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I. INTRODUCTION

The Estate of Barbara M. Purdue, by and through its Personal Representatives, Susan P. Christoff, Nancy P. Myhre, Hazel P. Beatty, and William J. Purdue (the “Estate”), seeks a refund of Washington estate tax improperly imposed on assets in “QTIP” (or “qualified terminable interest property”) trusts set up by Barbara Purdue’s (“Barbara”) husband, Robert Purdue (“Robert”), who predeceased her. Those QTIP trusts were created and funded before Washington enacted a stand-alone estate tax. The Washington Supreme Court ruled unanimously in *Clemency v. State* (“*In re Estate of Bracken*”), 175 Wn.2d 549, 290 P.3d 99 (2012), known as the “Bracken” decision, that the State could not assess estate tax on such property. The Department of Revenue (“Department”) has resolutely refused to follow *Bracken*. The question in this case is whether the Department must follow *Bracken*.

The Estate filed a verified petition in Superior Court asserting three causes of action: (1) a claim for mandamus relief; (2) a claim for declaratory relief under TEDRA, Chapter 11.96A RCW; and (3) a claim for judicial review of agency action under the Administrative Procedures Act (the “APA”), Chapter 34.05 RCW. After considering the Department’s contrary arguments, the court commissioner ordered the Department to follow *Bracken* and issue a refund to the Estate. Judge Lum, on a motion for

revision by the Department, affirmed the commissioner's order. Thereafter, the Washington State Legislature enacted EHB 2075, discussed below.

Before this Court, the Department seeks to avoid the Supreme Court's holding in *Bracken* on two bases. First, the Department argues that the Court's order was incorrectly issued under TEDRA, instead of the APA. Second, the Department argues that the purportedly retroactive EHB 2075, enacted after the superior court's order on revision, overrules *Bracken* and negates the Department's regulations.

Both of the Department's arguments are misplaced, and the superior court's order should be affirmed. TEDRA applies and is specifically incorporated into Chapter 83.100 RCW. Moreover, even if TEDRA did not apply, the result would be the same, making the remand requested by the Department unnecessary. The Estate asserted a claim under the APA, complied with all of the APA's requirements, and there are no disputed facts. In addition, EHB 2075 does not change the result, as it is inapplicable. Further, EHB 2075 would be unconstitutional if and as applied. The Court's order should be affirmed.

II. ISSUES PRESENTED

1. Does TEDRA apply to refund lawsuits by estates, where Chapter 83.100 incorporates TEDRA?

2. Even if TEDRA were not to apply, should the Court's order be affirmed under the APA, since the facts are undisputed and the Estate asserted an APA claim and complied with its requirements?
3. Should EHB 2075 be read consistently with the Supreme Court's holding in *Bracken*?
4. If EHB 2075 is read to be inconsistent with *Bracken*, is EHB 2075 unconstitutional as applied?
 - a. Does EHB 2075 violate constitutional requirements for imposing an excise tax?
 - b. Does EHB 2075 violate due process?
 - c. Does EHB 2075 violate the separation of powers doctrine?
 - d. Does EHB 2075 unconstitutionally impair contracts?
 - e. Does EHB 2075 violate the equal protection principles?

III. STATEMENT OF THE CASE

A. Barbara Purdue's Estate Paid Estimated Taxes Based on a Washington Taxable Estate that Included QTIP Assets for Which No State QTIP Election Had Been Made.

The facts which gave rise to this lawsuit are all undisputed. CP 295, 300-303; *see also* CP 1-4, 57-60. Robert, Barbara's husband, died on August 3, 2001, nearly four years before Washington State first enacted a stand-alone estate tax on May 17, 2005. CP 3. On Robert's death, and pursuant to his will, Robert's estate created and funded the Purdue

Qualified Trust and the Purdue GSTT Exempt Trust, both of which are QTIP trusts under federal law. Robert's estate made no Washington State QTIP election because at the time the QTIP trusts were created and became irrevocable, Washington law did not provide for a QTIP election. *Id.*

Barbara died on November 27, 2007, and her Estate paid \$1,788,134 to the Department in estimated Washington State estate taxes on or about August 26, 2008. CP 3, 67-69. Her Estate timely submitted a Washington State estate tax return to the Department on or about February 25, 2009, which showed that \$71,913.00 had been overpaid, and the Department refunded this amount. CP 3, 72-77, 127.

As a result of changes to the Estate's federal estate taxes,¹ the Estate submitted an amended tax return to the Department on or about January 4, 2012, which indicates a total Washington estate tax of \$1,408,602, i.e., \$307,619 less than the net \$1,716,221 that the Estate had previously paid to the Department. CP 3, 140-145. In both the first and amended tax returns, the value of Barbara's Washington taxable estate included the QTIP assets created by Robert's estate. CP 3.

¹ The federal estate tax has not been finally determined. There very likely will be further amendments to the Estate's state tax return when the federal return is finalized.

B. In *Bracken*, the Supreme Court Held that QTIP Assets for Which No State QTIP Election Has Been Made Are Not Includable in the Value of the Surviving Spouse's (i.e., Barbara's) Washington Taxable Estate.

In October 2012, the Washington Supreme Court issued *Bracken*, 175 Wn.2d 549, 290 P.3d 99 (2012). Under *Bracken*, the QTIP assets of a predeceasing spouse, for which no Washington QTIP election has been made pursuant to RCW 83.100.047, are not includable in the Washington taxable estate of the surviving spouse and are therefore not subject to Washington estate tax at the death of the surviving spouse. After the Supreme Court's decision in *Bracken*, the Department moved for reconsideration, which the Supreme Court denied. *Bracken*, No. 84114-4 (Wash. Jan. 10, 2013).

As conceded by the Department, under the holding of *Bracken*, the federal QTIP trusts created by Robert are not to be included in Barbara's Washington taxable estate. CP 3-4, 59 at ¶ 10 (“[T]he Department admits that under the holding in *In re Estate of Bracken* the estate of Barbara Purdue is entitled to exclude from its Washington taxable estate the value of QTIP passing under Internal Revenue Code section 2044.”).

C. The Department Did Not Respond to the Estate's Refund Request Because It Was Hoping for Legislation that Would Overrule *Bracken*.

On February 20, 2013, the Estate submitted a second amended estate tax return to the Department, requesting a total refund of \$1,314,336,

which includes \$1,068,336 attributable to the Supreme Court's holding in *Bracken*. CP 168.

The Department did not respond to the Estate's second amended return because, as the Department would later state, it was "waiting to see whether House Bill 1920 [would] be passed by the Washington Legislature before it approve[d] any refund claims submitted by estates claiming a refund under the holding in *In re Estate of Bracken*." CP 59-60. As explained in more detail below, HB 1920 was a bill, introduced in the State Legislature at the request of the Department, that the Department hoped would overrule the *Bracken* decision. HB 1920, which did not pass, was the forerunner of EHB 2075.

D. The Estate Filed a Verified Petition in Superior Court Requesting the Court to Direct the Department to Issue a Refund.

On March 14, 2013, the Estate filed a verified petition in superior court requesting the court to direct the Department to issue a refund. CP 1. The petition asserts three causes of action: (1) a claim for mandamus relief; (2) a claim for declaratory relief under TEDRA; and (3) a claim for judicial review of agency action under the APA. CP 1-7. The hearing on the petition was set for April 18, 2013, before the King County Ex Parte and Probate Department.

In response to the petition, the Department filed its administrative record and an answer admitting the underlying facts. CP 57-267. The answer also asserted three affirmative defenses: (1) the APA as an exclusive remedy; (2) failure to exhaust administrative remedies; and (3) untimeliness under RCW 83.100.130(3). CP 61.

The Department also filed an objection to the Estate's petition. CP 268-279. In addition to requesting a transfer to a judge for trial pursuant to a local rule, the Department argued that all three of the Estate's causes of action failed on the merits. CP 269. The Estate filed a response to the objection, CP 287-293, and the Department filed a reply. CP 359-363.

At the April 18 hearing, Commissioner Pro Tem Henry Judson confirmed he had reviewed the Department's Answer and the Objection. RP (4/18/2013) 4:10-15. In addition, the Department presented oral argument at the hearing, including its argument that the Estate's refund claim was untimely. *Id.* at 10:20-11:23. At the conclusion of the hearing, Commissioner Pro Tem Judson entered an order declaring the Estate to be entitled to a refund under *Bracken* and directing the Department to issue the refund within 30 days. CP 364-67. At the Department's request, the Commissioner's order indicates that relief was granted "as to the TEDRA petition." CP 366; RP (4/18/2013) 21:16-25.

The Department filed a motion for revision arguing the Commissioner had erred in deciding the matter under TEDRA instead of the APA. CP 370-97. The Estate filed a response, indicating the matter could be affirmed under TEDRA or the APA. CP 398-407. The Department filed a reply, again arguing that the Estate's refund claim was time-barred, and suggesting, without support, that the Commissioner "had simply ignored this key legal and factual issue." CP 408-423, 411. The Department raised the timeliness issue again in oral argument before Judge Lum. RP (5/17/2013) 8:23-9:7.

Judge Lum did not rule at the hearing but took the matter under advisement to allow time to review the record more thoroughly before deciding. RP (5/17/13) 44:1-5. On May 20, 2013, Judge Lum entered an order denying the Department's motion for revision. CP 424-25.

E. After Judge Lum Entered an Order Directing the Department to Issue a Refund, the State Legislature Passed EHB 2075.

As indicated above, in its answer to the Estate's petition, the Department relied on its hoped-for passage of HB 1920 when deciding not to process any *Bracken* refund claims. HB 1920 was introduced in the state legislature on February 18, 2013, at the Department's request. CP 281. Section 1 of HB 1920 stated that the Washington Supreme Court in *Bracken* had "narrowly construed the term 'transfer' as defined in the Washington

estate tax code”; that “[t]he legislature finds that it is well established that the term 'transfer' as used in the federal estate tax code is construed broadly *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945)”; and “[t]he legislature further finds that it is necessary to prevent the adverse fiscal impacts of the *Bracken* decision by reaffirming its intent that the term ‘transfer’ as used in the Washington estate and transfer tax is to be given its broadest possible meaning” CP 281-82.

HB 1920 was not adopted during the Legislature’s regular session or first special session. Other bills seeking to reverse *Bracken* (HB 2064, SB 5872, and HB 5939) also failed. However, on June 13, 2013, the Legislature passed EHB 2075, which was read for the first time on June 12, 2013. The floor debate on EHB 2075 appears in the Appendix at A-6 to A-16. The Governor signed the bill on June 14, 2013, three and a half weeks after Judge Lum entered his order directing the Department to issue a refund to the Estate. Laws of 2013, 2d Spec. Sess., ch. 2, § 2. In accordance with its emergency clause, EHB 2075 became effective immediately.

F. The Supreme Court Has Accepted Review of Another Case Challenging the Validity of EHB 2075.

The Estate is aware of several parallel cases in which the Department has asserted, as it does in this case, that EHB 2075 retroactively overrules *Bracken*. Several of those are on appeal in Division Two of this

Court. *E.g. Dep't v. Estate of Davis*, No. 45032-1-II; *Ford v. Dep't*, No. 44917-0-II; *Osborne v. Dep't*, No. 44766-5-II. At least such case has been certified to and accepted for direct review by the Washington Supreme Court. *Dep't v. Hambleton*, No. 89419-1.

IV. ARGUMENT

A. **TEDRA, Not the APA, Applies.**

Under TEDRA, the superior court has plenary power to adjudicate matters affecting estates. RCW 11.96A.010 provides in pertinent part:

It is the intent of the legislature that the courts shall have full and ample power and authority under this title to administer and settle: (a) All matters concerning the estates and assets of incapacitated, missing, and deceased persons....

RCW 11.96A.010(1)(a) (emphasis added). To remove any doubt about the nature of the superior court's authority, the statute further provides:

If this title should in any case or under any circumstance be inapplicable, insufficient, or doubtful with reference to the administration and settlement of the matters listed in subsection (1) of this section, **the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.**

RCW 11.96A.010(2) (emphases added). RCW 11.96A.040 is in accord and provides that the court may "administer and settle the affairs of...deceased individuals" and may "order and cause to be issued all such writs and other

orders as are proper and or necessary; and do all other things proper or incident to the exercise of jurisdiction under this section.” RCW 11.96A.040(3).

The Department’s counterargument is that only it can invoke TEDRA, not the Estate. Besides being counterintuitive, this argument is directly contradicted by the above-quoted language of TEDRA, which gives the court plenary authority.

In addition, the Department acknowledges that Chapter 83.100 incorporates TEDRA but reads the incorporating language too narrowly. RCW 83.100.180 provides:

At any time prior to the making of an order under RCW 83.100.170, any person having an interest in property subject to the tax may file objections in writing with the clerk of the superior court and serve a copy thereof upon the department, and the same shall be noted for trial before the court and a hearing had thereon as provided for hearings in RCW 11.96A.080 through 11.96A.200.

RCW 83.100.180. Here, no order was made under RCW 83.100.170. As such, the Estate, being an interested party, filed objections by way of its petition, served a copy on the Department, and the matter was heard in a manner consistent with RCW 11.96A.080 through 11.96A.200.

The Department’s argument that only it can invoke TEDRA is based on a reading of the statute which would rewrite RCW 83.100.180 to provide that an interested person may file objections to a tax and proceed under

TEDRA if and only if the Department first files findings of a deficiency under RCW 83.100.150. But nothing in Chapter 83.100 RCW makes the Department's filing of findings a prerequisite to the taxpayer filing objections and proceeding under TEDRA. This Court should reject the Department's invitation to read nonexistent language into Chapter 83.100 RCW. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (Courts "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.") (quoting *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)).

Moreover, by its own terms the APA does not apply "to the extent that de novo review or jury trial review of agency action is expressly authorized by provision of law." RCW 34.05.510(3). Here, RCW 83.100.180 expressly incorporates "RCW 11.96A.080 through 11.96A.200," and RCW 11.96A.170 expressly authorizes trial by jury. Thus, on its own terms, the APA does not apply. Even if this were not so, to the extent of any conflict between Chapter 83.100 RCW and the APA, Chapter 83.100 would govern as the more specific statute. *See Booker Auction Co. v. Dep't of Revenue*, 158 Wn. App. 84, 90, 241 P.3d 439 (2010) ("Where a general statute addresses the same matter as a specific statute and the two cannot be harmonized, the specific statute prevails over the

general.”) (holding that the APA’s general provisions could not overcome the specific provisions in Chapter 82.32 RCW).

B. Even if TEDRA Did Not Apply, This Court Should Still Affirm Under the APA.

“A trial court judgment may be affirmed by any basis supported by the record.” *Clype v. State*, 61 Wn. App. 94, 98, 808 P.2d 777 (1991). Here, even if this Court were to hold that the APA governs, it should still affirm the superior court’s order directing the Department to comport with its statutory mandate under RCW 83.100.130 and issue a refund. The Estate asserted an APA claim and complied with the APA’s requirements. Nothing would be gained by remanding to have the same order issued under a different name.

1. Judge Lum Had Full Jurisdiction Over the Estate’s APA Claim.

The Department argues “the Estate’s APA claim must be decided by the superior court sitting in its appellate capacity, not by a court commissioner.” Brief of Appellant 18. This argument misses the mark, as the superior court did decide the case and its decision is the one before this Court.

On revision, the superior court “reviews the commissioner’s findings of fact and conclusions of law de novo.” *Estate of Wegner v. Tesche*, 157 Wn. App. 554, 561, 237 P.3d 387 (2010); *In re Marriage of*

Moody, 137 Wn.2d 979, 993, 976 P.2d 1240 (1999). In other words, the superior court has “full jurisdiction of the entire case” and should “determine its own facts” directly or by further proceedings as it may deem necessary. *In re Smith*, 8 Wn. App. 285, 288-89, 505 P.2d 1295 (1973); *In re Marriage of Dodd*, 120 Wn. App. 638, 645, 86 P.3d 801 (2004) (“A revision court may, based upon an independent review of the record, re-determine both the facts and legal conclusions drawn from the facts.”); *see also E. Outfitting Co. v. Lamb*, 169 Wash. 480, 484, 14 P.2d 30 (1932) (On a motion for revision, “the entire matter” is “before the superior court for review.”). The superior court’s “power of review is essentially unlimited.” *In re Dependency of B.S.S.*, 56 Wn. App. 169, 171, 782 P.2d 1100 (1989).

In light of the superior court’s plenary jurisdiction on revision, appellate courts review “the superior court’s decision, not the commissioner’s decision.” *Estate of Wegner*, 157 Wn. App. at 561; *Williams v. Williams*, 156 Wn. App. 22, 27, 232 P.3d 573 (2010). As a practical matter, this may require reference to the commissioner’s ruling, since the superior court may adopt the findings of fact and conclusions of law of the commissioner. *Dependency of B.S.S.*, 56 Wn. App. at 170.

Here, Judge Lum’s order affirmed the Commissioner’s, effectively adopting the Commissioner’s findings and conclusions. CP 424-25. Judge

Lum's order, which he entered on de novo review having full jurisdiction of the case, is the decision of the superior court before this Court for review. The Department cannot on appeal make the superior court's decision anything less than what it is merely because a commissioner at one time also decided the matter.

2. The Estate Complied with All Procedural Requirements of the APA.

In arguing that this matter should be remanded for proceedings under the APA, as opposed to under TEDRA, the Department draws a distinction that in this case lacks any difference. The requirements of the APA, which the Department concedes is an available remedy,² were met. The Court should decline the Department's invitation to remand for entry of the same order by the same superior court under a different name.

The Department does not identify any way in which the Estate or superior court failed to comply with any of the procedural requirements of the APA. Instead, the Department merely asserts, without any support, that the superior court did not consider the Department's affirmative defenses. Br. of App. p.1 n.1, p.5 n.3. This ignores the fact that the Department had

² "The Estate could proceed under the APA – and in fact has asserted a claim for relief under the APA in this case." Br. of App. 12-13; *see also* RP (5/17/2013) 10:6-18 ("So long as the Court has the opportunity to review the Administrative record and is ready to rule under the APA, the Department is fine with that.")

an opportunity to argue and did argue its affirmative defenses before the Commissioner and before Judge Lum. *E.g.* CP 269 (“[E]ach of the Estate’s three causes of action should be denied on the merits.”); 360 (“[T]he Estate is also attempting to obtain an estate tax refund that is likely time-barred under the controlling state estate tax refund section), 411 (“The Estate did not assert in its TEDRA Petition that its refund claim was timely filed. . . .”).

The Department also argues that “TEDRA simply does not allow the Estate to sue the Department in an effort to obtain declaratory relief ordering the Department to issue an estate tax refund.” Br. of App. 13. This argument ignores that under the APA, the court may “order an agency to take action required by law . . . or enter a declaratory judgment order.” RCW 34.05.574. Under any title, this is exactly what the superior court did.

Because the Department does not argue that any APA procedures were lacking, its sovereign immunity argument is completely misplaced. *Cf. Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 50-51, 905 P.2d 338 (1995), (reversing class certification under CR 23 because the unnamed plaintiffs would not meet the “specific requirements” of the excise tax refund statute) (emphasis added). Here, the Estate filed its suit in the manner and according to the requirements prescribed by the APA. Thus even if the APA applied to the exclusion of TEDRA, nothing would be gained by remand.

3. The Correct Result Is the Same Under the APA.

Under the APA, an agency may be compelled to act where its inaction is outside its statutory authority or arbitrary and capricious. RCW 34.05.570(c); *Rios v. Wash. Dep't of Labor and Indus.*, 103 Wn. App. 126, 133, 5 P.3d 19 (2000) (holding that agency inaction in failing to adopt a rule was outside its authority where the statute directed the agency to promulgate rules by using the word "shall") *aff'd on other grounds*, 145 Wn.2d 483, 39 P.3d 961 (2002). This describes the Department's inaction here. Specifically, Washington's estate tax statute compels the Department to issue a refund whenever the taxpayer has overpaid:

If...the department determines that...a person...has overpaid the tax due under this chapter, the department shall refund the amount of the overpayment, together with interest....

RCW 83.100.130. The statute does not give the Department authority to withhold refund payments if the Department disagrees with the Supreme Court's binding interpretation of the underlying estate tax law. The statute does not give the Department discretion to refuse to issue refunds mandated by law in the hope that the law will someday change, which was the Department's proffered reason for not processing the Estate's *Bracken* refund request. CP 59-60. The statute says that the Department "shall refund." The Department's bare refusal, based solely on its hope that the legislature would overrule the Supreme Court, changing the law, was

arbitrary and capricious and outside of the Department's statutory authority. *See Singh v. Clinton*, 618 F.3d 1085, 1091 (9th Cir. 2010) (An agency "has no discretion to make a decision that is contrary to law.").

C. *Bracken* Governs; EHB 2075 Does Not.

1. *Bracken* Governs.

The Department concedes that under *Bracken*, the Estate overpaid its Washington estate taxes. CP 59 at ¶ 10.³ As in *Bracken*, a taxpayer (here, Robert) created marital deduction (QTIP) trusts several years before the stand-alone Washington estate tax was enacted.⁴ The trusts provided a life estate for his surviving spouse, Barbara, and qualified for the marital deduction, which meant that federal estate tax was deferred. When Barbara died, the assets in the trusts went to the remainder beneficiaries, exactly as the person who set up the trusts had directed. The question presented is whether the fact that the trusts qualified for a federal tax deferral and the surviving spouse died after May 17, 2005, means that the trust assets –

³ In making this concession, the Department refers to "QTIP passing under Internal Revenue Code section 2044," a misnomer the Department repeats five times in its opening brief. I.R.C. Section 2044, entitled "Property Treated as Having Passed from Decedent," establishes that QTIP does not actually pass upon the death of a surviving spouse. Rather, "passing" is a legal fiction linked to imposition of deferred federal tax. *See Bracken*, 175 Wn.2d at 566-68 (the surviving spouses in Barbara's position "never transferred, in any manner, the QTIP Property is transferred from a trustor when a trust is created, not when an income interest in the trust expires.").

⁴ The QTIP provisions have been a part of federal estate tax law since 1981. *See Eisenbach v. Schneider*, 140 Wn. App. 641, 652-53, 166 P.3d 858 (2007).

unlike the assets in all other trusts established before May 17, 2005 – are subject to Washington estate tax. The answer is no.

Bracken rests on two straightforward propositions. First, that the Washington estate tax is a tax on transfers by the deceased. Second, that the stand-alone estate tax applies prospectively – i.e., to persons dying on or after May 17, 2005. From these two propositions the Court’s holding follows directly: Washington estate tax does not apply to the assets in QTIP trusts created before May 17, 2005, because the transfer of those assets occurred before the Washington estate tax was established.

The Supreme Court in *Bracken* held, in a section entitled “Transfer Taxation Requires a Transfer,” that only “a transfer – a real transfer – is the sanction for the [estate] tax.” 175 Wn.2d at 566. “The requirement for a transfer is constitutionally grounded and long standing.” *Id.* at 564. Its source is the fundamental distinction between an excise tax and a property tax. An excise tax “is levied upon the use or transfer of property . . .,” whereas a tax “levied upon the property itself or the income derived from property is a direct tax.” *Id.* “If estate taxation cannot be tied to a transfer, it fails as an unapportioned (and therefore unconstitutional) direct tax.” *Id.* at 565 (citing *Levy v. Wardell*, 258 U.S. 542, 42 S. Ct. 395, 66 L. Ed. 758 (1922)).

The Supreme Court in *Bracken* correctly held further that the QTIP trust assets are transferred by the first spouse to die, not the surviving spouse. *Id.* at 566. The court stated:

Barbara Nelson, Sharon Bracken, and [their] Estates never transferred, in any manner, the QTIP that passed to the residuary beneficiaries of the QTIP trust. Property is transferred from a trustor when a trust is created, not when an income interest in the trust expires. QTIP does not actually pass to or from the surviving spouse.

Id. (citations omitted).

Here, Barbara is in precisely the same position as Barbara Nelson and Sharon Bracken. She did not transfer, in any manner, the QTIP in the trusts created by Robert's estate. That transfer occurred in 2001. The assets of Robert's QTIP trusts are not taxable in Barbara's Washington taxable estate. These assets pass through her estate, outside of her control, on their way to the ultimate beneficiaries of the QTIP trusts.

2. EHB 2075 Does Not Change the Result Required by *Bracken*.

The Department proposed, and the Legislature ultimately approved, changes in two definitional provisions that, the Department asserts, change the outcome in *Bracken*. The Department ignores that *Bracken's* holding is based upon constitutional requirements that may not be circumvented by legislative tinkering. Even if this fundamental flaw in EHB 2075 is ignored, its definitional changes do not alter the outcome in this case.

EHB 2075 modified the definition of “transfer” to encompass “any shifting upon death of the economic benefit in property or any power or legal privilege incidental to the ownership or enjoyment of property.” Laws of 2013, 2d Spec. Sess., ch. 2, § 2. The new language adds nothing of substance to the existing language, which defines “transfer” for purposes of the Washington estate tax as “‘transfer’ as used in section 2001 of the Internal Revenue Code.” RCW 83.100.020(11). It has long been the law that the power of the federal government to impose death taxes “extends to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property . . . occasioned by death[.]” *Fernandez v. Wiener*, 326 U.S. 340, 352, 66 S. Ct. 178, 90 L. Ed. 116 (1945). *Bracken* says this explicitly. 175 Wn.2d at 565 (quoting *Fernandez*, 326 U.S. at 352). The Supreme Court’s rejection of the Department’s position in *Bracken* was not based upon a more restrictive reading of “transfer” but rather upon the Court’s determination that the person making the transfer was the person setting up the trust – here, Robert – and not the surviving spouse who never owned the trust property. Barbara was not the transferor of Robert’s trust assets no matter how broadly “transfer” is defined.⁵

⁵ If a doting uncle were to designate Mary as the income beneficiary of his trust for two

Even if the critical question of **who** made the transfer could be ignored, the question of **when** it occurred looms just as large. Contrary to the Department's apparent claim, property interests do not shift when a lifetime beneficiary dies.⁶ That person's life estate and the interests of the remainder beneficiaries were fixed when the trust was established. *See, e.g., In re Estate of Smith*, 40 Wn. App. 790, 796-97, 700 P.2d 1181 (1985) (Remainder beneficiary of testamentary trust granting life estate to testatrix's brother possessed "an indefeasibly vested remainder in the trust," which "vested indefeasibly upon [testatrix's] death.")⁷

The second definitional change in EHB 2075, amending the definition of "Washington taxable estate," does not alter the outcome in this case either. As before, the Washington taxable estate starts with the federal taxable estate, which, the amended statute now says, "includes, but is not limited to, the value of any property included in the gross estate under

years, after which her sister Susan would become the remainder beneficiary, Mary would not be transferring anything to Susan when the calendar rolled around to the second anniversary of the trust's creation. The same thing is true if Mary had a life estate and died.

⁶ This is why, as the IRS states, "Life estates given to the decedent by others in which the decedent has no further control or power at the date of death are not included" in the decedent's Gross Estate. Internal Revenue Service, "What is excluded from the Estate?" at p.2 in Frequently Asked Questions on Estate Taxes, reproduced in the Appendix at A-17 to A-20.

⁷ There can be no credible claim that "transfer" means the mere receipt of property by a remainder beneficiary upon the death of the holder of a life estate. A transfer requires a transferor as well as a transferee.

section 2044 of the internal revenue code, regardless of whether the decedent's interest in such property was acquired before May 17, 2005.” Laws of 2013, 2d Spec. Sess., ch. 2, § 2. This new language changes nothing; the federal taxable estate has, since 1981, included section 2044 property.

The Department fails to explain how the two definitional changes in EHB 2075 alter the result in *Bracken* or how they apply to Barbara's estate. The two definitions do not affect the bases for the decision in *Bracken* – namely, the Washington estate tax applies only to transfers, and the Washington estate tax applies prospectively to transfers occurring after May 17, 2005. Absent an actual (and constitutional) change in the law underpinning the *Bracken* decision, *Bracken* remains controlling authority.⁸

As the *Bracken* Court held, the only transfer occasioned by a marital deduction trust occurs when the trust is established; there is no transfer when a lifetime beneficiary dies. The Legislature may have thought that it was doing something else when it adopted EHB 2075, but this Court must apply the language the Legislature chose. A court may not “add language to an unambiguous statute even if it believes the Legislature intended

⁸ Section 9 of EHB 2075 states that Sections 2 and 5 of the bill “apply both prospectively and retroactively to all estates of decedents dying on or after May 17, 2005.” EHB 2075 does not purport to apply to the estate of taxpayers such as Robert who died before 2005.

something else but did not adequately express it.” *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (quoting *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002)).

The Supreme Court observed in *Bracken* that a “tax statute must be construed most strongly against the taxing power and in favor of the taxpayer.” 176 Wn.2d at 563 (internal quotations and citations omitted). Furthermore, the Legislature is “presumed to have intended a meaning consistent with the constitutionality of its enactment.” *Id.* (quoting *State ex rel. Dawes v. Wash. State Highway Comm’n*, 63 Wn.2d 34, 38, 385 P.2d 376 (1963)). As discussed below, construing EHB 2075 as the Department urges would render it unconstitutional.

D. If it Were Applicable, EHB 2075 Would Be Unconstitutional as Applied

EHB 2075, as applied in this case, would violate both the state and federal constitutions. An as-applied challenge “occurs where a plaintiff contends that a statute’s application in the context of the plaintiff’s actions or proposed actions is unconstitutional.” *Lummi Indian Nation v. State*, 170 Wn.2d 247, 258, 241 P.3d 1220 (2010) (quoting *Wash. State Republican Party v. Pub. Disclosure Comm’n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000)). A statute held unconstitutional as applied in a particular case “cannot be applied in the future in a similar context, but it is not rendered

completely inoperative.” *Id.* (quoting *Wash. State Republican Party*, 141 Wn.2d at 282 n.14).⁹

As read by the Department, EHB 2075 cannot constitutionally be applied to Barbara’s estate because it violates (i) the limits on imposition of an excise tax, (ii) the Due Process Clause, (iii) the Separation of Powers doctrine, (iv) the Impairment Clauses, and (v) the Equal Protection Clause.

1. EHB 2075 Purports to Apply an Excise Tax to a Fictional Transfer, But Only Real Transfers May Be Taxed.

The Department, through EHB 2075, seemingly attempted to amend the Washington estate tax in a manner that would tax a fictional transfer of QTIP assets as if the transfer were real. If EHB 2075 actually brings the assets of Robert’s QTIP trusts into Barbara’s Washington taxable estate, it does so by (a) untethering the statutory definition of “transfer” from the constitutionally required meaning of that term, (b) imposing the estate tax on property without any transfer, or (c) both.

The Department fails to heed one of the most critical points made by the Supreme Court in *Bracken*:

⁹ A facial challenge would require a holding (not necessary here) that the challenged provision cannot be constitutionally applied in any circumstance. *Lummi Indian Nation*, 170 Wn.2d at 258. Here, EHB 2075 can be applied when both spouses die after the enactment of the stand-alone Washington estate tax on May 17, 2005.

Faced with arguments by the Estates and amicus that DOR is attempting to tax something other than 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.

175 Wn.2d at 566. The Court in *Bracken* added that without “a real transfer,” there is no constitutional authority for the tax. *Id.* No legislative alchemy can turn fiction into reality. This was clear long before *Bracken* was decided.

In 1935 the Legislature enacted a law providing that “[i]nsurance payable upon the death of any person shall be deemed a part of the estate for the purpose of computing the inheritance tax” Laws of 1935, ch. 180, § 115. The Washington Supreme Court considered the statute in *In re McGrath’s Estate*, 191 Wash. 496, 71 P.2d 395 (1937). William McGrath, president of the McGrath Candy Company, had eight life insurance policies in force when he died. Three named McGrath Candy Company as the beneficiary. One of the three had been taken out by McGrath himself, and he reserved the right to change the beneficiary. *McGrath*, 191 Wash. at 501. The other two had been taken out by McGrath Candy Company, which paid all of the premiums and had sole power to designate the beneficiary. *Id.* at 501-02. The trial court held that these two policies were outside the State’s lawful taxing authority, and the Washington Supreme Court agreed.

The Supreme Court observed that an estate tax is “a charge made in exchange for permission to a decedent to pass title to his heirs or legatees.” *Id.* at 502-03. It is “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.” *Id.* at 503. The rule is that “an estate tax cannot be collected with respect to property unless some right in it be transferred by the death of the decedent.” *Id.* With respect to the policies taken out by McGrath Candy Company, as to which the beneficiary corporation retained complete control without Mr. McGrath’s consent, the court observed: “The 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.” *Id.* at 504.

What was true in *In re McGrath’s Estate* was no less true in *Bracken* and is no less true in this case. Here, the rights of the beneficiaries vested at the time that Robert’s QTIP trusts were created in 2001, and those rights were complete and indefeasible.¹⁰ Barbara had no power to alter the beneficiaries’ rights. On the contrary, “[t]he assets in the QTIP trust could have been left to any recipient of [Robert’s] choosing, and neither [Barbara]

¹⁰ The beneficiaries include the personal representatives of Barbara’s Estate. CP 249, 255, 257.

nor the estate had any control over their ultimate disposition.” *Estate of Bonner v. U.S.*, 84 F.3d 196, 198 (5th Cir. 1996) (per curiam).

Bracken and *In re McGrath’s Estate* demonstrate that, if “transfer” is interpreted as the Department urges, the estate tax is an unconstitutional direct tax on property rather than a constitutionally permissible excise tax. The same flaw is apparent if the change in the definition of “Washington taxable estate” is read as the Department urges – namely, as adding (and not allowing the deduction under RCW 83.100.047(3)) of “the value of any property included . . . under section 2044 of the internal revenue code, regardless of whether the decedent’s interest in such property was acquired before May 17, 2005.” RCW 83.100.020(14). Absent a taxable transfer, which Barbara did not make, this definition represents the direct taxation of property, and, as such, it fails to meet the most basic litmus test of a permissible excise tax.

2. EHB 2075 Violates Due Process by Taxing Transactions that Predate Enactment of the Stand-Alone Estate Tax And Thus Deprive Individuals of Vested Rights.

If EHB 2075 applies to the assets in Robert’s QTIP trust, the statute violates state and federal constitutional Due Process protections¹¹ by imposing tax on a transfer, namely the transfer of assets into Robert’s QTIP

¹¹ U.S. Const., amend XIV; Wash. Const. art. 1, § 3.

trusts at his death, which occurred long before the effective date of the stand-alone Washington estate tax. Legislative tax decisions may be entitled to deferential review, but this deference does not permit a tax to apply retroactively as EHB 2075 does, nor does it permit retroactive taxation that divests vested rights.

The retroactive impact of EHB 2075 is not limited to the eight-year period emphasized by the Department. To be sure, Section 9 of the statute states that Sections 2 and 5 “apply both prospectively and retroactively to all estates of decedents dying on or after May 17, 2005.” But EHB 2075 actually reaches back 32 years to 1981 when the federal QTIP provisions were enacted - because the new statute, as the Department interprets it, redefines “Washington taxable estate” in a manner that converts the donating spouse’s transfer of QTIP property at any time in the past to a taxable event today. This includes Jim Bracken’s transfer of QTIP assets in 1984 and Robert’s transfer of QTIP trust assets in 2001. *See* 175 Wn.2d at 554-55, 572 (“Individuals who elected QTIP treatment for federal tax purposes before May 17, 2005...did not invite or assume the risk of a state reaching into the grave and taxing a transfer 25 years after the fact.”). In purporting to capture and tax the transfer of the QTIP trust assets, EHB 2075 violates Due Process.

The Department provides a string of citations referencing various periods of retroactivity¹² to justify what it argues is an eight-year retroactive period – from June 14, 2013 to May 17, 2005. Br. of App. at 34. However, even the most extreme example that the Department provides does not come close to EHB 2075’s 32-year reach. The Legislature’s attempt to tax transfers occurring long before the effective date of the statute violates the Due Process requirements of the state and federal constitutions. See *McGrath*, 191 Wn.2d at 510.

In addition to examining duration, courts consider “the nature of the tax and the circumstances in which is it laid” in determining the constitutional boundaries of retroactivity. *W.R. Grace & Co. v. Dep’t of Revenue*, 137 Wn.2d 580, 602, 973 P.2d 1011 (1999) (citing *Temple Univ. v. U.S.*, 769 F.2d 126, 135 (3d Cir. 1985)). Here too, EHB 2075 fails the test of a valid taxing statute.

The Department relies on *United States v. Carlton*, 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994), which involved a retroactive

¹² Other Washington cases, not cited by the Department, conclude that shorter retroactive periods fail to withstand constitutional scrutiny: *Bates v. Mcleod*, 11 Wn.2d 648, 657, 120 P.2d 472 (1941) (imposition of three-month retroactive tax on privilege of employing others, “the exercise of which had formerly been freely enjoyed,” violated Due Process Clause); cf. *State v. Pac. Tel. & Tel. Co.*, 9 Wn.2d 11, 17, 113 P.2d 542 (1941) (in case involving use tax, holding that approximately four-year retroactive period could not be sustained; retroactive tax could only apply to “prior but recent transactions”).

amendment clarifying a federal estate tax deduction for the sale of employer securities to an employee stock ownership plan. In *Carlton*, the Court applied various factors in evaluating whether retroactivity was permitted under the Due Process Clause. The Court upheld retroactivity because (a) Congress' purpose was not illegitimate or arbitrary and (b) Congress "acted promptly and established only a modest period of retroactivity," in accordance with the traditional practice of confining retroactive tax legislation "to short and limited periods required by the practicalities of producing national legislation." *Id.* at 32-33 (citations omitted). In *Carlton*, and in stark contrast to the 32-year effective reach of EHB 2075, the "modest period of retroactivity" was slightly greater than a year. *See id.* at 33.¹³

No doubt raising revenue for education is an appropriate legislative purpose, but it cannot justify arbitrary action. *See Covell v. City of Seattle*, 127 Wn.2d 874, 889-91, 905 P.2d 324 (1995) (while noting the city's honorable intentions, striking its street utility charge as an unconstitutional direct tax on property). In addition, EHB 2075 does not represent prompt

¹³ *Carlton* distinguished one prior case that held for the taxpayer as inapposite because it "involved a novel development in the estate tax which embraced a transfer that occurred 12 years earlier." 512 U.S. at 34 (citing *Nichols v. Coolidge*, 274 U.S. 531, 543, 47 S. Ct. 710, 71 L. Ed. 1184, (1927)). That is precisely the effect of EHB 2075 as applied to the transfer of Robert's property in 2001.

action, nor does it establish only a modest level of retroactivity. Seven years ago, in 2006, the Department adopted regulations excluding Robert's 2001 marital deduction trusts from Barbara's Washington taxable estate. Six years ago, when the *Bracken* litigation was filed, the Department was put on notice that taxpayers so understood and applied those regulations. The Department then changed its regulations in 2009, tacitly acknowledging taxpayers' understanding. But rather than seeking legislation to address a potential "leak in the public treasury," the Department simply continued to collect taxes, illegally, on pre-2005 trusts.

Only in 2013 – twelve years after Robert's 2001 QTIP trust was established, seven years after the Department adopted regulations exempting pre-2005 QTIP trusts, and six years after the *Bracken* refund suit was filed, did the Department seek a change in the law. EHB 2075 is not a prompt remedial measure, and its period of retroactivity (32 years) is not modest.

The circumstances surrounding the enactment of EHB 2075 also undermine its validity. EHB 2075 was passed with the specific purpose of avoiding the payment of refunds the Legislature knew were imminent.¹⁴

¹⁴ App. A-14 (Senate Floor Debate, June 13, 2013) (Statement of Sen. Nelson) (“[I]n eight hours and fifteen minutes without this legislation we begin to refund to the wealthiest estates in Washington. We begin to mail out checks for funds that could be used for our kindergartners . . .”).

This is strikingly similar to *Tesoro Refining and Marketing Co. v. Department of Revenue*, 159 Wn. App. 104, 110, 246 P.3d 211 (2010), *rev'd on other grounds*, 173 Wn.2d 551, 559 n.3, 269 P.3d 1013 (2012)¹⁵ in which the Court found the retroactive effect of a B&O tax amendment violated constitutional due process requirements:

And, unlike in *Carlton*, here the legislative history of the 2009 act shows the recent amendment was in direct response to Tesoro's refund request. . . . The direct references to Tesoro's lawsuit and the fact that the 2009 act became effective the day before trial was set to begin evidences the type of improper taxpayer targeting identified by the *Carlton* Court. 512 U.S. at 32-33, 114 S. Ct. 2018. There is no colorable argument to suggest a legislative act creating a 24-year retroactive tax period is "prompt" or establishes a "modest period of retroactivity." *Carlton*, 512 U.S. at 32-33, 114 S. Ct. 2018"

159 Wn. App. at 118-119. Still less colorable is any claim that a 32-year retroactive tax period reflects prompt action or modest scope.

EHB 2075 also deprives the beneficiaries of their vested right to the remainder of Robert's trusts and deprives Barbara's estate of its vested right to a refund. "Due process is violated if the retroactive application of a statute deprives an individual of a vested right." *Caritas Servs. Inc. v. Dep't of Social & Health Servs.*, 123 Wn.2d 391, 413, 869 P.2d 28 (1994)

¹⁵ Although the Court of Appeals' decision was reversed on other grounds, the due process analysis in *Tesoro* remains a valid constitutional interpretation. See *Misic v. Bldg. Serv. Employees Health & Welfare Trust*, 789 F.2d 1374, 1379 (9th Cir. 1986) (Where the Supreme Court reverses the Ninth Circuit on other grounds, it leaves unchanged the law of the Ninth Circuit on issues not reached by the Court.

(quoting *In re Marriage of MacDonald*, 104 Wn.2d 745, 750, 709 P.2d 1196 (1985)). A vested right is “something more than a *mere expectation* based upon an anticipated continuance of the existing law; *it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.*” *Id.* at 414 (quoting *MacDonald*, 104 Wn.2d at 750) (emphasis in original).

In this case, the rights of the beneficiaries to inherit the remainder of Robert’s marital deduction trust vested immediately upon creation of the irrevocable trust. *See, e.g. In re Estate of Smith*, 40 Wn. App. 790, 796-97, 700 P.2d 1181 (1985) (remainder beneficiary of testamentary trust granting life estate to testatrix’s brother possessed “an indefeasibly vested remainder in the trust,” which “vested indefeasibly upon [testatrix’s] death”). These rights, therefore, were a “title, legal or equitable, to the . . . future enjoyment of property,” *Caritas*, 123 Wn.2d at 414, and as such are protected by the Due Process clause from divestment by retroactive legislation. *See McGrath’s Estate*, 191 Wash. at 508-09 (noting that life insurance policies had fully vested before inheritance tax was enacted, and tax on right to receive proceeds of policies “would conflict with the due process clause of the Fourteenth Amendment”) (citing *Coolidge v. Long*, 282 U.S. 582, 605, 51 S. Ct. 306, 75 L. Ed. 562 (1931) (enforcement of tax on fully vested

trusts created before Massachusetts inheritance tax “would be repugnant to . . . the due process clause of the Fourteenth Amendment.”)).

Here, under RCW 83.100.130, the Department had the mandatory statutory duty to pay a refund, plus interest, when it received the Estate’s request and determined that it had overpaid taxes. It cannot avoid the Estate’s vested right in a refund by changing the rules after the refund claim was filed.

The Department points out that a taxpayer does not have a vested right in the tax code (*see Carlton*, 512 U.S. at 33), but the beneficiaries of Robert’s QTIP trusts have an entirely distinct vested right – namely, the right to receive the corpus of Robert’s QTIP trust. This right has been fully vested for more than a decade. Due Process principles prohibit the Legislature from impairing this vested right.

Washington courts have found vested rights in similar state-created property rights. *See Caritas*, 123 Wn.2d at 414 (right to reimbursement of Medicaid payments under existing statutory methodology vested upon performance of contracts governed by statutory methodology); *Willoughby v. Dep’t of Labor & Indus.*, 147 Wn.2d 725, 733, 57 P.3d 611 (2002) (vested right in L&I disability payments that are mandated by statute); *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 463-64, 832 P.2d 1303 (1992) (statute providing priority lien in favor of milk producers could not be applied

retroactively, as it would upset bank's vested, competing security interest in lien-protected collateral); *see also Lawson v. State*, 107 Wn.2d 444, 453, 730 P.2d 1308 (1986) (interest in railway easement, effective upon termination of use as railroad, was vested right that could not be altered by legislation without constituting taking).

No principled distinction exists between the vested rights recognized by Washington courts, such as reimbursement under an existing statutory formula or L&I payments under the existing statutory scheme, and the vested right to recover overpaid taxes under the refund directive of RCW 83.100.130. Because EHB 2075 divests the vested right of the Estate to receive a refund under RCW 83.100.130 and the vested right of the beneficiaries to receive the full QTIP trust remainder, it violates the Due Process Clause.

3. EHB 2075 Violates the Separation of Powers Doctrine.

The separation of powers is one of the “cardinal and fundamental principles” of the state constitutional system and protects “the balance of powers” between the branches of government. *Freedom Found. v. Gregoire*, No. 86384-9, slip op. at 8 (Wash. Oct. 17, 2013) (quoting *Wash. State Motorcycle Dealers Ass'n v. State*, 111 Wn.2d 667, 674, 763 P.2d 442 (1988); *Carrick v. Locke*, 125 Wn.2d 129, 136, 882 P.2d 173 (1994)). The separation of powers doctrine “recognizes that each branch of government

has its own appropriate sphere of activity” and “ensures that the fundamental functions of each branch remain inviolate.” *Hale v. Wellpinit School Dist.*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009). The judicial function is to interpret the law. *Id.* at 505. Courts “say what the law is,” and once the highest state court construes a statute, “that construction operates as if it were originally written into [the statute].” *Id.* at 506 (internal quotations and citations omitted).

Washington courts test for separation of powers violations by asking “whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Freedom Found. v. Gregoire*, No., slip op. at 8 (quoting *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009)). One principle guiding this evaluation is that “the legislature is precluded by the constitutional doctrine of separation of powers from making judicial determinations.” *City of Tacoma v. O’Brien*, 85 Wn.2d 266, 271, 534 P.2d 114 (1975). For example, a legislative finding that contractual performance has been rendered economically impossible invades an exclusively judicial function. *See id.* at 270-72.

The Court in *Bracken* made the following judicial determinations based on the facts in that case, facts that are no different here:

- When a QTIP trust is established, it is the trustor who transfers the QTIP trust assets. 175 Wn.2d 566.

- The transfer occurs when the QTIP trust is established. 175 Wn.2d at 554.
- The holder of a life estate who has no power to dispose of QTIP trust assets does not transfer them by dying. 175 Wn.2d 566.
- The estate of someone dying after May 17, 2005, prepares the estate’s Washington return and pays state tax in light of the Department’s then-applicable regulations. 175 Wn.2d at 570.

Each of these is an adjudication of fact. Indeed, the *Bracken* decision emphasizes the difference between what actually happens when a trust is created and administered – as reflected in the first three bullets above – and the provisions in federal tax law that permit deferral of federal estate tax on QTIP trusts.¹⁶ Under the Department’s reading, however, EHB 2075 requires this Court (a) to defer to the Legislature’s finding that the Washington Supreme Court has too narrowly construed the term “transfer” and (b) to treat the assets in the marital deduction trust that Robert created in 2001 as having been transferred by Barbara when she died, regardless of whether she in fact transferred anything. In the words of

¹⁶ It is a mistake, *Bracken* states, to rely upon “Ms. Bracken’s **fictional** receipt and transfer of property for federal tax purposes to ignore the **fact** that for purposes of imposing a state estate tax, she has not received or transferred the property at all.” *Bracken*, 175 Wn.2d at 573 (emphasis added).

O'Brien, “the legislature has no power to make such a judicial determination.” 85 Wn.2d at 270.

Further, the Department's reading of EHB 2075 violates “the bedrock principle that the legislature cannot contravene an existing judicial construction of a statute.” *State v. Maples*, 171 Wn. App. 44, 50, 286 P.3d 386 (2012). As the Court observed in *State v. Dunaway*, 109 Wn.2d 207, 216 note 6, 743 P.2d 1237, 749 P.2d 160 (1987), “even a clarifying enactment cannot be applied retrospectively when it contravenes a construction placed on the original statute by the judiciary. . . . Any other result would make the legislature a court of last resort.” (Internal quotations and citations omitted).

The Legislature also purports to overrule the Supreme Court on a question of constitutional law. The requirement that an estate tax may lawfully be imposed only on transfers “is constitutionally grounded and long standing.” *Bracken*, 175 Wn.2d at 564. The Legislature has no authority to alter the constitutional requirement of an actual transfer as the sine qua non for imposing an excise tax. “The construction of the meaning and scope of a constitutional provision is exclusively a judicial function.” *State Highway Comm'n v. Pacific Nw. Bell Tel. Co.*, 59 Wn.2d 216, 222, 367 P.2d 605 (1961).

These violations of the Separation of Powers doctrine are more than sufficient to invalidate EHB 2075, but the Legislature goes even further: It directs this Court to rewrite history. In *Bracken* the Supreme Court described the regulatory context in which the estates there prepared their tax returns by calculating the Washington taxable estate:

In April 2006, DOR adopted regulations to create the state QTIP election and provide guidance on the application and interpretation of the new Act. See ch. 458-57 WAC. . . . *The 2006 regulations also set forth the manner in which the Washington taxable estate is to be calculated. . . . The 2006 regulations¹⁷ provide for a series of adjustments to the federal taxable estate by which the effect of federal QTIP elections is canceled out.*

175 Wn.2d at 560-61 (emphases added). Section 5 of EHB 2075, however, states that the Washington taxable estate is now to be calculated “[n]otwithstanding any department rule.”

The Department’s reason for seeking this extraordinary provision is plain: Every Justice hearing the *Bracken* case found that the Department’s position was contradicted by its own rules (i.e., the 2006 regulations). Directing courts to treat those rules as if they never existed is revisionist and unconstitutional.¹⁸

¹⁷The 2006 regulations are reproduced in the Appendix at A-1 to A-5.

¹⁸The 2009 amendments were by the Department filed on January 22, 2009, effective February 22, 2009, and purport to apply to deaths “occurring January 1, 2009, and

In *O'Brien* the Court pointed out the crucial temporal dimension of judicial vs. legislative determinations:

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter.

85 Wn.2d at 272 (quoting *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226, 29 S. Ct. 67, 53 L. Ed. 150 (1908)). If, as *O'Brien* teaches, it is contrary to the Separation of Powers principles to direct this Court to disregard historical facts, it is no less a constitutional violation to instruct this Court to make a decision in light of only part of the governing law. “Any legislative attempt to mandate legal conclusions would violate the separation of powers.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 654, 771 P.2d 711, 780 P.2d 260 (1989).

The Department argues that EHB 2075 does not violate the Separation of Powers doctrine because it does not affect any final judgment or dictate how a court should decide any factual issue. The Department’s view of this constitutional doctrine is too narrow: “Retroactive changes in the law may violate separation of powers by disturbing judgments, interfering with judicial functions, or cause manifest injustice.” *Lummi*

after.” WAC 458-57-105(1)(a) (2009). The 2009 amendments do not apply to Barbara, who died in 2008.

Indian Nation v. State, 170 Wn.2d 247, 261, 241 P.3d 1220 (2010). The Department does not address interference with judicial functions or manifest injustice, even though both are present here.

Regardless, EHB 2075 fails even the narrow tests posited by the Department. The conflict between EHB 2075 and the Separation of Powers principles is manifest when one considers that EHB 2075 purports to overrule *Bracken* on the very judicial determinations that lie at its heart: the Court's adjudications of (1) who makes a transfer when a trust with a life estate is established, (2) when that transfer takes place, (3) the difference between transferring assets and simply dying, and (4) the regulatory context in which state tax returns were prepared with respect to deaths occurring between 2006 and 2008.

Legislative actions that violate the Separation of Powers doctrine are void. *O'Brien v. Tacoma*, 85 Wn.2d at 272. Because EHB 2075, as interpreted by the Department would require this Court to reach a different result than the Court did in *Bracken*, it is invalid.

4. EHB 2075 Violates the Constitutional Prohibition on Impairment of Contracts.

In addition to violating Due Process, EHB 2075 violates the impairment of contracts clauses of the state and federal constitutions. Wash. Const., art. I, § 23 (no "law impairing the obligations of contracts

shall ever be passed"); U.S. Const., art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."). The impairment clauses are implicated when (1) a contractual relationship exists and (2) legislation substantially impairs the contractual relationship. *Caritas*, 123 Wn.2d at 402-03.

EHB 2075 applies to a contractual relationship because interests in trusts have long been treated as contractual rights for impairment clause purposes. *See Coolidge v. Long*, 282 U.S. at 594-95 ("The trust deeds are contracts within the meaning of the contract clause of the Federal Constitution. They were fully executed before the taking effect of the state law under which the excise is claimed. The commonwealth was without authority by subsequent legislation, whether enacted under the guise of its power to tax or otherwise, to alter their effect or to impair or destroy rights which had vested under them."); *McGrath's Estate*, 191 Wash. at 507-08 (quoting *Coolidge* and holding that taxation of indefeasible insurance policies purchased before the state death taxes applied would violate the contracts clauses of the state and federal constitution); *see also In re Estate of Bodger*, 130 Cal. App. 2d 416, 424, 279 P.2d 61 (1955) (A declaration of trust is "a contract between the trustor and the trustee for the benefit of a third party.").

EHB 2075 also impairs the contractual rights of the beneficiaries with respect to the QTIP trust by “alter[ing] its terms, impos[ing] new conditions, or *lessen[ing] its value.*” *Caritas*, 123 Wn.2d at 404 (emphasis added). The value of the beneficiaries’ rights to the QTIP trust has been substantially devalued by retroactive imposition of the Washington estate tax. *See McGrath’s Estate*, 191 Wash. at 496 (“[A]ny subsequent statute passed during the existence of the contracts providing for taxation of that right would, if enforced, impair the obligation of these contracts, for the McGrath Candy Company would then receive less than it was entitled to receive according to the terms thereof.”).

Although the United States Supreme Court has applied a more deferential standard to legislation that abrogates private contracts, EHB 2075 still runs afoul of the impairment clauses. A private contract may be impaired if “the state has a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem,” and the “adjustment of ‘the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.’” *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983) (citation omitted).

“Financial necessity, though superficially compelling, has never been sufficient of itself to permit states to abrogate contracts.” *Carlstrom v. State*, 103 Wn.2d 391, 396, 694 P.2d 1 (1985). The Department’s attempt to extract revenue by altering contracts created years before any stand-alone estate tax existed in Washington is not legitimate under any standard. EHB 2075 violates the state and federal impairment clauses.

5. Distinguishing Between the Assets of QTIP Trusts and All Other Trusts Violates Equal Protection Principles.

If interpreted as the Department urges, EHB 2075 distinguishes between the life estate established under Robert’s QTIP trusts and all other trusts. According to the Department, the assets of the QTIP trust are subject to Washington estate tax upon the death of Barbara, but the assets of other types of trusts, such as a credit shelter trust, are not—this despite the fact that the terms of the two trusts may be virtually identical, their beneficiaries may be the same, and the life estate that the second spouse enjoyed in the trusts would terminate in exactly the same way: by his or her death.

There is no revenue-enhancing rationale for sparing all trusts established before May 17, 2005, except QTIP trusts, from taxation on the death of the second spouse. There is no distinction that can be drawn between the tax consequences to a QTIP trust and any other trust type. In fact, the only distinction that exists is that a QTIP trust qualifies for the

federal marital deduction, and federal law provides a mechanism for collection of deferred federal estate tax. Neither that federal law mechanism nor hostility to the federal marital deduction can provide a legitimate basis for subjecting the assets in QTIP trusts, alone, among those created before 2005, to state estate tax after 2005.

Our state's Equal Protection Clause (Const., art. I, § 12) and the Fourteenth Amendment to the United States Constitution require that "persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." *State v. Marintorres*, 93 Wn. App. 442, 450, 969 P.2d 501 (1999) (quoting *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992)). Economic legislation that neither sets up a suspect class nor affects a fundamental right is subject to the rational basis test. *Schuchman v. Hoehn*, 119 Wn. App. 61, 79 P.3d 6 (2003). The test under rational basis "is not whether the law being challenged has a rational basis; it is whether there is a rational basis for the classification embodied by the legislative scheme." *Marintorres*, 93 Wn. App. at 451 (citations omitted, emphasis in original).

To pass muster as rational, a classification must (1) apply alike to all members within the designated class, (2) be based on reasonable distinctions between those within and those outside the class, and (3) bear a rational relationship to the purpose of the legislation. *Id.* Tax statutes are

analyzed the same way. *See Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 287, 494 P.2d 216 (1972) (distinction between similarly situated taxpayers, based only upon timing of assessment for taxation, would constitute denial of Equal Protection) (“It is fundamental that all persons within the same class must be treated equally.”). For this additional reason, EHB 2075 is unconstitutional.

E. The Court Should Award the Estate Its Fees Under RAP 18.1 and RCW 4.84.185.

The Estate requests that the Court award the Estate its fees under RCW 4.84.185 and RAP 18.1.

V. CONCLUSION

The Department would turn the Legislature into a court of last resort. The Supreme Court already decided the refund issue in *Bracken*, and its holding governs. The Department’s legislation, even if applicable, would be unconstitutional as applied. More specifically with respect to this case, the superior court properly ordered the Department to comply with *Bracken*, and its order should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of November, 2013.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 1, 2013, I served via email (by agreement) on:

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DATED this 4th day of November, 2013, at Seattle, Washington.



Karen Baril

APPENDIX

existed January 1, 2005. Federal estate tax law changes enacted after January 1, 2005, do not apply to the reporting requirements of Washington's estate tax. The department will follow federal Treasury Regulations section 20 (Estate tax regulations), in existence on January 1, 2005, to the extent they do not conflict with the provisions of chapter 83.100 RCW or 458-57 WAC. For deaths occurring January 1, 2009, and after, Washington has different estate tax reporting and filing requirements than the federal government. There will be estates that must file an estate tax return with the state of Washington, even though they are not required to file with the federal government. The Washington state estate and transfer tax return and the instructions for completing the return can be found on the department's web site at <http://www.dor.wa.gov/> under the heading titled forms. The return and instructions can also be requested by calling the department's estate tax section at 360-570-3265, option 2.

(b) **Lifetime transfers.** Washington estate tax taxes lifetime transfers only to the extent included in the federal gross estate. The state of Washington does not have a gift tax.

(3) **Definitions.** The following terms and definitions are applicable throughout chapter 458-57 WAC:

(a) "Absentee distributee" means any person who is the beneficiary of a will or trust who has not been located;

(b) "Decedent" means a deceased individual;

(c) "Department" means the department of revenue, the director of that department, or any employee of the department exercising authority lawfully delegated to him by the director;

(d) "Escheat" of an estate means that whenever any person dies, whether a resident of this state or not, leaving property in an estate subject to the jurisdiction of this state and without being survived by any person entitled to that same property under the laws of this state, such estate property shall be designated escheat property and shall be subject to the provisions of RCW 11.08.140 through 11.08.300;

(e) "Federal return" means any tax return required by chapter 11 (Estate tax) of the Internal Revenue Code;

(f) "Federal tax" means tax under chapter 11 (Estate tax) of the Internal Revenue Code;

(g) "Federal taxable estate" means the taxable estate as determined under chapter 11 of the Internal Revenue Code without regard to:

(i) The termination of the federal estate tax under section 2210 of the IRC or any other provision of law; and

(ii) The deduction for state estate, inheritance, legacy, or succession taxes allowable under section 2058 of the IRC.

(h) "Gross estate" means "gross estate" as defined and used in section 2031 of the Internal Revenue Code;

(i) "Internal Revenue Code" or "IRC" means, for purposes of this chapter, the United States Internal Revenue Code of 1986, as amended or renumbered on January 1, 2005;

(j) "Person" means any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, joint venture, syndicate, or other entity and, to the extent permitted by law, any federal, state, or other governmental unit or subdivision or agency, department, or instrumentality thereof;

(k) "Person required to file the federal return" means any person required to file a return required by chapter 11 of the

WAC 458-57-105 Nature of estate tax, definitions. (1) Introduction. This rule applies to deaths occurring on or after May 17, 2005, and describes the nature of Washington state's estate tax as it is imposed by chapter 83.100 RCW (Estate and Transfer Tax Act). It also defines terms that will be used throughout chapter 458-57 WAC (Washington Estate and Transfer Tax Reform Act rules). The estate tax rule on the nature of estate tax and definitions for deaths occurring on or before May 16, 2005, can be found in WAC 458-57-005.

(2) **Nature of Washington's estate tax.** The estate tax is neither a property tax nor an inheritance tax. It is a tax imposed on the transfer of the entire taxable estate and not upon any particular legacy, devise, or distributive share.

(a) **Relationship of Washington's estate tax to the federal estate tax.** The department administers the estate tax under the legislative enactment of chapter 83.100 RCW, which references the Internal Revenue Code (IRC) as it

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Internal Revenue Code, such as the personal representative (executor) of an estate;

(l) "Property," when used in reference to an estate tax transfer, means property included in the gross estate;

(m) "Resident" means a decedent who was domiciled in Washington at time of death;

(n) "State return" means the Washington estate tax return required by RCW 83.100.050;

(o) "Taxpayer" means a person upon whom tax is imposed under this chapter, including an estate or a person liable for tax under RCW 83.100.120;

(p) "Transfer" means "transfer" as used in section 2001 of the Internal Revenue Code. However, "transfer" does not include a qualified heir disposing of an interest in property qualifying for a deduction under RCW 83.100.046;

(q) "Washington taxable estate" means the "federal taxable estate":

(i) Less one million five hundred thousand dollars for decedents dying before January 1, 2006, or two million dollars for decedents dying on or after January 1, 2006;

(ii) Less the amount of any deduction allowed under RCW 83.100.046 as a farm deduction;

(iii) Less the amount of the Washington qualified terminable interest property (QTIP) election made under RCW 83.100.047;

(iv) Plus any amount deducted from the federal estate pursuant to IRC § 2056 (b)(7) (the federal QTIP election);

(v) Plus the value of any trust (or portion of a trust) of which the decedent was income beneficiary and for which a Washington QTIP election was previously made pursuant to RCW 83.100.047; and

(vi) Less any amount included in the federal taxable estate pursuant to IRC § 2044 (inclusion of amounts for which a federal QTIP election was previously made).

[Statutory Authority: RCW 83.100.047 and 83.100.200. 06-07-051, § 458-57-105, filed 3/9/06, effective 4/9/06.]

WAC 458-57-115 Valuation of property, property subject to estate tax, and how to calculate the tax. (1) Introduction. This rule applies to deaths occurring on or after May 17, 2005, and is intended to help taxpayers prepare their return and pay the correct amount of Washington state estate tax. It explains the necessary steps for determining the tax and provides examples of how the tax is calculated. The estate tax rule on valuation of property etc., for deaths occurring on or before May 16, 2005, can be found in WAC 458-57-015.

(2) **Determining the property subject to Washington's estate tax.**

(a) **General valuation information.** The value of every item of property in a decedent's gross estate is its date of death fair market value. However, the personal representative may elect to use the alternate valuation method under section 2032 of the Internal Revenue Code (IRC), and in that case the value is the fair market value at that date, including the adjustments prescribed in that section of the IRC. The valuation of certain farm property and closely held business property, properly made for federal estate tax purposes pursuant to an election authorized by section 2032A of the 2005 IRC, is binding on the estate for state estate tax purposes.

(b) **How is the gross estate determined?** The first step in determining the value of a decedent's Washington taxable estate is to determine the total value of the gross estate. The value of the gross estate includes the value of all the decedent's tangible and intangible property at the time of death. In addition, the gross estate may include property in which the decedent did not have an interest at the time of death. A decedent's gross estate for federal estate tax purposes may therefore be different from the same decedent's estate for local probate purposes. Sections 2031 through 2046 of the IRC provide a detailed explanation of how to determine the value of the gross estate.

(c) **Deductions from the gross estate.** The value of the federal taxable estate is determined by subtracting the authorized exemption and deductions from the value of the gross estate. Under various conditions and limitations, deductions are allowable for expenses, indebtedness, taxes, losses, charitable transfers, and transfers to a surviving spouse. While sections 2051 through 2056A of the IRC provide a detailed explanation of how to determine the value of the taxable estate the following areas are of special note:

(i) **Funeral expenses.**

(A) Washington is a community property state and under *Estate of Julius C. Lang v. Commissioner*, 97 Fed. 2d 867 (9th Cir. 1938) affirming the reasoning of *Wittwer v. Pemberton*, 188 Wash. 72, 76, 61 P.2d 993 (1936) funeral expenses reported for a married decedent must be halved. Administrative expenses are not a community debt and are reported at 100%.

(B) **Example.** John, a married man, died in 2005 with an estate valued at \$2.5 million. On Schedule J of the federal estate tax return listed following as expenses:

SCHEDULE J - Funeral Expenses and Expenses Incurred in Administering Property Subject to Claims			
Item Number	Description	Expense Amount	Total Amount
1	A. Funeral expenses: Burial and services	\$4,000	
	(1/2 community debt)	(\$2,000)	
	Total funeral expenses.....		\$2,000
	B. Administration expenses:		
	1. Executors' commissions - amount estimated/agreed upon paid. (Strike out the words that do not apply.).....		\$10,000
	2. Attorney fees - amount estimated/agreed upon/paid. (Strike out the words that do not apply.).....		\$5,000

The funeral expenses, as a community debt, were properly reported at 50% and the other administration expenses were properly reported at 100%.

(ii) **Mortgages and liens on real property.** Real property listed on Schedule A should be reported at its fair market value without deduction of mortgages or liens on the property. Mortgages and liens are reported and deducted using Schedule K.

(iii) **Washington qualified terminable interest property (QTIP) election.**

(A) A personal representative may choose to make a larger or smaller percentage or fractional QTIP election on the Washington return than taken on the federal return in order to reduce Washington estate liability while making full use of the federal unified credit.

(B) Section 2056 (b)(7) of the IRC states that a QTIP election is irrevocable once made. Section 2044 states that the value of any property for which a deduction was allowed under section 2056 (b)(7) must be included in the gross estate of the recipient. Similarly, a QTIP election made on the Washington return is irrevocable, and a surviving spouse who receives property for which a Washington QTIP election was made must include the value of the remaining property in his or her gross estate for Washington estate tax purposes. If the value of property for which a federal QTIP election was made is different, this value is not includible in the surviving spouse's gross estate for Washington estate tax purposes; instead, the value of property for which a Washington QTIP election was made is includible.

(C) The Washington QTIP election must adequately identify the assets, by schedule and item number, included as part of the election, either on the return or, if those assets have not been determined when the estate tax return is filed, on a statement to that effect, prepared when the assets are definitively identified. Identification of the assets is necessary when reviewing the surviving spouse's return, if a return is required to be filed. This statement may be filed with the department at that time or when the surviving spouse's estate tax return is filed.

(D) **Example.** A decedent dies in 2009 with a gross estate of \$5 million. The decedent established a QTIP trust for the benefit of her surviving spouse in an amount to result in no federal estate tax. The federal unified credit is \$3.5 million for the year 2009. In 2009 the Washington statutory deduction is \$2 million. To pay no Washington estate tax the personal representative of the estate has the option of electing a larger percentage or fractional QTIP election resulting in the maximization of the individual federal unified credit and paying no tax for Washington purposes.

The federal estate tax return reflected the QTIP election with a percentage value to pay no federal estate tax. On the Washington return the personal representative elected QTIP treatment on a percentage basis in an amount so no Washington estate tax is due. Upon the surviving spouse's death the assets remaining in the Washington QTIP trust must be included in the surviving spouse's gross estate.

(iv) **Washington qualified domestic trust (QDOT) election.**

(A) A deduction is allowed for property passing to a surviving spouse who is not a U.S. citizen in a qualified domestic trust (a "QDOT"). An executor may elect to treat a trust as

a QDOT on the Washington estate tax return even though no QDOT election is made with respect to the trust on the federal return; and also may forgo making an election on the Washington estate tax return to treat a trust as a QDOT even though a QDOT election is made with respect to the trust on the federal return. An election to treat a trust as a QDOT may not be made with respect to a specific portion of an entire trust that otherwise would qualify for the marital deduction, but if the trust is actually severed pursuant to authority granted in the governing instrument or under local law prior to the due date for the election, a QDOT election may be made for any one or more of the severed trusts.

(B) A QDOT election may be made on the Washington estate tax return with respect to property passing to the surviving spouse in a QDOT, and also with respect to property passing to the surviving spouse if the requirements of IRC section 2056 (d)(2)(B) are satisfied. Unless specifically stated otherwise herein, all provisions of sections 2056(d) and 2056A of the IRC, and the federal regulations promulgated thereunder, are applicable to a Washington QDOT election. Section 2056A(d) of the IRC states that a QDOT election is irrevocable once made. Similarly, a QDOT election made on the Washington estate tax return is irrevocable. For purposes of this subsection, a QDOT means, with respect to any decedent, a trust described in IRC section 2056A(a), provided, however, that if an election is made to treat a trust as a QDOT on the Washington estate tax return but no QDOT election is made with respect to the trust on the federal return:

(I) The trust must have at least one trustee that is an individual citizen of the United States resident in Washington state, or a corporation formed under the laws of the state of Washington, or a bank as defined in IRC section 581 that is authorized to transact business in, and is transacting business in, the state of Washington (the trustee required under this subsection is referred to herein as the "Washington Trustee");

(II) The Washington Trustee must have the right to withhold from any distribution from the trust (other than a distribution of income) the Washington QDOT tax imposed on such distribution;

(III) The trust must be maintained and administered under the laws of the state of Washington; and

(IV) The trust must meet the additional requirements intended to ensure the collection of the Washington QDOT tax set forth in (c)(iv)(D) of this subsection.

(C) The QDOT election must adequately identify the assets, by schedule and item number, included as part of the election, either on the return, or, if those assets have not been determined when the estate tax return is filed, or a statement to that effect, prepared when the assets are definitively identified. This statement may be filed with the department at that time or when the first taxable event with respect to the trust is reported to the department.

(D) In order to qualify as a QDOT, the following requirements regarding collection of the Washington QDOT tax must be satisfied.

(I) If a QDOT election is made to treat a trust as a QDOT on both the federal and Washington estate tax returns, the Washington QDOT election will be valid so long as the trust satisfies the statutory requirements of Treas. Reg. Section 20.2056A-2(d).

(II) If an election is made to treat a trust as a QDOT only on the Washington estate tax return, the following rules apply:

If the fair market value of the trust assets exceeds \$2 million as of the date of the decedent's death, or, if applicable, the alternate valuation date, the trust must comply with Treas. Reg. Section 20.2056A-2 (d)(1)(i), except that: If the bank trustee alternative is used, the bank must be a bank that is authorized to transact business in, and is transacting business in, the state of Washington, or a bond or an irrevocable letter of credit meeting the requirements of Treas. Reg. Section 20.2056A-2 (d)(1)(i)(B) or (C) must be furnished to the department.

If the fair market value of the trust assets is \$2 million or less as of the date of the decedent's death, or, if applicable, the alternate valuation date, the trust must comply with Treas. Reg. Section 20.2056A-2 (d)(1)(ii), except that not more than 35 percent of the fair market value of the trust may be comprised of real estate located outside of the state of Washington.

A taxpayer may request approval of an alternate plan or arrangement to assure the collection of the Washington QDOT tax. If such plan or arrangement is approved by the department, such plan or arrangement will be deemed to meet the requirements of this (c)(iv)(D).

(E) The Washington estate tax will be imposed on:

(I) Any distribution before the date of the death of the surviving spouse from a QDOT (except those distributions excepted by IRC section 2056A (b)(3)); and

(II) The value of the property remaining in the QDOT on the date of the death of the surviving spouse (or the spouse's deemed date of death under IRC section 2056A (b)(4)). The tax is computed using Table W. The tax is due on the date specified in IRC section 2056A (b)(5). The tax shall be reported to the department in a form containing the information that would be required to be included on federal Form 706-QDT with respect to the taxable event, and any other information requested by the department, and the computation of the Washington tax shall be made on a supplemental statement. If Form 706-QDT is required to be filed with the Internal Revenue Service with respect to a taxable event, a copy of such form shall be provided to the department. Neither the residence of the surviving spouse or other QDOT beneficiary nor the situs of the QDOT assets are relevant to the application of the Washington tax. In other words, if Washington state estate tax would have been imposed on property passing to a QDOT at the decedent's date of death

but for the deduction allowed by this subsection (c)(iv)(E)(II), the Washington tax will apply to the QDOT at the time of a taxable event as set forth in this subsection (c)(iv)(E)(II) regardless of, for example, whether the distribution is made to a beneficiary who is not a resident of Washington, or whether the surviving spouse was a nonresident of Washington at the date of the surviving spouse's death.

(F) If the surviving spouse of the decedent becomes a citizen of the United States and complies with the requirements of section 2056A (b)(12) of the IRC, then the Washington tax will not apply to: Any distribution before the date of the death of the surviving spouse from a QDOT; or the value of the property remaining in the QDOT on the date of the death of the surviving spouse (or the spouse's deemed date of death under IRC section 2056A (b)(4)).

(d) **Washington taxable estate.** The estate tax is imposed on the "Washington taxable estate." The "Washington taxable estate" means the "federal taxable estate":

(i) Less one million five hundred thousand dollars for decedents dying before January 1, 2006, or two million dollars for decedents dying on or after January 1, 2006;

(ii) Less the amount of any deduction allowed under RCW 83.100.046 as a farm deduction;

(iii) Less the amount of the Washington qualified terminable interest property (QTIP) election made under RCW 83.100.047;

(iv) Plus any amount deducted from the federal estate pursuant to IRC § 2056 (b)(7) (the federal QTIP election);

(v) Plus the value of any trust (or portion of a trust) of which the decedent was income beneficiary and for which a Washington QTIP election was previously made pursuant to RCW 83.100.047; and

(vi) Less any amount included in the federal taxable estate pursuant to IRC § 2044 (inclusion of amounts for which a federal QTIP election was previously made).

(e) **Federal taxable estate.** The "federal taxable estate" means the taxable estate as determined under chapter 11 of the IRC without regard to:

(i) The termination of the federal estate tax under section 2210 of the IRC or any other provision of law; and

(ii) The deduction for state estate, inheritance, legacy, or succession taxes allowable under section 2058 of the IRC.

(3) **Calculation of Washington's estate tax.**

(a) The tax is calculated by applying Table W to the Washington taxable estate. See (d) of this subsection for the definition of "Washington taxable estate."

Table W

Washington Taxable Estate is at Least	But Less Than	The Amount of Tax Equals Initial Tax Amount	Plus Tax Rate %	Of Washington Taxable Estate Value Greater Than
\$0	\$1,000,000	\$0	10.00%	\$0
\$1,000,000	\$2,000,000	\$100,000	14.00%	\$1,000,000
\$2,000,000	\$3,000,000	\$240,000	15.00%	\$2,000,000
\$3,000,000	\$4,000,000	\$390,000	16.00%	\$3,000,000
\$4,000,000	\$6,000,000	\$550,000	17.00%	\$4,000,000
\$6,000,000	\$7,000,000	\$890,000	18.00%	\$6,000,000
\$7,000,000	\$9,000,000	\$1,070,000	18.50%	\$7,000,000
\$9,000,000		\$1,440,000	19.00%	\$9,000,000

(b) Examples.

(i) A widow dies on September 25, 2005, leaving a gross estate of \$2.1 million. The estate had \$100,000 in expenses deductible for federal estate tax purposes. Examples of allowable expenses include funeral expenses, indebtedness, property taxes, and charitable transfers. The Washington taxable estate equals \$500,000.

Gross estate	\$2,100,000
Less allowable expenses deduction	- \$100,000
Less \$1,500,000 statutory deduction	- \$1,500,000

Washington taxable estate	\$500,000
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Based on Table W, the estate tax equals \$50,000 (\$500,000 x 10% Washington estate tax rate).

(ii) John dies on October 13, 2005, with an estate valued at \$3 million. John left \$1.5 million to his spouse, Jane, using the unlimited marital deduction. There is no Washington estate tax due on John's estate.

Gross estate	\$3,000,000
Less unlimited marital deduction	- \$1,500,000
Less \$1,500,000 statutory deduction	- \$1,500,000

Washington taxable estate	\$0
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Although Washington estate tax is not due, the estate is still required to file a Washington estate tax return along with a photocopy of the filed and signed federal return and all supporting documentation.

[Statutory Authority: RCW 83.100.047 and 83.100.200, 06-07-051, § 458-57-115, filed 3/9/06, effective 4/9/06.]

**Washington State House Floor Debate on Engrossed House Bill 2075
2013 Special Session for June 13, 2013**

[Transcribed from TVW PLAYER BEGINNING MINUTE 5:15]

Forum: Washington State House of Representatives Floor Session on Pending Legislation
(2nd day of 2013 Second Special Session)

<u>Members Speaking</u>	<u>District</u>
Rep. Reuven Carlyle	36
Rep. Terry Nealey	16
Rep. Drew MacEwen	35
Rep. Gary Alexander	2
Rep. Maureen Walsh	16
Rep. Matt Shea	4
Rep. Jamie Pedersen	43

House Speaker: Sixth order of business. Consent of the House, House will now consider House Bill 2075. Hearing no objection, so ordered. House Bill 2075, Clerk will read.

[... regarding amendments, remarks, technical amendments, reservation of comment ...]

Speaker: ... Engrossed House Bill 2075 will be advanced to third reading. Hearing no objections, so ordered. Engrossed House Bill 2075 on third reading and final passage. Remarks. The gentleman from the 36th District, Representative Carlyle.

Carlyle: Thank you so much, Mr. Speaker. I rise for the third time in three legislative sessions, Mr. Speaker, to ask you once again to stand in support of the 2006 voter-supported estate tax in Washington State. It was a technical glitch of a lawsuit that had the effect of eliminating the estate tax for married couples only, not for single individuals, and I think that we can all accept that we needed to move forward with a responsible and thoughtful resolution to this particular court case. That's what this legislation accomplishes in order to invest in public education. I'm very appreciative of the hard work from the other side of the chamber to come to a resolution regarding a way to expand the eligibility for an additional deduction for family-owned small businesses. The Senate felt very strongly that that was an important part of a broader package and we were willing to engage with them in a meaningful way so long as we could do so in a way that would make it limited to truly small family-owned businesses, and we came to consensus. I would note that in accepting the Senate's suggestion that we raise the rate on the four highest rates in the estate tax in Washington State in order to make this a revenue-neutral proposal, we did feel that there was value for those small family-

owned businesses that's substantial given the fact that some businesses, warehousing or trucking or capital-intensive businesses, may not have the resources in order to pay the estate tax if that were the case. So this does help small family-owned businesses. It's responsible. It's thoughtful. We worked very hard to come to resolution and I appreciate the acknowledgment of so many members that, that this issue touches a sensitivity on some levels but there is a very real recognition that this investment in public education is essential. This is maintaining the status quo. This is in no way a tax increase in the aggregate level from the current status quo of how our estate tax has been operating for many, many years. We're merely fixing a technical lawsuit and I think we're doing it in a responsible way and, again, I appreciate the hard work of members of the Senate to try to find policy resolution on this issue. Thank you, Mr. Speaker. And I strongly ask for your support.

Speaker: Thank you. Any further remarks. Gentleman from the 16th District, Representative Nealey.

Nealey: Thank you, Mr. Speaker, and I still have some concerns about this matter. And the – I want to acknowledge that the bill has been improved. There has been a lot of work, especially in the last day or so between the Senate and the gentleman from the 36th and myself in trying to come to a better solution. It was well-stated that the changes to this bill does help small businesses even though there still some, I think, some problem with the language. We come across many small businesses that have capital, for example, buildings, assets and so forth, but not enough cash to pay the bill, to pay the tax bill, and this should help that situation out. However, Mr. Speaker, I still have very grave concerns about this bill's being retroactive. It reaches far back and affects taxes that would be owed from years ago and the problem is that those refunds are due to be paid out very soon. And according to the Supreme Court decision those are rightfully due to those estates. I think that we are bordering on the line of unconstitutionality if this bill passes. And if that were to occur and further lawsuits were to come against the Department of Revenue, i.e., the State of Washington, then we'd not only have to pay those refunds back but with interest and with attorneys' fees. It's been mentioned that these funds go into education. All of the budgets presented in this session fully fund the *McCleary* decision. We don't need this particular amount of funding to come from the *Bracken* decision to fund education, Mr. Speaker. That's a separate issue. What I'm concerned about here is the retroactivity and unconstitutionality of what we're doing today, and for that reason I would urge a no vote. Thank you.

Speaker: Thank you. Any further remarks? Representative Van De Wege.

Van De Wege: Thank you, Mr. Speaker. Please excuse Representative Farrell, Representative Hudgins, and Representative Santos.

- Speaker: Members are excused. The gentleman from the 35th District, Representative MacEwen.
- MacEwen: Thank you, Mr. Speaker. Please excuse Representatives Condotta, Crouse, Harris, Holy, Overstreet, Parker, Pike and Rodne.
- Speaker: Members are excused. The gentleman from the 2nd District, Representative Alexander.
- Alexander: Thank you, Mr. Speaker. Mr. Speaker, I share the concerns about the retroactivity probably as much as anybody about – I don't like to see decisions made retroactive that basically change the laws and the rules that are being governing our decisions. Now, Mr. Speaker, I am going to support this legislation today for one reason and one reason only. I believe we're going to have to reach some amount of give-and-take to get a budget resolved and out of this body and out of the Senate body. And I've been working with both sides and I believe that a number of the concerns of the Senate regarding this bill have been addressed in this particular striker and I think if this bill goes forward, not just the question of saving, the fact that tomorrow we pay off some paychecks – or some checks, not paychecks but checks, big checks by the way – but, more importantly, if this helps get to a resolved consensus without requiring new tax obligations on our, on our citizens that affect their daily lives then I think it's a move that out to be supported, so thank you, Mr. Speaker.
- Speaker: Thank you. Any further remarks? Lady from the 16th District, Representative Walsh.
- Walsh: Thank you, Mr. Speaker. And I certainly appreciate the sentiments from the previous speaker and have tremendous respect for him and all the work that he's done trying to get us out of here this year. But I also think there's a tremendous inherent unfairness with this bill. I just read an article about a family who had \$700,000 taken from – after their mother passed away in 2008. Now they have a son who's recently lost his wife to cancer and he's disabled and they really need the money. We did not take this money lawfully from these people. This money came because somebody boo-booed. I don't care – it was somebody's fault in government, Department of Revenue, but the reality is this money was not obtained lawfully from these families. This money – and my understanding, simplistic as it is, is that it was somewhere hovering around 160 million bucks to take care of this, to nip this in the bud, to be done with this. You know what? Maybe it's rainin'. Maybe it's a rainy day. Maybe we ought to just take 160 million dollars, pay back these families who we took this money from and be done with this. Because guess what? Constitutional issues and everything else aside, reality is this money belongs to those families because it was not lawfully taken from them in the first place. And guess what? We have seen lawsuits increased exponentially in

this place. I've been here 20 years and the amount of lawsuits against this state because of misinterpreted statutes or what have you has really grown exponentially and is *huge* right now. We need to step up, take care of this, pay back these families, and be done with this and not have this issue rear its ugly head continually as these families continue to come back and sue the state because we're going against a decision made by the Supreme Court to refund these families. That's what we should do. We should be done with this. I don't know why we're playing around and saying it's in the interests of education. We're all here for the interests of education and we're all going to do a good job to take care of education again because of a lawsuit! Why do we need to continue to step into this? We need to step away, refund these families, and be done with this for good. This is gonna keep coming back at us, folks. Let's just take care of it and call 'er good.

Speaker: Thank you. Any further remarks. Gentleman from the 4th District, Representative Shea.

Shea: Thank you, Mr. Speaker, and I also rise in opposition to the bill today for a couple reasons. Number one, this is isn't the government's money. And number two, we took an oath, Mr. Speaker, we took an oath to defend the state constitution and there's been a long-standing principle in America that we don't pass laws retroactively to hold people accountable for something they never knew they would be accountable for. And, Mr. Speaker, this is about people. If we pass this we are going to be sued as the State Washington. We are going to lose and not only are we going to have to pay back the money for all of that, we are going to have to pay attorneys' fees and we are gonna have to pay interest on that money. And you know where that money's gonna come from? It's gonna come from our children. It's gonna come from our disabled. It's gonna come from our future, Mr. Speaker. And I think that the solution to this entire dilemma is pretty simple. We should just fund education with our first dollar instead of our last dubious penny. Please vote no. Thank you.

Speaker: Thank you. Any further remarks? Gentleman from the 43rd District, Representative Pedersen.

Pedersen: Thank you, Mr. Speaker. You know, I actually agree with the gentleman from the 4th District about a number of things that he said. This is about people, this is about expectations, and this is about funding education. We're talking today about a group of roughly 70 families who met with their lawyers and made a very deliberate decision to form Qualified Taxable Investment Property Trusts so that they could delay payment of the estate taxes with the full understanding that on the death of the second spouse for federal estate tax purposes the estate tax would be payable with those trust assets. These are people who made very conscious planning decisions to defer payment of the estate tax, not to escape it entirely. Now, it's unfortunate, but not

unprecedented, that in the Legislature in developing the 2005 estate tax legislation that was ultimately approved, as my colleague from the 36th noted, by a substantial majority of the voters that there was a technical glitch. And as a result we have a system set up in which we have a profound inequity in treatment between married couples and unmarried individuals – a planning opportunity, my colleagues in estate planning would call it. That means that unless we make some change we're going to be in a situation in our state when only single people need to pay the estate tax because any married couple with the assets will be able to escape our estate tax entirely. And so this bill is about expectations and it's about, in terms of the retroactivity, weighing the expectations of those 70 families that planned to pay the estate tax later against the expectations of more than a million children whose education depends, depends on our doing a better job of funding it. I take issue with the remarks of the gentleman from the 16th District who says that we are fully funding education in this budget. We are doing nothing close to funding education amply. We need a lot more money, not just this money, to be applied to education but we'll take this as a step toward that day. On Monday morning I had the pleasure of going with my partner Eric to meet with the principal of Stevens Elementary School where our son Trig will be starting this fall. Our other three sons will be starting in two years. That system needs our help because those kids, like all of the other kids headed to school this fall, need our help. They need us to be doing more to support them. And this is an inadequate small step, but a step in the right direction, toward compliance with our constitutional obligations under the *McCleary* decision to make sure that all Washington kids have a good education. I urge your support.

Speaker: Thank you. Any further remarks? Seeing none, the question before the House is final passage of Engrossed House Bill 2075. The speaker's about to open the roll call machine. [*bell tolls*] The speaker has opened the roll call machine. Has every member voted? Does any member wish to change his or her vote? Speaker's about to lock the roll call machine. Representative Kretz, how do you vote? [*Inaudible*] Speaker has locked the roll call machine. Clerk will take the record, please.

Clerk: Mr. Speaker, there are 53 yea, 33 nay, 11 excused or not voting.

Speaker: Having received a constitutional majority, Engrossed House Bill 2075 is declared passed. [*gavel*] With the consent of the House the bill that was just immediately, that was just worked on, will be immediately transferred to the Senate. Hearing no objection, so ordered. [*gavel*] The House is now at ease subject to the call of the speaker. The House is now at ease.

*** END of 6/13/2013 Washington State House Floor Debate on Engrossed House Bill 2075 ***

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**Washington State Senate Floor Debate on Engrossed House Bill 2075
2013 Special Session on June 13, 2013**

[Transcribed from TVW PLAYER BEGINNING MINUTE 32:05]

Forum: Washington State Senate Floor Session on Pending Legislation (2nd day of 2013
Second Special Session)

<u>Members Speaking</u>	<u>District</u>
Sen. Andy Hill	45
Sen. Mike Padden	4
Sen. James Hargrove	24
Sen. Jim Honeyford	15
Sen. Joe Fain	47
Sen. Sharon Brown	8
Sen. Sharon Nelson	34
Sen. Michael Baumgartner	6
Sen. Rodney Tom	48
Sen. John Braun	20

Senate President: . . . and the bill be placed on final passage. Hearing no objection, so ordered. [*gavel*] Senator Hill.

Sen. Hill: Usually I work with my soccer teams. I wait when they quiet down. Mr. President, this bill clarifies some language in our Washington estate tax. It truly does close a loophole that was determined by Supreme Court order. In short order, it basically requires that marital trust property be included in the estate for the purposes of the estate tax. We also make some tweaks to the estate tax code. We provide a deduction for family-owned businesses and we adjust the – we now allow the \$2 million exemption to grow indexed at inflation on an annual basis. And it also increases the top four rates in the estate tax to make the entire change revenue-neutral. So I think what you have here is, we close a loophole, we give some needed relief to our family businesses, and in doing all of this we free up \$160 million. Now, according to my calculations we've got about \$1.9 billion of taxes coming in this year more than we did last year – I mean last biennium. When you add in our hospital safety net, our cost-shift to Medicaid expansion, and now this \$160 million, we now have roughly \$2.7 billion more than we had last biennium – 2.7 billion. And yet we have a budget that was pushed over here from the other side that could only get 700 dol- -- 700 million into basic education. And we have a Governor saying that we need to raise more taxes to get a billion into basic education. I hope that now with \$2.7 billion we can finally get a budget that both houses and the Governor can agree on that'll get us a billion dollars. Now this body has passed out two budgets that got a billion

into *McCleary*. And we have threats of shutting down the government because we need more taxes because we can't get that billion dollars. So I fully expect every dollar of this \$160 million to go to basic education, and I ask you for your vote. Thank you.

President: Senator Padden.

Sen. Padden: Tim. Evening's late but I did want to point out a few concerns I have, and certainly have tremendous respect for the gentleman from the 45th District in trying to put together a budget, certainly not an easy thing. But I have questions specifically about this. Frankly, I don't think we'll ever see this money. I think the Supreme Court will rule that this legislation, as far as the retroactivity, is unconstitutional. Certainly that was the opinion of the estate section of the Washington State Bar Association, and it wasn't just an opinion by a majority of those members, it was the unanimous opinion of each and every member of that estate tax division. I mean, the whole idea of retroactivity generally is considered unfair. And I mean I think you go back to Roman law or common law or whatever and the idea is, I mean, you ought to know what the rules are at the time that you take action, and here we're changing the rules after the fact. So certainly those estates that were involved before 2005, I just don't see the court's upholding this. I know that this new bill is an effort to have some policy changes that I support but, again, to do that they are raising the rates even more. And we have the highest estate tax rates in the country already. So I just have a lot of concerns with this. This bill did not have a hearing in the Ways and Means Committee and the last bill on this subject that had a hearing in the Ways and Means Committee didn't have enough votes to get out of the committee. So I mean, I think there's a lot of problems with this legislation and I would urge a no vote.

President: Senator Hargrove?

Sen. Hargrove: Well, thank you, Mr. President. Thank you very much. Just to make a few comments here. First of all, I'm very glad we're finally getting this particular piece done. This was \$160 million bogey that got handed to us by the court after we came here. We didn't get this news on this case until after we came to session and, if you remember, we were about 900 million in the hole on our current law budget when we came to session and then of course we knew we were going to have to make an investment in *McCleary* of, you know, whether it's a billion or a little less or a little more. Some people think more. Some people think a little less will do this year. The point is that our current law budget was upside-down by over a billion after this *McCleary* – after this estate tax decision came to us early in session. So, no matter how you look at the numbers and the math, you have to make real cuts. Things happen in our budget that are caseloads that grow, there's inflation, there's other things that are in current law that you have to make

decisions on. And we went through a long and a difficult decision-making process in our Senate budget even to end up coming up with a number of cuts that were very painful for some people that we've talked about in order to try to make these things balance. So I'm, you know – I appreciate the, the comments here. I'm very glad we're getting this particular piece done. I think it's going to be part of our go-home budget at some point in time, and I – believe me – I am very much looking forward to *going home*. Thank you very much. Encourage your support.

President: Senator Honeyford?

Sen. Honeyford: Thank you, Mr. President. A point of inquiry.

President: What is your point of inquiry?

Sen. Honeyford: Thank you, Mr. President. I notice tonight that several people have addressed the President of the Senate as President Pro Tem and I noticed that I know in the past the tradition of the Senate has been we address the President Pro Tem as President. And when we had the Vice-President Pro Tem we addressed him as President. Would you give us some direction, please?

President: Well, thank you for asking, Senator Honeyford. I believe the correct address to the presiding officer is 'Mr. President.' The President Pro Tem is elected by all the members of the Senate and, in the absence of the Lieutenant-Governor, serves in the role as President. So I believe the correct address to the presiding office is 'Mr. President.' Thank you for inquiring, Senator Honeyford. Senator Fain?

Sen. Fain: Thank you, Mr. President. I belatedly move that we suspend Rule 15 so that the chamber may be past 10:00 p.m.

[Laughter]

President: Senator Fain has moved that we suspend Rule 15 so we may belatedly be in session past 10:00 p.m. Hearing no objection [clamor] – so retroactively. Hearing no objection, so order. [gavel] Senator Brown.

Sen. Brown: Mr. President, thank you. I stand in opposition of the bill, particularly because it's retroactive and, as an attorney, I just cannot support retroactivity. The bill allows the Department of Revenue to tax a transaction with a tax that was not enacted until *thirty years* after the transfer was completed. This bill is an unconstitutional attempt to change the terms of the contract entered into prior to the enactment of Washington's estate tax and for that reason I stand in opposition of this. Thank you, Mr. President.

President: Senator Nelson?

Sen. Nelson: Thank you, Mr. President. And I stand in strong support of this legislation. The people of this state were very, very clear. They wanted an estate tax. They supported taxing the wealthiest estates for our children's education and their future. And when the Supreme Court threw a loop into the estate tax in January of this year we began our discussions and it became very clear that, if we are going to have a strong financial foundation to fund *McCleary*, we needed to take this action. We need to preserve not only the 160 million that go into refunds immediately but funding for the next biennium and the next for our kids. And ladies and gentlemen, in eight hours and fifteen minutes without this legislation we begin to refund to the wealthiest estates in Washington. We begin to mail out checks for funds that could be used for our kindergartners, for our third-graders, for everything that we believe in for our kids' futures. We need this action now. It is on the brink of being too late and in eight and a half hours, eight and a half hours, these checks go in the mail. We need this action tonight. Thank you.

President: Senator Baumgartner.

Sen. Baumgartner: Well, thank you, Mr. President. You know, I rise with some concerns and ask for a no vote. You know, I agree that the spirit of what was passed back in 2006 intended for folks to make these payments but the fact of the matter was the rule of law says that they shouldn't have. And I really think this is a trust issue with governance that if the law says that you shouldn't pay it, and you deserve to get it back, it's a fundamental trust in government to have the government reach back and take that money. You know, I think there's a lot of things going on in society right now that are eroding trust in government and I just think it's a wrong precedent for us to set here. This is a very potential slippery slope towards other times that we – you know, this is, is necessary money because we decided to greatly increase the size of government and government spending and this is a necessary accounting measure, I guess, to do that. To some extent I look at this as a short-term loan with a very high interest payment because I do expect the State is going to lose this lawsuit and these folks will get that money and will get at - be costing our future funds. But, you know, I just ask everybody to think about this basic trust in government. Does government do what it says it's going to do? And I don't think we're doing that here today. So spirit of 2006, yes. But this, this basic sense that these folks, under the rule of law, shouldn't have paid this money, and we should respect that. So I ask for a no, Mr. President.

President: Senator Tom?

Sen. Tom: Thank you, Mr. President. I would ask members to vote yes on this. I was here back when we passed this out of the Legislature. I'll be honest, I did vote no on this, and back in 2005. And the reason why I voted no is because

I don't think the estate tax is great on a state-by-state basis. I am a firm believe that an estate tax is a good tax on a national basis. I think, you know, one of the things as a country that probably we should do is have a stronger estate tax at the national and then that to fund maybe some of our higher-ed institutions, higher-ed research, and that. I don't think on an individual state basis it's a great idea. But I do think it was very clear when we passed that that the intent wasn't to have couples and singles taxed differently. I think everybody – one, that's not a logical means of having taxation policy and it surely wasn't the intent of the Legislature. So think that this is a good bill. But, more importantly, we need to make sure that if we have now \$160 million more than we did in the original Senate budget, if we were able to put a billion dollars for *McCleary* and we continue to hear off this Senate floor that education is our paramount duty and we need more money for education to make sure that our kids are prepared for a 21st Century economy, we need to make sure that this 160 goes to education, goes to *McCleary*, so that we can fund our constitutional and moral obligation. Thank you, Mr. President.

President: Senator Braun?

Sen. Braun: Thank you, Mr. President. I rise in somewhat conflicted support of this bill. You know, this bill attempts to fix the result of *Bracken* by expanding the definition of a transfer, a move that raises serious constitutional challenges under the contract clause of both the U.S. and the Washington State Constitution. It also attempts to apply a death tax enacted in 2005 to trusts created prior to 2005, again raising serious constitutional concerns. These are serious issues that deserve our careful consideration. Unfortunately, the dominant narrative has been one that pits millionaires against our children and it's created a political atmosphere that limited discussion on the issues of constitutionality. As a result, I believe we're abdicating our responsibilities to the courts. However – this is why I'm conflicted –, this has offered the opportunity to do something I believe of great benefit to our state's small family businesses that are disproportionately affected by the death tax. This bill creates a small family business deduction for our smallest employers that I believe are critical to our economic future, and our greatest risk to failure during intergenerational transfer. It does this in a revenue-neutral fashion and has high sideboards to prevent the gaming of the system. It's an important reform that was reached by finding common philosophical ground and then working in good faith to craft a compromise that met that shared vision. So, although I have great concerns about the constitutionality of this *Bracken* fix, I do trust our court system to address the issue. And I'm very proud of the good work this bill does for our smallest employers. Thank you, Mr. President.

President: The question before the Senate is final passage of Engrossed House Bill 2075. The Secretary will call the roll.

Secretary: [*calls roll*] . . . Mr. President, 30 ayes, 19 nay.

President: Having received the constitutional majority, Engrossed House Bill 2075 is declared passed. The title of the bill will be the title of the Act.

[*gavel*]

[*procedural matters*]

*** END of 6/13/2013 Washington State Senate Floor Debate on Engrossed House Bill 2075 ***

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Frequently Asked Questions on Estate Taxes

Below are some of the more common questions and answers about Estate Tax issues. You may also find additional information in [Publication 950](#) or some of the other forms and publications offered on our [Forms Page](#). Included in this area are the instructions to Forms 706 and 709. Within these instructions, you will find the tax rate schedules to the related returns. If the answers to your questions can not be found in these resources, we strongly recommend visiting with a tax practitioner.

- [When can I expect the Estate Tax Closing Letter?](#)
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- [What happens if I sell property that I have inherited?](#)
- [INTERNATIONAL: In a Form 706NA, how do I claim a pro-rata unified credit pursuant to a treaty?](#)
- [INTERNATIONAL: In a Form 706NA, how do I claim an exemption from U.S. estate tax pursuant to a treaty?](#)
- [INTERNATIONAL: How do I secure a transfer certificate \(U.S. Citizen\)?](#)
- [INTERNATIONAL: How do I secure a transfer certificate \(Non-U.S. Citizen\)?](#)

When can I expect the Estate Tax Closing Letter?

There can be some variation, but for returns that are accepted as filed and contain no other errors or special circumstances, you should expect to wait about 4 to 6 months after the return is filed to receive your closing letter. Returns that are selected for examination or reviewed for statistical purposes will take longer.

What is included in the Estate?

The Gross Estate of the decedent consists of an accounting of everything you own or have certain interests in at the date of death ([Refer to Form 706 \(PDF\)](#)). The fair market value of these items is used, not necessarily what you paid for them or what their values were when you acquired them. The total of all of these items is your "Gross Estate." The includible property may consist of cash and securities, real estate, insurance, trusts, annuities, business interests and other assets. Keep in mind that the Gross Estate will likely include non-probate as well as probate property.

I own a 1/2 interest in a farm (or building or business) with my brother (sister, friend, other). What is included?

Depending on how your 1/2 interest is held and treated under state law, and how it was acquired, you would probably only include 1/2 of its value in your gross estate. However, many other factors influence this answer, so you would need to visit with a tax or legal professional to make that determination.

What is excluded from the Estate?

Generally, the Gross Estate does not include property owned solely by the decedent's spouse or other individuals. Lifetime gifts that are complete (no powers or other control over the gifts are retained) are not included in the Gross Estate (but taxable gifts are used in the computation of the estate tax). Life estates given to the decedent by others in which the decedent has no further control or power at the date of death are not included.

What deductions are available to reduce the Estate Tax?

1. **Marital Deduction:** One of the primary deductions for married decedents is the Marital Deduction. All property that is included in the gross estate and passes to the surviving spouse is eligible for the marital deduction. The property must pass "outright." In some cases, certain life estates also qualify for the marital deduction.
2. **Charitable Deduction:** If the decedent leaves property to a qualifying charity, it is deductible from the gross estate.
3. **Mortgages and Debt.**
4. **Administration expenses of the estate.**
5. **Losses during estate administration.**

What other information do I need to include with the return?

See [Form 706 \(PDF\)](#) and [Instructions \(PDF\)](#) and [Publication 950](#). Among other items listed:

1. Copies of the death certificate
2. Copies of the decedent's will and/or relevant trusts
3. Copies of appraisals
4. Copies of relevant documents regarding litigation involving the estate
5. Documentation of any unusual items shown on the return (partially included assets, losses, near date of death transfers, others).

What is "Fair Market Value?"

Fair Market Value is defined as: "The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. The fair market value of a particular item of property includible in the decedent's gross estate is not to be determined by a forced sale price. Nor is the fair market value of an item of property to be determined by the sale price of the item in a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate." Regulation §20.2031-1.

What about the value of my family business/farm?

Generally, the fair market value of such interests owned by the decedent are includible in the gross estate at date of death. However, for certain farms operated as a family farm, reductions to these amounts may be available.

In the case of a qualifying Family Farm, IRC 2032A allows a reduction from value of up to \$1,070,000.

A similar deduction for a qualifying family owned business (IRC 2057) was revoked beginning in 2004.

What if I do not have everything ready for filing by the due date?

The estate's representative may request an extension of time to file for up to six months from the due date of the return. However, the correct amount of tax is still due by the due date and interest is accrued on any amounts still owed by the due date that are not paid at that time.

Who should I hire to represent me and prepare and file the return?

The Internal Revenue Service cannot make recommendations about specific individuals, but there are several factors to consider:

1. How complex is the estate? By the time most estates reach \$1,000,000, there is usually some complexity involved.
2. How large is the estate?
3. In what condition are the decedent's records?
4. How many beneficiaries are there and are they cooperative?
5. Do I need an estate tax professional?

With these questions in mind, it is a good idea to discuss the matter with several estate tax professionals. Ask about how much experience they have had and ask for referrals. This process should be similar to locating a good physician. Locate other individuals that have had similar experiences and ask for recommendations. Finally, after the individual(s) are employed and begin to work on estate matters, make sure the lines of communication remain open so that there are no surprises during administration or if the estate tax return is examined.

Finally, most estates engage the services of both attorneys and CPAs or Enrolled Agents (EA). The attorney usually handles probate matters and reviews the impact of documents on the estate tax return. The CPA or EA often handles the actual return preparation and some representation of the estate in matters with the IRS. However, some attorneys handle all of the work. CPAs and EAs may also handle most of the work, but cannot take care of probate matters and other situations where a law license is required. In addition, other professionals (such as appraisers, surveyors, financial advisors and others) may need to be engaged during this time.

Do I have to talk to the IRS during an examination?

You do not have to be present during an examination unless an IRS representative needs to ask specific questions. Although you may represent yourself during an examination, most executors prefer that professional(s) they have employed handle this phase of administration. They may delegate authority for this by signing a designation on the [Form 706](#) (PDF) itself, or executing [Form 2848 "Power of Attorney"](#) (PDF).

What if I disagree with the examination proposals?

You have many rights and avenues of appeal if you disagree with any proposals made by the IRS. [See Publications 1](#) (PDF) and [5](#) (PDF) for an explanation of these options.

What happens if I sell property that I have inherited?

The sale of such property is usually considered the sale of a capital asset and may be subject to capital gains (or loss) treatment. However, IRC §1014 provides that the basis of property acquired from a decedent is its fair market value at the date of death, so there is usually little or no gain to account for if the sale occurs soon after the date of death. (Remember, the rules are different for determining the basis of property received as a lifetime gift). Refer to [Gift Tax FAQ](#).

INTERNATIONAL: In a Form 706NA, how do I claim a pro-rata unified credit pursuant to a treaty?

Complete the entries for Lines 1 through 3 in Schedule B on the second page of the return. Attach a statement to the return that refers to the particular treaty applicable to the estate, and write that the estate is claiming its benefits. Show your computation of the pro-rata

unified credit in the statement, and enter that figure in the Tax Computation on Line 7 on the front page of the return. Attach to the Form 706NA a copy of the return filed with the treaty partner. If no estate or inheritance tax return has been filed with the treaty partner, explain in your statement why no foreign return was due. If there was no foreign return, attach a copy of an inventory that sets forth the decedents assets and their values at the date of death, and explains how the figure shown on Line 3 of Schedule B was computed.

INTERNATIONAL: In a Form 706NA, how do I claim an exemption from U.S. estate tax pursuant to a treaty?

In Schedule A of the return, list the estates U.S. assets, but show no values for those that are exempt from U.S. estate tax pursuant to a treaty. Attach a statement to the return that refers to the particular treaty applicable to the estate, and write that the estate is claiming its benefits. Entries for the gross estate in the U.S., the taxable estate, and the tax amounts, should be "0" if all of the decedents U.S. assets are exempt from U.S. estate tax pursuant to the applicable treaty. Attach to the Form 706NA a copy of the return filed with the treaty partner. If no estate or inheritance tax return has been filed with the treaty partner, explain in your statement why no foreign return was due.

Most information for this page came from the Internal Revenue Code: Chapter 11--Estate Tax (generally Internal Revenue Code §2000 and following, related regulations and other sources.)

If you have suggestions or comments (or suggested FAQs) for the Estate and Gift Tax Web site, please contact us: [CONTACT ESTATE AND GIFT TAX](#). We will not be able to respond to your email, but will consider it when making improvements or additions to this site.

Note: *This page contains one or more references to the Internal Revenue Code (IRC), Treasury Regulations, court cases, or other official tax guidance. References to these legal authorities are included for the convenience of those who would like to read the technical reference material. To access the applicable IRC sections, Treasury Regulations, or other official tax guidance, visit the [Tax Code, Regulations, and Official Guidance](#) page. To access any Tax Court case opinions issued after September 24, 1995, visit the [Opinions Search](#) page of the United States Tax Court.*

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