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## Marilyn Monroe's Legacy: Taxation of Postmortem Publicity Rights

In an April 2008 essay in *The Yale Law Journal Pocket Part*, Mitchell Gans, Bridget Crawford, and Jonathan Blattmachr argue that recent state legislation recognizing postmortem publicity rights fails to take into account the likely estate tax consequences.<sup>1</sup> Although Gans, Crawford, and Blattmachr are correct to argue that allowing publicity rights to pass by will or inheritance could have adverse tax consequences for some estates, those ramifications are not as far-reaching as might be imagined. Moreover, their “legislative solution” will not solve the problem.

Over the past few decades, courts and legislatures in most states have recognized a celebrity's right of publicity as a property interest that may survive his or her death.<sup>2</sup> California recently amended its 1985 statute so that it now makes publicity rights retroactively devisable for all who have died since 1915.<sup>3</sup> Legislation to similar effect is currently pending in New York.<sup>4</sup> These statutes allow the devisees of bygone celebrities such as Marilyn Monroe to profit whenever others use images of the deceased. Litigation over Monroe's estate seems to have been a primary impetus for the California legislation.<sup>5</sup>

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1. Mitchell M. Gans, Bridget J. Crawford & 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).
  2. See David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, 83-84 (2005).
  3. CAL. CIV. CODE § 3344.1(b), (h), (p) (West Supp. 2008). If the will designates no specific beneficiary, the right of publicity passes through the residuary or by intestacy. *Id.* § 3344.1(b), (d).
  4. S. 6005, 2007 State Assem., Reg. Sess. (N.Y. 2007).
  5. See Matthew Belloni, *Marilyn, Money Fueling Right of Publicity Battle*, Sept. 14, 2007, <http://www.reuters.com/article/entertainmentNews/idUSN1424817820070914>.

Gans, Crawford, and Blattmachr fear that, because publicity rights will be part of the celebrity's gross estate at death, the tax due may exceed the value of the other assets. Forcing heirs or devisees to liquidate other assets to pay the tax will allegedly compel them to seek the greatest financial benefit from the publicity right. As a solution to this supposed tax catastrophe, these authors suggest that states designate specific statutory heirs regardless of the celebrity's wishes. Analogizing from wrongful death benefits, they contend that if the celebrity lacks the authority to determine who receives the publicity rights, those rights will be exempt from estate tax. To give some flexibility to celebrities, however, Gans, Crawford, and Blattmachr would allow them to destroy rights of publicity *inter vivos*, allegedly without negative estate tax consequences.<sup>6</sup>

## I. TAXATION OF RETROACTIVE PUBLICITY RIGHTS

Gans, Crawford, and Blattmachr lead their piece by discussing the recent California legislation and its application to long-deceased celebrities like Monroe, which might lead a reader to infer that taxation of publicity rights has some relevance to Monroe's estate. The authors do not, however, discuss the status of publicity rights at Monroe's death or the applicable statute of limitations, both of which make it unlikely that the estate tax will be applied in Monroe's case.

Although the term "right of publicity" was coined in 1953, it took more than a decade for courts to recognize publicity rights as property.<sup>7</sup> In 1962, the year Monroe died, the Second Circuit squarely faced the question of whether a right of publicity was a property interest for federal tax purposes, and answered in the negative.<sup>8</sup> In the years following this case, however, courts began to accept publicity rights as property.<sup>9</sup> Yet the issue of postmortem transmission remained unsettled for decades.<sup>10</sup> If the ability to transmit to heirs

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6. A similar argument has been made before. See Note, *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683, 697-700 (1995).

7. See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); Westfall & Landau, *supra* note 2, at 76-89.

8. *Miller v. Comm'r*, 299 F.2d 706, 709-10 (2d Cir. 1962).

9. Westfall & Landau, *supra* note 2, at 80-86.

10. See *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 960 (6th Cir. 1980); *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979).

or devisees is an important stick in the bundle of rights that constitutes “property,”<sup>11</sup> publicity rights were not property at the time of Monroe’s death.

The federal gross estate values property “to the extent of the interest therein of the decedent at the time of his death.”<sup>12</sup> At the time of Monroe’s death, she had no property interest, or at least no descendible or devisable interest, in a publicity right. Given that Monroe’s executor could not have foreseen a law enacted more than four decades later, moreover, the statute of limitations would bar the IRS from collecting estate tax now unless the executor failed to file a return.<sup>13</sup> Money received from capitalizing on Monroe’s image today should, of course, be subject to income tax,<sup>14</sup> but estate tax cannot be collected.

The estate tax disaster predicted by Gans, Crawford and Blattmachr, therefore, is unlikely to arise in the retroactive context covered by the new California amendments. Indeed, the authors do not go so far as to assert that the government will levy taxes on the estates of persons who died years ago. They do claim, however, that the government could do so when celebrities die in the future. Yet their proposed reform is not likely to solve this latter problem, nor is it clear that the problem will be as widespread as they imply.

## II. WRONGFUL DEATH BENEFITS: A FLAWED ANALOGY

In arguing that legislatures should eliminate the power to devise publicity rights, Gans, Crawford, and Blattmachr draw an analogy to wrongful death claims, which are not considered part of the gross estate. “[I]f postmortem publicity rights pass only to specific individuals designated by statute and not by the decedent,” the authors argue, “then the value of those rights should not be included in the decedent’s gross estate, by analogy to wrongful death benefits.”<sup>15</sup> This argument, however, misconstrues the reasons for excluding wrongful death benefits from the gross estate.

The rationale for excluding wrongful death benefits was set forth in the 1972 case of *Connecticut Bank & Trust Co. v. United States*, which held that

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11. See *Hodel v. Irving*, 481 U.S. 704, 716 (1987).

12. I.R.C. § 2033 (2000).

13. The limitations period is three years, *id.* § 6501(a), or six in the event of a “substantial omission,” *id.* § 6501(e). If no return was filed, however, the IRS might still be able to collect today. *Id.* § 6501(c)(3).

14. *Id.* § 61(a)(3).

15. Gans, Crawford & Blattmachr, *supra* note 1, at 208.

because “there was no property interest in the decedent which passed by virtue of his death, but rather one which arose after his death, such an interest is not property owned at death and not part of the gross estate.”<sup>16</sup> Wrongful death benefits were excluded from the gross estate not because the decedent lacked the power to devise them: in fact, the decedent did have such a power under state law.<sup>17</sup> Rather, the court excluded them because they arose only at the decedent’s death, and did not belong to the decedent during life.<sup>18</sup> Prior to *Connecticut Bank*, the IRS treated wrongful death benefits as nontaxable only when the relevant statute was thought to deny the decedent a lifetime property interest in the proceeds.<sup>19</sup>

A celebrity is entitled to his or her publicity rights, unlike wrongful death benefits, during life. Eliminating a celebrity’s testamentary power over publicity rights does not change the fact that he or she enjoyed a property interest in them at the time of death. Thus, the analogy to wrongful death benefits does not support the elimination of the power to devise publicity rights. Moreover, if legislatures follow the suggestion of Gans, Crawford, and Blattmachr and grant celebrities a lifetime power to destroy their rights of publicity, a choice *not* to destroy is hard to distinguish from a devise to the designated heirs, which would certainly be taxable.<sup>20</sup> If the argument of these authors had merit, parents in Louisiana would be able to avoid estate tax on property passing to their children under age twenty-four, who are protected from disinheritance to the extent of the *legitime*.<sup>21</sup> A testamentary disposition is no less taxable when it is compelled by statute.<sup>22</sup>

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16. 465 F.2d 760, 763 (2d Cir. 1972).

17. *Id.* at 764.

18. See also Rev. Rul. 75-127, 1975-1 C.B. 297, 298 (stating the Service’s intent not to press the issue further).

19. See, e.g., Rev. Rul. 69-8, 1969-1 C.B. 219, 219 (“The decedent in his lifetime never had an interest in either the right of action or the proceeds.”); Rev. Rul. 56-637, 1956-2 C.B. 600, 600 (same); Rev. Rul. 54-19, 1954-1 C.B. 179, 180 (same).

20. Even if the right to destroy is exercised, the government might still attempt to collect estate tax. See Ray D. Madoff, *Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity*, 17 VA. TAX REV. 759, 788-89 (1998).

21. LA. CONST. art. XII, § 5; LA. CIV. CODE ANN. art. 1493 (2008). The *legitime* is not covered by I.R.C. § 2034 (2000), which deals with interests of the surviving spouse.

22. I.R.S. Tech. Adv. Mem. 8651001 (Aug. 8, 1986) (“Because property is required to pass by state law does not require that a downward adjustment in value take place.”).

### III. CONCLUSION

Whether states should recognize a devisable right of publicity is a difficult policy question. Gans, Crawford, and Blattmachr correctly point out that the federal estate tax may interfere with the plans of some celebrities who seek to devise their publicity rights to noncharitable devisees. It is unlikely, however, that the estate tax will affect the estates of celebrities who died long ago, and depriving future celebrities of the power to devise will not necessarily prevent or discourage the IRS from collecting the tax, especially if the celebrities retain a lifetime power to destroy. Moreover, the Hobson's choice presented to celebrities by Gans, Crawford, and Blattmachr may conflict with the policy reasons for recognizing a right of publicity in the first place.<sup>23</sup> In any event, if publicity rights are devised outright to the surviving spouse, they will be exempt from estate tax until the spouse's death because of the marital deduction,<sup>24</sup> and the publicity rights of the typical celebrity (as opposed to a timeless icon like Monroe) may not remain valuable for many years after his or her death. The specter of federal death taxes should not frighten state legislatures into imposing unnecessary restrictions on testamentary freedom.

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23. I intend to develop this point in a future article.

24. I.R.C. § 2056.