Legacy Trust Account and withdrawals

made “only for support of schools, expanding access to higher education and other educational improvement efforts. RCW 81.100.220 and .230.

It is also undisputed that by *budget legislation* at the end of the 2008 legislative session, the Legislature authorized transfer of Education Legacy Trust Account funds to the State general fund. (CP 178-180.) Then, in budget legislation in 2009, the Legislature directed transfer of \$67 million from the Education Legacy Trust Account to the State general fund. (CP 192-197.) The transfer was made by the State Treasurer.

The central issue in this appeal is whether the foregoing actions diverting funds from the stated object and purpose of the estate tax violated Article VII, Section 5 and Article II, Section 19 of the Washington State Constitution.

III. ARGUMENT IN REPLY

A. *Respondents Failed to Timely Seek Cross Review of the Trial Court’s Rejection of Affirmative Defenses.*

Respondents failed to file the necessary notice for seeking cross review required by RAP 5.1(d) but devote a significant portion of their brief urging this court to reverse the trial court’s decision rejecting the affirmative

defenses of statute of limitations, standing, mootness and separation of powers “without reaching the merits.”¹ Brief of Respondent at pp. 9-25.

B. The Trial Court Properly Rejected Respondents’ Affirmative Defenses.

Respondents here advance the same arguments in support of their affirmative defenses that were correctly rejected by the trial court.

1. The Two-year Statute of Limitations Period in RCW 4.16.130 Does Not Apply.

This lawsuit was commenced within three years following the transfer of funds at issue in this case. Brief of Respondents at p. 4. Respondents erroneously claim the case is governed by the two-year statute of limitations at RCW 4.16.130. They ignore the three-year statute of limitations found at RCW 4.16.080(2), which provides that “an action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated . . .” shall be commenced within three years.

1

Respondents seek affirmative relief pursuant to RAP 2.4(a) in asking this court to modify the decision of the trial court which rejected these affirmative defenses. The effort to have appellants’ claims barred by these defenses is not properly before the court. *Robinson v. Kahn*, 89 Wn.App. 418, 948 P.3d 1347 (1998).

When faced with the question of diversion of funds by government belonging to a “special fund,” courts routinely apply a three year statute of limitations as the limit on when these claims may be brought by a plaintiff. *Quaker City National Bank of Philadelphia v. Tacoma*, 27 Wash. 259, 67 Pac. 710 (1902) cited by *Amende v. Bremerton*, 36 Wn.2d 333, 340, 217 P.2d 1049, 1052 (1950). See also *Trimen Dev. Co. v. King County*, 124 Wash.2d 261, 276, 877 P.2d 187 (1994) (claim for reimbursement of illegal tax).

When there “is uncertainty as to which statute of limitations governs, the longer statute will be applied.” *Stenberg v. Pacific Power and Light*, 104 Wn.2d 710, 715, 709 P.2d 793 (1985), citing *Rose v. Rinaldi*, 654 F.2d 546 (9th Cir. 1981); *Shew v. Coon Bay Loafers, Inc.*, 76 Wn.2d 40, 51, 455 P.2d 359 (1969).

RCW 4.16.080(2) applies to any injury to the person or rights of another “not enumerated in other limitation sections.” See *Bader v. State*, 43 Wn.App. 223, 227, 716 P.2d 925 (1986).

In *Amende*, a local development district issued bonds and proceeds were held in a sinking fund. The sinking fund was closed by ordinance and the balance transferred into the city’s general fund. A bond holder challenged the diversion of funds. The court applied a three-year statute to this claim

holding the claim did not accrue until the bond holder had knowledge of the diversion to the general fund.

The court held at p. 340: "Actions seeking recovery of money alleged to be wrongfully diverted from special assessment funds, 'are subject to this (three year) statute of limitations.' "

Appellants seek declaratory relief alleging a diversion of funds from the Education Legacy Trust account contrary to the Washington State Constitution. The Washington Uniform Declaratory Judgments Act (UDJA), RCW Ch. 7.24, does not have an explicit statute of limitations, but lawsuits under the UDJA must be brought within a reasonable time. When discussing a constitutional violation, challenges to unconstitutional legislation have never been subject to a limitations period under the UDJA. *Auto. United Trades Org. v. State*, 175 Wn. 2d 537, 542, 286 P. 3d 377(2012) relying on *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 960 P.2d 919 (1998) (holding the statute of repose in medical malpractice claims to be unconstitutional 20 years after the legislation was enacted); *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 117, 118 P.3d 322 (2005) (holding racially restrictive covenants unenforceable and in violation of the United States

Constitution even though suit was brought over 60 years after the covenants attached to the property.

Respondents mischaracterize appellants' claims. Respondents claim appellants seek "to vindicate its faith in the government rather than to recover money." Brief of Respondent at p. 13. Make no mistake, this is an action for recovery of \$67 million wrongfully diverted from the Education Legacy Trust Account to the State General Fund. The three-year statute of limitations at RCW 4.16.080(2) applies to actions for recovery of personal property or "for any other injury to the person or rights of another not hereinafter enumerated."

In the present action, appellants allege an unconstitutional misappropriation of funds and seek return of those funds to the Education Legacy Trust Account. The action must be brought within a reasonable time. At a minimum, the three-year statute of limitations of RCW 4.16.080(2) must apply.

Respondents urge that appellant Estate has not suffered any actual injury or harm. Brief of Respondents at p. 12. Respondents miss the point. This court has repeatedly recognized that a taxpayer has standing to challenge illegal governmental acts on behalf of all taxpayers without the need to allege

a direct, special or pecuniary interest in the outcome.² *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614, 694 P.3d 27 (1985); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); *Walker v. Monroe*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994).

Acknowledging that the UDJA only requires that an action be brought within a reasonable time, respondents assert that a two-year limitation period is reasonable, citing *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn.App. 154, 159, 293 P.3d 407 (2013). But equally reasonable is a 3-year statute of limitations. In *Schreiner*, the court barred a declaratory judgment action challenging a written lease brought more than six years after alleged breach. The court acknowledged that the UDJA is to be liberally construed and administered, but concluded the claim was analogous to a general contract claim which should have been brought within six years.

Both RCW 4.16.080(2) and the UDJA support appellants' position that this action was timely commenced.

²

Citing distinguishable cases, respondents assert that claims challenging acts or omissions of a government official fall within a two-year limitation period. Brief of Respondents at p. 10. However, *Wolf v. Dept. of Transportation*, 173 Wn.App. 302, 306, 293 P.3d 1244 was a case involving negligent injury to real property specifically governed by the two-year statute of limitation. Also, cited are *Thompson v. Wilson*, 142 Wn.App. 803, 175 P.3d 149 (2008) and *Unisys Corp. v. Senn*, 99 Wn.App. 391, 994 P.3d 244 (2000) which do not seek recovery of unconstitutionally diverted funds.

2. ***Appellant Taxpayers have Standing to Bring a Constitutional Challenge to the Diversion of Funds.***

This is a declaratory judgment proceeding in which acts of the Legislature are challenged as being unconstitutional. The UDJA specifies who may institute such proceedings. RCW 7.24.020 provides in part:

A person interested . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance. . . may have determined any question of construction or validity arising under the . . . statute, ordinance, . . . and obtain a declaration of rights, status or other legal relations thereunder.

Taxpayers are freely granted standing to bring an action challenging government misconduct. See *Miller v. Pasco*, 50 Wn.2d 229, 310 P.2d 863 (1957); *State, ex rel Lamon v. Langlie*, 45 Wn.2d 82, 273 P.2d 464 (1954).

Giving taxpayers standing recognizes the interest of providing a judicial forum where this State's citizens can challenge the legality of official acts of government. Prohibiting this right is tantamount to saying there can be no effective check on what the Legislature can do. The Constitution is not a self-executing remedy to the prospects going beyond its proper limits. The prohibitions of the Constitution must be invoked by litigation.

This Court has acknowledged that the value of taxpayer suits generally outweighs any infringement on governmental processes. See

Boyles v. Whatcom County Superior Court, 103 Wn.2d 610, 614, 694 P.2d 27 (1985).

The *Boyles* court stated at p. 614:

This court recognizes litigant standing to challenge governmental acts on the basis of status as a taxpayer. See e.g., *Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); *Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wn.2d 912, 917-18, 436 P.2d 189 (1967), cert. Denied, 393 U.S. 960 (1968); *Fransen v. Board of Natural Resources*, 66 Wn.2d 672, 404 P.2d 432 (1965). Generally, we have required that a taxpayer first request action by the Attorney General and refusal of that request before action is begun by the taxpayer. See *Tacoma v. O'Brien*, supra; *Citizens Coun. Against Crime v. Bjork*, 84 Wn.2d 891, 893, 529 P.2d 1072 (1975). We have recognized however, that even that requirement may be waived when 'such a request would have been useless.' *Farris v. Munro*, 99 Wn.2d 326, 329-30, 662 P.2d 821 (1983).

It is undisputed that appellants did in fact request action from the Attorney General and were refused. (Complaint, §§ 5.1-5.3; CP 17-18.)

Respondents allege appellants do not claim "any direct damage or injury in fact resulting from the challenged transfer." Brief of Respondent at p. 17. Yet taxpayer standing alone gives appellants sufficient interest in the subject matter to sue. In *Kightlinger, et al. v. Public Utility Dist. No. 1 of Clark County*, 119 Wn.App. 501, 81 P.2d 876 (2003), taxpayers sought declaratory relief to enjoin the PUD from engaging in the business of

repairing electrical appliances. The court rejected the very argument made by respondent in the present action. The PUD, citing *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 802 P.2d 784 (1991) (relied upon by respondents in the present action) urged that taxpayer status was insufficient to confer standing without showing the violation of a unique right or interest. The court disagreed at p. 506, stating:

A taxpayer must show special injury where he or she challenges an agency's *lawful discretionary act*. *American Legion*, 116 Wn.2d at 7-8. Where a municipal corporation acts illegally, 'it is a fair presumption that every taxpayer will be injured in some degree by such illegal act.' *Barnett v. Lincoln*, 162 Wash. 613, 623, 299 Pac. 392 (1931). Here the Taxpayers do not challenge a lawful discretionary act. Rather, they argue that the PUD lacks lawful authority to operate an appliance repair business. Thus, the Taxpayers are not required to demonstrate a unique injury. *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 694 P.2d 27 (1985).

Continuing its theme that appellants must have suffered direct damage or injury in fact in order to have standing, respondents place reliance upon *Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wn.2d 912, 917 18, 436 P.2d 189 (1967). Respondents are correct that two churches were dismissed on the grounds they lacked taxpayer standing. However, in that

case, the court granted standing to ministers of the two churches who argued violations of their constitutionally protected religious freedom.³

3. This Lawsuit is not Moot.

A case is moot if "the issues it presents are purely academic." *State Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983), *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968). However, a case is not moot if a court can still provide "effective relief." *Turner*, 98 Wn.2d at 733.

The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief. The available remedy need not be fully satisfactory to avoid mootness. *City of Sequim v. Malkasian*, 157 Wn. 2d 251, 259, 138 P. 3d 943 (2006).

³

The trial court in the present action hesitatingly ruled that appellant Wall, as a general taxpayer, did not have standing. The court stated that Mr. Wall's standing as a general taxpayer separated him from the standing enjoyed by other taxpayers who have put forward evidence that they have paid the estate tax. The court stated, "I'm not entirely sure that drawing the line along those lines is consistent, necessarily, with *Boyles*, but I find that the heightened connection . . . nexus. . . between those who have paid the Estate Tax is a line I'm going to draw on standing. So, I will find that standing is appropriate for the estate . . ." (RP 31.)

Pursuant to the authorities cited herein, Mr. Wall certainly has taxpayer standing. He is not required to demonstrate a unique injury. Every taxpayer has an interest in policing unconstitutional conduct of the State Legislature.

Respondents assert that appellants' claims are moot because the money that the Legislature wrongfully transferred from the Education Legacy Trust Account to the General fund in violation of the Constitution, was "spent several biennia ago and the authorization to spend . . . expired long ago." Brief of Respondents, p. 23.

This unserious argument would absolve government from any claim for misuse of funds by simply alleging the money had been spent. The issue before this court is whether or not the admitted diversion of funds from the Education Legacy Trust Account to the State General Fund violated Article VII, Section 5 and Article II, Section 19 of the Washington Constitution. The Constitutional issues are hardly moot and the relief requested is restoration of funds from the General Fund to the Education Legacy Trust Account.

4. *The Separation of Powers Doctrine is Inapplicable.*

The separation of powers doctrine requires that this court abstain from considering internal legislative functions surrounding the passage of a bill "except as restrained by the State and Federal Constitutions." See *Brown v. Owen*, 165 Wn.2d 706, 722, 206 P.3d 310 (2009). The Washington Constitution is a limitation upon the powers of the Legislature, instead of a

grant of powers, and insofar as the power of the Legislature is not limited by the Constitution, it is unrestrained. *Union High School Dist. No. 1, Skagit County v. Taxpayers*, 26 Wn.2d 1, 172 P.2d 591 (1946).

The proposed limitation on judicial review put forth by respondents would eliminate any constitutional challenge to legislation under the separation of powers doctrine. It cannot be seriously argued that bringing constitutional challenges to actions of the Legislature are blocked by the doctrine of separation of powers. This would amount to a denial of judicial supremacy, a fundamental precept of American jurisprudence since *Marbury v. Madison*, 5 U.S. 137 (*Cranch*) 1803. None of the cases cited by respondent in this area involve constitutional challenges to Legislative action.

C. Article VII, Section 5 Applies to Taxes Other Than Property Taxes, Including the Estate Tax.

Respondents urge the unsupportable position that the estate tax is not a tax on property and, thus, Article VII, Section 5 of the Washington Constitution does not apply to the estate tax. Brief of Respondents at p. 30.

None of the authorities recited by respondents render Article VII, Section 5 inapplicable to Washington's estate tax. Washington's estate tax is a tax imposed on the transfer of the entire taxable estate and not upon any particular legacy, devise or distributive share. See WAC 458-57-005(2);

Lloyd Estate, 53 Wn.2d 196, 199, 332 P.3d 44 (1958), citing *Seattle First National Bank v. Macomber*, 32 Wn.2d 696, 203 P.2d 1078 (1949). See also *In Re Estate of Bracken*, 175 Wn.2d 549, 564, 290 P.3d 99 (2012) where the court noted at p. 564 that the estate tax is an excise tax on the transfer of property at death and not a tax on the property transferred. The court in *Bracken* at p. 563 also noted the applicability of Article VII, Section 5 to the estate tax statute.

In *Hemphill v. Dept. of Revenue*, 153 Wn.2d 544, 551, 105 P.2d 391 (2005) the court clearly applied Article VII, Section 5 to Washington's estate tax. The court referred to the estate tax scheme in Washington, holding that "A new tax burden can be created only by law that states such a purpose. *Constitution*, art. VII, § 5." *Hemphill* at p. 551.

In other recent cases, Article VII, Section 5 has been applied to taxes other than property taxes.

Specifically, in *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003), the court held that a municipal ordinance shifting the cost of operating street lights from the general budget to power utility rate payers was a tax. The tax was held invalid because it neither explicitly stated that it imposed a tax nor did it state the object to which the tax would be applied

as required by Article VII, Section 5. Clearly, *Okeson* was not a property tax case and the sweeping rule announced by respondents that Article VII, Section 5 applies only to property taxes is disproven. The *Okeson* court held at p. 556:

For a municipality to exercise the power to tax, it must have express statutory authority. *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982). Article VII, Section 5 of the Washington Constitution states: ‘No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.’ Ordinance 119747 does not explicitly state that it imposes a tax, nor does it state the object to which such a tax shall be applied. Therefore, the method of imposing the street lighting tax – by adoption of Ordinance 119747 – violated the state constitution. .

In *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 875 (2008), the court followed its decision in *Okeson* that charging water utility rate payers a flat hydrant fee was an improper tax. Specifically, the court stated at p. 884:

Thus, charges for hydrants are taxes, not fees. Since ‘[n]o tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied,’ *Wash. Const. art. VII § 5*, and since Seattle did not declare the charge to be a tax until 2005 or state a lawful object of a tax or statutory authority, the imposition was unconstitutional. See *Okeson*, 150 Wn.2d at 556.

In *Sheehan v. Central Puget Sound Regional Transit Auth.*, 155 Wn.2d 790, 123 P.3d 88 (2005) the court applied Article VII, Section 5 in ruling that motor vehicle excise taxes collected by transit authorities were lawful. In fact, this Court relied upon *Sheldon v. Purdy*, 17 Wash. 135, 141, 49 Pac. 228 (1897).

Respondents cannot distinguish away the clear applicability of Article VII, Section 5 to the excise tax at issue in *Sheehan*. As in the present action, individuals in *Sheehan* were challenging the excise tax legislation as failing to state distinctly the object of the tax to which “only” it shall be applied as required under Article VII, Section 5. In rejecting the challenge the court stated at p. 804:

Second, the ‘state distinctly’ requirement in *article VII, section 5* is directed not simply to the method of taxation but rather the relationship between the tax and the purpose of the tax. See *Sheldon v. Purdy*, 17 Wash. 135, 141, 49 P. 228 (1897). For example, the objects of the taxes in this case are the Ten-Year Regional Transit System Plan and Phase I of the Seattle monorail. *Article VII, section 5* would render unconstitutional actions taken to divert taxes assessed for those purposes into some wholly unrelated project or fund. There is no suggestion that such a diversion has occurred or is proposed with regard to either Sound Transit or the Monorail. Thus, there is no constitutional violation.⁴

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In a desperate effort to discount the applicability of these recent State Supreme Court cases, respondents speculate that it is “uncertain “ whether the Court

Respondents seek to artificially create an inconsistency between the older cases, which hold that Article VII in its entirety applies to property taxes, and the more current cases on excise taxes, which specifically deal with Article VII, Section 5 of the State Constitution. The older property tax cases are in fact consistent yet entirely inapplicable to the current cases. No overruling of those cases is suggested or necessary.

Respondents misplace reliance upon *State v. Clark*, 30 Wn.App. 439, 71 Pac. 20 (1902); *State v. Sheppard*, 79 Wash. 328, 140 Pac. 332 (1914); and *Standard Oil Co. v. Graves*, 94 Wash. 291, 162 Pac. 558 (1917) for its position that Article VII, Section 5 applies only to taxes on property. Yet these cases deal with Article VII of the Washington in its entirety. The uniformity and equality provisions of Article VII, Section 1 specifically apply only to taxes upon property and do not apply to excise taxes. With respect to Article VII, Section 5, the cases cited by respondents do not address the issue before the court in the present action.

is carving out an exception for local excise taxes. Respondents also believe it is “possible” the Court is creating a different standard for whether Article VII, Section 5 restrains a local government as compared to the State. No authority is provided for these musings and *Okeson*, *Lane* and *Sheehan* clearly illustrate that the Constitutional provision at issue in the present action, as well as the *Sheldon v. Purdy* case, have direct applicability to the issues before this court.

In *State v. Clark, supra*, the Constitutionality of Washington's inheritance tax was at issue. The statute was challenged as conflicting with Sections 1, 2 and 5 of Article VII. The case does not stand for the proposition asserted by respondents that Article VII, Section 5, applies "only" to taxes on property. No such holding or statement is found in the *Clark* decision. The clear emphasis in the *Clark* case was Article VII, Section 1 requiring all property to be taxed uniformly according to its value. Since Washington's estate tax is neither a property tax nor an inheritance tax, the requirement of uniformity under Article VII, Section 1 is not applicable.

Similarly in *State v. Sheppard, supra* the court stated at p. 333 that the provisions of Article VII "have reference only, when read together, to the manner of taxing of property according to value..." *State v. Clark* was cited for "the rule of equality" imposed upon the legislative exercise of the taxing power, found in Article VII of the Constitution. Article VII was considered "as a whole." *State v. Sheppard* at p. 333. As such, considering Article VII "as a whole" includes application of Section 1 which requires all property to be taxed uniformly according to its value. The requirement of uniformity or equality under Section 1, by its terms, applies only to "property."

Subsequent cases have considered Article VII, Section 5 independently of the other sections of Article VII.

In *Standard Oil Co. v. Graves, supra*, the court's analysis was once again not isolated on Article VII, Section 5. The court stated at p. 304 that the issue before it was whether the oil inspection tax conflicted with Article VII, Section 2 of the State Constitution requiring uniformity and equality of taxation as well as Section 5.

The cases cited by respondents deal primarily with the constitutionality of the tax itself. Appellants do not challenge the constitutionality of the estate tax as originally enacted. Article VII, Section 5 has two clauses. The first states: "No tax shall be levied except in pursuance of law. . . ." The issue before this court is the second portion of Article VII, Section 5. The latter clause reads: ". . . and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied." This clause has two requirements. The first is the requirement that the tax law shall state "distinctly the object" of the tax. That is not an issue in the present action. Secondly, the tax shall be applied "only" to the "object" of the tax. Educational funding is specifically addressed as the "object" of the estate tax.

Clark, Sheppard and Standard Oil, supra, stand for the proposition that Article VII of the State Constitution, when considered as a whole, including Sections 1 and 2 which require uniformity and equality in property taxation, would not apply to excise taxes for the estate tax. However, the legislative action challenged in this case is limited to Article VII, Section 5. A similar analysis of Article VII, Section 5 is found in more recent non-property tax cases such as *Okeson, Lane, Sheehan and Bracken*, cited herein.

D. The Transfer of \$67 Million to the State General Fund Violated Article VII, Section 5.

It isn't until p. 33 of their Brief that respondents address the fundamental constitutional issues presented in this appeal. Up to that point, respondents try to dodge the merits of the case by resort to preclusive doctrines of statute of limitations, standing, mootness and separation of powers. After presenting misguided affirmative defenses, respondents attempt to avoid the constitutional issues by urging that Article VII, Section 5 applies only to property taxes and not to the estate tax.

In trying to avoid the plain purport of Article VII, Section 5, respondents concede that RCW 83.100.220 has remained unchanged in providing that all receipts from estate taxes must be deposited into the Education Legacy Trust Account. Brief of Respondents, p. 34. However,

respondents (and the trial court) argue that the Legislature temporarily expanded the permissible uses of the Education Legacy Trust Account in the 2008 budget and appropriations legislation in changing the language of RCW 83.100.230. Brief of Respondents at p. 35. The trial court went so far as to state that the appropriations in 2009 (\$67 million transfer to the General Fund) would have violated Article VII, Section 5, “but for the 2008 legislation changing the language of RCW 83.100.230.” (CP at 308-10.)

This, of course, is the central issue in the present action. Respondents define the Legislature’s plenary power to enact and change laws as unbounded, limited only by actions of the Legislature itself. This case goes to the heart of that contention. The Legislature gets its legitimacy, and is subject to, the limitations on its authority set out in our State Constitution. *Wash. State Farm Bureau Fed’n. v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007).

Respondents’ reliance on *Washington State Hospital Assoc. v. State*, 175 Wn.App. 642, 309 P.3d 534 (2013) is misplaced. That case has no applicability to the issues before this court. In that case, it was held that Article VII, Section 5 of the Washington Constitution did not apply because the fee at issue was not a tax and thus there was no constitutional violation.

The Legislature was not restricted from amending a statute relating to Medicaid funding. The Court of Appeals affirmed the trial court's ruling that the assessment involved was not a tax and thus no constitutional violation was involved.

In the present action, the trial court correctly ruled that Article VII, Section 5 applies to the estate tax. Overlooking the fact that *Washington State Hospital Association* was not a challenge to diversion of tax funds, as here, respondents point out that the court also reasoned that the statutory amendment in that case "still accomplished the purpose of the original act. . . ." Brief of Respondent, p. 37. Such is not the case in the present action.⁵

Respondents claim that appellants' argument under Article VII, Section 5 would prohibit the legislature "from ever amending the object to which that tax may be applied." Brief of Respondent, p. 37. This is a blatant mischaracterization of appellants' position. Appellants do not challenge the power of the Legislature to repeal and reenact the estate tax with a different object. But, at a minimum, a change in the object of a tax

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Respondents urge in footnote 26, p. 37 that the "purpose" of the enactment of the estate tax was to address the lost revenues resulting from this court's *Hemphill* decision. Respondents seek to claim on the one hand that the budget bill in 2008 changed the object or purpose of the estate tax, while at the same time urging the legislation was consistent with the purpose or object of the estate tax.

must meet the “state distinctly” requirement of Article VII, Section 5. Burying a diversion of tax funds in budget and appropriations legislation violates both Article VII, Section 5 and Article II, Section 19 of the State Constitution.

Respondents (and the trial court) argue a distinction between a “constitutional fund” and a “statutory fund.” (Brief of Respondents, pp. 38-39.) Article II, Section 5 makes no such distinction between constitutional or statutory funds but applies to each and every tax levied bylaw which must state distinctly the object of the tax to which *only* the tax shall be applied. No such distinction was made in more recent cases of *Sheehan, Lane, Okeson* and *Bracken*, discussed previously herein.⁶

Respondents deflect the “state distinctly the object” constitutional requirement of Article VII, Section 5 by claiming that general fund taxes may

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Respondents make the unusual argument in footnote 27 that Article XXIII of the Washington Constitution supports the differentiation between constitutionally-based taxes and statutorily based taxes. Citing Article II, Section 40, respondents argue that the Legislature could not change the object of the highway fund created by Article II, Section 40, absent a constitutional amendment pursuant to Article XXIII. This point is obvious because Article II, Section 40 expressly requires all collected highway funds be placed in special fund to be used exclusively for highway purposes. Article VII, Section 5 applies to all taxes, particularly statutorily-based taxes where, unlike highway funds, the object of the tax is not constitutionally mandated.

be used for any public purpose. Respondents claim appellants' argument would "effectively eliminate the Legislature's ability to have a general fund." Brief of Respondent, pp. 40 and 41.

Respondents miss the point completely. The estate tax enacted in 2005 set forth a clear, distinct object: educational funding. Article VII, Section 5 requires that every law imposing a tax shall "state distinctly" the object of the same "*to which only it shall be applied.*" (Emphasis added.) Respondents completely ignore this latter clause. Absent repeal of the estate tax, the object of the tax to which only it shall be applied is educational funding. The issue before this court is not whether the Legislature can change the object of a tax, but rather the means of making such a change.⁷

The legislative amendment to RCW 83.100.230 in 2008 simply added a sentence: "During the 2007-2009 fiscal biennium, monies in the account may also be transferred into the State General Fund." This legislation was buried in the operating budget and did not designate an

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Respondents have conceded that RCW 83.100.220 has remained unchanged since creation of the estate tax in 2005. The statute always has provided that all receipts from estate taxes be deposited in to the Education Legacy Trust Account. All estate tax receipts have been deposited into that fund. Brief of Respondents at p. 34. RCW 83.100.230 has always provided that money in the account may be spent only after appropriation. Further, expenditures from the account "may be used only for support of the common schools. . . and other educational improvement efforts."

amount to be transferred or appropriated. (CP 1789-180.) The Laws of 2009, Ch. 564, §1702 were similarly part of a budget and appropriations legislation. Section 1701 directed the State Treasurer to transfer \$67 million from the Education Legacy Trust Account to the State General Fund “for fiscal year 2009.” (CP 192-197.)

As with the 2008 budget legislation, no statement of purpose is contained in this appropriations legislation. Neither legislation limited or conditioned expenditure of funds transferred from the Education Legacy Trust Account to educational funding purposes. The Legislature failed to “state distinctly” a new object or purpose of the estate tax (the General Fund). The trial court apparently implied a new purpose, a dual purpose, or suspension of the clearly stated purpose of the estate tax legislation which is educational funding.

A purported change in the object of the estate tax from educational funding to the State general fund was not distinctly stated by the Legislature as required by Article VII, Section 5. Similarly, the legislation violated the “to which only it should be applied” requirement of Article VII, Section 5. In short, it fails to meet the explicit constitutional demands for any tax to be valid.

E. A Change in Purpose of Tax Legislation Buried in an Appropriations Bill Violated Article II, Section 19.

Respondents hope to avoid the Article II, Section 19 constitutional challenge by claiming the issue was first raised on reconsideration. Brief of Respondent at p. 41. But legislation unlawfully adopted and void may be attacked at any time.

Hook v. Lincoln County Noxious Weed Control Bd., 166 Wn.App. 145, 269 P.3d 1056 (2012) provides no support to respondents. The *Hook* case does not support a challenge to a legislative amendment that involves a constitutional issue. In rejecting the claim that a constitutional violation was involved, the court stated at p. 152:

... legislation unlawfully adopted and void may be attacked at any time (citing cases). Insofar as Mr. Hook was challenging the constitutionality of what would be a legislative act, if we accepted his characterization, his claim was not time-barred.

RAP 2.5(a)(3) provides that a party may claim a manifest error affecting a Constitutional right for the first time in the appellate court.⁸

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It is undisputed that the 2008 legislation at issue in this case is a budget and appropriations bill despite defendants' quibbling over the formal title of the legislation. As expressed in the synopsis of the bill (CP 175) the bill is an act relating to "fiscal matters" and "making appropriations." It is further undisputed that Section 924 of Chapter 329, Laws of 2008 was added three weeks before the conclusion of the legislative session as one of the final sections of the bill. (CP 179-185.)

In this context, an Article II, Section 19 analysis is appropriate to determine whether a substantive change in law has been attempted beyond the scope of appropriating budget funds. In the present action the 2008 amendment at issue states no dollar amount. (CP 180.) "When the Legislature places a proviso in an appropriations section not containing a specific dollar amount, it does so at the peril of having the proviso invalidated." *Washington State Legislature v. State of Washington*, 139 Wn.2d 129, 145, 95 P.2d 353 (1999).

Respondents misplace reliance on *Retired Public Employees v. Charles*, 148 Wn.2d 602, 62 P.3d 470 (2003) which is factually dissimilar to the issues before this court. There was no attempt to change the object of a tax by a proviso in a budget bill. Rather, the Legislature made state retirement employer contribution rate changes which were not deemed a change to substantive law incapable of passing on its own merits. In the present action, the object of the estate tax (distinctly set forth as required by Article VII, Section 5) was purportedly amended in a fiscal and appropriations bill. The analysis of these facts in light of Article II, Section 19 of the Washington Constitution requires careful scrutiny.

Defendants refer to the “non-exclusive three factor test” for determining whether a budget bill is substantive. These, however, are not the exclusive factors and this Court has declined to adopt a categorical definition of “substantive law.” *Washington State Legislature v. State of Washington*, 139 Wn.2d 129, 147, 985 P.2d 353 (1999).

In their focus on the non-exclusive three factor test, respondents ignore the facts unique to the present action. Nevertheless, respondents must concede factor one, that the 2008 amendment to RCW 83.100.230 had been dealt with in substantive legislation previously. (CP 278.) Respondents correctly point out that factor two (bill extends beyond two years) would not apply because the amendment allowed a transfer only in the 2007-2009 biennium. Yet the identical amendment proviso was added at the Laws of 2010, changing only the years to the 2009-2011 fiscal biennium. (CP 330, Answer to First Amended Complaint at ¶ 3.8.) There is no indication that the Legislature would not seek similar amendments in subsequent years.

Respondents claim this two year change is "consistent with a budget bill rather than substantive legislation." (CP 278.) But the legislation did not provide a dollar amount and retained language from RCW 83.100.230 that

expenditures from the account be used only for educational improvement efforts. It failed to mention that the object of the estate tax was being changed.

State ex rel. Washington Toll Bridge Authority v. Yelle, 54 Wn.2d 545, 342 P.2d 588 (1959) found a constitutional violation based on the continuing nature of the legislation, but also on the basis that the provision was an amendment to existing law. In *Flanders v. Morris*, 88 Wn.2d 183, 558 P.2d 769 (1977) the fact that the legislation had a two-year duration and was not ongoing did not control the outcome. The court, at p. 190, stated:

Although our decision in the 1959 *Toll Bridge Authority* case turned on the reasoning that the offensive provision was ongoing and therefore a substantive amendment, it is not necessary that a given provision have effect in perpetuity (as there) to be stricken from an appropriations bill as substantive, amendatory law. . . . the provision amends the statute on the subject and must be codified as an amendment in conformance with our constitution. Nowhere do we find authority for the contention that amendments are only such changes in the law as continue beyond a 2-year period. Hence we hold the enactment to be violative of *Const. Art. 2, § 37*.⁹

⁹ Cases cited by both parties provide analysis under Article II, Section 19 as well as Article II, Section 37 of the Washington Constitution.

The two-year time limiting public assistance in *Flanders* attempted to suspend existing public assistance law in an appropriations bill. Similarly, in the present action the two-year time limit allowing diversion of estate tax funds is claimed to be an amendment to the object of the estate tax expressed in RCW 83.100.230. The holding in *Flanders* is the general law cannot be suspended by provision in appropriations bills which are in conflict. The *Flanders* court stated at p. 191:

We realize that in certain instances the legislature must place conditions and limitations on the expenditures of monies, but to the extent that such conditions or limitations have the effect of modifying or amending the general law they are unconstitutional enactments. An appropriations bill may not constitutionally be used for the enactment of substantive law which is in conflict with the general law as codified. Hence, we declare the challenged provision a nullity.

The third factor cited by respondents is whether the legislation defines rights and benefits. Clearly the allowance of transfer of Education Legacy Trust Account funds to the General Fund impacts the rights and benefits of those beneficiaries of the educational improvement expenditures. At issue here is the unconstitutional diversion of tax dollars dedicated to educational funding. To change the object of a statutory tax governed by Article VII, Section 5, requires legislative action beyond burying the amendment to

the object of the tax in appropriations legislation. Clearly this was a change to substantive law.

The 2005 estate tax legislation properly stated the object of the tax as required by Article VII, Section 5. The 2008 amendment makes no reference to the fact that the funds which may be transferred are estate tax funds dedicated to educational funding by constitutional mandate. The diversion of funds from the purpose of the estate tax is not disclosed. As such, legislators and the public would have no notice that the object of the estate tax was being changed.

A legislative enactment which is not complete in and of itself and requires reference to another statute to understand its purpose and meaning is amendatory legislation. *Washington Citizens Action of Washington v. The State of Washington*, 162 Wn.2d 142, 159, 171 P.3d 486 (2007).

Plainly, there is no rational unity between a budget and appropriations section allowing transfer of funds from one account to the general fund and the interpretation that the amendment changes the object of the estate tax. Such an interpretation violates not only Article II, Section 19 but also Article VII, Section 5.

It is well established that an Article II, Section 19 analysis requires some "rational unity" between the general subject of the amendment legislation and the incidental subdivisions. In *Barde v. State of Washington*, 90 Wn.2d 470, 584 P.2d 390 (1978) the court found no rational unity between criminal sanctions for dognapping and recovery of attorney's fees in civil replevin actions even though both acts related to the taking or withholding of property. Although there was arguably a nexus between replevin and dognapping, the court found no "rational unity" which would meet the one subject requirements of Article II, Section 19.

IV. CONCLUSION

The trial court's summary judgment of dismissal should be reversed and an order declaring the subject legislative acts unconstitutional should enter. An order should also enter directing return of \$67 million plus interest to the Education Legacy Trust Account.

Respectfully submitted this 30th day of July, 2014.

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Declaration of Service

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date I sent by U.S. Mail, first class, postage prepaid and also electronic mail, a true copy of this document to:

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Dated this 30th day of July, 2014.

/s/ Mary Berghammer
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Dear Clerk: We attach Reply Brief of Appellants in the case of *Wall, et al v. State of Washington, et al.*, Cause No. 89603-8.

A hard copy is also being sent for filing by legal messenger.

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