NO. 44917-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Matter of the:

ESTATE OF ARTHUR D. PHELPS, Deceased.

APRIL PHELPS FORD, in her capacity as personal representative of the Estate of Arthur D. Phelps,

Respondent,

v.

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

Appellant.

APPELLANT'S REPLY BRIEF

ROBERT W. FERGUSON
Attorney General

David M. Hankins, WSBA # 19194
Senior Counsel
Charles Zalesky, WSBA # 37777
Assistant Attorney General
Revenue Division, OID No. 91027
P.O. Box 40123
Olympia, WA 98504-0123
(360) 753-5528

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

A. *In re Estate Of Bracken* Is Not Controlling. 1

B. The 2013 Act Is Constitutional As Applied To The Estate. 3

1. Taxing QTIP passing under Internal Revenue Code § 2044 is constitutional. 4

2. The 2013 Act does not violate substantive due process. 8

3. The 2013 Act does not violate separation of powers. 12

4. The 2013 Act does not violate the Impairment Clause. 15

5. The 2013 Act does not violate equal protection. 19

C. The Department Is Not Barred From Defending Against The Estate's Refund Claim. 22

1. Collateral estoppel does not apply. 22

2. Equitable estoppel does not apply. 23

D. The Estate Is Not Entitled To Attorneys' Fees. 24

III. CONCLUSION 25

APPENDIX A- 1 Jacob Mertens, *The Law of Federal Gift and Estate Taxation*, § 1.04 (1959)

TABLE OF AUTHORITIES

Cases

Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hearings Bd.,
170 Wn.2d 577, 245 P.3d 764 (2010) 25

American Nat'l Can Corp. v. Dep't of Revenue,
114 Wn.2d 236, 787 P.2d 545 (1990) 14

Andersen v. King County,
158 Wn.2d 1, 138 P.3d 963 (2006) 20

Caritas Servs., Inc. v. Dep't of Soc. & Health Servs.,
123 Wn.2d 391, 896 P.2d 28 (1994) 17

Clemency v. State (*In re Estate of Bracken*),
175 Wn.2d 549, 290 P.3d 99 (2012) .... passim

Colonial Imports, Inc. v. Carlton Northwest, Inc.,
121 Wn.2d 726, 853 P.2d 913 (1993) 23

Commissioner v. Church's Estate,
335 U.S. 632, 69 S. Ct. 322, 93 L. Ed. 288 (1949) 5, 6

Dep't of Ecology v. Theodoratus,
135 Wn.2d 582, 957 P.2d 1241 (1998) 23

DeYoung v. Providence Med. Ctr.,
136 Wn.2d 136, 960 P.2d 919 (1998) 20

Energy Reserves Group, Inc. v. Kansas Power & Light Co.,
459 U.S. 400, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983) 16

Estate of Morgens v. Commissioner,
678 F.3d 769 (9th Cir. 2012) 7

Fernandez v. Wiener,
326 U.S. 340, 66 S. Ct. 178, 90 L. Ed. 116 (1945) 4, 5, 6, 8

Gardner v. First Heritage Bank,
175 Wn. App. 650, 303 P.3d 1065 (2013) 24

General Motors Corp. v. Dep't of Treasury,
803 N.W.2d 698 (Mich. Ct. App. 2010) 12

Goldmark v. McKenna,
172 Wn.2d 568, 259 P.3d 1095 (2011) 25

Gregory v. Ashcroft,
501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) 20

Haberman v. Wash. Pub. Power Supply Sys.,
109 Wn.2d 107, 744 P.2d 254, 750 P.2d 254 (1987) 3, 14, 16

Hale v. Wellpinit Sch. Dist. No. 49,
165 Wn.2d 494, 198 P.3d 1021 (2009) 13, 14

Helvering v. Hallock,
309 U.S. 106, 60 S. Ct. 444, 84 L. Ed. 604 (1940) 4, 5

Japan Line, Ltd. v. McCaffree,
88 Wn. 2d 93, 558 P.2d 211 (1977) 8

Lemond v. Dep't of Licensing,
143 Wn. App. 797, 180 P.3d 829 (2008) 22

Lummi Indian Nation v. State,
170 Wn.2d 247, 241 P.3d 1220 (2010) 14

Margola Assoc. v. Seattle,
121 Wn.2d 625, 854 P.2d 23 (1993) 17, 18

Oman v. Yates,
70 Wn.2d 181, 422 P.2d 489 (1967) 17

Pierce County v. State,
159 Wn.2d 16, 148 P.3d 1002 (2006) 16

Plaut v. Spendthrift Farms, Inc.,
514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) 13

Shoreline Cmty. Coll. Dist. No. 7 v. Emp't Sec. Dep't,
120 Wn.2d 394, 842 P.2d 938 (1992) 18

Standlee v. Smith,
83 Wn.3d 405, 518 P.2d 721 (1974) 22

State v. McCuistion,
174 Wn.2d 369, 275 P.3d 1092 (2012) 15

Thompson v. Dep't of Licensing,
138 Wn.2d 783, 982 P.2d 601 (1999) 22

Tyrpak v. Daniels,
124 Wn.2d 146, 874 P.2d 1374 (1994) 16

United States v. Carlton,
512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) 9, 12

United States v. Manufacturers National Bank of Detroit,
363 U.S. 194, 80 S. Ct. 1103, 4 L. Ed. 2d 1158 (1960) 5

Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976) 4

W.R. Grace & Co. v. Dep't of Revenue,
137 Wn.2d 580, 973 P.2d 1011 (1999) 9

Washington Off Highway Vehicle Alliance v. State,
176 Wn.2d 225, 290 P.3d 954 (2012) 13

Washington State Farm Bureau Fed'n v. Gregoire,
162 Wn.2d 284, 174 P.3d 1142 (2007) 3, 8

Washington State Grange v. Locke,
153 Wn.2d 475, 105 P.3d 9 (2005) 3

Whitney v. State Tax Comm'n,
309 U.S. 530, 60 S. Ct. 635, 84 L. Ed. 909 (1940) 5

Constitutional Provisions

Const. art. I, § 12 19

Const. art. I, § 23 16

Const. art. IX, § 1 19

Statutes

26 U.S.C. § 2010 21

26 U.S.C. § 2011 10

26 U.S.C. § 2044 .... passim

26 U.S.C. § 2044(b)(1)(A) 6

26 U.S.C. § 2044(c) 7

26 U.S.C. § 2056(b)(7) 7, 10

26 U.S.C. § 2056(b)(7)(A)(i) 6

Laws of 1981, 2d Ex. Sess., ch. 7 18

Laws of 2005, ch. 516, § 22 10

Laws of 2013, 2d Spec. Sess., ch. 2, § 1 13

Laws of 2013, 2d Spec. Sess., ch. 2, § 1(4) 3

Laws of 2013, 2d Spec. Sess., ch. 2, § 1(5) 3, 14

Laws of 2013, 2d Spec. Sess., ch. 2, § 2 .... 1, 2, 7

Laws of 2013, 2d Spec. Sess., ch. 2, § 5 2

Laws of 2013, 2d Spec. Sess., ch. 2, § 5(3) 15

Laws of 2013, 2d Spec. Sess., ch. 2, § 9 2

RCW 4.84.185 .... 24, 25

RCW 83.100.020(11) 1, 8

RCW 83.100.020(13) 7

RCW 83.100.030 (2004) 10

RCW 83.100.047 .... 2, 15

RCW 83.100.047(3)(b) 2

RCW 83.100.220 19

RCW 83.100.230 19

Rules

RAP 18.1(b) 24

RAP 18.9(a) 24, 25

Regulations

WAC 458-57-105(3)(q) 2

WAC 458-57-115(2)(d) 2

Treatises

1 Jacob Mertens, *The Law of Federal Gift and Estate Taxation*, § 1.04 (1959) 5, 6

16A C.J.S. *Constitutional Law*, § 394 (2013) 12

24 Am. Jur., *Gifts* § 11 (1939) 17

Other Authorities

H.B. 1920, 63rd Leg. (Wash. 2013) 24

Steven D. Nofziger, Comment, *EGTRRA and the Past, Present, and Future of Oregon's Inheritance Tax System*, 84 Or. L. Rev. 317 (2005) 20

Wash. St. Reg. 09-04-008 (effective February 22, 2009) 2

I. INTRODUCTION

The estate of Arthur Phelps ("Estate") raises a number of constitutional and equitable arguments in an effort to obtain a refund of estate tax on the value of QTIP passing at Mr. Phelps' death. None of the Estate's arguments has any merit.

II. ARGUMENT

A. *In re Estate Of Bracken* Is Not Controlling.

The Estate incorrectly argues that the holding in *Clemency v. State* (*In re Estate of Bracken*), 175 Wn.2d 549, 290 P.3d 99 (2012), is controlling in this case. *See* Resp. Br. at 9-11. The Estate ignores the retroactive amendments to the Washington estate tax code enacted in June 2013. It is the statute as amended that is controlling in this case.

The 2013 Act made three significant amendments to the Washington tax treatment of QTIP. First, the definition of "transfer" was amended to make it clear that Washington's tax is not limited to "real" transfers recognized under state property law. Laws of 2013, 2d Spec. Sess., ch. 2, § 2 (amending and renumbering RCW 83.100.020(11)). Instead, a "transfer" includes any "shifting upon death of the economic benefit in property." *Id.* That definition—and the "shifting of economic benefit" concept incorporated into the definition—is consistent with the constitutional limits imposed on estate and inheritance taxes.

Second, the Legislature amended the definition of "Washington taxable estate" to expressly include QTIP in the tax base. Laws of 2013, 2d Spec. Sess., ch. 2, § 2. Finally, the Legislature retroactively amended RCW 83.100.047 to repudiate administrative rules issued in 2006 that inadvertently permitted a deduction of QTIP passing under Internal Revenue Code § 2044 by the estate of the second spouse to die. *Id.* at § 5.[1] As amended, RCW 83.100.047 permits a deduction for QTIP passing under Internal Revenue Code § 2044 *only* when a separate Washington QTIP election was made by the estate of the first spouse to die. *See id.* (creating new subsection 83.100.047(3)(b) to permit the second spouse to die to deduct federal QTIP and add the amount of the Washington QTIP if a Washington QTIP election was made by the estate of the first spouse to die). Because Arthur Phelps' predeceased wife, Marguerite, did not make a separate Washington QTIP election, the deduction authorized by RCW 83.100.047(3)(b) does not apply.

The Legislature made sections 2 and 5 of the 2013 Act retroactive to "all estates of decedents dying on or after May 17, 2005." *Id.* at § 9. These key amendments were enacted to close the QTIP loophole created

[1] The Department's 2006 estate tax rules were poorly drafted and, according to the *Bracken* decision, allowed a deduction for QTIP passing under Internal Revenue Code § 2044 even when no separate Washington QTIP election was made. *Bracken*, 175 Wn.2d at 571 n.5 (discussing former WAC 458-57-105(3)(q) and -115(2)(d)). The rules were amended in 2009 to correct the error. Wash. St. Reg. 09-04-008 (effective February 22, 2009).

by the *Bracken* decision by defining "transfer" and "Washington taxable estate" to expressly include QTIP passing under Internal Revenue Code § 2044 in the Washington taxable estate and to permit a deduction only when the estate of the first spouse to die makes a separate Washington QTIP election. *Id.* at § 1(4)-(5).

The 2013 Act's changes to the Washington estate tax code are controlling. *See Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 304, 174 P.3d 1142 (2007) (the legislature may pass a law that directly impacts a case pending in Washington courts); *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 143-44, 744 P.2d 254, 750 P.2d 254 (1987) (same). Under the plain language of the amended estate tax code, the Estate cannot deduct QTIP from its taxable estate and is not entitled to a refund of the Washington estate tax it paid on the value of QTIP passing at Mr. Phelps' death.

B. The 2013 Act Is Constitutional As Applied To The Estate.

The Estate also contends that the 2013 Act is unconstitutional as applied. Resp. Br. at 11-12. Statutes enacted by the Legislature are presumed to be constitutional and a party seeking to invalidate a statute on constitutional grounds must establish that the provision is unconstitutional beyond a reasonable doubt. *Washington State Grange v. Locke*, 153 Wn.2d 475, 486, 105 P.3d 9 (2005). This presumption applies to retroactive laws. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976). Applying the 2013 Act to the QTIP passing at Mr. Phelps' death is constitutional and should be upheld.

1. Taxing QTIP passing under Internal Revenue Code § 2044 is constitutional.

The Estate incorrectly asserts that, as a matter of constitutional law, only "real transfers" may be taxed. Resp. Br. at 12-15. To the contrary, controlling case law holds that Congress and the States have broad power to determine by statute when a transfer occurs.

The term "transfer" as used in the federal estate tax code extends "to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property." *Fernandez v. Wiener*, 326 U.S. 340, 352, 66 S. Ct. 178, 90 L. Ed. 116 (1945). Consequently, a "transfer" subject to the federal tax is not limited to a formal conveyance of property under state law or common law. Rather, "Congress has a wide latitude in the selection of objects of taxation" and may include within the federal estate tax base property that was not formally conveyed upon the death of the decedent. *Wiener*, 326 U.S. at 352; *see also Helvering v. Hallock*, 309 U.S. 106, 60 S. Ct. 444, 84 L. Ed. 604 (1940) (formal distinctions pertaining to the law of real property are "irrelevant criteria in this field of [estate] taxation"). Ownership of the property by the decedent is not constitutionally required so long as the decedent had some economic interest in the property that passes at death. *Whitney v. State Tax Comm'n*, 309 U.S. 530, 538-39, 60 S. Ct. 635, 84 L. Ed. 909 (1940).

Since *Helvering v. Hallock* and *Whitney v. State Tax Commission* were decided in 1940, courts have consistently upheld the power of Congress to direct by statute what property will be included in the taxable estate of a decedent. *See, e.g.*, *Fernandez v. Wiener*, *supra*; *Commissioner v. Church's Estate*, 335 U.S. 632, 69 S. Ct. 322, 93 L. Ed. 288 (1949); *United States v. Manufacturers National Bank of Detroit*, 363 U.S. 194, 198-200, 80 S. Ct. 1103, 4 L. Ed. 2d 1158 (1960). A "transfer" in the constitutional sense is a broad and flexible concept, and an estate tax will withstand constitutional scrutiny "if there was a transfer of economic benefit, use, enjoyment or control [of property] at death." 1 Jacob Mertens, *The Law of Federal Gift and Estate Taxation*, § 1.04 at 9-10 (1959) (footnote omitted) (Appendix A). It is well settled that an estate tax is not restricted to the passing of particular items of property from the decedent to the transferee. Instead, Courts have narrowed the inquiry to two factors: did the decedent have an interest in property at death, and was the decedent's death "the generating source of definite accessions to the survivor's property rights." *Id.* at 11. "No formal transfer of title from the decedent to the transferee is required; a mere shifting of the economic benefits of the property may be the real subject of the tax." *Id.* at 10.

The passing of QTIP under Internal Revenue Code § 2044 undoubtedly qualifies as a "transfer" in the broad constitutional sense. A QTIP trust creates a life estate for the benefit of the surviving spouse and a future interest in the assets for the benefit of the remainder beneficiaries. When the second spouse dies, the life estate is extinguished and the remainder beneficiaries receive a present interest in the property. It is the death of the second spouse that causes the remainder beneficiaries' interest in the QTIP to transform from a future interest to a present interest. Consistent with the U.S. Supreme Court's holding in *Fernandez v. Wiener*, Congress is permitted to treat that shift in the economic benefit as a "transfer" subject to estate tax. *Cf. Commissioner v. Church's Estate*, 335 U.S. 632, 644-45, 69 S. Ct. 322, 93 L. Ed. 288 (1949) (right to receive trust income is a valuable property interest that passes to the reminder beneficiaries at death of the income beneficiary). Congress has expressly exercised that power by enacting Internal Revenue Code § 2044.

There are several provisions in the federal estate tax code designed to ensure that QTIP is subject to estate tax when the second spouse dies. *See* I.R.C. § 2056(b)(7)(A)(i) (QTIP is treated as passing to the surviving spouse when the first spouse dies); I.R.C. § 2044(b)(1)(A) (QTIP passing to the surviving spouse is included in that spouse's gross estate when he or she dies); I.R.C. § 2044(c) (QTIP is treated as passing from the surviving spouse when he or she dies). Under these provisions, the entire value of the QTIP is treated as passing through the surviving spouse even though the surviving spouse only held an income interest in the property. *Estate of Morgens v. Commissioner*, 678 F.3d 769, 771 (9th Cir. 2012). Because QTIP is treated as passing through the surviving spouse, federal estate tax is deferred until the surviving spouse dies. No estate tax is owed when the first spouse dies as a result of the marital deduction. I.R.C. § 2056(b)(7). However, estate tax is owed when the second spouse dies because Congress, by enacting Internal Revenue Code § 2044, has made that second transfer the subject of the tax.

The same treatment applies under the Washington estate tax code as amended by the 2013 Act. The federal definition of "taxable estate" is incorporated into the Washington tax. Laws of 2013, 2d Spec. Sess., ch. 2, § 2. The federal taxable estate of the second spouse to die includes the value of QTIP passing under Internal Revenue Code § 2044. Thus, the term "federal taxable estate" as defined in the Washington estate tax code includes QTIP passing when the second spouse dies. The QTIP is also included in the decedent's Washington taxable estate. *See id.* (amending and renumbering former RCW 83.100.020(13)). And the Legislature has amended the statutory definition of "transfer" to expressly incorporate the broad and flexible concept of that term that is employed under the federal tax code. *Id.* (amending and renumbering former RCW 83.100.020(11)).

"It is a fundamental principle of our system of government that the legislature has plenary power to enact laws, except as limited by our state and federal constitutions." *Washington State Farm Bureau*, 162 Wn.2d at 290. Accordingly, "[t]he legislature has broad plenary powers in its capacity to levy taxes." *Japan Line, Ltd. v. McCaffree*, 88 Wn. 2d 93, 96, 558 P.2d 211 (1977). The Legislature may exercise its power to levy an estate tax by incorporating definitions and concepts included in the federal estate tax code. And that authority is not limited by artificial distinctions between "real" and "deemed" transfers. Instead, the shift in economic benefit of the QTIP resulting from the death of the second spouse satisfies the requirement of a "transfer" in the constitutional sense. *Wiener,* 326 U.S. at 352; *In re McGrath's Estate*, 191 Wash. at 504.

The Estate's "real transfer" argument is contrary to law. The Constitution does not limit the Washington estate tax to "real" transfers.

2. The 2013 Act does not violate substantive due process.

The Estate next argues that the retroactive reach of the 2013 Act violates substantive due process under the rational basis standard applied by the courts when analyzing retroactive tax legislation, and deprives the

Estate and the remainder beneficiaries of the QTIP trust of "vested rights." Resp. Br. at 15-24. The Estate's due process arguments are contrary to the law and should be rejected.

The United States Supreme Court's most current decisions involving retroactive legislation refute any notion that the Due Process Clause imposes a fixed limit on the retroactive reach of tax statutes. *E.g., United States v. Carlton*, 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994). If a retroactive statute "is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Id.* at 30-31*; see also W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 602-03, 973 P.2d 1011 (1999) (analyzing and applying *Carlton*).

The 2013 Act supported a legitimate legislative purpose furthered by rational means. The Legislature amended the estate tax code to fix the significant loophole created when the Supreme Court narrowly construed the term "transfer" to mean only "real" transfers. In addition, the Legislature amended the statute at its first opportunity after the Supreme Court decided *Bracken.*[2] Moreover, it was entirely rational for the Legislature to amend the Washington estate tax code retroactively to May 17, 2005, because that was

[2] The Estate suggests that the Legislature could have amended the estate tax code in 2009 when the *Bracken* litigation began. Resp. Br. at 19-20. However, the Department prevailed before the superior court in *Bracken.* Legislation to close the QTIP loophole was not needed until the Supreme Court overturned the superior court decision.

the effective date of the stand-alone estate tax. *See* Laws of 2005, ch. 516, § 22 (emergency clause). By amending the estate tax retroactively to May 17, 2005, the Legislature ensured that the tax loophole would be closed for all estates.[3] A shorter period of retroactivity would have been irrational because it would have permitted some estates, but not others, to benefit from the QTIP loophole created by the *Bracken* decision.

In addition, the 2013 Act does not impermissibly tax the transfer of QTIP occurring before May 17, 2005. The Estate's argument to the contrary is based on the false premise that the *taxable* transfer of QTIP occurs when the first spouse dies and the QTIP election is made. *See* Resp. Br. at 16-17. But the Washington estate tax as amended—like the federal estate tax—applies to the transfer of QTIP occurring at the death of the second spouse when that spouse's life estate is extinguished and the property passes to the remainder beneficiaries. The transfer of assets *into* the QTIP trust is not subject to either the federal or Washington estate tax as a result of Internal Revenue Code § 2056(b)(7), which permits the value of QTIP to be deducted in computing the federal taxable estate of the first

[3] There was no reason for the Legislature to be concerned with the tax treatment of QTIP under the former pickup tax because there was no QTIP loophole in the former tax regime. The pickup tax was computed on the "adjusted taxable estate" of the decedent. *See* former RCW 83.100.030 (2004) and I.R.C. § 2011. Therefore, QTIP *excluded from the taxable estate* under Internal Revenue Code § 2056(b)(7) was not subject to the Washington tax under the pickup tax computation, while QTIP *included in the taxable estate* under Internal Revenue Code § 2044 was subject to the Washington tax. This is not materially different from the treatment of QTIP under the stand-alone estate tax as amended by the 2013 Act.

spouse to die. The Estate simply focuses on the wrong transfer when it argues that the 2013 Act should be invalidated on due process grounds.

Finally, the Legislature did not impermissibly target any estates when it retroactively amended the estate tax code. There is no question that the Legislature was concerned with the significant and unexpected fiscal impact of the *Bracken* decision and that it acted swiftly to close the unintended loophole. But closing a loophole that could have been exploited by the estate of Arthur Phelps and by other estates is not the type of "targeting" that could raise due process concerns. Otherwise, the Legislature would be powerless to retroactively close any tax loophole since, in every case, some taxpayer would have been able to exploit the loophole but for the retroactive amendment.

The Estate also argues that the 2013 Act "deprives" the remainder beneficiaries of "their vested right" to the QTIP passing at Ms. Mesdag's death, and "deprives" the Estate of a "vested right" to a refund. Resp. Br. at 21-24. Both arguments are incorrect. First, the 2013 Act does not take any "vested right" from the remainder beneficiaries. The Estate argues that the beneficiaries had "the right to receive the corpus of [the] QTIP trust." Resp. Br. at 22. But the Estate makes no effort to explain how any trust assets were impacted by the 2013 Act. Presumably the remainder beneficiaries received the property that remained in the QTIP trust at the death of Arthur

Phelps. There is no evidence in the record suggesting otherwise. The Estate simply raises a constitutional claim on behalf of non-parties to this lawsuit that is not supported by any evidence.

Second, the Estate has no "vested right" to a refund. "Tax legislation is not a promise" and no taxpayer has a "vested right" in the continuation of a particular tax law. *Carlton*, 512 U.S. at 33; *see also General Motors Corp. v. Dep't of Treasury*, 803 N.W.2d 698, 709 (Mich. Ct. App. 2010) (rejecting taxpayer's claim that it had a vested right to a tax refund); *see generally* 16A C.J.S. *Constitutional Law*, § 394 (2013) (in general, a taxpayer has no vested rights in a tax statute or in the continuance of a particular tax law). The fact that the Estate filed its refund claim with the Department and sought judicial review under the APA before the retroactive amendment to the estate tax code does not create a vested right to the claimed refund because the tax code as construed by the Supreme Court in *Bracken* was "not a promise."

3. The 2013 Act does not violate separation of powers.

The Estate also contends that the Legislature acted beyond its authority when it amended the Washington estate tax code to close the tax loophole created by the *Bracken* decision. Resp. Br. at 24-30. The Estate relies on an incorrect understanding of the separation of powers doctrine and misstates the purpose and effect of the 2013 Act.

As explained in the Department's opening brief, the 2013 Act does not violate the separation of powers doctrine. *See* App. Br. at 24-28. The 2013 Act amended the Washington estate tax code to expressly include QTIP passing under Internal Revenue Code § 2044 in the Washington taxable estate of a decedent. The Legislature has the authority to determine the tax policy of this state and to enact and amend laws to achieve that policy. *Hale v. Wellpinit Sch. Dist.* No. 49, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). Moreover, the Legislature did not reverse or annul the Supreme Court's decision in *Bracken*. Instead, the Legislature changed the statutory definitions of "transfer" and "Washington taxable estate" to ensure that QTIP does not escape the Washington tax. This was clearly within the "appropriate sphere of activity" of the legislative branch. *Hale*, 165 Wn.2d at 509; *accord Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 226-27, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995).

The Estate also incorrectly contends that in amending the estate tax code, the Legislature made "judicial determinations." Resp. Br. at 25-26. It is true that the Legislature has made legislative findings to support the underlying purpose of the 2013 Act and to assist in construing the Act. *See* Laws of 2013, 2d Spec. Sess., ch. 2, § 1. Those findings are entitled to substantial deference. *Washington Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 236, 290 P.3d 954 (2012). But nothing in the 2013

Act can be regarded as a "judicial determination." The Legislature has not declared that the 2013 Act is constitutional or limited the ability of the judicial branch to consider the constitutional arguments advanced by the Estate. Nor has the Legislature limited the ability of the judiciary to decide issues of fact or to apply the facts to the relevant law. Instead, the Legislature declared that it is the tax policy of this state to fund education through an estate tax that fairly, and constitutionally, applies to any transfer occurring at death, not just "real" transfers recognized under state property law. Laws of 2013, 2d Spec. Sess., ch. 2, § 1(5).

Amending the estate tax code to achieve the legislative purpose of closing a tax loophole does not intrude on the power of the courts to make judicial determinations. *See Haberman*, 109 Wn.2d at 144 ("legislative enactment of a facially neutral law for the court to apply to the facts before it" did not invade the province of the judicial branch); *see also American Nat'l Can Corp. v. Dep't of Revenue*, 114 Wn.2d 236, 252-53, 787 P.2d 545 (1990) (retroactive amendment to tax code that applied to pending litigation did not violate separation of powers). It is well established that separation of powers is not violated when the Legislature affirmatively amends a previously construed statute. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 262, 241 P.3d 1220 (2010); *Hale*, 165 Wn.2d at 509-10. The Legislature has not engaged in the judicial function of applying existing law to a particular set of facts but rather created "a rule of general application" that "falls squarely within the realm of legislation." *State v. McCuistion*, 174 Wn.2d 369, 396, 275 P.3d 1092 (2012).

It is also beyond reasonable dispute that the Legislature did not violate separation of powers when it retroactively amended RCW 83.100.047 in order to supersede two poorly drafted estate tax rules that, when read literally, permitted an estate to deduct "section 2044 property" even when no separate Washington QTIP election had been made. *See* Laws of 2013, 2d Spec. Sess., ch. 2, § 5(3).[4] A retroactive amendment that supersedes or invalidates an administrative rule does not violate separation of powers because the Legislature, not the administrative agency, has the ultimate responsibility for enacting and amending the laws of this state. Consequently, the Estate's separation of powers argument with respect to section 5 of the 2013 Act fails.

4. The 2013 Act does not violate the Impairment Clause.

The Estate's claim that the Washington estate tax violates the Impairment Clause is also unfounded. *See* Resp. Br. at 30-33. Article I, section 10 of the United States Constitution provides in part that "No state shall . . . pass any . . . law impairing the obligation of contracts." The

[4] Section 5 of the 2013 Act makes clear that "notwithstanding any department rule" the second spouse's estate may deduct section 2044 property only if the first spouse's estate made a separate Washington QTIP election pursuant to RCW 83.100.047.

Washington constitution contains a similar prohibition. Const. art. I, § 23. These constitutional provisions are coextensive. *Tyrpak v. Daniels*, 124 Wn.2d 146, 151, 874 P.2d 1374 (1994).

The Impairment Clause—sometimes referred to as the "Contracts Clause"—"is applicable only if the legislative act complained of impairs a contractual relationship." *Haberman*, 109 Wn.2d at 145. In determining whether legislation impermissibly impairs a contractual relationship, the reviewing court must determine (1) whether a contractual relationship exists, (2) whether the legislation at issue substantially impairs that contractual relationship, and, if so, (3) whether the substantial impairment is reasonable and necessary to serve a legitimate public purpose. *Pierce County v. State*, 159 Wn.2d 16, 28, 148 P.3d 1002 (2006). The last prong is a balancing of interests and recognizes that substantial impairment may still be valid if the state has "a significant and legitimate public purpose behind the regulation." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983).

Applying the three-part Impairment Clause test to the facts in this case, there is no constitutional violation. As to the first element, the Supreme Court has held that a "contract" for purposes of the Impairment Clause must be a contract "in the usual sense," i.e., "an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts." *Caritas Servs., Inc. v. Dep't of Soc. & Health Servs.*, 123 Wn.2d 391, 403, 896 P.2d 28 (1994) (internal quotations and citation omitted). In the present case, the QTIP trust created when Ms. Phelps died was not part of any "agreement of two or more minds, upon sufficient consideration." Instead, the trust was created to accomplish a testamentary gift.

A gift is not a contract in the usual sense. *Oman v. Yates*, 70 Wn.2d 181, 185-86, 422 P.2d 489 (1967) ("owing to the absence of consideration, a gift inter vivos does not come within the legal definition of a contract") (quoting 24 Am. Jur., *Gifts* § 11 (1939)). It follows that a trust created to complete a testamentary gift is not a "contract in the usual sense." At a minimum, the Estate cannot dispute that the *beneficiaries* of the trust were not parties to any "contract" since the beneficiaries made no promise supported by consideration. Because the Impairment Clause applies to contracts, not gifts, the Estate fails the first element.

The Estate has also not established that the 2013 Act imposes a substantial impairment to a contractual relationship. An "impairment is substantial if the complaining party relied on the supplanted part of the contract." *Margola Assoc. v. Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23 (1993). Moreover, "[a] contract is not considered impaired by a statute in force when the contract was made, as parties are presumed to enter into contracts in contemplation of existing law." *Shoreline Cmty. Coll. Dist.*

No. 7 v. Emp't Sec. Dep't, 120 Wn.2d 394, 410, 842 P.2d 938 (1992). State estate taxes are common, and many states impose estate tax on QTIP passing under Internal Revenue Code § 2044. Thus, it is reasonable to conclude that Marguerite Phelps was aware that state estate tax would likely be owed on any QTIP passing to the remainder beneficiaries when Arthur died. As a result, there is no substantial impairment even if a contract existed. *Margola*, 121 Wn.2d at 653 ("a party who enters into a contract regarding an activity already regulated in the particular to which he now objects is deemed to have contracted subject to further legislation upon the same topic").

Finally, in applying the third prong, the balancing of interests weighs most heavily in favor of the 2013 Act and against its invalidation. Washington has had an estate or inheritance tax since 1901. The current estate tax was enacted by the voters in 1981. Laws of 1981, 2d Ex. Sess., ch. 7. It cannot come as a surprise that Washington estate tax will be owed by estates with sufficient assets to qualify for the tax. Moreover, the estate of Marguerite Phelps elected to enjoy the benefit of the QTIP deduction when it filed its federal and state estate tax returns. Thus, even if application of the Washington tax to QTIP passing at the death of Arthur Phelps qualifies as "impairment," it is a minimal impairment under *Margola Associates* and *Shoreline Community College*.

By contrast, the State's sovereign authority and responsibility to provide for the general welfare of its citizens through its taxing power is vitally important. The purpose of Washington's estate tax is to fund education. RCW 83.100.220, .230. Providing dependable tax sources to fund education is one of the most important functions of government. *See* Const. art. IX, § 1. When the justification for the tax—funding education —is balanced against the "impairment" the Estate is claiming, it is evident that the Estate also fails the third prong of the three-part test.

5. The 2013 Act does not violate equal protection.

The Estate also asserts that the 2013 Act violates "equal protection principles" as applied to the Estate. Resp. Br. at 33-34. The Estate's equal protection challenge has no merit.

Under the Fourteenth Amendment of the United States Constitution "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Article I, § 12 of the Washington Constitution similarly state that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Courts apply the same analysis to the state Privileges and Immunities Clause and the federal Equal Protection Clause unless the challenged law favors a minority class. *Andersen v. King*

County, 158 Wn.2d 1, 18, 138 P.3d 963 (2006) (plurality opinion). The Estate has not asserted that the 2013 Act favors a minority class. Therefore, separate analysis under the state constitution is not required.

The Estate's equal protection challenge is analyzed under the rational basis standard. The Estate must prove that the classification drawn by the law is not rationally related to any legitimate state interest. *Beach Commc'ns*, 508 U.S. at 314-15; *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998). A classification will be upheld unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes" that the Court "can only conclude that the [legislature's] actions were irrational." *Gregory v. Ashcroft*, 501 U.S. 452, 472, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). The 2013 Act easily survives minimal scrutiny under the equal protection clause.

The Estate complains that the 2013 Act amended the Washington estate tax with respect to the treatment of QTIP, but not with respect to property passing through a "credit shelter trust." Resp. Br. at 33.[5] The simple answer to the Estate's complaint is that the Washington estate tax code incorporates the federal definition of "taxable estate" as the starting

[5] A credit shelter trust allows married couples to take advantage of the unified credit against estate taxes provided in Internal Revenue Code § 2010. *See generally*, Steven D. Nofziger, Comment, *EGTRRA and the Past, Present, and Future of Oregon's Inheritance Tax System*, 84 Or. L. Rev. 317, 338-39 (2005).

point for computing the decedent's Washington taxable estate. By using the federal taxable estate as the starting point, the Legislature "avoided having to duplicate congressional effort involved in explaining all the possible inclusions, exemptions, and deductions necessary to reach the taxable estate, and also helped to avoid the complication and confusion that a different set of state rules might create." *Bracken*, 175 Wn.2d at 583 (Madsen, C.J., concurring/dissenting). Under the federal estate tax code, QTIP is included in the taxable estate of the second spouse to die, but property passing through a credit shelter trust is not. Instead, property placed into a credit shelter trust is subject to federal estate tax when the first spouse dies; however, the tax is offset by a tax credit provided in Internal Revenue Code § 2010.

The Legislature amended the Washington estate tax in 2013 to make the tax as applied to QTIP consistent with the federal tax. There was no need to amend the Washington tax as applied to property passing through a credit shelter trust since the Washington tax code was already consistent with the federal tax code. The Legislature acted rationally when it chose to incorporate the federal definition of taxable estate as the starting place of determining the Washington taxable estate. The Estate's claim to the contrary is incorrect as a matter of law.

C. The Department Is Not Barred From Defending Against The Estate's Refund Claim.

The Estate argues that the Department should be estopped from denying its refund claim under the doctrines of collateral estoppel and equitable estoppel. Resp. Br. at 35-41. Neither doctrine applies here.

1. Collateral estoppel does not apply.

Collateral estoppel does not apply absent a showing by the party asserting the doctrine that the issue determined in a previous action is identical to the issue arising in the subsequent action. *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 791, 982 P.2d 601 (1999). In general, both the controlling facts and *applicable legal rules* must be identical for collateral estoppel to apply. *Standlee v. Smith*, 83 Wn.3d 405, 408, 518 P.2d 721 (1974); *Lemond v. Dep't of Licensing*, 143 Wn. App. 797, 805, 180 P.3d 829 (2008). Accordingly, collateral estoppel may only apply if the issue in the second case "involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment." *Standlee*, 83 Wn.2d at 408 (internal quotations and citation omitted).

Collateral estoppel does not apply in this case because the controlling law was amended by the 2013 Act. Consequently, the applicable "legal rule" at issue in this case is not identical in all respects to the legal rule at issue in the *Bracken* litigation.

2. Equitable estoppel does not apply.

The Estate's equitable estoppel argument is also devoid of merit. Equitable estoppel is disfavored and the party asserting estoppel must prove each element by clear and cogent evidence. *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 734, 853 P.2d 913 (1993). When equitable estoppel is asserted against the government, the asserting party must present clear and cogent proof of (1) an admission, statement or act inconsistent with a claim later asserted; (2) reasonable reliance by the other party; (3) injury to the relying party; (4) that estoppel against the government is necessary to prevent a manifest injustice; and (5) that application of the doctrine will not impair a government function. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998).

The Estate has presented no cogent evidence to support its estoppel claim, relying instead on confusing arguments that, under the Estate's theory, establish "misconduct" by the Legislature in debating and passing the 2013 Act in light of the significant amount of estate tax refunds that would have been owed under the *Bracken* decision, and by the Department in agreeing to stay the legal proceedings in this case pending the resolution of the *Bracken* appeal. Resp. Br. at 38-40. But it was not "misconduct" for the Legislature to debate the pros and cons of amending the estate tax code in light of the *Bracken* decision or to pass the 2013 Act in order to prevent an unanticipated drain on the State's education funding. Nor was it "misconduct" for the Department to agree to a stay of proceedings in this case or to give deference to the legislative branch which took up the QTIP issue within a few days after the 2013 legislative session convened.[6] Consequently, the Estate has not met the necessary elements supporting its estoppel claim, and that claim should be summarily rejected.

D. The Estate Is Not Entitled To Attorneys' Fees.

The Estate requests an award of attorneys' fees under RAP 18.9 and RCW 4.84.185. Resp. Br. at 48. However, the Estate presents no argument in support of its claim, and did not make its claim in a separate section of its opening brief as required by RAP 18.1(b). Consequently, this Court should reject the Estate's request. *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 676-77, 303 P.3d 1065 (2013) (requirements under RAP 18.1(b) are mandatory).

In any event, the Estate is not entitled to an award of fees in this case. RAP 18.9(a) permits an award of fees if, considering the entire record, "the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ" and is so devoid of merit that

---

[6] *See* H.B. 1920, 63rd Leg. (Wash. 2013) (introduced February 18, 2013). There was nothing improper about the executive branch of state government permitting the co-equal legislative branch a reasonable opportunity to consider the fiscal and tax policy impact of the *Bracken* decision and to take corrective action should it choose to do so. Moreover, the Department had no authority to "promise" that the Legislature would not amend the law in a manner that would impact this litigation.

there is no possibility of reversal. *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hearings Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010). RCW 4.84.185 permits an award of fees when the action or defense "is one that cannot be supported by any rational argument on the law or facts." *Goldmark v. McKenna*, 172 Wn.2d 568, 582, 259 P.3d 1095 (2011). All doubts as to whether an appeal is frivolous are resolved in favor of the appellant. *Advocates for Responsible Dev.*, 170 Wn.2d at 580.

The Department's appeal is not devoid of merit, and the arguments presented are rational and supported by the law and by the undisputed facts. Consequently, the Estate is not entitled to an award of attorneys' fees under either RAP 18.9(a) or RCW 4.84.185.

III. CONCLUSION

This Court should reverse the order granting the Estate's motion for summary judgment and remand the case with instructions to enter judgment in favor of the Department.

RESPECTFULLY SUBMITTED this 18th day of October, 2013.

ROBERT W. FERGUSON
Attorney General

Charles Zalesky

DAVID M. HANKINS, WSBA # 19194
Senior Counsel
CHARLES ZALESKY, WSBA # 37777
Assistant Attorney General
OID No. 91027
Attorneys for Appellant

PROOF OF SERVICE

I certify that I served a copy of this document, via electronic email on the following:

Mark W. Roberts
Robert B. Mitchell
Peter A. Talevich
K&L Gates LLP
925 Fourth Ave., Suite 2900
Seattle, WA 98104-1158
Rob.mitchell@klgates.com
Mark.roberts@klgates.com
Peter.talevich@klgates.com
Dawnelle.patterson@klgates.com
Joyce.hamack@klgates.com
Suzanne.petersen@klgates.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of October, 2013, at Tumwater, WA.

Candy Zilinskas

Candy Zilinskas, Legal Assistant

THE LAW OF FEDERAL GIFT AND ESTATE TAXATION

BY

JACOB MERTENS
of the New York Bar

ASSISTANT EDITOR
ALVIN E. MOSCOWITZ
of the New York Bar

IN SIX VOLUMES

VOLUME ONE

LOFIT PUBLICATIONS, INC.
SAUGERTIES, N. Y.

APPENDIX A

II. Limitations on the Exercise by Congress of the Taxing Power

A. ESTATE AND GIFT TAXES AS INDIRECT TAXES

§ 1.02. ESTATE AND GIFT TAXES ARE IMPOSED ON THE PRIVILEGE OF TRANSFER. The modern estate and gift tax laws have been upheld as an excise tax on the privilege of transfer of property,[8]

life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[8] It is well settled that the federal estate tax is an excise tax requiring no apportionment, as is required where the statute imposes a direct tax on property. See Chase Nat'l Bank of City of N.Y., Ex'rs v. U.S., 278 U.S. 327, 49 S.Ct. 126, 73 L.Ed. 405 (1929), 7AFTR8844; Greiner, Exec. v. Lewellyn, 258 U.S. 384, 42 S.Ct. 324, 66 L.Ed. 676 (1922), 3AFTR3136; New York Trust Co., Ex'rs v. Eisner, 256 U.S. 345, 41 S.Ct. 506, 65 L.Ed. 963 (1921), 3AFTR3110. See also Mertens, LOFIT, § 4.08.

The Supreme Court first sustained the constitutionality of a federal estate tax in 1874 when the succession tax of 1864 was upheld against an attack on the ground that it was invalid as an unapportioned direct tax. Scholey v. Rew, 90 U.S. (23 Wall.) 331, 23 L.Ed. 99 (1874), 2AFTR2345. The 1864 tax had already been repealed at the time of this decision and the issue remained moot thereafter until 1894. In that year Congress passed an income tax act which contained a provision including as income property acquired by gift or inheritance. The Supreme Court declared this act unconstitutional as it applied to income from real estate. Pollock v. Farmers Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895), 3AFTR2557, on rehearing 158 U.S. 601, 15 S.Ct. 912, 39 L.Ed. 1108 (1895), 3AFTR2602(i.t.).

However, when, in 1898, another succession tax was passed, its constitutionality was upheld in the leading case of Knowlton, Ex'rs v. Moore, 178 U.S. 41, 20 S.Ct. 747, 44 L.Ed. 969 (1900), 3AFTR2684. In a lengthy and exhaustive opinion, the Court found that the arguments under which the 1894 Act had been declared unconstitutional applied only to the income tax features of the act, that the succession tax was not a direct tax, that it was uniform and that it did adhere to due process.

The reasoning of the Court in the Knowlton case was so definitive that when the modern estate tax was passed in 1916, its constitutionality was upheld practically without discussion. New York Trust Co., Ex'rs v. Eisner, supra. The fact that the 1916 Act was an estate tax whereas the prior acts had imposed succession taxes made no difference.

The answer to the question of the validity of the gift tax was simplified by the fact that the Supreme Court did not have to face the issue until the estate tax cases, referred to above, had been decided. When the case did thus avoiding the prohibition against direct taxes on property without apportionment. The distinction between a direct tax on property and an excise on the transfer of property is neither illusory nor inconsequential. It is so fundamental that it has been made the basis for sustaining a tax of the latter character even though the subject of the transfer itself was tax-exempt. Thus the Federal Government may impose an estate tax on a gross estate which consists wholly of tax-exempt state or municipal bonds.[10] Such transfer concept supports a tax, without apportionment, on the shifting from one to another of any power or legal privilege incidental to the ownership or enjoyment of property. The Supreme Court in holding that the gift tax did not constitute a direct tax has rejected the proposition that taxes on the exercise of all rights and powers incident to ownership amounted to a direct tax on the property itself; hence, a tax on the exercise of individual rights and powers is clearly distinguishable from a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his prop-

come up, the Court upheld the gift tax against the usual objections after finding that there was no "intelligible distinction", for constitutional purposes, between the estate and gift taxes. Bromley v. McCaughn, 280 U.S. 124, 50 S.Ct. 46, 74 L.Ed. 226 (1929), 8AFTR10251 (g.t.).

[10] Greiner v. Lewellyn, 258 U.S. 384, 42 S.Ct. 324, 66 L.Ed. 676 (1922), 3AFTR3136; U.S. Trust Co. of N.Y., Exec. v. Helvering, 307 U.S. 57, 59 S.Ct. 692, 83 L.Ed. 1104 (1939), 22AFTR327. See § 14.17.

In Landman v. Comm., 123 F(2d) 787 (10th Cir.1941), 28AFTR417, aff'g 42 BTA 958, cert.den. 315 U.S. 810, 62 S.Ct. 799, 86 L.Ed. 1209 (1942), the estate of a member of an Indian tribe granted certain tax exemptions was held subject to estate tax, since the latter fell "upon the transfer or shifting of the economic benefits and not upon the property of which the estate [was] composed." Consequently, there was not available in this instance "any constitutional immunity growing out of [agreements] between the United States and Creek Indian".

The statement in the text is in part from the opinion in 42 BTA 958, supra, in which it is also said:

"Likewise it was held in United States Trust Co. v. Helvering, 307 U.S. 57, that the proceeds of a War Risk Insurance policy payable to a deceased veteran's widow was subject to Federal estate tax. In that case the executor of the estate contended that the proceeds of such policy should not be included in the estate because of the provisions of the World War Veterans Act, 43 Stat. 607, which provided that 'insurance . . . shall be exempt from all taxation.'"

But compare Landman v. U.S., 71 F.Supp. 640 (Ct.Cl.1947), 35AFTR1331, erty.[11] The Supreme Court has said[12] that the power to impose estate taxes:

"extends to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property, and when any of these is occasioned by death, it may as readily be the subject of the federal tax as the transfer of the property at death",[13]

and that:

"The power to tax the whole necessarily embraces the power to tax any of its incidents or the use or enjoyment of them. If the property itself may constitutionally be taxed, obviously it is competent to tax the use of it . . . or the gift of

cert.den. 332 U.S. 815, 68 S.Ct. 153, 92 L.Ed. 392 (1947), and Landman v. U.S., (Ct.Cl.1945), 34AFTR1662, superseding 58 F.Supp. 836 (Ct.Cl.1945), 33AFTR 811.

[11] In Bromley v. McCaughn, 280 U.S. 124, 50 S.Ct. 46, 74 L.Ed. 226 (1929), 8AFTR10251 (g.t.), the Supreme Court stated: "Even if we assume that a tax levied upon all the uses to which property may be put, or upon the exercise of a single power indispensable to the enjoyment of all others over it, would be in effect a tax upon property, . . . and hence a direct tax requiring apportionment, that is not the case before us."

The same contention was made 10 years later in Dupont v. Deputy, 26 F. Supp. 773 (D.Del.1939), 22AFTR788 (g.t.), the taxpayer emphasizing what he felt to be the netlike incidences of taxes in connection with the ownership of stock: income taxes imposed on dividends and on capital gains following its sale, estate taxes on its devolution at death, and gift taxes on its transfer without consideration during life. The court summarily rejected this argument, citing Bromley v. McCaughn, supra, and added that the "controlling authority of that case" was not affected by a provision in the 1932 Act rendering the gift tax a lien upon the property given and the donee personally liable for payment to the extent of its value.

[12] Fernandez v. Wiener, 326 U.S. 340, 66 S.Ct. 178, 90 L.Ed. 116 (1945), 34AFTR276, reh.den. 327 U.S. 814, 66 S.Ct. 525, 90 L.Ed. 1038 (1946).

[13] A broader view was expressed in Chickering, Adm. v. Comm., 118 F(2d) 254 (1st Cir.1941), 26AFTR663, cert.den. 314 U.S. 636, 62 S.Ct. 70, 86 L.Ed. 511 (1941), to the effect that:

". . . the estate tax is not a direct tax upon the property; nor is it in a strict sense a tax upon a 'transfer' of the property by the death of the decedent. It is an excise tax upon the happening of an event, namely, death, where the death brings about certain described changes in legal relationships affecting property. The value of the property so affected is merely used as a factor in the measurement of the excise tax."

But this view has never been adopted by the Supreme Court.

it . . . . It may tax the exercise, non-exercise, or relinquishment of a power of disposition of property, where other important indicia of ownership are lacking."

In line therewith taxation of the proceeds of life insurance payable to third persons was upheld where decedent retained the power to change the beneficiary and to surrender or pledge the policy, since these incidents of ownership were, in effect, transferred on death.[14]

§ 1.03. DEVELOPMENT OF THE MODERN CONCEPT OF A TRANSFER. The courts in applying the indirect tax theory to particular provisions of the estate tax law have evidenced considerable ingenuity in expanding the term "transfer" to meet the necessities of each new challenge.[15] The earlier cases rested on the fact that there was a "passing" of property from decedent at death.[16] Such passing concept did not require, however, that the term "transfer" be limited to those situations where there was a transfer in the technical, local law sense of the term, since Congress can completely disregard the refinements of state property law and rely on more realistic classifications.[17] Thus local characteristics of dower,[18] joint tenancies and tenancies by the entirety,[19] community property,[20] and life insurance proceeds[21]

[14] Chase Nat'l Bank of City of N.Y., Ex'rs v. U.S., 278 U.S. 327, 49 S.Ct. 126, 73 L.Ed. 405 (1929), 7AFTR8844.

[15] Since taxes are based on the "fundamental and imperious necessity of all government", it is obvious that the Supreme Court will reach for theories, definitions, and apologia to avoid a successful constitutional attack. This task has been ably performed.

[16] See §§ 19.26, 23.17 discussing the "passing" requirement.

[17] Fernandez v. Wiener, supra, n.12. See especially the concurring opinion of Mr. Justice Douglas.

[18] See Mayer, Trustees v. Reinecke, 130 F(2d) 350 (7th Cir.1942), 29AFTR 1156, cert.den. 317 U.S. 684, 63 S.Ct. 257, 87 L.Ed. 548 (1942); Allen v. Henggeler, Adm., 32 F(2d) 69 (8th Cir.1929), 7AFTR8680, cert.den. 280 U.S. 594, 50 S.Ct. 40, 74 L.Ed. 642 (1929); Nyberg, Adm. v. U.S., 66 Ct.Cl. 153 (1928), 6AFTR7845, cert.den. 278 U.S. 646, 49 S.Ct. 82, 73 L.Ed. 559 (1928).

[19] See U.S. v. Jacobs, Exec., 306 U.S. 363, 59 S.Ct. 551, 83 L.Ed. 763 (1939), 22AFTR282, motion to set aside judgment denied 306 U.S. 620, 59 S.Ct. 640, 83 L.Ed. 1026 (1939); Dimock, Exec. v. Corwin, 306 U.S. 363, 59 S.Ct. 551, 83 L.Ed. 763 (1939), 22AFTR282 (companion cases); Gwinn v. Comm., 287 U.S. 224, 53 S.Ct. 157, 77 L.Ed. 270 (1932), 11AFTR1092; Phillips v. Dime

have been disregarded. The constitutionality of a federal taxing act is not dependent upon conformity with state law. If such were the case, then an admittedly constitutional federal act could be rendered unconstitutional by a subsequent state enactment.[22] None of the successful constitutional attacks on the federal estate and gift tax provisions cases affected the established freedom of Congress to ignore the local law of property in the absence of arbitrariness or capriciousness.[23] On the con-

---

Trust & Safe Deposit Co., Exec., 284 U.S. 160, 52 S.Ct. 46, 76 L.Ed. 220 (1931), 10AFTR459; Tyler, Jr., Adm'rs v. U.S., 281 U.S. 497, 50 S.Ct. 356, 74 L.Ed. 991 (1930), 8AFTR10912.

[20] See Fernandez v. Wiener, 326 U.S. 340, 66 S.Ct. 178, 90 L.Ed. 116 (1945), 34AFTR276, reh.den. 327 U.S. 814, 66 S.Ct. 525, 90 L.Ed. 1038 (1946); U.S. v. Rompel, Jr., Adm., 326 U.S. 367, 66 S.Ct. 191, 90 L.Ed. 137 (1946), 34AFTR 289, reh.den. 327 U.S. 814, 66 S.Ct. 526, 90 L.Ed. 1038 (1946); Beavers v. Comm., 165 F(2d) 208 (5th Cir.1947), 36AFTR514, cert.den. 334 U.S. 811, 68 S.Ct. 1017, 92 L.Ed. 1743 (1948) (g.t.); Charles L. Francis, 8 TC 822 (g.t.).

[21] See Chase Nat'l Bank of City of N.Y., Ex'rs v. U.S., 278 U.S. 327, 49 S.Ct. 126, 73 L.Ed. 405 (1929), 7AFTR8844; Lewellyn v. Frick, Ex'rs, 268 U.S. 238, 45 S.Ct. 487, 69 L.Ed. 934 (1925), 5AFTR5383, had earlier held contra, at least by inference; but see Kohl, Ex'rs v. U.S., 226 F(2d) 381 (7th Cir.1955), 47 AFTR2022, which involved the "payment of premiums" test which was then applied in determining what insurance should be included in the gross estate, and in which the tax in effect was held unconstitutional as imposing an unapportioned direct tax.

[22] Continental Ill. Bank & Trust Co., Exec. v. U.S., 65 F(2d) 506 (7th Cir. 1933), 12AFTR816, cert.den. 290 U.S. 663, 54 S.Ct. 77, 78 L.Ed. 573 (1933), rejecting the contention that a provision, requiring the inclusion of property in the gross estate only if subject to payment of administration expenses, violated the uniformity requirement because state laws vary as to whether real estate was subject to payment of administration expenses. See discussion in § 1.06 of the due process requirement.

[23] See (1) Nichols v. Coolidge, Ex'rs, 274 U.S. 531, 47 S.Ct. 710, 71 L.Ed. 1184 (1927), 6AFTR6758, holding Sec.402(c) of the 1919 Act unconstitutional as confiscatory and in violation of the Fifth Amendment insofar as it applied the possession and enjoyment section to transfers made prior to the act, where the transfers were not in fact testamentary or designed for tax evasion; (2) Untermyer v. Anderson, 276 U.S. 440, 48 S.Ct. 353, 72 L.Ed. 645 (1928), 6AFTR 7789, rev'g 18 F(2d) 1023 (2d Cir.1927), which had aff'd an unreported district court opinion (g.t.), holding retroactive application of the gift tax provisions of the 1924 Act invalid under the Fifth Amendment; and (3) Heiner v. Donnan, Ex'rs, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932), 10AFTR1609, holding unconstitutional, under the due process provisions of the Fifth Amendment, that part of Sec.302(a) of the 1926 Act which called for a conclusive pre-

trary, it has been held that the Tenth Amendment constituted no limitation on congressional power to tax even though there might be some incidental regulatory effect of such taxation on local community property systems.[24] The Fifth Amendment, which invalidates a tax which is so arbitrary and capricious as to constitute confiscation of property and hence a deprivation of property without due process of law, has similarly failed to restrain congressional power to disregard local characterizations in designating the objects to be taxed under the federal estate and gift tax law where the provision prevents avoidance.[25]

In accord with the view above expressed that congressional power is not limited to an imposition upon the "passing" of property, it is equally well settled with respect to the imposition of estate taxes that the power to tax is not limited to "substitutes for testamentary disposition", although the phrase may be relevant in interpreting the purpose and scope of a statutory provision. Applying this principle to property jointly held and tenancies by the entirety the Supreme Court has clearly indicated that the basis for the estate tax thereon was not that the creation of the tenancy was a substitute for a testamentary transfer, nor a taxable event which antedated the death of one of the joint owners, but rather the practical effect of death in bringing about a shift in economic interests permitting the legislature to fasten on that shift as the occasion for a tax.[26]

§ 1.04. — TRANSFER AS PRESENTLY DEFINED. The modern concept of a transfer, in the constitutional sense, is premised on the recognition that taxation is "eminently practical".[27] In the

sumption that gifts made within 2 years of decedent's death were made in contemplation of death.

[24] Fernandez v. Wiener, supra, n.20.

[25] See discussion of due process in § 1.06.

[26] Fernandez v. Wiener, supra, n.20.

[27] In Tyler, Jr., Adm'rs v. U.S., 281 U.S. 497, 50 S.Ct. 356, 74 L.Ed. 991 (1930), 8AFTR10912, the Court made the following statement:

"Taxation, as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such survivor."

process of ruling out the "shadowy and intricate distinctions of common law property concepts"[28] and artificial rules which delimit the title, rights, and powers of tenants by the entirety (or joint tenancies) at common law,[29] the courts have striven to develop a concept of the term "transfer" which was both broad and flexible. The courts have said[30] that the estate tax provision was constitutional if there was a transfer of economic benefit,

[28] See U.S. v. Jacobs, Exec., supra, n.19. This description as applied to the extent of congressional power to impose the tax is quite different from recourse to such common law precepts to determine the characteristics of such tenancies.

In this case it is also said: "By virtue of this feudal fiction of complete ownership in each of two persons, the surviving tenant by the entirety is conceived to be the recipient of all the property upon the death of the cotenant, and therefore—it is said—all the property can be taxed." As to this suggestion the Court says: "The constitutionality of an exercise of the taxing power of Congress is not to be determined by such shadowy and intricate distinctions of common law property concepts and ancient fictions."

The provisions with respect to dower are essentially aimed at those state decisions and local laws providing that dower interests are not includible in decedent's estate since they passed by operation of law and not by virtue of death. The dower provision was, therefore, inserted into the Code and the prior statutes to assure that the gross estate of a decedent would not be diminished by the value of dower or curtesy interests or statutory interests in lieu of dower or curtesy. See Estate of Harry E. Byram, 9 TC 1.

[29] Tyler, Jr., Adm'rs v. U.S., supra. See also Foster, Exec. v. Comm., 90 F(2d) 486 (9th Cir.1937), 19AFTR864, aff'd 303 U.S. 618, 58 S.Ct. 525, 82 L.Ed. 1083 (1938), 19AFTR1266, per curiam, reh.den. 303 U.S. 667, 58 S.Ct. 748, 82 L.Ed. 1124 (1938); O'Shaughnessy, Exec. v. Comm., 60 F(2d) 235 (6th Cir.1932), 11AFTR738, cert.den. 288 U.S. 605, 53 S.Ct. 397, 77 L.Ed. 980 (1933); Comm. v. Emery, Exec., 62 F(2d) 591 (7th Cir.1932), 11AFTR1340, rev'g and remanding 21 BTA 1038.

[30] The Supreme Court in Saltonstall v. Saltonstall, 276 U.S. 260, 48 S.Ct. 225, 72 L.Ed. 565 (1928), 7AFTR9303, in holding that a state inheritance tax could be levied on the value of an inter vivos trust set up by the decedent under which he retained the power to alter and revoke, said:

"So long as the privilege of succession has not been fully exercised it may be reached by the tax. [Citing cases.] And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices."

The fact that, under state law, a power of appointment is not part of the probate estate, and that its transmission is not technically a "transfer" under local concepts, does not limit the federal power to tax such property. The use, enjoyment or control at death,[31] and it is now accepted that a passing or transfer of economic benefit is not required, though it may, of itself, justify the imposition of the tax.

It is well settled that, as used in the section imposing a tax "on the transfer of the taxable estate",[32] the word "transfer", or the privilege which constitutionally may be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It includes the "transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another."[33] No formal transfer of title from the decedent to the transferee is required; a mere shifting of the economic benefits of property may be the real subject of the tax.[34] It also now seems settled that nothing need "pass" at death, in the testamentary sense. The Supreme Court, in upholding the taxation of the full value of property held by the decedent and his wife as tenants by the entirety, has suggested that when applied to a taxing act the amiable fiction of the common law that husband and wife are but one person and that accordingly by the death of one party to this unit no interest in

---

constitutional limitations as to due process and direct taxation are satisfied since there is under local law a shifting of economic benefits at the time of death even though there is no technical transfer under local law.

[31] U.S. v. Jacobs, Exec., supra, n.19.

See also U.S. v. Waite, Ex'rs, 33 F(2d) 567 (8th Cir.1929), 7AFTR9184, rev'g and remanding 29 F(2d) 149 (W.D.Mo.1927), 7AFTR8288, cert.den. 280 U.S. 608, 50 S.Ct. 157, 74 L.Ed. 651 (1930); Estate of Laura Nelson Kirkwood, 23 BTA 955; Mercantile-Commerce Nat'l Bank in St. Louis, Ex'rs, 21 BTA 1347; Mary S. Garrison, Ex'rs, 21 BTA 904; Mattie McMullin, Exec., 20 BTA 527. See also Kurz, Ex'rs v. U.S., 156 F.Supp. 99 (S.D.N.Y.1957), aff'd — F(2d) — (2d Cir.1958), per curiam.

[32] I.R.C.1954, Sec.2001.

[33] Chase Nat'l Bank of City of N.Y., Ex'rs v. U.S., supra, n.14. This principle has been applied in numerous cases involving annuities. See, e.g., Hanner v. Glenn, 111 F.Supp. 52 (W.D.Ky.1953), 43AFTR748, aff'd 212 F(2d) 483 (6th Cir.1954), 45AFTR1444; Estate of Eugene F. Saxton, 12 TC 569; Estate of Isidor M. Stettenheim, 24 TC 1169 (1955-158); Estate of Paul G. Leoni, 11 TC 1140 (Memo.). See § 20.24.

[34] Chase Nat'l Bank of City of N.Y., Ex'rs v. U.S., supra, n.14; Tyler, Jr., Adm'rs v. U.S., supra, n.27 (tenancy by entirety); Fernandez v. Wiener, supra, n.20 (community property).

property held by them as tenants by the entirety passes to the other to be quite unsubstantial and that the power of taxation being, as it is, a fundamental and imperious necessity of all government was not to be restricted by such legal fictions. Whether such power so construed has been properly exercised as to any specific statutory enactment is to be determined by the actual results brought about by the death rather than by a consideration of the artificial rules which limit the title, rights, and powers of tenants by the entirety at common law.[35]

The modern explanations have been narrowed down to two factors: that decedent had an interest in property at death,[36] and that death became the generating source of definite accessions to the survivor's property rights.[37] His death is the source

[35] See discussion in § 23.17 of cases of Comm. v. Estate of Church, 335 U.S. 632, 69 S.Ct. 322, 93 L.Ed. 288 (1949), 37AFTR480, and Estate of Spiegel v. Comm., 335 U.S. 701, 69 S.Ct. 301, 93 L.Ed. 330 (1949), 37AFTR459.

As to the application of the principle to a tenancy by the entirety see Tyler, Jr., Adm'rs v. U.S., supra, n.27.

[36] The dower provisions, it has been pointed out, are in no way a departure from the fundamental excise character of the federal estate tax: ". . . the statute does not tax the widow's dower, it merely uses it as a measure of that part of the deceased husband's interest in his realty which was beyond his testamentary control and which ceased at his death." Mayer, Trustees v. Reinecke, 130 F(2d) 350 (7th Cir.1942), 29AFTR1156, cert.den. 317 U.S. 684, 63 S.Ct. 257, 87 L.Ed. 548 (1942) (1921 Act, Sec.402(b)).

The courts in upholding the constitutionality of the dower provisions have pointed to the extensive rights (incidents of ownership) in such property determined under state law which ceased at the decedent's death and hence constituted a proper occasion for the levying of an estate tax. See, e.g., Allen v. Henggeler, Adm., 32 F(2d) 69 (8th Cir.1929), 7AFTR8680, cert.den. 280 U.S. 594, 50 S.Ct. 40, 74 L.Ed. 642 (1929), upholding the constitutionality of the 1924 Act, Sec.302(b). See also Nyberg, Adm. v. U.S., 66 Ct.Cl. 153 (1928), 6AFTR7845, cert.den. 278 U.S. 646, 49 S.Ct. 82, 73 L.Ed. 559 (1928), involving the 1921 Act, Sec.402(b).

[37] In Estate of Levy v. Comm., 65 F(2d) 412 (2d Cir.1933), 12AFTR791, involving certain insurance policies in which the insured retained no rights, the circuit court, in response to an argument of unconstitutionality as to their inclusion, cited other cases, stating: "By these cases, we think it is authoritatively established that the death of a tenant by the entirety results in the enjoyment of property rights in the survivor and furnishes the occasion for the imposition of the tax, if that event takes place after the passage of the taxing statute, regardless of when the tenancy was created."

As to the effect of a required consent of a person having an adverse interest of assurance to the beneficiaries that their rights are secure.[38] Both of these standards fall within the general principle that the underlying justification for imposing the estate tax on an inter vivos transfer is that it remains "incomplete" at death. The question is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result to be measured, in whole or in part, by the value of such rights.[39] The essential difference between the old and new rationalization of such justification is that incompleteness can be demonstrated either by ascertaining whether interests remained in the grantor or by determining whether the interests of the beneficiaries were enlarged, improved, or "ripened" at the time of the grantor's death. In demonstrating such incompleteness, substance rather than form or any particular device, is controlling.[40] Both factors had been previously expressed in several early constitutional cases,[41] although their influence was submerged by the fact that a number of the important decisions were rendered in cases which employed the "incomplete" test to determine whether a provision was arbitrarily retroactive under the Fifth Amendment.[42]

to an exercise of a power of revocation by decedent where there was a transfer prior to 1924, see §§ 25.42, 25.43.

[38] Porter, Ex'rs v. Comm., 288 U.S. 436, 53 S.Ct. 451, 77 L.Ed. 880 (1933), 12AFTR25.

[39] The position of the Supreme Court in the Church and Spiegel cases was anticipated in Tyler, Jr., Adm'rs v. U.S., 281 U.S. 497, 50 S.Ct. 356, 74 L.Ed. 991 (1930), 8AFTR10912, which uses the language stated in the text. See §§ 23.17, 23.20 discussing I.R.C.1954, Sec.2037, covering the reversionary interest test under the transfer to take effect at death section.

[40] Comm. v. Estate of Church, supra, n.35.

[41] Phillips v. Dime Trust & Safe Deposit Co., Exec., 284 U.S. 160, 52 S.Ct. 46, 76 L.Ed. 220 (1931), 10AFTR459; Third Nat'l Bank & Trust Co. of Springfield, Ex'rs v. White, 287 U.S. 577, 53 S.Ct. 290, 77 L.Ed. 505 (1932), 11AFTR 1128, per curiam, involving property held by the decedent and spouse as tenants by the entirety. See also § 1.07, and Gwinn v. Comm., 287 U.S. 224, 53 S.Ct. 157, 77 L.Ed. 270 (1932), 11AFTR1092, involving property held by decedent and her son as joint tenants.

[42] Whether the transfer is complete, or something remains to be gained by

An "incomplete" transfer concept is also applicable to the gift tax,[43] although such concept has been formulated almost entirely on the basis of statutory interpretation rather than constitutional power.[44]

In applying both the estate and gift tax provisions, a basic element is that decedent have an interest in property which is capable of transfer, otherwise there could be no transfer, and any asserted tax would fail to satisfy the constitutional requirements that the tax involve the privilege of transfer and be not arbitrary and capricious. It has been held[45] that a taxable gift results when an inheritance is renounced. It has been argued,[46] however, that such a tax is so arbitrary and capricious as to violate the Fifth Amendment. Setting aside the merits of imposing such a tax,[47] it would appear that the tax can withstand a constitutional attack.[48] In a renunciation of a valid testa-

---

the survivors or lost by the decedent, so that decedent's death may be taken as the event which justifies at that time the imposition of an estate tax, has also been a material issue in determining whether particular provisions are arbitrarily retroactive or capricious and prohibited by the Fifth Amendment. See § 1.07.

[43] The nature of a transfer under the gift tax provisions is discussed in §§ 34.29, 34.51 and 34.56.

[44] As in the case of the estate tax, state law concepts do not furnish the standards for the definition of a completed transfer.

[45] Hardenbergh v. Comm., 198 F(2d) 63 (8th Cir.1952), 42AFTR314, cert.den. 344 U.S. 836, 73 S.Ct. 45, 97 L.Ed. 650 (1952) (g.t.); William L. Maxwell, 17 TC 1589 (g.t.).

[46] Roehner and Roehner, "Renunciation as Taxable Gift—An Unconstitutional Federal Tax Decision", 8 Tax L.Rev. 289 (1953). Contra, Lauritzen, "Only God Can Make An Heir", 48 Northwestern U.L.Rev. 568 (1953).

[47] A.L.I. Tent.Draft No.11, Sec.X1007(h), specifically excludes the renunciation from the gift tax. See discussion therein, pp.31–40.

[48] In A.L.I. Tent.Draft No.11, at p.39, there is a good statement in support of this view and the distinctions that must be drawn:

"If it were proposed to impose a tax on a transfer of property which came about by a mere refusal to accept a gratuitous proffer of that property, which the profferor was under no obligation to deliver even if his proffer were accepted, an argument might be made against the constitutionality of such a tax, since the taxpayer never received the property or any attribute of ownership over it. The proffer never became a gift and there would be no tax on the intended donor. It would be incongruous to tax the intended donee in this situation, and here we need not even consider the constitutional aspects of this mentary power the necessary property interest is clearly present and the renunciation would qualify as a "transfer" for the purpose of determining whether the tax is indirect; there is nothing "arbitrary" in the due process sense of that term, particularly since renunciation is a voluntary act. That the imposition of a tax would not violate the necessity of "uniformity" is obviously not any longer a debatable question.

§ 1.05. —— SITUATIONS AKIN TO TRANSFERS AT DEATH. Although the estate tax "contemplation of death" statutory provision involves a complete and full transfer by decedent of all incidents

---

situation. But where there is a renunciation in the case of a gift which is complete as far as the donor is concerned, as in the case of a trust or testamentary situation, as contrasted with a situation where the donor still had the power to make the gift incomplete regardless of whether it was accepted or not, different considerations arise. Here, the tax would be imposed on the only affirmative act which could result in an effective gratuitous transfer to someone other than the person intended by the decedent or donor to be the first taker—and a strong argument in favor of the validity of this proposal can be made. There would be no immediate hardships involved if the intended first taker knew he would be subject to the tax, since he could then not renounce, pay the tax, and then give away the balance. However, there would be an effect on his subsequent tax bracket. Since the federal laws are not governed by local property law concepts of when title passes but with the realities of the exercise of control over a bundle of rights, all in all this proposal should be able to withstand a challenge as to its constitutionality. It would not seem unconstitutional to tax the exercise of control of the property here possessed by the intended first taker, even though he got into this position of control involuntarily.

"If the argument of unconstitutionality were to prevail where the person who renounced the property never received under local law any attribute of ownership over it other than the ability to renounce, then this result would preclude a rule which operated with reasonable uniformity throughout the United States. For the tax would then be able to withstand a challenge to its constitutionality only where, under the applicable state law, some attribute of ownership other than the power to renounce vested in the person, such as vesting of title or ability of his judgment creditors to reach the property despite his desire to reject it. But the consequent limitation of the tax to situations where the renouncing taxpayer had some such attribute of ownership over the renounced property under the applicable local law would hardly be a satisfactory result. It may well be that this result of non-uniformity in operation of the tax would have some supporting effect on the argument of constitutionality in the situation where no local law attributes of ownership were received. At any event, it is a consideration in favor of the rule adopted in the Draft."

WASHINGTON STATE ATTORNEY GENERAL

October 18, 2013 - 9:45 AM

Transmittal Letter

Document Uploaded: 449170-Reply Brief.pdf

Case Name: In re the Matter of the Estate of Arthur D. Phelps, Deceased

Court of Appeals Case Number: 44917-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): ________

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ________

Comments:

No Comments were entered.

Sender Name: Candy Zilinskas - Email: **revolyef@ATG.WA.GOV**

A copy of this document has been emailed to the following addresses:

ChuckZ@ATG.WA.GOV
DavidH1@ATG.WA.GOV
Rob.mitchell@klgates.com
Mark.roberts@klgates.com
Peter.talevich@klgates.com
JulieJ@ATG.WA.GOV