



# LIFE BEGINS

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Washington State Bar Association  
Senior Lawyers Section

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## Save the Date!

### Senior Lawyers Section 2012 Annual Meeting & CLE Seminar Friday, May 11, 2012 – Marriott, Sea-Tac Airport

Once again, an informative and entertaining CLE seminar is coming your way. Earn CLE credits in the company of your friends and colleagues at the Section’s annual CLE.

The following information on speakers and topics is current as of late January 2012.

Confirmed speakers and topics include:

Justice Debra Stephens on new constitutional issues before the court.

Vicki Williams, associate professor and assistant dean at Gonzaga Law School, on health care funding under the Health Care Act.

A panel on the constitutionality of school funding to be chaired by Hugh Spitzer, Seattle attorney and affiliate professor at University of Washington School of Law. Panel members will include state legislator Ross Hunter; Seattle attorney Tom Ahearne, who argued the matter before the Supreme Court; and a third person to be identified.

Other confirmed speakers include trial lawyer Art Swanson, of Renton, and Karen Boxx, associate professor at University of Washington School of Law. Boxx spoke at the Section’s 2011 CLE.

The price once again is \$150 for Section members, \$170 to join the Senior Lawyers Section and attend the CLE, and \$250 for all others. The cost includes the seminar, written materials, an excellent lunch, parking, and a social hour at

the end of the session. This remains one of the best CLE bargains anywhere.

Please mark your calendar for May 11, 2012, and watch for the registration form in the mail, an upcoming *Life Begins*, or at [www.wsba.cle.org/seminars](http://www.wsba.cle.org/seminars).

**Thanks for supporting the Section.  
Please invite your colleagues to join.**

## Viall Is BOG Liaison to Section

Wilton S. “Bill” Viall III has succeeded Brian Comstock as WSBA Board of Governors (BOG) liaison to the Senior Lawyers Section. Both are members of the Section.

Admitted to WSBA in 1973, Viall was elected to the Board of Governors in 2011, where he represents the 8<sup>th</sup> Congressional District (eastern King and Pierce counties). He practices in Seattle at Williams Kastner. He was a partner at Simmons, Viall & Lee and for more than 20 years served as City Attorney for Normandy Park. He can be contacted at [wviall@wkg.com](mailto:wviall@wkg.com).

Comstock, who practices in Bellevue, joined the Section’s Executive Committee upon the conclusion of his BOG term.

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## Reasons to Use an Exemption Trust Despite the Portability Exemption

by Darin T. Jensen - Lasher Holzapfel Sperry & Ebberson PLLC

We are now six months in to this new and unprecedented gift from Congress, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "Act"). While many of the new tools given to estate planners through this Act are great, the purpose of this article is to advise that caution be given to reliance on the Portability Exemption. First, a quick overview of what the new Act provides for the next year and a half:

- A new estate tax rate of 35% and a \$5 million per-person exemption (adjusted for certain lifetime gifts). Tax historians have noted that except for the temporary repeal of the estate tax in 2010, the estate tax rate has not been less than 45% since 1931.
- The law in effect prior to 2010 provided a \$3.5 million lifetime exemption for estates, but only a \$1 million lifetime exemption for gifts. Under the new law, the estate and gift tax exemptions have been reunified, which means that the \$5 million estate tax exemption is also available for lifetime gifts. The gift tax rate for gifts in excess of the \$5 million gift tax exemption is 35%.
- The exemption from the generation-skipping tax (GST) – the additional tax on gifts and bequests to individuals two or more generations younger than the transferor – has also increased to \$5 million from the \$1 million it would have been without the new law. The GST tax rate for transfers made in 2011 and 2012 which exceed the exemption amount is 35%.
- The new law also gives heirs of decedents dying in 2010 a choice of which estate-tax rules to apply – 2010's or 2011's. That's important because although there was no estate tax in 2010, some inherited assets are subject to potentially higher capital gains tax under the 2010 rules, a situation that actually raises the tax burden for some heirs. Inherited assets under the 2010 rules have a tax basis equal to the price when they were purchased (referred to in tax parlance as "carryover basis") rather than the price at death. That could lead to a significant income tax burden for heirs who sell assets such as stocks that had been held for many years and have greatly appreciated in value.
- The Portability Exemption was introduced, which makes it easier for those without proper tax planning in their wills to transfer the \$5 million exemption to a surviving spouse, so married couples can shield \$10

million of their assets from federal estate taxes. In the language of tax professionals, the estate tax exemption will be "portable." However, for the reasons contained in the remainder of this article, very careful analysis suggests that, in most cases, this Portability Exemption should not be relied upon.

Much has been written about how to utilize this new and short-lived law to benefit clients. Clearly, now is the time to advise clients to make large gifts since gifting will freeze the value of the gifted property as well as avoid the Washington state estate tax. But, does the Act, under the Portability Exemption, provide a license to stop drafting credit shelter trusts?

In most cases it will still be much more beneficial to clients to draft the time-honored credit shelter trust into their wills rather than rely on the Portability Exemption. A credit shelter trust is a trust that is established in the will or living trust of the first to die of a married couple, most often for the benefit of a surviving spouse. It is generally created to avoid estate taxes at a first spouse's death by taking advantage of the available federal estate tax credit. The credit shelter trust may also be referred to as an A/B trust, B trust, bypass trust, exemption equivalent, or unified credit trust. Here, such trust will simply be referred to as the Credit Trust.

The reasons to use a Credit Trust despite the Portability Exemption are as follows:

1. **Creditor Protection.** One of the best and main reasons to utilize a Credit Trust is to protect assets. A Credit Trust is great for asset protection since the Trust's assets will be protected from creditors, second spouses, etc.
2. **Certainty and Simplicity.** A Credit Trust guarantees who the remainder interest will pass to (e.g., children of a prior marriage). Furthermore, this is a very simple part of the estate plan that the family can understand.
3. **State Law Problems.** There is no comparable state portability exemption. In Washington, where there is a combined community estate greater than \$2 million, the current \$2 million Washington state tax exemption will be partially or wholly lost on

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the first death unless it is used to fund a Credit Trust. Losing this exemption can result in higher Washington state estate taxes on the death of the second spouse. Consequently, in order to take complete advantage of both spouses' exemptions and minimize state estate taxes on the surviving spouse's estate a Credit Trust must be used.

4. **Post Death Asset Appreciation.** The value of the Credit Trust's assets will be "frozen" and any future appreciation of those assets will escape estate taxes. Note that the appreciation component will not benefit from step up in basis at the second death.
5. **Election Must Be Made.** To be able to transfer the unused exclusion amount over to the surviving spouse, the estate of the first spouse to die must file an election on a timely filed estate tax return (including extensions), regardless of whether the estate of the first spouse to die is required to file an estate tax return. If the election is not timely made, the exemption is lost. This presents an additional expense in the first estate and a trap for the unwary.
6. **Statute of Limitations Waived.** If the election to use the Portability Exemption is made, the IRS, under the new law, is permitted to review the gift and estate tax returns of first spouse to die to determine the proper amount of unused exclusion, notwithstanding that the statute of limitations with respect to those returns may have closed. This opens the second estate to possible large audit costs and possible taxes due to assets being revalued in the first estate.
7. **No Portability of GST Exemption.** The 2010 Act does not provide for portability of the generation-skipping transfer tax exemption (the "GST Exemption"). Therefore, unless the GST Exemption is allocated elsewhere in the first estate, GST Exemption of the first spouse to die is lost if a Credit Trust is not used.
8. **Remarriage Issues.** If a surviving spouse receives some portable exemption, then remarries and her new spouse predeceases her, she could lose some of the first deceased spouse's exemption. A Credit Trust protects the amount of the exemption allocated to it regardless of future marriages.
9. **Valuation Adjustments for Assets.** A Credit Trust can be funded on the first death with assets that

have been given valuation adjustments due to minority discounts, which under case law are kept separate from the surviving spouse's Credit Trust.

10. **Income Tax Savings.** There are possible income tax savings if the beneficiaries of the Credit Trust (typically children) are in a lower tax bracket.
11. **Portable Exemption Could Sunset.** While the likelihood for extending the Portability Exemption in the next estate tax bill is high, the law in its present form is set to see the Portability Exemption sunset at the end of 2012. Before abandoning the use of a Credit Trust or having spouses equalize the property they own, be aware that the portability exemption rules currently are set to expire in 2013. Even then, if the surviving spouse lives at least until 2013, there is some uncertainty as to how the portable amount of the exemption received from the deceased spouse will be treated in subsequent years.

For those who might still come away thinking that the Credit Trust has forever been replaced by the Portability Exemption, here are a few reasons you can proudly give for why the Portability Exemption is better:

1. **No Credit Trust Tax Returns, Trustee Fees, etc.** Use of the Portability Exemption eliminates the need for annual income tax returns for the Credit Trust as well as potential trustee fees, separate bank accounts, etc.
2. **Portable Gift Tax Exemption.** It appears that if the transfer of the unused exemption amount is elected, it may also be used for gifts by the surviving spouse during his/her remaining life.
3. **Second Step up in Income Tax Basis.** Appreciation between the first spouse's death and the surviving spouse's death can be sheltered from the capital gains tax.

While the Portability Exemption has its limited place, the role of and the need for the Credit Trust remains relatively unchanged. Indeed, its importance is multifaceted. The Credit Trust provides asset protection, certainty, and simplicity. To boot, it provides valuable tax savings by preserving the federal and state estate tax exemptions, freezing asset values, and preserving an asset's valuation adjustment.

## Summer in Ashland

by Phil DeTurk

"Proud of employment, willingly I go." – LLL

"Our doubts are traitors, and make us lose the good we oft may win." – MM

"...when thou art old and rich, thou hast neither heat, affection, limb, nor beauty, to make thy riches pleasant. What's yet in this that bears the name of life? ...yet death we fear, that makes these odds all even." – MM

"... it is the disease of not listening, the malady of not marking, that I am troubled withal." – KH4th

During my recent trip – perhaps my tenth – to Ashland, Oregon, each of the above sallies could be heard from their respective plays, *Measure for Measure*, *Love's Labour's Lost* and *King Henry IV, Part II*.

But Ashland is not just the king of Shakespearean plays in the Pacific Northwest. According to Paul Nicholson, executive director of the Oregon Shakespeare Festival, "... today, we are regarded by the theatre world as one of the premier theatre companies in the United States." Nestled south of Medford not far from the California border, this city of 20,000 – home also to Southern Oregon University – is the place to partake of at least four plays by the Bard every season. Nowadays, nearly 80 years after its inception in 1935, it also presents anywhere from six to eight other works of art. For instance, 2011 marked the first time that a musical – *The Pirates of Penzance* – was offered at the outdoor Elizabethan Stage.

Downtown Ashland by itself is worth the trip. While it is only a few blocks long, it features at least six fancy restaurants and that many, if not more, motels and B & Bs, some bearing names like Arden Forest Inn or *Midsummer's Dream*, or even Stratford, or *To Sleep, Perchance to Rest*. (Okay, the last is a fictional accommodation, but one I might adopt were I to become an hotelier in Ashland.) There is also the Ashland Springs Hotel, eight stories high, which is located less than two blocks from the entrance to the three theaters. Yes, there are three of them, the New Theatre, to which Paul Allen made a substantial donation, being the most recent. There were four this summer until the Bowmer Theater had to close due to structural damage. Yet, the show must go on, and it did. A tent was soon erected nearby so plays could continue to be offered.

### Thespian Adventures

The theaters are situated on a hill between the university and the town itself. Descending almost 40 steps from the hilltop, one ends up next to the beautiful winding Lithia Creek. During the daylight one can relax while reviewing the print edition of the next play on your schedule. Or you can slum it and just read a newspaper. To the north, another hill beckons. It is a residential section but has plenty of parking spaces on the streets next to the homes. One is never more than three blocks from thespian adventures.

Over the years I have enjoyed many plays in Ashland, some more than once. Besides Will's works, I have seen *Idiot's Delight*, *The Three Musketeers*, Moliere's *Imaginary Invalid*, *Cat on a Hot Tin Roof*, *Pride and Prejudice*, *The Cherry Orchard*, *Noises Off*, August Wilson's *Seven Guitars*, and some being presented for the first time anywhere.

An indication of how the area has grown is recorded in the development of the then Elderhostel Program run through Southern Oregon University. Twelve years ago, rooms for the seniors (of Elderhostel vintage, not young collegiate types) offered only a communal bathroom. Five years later, there were private rooms with baths in a new wing and now the oldsters doing a Road Scholar adventure have a whole building to themselves. Incidentally, four plays with the best seating are part of the package.

During my recent three nights there, I had a feeling that I had seen a certain actor before in his portrayal of the Duke in *Measure for Measure* (MM). Later when I read his acting highlights, I realized that Anthony Heald had portrayed the vice principal in *Boston Public*, which was a staple of Fox TV for many years. Many actors in Ashland have acted elsewhere but now call this location in the Rogue Valley home.

### Anachronism as Artistic License

The various directors are given license to present their version of Shakespeare – always adhering to his language – in a fashion never done before. MM was set in the 1970s primarily in the civic building used for governmental purposes. A clever window display behind the actors enabled the audience to look outwards while the action was indoors. In one scene a severe storm was taking place as various cast members came indoors. Such has been the case for many years with Caesar as a fascist, Iago as a bullying hector from a motorcycle gang, and *The Comedy of Errors* featuring clowns as well as a gorilla. *MacBeth* had more blood than normal as emphasis was put on the witches. You are always going to find some uniqueness about each of these plays. While there never has been a musical before, that is not to say there has not been music, especially in the Bard's creations. One memorable adaptation in the past had Spanish guitars strumming eight stringed melodies during

*continued on next page*

## LOMAP for You – Especially for Late Career

by Peter Roberts



We – WSBA’s Law Office Management Assistance Program – are here for you when it comes to your “next chapter” or “next steps” or ultimate withdrawal from the practice of law. As members of the Senior Lawyers Section, you have earned the right to enjoy the fruits of the many decades you have served clients in so many important ways.

One question you may have is how to stop accepting new client matters. It is easy (or not so easy!) to “just say no.” I offer you an approach that may make more sense. Apart from withdrawing from matters in certain areas of the law, consider refusing new cases in this order:

1. Refuse new matters from anonymous sources such as website, phone book, or office sign.
2. Refuse new matters from certain referral sources.
3. Refuse new matters from trusted or loyal referral sources other than clients.
4. Refuse new matters from clients and former clients.

If “refusing” is not a word in your vocabulary, you can still reach the same goal with a courteous “Thank you for contacting me, but I am no longer taking on new cases.”

Be sure to take a look at the LOMAP’s practice-closing resources at <http://www.wsba.org/Resources-and-Services/LO-MAP/Closing-a-Practice>. It covers many areas and includes checklists for closing a practice, arranging for an assisting attorney in the event of your disability, forms, sample agreements, and the best timing of your announced retirement.

Craft your departure from practice any way you wish. Some clients you may wish to continue to assist on minor issues as a trusted advisor. Remember, you are in charge of your future!

Not sure if you are ready for a next chapter? Remember Jay Foonberg, star CLE speaker and author of many books, including *How to Start & Build a Law Practice?* Like all of us, he somehow got older. He is now 75 years old. These Foonberg “reminders” may jump-start your awareness of whether you are ready for your next chapter:

1. You are constantly asked if you want your senior citizen discount.
2. You are given a senior citizen discount without being asked.
3. Cab drivers and doormen offer to help you leave a vehicle.
4. You instinctively grab the handrail on stairs instead of going down the middle.
5. You do not want to drive at night.
6. When you read that someone died at “66” you do not think they were “old.”
7. You have stopped exercising.
8. You avoid reunions.
9. Conversations with friends turn into discussions about health/illness.
10. You lack patience when you want food or drink.

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### *Summer in Ashland* from previous page

the course of the production, whereas singers are usually blended into the theme being offered. In *Idiot’s Delight*, there was a wonderful rendition of “It’s a Sin to Tell a Lie.”

Getting to Ashland is really quite simple. You follow highway 95 south and you are there. Or you can fly to Medford and rent an automobile. I would not recommend a train trip, however, since the tracks go through Klamath Falls enroute to California. By the by, this is also wine country. A number of vineyards dot the area, along with local purveyors of local brands where tastings can be had.

Jacksonville, which is within minutes of Ashland, has entertainment of its own available as well as a summer fair. If you are not with local friends, there are numerous ranches available to visit or at which to stay. There is a golf course, albeit one that is built on hills. Medford has a 27-hole country club. Bike trips are encouraged. Taking a side trip to either Klamath Falls to the east or to the Oregon Caves to the west requires only one day. Years ago I took my children for a stay on the Rogue River where we could have rafted.

This year’s season became history once the plays closed in early November. The 2012 season opened in February. Along with *Troilus and Cressida* and *Romeo and Juliet* (this time in the Bowmer Theatre; I last saw it outdoors), and *As You Like It*, there will be presentations of the non-Bardian classic *Animal Crackers* running the entire season. For particular information, try [www.osfashland.org](http://www.osfashland.org).

*Philip H. De Turk is a longtime fan of the arts not only in Oregon but everywhere, including his visits home to North Carolina.*

*Peter Roberts is the Practice Management Advisor in the WSBA Law Office Management Assistance Program. You can reach him at [peter@wsba.org](mailto:peter@wsba.org) or 206-727-8237.*

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## Information for Your Clients

Did you know that easy-to-understand pamphlets on a wide variety of legal topics are available from the WSBA? For a very low cost, you can provide your clients with helpful information. Pamphlets cover a wide range of topics:

Bankruptcy	Lawyers' Fund for Client Protection	Real Estate
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Each topic is sold separately. Pamphlets are \$9 for 25, \$15 for 50, \$20 for 75, and \$25 for 100. Pricing for larger quantities is available on request.

To place your order or for more information, please contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA. Sales tax is applicable to all in-state orders.

### If you're not already a member of the Senior Lawyers Section for 2011-2012, join now!

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- Access Casemaker free legal research.
- Sign up to volunteer for the Home Foreclosure Legal Assistance Project.
- Sign up for the Moderate Means Program.

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