

Department of Legislative Services
Maryland General Assembly
2012 Session

FISCAL AND POLICY NOTE

House Bill 557
Judiciary

(Delegate Rosenberg)

Estates and Trusts - Deceased Personality - Property Rights

This bill establishes a cause of action for the unauthorized use of a deceased personality's name, voice, signature, photograph, or likeness on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services. The rights to such use are property rights, freely transferable or descendible, and the bill specifies how ownership of the rights is determined. "Deceased personality" includes an individual who has died within 70 years before October 1, 2012, though an action under the bill may not be brought beyond 70 years after the death of the deceased personality. The rights recognized by the bill are expressly made retroactive, including to deceased personalities that died or die before October 1, 2012, but the bill only applies prospectively and does not apply to any cause of action arising from the use of a name, voice, signature, photograph, or likeness before the bill takes effect.

Fiscal Summary

State Effect: General fund expenditures may increase to the extent the property rights recognized by the bill are subjected to Maryland estate and/or inheritance tax. The extent to which these rights would be subject to these taxes, however, is uncertain and any increase cannot be reliably estimated.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary:

Prohibition and Cause of Action

The bill prohibits a person from using a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person owning the property rights to the deceased personality's name, voice, signature, photograph, or likeness. A person who does so is liable for any damages sustained by the injured party as a result of the use in an amount equal to the greater of \$750 or the actual damages suffered as a result of the unauthorized use and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. Punitive damages may also be awarded to the injured party or parties and a prevailing party is entitled to reasonable attorney's fees and costs.

“Deceased personality” is an individual whose name, voice, signature, photograph, or likeness has commercial value at the time of the individual's death whether or not, during the lifetime of the individual, the individual used the individual's name, voice, signature, photograph, or likeness on or in products, merchandise or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods, or services.

The remedies provided for in the bill are cumulative and in addition to others provided for by law. The bill applies to the adjudication of liability and the imposition of damages or other remedies in cases in which the liability, damages, and other remedies arise from acts occurring in the State.

Persons Holding Property Rights

The rights recognized under the bill are property rights, freely transferable or descendible, in whole or in part, by contract or by means of a trust or other testamentary instrument, including by a subsequent owner. The bill may not be construed to render invalid or unenforceable a contract assigning the rights entered into by a deceased personality during the lifetime of the deceased personality.

The consent required by the bill for the use of a deceased personality's name, voice, signature, photograph, or likeness is exercisable by the person to whom the right of consent, or portion thereof, has been transferred by contract, trust, or testamentary instrument. If no transfer has occurred, however, the bill specifies how those rights are assigned to certain surviving family members. Where the rights are assigned to multiple family members, the rights may be exercised, on behalf of and for the benefit of all of

those family members, by those who, in the aggregate, are entitled to more than one-half interest in the rights. If a deceased personality does not transfer the rights by contract, trust, or testamentary instrument and there are no surviving family members, the rights terminate.

Exceptions

The bill specifies certain uses of a deceased personality's name, voice, signature, photograph, or likeness that do not require consent. Use in a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of those works, does not require consent if it is fictional or nonfictional entertainment or a dramatic, literary, or musical work. A person, however, could be liable for unauthorized use of a deceased personality's name, voice, signature, photograph, or likeness to advertise, sell, or solicit purchases of a product, article of merchandise, good, or service within one of those works.

Use of a deceased personality's name, voice, signature, photograph, or likeness in connection with a news, public affairs, or sports broadcast or account or a political campaign also does not require consent. The use of a name, voice, signature, photograph, or likeness in a commercial medium does not constitute a use for which consent is required solely because the material containing the use is commercially sponsored or contains paid advertising. However, it is a question of fact whether the use was so directly connected with the commercial sponsorship or paid advertising that it constitutes a use for which consent is required.

The bill does not apply to the owners or employers of a medium used for advertising which publishes or disseminates an advertisement or solicitation that is in violation of the bill, unless it is established that the owners or employers had knowledge of the unauthorized use of the deceased personality's name, voice, signature, photograph, or likeness.

Current Law: There does not appear to be Maryland statutory or case law explicitly addressing the unauthorized use of a deceased personality's name, voice, signature, photograph, or likeness. The Maryland Court of Appeals, however, has recognized the tort of invasion of privacy in *Carr v. Watkins*, 227 Md. 578 (1962), which can include an appropriation of another's name or likeness. The court has viewed with approval the Restatement's definition of the tort. *Lawrence v. A.S. Abell Co.*, 299 Md. 697 (1984). The *Restatement (Second) of Torts* states that:

(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

(2) The right of privacy is invaded by

- (a) unreasonable intrusion upon the seclusion of another;
- (b) *appropriation of the other's name or likeness*;
- (c) unreasonable publicity given to the other's private life; or
- (d) publicity that unreasonably places the other in a false light before the public.

Restatement (Second) of Torts, §652A (emphasis added).

Lawrence v. A.S. Abell Co. appears to be the only case in which the Court of Appeals has considered a claim of invasion of privacy based on appropriation of a person's name or likeness and in that case concluded that there was no invasion of privacy where a photograph of two infants from a news story was used in the newspaper's advertising campaign. The use was determined by the court to be incidental and not actionable generally because the children's identity had no proven "value," simply being members of the public and not famous or professional models, whose photograph was taken while in a public place and reproduced to show a realistic sample of the publisher's product and not to boost profits through the use of the children's photograph.

Background: An article in the secondary legal source *Causes of Action, Second Series* discusses a "right of publicity," described as a relatively new development in the law (with an origin in the 1950s) related to the appropriation tort of the right of privacy. According to the article, the right can be clearly defined as "the inherent right of every human being to control the commercial use of his or her identity." (*Citing McCarthy, The Rights of Publicity and Privacy 2d § 1:3*). It appears that a right to privacy cannot be assigned (transferred), whereas the article indicates that generally courts have held that the right of publicity is a property right that can be transferred. The article references case law and statutes in various states (not including Maryland) that have recognized or addressed a right of publicity.

The *Causes of Action* article indicates that jurisdictions vary with respect to the existence of a postmortem right of publicity, with some limiting postmortem enforcement of publicity rights and others completely denying postmortem rights. According to the article, however, "most courts, on the basis of state statutes, have held that the right of publicity is a property right that is descendible," and where there are postmortem rights, the length of time for which the rights last ranges from 20 years to 100 years.

According to media reports, right of publicity laws in at least a couple of states (Indiana and Washington) have been the subject of court actions recently.

State Fiscal Effect: General fund expenditures may increase to the extent the property rights recognized by the bill are subjected to Maryland estate and/or inheritance tax. The extent to which these rights would be subject to these taxes, however, is uncertain and any increase cannot be reliably estimated.

The Maryland estate tax is calculated based in part on the federal gross estate as specified by the Internal Revenue Code and a right of publicity such as is being recognized by the bill apparently could be subject to inclusion in the federal gross estate of a person and consequently affect the Maryland estate tax collected. (See *e.g.*, Tate, Joshua C., *Immortal Fame: Publicity Rights, Taxation, and the Power of Testation*, 44 Ga. L. Rev. 1 (Fall 2009)).

The inheritance tax is imposed on the privilege of receiving property that passes from a decedent and has a taxable situs in the State. The tax is 10% of the clear value (fair market value minus expenses) of the property that passes from a decedent. Certain exemptions apply, however, including property that passes to lineal relatives, a spouse, or siblings, and specified nonprofit organizations.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); Comptroller's Office; Register of Wills; Thomas Phillip Boggess V, Esq., *Cause of Action for an Infringement of the Right of Publicity*, 31 Causes of Action 2d 121; The Hollywood Reporter; Tate, Joshua C., *Immortal Fame: Publicity Rights, Taxation, and the Power of Testation*, 44 Ga. L. Rev. 1 (Fall 2009); Department of Legislative Services

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