

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

House Bill 1271
Judiciary

(Delegate Rosenberg)

Courts - Unauthorized Use of Name or Likeness

This bill establishes a right to bring an action for the unauthorized use of an individual's name or likeness, for a commercial or advertising purpose, where the individual's name or likeness has commercial value. The bill authorizes an individual to extinguish the right to license the use of the individual's name or likeness for a commercial or advertising purpose upon the individual's death. However, if an individual does not extinguish that licensing right, the right to bring an action established by the bill exists both during the individual's lifetime and for a period of 70 years after the individual's death, passing to the surviving spouse or other heir or heirs. The bill applies only prospectively to a cause of action arising from the use of a name or likeness on or after the bill's effective date of October 1, 2013.

Fiscal Summary

State Effect: General fund revenues may increase to the extent the right recognized by the bill is subjected to Maryland estate and/or inheritance tax. The extent to which the right 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: If the individual is alive, the action may be brought by (1) the individual; (2) a parent or guardian of the individual, if the individual is a minor; or (3) a

person authorized in writing by the individual to license the individual's name or likeness for commercial or advertising purposes.

The bill authorizes an individual to extinguish by testamentary instrument (*e.g.*, a will or testamentary trust) the right of all persons from licensing the use of the individual's name or likeness for commercial or advertising purposes after the death of the individual. If the individual is deceased and did not expressly extinguish that right in a testamentary instrument, an action as described above may be brought by:

- the deceased individual's surviving spouse or, if there is no surviving spouse, any other heir or group of heirs entitled to receive, individually or collectively, more than a 50% interest in the deceased individual's estate; or
- a person authorized in writing to license the use of the individual's name or likeness for commercial or advertising purposes by the deceased individual's surviving spouse or heirs as described above.

A right to enjoin unauthorized use and recover damages does not exist more than 70 years after the death of the individual whose name or likeness was used.

A person in the business of producing, manufacturing, publishing, or disseminating material for commercial or advertising purposes by a communications medium may not be held liable under the bill unless the person knew or should have known of the unauthorized use of the name or likeness of an individual.

Current Law: The Maryland Court of Appeals 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," as they were simply members of the public and not famous or professional models. The photograph was taken while the infants were 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.

There does not appear to be Maryland statutory or case law explicitly addressing the unauthorized use of a deceased individual's name or likeness.

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 to 100 years.

Providing in state law that postmortem rights of publicity pass automatically to a deceased individual's surviving spouse and descendants and allowing for a person to extinguish those rights upon their death have been suggested as potential ways to avoid federal estate taxation of postmortem rights of publicity. See Mitchell M. Gans, Bridget J. Crawford, and Jonathan G. Blattmachr, *Postmortem Rights of Publicity: The Federal*

Estate Tax Consequences of New State-Law Property Rights, 117 Yale L.J. Pocket Part 203 (2008); Mitchell M. Gans, Bridget J. Crawford, and Jonathan G. Blattmachr, *The Estate Tax Fundamentals of Celebrity and Control*, 118 Yale L.J. Pocket Part 50 (2008). Cf. Joshua C. Tate, *Marilyn Monroe's Legacy: Taxation of Postmortem Publicity Rights*, 118 Yale L.J. Pocket Part 38 (2008); Joshua C. Tate, *Immortal Fame: Publicity Rights, Taxation, and the Power of Testation*, 44 Ga. L. Rev. 1 (2009).

State Fiscal Effect: General fund revenues may increase to the extent the right recognized by the bill is subjected to Maryland estate and/or inheritance tax. The extent to which the right is 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 recognized by the bill apparently may be subject to inclusion in the federal gross estate of a person and consequently affect the Maryland estate tax collected. (See the above-cited articles.)

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 the receipt of property that passes to lineal relatives, a spouse, or siblings, and specified nonprofit organizations. Receipt of property that passes to certain heirs, however, such as a niece or nephew, is not exempt.

Additional Information

Prior Introductions: HB 557 of 2012, a similar bill, received an unfavorable report from the House Judiciary Committee.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); Register of Wills; Comptroller's Office; Maryland State Bar Association (Estate and Trust Law Section); Thomas Phillip Boggess V, Esq., *Cause of Action for an Infringement of the Right of Publicity*, 31 Causes of Action 2d 121; Department of Legislative Services

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