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I. INTRODUCTION

The Estate of Barbara Purdue (Estate) requested a refund of estate taxes it paid to the Department of Revenue. Before the Department could process the application for refund, the Estate filed a petition in superior court seeking a declaration that that the Estate is entitled to the refund.

The request for declaratory relief was filed under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A. TEDRA broadly provides for the resolution of an array of issues relating to trusts and estates. RCW 11.96A.020. However, state estate tax refunds are not one of the matters that falls within the scope of TEDRA. *See* RCW 11.96A.030(2). The Administrative Procedure Act (APA) provides the exclusive method for seeking judicial review if the Department denies an estate tax refund claim. *See* RCW 34.05.510.

Since the APA provides the sole means of judicial review, the order granting the petition for declaratory relief under TEDRA should be vacated. The case should be remanded for further proceedings under the APA.¹

¹ The Estate raised a claim for relief under the Administrative Procedure Act as part of its “Verified TEDRA Petition.” CP 6. Consequently, this case can go forward on the Estate’s APA claim. On remand, the Superior Court should consider the affirmative defenses raised by the Department, which the Court Commissioner and the Superior Court ignored in granting the Estate’s TEDRA petition.

II. ASSIGNMENT OF ERROR

The Superior Court erred when it upheld the Commissioner's order granting the Estate's TEDRA petition.

III. ISSUES PRESENTED

1. Did the Superior Court err when it upheld the Court Commissioner's order granting the Estate's refund claim under the Trust and Estate Dispute Resolution Act, when that Act provides procedures for the Department to collect unpaid estate taxes and does not apply to an estate tax refund claim?
2. Did the Superior Court err when it upheld the Court Commissioner's order granting the Estate's TEDRA petition when the Estate is not entitled to the refund it is seeking under the plain language of the Washington estate tax code as retroactively amended in June 2013?

IV. STATEMENT OF THE CASE

The Estate filed an estate tax refund claim with the Department on February 20, 2013. The Estate's refund claim pertained to Washington estate tax it paid in 2008 on qualified terminable interest property (QTIP) that was included in the Estate's taxable estate under Internal Revenue Code § 2044. The Estate claims that the refund is owed under the holding of *Clemency v. State*, 175 Wn.2d 549, 290 P.3d 99 (2012) (hereinafter "*Bracken*" or "*In re Estate of Bracken*").²

² Carol B. Clemency was one of the personal representatives of the estate of Sharon M. Bracken. For consistency and simplicity, the Department will refer to the case as "*Bracken*" or "*In re Estate of Bracken*" rather than its reported case name.

A. The Estate's Refund Claim And Procedural History.

Barbara Purdue died on November 27, 2007. CP 3, ¶ 5. At the time of her death, Ms. Purdue was a resident of the state of Washington and was living in King County, Washington. CP 69. In August 2008, the Estate made an estimated payment of Washington estate tax in the amount of \$1,788,134. CP 70. A few months later the Estate filed its Washington State Estate and Transfer Tax Return. CP 74. The return showed an overpayment of tax in the amount of \$71,913. CP 74, Part 2, line 13. The Department processed the return and issued a refund to the Estate of the \$71,913 overpayment plus interest. CP 128.

In January 2012, the Estate filed an amended Washington estate tax return seeking a refund of \$307,619. CP 142. The Department's review of that amended return was placed on hold pending the final resolution of the federal estate tax refund claim that was also filed in January 2012. *See* CP 158 ("We understand that the Washington Department of Revenue will not take any action on the refund claim until there is a final resolution of the federal refund claim . . . also filed on January 4, 2012"). That refund claim is still pending and is not at issue in this case.

On February 20, 2013, the Estate filed a second amended return. CP 170. The second amended return claimed a refund of \$1,314,336. CP 170, Part 2, line 13. In the cover letter submitted with its second amended

Washington estate tax return, the Estate claimed that it was entitled to “an immediate refund of \$1,068,336” of the \$1.314 million overpayment claimed on line 13 of the second amended return. CP 169. The Estate also attempted to impose a two-week time limit on the Department, stating that if “no such payment or written denial is received by March 6, 2013, the Estate will assume this request for immediate payment is denied.” *Id.*

The Department did not process or approved the Estate’s second amended return within the two-week timeframe the Estate attempted to unilaterally impose. On March 14, 2013, three weeks after filing its second amended return, the Estate filed a “Verified TEDRA Petition” in King County Superior Court naming the Department as the respondent. CP 1. The petition contained three causes of action: (1) a claim for a statutory writ of mandamus under RCW 7.16.160, (2) a claim for declaratory relief under the Trust and Estate Dispute Resolution Act, and (3) a claim for judicial review under the Administrative Procedure Act. *See* CP 5-6, ¶¶ 15-19 (mandamus), ¶¶ 20-22 (declaratory relief under TEDRA), and ¶¶ 23-27 (judicial review under the APA). The Estate noted its TEDRA claim for an ex parte hearing under King County Local Civil Rule 7(b)(3)(D).

The Department filed an answer to the Estate’s TEDRA petition. CP 57. In its answer, the Department asserted affirmative defenses to each of the three causes of action set out in the petition, including the defense that

the Estate's refund claim was time-barred under the four-year nonclaim statute set out in RCW 83.100.130(3). CP 61.³ The Department also filed an objection to the Estate's request for ex parte relief. CP 268. In its objection, the Department requested the Ex Parte and Probate Department to assign this case to a superior court judge pursuant to King County Local Civil Rule 40.1(b)(2)(D). CP 271-72. The Department also explained why the Trust and Estate Dispute Resolution Act did not apply to a claim for refund of Washington estate tax. CP 273-75.

On April 18, 2013, Court Commissioner pro tem Henry Judson granted in part the Estate's TEDRA petition, ordering the Department to refund the estate tax the Estate had claimed it overpaid. CP 364-66. The order specified that the Estate was entitled to relief with respect to its TEDRA cause of action, but not its other two causes of action. CP 366. The written order does not explain why the Court Commissioner found that the Trust and Estate Dispute Resolution Act applied. CP 364-66. Nor does the order address the affirmative defenses the Department raised in its answer to the Estate's TEDRA petition. *Id.*

³ RCW 83.100.130(3) provides in part that "[e]xcept as otherwise provided in subsection (4) of this section and RCW 83.100.090, no refund shall be made for taxes . . . paid more than four years prior to the beginning of the calendar year in which the refund application is made." The Estate filed its application for refund on February 20, 2013, seeking a refund of estate tax paid in August 2008. Because the estate taxes at issue were paid more than four years prior to January 1, 2013 (the beginning of the calendar year in which the application for refund was made), the refund claim is time-barred unless the Estate can establish that an exception to the 4-year nonclaim statute applies. To date, none of the Department's affirmative defenses have been adjudicated by any court.

The Department filed a timely motion seeking revision of the Court Commissioner's order pursuant to RCW 2.24.050 and King County Local Civil Rule 7(b)(8). CP 370. The Superior Court, the Honorable Dean Lum, denied the Department's motion. CP 431. The order denying the Department's motion did not provide any explanation or analysis. CP 431-33. Shortly thereafter the Department filed this timely appeal.

B. The Legislature's Retroactive Amendment Of The Estate Tax Code In June 2013.

The Estate's refund claim is based on the holding in *In re Estate of Bracken*, 175 Wn.2d 549, 290 P.3d 99 (2012). CP 169; CP 3, ¶ 10.

According to the Estate, *Bracken* required the Department to immediately refund the Washington estate tax the Estate had paid on QTIP included in the Estate's federal taxable estate under Internal Revenue Code § 2044. CP 169.

The Supreme Court issued its decision in *Bracken* on October 18, 2012, holding that the Legislature did not intend to impose estate tax on QTIP passing under Internal Revenue Code § 2044 at the death of the second spouse. *In re Estate of Bracken*, 175 Wn.2d 549, 290 P.3d 99 (2012). The Department filed a motion for reconsideration, which was denied on January 10, 2013.

The Legislature promptly amended the estate tax code in response to the *Bracken* decision. Laws of 2013, 2d Spec. Sess., ch. 2.⁴ That 2013 legislation (the “2013 Act”) amended the definitions of “transfer” and “Washington taxable estate” to expressly include QTIP in the Washington taxable estate of a decedent. *Id.* at § 2. The amended definitions are retroactive to “all estates of decedents dying on or after May 17, 2005.” *Id.* at § 9.⁵ The amendment applies to the estate of Barbara Purdue, who died in 2007.

V. ARGUMENT

A. Standard Of Review.

The actions of a court commissioner are subject to revision by the superior court. RCW 2.24.050; *State v. Smith*, 117 Wn.2d 263, 268, 814 P.2d 652 (1991); *see also* Const. art. IV, § 23. On appeal from an order denying revision of a court commissioner’s decision, the appellate court normally reviews the decision of the superior court, not the court commissioner’s ruling. *In re Estate of Wright*, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008). However, in this case the Superior Court issued no findings of fact or conclusions of law to support its decision, apparently

⁴ A copy of the 2013 session law is attached as Appendix A.

⁵ May 17, 2005, is the effective date of the 2005 legislation that changed the Washington estate tax from a pick-up tax to a stand-alone tax. *See* Laws of 2005, ch. 516, § 22. Thus, section 2 of the 2013 Act was expressly made retroactive to the effective date of the Washington stand-alone estate tax.

upholding the Court Commissioner's order for the reasons stated in that order. CP 424-25. Therefore, this Court reviews the Commissioner's order as the decision adopted by the Superior Court. *In re Interest of Mowery*, 141 Wn. App. 263, 274-75, 169 P.3d 835 (2007); *In re Marriage of Bralley*, 70 Wn. App. 646, 658, 855 P.2d 1174 (1993).

The primary issue in the Department's motion for revision of the Court Commissioner's order was whether TEDRA applies to an estate tax refund claim. CP 373-380. This is a question of statutory interpretation that is reviewed de novo. *Cf. Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009) (whether the Land Use Petition Act applies is reviewed de novo).

B. The Superior Court Improperly Granted Relief To The Estate Under The Trust And Estate Dispute Resolution Act Because That Act Does Not Apply To An Estate Tax Refund Claim.

The Superior Court acted without statutory authority when it granted the Estate's claim for a refund of estate taxes under the Trust and Estate Dispute Resolution Act. Title V of the Administrative Procedure Act provides the exclusive method for seeking judicial review when a taxpayer is aggrieved by a final action of the Department in denying an estate tax refund. *See* RCW 34.05.510. Consequently, the non-APA claims in the Estate's petition should have been dismissed. *See, e.g., Judd v. American Tel. and Tel. Co.*, 152 Wn.2d 195, 205, 95 P.3d 337

(2004) (dismissal of claim is proper where cause of action existed under APA and none of the exceptions in RCW 34.05.510 applies); *Washington Citizen Action v. Office of Ins. Comm'r*, 94 Wn. App. 64, 72, 971 P.2d 527, rev. denied 138 Wn.2d 1004, 984 P.2d 1035 (1999) (judicial review of agency action controlled by APA where exception in RCW 34.05.510(3) did not apply); *N.W. Ecosystem Alliance v. Ecology*, 104 Wn. App. 901, 919, 17 P.3d 697, rev'd in part on other grounds, *N.W. Ecosystem Alliance v. Forest Bd.*, 149 Wn.2d 67 (2002) (declaratory relief under RCW 7.24.020 is not available to challenge agency action reviewable under the APA). Unfortunately, the Department has not been afforded the opportunity to file a motion to dismiss the Estate's non-APA claims because this case was decided on an expedited basis under TEDRA and King County Local Civil Rule 7(b)(3)(D).

This Court should reverse the order granting the Estate's TEDRA petition and remand the matter to Superior Court for judicial review proceedings under the APA.

1. **The Trust and Estate Dispute Resolution Act does not supersede other statutes.**

The Trust and Estate Dispute Resolution Act provides for judicial and nonjudicial resolution of disputes involving trusts and estates. *In re Estate of Becker*, 177 Wn.2d 242, 246, 298 P.3d 720 (2013). The express

purpose of the Act was to consolidate all procedures for resolving trust and estate disputes into one chapter, and to promote prompt and economical resolution through nonjudicial means when possible. RCW 11.96A.010; *see also* RCW 11.96A.210, .260 (emphasizing nonjudicial resolution of disputes). The Act also (1) specifies that the superior courts of each county have original subject matter jurisdiction over the probate of wills and the administration of trusts, (2) identifies the parties who can sue in state court and the procedures to follow when seeking judicial resolution of a dispute, and (3) lists the “matters” that may be considered. RCW 11.96A.040 - .190 (original subject matter jurisdiction and procedures), .030(5) (defining “parties”), .030(2) (defining “matters”).

While TEDRA provides the superior courts with broad authority to probate wills and to administer trusts, the Act does not supersede or preempt other provisions of law. RCW 11.96A.080(2); *In re Estate of Kordon*, 157 Wn.2d 206, 212, 137 P.3d 16 (2006); *see also Henley v. Henley*, 95 Wn. App. 91, 97, 974 P.2d 362 (1999) (court not permitted to ignore the express language of a statute when exercising probate jurisdiction; decided under prior law); *see generally* 26B Cheryl C. Mitchell & Ferd H. Mitchell, *Washington Practice: Probate Law and Practice* § 2.32 (2012) (“it is essential to note that TEDRA provides authority to resolve issues only through procedures and agreements that

are not in violation of any statute”). Consequently, the broad authority conferred under TEDRA does not allow the superior courts to ignore other statutes. Likewise, TEDRA does not grant jurisdiction over issues and matters that are governed under different statutes, such as the state estate tax issue in this case.

2. **The Estate’s claim for relief under the Trust and Estate Dispute Resolution Act is barred by sovereign immunity.**

The Washington State Constitution provides that the Legislature “shall direct by law, in what manner, and in what courts, suits may be brought against the state.” Const. art. II, § 26. This constitutional provision allows the Legislature, if it chooses, to waive state sovereign immunity. This principle is succinctly stated in *State ex rel. Pierce County v. Superior Court*, 86 Wash. 685, 151 P. 108 (1915):

It is well settled that an action cannot be maintained against the state without its consent, and that the state, when it does so consent, can fix the place in which it may be sued, limit the causes for which the suit may be brought, and define the class of persons by whom it can be maintained. In other words, the state being sovereign, its power to control and regulate the right of suit against it is plenary; it may grant the right or refuse it as it chooses, and when it grants it may annex such conditions thereto as it deems wise, and no person has power to question or gainsay the conditions annexed.

Id. at 688. *See also Haddenham v. State*, 87 Wn.2d 145, 149, 550 P.2d 9 (1976) (“It is an established principle of jurisprudence in all civilized

nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State.”) (quoting *Beers v. Arkansas*, 61 U.S. 527, 529, 15 L. Ed. 991 (1857)).

It is also well established that a State, absent its consent, may not be enjoined in matters relating to tax administration. This is so because “the several States chiefly rely [upon their taxing powers] to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.” *Dows v. City of Chicago*, 78 U.S. 108, 110, 20 L. Ed 65 (1871). As a result, actions against the taxing power of the State must be “exercised in the manner provided by the statute.” *Lacey Nursing Ctr., Inc. v. Dep’t of Revenue*, 128 Wn.2d 40, 52, 905 P.2d 338 (1995) (quoting *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 575, 403 P.2d 880 (1965)).

The principle of sovereign immunity, particularly in the context of state tax administration, is vitally important in this case because the Estate is attempting to bring an action for declaratory relief against the Department of Revenue relating to a dispute over the proper amount of Washington estate tax owed by the Estate. While the Estate could

proceed under the APA—and in fact has asserted a claim for relief under the APA in this case—it is not permitted to pursue any relief under the Trust and Estate Dispute Resolution Act. TEDRA simply does not allow the Estate to sue the Department in an effort to obtain declaratory relief ordering the Department to issue an estate tax refund.

Whether the Legislature has waived sovereign immunity by statute is a question of statutory interpretation. *Locke v. City of Seattle*, 162 Wn.2d 474, 480, 172 P.3d 705 (2007). The waiver must be expressly set out by the statute, and the express waiver may not be enlarged by implication. *See Linville v. State*, 137 Wn. App. 201, 208, 151 P.3d 1073 (2007) (Legislature must expressly waive sovereign immunity by statute); *Klickitat County v. State*, 71 Wn. App. 760, 765, 862 P.2d 629 (1993) (express waiver of state immunity is strictly construed and not enlarged beyond what the statutory language requires.); *Odessa Trading Co. v. Federal Crop. Ins. Corp.*, 6 Wn. App. 423, 425, 493 P.2d 809 (1972) (“Waivers of sovereign immunity from suit are strictly construed”); *see also United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L. Ed. 2d 52 (1969) (a waiver of immunity “cannot be implied but must be unequivocally expressed”).

When the Legislature has waived state sovereign immunity by statute in various contexts, it has done so in clear and express terms. *See*

RCW 4.92.090 (express waiver of sovereign immunity in tort action); RCW 4.56.115 (express waiver of sovereign immunity from post-judgment interest on tort claim). TEDRA contains no express waiver of state sovereign immunity. As a result, the Estate has no right to bring an action for declaratory relief against the State Department of Revenue under TEDRA.

Furthermore, even if a waiver of sovereign immunity could be implied by the context of a statute or act, there is nothing in the Trust and Estate Dispute Resolution Act to indicate that the Legislature intended to waive state immunity by implication. State estate taxes are not listed as a “matter” subject to review under TEDRA. *See* RCW 11.96A.030(2) (defining “matter.”). In addition, neither the State of Washington nor any agency of the State is listed as a “party” or as a “person interested in the estate or trust” as those terms are defined in RCW 11.96A.030(5) and .030(6). *Compare* RCW 7.04A.010(6) (expressly defining “person” under the Uniform Arbitration Act to include “government; governmental subdivision, agency, or instrumentality”) *and* RCW 26.21A.010(14) (expressly defining “person” under the Uniform Interstate Family Support Act to include “government; governmental subdivision, agency, or instrumentality”) *with* RCW 11.96A.030(5) and .030(6) (government or governmental agency not listed as a “party” or “person interested in the

estate or trust”). In short, there is nothing within the four corners of the Trust and Estate Dispute Resolution Act that expresses the intent of the Legislature to waive state sovereign immunity. As a result, TEDRA does not create a basis for judicial review of the Estate’s refund claim.

3. **RCW 83.100.180, which incorporates by reference portions of TEDRA into the Washington estate tax chapter, does not apply because the Department is not pursuing collection action against the Estate.**

While TEDRA does not apply in this case, that is not to suggest that TEDRA never applies in an estate tax controversy. The Washington Legislature has specifically incorporated portions of the Trust and Estate Dispute Resolution Act into the Washington estate tax chapter through RCW 83.100.180. That provision is part of the collection remedies available to the Department under RCW 83.100.150 through .190 when an estate has failed to pay the proper amount of estate tax. Those sections provide that the Department may seek to collect unpaid estate tax by filing “findings” with the superior court in which the estate is being probated. RCW 83.100.150. After notice is given to persons interested in the proceedings, RCW 83.100.160, the estate is permitted to file “objections” to the Department’s findings. RCW 83.100.180. After the findings and objections are filed, the matter “shall be noted for trial

before the court and a hearing had thereon as provided for hearings in RCW 11.96A.080 through 11.96A.200.”

Under the plain language of the statute, specific provisions of the Trust and Estate Dispute Resolution Act are triggered only when the Department files “findings” with the superior court. RCW 83.100.150. By filing findings as a precondition to seeking judicial enforcement of an estate tax liability, the Department is initiating a lawsuit against an estate for collection of taxes. It is undisputed that the Department has not filed findings in this case and is not seeking to collect any unpaid estate tax. As a result, the Department has not initiated a lawsuit and has not triggered the TEDRA hearing procedures the Legislature incorporated in the estate tax code.

The fact that the Legislature incorporated only portions of TEDRA into RCW 83.100.180 is telling. Had the Legislature intended, by enacting the Trust and Estate Dispute Resolution Act, to unconditionally waive state sovereign immunity in all actions involving state estate taxes, there would be no need to incorporate only certain portions of TEDRA into RCW 83.100.180. Moreover, if TEDRA by its own force allows judicial review of estate tax disputes even though RCW 83.100.180 does not apply, the specific incorporation of portions of TEDRA into RCW 83.100.180 would have been unnecessary. “[T]he legislature does not engage in unnecessary

or meaningless acts, and we presume some significant purpose or objective in every legislative enactment.” *John H. Sellen Constr. Co. v. Dep’t of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976).

4. **Declaratory relief under the Trust and Estate Dispute Resolution Act is not available because the Estate has an available remedy under the APA.**

Even if the Trust and Estate Dispute Resolution Act could be construed as an unconditional waiver of state sovereign immunity in all actions involving state estate taxes, the Estate would still be precluded from seeking declaratory relief under TEDRA since it has an available remedy under the APA.

It is well established that declaratory relief is generally not available where a statutory method for determining a particular type of case has been provided. *Stafne v. Snohomish County*, 174 Wn.2d 24, 39, 271 P.3d 868 (2012); *Mulhausen v. Bates*, 9 Wn.2d 264, 270, 114 P.2d 995 (1941). This principle is designed to prevent a party from seeking declaratory relief as a means of circumventing the special statutory remedy made available by the Legislature. Thus, for example, declaratory relief under the Uniform Declaratory Judgments Act is not available to challenge agency action reviewable under the APA. *N.W. Ecosystem Alliance v. Ecology*, 104 Wn. App. 901, 919, 17 P.3d 697 (2001), *rev’d in part on other grounds*, *N.W. Ecosystem Alliance v.*

Forest Bd., 149 Wn.2d 67, 66 P.3d 614 (2002). The same principle holds true in this case. Because the Estate has an available remedy under the APA, it must proceed under that special statutory remedy.

Title V of the APA “establishes the *exclusive means* of judicial review of agency action” RCW 34.05.510 (emphasis added).⁶ Because the APA establishes the exclusive means for review of agency action in the context of the Washington estate tax, declaratory relief under TEDRA or any other statute is not available. *N.W. Ecosystem Alliance, supra*. See also *Richards v. City of Pullman*, 134 Wn. App. 876, 883, 142 P.3d 1121 (2006) (declaratory judgment action properly dismissed where Land Use Petition Act provides the exclusive means of judicial review of final land use decisions); *Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 105-06, 38 P.3d 1040 (2002) (same). Moreover, a court commissioner is not authorized to decide an action under the APA. See RCW 2.24.040 (setting out the power, authority, and jurisdiction of court commissioners). Thus, the Estate’s APA claim must be decided by the superior court sitting in its appellate capacity, not by a court commissioner.

⁶ The APA contains an exception for cases where “de novo review or jury trial review of agency action is expressly authorized by provision of law.” RCW 34.05.510(3). That exception does not apply with respect to the Washington estate tax. Compare chapter 83.100 RCW (Washington estate tax – no provision allowing de novo judicial review) with RCW 82.32.180 (de novo refund action authorized for most Washington excise taxes).

Where the Legislature has made a remedy available—in this case APA review challenging the denial of an estate tax refund claim—a plaintiff cannot complain that the available remedy is not to his or her liking. *Systems Amusement, Inc. v. State*, 7 Wn. App. 516, 518-19, 500 P.2d 1253 (1972). And it does not matter that the person seeking review has not effectively invoked the jurisdiction of the superior court under the APA. *See generally Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 357-362, 271 P.3d 268 (2012) (petitioner is not entitled to advance alternative remedies merely because it failed to timely seek judicial review under the APA). More importantly, a plaintiff cannot seek declaratory relief in an effort to circumvent the remedy the Legislature has established. The Estate's claim to the contrary is not supported by the law and should be rejected.

C. Even If The Trust And Estate Dispute Resolution Act Did Apply To The Estate's Refund Claim, The Superior Court's Order Should Be Reversed Because The Controlling Law Has Changed.

As explained above, TEDRA does not apply to a claim for refund of Washington estate tax. But even if TEDRA did apply, the Superior Court's decision adopting the Court Commissioner's order is incorrect as a matter of law because the controlling law has changed. Under the Washington estate tax code as amended in June 2013, the Estate is not

entitled to a refund of the Washington estate tax it paid on the value of QTIP passing under Internal Revenue Code § 2044.

1. **Overview of the federal estate tax.**

To better appreciate the legal arguments presented below, it is helpful to have a general understanding of both the federal estate tax and the Washington estate tax. The federal estate tax is set out in subtitle B, chapter 11, of the Internal Revenue Code.⁷ The tax is “imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.” I.R.C. § 2001(a). The term “transfer” is construed broadly and “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). Thus, a “transfer” for federal estate tax purposes is not limited to a formal conveyance of property under state property law. Rather, Congress may include within the estate tax base property that was not formally conveyed on the death of the decedent. *Id.*

The federal estate tax is computed on the “taxable estate” of the decedent. I.R.C. § 2001(b). In computing the taxable estate, a deduction is allowed under Internal Revenue Code § 2056 for “the value of any interest in property which passes or has passed from the decedent to his

⁷ All references to the Internal Revenue Code will be to the Internal Revenue Code as amended as of January 1, 2005.

surviving spouse.” I.R.C. § 2056(a). The deduction is limited by Internal Revenue Code § 2056(b), which provides that “terminable interests” in property—such as a life estate or other interest that will lapse due to the passing of time or the occurrence or non-occurrence of an event—do not qualify for the marital deduction.

As originally enacted, the marital deduction was limited to fifty percent of the decedent’s separate property passing outright to the surviving spouse. Transfers of “terminable interest” property such as a life estate did not qualify. Although limited both in the amount that could be deducted and the type of property interest that qualified, the deduction provided an important estate planning tool for married couples. Separate property passing outright to the surviving spouse, up to the fifty percent limitation, was excluded from the estate tax base of the first spouse to die.

In 1981 Congress significantly changed the marital deduction by making the deduction unlimited in amount and by creating a special category of terminable interest property—so-called “qualified terminable interest property”—that would qualify for the deduction. *See In re Estate of Bracken*, 175 Wn.2d at 577 n.4 (Madsen, C.J., concurring/dissenting) (quoting Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, States and Gifts*, 1997 WL 440177 at *17). Thus, Congress

created an “exception-to-the-exception” that permitted certain terminable interest property to pass untaxed to the surviving spouse.

In order for QTIP to qualify for the marital deduction, the property must pass from the decedent to the surviving spouse, the surviving spouse must have the right to receive the income from the property for life, and the executor of the decedent’s estate must make an election to have the property treated as QTIP. I.R.C. § 2056(b)(7)(B)(i). While the estate of the first spouse to die gets to claim the deduction, any QTIP still remaining when the surviving spouse dies is included in his or her gross estate. I.R.C. § 2044. In this way, QTIP does not escape taxation entirely. Instead, the estate tax applies to the remaining QTIP that passes when the surviving spouse dies. I.R.C. § 2044(c).

2. Overview of the Washington estate tax.

The Washington estate tax was enacted in 1981 as a result of Initiative No. 402. Laws of 1981, 2d Ex. Sess., ch. 7. Prior to that, Washington imposed an inheritance tax. Laws of 1901, ch. 55. The Washington estate tax, as enacted in 1981, imposed a tax equal to the state death tax credit allowed under Internal Revenue Code § 2011. State estate taxes of this nature are commonly referred to as “pick-up” taxes.

In June 2001, Congress enacted the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA).⁸ That act reduced the amount of the state death tax credit by 25% each year beginning in 2002, resulting in the total elimination of the credit by 2005. This reduction and eventual elimination of the state death tax credit had a serious impact on states like Washington that employed a pick-up tax. *See Estate of Hemphill v. Dep't of Revenue*, 153 Wn.2d 544, 548, 105 P.3d 391 (2005) (“EGTRRA essentially ends the estate tax revenue sharing between the federal government and states.”). To keep the Washington tax viable, the Legislature needed to establish a “stand-alone” tax that was not dependent on the federal death tax credit mechanism. *Id.* at 551. The Legislature accomplished this in 2005 when it amended the Washington estate tax to change from a pick-up tax to a stand-alone tax. *See* Laws of 2005, ch. 516.

As amended in 2005, the Washington tax is imposed “on every transfer of property located in Washington.” RCW 83.100.040(1) (2012). “Property” is defined as “property included in the gross estate.” RCW 83.100.020(8) (2012). “Gross estate” is defined as “‘gross estate’ as defined and used in section 2031 of the Internal Revenue Code.” RCW 83.100.020(5) (2012). Thus, while the 2005 Act established a stand-alone estate tax, the tax was still tied to a large extent to the federal estate tax

⁸ Pub. L. No. 107-16, 115 Stat. 73 (2001).

code. *See In re Estate of Bracken*, 175 Wn.2d at 581 (Madsen, C.J., concurring/dissenting).

The tax is computed at a graduated rate on the value of a decedent's "Washington taxable estate." Laws of 2013, 2d Spec. Sess., ch. 2, § 4 (amending RCW 83.100.040(2)(a)). The term "Washington taxable estate" is defined as "the federal taxable estate" less specified additions and deductions. *Id.* at § 2 (amending and renumbering RCW 83.100.020(13) (2012)). "Federal taxable estate" is defined as "the taxable estate as determined under chapter 11 of the Internal Revenue Code" without regard to the termination of the federal estate tax or the deduction for state death taxes. RCW 83.100.020(14) (2012). By using "federal taxable estate" as the starting point for computing the "Washington taxable estate" of a decedent, 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." *In re Estate of Bracken*, 175 Wn.2d at 583 (Madsen, C.J., concurring/dissenting).

As with the federal estate tax, the Washington tax is imposed on the *transfer* of property. Under the Washington estate tax code, "transfer" means a "'transfer' as used in section 2001 of the Internal Revenue Code and

includes any shifting upon death of the economic benefit in property or any power or legal privilege incidental to the ownership or enjoyment of property.” Laws of 2013, 2d Spec. Sess., ch. 2, § 2 (amending and renumbering RCW 83.100.020(11) (2012)). Thus, the Legislature has clearly established that a “transfer” under the Washington estate tax code is not limited to formal conveyances of property owned by the decedent. Rather, the Washington tax—like its federal counterpart—extends to the “creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property.” *Wiener*, 326 U.S. at 352.

3. ***Bracken* is no longer controlling authority.**

Prior to the 2013 amendment to the Washington estate tax, the tax as construed by the Supreme Court in *Bracken* was limited to only “real” transfers of property occurring at death. *In re Estate of Bracken*, 175 Wn.2d at 570-71. *Bracken* involved a claim by the estates of Sharon Bracken and Barbara Nelson that QTIP passing under Internal Revenue Code § 2044 must be excluded in computing the Washington stand-alone estate tax. The Supreme Court agreed, holding that the Legislature did not intend to include QTIP in the Washington estate tax computation when it amended the tax in 2005 to change from a pick-up tax to a stand-alone tax.

As part of its analysis, the Supreme Court reasoned that the “real” transfer of QTIP occurs when the first spouse dies and his or her estate elects to claim the QTIP deduction under Internal Revenue Code § 2056(b)(7). *Bracken*, 175 Wn.2d at 572-74. The Court considered the transfer occurring at the death of the second spouse, when the spouse’s life estate is extinguished and the property passes to the remainder beneficiaries under Internal Revenue Code § 2044, as merely a “deemed” or “fictional” transfer created by Congress. *Id.* The Court then held that the Legislature intended to tax only real transfers when it amended the Washington estate tax in 2005 to change from the former pick-up tax to the stand-alone estate tax. *Id.* at 574. To achieve what it perceived the Legislature intended, the Court judicially modified the Washington estate tax code to exclude QTIP from the Washington tax when the second spouse dies. *Id.* at 570-71. Specifically, the Court ruled that the federal definition of “taxable estate,” which includes the value of QTIP passing when the second spouse dies, “cannot be used without a modification necessary to conform to the [2005] Act: the definition must be read to exclude items that are not transfers.” *Id.*

The Legislature learned of the *Bracken* decision early in the 2013 legislative session and was troubled by the Supreme Court’s construction of the Washington tax. Taxes collected from the Washington estate tax are deposited into the Education Legacy Trust Account and are used to support

K-12 public schools and institutions of higher education. *See* RCW 83.100.220, .230. The fiscal impact of the *Bracken* decision was estimated to be a loss of approximately \$160.3 million in the 2013-2015 biennium. *See* Fiscal Note for EHB 2075.⁹ In light of the Supreme Court’s decision in *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), the Legislature had good reason to be concerned with the holding in *Bracken*.¹⁰ By excluding QTIP from the reach of the Washington estate tax, the Supreme Court made the State’s constitutional obligation to “make ample provision for the education of all children” more difficult. Const. art. IX, § 1.

In addition, the holding in *Bracken* created a sizable loophole that only married couples could exploit. The Legislature understandably was concerned by that disparate tax treatment. *See* Laws of 2013, 2d Spec. Sess., ch. 2, § 1(4) (legislative finding that excluding QTIP from the Washington estate tax creates an inequity between married couples and unmarried individuals).

On June 13, 2013, the Legislature addressed the fiscal and tax policy issues raised by the *Bracken* decision by amending the Washington estate tax to make clear that the tax *does* apply to QTIP passing at the

⁹ Copy attached as Appendix B.

¹⁰ In *McCleary*, the Supreme Court held that the State is failing to meet its paramount constitutional duty to amply provide for the education of all children, and it ordered the Legislature to develop a basic education program that meets the constitutional standard and to “fully fund that program through regular and dependable tax sources.” *McCleary v. State*, 173 Wn.2d 477, 546-47, 269 P.3d 227 (2012).

death of the second spouse. Laws of 2013, 2d Spec. Sess., ch. 2. The 2013 Act provides that a “transfer” subject to the Washington tax is broadly defined and that QTIP is properly included in the “Washington taxable estate.” *Id.* at § 2 (amending the definitions of “transfer” and “Washington taxable estate”). These key amendments to the estate tax code apply retroactively to estates of decedents dying on or after May 17, 2005. *Id.* at § 9; *see also id.* at § 14 (emergency clause).

Under the current law as amended by the 2013 Act, the Estate is simply not permitted to deduct QTIP in computing its Washington estate tax liability. Moreover, it is the current law, not the prior law, which applies in this case. As explained in *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142 (2007), the Legislature may pass a law that directly impacts a case pending in Washington courts. *Id.* at 304. And it is the obligation of the appellate court to apply that new law in deciding the case “even if the new law alters the outcome.” *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 627, 90 P.3d 659 (2004) (citing *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 226-27, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995)).

4. **The 2013 Act was a valid exercise of legislative authority.**

The 2013 Act was a valid exercise of the Legislature’s authority to enact law establishing the tax policy of this state and to amend existing laws. The Legislature’s power to enact and amend the laws of this state “is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions.” *Washington State Farm Bureau*, 162 Wn.2d at 300-01 (quoting *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004)). Moreover, courts give “great deference” to the legislative process and will invalidate a statute only when the court is “fully convinced, after a searching legal analysis, that the statute violates the constitution.” *School Dists. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 606, 244 P.3d 1 (2010) (quoting *Island Cnty. v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998)).

Legislation affecting economic matters is presumed to be constitutional, even when retroactive. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976). Simply put, the strong deference the judiciary accords to the co-equal legislative branch in the field of economic policy “is no less applicable when that legislation is applied retroactively.” *Pension Benefit Guar. Corp. v. R.A.*

Gray & Co., 467 U.S. 717, 729, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984).

The 2013 legislation at issue in this case was constitutional and should be upheld.

a. The 2013 Act complies with substantive due process.

Retroactive tax legislation enacted by a state is occasionally challenged under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. As a matter of “substantive” due process, the Due Process Clause protects private persons from arbitrary and irrational legislation. *United States v. Carlton*, 512 U.S. 26, 30, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994).¹¹ However, the United States Supreme Court repeatedly upholds retroactive tax legislation against due process challenges. *Id.* As explained in *Carlton*:

The retroactive aspects of legislation, as well as the prospective aspect, must meet the test of due process, and the justification for the latter may not suffice for the former. . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

¹¹ Article I, section 3, of the Washington Constitution provides equal, but not greater, due process protections than those provided by the Fourteenth Amendment of the United States Constitution. See *In re Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001). Consequently, Washington courts analyze due process challenges under the Fourteenth Amendment. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216 n.2, 143 P.3d 571 (2006).

Id. at 31 (internal quotation marks omitted) (quoting *Pension Benefit Guar. Corp.*, 467 U.S. at 730).

Under *Carlton*, courts uphold the retroactive application of tax legislation if it serves a legitimate legislative purpose furthered by rational means. *Id.* at 30-31. The rational basis standard applied in *Carlton* is a deferential standard, and once it is met “judgments about the wisdom of [the subject] legislation remain within the exclusive province of the legislative and executive branches.” *Carlton*, 512 U.S. at 31.¹²

Washington courts apply the same rational basis standard, as demonstrated in *W.R. Grace & Co. v. Dep’t of Revenue*, 137 Wn.2d 580, 602-03, 973 P.2d 1011 (1999). In that case, a group of corporate taxpayers argued that retroactively applying the system of multiple activities B&O tax credits provided in RCW 82.04.440 violated their due process rights. The Legislature had enacted the tax credit mechanism in 1987 to replace the former multiple activities tax exemption that the United States Supreme Court invalidated on constitutional grounds. *See Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 483 U.S. 232, 107 S. Ct. 2810,

¹² The United States Supreme Court has only rarely invalidated retroactive tax legislation on due process grounds, and it has not done so since the 1920s. *See Nichols v. Coolidge*, 274 U.S. 531, 47 S. Ct. 710, 71 L. Ed. 1184 (1927); *Blodgett v. Holden*, 275 U.S. 142, 48 S. Ct. 105, 72 L. Ed. 206 (1928); *Untermeyer v. Anderson*, 276 U.S. 440, 48 S. Ct. 353, 72 L. Ed. 645 (1928). While these *Lochner*-era cases have not been overruled, they are applicable only to situations involving the creation of a wholly new tax. When the issue is the constitutionality of amendments to *existing* tax laws, as in this case, “their authority is of limited value.” *Carlton*, 512 U.S. at 34.

97 L. Ed. 2d 199 (1987). The taxpayers filed actions seeking full refunds of taxes paid as early as January 1980, almost eight years prior to the challenged statutory amendment. 137 Wn.2d at 588-89. The taxpayers argued that retroactive application of the 1987 amendment violated substantive due process because it “reach[ed] back too far in time.” *Id.* at 600.

The Supreme Court squarely rejected the taxpayers’ due process argument. Relying on *Carlton*, the Court concluded that tax legislation will satisfy due process constraints if the retroactive application of the statute is justified by a rational legislative purpose. *Id.* at 603. Moreover, the Court noted that “[t]he United States Supreme Court has not set a specific duration to the retroactive effect of tax legislation, preferring to rely on legislative decisions in this context.” *Id.*

The 2013 amendment to the Washington estate tax code meets the rational basis standard applied in *Carlton* and *W.R. Grace*. First and foremost, the 2013 Act served a legitimate purpose. The Legislature sought to avoid an unexpected loss of revenue to public school funding brought about by the Supreme Court’s holding in *Bracken*. Preventing unanticipated revenue losses is a legitimate legislative purpose. *Carlton*, 512 U.S. at 32; *see also Montana Rail Link, Inc. v. United States*, 76 F.3d 991, 994 (9th Cir. 1996) (same). As the Michigan Court of Appeals

recently explained, “[a] legislature’s action to mend a leak in the public treasury or tax revenue—whether created by poor drafting of legislation in the first instance or by a judicial decision—with retroactive legislation has almost universally been recognized as ‘rationally related to a legitimate legislative purpose.’” *General Motors Corp. v. Dep’t of Treasury*, 803 N.W.2d 698, 710 (Mich. Ct. App. 2010) (quoting *Carlton*, 512 U.S. at 35).

In addition, the Legislature employed rational means to “mend the leak” created by the Supreme Court’s construction of the Washington estate tax as applied to QTIP. The Legislature enacted the retroactive fix during the 2013 legislative session, which was the first opportunity to address the issue after the Supreme Court’s decision in October 2012. In addition, the 2013 Act did not create a wholly new tax that the Estate and others could not have anticipated. Instead, the Legislature amended the statutory definitions of “transfer” and “Washington taxable estate” to make the Washington estate tax treatment of QTIP consistent with the federal treatment and to conform those key definitions to the perceived intent of the Legislature when it amended the Washington estate tax in 2005. *See* Laws of 2013, 2d Spec. Sess., ch. 2, § 1(5). Finally, the

Legislature limited the retroactive reach of the Act to May 17, 2005, which was the effective date of the 2005 Act.¹³

As noted, section 2 of the 2013 Act has a retroactive reach of only eight years, to May 17, 2005. Courts throughout the United States have approved the retroactive application of tax statutes for similar and much longer periods. See *W.R. Grace*, 137 Wn.2d at 586-87 (more than seven years); *Montana Rail Link*, 76 F.3d at 993-95 (seven years); *Maples v. McDonald*, 668 So.2d 790, 792-93 (Ala. Civ. App. 1995) (more than eight years); *Enterprise Leasing Co. v. Arizona Dep't of Revenue*, 211 P.3d 1, 5 (Ariz. Ct. App. 2008) (six years); *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 400-01 (Ky. 2009) (nine years); *King v. Campbell Cnty.*, 217 S.W.3d 862, 866-67 (Ky. Ct. App. 2006) (nineteen years); *General Motors*, 803 N.W.2d at 710 (five years); *Moran Towing Corp. v. Urback*, 768 N.Y.S.2d 33, 1 A.D.3d 722 (2003) (thirteen years); *Atlantic Richfield Co. v. Oregon Dep't of Revenue*, 14 Or. Tax 212 (Or. Tax Ct. 1997) (eight years). Similarly, the United States Supreme Court upheld retroactive economic legislation going back six years in *General Motors Corp. v. Romein*, 503 U.S. 181, 191-92, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992).

¹³ Only sections 2 and 5 of the 2013 Act apply retroactively. See Laws of 2013, 2d Spec. Sess., ch. 2, § 9. Section 5 specifies the manner in which the Washington taxable estate is to be computed if the first spouse to die had made a separate Washington QTIP election under RCW 83.100.047. This case does not involve a separate Washington QTIP election, so section 5 of the 2013 Act is not material.

Thus, even if the Due Process Clause imposes a limit on the retroactive reach of tax legislation, the eight-year retroactive reach of the 2013 Act would not cross that line.

Considering the totality of the facts and circumstances, the Estate cannot meet its difficult burden of establishing that the 2013 amendment to the stand-alone estate tax transgressed due process limitations on retroactive tax legislation. Rather, because the 2013 amendment serves a legitimate legislative purpose furthered by rational means, the retroactive application of that statute meets the standard applied in *Carlton* and *W.R. Grace* and does not violate due process.

b. The 2013 Act complies with the separation of powers doctrine.

In addition to being a rational means of achieving a legitimate legislative purpose, the 2013 Act does not transgress separation of powers principles. The separation of powers doctrine is grounded in the notion that “each branch of government has its own appropriate sphere of activity” and seeks to insure that “the fundamental functions of each branch remain inviolate.” *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009). The Legislature’s role is to set policy and to draft and enact laws, while the role of the judiciary is to interpret the law. *Id.* at 505-06. Separation of powers issues arise when “the

activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Id.* at 507 (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)).

A retroactive amendment to a statute does not intrude on the court’s responsibility to apply new law to the facts of a case being litigated where that retroactive legislation “does not dictate how the court should decide a factual issue” and does not “affect a final judgment.” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 143-44, 744 P.2d 254, 750 P.2d 254 (1987). On the other hand, “[w]hen retroactive legislation requires its own application *in a case already finally adjudicated*, it does no more and no less than ‘reverse a determination once made, in a particular case.’” *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 225, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) (emphasis added) (quoting *The Federalist No. 81*, at 545 (J. Cooke ed. 1961)). Consequently, Congress, and by analogy the Washington Legislature, lacks the power to “reopen,” “reverse,” “vacate,” or “annul” a final court judgment. *Id.* at 219, 220, and 224. As explained in *Plaut*, “[h]aving achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was

something other than what the courts said it was.” *Id.* at 227 (emphasis in original).

Retroactive legislation does not run afoul of the separation of powers doctrine when applied to a case that has not been finally decided. *Plaut*, 514 U.S. at 226-27. Rather, separation of powers principles are offended only to the extent that a statute changes the outcome of a case that has been finally determined by the courts or dictates how a court should decide an issue of fact. *Haberman*, 109 Wn.2d at 144.

The 2013 Act that retroactively amended the statutory definitions of “transfer” and “Washington taxable estate” does not violate the separation of powers doctrine. Section 10 of the Act provides that “[t]his act does not affect *any final judgments, no longer subject to appeal*, entered by a court of competent jurisdiction before the effective date of this section.” Laws of 2013, 2d Spec. Sess., ch. 2, § 10 (emphasis added). That section became effective on June 14, 2013, when the Governor signed the law. *Id.* at § 14 (emergency clause). Thus, the amended law preserved the final judgment entered in favor of the estate of Sharon Bracken and any other final judgment entered prior to June 14, 2013.

Moreover, applying the amended law to the transfer of QTIP occurring at the death of Barbara Purdue does not threaten the independence or integrity of the judicial branch by dictating how a court

should determine an issue of fact. Instead, the Legislature “acted wholly within its sphere of authority to make policy, to pass laws, and to amend laws already in effect” when it passed the retroactive fix to the Washington estate tax. *Hale*, 165 Wn.2d at 509. 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 passing under Internal Revenue Code § 2044 will not escape the Washington tax. Enacting laws and determining the tax policy of this state clearly are within the “appropriate sphere of activity” of the legislative branch, and the 2013 Act was a valid exercise of legislative power.

In addition, it is of no constitutional significance that the Legislature amended a statute that had been previously construed by the Supreme Court. It is well established that the separation of powers doctrine 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. A statute does not become a “super law” once it is construed by the courts. Thus, treating a statute that has been construed by the judiciary as being constitutionally immune to a retroactive amendment makes no logical sense. So long as the Legislature is careful not to attempt to “overrule” a

final judgment, there is no reason why it cannot retroactively amend a statute to affirmatively change the law. To conclude otherwise would likely violate separation of powers because the judicial branch would be invading the sphere of authority of the legislative branch to make policy, pass laws, and to amend laws already in effect. *Lummi*, 170 Wn.2d at 262.

The 2013 Act amended the Washington estate tax code by changing the statutory definitions of “transfer” and “Washington taxable estate.” The Legislature did not, however, invade the province of the judiciary by overruling any final judgment. Under the analysis in *Lummi* and *Hale*, the 2013 Act does not violate separation of powers.

5. **The Estate is not entitled to an estate tax refund under the 2013 Act.**

Because the controlling law has changed, the Estate is not entitled to a refund of Washington estate tax on the value of QTIP passing under Internal Revenue Code § 2044. Thus, even if the Court Commissioner had jurisdiction to decide this matter under TEDRA, the Commissioner’s order declaring that the Estate is entitled to a refund is incorrect as a matter of law.

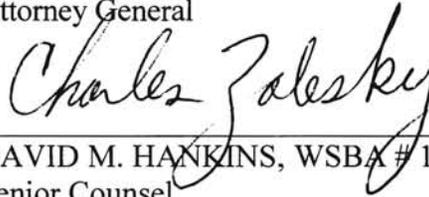
VI. CONCLUSION

For the reasons set forth, the Department respectfully requests that the Court reverse the Superior Court’s decision upholding the Court Commissioner’s order granting the Estate’s estate tax refund claim under

TEDRA and remand this case with instructions to proceed under the
Estate's APA claim.

RESPECTFULLY SUBMITTED this 3rd day of October, 2013.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink that reads "Charles Zalesky". The signature is written in a cursive style and is positioned above a horizontal line.

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

DATED this 3rd day of October, 2013, at Tumwater, WA.



Carrie A. Parker, Legal Assistant

CERTIFICATION OF ENROLLMENT

ENGROSSED HOUSE BILL 2075

Chapter 2, Laws of 2013

63rd Legislature
2013 2nd Special Session

EDUCATION LEGACY TRUST ACCOUNT--ESTATE AND TRANSFER TAX

EFFECTIVE DATE: 06/14/13 - Except for sections 3, 4, and 6, which become effective 01/01/14.

Passed by the House June 13, 2013
Yeas 53 Nays 33

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate June 13, 2013
Yeas 30 Nays 19

TIM SHELDON

President of the Senate

Approved June 14, 2013, 12:30 a.m.

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is ENGROSSED HOUSE BILL 2075 as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

June 14, 2013

Secretary of State
State of Washington

APPENDIX A

ENGROSSED HOUSE BILL 2075

Passed Legislature - 2013 2nd Special Session

State of Washington 63rd Legislature 2013 2nd Special Session

By Representatives Carlyle and Roberts

Read first time 06/12/13.

1 AN ACT Relating to preserving funding deposited into the education
2 legacy trust account used to support common schools and access to
3 higher education by restoring the application of the Washington estate
4 and transfer tax to certain property transfers while modifying the
5 estate and transfer tax to provide tax relief for certain estates;
6 amending RCW 83.100.020, 83.100.040, 83.100.047, 83.100.047,
7 83.100.120, and 83.100.210; adding a new section to chapter 83.100 RCW;
8 creating new sections; providing an effective date; providing an
9 expiration date; and declaring an emergency.

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

11 NEW SECTION. **Sec. 1.** (1) In 2005, to address an unexpected
12 significant loss of tax revenue resulting from the *Estate of Hemphill*
13 decision and to provide additional funding for public education, the
14 legislature enacted a stand-alone estate and transfer tax, effective
15 May 17, 2005. The stand-alone estate and transfer tax applies to the
16 transfer of property at death. By defining the term "transfer" to mean
17 a "transfer as used in section 2001 of the internal revenue code," the
18 legislature clearly expressed its intent that a "transfer" for purposes

1 of determining the federal taxable estate is also a "transfer" for
2 purposes of determining the Washington taxable estate.

3 (2) In *In re Estate of Bracken*, Docket No. 84114-4, the Washington
4 supreme court narrowly construed the term "transfer" as defined in the
5 Washington estate tax code.

6 (3) The legislature finds that it is well established that the term
7 "transfer" as used in the federal estate tax code is construed broadly
8 and extends to the "shifting from one to another of any power or
9 privilege incidental to the ownership or enjoyment of property" that
10 occurs at death. *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945).

11 (4) The legislature further finds that: The Bracken decision held
12 certain qualified terminable interest property (QTIP) of married
13 couples was transferred without incurring Washington state estate tax
14 liability, which: (a) Creates an inequity never intended by the
15 legislature because unmarried individuals did not enjoy any similar
16 opportunities to avoid or greatly reduce their potential Washington
17 estate tax liability; and (b) may create disparate treatment between
18 QTIP property and other property transferred between spouses that is
19 eligible for the marital deduction.

20 (5) Therefore, the legislature finds that it is necessary to
21 reinstate the legislature's intended meaning when it enacted the estate
22 tax, restore parity between married couples and unmarried individuals,
23 restore parity between QTIP property and other property eligible for
24 the marital deduction, and prevent the adverse fiscal impacts of the
25 Bracken decision by reaffirming its intent that the term "transfer" as
26 used in the Washington estate and transfer tax is to be given its
27 broadest possible meaning consistent with established United States
28 supreme court precedents, subject only to the limits and exceptions
29 expressly provided by the legislature.

30 (6) As curative, clarifying, and remedial, the legislature intends
31 for this act to apply both prospectively and retroactively to estates
32 of decedents dying on or after May 17, 2005.

33 **Sec. 2.** RCW 83.100.020 and 2013 c 23 s 341 are each amended to
34 read as follows:

35 (~~As used in this chapter:~~) The definitions in this section apply
36 throughout this chapter unless the context clearly requires otherwise.

37 (1) (a) "Applicable exclusion amount" means:

1 (i) One million five hundred thousand dollars for decedents dying
2 before January 1, 2006;

3 (ii) Two million dollars for estates of decedents dying on or after
4 January 1, 2006, and before January 1, 2014; and

5 (iii) For estates of decedents dying in calendar year 2014 and each
6 calendar year thereafter, the amount in (a)(ii) of this subsection must
7 be adjusted annually, except as otherwise provided in this subsection
8 (1)(a)(iii). The annual adjustment is determined by multiplying two
9 million dollars by one plus the percentage by which the most recent
10 October consumer price index exceeds the consumer price index for
11 October 2012, and rounding the result to the nearest one thousand
12 dollars. No adjustment is made for a calendar year if the adjustment
13 would result in the same or a lesser applicable exclusion amount than
14 the applicable exclusion amount for the immediately preceding calendar
15 year. The applicable exclusion amount under this subsection
16 (1)(a)(iii) for the decedent's estate is the applicable exclusion
17 amount in effect as of the date of the decedent's death.

18 (b) For purposes of this subsection, "consumer price index" means
19 the consumer price index for all urban consumers, all items, for the
20 Seattle-Tacoma-Bremerton metropolitan area as calculated by the United
21 States bureau of labor statistics.

22 (2) "Decedent" means a deceased individual((+)).

23 ((+2+)) (3) "Department" means the department of revenue, the
24 director of that department, or any employee of the department
25 exercising authority lawfully delegated to him or her by the
26 director((+)).

27 ((+3+)) (4) "Federal return" means any tax return required by
28 chapter 11 of the internal revenue code((+)).

29 ((+4+)) (5) "Federal tax" means a tax under chapter 11 of the
30 internal revenue code((+)).

31 ((+5+)) (6) "Gross estate" means "gross estate" as defined and used
32 in section 2031 of the internal revenue code((+)).

33 ((+6+)) (7) "Person" means any individual, estate, trust, receiver,
34 cooperative association, club, corporation, company, firm, partnership,
35 joint venture, syndicate, or other entity and, to the extent permitted
36 by law, any federal, state, or other governmental unit or subdivision
37 or agency, department, or instrumentality thereof((-)).

1 ~~((7))~~ (8) "Person required to file the federal return" means any
2 person required to file a return required by chapter 11 of the internal
3 revenue code, such as the personal representative of an estate(~~(7)~~).

4 ~~((8))~~ (9) "Property" means property included in the gross
5 estate(~~(7)~~).

6 ~~((9))~~ (10) "Resident" means a decedent who was domiciled in
7 Washington at time of death(~~(7)~~).

8 ~~((10))~~ (11) "Taxpayer" means a person upon whom tax is imposed
9 under this chapter, including an estate or a person liable for tax
10 under RCW 83.100.120(~~(7)~~).

11 ~~((11))~~ (12) "Transfer" means "transfer" as used in section 2001
12 of the internal revenue code and includes any shifting upon death of
13 the economic benefit in property or any power or legal privilege
14 incidental to the ownership or enjoyment of property. However,
15 "transfer" does not include a qualified heir disposing of an interest
16 in property qualifying for a deduction under RCW 83.100.046 or ceasing
17 to use the property for farming purposes(~~(7)~~).

18 ~~((12))~~ (13) "Internal revenue code" means(~~(, for the purposes of~~
19 ~~this chapter and RCW 83.110.010,)~~) the United States internal revenue
20 code of 1986, as amended or renumbered as of January 1, 2005(~~(7)~~).

21 ~~((13))~~ (14) "Washington taxable estate" means the federal taxable
22 estate(~~(, less: (a) One million five hundred thousand dollars for~~
23 ~~decedents dying before January 1, 2006; and (b) two million dollars for~~
24 ~~decedents dying on or after January 1, 2006; and (c) the amount of any~~
25 ~~deduction allowed under RCW 83.100.046; and)~~ and includes, but is not
26 limited to, the value of any property included in the gross estate
27 under section 2044 of the internal revenue code, regardless of whether
28 the decedent's interest in such property was acquired before May 17,
29 2005, (a) plus amounts required to be added to the Washington taxable
30 estate under RCW 83.100.047, (b) less: (i) The applicable exclusion
31 amount; (ii) the amount of any deduction allowed under RCW 83.100.046;
32 (iii) amounts allowed to be deducted from the Washington taxable estate
33 under RCW 83.100.047; and (iv) the amount of any deduction allowed
34 under section 3 of this act.

35 ~~((14))~~ (15) "Federal taxable estate" means the taxable estate as
36 determined under chapter 11 of the internal revenue code without regard
37 to: (a) The termination of the federal estate tax under section 2210

1 of the internal revenue code or any other provision of law, and (b) the
2 deduction for state estate, inheritance, legacy, or succession taxes
3 allowable under section 2058 of the internal revenue code.

4 NEW SECTION. Sec. 3. A new section is added to chapter 83.100 RCW
5 to read as follows:

6 (1) For the purposes of determining the tax due under this chapter,
7 a deduction is allowed for the value of the decedent's qualified
8 family-owned business interests, not to exceed two million five hundred
9 thousand dollars, if:

10 (a) The value of the decedent's qualified family-owned business
11 interests exceed fifty percent of the decedent's Washington taxable
12 estate determined without regard to the deduction for the applicable
13 exclusion amount;

14 (b) During the eight-year period ending on the date of the
15 decedent's death, there have been periods aggregating five years or
16 more during which:

17 (i) Such interests were owned by the decedent or a member of the
18 decedent's family;

19 (ii) There was material participation, within the meaning of
20 section 2032A(e)(6) of the internal revenue code, by the decedent or a
21 member of the decedent's family in the operation of the trade or
22 business to which such interests relate;

23 (c) The qualified family-owned business interests are acquired by
24 any qualified heir from, or passed to any qualified heir from, the
25 decedent, within the meaning of RCW 83.100.046(2), and the decedent was
26 at the time of his or her death a citizen or resident of the United
27 States; and

28 (d) The value of the decedent's qualified family-owned business
29 interests is not more than six million dollars.

30 (2)(a) Only amounts included in the decedent's federal taxable
31 estate may be deducted under this subsection.

32 (b) Amounts deductible under RCW 83.100.046 may not be deducted
33 under this section.

34 (3)(a) There is imposed an additional estate tax on a qualified
35 heir if, within three years of the decedent's death and before the date
36 of the qualified heir's death:

1 (i) The material participation requirements described in section
2 2032A(c)(6)(b)(ii) of the internal revenue code are not met with
3 respect to the qualified family-owned business interest which was
4 acquired or passed from the decedent;

5 (ii) The qualified heir disposes of any portion of a qualified
6 family-owned business interest, other than by a disposition to a member
7 of the qualified heir's family or a person with an ownership interest
8 in the qualified family-owned business or through a qualified
9 conservation contribution under section 170(h) of the internal revenue
10 code;

11 (iii) The qualified heir loses United States citizenship within the
12 meaning of section 877 of the internal revenue code or with respect to
13 whom section 877(e)(1) applies, and such heir does not comply with the
14 requirements of section 877(g) of the internal revenue code; or

15 (iv) The principal place of business of a trade or business of the
16 qualified family-owned business interest ceases to be located in the
17 United States.

18 (b) The amount of the additional estate tax imposed under this
19 subsection is equal to the amount of tax savings under this section
20 with respect to the qualified family-owned business interest acquired
21 or passed from the decedent.

22 (c) Interest applies to the tax due under this subsection for the
23 period beginning on the date that the estate tax liability was due
24 under this chapter and ending on the date the additional estate tax due
25 under this subsection is paid. Interest under this subsection must be
26 computed as provided in RCW 83.100.070(2).

27 (d) The tax imposed by this subsection is due the day that is six
28 months after any taxable event described in (a) of this subsection
29 occurred and must be reported on a return as provided by the
30 department.

31 (e) The qualified heir is personally liable for the additional tax
32 imposed by this subsection unless he or she has furnished a bond in
33 favor of the department for such amount and for such time as the
34 department determines necessary to secure the payment of amounts due
35 under this subsection. The qualified heir, on furnishing a bond
36 satisfactory to the department, is discharged from personal liability
37 for any additional tax and interest under this subsection and is
38 entitled to a receipt or writing showing such discharge.

1 (f) Amounts due under this subsection attributable to any qualified
2 family-owned business interest are secured by a lien in favor of the
3 state on the property in respect to which such interest relates. The
4 lien under this subsection (3)(f) arises at the time the Washington
5 return is filed on which a deduction under this section is taken and
6 continues in effect until: (i) The tax liability under this subsection
7 has been satisfied or has become unenforceable by reason of lapse of
8 time; or (ii) the department is satisfied that no further tax liability
9 will arise under this subsection.

10 (g) Security acceptable to the department may be substituted for
11 the lien imposed by (f) of this subsection.

12 (h) For purposes of the assessment or correction of an assessment
13 for additional taxes and interest imposed under this subsection, the
14 limitations period in RCW 83.100.095 begins to run on the due date of
15 the return required under (d) of this subsection.

16 (i) For purposes of this subsection, a qualified heir may not be
17 treated as disposing of an interest described in section 2057(e)(1)(A)
18 of the internal revenue code by reason of ceasing to be engaged in a
19 trade or business so long as the property to which such interest
20 relates is used in a trade or business by any member of the qualified
21 heir's family.

22 (4)(a) The department may require a taxpayer claiming a deduction
23 under this section to provide the department with the names and contact
24 information of all qualified heirs.

25 (b) The department may also require any qualified heir to submit to
26 the department on an ongoing basis such information as the department
27 determines necessary or useful in determining whether the qualified
28 heir is subject to the additional tax imposed in subsection (3) of this
29 section. The department may not require such information more
30 frequently than twice per year. The department may impose a penalty on
31 a qualified heir who fails to provide the information requested within
32 thirty days of the date the department's written request for the
33 information was sent to the qualified heir. The amount of the penalty
34 under this subsection is five hundred dollars and may be collected in
35 the same manner as the tax imposed under subsection (3) of this
36 section.

37 (5) For purposes of this section, references to section 2057 of the

1 internal revenue code refer to section 2057 of the internal revenue
2 code, as existing on December 31, 2003.

3 (6) For purposes of this section, the following definitions apply:

4 (a) "Member of the decedent's family" and "member of the qualified
5 heir's family" have the same meaning as "member of the family" in RCW
6 83.100.046(10).

7 (b) "Qualified family-owned business interest" has the same meaning
8 as provided in section 2057(e) of the internal revenue code of 1986.

9 (c) "Qualified heir" has the same meaning as provided in section
10 2057(i) of the internal revenue code of 1986.

11 (7) This section applies to the estates of decedents dying on or
12 after January 1, 2014.

13 **Sec. 4.** RCW 83.100.040 and 2010 c 106 s 234 are each amended to
14 read as follows:

15 (1) A tax in an amount computed as provided in this section is
16 imposed on every transfer of property located in Washington. For the
17 purposes of this section, any intangible property owned by a resident
18 is located in Washington.

19 (2) (a) Except as provided in (b) of this subsection, the amount of
20 tax is the amount provided in the following table:

| If Washington Taxable | | The amount of Tax Equals | | Of Washington |
|-----------------------|---------------|------------------------------|-----------------|----------------------|
| Estate is at least | But Less Than | Initial Tax Amount | Plus Tax Rate % | Taxable Estate Value |
| \$0 | \$1,000,000 | \$0 | 10.00% | \$0 |
| \$1,000,000 | \$2,000,000 | \$100,000 | 14.00% | \$1,000,000 |
| \$2,000,000 | \$3,000,000 | \$240,000 | 15.00% | \$2,000,000 |
| \$3,000,000 | \$4,000,000 | \$390,000 | 16.00% | \$3,000,000 |
| \$4,000,000 | \$6,000,000 | \$550,000 | ((17.00%)) | \$4,000,000 |
| | | | <u>18.00%</u> | |
| \$6,000,000 | \$7,000,000 | ((\$890,000)) | ((18.00%)) | \$6,000,000 |
| | | <u>\$910,000</u> | <u>19.00%</u> | |
| \$7,000,000 | \$9,000,000 | ((\$1,070,000)) | ((18.50%)) | \$7,000,000 |
| | | <u>\$1,100,000</u> | <u>19.50%</u> | |

| | | | | |
|---|-------------|--------------------|---------------|-------------|
| 1 | \$9,000,000 | (\$1,440,000) | ((19.00%)) | \$9,000,000 |
| 2 | | <u>\$1,490,000</u> | <u>20.00%</u> | |

3 (b) If any property in the decedent's estate is located outside of
4 Washington, the amount of tax is the amount determined in (a) of this
5 subsection multiplied by a fraction. The numerator of the fraction is
6 the value of the property located in Washington. The denominator of
7 the fraction is the value of the decedent's gross estate. Property
8 qualifying for a deduction under RCW 83.100.046 must be excluded from
9 the numerator and denominator of the fraction.

10 (3) The tax imposed under this section is a stand-alone estate tax
11 that incorporates only those provisions of the internal revenue code as
12 amended or renumbered as of January 1, 2005, that do not conflict with
13 the provisions of this chapter. The tax imposed under this chapter is
14 independent of any federal estate tax obligation and is not affected by
15 termination of the federal estate tax.

16 **Sec. 5.** RCW 83.100.047 and 2005 c 516 s 13 are each amended to
17 read as follows:

18 (1) If the federal taxable estate on the federal return is
19 determined by making an election under section 2056 or 2056A of the
20 internal revenue code, or if no federal return is required to be filed,
21 the department may provide by rule for a separate election on the
22 Washington return, consistent with section 2056 or 2056A of the
23 internal revenue code, for the purpose of determining the amount of tax
24 due under this chapter. The election (~~shall be~~) is binding on the
25 estate and the beneficiaries, consistent with the internal revenue
26 code. All other elections or valuations on the Washington return
27 (~~shall~~) must be made in a manner consistent with the federal return,
28 if a federal return is required, and such rules as the department may
29 provide.

30 (2) Amounts deducted for federal income tax purposes under section
31 642(g) of the internal revenue code of 1986 (~~shall~~) are not (~~be~~)
32 allowed as deductions in computing the amount of tax due under this
33 chapter.

34 (3) Notwithstanding any department rule, if a taxpayer makes an
35 election consistent with section 2056 of the internal revenue code as

1 permitted under this section, the taxpayer's Washington taxable estate,
2 and the surviving spouse's Washington taxable estate, must be adjusted
3 as follows:

4 (a) For the taxpayer that made the election, any amount deducted by
5 reason of section 2056(b)(7) of the internal revenue code is added to,
6 and the value of property for which a Washington election under this
7 section was made is deducted from, the Washington taxable estate.

8 (b) For the estate of the surviving spouse, the amount included in
9 the estate's gross estate pursuant to section 2044 (a) and (b)(1)(A) of
10 the internal revenue code is deducted from, and the value of any
11 property for which an election under this section was previously made
12 is added to, the Washington taxable estate.

13 Sec. 6. RCW 83.100.047 and 2009 c 521 s 192 are each amended to
14 read as follows:

15 (1) (a) If the federal taxable estate on the federal return is
16 determined by making an election under section 2056 or 2056A of the
17 internal revenue code, or if no federal return is required to be filed,
18 the department may provide by rule for a separate election on the
19 Washington return, consistent with section 2056 or 2056A of the
20 internal revenue code and (b) of this subsection, for the purpose of
21 determining the amount of tax due under this chapter. The election
22 ~~((shall be))~~ is binding on the estate and the beneficiaries, consistent
23 with the internal revenue code and (b) of this subsection. All other
24 elections or valuations on the Washington return ~~((shall))~~ must be made
25 in a manner consistent with the federal return, if a federal return is
26 required, and such rules as the department may provide.

27 (b) The department ~~((shall))~~ must provide by rule that a state
28 registered domestic partner is deemed to be a surviving spouse and
29 entitled to a deduction from the Washington taxable estate for any
30 interest passing from the decedent to his or her domestic partner,
31 consistent with section 2056 or 2056A of the internal revenue code but
32 regardless of whether such interest would be deductible from the
33 federal gross estate under section 2056 or 2056A of the internal
34 revenue code.

35 (2) Amounts deducted for federal income tax purposes under section
36 642(g) of the internal revenue code of 1986 ~~((shall))~~ are not ~~((be))~~

1 allowed as deductions in computing the amount of tax due under this
2 chapter.

3 (3) Notwithstanding any department rule, if a taxpayer makes an
4 election consistent with section 2056 of the internal revenue code as
5 permitted under this section, the taxpayer's Washington taxable estate,
6 and the surviving spouse's Washington taxable estate, must be adjusted
7 as follows:

8 (a) For the taxpayer that made the election, any amount deducted by
9 reason of section 2056(b)(7) of the internal revenue code is added to,
10 and the value of property for which a Washington election under this
11 section was made is deducted from, the Washington taxable estate.

12 (b) For the estate of the surviving spouse, the amount included in
13 the estate's gross estate pursuant to section 2044 (a) and (b)(1)(A) of
14 the internal revenue code is deducted from, and the value of any
15 property for which an election under this section was previously made
16 is added to, the Washington taxable estate.

17 **Sec. 7.** RCW 83.100.120 and 1981 2nd ex.s. c 7 s 83.100.120 are
18 each amended to read as follows:

19 (1)(a) Except as otherwise provided in this subsection, any
20 personal representative who distributes any property without first
21 paying, securing another's payment of, or furnishing security for
22 payment of the taxes due under this chapter is personally liable for
23 the taxes due to the extent of the value of any property that may come
24 or may have come into the possession of the personal representative.
25 Security for payment of the taxes due under this chapter (~~shall~~) **must**
26 be in an amount equal to or greater than the value of all property that
27 is or has come into the possession of the personal representative, as
28 of the time the security is furnished.

29 (b) For the estates of decedents dying prior to April 9, 2006, a
30 personal representative is not personally liable for taxes due on the
31 value of any property included in the gross estate and the Washington
32 taxable estate as a result of section 2044 of the internal revenue code
33 unless the property is located in the state of Washington or the
34 property has or will come into the possession or control of the
35 personal representative.

36 (2) Any person who has the control, custody, or possession of any
37 property and who delivers any of the property to the personal

1 representative or legal representative of the decedent outside
2 Washington without first paying, securing another's payment of, or
3 furnishing security for payment of the taxes due under this chapter is
4 liable for the taxes due under this chapter to the extent of the value
5 of the property delivered. Security for payment of the taxes due under
6 this chapter (~~shall~~) must be in an amount equal to or greater than
7 the value of all property delivered to the personal representative or
8 legal representative of the decedent outside Washington by such a
9 person.

10 (3) For the purposes of this section, persons who do not have
11 possession of a decedent's property include anyone not responsible
12 primarily for paying the tax due under this section or their
13 transferees, which includes but is not limited to mortgagees or
14 pledgees, stockbrokers or stock transfer agents, banks and other
15 depositories of checking and savings accounts, safe-deposit companies,
16 and life insurance companies.

17 (4) For the purposes of this section, any person who has the
18 control, custody, or possession of any property and who delivers any of
19 the property to the personal representative or legal representative of
20 the decedent may rely upon the release certificate or the release of
21 nonliability certificate, furnished by the department to the personal
22 representative, as evidence of compliance with the requirements of this
23 chapter, and make such deliveries and transfers as the personal
24 representative may direct without being liable for any taxes due under
25 this chapter.

26 Sec. 8. RCW 83.100.210 and 2010 c 106 s 111 are each amended to
27 read as follows:

28 (1) The following provisions of chapter 82.32 RCW have full force
29 and application with respect to the taxes imposed under this chapter
30 unless the context clearly requires otherwise: RCW 82.32.110,
31 82.32.120, 82.32.130, 82.32.320, 82.32.330, and 82.32.340. The
32 definitions in this chapter have full force and application with
33 respect to the application of chapter 82.32 RCW to this chapter unless
34 the context clearly requires otherwise.

35 (2) In addition to the provisions stated in subsection (1) of this
36 section, the following provisions of chapter 82.32 RCW have full force
37 and application with respect to the taxes, penalties, and interest

1 imposed under section 3 of this act: RCW 82.32.090, 82.32.117,
2 82.32.135, 82.32.210, 82.32.220, 82.32.230, 82.32.235, 82.32.237,
3 82.32.245, and 82.32.265.

4 (3) The department may enter into closing agreements as provided in
5 RCW 82.32.350 and 82.32.360.

6 NEW SECTION. Sec. 9. Sections 2 and 5 of this act apply both
7 prospectively and retroactively to all estates of decedents dying on or
8 after May 17, 2005.

9 NEW SECTION. Sec. 10. This act does not affect any final
10 judgment, no longer subject to appeal, entered by a court of competent
11 jurisdiction before the effective date of this section.

12 NEW SECTION. Sec. 11. Section 4 of this act applies to estates of
13 decedents dying on or after January 1, 2014.

14 NEW SECTION. Sec. 12. If any provision of this act or its
15 application to any person or circumstance is held invalid, the
16 remainder of the act or the application of the provision to other
17 persons or circumstances is not affected.

18 NEW SECTION. Sec. 13. Section 5 of this act expires January 1,
19 2014.

20 NEW SECTION. Sec. 14. This act is necessary for the immediate
21 preservation of the public peace, health, or safety, or support of the
22 state government and its existing public institutions, and takes effect
23 immediately, except for sections 3, 4, and 6 of this act, which take
24 effect January 1, 2014.

Passed by the House June 13, 2013.

Passed by the Senate June 13, 2013.

Approved by the Governor June 14, 2013.

Filed in Office of Secretary of State June 14, 2013.

Department of Revenue Fiscal Note

| | | |
|------------------------|-------------------------------------|-----------------------------------|
| Bill Number: 2075 E HB | Title: Estate, transfer tx/edu acct | Agency: 140-Department of Revenue |
|------------------------|-------------------------------------|-----------------------------------|

Part I: Estimates

No Fiscal Impact

Estimated Cash Receipts to:

| Account | FY 2014 | FY 2015 | 2013-15 | 2015-17 | 2017-19 |
|--|--------------------|-------------------|--------------------|-------------------|-------------------|
| Education Legacy Trust Account-State 01 - Taxes 55 - Inheritance Tax | 109,700,000 | 39,300,000 | 149,000,000 | 74,600,000 | 74,400,000 |
| Education Legacy Trust Account-State 01 - Taxes 75 - Penalties and Intrst | 8,700,000 | 1,700,000 | 10,400,000 | 900,000 | |
| Total \$ | 118,400,000 | 41,000,000 | 159,400,000 | 75,500,000 | 74,400,000 |

Estimated Expenditures from:

| Account | FY 2014 | FY 2015 | 2013-15 | 2015-17 | 2017-19 |
|----------------------|---------------|---------|---------------|---------|---------|
| FTE Staff Years | 0.2 | | 0.1 | | |
| GF-STATE-State 001-1 | 20,600 | | 20,600 | | |
| Total \$ | 20,600 | | 20,600 | | |

Estimated Capital Budget Impact:

NONE

This bill was identified as a proposal governed by the requirements of RCW 43.135.031 (Initiative 960). Therefore, this fiscal analysis includes a projection showing the ten-year cost to tax or fee payers of the proposed taxes or fees.

The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.
- Requires new rule making, complete Part V.

| | | |
|-----------------------------------|----------------------|------------------|
| Legislative Contact: Dean Carlson | Phone: (360)786-7305 | Date: 06/14/2013 |
| Agency Preparation: Kim Davis | Phone: 360-534-1508 | Date: 06/18/2013 |
| Agency Approval: Kathy Oline | Phone: 360-534-1534 | Date: 06/18/2013 |
| OFM Review: Cherie Berthon | Phone: 360-902-0659 | Date: 06/18/2013 |

Request # 2075-3-1

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APPENDIX B

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact

Briefly describe, by section number, the significant provisions of the bill, and any related workload or policy assumptions, that have revenue or expenditure impact on the responding agency.

Note: This fiscal note reflects language in EHB 2075, 2013 Second Special Legislative Session.

This legislation clarifies the meaning of the terms "transfer" and "Washington taxable estate" as used in the Washington estate tax. The Legislature enacted a stand-alone estate tax, which took effect May 17, 2005. The tax applies to the transfer of property at death. A recent Washington Supreme Court decision has effectively exempted qualified terminable interest property (QTIP) from Washington's estate tax when the taxpayer makes a federal QTIP election and no separate Washington QTIP election. This legislation is intended to restore the estate tax as it existed before that recent court decision.

The definition of "transfer" is amended to clarify that a transfer includes the shifting upon death of the economic benefit in property or any power or legal privilege incidental to the ownership or enjoyment of property.

New language is also added to the definition of "Washington taxable estate" to include the value of any property included in the gross estate under Section 2044 of the Internal Revenue Code, regardless of whether the decedent's interest in such property was acquired before May 17, 2005.

The bill also provides that if a taxpayer makes a separate Washington QTIP election, the Washington taxable estate of the taxpayer and his or her surviving spouse must be adjusted as follows:

- For the taxpayer, any amount deducted from the federal gross estate by reason of Section 2056(b)(7) of the Internal Revenue Code is added to, and the value of property for which a Washington QTIP election is made is deducted from, the Washington taxable estate.
- Upon the surviving spouse's death, the amount included in the estate's federal gross estate pursuant to Section 2044(a) and (b)(1)(A) of the Internal Revenue Code is deducted from, and the value of any property for which a Washington QTIP election was previously made is added to, the Washington taxable estate.

New language adjusts the Washington filing threshold annually using the Seattle-Tacoma-Bremerton metropolitan area consumer price index to determine the adjustment.

A new deduction is created for the value of the decedent's qualified family-owned business interests with the following limitations:

- The value of qualified interests must exceed 50 percent of the Washington taxable estate without regard to the threshold deduction,
- Material participation requirements must be met before and after the death of the decedent,
- The value of the decedent's qualified family-owned business interests is not more than \$6 million, and
- The deduction allowed may not exceed \$2.5 million.

The top four rates in the Washington estate tax table are each increased:

- From 17 percent to 18 percent,
- From 18 percent to 19 percent,
- From 18.5 percent to 19.5 percent, and
- From 19 percent to 20 percent.

The bill also eliminates liability for a personal representative for estate taxes on QTIP if the decedent dies prior to April 9, 2006, and the property is not located in Washington or under the control of the personal representative.

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Bill # 2075 EHB

Sections 2 and 5 of this act apply both prospectively and retroactively to all estates of decedents dying on or after May 17, 2005.

This legislation has an emergency clause and takes effect immediately upon signature, except for Sections 3, 4, and 6 which take effect January 1, 2014.

II. B - Cash receipts Impact

Briefly describe and quantify the cash receipts impact of the legislation on the responding agency, identifying the cash receipts provisions by section number and when appropriate the detail of the revenue sources. Briefly describe the factual basis of the assumptions and the method by which the cash receipts impact is derived. Explain how workload assumptions translate into estimates. Distinguish between one time and ongoing functions.

This estimate reflects a change in the Department's application of current law due to a recent court case. On January 10, 2013, the Washington Supreme Court denied the Department's petition for reconsideration of its consolidated Estate of Bracken and Estate of Nelson decision.

ASSUMPTIONS

- All estates that have filed a return excluding QTIP assets will file an amended return, so the state will realize all revenues.
- Assumes limiting liability for personal representatives impacts few than 10 estates.
- The entire impact for limiting liability for personal representatives is reflected in Fiscal Year 2014 because all returns for deaths prior to April 9, 2006 have been received by the Department of Revenue.
- All payments are made timely at the 9 month due date.
- The first payments would be due on October 1, 2014, which will result in 9 months of impact in Fiscal Year 2015.
- Federal data of Estate Tax Returns filed for 2007 decedents was used for this estimate.
- Business assets include: 25% of closely held stock, 100% of investment real estate, 100% of non-corporate business assets, and 100% of other limited partnership assets.

DATA SOURCES

- Department of Revenue (Department) Estate Tax data
- Estate Tax Forecast Model (November 2012)
- Federal Estate Tax data

REVENUE ESTIMATES

This legislation will increase revenues to the education legacy trust account by an estimated \$118.4 million in Fiscal Year 2014. The estimated revenue increase reflects the retroactive clarifications of the definitions of "transfer" and "Washington taxable estate" to conform to the Department's interpretation, thereby eliminating any refund claims resulting from the recent court decision, other than for the Estate of Bracken. It also reflects other changes made to existing estate tax law.

TOTAL REVENUE IMPACT:

State Government (cash basis, \$000):

| | |
|-----------|-----------|
| FY 2014 - | \$118,400 |
| FY 2015 - | \$ 41,000 |
| FY 2016 - | \$ 40,200 |
| FY 2017 - | \$ 35,300 |
| FY 2018 - | \$ 34,400 |
| FY 2019 - | \$ 40,000 |

Local Government, if applicable (cash basis, \$000): None.

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II. C - Expenditures

Briefly describe the agency expenditures necessary to implement this legislation (or savings resulting from this legislation), identifying by section number the provisions of the legislation that result in the expenditures (or savings). Briefly describe the factual basis of the assumptions and the method by which the expenditure impact is derived. Explain how workload assumptions translate into cost estimates. Distinguish between one time and ongoing

FIRST YEAR COSTS:

The Department will incur total costs of \$20,600 in Fiscal Year 2014. These costs include:

- Labor Costs - Time and effort equates to 0.2 FTEs.
- One significant rule-making process to create one new rule and amend three existing rules.

Part III: Expenditure Detail

III. A - Expenditures by Object Or Purpose

| | FY 2014 | FY 2015 | 2013-15 | 2015-17 | 2017-19 |
|----------------------------|-----------------|---------|-----------------|---------|---------|
| FTE Staff Years | 0.2 | | 0.1 | | |
| A-Salaries and Wages | 12,700 | | 12,700 | | |
| B-Employee Benefits | 3,800 | | 3,800 | | |
| E-Goods and Other Services | 2,900 | | 2,900 | | |
| J-Capital Outlays | 1,200 | | 1,200 | | |
| Total \$ | \$20,600 | | \$20,600 | | |

III. B - Detail: List FTEs by classification and corresponding annual compensation. Totals need to agree with total FTEs in Part I and Part IIIA

| Job Classification | Salary | FY 2014 | FY 2015 | 2013-15 | 2015-17 | 2017-19 |
|--------------------|----------------|------------|---------|------------|---------|---------|
| HEARINGS SCHEDULER | 32,688 | 0.0 | | 0.0 | | |
| TAX POLICY SP 2 | 61,628 | 0.0 | | 0.0 | | |
| TAX POLICY SP 3 | 69,756 | 0.1 | | 0.1 | | |
| WMS BAND 3 | 88,546 | 0.0 | | 0.0 | | |
| Total FTE's | 252,618 | 0.2 | | 0.1 | | |

Part IV: Capital Budget Impact

Identify acquisition and construction costs not reflected elsewhere on the fiscal note and describe potential financing methods

NONE

None.

Part V: New Rule Making Required

Identify provisions of the measure that require the agency to adopt new administrative rules or repeal/revise existing rules.

Should this legislation become law, the Department will use the significant rule making process to create one new rule; and amend the following: WAC 458-57-105, titled: "Nature of estate tax, definitions"; WAC 458-57-115, titled: "Valuation of property, property subject to estate tax, and how to calculate the tax"; and WAC 458-57-125, titled: "Apportionment of tax when there are out-of-state assets". Persons affected by this rule-making would include those required to pay estate tax and estate tax professionals.