

NO. 65948-1-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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ESTATE OF JESSIE CAMPBELL MACBRIDE,

THOMAS H. MACBRIDE III AND PHILIP C. MACBRIDE, Personal  
Representatives of the Estate of Jesse Campbell Macbride,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

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APPELLANT'S SUPPLEMENTAL BRIEF

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## I. INTRODUCTION

This (Second) Supplemental Brief of Appellant responds to the Court's July 24, 2013 letter directing the parties to file supplemental briefs addressing the impact of "the legislature's recent enactment of EHB 2075" on this case.

As the Court knows, the personal representatives of the Estate of Jessie Campbell Macbride ("Jessie") seek a refund of a \$638,703 overpayment of Washington state estate tax on a QTIP Trust ("Thomas's Trust") created in 1999 by the estate of Thomas Macbride ("Thomas"). This appeal was stayed for more than two years while two other identical QTIP cases were litigated at the state Supreme Court, which ruled in favor of the taxpayers in *Clemency v. State (In re Estate of Bracken)*, 175 Wn.2d 549, 290 P.3d 99 (2012) ("*Bracken*"). Notwithstanding the *Bracken* decision, the Department of Revenue ("DOR") refused to issue refunds, instead drafting legislation that Washington State legislature ultimately passed June 14, 2013. See Engrossed House Bill 2075, 63rd Leg., 2nd Special Sess. (Wash. 2013) (the "2013 Amendments").

The 2013 Amendments are a blatant attempt by the legislature to overturn the *Bracken* Court's recent unanimous decision and redefine federal law. The *Bracken* Court held that the May 17, 2005 Stand Alone Tax unambiguously excluded QTIP property on the death of the surviving

spouse. In doing so, the Court not only interpreted the Washington statute, it also interpreted federal law. The Washington legislature has no power to re-interpret or clarify federal law in contravention to the federal understanding of that law.

The 2013 Amendments, which purport to tax Thomas's 1999 QTIP Trust, are unconstitutional under the separation of powers doctrine, the federal and state due process clause, and the federal and state impairment clause. In addition, the 2013 Amendments violate the uniformity requirement of the Washington Constitution, art. VII, § 1. Finally, the DOR should be estopped from applying the 2013 Amendments to the Macbride Estate, which—but for a simple transfer from this Division 1 to the Supreme Court—would have enjoyed the same exclusion from the 2013 Amendments as the Bracken and Nelson estates do now.

## **II. PROCEDURAL HISTORY**

A full recitation of relevant facts is set forth in Appellants' Opening Brief. This brief describes the relevant history of this case on appeal.

### **A. Creation of QTIP by Thomas Estate**

The Macbride Estate filed this case, seeking a refund of tax imposed by the DOR after enactment of the new Stand-Alone estate tax on a QTIP Trust created by Thomas Macbride on October 20, 1999. In the

trial court, summary judgment was entered in favor of the DOR and the Macbride Estate sought review in this court. The record was perfected and the appellant's and respondent's briefs were filed as of March 2011.

Two other cases with the identical legal issues were also on appeal at the same as the Macbride appeal: *In re Estate of Sharon Bracken* and *In re Estate of Barbara J. Nelson* (consolidated in the Washington Supreme Court as case no. 84114-4). The Supreme Court granted the Bracken estate's petition for direct review on August 5, 2010. The Nelson Estate had first appealed to this Court, but later transferred its case to the Supreme Court to consolidate it with Bracken on October 12, 2010.

**B. Estate of Macbride Appeal Stayed Prior to Transfer to Supreme Court with Estates of Bracken and Nelson**

Appellants followed closely on the heels of the *Bracken* and *Nelson* cases and were preparing to transfer their case from Division 1 Court of Appeals to the Washington Supreme Court to join Bracken and Nelson. However, after the Appellant's Opening Brief, the DOR sought a stay of proceedings in this case on December 16, 2010. *See* Respondent DOR's Motion to Stay. The accompanying declaration of the Department's attorney in support stated that "[r]esolution of this issue in the consolidated Estate of Bracken appeal should resolve the present appeal filed by the personal representatives of the estate of Jessie

Campbell Macbride and moot any further proceedings on the merits.” *See id.* The Macbride Estate opposed the stay because it wished to transfer its case to the Washington Supreme Court to join the pending Bracken and Nelson cases. The Court initially denied the requested stay on January 31, 2011 but issued another letter on March 22, 2011, directing the parties to explain why a stay should not be entered in light of Bracken and Nelson.

In a March 22, 2011 letter to this Court, the DOR stated that:

the reasons why a stay is warranted are set out in the Motion to Stay Proceedings that was filed by the Department on December 17, 2010. In short, the Estate of Bracken and Estate of Nelson appeals involve the same legal issues raised in this appeal and the Supreme Court’s decision in Estate of Bracken/Estate of Nelson will likely resolve this appeal and make any further proceedings moot.

*See* letter from C. Zalesky & D. Hankins to Court Administrator R.

Johnson (March 22, 2011) (attached). This case was thereafter stayed on April 12, 2011.

### **C. The Bracken Court Rules in Favor of Taxpayers**

The Supreme Court ruled in favor of the taxpayers on the QTIP tax issue in *Bracken* and *Nelson* on October 12, 2012, denying reconsideration on January 13, 2013. The six-strong majority rejected the Department’s interpretation of the 2005 Act. It noted that the “requirement for a transfer

is constitutionally grounded and long standing,” and that “transfer taxation requires a transfer.” *Id.* at 563-564 (emphasis added). The Court explained that property is transferred from a trustor when a trust is created, not when an income interest in the trust expires. *Id.* at 567 (citing *Coolidge v. Long*, 282 U.S. 582, 605, 51 S.Ct. 306 (1931)). The Court denied the DOR’s request for rehearing. Based upon the *Bracken* decision, this Court lifted its stay.

Notwithstanding *Bracken*, the DOR withheld the refund due the Macbride estate. Instead, the DOR assisted in drafting legislation in an attempt to overturn the recent *Bracken* decision. On May 15, 2013, this Court first directed the parties to file supplemental briefs on the effect of the *Bracken* decision to Macbride. However, less than two court days before the due date of Appellants’ supplemental brief, the Washington legislature passed a new state law directly in response to *Bracken*. *See* Engrossed House Bill 2075, 63rd Leg., 2nd Special Sess. (Wash. 2013) (*see* Laws of 2013, ch. 2).

In the 2013 Amendments, the legislature disagreed with the Supreme Court’s construal of “transfer” under the 2005 Act and federal law interpreting the definition of “transfer.” The legislature claimed that the term “transfer” was to be given “its broadest possible meaning consistent with established United States Supreme Court precedents,

subject only to the limits and exceptions expressly provided by the legislature”—and, presumably, by the limits contained in the United States and Washington Constitutions. Laws of 2013, ch. 2, § 1(4).

In the 2013 Amendments, the legislature reaffirmed that the 2005 Stand Alone Tax Statute was independent of the federal tax (“the legislature enacted a stand-alone estate and transfer tax”) and that it only “applies to the transfer of property at death.” See Laws of 2013, ch. 2, § 1(1). However, the 2013 Washington legislature suggests that the Washington Supreme Court did not correctly interpret *federal law* and did not broadly enough interpret “transfer.” *Id.* As if to add emphasis, the Washington legislature cited to the federal case *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945) as the conceptual basis for its definition of the limits of a transfer. See Laws of 2013, ch. 2, § 1(3).

The 2013 Amendments modified the definitions contained in the Stand-Alone Estate Tax in response to *Bracken* in two respects:

*First*, while the 2013 Amendments retained the definition of “transfer” interpreted in *Bracken*—that “‘transfer’ means ‘transfer’ as used in section 2001 of the internal revenue code,” the 2013 Legislature also added the following language (underlined):

“Transfer” means “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.

See 2013 Amendments, § 2(12). The underlined addition is lifted directly from the *Fernandez* case. See *Fernandez*, 326 U.S. at 352.

Second, the 2013 Amendments include in the definition of “Washington taxable estate” the value of federal QTIP property, “regardless of whether the decedent’s interest in such property was acquired before May 17, 2005.” Laws of 2013, ch. 2, § 2(14). The 2013 Legislature states that it now intends “for this act to apply both prospectively and retroactively to estates of decedents dying on or after May 17, 2005.” *Id.* § 1(6) (emphasis added). However, the 2005 Legislature had stated that the 2005 Stand-Alone Tax applied “prospectively only and not retroactively.” Laws of 2005, ch. 516, § 20.

Appellants filed their supplemental brief on June 17, 2013. The Department contends that *Bracken* no longer controls, and that the legislature in 2005 intended “transfer” under the 2005 Act to include fictional transfers. EHB 2075 is applicable to all estates, except the Estates of Bracken and Nelson. Whatever the outcome of this case may be, the Nelson and Bracken estates will enjoy the benefit of *Bracken*—as the Macbride Estate would have, had it not relied on the assurance that *Bracken* would govern this case as well.

On July 24, 2013, this Court directed the parties to file supplemental briefs addressing the impact of “the legislature’s recent enactment of EHB 2075” on this case.

### III. ARGUMENT

This (Second) Supplemental Brief responds only to the Court’s request that the parties address the impact of EHB 2075. The Macbride Estate previously briefed the stare decisis and collateral estoppel effect of *Bracken* on the parties in this case. *See* (First) Supplemental Brief of Appellants, at 2-5 (dated June 17, 2013). When it was decided, *Bracken* became binding precedent on this case. Appellants incorporate their argument from their (First) Supplemental Brief.

#### A. **The 2013 Amendments Impose an Unconstitutional Tax Under Separation of Powers, Due Process, and Impairment-Clause Principles.**

When Thomas Macbride died in 1999, no Washington estate tax existed. When his wife, Jessie, died in 2007, the DOR’s own regulations instructed her to exclude the QTIP assets from her Washington taxable estate. Neither Thomas nor Jessie had any reason to suspect that Washington would attempt to tax the QTIP assets. Now, in 2013, the DOR would like to reach back into their graves to fund Washington’s education legacy trust account—to create a tax that no one at the time had any reason to pay or believe they should pay.

Few would argue that public education is not a laudable goal. But that goal cannot be pursued at the expense of individual constitutional rights. The legislative branch's goals cannot serve as the sole justification for an unfettered, unlimited taxing power. Washington's system of checks and balances between branches of government exists in no small part to safeguard the fundamental rights of the weak, strong, poor, rich, majority, and minority alike. As James Madison wrote:

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

The Federalist No. 51 (James Madison).

It is not only the legislature, but also at times the judiciary, that must act as “guardians of the rights and liberties of the people.” The Federalist No. 49 (James Madison). That is why “[t]he legislature’s power to enact a statute is unrestrained except where . . . prohibited by the state and federal constitutions.” *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004) (emphasis added). “Ultimately, however, it is for the judiciary to determine whether a given enactment violates the constitution[s].” *State v. Gresham*, 173 Wn.2d 405, 428, 269

P.3d 207 (2012). And as applied to Jessie Macbride’s estate, the 2013 Amendments are unconstitutional for the reasons set forth below.

**1. The 2013 Amendments are Clearly Retroactive.**

The 2013 Amendments are without a doubt retroactive. The 2013 Amendments purport both to amend and to “clarify[]” the 2005 Act. Engrossed House Bill 2075, 63rd Leg., 2nd Special Sess. (Wash. 2013), § 6. Insofar as they are clarifications, the 2013 Amendments “are generally retroactive and effective from the original date of the statute.” *Johnson v. Morris*, 87 Wn.2d 992, 925, 557 P.2d 1299 (1976). And the legislature’s intent that amendments apply retroactively overrides the presumption against retroactivity. *Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 536-37, 39 P.3d 984 (2002); Engrossed House Bill 2075, 63rd Leg., 2nd Special Sess. (Wash. 2013) § 1(6) (amending the 2005 Act to “apply [it] both prospectively and retroactively to estates of decedents dying on or after May 17, 2005”) (emphasis added).

Thus eight years after its enactment, the legislature has stated that the 2005 Act has—since its inception—permitted the DOR to collect taxes on QTIP transfers that occurred even decades earlier. *See id.* at § 1(5) (“[T]he legislature finds that it is necessary to reinstate the legislature’s intended meaning when it enacted the estate tax . . .”). The legislature bases its interpretation of the 2005 Act on the claim that “transfer” under

federal law extends to the distribution of QTIP assets after the death of a surviving spouse, citing *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945).

It is important to recognize that there are two levels of retroactivity in the 2013 Amendments: *First*, the legislature has amended the 2005 Act to overrule the Bracken court's 2012 interpretation of the 2005 Act. *Second*, the legislature has—with the 2013 Amendments—reached back well prior to the 2005 Act to tax QTIP transfers that occurred decades before the Stand Alone Tax ever existed. This legislative overreach is unprecedented in Washington, and cannot withstand constitutional scrutiny.

## **2. The 2013 Amendments Violate the Separation of Powers Doctrine.**

Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation. *Johnson*, 87 Wn.2d at 927-928. The legislature is presumed to be aware of judicial construction of existing statutes. *Hazel v. Van Beek*, 135 Wn.2d 45, 58, 954 P.2d 1301 (1998). Any attempt by the legislature to retroactively change a statute in contravention of an existing judicial construction of that statute raises separation of powers issues. *Johnson*, 87 Wn.2d at 926. The starkest violation of this principle

is seen in the 2013 Legislature’s attempt to clarify federal statutory law and case law.

a. **The Legislature Has Interfered with a Judicial Function by Misinterpreting and Misapplying Federal Law.**

“It is emphatically the province and duty of the judicial department to say what the law is.” *In re Juvenile Dir.*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976) (quoting *Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed 60 (1803)). This is the foundation of the principle of separation of powers, which was incorporated into the Washington State Constitution in 1889. *Hale v. Wellpinit School District No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009).

In *Bracken*, the Washington Supreme Court directly and thoroughly addressed the following question: Does the Internal Revenue Code regard the death of a surviving spouse as giving rise to a transfer in a QTIP? The Court answered that question with a resounding, “No.”:

The stand-alone estate tax adopted by the [2005] Act is, like the federal estate tax, a transfer tax, “imposed on every transfer of property located in Washington.” RCW 83.100.040(1). Compare RCW 83.100.040, with I.R.C. § 2001(a). ***The requirement for a transfer is constitutionally grounded and long standing. It arises from the distinction between an excise tax, which is levied upon the use or transfer of property (even though it might be measured by the***

property's value), and a tax levied upon the property itself . . . The estate tax has long been recognized as an excise tax . . . ***If estate taxation cannot be tied to a transfer, it fails as an unapportioned (and therefore unconstitutional) direct tax.***

*Bracken*, 175 Wn.2d at 563-64 (emphasis added). The *Bracken* Court then cited *Fernandez* for support—the very Supreme Court case that the legislature relies on for the opposite proposition in the 2013 Amendments. The 2013 Amendments expressly contradicted the *Bracken* Court's interpretation of *Fernandez* and the Internal Revenue Code, claiming (incorrectly) that “it is well established that the term ‘transfer’ as used in the federal estate tax code” extends to distribution of QTIP assets upon the surviving spouse's death. See Engrossed House Bill 2075, 63rd Leg., 2nd Special Sess. (Wash. 2013), § 3. A more blatant encroachment on the judiciary function is hard to imagine.

The *Bracken* Court continued on to explain that a QTIP distribution on the death of the surviving spouse is not a taxable transfer under federal law:

The same principles that require a transfer for federal estate tax purposes were held to require a transfer for Washington's former inheritance tax in *In re Estate of McGrath* . . . ***“for in neither case can there be any tax unless there is a transfer.”*** . . . DOR too readily concludes that a fictional or deemed transfer is something that Congress or the

legislature can substitute for an actual transfer. When DOR argues that “the power of Congress to change the common-law rule is not to be doubted,” it fails to consider that a transfer—*a real transfer—is the sanction for the tax. . . [T]he Internal Revenue Code does not regard the death of the surviving spouse as giving rise to a taxable transfer even though the deemed transfer on the death of the surviving spouse is the taxable event.* A transfer supporting taxation has occurred, but *federal law and regulation recognize that it occurred upon the death of the first spouse.* The transfer is taxed later at a time when there is no transfer, by virtue of the deferral election. The Internal Revenue Code and its regulations provide, with their characteristic precision, that the first spouse engages in the transfer of QTIP and that passage of QTIP to and from the surviving spouse is a fiction. . .

*Id.* at 565-567 (emphasis added). The *Bracken* Court then noted that the same constitutional principles that require a transfer for federal estate tax purposes were held to require a transfer for Washington’s former inheritance tax in *In re Estate of McGrath*, 191 Wash. 496, 505, 71 P.2d 395 (1937). The court stated that under *McGrath*, the transfer requirement would apply equally to any estate tax:

It is universally agreed that the right of the sovereign to control the transfer is the sanction upon which all such exactions rest, whether they be called estate taxes, succession taxes, inheritance taxes, or privilege taxes. *It is therefore, in the very*

***nature of things, impossible for an estate or inheritance tax to be exacted with respect to something in which the decedent did not own or have some kind of right at the time of his death, for in such a case there is no transfer.***

*Bracken*, 175 Wn.2d at 566 (quoting *McGrath*, 191 Wash. at 503)

(emphasis added).

As the *Bracken* court implicitly recognized, *Fernandez* does not overrule or alter *McGrath*'s holding. In a larger sense, *Fernandez* does not apply to a QTIP analysis, because it involves a different issue.

*Fernandez* dealt with the disposition on death of one spouse of jointly held property. In a QTIP, the surviving spouse does not hold any property, but is merely a lifetime income beneficiary of a trust. *Fernandez* addressed the inclusion of the entire community in a husband's gross estate on his death, not the expiration of a spouse's terminable lifetime interest.

The *Fernandez* Court highlighted the idiosyncrasies of Louisiana community property law in the 1940s, where "the wife has no control over community property. She may not give it away, not sell it, and in general, may not bind it for the payment of her debts." *Fernandez*, 326 U.S. at 349. The death of the husband terminates his control over the wife's share, and "for the first time" transfers to her full and exclusive possession, control and enjoyment under Louisiana law. *Id.* at 355-356.

*Fernandez* did not hold that a surviving spouse with only a lifetime income interest has any interest in her predeceased husband's irrevocable marital trust to convey on her death.

In fact, a treatise recently cited by the DOR in support of its arguments notes that, *even after Fernandez, the modern concept of transfer requires "that decedent ha[ve] an interest in property at death."* 1 J. Mertens, *The Law of Federal Gift and Estate Taxation* § 1.04 (1959). *Indeed, federal law has never held the expiration of a lifetime interest income from a QTIP to be a "transfer."* See *Estate of Bonner v. Comm'r*, 84 F3d 196, 199 (5<sup>th</sup> Cir. 1996); *Estate of Mellinger v. Comm'r*, 112 T.C. 26, 36 (1999) acq. 1999-2 CB. As *McGrath* and *Bracken* make clear, Jessie had no interest at all in Thomas's trusts at her death; had nothing to transfer; and so taxing the nonexistent transfer through the estate tax is unconstitutional.

The *Bracken* court did not merely interpret a Washington statute. It also necessarily interpreted federal law, because the 2005 Act—like the 2013 Amendments—define "transfer" to mean a "transfer as used in section 2001 of the internal revenue code." See Engrossed House Bill 2075, 63rd Leg., 2nd Special Sess. (Wash. 2013), §2(12). The legislature purports to add to this federal definition of transfer the distribution of QTIP assets on the death of the surviving spouse. But as the *Bracken*

court expressly held, this is not what “transfer” means under the Internal Revenue Code, and so is not the law.

Not only can a state statute not amend a federal law, but a state legislature cannot act as a judiciary by “say[ing] what the [federal] law is.” *Marbury*, 5 U.S. at 177. The legislature has acted outside “its sphere of authority to make policy to pass laws, and to amend laws already in effect,” and “has invaded the prerogatives of the judicial branch.” *Hale*, 165 Wn.2d at 509-510. The 2013 Amendments clearly violate the separation of powers doctrine, insofar as they purport to change the Washington Supreme Court’s interpretation of federal law.

**b. Recent Washington Court Decisions Confirm that the Legislature Has Overstepped its Bounds.**

Several recent decisions issued by Washington courts confirm that the 2013 Amendments cannot survive a separation of powers challenge. First, in *Lummi Indian Nation v. State*, the Washington Supreme Court rejected a separation of powers challenge because the legislature had been extremely careful in performing its legislative task so as not to invade the judicial branch’s prerogatives. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010). The Court had held in 1998 that under then-existing law, new private water rights did not fully vest until the water was put to a beneficial use. *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582,

586, 957 P.2d 1241 (1998). The *Theodoratus* Court cautioned that it was not considering municipal water rights. *Id.* at 594.

As a proactive measure, the legislature amended the municipal water law to define certain private water suppliers as municipal and make that definition retroactive. Addressing facial rather than as-applied challenges to the statutes (and noting that “many of the arguments” before it “might be better raised in an ‘as applied’ challenge”), the *Lummi* Court applauded the legislature’s care in crafting the legislation: “The legislature approached its legislative task both thoughtfully and with deference to this court’s construction in *Theodoratus*. It adopted this court’s holding prospectively . . . it evoked this court’s language . . . and it used the fact that this court did not consider ‘issues concerning municipal water suppliers’ in *Theodoratus* as an opportunity to secure the rights of some existing water certificate holders.” *Lummi*, 170 Wn.2d at 258, 263. In stark contrast to *Lummi*, the legislature here has “interfer[ed]” with a judicial function by usurping the judiciary’s role as interpreter of federal law. *Id.* at 263.

Second, in *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Board*, a Washington Court of Appeals found no separation of powers issue because no majority interpretation of a statute existed; instead, the eight justices who had

“expressed an opinion on the topic were evenly divided.” 160 Wn. App. 250, 260, 255 P.3d 696 (2011). The legislature’s response to “confusion about the [statute] did not amount to overturning a settled construction of the statute. Rather, the legislature stepped in to clarify its intent in the face of judicial uncertainty.” *Id.* at 261. “[I]n this situation,” the court held, later retroactive amendments clarifying the law did not violate the separation of powers doctrine. *Id.* (The Washington Supreme Court later cited *Kitsap* with approval. *Lauer v. Pierce County*, 173 Wn.2d 242, 258 n.3 (2011).)

*Bracken*, unlike *Kitsap*, involved a unanimous decision in favor of the Bracken estate, with all nine justices agreeing that no taxable event occurred when the surviving spouse died. And a clear majority of the justices agreed that an estate tax is a tax on the transfer of property at death, and that no such transfer occurred on the surviving spouse’s death. The 2013 Amendments did not “step[] in to clarify [the legislature’s] intent in the face of judicial uncertainty.” *Kitsap*, 160 Wn. App. at 261. The legislature stepped in to disagree with the Washington Supreme Court about issues of federal law, and state law based on that federal law. Saying what such law is remains a function of the judiciary.

Third, in *State v. Elmore*, a Washington Court of Appeals upheld a retroactive amendment in response to a Washington Supreme Court

decision because the amendment changed the statute—without disagreeing with the Court’s interpretation of the statute’s language—rather than clarifying it in contravention of an existing judicial construction. *State v. Elmore*, 154 Wn. App. 885, 905-907 (2010). The Washington legislature had created new procedures for juries to consider aggravating factors supporting an exceptional sentence. Former RCW 9.94A.537(2) (2005). But as a result of a 2007 Washington Supreme Court interpretation of the statute’s plain language, trial courts could not follow these procedures with defendants who had pleaded guilty or been tried before the statute’s 2005 effective date. *Elmore*, 154 Wn. App. at 904. So the legislature amended the statute to ensure that trial court judges had this authority in all cases that came before them, regardless of when defendants had pleaded guilty.

Elmore had been retried and convicted of first degree murder in 2006, and argued that the 2007 amendments as applied to her would violate the separation of powers doctrine. The court disagreed. The court cited *Marine Power & Equip. Co. v. Human Rights Comm’n Hearing Tribunal*, explaining that where the controlling statute changes between a judgment below and an appeal, the appellate court applies the new or altered statute—especially where no vested rights are involved. *Id.* at 907 (citing *Marine Power v. Human Rights Comm’n*, 39 Wn. App. 609, 620,

694 P.2d 697 (1985)). The 2013 Amendments, by contrast, deprive the Macbride estate of its vested rights in QTIP assets and also expressly seek to “clarify” the 2005 Act in direct contravention of an existing judicial interpretation of the 2005 Act’s plain language. And the “Legislature may not, under the guise of clarification, overrule by legislative enactment a prior authoritative Supreme Court opinion construing a statute.” *Marine Power*, 39 Wn. App. at 615. *See also State v. Ramirez*, 140 Wn. App. 278, 289 n. 7, 165 P.3d 61 (2007) (“[E]ven when the Legislature specifically enacts a law to ‘correct’ what it deems to be an erroneous judicial interpretation of a statute, the new legislation does not thereby reach back in time to ‘correct’ the previous law when the court interpreted the previous law as unambiguous. Rather, the new legislation prospectively amends the statute to escape the court’s erroneous interpretation of its predecessor version.”).

Lastly, in *State v. Maples*, the Court of Appeals addressed the 2002 amendment of a statute that stated “unequivocally that [the Department of Correction’s] authority to require preapproval of the prisoner’s residence plan had always existed, dating back to the 1988 statute.” *State v. Maples*, 171 Wn. App. 44, 48, 286 P.3d 386 (2012). With this amendment, the legislature intended to clarify the statute in response to *In re Pers. Restrain of Capello*, a 2001 Washington Court of Appeals decision that

interpreted the 1991 version of the statute differently. *In re Pers. Restrain of Capello*, 106 Wn. App. 576, 583-84, 24 P.3d 1074 (2001). In 2003, the same Washington Court of Appeals had concluded that this 2002 legislation violated the separation of powers doctrine in *In re Pers. Restrain of Stewart*, 115 Wn. App. 319, 331, 75 P.3d 521 (2003). The Stewart court held that these “amendments cannot have retroactive application because the amendatory act contravenes this court’s judicial construction of the statutory scheme in effect prior to 1992 and retroactive application of the amendments violates the separation of powers doctrine.” *Id.* at 331.

The *Maples* court followed *Stewart*, declining to find that *Stewart* was no longer good law. The court explained that *Stewart* “rested on the bedrock principle that the legislature cannot contravene an existing judicial construction of a statute,” and pointed to the Supreme Court’s decision in *Lummi*, which also did not overrule *Stewart*. The *Maples* court held that the 2002 amendments applied prospectively only—as should the Court here with respect to the 2013 Amendments.

**c. *Hale and Plaut Support This Result.***

We anticipate that the DOR will look to a 2009 Washington Supreme Court case and a 1995 U.S. Supreme Court case for support. First, the DOR will argue that *Hale v. Wellpinit School District No. 49*

stands for the proposition that as long as the legislature does not reverse a particular final judgment, it cannot invade the judiciary's realm. *Hale v. Wellpinit School District No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009). Hale does not stand for that narrow proposition. In 2009, Hale court held that a legislature's retroactive amendment of the Law Against Discrimination ("LAD") did not violate the separation of powers doctrine. Hale differs in several key respects from the case at hand.

In *Hale*, the court addressed the legislature's rejection of the Supreme Court's decision in *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). The *McClarty* court had been confronted with a statute that did not define "disability," and so resorted to the definition in the federal Americans with Disabilities Act. As the *Hale* court emphasized, a "[c]losely divided court" decided on the definition "in a five to four opinion." *Hale*, 165 Wn.2d at 501, 510. In response to *McClarty*, the legislature promptly amended the LAD to provide a new statutory definition of "disability," applying the definition retroactively. *Id.* at 501-502. As the *Hale* court underscored, *Hale* involved "no claims that the legislation may have contravened other constitutional limits," like due process or the right to contract. *Id.* at 503.

*Hale* represents branches of government "work[ing] together in harmony and in the spirit of reciprocal deference to the other's important

role and function in the art of governance.” *Id.* at 510. The *McClarty* court, in a close decision, had interpreted a statute where the legislature had not previously spoken on an issue, and the *Hale* court subsequently deferred to the changed law where the parties raised no other constitutional issues.

This case represents something entirely different. In *Hale*, the legislature had added something to the law that “had not previously existed.” *Marine Power*, 39 Wn. App. 615. Here the 2005 Act included a definition of “transfer”—which is still based on the Internal Revenue Code definition. The 2005 Act stated explicitly that the law would only apply “prospectively” and not retroactively. And the *Bracken* court ruled decisively for the *Bracken* estate by interpreting not only that statute, but the federal law on which the statute was and still is based. The legislature in this case has acted as a “court of last resort,” and the 2013 Amendments can only avoid violating the separation of powers doctrine if they apply prospectively as originally drafted in 2005 and interpreted by the *Bracken* court. *State v. Dunaway*, 109 Wn.2d 207, 216 n. 6, 743 P.2d 1237 (1987) (citation omitted).

*Second*, we expect that the DOR will point to *Plaut v. Spendthrift Farms, Inc.* and argue that separation of powers principles cannot be violated when retroactive legislation applies to a case that has not been

finally decided. 514 U.S. 211, 115 S.Ct. 1447 (1995). But the separation of powers doctrine has never been this narrow. *Plaut* held only that the federal Constitution's separation of legislative and judicial powers denied Congress the authority to enact retroactive legislation requiring an Article III court to set aside a final judgment. *Id.* at 240. *Plaut* did not hold that this is the only way that a legislature can step on a judiciary's toes. On the contrary, the Court cited Thomas Cooley's telling 1868 treatise with approval:

If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments .

*Id.* at 225 (quoting T. Cooley, *Constitutional Limitations* 94-95 (1868)) (emphasis added). The 2013 Amendments attempt to control the Washington Supreme Court's construction of federal law according to its own views, and violates the separation of powers doctrine.

### 3. **The 2013 Amendments Violate the Due Process Clause.**

The Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the Washington State Constitution provide that “[n]o person shall be deprived of life, liberty or property without due process of law.” Washington's due process clause is coextensive the

Fourteenth Amendment's. *See State v. Morgan*, 163 Wn. App. 341, 352 (2001).

**a. The 2013 Amendments Deprive the Remainder Beneficiaries of their Vested Property Rights without Due Process of Law.**

The 2013 Amendments would deprive the Macbride beneficiaries of property rights that vested in 1999. The legislature cannot give an amendment retroactive effect in these circumstances.

A “vested right” is “a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.” *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 304-305, 174 P.3d 1142, 1152 (2007) (quoting *Lawson v. State*, 107 Wn.2d 444, 454, 730 P.2d 1308 (1986)). The Macbride beneficiaries—as of Thomas’s death in 1999—held a future but vested interest in the QTIP assets. This is the textbook example of a vested remainder, as Washington courts have noted:

[T]he [*In re Estate of Gochnour*, 192 Wash. 92, 93, 72 P.2d 1027 (1937)] court stated: By the terms of the will, under the great weight of authority, Jacob B. Gochnour takes a life estate, with vested remainder to the decedent's sister and nieces, notwithstanding his absolute power of disposal during his lifetime . . . [T]he interest created in the remaindermen

is identical with the interest placed in trust in the case at bar. Accordingly, we hold that testatrix created a life estate and a future interest denominated a vested remainder, both interests of which came into being at the time of her death. *Edwards v. Edwards*, 1 Wn. App. 67, 70-72, 459 P.2d 422, 425 (1969) (citing also *Shufeldt v. Shufeldt*, 130 Wash. 253, 227 P. 6 (1924)). *See also* Restatement (Second), Trusts § 77 (1959) (“A, the owner of Blackacre, transfers Blackacre to B for life, remainder to C and his heirs and directs that C hold his interest in trust for D. C holds a vested remainder in trust for D.”). Unlike in *Gregoire* (where appellants could not prove a vested right to vote on taxes), the rights at issue here clearly vested—fourteen years ago. The 2013 Amendments would substantially impair these rights over a decade later. The due process clauses prohibit this outcome.

The Washington Supreme Court has held repeatedly that a retroactive statute is unconstitutional if the statute takes away or impairs vested rights acquired under existing laws—the existing law here being, in effect, no estate tax law at all, or rather the “pickup” tax Washington instituted in 1981. In *In re F.D. Processing, Inc.*, for example, the court explained that even if an amendment were remedial, it could not be given retroactive effect in that case. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). In 1990, U.S. Bank had achieved a perfected

security interest in a company's inventory and accounts receivable. Certain milk producers who had not been paid for delivered milk argued that their liens were valid and had priority. In 1991, the legislature expressly extended lien protection to include milk producers. The amendments were silent on retroactivity, but the court noted that it could not give the statute retroactive effect in any event: U.S. Bank possessed a perfected security interest, and applying the amendment retroactively would unconstitutionally "'affect' U.S. Bank's vested interest as long as the retroactive application would cause U.S. Bank to recover a smaller amount of its secured claim." *Id.* So too, here, do the 2013 Amendments affect the beneficiaries' vested rights by causing a far smaller distribution of the QTIP trust assets.

Also, in *State v. Varga*, the Washington Supreme Court confirmed that a statute imposed retroactively to deprive a party of vested rights violates that party's substantive due process rights. *State v. Varga*, 151 Wn.2d 179, 86 P.3d 139 (2004). In 2002, the legislature amended the Sentencing Reform Act in response to two court decisions that had held that amendments to the act showed no intent to include "washed out" convictions in calculating offender scores. In the 2002 amendments, the legislature explained that it "never intended to create in an offender a vested right" with respect to whether offender scores included prior

convictions. Laws of 2002, ch. 107, § 1. In *Varga*, the court acknowledged the statute's now-plain retroactivity, and held that the retroactivity did not violate Varga's due process rights:

“A retroactive law violates due process when it deprives an individual of a vested right.” *State v. Shultz*, 148 Wn.2d 638, 646, 980 P.2d 1265 (1999) . . . “We find no vested right which has been impaired or taken away. The act does not impose any new duty . . . The defendants could have avoided the impact of the act . . .” [*State v. Scheffel*, 82 Wn.2d 872, 878-879, 514 P.2d 1052 (1973).] *Varga*, 151 Wn.2d at 194 (emphasis added). Unlike *Varga*, neither Thomas, nor Jessie, nor the beneficiaries could have avoided the impact of the 2013 Amendments. Instead, the amendments “sweep away [their] settled expectations,” which the federal and state constitutions forbid. *Landgraf v. USI Film Products*, 511 U.S. 244, 255, 266, 114 S.Ct. 1483 (1994) (noting that “individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted”). *See also Lummi*, 170 Wn.2d at 261 (“Retroactive changes in the law alter the status quo in the law upon which people should be able to reasonably rely.”); *Strand v. Stewart*, 51 Wash. 685, 687-688, 99 P. 1027 (1909) (The legislature may not interfere with or divest estates which have already become vested through the death of a testator.); *In re Verchot's*

*Estate*, 4 Wn.2d 574, 582, 104 P.2d 490 (1940) (An interest in an estate vests immediately upon the death of the ancestor in the heir or devisee entitled thereto, subject only to the rights of creditors.)

**b. The 2013 Amendments' Retroactivity Period and Effect Exceed Permissible Retroactivity.**

While the mere fact that a tax or amendment is retroactive does not make that tax or amendment unconstitutional, there are constitutional limits to permissible retroactivity. The 2013 Amendments fall well outside of those limits. According to the U.S. Supreme Court, a retroactive tax statute violates due process if it applies to more than “only a modest period of retroactivity.” *United States v. Carlton*, 512 U.S. 26, 31-32, 114 S.Ct. 2018 (1994). In *Carlton*, for example, the retrospective period spanned only 14 months. *Id.* As for Washington courts, a twenty-four year retroactivity period was “well beyond the limit of permissible retroactivity and retroactive enforcement.” *Tesoro Refining and Marketing Co. v. Dep't of Revenue*, 159 Wn. App. 104, 246 P.3d 211 (2010), reversed on other grounds, 173 Wn.2d 251 (2011) (emphasis added). The *Tesoro* court relied on a Washington Supreme Court case in which the court found a four year retroactive period unconstitutional. *See State v. Pacific Tel. & Tel. Co.*, 9 Wn.2d 11, 113 P.2d 542 (1941).

The 2013 Amendments go back eight years to “clarify” the 2005 Act, *and reach back even decades further to capture property transferred and vested long before the Stand Alone Tax even existed*. In fact, had the 2005 Act itself been clearly retroactive, that new “stand-alone” tax made necessary by *Hemphill* would have violated due process under Washington law. *See Bates v. McLeod*, 11 Wn.2d 648 (1941) (striking down a new unemployment insurance tax made retroactive for 2.5 months because it violated due process); *Japan Lines v. McCaffree*, 88 Wn.2d 93 (1997) (upholding a 2.5 month retroactive leasehold excise tax because the tax was not “novel”). In short, had the *Bracken* court in fact reached the constitutional issues—and as it heavily implied in its opinion—it would have likely held that, applied retroactively, the 2005 Act violated due process.

#### **4. The 2013 Amendments Violate the Impairment Clause.**

Article I, Section 10 of the U.S. Constitution provides that “[n]o state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts.” Article I, section 23 of the Washington State Constitution provides that “[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be

passed.” These constitutional provisions are coextensive. *Tyrpak v. Daniels*, 124 Wn.2d 146, 151, 874 P.2d 1374 (1994).

The threshold inquiry under the Impairment Clauses is whether the law has, in fact, “operated as a substantial impairment of a contractual relationship.” *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S.Ct. 2716 (1978)). An “impairment is substantial if the complaining party relied on the supplanted part of the contract, and contracting parties are generally deemed to have relied on existing state law pertaining to interpretation and enforcement.” *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23 (1993). “A contract is impaired by a statute which alters its terms, imposes new conditions or lessens its value.” *Caritas Servs., Inc. v. Dep’t of Social & Health Servs.*, 123 Wn.2d 391, 404, 869 P.2d 28 (1994).

Washington courts have held that regardless of the legislature’s intent, “a statute may not operate retroactively where the result would be to impair the obligation of a contract.” *Gillis v. King County*, 42 Wn.2d 373, 376, 255 P.2d 546, 548 (1953); *Hearde v. Seattle*, 26 Wn. App. 219, 611 P.2d 1375 (1980). And the Impairment Clauses apply to trusts like any other contract. As the U.S. Supreme Court explained in *Coolidge v. Long*, “trust deeds are contracts within the meaning of the contract clause

of the Federal Constitution.” *Coolidge v. Long*, 282 U.S. 585, 595, 51 S. Ct. 306 (1931). In *Coolidge*, the Court held that the state did not have the authority to impair or destroy rights that had already vested in the trust deeds, which had been fully executed before the state law came into effect. *Id.* The same logic applies here.

The Washington Supreme Court followed *Coolidge* in *In re McGrath's Estate*. McGrath Candy Company had purchased two life insurance policies before the legislature subjected life insurance proceeds to Washington's then-existing inheritance tax. *McGrath*, 191 Wash. at 497-98. The court held that taxing the insurance proceeds was an unconstitutional impairment of the insurance contracts under the federal and state constitutions. The McGrath court noted that in *Coolidge*, the remainder beneficiaries' right to take the trust property upon their parents' deaths arose and vested in them when the Coolidges created the trust. *Id.* at 508. By analogy, the court found that McGrath Candy Company's right to take the proceeds of the life insurance arose and vested when the company executed the contracts. *Id.* Any later statute that attempted to tax the insurance proceeds would, if enforced, impair the company's contractual rights because the company would receive less than it was entitled to receive under the contract's term. *Id.* at 508-09.

The legislature's imposition of the Washington estate tax on Thomas's irrevocable QTIP trust is an unconstitutional impairment of the rights arising from that trust. The trust arose, and the property subject to the trust vested, years before the 2005 Act and the 2013 Amendments. Since 1999, the trusts have been irrevocable contracts under the state and federal constitutions. To apply Washington's estate tax to these trusts would impair the rights of the beneficiaries in contravention of the Impairment Clauses of the federal and state constitutions.

While legislation generally does not unconstitutionally impair contractual obligations if it advances a legitimate public purpose under the police power, it is utterly unreasonable for a state legislature to reach back as far as thirty years to impose a retroactive tax. *See Birkenwald Distributing Co. v. Heublein, Inc.*, 55 Wn. App. 1, 9, 776 P.2d 721 (1989) (holding that the legislature did not legitimately exercise the police power because the contract because the impairment was sufficiently severe and there was no showing of an important general social problem). Furthermore, there is absolutely no pre-existing or conceivable relationship between funds the DOR would like to collect from the QTIP trusts created decades ago and the state's Education Legacy Trust Account described in RCW 83.100.230. *See Allied Structural Steel*, 438 U.S. at 248 ("The presumption favoring 'legislative judgment as to the necessity and

reasonableness of a particular measure,' *United States Trust Co. of New York v. New Jersey*, 431 U.S., 1, 23, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977), simply cannot stand in this case." The state cannot have unfettered rein to impose any retroactive tax it deems useful.

The DOR cannot cite to a case overruling *McGrath* or *Coolidge* because none exists. The *Bracken* court also relied on *McGrath*. See *Bracken*, 175 Wn.2d at 565-66. The 2005 Act and the 2013 Amendments therefore impair the QTIP trust beneficiaries' contractual rights because they receive less—far less—than they would have received under the pickup tax regime at the trust's inception. *McGrath*, 191 Wash. at 508-09.

**B. The 2013 Amendments Violate art. VII, § 1 of the Washington Constitution.**

Without a transfer or voluntary action by the decedent of an estate, a tax on the QTIP itself violates the uniformity requirement of art. VII, § 1 of the Washington Constitution. Under that section,

All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. The word "property" as used herein shall mean and include everything, whether tangible or intangible, subject to ownership.

Admittedly, true excise taxes fall beyond the breadth of the uniformity requirement. *Dean v. Lehman*, 143 Wn.2d 12, 25-26, 18 P.3d 523 (2001).

However, simply labelling a tax an excise tax or transfer tax does not make it so. The distinction between a property tax, which must be uniformly applied, and an excise tax is that an excise tax is based upon a voluntary action:

[T]he obligation to pay *an excise is based upon the voluntary action of the person taxed in performing the act*, enjoying the privilege or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand, as in the case of a property tax, is lacking.

*Covell v. City of Seattle*, 127 Wn.2d 874, 889, 905 P.2d 324 (1995)

(emphasis added); *High Tide Seafoods v. State*, 106 Wn.2d 695, 699, 72 P.2d 411 (186), *appeal dismissed*, 479 U.S. 1073 (1987); *Black v. State*, 67 Wn.2d 97, 406 P.2d 761 (1965) ((quoting 1 T. Cooley, *Taxation* § 46, at 132 (4th ed. 1924)).

In *Black*, the Court defined a property tax as a tax on things tangible or intangible and an excise tax on “the right to use or transfer things.” *Black*, at 99, 406 P.2d 761. Conversely, the right to own and hold property cannot be made the subject of an excise tax, because to tax by reason of ownership of property is to tax the ownership itself. See *Jensen v. Henneford*, 185 Wash. 209, 218, 53 P.2d 607 (1936). This is undoubtedly why the operative taxing language in RCW 83.100.040 limits

the imposition of the tax under that section to “every transfer of property located in Washington” rather than imposing a tax on the property itself. *See Seattle-First National Bank v. Macomber*, 32 Wn.2d 696, 203 P.2d 1078 (1949) (an estate tax is a tax upon the transfer of property, and not on the property itself).

When Jessie died, she did not engage in any voluntary act to use or transfer assets in the Thomas Trust. As noted in Appellant’s Opening Brief, when the QTIP trusts were created in 1999, it was *Thomas’s* voluntary act that directed the distribution of the Trust: the beneficiaries were vested, determined and fixed. Jessie was entitled to receive income as long as she was alive, but when she died, Thomas’s QTIP Trust (drafted in 1998 and set in motion at his death in 1999) had already fixed the distribution of the Trust. Indeed, that is the nature of the QTIP. The lifetime beneficiary cannot redirect the trust by her voluntary act. The only thing Jessie did was to die (which even the State will not contest was a voluntary act). *See also McGrath*, at 504 (“[t]he death of McGrath added nothing to the company's right to the proceeds of the policies, for the right was from the beginning complete and indefeasible.”)

Because the DOR will not be able to identify any voluntary act of Jessie’s, the Stand-Alone Tax as applied to the QTIP is in actuality a property tax on the QTIP itself. By the very structure of its graduated

rates of Stand-Alone Tax, the tax violates the uniformity requirement as applied to QTIP property under the 2013 Amendments. *See, e.g., Inter Island Telephone Co., Inc. v. San Juan County*, 125 Wn.2d 332, 883 P.2d 1380 (1994). Thus, the 2013 Amendments are unconstitutional under Wash. Const. Art. VII, § 1.

**C. The DOR is Estopped from Applying the 2013 Amendments to the Macbride Estate, Which was Prejudiced by the Stay Pending the Outcome of Bracken.**

The 2013 Amendments apply to all estates except for those estates that participated in the Washington Supreme Court decision in *Bracken*. *See* Laws of 2013, ch. 2, § 10; *see also*, HB 2075, House Bill Report, at 2 (“[t]he changes in the bill do not impact the parties involved in the Estate of Bracken decision.”) Macbride was identical in virtually all respects to the cases (and indeed, the briefing in Macbride and Nelson cases were substantially identical). But for the stay of these proceedings, the Macbride estate—which had fully briefed its case and was prepared to transfer its case to the state Supreme Court just as the Nelson estate had done—relented on the assurances that the outcome of the Bracken case would bind the Macbride estate, whichever way the Court decided Bracken.

Yet rather than issue refunds required by Bracken, the DOR instead lobbied the legislature at the end of the 2012-13 session, and through two special sessions, to fix what it referred to as the “Bracken problem.” The Macbride estate never would have agreed to the stay if it knew that only those who participated in Bracken would be safe, and all others who had not transferred their cases to the Supreme Court would be in jeopardy from new proposed legislation.

Equitable estoppel against a government agency requires a showing of: (1) an admission, statement, or act by the government inconsistent with its later claim; (2) reliance on the admission, statement, or act; (3) injury to the relying party if the government were allowed to contradict or repudiate its prior admission, statement, or act; (4) the necessity of estoppel to prevent a manifest injustice; and (5) no impairment of governmental functions if estoppel is applied.

*Kramarevcky v. Dep’t of Soc. & Health Servs.*, 122 Wn.2d 738, 743-44, 863 P.2d 535 (1993); *see also Shafer v. State*, 83 Wn.2d 618, 521 P.2d 736 (1974) (estopping the state from asserting untimely filing because the government led plaintiff and her attorney to believe it would recognize her claim).

As the DOR indicated in its stay motions, the *Bracken* decision would govern the Macbride case “and render any further proceedings

moot.” Thus, the appellants did not need to transfer the case from Division One to join the Bracken and Nelson estates. The immediate change in position after the Supreme Court published Bracken is plainly inconsistent with its earlier assurances. If this Court allows this change in position, then the Macbride estate will be injured severely. Under the 2013 Amendments, the Bracken and Nelson estates enjoy the benefit of *Bracken* (in the legislature’s ineffective attempt to avoid a separation of powers issue). The Macbride estate beneficiaries, on the other hand, are hit by a substantial reduction in their property—and only because they relied on the statements in the stay motions. No government function could possibly be impaired by estopping the DOR from pursuing its manifestly unjust arguments against the Macbride estate.

Excluding Macbride from the retroactive provisions of the 2013 Amendments is bad policy as well. If the Macbride estate is not excluded, then the message is clear: all taxpayers should litigate their cases to the supreme court and join or consolidate *en masse* or face the risk of a retroactive amendment by a state legislature.

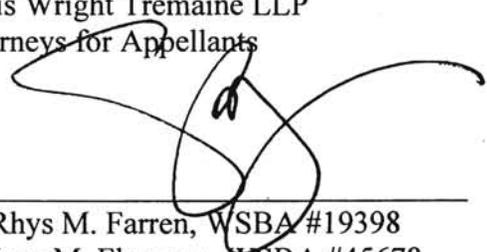
#### IV. CONCLUSION

For the reasons set forth above, and in Appellants’ Opening Brief, Reply Brief and its (First) Supplemental Brief, this Court should hold that

*Bracken* is binding precedent and that EHB 2075 as applied to the  
Macbride Estate is unconstitutional.

RESPECTFULLY SUBMITTED this 7th day of October, 2013.

Davis Wright Tremaine LLP  
Attorneys for Appellants

By  \_\_\_\_\_

Rhys M. Farren, WSBA #19398  
Jean M. Flannery, WSBA #45678  
Attorneys for Appellants  
Suite 2300, 777 108th Avenue NE  
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(425) 646-6100 Phone  
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[jeanflannery@dwt.com](mailto:jeanflannery@dwt.com)

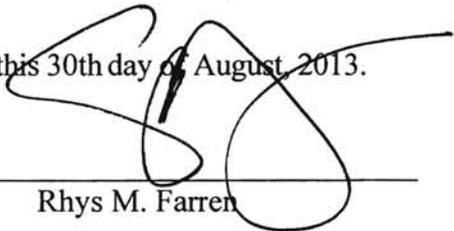
PROOF OF SERVICE

I, Rhys Farren, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

On this date, I caused to be served a true copy of the document entitled SUPPLEMENTAL BRIEF OF APPELLANTS to which this is attached, by First Class U.S. Mail and electronic mail on the following:

Washington State Department of Revenue  
David M. Hankins, WSBA #19194  
davidh1@atg.wa.gov  
Charles Zalesky, WSBA #37777  
chuckz@atg.wa.gov  
Office of the Attorney General, Rob McKenna  
PO Box 40123  
Olympia, WA 98504-0123

Executed at Bellevue, Washington this 30th day of August, 2013.

  
\_\_\_\_\_  
Rhys M. Farren

NO. 65948-1-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

ESTATE OF JESSIE CAMPBELL MACBRIDE,  
THOMAS H. MACBRIDE III AND PHILIP C. MACBRIDE, Personal  
Representatives of the Estate of Jesse Campbell Macbride,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

---

APPELLANT'S SUPPLEMENTAL BRIEF  
EXHIBITS

---

Rhys M. Farren  
Jean M. Flannery  
DAVIS WRIGHT TREMAINE LLP  
Attorneys for Appellants  
Suite 2300, 777 108th Avenue NE  
Bellevue, WA 98004-5149  
(425) 646-6100 Phone  
(425) 646-6199 Fax

2013  
2:13

**EXHIBIT A**

NO. 65948-1-I

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

THOMAS H. MACBRIDE III and  
PHILIP C. MACBRIDE, Personal  
Representatives of the Estate of Jessie  
Campbell Macbride,

Appellants,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF REVENUE,

Respondent.

MOTION TO STAY  
PROCEEDINGS

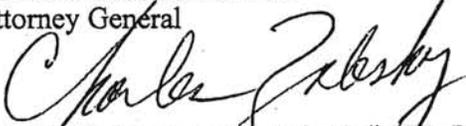
1. *Identity of Moving Party.* Respondent State of Washington, Department of Revenue seeks the relief designated in part 2.
2. *Statement of Relief Requested.* Respondent seeks a stay of the proceedings pending the decision of the Washington Supreme Court in *In Re the Estate of Sharon M. Bracken*, Supreme Court No. 84114-4.
3. *Facts relevant to motion.* The facts relevant to this motion are set forth in the accompanying Affidavit of Charles Zalesky, filed in support of this motion.
4. *Grounds for Relief and Argument.* RAP 18.8(a) provides that the appellate court may, on motion of a party, enlarge or shorten the time within which an act must be done in a particular case in order to serve the interests of justice. Enlargement of time necessarily includes the power to stay the proceedings for a set time or until the occurrence of an event. In

light of the facts set forth in the affidavit and exhibits submitted in support of this motion, the Respondent, Department of Revenue, respectfully submits that a stay of the proceedings in this appeal pending the decision of the Washington Supreme Court in the *Estate of Bracken* appeal would serve the interests of justice.

*Estate of Bracken* involves the same legal issues raised in this appeal. Thus, the Washington Supreme Court's decision in the *Estate of Bracken* appeal will likely resolve this appeal and make any further proceedings moot. Moreover, a stay of this appeal pending the final decision in the *Estate of Bracken* appeal will reduce the costs to the parties, and promote judicial economy. As a result, a stay of these proceedings pending the final decision in *Estate of Bracken* is warranted in the interests of justice.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of December, 2010.

ROBERT M. MCKENNA  
Attorney General

  
CHARLES ZALESKY, WSBA # 37777  
Assistant Attorney General  
DAVID M. HANKINS, WSBA # 19194  
Senior Counsel  
Attorneys for Respondent  
State of Washington, Department of  
Revenue



exemption for qualified terminable interest property ("QTIP") included in the decedent's taxable estate under Internal Revenue Code § 2044.

Resolution of this issue in the consolidated *Estate of Bracken* appeal should resolve the present appeal filed by the personal representatives of the estate of Jessie Campbell Macbride and moot any further proceedings on the merits.

  
CHARLES ZALESKY

SUBSCRIBED AND SWORN TO before me this 16th day of  
December, 2010.



  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at Olympia  
My Commission expires 6-6-11

**EXHIBIT B**

*The Court of Appeals*  
of the  
*State of Washington*

RICHARD D. JOHNSON,  
Court Administrator/Clerk

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

January 31, 2011

Charles E Zalesky  
Attorney General of Washington  
PO Box 40123  
Olympia, WA, 98504-0123

David M. Hankins  
Atty Generals Ofc/Revenue Division  
7141 Cleanwater Dr SW  
PO Box 40123  
Olympia, WA, 98504-0123

Rhys Matthew Farren  
Davis Wright Tremaine LLP  
777 108th Ave NE Ste 2300  
Bellevue, WA, 98004-5149

CASE #: 65948-1-1

Thomas H. MacBride III, et al., Appellants v. State of Washington, Department of Revenue,  
Respondent

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on January 28, 2011, regarding respondent's motion to stay:

Respondent's motion to stay is denied as In re Estate of Bracken, No. 84114-4 is not yet set. Once the briefing is complete, either party may seek to transfer this matter to the Supreme Court. See RAP 4.4.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

jh

**EXHIBIT C**

*The Court of Appeals*  
of the  
*State of Washington*

RICHARD D. JOHNSON,  
Court Administrator/Clerk

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

March 21, 2011

Charles E Zalesky  
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David M. Hankins  
Atty Generals Ofc/Revenue Division  
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PO Box 40123  
Olympia, WA, 98504-0123

Rhys Matthew Farren  
Davis Wright Tremaine LLP  
777 108th Ave NE Ste 2300  
Bellevue, WA, 98004-5149

CASE #: 65948-1-1

Thomas H. MacBride III, et al., Appellants v. State of Washington, Department of Revenue,  
Respondent

Counsel:

The following notation ruling by Commissioner James Verellen of the Court was entered on  
March 21, 2011:

The parties are directed to indicate by April 1, 2011, any reason why this appeal should  
not be stayed pending the outcome of Estate of Sharon Bracken and Estate of Nelson,  
currently pending in the Washington Supreme Court No. 84114-4.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

jh

**EXHIBIT D**



Received  
MAR 24 2011  
Rhys M. Farren

Rob McKenna  
**ATTORNEY GENERAL OF WASHINGTON**  
Revenue Division  
PO Box 40123 • Olympia, WA 98504-0123 • (360) 753-5528

March 22, 2011

Richard D. Johnson  
Court Administrator/Clerk  
Court of Appeals, Division I  
One Union Square  
600 Unions Street  
Seattle, WA 98101-4170

**RE: Case # 65948-1-I -- *Thomas H. MacBride III, et al., Appellants v. State of Washington, Department of Revenue, Respondent***

Dear Mr. Johnson:

In response to your letter of March 21, 2011, pertaining to the ruling by Commissioner James Verellen, the Department of Revenue supports staying the above appeal pending the outcome of *Estate of Bracken* and *Estate of Nelson*.

The reasons why a stay is warranted are set out in the Motion to Stay Proceedings that was filed by the Department on December 17, 2010. In short, the *Estate of Bracken* and *Estate of Nelson* appeals involve the same legal issues raised in this appeal and the Supreme Court's decision in *Estate of Bracken / Estate of Nelson* will likely resolve this appeal and make any further proceedings moot.

Sincerely,

CHARLES ZALESKY, WSBA # 37777  
Assistant Attorney General  
DAVID M. HANKINS, WSBA # 19194  
Senior Counsel  
Attorneys for Respondent  
State of Washington, Department of Revenue

cc: Rhys M. Farren, Davis Wright Tremaine LLP, Attorneys for Appellants.

**EXHIBIT E**

# HOUSE BILL REPORT

## HB 2075

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As of Second Reading

**Title:** An act relating to preserving funding deposited into the education legacy trust account used to support common schools and access to higher education by restoring the application of the Washington estate and transfer tax to certain property transfers while modifying the estate and transfer tax to provide tax relief for certain estates.

**Brief Description:** Preserving funding deposited into the education legacy trust account used to support common schools and access to higher education by restoring the application of the Washington estate and transfer tax to certain property transfers while modifying the estate and transfer tax to provide tax relief for certain estates.

**Sponsors:** Representative Carlyle.

**Brief History:**

**Committee Activity:**

None.

**Brief Summary of Bill**

- Requires certain marital trust property to be included in the estate for purposes of the Washington estate tax.

---

**Staff:** Jeffrey Mitchell (786-7139).

**Background:**

In 1981 Initiative 402 repealed the state inheritance tax and replaced it with an estate tax equal to the amount allowed under federal law as a credit against the federal estate tax. This is commonly referred to as a "pick-up" tax. A pick-up tax is not an additional tax on the estate but merely shifts revenues from the federal government to the state. Federal law phased out state pick-up taxes (i.e. federal sharing), with a complete termination in 2005.

On February 3, 2005, the Washington Supreme Court (Court) invalidated Washington's estate tax by holding that Washington's "pick-up" estate tax was based on current federal law, which

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

had ended state-sharing, and Washington law did not impose an independently operating Washington estate tax. Until the Legislature expressly created a stand-alone tax, the tax remained a pick-up tax that must be fully reimbursed by the federal credit.

In response to the Court decision, Washington created a stand-alone estate tax in 2005. The tax took effect May 17, 2005. The current Washington estate tax is imposed on every transfer of property located in Washington at the time of death of the owner. The term "property" includes real estate and other property located in this state, as well as intangible assets owned by a Washington resident, regardless of location.

The measure of the tax is based on the taxable estate as determined under federal law, as it existed on January 1, 2005. For Washington decedents dying on or after January 1, 2006, a deduction of \$2 million is allowed from the taxable estate. The value of property used for qualifying farming purposes is also deductible.

After subtracting any applicable deductions (e.g., the \$2 million statutory deduction and the value of qualifying farm property), the remaining Washington taxable estate is subject to a graduated rate schedule ranging from 10 to 19 percent.

As previously mentioned, the federal taxable estate is the starting point for determining Washington's estate tax. Federal law allows an unlimited marital deduction for property passed outright to a surviving spouse. Federal law also allows certain transfers of property to marital trusts to qualify for the unlimited marital deduction even though the surviving spouse does not have total control of the property. This property is referred to as qualified terminable interest property (QTIP). The QTIP is included in the federal taxable estate of the surviving spouse upon the surviving spouse's passing. Under both federal and state law, the personal representative of the first spouse to die can make a QTIP election to qualify the property for the marital deduction. Since the current Washington estate tax did not take effect until May 17, 2005, an issue arises as to whether the Washington estate tax applies to QTIP when the first spouse passed away prior to May 17, 2005.

On October 18, 2012, the Court in *Estate of Bracken*, 175 Wn.2d 549 (2012), specifically held that QTIP included in the federal taxable estate where the federal QTIP election was made prior to May 17, 2005, is not subject to Washington estate tax when the surviving spouse passes away after May 17, 2005. The Court reasoned that Washington's estate tax is specifically triggered by the transfer of property of the decedent and with QTIP, the actual transfer occurs when the first spouse passes away. The surviving spouse is an income beneficiary of QTIP, but upon the surviving spouse's death, no actual transfer occurs. Under federal law, a fictional transfer of QTIP occurs when the second spouse dies based on the original QTIP election by the first spouse. However, since the current Washington estate tax did not exist until May 17, 2005, no state QTIP election could have been made prior to this time.

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#### **Summary of Bill:**

The definition of "transfer" is amended to specifically include property where the decedent economically benefitted in the property, i.e., property in a QTIP marital trust. A commensurate change is made to the definition of the "Washington taxable estate" to specifically include an interest in QTIP, regardless of whether the decedent acquired the interest in the property prior to May 17, 2005.

For decedents dying prior to April 9, 2006, the personal representative of the estate is not personally liable for estate taxes on QTIP if the property is not located in Washington and the personal representative does not have possession of the property.

The changes in the bill apply prospectively as well as retroactively to decedents dying on or after May 17, 2005.

The changes in the bill do not impact the parties involved in the *Estate of Bracken* decision.

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**Appropriation:** None.

**Fiscal Note:** Requested on June 12, 2013.

**Effective Date:** The bill contains an emergency clause and takes effect immediately, except for section 4 relating to qualified terminable interest property, which takes effect January 1, 2014.

**Staff Summary of Public Testimony:**

(In support) None.

(Opposed) None.

**Persons Testifying:** None.

**Persons Signed In To Testify But Not Testifying:** None.

**EXHIBIT F**

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

---

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(~~(7 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(~~(7 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	<del>((17.00%))</del> <u>18.00%</u>	\$4,000,000
\$6,000,000	\$7,000,000	<del>(\$890,000)</del> <u>\$910,000</u>	<del>((18.00%))</del> <u>19.00%</u>	\$6,000,000
\$7,000,000	\$9,000,000	<del>(\$1,070,000)</del> <u>\$1,100,000</u>	<del>((18.50%))</del> <u>19.50%</u>	\$7,000,000

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.